

**DECLARATIONS OF TRUST
AS
EFFECTIVE SUBSTITUTES
FOR INCORPORATION**

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Declarations of trust as effective substitutes for incorporation by John H. Sears

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JOHN H. SEARS

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Declarations of Trust as
Effective Substitutes
for Incorporation



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DECLARATIONS OF TRUST AS EFFECTIVE SUBSTITUTES FOR INCORPORATION.

“MASSACHUSETTS LAND TRUSTS.”

1. Introduction.
2. Comparison of Corporate Attributes and those of Trust Estates.
3. Advantages of the Trust Method over Incorporation.
4. Form of Declaration of Trust formed to hold Real Estate.
5. Form of Declaration of Trust formed to handle Personal Property.

1. **Introduction.**—The decision of the United States Supreme Court in the consolidated case of *Eliot v. Freeman et al.*, and *Maine Baptist Missionary Convention v. Cotting et al.*, 31 Sup. Ct. Rep. 360 (1911), holding that the so-called Massachusetts Trusts are not subject to the Federal excise tax on corporations, has emphasized the importance of this method of conducting business as compared with incorporation. The laws of Massachusetts do not permit of incorporation for the purpose of holding or dealing in real estate, except by special charter, and as special charters are difficult to secure, the 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 in the hands of trustees, who held the legal title and issued certificates, similar to shares of stock, to the

cestuis qui trust, showing the interest owned by each, possessed nearly all the advantages desired. Its efficiency was soon appreciated. At first applied to real estate, they became and are still known as the "Massachusetts Land Trusts." Their advantages so appealed to others in Massachusetts who were acquainted with them that they applied them to the holding of personal property, and a declaration of trust for this purpose, known as "The Massachusetts Electric Companies," is set forth in this book. We understand that this instrument was drawn by Richard Olney, one time Attorney General and later Secretary of State of the United States. As these trusts are effected under the common law, it is apparent that organizers outside of Massachusetts may profit by the examples afforded. Increasing restrictions and regulations imposed upon corporations invite attention to methods other than corporate. Several of the States provide for the organization of "joint stock companies and associations," in addition to incorporation.

Pennsylvania, Act of June 2, 1874;
Virginia, Act of March 2, 1875;
Michigan, Compiled Laws, 1897, Ch. 160;
New Jersey, General Statutes, 1896, p. 2240;
Ohio, General Code, 1910, Sec. 8059;
New York, "Joint Stock Association Laws," Consolidated Laws of N. Y. (1909), p. 1873-1876.

While these joint stock companies have an artificial entity, they do not provide against individual liability as does incorporation. They possess some of the characteristics of corporations and some of the characteristics of co-partnerships. However, they are organized under enabling statutes which enlarge the privileges possessed at common law, and they are, therefore, subject to State regulations, which may be equally burdensome to those imposed upon corporations. An organization *under the common law*, with no special privilege or franchise from legislative authority, is the organization that can do the same acts as

an individual, with no further restrictions than are placed upon individuals. Such an organization is afforded by the declarations of trust herein set forth.

2. Comparison of Corporate Attributes and those of Trusts.—A comparison of the usual corporate advantages and the method of equaling or approaching them, arrived at in the declarations of trust for this purpose, will be noted as follows:

Advantages of Incorporation.	Corresponding Provision in Trust Agreements.
1. CONTINUED EXISTENCE. (Perpetual or a certain number of years.)	1. The trust continues for twenty years after the death of the last surviving original subscriber. This prevents violation of the rule against perpetuities. The agreement provides that the death of a shareholder merely entitles his legal representatives to a new certificate. The shareholders have no right to call for partition or division of the property.
2. LIMITED INDIVIDUAL LIABILITY.	2. The liability of the shareholders to the organization for assessments is limited by the terms of the agreement. As to third parties, the trustees are required to provide in their contracts that only property in their hands as trustees shall be answerable.

Hussey v. Arnold et al., 185 Mass. 203 (1904).

Whether there is an individual liability for torts and implied contracts is apparently undecided at this writing (October, 1911). This, however, would not be important, except in case of insolvency of the organization.

3. THE EASE WITH WHICH THE OWNERS OF SHARES OF STOCK MAY DISPOSE OF THEM BY WILL, SALE, OR OTHERWISE.

3. The trustees issue certificates for the number of shares to which each is entitled. These certificates have a par value, entitle the holder to one vote for each share, and are transferable on the books of the trustees.

4. THE SAFETY AND CONVENIENCE OF REGULAR MEETINGS AND OF CONDUCTING BUSINESS THROUGH THE AUTHORITY OF A BOARD OF DIRECTORS OF LIMITED AND DEFINED POWERS.

4. The shareholders meet annually, and they have such special meetings as may be necessary. The shareholders, at such meetings, fill vacancies in the number of trustees, and may depose any or all of the trustees and elect others. The trustees have exclusive management; under the terms of the trust, they may borrow money and mortgage the assets, and perform other acts, practically the same as directors of a corporation.

5. BRINGING AND DEFENDING LITIGATION IN THE CORPORATE NAME AND ENTITY.

5. Same rules as to parties and procedure at law and in equity as are applicable to all trust estates.

6. BROAD POWERS. HOLDING COMPANIES, ETC.

6. The powers of such an organization may be broader than most corporations, as it may provide for whatever any individual may do. Ownership of stocks in incorporated companies may be provided for.

3. Advantages of the Trust Method Over Incorporation.

1. Taxation peculiar to corporations, as, for example, Federal excise tax (*Eliot v. Freeman et al.*, 31 Sup. Ct. Rep. 360) and state organization and franchises taxes are avoided.

2. Reports required of corporations need not be filed.

3. The trustees do not have to comply with the foreign corporation laws of various States.

4. There is no legal obligation to maintain the capital and refrain from paying dividends out of capital.

5. As shares of stock in corporations are personal property in the hands of the owner, there are often two taxes on the same property, first against the corporation and then against the owner of the stock. A *cestui qui trust*, under these trust agreements, has merely an equitable interest in the property.

6. The interests of *cestuis qui trust* are well protected by courts of equity. The power to secure information as to the actions of the trustees and the status of the trust fund is, no doubt, superior to the rights and remedies of stockholders in corporations.

7. Dissolution may be effected without formalities required of corporations.