that purpose at least five days before its approval for payment by the commissioners. When approved, the date thereof shall be entered on such book opposite the claim, and payment thereof shall not be made until after the expiration of five days after the approval has been so entered."

In an opinion of the Attorney General, found in Opinions of the Attorney General for 1920, p. 428, it was held in substance that where assessments had been collected for the payment of bond issues and the improvement was not undertaken, under such circumstances the county commissioners could properly allow to the persons who had paid such assessments their claims and refund the same. It would appear that Sections 2460 and 2572 would have application under such circumstances as are under consideration herein.

Based upon the foregoing, it is my opinion:

1. By reason of the provisions of Section 22 of the World War Veterans' Act (Section 454 U. S. Code Ann.), where a guardian has been appointed for an insane ward who has been committed to a state hospital for the insane, the compensation, insurance or maintenance and support paid to the guardian of such ward may not be expended by said guardian for the purpose of paying the cost of clothing or support, furnished to said ward prior to his appointment and receipt of such compensation.

2. Under such circumstances, where such patient is maintained in a state hospital, the guardian may properly pay such bills as he incurs for such support subsequent to his appointment and receipt of funds, subject to the approval of the court.

3. In the event the guardian has improperly paid the county for such support furnished prior to his receipt of said funds the county commissioners may properly authorize the refunding of said amounts to said guardian, under the provisions of Sections 2460 and 2572 of the General Code.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1810.

CONSOLIDATION—TWO NATIONAL BANKING ASSOCIATIONS, STATE BANK WITH NATIONAL BANKING ASSOCIATIONS OR TWO STATE BANKS HAVING TRUST POWERS—WHEN SUPERINTENDENT OF BANKS MAY AUTHORIZE WITHDRAWAL OF FUNDS FROM STATE TREASURER—RIGHT OF CONSOLIDATED BANK TO EXECUTE TRUSTS OF CONSTITUENT TRUST COMPANIES DISCUSSED.

SYLLABUS:

1. *In instances of consolidation of two national banking associations, a state bank with a national banking association or two state banks, which possessed trust powers, before the Superintendent of Banks may authorize the withdrawal of funds deposited with the Treasurer of State under Section 710-150 of the General Code, he must be satisfied that in cases in which said banks have been acting in a fiduciary capacity, such as trustee, executor, administrator, guardian, receiver, etc., their duties as such have been properly terminated.*

2. *Upon consolidation, a consolidated bank is possessed of the rights, privileges, powers and franchises of the several companies and may act as trustee of the trusts held by the constituent companies, except in those cases where authority to act in a fiduciary capacity must be granted by a court, and before any of the trusts may be transferred to the*

consolidated bank, the new corporation shall deposit with the Treasurer of State one hundred thousand dollars, as provided for in Section 710-150 of the General Code of Ohio.

COLUMBUS, OHIO, April 24, 1930.

HON. O. C. GRAY, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication, which reads as follows:

