the number of loads of hay which B had counted, where A had only been told the number by B and the latter had forgotten the number. Stating that hearsay was not involved since the question was as to the declaration made by B and not as to its truth or falsity, the court analogized A's testimony to a memorandum. The conclusion that no hearsay was involved may be questioned, for it seems that, viewed broadly, B's extrajudicial statement was relevant only if true. Moreover, the fact that A's testimony was regarded as a memorandum of B's statement does not necessarily remove the hearsay factor, for it has been pointed out that many authorities regard past recollection recorded as hearsay. But, since both A and B were present in court and could be questioned as to parts of the total transaction, the court would seem justified in admitting the evidence as an exception to the hearsay rule. The *Van Dyke* case is significant, however, because it required present memory as a means of transition to the contents of the "memorandum." Consequently, there was the same element of unreliability as was present in the principal case. The opportunity for cross-examination at this crucial point in the *Van Dyke* case was therefore no greater than in the principal case; nor was it improved at this point by the presence of an additional witness.

Even if there be no technical objection to the evidence, it should perhaps have been excluded in the instant case. The plaintiff first stated in a deposition that he did not know the number of shares he owned. Only later, before the master, did he testify as to the memorandum and his memory of its contents.[10] While the fabrication of a memorandum seems just as easy as fabrication of a present memory, the memorandum does make a more convincing story. The fact that would-be stockholders were claiming more than twice as many shares as could have ever been issued lends some significance to the plaintiff's failure to stand by his original story.[11]

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**Income Taxes—Persons Subject to Tax—Taxation of Investment Trust as Corporation—[Federal].**—Distributors Group, Incorporated, and the respondent, as trustee, executed a trust agreement whereby the former was to deposit with the trustee bonds conforming to requirements set out in the trust instrument, and the trustee was to issue certificates representing undivided interests in the corpus. The respondent was to hold the bonds and receive and distribute to certificate holders the income and proceeds from the sale of securities. It had no power to reinvest earnings or the proceeds from sales and could sell only at the direction of the depositor, which might require sales whenever in its opinion a bond should be eliminated in order to preserve the in-

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remember number); cf. Clute v. Small, 17 Wend. (N.Y.) 238 (1837) (B not permitted to testify as to contents of lost letter which had been dictated to him).

[10] Q. "When you gave your deposition here some time back why did you say at that time that you were unable to state the number of shares you owned at this time or purchased?"

A. "I do not know, that was the first deposition I ever filled out, . . . . " Transcript of Record, at 56.

Q. "How many shares did that memorandum show that you had?"

A. "I had ten thousand in the Virginia Company, Inc. and 126 shares in the Virginia Oil and Refining Company." Transcript of Record, at 35.

". . . . I based my claim on this memorandum. . . . " Transcript of Record, at 61.

[11] Brief of Appellee, at 3.

vestment quality of the portfolio. The depositor, when creating new interests by depositing eligible bonds with the trustee, was not limited to the issues which it had selected for the original interests. The new bonds were commingled with the previous deposits to form one trust fund. The certificates were not assignable but could be surrendered to the trustee at any time in exchange for a sum equal to a proportionate share of the market value of the underlying securities.[1] There is no indication in the decision or the record as to whether distributions were made directly to cestuis or through the depositor. The Board of Tax Appeals[2] reversed the commissioner's decision that the respondent was an association, the income of which was taxable as that of a corporation.[3] On appeal, *held*, one judge dissenting, that the trust, being engaged in business, was an association for income tax purposes. Judgment reversed. *Com'r v. North American Bond Trust.*[4]

The relevant section of the Revenue Act of 1934 provides that "the term 'corporation' includes associations, joint-stock companies, and insurance companies."[5] While this clause has remained substantially unchanged since 1913,[6] the Supreme Court has progressively broadened the definition of "association" to prevent evasion of corporate income taxes.[7] In *Hecht v. Malley*[8] the court established the rule that trusts which have quasi-corporate organization and which are engaged in carrying on a business enterprise are taxable as associations.[9] In *Morrissey v. Com'r,*[10] in holding a trust taxable as an association, the Supreme Court enumerated the following salient features of quasi-corporate organization: centralized management by a continuing body of trustees, continuity of enterprise uninterrupted by death of cestuis, transferability of beneficial interests, introduction of new participants, and limitation of personal liability of certificate holders.[11] But the court in the principal case failed to consider whether the trust met these requirements. Although the trust in the principal case did embody

[1] The value of the corpus at the end of the taxable year, 1936, was $6,266,340.77. Com'r v. North American Bond Trust, 122 F. (2d) 545, 550 (C.C.A. 2d 1941).

