

EFFECT OF CORPORATE TRANSFORMATION UPON ADEMPTION, LAPSE, AND FIDUCIARY APPOINT- MENTS

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The merger, consolidation and other transformations of corporations give rise to three closely related problems. One of them involves the ademption of legacies of stock in a corporation which, before the testator's death, has passed through some form of change. In the case of legacies, it is commonly said that if the thing (tangible or intangible) does not continue to exist, the legacy is adeemed. Another arises in those cases where the beneficiary of a legacy is a corporation and the question is whether its successor is entitled to the gift. A third problem exists where a corporation is appointed executor or trustee or both and after an alteration in its structure takes place, the new corporation claims the privilege of succeeding to the appointment. The same general principles may be applicable to all three situations.

The more important changes of corporate structure raising the issue of ademption of legacies are: (1) recapitalization involving split-ups and reductions, and change from common to preferred and the reverse; the conversion of securities into another form involving substitutes of a different quality and the bringing of surplus into capital by the declaration of stock dividends, (2) merger, (3) consolidation, (4) reorganization, (5) sale of assets.

I. ADEMPTION OF STOCK LEGACIES BY ALTERATION OF THE CORPORATION

The earlier view respecting ademption attempted to give effect to the intent of the testator.¹ Later, under the influence of Lord Thurlow, the test of ademption came to be "does the thing bequeathed continue to exist as a part of the estate?"² We have never, however, gotten wholly away from the conviction that the intention of the testator should be considered, and courts are now more frequently following that which they believe is the intent rather than simply the difficult test of un-

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1. (1935) 10 WIS. L. REV. 307, 308. For an excellent discussion, see Mechem, *Specific Legacies of Unspecific Things—Ashburner v. MacGuire Reconsidered* (1939) 87 U. OF PA. L. REV. 546. See also Notes (1929) 63 A. L. R. 639; (1935) 97 A. L. R. 1033; (1938) 117 A. L. R. 811. See also *In re Slater* [1907] 1 Ch. 665, 8 ANN. CAS. 141 (1908); Comment (1932) 41 YALE L. J. 101.

2. *Ashburner v. MacGuire*, 2 Bro. C. C. 108, 29 Eng. Rep. R. 62 (1786).

changed existence. In fact, it appears that the law of wills respecting ademption frequently finds itself in conflict with corporate theory expressed in many decisions, that the economic equivalent of the stock given goes to the legatee. Thus, it may be suggested that the older rule of property law which is stricter and inelastic, conflicts with the later rule of corporation law due to the rapid changes which are being made in investment practices, and which invite a different legal result.

(1) Recapitalization

(a) *Split-ups and Reductions*: In all cases where the legacies have been held to be specific, the additional number of shares after the split-up occurred also passed to the legatee.³ If there is a reduction in the number of shares arising from an increase in the par value, additional purchases, even though they make the total number of shares held in the estate equal to the number given in the will, do not pass under the legacy.⁴ The principle of economic equivalent is fully recognized. If, on the other hand, the legacy is general, then the increased number after a split-up does not pass to the legatee.⁵

In the case of split-ups or reductions, there are usually few circumstances affecting the result other than the question whether the gift is specific or general. In *In re Gillins*,⁶ particularly, a case of a general legacy, it is noted that the result that the increased number does not pass cannot be the one intended by the testator. He had, by will, apparently disposed of all his property, including his stocks. To hold that the increase does not pass to the legatees is to leave him intestate in some portion of his stocks. If one must insist upon the "my" test⁷

3. *Fidelity Title & Trust Co. v. Young*, 101 Conn. 359, 125 Atl. 871 (1924) (5 shares for 1 split-up); *Birley's Administrators v. United Lutheran Church in America*, 239 Ky. 82, 39 S. W. (2d) 203 (1931) (par reduced and 4 shares for 1 split-up); *First National Bank v. Union Hospital*, 281 Mass. 64, 183 N. E. 247 (1932) (2½ shares for 1 split-up); *In re Mandelle's Estate*, 252 Mich. 375, 233 N. W. 230 (1930) (split-up accompanied by reframing of corporate structure and par changed to no par); *In re Martin's Will*, 252 N. Y. 582, 170 N. E. 151 (1929) (4 shares for 1 split-up); *Walton v. Walton*, 7 Johns. Ch. 258 (N. Y. 1823) (3 shares for 1 split-up of stock in navigation company. Stock became vested in the state by act of the legislature and the sum paid for it goes to the legatee); *Re Greenberry*, 55 Sol. J. 633 (Ch. 1911) (10 shares for 1 split-up). *But see Wood's Estate*, 267 Pa. 462, 110 Atl. 90 (1920).

4. *Fidelity Ins. Trust and Safe Deposit Co.'s Appeal*, 108 Pa. 492, 1 Atl. 233 (1885). There, par was doubled and the number of shares reduced by one-half. The shareholders were given the right to buy additional shares which the testator did and so had the exact number named in the will.

5. *Heckler v. Young*, 264 Ill. App. 34 (1931) (here the increased number passed, though the legacy was general because of the intent shown by other language); *In re Gillins* [1909] 1 Ch. 345 (5 shares for 1 split-up. The court points out that such gifts are *generic*, subject to increase and diminution).

6. [1909] 1 Ch. 345. See also *Re Gray* [1887] 36 Ch. 205, where there was 2 shares for 1 split-up, and an unlimited company (partnership) was changed to a limited company along with a change of par from 100 to 60. The legacy was *general* and the legatee took all.

7. This test, not used here, provides that the use of the words "my stock" in the will indicate that ademption is to be determined as of the time the instrument was executed.

as the distinction between specific and general, he may still urge that the will should be interpreted as of its own date.⁸ Other circumstances occasionally appearing along with split-ups, such as stock dividends, change in capital structure, change of name, property taken over by the state, are discussed later.

(b) *Interchange of Par and Non-Par, of Preferred and Common:*

Is the change of par stock to non-par or of non-par to par, or of preferred to common, or of common to preferred a change of substance? The authorities on this matter, taken alone, are very meager. There are usually other factors involved which are likely to be of themselves controlling. In *In re Mandelle's Estate*,⁹ however, the only other factor was a split-up. This fact, as has been seen, is without significance. Par was exchanged for no-par and the court held there was no ademption because there was no intent to adeem. Notice was taken of the fact that the change was not initiated by the testatrix, and the test of economic equivalence was not specifically applied. In a similar way in *Will of Himmers*,¹⁰ the common stock, subject of the legacy, was replaced partly with common and partly with preferred. Not only was the capital structure altered, but there was a complete reorganization. There was no ademption, said the court, because there was no *intent* to adeem. The book value had more than doubled after the will was executed at or before the time of the reorganization. Probably a change from par to non-par or from non-par to par may be regarded as formal. There is little difference to the investor, economically, whether his stock is par or non-par.

It scarcely seems possible, however, to say that the change from common to preferred is merely formal. The alteration in the right to preference for dividends and in the assets on winding up appears to be a substantial change. The justification for the result must depend upon either the intent of the testator, or upon the proposition that he had received an approximate economic equivalent for his old stock.

(c) *Stock Dividends:* Specific legacies of stock draw to themselves such stock and cash dividends as are declared after the testator's death.¹¹ With respect to stock dividends declared before the death of

8. This is precisely the ground for no ademption in *Uhrig v. Johns Hopkins University*, 145 Md. 114, 125 Atl. 606 (1924).

9. 252 Mich. 375, 233 N. W. 230 (1930).

10. 216 Wis. 294, 257 N. W. 148 (1934). See also *In re Leeming* [1912] 1 Ch. 828, 106 L. T. R. (N. S.) 793 (reorganization and same name retained, ordinary shares were replaced by ordinary and preference shares).

