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BANKS AND BANKING — RIGHT OF NATIONAL BANK TO SUE ON PERSONAL GUARANTY TO STATE BANK AFTER CONSOLIDATION¹ OF STATE BANK WITH NATIONAL BANK — Defendants guaranteed payment to a state bank of the notes and renewals made by a borrower. Shortly thereafter the state bank

¹ A consolidation takes place when two or more old companies are extinguished and a new one is created. This is to be distinguished from a merger, which contemplates the absorption of one or more old companies by another old company, which continues in existence with the property of all the others. 8 THOMPSON, CORPORATIONS, 3d ed., § 6012 (1927).

In both § 33 (consolidation of national banks) and § 34a (consolidation of a state and a national bank), provision is made for continuance under the charter of one of

was consolidated with a national banking association. The borrower issued a renewal note to the consolidated bank for the indebtedness owing the state bank. This was followed by a consolidation with another state bank, the appointment of a receiver, and the sale of the consolidated bank's assets to plaintiff.² In answer to the claim on the guaranty for payment of the renewal note, defendants declared that the obligation was not assignable and that the identity of the obligee was dissolved by the first consolidation. *Held*, that the corporate existence of the state bank never terminated, but continued in the resulting banking association. *Guardian Depositors Corp. v. Currie*, 292 Mich. 549, 291 N. W. 2 (1940).

Although the consolidation of corporations was unauthorized at common law,³ Congress had for some time provided for the conversion of state banks into national banks.⁴ In 1927 the Federal Banking Act was amended to permit the consolidation of state and national banks.⁵ Under the provision for conversion it was held that the consent of the state to such action was unnecessary,⁶ and the same rule was applied to the consolidation procedure for state banks.⁷ As a corollary to this proposition it was held that the identity of the state bank could not be destroyed by act of Congress.⁸ It is apparent that these corporations were created by two distinct sovereigns, each supreme within its sphere. The reference above to the retention of the state bank's identity upon conversion, as well

the national banks. 40 Stat. L. 1043 (1918), 12 U. S. C. (1934), § 33; 44 Stat. L. 1225 (1927), 12 U. S. C. (1934), § 34a.

"A legislature may authorize a consolidation of corporations by merging one in the other and continue the existence of the latter with the property, rights and franchises of both." 8 THOMPSON, CORPORATIONS, 3d ed., § 6012, p. 66 (1927); Philadelphia, W. & B. R. R. v. Maryland, 51 U. S. 376 (1850).

Throughout this note the term consolidation will be confined to the statutory expression in the National Bank Act, which is in substance a merger under the historical definition.

² The Michigan Supreme Court assumes that the claim is unassignable; yet it did not concern itself with the problem of the sale of a nonassignable claim to plaintiff, who is not the successor of the resulting bank, for by the statute the national bank cannot be so dissolved. The trial judge treated the guaranty as a continuing one running to the resulting corporation as to sums advanced by the state bank, and which could be sold to plaintiff. Record in the principal case, p. 30. An examination of the briefs of counsel indicates that the issue of the sale of a nonassignable guaranty was not argued below and that no exception was saved.

³ Consolidation (and merger) are not within the objects of a corporation unless provided for and cannot be implied. *BALLENTINE, PRIVATE CORPORATIONS* 752 (1927); *Pearce v. Madison & I. R. R.*, 21 How. (62 U. S.) 441 (1859).

⁴ 13 Stat. L. 112 (1864) as amended, 12 U. S. C. (1934), § 35.

⁵ 44 Stat. L. 1225 (1927), 12 U. S. C. (1934), § 34a.

⁶ *Casey v. Galli*, 94 U. S. 673 (1876).

⁷ *Ex parte Worcester County Nat. Bank*, 263 Mass. 444, 162 N. E. 217 (1928), *affd.* 279 U. S. 347, 49 S. Ct. 368 (1929).

