1929

Some Recent Developments in the Law of Trusts

George Gleason Bogert

ILLINOIS LAW REVIEW

Volume XXIII APRIL, 1929 Number 8

SOME RECENT DEVELOPMENTS IN THE LAW OF TRUSTS

By George G. Bogert*

The Termination of Trusts

The power of all the beneficiaries to bring the trust to a premature ending is a question frequently before the courts in recent months. Testators have with patient caution provided incomes for their beneficiaries for years to come and guarded the principal against invasion. After the death of the benefactor the cestuis seek to enjoy directly and at once the entire gift. They are impatient with prudence and delay. They want swift and concentrated enjoyment. Running back to *Claflin* v. *Claflin*[1] we find the courts disagreeing on the proper attitude to take in such cases. On the one side there are the more conservative judges who lay stress on carrying out the testator's intention; on the other are the courts which are impressed with the absolute nature of the property interest of the cestuis and with the principle that an owner should be able to enjoy his property in whatever form and at whatever time he may desire.

Within recent months five cases have passed through the higher courts touching upon this question. Two of the courts, namely, the California appellate court[2] and the Kentucky Court of Appeals,[3] allowed the cestuis to destroy the trust; two other courts, namely, the Supreme Courts of Rhode Island[4] and Missouri,[5] refused the request for a decree of termination. A fifth, the Supreme Judicial

*Professor of Law, University of Chicago.

1. (1889) 149 Mass. 19.
2. *Moor* v. *Vawter* (Calif. 1927) 258 Pac. 622.
3. *Reedlin's Guardian* v. *Cobb* (1928) 222 Ky. 654.
4. *Newport Trust Co.* v. *Newton* (R. I. 1928) 139 Atl. 793.
5. *Shaller* v. *Mississippi Valley Trust Co.* (Mo. 1928) 3 S. W. (2nd) 726.

Court of Maine, felt bound by precedent to refuse the decree for termination, but succumbed to what seems an obvious subterfuge framed by lawyers to bring about a partial ending of the trust.

This latter case was *Cady* v. *Tuttle*.[6] A woman sixty-two years of age was entitled as cestui to the income of $10,000 for twenty years, if she lived that long, and also to a portion of the corpus of the trust estimated at $70,000, provided she lived out the twenty years. The trustees and all beneficiaries were willing that the trustees should pay this beneficiary at once $20,000 for her entire interest in principal and income, and that the trust should be ended as to her. The court adjudged that the trust could not be determined in whole or in part by the cestuis and trustees, but that the trustees might, with the approval of the court, invest a portion of the capital fund in buying up the interest of this woman as cestui, and hence they approved the plan proposed as a trust investment. This seems an evasion. An investment means that the trust res has changed form but the trust continues in full force. The trustee exchanges one form of trust property for another, in order to bring in current income for distribution. If, as here, the payment out of the $20,000 produces no new asset for the trust, but merely relieves the trust of a liability, the transaction cannot properly be called an investment. The payment out of the $20,000 in this case did not leave the trust in question standing, with merely a change in the res. It was in effect a severance of that portion of the res which the parties agreed was equal in value to the share of this cestui and the cancellation of the trust as to the sum thus severed. The real import of this transaction can be judged by seeing what its effect would be if applied to all the cestuis. If the trustees proceeded to "invest" other sums in buying up the shares of the other cestuis, one by one, in the end the trust would have no beneficiaries and presumably the res would also be exhausted. There would be a piecemeal destruction of the trust by consent of trustees, cestuis, and court. There was hardship in the case, no doubt, because the income of $10,000 was inadequate to support the elderly lady, and the court was probably influenced by sympathy in reaching this dubious result. It should have left the cestui to seek a sale or mortgage of her interest through negotiation with bankers or money lenders.

Trust Investments

There is a noticeable tendency to liberalize by statute the rules with respect to trust investments. This is doubtless due in part to

6. (Me. 1928) 141 Atl. 188.

the demand from the wealthy for the tax exempt government securities which form such an important part of the list open to trustees. The prices of these tax exempt securities have become so high that the yield is inadequate for the purposes of many trusts.

