Briefs IRRIGATION BANK AND STATE BANK OF MINITARE

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IN THE

Supreme Court of Nebraska

THE STATE OF NEBRASKA EX REL C. A. SORENSEN, ATTORNEY GENERAL, AND E. H. LUIKART, SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE, APPELLANTS,

V.

IRRIGATORS' BANK SCOTTSBLUFF, NEBRASKA, ET. AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF SCOTTS BLUFF COUNTY
Hon. E. F. Carter, Judge.

ANSWER BRIEF OF APPELLEES.

I. D. Beynon,
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STATEMENT.

Appellees have heretofore filed brief in support of motion to dismiss. Appellants filed brief in resistance to motion to dismiss and oral argument was had before the court on said motion and then in open court appellees were given leave to file brief and appellants leave to reply to same. We will call this appellee's

answer brief. We have heretofore filed brief statement, but will again call the court's attention to same, and the issues.

E. H. Luikart, claiming to be the Secretary of the Department of Trade and Commerce of the State of Nebraska, applied to the district court of the 17th Judicial District for appointment as a receiver of the various insolvent state banks involved in this appeal. Mr. Luikart, as grounds for his right to such appointment and authority therefor, invoked Section 8-192, Compiled Statutes of Nebraska for 1929, which section provides:

> "The Secretary of the Department of Trade and Commerce shall be the sole and only receiver of failed or insolvent banks, and shall serve as such without compensation other than his compensation as secretary of said Department."

Clarence G. Bliss, the former Secretary of the Department of Trade and Commerce had been appointed receiver by the court of certain of these failed banks and H. C. Peterson had been appointed receiver by the court of certain other of these failed banks. Mr. Bliss and Mr. Peterson filed their final accounts and were discharged as such receivers. The court, upon hearing the application of Mr. Luikart refused to appoint him as receiver and appointed one A. E. Torgeson as receiver of these failed banks.

The Issues.

The issues involved in this case, as appellees view same, are as follows:

1. Is Section 8-192 Compiled Statutes of Nebraska, 1929, to be construed as mandatory or discretionary?

2. Under the statutes of Nebraska do we have a statutory receiver, or a civil officer under whom the liquidation of banks is carried on without going into court and without the court having any jurisdiction over said officer?

3. If Section 8-192 (supra) is mandatory then is same constitutional?

4. Does the record show that E. H. Luikart is the Secretary of the Department of Trade and Commerce?

5. Does E. H. Luikart have any appealable interest?

6. Will it not be presumed, in the absence of a bill of exceptions, that the district court correctly determined every issue of fact presented by the pleadings?

7. If Section 8-192 is mandatory, then under the pleadings shown by the record, the district court necessarily was compelled to pass upon the constitutionality of said section.

In our brief in support of motion to dismiss we laid down six propositions of law supported by authorities and the court of course will consider our former brief and this brief together, so that it will not be necessary for us to repeat each and all of these propositions, or to cite the cases thereunder.

PROPOSITIONS OF LAW.

1. The burden is on the party alleging error to show it affirmatively by the record; all judgments appealed from are presumed to be right, and every

reasonable presumption will be resolved against appellant and in favor of judgment below.

Vol. I, N. W. Digest, Sec. 901 on Appeals (and cases cited).

Carter v. *Gibson,* 85 N. W. 45 (Neb.).

Ashpole v. *Hallgren,* 82 N. W. 623 (Neb.).

Buchanan v. *Mallalieu,* 41 N. W. 152 (Neb.).

Wright v. *Greenwood,* 7 Neb. 435.

2. A judgment overruling a petition is deemed correct where the grounds therefor do not appear.

Goodub v. *Horning,* 127 Ind. 181.

Vol. II, Encyc. Plead. & Prac. 469.

3. A receiver is an officer of the court, an arm of the court, the hand of the court.

Mauron v. *Crown Carpet Lining Company,* 50 Atl. 387, 23 R. I. 344.

Castleman v. *Templeman,* 40 Atl. 275, 87 Md. 546.

American Trust & Savings Bank v. *McGettigan,* 52 N. E. 793, 152 Ind. 582.

Standard Oil Co. v. *Hawkins,* 74 Fed. 395.

State v. *Hubbard,* 51 Pac. 290, 58 Kan. 797.

Farmers Loan and Trust Co. v. *Oregon Pacific R. Co.,* 48 Pac. 706, 31 Ore. 237.

