



1934

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Recommended Citation

Fruchtman, Edward J. (1934) "The Effect of Merger or Consolidation on the Succession of Corporate Fiduciaries," *Kentucky Law Journal*: Vol. 22 : Iss. 3 , Article 3.

Available at: <https://uknowledge.uky.edu/klj/vol22/iss3/3>

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THE EFFECT OF MERGER OR CONSOLIDATION ON THE SUCCESSION OF CORPORATE FIDUCIARIES

By EDWARD J. FRUCHTMAN*

I. THE PROBLEMS INVOLVED

The comparatively recent trend toward trust-mindedness,¹ the more frequent use of the corporate body as trustee or fiduciary² for other purposes, the expansion of banking business,³ and the tendency toward the "centralization of corporate interests"⁴ have combined to create the situations involving the problems to be considered here. The questions to be dealt with specifically relate to the succession of fiduciary relationships, and appointments thereto, after a consolidation or merger of banks and trust companies, at least one of which has been named as trustee, executor, or administrator. Objection may be raised that discussion of the succession problem must be purely academic, in view of the fact that the corporation succeeding after the consolidation or merger has title to the property in question, and consequently will act as trustee, executor or administrator, as the case may be, without interference from any of the parties concerned. It is believed however, that to follow a policy of "letting a sleeping dog lie" does not lead to beneficial results, but must involve time and money wasting litigation.⁵

It may be well to note at the outset what limitations and exclusions will be followed here. No attempt will be made to

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¹ Powell: *Cases & Materials on Trusts & Estates*. 41-5.

² Bogert: *Trusts & Some Recent Developments*, 23 Ill. L. R. 749.

³ Levit: *Trust Powers of National Banks*. 77 U. of Pa. L. R. 835.

⁴ *Supra*, note 2.

⁵ *Supra*, note 2. "It is true that in the case of many trusteeships this practical construction in favor of succession may succeed in avoiding all trouble," but "Some beneficiary is sure to object sooner or later and demand the appointment of a new trustee or object to the payment of compensation to the corporate trustee on the ground that it is merely a trustee de son tort. And, furthermore, third parties are sure to raise the question of the validity of the acts of the new corporation as trustee, as in the case of sales of land by the company assuming to act as a successor trustee. The risks of litigation and loss of time and money are too great to allow these questions of succession to be passed over as merely theoretical."

delve into the questions posed by the converting or reorganization of a state bank named as fiduciary into a national bank. Generally, such a change is not considered a transmogrification or extinguishment of the corporate identity of the state bank, and consequently the reorganized institution succeeds as fiduciary, whether the state bank was already acting as fiduciary or merely had been designated as successor in the will of a living person.⁶ Nor will consideration be taken of the situations in which the creator of the fiduciary relationship has expressly provided for the contingencies of consolidation and/or merger. They present little or no problem. The ability of national banks to act as fiduciaries⁷ is assumed, as is the constitutionality of the statutes hereinafter mentioned.

Later confusion may best be avoided by defining consolidation and merger at this point. The distinction between them is vital in some of the fact situations in which the question of succession may arise, although such might not be the impression gained by the haphazard way in which some judges and legislators sport with them. Briefly, consolidation involves the union of two or more constituent corporations, resulting in the creation of a new corporate entity and the determination of the lives of the participating institutions.⁸ Merger "is absorption of one corporation by a second corporation. Its theory is that the merged corporation loses its corporate existence and its property interests pass to the corporation into which the merged corporation has become absorbed. The second corporation, which does the absorbing, *continues in existence with all its former powers and rights*" (italics ours)⁹ In view of this striking difference it is rather startling to find the courts speaking of consolidation when they mean merger¹⁰ and vice versa.

⁶ *Supra*, note 2, also stating that the only operative change is that the reorganized institution is now subject to control by federal rather than state law.

⁷ The privilege of exercising fiduciary powers has been open to national banks since 1913. 38 Stat. 251 11 (k).

⁸ 31 Columbia Law Review 732. *Chicago Title & Trust Co. v. Zinser*, 264 Ill. 31, 35; 105 N. E. 718 (1914).

⁹ *Supra*, note 2. *Consolidation & Merger*: 6 New York University Law Review 404, stating that "a new corporation results always from a consolidation, never from a merger."

¹⁰ *Worcester County National Bank, Petitioner*, 263 Mass. 444, 162 N. E. 217 (1928) *affd.* 279 U. S. 347, 49 S. Ct. 368 (1929). *Infra* note 33.

II. PRESENT STATE OF THE LAW ACCORDING TO DECISIONS IN JURISDICTIONS WHERE THERE ARE NO STATUTES SPECIFICALLY DEALING WITH THE PROBLEM OF SUCCESSION

The variety of fact situations in which problems of succession may arise is so great¹¹ that the paucity of decided cases

¹¹ The possible variations in which the problem of succession may arise where only a single union (consolidation or merger) has occurred:

I. Testamentary Trustees:

A. Where State Bank A merges into State Bank B.

1. And A has already been designated trustee, but testator hasn't yet died.
2. And A is already acting as trustee when the merger occurs.
3. And A is designated trustee after the merger has occurred. Problem: Does B succeed as trustee?
4. And B has already been designated trustee, but testator hasn't yet died.
5. And B is already acting as trustee when merger occurs.
6. And B is designated trustee after the merger has occurred. Problem: Does B continue as trustee?

N. B.—In the remaining portions of this footnote, the language of I-A-1, 2, 3, 4, 5, 6 will be omitted, but will be designated by *et cetera*."

B. Where State Banks A & B Consolidate to Form State Bank C:

1. And A etc. 2. And A etc. 3. And A etc.
Problem: Does C succeed as trustee?
4. And B etc. 5. And B etc. 6. And B etc.
Problem: Does C succeed as trustee?

C. State Bank A Merges into National Bank C:

1. And A etc. 2. And A etc. 3. And A etc.
Problem: Does C succeed as trustee?
4. And C etc. 5. And C etc. 6. And C etc.
Problem: Does C continue as trustee?