Within the last five years Virginia[7] has revised its trust investment statute, adding to the list state bonds of other states, municipal bonds of cities outside Virginia, urban real property mortgages in cities within the fifth federal reserve district, and certain railroad bonds. Very recently federal farm loan bonds have been added in Iowa,[8] Ohio[9] and Pennsylvania;[10] and joint stock land bank bonds in New Jersey[11] and Pennsylvania.[12] In Connecticut[13] the stocks of certain domestic insurance companies have been approved by statute. In Minnesota[14] certain described public utility bonds have been sanctioned as trust investments, and in Wisconsin[15] the public utility field open to trustees has been enlarged. In New York[16] savings and loan association shares are now authorized. In New York[17] and Ohio[18] trustees selling land are by recent acts allowed to invest in the stock or bonds of a corporation buying such real estate from the trustee, provided there is approval by cestuis and the court.

It seems highly probable that this expansion of the list of approved trust securities will continue. High grade public utilities and equipment trust certificates may well be generally added to the list. The difficulty is to frame a statute which by a general description as to margin of security, earnings and other facts of financial history will enable the law makers to select the bonds which have the requisite security and steadiness of income.

Stock Dividends and Profits on the Sale of Stock

The courts continue to struggle with the disposition of stock dividends and stock subscription rights, where stock is held by a trustee for a life tenant and remaindermen. During the past few

7. Laws (1928) ch. 427.
8. Laws (1925) ch. 175.
9. Laws (1925) ch. 45.
10. Laws (1923) ch. 430.
11. Laws (1925) ch. 38.
12. Laws (1923) ch. 430.
13. Laws (1925) ch. 171.
14. Laws (1927) ch. 422.
15. Laws (1927) ch. 323.
16. Laws (1928) ch. 362.
17. Laws (1927) ch. 172.
18. Laws (1923) ch. 80.

months the Supreme Court of Missouri[19] has for the first time announced its stand. It takes the position that the declaration of a stock dividend is merely a matter of corporate bookkeeping, that nothing is taken from the corporation and nothing given to the stockholders. The court, therefore, holds that the new stock should be retained by the trustee just as the old stock was held, namely, as part of the trust corpus. There has, the Missouri court says, been no income received and consequently the life cestui is entitled to no part of the new stock. The court announces that it is following the Massachusetts rule that cash dividends go to the life cestui and stock dividends to capital. Such was the original Massachusetts rule,[20] but that court has long since departed from it and swung around towards the Pennsylvania rule in which the source of the dividend and not its form is considered.[21]

The simplicity of the old Massachusetts rule no doubt commends itself to the trustees and corporation involved. The application of a rule of apportionment means complicated accounting problems and frequent litigation. Courts and legislatures feel the tug of two conflicting emotions. They are pulled in one direction by the desire for certainty and ease of administration; and they are impelled in an opposite course by the wish to do exact justice between temporary beneficiary and ultimate taker. Much labor and litigation can be avoided and a certain rough measure of justice reached by treating all stock dividends as capital and giving the life cestui the income from new and old capital. But doubtless a higher degree of strict justice can be attained by detailed research into the accounting and financial history of the corporation. The federal courts[22] continue to show a fondness for the old Massachusetts rule, and the New York legislature in 1926[23] provided that all stock dividends should be added to capital in the case of trusts going into effect after May 17, 1926.

The Pennsylvania courts adhere to their rule of the source, both as to stock dividends and as to stock subscription rights. They have also extended the doctrine within recent months to the apportionment of a profit on the sale of trust stock. In *Nirdlinger's Estate*[24] trustees bought corporate stock for about $21,000 and several years

19. *Hayes* v. *St. Louis Union Trust Co.* (1927) 317 Mo. 1028, 298 S. W. 91.
20. *Minot* v. *Paine* (1868) 99 Mass. 101.
21. *Old Colony Trust Co.* v. *Jameson* (1926) 256 Mass. 152, 152 N. E. 52.
22. *Buder* v. *Franz* (1928) 27 Fed. (2nd) 101.
23. Laws (1926) ch. 843.
24. (1927) 290 Pa. 457.

