WEISS'S CONCISE TRUSTEE HANDBOOK

A Guide to the Administration Of an Express Trust under the COMMON LAW, functioning under the GENERAL LAW-MERCHANT

BY
CARLTON ALBERT WEISS

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**Enlarged and revised*

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INTRODUCTION

THIS HANDBOOK is about the administration of Express Trusts created under the original American common law and functioning within the unique system of commerce in the American states, i.e., the general law merchant,[1] as it stands in twenty-first century America.

The material presented herein has been reduced from various sources which the reader is encouraged to examine for his own knowledge and further understanding. The material herein has been rendered into a concise handbook format, intended to allow the reader to refer to each section for guidance on decisions regarding the most pertinent aspects of the administration of an Express Trust. So, only secondary attention has been given to all other matters.

All in all, the author's objective by this handbook is to devise a simple guide, with clearly outlined methods and sample forms, for the effective handling of affairs of Express Trusts, while also showing the many options for growth and prosperity, and profound protections afforded by Express Trusts when created and administered properly. This book is written in a somewhat unconventional manner in order to accommodate this objective.

If the reader should find, after examining the sources, that this work has failed in its objective, then let it be attributed to a fault of the author, not to any supposed faultiness of the sources or the Express Trust itself. It will be admitted by all honest and learned[2] lawyers (as it once was when a lawyer, by definition, was "learned in the law"[3])

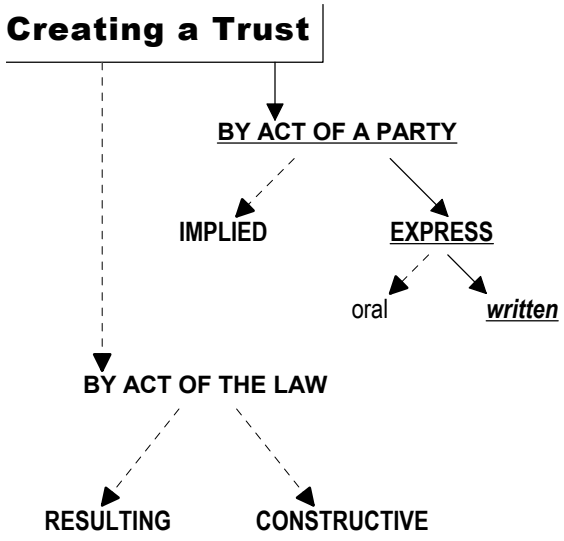
[1] The general law merchant is embraced under general common law, i.e., the original and unique system of commercial law in the American states, in which there is no commerce regulation of Express Trusts accept in connection with income derived from corporate stock and physical franchises under art. I, § 8, cl. 1 and 3 of the Constitution. See William A. Fletcher, THE GENERAL COMMON LAW AND SECTION 34 OF THE JUDICIARY ACT OF 1789: THE EXAMPLE OF MARINE INSURANCE, 97 Harv. L. Rev. 1513, 1514 (1984).

[2] It was the strongly held belief of U.S. Supreme Court Chief Justice Warren E. Burger that seventy-five to ninety percent of all trial lawyers are either incompetent, dishonest, or both. See 102 REPORTS OF THE AMERICAN BAR ASSOCIATION, 205-206 (1978).

that the Express Trust, especially one created with proper care to its instruments, is a far superior form of security, or organization in general, for individuals who desire to exercise their natural rights.

TRUST BASICS

FIRST, it must be understood that any trust, regardless of the many designations applied to them, is, in its most basic sense, "a property interest held by one person (the *trustee*) at the request of another (the *settlor*) for the benefit of a third party (the *beneficiary*)."[4] The classification applied to a trust is based primarily upon its mode of creation, in which it may be created either by act of a party or by operation of the law. In the case of the former, trusts are divided into two types: *express* or *implied*.



Without getting into the various subclasses of express and implied trusts, the basic difference between one created by express act of a party and one created by implied act of a party is that the former is stated fully in language (oral or written), while the latter is inferred solely from the conduct of the parties. These are very generalized definitions so presented for want of space, since there are many intricacies concerning the true meaning of the term *implied*. (It has been shown that, in a sense, the classification of "express" trust can only be applied based on what is *implied* by the language of the instrument which created the trust.)[5] So, we won't get into that. Our focus is on a particular written express trust type, and even though the above definition is essentially accurate, it does little to define the Express Trust as it is known in its fullest sense under the protections of the common law.

EXPRESS TRUSTS UNDER THE COMMON LAW

THE MOST ADEQUATE DEFINITION of the Express Trust is to be understood from the earlier case law which has been eloquently summed up and restated into a clear, concise

[3] Black's Law Dictionary, p. 695 (1st ed. 1891).

[4] Black's Law Dictionary, p. 1513 (7th ed. 1999). An even more basic definition is provided therein as "[t]he right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title[.]" There are many more sub-definitions, as well as expansions upon the nature of a trust relationship, being a fiduciary one, but we won't get into them for want of space.

[5] See George P. Costigan, Jr., CLASSIFICATION OF TRUSTS, 27 Harv. L. Rev. 437, 438-439 (1914).

definition by Alfred D. Chandler, Esq.[6] in a report submitted to the Tax Commissioners of Massachusetts on unincorporated associations.[7] His study was conducted as part of a legislative investigation into their economic effect on the state in 1911; in the first part of the report, at pages 6-7, he offers the following definition:

> **Express Trusts . . . put the legal estate entirely in one or more** [persons]**, while others have a beneficial interest in and out of same, but are neither partners nor agents**. **This simple, adequate, common-law right, any person or group of persons *sui juris*[8] may exercise**, the Trustees issuing certificates of beneficial [and capital] interest divided into shares, as well as issuing bonds and other obligations, as freely as they open a bank account, have a pass book, and draw and circulate checks, **or make whatever contractual relations are allowed to persons as a natural right**. [Italics emphasis supplied in original; bold emphasis and bracket information added.]

What becomes clear from this definition is that the Express Trust is not merely a property interest held by one for the benefit of another like any basic trust. Rather, it is a trust created by private contract for the holding of a divisible property interest wherein the trustee is empowered by the settlor to do for a beneficiary of his (the trustee's) choosing whatever he may do for himself as an individual *sui juris*.[9] What has been created here is a trust organization, lawfully, by natural right. "As a general proposition, it may be asserted that one who creates a trust may mold it into whatever form he pleases, and that whatever one may lawfully do himself he may authorize another to do for him."[10] Doing so requires no benefit, privilege or franchise from any government or other outside-party;[11] and, therefore the parties owe no duty to any government or other outside-party to the extent that no common-law criminal or civil wrong is the purpose of

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[6] EXPRESS TRUSTS UNDER THE COMMON LAW: A SUPERIOR AND DISTINCT MODE OF ADMINISTRATION, DISTINGUISHED FROM PARTNERSHIPS, CONTRASTED WITH CORPORATIONS (1912).

[7] Mr. Chandler lucidly brought to the attention of the Massachusetts Tax Commission the misapplication of the term *voluntary association* to the Express Trust. It is well-settled that "[t]he term 'association' for income tax purposes taxable as a 'corporation' embraces 'business trusts' and what Congress did not intend to embrace within the term 'association' was a pure [express] 'trust' that is a trust of traditional pattern where property is conveyed by will, deed, or declaration to a trustee[.]" PENNSYLVANIA CO. FOR INSURANCE ON LIVES AND GRANTING ANNUITIES V. U.S., 138 F.2d 869 (C.C.A.3 (Pa.) 1943). In CROCKER V. MALLEY, 249 U.S. 223, 63 L.Ed. 573 (1919) the court made it clear that a pure Express Trust, active and functioning as such, has standing in law as a trust, not an association.

[8] This is defined as: "Of his own right; . . . not under any legal disability, or the power of another or guardianship. Having capacity to manage one's own affairs, not under legal disability to act for one's self." Black's Law Dictionary, p. 1135 (1st ed. 1891).

[9] See Pres. Woodrow Wilson's address before the American Bar Association, at Chattanooga, Tenn. (Aug. 31, 1910), entitled THE LAWYER AND THE COMMUNITY. He says: ". . . liberty is always *personal*, never aggregate; always a thing inhering in individuals taken singly, never in groups or corporations or communities. The individual unit of society is the individual." It has long been held that trustees of Express Trusts have greater latitude than ordinary trustees, simply because such trusts, created by individuals *sui juris*, may do whatever individuals *sui juris* may do.

[10] HARWOOD V. TRACY, 118 Mo. 631, 24 S.W. 214, 216; see also SHAW V. PAINE, 12 Mass. 293; ". . . a person who creates a trust may mould it into whatever form he pleases." PERRY ON TRUSTS, I, §§ 67, 287 (4th Amer. ed.); UNDERHILL ON TRUSTS, p. 57 (Amer. ed.).

[11] See HALE V. HENKEL, 201 U.S. 43, 74 (1906).

the contract.[12] When done properly the trust is afforded all the common-law protections ordinarily given to private contracts, particularly the *obligation* of them.[13] Now, the question is whether the parties to the contract are truly acting *sui juris*, i.e., of their pure, unadulterated common-law (natural) rights, because if the parties import or associate benefits which grant an outside party a vested interest in the proposed contract, then the contract has acquired a third-party overseer/intervenor.[14]

DECLARATION OF THE EXPRESS TRUST

THE DECLARATION OF TRUST[15] is the trust instrument that constitutes the trust. It has been noted in trust law that no technical expressions are required to create a valid declaration, so long as the words used make clear the settlor's intent to create the trust or confer a benefit of some sort that would be best carried out in the form of a trust.[16] A trust instrument doesn't necessarily need to be a declaration either, for a trust may be, and often is, formed out of a simple agreement or even a will.[17] But with an Express Trust, the declaration has been preferred since the beginnings of trusts under the common law of England, which otherwise shunned fictions of law. This is where careful attention to detail is most crucial, because in order to properly construe the intent of the settlor, the objects, property, and manner in which all is to be carried out must be set forth in unambiguous, precise language so as to particularly create the Express Trust; and where the intent of the settlor is unclear, under equity, interpretation is required to construe the intent of the parties, and the trust may be deemed invalid, depending on

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[12]LAWSON ON CONTRACTS § 294, p. 381 (3d ed. 1923).

[13]In BERRY V. MCCOURT, 204 N.E.2d 235, 240 (1965) the court held that the Express Trust is a "contractual relationship based on trust form" and in SMITH V. MORSE, 2 Cal. 524, it was held that any law or procedure in its operation denying or obstructing contract rights impairs the contractual obligation and is, therefore, violative of Article I, Section 10 of the Constitution. Because the Express Trust is created by the exercise of the natural right to contract, which cannot be abridged, the agreement, when executed, becomes protected under federally enforceable right of contract law and not under laws passed by any of the several state legislatures. In ELIOT V. FREEMAN, 220 U.S. 178 (1911), the court made it clear that the Express Trust is not subject to legislative control. It went further to acknowledge the right-wise stance of the United States Supreme Court that the trust relationship comes under the realm of equity, based upon the common-law right of contract, and is not subject to legislative restrictions as are corporations and other organizations created by legislative authority. To clarify the equity and common-law distinctions, the basis for Express Trusts under the common law in this instance, is not that such organizations are creatures of common law, as distinguished from equity, but that they are created under the common law of contracts and do not depend upon any statute.

[14]See Lee Brobst et al., U.S.A. THE REPUBLIC, IS THE HOUSE THAT NO ONE LIVES IN, available at <http://www.usa-the-republic.com/Lee%20Brobst/usa.html> (last visited Jan. 8, 2007).

[15]This is sometimes referred to as the *trust indenture* for the purpose of denoting that it outlines the terms and conditions governing the conduct of the trustee as an indentured servant to the beneficiary under contractual arrangement (referred to in this sense as an *indenture trustee*).

[16]See Underhill, *supra* at art. 3, p. 10; see also CHICAGO M. & ST. PR. CO. V. DES MOINES UNION R. CO., 254 U.S. 196, 65 L.Ed. 219 (1920).

[17]UNDERHILL ON TRUSTS, art. 5, p. 19 (Lond. ed. 1878).

the degree of ambiguity.[18] However, when all is done properly, obviously, there can be no lawful impairment of the obligations of contract.[19]

Moreover, the declaration, by its terms and provisions, serves to establish the entire contractual arrangement, including the identities and positions of the parties, the trust's name, jurisdiction and situs, and all particulars of administration, all of which the courts of equity will fully support by the principle that equity compels performance.[20] The ultimate result is the creation of a *bona fide* legal entity[21] with its own separate and distinct juridical personality;[22] with standing to sue and be sued,[23] and to function as a person in commerce by and through its trustee(s). The term *natural person* has been applied to Express Trusts by courts of equity because of its administration, being carried out by men acting as natural persons.[24] Under this application, the trust's right of

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[18]*Id*. at p. 11.

[19]See the Constitution for the United States of America, art. I, § 10 (1789): "No State shall . . . pass any . . . Law impairing the Obligation of Contracts[.]"

[20]See CLEWS v. JAMIESON, 182 U.S. 461, 21 S.Ct. 845, 45 L.Ed. 1183 (1901).

[21]See BURNETT v. SMITH, S.W. 1007 (1922); and MUIR v. C.I.R., 182 F.2d 819 (C.A.4 1950).

[22]See BRIGHAM v. U.S., 38 F.Supp. 625 (D.C.Mass. 1941), appeal dismissed 122 F.2d 792 (reported in Title 26 I.R.C. 31, p. 356).

[23]See WATERMAN v. MACKENZIE, 138 U.S. 252 (1891).

[24]A generally unknown fact is that there are several types of citizens now existing in America. The trustee(s) of an Express Trust may seek protection under the Constitutions as *state citizens* throughout the "Union" of states, a jurisdiction outside the scope of the 14th Amendment which we will discuss in a later section. However, it should also be noted of all citizenship, 14th Amendment or otherwise, that jurisdiction over natural and artificial persons is distinguished without a fundamental difference. This stems, surprisingly, from the operation of *in rem* jurisdiction which underlies all Civil Law. Though all courts are familiar with the action *in personam* (against persons), it is the action *in rem* (against things) which, though *practiced* only in Maritime Law, stealthily operates in every civil and criminal court. This principle is one of the least understood in its entirety.

In rem jurisdiction over a man or woman can only exist if the man or woman is a slave, i.e., property or *res* (an object), in which case his or her disposition at law is no different than if he or he were a horse or other goods. See THE ZONG (GREGSON v. GILBERT), 99 E.R. 3:233 (K.B. 1783). In nature, *in rem* jurisdiction is exercised over men and women by their Creator, exclusively. Governments can therefore gain only a fictional *in rem* jurisdiction over men by creating various legal devices (personas) for those men to assume limited control of (e.g., citizen, taxpayer, driver, etc.). Since the device is legal fiction, a falsehood made true by force of law, this persona is in-fact a legal object or *res*. Just as in theatre, the persona ("person") is separate from the man or woman playing the part; therefore, there may be artificial persons, but not artificial men; natural persons, but not natural men. AMERICAN LAW & PROCEDURE, vol. XIII, ch. V, § 65, pp. 156-157:

"**The word 'person' defined.** Gaius says 'De juris divisione' (the divisions of law) immediately preceding his division of the law; then follows, 'De conditione hominum' (meaning the condition or status of men).

"In the Institutes 'De jura personarum' precedes the expression 'all our [civil] law relates either to persons, or to things, or to actions.' The words persona and personae did not have the meaning in the Roman which attaches to homo, the individual, or a man in the English; it had peculiar reference to artificial beings, and the condition or status of individuals." [Citations omitted; bold and italics emphasis added.]

In footnote 33, we get at the modern application and its implications:

". . . The word 'person,' in its primitive and natural sense, signifies the mask with which actors, who played dramatic pieces in Rome and Greece, covered their heads. These pieces were played in public places, and afterwards in such vast amphitheatres that it was impossible for a man to make himself heard by all the spectators [and later by all judges]. Recourse was had to art; the head of each actor was enveloped with a mask, the figure of which represented the part he was to play, and it was so contrived that the opening for the emission of his voice made the sounds clearer and more resounding, *vox peronabat*, when the name persona was given to the instrument or mask which facilitated the resounding of his [legal] voice. The name persona was afterwards applied to the part

contract is alienable, whereas its creators' natural right of contract obviously is not.[25] The Express Trust nevertheless possesses, *inter alia*, the right to all enjoyments stemming from the contracts into which it enters, as well as all the obligations imposed under such contracts. The Express Trust possesses the ability to hold/own property, engage in business transactions, and incur liabilities (including tax liabilities) as well as assume creditorship (including secured party status), like any other legal person.

THE TRUST CORPUS

THE CORPUS is the "body" of the trust, i.e., the property being held in trust for the beneficiary(s), the very subject-matter of the declaration. It should be noted that virtually any *thing*[26] may be held in trust, however, there are certain things which, given their innate traits recognized in Law, make for better subject-matter, so to speak.