D. State Bank A Consolidates with National Bank C to Form National Bank D:

1. And A etc. 2. And A etc. 3. And A etc.
Problem: Does D succeed as trustee?
4. And C etc. 5. And C etc. 6. And C etc.
Problem: Does D succeed as trustee?

E. National Banks C & D Consolidate to Form National Bank E:

1. And C etc. 2. And C etc. 3. And C etc.
Problem: Does E succeed as trustee?
4. And D etc. 5. And D etc. 6. And D etc.
Problem: Does E succeed as trustee?

F. National Bank C Merges into National Bank D:

1. And C etc. 2. And C etc. 3. And C etc.
Problem: Does D succeed as trustee?
4. And D etc. 5. And D etc. 6. And D etc.
Problem: Does D continue as trustee?

II. Inter Vivos Trustees:

A. Where State Bank A merges into State Bank B.

B. Where State Banks A & B consolidate to form State Bank C.

C. Where State Bank A merges into National Bank C.

D. Where State Bank A consolidates with National Bank C to form National Bank D.

in this category is noticeable. The first New York case was a lower court decision in which it was held that the merger of a state organization, named as executor, into another state organization during the lifetime of the testator precluded the absorbing corporation from succeeding as executor.¹² The reasoning of the court shows that the decision was written with an eye

E. Where National Banks C & D consolidate to form National Bank E.

F. Where National Bank C merges into National Bank D.

All those fact situations under variations I-A, B, C, D, & F are also present under variations II-A, B, C, D, E & F (i. e. Where *inter vivos* trusts rather than testamentary trusts have been created, *with one exception*, viz.: fact situation No. 1—Explicitly, fact situation No. 1 under I-A, B, C, D, E & F occurs when the particular bank in question has already been designated trustee, but the testator hasn't yet died at the time of the consolidation or merger. Clearly, this situation cannot arise where an *inter vivos* trust has been created, for the trust begins at once on the execution of the instrument.

III. Executors:

A. Where state bank A merges into state bank B.

B. Where state banks A & B consolidate to form state bank C.

C. Where state bank A merges into national bank C.

D. Where state bank A consolidates with national bank C, to form national bank D.

E. Where national banks C & D consolidate to form national bank E.

F. Where national bank C merges into national bank D.

In this class (III) the possible fact situations under variations A, B, C, D, E & F, are identical with the fact situations in class I—i. e., numbers 1, 2, 3, 4, 5, 6 are to be considered as all coming under each variation A, B, C, D, E, F.

IV. Administrators:

A. Where state bank A merges into state bank B.

B. Where state banks A & B consolidate to form state bank C.

C. Where state bank A merges into national bank C.

D. Where state bank A consolidates with national bank C to form national bank D.

E. Where national banks C & D consolidate to form national bank E.

F. Where national bank C merges into national bank D.

All those fact situations under variations of class IV are also present under variations of class I, with one exception, viz.: fact situation No. 1. In fact situation No. 1 under class I variations occur when the will making the designation is still ambulatory. Such a situation cannot obtain in class IV, for the designation as administrator doesn't take effect until after the intestate's death.

It will be observed that the above analysis applies only when there has been a single consolidation or merger. The situation may be made more complex by interspersing reorganizations and further consolidations or mergers.

¹² *Matter of Stikeman*, 48 Misc. 156; 96 N. Y. S. 460 (1905): Testator named the A Trust Co. as executor. Thereafter, and during testator's life, the A Trust Co. was merged into the B Trust Co. which seeks to act as executor. *Held*: B Co. does not succeed to the executorship.

to the actual financial make-up of the absorbing corporation. The trust company originally designated was purely a banking institution with specific power to act as executor while the absorbing company was the Title Guarantee & Trust Co., organized under special legislative act in which no specific mention of power to act as executor was made. In refusing to allow the succession the court took notice of the fact that the absorbing company had greater liabilities and obligations because of its business of guaranteeing mortgages and titles to real estate. It is interesting to note that the court, in passing, disposed of two arguments^{12a} that were later to be relied on by the same and different courts in reaching an opposite conclusion.

Seven years later the New York Court of Appeals reached a contrary result on an almost identical state of facts¹³ with the added variant of a statute,¹⁴ which, however, in terms made no mention of the right to succeed as fiduciary. The reasoning of the court was to the effect that inasmuch as the right to make a

^{12a} Matter of Stikeman, *supra*, note 12: "There was no vested or inchoate right obtained by (A Trust Co., Ed.) by reason of its having been named as executor of the will; this right to administer became vested or inchoate only upon the death of the testator and at that time the corporation named was not in existence, . . . the petition must be dismissed on the ground that the petitioner is a stranger to the will and its probate."

"The will was made before there was any suggestion of merger between the two companies, and, therefore, it could not have been in contemplation of the will maker at the time of the execution of his testamentary instrument. It is argued that all that the law permitted a corporation to do must be presumed to be in the mind of the trust-maker, but this, I think, would be straining the rule as to presumption beyond its legitimate purpose. We are to gather, if we can, the intention of the testator."

¹³ *In the matter of Bergdorf*, 206 N. Y. 309; 99 N. E. 714 (1912). Testator named A Trust Co. as an executor, later, but while testator was yet alive, the A Trust Co. was merged into the B Trust Co. which, on the subsequent death of testator, petitioned for letters testamentary as executor. The court allowed the petition on the ground that the designation as executor was a "privilege or interest" under the existing statute (*infra* n. 14) which by the merger was transferred to the B Trust Co.

¹⁴ New York Banking Laws 39 (Consol. Laws), 1909, c. 2, 839.

"Effect of Merger.—Upon the merger of any corporation in the manner herein provided all and singular the rights, franchises and interests of the said corporation so merged in and to every species of property, real, personal and mixed, and things in action thereunto belonging shall be deemed to be transferred to and vested in such corporation into which it has been merged, without any other deed or transfer and said last named corporation shall hold and enjoy the same and all rights of property."

testamentary disposition depended on statutory permission, the legislature could make its exercise subject to such regulations as it might please. *Ergo* a testator must be deemed to have intended the results which the operation of those regulations produces.¹⁵ After this slightly strong-arm method of dragging in the statute, the only link in the chain of reasoning necessary to be forged was that the designation of the A Trust Company as executor was an "interest" within the meaning of the Statute and therefore was transferrable to the absorbing institution. The court hesitated not an instant.