later sold it for $170,000. The life cestui claimed that $40,000 of this profit on the sale of the stock held by the trust was due to corporate income which had been accumulated as surplus during the ownership of the stock by the trustees and not distributed as dividends. The life-tenant argued that he was entitled to all dividends declared by the corporation out of earnings accruing during the life of the trust, and that the sale of the stock at a price partly based on accrued corporate earnings was in effect a distribution of those earnings, that is, the equivalent of a cash dividend. The Supreme Court of Pennsylvania ruled that if the life cestui could prove his allegation that a part of the sale price was paid on account of undistributed current earnings, the trustees should turn over to him as income such part of the price, provided always the original book value of the trust capital was maintained. The court said that in substance, though not in form, this profit was a dividend—a realization of earnings by the trust, and should be treated as income. One's *first* impression is the inconsistency between this result and the usual rule regarding profits on the sale of any trust investment. Such profits are almost invariably added to the corpus. It is doubted whether many trustees have considered accounting for any part of the profits of the sale of corporate stock as income. *Secondly,* one is impressed with the serious difficulties of proof. Is it not a matter of somewhat speculative opinion what different elements of value caused the buyer of this stock to offer $170,000 for it? Can even that buyer truly testify that he offered $40,000 of the price in return for $40,000 of surplus added since the trustee held the stock? Is it practical to apportion the price paid to the different elements of value which the stock possessed?

Doubtless there is an increasing tendency to provide in the trust instrument concerning the disposition of all stock dividends and subscription rights, so as to avoid for trustees the trouble of apportionment and litigation. Trust companies are wise to insist for their own protection on such express provision by the settler.

DEFERRED PAYMENT INSURANCE TRUSTS

Insurance companies have been using for many years the deferred payment contract in which the company as trustee is made the beneficiary of the policy and it agrees to hold the proceeds of the policy in trust for the relatives of the insured and make payments of the principal to them over a period of years in installments, with interest.

There has been remarkably little judicial construction of these policies.[24a] A recent federal district court decision in the western district of Michigan[25] is one of the few decisions touching the policy and it is inconclusive. In that case prior to the death of the insured the company brought an action to cancel the policy on the ground of fraud. Pending this litigation the insured died. His widow and children, who were the cestuis under the trust agreement and were to receive the face value of the policy in 240 installments, were defendants and asked the federal court to remove the insurance company as trustee on account of its hostility to the cestuis and appoint a trust company in its place. This relief was granted. The insurance company, in defending itself against removal as trustee, addressed itself largely to the question of the authority of the federal court to remove a trustee of such a trust, but also incidentally the company urged that there was no trust until a sum had been adjudged payable under the policy and such sum had been paid to the insurance company as trustee. The court did not discuss these latter contentions, but assumed that the policy created a real, and not merely a nominal, trust. The court did not analyze the legal theory of the deferred payment arrangement.

It is apparent that there are certain difficulties in the way of treating these deferred payment insurance policies as creating true trusts and not merely debts. In the first place, until the death of the insured we have the insurance company holding in trust its own promise to pay to itself. A chose in action can, of course, be the subject-matter of a trust, but must it not be an obligation of a third party to the trustee? Secondly, after the death of the insured no separation out of any assets of the insurance company as the trust res is contemplated or ever actually occurs. The insurance company merely credits itself as insurer and debits itself as so-called trustee. If asked to point out bonds or stock or mortgages or cash from which it expected to meet the 240 monthly payments, the company would reply that no definite property was held in trust for such purpose, and that the trust was to be satisfied out of any of the assets of the insurance company.

But should not a definite res be of the essence of every trust? A trust means equitable ownership by the beneficiary, and ownership without something owned is nonsense. The trust is an institution involving certain special advantages to the cestui que trust,

24a. For an excellent recent discussion see *Van Hecke* "Insurance Trusts—The Insurer as Trustee" (1928) 7 N. C. Law Rev. 21.

