

IN THE CHANCERY COURT FOR LEWIS COUNTY  
AT HOHENWALD, TENNESSEE

In re:

SENTINEL TRUST COMPANY

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) No. 4781  
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Objections of Danny N. Bates, et al.,  
to Motion to Approve Sale of Sentinel's  
"Bellevue Property"

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These formal objections are made pursuant to the Court's open-Court instructions that these objecting parties should file explicit written objections. They are also made with the respectful suggestion that the Court permit such to be argued in open court in its courtroom in Franklin on the afternoon of May 20, 2004, instead of by telephone.

Despite the complaint of Movant's attorney that he is accustomed to walking into this Court and getting his way without delay, the objecting parties, Dannie N. Bates, et al., and Sentinel Trust Company by its Board of Directors, (hereinafter, "Objecting Parties," being the same parties who objected on or about February 25, 2005 to certain motions of the Receiver, and making other objections thereafter) make the following objections to the Motion to Approve of the sale of Sentinel's office condominium property located at 8122 Sawyer Brown Road, Bellevue, Tennessee on the following grounds:

1<sup>st</sup>: The Movant's insistence that the court both render its "statutory" approval and make its order non-final is arrogant and unjustifiable to the extent that even if there were a "colorable" power vested in the Commissioner to convert and thereby destroy the properties owned by Sentinel and indirectly by its stockholders, as to whose actual legal existence the reasons for these parties' denial are so strong—with Movant not having even **attempted** to demonstrate the actual existence

of such power—that any approval granted out of misplaced respect for the Commissioner’s high office should be declared final so as to be appealable. But it should also be conditioned upon both preservation of the sales proceeds by payment of the same into Court and by expressly retaining the power to nullify the transfer in the event of actual adjudication of the issues based upon a conscious reading and application of the written provisions of the statutes.

2<sup>nd</sup>: As heretofore shown by numerous objections, virtually every action in the past as to which the Receiver or the Commissioner has sought this Court’s approval has been of a decision not even arguably within the Court’s jurisdiction because they were matters that would have been wholly within the powers of the Commissioner, acting without the cover of the appearance of legalization sought to be afforded by judicial approval, had the Commissioner seized a state bank as he is authorized to do under stated conditions by T.C.A. §§ 45-2-1502 and 45-2-1504, or to illegally use trust funds to fund his receivership and liquidation efforts, which is not authorized either by any statute or by the common law.

3<sup>rd</sup>: This is the first effort by the Commissioner to ask the court to sanction the sale of Sentinel Trust Company’s own property, which he would be authorized to ask the court to sanction if Sentinel Trust Company were a “state bank,” as to which type of institution such powers are created and delegated by T.C.A. § 45-2-1504(a). As to the lack of power of the Commissioner to so seize and forfeit ownership of a Trust Company’s real properties (indirectly owned by its stockholders), Sentinel Trust Company’s briefing before the Tennessee Court of Appeals in *In re: Sentinel Trust Company*, No. M2005-00031-COA-R3-CV, claims to demonstrate that the word “bank” cannot be construed as meaning “trust company” by any reader who shows respect for the actual meaning of words in a text, whether statutory or constitutional. Such argument, of which relevant excerpts (on statutory construction and due process of law) are appended hereto as an addendum, claims to prove the fact that a reading of “bank” as including “trust company” cannot be achieved except by abandoning the plain meaning of language as it has existed for a period of centuries. For this reason—

- (a) The movants cannot, in good faith, so far depart from the plain meaning of language except by explicitly demonstrating to this Court, through application of the recognized principles of statutory construction, that a grant of power to the Commissioner to seize and destroy the private ownership of property of a bank,

grants him any authority to seize and destroy the private ownership of a non-bank, with the business of a trust company having none of the attributes (or hazards) of the business of a bank. *Stare decisis* determination that the grant to the Commissioner of powers *vis á vis* banks is not a grant of the same powers over non-banking corporations subject to the Commissioner's administrative authority was rendered in *Madison Loan & Thrift Co. v. Neff*, 648 S.W.2d 655 (Tenn.App., M.S., 1982) (cited with approval, *Tennessee Department of Revenue v. Moore*, 722 S.W.2d 367, 378 (Tenn., 1986)), whose authoritative force has not been disclaimed by the Supreme Court or by any other appellate court.