Initially, the legal minds who perfected the Express Trust in America did so to accommodate for the great obstacles in procuring special charters for corporations intended to deal in real estate, which trusts eventually came to be known as the "Massachusetts Land Trusts." It was when those individuals came to realize the immense benefits of employing the trusts for the purpose of holding land, that they eventually expanded their utility to include the holding of personal property; these eventually came to be known as the "Massachusetts Electric Companies." As an aside, when considering the presently hostile official attitude toward non-statutory trusts, what is interesting to note is that much of the Express Trust's perfection is attributed to Attorney General and later United States Secretary of State Richard Olney;[27] but the

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itself which the actor had undertaken to play, because the face of the mask was adopted to the age and character of him who was considered as speaking, and sometimes it was his own portrait. It is in this last sense of personage, or of the part which an individual plays, that the word persona is employed in jurisprudence, in opposition to the word man, homo. When we speak of a person, we only consider the state of the man, the part he plays in society, abstractly, without considering the individual." 1 Bouv. Inst., note 1. [Bold and italics emphasis, and bracket information added.]

Logic follows that if the man plays no part in a society, then he has no personal attachment or obligation thereto. The trustee(s) under a declaration of an Express Trust are only persons in the private sense because he is only a person once he has accepted the role offered to him by the settlor. Private persons may also pursue constitutional protection as natural persons, "citizens" within the meaning of Article IV, Section 2 of the Constitution, and may thereby claim entitlement to all the "privileges and immunities" of same. See generally PAUL V. VIRGINIA, 75 U.S. 168 (1868). Even though, in today's economic situation the term "citizen" is presumed to signify the 14th Amendment citizen, the term cannot be applied to Express Trusts when administered properly. In contrast, corporations, as artificial persons, are "citizens of the United States," within the meaning of the 14th Amendment per SANTA CLARA COUNTY V. SOUTHERN PACIFIC R. CO., 118 U.S. 394, 396 (1886).

[25]Man's right of contract is considered so fundamental that even under Roman law, in its system of domestic slavery, all men, citizen or not, with the exception of slaves (the only non-persons) retained this fundamental right *ius gentium*. It is understood to derive from a man's Creator, and therefore is unalienable, even with his own consent/waiver. Man's right of contract, logically, is held by him in trust to his Creator as property which has been settled upon him, and thus can never be contracted away because such would invalidate the original contract itself.

[26]The "thing" held in trust is referred to as the trust *res*, the subject-matter of the trust.

[27]See John H. Sears, DECLARATIONS OF TRUST AS EFFECTIVE SUBSTITUTIONS FOR INCORPORATION, § 1, p. 4 (1911). Olney served as Attorney General in 1893-1895, U.S. Secretary of State in 1895-1897, and prior to that in the Massachusetts House of Representatives in 1874.

fact that the Express Trusts were initially, primarily utilized for purposes of holding and handling real estate is very significant, especially to our present situation.

The significance derives, in pertinent part, from the integral relationship between the law and the land. It is a fundamental principle of law that the land and the law go hand in hand; and, in America, without the 14th Amendment, the Law of the Land is the Constitution with its common-law principles and its substance of gold and silver.[28] Referred to in this sense, precious metals are regarded in law as *portable land*. The basic principle of law holds that land includes everything of value extracted from it, and without getting too deep into the operation of common law, it is this principle regarding the relationship of land and law which, by its operation, threw up an obstacle to corporate real estate ownership. In order to charter a statutory (civil law) entity to handle the substance of the common law (land), special, if not extraordinary, legal circumstances must exist. These circumstances did not exist prior to the post-*Erie* Federal Common Law[29] whose imposition was made possible by loss of the gold standard (the substance of the law) in 1933.[30] A statutory entity is inherently accountable to courts of civil (legislative) jurisdiction, deriving subject-matter jurisdiction from the corporate charter, over which the legislature holds *in rem* jurisdiction as well by way of possession of the charter documents themselves. Whereas, an Express Trust is obviously inherently accountable to courts of common law and equity,[31] deriving subject-matter jurisdiction from the trust instrument and corpus. As logic follows, *in rem* jurisdiction remains with the trustee at all times unless the trust instrument and corpus are surrendered to a third-party voluntarily. *In rem* jurisdiction, i.e., actual possession, is the key.

This brings us to today. In the jurisdiction of the 14th Amendment United States public trust, precious metal, the substance of the common law, is legally merely a commodity. Back in the Republic, however, it remains the staple for payment of debts,[32] though surface gold and silver are in considerably lesser quantity and without a fixed standard upon which to be traded. The Express Trust under the common law, holding real estate, silver or gold, is holding the very substance of the law under which it was

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[28]Referred to in this sense, it is regarded in law as *portable land*. The basic principle of law is that the land includes everything of value extracted from it.

[29]See Lee Brobst et al., THE LAW, THE MONEY AND YOUR CHOICE (2003), available at <http://www.usa-the-republic.com/Lee%20Brobst/The%20Law.html> (last visited Jan. 8, 2007).

[30]See House Joint Resolution 192 of June 5, 1933; Pub. L. 73-10. Prior to that, silver had already been de-monitized, in practice but not in fact, by the Coinage Act of 1873 (commonly referred to as the "crime of '73" which, it is blatantly obvious, would have been unconstitutional if done in-fact. It is said to have been a tactic of congress to place in the public mind the perception of the currency as being solely backed by gold, presumably for the purpose of the eventual passing of H.J. Res. 192, which congress knew would effect a removal of the substance of law). Silver was later withdrawn from circulation in certain coins by the Coinage Act of 1964, and was removed entirely by amendment to the Coinage Act of 1964 by the Bank Holding Company Act of 1970. Then, all silver-backed certificates were discontinued in 1972.

[31]It should be noted that though the Express Trust is created under common law, it is not a creature of the common law as distinguished from equity, but rather, it is created under common law of contracts and not dependent upon any statutes; Equity supplements the common law. See generally SCHUMANN-HEINK V. FOLSUM,328 Ill. 321. And though the trust may bring an action in Admiralty, it is not inherently accountable to that jurisdiction.

[32]See Constitution for the United States of America, art. I, § 10 (1789).

created, thus ensuring that bond between law and land, and the powers and guarantees that come with it.[33]

CERTIFICATES

WHAT MAY COME as a surprise is that any trust may divide its trust property into shares and issue certificates.[34] The power to issue certificates and bonds, and employ the use of an official seal[35] never has been restricted to corporations.[36] It is well-settled law that whatever else most corporations possess beyond their artificiality and right of suit in a corporate name is a mere incident or consequence of incorporation, and not a "primary constituent."[37] In fact, most attributes now commonly held as "corporate" in nature, such as the power of issuing transferable shares, limiting liability of officers, using an official seal, making by-laws, purchasing lands and chattels, are merely the legislative recognition and adoption of natural common-law rights any man or woman *sui juris* may exercise without permission (much less a charter) from the state. The court in *Warner v. Beers*[38] clarified this principle most effectively:

> There are several very useful and beneficial *accessary* [also spelled *accessory*] powers or attributes, very often accompanying corporate privileges, especially in moneyed corporations, which, in the existing state of our law, as modified by statutes, are more prominent in the public eye, and perhaps sometimes in the view of our courts and legislatures,[39] than those which are *essential* to the being of a corporation. **Such added powers, however valuable, are *merely accessary*. They do not in themselves alone confirm a corporate character, *and may be enjoyed by unincorporated individuals***. Such a power is the ***transferability of shares***. . . . Such, too, is the ***limited responsibility*** [liability]. . . . So, too, the ***convenience of holding real estate for the common purposes, exempt from the legal inconvenience of joint tenancy or tenancy in common***. Again: There is the ***continuance of the joint property for the benefit and preservation of the common fund, indissoluble by death or legal disability*** of any partner. **Every one of these attributes or powers, though commonly falling within our notions of a moneyed corporation, *is quite unessential to the legality of a corporation, may be found where there is no pretense of a body corporate; nor will they***

[33]See Bill of Rights, amend. VII (1791).

[34]See HART v. SEYMOURE, 147 Ill. 598, 35 N.E. 246; and VENNER v. CHICAGO CITY RY. CO., 258 Ill. 523, 101 N.E. 949.

[35]As a side-note, the right of an individual using a seal has never been challenged, based upon the universal understanding that it is used as a matter of right. Once the trustee has adopted the seal and has used it, it is automatically presumed that the use is lawful, until proven otherwise. See JOHNSON v. CRAWLEY, 25 Ga. 316, 71 Am.Dec. 173; and MULLANPHY v. SCHOTT, 135 Ill. 655, 26 N.E. 640.

[36]See THOMPSON-BUSINESS TRUSTS § 23; SEARS TRUST ESTATE § 105 (2d ed.); and PHILLIPS v. BLATCHFORD, 137 Mass. 510.

[37]See WALD'S POLLOCK ON CONTRACTS, pp. 126, 296.

[38]23 Wend. 103, 145-146 *et seq.*

[39]I will show you in the conclusion why this is the state of affairs today, as it was back then, and why the principles interpreted by the court in this case apply now more than ever.

> ***make one if all were combined, without the presence of the essential quality of legal individuality***[.] [Italics and bold emphasis, and bracket information added.]

The trustee of an Express Trust is empowered by the terms and provisions of the trust instrument to issue certificates not only of beneficial interest,[40] but also of capital interest.[41] Generally speaking, beneficial interest is that which is held by the beneficiary(s) of the trust, who is entitled to a certain proportional share of the trust assets during the life or at the termination of the trust; while capital interest is that which is held by the exchanger(s) who has invested property into the trust, and thus becomes entitled to a certain proportional share of any profits and assets remaining at the termination of the trust.

As a rule, the terms and provisions of the trust instrument control the manner in which beneficial and capital interest are to be administered. It should define the rights of interest-holders, who, incidental to their acceptance of the interest, are bound under the trust instrument to that extent.[42] But there are certain principles which govern these interests in construing the fundamental classification of the trust. For instance, it is held that where the certificate-holders have control over the trust property and/or administration of the trust's affairs, the trust arrangement is, in fact, a partnership, in which the shareholders become liable for the acts of the trust.[43] The basic principle is that if it is free from the control of its interest-holders, then it is an Express Trust.[44] This is commonly referred to by courts of equity as the "Control Test,"[45] in which, control must ultimately rest with the trustee(s) of the trust in order for it to be properly classified as an Express Trust. The well-settled principle applied by courts of equity is that interest-holders, by full legal title and control over the trust property being vested absolutely in the trustee(s), cannot be considered partners nor agents,[46] and therefore cannot be held liable for the debts of the trust in that manner.[47]

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[40]Also referred to as *trust certificates* or *certificates of trust units*.

[41]Also referred to as *capital certificates* or *certificates of capital units.*

[42]See HARDEE v. ADAMS OIL ASSN., 254 S.W. 602 (1923); TODD v. FORD, 92 Colo. 392; and WEIMER & CO. v. DOWNS, INC., 77 Colo. 377.

[43]See RAND v. MORSE, 289 Fed. 339 (C.C.A.8 (Mo.) 1923); GOLDWATER v. OLTMAN, 210 Cal. 408; SCHUMANN-HEINK v. FOLSOM, *supra*; FIRST NATIONAL BANK v. CHARTER, 305 Mass. 316; and NEVILLE v. CLIFFORD, 242 Mass. 124. See, for examples of what will constitute a co-partnership, TAFT v. WARD, 106 Mass. 518; and PHILLIPS v. BLATCHFORD, *supra*.

[44]*Id.*

[45]See BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. SCULLY, 92 F.2d 97 (C.C.A.10 (Colo.) 1937); RAND v. MORSE, *Id.*; GOLDWATER v. OLTMAN, 210 Cal. 408; SCHUMANN-HEINK v. FOLSOM, *Id.*; FIRST NATIONAL BANK v. CHARTER, *Id.*; COMMERCIAL CASUALTY INS. CO. v. PEARCE, 320 Ill.App. 221; ROSEMAOND v. MARCH, 287 Mich. 580 (Rehearing denied, 287 Mich. 270); NELVILLE v. CLIFFORD, *Id.*; CARLING v. BUDDY, 318 Mo. 784 (IN RE WINTER, 133 N.J.Eq., 245); and RHODE ISLAND TRUST CO. v. COPELAND, 39 R.I. 193.

[46]See MAVO v. MORITZ, 151 Mass. 481, 484, 24 N.E. 1083 (1890); MASON v. POMEROY, 151 Mass. 164, 7 L.R.A. 771; JOHNSON v. LEWIS, 6 Fed. 27, 28 (C.C.Ark. 1881); TAYLOR v. MAYO, 110 U.S. 330, 334-335, 28 L.Ed. 163, 165 (1884); LACKETT v. RUMBAUGH, 45 Fed. 23, 29 (C.C.N.C. 1891); and SMITH v. ANDERSON, L.R. 15, Ch. D, 247, 275-276, 284-285.

[47]See IN RE CONOVER, 295 Ill.App. 443; and GRECO v. HUBBARD, 242 Mass. 37.

Furthermore, the certificates have no determinable fair market value, and, therefore, no gain or loss is recognized until the cost or other basis of the property disposed of has been recovered.[48] In *Commissioner of Internal Revenue v. Marshman*,[49] the court held that fair market value is determined by property received by the taxpayer, not the fair market value of the property transferred by the taxpayer into the trust. What's more is that certificates are considered not necessarily as chattels, but as documentary evidence of ownership and intangible rights;[50] and, in and of themselves, they are only personal property,[51] not the actual interest or share itself.[52] The interest in an Express Trust, cannot be traded without the approval of the trustee(s). This is contrasted with the certificate of stock, which courts have long held may be dealt with in the market as a "commercial document of value."[53]

TRUSTEE BASICS

FIRST AND FOREMOST, anyone (man or person) capable of taking physical possession of or legal title to property can be a trustee.[54] And there is no limit to the number of trustees who may serve in any one trust. Generally, where there is more than one trustee, the trustees, with respect to each other, are referred to as co-trustees,[55] and when acting jointly as a collective body are referred to as the Board of Trustees.

Furthermore, there is no law prescribing the character of a trustee, and while it has been held that a trust cannot be invalidated simply due to incompetence, the trustee should be at least someone capable and fit for executing the powers and duties honorably.[56] (This is the basis for the general rule that beneficiaries are not desirable as trustees, though there is no law to forbid such appointment. Equity will generally avoid all temptation to a breach of trust.) The trustee should be stationed within the jurisdiction of the court of equity in which the estate is located, if indeed the trust corpus is an estate. But where the trust corpus is *portable land*, the trustee need not be stationed

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[48]See Master Tax Guide, para. 910. In regard to Capital Certificates, the courts have long upheld the doctrine of exchange, in that certificates in exchange are not taxable until a realized gain has occurred. See BURNET V. LOGAN, 283 U.S. 404 (1931); and TRENTON COTTON OIL CO. V. COMMISSIONER, 147 F.2d 33 (C.C.A.6 1945).

[49]279 F.2d 27 (C.A.6 1960).

[50]See GOODHUE V. STATE ST. TRUST CO., 267 Mass. 28.

[51]See PARKER V. MONA-MARIE TRUST, 278 S.E. 321; and IN RE PITTSBURG WAGON WORKS' ESTATE, 204 Pa. 432, 54 A. 316.

[52]See MALLEY V. BOWDITCH, 259 Fed. 809 (C.C.A.1 (Mass.) 1919).

[53]See Joseph H. Beale, THE EXERCISE OF JURISDICTION *IN REM* TO COMPEL PAYMENT OF A DEBT, 27 Harv. L. Rev. 107, 111 (1913), citing STERN V. QUEEN, (1896) 1 Q.B. 211; PINNEY V. NEVILLS, 86 Fed. 97 (C.C.Mass. 1898); *et cetera*.

[54]See BEACH'S COMMENTARIES ON THE LAW OF TRUSTS AND TRUSTEES, vol. I, ch. III, § 23, p. 30 (1897). Even a thief is considered, by operation of trust law, to be a *constructive trustee*.

[55]This term is sometimes used to denote that the *co-trustee* has less authority than the *trustee*. In that sense, the co-trustee is called a *passive trustee*, and the trustee an *active trustee*. But Express Trusts usually employ the term *co-trustee* simply to denote that there are several trustees of that trust.

[56]Beach, s*upra.* Beach describes this concept as "in such a manner as to subserve the interests of the beneficiary[.]"

within any single jurisdiction. Non-residency will not disqualify or preclude the trustee from carrying out his position.[57]

As far as accepting the appointment is concerned, this should be done formally, expressly in writing, even though it will always be implied "if the individual intermeddles with the trust property, or performs any act to carry out the trust."[58] Once acceptance has been tendered, no court of common law or equity can prevent the trustee from holding that office, except for breach of trust[59] or good cause dependent upon clear and lawful necessity.[60] Removal must be procured pursuant to the provisions of the declaration, or, where no such provisions are made, by decree of a court of equity.

Lastly, it should be noted that the office of trustee is not always a desirable one. When the trust instrument conveys a burdensome obligation, the trustee is miserable and at risk of breach by failure to perform; when the trust instrument has been constructed poorly, the trustee is miserably confined and inhibited and he may well be held liable for trust contracts with outside parties. The trustee has a duty of care toward the beneficiary(s), and must harbor no biases or resentment in administration; therefore, it is prudent to empower the trustee with enough discretion to carry out his position to the best of his ability and responsible creativity. To put it plainly, the settlor must truly *trust* the trustee to carry out his duties, and use his powers justly.