Blair v. *Core,* 20 W. Va. 265.

Grey v. *Covert,* 58 N. E. 731, 25 Ind. App. 561.

Jackson v. *King,* 58 Pac. 1013, 9 Kan. App. 160.

Makeel v. *Hotchkiss,* 60 N. E. 524, 190 Ill. 311.

State Central Savings Bank v. *Fanning Ball-Bearing Chain Company,* 92 N. W. 712, 118 Ia. 698.

State ex rel Spillman v. *American State Bank,* No. 27944, decided by this court Nov. 24, 1931, 239 N. W. 214.

State ex rel v. *Farmers & Merchants Bank,* 114 Neb. 378.

State ex rel v. *Security State Bank,* 116 Neb. 223, 225.

4. Upon resignation of a receiver a successor may be appointed by the court having jurisdiction of the cause *ex mero motu.*

53 C. J. 93.

Re: Graff, 86 Neb. 535.

5. The court can pass on the constitutionality of an act as it applies and is sought to be enforced.

6 R. C. L., par. 87, p. 90.

6. The power to appoint a receiver by a court of equity in a proper case is one which exists in such court independent of any statute.

State ex rel Barton v. *Farmers & Merchants Ins. Co.,* 90 Neb. 664.

7. The appointment of a receiver is a judicial act and this power is one of the prerogatives of a court of equity, "exercised in aid of its jurisdiction, in order to enable it to accomplish, as far as practicable, complete justice between the parties before it. It is regarded as being inherent in all courts exercising chancery jurisdiction, and is not dependent on statute."

State v. *Noble,* 21 N. E. 244 (Ind.).

23 R. C. L. 32, par. 30.

Corrington v. *Crosby,* 210 N. W. 342, 345.

Ex Parte Faust, 81 S. E. 7 (S. C.).

State v. *Wildes,* 116 Pac. 595.

8. A court of equity or chancery or, a court possessed of equitable or chancery jurisdiction has inherent power to appoint a receiver.

53 C. J. 49, par. 36.

9. "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others except as hereinafter expressly directed or permitted."

Constitution of Nebraska, Article 2, Sec. 1.

10. An act of the legislature forbidden by the constitution is absolutely null and void.

Whetstone v. *Slonaker,* 110 Neb. 343.

Central National Bank v. *Southerland,* 113 Neb. 126.

State v. *Several Parcels of Land,* 78 Neb. 703, 80 Neb. 11.

11. An unconstitutional act is not a law, it confers no rights, it imposes no duties, it affords no protection, it creates no office, it is, in legal contemplation, as inoperative as though it had never been passed.

Norton v. *Shelby County,* 118 U. S. 424-442.

12. An act of the legislature, the effect of which is to invade the inherent power of the judiciary is unconstitutional and void and an act of the legislature which confers legislative or executive functions on a court is also unconstitutional and void.

Re: Supreme Court Commissioners, 100 Neb. 426.

State v. *Neble,* 82 Neb. 267-277.

Witter v. *Cook County Commissioners, et al.*, 100 N. E. 148 (Ill.).
Gordon v. *Lowry*, 116 Neb. 359.
Searle v. *Yensen*, 118 Neb. 835.
State v. *Noble*, 21 N. E. 244 (Ind.).

13. The courts have the power, and it is their duty to declare a statute unconstitutional, when it is necessarily involved in the case before the court.

Weyman-Bruton Land Co. v. *Ladd*, 231 Fed. 898, 901, 146 C. C. A. 94.
Republic Iron & Steel Co. v. *Carlton*, 189 Fed. 126.
Ex parte Randolph, 2 Brock. 447, 20 Fed. Cas. No. 11,558.
State ex rel Glass v. *Stone*, 73 So. 330 (Ala.).
Martin v. *State*, 79 Ark. 236, 96 S. W. 372.
Marin Municipal Water Dist. v. *Dolge*, 172 Cal. 724, 158 Pac. 187.
Lippman v. *State*, 72 Fla. 428, 73 So. 357.
Scoville v. *Calhoun*, 76 Ga. 263.
Illinois Cent. R. Co. v. *Chicago & G. W. R. Co.*, 246 Ill. 620, 93 N. E. 44.
State v. *McCormack*, 185 Ind. 302, 113 N. E. 1001.
Hoover v. *Wood*, 9 Ind. 286.
Thompson v. *Mitchell*, 133 Ia. 527, 110 N. W. 901.
Dubuque & Dak. Ry. Co. v. *Diehl*, 64 Ia. 635, 21 N. W. 117.
Shohoney v. *Quincy, Q. & K. C. R. Co.*, 231 Mo. 131, 132 S. W. 1059, Ann. Cas. 1912A, 1143.
Davidson v. *Hartford L. Ins. Co.*, 151 Mo. App. 561, 132 S. W. 291.