*Chicago Title & Trust Co. v. Zinser*¹⁶ dealt with a similar set of fact but involved a consolidation rather than a merger, but in reaching the same result, a somewhat different approach was employed. After asserting that the testatrix was presumed to intend¹⁷ the future consolidation of her original executor with other banks, the court did not consider, as was done in *Matter of Bergdorf*, whether the mere designation as executor was a sufficient interest or property right to be transferred to the successor bank. It impliedly assumed that it was. The main problem was whether the designation as executor, usually indicating a close personal relation, could be delegated. It was held that the "personal relation" rule had no applicability in the case of corporations.¹⁸

¹⁵ *In the matter of Bergdorf, supra*, n. 13. "They affect the testamentary dispositions . . . as tho embodied in the will" "In reading the sections, we do not regard the intention of the testator but that of the legislature."

¹⁶ 264 Ill. 31; 105 N. E. 718; Ann. Cas. 1915 D, 931 (1914). In an action for specific performance of a contract for the sale of land brought by C Trust Co., D defended on the ground that P didn't have authority to sell. P Trust Company was the result of a consolidation of state organizations A & B *during life of the testatrix*, who had designated Trust Co. A as executor in her will. The court held that the P corporation succeeded as executor and was therefore entitled to specific performance.

¹⁷ "She (testatrix: Ed.) therefore contemplated that these changes (Consolidation: Ed.) might occur and that the Real Estate Title and Trust Co. might be consolidated with some other corporation such as the Chicago Title and Trust Co. and that it would thereby cease to exist and become a component part of a new corporation."

¹⁸ "That general rule (non-delegability by the named executor of non-ministerial powers: Ed.) rests upon the ground that the selection of a trustee implies personal confidence in his discretion and judgment. . . . The rule, however, cannot be applied to the case of a corporation, because the element of trust in the judgment and discretion of an individual is *entirely* wanting. A corporation is without personality, and if it is selected as trustee or executor, there can be *no* reliance

It is believed that the theories of the two courts are open to some criticism, both on strictly legalistic and practical considerations. It seems too much to say that the mere designation as executor in a will is a property right while the testator is yet living. To hold the contrary would appear to be an *a fortiori* conclusion from the accepted view of the interest of a devisee or legatee before the testator has died, for in the case of a devisee a clear pecuniary gain, usually unearned in the sense that it is not a return for rendered services, will result on his surviving the testator. During the latter's life, the devisee has merely an expectancy which will lapse, in the absence of statute, on his predeceasing him, the testator.¹⁹ The one named as executor has, while the testator is yet alive, a less desirable interest than the expectant devisee, at least from the pecuniary point of view. What he will receive, on the death of the testator, will be, not a windfall, but merely a right to compensation for services to be rendered. This no doubt is valuable,²⁰ but not, it is thought, to as great an extent as the devisee's interest. Similarly, therefore, the expectancy of becoming an executor should lapse on the death (by consolidation or merger) of the person (corporation) designated as such. Viewed, therefore, in a strictly logical light the decision of *In the Matter of Bergdorf*²¹ is unjustifiable. Whether the result is a desirable one in the light of common practice and the interests of the parties involved will be considered later.

The Illinois Court has too fully disregarded the factors that influence an individual in choosing his executors or trustees. Starting from the wooden premise that a corporation has no "personality" it is an easy step to the conclusion that no confidence can be reposed in such a body. Factually, it is believed, such is not even usually the case. Particular banks are chosen because of reputations for conservatism, because the testator may be the brother-in-law of the third vice-president, because of confidence in the current personnel, because the bank may once have extended business aid to the testator or for a variety of

upon individual discretion or even upon the continuance of the same administration."

¹⁹ See *Kehl v. Taylor*, 275 Ill. 346, 114 N. E. 125 (1916).

²⁰ Since 1929, the mere opportunity of working has taken on the aspect of a boon from the gods.

²¹ *Supra*, note 13.

other reasons. The change of legal exterior, by merger or consolidation may or may not carry with it more significant changes.²² The failure to investigate such possibilities may lead to foisting on the estate an executor of whom the testator might never have thought, or have purposely refrained from appointing at the time of executing the will. There is no indication either way in the decision, but the fact that nothing untoward happens in a specific instance does not serve to excuse a faulty, too-artificial technique.

The Massachusetts Courts have evinced an attitude at the other extreme, although the cases can be differentiated factually. *Commonwealth-Atlantic National Bank of Boston, Petitioner*²³ and *Atlantic National Bank, Petitioner*²⁴ involved reorganizations coupled with consolidations and in each it was held that the evolving national bank did not succeed as executor and trustee respectively. In *Atlantic National Bank, Petitioner*, the court refused to be guided by a *dictum* in a case²⁵ decided three years previously, sanctioning such succession. The first of the trio refused to allow the succession on two grounds: (1) That the mere designation as executor in an ambulatory will was not a thing which passed as property, or as an asset to the evolving

²² E. g. (1) Change of personnel, (2) change of policies, (3) increased liabilities, (4) depreciation of stock.

²³ 249 Mass. 440; 144 N. E. 443 (1924). State bank A was converted into national bank B, which consolidated with National bank C during life of testator to form national bank D. D, on testator's subsequent death, petitioned to act as executor as successor to state bank A, which testator had originally named executor. The Court held the executorship was vacant and didn't pass to national bank D.

²⁴ 261 Mass. 217; 158 N. E. 980 (1927). Trust Co. A was appointed trustee in testator's will. After testator died A was converted into national bank B, which consolidated with national bank C to form national bank D. Held: Bank D doesn't succeed as trustee.