11. *McLaran v. Crescent Planing Mill Co.*, 117 Mo. App. 40, 93 S. W. 819 (1906) (dividend shares declared after death); *Maclaren v. Stainton*, 3 DeG. F. & J. 202, 45 Eng. Rep. R. 855 (Ch. App. 1861). Cash dividends paid or declared before death do not go to the specific legatee. *Matter of Kernochan*, 104 N. Y. 618, 11 N. E. 149 (1887) (cash dividend paid to testator); *Brundage v. Brundage*, 60 N. Y. 544 (1875)

the testator, the courts do not agree upon how they shall pass. In one English case,¹² where the legacy was specific there was an increase called a bonus issue, but it may have been like a split-up of shares rather than a capitalization of surplus. The increase, however, did not pass as part of the legacy, the argument being that only so many shares as are mentioned can pass. But this does not agree with the theory or result in the split-up cases. It is flatly declared in Rhode Island, also, that stock dividends do not pass to the specific legatee,¹³ and the same result was reached in New York in *Matter of Brann*.¹⁴ Here thirty shares of the Standard Oil stock were specifically bequeathed. The company had been required by court order to de-consolidate and therefore it had declared stock dividends in its subsidiaries. After the distribution of subsidiary stock to shareholders the testatrix executed a codicil but took no notice of the stock dividend. She did, however, make several small pecuniary legacies which must fail if the stock dividends pass with the specific legacy. The shares were still not far below their former market value, whereas if the dividends pass the former value would be greatly enhanced. The result probably agrees with the presumed intention of the testatrix, and gives to the legatee the economic equivalent of the legacy at the time the will was executed.

Three courts of last resort have held that the stock dividend passes with the specific legacy. Thus, in *Chase National Bank v. Deichmiller*,¹⁵ not only the additional shares arising from a split-up but the additional shares arising from capitalizing surplus went to the legatee. Intent was declared to be a material factor with reference to the question of ademption, and it was felt that the testator meant to give the

(interest certificates delivered to the testator). For general legacy and cash dividend, see *Cogswell v. Cogswell*, 2 Edw. Ch. 231 (N. Y. 1834); *De Gendre v. Kent*, L. R. 4 Eq. 283, 16 L. T. R. (N. S.) 694 (1867). In *Ogden v. Pattee*, 149 Mass. 82, 21 N. E. 227 (1889) it was held that a dividend coupon overdue at the testator's death, but still attached, passed to the specific legatee.

12. *Norris v. Harrison*, 2 Madd. 268, 56 Eng. Rep. R. 333 (V. C. 1817).

13. *Sherman v. Riley*, 43 R. I. 202, 110 Atl. 629 (1920); *accord*, *Union Trust Co. v. Taintor*, 85 Conn. 452, 83 Atl. 697 (1912); *Hicks v. Kerr*, 132 Md. 693, 104 Atl. 426 (1921); *McGregory v. Gaskill*, 296 S. W. 833 (Mo. App. 1927). See also Notes (1921) 10 A. L. R. 1326; (1934) 89 A. L. R. 1130.

14. 219 N. Y. 263, 114 N. E. 404 (1916). See also *Brundage v. Brundage*, 60 N. Y. 544 (1875), which cannot properly be classed with this case since the dividend was not stock but interest certificates and so more similar to a cash dividend. This case has the effect of overruling *Matter of Leavitt's Estate*, 86 Misc. 609, 148 N. Y. Supp. 758 (Surr. Ct. 1914), where it was held that dividends declared in subsidiary corporations did pass, otherwise there would be a great decrease in the value of the specific legacy.

15. 107 N. J. Eq. 379, 152 Atl. 697 (1930). In *Hayes v. St. Louis Union Trust Co.*, 317 Mo. 1028, 298 S. W. 91 (1927) the court observed that a stock dividend was not a dividend at all in any true sense. "A dividend", it said, implies a division and severance from the corporation's assets of the subject of the dividend and a distribution thereof among the shareholders. But a stock dividend is a mere incident of bookkeeping. Thus, equity comes in to modify the doctrine of ademption. See (1926) 11 CORN. L. Q. 271; (1926) 14 Ky. L. J. 182.

shares as they had been, which included in their value their proportionate part of the surplus. So, in *Will of Hinners*,¹⁶ where there was a reorganization and an alteration of the capital structure, the stock dividend was declared to be a part of the reorganization plan and for that reason passed with the stock in the reorganized company. The book value had doubled after the will was executed, due to the accumulation of surplus. The stock dividend was obviously a part of the stock and created a mere formal change as to a stockholder. Although the court observes that generally the specific legatee does not get the stock dividend, the facts of the case are not such as should make it peculiar. Likewise, in Kentucky¹⁷ it has been held that where there was a merger of *T* bank into *P* bank and the testator received five shares of stock in the *P* bank in place of his five shares of *T* stock, and in addition he received a liquidating dividend of stock in a real estate corporation (coincidentally formed to take over the *T* bank's land holdings) this dividend also passed to the specific legatee. The court's opinion warrants the conclusion that stock dividends should pass to the legatee because they are part of the principal stock given him.

In the analogous case of the successive interests of life tenant and remainderman, the rule adopted by the American Law Institute takes into consideration the period of time during which the surplus has accrued. If the accrual occurs between the time the trust was established and the death of the life tenant, then it goes as income to the life tenant. This rule is regarded as expressive of the intent of the settlor.¹⁸ In the same way it seems fair to suppose that the testator means to give all the economic interest in the corporation represented by the specific shares bequeathed. If in the case of split-ups, which primarily affect the capital stock, the legatee gets the new number as well, he should also have the extraordinary stock dividend which represents the interest which, prior to the declaration, attached to the surplus.

(2) Change of Name

The case of mere change of name, not associated with a consolidation or reorganization or change from a state into a national corporation, is not frequent. It is likely to occur in connection with some

16. 216 Wis. 294, 257 N. W. 148 (1934), and see *In re Adams' Estate*, 90 Misc. 254, 152 N. Y. Supp. 727 (Surr. Ct. 1915), where the testatrix, after having specially bequeathed her 166 shares of mining stock, later received 472 additional shares as stock dividends. These were held to pass to the specific legatee. Under much the same facts, a contrary result was reached in a recent English case. *In re Kuypers* [1925] Ch. 244, 133 L. T. R. (N. S.) 468. Here the stock dividend was issued in compensation for reduction in rights. To have given double the number of shares named in the will would have resulted in a slightly increased call on dividends (16% rather than 15%) but would have had no effect on the proportionate interest in corporate capital.

17. *Goode v. Reynolds*, 208 Ky. 441, 271 S. W. 600 (1925).

18. See RESTATEMENT, TRUSTS (1935) § 236.

alteration in the corporate structure,¹⁹ and is mere formality, having no effect upon the legacy.

(3) Liquidation Without Reorganization

Presumably the liquidation of a corporation does not adeem the legacies of stock in it save as the value of the assets is lessened, but there is not much authority on this point.²⁰

(4) Alteration of Status from State to National Bank

This problem is more commonly raised in those cases where a bank has been named executor-trustee and alters its status thereafter. Thus, a state bank may become a national bank subject to the federal statutes and supervision. A consideration of this matter is for the present reserved. There is clearly here no change of substance economically which should cause an ademption.²¹

(5) Conversion and Substitution

The securities may contain a provision for conversion such as bonds for stock or stock for bonds, and the testator may convert by an agreement, subsequently made, or the conversion may be made involuntarily so far as he is concerned.