> "Section 710-88, General Code, provides among other things that after a consolidation of banks has been consummated, the banks, parties to such consolidation, shall be held to be one company possessed of the rights, privileges, powers and franchises of the several companies comprising the same and all and singular the property and rights of every kind of the several companies shall be transferred to and vested in such new company.
>
> By the provisions of an Act of Congress, entitled 'An Act to provide for the consolidation of National Banking Associations,' approved November 7, 1918, as amended February 25, 1927, all the rights, franchises and interests of a state or district bank 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 and the 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 the same extent as was held and enjoyed by a state or district bank so consolidated with a national banking association.
>
> Since the statutes of this state are silent regarding the method of withdrawal of the funds or securities deposited with the Treasurer of State under Section 710-150, General Code, by national banking associations and domestic trust companies, I would appreciate your opinion upon the several questions following, which have arisen relative to the procedure to be had by either a national banking association, possessed of trust powers, or a bank organized under the laws of this State, possessed of trust powers, party to a consolidation, before I may authorize the withdrawal of such funds or securities:
>
> 1. In instances of a consolidation of two national banking associations, each possessed of trust powers, before authorizing the withdrawal of the funds or securities deposited under Section 710-150 of the General Code by a bank, party to such consolidation, other than the one under the charter of which a consolidation has been effected, must I be satisfied that in cases in which such bank has been acting in a fiduciary capacity, such as trustee, executor, administrator, guardian, receiver, etc., its duties as such have been properly terminated?
>
> 2. In instances of a consolidation of a bank organized under the laws of this state with a national banking association, each possessed of trust powers, before authorizing the withdrawal of the funds or securities deposited, under Section 710-150 of the General Code, by the state bank, must I be satisfied that in cases in which said state bank has been acting in a fiduciary capacity, such as trustee, executor, administrator, guardian, receiver, etc., its duties as such have been properly terminated?
>
> 3. In instances of the consolidation of two banks, each organized under the laws of this state and each possessed of trust powers, do the right of each bank, party to such consolidation, as a fiduciary, whether it be as trustee, executor, administrator, guardian, receiver, etc., automatically pass to the

consolidated bank? If not, must I before authorizing the withdrawal of the funds or securities deposited under Section 710-150 of the General Code, by either bank, party to such consolidation, be satisfied that in cases referred to its duties as such have been properly terminated?

4. In instances of consolidation as indicated in inquiry three, if, in your opinion the right to act in the fiduciary capacities specified does not automatically pass from the constituent companies to the consolidated bank, should I require the consolidated bank to immediately deposit one hundred thousand dollars in cash, or in lieu thereof securities as provided in Section 710-150 of the General Code, in addition to the one hundred thousand dollars in cash or securities had on deposit at the time by each of the constituent companies?"

Section 710-88 of the General Code provides in part as follows:

"In case of consolidation, when the agreement of consolidation is made and a duly certified copy thereof is filed in the office of the Secretary of State, together with a certified copy of the approval of the Superintendent of Banks to such consolidation, the banks, parties thereto, shall be held to be one company possessed of the rights, privileges, powers and franchises of the several companies, but subject to all the provisions of law relating to the different department of its business. The directors and other officers named in the agreement of consolidation shall serve until the first annual election, the date for which shall be named in the agreement. On filing such agreement all and singular the property and rights of every kind of the several companies, including the exclusive right in and to the corporate name of each of the banks parties to such agreement shall thereby be transferred to and vested in such new company and be as fully its property as they were of the companies parties to such agreement. * * *"

In the consideration of your inquiry, I shall confine myself to a discussion of cases where the consolidation has been by virtue of Section 710-88 of the General Code, supra, and no consideration will be given to cases where there might have been a transfer of assets and liabilities to another bank as provided in Section 710-86, General Code.

The authority for national banks to consolidate with state banks, or banks incorporated under the laws of the State of Ohio, is found in the United States Code Annotated, Title 12, Section 34a, a part of the provisions of the act of Congress of February 25, 1927, Chapter 191, being Section 3 of that Act, which reads in part as follows:

"Any bank incorporated under the laws of any state, or any bank incorporated in the District of Columbia, may be consolidated with a national banking association located in the same county, city, town, or village under the charter of such national banking association on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each association or bank proposing to consolidate, and which agreement shall be ratified and confirmed by the affirmative vote of the shareholders of each such association or bank owning at least two-thirds of its capital stock outstanding, or by a greater proportion of such capital stock in the case of such state bank if the laws of the state where the same is organized so require, * * *; and all the rights, franchises, and interests of such state or district bank so 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 the same extent as was held and enjoyed by such state or district bank so consolidated with such national banking association.
* * *

The words 'State bank,' 'State banks,' 'bank,' or 'banks,' as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of state laws."