25. *New York Life Insurance Co.* v. *O'Brien* (1927) 27 Fed. (2nd) 773.

as, for example, a position like that of a preferred creditor, a right to exact the highest kind of good faith from the trustee, a right to the supervision and protecting hand of a court of equity, and the possibility of protection against creditors through the medium of a spendthrift trust. In the absence of statute, a mere debtor has none of these advantages. A trust, it is true, also involves some possible disadvantages, not found in contracts, as, for example, restrictions under the rule against remoteness of vesting and the rule against restraints on alienation. The effort of the insurance companies in these deferred payment trusts seems to be to call a debt a trust and thus be able to hold out to the prospective insured the advantages of a trust without in fact putting the insurance company to the trouble of setting up a real trust.

It is true that legislatures may be induced to give these deferred payment contracts the same benefits which can be derived from spendthrift trusts, without the setting up of any real trust fund, and this has been done in many states. In Connecticut,[26] Massachusetts,[27] New York,[28] Pennsylvania,[29] and Wisconsin[30] statutes authorize a mingling of the proceeds of these deferred payment contracts with general assets; and in California,[31] Colorado,[32] Connecticut,[33] Massachusetts,[34] Minnesota,[35] Nebraska,[36] New York,[37] Ohio,[38] Pennsylvania,[39] Vermont[40] and Wisconsin[41] spendthrift provisions in the insurance trust agreement between insured and insurer are authorized, so that the payments to be made by the company cannot be reached by the creditors of the beneficiaries in advance of actual payment to the cestui. But this legislation merely means that in these states legislatures have attached some of the incidents of a trust to the insurance company's debt. It does not mean that these deferred payment contracts have all the incidents of the trust relation or are changed into trusts. In most states the question

26. Gen. Sts. sec. 4155; Laws (1927) ch. 77.
27. Mass. Gen. Laws (1921) ch. 175 sec. 119; Laws (1921) ch. 168.
28. New York Personal Property Law, sec. 15; Laws (1911) ch. 327.
29. Pa. Laws (1923) ch. 104.
30. Wis. Sts. (1927) sec. 207, 13.
31. Civil Code sec. 2768.
32. Laws (1925) p. 310.
33. Gen. Sts. sec. 4155; Laws (1927) ch. 77.
34. Gen. Laws (1921) ch. 175 sec. 119; Laws (1921) ch. 168.
35. Minn. Laws (1913) ch. 426.
36. Comp. Sts. (1922) sec. 7898.
37. Personal Property Law, sec. 15; Laws (1911) ch. 327.
38. Laws (1917) H. B. 250 p. 606.
39. Pa. Laws (1923) ch. 104.
40. Laws (1917) sec. 5579.
41. Sts. (1927) sec. 207, 13.

whether this peculiar policy gives birth to a real trust, a mere contract, or a hybrid, is left unsettled by statute or decision. The insurance companies endeavor to issue these deferred payment contracts in such a way as to have them governed by the laws of the state where the insurance company is chartered. Probably, therefore, the questions raised are of more local interest than if the law of the state of residence of the insured or beneficiaries were to control. It is in the home states of many of the large companies that much of the legislation has occurred.

"Living" Testamentary Trusts

I advisedly use this apparently contradictory heading regarding the Ohio case of *Union Trust Company* v. *Hawkins*.[41a] There has been an application for a rehearing in this case, with other trust companies seeking to file briefs as friends of the court. The judges seem to be uncertain of the soundness of their decision and to be withholding final action. In the *Hawkins* case a settlor delivered property to a trust company under a document providing that the income should be paid to the settlor for her life, and that at her death the trust should cease and the property should be divided by the trust company among certain relatives of the settlor. The settlor also reserved the power to revoke the trust during her life and to withdraw for her own use any part or all of the principal of the trust. Evidently the trust companies of Ohio are endeavoring to build up business of a quasi-testamentary nature and seek to learn just how far these "living trust" instruments can go in giving control to the settlor without falling foul of the Statute of Wills. It would seem that the trust companies selected a poor instrument as the basis for their test case. The settlor stands out in the *Hawkins* case as in such complete control of the income and principal during her life that the tentative conclusion of the Ohio Supreme Court that the disposition is testamentary seems sure to stand. Furthermore, the ultimate donees of the principal were to take, if at all, not as cestuis of a trust, for the trust was to end at the death of the settlor, and yet the theory of the instrument was not that of an immediate direct gift of the legal interest in the remainder to the ultimate donees. This ultimate gift must, it would seem, be construed as testamentary.