- (b) The movant cannot properly ask the Court to disregard all authoritative law governing the reading and interpretation of statutes except by presenting principled argument that the claims for judicial sanction “are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law . . .”, Rule 11.02(2), Tenn.R.Civ.P., and the only body of law that exists and which can be used in rational argumentation for such purpose is the law of statutory construction. In seeking this destruction of private property rights, the movant has not even attempted to present any rationale that is remotely related to the law of statutory construction.
- (c) Movants cannot frame the rationale indisputably required by the considerations set out in sub-paragraph (b), except by either (i) using the law of statutory construction to demonstrate by actual reasoning that Sentinel's position is wrong, or (ii) enunciating some other theory, founded upon recognizable legal principles, adequate to persuade another mind that the wisdom of the law of statutory construction is irrelevant to the labor of construing a statute to determine its meaning. Movants cannot rely upon prior judicial rejections by the Chancery Courts of Lewis and Davidson Counties of Sentinel's stated arguments(as quoted in the addendum), because (i) every trial court's subject-matter jurisdiction, where vested, is to decide wrong no less than to decide right, (ii) the purpose of every appeal is to insist that the trial court's decisions were contrary to governing law, and (iii) both such chancery decisions are presently on appeal. By the same reasoning, Sentinel and its directors

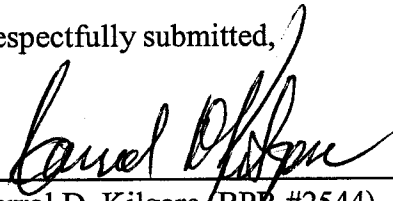
cannot fail to continue to object, else they might waive such objections they insist to be valid.

- (d) This Court should not permit its powers to be perverted by exercising a “statutory” approval power not in fact granted by the plain words of the statute invoked, because such would be a judicial taking of property without due process of law and contrary to the law of the land, in violation of Section 1 of the 14th Amendment to the Constitution of the United States and of the Constitution of Tennessee, Article I, Section 20 and Article XI, Section 16; and would constitute a state judicial seizure of private property for public use without just compensation, contravening the judicial obligation to uphold the Constitutions of the United States and of the State of Tennessee.

4<sup>th</sup>. Upon every occasion when the Commissioner and/or his Receiver heretofore collected sums due under each defaulted bond issue of which Sentinel was the appointed Trustee, all such receipts were trust funds with the following consequences: (i) each was burdened with all obligations owed by the trust issuer to Sentinel as holder of the pooled trust funds, pursuant to which the Commissioner/Receiver was obligated to continue charging to each such delinquent account the monthly interest rate of 1½%, compounded monthly (which, for the seven months from the end of May through the end of December, 2004 would have increased each negative balance by 12.62936% as a matter of simple arithmetic); (ii) upon each such receipt, the Commissioner and Receiver were obligated to pay (or credit) all recovered moneys into the pooled trust fund to the extent necessary to overcome the negative balance, or “zero out” the account, as updated to the date of payment, and (iii) the Commissioner’s failure to so pay charges due to the pooled account before distributing the balance among bond-holders could only be an unauthorized and illegal diversion of trust funds. With filings by the Commissioner or Receiver demonstrating that they in fact failed to segregate and preserve such trust funds, but instead diverted them to other uses, the Commissioner cannot equitably ask the Court to sanction any of his actions until he has restored to the trust funds the moneys he has illegally diverted therefrom. (See, e.g., Receiver’s motion mailed Feb. 17, 2005, re Final Distribution of Hernando County, Florida proceeds, p. 4, revealing failure to post interest charges during post-seizure period.)

The details of these conclusions can better be demonstrated upon oral argument, and by consultations of the affidavits filed herein executed by Danny Bates and by Robert Whisenant.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Carrol D. Kilgore", written over a horizontal line.