The effect of consolidation with respect to the extinction of the constituent corporations and the creation of a new corporation or the continued existence of one or both of the constituent corporations, depends upon the statute under which the consolidation is effected. The general rule is that a consolidation effects the dissolution of the original corporations and brings into existence a new corporation. Where the Legislature simply authorizes a consolidation without expressly declaring its effect, it must be deemed to have this general rule in view, and to intend that it shall apply. 14A Corpus Juris, p. 1067.

Your attention is called to the fact that Section 710-88, supra, specifically refers to such consolidated company as a new company. There is no question, therefore, that, under such a statute, the consolidated company being considered a new company, before any of the trust powers of the constituent corporations, as set out in your communication, could be transferred to it, it would be necessary for the consolidated company to comply with Section 710-150 of the General Code of Ohio and deposit with the Treasurer of State one hundred thousand dollars, as provided for in said section. After having given consideration to your inquiry, I have reached the conclusion that the four specific questions therein set forth may all be considered in a general discussion.

As I have heretofore indicated, Section 710-150 of the General Code of Ohio provides that no trust company or corporation, either foreign or domestic, doing a trust business, shall accept trusts which may be vested in, transferred or committed to it by a person, firm, association, corporation, court or other authority, of property within this state, until its paid-in capital is at least one hundred thousand dollars, and until such corporation has deposited with the Treasurer of State in cash the sum of one hundred thousand dollars, except that the full amount of such deposit by such corporation may be in bonds, or other interest bearing obligations of the United States, as provided in said section.

Section 710-159, General Code, reads as follows:

"A trust company may act as agent, and take, accept and execute any and all trusts, duties and powers in regard to the holding, management and disposition of any property or estate, real or personal, which may be committed or transferred to, or vested in said trust estate, and the rents and profits thereof or the sale thereof, as may be granted or confided to it by any person, association, corporation, municipal or other authority; and may act as trustee under any will or deed or other instrument creating a trust for the care and management of property under the same circumstances and in the same manner, and subject to the same control by the court having jurisdiction of the same as in the case of a legally qualified person."

Section 710-161, General Code of Ohio, provides that the funds deposited with the Treasurer of State, as provided in Section 710-150, supra, shall be held as security

for the faithful discharge of the duties undertaken by such trust company in regard to any trust. I am inclined to the view that until such time as all trusts have been executed or transferred to another trustee, and all other acts of the trustee have been terminated so there will be no liability against the trustee, there would be no authority to withdraw the funds so deposited with the Treasurer of State. Section 34a of Title 12, United States Code Annotated, above mentioned, provides that any bank, including a trust company, incorporated under the laws of any state, may be consolidated with a national banking association located in the same county under the charter of any such national banking association or under such terms and conditions as may be lawfully agreed upon in the manner specified, and that all the rights, franchises and interest of such state bank so consolidated with the national banking association in and to every species of property, real, personal and mixed, and choses in action, 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 the same extent as was held and enjoyed by such state bank so consolidated with such national banking association, and that no such consolidation shall be in contravention of the laws of the state under which such bank is incorporated.

Referring to the last sentence of the section just discussed, it may be observed that the consolidation, as it is termed by Congress, of a state bank with a national bank is not in contravention of the laws of Ohio. Section 710-86 authorizes a consolidation or merger of banks incorporated under the laws of this state with other banks, upon the observance of prescribed procedure and permission of the Superintendent of Banks. This section has been construed to authorize the consolidation or merger of banks chartered under the laws of this state with national banking associations by the Superintendent of Banks, and I have no disposition to question the construction.

> "Generally by express provision of the statute or agreement of consolidation and by implication in the absence of a provision to the contrary, the consolidated corporation succeeds to and may enforce the rights of the consolidating corporations under contracts made by them before consolidation."
>
> Clark and Marshall on Corporations, Sec. 355c.

> "Even where there is a consolidation instead of a merger, the new corporation has power to execute a trust conferred upon one of the constituent companies by a testator under his will, the consolidation having been made before the death of the testator, and where a corporation which was appointed trustee under a will was, prior to the death of the testator, merged into another corporation, the latter became entitled on the testator's death, to act as trustee."
>
> Fletcher Ency. Corporations, Vol. 7, Sec. 4719.