N. B.—Both the reorganization and consolidation occurred after the death of testator.

²⁵ *Iowa Light, Heat and Power Co. v. First National Bank*, 250 Mass. 353; 145 N. E. 433 (1924). By inter vivos trust, plaintiff conveyed property to trust company A as trustee, reserving right to replace any of the trust property "that may be no longer used or useful" by other property.—Trust Co. A (state organization) consolidated with defendant national bank. P seeks to replace some of the trust property with other property and D refuses to act. P sues to compel D to release the property from the trust mortgage. Held: Since the property sought to be replaced is still being used, P hasn't complied with the terms of the trust. *Dictum*: The D bank "has succeeded to all the rights, powers and title of" the A trust Co., and was "trustee for the bondholders."

bank.; (2) that the distinctions²⁶ between a trust company organized under Massachusetts law and a national bank organized under acts of Congress with respect to being an executor were too fundamental to say that the entities were the same. Clearly, however, the first ground of decision in the *Commonwealth-Atlantic National Bank of Boston, Petitioner*²⁷ cannot²⁸ justifiably be employed to support the result of *Atlantic National Bank, Petitioner*,²⁹ because in the latter case, the reorganization and consolidation occurred *after* testator's death, i. e. after the trusteeship had vested. The case may more safely rely on the second reason, if at all.

III. PRESENT STATE OF THE LAW BY DECISIONS WHERE STATUTE IS INVOLVED

A. *The McFadden Act.*

In 1927³⁰ Congress passed a statute designed to obviate most of the difficulties latent in the succession problem, but the rare genius of the courts to take sides has evidenced itself, in the

²⁶ Some of the differences enumerated by the court:

- 1) Under Mass. law, a fiduciary must be appointed by the probate court—not so under Federal law.
- 2) A national bank is not governed by Mass. law as to its corporate functions, duties and responsibilities—a state bank is.
- 3) A national bank is not subject to same laws in respect to supervision as a state bank is.
- 4) The respective banks, in short, "are controlled by different laws."

²⁷ *Supra*, note 23.

²⁸ Although the court expressly said that the trust company had no such property interest in its appointments as trustee as passed to the national bank as its successor. This seems unsound.

²⁹ *Supra*, note 24.

³⁰ "The McFadden Act": 44 Stat. 1224, 1 (1927), 12 U. S. C. 34a, 12 U. S. C. A. 34a. After providing for the consolidation of state institutions with national banks: "all the rights, franchises and interests of such state or district bank as consolidated with a national banking association, in and to every species of property, real, personal and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such national banking association *into which* it is consolidated without any deed or other transfer, and the said consolidated national banking association shall hold and enjoy the same and all rights of property, franchises and interests, *including the right of succession as trustee, executor or in any other fiduciary capacity* in the same manner and to same extent as was held and enjoyed by such state or district bank so consolidated with such national banking association . . . No such consolidation shall be in contravention of the law of the State under which such bank is incorporated."

face of apparently clear language, supplemented by an opinion by the Comptroller of the Currency.³¹ In *Worcester County National Bank, Petitioner*,³² the absorbing national bank in a merger was allowed to continue as administrator, to which position it had been appointed before the merger. The court expressly refused to discuss the application of the McFadden Act. But in a case³³ decided the same year, under a different state of facts, the McFadden Act was held unconstitutional. The court's conclusion as to the Act's unconstitutionality was a *non sequitur*,³⁴ and on appeal,³⁵ the United States Supreme Court rejected the Massachusetts courts' view in that respect, though the opinion was affirmed as to the rest. Taking its cue from the Supreme Court decision, the Georgia court reached a similar

³¹ He expressed his opinion to be that, on the consolidation of a state trust company with a national bank, the latter succeeded as trustee not only to the trusts actually being administered by the trust company at the time of the consolidation but also to appointments under wills designating the trust company as fiduciary, even though such wills had not been admitted to probate until after the consolidation. Letter of Comptroller of Currency, March 22, 1927. *Fourteenth Annual rep. Fed. Res. Board*, 267-271.

³² 263 Mass. 394; 161 N. E. 797 (1928).

National bank was appointed administrator of decedent; the X bank absorbed Y state bank in a merger occurring subsequent to the appointment. Held: X national bank continued to act as administrator. It will be noticed that no question of *succession* is here raised. The problem is simply whether a bank may *continue* to act as fiduciary after a combination with another bank which, by definition (*supra*, note 2-3), has not destroyed or changed its *legal* existence and character—Factually, however, the merger may have resulted in an all-important change, e. g., increase of liabilities, change of personnel et cetera. Legalistically, the decision is sound. Query: whether such legalistic technic is *necessarily* always so from a pragmatic point of view.

³³ *Worcester County National Bank, Petitioner*, 263 Mass. 444; 162 N. E. 217 (1928). State bank A was appointed executor by the court *after decedent's death*. In a merger, Bank A was absorbed by national bank B. Held: The absorbing bank didn't succeed as executor, notwithstanding the McFadden Act.

³⁴ The court reasoned that since the appointment of an executor (in Mass.) is a judicial function, a statute providing for the automatic succession as fiduciary, without court's intervention, was a usurpation of such function and contrary to Mass. law and *therefore was unconstitutional*.

³⁵ *Ex parte Worcester County National Bank*, 279 U. S. 347, 49 S. Ct. 368, 73 L. Ed. 733 (1929). The Supreme Court affirmed on the ground that the McFadden Act was intended to apply only when not in contravention of state law and therefore was inapplicable in Mass. But the mere fact of its inapplicability didn't render it unconstitutional.

result in *Stevens v. First National Bank & Co.*,³⁶ a case on all fours with the last Massachusetts case.³⁷ It will be noticed that though the McFadden Act uses the word "consolidation" exclusively, it has been made applicable to cases of merger too.³⁸

A rather interesting construction of the Act of 1927 was made by an acrobatic southern court with a flair for the syllogism. In *Hofheimer, Exr. v. Seaboard Citizens National Bank*,³⁹ the testator appointed state bank X as a co-executor. During testator's life, bank X consolidated with National bank Y, the defendant bank emerging. After testator's death, D claimed the right to act as co-executor with P. The court held that succession under the McFadden Act was impossible. Under the Act the emerging bank was to hold the "right of succession as trustee . . . to the same extent as was held and enjoyed by such state bank." At the time of the consolidation, however, the state bank "held and enjoyed" nothing, for at the moment, the state bank was not yet an executor nor was the mere designation as fiduciary in an ambulatory will a property right which might pass to the successor corporation. The logic is unassailable, but the approach, as in all the preceding cases, is an artificial, purely mechanical and formalistic technique. Whether such a technique always reaches the most desirable results, pragmatically, i. e., from the standpoint of the interested parties other than the fiduciary, is questionable. This point will be considered later.

