

Opinion No. 277.

**Corporations—Mining Corporations—
Consolidation or Merger—Right
to—Procedure.**

HELD: 1. So long as the state is not deprived of jurisdiction, over the corporate property, a foreign and do-

mestic corporation may merge or consolidate, the merged corporation to remain a Montana corporation.

2. "Consolidation," as used in Article XV, Section 15, of the Montana Constitution, and in Section 6001, R. C. M. 1935, is inclusive rather than accurate and is meant to cover "Union," "Merger," "Blending," or "Coalescence," of two or more corporations in one corporate body, providing the consolidation or merger is not in violation of Article XV, Section 20, of the Constitution relating to Trusts.

3. The procedure of consolidation shall conform to the provisions of Section 6650, R. C. M. 1935.

May 10, 1938.

Hon. Sam W. Mitchell
Secretary of State
The Capitol

Dear Mr. Mitchell:

You have submitted the following question for our opinion:

"Can an existing Montana corporation absorb by merger an Illinois corporation, both of which corporations are engaged in mining operations and the property of each of said corporations being in the State of Montana and adjoining?"

The use of the word "consolidation" by textwriters and in adjudged cases has frequently been inclusive rather than accurate. Practically every alliance of corporations and every transaction looking to the control of one corporation by another has been termed a "consolidation" of the two. By consolidation, however, in its proper and more restricted sense is meant a union, merger, blending or coalescence of two or more corporations in one corporate body, whereby, in general, their property, powers, rights, and privileges enure to, and their duties and obligations devolve upon, a new organization thus called into being.

There is a distinction between consolidation and merger, and while our statutes and Constitution suggest a privilege consolidation, the word "merger" is not mentioned. Section 15, Article XV of the Constitution of the State of Montana, as far as pertinent to the question, reads as follows:

"If * * * or other corporation or company organized under any of the laws of this state, shall consolidate, by sale or otherwise, with * * * or other corporation, organized under any of the laws of any other state * * *, the same shall not thereby become a foreign corporation, but the courts of this state shall retain jurisdiction over that part of the corporate property within the limits of the state, in all matters that may arise as if said consolidation had not taken place."

This constitutional section is again repeated under our Section 6001, R. C. M. 1935, and refers to the consolidation of a domestic corporation with a foreign corporation. The section has been construed as not to prohibit consolidation but it does prohibit an attempt to deprive the state courts of jurisdiction.

MacGinniss v. B. & M. C. C. & S. M. Co., 29 Mont. 428, 461, 75 Pac. 89.

Section 6650, R. C. M. 1935, provides for consolidation of mining corporations, and while the said section pertains particularly to corporations formed under the laws of the state, we take it that in view of the constitutional provision and Section 6001, R. C. M. 1935, that as long as the state is not deprived of jurisdiction of the corporate property, that the consolidation of a foreign corporation with a domestic corporation, and the domestic corporation, in a sense, absorbs the foreign corporation and remains a Montana corporation, that such would be permissible under our laws.

The question submitted relates to merger, and, in conformity with the general rule, as long as all of the rights, privileges, franchises, property interests, etc., become the property of the domestic corporation under the merger, we are of the opinion that it serves the purpose of consolidation.

It has been stated that unless the legislature gives to the corporations interested power to do a certain thing, such power does not exist, and while our legislature has not given to the corporation, in so many words, the power of merger, although it has given the power of consolidation, yet it is

our construction that consolidation shall include merger.

State v. Railway Companies, 21 Mont. 221, 228.

The term "consolidation" is an elastic one and may include the union of two or more corporations into a new one with a different name, with or without extinguishing the constituent corporations, or the merger of two or more corporations into another existing corporation under the name of the latter.

State v. Railway Companies, *supra*, p. 242.

The word "consolidate" is here used in a sense to join or unite, and the Constitution aimed at practical results.

State v. Railway Companies, *supra*, p. 247.

In the case of MacGinniss v. B. & M. C. C. & S. M. Co., *supra*, the court makes this statement:

"* * * Apart from these prohibited combinations, the right of consolidation by corporations or associations engaged in these particular pursuits is not prohibited."

We take it that this means to say that consolidation is warranted unless it goes to the extent of violating that section of our Constitution pertaining to trusts, to-wit: Article XV, Section 20. The general procedure followed is that the board of directors of the constituent corporations will meet and enter into an agreement of consolidation or merger, signed by each board, which agreement will prescribe the terms and conditions of the consolidation, the mode of carrying the same into effect, and the provisions as to purposes, capitalization, etc., of the absorbing corporation. The board of directors of each of the constituent corporations will adopt a resolution approving the consolidation or merger agreement and call a meeting of the stockholders of such corporations for the purpose of the consolidation. The stockholders of each constituent corporation will meet and vote whether or not to adopt such an agreement, and under our statute no such a consolidation must take place without the

consent of the stockholders representing two-thirds of the capital stock of each corporation, and no such consolidation relieves such corporations, or the stockholders thereof, from any and all just liabilities. Due notice must be given, by advertising, for one month, in at least one newspaper in the county and state where the said property is situated. When the said consolidation is completed, a certificate thereof, containing the manner and terms of said consolidation, must be filed in the office of the county clerk of the county in which the original articles of incorporation are filed, and a copy thereof filed in the office of the secretary of state. Such certificate must be signed by a majority of each board of directors of the original corporations, and it is their duty to call, within thirty days after the filing of such certificate, and after at least ten days' public notice, a meeting of the stockholders of all of said corporations so consolidated, to elect a new board of directors for the consolidated corporation for the year next ensuing.