If the proposed conversion of stock into bonds is not completed at the death of the testator, the subsequent conversion naturally does not cause an ademption, even though the testator has made a voluntary arrangement for the conversion. If there was any intent to adeem, it was not expressed in a way as to be effective.²² Thus in Maryland,

19. *Uhrig v. Johns Hopkins University*, 145 Md. 114, 125 Atl. 606 (1924) (mere change of name so far as appears); *In re Clifford* [1912] 1 Ch. 29, 106 L. T. R. (N. S.) 14 (similar); *Guardian Trust & Exrs. Co. v. Smith* (1923) N. Z. L. R. 1284 (change of name and alteration of the memorandum of association). See discussion of reorganization, p. 680 *infra*.

20. See *Walton v. Walton*, 7 Johns. Ch. 258 (N. Y. 1823) (charter had expired and assets were transferred to trustees for the shareholders). *Cf. In re Howard's Estate*, 46 Misc. 204, 94 N. Y. Supp. 86 (Surr. Ct. 1905). Here there was a legacy of "all my deposit of money in B bank". The bank was liquidated and one dividend had been placed to the credit of testator of which he had used a part. It was held that the legatee gets the balance in preference to the residuary legatee. In *Guardian Trust & Exrs. Co. v. Smith* (1923) N. Z. L. R. 1284, the corporation was first consolidated with another. The new corporation failed and was liquidated. Its assets were sold to a trustee for a new corporation and the liquidators received one-half the stock in the new corporation. The court held that the legacies were adeemed. This is not, however, a clear case on liquidation.

21. *Maynard v. Mechanics National Bank*, 1 Brewst. 483 (Pa. C. P. 1867) (legacy of stock of a state bank which became a national bank); *cf. Michigan Ins. Co. v. Eldred*, 143 U. S. 203 (1892) (change of a state into a national bank with change of name does not affect its identity nor right to sue on claims due it under its former name); *Poisson v. Williams*, 15 F. (2d) 582 (E. D. N. C. 1926) (trustee transformed from a state to a national bank); *Adams v. Atlantic Nat. Bank*, 115 Fla. 399, 155 So. 648 (1934) (state bank named executor merged with national bank); *Alt v. Liberty Nat. Bank*, 260 Ky. 87, 83 S. W. (2d) 866 (1935) (state bank named executor became a national bank).

22. *In re Frahm's Estate*, 120 Iowa 85, 94 N. W. 444 (1903). See, *Effect on Bequest of Stock of Substitution or Change of Stock by the Company* (1929) 63 A. L. R. 639.

it is held that where the substitution of bonds, not convertible by their terms, for stock did not originate with the testator, there is no ademption.²³ It is clearly implied, therefore, that ademption is a matter rather of intent than of change of form or substance. If the change were initiated by the testator there is room for the inference that an ademption was intended. But such an inference seems far fetched. The intent to make a substantial alteration in one's holdings need not be an intent to adeem. Here again the economic substitute may be found in the existing thing. In *In re Pilkington's Trust*,²⁴ stocks were replaced by bonds, the transaction being a general one initiated by the corporation. The testator assented and later republished his will, but made no mention of the matter. Jarman thinks that the republication is without significance in this respect,²⁵ knowledge by the testator of the new quality being held to be unimportant. It was not his voluntary act, since the will made a gift of the bonds "according to the nature and quality thereof". These words indicate a lack of intent to adeem.

In *In re Lane*²⁶ the conversion of debentures into debenture stocks was made at the maturity of the bonds and not in pursuance of any conversion privilege incident to the execution of the bonds. Being a voluntary change of substance, this was regarded as indicating an intention to adeem. Here also is the implication that there would have been no ademption if the bonds had contained a recital of the conversion privilege. In such a case, the legacy contains within itself its quality of alterability. However, it is important to note the case of *First National Bank v. Perkins Institute*,²⁷ where the legacy consisted of callable stock which was called, and in substitution therefor the underwriters offered debentures, the funds so derived to be used to purchase the stock. It was held that since the debentures came from the bankers and not from the company, there was a change of sub-

23. Uhrig v. Johns Hopkins University, 145 Md. 114, 125 Atl. 606 (1924) (there was also a reorganization, and bonds in the new corporation were substituted). See also *Spinney v. Eaton*, 111 Me. 1, 87 Atl. 378 (1913) (stocks exchanged for bonds of same company, the change being initiated by the company). In *Kenaday v. Sinnott*, 179 U. S. 606 (1900), a deposit of \$10,000 in a bank was specifically bequeathed. The testator drew out \$9,000 and invested it in bonds. The court inferred from the fact that this was part of the provision for his wife and also because he would otherwise have died partially intestate, that there was no ademption.

24. 13 L. T. R. (N. S.) 35 (V. C. 1865). See also *Bronsdon v. Winter*, 1 Amb. 57, 27 Eng. Rep. R. 32 (Ch. 1738). In *Re Lane*, 14 Ch. D. 856 (1888) the exercise of an option to exchange debentures for debenture stocks was held an ademption.

25. I JARMAN, WILLS (7th ed. 1930) 189, n. 8. See also *Hosea v. Jacobs*, 98 Mass. 65 (1867) note 51 *infra*, noted there on the matter of republication.

26. 14 Ch. D. 856 (1888).

27. 275 Mass. 498, 176 N. E. 532 (1931). See also *Beck v. McGillis*, 9 Barb. 35 (N. Y. 1850) (bond secured by mortgage, mortgage foreclosed and land resold and new bond and mortgage received from a different purchaser); *Blackstone v. Blackstone*, 3 Watt. 335 (Pa. 1834) (bequeathed stock sold and purchaser's bond for payment received).

stance involving a change of obligor and so an ademption. Although the economic aspect was not considered, it seems that a change of obligor does not necessarily work an ademption where a substantially economic equivalent is found. Thus, where the legacy consisted of a note signed by *A* and *B* and the testator accepted a new note in place of it signed by *B* and *C*, there was, in the opinion of the court, no ademption.²⁸

Here we may also consider those cases where the state is successor to private corporations and the obligations of the latter are transformed into those of the former. In an early New York case²⁹ the obligation of the state substituted for stock of a private corporation caused no ademption. In the later English case of *In re Slater*,³⁰ however, the court held there was an ademption. There the testator bequeathed the interest from money invested in the stocks of a certain private water company. By statute and under eminent domain proceedings the shareholders received semi-municipal stocks instead of cash when the municipality took over the plant. The court laid some emphasis upon the fact that these new shares were interests in a unified project resulting from the union of a number of water works projects located throughout London, while the bequeathed shares represented interests only in a constituent corporation—a change of economic substance. Apparently, then, the New York court applied the economic test and the English court applied the test of substantial change though the facts are similar.

Where the substance or identity is maintained, though the alteration affects a term of the description, there is naturally no ademption. Thus, a legacy of the whiskey business located at *X* is somewhat analogous to a gift of shares of stock. A change of location is not a change of substance.³¹ So a general legacy of annuities described in such way as to be referable only to those in existence at the date of the will, is not

28. *Pope v. Hinckley*, 209 Mass. 323, 95 N. E. 798 (1911) (a voting trust certificate obligation of the reorganization committee substituted for stock); *Prendergast v. Walsh*, 58 N. J. Eq. 149, 42 Atl. 1049 (1899) (deposits in four banks withdrawn and redeposited in other banks); *Stout v. Hart*, 7 N. J. L. 414 (1801); *Doughty v. Stillwell*, 1 Bradf. 300 (N. Y. Surr. Ct. 1850) (note of a church secured by mortgage bequeathed. On transfer of church to another church, a new note and mortgage were substituted); *Skipwith v. Cabell*, 19 Gratt. 758 (Va. 1870) (private bonds guaranteed by the state surrendered and state bonds substituted). Cf. *Tipton v. Tipton*, 41 Tenn. 252 (1860), where a note was sold and the note of the purchaser was accepted, it was held there was an ademption. Compare *Holmes v. Langley* [1913] 1 Ir. R. 232 (power of appointment adeemed by change of obligor), with *Browne v. M'Gire*, 1 Beatty Ch. R. 358 (Ir. 1829) (where there was an ademption in a case of government stock converted into other government stock).

