Flower v. Bricker, 178 Ark. 764, 12 S.W. (2d) 394 (1929). And where the prior mortgagee was assured by the junior mortgagee that taxes had been paid, and that no prior lien was in existence, the latter was estopped to assert a prior lien for the taxes he had paid. *Warranty Bldg. & Loan Assn. v. Cimirro Construction Co.*, 111 N.J.Eq. 8, 160 Atl. 847 (1932), affd. 113 N.J.Eq. 31, 166 Atl. 198 (1933). In a few jurisdictions, the problem has been recognized by the legislature and the taxpaying junior incumbrancer given a prior lien by statute. Ky. Stat. (1930), § 4032; La. Civ. Code (1932), Art. 2161; see *Timken v. Wisner Estates*, 153 La. 262, 95 So. 711 (1923).

MISHA RUBIN

Partnership—Individual Liability of Beneficiaries of Business Trust—[New York].—Defendants formed a syndicate agreement to deal in bank stock with sole control vested in named managers. The agreement restricted the liability of a participant to the amount contributed. Plaintiff who knew of the agreement brought this action to recover the balance due on a promissory note or the same balance due for money lent. The courts below held the agreement created a trust and that the managers would be solely liable. *Held*, judgment below reversed. The subscribers are liable as partners, and the plaintiff is bound by the agreement to restrict liability. *Brown v. Bedell*, 263 N.Y. 177, 188 N.E. 641 (1934).

The business trust has been used as a device to escape partnership liability and to secure corporate advantages where there is an inability to incorporate or a desire to avoid corporate burdens. See *Weber Co. v. Alter*, 120 Kan. 557, 245 Pac. 143, 46 A.L.R. 158 (1926); Bonbright and Means, The Holding Company (1932), 81, 120, 207–208, 218; Warren, Corporate Advantages without Incorporation (1929), 398; Powell, The Passing of the Corporation in Business, 2 Minn. L. Rev. 401 (1918); Massachusetts Trusts, 37 Yale L. Jour. 1103 (1928). The investors, while contributing capital for the purpose of profit making, seek to be protected from personal liability on the theory that as cestuis they are not answerable for the debts of the trust. *Dantzler v. McInnis*, 151 Ala. 293, 44 So. 193 (1907); *Goldwater v. Altman*, 210 Cal. 408, 292 Pac. 624 (1930); *Falardeau v. Boston Art Assn.*, 182 Mass. 405, 65 N.E. 797 (1903); see 19 Cal. L. Rev. 42 (1930). Some jurisdictions have permitted such insulation from liability where the investors have retained little or no control over the trustees. *Dana v. Treasurer & Receiver General*, 227 Mass. 562, 116 N.E. 947 (1917); *Greco v. Hubbard*, 252 Mass. 37, 147 N.E. 272 (1925). Investors retaining no control, without the protection of the trust, are like dormant partners, who in order to escape partnership liability would probably have to comply with the limited partnership statutes. But see *Giles v. Vette*, 263 U.S. 553, 44 Sup. Ct. 157, 68 L. Ed. 441 (1924); Crane, Are Limited Partnerships Necessary?, 17 Minn. L. Rev. 351 (1933). Even the protection of the trust has been insufficient in some jurisdictions to prevent liability to the investors because the legislature by authorizing certain business devices for limiting liability has been said to have negatived the use of others. *Reilly v. Clyne*, 27 Ariz. 432, 234 Pac. 35 (1925); *Willey v. Hoggson Corp.*, 90 Fla. 343, 353, 106 So. 408 (1925); *McClaren v. Dawes Elec. Sign & Mfg. Co.*, 86 Ind. App. 196, 156 N.E. 584 (1927); *Weber Engine Co. v. Barley*, 123 Kan. 665, 266 Pac. 803 (1927); *Thompson v. Schmitt*, 115 Tex. 53, 274 S.W. 554 (1925); *State v. Paine*, 137 Wash. 566, 243 Pac. 2 (1926); see Magruder, The Position of Shareholders in Business Trusts, 23 Col. L. Rev. 423 (1923); Brown, Contractual Limitation

of Liability by the So-Called "Massachusetts Trust," 3 Ind. L. Jour. 318 (1928). And it has been said that the protection granted the cestuis by courts of equity together with the profit-making purpose of the association should render the cestuis personally liable. *Thompson v. Schmitt*, 115 Tex. 53, 274 S.W. 554 (1925). The trustee's right to reimbursement from the trust estate, and, if that is insufficient, then against the beneficiary personally, has been suggested as a means of placing an indirect liability upon the investors, where the existence of the trust is regarded as a bar to direct obligation. *Hardoon v. Belilios*, [1901] A.C. 118; Stevens, Limited Liability in Business Trusts, 7 Corn. L. Quar. 116 (1922); Hildebrand, Liability of Trustees, Property, and Shareholders of a Massachusetts Trust, 2 Tex. L. Rev. 139, 165 (1924). But even in jurisdictions where an investor without control is protected by the trust device, an investor who has the power to "make rules for the conduct of the business and to direct the trustees in any matter" is held liable on the theory that the association created is a partnership and the trustees are agents. Douglas, Vicarious Liability and Administration of Risk, 38 Yale L. Jour. 720, 741 (1929); *Betts v. Hackathorn*, 159 Ark. 621, 626, 252 S.W. 602, 604, 31 A.L.R. 847, 850 (1923); *Simson v. Klipstein*, 262 Fed. 823 (1920); *Frost v. Thompson*, 219 Mass. 360, 106 N.E. 109 (1914).