For the purposes of the Statute of Wills the reservation of life income to the settlor coupled with a power of revocation is generally regarded as unobjectionable, while the reservation of a power to take

41a. Decided by Supreme Court of Ohio May 31, 1928, but not yet officially published.

the principal without revoking the trust has been held to make the instrument testamentary. As a practical matter the ability to revoke and take for oneself seems to be equivalent to the capacity to take without revoking. In the related but distinct field of the federal inheritance tax law, the settlor's ability to revoke the trust has now come to be regarded as such a mark of mastery as to make the disposition one taking effect in possession and enjoyment at the death of the settlor and hence taxable. In the construction of the Statute of Wills and instruments alleged to violate it, the courts should not relax but rather tighten the rules as to what is a testamentary instrument. It is good policy to safeguard the testator with some formal requirements in the distribution of his property, and it is also wise to pass the property of the deceased through the probate courts where the interests of the state, the creditors and the relatives may be watched. The substitution of trust companies for probate courts is not a desideratum for the general public.

Effect of Merger or Consolidation in the Case of Corporate Trustees

With the increasing use of trust companies, national banks and in some jurisdictions state banks as trustees, and with the modern tendency towards the union of two or more institutions and the centralization of corporate interests, the effect of corporate merger or consolidation on trusteeships becomes an increasingly important problem.

Four recent cases from Massachusetts have brought the problem into the lime light. Two involved the change of the Commonwealth Trust Company of Boston into a national bank and the later consolidation of that national bank with another national bank.[42] Two other decisions were concerned with the merger of the Fitchburg Bank and Trust Company, a Massachusetts corporation, with the Merchants National Bank of Worcester, under the corporate title of the Worcester County National Bank.[43]

The distinction between merger and consolidation should first be noticed. 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

42. *Commonwealth National Bank,* Petitioner (1924) 249 Mass. 440; Petition of *Atlantic National Bank* (1927) 261 Mass. 217, 158 N. E. 780.

43. Petition of *Worcester County National Bank* (Mass. 1928) 161 N. E. 797; Petition of *Worcester County National Bank* (Mass. 1928) 162 N. E. 217.

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. The Illinois Statutes[44] purport to provide for both merger and consolidation, but they have been construed, so far as banks and trust companies are concerned, to allow merely consolidation.

Consolidation involves the extinction of two or more corporations and the formation of a new corporation which takes over the assets and liabilities of the old corporations. Consolidation is expressly provided for in the Illinois General Corporation Law. In *Chicago Title and Trust Company* v. *Doyle*[45] it was held that the corporation resulting from the consolidation must pay a tax on its capital stock as a new corporation.

At least five possible situations involving merger or consolidation seem to be presented. *First,* one state institution may be merged in another. *Secondly,* there may be the consolidation of two or more state institutions. *Thirdly,* under the federal statutes a state institution may be changed into a national bank. *Fourthly,* under federal laws a state institution may be merged into a national bank. *Fifthly,* under federal laws there may be the consolidation of two national banks.

In considering the effect of these five transactions on trusteesships held by one or the other of the institutions involved we will first assume that the trusteeship was created prior to the merger or consolidation. This is of course the more usual case and the one involving greater difficulty.