29. *Walton v. Walton*, 7 Johns. Ch. 258 (N. Y. 1823); cf. *Oakes v. Oakes*, 9 Hare 666, 68 Eng. Rep. R. 680 (Ch. 1852).

30. [1906] 2 Ch. 480, 95 L. T. R. (N. S.) 350.

31. *Wiggins v. Cheatham*, 143 Tenn. 406, 225 S. W. 1040 (1920). See also *Elwyn v. De Garmendia*, 148 Md. 109, 128 Atl. 913 (1925), where a double pearl necklace consisted of one string within the other and one was given to *A*, the other to *B*. The combination of the two into one so that the originals were indistinguishable and their identity destroyed, did not work an ademption.

adeemed, where such annuities were first reduced in income and subsequently called in and new ones substituted.³² It is necessary here to consider the legacy from the standpoint of economic interest rather than from that of testamentary formula. Furthermore, there is no conflict over the proposition that a mere renewal of an obligation that has been bequeathed does not adeem it.³³

Merger, Consolidation, Reorganization and Sale of Assets: If the term *merger* is strictly used, then the merged corporation ceases to exist and the stock bequeathed is the obligation of a totally different obligor. Is this a mere change of form? With perhaps some exceptions³⁴ the authorities usually hold that legacies of stock in a corporation which later becomes merged are not adeemed by the merger.³⁵

Consolidation means that two or more corporations have become amalgamated and have formed a new one. The term is loosely used sometimes as applicable to any or all mutations which may occur. Generally a consolidation does not, of itself, cause an ademption. In *Goode v. Reynolds*³⁶ the testator bequeathed to *A* four of his eighteen shares in the Farmers' Bank. Before his death the Farmers' Bank consolidated with another bank and the consolidation assumed the name Farmers' Deposit Bank, the shareholders of the Farmers' Bank

32. *Sheffield v. Coventry*, 2 Russ. & M. 317, 39 Eng. Rep. R. 415 (1833); *Blair v. Scribner*, 65 N. J. Eq. 498, 57 Atl. 318 (1904), where the bonds bequeathed were surrendered and others of the same company substituted.

33. *Connecticut Trust and Safe Deposit Co. v. Chase*, 75 Conn. 683, 55 Atl. 171 (1903); *Ford v. Ford*, 23 N. H. 212 (1851) (new notes taken and one signer released); *Anthony v. Smith*, 45 N. C. 188 (1853) (renewal of bond by same debtor); cf. *Dingwell v. Askew*, 1 Cox 427, 29 Eng. Rep. R. 1233 (Ch. 1788). See *Smith, Ademption by Extinction* (1931) 6 WIS. L. REV. 229, 234; (1926) 11 CORN. L. Q. 271. If the subject matter of a specific legacy is sold and subsequently other shares of the same description are purchased, the legacy is held to be adeemed in spite of the fact that the will is to be construed as if written just at the time of death. Such a repurchase is not a substitution. *In re Gibson*, L. R. 2 Eq. 669 (1866).

34. *Kepple's Estate*, 19 Pa. Dist. 627 (1910).

35. *Goode v. Reynolds*, 208 Ky. 441, 271 S. W. 600 (1925); *Gardner v. Gardner*, 72 N. H. 257, 56 Atl. 316 (1903); *Matter of Spears*, 151 Misc. 181, 271 N. Y. Supp. 110 (Surr. Ct. 1934); *In re Jameson* [1908] 2 Ch. 111, 98 L. T. R. (N. S.) 745. (This is really a case, however, of misdescription. The testatrix had originally owned stock in Corporation *A* but it had merged with *B* and she had accepted *B* stock.)

36. 208 Ky. 441, 271 S. W. 600 (1925). Other such cases are: *Wood's Estate*, 267 Pa. 462, 110 Atl. 90 (1920); *In re Pierce*, 25 R. I. 34, 54 Atl. 588 (1903) (four corporations consolidated); *Oakes v. Oakes*, 9 Hare 666, 68 Eng. Rep. R. 680 (Ch. 1852) (This may be a species of consolidation. The change was authorized by a special statute which is a common English way of handling the situation); *Re Humphreys*, 60 Sol. J. 105 (Ch. 1915) ("All my shares in *A* Co." passes the shares held by testator in *B* Co. due to a reconstruction of *A*). *Contra*: *Horn's Estate*, 317 Pa. 49, 175 Atl. 414 (1934); *Re Atlay*, 56 Sol. J. 444 (Ch. 1912). In *Horn's Estate*, the testator made a specific legacy of stock in Co. *A*, which consolidated with *B* to form *C* and testator received stock in *C*, both common and preferred, in exchange. Later there was a 2½ split-up of the *C* stock and a declaration of 25% stock dividend. The legacy was held to be adeemed. This case follows the testamentary rule rather than that of economic equivalent. In the case of *Re Atlay, supra*, the testator made a specific bequest of stock in the *W* Co. at the time she owned stock in the *A* Co. At the time of her death, *A* and *W* had consolidated, forming a new company, *B*. The court held that the bequest failed. *Quaere*, however, why the bequest in the *W* Co. could not be regarded as a misdescription for "*B* Co.".

receiving an equal number of the shares in the Farmers' Deposit Bank. They also received a large liquidating dividend. Later the Farmers' Deposit Bank combined with the Phoenix National Bank and the testator received four shares in it. Testator also bequeathed to *A* his stock in *N* bank, which thereafter consolidated with *P* bank, the testator receiving the same number of shares in the consolidated bank as he had old shares, plus a liquidating stock dividend in a third corporation. In holding, as to both legacies, that the new stock, as well as the stock dividend, passed to *A*, the court cited cases of split-ups, consolidations, reorganizations and obligations with change of obligor, which had held that there was no ademption. Mr. Justice Dietzman observed that one theory of ademption depends upon intent, and that even if the intent theory were not adopted, there was here no more than a formal change. This sums up however to the proposition that the legatee is to be placed in the equivalent economic position he would have enjoyed if there had been no change. The effect of this is that the exact language of the will is abandoned.

A *reorganization* of a prosperous as well as of a failing company may occur. It may amount to an alteration in the capital structure without change of name, or it may consist of a change of name and but little more.³⁷ Again, there may be a winding up of a failing corporation and a sale of its assets to a new or to a reorganized company. Thus, a reorganization may become so complete a transformation of the original as to make its shares of stock entirely different, as to the risk involved, as to personnel, or even as to its scope of activity, so that there may be little left of the original substance. A consolidation of several corporations thins down the original interest of a shareholder in one of them proportionate to the number and size of corporations involved and the amount of capital brought in. Further, additional ventures and hazards are introduced. Accordingly, the consolidated entity may easily involve little more than a memory of the old corporation. Yet even here the view is often taken that specific legacies of the original stock are not ademed. In the case of *Pope v. Hinckley*,³⁸ for example, the corporation went into the hands of a receiver. The assets were sold to a foreign corporation and the testator received a voting certificate from the reorganizers to be subsequently exchanged for new

37. See *In re Clifford* [1912] 1 Ch. 29, 106 L. T. R. (N. S.) 14 (mere change of name accompanied by 4 to 1 split-up); *In re Leeming* [1912] 1 Ch. 828, 106 L. T. R. (N. S.) 993 (change of name, and testator exchanged ten £5 shares preferred for 20 preferred and 20 common, each £5).