The New York Court apparently has recognized that a trust will bar the investor's liability to creditors where little or no control is retained. *Jones v. Gould*, 209 N.Y. 419, 103 N.E. 720 (1913); *Barnes v. Chase Nat. Bank*, 225 App. Div. 102, 232 N.Y.S. 224 (1928), affd. 251 N.Y. 551, 168 N.E. 423 (1929). The investors in the present case seemed to have retained no control, but the court, declaring that it "should not be solicitous to give corporate advantages without incorporation" and that it had an "abundance of authority to sustain" its position, found that no trust existed to bar liability inasmuch as there was no formal conveyance of title to the managers and the managers were not called trustees. 263 N.Y. 189; see Riley, Business Trusts and Their Relation to West Virginia Law, 28 West Va. L. Quar. 287, 288 (1922).

Assuming that the trust device has not insulated the investors from liability, a creditor may be limited by his express agreement from holding either the manager or the investors. *Shelton v. Montoya*, 292 S.W. 165 (Tex. Com. App. 1927); *Philip Carey Co. v. Pingree*, 223 Mass. 352, 111 N.E. 857 (1916). Furthermore, as in the present case, the creditor's knowledge that the investors intended and believed their liability to be limited has been held to so limit their liability as to that creditor. *McCarthy v. Parker*, 243 Mass. 465, 138 N.E. 8 (1923); *Hotchin v. Kent*, 8 Mich. 526 (1860); *contra: Victor Refining Co. v. City Nat. Bank of Commerce*, 115 Tex. 71, 274 S.W. 561 (1925); see Wrightington, Voluntary Associations in Massachusetts, 21 Yale L. Jour. 311, 319 (1912). This result has been reached either on the basis of estoppel or on the doctrine that one who knows an agent is unauthorized to act cannot hold the principal for the unauthorized act. *Dunning v. Gibbs*, 213 Ky. 81 (1926); *Roberts v. Aberdeen Syndicate*, 198 N.C. 381, 151 S.E. 865 (1930); cf. *Chapman v. Witt*, 285 S.W. 331 (Tex. Civil App. 1926). It is analogous to the denial to a creditor of the right to hold the shareholder of a defectively organized corporation (not a *de facto* corporation) personally liable when he has dealt with them as shareholders with limited liability. Ballantine, Corporations (1927), §§ 28, 29. But it is perhaps inconsistent with the doctrine that members of a defective limited partnership are personally liable to a creditor who knew they represented themselves as limited partners. *Andrews v. Schott*, 10 Pa. St. 47 (1848). And with the fact that trustees of a business trust held to be a partnership

will be personally liable to a creditor who knew of the existence of partners but not their identity. 1 Mechem Agency (2d ed. 1914), § 1169; Restatement of the Law of Agency (1933), § 336, comment C.

In the present case, the court held the plaintiff bound by his knowledge of the agreement by the partners to restrict their liability. It is not clear whether the liability of the managers, who were also investors, was intended by the court to be similarly limited.

In Illinois the position of a shareholder without control in a business trust is uncertain. See Judah, Possible Partnership Liability under the Business Trust, 17 Ill. L. Rev. 77 (1922). A strong dictum in *Schumann-Heink v. Folsom*, 328 Ill. 321, 159 N.E. 250, 58 A.L.R. 485 (1928) recognized the shareholders' immunity from personal liability to creditors, but the case actually involved an express contract by the creditor not to hold the trustees personally liable, and the court gave effect to that contract. On the other hand, an equally strong dictum in *Hunter v. Winter*, 268 Ill. App. 487 (1932) indicates that the shareholders will be answerable to creditors, although the decision merely held trustees personally liable in the absence of an express contract against personal liability as was present in the *Schumann-Heink* case. The use of the trust device in Illinois was no doubt stimulated by the prohibition in the former General Corporation Act against corporations founded for the purpose of owning and dealing in real estate. Ill. Cahill's Rev. Stat. (1931), c. 32, § 10. See Aaron, The Massachusetts Trust as Distinguished from Partnership, 12 Ill. L. Rev. 482 (1918). The present Business Corporation Act removes that restriction. Ill. Cahill's Rev. Stat. (1933), c. 32, § 7.

HAROLD ALFRED LIPTON

Taxation—Excise Tax upon Sales of Stock Made Outside the Jurisdiction—[Federal].—A Florida statute placed a stamp tax upon "all sales, agreements to sell, or memoranda of sales or deliveries of, [or] transfers of legal title to shares," whether or not entered upon the books of the corporation; and upon written obligations to pay money which were made, executed, or transferred in Florida. [Laws (Ex. Sess. 1931), c. 15787]. Plaintiffs, doing business as brokers in Florida, sought to enjoin the levying of the tax, presumably upon transactions wherein the plaintiffs received orders to sell stock from customers in Florida and executed the sales on the New York exchange. *Held*, (1) that the tax was unconstitutional as applied to sales of stock of foreign corporations made outside the state; (2) that as to shares of a Florida corporation and transfers thereof made on the company books in Florida, the tax was valid, even though the sales were executed outside the state; and (3) that stockbrokers' loans to clients on margin accounts were subject to the tax as transactions distinct from the sale or purchase of the stock. *Bickell v. Lee*, 5 F. Supp. 720 (D.C.N.D. Fla. 1934).

In addition to Florida, tax statutes of this type have been enacted by the federal government, 43 Stat. 331 (1924), 26 U.S.C.A. § 901(3) (1928); Indiana, Acts (1933), c. 81; Massachusetts, Gen. Laws (1932), c. 64; New York, Cahill's Cons. Laws (1930), c. 61, §§ 270–281; Pennsylvania, 72 Purdon's Stat. (1931), §§ 2041, 2042; South Carolina, Code (1932), § 2525. Since most sales of shares take place in New York the present decision serves to prevent states other than New York from realizing any considerable income from taxing transactions of this character. The severity of the decision is lessened by the holding that loans upon margin accounts are subject to an excise tax.