[2] North American Bond Trust, 403 C.C.H. ¶ 7284-A (B.T.A. 1940).

[3] Revenue Act of 1934, § 801(a)(2), 48 Stat. 771 (1934), 26 U.S.C.A. § 3797(a)(3) (1940). The income of strict trusts, however, is taxed like that of an individual. 48 Stat. 727, 728 (1934), 26 U.S.C.A. §§ 161–63 (1940). See 86 Treas. Reg. art. 801–1–3 (1934).

[4] 122 F. (2d) 545 (C.C.A. 2d 1941).

[5] 48 Stat. 771 (1934), 26 U.S.C.A. § 3797(a)(3) (1940).

[6] 38 Stat. 172 (1913).

[7] Compare Crocker v. Malley, 249 U.S. 223 (1919), with Hecht v. Malley, 265 U.S. 144 (1924), and Morrissey v. Com'r, 296 U.S. 344 (1935). Compare also the congressional effort to prevent avoidance of the excise tax on corporate income. In 1909 an excise tax of 1 per cent was levied on the income of corporations, joint-stock companies, and associations "organized under the laws of the United States, or any State or Territory." 36 Stat. 112 (1909). When this statute was held to apply only to statutory corporations, in Eliot v. Freeman, 220 U.S. 178 (1911), the statute was changed by omitting the phrase "organized under the laws of the United States . . . . "38 Stat. 172 (1913).

[8] 265 U.S. 144 (1924).

[9] Ibid., at 157.

[10] 296 U.S. 344 (1935).

[11] Ibid., at 359.

most of these corporate features, the certificates were not assignable. This fact, however, tends to lose significance since a cestui could surrender his certificate to the trustee for cash and thereby achieve much the same liquidity which assignability would have conferred. The right to surrender in itself may, of course, in theory deprive the trust of that permanency of capital which is characteristic of a corporation; in practice, however, this right has resulted in slight impairment of the trust fund, for less than 2 per cent of the certificates were redeemed in the taxable year.[12]

The court, considering only the question of whether the trust was carrying on a business, emphasized the fact that the depositor could create new interests by depositing any eligible bonds without regard to the existing composition of the corpus. This power, coupled with the power to sell investments whenever the depositor deemed it advisable, enabled the depositor to improve the quality of the trust fund by taking advantage of favorable market conditions; these powers were broad enough, in the opinion of the court, to justify a finding that the trustees were engaged in business.

An unusual feature of the trust involved in the principal case is that the depositor and the trustee could not reinvest the funds. In cases where reinvestment has been allowed, the courts[13] and the Board of Tax Appeals[14] have uniformly held the trusts taxable as associations.[15] Since few cases have come before the courts where reinvestment of trust funds was not permitted, the materiality of this feature cannot be fully determined. In *Equitable Trust Co. v. Magruder*,[16] where there was no power to sell the securities or to reinvest, the court held the trust taxable as a strict trust rather than as an association. That case, however, is distinguishable since the trust instrument there involved allowed investment in the stock of one investment corporation only and hence conferred little power to take advantage of market changes. Thus, it is questionable whether the decision in the principal case represents a broadening of the definition of "association."

In *Com'r v. Chase Nat'l Bank*,[17] decided by the same court on the same day as the principal case, respondent was trustee of four investment trusts similar to that in the instant case, except that the depositor was to place with the trustee "units" of common stock consisting of sixteen shares in each of thirty corporations in exchange for assignable certificates. New beneficial interests could be created by depositing units identical

[12] $102,530.39 out of corpus of $6,266,340.77 worth of bonds were liquidated to pay holders for certificates surrendered, 122 F. (2d) 545, 550 (1941).