38. 209 Mass. 323, 95 N. E. 798 (1911). See *Gorham v. Chadwick*, 135 Me. 479, 200 Atl. 500 (1938), where the testator's will bequeathed common stock in corporation *X* to *A*. The company became insolvent and testator became liable on calls. To satisfy the liability, testator subscribed to new second preferred stock. And it was held that this passed under the specific bequest.

stock. The voting certificate passed in lieu of the stock. The same result was reached in *Pilkington's Trust*,³⁹ where the bonds of an embarrassed corporation having been bequeathed were surrendered for stock in the new one. On the other hand in *Bradley's Estate*,⁴⁰ *Re Leeming*,⁴¹ and *Re Kuypers*,⁴² it may fairly be said that the reorganized corporation was essentially similar to the old one, and for that reason there was no redemption.

The matter of sale of corporate assets normally involves the surrender of the charter of the seller and the liquidation and distribution of its assets to its shareholders. In such a case redemption of the bequeathed shares of its stock seems inevitable. If, however, the sale of assets is in pursuance of a reorganization scheme, the corporation having gone upon the financial rocks, it is merely another situation like the one outlined above.⁴³ Some authority however has been found to the effect that there is an redemption and that it makes no difference whether testator receives cash, or a bond, or new stock.⁴⁴

From the standpoint of the testamentary law the most astonishing thing about these cases is the violation of supposed redemption rules in the matter of conversion and substitution. The exchange of bonds for stock and stock for bonds has not infrequently been held to be without effect on the will. Courts, considering the question as one of corporation law, often hold that *intent* is of paramount importance though the testamentary rule is that intent does not control. Although the matter often is not one of voluntary or involuntary change of form, there is enough left of the testamentary rule to produce in many cases confused and irrational results. Perhaps equally strange are the consequences arising in cases of consolidation. There can scarcely be said to be a mere formal change in stock where a small corporation merges with a larger one, especially since the personnel is much changed and perhaps there is also an alteration in the nature of the business, a change of location, an increase in hazards, and a change in the business outlook. The same is true in reorganization cases, and yet in nearly all such

39. 13 L. T. R. (N. S.) 35 (Ch. 1865).

40. 119 Misc. 2, 194 N. Y. Supp. 888 (Surr. Ct. 1922) (corporation reorganized only because some shareholders refused to consent to renewal of the charter, which had expired). See also *Johns Hopkins University v. Uhrig*, 145 Md. 114, 125 Atl. 606 (1924), where the nature of reorganization was not shown, but it apparently involved considerable alteration of capital structure.

41. [1912] 1 Ch. 828, 106 L. T. R. (N. S.) 793 (reorganized company with change of name, essentially same as the one liquidated, though the capital structure was changed).

42. [1925] Ch. 244, 133 L. T. R. (N. S.) 468. The capital changes might have been made without a reorganization and change of name.

43. *Pope v. Hinckley*, 209 Mass. 323, 95 N. E. 798 (1911).

44. *Kepple's Estate*, 19 Pa. Dist. 627 (1910). *But cf.* *Buder v. Stocke*, 343 Mo. 506, 121 S. W. (2d) 852 (1938).

instances there is no ademption.⁴⁵ Thus the test whether the change is formal or substantial does not work. The problem whether trustees may retain securities received as a result of corporate transformations like those described above is somewhat analogous.⁴⁶

II. THE BENEFICIARY CORPORATION IS MERGED

So much for the effect of mergers, consolidations, reorganizations and mutations of capital structure upon the ademption of legacies of shares of stock in a corporation.

What effect do similar changes have when the beneficiary is transformed? In *Wright v. Wright*⁴⁷ the testator gave one-third of his

45. It is interesting to note how completely overlooked is this matter of ademption by writers on corporations. Thus, there is no such topic in FLETCHER, CORPORATIONS (1931). In 6 THOMPSON, CORPORATIONS (3d ed. 1927), § 4321, the short section on ademption deals with the ordinary cases of extinction and there is no discussion at all of the mutations of stocks through corporate modifications. See also 2 CLARK & MARSHALL, CORPORATIONS (1901) 1613; 2 COOK, CORPORATIONS (8th ed. 1923) §§ 299-307.

The discussion of the matter in treatises on wills is fragmentary. See 2 JARMAN, WILLS (7th ed. 1930) 1038-1044; 2 PAGE, WILLS (2d ed. 1926) §§ 1333-1335; 2 WILLIAMS, EXECUTORS (12th ed. 1930) 862-3; 3 WOERNER, AMERICAN LAW OF ADMINISTRATION (3d ed. 1923) 1524-5.

46. In an early New York case, *Hogan v. De Peyster*, 20 Barb. 100 (N. Y. 1855), a corporation was chartered by the United States and the charter expired. The shareholders received stock in the United States bank chartered by Pennsylvania (a bank organized to take over the assets of the former). It was held that a trustee was not liable to a penalty for holding the new stock, though the new corporation later failed. But it has also been held in New York that stocks of subsidiary corporations received by the trustee as liquidating dividends could not be continued in his portfolio. *In re Franklyn Trust Co.*, 84 Misc. 686, 147 N. Y. Supp. 885 (Surr. Ct. 1914).

The English court has, on at least one occasion, held that stock in a reorganized company could be held under the terms of the trust permitting the retention "in the present form of investment". The court said that there was no difference in the business. "Of course shares in the new company are not shares in the old. . . . I ought to look at the substance of the transaction." *Smith v. Lewis* [1902] 2 Ch. 667, 671. This case conflicts with *Bucknill v. Morris*, 54 L. J. (N. S.) 388 (Ch. 1885) and was criticized in *Lovelace v. Anson* [1907] 2 Ch. 424, where trustees held stock in a holding company which held the stock of two railways. This stock was cancelled, and it was said that the trustees could not retain the new stock in the two railways issued in lieu of the old stock. In accord with *Smith v. Lewis*, *supra*, *Anderson v. Bean*, 272 Mass. 432, 172 N. E. 647 (1930); *Macfarlane's Estate*, 317 Pa. 377, 177 Atl. 12 (1935). In the latter case, the trustee joined in a reorganization plan and received in return for the old common stock, new stock partly common and partly preferred. It was held that he might hold the new stock, it being substantially equivalent to the old. In the *Anderson* case, the assets of a Maine corporation were transferred to a Massachusetts corporation of the same name, and stock in the latter was issued to the trustee in lieu of stock in the former corporation. It was held that he may continue to hold them. See 2 SCOTT, TRUSTS (1939) § 231.4. Not so where the reorganization involves the exchange for securities of inferior quality and value, as in *Scott's Trust*, 322 Pa. 1, 184 Atl. 245 (1936). Where trustees are permitted to keep the new stock, it is generally on the ground of an emergency which equity will surmount. *In re New* [1901] 2 Ch. 534 (trustees permitted to assent to the reorganization of a prosperous company and hold the new stock); see *In re Tollemache* [1903] 1 Ch. 457, 461, *appeal dismissed, id.* at 955. Cf. *Old Colony Trust Co. v. Shaw*, 261 Mass. 158, 158 N. E. 530 (1927), where the terms of the will were broad enough to permit the purchase or retention of the new shares. See 2 SCOTT, TRUSTS (1939) § 167.

