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## Corporation Law

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ROBERT L. FLETCHER

### CORPORATION LAW

The Massachusetts Trust Act of 1959. Chapter 220, Session Laws of Washington of 1959 is designed to legalize in the State of Washington the type of business associations known as a "Massachusetts Trust" or "Business Trust." This type of business association employs the trust relation for the purpose of conducting a business. Money or property or both are transferred to trustees under a trust instrument authorizing them to use such assets to carry on a business for the benefit of the contributors and their successors in interest. Since the beneficiaries of a trust are not liable for the acts of the trustees, the beneficiaries achieve the same limited liability as corporate shareholders have, if trust law applies to the relationship. Beneficial interests are made freely transferable like corporate shares. The trustees are liable for their acts, but have a right of reimbursement from the trust assets for any obligations properly incurred by them. In practice the trustees endeavor to obtain from third parties with whom they deal an agreement that such parties will not hold the trustees personally liable, but will look only to the trust assets.

This type of organization, as its name implies, was first largely popularized in Massachusetts. It was developed as a substitute for the corporate form of doing business and in its earlier history was used to achieve exemption from some of the restraints of corporate law. In recent years state and federal legislation has been enacted to deprive the Massachusetts Trust of most, if not all, of those exemptions. Consequently, the motivation for organizing business trusts has largely disappeared.

While the Massachusetts Trust received quite general legal acceptance, such was not the case in the State of Washington. In *State ex rel. Range v. Hinkle*<sup>1</sup> and *State ex rel. Colvin v. Paine*,<sup>2</sup> the Washington Supreme Court held that a "Massachusetts Trust" was a corporation within the meaning of article XII, section 5 of the state constitution

<sup>1</sup> 125 Wash. 581, 219 Pac. 41 (1923).

<sup>2</sup> 137 Wash. 566, 243 Pac. 2, 247 Pac. 476 (1926), Annot., 46 A.L.R. 165.

and was illegal because not formed under state laws relating to corporations. Several other decisions<sup>3</sup> held the illegality of such an organization could be raised only by the state in a direct action and that in private litigation the status of the Massachusetts Trust would be generally respected. Nevertheless, such an organization remained in the insecure position of being subject to attack in an action brought by the state.

The 1959 act is undoubtedly designed to avoid this consequence of the *Range* and *Colvin* cases. It provides in quite general terms that such organizations are legal and shall be governed by the "applicable" provisions of the corporation statute. The act is brief and lacking in details. It is questionable whether provisions of such a general character will meet the objections of the *Range* and *Colvin* cases. However, since those cases were primarily concerned with apparent attempts to avoid taxes, fees, and state controls, and since the act purports to subject business trusts to at least some such burdens, the courts may hold that the objections of those cases have been met.

To accomplish this result, however, it may be necessary to apply corporation law quite broadly to Massachusetts Trusts. Section 4 of the act provides that any Massachusetts trust "shall be subject to such applicable provisions of law . . . with respect to . . . corporations . . . as relate to the issuance of securities, filing of required statements or reports, service of process, general grants of power to act, right to sue and be sued, limitation of individual liability of shareholders, rights to acquire, mortgage, sell, lease, operate and otherwise to deal in real and personal property, and other applicable rights and duties existing under the common law and statutes of this state in a manner similar to those applicable" to corporations. Just how this very general language will be interpreted cannot be predicted. If essentially the entire body of corporate law is applied to Massachusetts Trusts, the *Range* and *Colvin* cases will be clearly inapplicable, but there will obviously remain no conceivable advantage in having a Massachusetts Trust rather than a corporation. No distinction would remain other than the artificial designation of the character of the organization. On the other hand, if the "applicable" provisions of corporate law are substantially less than the total body of such law, avoidance of the *Range* and *Colvin* cases becomes doubtful and the dividing line between

<sup>3</sup> *Jesseph v. Carroll*, 126 Wash. 661, 219 Pac. 429 (1923); *Denny v. Cascade Platinum Co.*, 133 Wash. 436, 232 Pac. 409 (1925); *Elsom v. Tefft*, 140 Wash. 586, 250 Pac. 346 (1926); *Haynes v. Central Business Property Co.*, 140 Wash. 596, 249 Pac. 1057 (1926); *Thomle v. Soundview Pulp Co.*, 181 Wash. 1, 42 P.2d 19 (1935).