That the McFadden Act is not restricted in its application to creating instruments of a testamentary nature is evidenced by *First National Bank v. Chapman*,⁴⁰ allowing the bank emerging

³⁶ 173 Ga. 332; 160 S. E. 243 (1931). State bank X was appointed administrator by the ordinary, as required by Ga. law. Before making its final return after fully administering the estate, bank X was merged into national Bank Y, changing its name to national bank Z. Bank Z tendered the final return, which the ordinary returned on the ground that bank Z wasn't the administrator. Held: Order granting bank Z a mandamus requiring the ordinary to receive the return reversed. . . . The McFadden Act, authorizing automatic succession, is in contravention to Ga. law, which requires an administrator to be appointed by an ordinary, and therefore, by its very terms (*supra*, n. 30—last sentence) doesn't apply.

³⁷ *Supra*, note 33.

³⁸ *Supra*, note 33, 36.

³⁹ 154 Va. 392, 153 S. E. 656, *affd.* in 154 Va. 896, 156 S. E. 531 (1931); 160 Tenn. 72, 22 S. W. (2nd) 245 (1929).

⁴⁰ 106 Tex. 322, 164 S. W. 900 (1914). One Smith conveyed to state bank X, as trustee, some realty to secure payment of notes in favor

from a "consolidation" to succeed to the trustee-ship created by an inter vivos trust. It is believed that the court is sound in its contention that a trustee-ship, at least in the case of banks and trust companies, is a valuable property right. Since such institutions have been empowered to act as fiduciaries, a material portion of their business is of this nature, and much of their income is derived from such sources.

B. *Other Statutes.*

The cases in this group have travelled the same orthodox road outlined above and with one exception, shed no other interesting light on the problem.

*Mueller v. First National Bank of Atlanta*⁴¹ allowed the succession under a statute⁴² providing that the "consolidated national bank shall enjoy all rights of property, franchises and interests to same extent as was enjoyed by the national bank so consolidated therewith."—California, under a more comprehensive enactment has allowed the succession uniformly, whether the trust be testamentary⁴³ or *inter vivos*.⁴⁴

of D. Trustee was authorized, on default, to sell the land for the satisfaction of the secured indebtedness. Bank X then "consolidated" with P national bank under the McFadden Act. On Smith's subsequently defaulting, P seeks to sell according to terms of the trust deed, claiming to have succeeded as trustee. Held: P bank succeeded as trustee.

⁴¹ 171 Ga. 845, 156 S. E. 662 (1931). X & Y national banks consolidated to form Z national bank. The consolidation occurred between date of making the will and date of death of testator. Held: The right to act as executor, being an interest in property, passes to the successor bank, although the consolidation occurs while the will is still ambulatory.

⁴² 1918, c. 209, 21, 40 Stat. 1044.

⁴³ *In re Barnett's Estate*, 58 Cal. App. Dec. 671; 275 P. 453 (1929). Testator named state bank A trustee. Bank A sold its business to bank B, which in turn sold its business, including the trust department, to bank C. Bank C was converted into national bank D. The beneficiaries objected to the filing of the report of the trust of testator by bank D. Held: Bank D was the successor trustee and could render the report.

⁴⁴ *Mercantile Trust Co. v. San Joaquin Agricultural Corp.*, 265 P. 533 (1928). D appointed X trust company as trustee and delivered to it a mortgage. X trust company consolidated with Y trust company (both were state organizations), P was the evolving trust company, D defaulted on the interest payments on the mortgage and P sued to foreclose on the ground that it was the successor trustee. Held: P succeeded as trustee under a statute providing that the new corporation must be deemed to have succeeded to all the trusts of the constituent corporations and to be entitled to enforce the same as fully as its constituents might have done had no consolidation taken place.

Cf. *Matter of Estate of Barreiro*, 70 Cal. App. Dec. 384 (July 29,

A recent New York case⁴⁵ involved a somewhat peculiar set of facts, apart from the number of combinations involved. Testator executed a will in 1931, naming bank A as trustee. In 1928 bank A was merged into Bank B. In 1929 bank B surrendered its charter and was succeeded by bank C. Later in 1929 bank C was merged into trust company D, which in 1930 consolidated with bank E. It will thus be noticed that all these mergers, surrenders and consolidations occurred, not only prior to the probate of the will, but also prior to its execution and the designation of bank A therein. Bank E's contention that testator intended to name bank E as successor to bank A was brusquely pushed aside, and rightly, it is believed. Certainly so on the application of a mechanical technique, for at the time the will was executed, bank A had ceased to exist. From the factual standpoint, too, the decision is desirable. It strains one's credulity to believe that *necessarily* the testator would have appointed bank E, in view of the far-reaching changes in personnel, policy, and increase or decrease in assets and liabilities resulting from the several combinations. It must be remembered, however, that the courts have not openly expressed their concern with these factors.⁴⁶ It is to be hoped that the future will mark a change in their attitude.

IV. STATUTORY MODIFICATIONS

A. *Quantity of the Modification.*

With the exception of eleven jurisdictions,⁴⁷ legislatures have made attempts, with varying degrees of completeness, to provide for the succession of corporate fiduciaries. It may be more than mere coincidence that of the eleven, only two are

1932), involving two sales, a conversion and a consolidation. Bank A received letters testamentary as executor of testator's will. *Thereafter*, bank A was sold to bank B, which consolidated with bank C, forming bank D. The latter was then sold to bank E which reorganized, becoming *National* bank F. While this was going on accounts in this estate were duly filed, including two by bank F. Objection to the last account was made on the ground that bank F didn't succeed to office of executor to which bank A had been appointed. Held: Bank F succeeded to the office of executor.

⁴⁵ *Matter of Wolbert*, 144 Misc. 328, July 19, 1932.

⁴⁶ Cf. *Matter of Stikeman*, *supra*, note 4.