47. 225 N. Y. 329, 122 N. E. 213 (1919). See also *Gladding v. St. Matthew's Church*, 25 R. I. 628, 57 Atl. 860 (1904). The testator gave the principal over after the death of his son A to St. Ann's Church for the benefit of deaf mutes of New York City. There was at the time a church corporation named Rector, Church Wardens and Vestrymen of St. Ann's Church for Deaf Mutes of New York City. This church sold its buildings and was torn down and later consolidated (merged) with another having a similar name and the same objects. The court held that the legacy lapsed.

residuary estate to trustees in trust to pay the income to his sister for her life and after her death to pay out of the principal, the sum of \$100,000 to the Washington Heights Library in New York City. Before his death a statute was passed enabling all library corporations in New York City to consolidate. The statute provided that on consolidation, "all manner of rights and privileges and every species of property theretofore belonging to the separate companies should be deemed to be transferred to and vested in the new corporation". After the testator's death another statute was passed providing that when any library had transferred all its property to the New York Public Library (on conditions agreed upon) a surrender of the charter might be accepted (by the regents of New York University) and any devise or bequest contained in any last will which had been made to any corporation so conveying its property should not fail, but should inure to the benefit of the New York Public Library. Thereupon the Washington Heights Library, before the death of the life tenant, surrendered its charter, having conveyed its property to the New York Public Library under an appropriate agreement for maintenance of the library at its location. On the death of the life tenant, the New York Public Library claimed the benefit of the legacy to the Washington Heights Library. It was held (a) that no interest in the legacy vested prior to the death of the life tenant; (b) that the beneficiary having surrendered its charter, ceased to exist; and (c) the statute enacted in order to save the benefit to the claimant did not have that effect inasmuch as the legacy had already lapsed and was intestate property.

It follows from this holding that where a beneficiary corporation merges into or consolidates with another or others it ceases to exist and its successor does not take. Actually involved here is either a merger or a transfer of assets amounting to a sale, which has been held to be a mere merger.⁴⁸

It has been shown above that a merger generally does not cause the ademption of a bequest of the stock of the merged corporation.⁴⁹ There is a close analogy between the ademption and the lapse of legacies. In the one case the property no longer exists in the estate and in the other the beneficiary has ceased to exist. The issue of existence is the same and the same principles would seem to control.

The court relied upon *In re Bergdorf's Will*⁵⁰ as a precedent, in which the appointment of an executor and trustee of a merged bank was

48. Cf. *Collinsville Nat. Bank v. Esau*, 74 Okla. 45, 176 Pac. 514 (1918).

49. See cases in note 35 *supra*. The same is generally true of a consolidation, see cases in note 36 *supra*; and of a reorganization, see notes 38 to 42 *supra*.

50. 206 N. Y. 309, 99 N. E. 714 (1912).

held to pass to the surviving corporation. This was explained, however, as occurring by act of the legislature rather than by the fact of continuing identity. It was intimated that the appointment would have failed but for the statute. But the statute so relied on provided merely that all rights, franchises and interests of the merged corporation should pass to the continuing corporation. And it is commonly thought that if a statute is required to provide for the succession, such a provision is not broad enough to apply to fiduciary duties which are not assignable unless expressly made so by statute.

There are some cases reasonably parallel to *Wright v. Wright* which reach the contrary result. In *McCully's Estate*⁵¹ there was a gift to Grace Presbyterian Church. This organization consolidated with another of the same denomination to form the Waverly Presbyterian Church. The testator, formerly a member of the original group, executed his will while still a member, and on the accomplishment of the consolidation, took membership in the new organization, but never changed his will. It was held that the Waverly Presbyterian Church took the legacy. And the right of succession was not grounded on a statute. Likewise, in *In re Scrimger's Estate*,⁵² where a legacy had been left to the trustees of the old corporation, the new one was allowed to take. The beneficiary was a Roman Catholic Orphans Association, whose charter had expired prior to the execution of the will. After that a new association, having almost the same name and exactly the same purposes, was chartered. There were three grounds assigned for this result: (1) the beneficiaries are identical; (2) the corporation is the same; and (3) the *cy pres* doctrine may be applied. In support of the second position, the court quoted from an earlier case to the effect that where there is a reorganization under a new name but the shareholders are practically the same, the directors identical, and the business the same, "a court of equity will regard the new corporation as a continuation of the old".⁵³ This case might also be regarded as one of a merger, since if the new corporation received the property of the old one, it would undoubtedly be liable for the former's obligations.⁵⁴

51. 269 Pa. 122, 112 Atl. 159 (1920). See also *Hosea v. Jacobs*, 98 Mass. 65 (1867). There the testator gave a legacy to a church organization of which he was a member. Before his death it changed its name and place of worship and formed a new corporation. A codicil executed after this change expressly confirmed the will. In holding that the legacy did not lapse, the court said it was composed of the same membership, worshipped in the same manner and under the same discipline and used the same records. The fact of republication seems to be without significance. Cf. *Coldwell v. Holme*, 2 Sm. & G. 31, 65 Eng. Rep. R. 288 (V. C. 1854), where the gift went to the new society on the theory that it was merely misdescribed in the will. See also *Evans, Irregularities of Testamentary Expression* (1939) 27 Ky. L. J. 241, 247.

52. 188 Cal. 158, 206 Pac. 67 (1922).

53. *Stanford Hotel Co. v. Schwind Co.*, 180 Cal. 348, 354, 181 Pac. 780, 783 (1919).

54. *Collinsville Nat. Bank v. Esau*, 74 Okla. 45, 176 Pac. 514 (1918).

So in *Wright v. Wright*⁵⁵ the patrons of the library, the property devoted to its purposes, the location and all the surroundings of the new corporation are identical with those of the old, and if the testator were living he would have the same interest in the new organization as in the old. A court of equity might well have found such continuity of existence of the named beneficiary sufficient to warrant reaching a different conclusion from the one declared. The analogy of legacies of stock in corporations which subsequently undergo transformations points in the same direction. It seems probable that only charitable corporations will be involved in this type of situation. The Pennsylvania and California cases reach a sounder result, the existence of the trust in the California case not being regarded as a material factor. In the final analysis the evident intent of the testator should not be frustrated. In the *Wright* case no consideration was taken of the possible application of *cy pres*, and undue emphasis was placed upon the surrender of the charter.

III. THE MERGER OF A CORPORATE FIDUCIARY

The question whether a corporation which has been named executor-trustee and which thereafter undergoes various possible transformations, may qualify or if it has already qualified, may continue so to act, or may file the final account of the one originally named, has met with diametrically opposed answers. The degree, quality or number of transformations has played but little part in the matter.

In *Chicago Title Co. v. Zinzer*,⁵⁶ Trust Co. A, which had been appointed executor-trustee to sell land merged with Trust Co. B, the latter continuing the business of the former. By statute in Illinois such a merger is permitted but is expressly declared to be a consolidation rather than a merger. B contracted to sell defendant the land in question which constituted a part of the estate which was under settlement. In an action by the trustee for specific performance, it was held that B succeeded to A's appointment and could pass a good title. It was declared that the rule forbidding the delegation of fiduciary duties was not applicable to a corporation because the testator must know that management is subject to change. *In re Bergdorf's Will*⁵⁷ also decides

55. 225 N. Y. 329, 122 N. E. 213 (1919).

56. 264 Ill. 31, 105 N. E. 718 (1914). Cf. *First Minn. Trust Co. v. Lancaster Corp.*, 185 Minn. 121, 240 N. W. 459 (1931) involving a transfer of land to a trust company in trust. It merged with another company and later consolidated with still another to form the plaintiff. The plaintiff was allowed to sue on a lease made by the original trustee. The statute authorizing consolidation does not violate the constitution respecting the appointment of trustees by the courts. The matter of succession to the appointment does not depend upon a specific statute. See 15 FLETCHER, *CYC. CORP.* (Repl. Vol. 1938) § 7094; Bisbee, *Consolidation and Merger* (1929) 6 N. Y. U. L. Q. REV. 404, 421; Fruchtmann, *The Effect of Merger or Consolidation on the Succession of Corporate Fiduciaries* (1934) 22 Ky. L. J. 378; Note (1930) 8 N. Y. U. L. Q. REV. 126.