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## ADDEMDUM

(EXCERPTS, COURT OF APPEALS BRIEF OF SENTINEL TRUST COMPANY)<sup>1</sup>

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### ***Statutory Construction Consideration—Commissioner’s Powers over a Trust Company:***

Some of the main rules of statutory construction were recently re-stated by the Supreme Court in *Wilkins v. The Kellogg Company*, 48 S.W.3d 148 (Tenn., 2001), which included the following comments:

“[The] premise [that a statute be construed favorably to employees doesn’t warrant a court’s ‘amendment, alteration or extension of its provisions beyond its obvious meaning’] is simply a specific application of the most basic rule of statutory construction: **courts must attempt to give effect to the legislative purpose and intent of a statute, as determined by the ordinary meaning of its text, rather than seek to alter or amend it.**” (48 S.W.3d at 152; emphasis added). This prohibits judicial amendment of a statute by changing “bank” to mean “bank or trust company,” and equally prohibits drawing legislative intent from other than the body of the statute, absent clear ambiguity. Repeated statements that the Commissioner is empowered to do destructive acts to **state banks** furnish no basis for *de facto* judicial amendment adding trust companies to that term, especially when the statute elsewhere defines the word “bank” as including “trust company” for some sections but for none other.

**“In attempting to accomplish this goal [of statutory construction], courts must keep in mind that the ‘legislature is presumed to use each word in a statute deliberately, and that the use of each word conveys some intent and has a specific meaning and purpose.’** *Bryant v. Genco Stamping & Mfg. Co.*, 33 S.W.3d 761, 765 (Tenn. 2000). ‘Consequently, where the legislature includes particular language in one section of the statute but omits it in another section of the same

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<sup>1</sup>As filed in the Court of Appeals, except that footnotes were automatically renumbered by computer operation.

act, it is presumed that the legislature acted purposefully in including or excluding that particular subject.' Id." (*Ibid.*; emphasis added). So when the Legislature says the Commissioner's powers over **trust companies** should include the one specified power of examination **for a limited and defined 3-year period**, it is rationally impermissible to conclude that this expresses a grant not only of the examining power, but of **all other** banking-related powers to be freely exercised over trust companies.

In addition to these rules of construction summarized by the Supreme Court, when there is an amendatory statute, as here, the "mischief rule" applies, authorizing construction, where needed, to suppress the mischief and give effect to the remedy the legislation sought to make available. With the rule that all words must be given their normal meaning, the Legislature is given notice that if it wants to enact something, it must choose the appropriate words, and not leave the meaning of the enactment to the power-enlarging imagination of some executive. The well-known canons of construction require that the reader be literate and that the reader must allow and compel the words enacted to actually enter his thinking process and must use common sense, respecting the fact that words in a single instrument must be given uniform meaning.

The long and short of it is that if the Legislature wanted to create new powers over trust companies, it must use the words "trust company" in relation to any particular grant of power. The *stare decisis* determination of this point was made by *Madison Loan & Thrift Co. v. Neff*, 648 S.W.2d 655 (Tenn.App., M.S., 1982). Defendant Commissioner's self-serving assumption that emergency bank liquidation powers must be given to him to exercise over trust companies as well is belied by the words of the legislation: If this had **any** rational basis, the Legislature would not have enacted that Defendant Commissioner is empowered to exercise his bank-examining powers over every new trust company newly coming under his authority for a limited period of only three years, from July 1, 1999 through June 30, 2002. This would be totally pointless and absurd if the Commissioner were empowered to exercise perpetually over every trust company each power he is empowered to exercise over every state bank. The Commissioner is bound to honor every statute he is sworn to uphold.

Previously, when the Legislature wanted to empower the Commissioner to exercise bank-seizure powers over other types of entities, it amended T.C.A. § 45-1-103(3) to enlarge the definition

of a bank (“any person . . . doing a banking business”<sup>2</sup>) by adding that for the purposes of “supervision, examination, and liquidation” the word “bank” also includes “industrial investment companies and industrial banks . . .” The Legislature surely knew it could insert at that point the words “trust companies” as included in the word “bank” but the Legislature did not do so. It surely knew it could provide express language defining “bank” as including “trust company” as it has done in T.C.A. § 45-2-1001(c)(1) “for the purposes of this section and §§ 45-2-1002–45-2-1006”.