Potter v. *Furnish,* 128 Pac. 542 (Mont.).
Reeves & Co. v. *Russell,* 148 N. W. 654 (N. D.) L. R. A. 1915D, 1149.
State v. *Baughman,* 38 Ohio St. 455.
Sayles v. *Walla Walla Co.,* 30 Wash. 194, 70 Pac. 256.

14. Generally, a constitutional question must be presented to the trial court at the earliest possible moment and kept alive throughout, otherwise it would be waived, *but an exception exists where plaintiff's cause of action is founded on a statute, invalidity of which would absolutely destroy plaintiff's right of action, in which case constitutionality of statute can be attacked for first time on appeal.*

Lieber v. *Heil,* 296 S. W. 200 (Mo. 1927).
McGrew v. *Mo. Pac. Ry. Co.,* 230 Mo. 496, 132 S. W. 1076.
Simpson v. *Wittee Iron Works Co.,* 144 S. W. 895 (Mo. App.).
Parsons v. *Van Wyck,* 67 N. Y. S. 1054, 56 App. Div. 329.
Dolan v. *N. Y. Ry. Co.,* 77 N. Y. S. 815, 74 App. Div. 434.

15. Under the statutes of Nebraska we have what is called a court receiver, and not a civil or executive officer where liquidation is carried on without going into court.

Sections 8-190, 8-192, 8-193, and 8-196, Compiled Statutes of Nebraska, 1929.

ARGUMENT.

We call the court's attention first to the sections of the statute cited under our last proposition of law.

Section 8-190 provides in case of insolvency, etc., that:

> "The Secretary shall report the facts to the Attorney General, who shall apply to the district court of the county in which the bank is located, or to a judge thereof within his judicial district, or to a judge of the Supreme Court, for a decree determining such insolvency or violation of law, *and the appointment of a receiver.*" (Italics used in these statutory quotations are ours.)

Section 8-192 provides that the Secretary of the Department of Trade and Commerce shall be the sole and only receiver of failed and insolvent banks.

Section 8-193, which appellants never quote in full, is as follows:

> "When, by a decree of court, a bank is ordered liquidated, the decree shall place the assets of said bank in the hands of Secretary of the Department of Trade and Commerce, *and liquidation shall thereafter be had under order of court in the manner provided by law.*"

Section 8-196 provides that receiverships of banks pending when this act takes effect, shall be transferred to the secretary upon his application, *"unless the court in a given case shall determine that final liquidation is so near at hand that a transfer will be subversive of the best interests of the creditors of the bank."*

The Distinction Between a Court Receiver and an Administration Receiver.

In Nebraseka we have what is called a court receiver where the assets of a failed bank are liquidated under order of the court—not a civil or executive officer with

power to liquidate the assets of a bank without going into court.

We wish at the outset to challenge the court's attention to the two kind of receiverships and we wish to point out the distinction which is made in every case and will demonstrate and prove that the cases cited by appellants are not in point.

We assert this distinction between a court receiver and an administration receiver is clear and marked and we challenge counsel for appellants to show any authority from any court that holds that the office of a receiver is a civil office analogous to national bank receiverships where the statutes of the state provide, *as do ours,* that the receiver must be appointed by the court. We assert that wherever the statute provides that an application has to be made to the court for the appointment of a receiver, that the receiver then is a *court receiver* and the assets are administered under order, control and direction of the court. In other words the state banking systems for liquidation of failed state banks over the country fall into two classes. The first scheme for liquidation may be designated as a statutory or administrative receivership where the receiver is appointed by an executive officer, or by statute with power to liquidate without applying to the court for a receiver, as distinguished from the second type of liquidating scheme where liquidation is carried on through the court by a receiver appointed by the courts. The National Banking Act represents the first type of liquidating scheme and is followed in such states as Alabama, Oklahoma, Kentucky, New York and Minnesota. In these instances a receiver