POWERS & DUTIES OF THE TRUSTEE

THE POWERS of a trustee are divided into three categories: general, special and discretionary. The general are all those inherent in trustees *virtute officii*, i.e., ordinarily conferred by trust law; the special are all those conferred by the trust instrument; and the discretionary are all those arising out of the necessity of personal judgment (though broad discretion may also be conferred by law and as well as by trust instrument).[61] It is well-settled law that under a declaration of trust, the trustees must have all the powers necessary to carry out the obligation of that private contract which they have assumed.[62]

Furthermore, it is settled that the trustees of an Express Trust are afforded greater latitude to carry out their duties than ordinary trustees.[63] The trustees are

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[57]*Id.* at § 19, p. 28.

[58]August P. Loring, A TRUSTEE'S HANDBOOK, pt. I, § 3, p. 5 (1898).

[59]See IN RE TEMPEST, (L.R. 1 Ch. 487), 31, 1431: Lord Justice Turner settled the rule of law that "[f]irst the court will have regard to the wishes of the persons by whom the trust has been created, if expressed in the instrument creating the trust, or clearly to be collected from it. . . . If the author of the trust has in terms declared . . . a particular person . . . [t]he court in those cases conforms to the wishes of the [creator]." A Breach of Trust does not include a technical breach of trust, e.g., one made through mistake.

[60]See Loring, *supra* at § 8, p. 19. The reasons are generally for guilt of willful breach of trust, waste or mismanagement of trust property, refusal to account to beneficiary, lunacy, drunkenness, bad habits or carelessness which endangers the trust property, or improvidence.

[61]See Beach, *supra* at vol. II, ch. XXI, §§ 427-435, pp. 986-1006.

[62]See BOYD V. U.S., 116 U.S. 616 (1886); and SILVERTHORNE LUMBER CO. V. U.S., 251 U.S. 385 (1920).

[63]See ASHWORTH V. HAGAN ESTATES, 181 S.E. 383 (1935).

empowered to control every aspect of the trust according to the trust instrument and equity, and retain the power to remove even the beneficiary(s) from the premises.[64] These powers include, but are in no way limited to—

- The power to bind the trust in a contract, especially where such obligation is implied-by-law,[65] and the power to contract with the beneficiary(s);
- The power to partition, exchange, sell, pledge or mortgage the trust property, either in whole or in part;[66]
- The power to lease trust property;[67]
- The power to issue, change, or otherwise dispose of securities of the trust;
- The power to support the beneficiary(s) in all reasonable manner;
- The power to prosecute and defend in the trust's name or trustee's name;
- The power to make gifts out of trust property;
- The power to delegate all unessential powers and duties; and
- The power to exercise personal judgment and every discretionary power not prohibited by the trust instrument.[68] He may do whatever a man or woman may lawfully do according to natural right.

The fundamental principle of law is that for every power there is a correlative duty. The trustee, as a fiduciary to the beneficiary(s), assumes certain basic duties outside of the management of trust property, and other general duties aside from whatever specific duties may be conferred upon the trustee in the trust instrument. These duties include, but are not limited to—

- The duty to support the beneficiary(s) in any essential needs which it may have, out of the funds which would otherwise be paid to it in distribution. And if such funds are not available, the duty to accumulate any balance needed;[69]
- The duty to refrain from taking advantage of peculiar knowledge or position when dealing directly with the beneficiary(s);
- The duty to exercise the utmost good faith in all concerns of the trust, whether dealing with the trust property itself, or directly with the beneficiary(s) in matters concerning the trust,[70] including to care for, protect and secure the trust property;

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[64]See DEVEN V. HENDERSHOTT, 32 Iowa 192.

[65]See DURKIN V. LANGLEY, 167 Mass. 577; PERRY ON TRUSTS, *supra* at § 437, p. 120; HAPGOOD V. HOUGHTON, 10 Pick. 154. Cf. Comp. Law Dak. (1887), § 3946; Rev. Code N. Dak. (1895), § 4289; and Civ. Code Cal. (1885), § 2267.

[66]See Loring, *supra* at pt. II, § 3, pp. 54-69. It should be noted that even though the trustee may have sold the entire trust estate, the trust is not necessarily terminated until all obligations of the trust arrangement have been fulfilled, especially the transferring of the proceeds to the interest-holder(s).

[67]It is a general rule that the if, without adequate provision, the trustees lease property outside of the powers granted to them by the trust instrument, such an act will constitute breach of trust. Again, it all comes back to the design of the trust instrument.

[68]See James Hill, A PRACTICAL TREATISE ON THE LAW RELATING TO TRUSTEES, THEIR POWERS, DUTIES, PRIVILEGES AND LIABILITIES, pt. III, div. I, ch. II, § 3, pp. 471-495.

[69]See Loring, *supra* at pt. II, § 4, p. 69. "[The trustee's] fealty is to the trust, and all his acts must be governed by strict loyalty to it and the interests of the beneficiaries; and any act which is not in the interest of the beneficiaries is a breach of trust."

[70]*Id.* at p. 72.

- The duty to preserve, protect and further the trust's interests according to the purposes designated in the trust instrument, including pressing all reasonable demands and prosecuting and fending off all claims, and claiming all available exceptions and taking all available remedies and advantages in trust matters;
- When delegating unessential powers and duties, the duty to exercise at least a general supervision of the trust affairs, and to perform any ministerial acts which require the exercise of discretion or judgment;[71]
- The duty to keep minutes, and separate accounts of the trust, even if kept in a book with other accounts, with minutes showing decisions and resolutions reached, and accounts showing the state of the trust and pertinent details of transactions (generally in the form of schedules of income received, income paid, additions to principal, deductions from principal, principal on hand, and changes in investment consisting of debtor and creditor sides);[72]
- Upon acceptance of the trusteeship, the duty to secure and protect the trust property and trust documents;[73]
- When investing trust funds, the duty to invest them securely, "so that they shall be preserved intact for the remainderman," and to invest productively, "so that they shall yield [at least] the current rate of interest to the life tenant;"[74] and
- The duty to concur with all co-trustees, except where authorized to act individually.[75]

PRIVILEGES & LIABILITIES OF THE TRUSTEE

IN ADDITION TO POWERS AND DUTIES, there are certain privileges (including allowances), rights and liabilities of the trustee. These are all those which are enumerated in the trust instrument and naturally extended to the trustee of an Express Trust. As was noted earlier, certain restrictions placed upon trustees of ordinary trusts do not apply to the

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[71]See PERRY ON TRUSTS, *supra* at § 409, p. 49. It is completely lawful and equitable for a trustee to appoint an Authorized Representative to act as agent in collecting rents and dividends, keep books and minutes, and, in general, act for the trustee wherever there is a moral or legal necessity to employ such an agent. (Necessity may be determined to exist where the ordinarily prudent business man would employ an agent in his own affairs. See EX PARTE BELCHIER, Amb. 219.)

[72]This is not required, but the rule of thumb is that the more detail kept, the better the accounting. The trustee is accountable to the beneficiary(s), and the accounts must ultimately balance out in the end. And an account settled in a court of equity is final; it cannot be reopened except to correct a mistake or fraud, and its correctness cannot be questioned in a collateral proceeding in equity or in a court of law. See STETSON V. BASS, 9 Pick. 26, 29; DODD V. WINSHIP, 144 Mass. 461; SEVER V. RUSSELL, 4 Cush. 513; and PARCHER V. BUSSELL, 11 Cush. 107.

[73]See HALLOWS V. LLOYD, 39 Ch. Div. 686, 691; Underhill, *supra* at p. 219.

[74]Loring, *supra* at pt. II, § 4, p. 95. Generally, where it is impossible to comply with the investments required by the trust instrument, a trustee has recourse to apply to a court of equity for directions. See MCINTIRE'S ADM'N V. ZANESVILLE, 17 Ohio St. 352.

[75]See James Hill, *supra* at pt. III, div. I, ch. I, § 1, pp. 305-309; BROWN V. DONALD, 216 S.W.2d 679 (1949); MELDON V. DEVLIN, 31 App.Div. 146, 53 N.Y.Sup. 172; BARROLL V. FOREMAN, 88 Md. 188, 40 A. 883; and APPEAL OF FESMIRE, 134 Pa. 67, 19 A. 592.

trustee of an Express Trust pursuant to the doctrine of greater latitude.[76] These, aside from those allowed by the trust instrument, include, but are not limited to—

- The inherent, unquestionable right to full compensation, including reimbursement of all out-of-pocket and other expenses incurred in the discharge of duties. (And unduly withheld reimbursement results in a lien on the trust for the amount plus interest);[77]
- The privilege of residing within the trust estate and allowance of rates and taxes "although he [the trustee] has the benefit of residing in the house;"[78]
- The right to employ a solicitor[79] for assistance and guidance in the administration of the trust, and, in the case of any doubt or difficulty, to seek the opinion of competent counsel, and, in the case where the trust's accounts are intricate and complicated, to seek the assistance of an accountant—to the charge of the trust;
- The right to apply to a court of equity for directions in the execution of the trust, or to obtain a declaratory judgment in order to establish the meaning and intent of the trust instrument;[80]
- The right to carry on in separate business for the benefit of the trust given certain conditions;
- The allowance of remuneration for loss of time under certain circumstances;
- The right not to be compelled by subpoena or review to produce and show records or books to outside parties;[81]
- The right to further limit his liability in particular contracts, even beyond the limitation made in the trust instrument;
- The right to relocate, move trust property, or change the trust's domicile;[82] and
- The inalienable right to disclaim the office at the execution, or resign at a later date.

With regard to the personal liabilities of a trustee, basically, the inherent liabilities (and non-liabilities) are all those incident to ownership at law[83] and imposed or exempted under contract law, for it is a maxim of law: *le contrat fait la loi*.[84] Therefore, a trustee's liability is largely determined according to the particular circumstances of the

[76]See ASHWORTH V. HAGAN ESTATES, *supra*.

[77]James Hill *supra* at pt. IV, div. II, ch. IV, pp. 570-571. "Such is the rule of courts of equity, and such also is the rule at common law." Quoting Lord Cottenham in ATT.-GEN. V. MAYOR OF NORWICH, 2 M. & Cr. 406, 424. See also REX V. INHABITANTS OF ESSEX, 4 T.R. 591; and REX V. COMMISSIONERS OF SEWERS, 1 B. & Adolph 232.

[78]*Id.* "However a trustee who employs a park-keeper, or other servant, for his own purposes, must pay him himself, and will not be allowed his wages out of the estate. And so a trustee, with the most ample powers of management, cannot of his own authority keep up a mere pleasurable establishment, such as gamekeepers, &c."

[79]This is defined as "[a] person who conducts matters on another's behalf; an agent or representative." Black's Law Dictionary, p. 1399 (7th ed. 1999).

[80]See DUNBAR V. REDFIELD, 7 Cal.2d 515.

[81]See BOYD V. U.S., *supra*; and SILVERTHORNE LUMBER CO. V. U.S., *supra*.

[82]See Beach, vol. I, *supra* at § 19, p. 28; RICE V. HOUSTON, 80 U.S. 66 (1871); Fost. Fed. Pr. Sec. 19; and Story, Fed. Pr. Sec. 19. Also, in NEW ORLEANS V. WHITNEY, 138 U.S. 595, 34 L.Ed. 1102 (1891) the court said "[w]e have repeatedly held that representatives may stand upon their own citizenship in the federal courts irrespective of the citizenship of the persons whom they represent—as executors, administrators, guardians, trustees, receivers, [etc.]"

[83]See Loring, *supra* at pt. II, § 1, p. 23.

[84]"The contract makes the law." See, generally, Bouvier's Law Dictionary, pp. 770-790 (1928). The basic principle is that all man's law is contractual in nature, regardless of the particular classification of the law, and can acquire force only by consent: consensus facit legem.

situation, especially contracts wherein the trustee has properly limited his liability via qualified signature. (I will discuss the principles of and procedure for properly qualifying one's signature in a later section.). For now we will entertain the general liabilities, which may include, but are not limited to—

- Liability on all contracts made, whether signing as "trustee" or signing individually;[85]
- Liability of removal for breach of trust, waste, mismanagement, or good cause shown in an action for removal in a court of equity,[86] or according to trust instrument;
- Liability for losses sustained by the trust as a result of negligence;[87]
- Liability for torts and common-law criminal and civil wrongs, or acts of bad faith;[88]
- Liability in all cases of co-mingling of trust funds;[89] and
- Liability for all mischief of his agents contracted to exercise discretionary powers.[90]

But, the trustee is not at all liable for any losses sustained in the proper discharge of duties,[91] and, in the case of other losses due to negligence or tort, the trustee may be able to be bonded in the manner ordinarily used by executors and administrators. They are generally not liable for—

- Contracts in which liability was properly limited using the methods to be shown later. Such contracts may also encompass the codes and statutes of various jurisdictions, given that all manmade law is, by its nature, fundamentally contractual;
- The debts of the trust incurred requiring the creditor to look solely to the trust for payment.[92] (Conversely, the trust is not liable for the personal debts of the trustee either,[93] except to the extent of attachability of the trustee's interest in the trust[94]);

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[85]See Loring, *supra* at pt. II, § 3, p. 65. Simply using the title "trustee" will not sufficiently limit liability in certain contracts such as debt instruments and agreements which fail to specify the non-personal capacity of the trustee. That without some express stipulation he is personally bound is well-settled law. See FELDMAN v. PRESTON, 194 Mich. 352, 160 N.W. 655; BRIED v. MINTRUP, 203 Mo.App. 567, 219 S.W. 703; HUSSEY v. ARNOLD, *supra*; CARR v. LEAHY, 217 Mass. 438, 105 N.E. 445; also KNIPP v. BAGBY, 126 Md. 461, 95 A. 60.

[86]Any such action would have to be instituted by an interest-holder, as a last resort. And the burden of proof rests with the party bringing the action.

[87]See HOLMES v. MCDONALD, 226 Ill. 169, 80 N.E. 714; and NORLING v. ALLEE, 10 N.Y.Sup. 97. But it must also be noted that this, as with all of the others can be limited. In FISHERIES CO. v. MCCOY, 202 S.W. 343 it was held that it is lawful for liability to be limited even in certain cases of tort and negligence, except where the relation of master-servant or passenger-carrier exists.

[88]See Loring, *supra* at § 1, p. 26. However, in torts and civil wrongs, limitation of liability is amply available as per FISHERIES CO., *supra*. Common-law crimes are strictly of an *in personam* nature, going against the officer personally.

[89]Generally, in cases of co-mingling of the trustee's personal funds with trust funds, courts will follow the trust property, unless co-mingled beyond separation, in which case the courts will treat the trust as the alter-ego of the individual acting under the assumed alias of "trustee" and will ignore the trust arrangement completely. See GREGORY v. HELVERING, 293 U.S. 465 (1935), XIV-1 C.B. 193; and HELVERING v. CLIFFORD, 309 U.S. 331 (1940). Mixing trust property with personal property is co-mingling. See PERRY ON TRUSTS, vol. I, ch. XV, § 447 (6th ed.). In many cases, however, it should be noted that, co-mingling or not, *in rem* jurisdiction is waived by the defendants giving way to these at-law actions; ignorance of procedural defects relating to *in rem* jurisdiction is the real cause.

[90]See Beach, vol. II *supra* at ch. XXV, § 548, p. 1243; and WINTHROP v. ATT.-GEN., 128 Mass. 258.

[91]Equity will always follow the law. And the trustees can never be penalized for properly discharging their duties.

[92]See TAYLOR v. MAYO, 110 U.S. 330, 4 S.Ct. 147, 28 L.Ed. 163 (1884); and FROST v. THOMPSON, 219 Mass. 360,

- The independent, non-preventable acts of co-trustees, of which he had no prior knowledge;[95]
- The acts of his agents when properly contracted;
- Taxes on income of the trust;[96] and
- Lawsuits against the trust.

AUTHORIZED REPRESENTATIVES

AS SHOWN ABOVE, it is well within the power, discretion, and, often times, duty to contract an Authorized Representative, Managing Agent or Attorney-in-fact to deal with certain affairs of the trust. And the basic rule which courts of equity have laid down is that a trustee may contract such agents to handle all affairs which require no discretion, be they ministerial or not, and he may not delegate the essential part of a power unless, of course, he is permitted to do so by the trust instrument.[97]

In clarifying the discretionary power rule, it must be noted that there is no law against delegating discretionary powers to agents. The rule is simply that a trustee who does so, "does so at his own peril,"[98] for he is liable for all losses generated by the agent, if any. To clarify what constitutes the essential and unessential parts of a power, the essential part is defined as the exercise of discretion, the determining of needs of the trust, or the appropriateness of an action. The unessential part is that "not requiring the exercise of discretion," etc., etc. However, there is a simple solution, allowing for greater flexibility in this rule. The solution is to "authorize the agent to contract [on behalf of the trust] subject to the assent of the trustee."[99] And, as noted in the previous section, if the trust instrument makes provisions for the contracting of an Authorized Representative, then the trustee cannot be liable for his acts.[100]

Now, the method for contracting such agents may be either by formal appointment if mandated by the trust instrument, or by execution of a limited power of attorney, letter of authorization or even certificate of verbal authorization documented by

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106 N.E. 1009.

[93]See WRIGHT v. FRANKLIN BANK, 59 Ohio 80, 51 N.E. 876.

[94]See Loring, *supra* at pt. II, § 1, p. 41; MAVO VS. MORITZ, *supra*; and HUSSEY v. ARNOLD, 70 N.E. 87 (1904).