The Legislature elected not to insert such phraseology to *drastically change and enlarge* the powers of the Commissioner over *every trust company*, both those under his authority since 1980 and those newly subjected to his authority by the 1999 Act. No court is empowered to amend this legislation by inserting words that would make it mean what the Commissioner wishes it meant. But the Legislature did look at one of those listed powers, that of “examination” and deliberately enacted that the Commissioner can exercise that power over trust companies for only a limited 3-year period. **This grant of power had expired** before this Commissioner did his final “examination.”

But there is another aspect of statutory construction, in that the Legislature **did** consider and enact a special provision relating alone to trust companies, not banks, whether those trust companies newly came under his general policing authority in 1999 or had already been subject to his charter-approval and regulatory authority since 1980.

This is in regard to ending corporate existence or selling all corporate assets, and the Tennessee Banking Act has long empowered the Commissioner to seize an insolvent bank, and has prescribed with great particularity how he shall do it and the scope of his powers, T.C.A. §§ 45-1-107, 45-2-1502, and 45-2-1504, with the terminal provision that when all the liquidating and accounting have been achieved, the bank’s “charter shall be cancelled.” T.C.A. § 45-2-1504(k).

But to back up, aside from *quo warranto* and administrative forfeiture of a corporate charter for failure to file required reports, the general corporate laws provide for surrender of a corporate charter and the corporation’s dissolution upon a filing approved by a majority of the corporation’s

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<sup>2</sup>This doesn’t include trust company, which does not and can not accept deposits, and no checks can be drawn against the moneys it holds in trust.

*stockholders*. The 1999 Amendment<sup>3</sup> provides that it amends these two chapters of T.C.A., thereby subjecting it to the entire Code's basic rule for construction, which says: "If provisions of different titles or chapters of the code appear to contravene each other, *the provisions of each title or chapter shall prevail as to all matters and questions growing out of the subject matter of that title or chapter.*" T.C.A. § 1-3-103 (emphasis added).

This says in the plainest possible language that the general statute on corporations governs the termination of corporate existence and the sale of all the corporation's assets, except where other provisions specifically provide different methods in special cases, *e.g.*, administrative charter forfeiture, *quo warranto*, and the termination of a banking corporation's existence by operation of law under T.C.A. § 45-2-1504(k). The searcher is led to these different parts of the code, but they say nothing different about involuntarily ending a trust company's existence or divesting it of its assets by seizure.

But that subject was taken up **by the 1999 Act** as the appropriate way to divest an insolvent trust company of its properties and business under the Commissioner's official oversight and without its stockholders' consent. That provision is codified as T.C.A. § 45-2-1021.

This codification incorporates part of Chapter 112, § 10, Public Acts of 1999. It empowers a trust company's board of directors to vote to sell all of the corporation's assets "without shareholder approval . . .", T.C.A. § 45-2-1021(a), but permits this result **only** with the Commissioner's approval, and it requires the Commissioner make specific findings to authorize such liquidation.<sup>4</sup> This is followed by provisions of T.C.A. 45-2-1021(b) of precise requirements of such

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<sup>3</sup>Of which the Attorney-General has provided the Court both a copy and the full legislative history, which pretty much revealed the legislative thinking that whatever this bill provides, it was written by the Department of Financial Institutions, and is what they want. So much for the *actual* legislative intent.

<sup>4</sup>The required findings by the Commissioner for dissolution by the Board without stockholder approval are:

"(1) Interests of the state trust company's clients and creditors are jeopardized because of insolvency or imminent insolvency of the state trust company; and

"(2) Sale is in the best interest of the state trust company's clients and creditors."  
T.C.A. § 45-2-1021(a)(1) and (2)

final asset sale.<sup>5</sup> This was the Legislature's enactment, and its *only* enactment dealing with the problem of possible trust company insolvency.

