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Executors and Administrators—Right of Consolidated Bank to Qualify as Executor

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that closed corporations should be allowed such, the courts will give effect to their option to repurchase. On the other hand, if they would refuse to give effect to the option as being a restraint upon alienation, they would likewise hold void a covenant between the stockholders made for the same purpose.

—JAMES A. MCWHORTER.

EXECUTORS AND ADMINISTRATORS — RIGHT OF CONSOLIDATED BANK TO QUALIFY AS EXECUTOR.—In *Mueller v. First National Bank of Atlanta*¹ the testatrix, A, named the X National Bank as her executor. About three month's prior to A's death, the X National Bank effected a legal consolidation with the Y National Bank under the latter's charter. A knew of the consolidation, but her heirs at law now challenge the right of the consolidated bank to qualify as her executor. The Act of Congress authorizing the consolidation of national banks did not expressly cover the situation. *Held*, A either knew or was chargeable with knowing that the act authorized such consolidation, and it is broad enough to pass the executorship as a right or interest in property to the Y National Bank.²

There has been a split of authority on this question.³ The Massachusetts court in *Petition of Commonwealth-Atlantic National Bank of Boston*⁴ takes a precisely contrary view of construing the same Act of Congress on the ground that the selection

¹ 156 S. E. 662 (Ga. 1931).

² 40 Stat. 1043, 12 U. S. C. A. § 34 (1926).

³ *First National Bank v. Chapman*, 160 Tenn. 72, 22 S. W. (2d) 245 (1929) (trustee in deed of trust, consolidation of state bank with national bank under federal law); *Iowa Light Co. v. First National Bank*, 250 Mass. 353, 145 N. E. 433 (1924) (trustee in deed of trust, consolidation of state bank with national bank); *Chicago Title & Trust Co. v. Zinser*, 264 Ill. 31, 105 N. E. 718 (1914) (executor, consolidation of two state banks under state law prior to testatrix' death); *In re Bergdorf's Will*, 206 N. Y. 309, 99 N. E. 714 (1912) (executor, consolidation of state banks under state law prior to testator's death). *Contra*: *Hofheimer v. Seaboard Citizens National Bank*, 153 S. E. 656 (Va. 1930) (executor, consolidation of state bank with national bank under federal law prior to testator's death); *Petition of Worcester County National Bank*, 263 Mass. 444, 162 N. E. 217 (1928), *aff'd.*, 279 U. S. 347, 49 S. Ct. 368 (1929) (executor, consolidation of state bank with national bank under federal law after testator's death); *Petition of Commonwealth-Atlantic National Bank*, 261 Mass. 217, 158 N. E. 780 (1927) (trustee in will, consolidation of state bank with national bank after testator's death); *Petition of Commonwealth-Atlantic National Bank*, 249 Mass. 440, 144 N. E. 443 (1924) (executor, consolidation of national banks under federal law prior to testator's death).

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

of an executor is based on personal confidence, that it confers no property right, and that the consolidated bank is a different corporate person than that named in the will. The court in the Mueller case, *supra*, does not believe that personal confidence is a consideration which can reasonably influence the appointment of a corporate executor, since "the stockholders, the officers, and the entire management of a corporation may be expected to change from time to time". The variance in the two cases is perhaps explicable on the basis of a difference in the respective statutes relative to the appointment of executors. In Georgia such appointment can only be made by the testator.⁵ In Massachusetts the probate court appoints the executor, and, by statutory provision,⁶ must inquire whether or not the person named by the testator is "suitable"; hence, here it is felt that such judicial examination of the consolidated bank is important in view of recent numerous bank failures.⁷

Both viewpoints seem justifiable. Where the probate court examines and appoints the executor, the element of personal confidence may well be said to be involved in the case of a corporate person. Where the testator appoints and the court has no such power to scrutinize the person named, the simplest thing is to permit the consolidated bank to qualify as executor. That bank failures have been numerous would not seem to be a controlling factor in the latter situation unless it could be shown that more consolidated than other banks fail. Consolidation may save a sinking bank; nor does it arise at will but must be legal and approved by the Comptroller of the Currency and/or the state banking commissioner. Eliminating the consolidation factor, even

⁵ GA. CODE ANN. (Michie, 1926) c. 2, art. 4, §§ 3883-4. So in Virginia and West Virginia the testator appoints, the only statutory qualifications for an executor being the taking of an oath and giving bond; VA. REV. CODE (1930) c. 219, § 5357; W. VA. REV. CODE (1931) c. 41, art. 1, § 1.

⁶ MASS. GEN. LAWS (1921) c. 192, § 4.

⁷ Petition of Worcester County National Bank, *supra* n. 3, at 222. Here the court was so intent on preserving the probate court's examining power that it declared unconstitutional an Act of Congress providing for the transmission of the office of trustee or executor to a consolidated bank. Under this decision as affirmed by the U. S. Supreme Court, while the property of the estate passed to the consolidated bank, it had to apply to the probate court for appointment as succeeding fiduciary. In Hofheimer v. Seaboard Citizens National Bank, *supra* n. 3, the Virginia court goes farther in holding where a natural person and a bank were named joint executors and the latter effected a consolidation, that the executorship survived in the natural person. The Worcester bank case, *supra*, is distinguished in that there the right was already vested at the time of the consolidation; but this distinction alone, based on whether the testator died before or after the consolidation, does not seem important enough to sustain the decision.

a single corporation may conceal a changed personnel. Suppose *X* Bank is appointed executor; if *Y* Bank now purchases the controlling stock so as to make the former a part of its chain of banks, the *X* Bank, although continuing its legal existence, is no longer the same. Any personal confidence which the testator may have originally imposed is now fundamentally a negligible consideration.

The writer has been unable to find any West Virginia case bearing on the question, but the revised codes of both Virginia and West Virginia expressly adopt the view that the consolidated bank may qualify as executor.⁸ These new provisions may be said to follow the better view, since in neither jurisdiction does the court have the authority to inquire as to the suitability of the executor, whether a natural or corporate person.⁹

—BERNARD SCLOVE.

JUDGMENTS — RES ADJUDICATA — EFFECT OF JUDGMENT OF JUSTICE COURT ON PENDING TORT ACTION IN CIRCUIT COURT. — In a litigation arising out of an automobile accident between cars owned by plaintiff and defendant the plaintiff started a suit in the circuit court and the defendant shortly afterwards started a suit in the justice of the peace court. The circuit court plaintiff appeared in the justice court and pleaded to the merits. He did not advise the justice court of the circuit suit, pending on the same cause of action. Judgment was given in the sum of \$14.77 for the circuit court plaintiff, who thereafter prosecuted his circuit court suit to judgment. On appeal the judgment was reversed for error in disallowing evidence in support of defendant's pleas of res adjudicata. *Johnson v. Rogers*.¹

This case is unusual because of the unique fact situation and the problems arising as a result of the decision. Under the rule of this case the plaintiff, starting a suit in the circuit court, must appear in the justice court and plead a suit pending in the circuit court, though the latter was prior in time to the justice action. If he fails to advise the tribunal of this fact and pleads to the merits,

⁸ W. VA. REV. CODE (1931) c. 31, art. 4, § 7, outlines the rights, privileges, powers and immunities of trust companies and confers the same upon national banks provisionally, and c. 31, art. 8, § 29, passes the office of trustee or executor to a consolidated bank whether or not already vested "to same effect as if the consolidated institution had been named in such deed, will, etc." VA. REV. CODE (1930) c. 164a, § 4149(10).

⁹ See statutes, *supra* n. 5.

¹ 157 S. E. 409 (W. Va. 1931).