“applicable” and inapplicable provisions becomes uncertain. Obviously the act invites litigation.

An effort to avoid problems of judicial construction is indicated by the statutory provision purporting to authorize the Secretary of State, the Director of Licenses, the state Tax Commission and the County Auditor of the county in which the principal place of business is located “to prescribe binding rules and regulations applicable” to the trust. The rather startling generality of this provision will in turn doubtless require the same interpretation as the other parts of the statute.

The uncertainties which exist in the statute will probably discourage its general use. It may strengthen the position of Massachusetts Trusts which happen to be already operating in the state, if such exist. So far as new organizations are concerned, anyone proceeding under the statute must face, on the one hand, the decisions in the *Range* and *Colvin* cases, and on the other, the alternate possibilities that he has created either (1) something essentially in the nature of a Massachusetts Trust with the minimum adaptations necessary to avoid the *Range* and *Colvin* cases, (2) a corporation under the guise of a trust, or (3) a form of hybrid association, part trust and part corporation, with the relative proportions of trust and corporation law quite unpredictable.

**Securities Act of Washington.** Chapter 282 of the Laws of Washington of 1959 is a quite lengthy and comprehensive act, dealing with the issuance and sale of investment securities and the registration and control of investment brokers, dealers, salesmen and advisers.

The act is patterned on the Uniform Securities Act drafted by the National Conference of Commissioners on Uniform State Laws. In fact, by far the greater part of the act follows the Uniform Act verbatim. The act is designed to supersede the so-called Blue Sky Law, RCW Title 21.

Because of its much more highly detailed provisions and more comprehensive coverage, the act should be far more effective than the earlier law. It is anticipated it will give to purchasers of investment securities much greater protection as to intra-state transactions which are exempt from federal regulation. Space does not permit a detailed analysis of this lengthy and complex statute. The following general comments touch a few of the significant features. In order to be eligible for a “public offering,” securities must be registered under the

act. Three different procedures, known as registration by notification, registration by co-ordination, and registration by qualification, are provided for. All of these are fundamentally patterned upon the philosophy of the Federal Securities Act of 1933 which requires disclosure of pertinent facts as a condition precedent to a public offering. The state does not purport to pass upon the merits of the securities, but rather to assure that all required relevant information is available to the investor.

Administration of the act is vested in the Director of Licenses who is to be assisted by an advisory committee to be appointed by the Director.

In addition to requiring disclosure, the act prohibits fraudulent and misleading practices, requires registration of brokers, dealers, salesmen, and investment advisers, and creates certain statutory civil remedies. The act also contains detailed provisions exempting certain securities and certain transactions from the scope of the law.

In view of the adoption of this detailed and technical act, it behooves members of the Bar who represent clients contemplating a "public offering of securities" to familiarize themselves with the provisions of the statute. By way of admonition, the phrase "public offering" is not susceptible of precise definition, but the federal courts in interpreting this phrase in the Federal Securities Act of 1933 have in marginal cases shown a distinct disposition to hold that the offering is "public" and, therefore, within the scope of the act. In case of doubt, it will be advisable to examine the federal interpretations before determining that an offering is not public and, consequently, not covered by the act.

J. GORDON GOSE

## CRIMINAL LAW

**Chapter 229—Washington's Anti-Shoplifting Statute.** The exact annual amount actually deprived this nation's store owners by shoplifters is, quite realistically, impossible to know. Yet, by almost any standard, estimates reveal that the dollar-value sums are staggering. One author concludes that the total national loss in 1948 was over \$246,106,000.00,<sup>1</sup> and a more conservative source estimates this nation's average annual shoplifting loss is somewhat in excess of \$100,000,000.00.<sup>2</sup> On the state level, it is reported that \$12,500,000.00 is taken

<sup>1</sup> Comment, 62 *YALE L. J.* 788 (1953) n. 5.

<sup>2</sup> *Wall Street Journal*, Oct. 31, 1956; cited in Comment, 19 *MD. L. REV.* 28 (1959) n. 3.