If the legislature wanted to grant to the commissioner the power to exercise these sweeping and destructive bank-liquidation powers over a trust company, which holds no deposits as its own property, but only funds in trust for others, the Legislature was obligated to so enact. Absent the enactment, the Commissioner has no power to insert additional words into the enactment, nor does any Court.

This destructive power, whose creation **in some form** is essential for control of the banking business, because the business is essentially one of a private company creating an equivalent to currency from money that does not exist, and when credit becomes tight and many of a bank's creditors cannot pay their notes or instalment payments, this has repeatedly led to a lack of public confidence, causing a "run" on banks and loss of depositors' money.

But to apply these powers in such a precipitous and dictatorial manner to a trust company which had already successfully managed the recovery from insolvency of over 60 bond issuers whose bonds went into default, is not defensible. The law does not authorize it and no court should judicially legislate to support the Commissioner's usurpation of powers never granted to him.

Finally, the rule of *expressio unius* plainly applies. For the enforcement of all the banking laws against banks and trust companies as well, the statute points the Commissioner to the Davidson County Chancery Court's remedial powers, in whatever part of the state the bank, trust company, or other financial institution may be situated, T.C.A. § 45-2-107(a)(6), and provides an exception of direct, sudden, and forcible action against banks approaching failure, providing there are no other

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<sup>5</sup>“(b) A sale under this section must include an assumption and promise by the buyer to pay or otherwise discharge:

“(1) All of the state trust company's liabilities to clients;

“(2) All of the state trust company's liabilities for salaries of the state trust company's employees incurred before the date of the sale;

“(3) Obligations incurred by the commissioner arising out of the supervision or sale of the state trust company; and

“(4) Fees and assessments due the department.”

exceptions. It conditions this exceptional power on threatened harm to **depositors**, but in the alternative mode of terminating a trust company's accounts without consent of their stockholders, it points only to the interests of the trust company's clients and creditors being jeopardized, T.C.A. § 45-2-1021(a)

It would be senseless to grant such sweeping business-seizure powers to be used against trust companies when they **must** be granted over banks, because banks keep so little cash in relation to their deposits. This is controlled by federal law,<sup>6</sup> which requires a minimum percentage of cash "reserves," partly in "vault cash" but mostly deposited in a Federal Reserve Bank, as a credit that can immediately be converted into cash to meet every demand that can be reasonably foreseen. The maintenance of this reserve is a mandatory requirement imposed upon every federally-insured bank 12 U.S.C. § 461(b)(2) (that is, in practical effect, every bank).

But there is *no statutory requirement*, either federal or state, that a trust company have *any* such reserve, there is no need for such a requirement. The reason there is no legal requirement for a cash reserve imposed upon trust companies, as distinguished from banks, is that the huge sums of money are held in trust, are not money of the corporate trustee, and form no part of the equation for determining if insolvency (the inability to pay debts as they accrue in the normal course of business) has occurred. So long as a bond-indenture trust company can borrow enough money occasionally to meet its operating expenses (payroll, supplies, utilities), it will never have to pay out trust money except to its beneficiaries from money monthly or semi-annually remitted from bond-issuers.

With Sentinel, by the sworn allegations, paying out over \$100 million a year to bondholders, this does not represent any obligation upon Sentinel to pay out even as much as 1¢ of its own money. If a bond issuer on any issue should withhold paying the required monthly or semi-annual amounts into trust, Sentinel would just properly withhold paying the semi-annual interest instalments to bondholders, declare the issue in default, and commence liquidation proceedings against the collateral. When the negative balances of trust fund overdrafts in Sentinel's bond-issuer accounts were at its highest level, at any point when its own earned moneys were in a high cash amount, its directors could have declared a dividend for the rest of Sentinel's non-committed money, and could

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<sup>6</sup>These Federal statutes are cited and their provisions are described in detail, Ex. 1, ¶ 3, p. 3.

have sold its trust business, with or without Sentinel's corporate properties. Each month fees from its bond issues produced income for monthly operations and required little or no liquid capital. After all, millions of dollars were received and disbursed each month, averaging about \$8⅓ million dollars a month, so there was a lot of cash to assure liquidity to fulfill current trust obligations. These were the obligations of the bond-issuers to transmit to Sentinel the monthly or semi-annual payments required by their bond indentures.