[95]See James Hill, *supra* at pt. III, div. I, ch. I, p. 309. If the acts were indeed preventable, and he had prior knowledge, then the trustee is co-liable and accountable for the loss. See also IN RE ADAMS' ESTATE, 221 Pa. 77, 70 A. 436; and IN RE COZZENS' ESTATE, 15 N.Y.Sup. 771.

[96]Again, the trustee must be indemnified by the trust instrument from taxation for trust gains. If the trustee holds interest in the trust, he is taxable only at the realization of an actual gain, not at the point of investment. Cf. BURNET v. LOGAN, *supra*; and TRENTON COTTON OIL CO. v. COMMISSIONER, *supra*.

[97]See Loring, *supra* at pt. II, § 2, p. 49.

[98]*Id.* at § 4, p. 74.

[99]*Id.* at § 2, pp. 48-49.

[100]It should be noted here that in the previous section it was shown to be a general duty of the trustee to minimize any potential risk not only to the trust, but also to himself, when contracting agents. In cases of uncertainty, the trustee may require that the agent be bonded for a certain amount which would satisfy any potential general or specific loss, assuring the trustee and trust of the good-faith performance of the agent.

minutes of meeting. The most effective, secure method of contracting such an agent would obviously be an actual appointment with written contract setting forth the specifics of the position. But, a letter of introduction is, for most purposes, sufficient, as is a simple power of attorney when the agent is acting specifically under the title of Attorney-in-Fact.[101]

EXPRESS TRUST vs. CORPORATION

FIRST, I MUST CLARIFY, though I am referring primarily to corporations, included in the reference are all organizations which owe their existence to legislative acts, not limited to Limited Liability Companies, Limited Partnerships, Agencies, Associations, etc.; though not classified as corporations, they avail themselves of benefits, privileges, and franchises of the state for their very creation and existence. Second, since we have already shown the distinct juridical personality of the trust as a legal entity,[102] we will not reexamine it until we consider its personality under the Roman civil law of the 14th Amendment in a later section. But it must be noted the well-settled law that the Express Trust is a lawful,[103] legal, valid business organization,[104] with the right to hold property and sue in its business name.[105] And its uses in modern business have some of their strongest roots in England, Germany and many of the United States where it has been recognized for its superiority, and even praised, by such notable authorities as the Ohio Supreme Court for its effectiveness in the business of life insurance.[106]

The declaration of trust has been held to be an effective substitute for incorporation, for its many advantages, which will undoubtedly shine though to the reader by the following table. I have prepared this table based upon the work by John H. Sears who, after discussing the impact of the twin landmark cases[107] on the grave lack of profitability of using corporations for, *inter alia*, dealing in real estate, went to task in

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[101]I have supplied the reader with a sample multipurpose letter of introduction for opening a bank account in the sample forms section. All the reader need do is modify the letter to encompass the particular purpose for which the authorization may be necessary. A sample limited power of attorney is also provided in that section. I have also provided a sample Authorized Representative contract, specifying the particular authorization, power, and limitation of liability, etc., for said agent. (When used with Managing Agents, modification to the contract's language may be necessary.)

[102]See BRIGHAM V. U.S., *supra*; and BURNETT V. SMITH, *supra*.

[103]The lawfulness of the Express Trust created under the common law is obvious, however, the allegation to the contrary has often been made in the past and, occasionally, by the ignorant nowadays. Among the long list of precedents confirming its lawfulness is PALMER ET AL. V. TAYLOR ET AL., 269 S.W. 996 (1925), offered here simply to add to the collection.

[104]See BAKER V. STERN, A.L.R. 462; REEVES V. POWELL, 267 S.W. 328 (1924); WEEKS V. SIBLEY, 269 Fed. 155 (D.C.Tex. 1920); PHILLIPS V. BLATCHFORD, 137 Mass. 510 (1884); and BURNETT V. SMITH, *supra*.

[105]See U.S. V. CARRUTHERS, 219 F.2d 21 (C.A.9 (Or.) 1955).

[106]"There was no class of business, the transaction of which, as a matter of private right, was better recognized at common law than that of making contracts of insurance upon the lives of individuals." STATE V. ACKERMAN, 51 Ohio St. 163, 37 N.E. 828, 24 L.R.A. 298.

[107]ELIOT V. FREEMAN, *supra*; and MAINE BAPTIST MISSIONARY CONVENTION V. COTTING ET AL., 220 U.S. 178 (1911).

outlining the distinct benefits of Express Trusts. The works by William C. Dunn,[108] Guy A. Thompson,[109] and Sidney R. Wrightington[110] are cited as well. Mr. Sears says:[111]

> The decision of the United States Supreme Court . . . holding that **the** [Express] **Trusts are not subject to the Federal excise tax on corporations**, has emphasized this method of conducting business as compared with corporations. . . [T]**he best legal talent was soon impressed into the service of devising a means of affording the usual advantages belonging to a corporation without the authority of any legislative act**. A method of placing the property into the hands of trustees, who held the legal title and issued certificates, similar to shares of stock, to the *cestui qui trust*, showing the interest owned by each, possessed nearly all the advantages desired. [This excluded the use of limited liability companies, joint-stock associations, and co-partnerships, which are] **organized under enabling statutes** which [merely] enlarge the privileges possessed at common law, and they are, therefore, subject to State regulations, which may be equally burdensome to those imposed on corporations. [Italics emphasis supplied in original; bold emphasis and bracket information added.]

Express Trust	Corporation
Governed under equity. Trust law is the most well-settled body of law in America.	Governed under statute. Forever changing according to political agendas and schemes.
Trustee(s) are sole authority, except where delegated to Agents or a Board of Directors.	Board of Directors are managers with limited, defined powers to conduct business, hold regular meetings, etc.
Trustees afforded more leverage and powers are generally broader than corporate officers. Law provides that whatever any individual may lawfully do, the trust can do. The sky (nature) is the limit.	Relatively broad powers, such as with holding companies. But corporation may not do whatever any individual may lawfully do; they can only do what is *legal*. The statute (legislature) is the limit.
Trustee's liability is limited by trust instrument and by signature on all contracts and instruments. Remember *Boyd* and *Silverthorne*— trustees not subject to subpoena.	Corporate officers personally liable to legislature and to creditors for all ambiguous indorsements. Remember *Enron* and *Global Crossing*—cannot escape service of process.[112]

[108] TRUSTS FOR BUSINESS PURPOSES (1922).

[109] BUSINESS TRUSTS AS SUBSTITUTES FOR BUSINESS CORPORATIONS (1920).

[110] THE LAW OF UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS (2d ed. 1923).

[111] *supra* at § 1, p. 3.

[112] Although corporate officers reserve the relative-right to plead the fifth, they have merely the relative-right to plead the congressionally interpreted "spirit" of the amendment, not the letter of the law, due to their 14th Amendment citizenship. Trustees of an Express Trust have the absolute-right to directly refuse self-incrimination as well as indirectly on a jurisdictional basis. See Lee Brobst et al., *supra*; BOYD V. U.S., *supra*; and SILVERTHORNE LUMBER CO. V. U.S., *supra*.

Life-span of 20-25 years at a time in order to avoid rules against perpetuities. Death of settlor or trustee has no effect on life or affairs of trust. Succession of power is quiet and private.	Life-span is perpetual or certain number of years according legislative requirements. All officer changes must be reported, which records are open for public review.
Trust is not required to obtain business license.[113]	The opposite is the case.
Trustees are not required to file reports with any entity, and are accountable only to the beneficiary, governed strictly under principles of equity.	Required to file statements and reports quarterly, etc.
Business name is naturally protected by injunction. (May also use trade-name or trademark for trust purposes without registration.)[114]	Must apply for and secure fictitious firm name, and must register all trade-names and trademarks.
All Federal excise tax and state organization and franchise taxes are legally avoided.	The opposite is the case, except for state taxes in certain states. In either respect, all corporations are taxed indirectly via inflation.[115]
Not subject to foreign corporation laws of any state. Not inherently subject to commercial regulation except for "income" derived from corporate stock and physical franchises under Article I § 8 Clauses 1 and 3. Express Trust is a valid legal entity in all States of the Union.[116]	Inherently subject to all foreign corporation laws and public policy regulation.
Trust may function as an Article IV § 2 citizen of the United States via its trustee, not a 14th Amendment citizen.[117] This citizen is understood in constitutional law as the *private* citizen.[118]	Corporation is 14th Amendment citizen,[119] regardless of citizenship of corporate officer. Generally state corporations require officers to be citizens as well. This citizen is inherently public due to the nature of the amendment.[120]

[113]See PEOPLE v. ROSE, *supra*. Once trust is executed, it is an existing "express business," and, unless the trust instrument requires the trustee to obtain a business license, one is not needed except for new (i.e., heretofore nonexistent) express business.

[114]See PEOPLE v. ROSE, 219 Ill. 46, 76 N.E. 42; YWCA v. YWCA, 194 Ill. 194, 62 N.E. 551; MCLEAN v. FLEMING, 96 U.S. 245 (1877); LANE v. BROTHERS, ETC., 120 Ga. 355; AIELLO v. MONTECALFE, 21 R.I. 496; and RUDOLPH v. SOUTHERN BENEFICIAL LEAGUE, 23 Abott's N.C. 199.

[115]"[I]nflation is a 'method of taxation' which the government uses to 'secure the command over real resources, resources just as real as those obtained by [ordinary] taxation'. 'What is raised by printing notes,' . . . is just as much taken from the public as is . . . an income tax.'" 1980 ANNUAL REPORT, Federal Reserve Bank of Richmond, p. 10, quoting John Maynard Keynes' THE ECONOMIC CONSEQUENCES OF THE PEACE (1920).

[116]See JONES v. HABERSHAM, 107 U.S. 174, 27 L.Ed. 401 (1883); FELLOWS v. MINER, 119 Mass. 541; SOHIER v. BURR, 127 Mass. 221; SEWALL v. WILMER, 132 Mass. 131; and CROSS v. U.S. TRUST CO., 131 N.Y. 330, 349, 30 N.E. 125. A trust invalid where created, but valid where to be administered will be upheld where made. HOPE v. BREWER, 136 N.Y. 126, 143, 32 N.E. 558.

[117]See FARMERS LOAN & TRUST CO. v. C. &. A. RY. CO., 27 Fed. 146 (C.C.Ind. 1886); and SHIRK v. CITY OF LAFAYETTE, 52 Fed. 857 (CC.Ind. 1892). For an understanding of the profound superiority of Article IV § 2 citizenship over 14th Amendment citizenship, see Lee Brobst et al., *supra*.

[118]See HALE v. HENKEL, *supra*.

[119]See SANTA CLARA COUNTY v. SOUTHERN PACIFIC R. CO., *supra*.

[120]14th Amendment citizens, under the Roman civil law (private international law/admiralty-maritime law), are inherently public, with only relative-privacy.

Trustees have absolute-rights and privileges to engage in commerce under protection of the Federal Constitution.[121]	Corporate officers have relative-right and privileges to do so, and incur more taxability by doing so.
Trustees issue certificates in the manner prescribed by trust instrument. Certificate holders have no say in the administration of trust affairs.	Must go "public" in order to issue stock. Stockholders have a relative say in affairs depending on the extent of their holdings.
Interests of the beneficiary(s) well protected by equity. Power to secure information as to the actions of the trustees and trust affairs is, no doubt, superior to the rights and remedies of stockholders in corporation.	Stockholders rights protected by courts, yet the basic statutory nature of corporations allows for abuse. Stockholders are generally at the mercy of someone.
Units of interest in the trust are not personal property of certificate holder and carry no liability as such.	Shares of stock are personal property in hands of owner and taxes issue on same property against both owner and corporation.
No legal obligation to maintain the capital and refrain from paying dividends out of capital. Trust instrument governs.	The opposite is the case.
May prosecute/defend litigation in trust or trustee name without compromising legality. Same rules as to parties and procedure at law and in equity are applicable.	May bring and defend litigation in the corporate name and entity only. The process of piercing corporate veils succeeds mostly due to confusion of personal and official capacities by officers.

While the mortality rate of corporations and the like have historically remained high, Express Trusts remained, and indeed to this day, continue to remain vital.[122] Also, as the table shows, many of the powers of an Express Trust are substantially the same as those of a corporation in effect, but without the legislative requirement of registration in order for those powers to be activated. These advantages and more have been and are still seized by some of the shrewdest, wealthiest individuals and families in America and from abroad. But the widely perceived, yet untraceable, wealth of such individuals and families like the Rothchilds, Rockerfellers, Kennedys, Forbes, and many of the American founding fathers, plus countless modern day politicians, are strong

[121]Any statute enacted by a state which prohibits this right is in conflict with the Constitution. See BRUANT v. RICHARDSON, 126 Ind. 145, 25 N.E. 807; ROBEY v. SMITH, Ind.Sup. 30 N.E. 1093; and FARMERS' LOAN & TRUST CO., *supra*.

[122]See Chandler, *supra* at p. 11. Reportedly, the oldest Express Trust in America is the North American Land Company, formed by Patrick Henry, with the aid of John Nicholson and James Greenleaf, for Robert Morris of Virginia (popularly known as the "Financier of the American Revolution," distinguished from Virginia Colony Governor), circa 1764, roughly a decade prior to the signing of the Declaration of Independence (1776) and Mr. Henry's compelling address to the Virginia Legislature, GIVE ME LIBERTY (1775). North American Land Company was later expanded in 1795, but was dissolved in 1798, at which time its land holdings consisted of roughly 4 million acres scattered over Georgia, the Carolinas, New York, and the states in between. See PLAN OF ASSOCIATION OF THE NORTH AMERICAN LAND COMPANY: ESTABLISHED FEBRUARY 1795 by Peter Force (1795).

Another, and possibly more noteworthy, Express Trust was the Merchants Bank of New York, formed by Alexander Hamilton, circa 1810. As an aside, this Express Trust made full use of transferability of shares, i.e., certificates, and limited liability (see HAMILTON'S WORKS, Congressional ed., VII, 838), whereas Mr. Morris ultimately served time in debtors prison after the trust revenues from installment sales and share sales did not come in quickly enough to meet the loan and tax deadlines. George Washington is reported to have had many a dinner in debtors prison with Mr. Morris, where he visited him frequently; the two were good friends.

circumstantial evidence of this. One may find many articles and information, as well as quotes,[123] attesting to this.

Lastly, it should be mentioned that, unlike the corporation, there is no lawful method by which to pierce the trust without the express permission or implied consent of the trustee, or some unlawful activity on the part of the trust giving rise to a *bona fide* cause of action. As a result, virtually no direct evidence of the trust's existence can be found unless it is made to be found via recording— even then it can only be heard by a court of competent jurisdiction, which, as you shall see in the sections ahead, is very hard to find nowadays. This is protection at its finest, hiding in plain sight, for as the maxim goes: *bene vixit, qui bene latuit*.[124]

UNDERSTANDING COMMERCE

HERE IS WHERE we begin to address the Express Trust in action. As shown above, the trust may engage in all manner of trade and commerce,[125] but before taking the step of doing so, the reader would greatly benefit the trust by understanding the nature of commerce in twenty-first century America. And for my brief explanation of the subtle intricacies involved, I will rely upon the two works by Lee Brobst et al.[126] I will not go into a detailed explanation of the constitution or the history of commerce for want of space, but I would suggest that the reader read the works relied upon herein.

When the trustee is engaging in trade or commerce in behalf of the trust, acting under general common law, the trust is within the jurisdiction over which the literal and absolute protections of the Bill of Rights extend, and he has no direct contact with the federal government. Under right of contract law protected by the Federal Constitution, the trustee may enter into the 14th Amendment jurisdiction via contract, i.e., by willfully availing the trust of benefits like the quasi-corporate privilege/franchise of limited liability for the *discharge* of debts using Federal Reserve Notes, pursuant to the economic system established under former H.J. Res. 192.[127] (Contrast *discharge* with the *payment* of debts with standard gold-backed currency under the original Coinage Act of 1792.)

[123]One such quote is that of John D. Rockerfeller who is reported to have said that the key to *true* wealth and power is to "own nothing and control everything." Your author is confident that the reader will see the self-evidence of this truth; and the Express Trust throughout the relatively short history of America has served to facilitate this practice. A search for the assets of the Rockerfeller family will prove the truth of this philosophy.

[124]"He lives well who conceals himself [his assets] well." Ovid (c. 43 B.C.-A.D. 18).

[125]"The words 'trade' and 'commerce' are often used interchangeably; but, strictly speaking, commerce relates to intercourse or dealings with foreign nations, states, or political communities, while trade denotes business intercourse or mutual traffic within the limits of a state or nation, or the buying, selling, and exchanging of articles between members of the same community." Black's Law Dictionary, p. 336 (4th ed. Rev. 1968).

[126]*supra*, see footnotes 14 and 29.

[127]H.J. Res. 192 was tacitly repealed on October 27, 1977 as codified at 31 U.S.C. § 5118(a)(1) and (d)(2). And though gold clauses have since been upheld as legally enforceable again (see FAY CORP. V. FREDERICK & NELSON SEATTLE, INC., 896 F.2d 1227 (C.A.9 (Wash.) 1990)) it successfully put in place a system which survived the repeal, and thus today most participants make no noticeable use of the now legally enforceable gold clause. Therefore, all discussion relating to H.J. Res. 192 remains valid in the sense that nothing has changed materially since its repeal thirty years ago.