⁴⁷ Arizona, Arkansas, Iowa, Louisiana, Mississippi, Nebraska, New Hampshire, Oklahoma, Rhode Island, South Dakota and Texas. Also District of Columbia.

eastern states, with honors as to the remaining eight jurisdictions equally divided between the south and west. It has been pointed out⁴⁸ that the development of the corporate fiduciary, in a given area, is closely related to the economic set-up of that particular territory. The frequency of wealth accumulations breeds the trustee.⁴⁹ Only comparatively recently have large fortunes occurred with any great frequency in the south and west. It is not difficult to see that the problem of succession is of little importance in communities where trust business is slight and trust companies few. Absence of statutory provisions is not surprising.

B. *Quality of the Modification.*

The fact that thirty-seven states have statutes relating to the succession of corporate fiduciaries does not mean that the question is a closed one in those jurisdictions. At least ten of these make no reference in terms to fiduciaries⁵⁰ or succession,⁵¹ and even those statutes which are most comprehensive from a mechanical point of view omit provisions which are to be desired. The table below gives an analysis of the statutes under five headings⁵² viz.: 1) Does the particular statute apply to all banks, state and national? 2) Does the statute apply both to merger and consolidation, or only to one of them? 3) Does the statute allow the succession, no matter what kind of instrument creates the fiduciary relationship? 4) Does the statute allow the succession? a) When the consolidation and/or merger occurs subsequent to the actual vesting of the fiduciary relationship in the bank participating in the consolidation and/or

⁴⁸ See T. G. Smith, *Trust Companies in the United States* (1928), 343-5.

⁴⁹ Powell, *Cases & Materials on Trusts & Estates*, Vol. I, ch. 2, footnote 36 (1932).

⁵⁰ The Illinois Statute is representative of this group. Ill. Rev. St. (Cahill 1931), c. 32, paragraph 70. "Such single corporations (after merger or consolidation: Ed.) shall thereafter possess all the rights, powers, privileges and franchises, and all property, real, personal or mixed . . . belonging to each of such corporations and subject to all the restrictions liabilities and duties of each such corporation so merged or consolidated. All property, rights, privileges, powers and franchises and all and every other interest shall thereafter be as effectually the property of the single corporation as they were of the several and respective merging or respective corporations."

⁵¹ *Supra*, note 50. See *Chicago Title & Trust Co. v. Zinser*, *supra*, note 16.

⁵² See appendix for chart of the statutes.

merger? b) When it occurs subsequent to the designation as fiduciary but prior to the actual vesting of the relationship, e. g., where the consolidation and/or merger occurs during the life of a testator who has designated one of the participating banks as fiduciary? c) When the consolidation and/or merger occurs *prior* to the designation?⁵³ 5) Does the statute apply to executors, administrators and trustee, or only to some?

In the states^{53A} where the only referable statute is in the general corporation law, a two-fold mechanical approach is open, viz.: 1) that of the *Mueller* case⁵⁴ or 2) that of the Massachusetts courts.⁵⁵ On a purely technical basis, it is believed that the view that a mere designation as fiduciary is not a property right is sounder.⁵⁶ Of the remaining states only two⁵⁷ have evinced any semblance of interest in criteria for the determination of succession which have regard to the interest of the other parties involved. South Carolina's statute allows succession where state banks only are involved, on the occurrence of two conditions precedent: 1) the consent of the originally-designated bank; 2) the approval of the court.⁵⁸ Washington is more explicit.⁵⁹

It was noted above that only one case had been found where the designation was made *after* the named bank's existence had been destroyed by merger.⁶⁰ No reference was there made to the New York statute⁶¹ but it is doubtful whether aid would be forthcoming from that source because the statute provides ex-

⁵³ Cf. *Matter of Wolbert, supra*, note 45.

^{53A} Delaware, Florida, Idaho, Illinois, Maine, Maryland, Massachusetts, Nevada, New Mexico, and Utah.

⁵⁴ *Supra*, note 41.

⁵⁵ *Supra*, note 23.

⁵⁶ *Supra*, pp. 2-3; *supra*, pp. 5-6.

⁵⁷ South Carolina and Washington.

⁵⁸ South Carolina. Laws of 1928. No. 693, Sec. 10.

⁵⁹ Washington Laws 1931, c. 126, Sec. 9. ". . . . Provided that nothing shall be construed as requiring any court to confirm such consolidated bank in any office, appointment or trust, or as preventing any court from removing such consolidated bank from any office, appointment or trust to which it has succeeded by virtue of such consolidation, if such court shall deem such consolidated bank incapable of or disqualified from exercising such office, appointment of trust, or that its appointment to, or continuance in such office, appointment or trust would not be for the best interest of the estate, interest or trust to which such office, appointment or trust pertains."

⁶⁰ *Matter of Wolbert, supra*, note 45.

⁶¹ N. Y. Laws, 1930, c. 407, amending N. Y. Banking Law (Consol.). Laws 1917, c. 2, Sec. 737, adding Secs. 225, 226.

pressly for every contingency but that one. Only two statutes have been found which in terms cover such a situation.⁶²

In all but one⁶³ statute technical loopholes might possibly be found under one of the five headings outlined above. A goodly number of the statutes use only "consolidation."⁶⁴ Do they employ it strictly according to its definition?⁶⁵ If they do, are mergers definitely excluded from the application of the statute? If the word is used to describe a merger, will that necessarily prevent a consolidation from coming under the statute? The McFadden Act⁶⁶ is a good example of the loose terminology employed by legislators. "Consolidation" is the word used throughout. Nevertheless it is believed, from a perusal of the surrounding text,⁶⁷ that "merger" was meant. The courts have unwittingly carried on the comedy of errors by allowing mergers⁶⁸ to come within the ambit of the statute, without, however, excluding true consolidation.⁶⁹ The use of words having definite connotations which express a meaning different from that intended to be conveyed can only lead to confusion. Some states,⁷⁰ unfortunately few, have taken care to make the distinction. Ambiguity of terminology is a too frequent fault. More expert draftsmanship is the easy solution.