If the reserve requirements that are essential for every bank were imposed upon Sentinel, with its \$100 million or more in transactions every year, it would have had to keep a cash reserve of \$9,750,000 (see Ex. 1, ¶ 3, p. 3, and federal statutory citations therein). This would be absurd and arbitrary. This would mean that Sentinel would have to deposit it in a bank or banks so the banks could enrich themselves by earning high interest rates while paying its depositor the customary low interest rate of around 1%± per annum.. It is an accepted principle of statutory construction in Tennessee law: "It is presumed that the Legislature in enacting [any] statute did not intend an absurdity, and such a result will be avoided if the terms of the statute admit of it by a *reasonable construction*." *Epstein v. State*, 211 Tenn. 633, 641, 366 S.W.2d 914, 918 (1963).

The lack of need and lack of hazard are demonstrated by the Whisenant affidavit (summarized *supra*, pp. 14-15), and by the fact that Sentinel had a years-long history of overcoming the negative overdraft balances in liquidating all but 13 of the 63 defaulted bond issues. To reach the construction the Commissioner **assumed**, without foundation, is to disregard the law of statutory construction. If that law be applied, it cannot be concluded that "bank" doesn't mean "bank," and that powers the Commissioner is authorized to exercise only over banks, he may also exercise over non-banks not subject to the hazards of banking.

Plainly, the Tennessee Banking Act uses the clearest language to empower the Commissioner to seize an insolvent **bank**, T.C.A. § 45-2-1502(b)(2), with no mention of seizing a trust company, to liquidate an insolvent **bank**, T.C.A. § 45-2-1504, with no mention of liquidating a trust company, to remove from office individual directors of a **bank**, T.C.A. § 45-1-107(b) on specific and narrow grounds,<sup>7</sup> with no mention of powers to remove a trust company's directors. The legislative text

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<sup>7</sup>This statute empowers him to remove a *bank* director "who becomes ineligible to hold such position or who, after receipt of an order to cease under subsection (a), violates the

contains no explicit grant of such powers to the Commissioner over trust companies. Yet there are numerous provisions of the Tennessee Banking Act that apply directly to trust companies by their own terms, others that apply to banks by their own terms, others that apply to the Commissioner, giving him some powers over named types of entities but not over other types, and the list goes on and on.

Every legislative act is required to be construed as a whole, not by a glance at a single isolated provision, every legislative grant to an official of specific powers over otherwise free people or companies is required to be construed **against** broadening those powers beyond the specific statutory language, *Gallagher v. Butler*, 214 Tenn. 129, 140, 378 S.W.2d 161 (1964), are to be construed with common sense, *Arinki v. State*, 168 Tenn. 393 (1934), and each word (and the omission of related words) is to be given its rational effect, *Tidwell v. Servomation-Willoughby Co.*, 483 S.W.2d 98 (Tenn., 1972), *Reynolds Tobacco Co. v. Carson*, 187 Tenn. 157, 164, 213 S.W.2d 15 (1948)..

There is only one reason for accepting the distorted “construction” that Defendant Commissioner desires: To save him the embarrassment of having abused the trust placed in him by the appointing power by seizing powers not even arguably vested in him if the statute is construed in accordance with the applicable body of law, the law of statutory construction.

(Brief, pp. 24-32)

#### [Due Process of Law Excerpt from Brief:]

The first absolute in Federal due process jurisprudence is that a state cannot seize private property without a prior meaningful hearing on the merits to determine that it is empowered to so take the property, *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), *Grannis v. Ordean*, 234 U.S. 385, 34 S. Ct. 779, 58 L. Ed. 1363 (1914), *Armstrong v. Manzo*, 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965).