Under this jurisdiction, the federal government (Congress) has full and direct contact with the trust, "as they see fit, for the benefit of public policy regulations (known as codes & statutes) of this jurisdiction."[128] This makes the federal government a third-party intervenor in the affairs of the trust by operation of law,[129] because the trust (as with the 14th Amendment citizens) is being allowed to get away with not truly fulfilling its commercial contracts as is required under the common law of contracts. (I will show how this can all be avoided, in a later section.)

The resulting nexus or "confederacy developed under [H.J. Res. 192] . . . is an affiliation known better as an association[[130]]." "And the 'common enterprise' of this unincorporated society, is to offer all Americans a so-called 'privilege' in the form of what is better known as a '[quasi-contract]' to participate in commerce without 'Payment of Debts' for 'social security' purposes. Moreover, this unincorporated society is outside the literal common-law principle that demands the 'Payment of [D]ebts' as stated in Article 1 Section 10, but is allowed, upheld and protected by Article 1 Section 10 that upholds [the] 'Obligation of Contracts.'"[131] This amounts to a "federated unincorporated society by operation of law [which] is contractually protected by the Constitution [in the same way the Express Trust and its trustee(s) are]." And the trust and/or trustee reserves the right to "domicile themselves in . . . the Union under Article IV Section 3 [C]lause 1, [and] thus to contract under Article I Section 10 despite the fact that [they] ... cannot 'Pay' [their] . . . debts. In other words, Congress cannot compel [the trust or its trustee(s)] . . . to participate in a federal interstate unincorporated banking association under Article IV Section 3 [C]lause 2 and [H.J. Res. 192] . . . for the *NON* payment of debts. The choice of law is up to each person still."[132]

Corporations are "artificial creations of the state or federal government under physical charter (franchise) issued via state or federal civil law for commercial regulation under Article I Section 8 [C]lauses 1 & 3. They are not under the literal common law because of the charter (franchise). Any legal action against the corporation is legally called an '*in rem*' action, because it is against the *thing* or property (also called *res*) of the corporation under charter. The courts have automatic subject[-]matter jurisdiction, because the physical charter is the *subject*[-]*matter*."[133]

"Under the letter of the constitutional law there is no commercial regulation, but [H.J. Res. 192] . . . along with 15 USC brought in a third party for commercial regulation for the social security public policy. Remember, 'equity compels performance.' The law

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[128]THE LAW, THE MONEY AND YOUR CHOICE, p. 3.

[129]The federal government's power of regulation in this manner is fully constitutional, deriving its authority from art. I, § 8, cl. 1 and 8, being one of the general legislative powers. The relationship between congress and the 14th amendment citizen is controlled under art. IV, § 3, cl. 2 because there is no physical federal or state charter issued to regulate the relationship.

[130]Brobst et al., *supra* at pp. 7-8. An association is defined as "[a]n unincorporated society; a body of persons united and acting together without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise." Black's Law Dictionary, p. 156 (4th ed. Rev. 1968).

[131]Brobst et al., *Id.*

[132]*Id.*

[133]*Id.* at p. 9.

views unincorporated associations as a danger to the substance of the common law, because of their debt/credit system. This is because there is no counter balance to the demands the association puts on the substance of the earth, thus the reason for all the federal and state regulatory agencies. In other words, there is a presumption by implication in the civil law that a charter (a metaphysical/abstract/unreal type) exists, because persons are availing themselves (volunteering) of the privileges pertaining to [H.J. Res. 192]. Therefore, these persons come under a 'quasi in rem' jurisdiction of the civil law in order to regulate, control (including compel) those that are outside the literal common[-]law principles."[134]

The many participants under this system, especially the 14th Amendment citizens from each state, together form an unincorporated federation of state associations operating under interstate commerce as addressed in Article IV § 3 cl. 2, and reinforced by the landmark *Erie R. Co. v. Tompkins*[135] decision. This is the basis for the federal (and state) government's compulsion of persons to its private international law (i.e., the spirit, not the letter, of the common law mixed with public Roman civil law, under Law of Nations per Article I § 8 cls. 3 and 10, and Article VI cl. 2) nowadays commonly known as codes and statutes (state or federal), to regulate everything as a matter of commerce.[136]

Without getting into the history of religion, and speaking purely from an analytical perspective, the Roman civil law, as a base-model for commerce regulation, was developed out of necessity of the church to avoid political scrutiny for its handling of ever increasing amounts of precious metals. It had become a "'storehouse' for the money and property the people were persuaded to give in exchange for limited liability — go directly to heaven instead of hell. As the people became more educated and saw what was really behind the power of religion [in generating wealth], the Roman Church fell under greater and greater criticism. This led to the development of a banking system to handle and control church wealth and take the critical focus [away from the church.]"[137]

"The bank learned from the church about limited liability. If you could get people to borrow money beyond their ability to pay back, you could get them to keep performing [paying interest in one form or another] on a debt (liability) without ever

[134]*Id.* at pp. 9-10.

[135]304 U.S. 64 (1938).

[136]This can be better understood from PROPELLER GENESEE CHIEF v. FITZHUGH, 53 U.S. 443, 451-453 (1851), wherein the court said that, within the letter of the constitution, "[t]he law contains no regulations of commerce. . . . It merely confers a new jurisdiction on the district courts; and this is its only object and purpose. . . . It is evident . . . that Congress, in passing [the law], did not intend to exercise their power to regulate commerce. . . . The statutes do no more than grant jurisdiction over a particular class of cases. . . . Now the judicial power in cases of admiralty and maritime jurisdiction, has never been supposed to extend to contracts made on land and to be executed on land. But if the power of regulating commerce can be made the foundation of jurisdiction in its courts, and a new and extended admiralty jurisdiction beyond its heretofore known and admitted limits, may be created on water under that authority, the same reason would justify the same exercise of power on land."; see also VERLINDEN v. BANK OF NIGERIA, 461 U.S. 496 (1983). Roman civil law is also why the I.R.S. continually refers to income taxes as voluntary although, to the ignorant, it appears to be the exact opposite.

[137]U.S.A. THE REPUBLIC, IS THE HOUSE THAT NO ONE LIVES IN, p. 9.

demanding it [the principal] back, thereby, loaning out that same credit to more than one individual or company. This meant that the bank was limiting the liability of the borrower so he was not fully responsible for the debt as long as he continued to perform to paying the interest. This way real money (gold) became credit (paper money) by loaning to more than one person. Being involved in this sort of commerce was called 'private commerce.' With the church's control over wealth, this private commerce became standard practice in world trade upon the sea — private international or admiralty/maritime law became known as Roman civil law as it began to figure heavily in the politics of every city and country it touched through international commerce."[138]

By operation of this body of law, particularly its *in rem* element, all persons subject to its jurisdiction are not necessarily regarded as fictional "vessels" per say, but are more so as objects of the State, discussed earlier (see footnote 24). These objects, like vessels in traditional Admiralty practice, are vested with a distinct quasi-corporate, juridical personality, but, unlike vessels, are capable of suing and being sued *in personam*.[139] 14th Amendment citizens of the United States, whether state or federal chartered corporations or metaphysical-chartered corporate-colored public persons, therefore, are akin to public vessels of the United States within the broad meaning of the Public Vessels Act, and are regulated accordingly. The United States, as with the Roman Church, is considered in international law as a "ship of state". The Express Trust, then, is akin to a private vessel of the united states of America, navigating through the often hostile waters called interstate commerce (which is international commerce via the United States treaties).

DOING BUSINESS

EVEN THOUGH the Express Trust is technically not a "business trust"[140] within the established meaning of the term, this in no way prevents or inhibits the trust from engaging in all manner of business the trustee is permitted to under declaration, and it need only obtain the franchise of a business license if it anticipates doing express business in the above-described jurisdiction.[141] The trust may operate a business, acquire a business, sell or otherwise dispose of its business, or even contract under the limited liability system and become a taxable entity— the choice is yours. The only thing which may bar the trust from conducting a particular kind of business in any certain jurisdiction is the public policy of that jurisdiction, regarding which, it has been admitted, most states have not passed upon the subject directly.[142]

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[138] *Id.*

[139] See THE CHINA, 74 U.S. 53 (1868); and THE BARNSTABLE, 181 U.S. 464 (1901). For an esoteric perspective, see also WHY WE ARE IN THE ADMIRALTY JURISDICTION (April 18, 2004), available at <http://www.commonlawvenue.net/main/MSL/021-Why%20We%20Are%20in%20the.doc> (last visited May 1, 2007).

[140] PENNSYLVANIA CO. V. U.S., *supra*.

[141] See PEOPLE V. ROSE, *supra*.

[142] No state has ever made any attempt to prohibit Express Trusts (i.e., impair the contract rights of persons *sui juris*). However, many states have attempted successfully to prohibit "associations," the most notable being the Ohio Attorney General in STATE V. ACKERMAN (*supra*), against C.F. Ackerman and ninety-nine other persons who

Regardless of the nature of the business, there is a due notice rule which confers a duty upon the trustee under equity. The rule consists of two parts:

The first is that he should sufficiently distinguish and represent the nature of the trust to the party with whom he is doing business. It is of the utmost importance, in the forming of business contracts, that full disclosure be made—on all letterheads, business cards, checks, bills and order blanks, papers, etc.—so as to prevent any claims of lack of disclosure from arising in the future. But prudence dictates that a trustee must not disclose every fact regarding the trust, its declaration, and its affairs. The first part of the due notice requirement can be sufficiently accomplished simply by employing the designations "Irrevocable Express Trust Organization," "Express Trust Organization," "Trust Organization," or "Organized under Declaration of Trust," beneath or next to the trust's name. It must not be excessively revealing about the trust (the trustee has a duty to protect the privacy of the trust), but it also must not be misleading (the trustee has a duty to not compromise the integrity of the trust). He is in no way prohibited from exercising the utmost shrewdness.[143]

The second part is that he should stipulate in plain and certain language, in all written contracts and obligations that the trust only is liable for its obligations and that neither the trustee nor interest-holders are to be held to any personal liability in the contract.[144] He may also wish to cite the provision of the trust which so limits his and/or the interest-holders' liability, but this is often unnecessary. And the trustee should always designate his title either under or immediately next to his name and signature.[145]

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were transacting business of guarantee and accident insurance in the state under the name of the Guarantee and Accident Lloyds, New York. The Attorney General alleged that they were doing business without having complied with the laws of the state or receiving proper authority from the state to do business of that kind. The court found that because the defendants were acting under mere association (as opposed to under declaration of trust), they were an association unlawfully exercising a franchise within the state, acting as a corporation therein without being legally incorporated. The court indirectly affirmed the well-understood principle scarcely in need of restatement that Express Trusts may engage in any manner of business allowed to individuals as a natural right. In fact, to restate this principle over and over again would be "ostentatious." CHISHOLM v. GEORGIA, 2 U.S. 419, 453 (1793).

As public policy is a form of regulation, it should be noted the case of MUNN v. ILLINOIS, 94 U.S. 113, 126 (1876) in which the court expounded on the principle of regulation. Because the trust is of private property, and its business is private as well, the trust business is not "affected with a public interest." It does not become affected with a public interest until the trustee participates in behalf of the trust in the unincorporated interstate banking association, obtains a business license or other franchise, contracts under it, or conducts the private business of the trust in a "manner to make it of public consequence, and affect the [14th Amendment] community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use and must submit to be controlled by the public [policy] . . . to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

[143]See McCoy, *supra* at p. 1.

[144]*Id.*

[145]It has been suggested that whether the trustee designates his title or not, he is in-fact acting as trustee, because the substance not the form is what controls. However, for security purposes, I would argue that the designation should be applied in all situations, regardless. Doing so will avoid any superficial confusion.

The trustee should obtain a mailing address for the trust, and though he is the principal and holder of the trust property, it is generally prudent to refrain from mixing the trust's affairs with his own. He should also obtain all separate business necessities (telephone service, utilities, etc.) for the trust. (Logic follows that he should do these things regardless of whether he is operating trust business or not. He should, for all intents and purposes, maintain a strict separation of the trust's identity from his own.)

LIMITING LIABILITY & RISK

IN ALL CONTRACTS, as we have already noted, though it is best to always apply it, the trustee's mere designation of title is not sufficient to limit his liability or remove the risks to his own individual assets. Instead, he must employ the proper language either within the terms of the contract or above or beneath his signature, or in any proper place where it will appear unambiguously, indicating something to the effect of—

- "The property and funds of the Trust Organization only are liable for contract obligations, individual Trustee(s) or interest-holders are not personally liable";
- "John W. Doe, acting as Trustee under the Declaration of Trust dated October 1, 2005, establishing the Trust Organization therein called ABC Trust and not individually";
- "John Doe as Trustee and not personally";
- "As Trustee but not personally"; or
- "Without recourse to Trustee".

Any form of words that will convey in certain, unmistakable language to the other party that he is dealing with an Express Trust is sufficient notice under the rule; whether it is necessary to also cite the provision of the trust instrument which limits his liability is a decision left to the discretion of the trustee. To quote Mr. Justice Woods in the case of *Taylor v. Mayo*:[146] "If a trustee contracting for the benefit of a trust wants to protect himself from individual liability on the contract, he must stipulate that he is not to be personally responsible, but that the other party is to look solely to the trust estate." And in the case of *Shoe and Leather National Bank v. Dix*[147] the court held, with regard to the promissory note made by the trustees under such limited liability, that it was not within the power of the court to change the trust liability on the note into a personal one of the trustees; that liability on a contract must be determined by the terms of the contract itself; and that a contract entered into under such limited liability (be it a note, agreement, etc.) cannot be converted into one under personal liability by law. To do so would be to alter the terms of the contract itself. (Furthermore, any such stipulation is ultimately subject to the acceptance of the other party in order to gain validity in the contract.)

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[146] *supra*. See also MITCHELL V. WHITLOCK, 121 N.C. 166, 28 S.E. 292.

[147] 123 Mass. 148, 25 Am.Rep. 49.

BANKING

THE TRUSTEE MAY open any business checking account, financial account, trust account, etc., which he is authorized by declaration to open, but he must keep in mind that by doing so, the trust will be participating directly in that unincorporated interstate banking association with all its limited-liability consequences described above. There is only one type of account that avoids those consequences: *the non-interest bearing checking account*. When utilized in conjunction with the following banking practices, the trust and the trustee will remain out of the tentacles of public policy. Unless the trustee intends to play within the system, the trustee should—

- Never contract for any credit cards, and if the trust has already obtained them, rescind and cancel the contracts;
- Open a non-interest bearing checking account in order to avoid the "privileges and immunities" associated with interest;[148]
- Maintain the minimum required balance at all times if possible and unless specific transactions demand otherwise;
- When transacting business, use that bank account solely for depositing the checks and keeping track of the trust funds;
- Never send or allow trust checks to be sent across state lines;
- Instead of writing checks, use postal money orders or the bank's corporate certified checks or corporate money orders when sending interstate payments; and
- Use a bonded or non-bonded agent to establish the account on behalf of the trustee.

When opening the bank account (non-interest bearing as well as any other), the following must be provided—

1. **The original, notarized Letter of Authorization** (or letter of introduction or a limited power of attorney) if being opened by an Authorized Representative;[149]
2. **A copy of the Certificate of Trust**;
3. **A copy of the Trustee Appointment**;
4. **A copy of the settlor's acknowledgment of trust or Letter of Introduction** (introducing the trustee). There are usually two introduction or acknowledgment documents per trustee: one regarding his fiduciary powers specifically addressed to banking institutions and one regarding his general power to establish all other accounts;
5. ***A copy of the first and signature pages of the declaration of trust**. Note: The bank will almost always require evidence of a trust agreement, but the other documents may be sufficient depending on who you are dealing with. If you can open the account without providing these documents, or with providing only a few of

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[148]It should be noted that proof of the operation of law in the manner described in the preceding sections is that banks are not required to obtain a social or tax identification number, and may accept any kind of identification information they wish— only when opening non-interest bearing accounts.

[149]The agent should set up a date with the bank for the trustee to come in and sign the bank card and give identification. The trustee should sign as trustee under limitation of liability.

the documents, great. Again, this is a non-interest bearing checking account, so scrutiny is not a priority. Accounts such as this have been downplayed by banks via advertised interest rates, so most people would rather open accounts that appear to have the prospect of interest earnings; and

6. **Only if necessary to obtain an EIN, a copy of the filed IRS Form SS-4**.

Take into account the state of ignorance of the law which prevails in America today. Give only the information needed to open the account, but do not arouse suspicion or fear from lack of understanding on the part of bank employees. If you are able to befriend someone in the institution who can establish the account more flexibly, then do it. You must be shrewd in your methods for establishing the account, since, regardless of which bank you choose, you will be dealing with trained employees who, usually, are just a few screws and bolts away from being robots. You should consult the business tactics of successful negotiators who will all attest that the individual who needs the service is at the mercy of the provider, but the individual whose confidence and attitude subtly convey that his business is in high demand is given services, gifts, perks, not to mention any kind of account— just to get his business. It is not my intention to state the obvious, for in all business dealings, which a bank account is, one must be persuasive to get the desired results. And don't be hesitant to shop around—negotiate—bend perception—create competition.