> "When a consolidation results in the creation of a new corporation, the usual effect of the consolidation statutes is that the consolidated corporation succeeds to the rights, powers, privileges and immunities of each of the original corporations except in so far as otherwise provided by the act of consolidation or by other applicable statutory or constitutional provision."
>
> 14a C. J., p. 1970.

The reason ordinarily forbidding the transfer of the office or duties of trustee to another is that "the performance of the trust is a matter of personal confidence, which it is a breach of trust in a trustee to make over to a stranger; and the original trustee

will continue responsible for all the acts of the person so substituting." 45 Tenn., 373. Such consideration cannot reasonably influence the appointment of a corporate trustee. Personal confidence cannot be the basis of such a selection. The stockholders, the officers, the entire management of a corporation may be expected to change from time to time. These things are sanctioned by law and constitute, on the part of the corporation, no breach of its duty as trustee. So the law sanctions the consolidation of one corporation with another corporation organized for like purposes, and those appointing a corporate trustee do so with knowledge that such a union may take place carrying all the rights and properties of both entities into combined organization. Such consolidation, authorized by law, is no more a breach of trust than a change in corporate officers and directors.

In addition to changes in the personnel of its management, a corporation may increase or decrease its capital stock, or otherwise amend its charter. One dealing with a corporation deals with a creature of the law that may proceed as the law permits.

In the matter of Bergdorf, 206 N. Y. 309, the testator made a will appointing the Morton Trust Company, his executor. Prior to his death the Morton Trust Company was merged into the Guaranty Trust Company under authority of a New York statute. Upon the testator's death, the Guaranty Trust Company applied for letters testamentary. Referring to the statute and the effect of the merger, the court said:

> "In reading the sections we do not regard the intention of the testator, but that of the Legislature. Their language is broadly and conspicuously comprehensive. The merger transferred to the Guaranty Company 'all and singular the rights, franchises and interests of' the Morton Company 'in and to every species of property, real, personal and mixed, and things in action thereunto belonging' and empowered the Guaranty Company to 'hold and enjoy the same and all rights of property, franchises and interests in the same manner and to the same extent' as the Morton Company would if it 'should have continued to retain the title and transact the business of' the Morton Company. This language means not only that every right, privilege, interest, or asset of conceivable value or benefit then held by the Morton Company (except the right to be a corporation) should pass into and be absorbed by the Guaranty Company, but also that every right, privilege, interest or asset of conceivable value or benefit then existing which would inure to the Morton Company under an unmerged existence should inure to the Guaranty Company. Nothing appertaining to the Morton Company was to be lost, forfeited or destroyed.
>
> The designation of the Morton Company as an executor created a privilege or an interest in the estate of the testator appertaining to that company. The privilege or interest was not complete or vested; it was incomplete, potential and ambulatory. From it, undisturbed until the testator's death, issued the absolute interest of an executorship and the power to participate in the control and administration of the testator's estate and receive the legal fees and commissions. The interest had no source or origin other than the will and the designation. The testator's death did not complete and vest that which theretofore existed. It existed, although in an incomplete, imperfect and dependent condition, from the making of the will and at the time the merger of the Morton Company was consummated. Ignorance on the part of the Morton Company of its existence did not affect it. Through it that company would have been an executor and entitled to the letters testamentary if it had 'continued to retain the title and transact the business of such corporation.' The merger transferred it to the Guaranty Company and in effect substituted that company for the Morton Company. The Guaranty Company was entitled to hold and enjoy it even as would the Morton Company under an un-

merged existence. By virtue of the statute, effective as a part of the will, the Guaranty Company was designated as an executor and as such is entitled to receive the letters testamentary."