In this case, the Commissioner plainly seized Sentinel without any prior evidentiary hearing

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provisions of this title or a lawful regulation or order issued thereunder, or who is dishonest.” There was no showing or finding that any of Sentinel’s directors did any of these three things.

upon previously-framed issues, but only a confrontation at which the Commissioner demanded actions according to the “law” he laid down. The Supreme Court has recognized that in spur-of-the-moment types of actions, as by a police officer or prison guard whose superiors cannot possibly know in advance what his actions will be, or in great emergencies, it must suffice if a post-action due process hearing is provided reasonably soon after the fact, *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62, 66 (1965), as distinguished from more deliberate, formal, and planned state action, which must be based upon the record of a *prior* hearing. *Wolff v. McDonald*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

Here, the law specifically empowers the Commissioner to act after grounds for bank-seizure have been established, T.C.A. § 45-2-1502(a),<sup>8</sup> but not without a prior hearing. But the Legislature has provided a specific and narrow exception—adequate to pass *federal* constitutional muster—for the Commissioner to seize a **state bank** without a hearing: He is so empowered whenever he concludes that “an emergency exists which *will result in serious losses to the depositors*, the commissioner may take possession of a state bank without a prior hearing.” T.C.A. § 45-2-1502(c) (emphases added).

But this exception cannot apply to what the Commissioner described as a non-deposit institution (**Ex. 1, Ex. G** thereto), which has no depositors and has never had a depositor. This is a studied and reasonable pre-condition to the exercise of power which is plainly justified because of the perilous condition of banks when they fail.

There being no statutory authority, whose pre-conditions are met, for Sentinel’s seizure, it simply does not accord with the law of the land, and thereby accord Sentinel due process of law. The

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<sup>8</sup> “The commissioner may take possession of *a state bank* if, *after a hearing*, the commissioner finds:

“(1) Its capital is impaired or it is otherwise in an unsound condition;

“(2) Its business is being conducted in an unlawful or unsound manner;

“(3) It is unable to continue normal operations; or

“(4) Its examination has been obstructed or impeded.”

(Emphases added)

concept and *meaning* of due process of law had their origin and meaning at the time of American Independence, hence derived from the common law, in the older phrase prohibiting the taking of one's life, liberty or property but by the law of the land. This older phraseology for due process is written into Tennessee's Constitution (Art. I, § 8 and Article XI, § 16 ). Its very earliest origin was in the 39<sup>th</sup> Chapter of *Magna Carta*, which an English king was compelled by force of arms to sign the year 1215:

“39. No freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and *by the law of the land.*”

Pound, *The Development of Constitutional Liberty* (Yale Univ. Press, 1957; Emphasis added).

Tennessee adopted the purer and older language rather than the then-modern catch-phrase, but its meaning had remained unchanged since 1215, over a half-millinium before our Declaration was made to the world.

Its meaning was simply that government—legislative, executive and judicial—is obligated to follow the existing law when it forfeits one's life, liberty, or property: The property of Sentinel and of its stockholders, who indirectly owned everything Sentinel owned.

The most widely-recognized authority on the state of English law was Blackstone's Commentaries published in 1765. He wrote of the *judicial* due process obligation:

**“The Courts: Due Process of Law.** It were endless to enumerate all the *affirmative* acts of parliament, wherein justice is directed to be done according to the law of the land; and what that law is, every subject knows, or may know, if he pleases; for it depends not upon the arbitrary will of any judge; but is permanent, fixed, and unchangeable, unless by the authority of parliament.”<sup>9</sup>

I BLACKSTONE, COMMENTARIES, § 197, pp.\*141-\*142 (Jones ed., 1915).

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<sup>9</sup>Such meaning is reflected in holdings of the U. S. Supreme Court, that the words of the Due Process Clauses “. . . come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the crown and place him under the protection of the law. They were deemed to be equivalent to ‘the law of the land.’” *Dent v. West Virginia*, 129 U.S. 114, 123-124, 9 S. Ct. 231, 234, 32 L. Ed. 623, 626 (1889).