is appointed by an executive officer, or the statute gives a designated officer the power to take possession of the assets and *proceed* to liquidate the banks without court order and without asking the court for any appointment of a receiver. This distinction is made clear in the case of *Baird* v. *Lefor,* (N. D.) 201 N. W. 997. In this case it was argued that the appointment of the plaintiff Baird as receiver of banks in liquidation was void under a section of the constitution to the effect that no member of the legislative assembly shall during the term for which he was elected be appointed or elected to any civil office. The question then arose as to whether the bank liquidating receiver was a civil officer under the meaning of that section of the statute. The court said:

> "The defendant urges, in support of his contention, that a court receiver is a civil officer, and therefore holds a civil office, the authority of numerous decisions of the federal and other courts holding that a national bank receiver is a public officer.
>
> "He argues that if such a receiver is a public officer, likewise the receiver in the instant case must be a public officer and the holder of a public office; and that public office and civil office are synonymous. But a receiver of a national bank is not a court receiver. He is an administrative receiver. He is appointed by the comptroller of the currency with the presumed concurrent approval of the Secretary of the Treasury. He is answerable to no court, except as a litigant, and in no manner different from that in which any other litigant is answerable. The holding of the whole line of authorities cited by the defendant, beginning with the case of *Platt* v. *Beach, supra,* is based upon

> this distinction. Judge Benedict in the Platt case, analyzing the character of a national bank receiver, says that he is an officer, but that he is not a court officer and that therefore he must be an officer of the United States; thus drawing the very distinction that the defendant seeks to avoid. The appointment of the plaintiff as receiver is not void as contravening Section 39 of the Constitution."

The cases cited by appellant all deal with administrative receivers and not court receivers.

Cases Cited By Appellant.

Appellant cites Alabama, Kentucky, Minnesota, Oklahoma and New York, but a careful examination of these cases will show that in all these states the court is talking about an administrative receiver and not a court receiver.

The case of *Oats* v. *Smith,* 176 Ala. 39, declares the Alabama liquidating scheme to be a statutory receivership and the appointment of a court receiver unnecessary.

The case of *Cornell* v. *Commercial Bank,* 153 Ky. 798, 156 S. W. 1048, holds that the liquidating scheme has provided an exclusive remedy for liquidation and that a court receiver should not be appointed unless the bank examiner refuses to act.

The case of *Northwestern* v. *Livestock,* (Minn.) 234 N. W. 304, holds that the liquidation scheme does not contemplate the appointment of a court receiver in the state of Minnesota and the case of *State* v. *Norman,* 206 Pac. 522, shows that the Oklahoma liquidation

scheme does not contemplate the appointment of a court receiver. The court's opinion explains their type of receivership:

> "From the detailed manner in which the legislature has dealt with the subject it was undoubtedly intended that the procedure looking toward the closing of insolvent banks and their liquidation, was to be under the supervision of the Bank Commissioner and to obviate the necessity of going into a court of chancery to procure the appointment of a receiver in order to wind up the affairs of insolvent banks. Indeed there is no necessity for a receiver when the Bank Commissioner proceeds as directed by the provision of this act."

As distinguished from the above type of liquidating schemes we have instances where the liquidation is carried out through court receivers. In New Mexico, South Carolina and Iowa there is now, or was at one time, a scheme for liquidation through receivers appointed by the court. Under such liquidation schemes it is our contention the appointment of a receiver lies within the discretion of the court.

The case of *State ex rel Reid, Attorney General* v. *Ryan,* (N. M. 1922) 204 Pac. 69, says:

> "The sole question in this case is whether or not under Chapter 134, Laws 1921, the district judge to whom application for the appointment of a receiver is made for an insolvent bank, is bound to appoint the State Bank Examiner receiver and has no discretion to appoint another. The statute reads in part as follows: The Attorney General shall institute forthwith proper proceedings in the proper court *for the purpose of having the state bank examiner appointed as receiver* to take charge of

such bank and wind up its affairs and the business thereof for the benefit of its depositors, creditors and stockholders). The Bank Examiner is not by statute made receiver of insolvent banks, as he is in some jurisdictions, nor is he a receiver for an insolvent bank appointed by the Executive Department. *Under this statute he applies to the court to be appointed receiver* and is not in any better position by virtue of his office as State Bank Examiner than any other applicant.