57. 206 N. Y. 309, 99 N. E. 714 (1912); accord, *In re Barreiro's Estate*, 125 Cal. App. 153, 13 P. (2d) 1017 (1932); *In re Barnett's Estate*, 97 Cal. App. 138, 275 Pac.

that in New York the appointment as fiduciary of a corporation that merges into another passes to the continuing company. The court gave two reasons for this holding: (a) Corporations are allowed to merge and to consolidate. The testator, knowing this fact, must be taken to have consented in advance to the delegation of the fiduciary duties and to have intended that such a succession should take place. This was the ground of the holding in Illinois. (b) The second reason is based upon the statute which provides that "all manner of rights and privileges and every species of property theretofore belonging to the separate companies shall be deemed transferred to and vested in the new corporation". The second reason is inconsistent with the first because the court expressly declared that the intent of the testator is without importance since it is enforcing the intent of the legislature. Further, as above observed, the language of the statute seems hardly broad enough to direct the succession of fiduciary duties to a new and different fiduciary if a statute is necessary. If the first ground stands, and it is more plausible than the second, a statute expressly transferring the appointment to the successor is probably unnecessary. Recently in Kentucky it has been held that where a state corporate trustee had been changed into a national bank the successor could exercise the appointment as executor. The case purports to find authority therefor in the statutes which authorize banks to do a trust business and those other statutes which authorize merger and consolidation and transmutation from state to national banks. No express authority, however, for the succession to fiduciary duties can be found in these statutes.⁵⁸ The court might well have placed its decision on the continued identity of the executor.⁵⁹ In Massachusetts, if there is a merger, the surviving bank appointed a fiduciary before the merger may continue thereafter, even though there was a change of name, since it operates under its former charter. The corporate identity continues, despite the fact that there may well be a material increase in the hazards of business arising from the merger.⁶⁰

453 (1929); *Mueller v. First National Bank*, 171 Ga. 845, 156 S. E. 662 (1931) (bank *A* appointee became bank *C* before testator's death). *Barnett's Estate* involved a very extended transformation. The nominee *A* sold out to *B*, who sold out to *C*, a state bank. *C* was transformed into national bank *D*. It was held that, under the statute, the successor could render the final account of the trustee. This is a case of continuing rather than of originally qualifying under the will.

58. *Alt v. Liberty National Bank & Trust Co.*, 260 Ky. 87, 83 S. W. (2d) 866 (1935). See also KY. STAT. ANN. (Carroll, 1936) § 588, authorizing reorganizations; and *id.* § 883c-1, authorizing banks to become fiduciaries and to change to national banks. See also *Adams v. Atlantic Nat. Bank*, 115 Fla. 399, 155 So. 648 (1934).

59. See cases cited note 21 *supra*.

60. See *Worcester Co. National Bank, Petitioner*, 263 Mass. 394, 399, 161 N. E. 797, 798 (1928), where a state bank consolidated with a national bank and the consolidated bank continued doing business under the charter of the national bank, though there was a change of name. This amounts to a merger. On the other hand, where

In case of change into a national bank, however, it is held that the successor cannot exercise the powers granted under the appointment. Thus, in *Petition of Commonwealth-Atlantic National Bank*,⁶¹ state bank *A*, having been appointed a fiduciary, was converted into national bank *B* during the lifetime of the testator and later merged with national bank *C*. It was held that bank *C* could not perform the duties arising under the appointment made to *A*. The observations were made that such an appointment is neither property nor an asset; that in the case of the appointment of a corporation there is some degree of trust and confidence implied, though it be subject to very great possible changes of management, hazards, etc.; that the distinctions between a state bank and national bank are fundamental, since the banks are controlled by different sets of laws, and since the state charter has to be surrendered. It was admitted, however, that the new corporation is identical for most purposes with the old one and that most of the powers of the merged corporation pass without express provision therefor.⁶² Moreover, the argument that the change of a state bank into a national bank is significant because of the difference in the control regulations and surrender of the old charter is alone clearly insufficient to create a change of identity. The unquestioned substantial continuance of the entity of a state bank when changed to a national bank seems to make inconsequential the contention in the Massachusetts cases that the change arising from the application of national laws and supervision, instead of state laws and supervision, makes the succession to the appointment impossible.⁶³ It must, therefore, be the consolidation thereafter which changed the identity, but even here the court says there is an identity for most purposes. Since a testator knows of the possibility or even probability of such a change, why may he not be said to have consented that the changed entity shall perform the appointment? The property of the old bank continues in the new one and doubtless most of the powers under the present charter were found in the old one; likewise, the corporate purposes are the same. In fact, the transformation is less great than would arise in case three corporations should merge into a fourth which formally continues with its name and char-

this same merged state bank had been appointed a fiduciary, the appointment was held not to pass to the consolidated bank. *Worcester Co. Nat. Bank, Petitioner*, 263 Mass. 444, 162 N. E. 217 (1928).

61. 249 Mass. 440, 144 N. E. 443 (1924).

62. E. g., a lease held by the merged corporation determinable at such time as the corporation shall cease to exist, is not terminated by a consolidation where the lessee disappears and the continuing company is chartered under the laws of a different state. *The lessor knew he was dealing with a corporation which was subject to change. Proprietors of Locks & Canals v. Boston & Maine R. R.*, 245 Mass. 52, 139 N. E. 839 (1923).

63. *But cf. Atlantic Nat. Bank, Petitioner*, 261 Mass. 217, 158 N. E. 780 (1927); *accord, Stevens v. First Nat. Bank & Trust Co.*, 173 Ga. 332, 160 S. E. 243 (1931).

ter. Thus, overemphasis is laid upon the purely formal continuance of the corporation which retains its charter, and perhaps its name, and too little significance is attached to the factual continuance of the merged company.⁶⁴

Where the new corporation succeeds to the appointment it may do so (a) because the identity of the merged corporation may be found to continue as the functional equivalent, or (b) because a statute may create the right of succession. Such a statute must be one which expressly transfers fiduciary appointments to the successor, and there are not many states which make express statutory provisions for this matter.⁶⁵

There are certain situations which, while formally somewhat analogous, are in no way controlling. Thus, (a) the question arises whether the transformed corporation may sue on claims due the original corporation; (b) one of the transformed corporations may have been granted certain tax exemptions; (c) the matter of paying a new organization fee to the state on the ground that a new entity has been created appears; and finally (d) the issue comes up whether certain powers granted in the original corporate charter may be exercised by the new corporation.

(a) In *actions on claims* due the predecessor authority in the successor to sue is assumed. This may be due in part to some statute and especially to the agreement of the original constituent corporations where the rights claimed were assignable.⁶⁶

(b) As to whether the *tax exemptions* of the old corporation exist in favor of the new, it may be surmised that the statute under which the privilege is claimed would always be strictly construed. It has been held that the adoption of a new name, the calling in of the certificates

64. It has occasionally been suggested that both corporations in a merger or consolidation continue their existence. See *Bishop v. Brainerd*, 28 Conn. 289, 299 (1859). In *Commonwealth v. First Nat. Bank & Trust Co.*, 303 Pa. 241, 154 Atl. 379 (1931) a state trust company joined with a national bank to form a national bank and trust company, using the charter of the national bank but with change of name. The consolidation did not extinguish the state corporation. Also where a domestic and a foreign corporation consolidate, it is commonly said that both continue to exist. See *Ohio & M. Ry. v. People*, 123 Ill. 467, 483, 14 N. E. 874, 880 (1888); *Vaughan v. Nashville C. & St. Louis Ry.*, 192 Ky. 137, 144, 232 S. W. 411, 415 (1921).

65. See statutes cited in 3 BOGERT, TRUSTS AND TRUSTEES (1935) § 531, nn. 15, 24. For decisions under such statutes, see *Estate of Barreiro*, 125 Cal. App. 153, 13 P. (2d) 1017 (1932); *In re Barnett's Estate*, 97 Cal. App. 138, 275 Pac. 453 (1929); *Mercantile Trust Co. v. San Joaquin Agr. Corp.*, 89 Cal. App. 558, 265 Pac. 583 (1928).