⁸ There is a transition to the federal jurisdiction, but not a creation of a new entity and destruction of the state corporation. *Commonwealth v. First Nat. Bank & Trust Co. of Easton*, 303 Pa. 241, 154 A. 379 (1931); *Ex parte Worcester County Nat. Bank*, 279 U. S. 347, 49 S. Ct. 368 (1929).

as the consolidation of corporations of different states under concurrent consolidation statutes resulting in two distinct corporations,⁹ are ample authority for the continuation of the state bank in the resulting national bank. Although it is within the authority of the state to destroy the identity of the state bank upon consolidation, the Michigan legislature has not done so.¹⁰ The only holdings on this subject which deny the continuation of the state bank are founded upon state statutes which dissolve the state corporation upon the act of consolidation.¹¹ Since this type of consolidation is restricted by the limitations upon the authority of the respective sovereigns, it would seem that the continuation of the assets and liabilities of the constituent corporations in the resulting corporation is the fairest solution.¹² The rule prevailing in Massachusetts that the resulting corporation does not succeed to the offices of trust of the state bank depends upon the Massachusetts statute, founded on sound reasons of policy.¹³ However, in states which make no statutory provision, the courts have held that the change does not affect the character of the trustee¹⁴ and that the person selecting the state bank as a trust official contemplated the federal consolidation statute.¹⁵ In the principal case it cannot be said that the entity of the resulting corporation is such an alteration that the guarantors are burdened with an increased obliga-

⁹ The laws of one state cannot create a corporation in another state. *BALLENTINE, PRIVATE CORPORATIONS* 758 (1927); *J. W. Wells Lumber Co. v. Menominee River Boom Co.*, 203 Mich. 14, 168 N. W. 1011 (1918).

¹⁰ 3 Mich. Comp. Laws (1929), § 11956. Permission to consolidate is given, but the dissolution of the state bank is not provided for. Principal case, 292 Mich. 549 at 558. As in the federal act, the language is that of consolidation, but the substance is merger.

¹¹ Mass. Gen. Laws (1921), c. 172, § 44, amended by Stat. (1922), c. 292: "The charter of a trust company the business of which shall . . . be consolidated or merged with, or absorbed by, another bank or trust company, shall be void except for the purpose of discharging existing obligations and liabilities." See *Ex parte Worcester County Nat. Bank*, 263 Mass. 444 at 447, 162 N. E. 217 (1928), *affd.* 279 U. S. 347, 49 S. Ct. 368 (1929).

¹² In an action on a guaranty by a consolidated national bank, very similar to the principal case, the Ohio Supreme Court held that the words of the federal statute transferring all rights, franchises, and interests of the state bank included the right to enforce the guaranty. *Central United Nat. Bank of Cleveland v. Abbott*, 135 Ohio St. 37, 18 N. E. (2d) 981 (1939).

¹³ Trust officers should be subject to the appointive power of the court. *Ex parte Worcester County Nat. Bank*, 263 Mass. 444 at 454, 162 N. E. 217 (1928), *affd.* 279 U. S. 347, 49 S. Ct. 368 (1929).

¹⁴ The California law authorizes the continuation of the office of trustee by the national bank after consolidation. *Bayer v. Barrett*, 127 Cal. App. 305, 15 P. (2d) 801 (1932).

¹⁵ *Adams v. Atlantic Nat. Bank of Jacksonville*, 115 Fla. 399, 155 So. 648 (1934); *First Minneapolis Trust Co. v. Lancaster Corp.*, 185 Minn. 121, 240 N. W. 459 (1931).

tion.¹⁶ The Michigan court correctly accepted this view and made no attempt to read into the Michigan statutes any limitation which would destroy this liability fairly owing by defendant to plaintiff.

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¹⁶ The Massachusetts court in holding that the state corporation was dissolved conceded that in many respects, including contract obligations, the identity of the state corporation is continued in the resulting corporation. *Ex parte Worcester County Nat. Bank*, 263 Mass. 444, 162 N. E. 217 (1928), *affd.* 279 U. S. 347, 49 S. Ct. 368 (1929); *Commonwealth v. First Nat. Bank & Trust Co. of Easton*, 303 Pa. 241, 154 A. 379 (1931); *Central United Nat. Bank of Cleveland v. Abbott*, 135 Ohio St. 37, 18 N. E. (2d) 981 (1939).