In the event it becomes unavoidably necessary to the opening of a non-interest bearing account or if the trustee does see fit to obtain an interest bearing or other financial account, then he (or an agent) must apply to the IRS for an Employer Identification Number (EIN) for banking purposes. This may be done in one of the following ways:

- Instantly, via telephone from 7:00 a.m. to 11:30 p.m. (Eastern Time) by calling the **Foreign Business Tax Line** at **(215) 516-6999**;
- Instantly, online by going to **http://www.irs.gov/businesses/small/article/0,,id=98350,00.html**), clicking "apply online," then "APPLY ONLINE NOW," and filling out the online Form SS-4 Application for Employer Identification Number, and proceeding through the prompts. (Be sure to print all the pages for the trust's records); or
- By performing the same steps above, but after clicking "apply online," click "How to Apply for an EIN," then "Form SS-4," and fill it out, print it, then either:
  - Send it via mail or carrier to the proper regional office or else the one designated for "entities with no legal residence, principal place of business, or principal office or agency in any state":
    Attn: EIN Operation
    Philadelphia, Pennsylvania 19255; or
  - Fax it to **Fax-TIN** at **(215) 516-1040**.

The form should be filled out according to the specifications of the trust. I have provided an example of how it has been filled out without a problem. It should be noted that due to recent changes in the online application, you may find it more advantageous

to apply via any method other than online, e.g., via fax. The new changes make it contractually impossible to apply for an EIN strictly for the purpose of opening a bank account. In fact, with the new online form, the applicant is forced to misrepresent the nature of the trust as non-statutory, which automatically imports the provisions of the Internal Revenue Code applicable to Federal taxable entities.

With both telephone and online applications, the trust will immediately be given a temporary EIN until the hard-copy application, which will be sent to the trust address for completion and indorsement, has been returned to that office within 15 days of the original online application. The EIN is valid 24 hours from the moment the voice or electronic application is submitted, but if the hard-copy application is not returned within 15 days, the temporary EIN will expire and cannot be used. In fact, it is not permanently registered into the Federal Tax ID database until the hard-copy has been processed.

With faxed applications, the trust will be given a temporary EIN by fax within 4 business days, which will become permanent once the hard-copy application is sent in via mail or carrier. And, with mailed in applications, the application is processed upon receipt, and an EIN is issued via the mail within 2 weeks. The other EIN application offices based on region can be found at the IRS Internet address given above by clicking "Where to File" in the side menu located in the left margin of the web page.

TRANSFERRING ASSETS

THERE ARE THREE principal ways to transfer assets into the trust. It may be done via a buy (in precious metals), purchase (in negotiable instruments) or exchange (based on barter). How it is done in any given situation makes all the difference, and there are certain guidelines to follow to insure that the transfer cannot be nullified and voided.

As a general rule, the trustee, as owner of legal title to the trust property, cannot buy or purchase the trust property for himself, nor convert it to his own use contrary to the trust instrument. This is generally regardless of whether the property was bought or purchased at a public, private or judicial sale, instituted by him,[150] for he has the unfair advantage, and any such sale, absent certain conditions, is deemed voidable *ab initio*, to be set aside at the option of the beneficiary(s). The only way the property may be obtained is where it can be shown that the interest-holder assented intelligently, willfully, and without undue influence arising from the trust relationship.[151] In order to sustain a sale of trust property by the trustee to himself individually (on the ground that the interest-holder assented thereto) the evidence must show the good faith of the transaction, the adequacy of the consideration, a full knowledge of the facts, and an independent consent on the part of the interest-holder.[152] He may, of course, buy,

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[150]Since the trustee's advantage comes by virtue of his office, it has been ruled that he may lawfully buy trust property at a sale caused by a third party, in which he has no part in procuring and over which he can exercise no control. See STEINBECK V. BON HOMME MINING CO., 152 Fed. 333 (C.C.A.8 (Colo.) 1907).

[151]See SWIFT V. CRAIGHEAD, 75 N.J.Eq. 102, 75 A. 974.

[152]See CLAY V. THOMAS, 178 Ky. 199, 198 S.W. 762; and FRENCH V. FRENCH, 58 Ind.App. 621, 108 N.E. 786.

purchase or exchange trust property in the discharge of his duty to protect the trust.[153] These same principles apply to the selling of the trustee's individual property to the trust, as well as to any barter-exchange between trustee and trust. (In the case of barter-exchange there is an additional option which the trust provides, though it is usually not advisable to exercise it.) Simply put, if the contract of transfer is evidently "fair and reasonable, untainted by fraud and undue influence, . . . conveyance of . . . property will be upheld."[154]

The contract of transfer need not be a complex document, so long as key principles of equity, the "guidelines,"[155] are strictly followed; this requires that all necessary warranties be made in the documents themselves in order to legitimize the deal. (I have provided a sample bill of sale and asset sale agreement in the sample forms section.) The general guidelines are that—

- The seller intends that the buyer shall buy, and the buyer intends that the seller shall sell, or both parties intend to effect a purchase, or that each knowingly intend to exchange one item for the other;
- The party, especially if trustee, discloses to the trust before the contract is made every fact he has learned in his fiduciary relation which is material to the sale, purchase or exchange;
- The party, especially if trustee, exercises the utmost good faith in the transaction;
- No advantage is taken by misrepresentation, concealment of or omission to disclose important information gained as trustee (or agent); and
- The entire transaction is fair and open on its face.

Aside from the general guidelines, there are some specific recommendations for transacting in, as well as purchasing, precious metals for common-law purposes—

- **Understand your objective in terms of trusteeship**. Contrary to conventional teaching, precious metals are *true* money, not investments. So, although there may be price appreciation, your primary objective should be wealth preservation, i.e., preservation of the trust corpus, not necessarily profiteering, even though a significant profit may likely result to the benefit of the interest-holders;
- **Know the size & grade of the coins**. The size and grade are critical factors. Size determines how much precious metal you're getting. Grade determines the relative value within the size of the coin;
- **Acquire only low-grade old American gold (graded AU or lower)**. The best form of gold holding is low-grade old American coin in lightly circulated condition (1850-1933). This gold is historically exempt from U.S. gold confiscation laws. Avoid extremely high coin premiums such as CU, BU, MS-61 through MS-64 and above; low-end coin not only protects the corpus' value, as well as its purchasing power

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[153]See HARDWICKE v. WURMSER, 180 S.W. 455. He may also apply to a court of equity, showing good cause, to obtain a decree for his purchasing of the property for protection purposes, if necessary.

[154]Dunn, *supra* at ch. IV, § 44, p. 78.

[155]Per BYRNE v. JONES, 159 Fed. 321 (C.C.A.8 (Ark.) 1908).

(credit) but is highly liquid (marketable). Always purchase common date coins, not date-specific ones with various mint marks;

- **Pay attention to delivery time**. In a normal financial environment, two weeks should be the maximum time needed to complete the transaction and delivery of the metal. In an economic crisis however, demand often exceeds supply, which will alter delivery times significantly and unpredictably;
- **Don't acquire rare gold coins (graded MS-64 or higher)**. These coins are not suitable for corpus preservation or common-law purposes in general. They are investment-grade which focus on quality plus rareness of date and mint mark, and are less liquid as a result. Moreover, due to the small market they appeal to (i.e., collectors), it is often difficult to establish fair market values, which tends to give leverage to dishonorable coin merchants;
- **Let the buyer beware**. Test the merchant and be sure he does not grade his own coins in-house. Ask his recommendation; if he offers bullion without warning of U.S. confiscation laws, old foreign gold, high MS coin, a gold IRA or sells in the name of a religion... beware. Also, you should never place a large order without a reliable third-party recommendation in general. At common law, diligence is the responsibility of the party who stands to lose by the lack thereof;
- **Don't convert all trust cash into metals**. It is generally recommended that you limit the trust's precious metals holdings to between 10-50% of the total net worth of its corpus. If, however, you deem appropriate, it may prove highly advantageous in the near future to convert up to 80% of its total fund holdings. As trustee, it is prudent to keep enough currency for regular expenses, so as not to force yourself to have to liquidate the corpus in order to raise cash for trust expenses. The objective is to only keep as much cash as the trust can suffer to lose in an economic crisis;
- **Acquire gold for corpus preservation & silver for barter**. It is recommended that 90% of the trust's metals be in gold because that is its core of wealth and store of value. Gold will be too valuable per ounce for small trade, and therefore should be reserved for big-ticket transactions only. The remaining 10% of holdings should be in silver for general barter and trade purposes. The silver should be American pre-1964 dated coin; and
- **Always take direct possession of the metal**. Unless dealing trust-to-trust within the arrangement you command, never take a paper receipt and allow the seller to hold the metals for safekeeping. Possession is nine-tenths of the law, and anything less defeats the purpose behind acquiring the metals in the first place. When transacting trust-to-trust (or trustee-to-trust) within the arrangement however, only then is it effective to utilize negotiable instruments such as notes, bonds and drafts issued and drawn against the value of the corpus. This practice keeps *in rem* jurisdiction, i.e., control, over the metals with the trustee and allows for greater flexibility in using the trust's credit and worth.

What's more, there is an additional method by which assets may be transferred. This is by way of assignment— either of trustee compensation, venture proceeds or profits, or even the trustee's separate employment wages/salary to the trust as value consideration in the contract of transfer. Whatever the object assigned, that the value consideration shall be in the form of an assignment should be set forth as an express

term or provision in the documents evidencing the transfer.[156] A trustee may issue a negotiable instrument, such as a promissory note or bond, to the trust, dividing his personal labor into shares of interest in his trustee compensation, wages, salary, etc., and assigning it to the trust in order to complete the contract. To do this, in addition to the note or bond, he must execute a formal assignment, and then give his employer, payor, etc. notice and instructions to send the payment instrument (e.g., employment check, money order, bills, etc.) to the trust, which is entitled to indorse the instrument with an authorized signature in the name of the individual trustee per the assignment. It may otherwise be agreed that the trustee shall accept the payment personally, then deliver and sign over the instrument to the trust via a special indorsement of the same.

The assignment is akin to a private (quasi) garnishment, in which the employer, payor, etc., is noticed and instructed to send the payment(s) directly to the trust, or deposit the funds directly in the trust's account per the assignment; however, a garnishment proceeding is generally given precedence over voluntary assignments. (Sample assignment and notice of assignment forms are provided in the sample forms section.)

ISSUING CERTIFICATES & BONDS

AS DISCUSSED in the earlier section, the trustees may issue certificates of beneficial or capital interest, or other obligations to any person they choose.[157] There are a total of 100 units of beneficial interest, and a separate 100 units of capital interest in the trust. The trustees determine the number of units (percentage of total interest) to be held by any one interest-holder, and may issue the full 100 units (100%) of either interest to a single individual. To issue a certificate of either interest, the trustees must act jointly as the Board of Trustees, unless there is only one trustee for the trust. They should execute under seal,[158] then deliver to the interest-holder(s), the actual certificate(s) evidencing the interest held. The Board should also record minutes of the meeting(s) in which it was resolved to issue the interest, and then record the act along with the interest-holders' identification information in the appropriate schedule.

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[156]It should be noted that such an assignment can be done without any contract of transfer, rendering the object of assignment a gift. But, given the trustee's position, this is generally looked upon with great suspicion simply because of the absence of apparent value consideration for the trustee (the trustee would have to show that he gifted the thing in the spirit of charity and a warm heart, for instance). It gives the superficial appearance that the actual, ulterior motive was to avoid the liability of registered ownership, yet retain full and total ownership-in-fact, using the trust as a device to accomplish this. The property transfer must be a *bona fide* transfer on its face.

[157]It should be noted that a beneficial interest-holder, having such an interest in the trust property, has an inherent right to insist, in proper proceedings, that the trust be maintained and executed according to the terms of the trust instrument. At law, the trustees are considered the owners of the trust property, yet, in equity, the beneficial interest-holders are the absolute owners, hence their power to apply for the voiding of a voidable transaction or transfer of property as mentioned in the preceding section. See HILL v. HILL, 152 P. 1122; EX PARTE JONES, 186 Ala. 567, 64 So. 960; and COX v. COX, 95 Va. 173, 27 S.E. 834. And a beneficiary may apply to the court of equity to enforce their rights. See BINGHAM v. GRAHAM, 220 S.W. 105.

[158]All certificates and official documents should be executed under seal. The sealing of an instrument is *prima facie* evidence that it has been duly executed. See JOHNSON v. CRAWLEY, *supra*; and MULLANPHY v. SCHOTT, *supra*.

With certificates of capital interest the method is much different, though the procedure is the same as that for the trust certificates. Capital certificates work based upon barter-exchange with investors called Exchangers, who may be anyone the Board of Trustees wishes to barter with. The Board of Trustees determines the number of units to issue in exchange for the property proposed for investment into the trust. This is a pure barter between the parties, and whatever number of units is agreed stands as the full value in exchange for the proposed property.[159] The exchanger should present a written proposal (an example of which is provided in the sample forms section) to the Board of Trustees. Any negotiations which take place should be recorded in the minutes in which it is resolved to either issue the interest or refuse the proposal. If the Board of Trustees has resolved to issue the interest and make the exchange, the certificate(s) must be executed and delivered to the interest-holder(s), and the property(ies) in exchange must be delivered by the interest-holder(s) to the Board of Trustees. The final act should be recorded along with the interest-holders' information, and the property inventoried, in their respective schedules.

With bonds, because a bond is merely an obligation or promise to pay money or to do some act upon the occurrence of certain circumstances, the trust need only issue the bond according to the particular transaction, e.g., to back the performance of a particular contract, to raise capital from outside investors in the form of "IOU's," etc. The distinguishing feature of a bond is that the document shows an obligation to pay some fixed amount of money or services, at a definite time, with stated interest. (I have provided some samples for various uses in the sample forms section.)

Now, there is no rule against a trustee (or agent) of the trust, exchanging his individual property for capital interest in the trust. And there is no rule against the trustee (or agent) holding beneficial interest either, though the holding of beneficial interest is generally regarded with greater suspicion than capital interest. The actual rule is that either transaction will be sustained as non-voidable if it clearly appears free of fraud, concealment, or undue advantage.[160] This means, any omission by the trustee (or agent) to disclose any material fact of the deal which is learned by the trustee by virtue of his office, and any misrepresentation, concealment, or other disregard of condition renders the issuance, exchange, and contract voidable at the option of the beneficial interest-holder(s). And one can wager that any accusation of invalidity of the trust by an outside party will be made on those grounds as well.

This suspicion, however unreasonable without regard to the particular merits of the situation, stems from the many Express Trusts successfully dismantled based upon the unscrupulous and often foolish failing of the Control Test. In fact, the Express Trust graveyard is mostly populated with the dead corpuses of trusts who died from this very mistake. When a trustee holds all or a majority of interest (beneficial or capital) in the trust, he is, in effect, an interest-holder exercising control over the affairs and *res* of the trust. He derives the sole benefit of his actions, and determines the actions which would cause him to derive that sole benefit. He is owner of the legal title to the trust property

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[159]We have already covered the nature of the certificates in that previous section, so we won't reexamine it here.

[160]See MURRY V. KING, 153 Mo.App. 710, 135 S.W. 107; and MILLS V. MILLS, 63 Fed. 511 (C.C.Or. 1894).

as trustee, as well as owner of the equitable title to the property as interest-holder. At best, the trust is his alter-ego, hence he may be proceeded against as though the trust does not even exist. This is why it is recommended that any transfers between trustee (or agent) and the trust (or interest-holder) be by sale as prescribed according to the guidelines, through a third party, or by outright exchange, with all documents in support of the transaction ready to repel the outside party who might attempt to come in under the guise of the Express Trust's grim reaper.

KEEPING MINUTES

AS MENTIONED EARLIER, it is the duty of the trustee(s) to keep minutes for all resolutions, decisions, and acts done in the administration of the trust. This is a form of accounting, and may suffice as the accounting, however, it is recommended that some separate, more detailed accounting always be kept.

It is generally best to keep minutes of every Board of Trustees meeting, based upon the notes or report taken during the meeting, or, if there is only one trustee for the trust, on a decision-to-decision basis. How often and by what protocol minutes are kept is, of course, a matter of the trustee's discretion. The rule of thumb is that at least one Board of Trustees meeting regarding general business or the status of the trust should be held (and the minutes kept) annually. They should probably be held (and kept) at least quarterly, in conjunction with all other accounting.

The more often the accounting, the more up-to-date, accurate, and reliable the records in administering trust business. Everything the trustee does should be clearly reflected in the minutes, which can be kept using any word-processing software (or even a typewriter). The minutes are stored in succession in the minutes book section of the trust binder. (I have provided samples of minutes for various acts and resolutions by the Board of Trustees. The format and core language is always the same or similar.)

PREVAILING IN LEGAL AFFAIRS

HERE IS WHERE we shall get into legal action, the rare instance of public legal affairs, such as determining tax liability, defending a court action instituted against the trust (or trustee), and prosecuting a legal action on behalf of the trust (or trustee) as well as the possible necessity of commencing a private action pursuant to the Commercial Process. The reader must keep in mind that the chances of an action being taken against the trust or trustee who has properly limited his liability are slim to none. And if an action is taken against them anyway, generally, such cases don't make it past the crucial phase of determining jurisdiction. When one examines the definition of jurisdiction, the fog begins to clear:[161]

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[161]Black's Law Dictionary, p. 855 (7th ed. 1999).