[13] Hamilton Depositors Corp. v. Nicholas, 111 F. (2d) 385 (C.C.A. 10th 1940); Brooklyn Trust Co. v. Com'r, 80 F. (2d) 865 (C.C.A. 2d 1936); Ittleson v. Anderson, 67 F. (2d) 323 (C.C.A. 2d 1933), noted in 47 Harv. L. Rev. 716 (1934); Continental Bank & Trust Co. v. United States, 19 F. Supp. 15 (N.Y. 1937). But cf. Eaton v. Phoenix Securities Co., 22 F. (2d) 497 (C.C.A. 2d 1927).

[14] Schroeder Employees Thrift Club, 36 B.T.A. 645 (1937); A-C Investment Ass'n, 24 B.T.A. 582 (1931); Tulsa Mortgage Investment Co., 21 B.T.A. 735 (1930).

[15] Even where the power to reinvest is given, testamentary and family trusts are seldom held to be associations. McKean v. Scofield, 108 F. (2d) 764 (C.C.A. 5th 1940); Lyman, Trustee, 36 B.T.A. 161 (1937); Murphy Personal Property Trust, 25 B.T.A. 724 (1932); cf. City Bank Farmers Trust Co. v. Com'r, 313 U.S. 121 (1941). Contra: Com'r v. Vandergrift Realty & Investment Co., 82 F. (2d) 387 (C.C.A. 9th 1936).

[16] 414 C.C.H. Fed. Tax Serv. ¶ 9325 (D.C. Md. 1941).

[17] 122 F. (2d) 540 (C.C.A. 2d 1941).

in composition with existing units. By the terms of the first two trust instruments the depositor could direct sales only upon the occurrence of a few specified events,[18] but under the other two trusts, the depositor could direct the sale of a stock whenever in its opinion it would "increase the sound investment character of the stock units." Again, there was no indication as to the actual practice in distributing the proceeds. As in the principal case, there was no power to reinvest. The court, holding this trust not taxable as an association, distinguished the two cases on the ground that in the *Chase* case there was no opportunity to improve the investment quality of the corpus by adding units, because the new units had to be identical with the old, whereas in the instant case the depositor, when creating new interests, could select any eligible bonds and thus take advantage of the market to improve the quality of the whole trust fund. If the North American Bond Tust was a quasi-corporate organization engaged in carrying on a business, it might be said that the two subsequently established trusts in the *Chase* case were also taxable as associations since the power to sell fluctuating securities gives the trustee and depositor considerable ability to take advantage of market fluctuations. Furthermore, even the terms of the two original trusts in the *Chase* case permitted certificate holders to realize a profit by surrendering their certificates when prices of the underlying securities were high. Although the profits realized by surrender would not accrue to the trust, nevertheless they were made possible by the terms of the trust agreement. Hence the almost equal profit-making opportunities of the trusts in these two cases would seem to put them in the same classification for taxation purposes.[19]

It would seem that greater attention should have been paid to the actual operation of the trusts and less to the formal set-up. While in theory reinvestment of earnings was not allowed, there is some indication that it was not unusual for the cestuis to purchase additional interests with proceeds received from the sale of securities.[20] The actual operations and purposes of the trusts in these cases should determine their tax status rather than apparent limitations on the trustee's powers which do not in fact curtail profit-making activities.[21]

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**Labor Law—Fair Labor Standards Act—Computation of Overtime Compensation—[Federal].**—Prior to the passage of the Fair Labor Standards Act[1] the plaintiffs, five

[18] These events were designated in order to permit sales to preserve the liquidity, diversity and soundness of the investments. Ibid., at 542.

[19] From one standpoint, the Chase trusts bore an even greater resemblance to a corporate organization than did the North American Bond Trust. The certificates in the Chase trusts were assignable. Note 17 supra.

[20] During the taxable year the number of cestuis increased by 21.3 per cent while the number of new interests increased by 28.4 per cent. Data compiled from Abstract of Record, at 18, Com'r v. North American Bond Trust, 122 F. (2d) 545 (C.C.A. 2d 1941). While this greater increase in number of interests than in number of cestuis may be due to the fact that the new cestuis were buying on the average a greater number of interests than their predecessors, it may also be due to reinvestment by the old beneficiaries.

[21] Com'r v. Vandergrift Realty & Investment Co., 82 F. (2d) 387 (C.C.A. 9th 1936).

[1] 52 Stat. 1060 (1938), 29 U.S.C.A. §§ 201–19 (Supp. 1940).