In case one we have the merger of one trust company or other state banking institution into another trust company or other state banking institution. Let us assume that trust company A has been appointed the trustee of a trust and that thereafter trust company A is merged under state laws into trust company B. What is the effect on the A company trusteeship? Does trust company B which has succeeded to all the assets of trust company A also succeed to its trusteeships, executorships, administratorships, guardianships, and other similar fiduciary relations? In this and all the following illustrations it is assumed, unless otherwise stated, that there is no controlling statute or trust instrument. There seems to be no doubt that trust company B does not succeed to the A company trusteeship and that the trusteeship becomes vacant. The legal title to the trust property held by trust company A passes to trust company

44. Ch. 32 sec. 65.
45. (1913) 259 Ill. 489.

B under the merger but the right to continue as trustee does not so pass to trust company B. This right in the A company to continue as trustee is not property in the ordinary sense. It is not transferable at the will of the trustee. It involves an intimate relation of trust and confidence which depends on the personality of the trustee.

In the first case mentioned above a second situation may of course be involved, namely, that of a merger of state corporation A into state corporation B, and a trusteeship with corporation B as the trustee prior to the merger. There is no difficulty here. Corporation B, which is on the receiving end of the merger, continues to maintain its old corporate status and therefore holds its trusteeship as well as its property rights in the ordinary sense.

In the second situation mentioned above we are assuming a consolidation of trust company A with trust company B and the continuance of the business by means of a new corporation to be known as the A-B Trust Company. Here, on principle and in the absence of statute or controlling trust instrument, it appears to be certain that a trusteeship held by either of the consolidated corporations prior to the consolidation should be considered vacant and it should be necessary for the A-B Trust Company to have itself substituted as trustee in the case of any trusteeship previously held by either the A Trust Company or the B Trust Company.

The third case suggested above was that of a state bank changing itself under authority of the federal law into a national bank. We assume that the state bank was a trustee prior to this change. The theory of such change is that the corporate entity continues unaffected, except that the bank is now subjected to control by federal law instead of by state law.[45a] There should, therefore, be no vacancy in the trusteeship and the national bank should have authority to continue acting as trustee.

If we assume the fourth situation named above, we have the case of a state institution merged in a national bank and either the state institution a trustee prior to the merger, or the national bank a trustee prior to the merger. Here the same principles are involved as in the case of one state institution merging in another, described above. Trusteeships held by the state institution prior to its merger in the national bank would seem to be vacant, whereas trusteeships held by the national bank prior to the merger of the state bank in it should continue unaffected. In the second *Worcester*

45a. *Poisson* v. *Williams* (1926) 15 Fed. (2nd) 582.

County National Bank[46] case the decision was that a trusteeship held by the state trust company before its merger in the national bank did not survive in the national bank. Chief Justice Rugg said:

"The trust arising from appointments to such positions as executor, administrator, and the like is highly personal. It is not commercial. It is not contractual. It is not a property right. It involves no pecuniary interest on the part of the fiduciary. . . . A strictly confidential relation of this nature cannot survive such a transmutation as is wrought by the consolidation of a state bank with a national banking association under the character of the latter in accordance with the terms of said section 3."

The decision in Petition of *Commonwealth Atlantic National Bank*[47] was to the same effect.

In the first *Worcester County National Bank* case[48] it was decided that an administratorship held by the national bank before merger of the state trust company into the national bank remained unaffected by the merger.

The fifth situation mentioned above was that of the consolidation of national bank A with national bank B. If we assume that either national bank A or national bank B was a trustee prior to the consolidation it would seem that there should be a vacancy in the trusteeship after the consolidation. The principles applicable are the same as those involved in the consolidation of two state institutions.

It is of some importance next to consider wills or other instruments going into effect and appointing a corporation trustee after that corporation has been affected by merger or consolidation. Many wills are unchanged for a period of years after their making. The testator may have selected a trustee which has later participated in a merger or consolidation, and the testator may have allowed the will to stand till his death, unchanged, notwithstanding the merger or consolidation.

Under this head we may assume first that the will appoints as trustee a corporation which prior to the date when the will took effect had become merged in another corporation. Here it would seem plain that the trust takes effect under the well-known doctrine that equity will not allow a trust to fail for want of a trustee but that the trusteeship is vacant. The corporation named as trustee is out of existence, and the corporation into which it has merged

46. Supra, note 43.
47. Supra, note 42.
48. Supra, note 43.

is not within the description of the will. The decision in *Commonwealth Atlantic National Bank* Petitioner[49] was to the effect that a national bank was not entitled to an executorship under a will which named as executor a trust company which had become merged in the national bank before the will took effect. Doubtless a court could easily be persuaded to appoint the corporation into which the named trustee had been merged as administrator with the will annexed.