Upon incorporation of a second due process clause into the Fourteenth Amendment to bind state governments, this had the core meaning that each state must accord *due process of state law* in inflicting such deprivations, *Dent v. West Virginia*, 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889); *In re Kemmler*, 136 U.S. 436, 10 S.Ct. 940, 34 L.Ed. 519 (1890); *Twining v. New Jersey*, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908). Although the Eleventh Amendment is a formidable barrier to federal judicial enforcement of the Due Process Clause, and although the U. S. Supreme Court has imaginatively expanded the clause's meaning where it appears in both amendments, into highly particularized narrow applications, that Court has never tried to declare its underlying meaning destroyed. Both the Amendment's Due Process Clause and Tennessee's law of the land clause require that government follow the law (perhaps subject to such parts of the common law as the *de minimus* doctrine) in destroying Sentinel's business and property.

This means *all* of Tennessee's relevant law, including its constitutional prohibitions against executives ever exercising judicial power and judges ever legislating by effectively inserting words not enacted or deleting words enacted,<sup>10</sup> because our Law of the Land Clause is a part of the Declaration of Rights, as to which the following effect is given:

**Sec. 16. Bill of rights to remain inviolate.** — The declaration of rights hereto prefixed is declared to be a part of the Constitution of this State, and shall never be violated on any pretence whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in the bill of rights contained, is excepted out of the General powers of government, and shall forever remain inviolate.”

Constitution, Art. XI, § 16

As one long-departed member of the Tennessee Supreme Court wrote, where the Constitutions language is plain, it is not required to be interpreted, but to be obeyed. That such is still the law is demonstrated in the concurring opinion<sup>11</sup> of then-Justice Drowota in *Summers v. Mayor Robert L. Thompson*, 764 S.W.2d 182, 188 (Tenn., 1988), with extensive discussion of the necessity of following the Constitutional requirement that neither legislative nor executive departments can

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<sup>10</sup>Constitution, Art II, §§ 1 and 2.

<sup>11</sup>The 3-vote majority did not reject Justice Drowota's reasoning, but simply held that the constitutional issue need not be addressed.

in fact intrude upon the powers of the judicial department. The Opinion states, in part:

“. . . Moreover, ‘ “it is essential to the maintenance of republican government that the action of the legislative, judicial, and executive departments should be kept separate and distinct. . . .” *Richardson v. Young*, 122 Tenn. 471, 492, 125 S.W. 664, 668 (1909). The tension and play among these powers provide restraint and maintain the limits placed on the government in all its departments to protect the rights and liberties of the citizens and to deter abuses of power. . . .

“When the thirteen colonies declared their independence from Britain in 1776, one of ‘the causes which impel[led] them to the separation’ was that the King of Great Britain had ‘made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.’ Not only had the recent history of the colonies demonstrated that one of the most immediately oppressive and dangerous instruments of repression was a court subject to arbitrary political whims rather than to the dictates of law, but the history of Europe provided glaring examples of the extent to which judicial power could be abused. The Star Chamber and the Inquisition are sufficient for the point. Before a court whose purpose is to achieve a predetermined, unguided and unrestrained objective, no individual can hope to stand and receive a fair hearing. *A court acting in accord with well-defined procedures and pursuant to the authority of a restraining Constitution and the rule of law, independent of the political system for its term of service and its compensation, was considered essential to the success of a constitutional system and to the preservation of fundamental rights.* As this Court stated at the time of the adoption of the Constitution of 1834, “the independence of the judiciary ought to be anxiously preserved unimpaired; not on account of the individuals who may happen to be judges -- they are nothing -- but on account of the security of life, liberty, and property of the citizen.” *Fisher's Negroes v. Dabbs*, 14 Tenn. 119, 139 (1834).

(764 S.W.2d at 188-189; emphasis added)

Unless all of the law—including the law of statutory construction—be followed in judicial decisions in this case, then Sentinel will have been deprived, as it has, of its properties without due process of law, because law does not exist at all except as it is the living force that guides the courts to their decisions.

(Brief, pp. 33-38)

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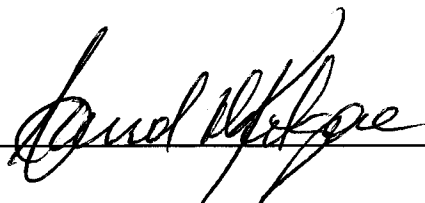
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