In *Chicago Title & Trust Company* vs. *Zinser*, 264 Ill. 31, the testator by her will nominated the Real Estate Title and Trust Company as executor. Prior to her death that corporation consolidated with the Chicago Title and Trust Company under authority of an Illinois statute. After the testator's death, the Chicago Title and Trust Company applied for and obtained letters testamentary and undertook to make a deed to testator's real estate as the executor nominated in the will was empowered to do. The right of the consolidated corporation to qualify as executor and to make such a deed was questioned but was upheld. The court said:

"By the consolidation of the Real Estate Title and Trust Company and the Chicago Title and Trust Company the original corporations ceased to exist, and the appellee, as the consolidated corporation, acquired and succeeded to all the faculties, property, rights and franchises of its component parts and became subject to all the duties, obligations and conditions imposed upon them. (*Robertson* vs. *City of Rockford*, 21 Ill. 451; *Chicago Rock Island and Pacific Railroad Co.* vs. *Moffit*, 75 id. 524.) The material question here is whether the general rule that a trustee cannot delegate his authority to another is an obstacle to the exercise of a power by the appellee to act as executor or trustee where one of the constituent corporations was named as such. That general rule rests upon the ground that the selection of a trustee implies personal confidence in his discretion and judgment. If a power is given to an executor or trustee which is not ministerial or given for the purpose of executing a declared trust which the court can enforce but which involves the exercise of discretion and judgment, the power cannot be delegated or transferred to another, either by the trustee or a court. 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 upon individual discretion or even upon the continuance of the same administration. Etta Nelson, in naming the Real Estate Title and Trust Company as executor, and trustee, knew that its directors, officers and stockholders might change from time to time, and that the statute authorizes a change of name or place of business, enlargement or change of the object for which the corporation was formed, an increase or decrease of capital stock or change in the number of shares or par value, increase or decrease of the number of directors, and the consolidation of the corporation with any other corporation then existing or that might thereafter be organized. She therefore contemplated that these changes might occur and that the Real Estate Title and Trust Company might be consolidated with some other corporation such as the Chicago Title and Trust Company, and that it would thereby cease to exist and become a component part of a new corporation. A consolidation took place and a new corporation was created from the original corporations, with an enlarged capital stock and unimpaired franchises. The appellee was entitled to execute the trust, and the chancellor did not err in overruling the demurrer."

In Ohio, since no person nominated as executor may enter upon the administration of the deceased's estate without letters testamentary (Section 10605 G. C.), and since under Section 10605, et seq., of the General Code of Ohio, detailed provisions are made for the qualification and supervision of an executor, it is doubtless true that such

a consolidation of banks will not of itself and alone justify the consolidated bank in undertaking to execute such trusts as these. The right to administer such trusts doubtless follows the consolidation, but the consolidated bank must by proper procedure properly qualify as executor or guardian, as the case may be, before undertaking to proceed in such capacities. Where, however, the authority to administer a trust is altogether derived from the instrument appointing the bank as trustee, I am of the opinion that a consolidation of a state bank with a national bank, under Section 34a of Title 12, United Stated Code Annotated, substitutes the national bank for the state bank as such trustee, with the same rights, title, duties and powers, unless such transfer is negatived by the instrument creating the trust. This is for the reason, as heretofore set out, that the maker of the instrument appointed with imputed knowledge of the law under which a corporation might change its corporate structure.

In Ex Parte Worcester County National Bank, 49 Sup. Ct. Rep., 368, 61 A. L. R., 992, Chief Justice Taft, speaking for the court, said as follows:

> "It is very clear to us that Congress in the enactment of Section 3 of the Act of February 25, 1927, was anxious even to the point of repetition to show that it wished to avoid any provision in contravention of the law of the state in which the state trust company and the national bank to be consolidated were located. So strongly manifest is this purpose that we do not hesitate to construe the effect of Section 3 in Massachusetts to be only to transfer the property and estate from the trust company to the national bank to be managed and preserved as the state law provides, for administration of estates, and not to transfer the office of executor from the state trust company to the succeeding national bank. As this requires another judicial appointment by a probate court, it would become the duty of a consolidated national bank, after the union, immediately to apply for the appointment of itself as executor, subject to the examination and approval of the proper probate court. Because of the interest of the national bank in all of the assets of the trust company, including the estate at bar, transferred to its custody, the bank would seem to have a right to make such an application to the probate court and await the action of that court. If, on the other hand, it assumed improperly that it was made an executor by the mere consolidation, and held the transferred property as such, it must be held to have become an executor de son tort and should bring the assets before the probate court and proceed by proper application to secure the appointment of a legal executor by the court, as pointed out by the supreme judicial court in this case, and in Re Commonwealth-Atlantic Nat. Bank, 261 Mass. 217, 158 N. E. 780, and Re Commonwealth-Atlantic Nat. Bank, 249 Mass. 440, 144 N. E. 443."

In specific answer to your questions set forth in your inquiry, I am of the opinion that in instances of consolidation of two national banking associations, a state bank with a national banking association or two state banks, which possessed trust powers, before you may authorize the withdrawal of funds deposited with the Treasurer of State under Section 710–150 of the General Code, you must be satisfied that in cases in which said banks have been acting in a fiduciary capacity, such as trustee, executor, administrator, guardian, receiver, etc., their duties as such have been properly terminated.

I am further of the opinion that upon consolidation, a consolidated bank is possessed of the rights, privileges, powers and franchises of the several companies and may act as trustee of the trusts held by the constituent companies, except in those cases where authority to act in a fiduciary capacity must be granted by a court, and before any of the trusts may be transferred to the consolidated bank, a new corporation shall

deposit with the Treasurer of State one hundred thousand dollars, as provided for in Section 710-150 of the General Code of Ohio.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1811.

DISAPPROVAL, BONDS OF CITY OF STEUBENVILLE, JEFFERSON COUNTY—$16,600.00.

COLUMBUS, OHIO, April 24, 1930.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:

Re: Bonds of City of Steubenville, Jefferson County, Ohio, $16,600.00.

The transcript relative to the above bonds discloses that this purchase is a part of an issue of bonds in the aggregate amount of $38,600.00, these bonds having been issued for the purpose of purchasing certain real estate in the City of Steubenville. The transcript discloses that bonds were authorized in the amount of $40,600.00 for this purpose, and after having been offered to and rejected by the sinking fund trustees, they were advertised pursuant to the provisions of Section 2293-28, General Code, for three consecutive weeks commencing January 28, 1930. These bonds in the amount of $40,600.00 appear to have been awarded on March 4, 1930. The transcript further discloses that subsequent to this award of bonds in the amount of $40,-600.00 and on March 18, 1930, council passed an ordinance, No. 5537, reducing the amount of the issue to $38,600.00. There appears no evidence of a readvertisement of bonds in this last mentioned amount, and I accordingly assume that pursuant to advertisement and award of bonds in the amount of $40,600.00, the city has issued to the high bidder bonds in the amount of $38,600.00.

I am of the view that since Section 2293-28, General Code, providing for the advertisement of bonds of the various subdivisions of the state, requires that such advertisement shall state the amount of bonds to be sold, there is no authority for the sale of bonds in a different amount without readvertisement, and I am, therefore, of the opinion that this issue in the amount of $38,600.00, of which the above purchase is a part, has not been sold pursuant to the requirements of the law. I, accordingly, advise you not to purchase these bonds.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1812.

MUNICIPALITY—AMOUNT OF FINAL JUDGMENTS INCLUDED IN GENERAL LEVY WITHIN FIFTEEN MILL LIMITATION—ANNUAL TAX BUDGET MUST SHOW AMOUNT REQUIRED FOR SUCH JUDGMENTS—BONDS ISSUABLE WITHOUT VOTE OF ELECTORS, IF SAID JUDGMENTS BASED ON NON-CONTRACTUAL OBLIGATIONS.

SYLLABUS:

1. *A subdivision should include in the general levy for current expenses the amount required for the payment of final judgments, and such levy is within the fifteen mill limita-*