We next assume that the will appoints as trustee a corporation which has received another into itself by merger previous to the time when the will went into effect. The trustee named will of course take the trusteeship and have power to administer it. Its corporate existence has not been affected by the merger.

We may next suppose that the will in question appoints as trustee either one of two corporations which have been consolidated prior to the time the will took effect. Here since both of these corporations have gone out of existence it would seem that there should be a vacancy in the trusteeship and that, while the trust should take effect, application to a court would be necessary in order to have the corporation resulting from the consolidation take up the administration of the trust. Under the Illinois consolidation statute, however, the Supreme Court has held that the result in Illinois is not that just suggested. In *Chicago Title and Trust Company* v. *Zinser,*[50] that court held that the Chicago Title and Trust Company was entitled to administer an executorship in a will appointing the Real Estate Title and Trust Company executor. This will went into effect after the Real Estate Title and Trust Company had consolidated with the old Chicago Title and Trust Company, and formed a new corporation known as the Chicago Title and Trust Company. The court bases its decision on the intention of the testator. It argues that a testator appointing a corporation executor impliedly provides that the executorship shall go to any corporate successor of the corporation named in the will. Corporate mergers, consolidations and reorganizations are deemed contemplated by the testator.

Lastly we may assume that the will appoints as trustee a state institution which had prior to the death of the testator been changed into a national bank. Here the national bank would seem to have power to act as trustee without any further grant of authority, since it is the same corporate person as the old state bank.

49. Supra, note 42.
50. (1914) 264 Ill. 31.

In the previous discussion it has been assumed that a bank or trust company has in each case been appointed *sole* trustee. If we assume that a bank or trust company was appointed one of two or more trustees and that private persons constituted the other trustees, new problems will of course be involved. There will be no vacancy in the trusteeship if the corporate trustee has gone out of existence. The other trustees named will take and administer under the rule usually applied that where there are plural trustees and one is incompetent to act the others proceed with the trust without difficulty.

In the previous discussion it has also been assumed that each question arose unaffected by the terms of the trust instrument, the terms of any court decree appointing the trustee, or the terms of any state or federal statute.

It is obvious of course that in the trust instrument the settlor may provide expressly for the effect of merger or consolidation on the trusteeship. He may provide that if the corporate trustee which he names is merged in another corporation, the corporation receiving the merger shall continue as trustee; or he may provide that if the corporation which he names as trustee is consolidated with another corporation the new corporation resulting from the consolidation shall take the trusteeship. It is also apparent that where a trustee is appointed by court decree, provisions may lawfully be inserted in the decree governing the effect of consolidation or merger along the same lines as those stated with respect to the terms of a trust instrument.

It is likewise rather clear that a state statute may obviate all difficulties with regard to trusteeships arising out of corporate merger or consolidation. In order to do this, however, it would seem best to have the statute expressly provide for succession to the trusteeship and not merely provide that all the property of the merged or consolidated corporation shall be vested in the corporation into which the merger occurs or the new corporation arising out of the consolidation. A trusteeship is not a property right voluntarily transferable by the trustee. It is at least doubtful whether any general statute such as exists in Illinois with regard to corporate consolidations is broad enough to cover the case of succession to trusteeships. The Illinois statute[51] provides that the new corporation resulting from the consolidation shall have all the rights, privileges, immunities, powers and franchises, and all property real, personal, and mixed of each of the old corporations.

51. *Smith* and *Hurd* "Illinois Statutes" (1927) ch. 33 sec. 65.

In the *Zinser* case[52] the Illinois Supreme Court did not place reliance on the effect of this statute in giving the new Chicago Title and Trust Company the right to carry on the executorship given to the Real Estate Title and Trust Company, but rather placed the decision on the ground of carrying out the testator's intent.