66. *Michigan Ins. Co. v. Eldred*, 143 U. S. 293 (1892) (where a state bank was converted into a national bank, the latter was allowed to sue on an obligation due the state bank); *Green Co. v. Conness*, 109 U. S. 104 (1883) (Bond issued by a county in payment of subscription for the construction of a railway; payee merged; held, that the successor may sue, because all franchises and privileges are merged); *Barrett v. Stoddard Co.*, 183 S. W. 644 (Mo. App. 1916) (same result where there is a consolidation).

for cancellation and the issuance of new certificates, and a subsequent filing of the articles with the Secretary of State, indicate that there was a complete destruction of the corporation, which fact destroys the tax exemption.⁶⁷ In the case of a merger, however, where the survivor had the tax immunity, the property acquired by the merger did not thereafter enjoy it, though the property and franchises of the survivor were unaffected by the merger.⁶⁸

(c) Most of the cases hold that from the standpoint of paying incorporation *fees*, the resultant corporation is a new one and must pay them.⁶⁹ This is a matter of course result.

(d) Whether the express *powers* found in the original charter or charters of the constituents continue under the new organization depends upon the wording of the statute under which the transformation takes place and perhaps somewhat upon the agreement made between these original corporations.⁷⁰ The power of delegation of fiduciary duties is not generally included among the express powers. So where a bank having, as trustee, the power to sell land on default of the debtor, merged with another, it was held that the successor had the same power.⁷¹ The rule against the power to delegate duties was declared inapplicable to corporations because when a corporation is selected as trustee the settlor knows that the management must in time change, and the choice does not depend upon personal confidence. He also

67. *Keokuk & Western R. R. v. Missouri*, 152 U. S. 301 (1894). See also *St. Louis & Southern Ry. v. Berry*, 113 U. S. 465 (1885). Cf. *Shields v. Ohio*, 95 U. S. 319 (1877); *People v. Rice*, 57 Hun. 547, 11 N. Y. Supp. 249 (3d Dep't 1890); 15 FLETCHER, CORPORATIONS (1938) § 7094.

68. *Tomlinson v. Branch*, 82 U. S. 460 (1872). See also *R. R. v. Georgia*, 98 U. S. 359 (1878); *Chesapeake & Ohio Ry. v. Virginia*, 94 U. S. 718 (1876); *Central R. R. and Banking Co. v. Georgia*, 92 U. S. 665 (1875); *Philadelphia and Wilmington R. R. v. Maryland*, 51 U. S. 376 (1850).

69. *Chicago Title & Trust Co. v. Doyle*, 259 Ill. 489, 102 N. E. 790 (1913) (this was, in fact, a merger, but is called a consolidation by the court, because the statute did not authorize a merger); *Scheidel Coil Co. v. Rose*, 242 Ill. 484, 90 N. E. 221 (1909). In *Clearwater v. Meredith*, 1 Wall. 25 (U. S. 1864), the defendant had guaranteed that the stock of corporation *A* would be worth a named amount at a given date. On that date *A* had consolidated with *B*, forming corporation *C*. Defendant was not liable as a guarantor of the *C* stock.

70. *R. R. v. Georgia*, 98 U. S. 359 (1878). In *Title Guarantee Loan & Trust Co. v. Alabama By-Products Corp.*, 214 Ala. 486, 108 So. 353 (1926) the merged corporation had power to mortgage its mineral rights. Since the statute gives to the successor all the rights, privileges, powers, and franchises of the predecessor, the former had the power to mortgage the mineral rights. The same result was reached in *Cooper v. Corbin*, 105 Ill. 224 (1882) (power to mortgage) and for the same reason in *Chicago, R. I. & P. R. R. v. Moffitt*, 75 Ill. 524 (1874), the new corporation was liable for a prior tort. See *Ohio & M. Ry. v. People ex rel. Hanna*, 123 Ill. 467, 14 N. E. 874 (1888). Cf. *Guardian Trust & Exrs. Co. v. Smith* (1923) N. Z. L. R. 1284. If the appointment or function claimed is not delegable, it is difficult to see how an agreement thereto by the corporations concerned can make it so.

71. *First Nat. Bank v. Chapman*, 160 Tenn. 72, 22 S. W. (2d) 245 (1929) (inter vivos transaction). The court cites the *McFadden Act*, 44 STAT. 1224, (1927); 12 U. S. C. A. § 34a (1934), but also cites cases reaching a similar result which do not depend upon this Act.

knows that the corporation may be absorbed into another. So in California, the trustee corporation, *X*, had been the grantee in a mortgage to secure an obligation. *X* consolidated with *Y* and became *Z*. On default *Z* successfully sued to foreclose the mortgage.⁷² In Maryland, however, the power of the constituent to execute certain bonds was denied to the successor because it was held that the terms of the consolidation and statute did not confer all the powers held by the constituents to the new corporation.⁷³

To conclude. As to the three issues: will a bequest of stock in corporation *A* pass to the legatee as stock in corporation *B*; will legacies to corporation *A* pass to corporation *B*; and will the appointment of *A* as fiduciary inure to the benefit of *B*—all depend for their solution upon the degree of corporate continuity and thus upon the existence of an equivalent where no statute affects the matter. The law of accession may offer an analogy. The former test whether title passed or not was the continued identity of the subject matter, especially in the Roman Law. The new test is that of comparative value.

It is evident that no hard and fast rule should be laid down. A rigid formal rule which requires the corporation to be identical in all essentials with its former self or to retain its charter in order to prevent a failure, or lapse of the legacy or of the appointment, is undesirable. In a busy world not all possible contingencies can be foreseen and provided for. The above discussion seems to show: that the rule of economic equivalent is supplanting the rule requiring substantial identity in the case of ademptions; that the authorities are divided on both the issues of the lapsing of legacies and the matter of transmitting appointments. In all those cases where a lapse has been declared it seems probable that the testator's intention was thwarted. It is believed that the cases sustaining the gift for the benefit of charity produce more desirable consequences and that there is a "purpose equivalent" in the new corporation. With respect to the matter of transmitting appointments, strictly speaking when a testator appoints *A* he does not intend to appoint *B*. But it does not follow that if *A* becomes *B* or both *A* and *B* become *C*, he affirmatively does not wish *B* or *C*, as the case may be, to act. There are certain considerations which should not be overlooked, such as the fact that the new corporation has much the same

72. *Mercantile Trust Co. v. San Joaquin Agr. Corp.*, 89 Cal. App. 558, 265 Pac. 583 (1928) (inter-vivos). The California statute was interpreted as having the effect of awarding this power to the plaintiff. See also *Iowa Light, Heat & Power Co. v. First National Bank*, 250 Mass. 353, 145 N. E. 433 (1924) (the trustee succeeds to all the rights, title, and powers of the original trustee, changed by consolidation); *First Nat. Bank v. Chapman*, 106 Tex. 322, 164 S. W. 900 (1914).

73. *Diggs v. Fidelity & Deposit Co.*, 112 Md. 50, 75 Atl. 517 (1910) (old companies were dissolved and plaintiff is a new one).

personnel, that it continues the business, that it possesses the old assets, and has much the same powers. These matters are as significant as are the formal change of name, the enlargement of the business and surrender of charter (which may or may not have occurred).⁷⁴ Here it may be said that there is a functional equivalent. At least the corporation in its transformed state is more nearly the fiduciary chosen by the testator than any other one.

⁷⁴ See James Truslow Adams, *Corporate Trusts and Mergers* (1931) 16 MASS. L. Q. 28.