

1934

## PARTNERSHIP - DECLARATION OF TRUST - STIPULATION AGAINST PERSONAL LIABILITY

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Business Organizations Law Commons](#), and the [Estates and Trusts Commons](#)

---

### Recommended Citation

*PARTNERSHIP - DECLARATION OF TRUST - STIPULATION AGAINST PERSONAL LIABILITY*, 32 MICH. L. REV. 559 (1934).

Available at: <https://repository.law.umich.edu/mlr/vol32/iss4/19>

This Recent Important Decisions is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

PARTNERSHIP — DECLARATION OF TRUST — STIPULATION AGAINST PERSONAL LIABILITY — Plaintiff, the payee of a note of a Texas unincorporated association, sought to hold the defendant shareholders liable as partners. The articles of association provided for trustees to hold and manage the association property, but reserved powers in the shareholders so the latter could: (1) increase capital stock, (2) annually elect the trustees and annually increase or diminish the number of trustees, (3) repeal or amend any of the articles of association, (4) order trustees to call special meetings, (5) remove trustees and subject them to shareholders' orders at all times, (6) transact such business as they might inaugurate or as might be submitted to them by the trustees, and (7) dissolve the association. There was an express stipulation against personal liability attaching to either the trustees or the shareholders. Also, the trustees executed a trust agreement by the terms of which they agreed to hold the association's property and conduct the business as a trust. All contracts were to be made with an express reference to the trust agreement. *Held*, such express agreement against liability for loss negatives the existence of a partnership. *Farmers and Merchants Nat. Bank v. Anderson*, (Iowa 1933) 250 N. W. 214.

The articles of association, by express stipulation, purport to create a joint-stock association. If this was effected, the shareholders are liable as partners.<sup>1</sup> The general rule is that one may not secure the benefits of the relation of a partner and by agreement in the articles of association secure immunity from its liabilities as against creditors.<sup>2</sup> By superimposing a trust structure upon such articles of association there might have been an attempt to form a business trust and thereby escape personal liability. The amount of control in the shareholders is

<sup>1</sup> *Horgan v. Morgan*, 233 Mass. 381, 124 N. E. 32 (1919); *In re Ballard*, (D. C. N. D. Tex. 1922) 279 Fed. 574; *Roller v. Madison*, 172 Ky. 693, 189 S. W. 914 (1916).

<sup>2</sup> 1 ROWLEY, *MODERN LAW OF PARTNERSHIP*, sec. 103 (1916); MECHEM, *ELEMENTS OF PARTNERSHIP*, 2d ed., sec. 81 (1920), which states, "It is lawful for the partners, as between themselves, to stipulate that one or more of them shall be indemnified against loss, though such a stipulation cannot affect the liability of the partners so indemnified to third persons."

the element which usually determines whether a trust agreement sets up a real trust or just a partnership.<sup>3</sup> Where shareholders can remove the trustees and elect others, or amend the articles of association a partnership results.<sup>4</sup> The right to elect trustees annually is probably enough control to make the association a partnership.<sup>5</sup> However, the mere right to fill vacancies among the trustees is probably not enough,<sup>6</sup> and surely where there is no control in the shareholders there is no partnership.<sup>7</sup> Since there was no notice of the existence of the trust agreement in the instant case, the defendants' liability depends on the real nature of their business relation.<sup>8</sup> In Texas the business trust has been virtually annihilated as an institution,<sup>9</sup> but the Iowa court felt that the instant case did not come under any comity rule which would necessitate recognition of Texas law on partnership or trust associations.

T. A. P.

<sup>3</sup> *Williams v. Inhabitants of Milton*, 215 Mass. 1, 102 N. E. 355 (1913). See also, Rowley, "The Influence of Control in the Determination of Partnership Liability," 26 MICH. L. REV. 290 (1928).

<sup>4</sup> *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009 (1914).

<sup>5</sup> Douglas, "Vicarious Liability and Administration of Risk," 38 YALE L. J. 720 at 742 (1929).

<sup>6</sup> Douglas, "Vicarious Liability and Administration of Risk," 38 YALE L. J. 720 at 742 (1929).

<sup>7</sup> *Schumann-Heink v. Folsom*, 328 Ill. 321, 159 N. E. 250 (1927).

<sup>8</sup> For the effect of notice of trust agreement on a creditor's rights, see *Kramer & Co. v. Cummings*, 225 Ill. App. 26 (1922).

<sup>9</sup> *Thompson v. Schmitt*, 115 Tex. 53, 274 S. W. 554 (1925); *Hollister v. McCamey*, 115 Tex. 49, 274 S. W. 562 (1925).