Two recent New York statutes[53] authorizing the consolidation of religious corporations provide that the new corporations shall have all the rights, powers, privileges and interests of the two old corporations and shall take under wills naming either of the two old corporations as donee, but do not expressly provide for succession to trusteeships. In Pennsylvania a recent act[54] expressly provides for succession to trusteeships and other fiduciary relations in the case of consolidations under state law. It is believed that such provision for succession is entirely within the powers of the state legislature. The instances where a state legislature has either directly made provision for successor trustees or given the power to a court to appoint such successor trustees are exceedingly numerous.

Congress by its act of 1927[55] regarding merger of a state institution in a national bank attempted to provide that the national bank should thereafter have all the trusteeships which the state institution previously had. It provided that the national bank receiving the state institution by way of merger should have "the right of succession as trustee, executor, or in any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by such state or District bank so consolidated with such national banking association." While Congress used the word "consolidated" in this act, the courts have construed the process to be merger. The Supreme Judicial Court of Massachusetts has held in the second *Worcester County National Bank* case[56] that this quoted portion of the 1927 federal law is unconstitutional because it is not within the power of Congress to prescribe successors to trustees and executors who are administering trusts under the laws of Massachusetts. The court gave as an additional ground for its decision that the provision of the federal act for the succession of the national bank to the state trust company's trusteeship was in contravention of the law of Massachusetts in that it attempted to take over as a legislative function what was purely a judicial func-

52. Supra, note 50.
53. N. Y. Laws (1927) chs. 429, 430.
54. Pa. Laws (1923) ch. 128.
55. Act of Feb. 25, 1927; U. S. Code Ann., "Banks and Banking" sec. 34a.
56. Supra, note 43.

tion, namely, the appointment of trustees. The federal act expressly provides that none of its terms regarding merger shall be effective if they are "in contravention of state law." Space will not admit of any effort to discuss the soundness of these conclusions in the field of constitutional law, or the probability of other state courts following the Massachusetts court.

In the recent consolidations in Chicago this Massachusetts construction of the federal act has been accepted. While counsel may have doubted its correctness, they have not wanted to run the risk of ignoring it. In the Continental-Illinois Merchants joinder and in the First National-Union Trust consolidation the guiding principles seem to have been two: (1) the avoidance of the merger of any state corporate trustee into a national bank; (2) the use of the Illinois act for all consolidations of corporate trustees.

It was probably felt that the merger of a state corporate trustee into a national bank might make vacant the former's trusteeships under the doctrine of the Massachusetts decisions, while under the *Zinser* decision in Illinois it was apparently believed that the corporation resulting from the consolidation under the Illinois law would surely succeed to all fiduciary relations which the old trustees had.

The question may be asked, "Is not the succession problem in the case of merger or consolidation theoretical rather than practical? The bank or trust company arising from the merger or consolidation in fact has possession of the trust assets and also has legal title thereto. It will go on administering the trusts, whether it has the technical right to do so or not, and no one interested will complain." It is true that in the case of many trusteeships this practical construction in favor of succession may succeed in avoiding all trouble. But it is not believed that such a loose administration of trusteeships will in the long run be satisfactory. 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.

Professional trustees will doubtless avoid much of this difficulty in the future by drawing their trust instruments which go into effect hereafter so that provision is made to avoid any difficulty arising from merger or consolidation of the trustee. Court decrees affecting executorships, administratorships, trusteeships and guardianships may perhaps also be worded so as to guard against any unpleasant effect of corporate changes.

Whether it is desirable from the point of view of settlor and cestuis to give a corporate trustee a blank check with respect to mergers and consolidations may well be doubted. The settlor selects his original bank or trust company as trustee because he relies on its officers and employees, approves its financial policies, its size, its connections and similar characteristics. Either a merger or a consolidation may mean a corporation operated by entirely different men with new policies. The settlor may have selected a small trust company, operated by personal friends, and having no affiliation with any bond selling corporation. If he permits any corporate successor by merger or consolidation to succeed automatically to the trusteeship, he may soon find his trust being operated by a large trust company in which his personal friends are a minor factor, where trust investments are placed with an affiliated investment house.