> Jurisdiction, *n*. 1. A government's *general* power to exercise authority over all **persons and things** within its territory <New Jersey's jurisdiction>. 2. **A court's power to decide a case or issue a decree** <the Constitutional grant of federal-question jurisdiction>. 3. A **geographic area within which political or judicial authority may be exercised** <the accused fled to another jurisdiction>. 4. A political or judicial subdivision within such an area <other jurisdictions have decided the issue differently>. [Bold emphasis added.]

There are two territorial jurisdictions created by the Constitution: the first is "the Territory,"[162] i.e., that designated portion of the earth's surface which is deemed the imperially extensive real estate holdings of the nation over which all power must be exercised within the strict letter of the Constitution; the second is the "other Property,"[163] i.e., *a territory* unincorporated (not included) into the Union of states, over which all power may be exercised strictly according to the mere "spirit" of the Bill of Rights as interpreted by Congress. The latter is subject to Congress outside the strict letter of guarantees of the Constitution and Bill of Rights. In the former, the federal government can have no direct control over the people but by way of contract because it is entering onto every scene equally subject to the same laws as all persons; as opposed to the latter wherein the federal government can have full and direct control over people who are beneficiaries of this jurisdiction. As noted earlier, they may act "as they see fit [i.e., as trustees], for the benefit of public policy regulations (known as codes & statutes) of this jurisdiction."[164]

Understanding that most courts currently in business in America are in fact, by the 1938 change in the operation of law, courts of limited jurisdiction,[165] limited to cases involving subject-matter of the 14th Amendment public trust, it becomes clear that whether they are distinguished as federal or state courts, such is a distinction without a fundamental difference — all are inherently federal. In order to get at how such courts may obtain jurisdiction over an Express Trust or its trustee(s) in a legal action, the nature of jurisdiction should be briefly, but sufficiently examined.

First, a court must have three essentials: jurisdiction to determine jurisdiction, jurisdiction over the subject-matter of the case (i.e., it must have the power/competence to decide the kind of controversy involved), and jurisdiction over the parties to the case

[162]Art. IV, § 3, cl. 2 in reference to the incorporated "Union" of states incorporated under clause 1 of the same section. The Articles of Confederation were also incorporated into the Constitution under clause 1, and the Union of states is also incorporated under the Articles of Confederation by reference.

[163]*Id.* This "other Property" is known as "*a* territory". Both "the Territory" and "other Property" signify property, since the language in that section is not "the Territory or Property"— the operative word is "other". Therefore, "other Property" must be interpreted to mean "a territory," as in a governmental subdivision which happened to be called "a territory," but which could have been called a "province," "colony," etc. It refers to an incomplete state. See EX PARTE MORGAN, 20 Fed. 298, 305 (D.C.Ark. 1883); and O'DONOGHUE v. UNITED STATES, 289 U.S. 516, 537 (1933).

[164]Brobst et al., *supra*.

[165]Such courts are defined as having "[j]urisdiction that is confined to a particular type of case or that may be exercised only under statutory limits and prescriptions. Also termed *special jurisdiction*." Black's Law Dictionary, p. 856 (7th ed. 1999).

(i.e., *in personam* or personal jurisdiction to compel the parties' performance). If either one is lacking in any way, the court is without power to decide the case;[166] and any order, decree or judgment, other than a dismissal, by such a court is void *ab initio*,[167] having only the semblance or appearance of validity,[168] and may be attacked directly or collaterally and vacated at any time.[169] It is settled law that "a tribunal has jurisdiction to determine its own jurisdiction,"[170] which brings us to the remaining two elements.

Subject-matter jurisdiction is like the hub around which the wheel turns: without the hub, the wheel cannot turn credibly. It is comprised of two parts: the statutory or common-law authority of the court to hear the case and the appearance and testimony of a competent fact-witness (i.e., sufficiency of pleadings). It can never be waived; and it cannot be obtained by lapse of time, consent of the parties, or any event other than the sufficiency of pleadings of the party bringing the suit (i.e., the plaintiff). However, although it may have been established by the pleadings, it can still be lost due to, *inter alia*—

- Fraud upon the court;[171]
- The judge's failure to follow proper procedure;[172]
- The unlawful activity or undisclosed conflict of interest of the judge (e.g., involvement in a scheme of bribery);[173]
- The court exceeding its statutory authority;[174]
- Violation of due process;[175]
- Improper representation of a party before the court, improper issuance of a summons, or defective service of process;[176]
- Proper notice not being given to all parties by the movant;[177]
- The court basing its order or judgment upon a void order or judgment;[178] and
- Violation of public policy.[179]

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[166]See ABELLEIRA v. DISTRICT COURT OF APPEAL, 17 Cal.2d 280, 109 P.2d 942 (1941).

[167]See HOLSTEIN v. CITY OF CHICAGO, 803 F.Supp. 205; LUBBEN v. SELECTIVE SERVICE SYSTEM LOCAL BD. NO. 27, 453 F.2d 645 (C.A.1 (Mass.) 1972); HOBBS v. U.S. OFFICE OF PERSONNEL MANAGEMENT, 485 F.Supp. 456 (D.C.Fla. 1980); and IN RE ADOPTION OF E.L., 733 N.E.2d 846, (Ill.App. 1 Dist. 2000).

[168]See MILLS v. RICHARDSON, 81 S.E.2d 409 (N.C. 1954).

[169]See PEOPLE v. ROLLAND, 581 N.E.2d 907, (Ill.App. 4 Dist. 1991); PEOPLE v. WADE, 506 N.W.2d 954 (Ill. 1987); and IN RE MARRIAGE OF WELLIVER, 869 P.2d 653 (Kan. 1994).

[170]ALBELLEIRA, *supra* at p. 302.

[171]See IN RE VILLAGE OF WILLOWBROOK, 37 Ill.App.3d 393 (1962); and ROOK v. ROOK, 353 S.E.2d 756, (Va. 1987).

[172]See ARMSTRONG v. OBUCINO, 300 Ill. 140, 143 (1921).

[173]See Code of Judicial Conduct; and the ALEMANN cases, BRACEY v. WARDEN, U.S. Supreme Court No. 96-6133 (June 9, 1997).

[174]See ROSENSTIEL v. ROSENSTIEL, 278 F.Supp. 794 (D.C.N.Y. 1967).

[175]See JOHNSON v. ZERBST, 304 U.S. 458, 58 S.Ct. 1019 (1938); PURE OIL CO. v. CITY OF NORTHLAKE, 10 Ill.2d 241, 245, 140 N.E.2d 289 (1956); and HALLBERG v. GOLDBLATT BROS., 363 Ill. 25 (1936).

[176]See JANOVE v. BACON, 6 Ill.2d 245, 249, 218 N.E.2d 706, 708 (1955).

[177]See WILSON v. MOORE, 13 Ill.App.3d 632, 301 N.E.2d 39 (1st Dist. 1973).

[178]See AUSTIN v. SMITH, 312 F.2d 337, 343 (C.A.D.C. 1962); and ENGLISH v. ENGLISH, 72 Ill.App.3d 736, 393 N.E.2d 18 (1st Dist. 1979).

[179]See MARTIN-TREGONA v. RODERICK, 29 Ill.App.3d 553, 331 N.E.2d 100 (1st Dist. 1975).

And when subject-matter jurisdiction is lacking or lost, the court must discharge its ministerial duty to dismiss on that ground on its own motion, whether it has personal jurisdiction or not.[180]

Given the preceding sections on the unincorporated banking association under former H.J. Res. 192, and all of the above regarding the "other Property" nature of the states today, it is easy to see why these courts are *ipso facto* courts of limited jurisdiction, having no jurisdiction over subject-matter in "the Territory". But assuming for the sake of explanation that subject-matter jurisdiction did exist, then personal (or personal *in rem*)[181] jurisdiction over the trust and its trustee(s) can only be obtained in four ways, either by the trust's or trustee's—

- **Presence**[182] (i.e., its/his being served with a copy of the summons and complaint while physically present in the forum jurisdiction);
- **Domicile**[183] (i.e., residence alone is a basis for exercising jurisdiction. In the case of corporations, domicile is the state in which they are incorporated, and in the case of Express Trusts, the place of their situs);
- **Permission or Consent**[184] (i.e., a trustee either personally or on behalf of the trust, having not been properly served, can nevertheless give the forum court permission to exercise jurisdiction. Depending on the act of the trustee, permission can be given well in advance of any lawsuit filed and the consent can also be implied); and
- **Minimum Contacts**[185] (i.e., having sufficient dealings or affiliations with the forum jurisdiction which make it reasonable to require the trust/trustee to defend a lawsuit

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[180]See MORRIS v. GILMER, 129 U.S. 315, 326-327 (1889). Once a judge has knowledge that subject-matter jurisdiction is lacking, he has no discretion but to dismiss the action, and failure to do so subjects the judge to personal liability.

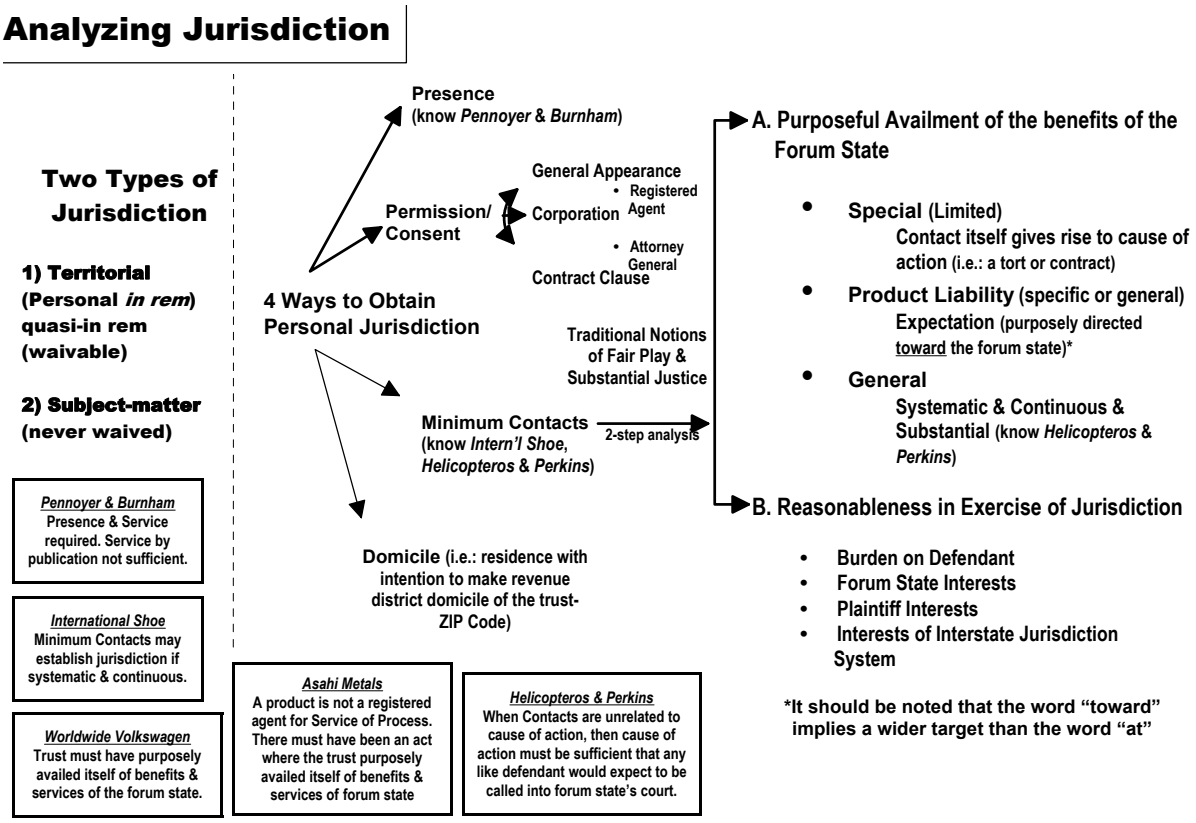
[181]That is to say, "against the thing" as though it were a person vested with legal rights, as is the case with proceedings against vessels under Maritime Law. In such maritime claims, the standards of INT'L SHOE regarding fairness and substantial justice that govern *in personam* actions are applicable. See SHAFFER v. HEITNER, 433 U.S. 186 (1977). It should be noted however, the much deeper level to *in rem* jurisdiction, for instance, that a presumption of *in rem* jurisdiction must necessarily precede all actions *in personam*, whether maritime or otherwise. *In rem* jurisdiction exists, in some form, officially recognized or not, in almost all courts of whatever law. It is, in fact, what ultimately empowers courts to exercise personal jurisdiction, in a practical sense, because, as the maxim goes: possession is nine-tenths of the law; hence, nowadays, courts will generally prefer the parties to be represented by counsel, as has traditionally been the practice in actions against vessels which can not otherwise be heard in court.

[182]The physical presence of a defendant in the forum is a sufficient basis for acquiring jurisdiction over him, no matter how brief his stay might be, as long as it is served while present. See PENNOYER v. NEFF, 95 U.S. 714 (1877).

[183]See MILLIKEN v. MEYER, 311 U.S. 457 (1941).

[184]See HESS v. PAWLOSKI, 274 U.S. 352 (1927). Under this doctrine, a forum state can legislate that a nonresident motorist using its highways be deemed to have appointed a local official as his agent to receive service of process in any action growing out of the use of the vehicle within the state. But the state must have provided actual notice of this to the nonresident motorist beforehand. The obvious questions are whether the trustee is a motorist or traveler, whether the conveyance is a vehicle or automobile, whether the trustee is driving or traveling, and what exactly are the actual physical or metaphysical territorial limits of the jurisdiction— these are fundamentals to jurisdiction, which may only be bypassed with the express or implied permission of the party to be charged.

[185]See INTERNATIONAL SHOE CO. v. WASHINGTON, 326 U.S. 310 (1945). Under this doctrine, the trust or trustee who has never set foot in the forum may nevertheless be subject to valid personal jurisdiction so as to be compelled to



brought in the forum state. If the state has no contacts, ties or relations with the trust or trustee(s), personal jurisdiction cannot be obtained in this manner).[186] The four principles of minimum contacts are, that:

1. The trust's or trustee's activity must be continuous and systematic in the forum jurisdiction, and the cause of action must be related to that activity;
2. Sporadic or casual activity of the trust or trustee(s) in the forum jurisdiction does not justify the exercise of jurisdiction in a cause of action unrelated to that activity;
3. If the trust's or trustee's contacts are sufficiently substantial and of such a nature as to make the exercise of jurisdiction reasonable, then *general*[187] jurisdiction may be exercised by the forum over the trust or trustee(s); and
4. If the trust's or trustee's activity is sporadic or consists only of a single act, then *specific*[188] jurisdiction may be exercised by the forum only when the cause of action arises out of that activity or act.

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defend a lawsuit there provided that it/he has minimum contacts with the forum such that would not offend traditional notions of fair play and substantial justice.

[186]The minimum contacts must have been had in the form of purposeful affiliation on the part of the trust or trustee(s). See HANSON V. DENCKLA, 357 U.S. 235 (1958).

[187]This is defined as "[a] court's authority to hear all claims against a defendant, at the place of the defendant's domicile or the place of service, without any showing that a connection exists between the claims and the forum state." Black's Law Dictionary, *supra*. In order for a court to assert general jurisdiction there must be substantial forum related activity on the part of the trust or trustee(s). See HELICOPTEROS NACIONALES DE COLOMBIA V. HALL, 466 U.S. 408 (1984).

[188]This is defined as "[j]urisdiction that stems from the defendant's having certain minimum contacts with the forum

Unlike subject-matter jurisdiction, once personal jurisdiction is obtained, it can rarely be lost. And if the trust (or trustee) permits or makes an unrestricted appearance, it cannot be later denied. Contrary to the general appearance which constitutes consent, the trust or trustee(s) may avoid personal jurisdiction by making a *special* or *restricted* appearance for the purpose of attacking the forum court's personal jurisdiction,[189] and may even attack, so to speak, subject-matter jurisdiction. Generally, a challenge to subject-matter jurisdiction constitutes consent, a waiver of personal jurisdiction for the purpose of arguing, but this doctrine does not apply to cases involving Express Trusts over which subject-matter jurisdiction clearly does not exist.[190]

Upon further analysis of the preceding diagram, we see the following—

- **Presence**: the trust is created and functioning in "the Territory," doing business under the general common law, not the private law of the unincorporated banking association. Presence can therefore only be construed to exist where the trust has become a member of that association via residence in a revenue district (indicated by ZIP code) or by engaging in a particular transaction. Even then, the trust or trustee(s) must be "present" by membership or transaction in that particular political subdivision ("State") and given notice "reasonably certain"[191] to reach them (i.e., service of process via either personal service, substituted service, or constructive service) as service by mere publication in a newspaper of general circulation has been held insufficient in such cases.[192] (And, as a side-note, mere physical presence in a courtroom during some phase or proceeding does not constitute an appearance.)[193]
- **Domicile**: the situs of the trust is in the united states of America, designating "the Territory," the Union of states as the land of which the common law is supreme law. Unless the trustee(s), in behalf of the trust, adopts a principal place in the "other Property," establishes a residence in a place subject to the federal jurisdiction with the "intention to make it [its] domicile,"[194] personal jurisdiction is lacking in this respect. It must purposely establish an address directly in a revenue district (e.g., via post office box, or street address) to be liable in this way. But if the trustee(s) contracts with a private mail service provider or carrier, signing "without prejudice,"

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state so that the court may hear a case whose issues arise from those [specific] minimum contacts." Black's Law Dictionary, p. 857 (7th ed. 1999).