Almost half of the thirty-seven statutes have no provision

⁶² Michigan: Compiled Laws 1929, § 12026: "the consolidated corporation . . . shall hold, exercise, and perform all rights, powers, privileges, duties and obligations appertaining to any and all trusts, representative or fiduciary relationship whatsoever as to, or for which, either or any one of the corporations so consolidating may have been appointed, nominated or designated by any will or conveyance or otherwise. *Whether or not such will, conveyance, or other act intended to create such trust, representative or fiduciary relationship shall have been executed or have come into or taken effect at the time of such consolidation.*" Oregon Laws (1931), c. 278, § 36: "the successor corporation shall succeed to the appointment of all executorships, trusteeships . . . and other fiduciary capacities in which the former corporation may be then or *thereafter* named in wills theretofore or thereafter probated on in any other instruments."

⁶³ West Virginia Code (1931), 31-8-29.

⁶⁴ *Supra*, note 52.

⁶⁵ *Supra*, pages 2-3.

⁶⁶ *Supra*, note 30.

⁶⁷ Note especially the words "into which it is consolidated", *Supra* n. 30.

⁶⁸ *Worcester County Nat. Bank, Petitioner, supra*, n. 33. *Stevens v. First Nat. Bank and Co.*, *supra* n. 36.

⁶⁹ *Hofheimer Exr. v. Seaboard Citizens' Nat. Bank, supra* n. 39.

⁷⁰ Cf. Georgia: Park's Annotated Code (1914) § 2274 (e), (f); Maine: Revised Statutes (1930), c. 56, § 63.

relating either to the consolidation or merger of a state with/into a national bank. Does that mean that the state bank must reorganize into a national bank before it may consolidate with or merge into another national bank? A large part of the difficulty is obviated by the McFadden Act, but the limitations to and the loopholes in the federal statute are too great to permit us to be content with its workings.

V. SUGGESTION AS TO FUTURE ACTION, STATUTORY AND JUDICIAL.

It is noticeable, in the relatively few decided cases, that the approach of the courts has been by way of a strictly mechanical, syllogistic technique. That is to say, the problem as to whether a given corporation should succeed to a fiduciary relationship is solved by answering one or two barren questions and glossing over sometimes-justifiable objections. Is the bank seeking the succession "the same bank" named in the creating instrument? If not, no succession; if so, then succession allowed. It is submitted however, that the courts, and the legislatures too, in arriving at their conclusions, slide over an important implication raised by the words "the same bank." What criteria are to be used in deciding the meaning of those words? Shall the name of the new bank be decisive? The absurdity of the query is its own sufficient answer. Is the successor corporation the same legal entity as the institution originally named? Clearly not in the case of consolidation.⁷¹ Likewise not where the designated bank is the one absorbed in a merger. But just as clearly the absorbing bank in a merger is no different, in the eyes of the law, from what it was prior to the merger. Should such a bank, where it has already been named as fiduciary, continue to act as such? There has been no hesitation on the part of the courts in giving an affirmative answer.⁷² It is believed that hesitation here is desirable. The change or continuation of the legal entity may or may not bring with it differences of a more significant nature. It is entirely conceivable that a substitution of legal entities will involve a change in personnel, or a difference in policy, or a dissimilarity in limitations on the in-

⁷¹ *Supra*, pp. 2-3.

⁷² *Supra*, n. 32.

vestment of trust funds. All or any of these factors may have been the prime considerations in the choice of a fiduciary. To allow the chosen corporation carte blanche, as provisions for automatic successors do allow, may well mean the creation of a Frankenstein which will ultimately destroy the maker. Specifically, there occurs to the mind the situation where the "designator," after thorough investigation, chooses as his trustee an institution with a well-deserved reputation for conservatism and stability. Subsequently the chosen bank may do a number of things: e. g. 1) it may absorb a financially weak bank in a merger, thus weakening its own position without a change of legal exterior; 2) it may become absorbed by a financially weak bank, its own legal existence ended; 3) it may consolidate with one or more banks to save the latter from going on the rocks, the resulting institution being a solvent, although probably weaker corporation. It does not unduly strain one's credulity to see that very possibly the risk of loss of trust funds may be increased and the chances of foisting an undesired executor or administrator on the estate enlarged. The rebuttal of the courts that the testator or settlor is presumed to intend the results which the operation of the statutes produce seems factually without basis when the results are adverse to his, the estate's or the beneficiary's interests. Nor, as has been seen, is it sound to say that the designation as fiduciary in an ambulatory document is such a property interest as passes on merger or consolidation. It may be technically defensible to so hold where the fiduciary relation has "vested," but it is thought that such a wooden ground should be of trifling importance. The bank originally designated may have been chosen because of the great degree of personal control characterizing the administration of its trust department. To the inherent limitations of a corporate trustee⁷³ may be added the possibility that the successor corpora-

⁷³ Fulton, *Advantages and Limitations of Corporate Trustees*, 34 L. Q. Rev. 304 (1918). "In the case of the corporate trustee . . . frequent changes must take place in the personnel of the 'trustee' and the greater the expansion of business, the more frequent will be the changes . . . The new trustee must rely, not upon his own knowledge derived from a personal contact with the beneficiaries . . . or . . . the settlor or the retiring trustee, but from such information as he can glean from the file of papers connected with the case . . . he will still, for a time at any rate, lack that confidence which he would have had had he dealt with the case throughout, and the same results will follow on each successive change."

tion will have a large trust department necessitating lessened personal contact by an entirely different personnel. It is just as possible, however, that the substitution or continuation mentioned above will not involve such important differences. At any rate, it is believed that these considerations are important and should be the factors leading the courts to make their decisions one way or the other. Nor have the legislatures been free from the same charge. Only two statutes have shown any indication that other than mechanical, orthodox criteria shall prevail.⁷⁴ It is submitted that in amending old and drafting new statutes, consideration should be given to two factors. Firstly the mechanics of the succession problem should be carefully considered: Ambiguity of terminology, as to consolidation and merger, to be avoided, and provision made for the statute's application to every kind of creating instrument, to all banks, state and national, to all kinds of fiduciaries and to all variations of fact situations.⁷⁵ Then room should be allowed for judicial supervision, so that the court could take account of the factual changes wrought by the consolidation or merger to decide whether or not it would be desirable, in the light of those changes, to allow the succession. Wooden formulae to the effect that change of legal entity per se bars the succession, or that the appointment to a fiduciary position is a property right which passes to the successor corporation are barren criteria, which, mechanically applied, must needs produce, at one time or another, barren results. Litigants and bench alike ought not to be lackadaisically tolerant of them. It is hoped they will not be.