[189]See DICKSON V. PARKER, 212 P. 42, 59 Cal.App. 778 (1922); and BROWN V. RINER, 496 P.2d 907.

[190]A challenge to the subject-matter jurisdiction of the court where it is clear on the face of the record that subject-matter jurisdiction is lacking is not inconsistent with a challenge to personal jurisdiction. Moreover, since the court must dismiss on its own motion, an appropriate challenge to subject-matter jurisdiction aids the court in performing its duty. The defendant should therefore be allowed to point out lack of subject-matter jurisdiction without making a general appearance. JUDSON V. SUPERIOR COURT, 21 Cal.2d 11, 129 P.2d 361 is to the contrary, but it has often been criticized (see 31 Cal. L. Rev. 342; 1 WITKIN, CAL. PROCEDURE (1954), § 76, p. 346) and is overruled. GOODWINE V. SUPERIOR COURT, 63 Cal.2d 481, 485 (L.A. No. 28464. In Bank. Nov. 4, 1965).

[191]MULLANE V. CENTRAL HANOVER TR. CO., 339 U.S. 306 (1950).

[192]See PENNOYER, *supra*; and BURNHAM V. SUPERIOR COURT OF CALIFORNIA, COUNTY OF MARIN, 495 U.S. 604 (1990).

[193]See AUSTIN V. STATE EX RE. HERMAN, 10 Ariz.App. 474, 459 P.2d 753.

[194]Black's Law Dictionary, p. 1473 (4th ed. Rev. 1968).

then personal jurisdiction does not attach— this effects an exclusion of any third-party intervenor/overseer, and reserves the obligation to the course of the common law of contracts (i.e., bilateral contracts not trilateral ones).

- **Permission**: it may seem tricky but it is rather simple. Any answer to any presentment from a forum jurisdiction constitutes giving them permission to exercise authority, unless it is specifically a special or restricted appearance for the sole purpose of challenging their authority (personal jurisdiction). If the trustee(s) do not answer in general, or subordinate themselves, then consent has not been given. And if the trustee(s) (presumably under properly limited liability) enter into a contract under a forum-selection clause, then the forum selected will have personal jurisdiction. However, there are limitations to what constitute an enforceable forum clause; for if the clause is expressed in fine print, placed in the contract so as to avoid litigation,[195] unreasonable or ambiguous,[196] not "fundamentally fair,"[197] or if the clause could not have been disputed without impunity as a part of a freely negotiated contract, then it is invalid.
- **Minimum contacts**: the trust must purposely avail itself of benefits (and services) of the state[198] (e.g., license, registering "ownership" there, contracting with the government there, availing itself of benefits or services of the legal system there—court actions, utilizing police or fire services, etc.—systematically and continuously, or sporadically but substantially enough so as to warrant the trust or trustee(s) being compelled to come into the forum).[199] I will not get into diversity of citizenship here, though it is wholly important to subject-matter jurisdiction in the federal courts, for it is highly improbable that it would even be necessary to bring it up in such an action, given all of the above with which the Express Trust is naturally armed.[200]

As a final note, when the Express Trust is taking an action against an outside party, the most effective method is via the Commercial Process, i.e., a private (out of court) legal action instituted under the fundamental rules of commerce/trade (Business). Lawsuits should be regarded as a last resort to secure judicial enforcement of a private judgment, for public suits confer full personal jurisdiction upon the court. Taking a claim to a legislative court avails the trust of several benefits and services of that forum, and thereby establishes a substantial minimum contact. Even still, any action for judicial enforcement of a private judgment can be done out of court pursuant to the Commercial Process. In private actions, the maxims of commerce, the foundation of all commercial law and western legal systems, govern—

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[195]See JOHNSON AND JOHNSON v. HOLLAND AMERICA LINE-WESTOURS, INC., 557 N.W.2d 475.

[196]See DEIRO v. AMERICAN AIRLINES, INC., 816 F.2d 1360, 1364 (C.A.9 (Or.) 1987).

[197]CARNIVAL CRUISE LINES, INC. v. SHUTE, 499 U.S. 585, 595 (1991); HODES v. S.N.C. ACHILLE LAUROED ALTRI-GESTIONE, 858 F.2d 905, 908 (C.A.3 (N.J.) 1988); and SHANKLES v. COSTA ARMATORI, S.P.A., 722 F.2d 861, 866 (C.A.1 (Puerto Rico) 1983).

[198]See WORLD-WIDE VOLKSWAGEN CORP. v. WOODSON, 444 U.S. 286 (1980); ASAHI METAL INDUSTRY CO., LTD. v. SUPERIOR COURT OF CALIFORNIA, SOLANO COUNTY, 480 U.S. 102 (1987); see also Dick Lancial, BENEFITS ACCEPTED = JURISDICTION.

[199]See HELICOPTEROS, *supra*; and PERKINS v. BENGUET CONSOL. MIN. CO., 342 U.S. 437 (1952).

[200]A good case to review regarding the rule of "complete diversity" is STRAWBRIDGE v. CURTISS, 7 U.S. 267 (1806).

- **A workman is worthy of his hire**. Exodus 20:15; Lev.19:13; Matt.10:10; Luke 10:7; and II Tim. 2:6. Legal maxim: It is against equity for freemen not to have the free disposal of their own property.
- **All are equal under the Law**. Law of God — Moral and Natural Law; Exodus 21:23-25; Lev. 24:17-21; Deut. 1:17, 19:21; Matt. 22:36-40; Luke 10:17; and Col. 3:25. Legal maxim: No one is above the law. Commerce, by the Law of Nations, ought to be common, and not to be converted into a monopoly and the private gain of a few.
- **In Commerce Truth is Sovereign**. Exodus 20:16; Ps. 117:2; John 8:32; and II Cor. 13:8. Legal Maxim: To lie is to go against the mind. Oriental Proverb: Of all that is good, sublimity is supreme.
- **Truth is expressed by means of an affidavit**. Lev. 5:4-5; Lev. 6:3-5; Lev. 19:11-13; Num. 30:2; Matt. 5:33; and James 5:12.
- **An unrebutted affidavit stands as the Truth in Commerce**. 1 Pet. 1:25; Heb. 6:13-15. Legal Maxim: He who does not deny, admits.
- **An unrebutted affidavit becomes the Judgment in Commerce**. Heb. 6:16-17. Any proceeding in a court, tribunal, or arbitration forum consists of a contest, or "duel" of affidavits wherein the points remaining unrebutted in the end stand as the truth and the matters to which the judgment of the law is applied.
- **A matter must be expressed to be resolved**. Heb. 4:16; Phil. 4:6; and Eph. 6:19-21. Legal maxim: He who fails to assert his rights has none.
- **He who leaves the field of battle first loses by default**. Book of Job; and Matt. 10:22. Legal maxim: He who does not repel a wrong when he can, occasions it.
- **Sacrifice is the measure of credibility**. One who is not damaged, put at risk, or willing to swear an oath on his commercial liability for the truth of his statements and legitimacy of his actions has no basis to assert claims or charges and forfeits all credibility and right to claim authority. Acts 7, Life and Death of Stephen. Legal maxim: He who bears the burden ought also to derive the benefit.
- **A lien or claim can be satisfied only through rebuttal by counter-affidavit point-for-point, resolution by jury, or payment**. Gen. 2-3; Matt. 4; and Revelations. Legal maxim: If the plaintiff does not prove his case, the defendant is absolved.

MAINTAINING PROPER I.R.S. RELATIONS

LAST BUT NOT LEAST, due attention must be paid to the Internal Revenue Service, for they are the lawful, legal entity, duly authorized to collect association dues (income taxes) from 14th Amendment citizens and other persons volunteering and availing themselves of the "privileges and immunities" regarding non-payment of debts in the system implemented under former H.J. Res. 192, 12 USC § 95a, and 15 USC, ch. 41, § 1602(c)(d)(e). "They [participants] are considered as a debtor/creditor in a social security association (unchartered, unincorporated commune) whereby each person insures everybody else in the association by agreeing never to demand payment for

debts. [It is] [u]nder this volunteer arrangement [that] these persons become primarily a U.S. citizen, secondarily a state citizen, 'subject to' clause 1 of the 14th Amendment, while the literal 10th Amendment rights are forfeited."[201]

Persons under this system have only relative rights to life, liberty, and property; their natural rights are converted into "privileges and immunities" and "civil rights". As debtors, they have no absolute literal property ownership, for it has thus been converted to mere usership.[202] Plainly put, IRS taxes serve several functions, but principally as dues for the privileges and immunities associated with participating in the "federated unincorporated interstate banking association for the *non* 'Payment of Debts.'"[203] What's more, the collection of income taxes is crucial to maintaining order within the association, more so than for any proposed funding of the association.[204]

But that has no bearing on a properly created and administered Express Trust. It is well-settled that a trust, created by parties not availing themselves of such privileges and immunities, is not illegal even if formed for the purposes of limiting or avoiding taxes altogether.[205] Nor is the Express Trust subject to federal excise taxes imposed on corporations.[206] Nor is an Express Trust taxable merely because it possesses all the accessory powers possessed by corporations.[207] Nor can the dignity of its trust instrument be set aside simply because a "tax benefit" results, whether by design or by accident.[208] Frankly, unless it incurs a tax liability in the United States via a valid forum clause in a contract, membership in the unincorporated banking association, becoming an employer, employee, or worker, or corporate entity, deriving income from corporate stocks or physical franchises, accepting other "privileges and immunities" under the 14th Amendment, or availing itself of any other benefits of the public trust invoking the doctrine of reciprocity, it has nothing to do with the IRS.

However, as it might stand as a beacon of organizational liberty, the IRS has a reasonable interest in making sure the Express Trust example does not upset collections and, most important of all, compliance; the IRS, thus, takes every precaution

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[201]Brobst et al., *supra*.

[202]"Debts . . . are not the property of the debtors; they are obligations of the debtors, and only possess value in the hands of creditors. With the creditor they are property [absolute][.]" JONES V. NEW PITTSBURGH COURIER PUB., 364 A.2d 1315, 469 Pa. 157, quoting IN RE STATE TAX ON FOREIGN-HELD BONDS, 82 U.S. 300, 320, 21 L.Ed. 179 (1872). See also Beale, *supra* at p. 114.

[203]Brobst et al., *supra* at p. 14.

[204]"If . . . government refrains from regulation [i.e., taxes] . . . the worthlessness of the money [i.e., credit] becomes apparent, and the fraud upon the public can be concealed no longer." John Maynard Keynes, THE ECONOMIC CONSEQUENCES OF THE PEACE, p. 225 (1920). It has been argued that in 1930s America, with the outcry for quick-fixes as opposed to independent recovery, the public requested (democratically) the frauds which occurred during the Depression Era.

[205]See WEEKS V. SIBLEY, *supra*; and PHILLIPS V. BLATCHFORD, *supra*.

[206]See ELIOT V. FREEMAN, *supra*; and MAINE BAPTIST MISSIONARY CONVENTION, *supra*.

[207]See PHILLIPS V. BLATCHFORD, *supra*; GLEASON V. MCKAY, 134 Mass. 419 (1883); O'KEEFFE V. SOMERVILLE, 190 Mass. 110 (1906); and OPINION OF THE JUSTICES, 196 Mass. 603, 627 (1908). See also THE PERSONALITY OF THE CORPORATION AND THE STATE, 21 L. Qtly. Rev. 365, 370 (Oct. 1905).

[208]See EDWARDS V. COMMISSIONER, 415 F.2d 578, 582, (C.A.10 (Okl.) 1969).

to shoot down trusts of any kind which even hint at having origins lying outside of its jurisdiction, i.e., the "other Property". It is interesting to note, that the IRS-taxpayer relationship, by operation of law, is that of beneficiary (*cestui qui trust*) to trustee. It is a classic *resulting trust*. The tax payer is presumed to be a trustee, hence he is legally obligated to report and make distributions to the party having a legal right to certain amounts pursuant to the trust bylaws, i.e. the US Tax Code. It becomes understandable, then, that the IRS would construe every instance, no matter how rare, of a non-statutory trust condemned in court as being attributable to some purported inherent unlawful nature of non-statutory trusts in general. Hence the classification of "abusive trust," though any trust (statutory or non-, express or implied, resulting or constructive) which abuses the fundamental principles upon which equity rests is, technically, abusive. Yet, they never speak of them. The reader should therefore be keen to know how to discern good information from dis- and misinformation.

In the event the IRS takes an action against a purported "common-law trust" or "pure trust," (a.k.a. "poor trust") it is generally a lawful action, actually in response to some unlawful activity on the part of the parties or defect in their contractual relations. Your author has never seen an action taken against a properly drawn Express Trust, i.e., one drafted from the perfected language and form of that "best legal talent"[209] to which the power and superiority of the Express Trust is attributed. Even in those cases, a thorough analysis of jurisdiction, such as the one treated in the previous section, sheds light on the blatant limitations of the IRS's, and courts' in general, jurisdiction. The fact that they manage to establish subject-matter jurisdiction *and* personal *in rem* jurisdiction attests to the ignorance of the defendants, and indeed, personal jurisdiction usually would never have been obtained without the defendants' unwitting permission.[210] It is no secret that all actions of the IRS are commenced as proceedings in admiralty.[211]

CONCLUSION

THE ONLY WAY TO THRIVE in twenty-first century America is to "own nothing and control everything," privately. And though any trustee is the legal owner of the property in trust, the trustee(s) of Express Trusts do not experience the incidents of *personal* ownership due to properly limited liability via trust instrument and the cardinal virtues of the trustee(s). It is this limited liability that makes the Express Trust no less than the corporation. But it is the latitude of choice of whether to function in the common law venue with absolute rights in commerce under the general law merchant or in the Roman civil law venue with only relative rights in commerce under private international law that makes the Express Trust, *inter alia*, far superior and profitable. Under the aegis of the Express Trust, the trustee is clothed in a veil impenetrable but from within. This

[209]Sears, *supra* at § 1, p. 3.

[210]In fact, Judge Robert Bjork, from whose name the phrase "bjork'd in the senate" was derived, is reported to have openly acknowledged, during Senate confirmation hearings, that every prisoner in America today is there because he gave his permission to be imprisoned, in one way or another. Supposedly, this is the reason why the Senators "bjork'd" him so badly.

[211]It is highly recommended that the reader read ARE YOU LOST AT SEA (1995), available at <http://www.friends-n-family-research.info/FFR/Merrill_AreYouLostAtSea.pdf> (last visited Jan. 8, 2007).

suit of armor is the trust instrument, which molds to the trustee in all his good-faith dealings on behalf of the trust, fully compensating him for his services, privileging his use of trust property, and enabling his exercise of creativity in business endeavors, all without the excessive weight of inquisitorial legislation.

The greater latitude afforded under Express Trusts manifests itself in a number of ways; one of which is in the prosecution of claims and commercial liens wherein the trust acquires for value the account of a debtor, and the trustee utilizes the trust's qualities in order to effectively collect the debt owed. The trust brings with it a form of professionalism and authority which enables the debt to be collected honorably. And when one is trustee, he is in a fiduciary position generally looked upon with respect for the integrity inherent in the position. This has always been the case, except where the power has been abused. But even so, history is clear that there are far more abuses of power via corporations than Express Trusts.[212]

Given the statistics, and the fact that all governments in twenty-first century America are corporations themselves, it becomes clear that the extensive recognition given to corporations by the state is simply because of the special-interest relationship between the two. In a way, it is the same relationship between the "john" and the prostitute,[213] for it is always in the best interest of the prostitute to take measures to keep the "john" in business. This is done in order to indirectly protect her own job security. This is also the underlying cause for much of the negative sentiment towards Express Trusts operating in the statutory world. It is this relationship that has bred the irrational view that "*some* trusts have been created independent of statute; *some* non-statutory trusts are said to have done harm; *therefore* public policy demands that hereafter *all* trusts shall be regulated." The irrationality of this becomes more apparent when the syllogism is paraphrased thus: "*some* lawyers have been Presidents of the United States; *some* Presidents are said to have done harm; *therefore* public policy demands that hereafter *all* lawyers shall be prohibited."

The bottom line is that the Express Trust relation is the most effective means to owning nothing while controlling it all, and, when utilized properly, it affords its participants with all the ingredients of legal health and commercial wellness. It is also true that no matter how many arguments are made against the Express Trust, the learned reader will always see through the propaganda and spin, knowing the state's nagging concern is the utter lack of *in rem* jurisdiction over Express Trusts; possession is nine-tenths of the law. At the end of the day, *in rem* jurisdiction remains in the private venue, i.e., with the trustee pursuant to the private contract between he and the settlor. So, from natural deduction, it should become clear that the Express Trust can really only fail due to some misgiving or impropriety on the part of the trustee— the trustee must therefore *trust* himself.

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[212]See Chandler*, supra* at p. 10, *et seq*.

[213]Governor Fernald of Maine, in his address to the Maine Legislature in 1909, referring to needed reformation of the corporation laws said, "[w]hile it is true that the State is receiving large revenue from this [corporate] source, it is also true that, in a considerable measure, *it is the price of prostitution*. I hope you will take steps to remodel them [corporation laws], along evident lines of reform, thus restoring to Maine her self-respect." [Italics emphasis added.]