⁷⁴ *Supra*, note 58, 59.

⁷⁵ *Supra*, note 11.

APPENDIX

LIST OF STATUTES

1. Alabama Laws (1931), Act No. 62, sec. 4.
2. California Statute (1929), c. 239, § 8, amending Stat. 1927, p. 1795, No. 31d of Banking Law.
3. Colorado Laws (1931), c. 54, §§ 1, 2, 3.
4. Connecticut General Statute (1930), § 3890, § 3993.
5. Delaware: Laws (1927), c. 85, § 19.
6. Florida General Laws (1927), § 6563.
7. Georgia: Park's Annotated Code (1914), § 2274 (e), (f), Ga. Code Ann. (Mich. 1926), c. 2, art. 4, § 3883-4.
8. Idaho: Laws (1925), c. 133, art. 1, § 51.
9. Illinois Rev. Statute (Cahill 1931), c. 32, par. 70.
10. Indiana Laws (1931), c. 23, §§ 1, 2, 3.
11. Kansas Laws (1931), c. 84, §§ 1, 2; c. 87.
12. Kentucky: Statutes (1930), § 603a-1.
13. Maine: Revised Statute (1930), c. 56, § 63.
14. Maryland: Bagby's Annotated Code (1924), § 59, as amended by Laws (1931), c. 294, § 8.
15. Massachusetts General Laws (1921), c. 172, § 44, as amended by Laws (1931), c. 12.
16. Michigan: Compiled Laws (1929), § 12026.
17. Minnesota: Statute (1931), § 7699-99½ as amending Minn. Stat. (1927), § 7699-5 and § 7699-9.
18. Missouri: Rev. Statute (1929), § 5490.
19. Montana: Laws (1931), c. 108, amending Laws (1927), c. 89, § 94.
20. Nevada: Compiled Laws (1929), § 1737.
21. New Jersey Laws (1928), c. 20, § 1.
22. New Mexico: Statute (1929), § 32-216.
23. New York Laws (1930), c. 407 amending New York Banking Law (Consol. Laws 1917, c. 2), § 137, adding secs. 225, 226.
24. North Carolina Code (1931), § 217.
25. North Dakota Laws (1931), c. 95, § 2 amending Session Laws of North Dakota (1927), c. 108.
26. Ohio General Code (1932), § 10506-57 (114 Ohio Laws p. 376).
27. Oregon Laws (1931), c. 273, § 36.
28. Pennsylvania 7 P. S. (1931) (Banks & Banking), §§ 392, 393, 412.
29. South Carolina Compiled Laws (1929)—Laws 1928, § 693, § 10, Acts of 1930, §805, § 1.
30. Tennessee Laws (1931), c. 29, § 2.
31. Utah: Compiled Laws (1917), § 888, as amended by Laws (1921), c. 22.
32. Vermont: Laws (1919), § 125.
33. Virginia Code (1930), § 4149-10.
34. Washington Laws (1931), c. 126, §§ 8, 9.
35. West Virginia Code (1931), 31-8-29.
36. Wyoming Laws (1931), c. 91.
37. Wisconsin Laws (1931), c. 395.

State	Application to Kinds of Banks		Application to Merger and/or Consolidation			Application to Kinds of Creating Instruments			Application to Time of Consolidation and/or Merger			Application to Kinds of Fiduciaries					
	All Kinds	State Banks Only	Merger Only	Consolidation Only	Consolidation and/or Merger	Sale, Lease or Exchange	All Kinds	No Mention	"Just Agreement"	No VIII Appointing Trustee	No Mention of Time	No Restriction Where Desires Prior to Consolidation and/or Merger	No Restriction Where Desires After Consolidation and/or Merger	All Kinds	No Mention of Fiduciaries	All But Testamentary Trustees	Refers Only to "Trusts"
Ala.	*													*			
Cal.	*				*									*			
Colo.	*			*										*			
Conn.		*			*									*			
Del.		*			*									*			
Fla.		*			*									*			
Ga.		*			*									*			*
Idaho		*			*									*			
Ill.		*			*									*			
Ind.		*			*									*			
Ikan.		*			*									*			
Ky.		*			*1									*			
Me.		*			*									*			
Md.		*			*									*			
Mass.		*			*									*			
Mich.		*			*									*			
Minn.		*			*									*			
Mo.		*			*									*			
Mont.		*			*									*			
Nev.		*			*									*			
N. J.		*			*									*			
N. M.		*			*									*			

	22	15	2	14	20	1	17	17	2	1	11	23	3	24	10	1																
N. Y.		*		*2		*3		*		*		*		*		*																
N. C.		*				*		*		*		*		*		*																
N. D.		*				*		*		*		*		*		*																
Ohio		*				*		*		*		*		*		*																
Ore.		*				*		*		*		*		*		*																
Pa.		*				*		*		*		*		*		*																
S. C.		*				*		*		*		*4		*		*																
Tenn.		*				*		*		*		*		*		*																
Utah		*				*		*		*		*		*		*																
Vt.		*				*5		*		*		*		*		*																
Va.		*				*		*		*		*		*		*																
Wash.		*				*		*		*		*		*		*																
W. Va.		*				*		*		*		*		*		*																
Wis.		*				*		*		*		*		*		*																
Wyo.		*				*		*		*		*		*		*																
Total		22		15		2		14		20		1		17		17		2		1		11		23		3		24		10		1

¹ Kentucky Statute allows constituent corporations to continue in existence after the consolidation.

² Only merger referred to where state banks only involved.

³ Only consolidation referred to where state banks and national banks concerned.

⁴ No restriction where only state banks involved; when state and national banks concerned, succession allowed only where fiduciary relation is vested.

⁵ Section titled: "Consolidation; merger," but section itself doesn't use either term.