"We hold that had the legislature intended the State Bank Examiner should be receiver of insolvent banks it would have so provided and a different question as to the constitutionality of such an act might arise, but the statute does not so provide. *It requires the Attorney General to institute proceedings for the purpose of having the Bank Examiner appointed as receiver.* The act does not attempt to control the discretion of the court in appointing a receiver and under it the court may appoint or refuse to appoint the applicant as receiver."

(See case of *Rhame* v. *Bank of Bronson,* 81 S. E. 7, cited on pages 14-15 of our former brief.)

In re Citizens Exchange Bank of Denmark, (S. C. 1927) 139 S. E. 135:

"Section 3985 relates especially to the duties of the examiner, not as to honest, solvent banks, but to banks which are insolvent or to banks dishonestly conducted. The examiner in such instances * * * is given the power to procure court order directing him to take charge of the assets and property of the institution and he is required as a matter of duty to make application for a receivership.

"The power of the circuit judge to designate a receiver is clearly a matter of discretion; perhaps

> even more enlarged than that of deciding in the first instance whether or not there should be a receivership. Even when the Bank Examiner applies to the court for a receiver's appointment for an unsound bank the court is not required to appoint the examiner's nominee or even the examiner himself; and this discretion extends to the appointment of a new receiver when the old receiver has been removed."

(See case of *Andrews* v. *Bevington Savings Bank*, pages 12-13 of our former brief.)

In *Leach* v. *Exchange State Bank*, (Ia.) 203 N. W. 31, at page 33 of the opinion the court draws a distinction between National Bank Receivers and the Iowa statute before the enactment of the present Iowa system where it is not necessary to go into court to liquidate the banks and indicating that as long as the banking system required a court receivership, the matter of the appointment of a receiver was discretionary with the court.

We contend, therefore, that notwithstanding Section 8-192, that since the statutes of Nebraska provide that an application must be filed asking the court to appoint a receiver that the matter then becomes discretionary with the court and that the statute designating the Secretary of the Department of Trade and Commerce to be named as receiver is a mere nomination, as has been held in every case where a receiver is appointed by the court, as shown by cases cited herein.

We presume it will be admitted without citations of authority that the burden is on the parties alleging error to show it affirmatively by the record and the

cases cited amply bear out this proposition. Also every reasonable presumption will be resolved against appellant in favor of correctness of the judgment below. We also insist that Mr. Luikart has no appealable interest in the suit.

The Pleadings.

Some member of the court suggested when oral argument was being made on motion to dismiss that since there was no answer filed to the application of Mr. Luikart that the effect would be similar to a demurrer. We do not believe this theory is tenable. In the first place, there can not be said to be any default for the reason that no one was in court and no notice served on anyone with authority to object or file an answer. Certainly there was no default and the pleadings could not be treated as a demurrer. We call the court's attention to the fact that the district court found *against* the application and, therefore, must have found against the allegations therein set out. If the court on the other hand had found in favor of the application, then the effect would have been that the court found the allegations were true, but the court in this instance specifically found against the allegations of the petition by refusing to grant the petition.

What were the principal allegations of fact set out in the application? The application (pp. 30-31 of transcript) alleges the following material facts: First, that on the 8th day of July, 1931, the Governor duly and legally appointed E. H. Luikart to the position of Secretary of the Department of Trade and Commerce. The court by denying this application may have found this allegation to be untrue. Second, it was alleged that said E. H. Luikart duly qualified as Secretary

and is the only person qualified under the law to act as receiver. Assuming that the record is correct, as must be assumed, it follows that the court may have found that E. H. Luikart did not qualify as Secretary or that he was not the only person qualified to act as receiver. If the court found against any one of the above material allegations set out in the application, it will be conceded that the court was justified in refusing to appoint Mr. Luikart receiver and that the court in its discretion had a right under its general equity powers to appoint any other party as receiver. By denying the Luikart application the court must have found the allegations untrue, or that the appointment of a receiver was discretionary with the court, or that the statute in question was unconstitutional.

There being no bill of exceptions, we insist that by reason of the fact that the court denied the application of Mr. Luikart that it must be conclusively presumed that the court found against the allegations of said application and we believe the court on careful consideration will come to the conclusion that the pleadings can not possibly be considered in the nature of a demurrer when there was no default and when no admissions were made or filed and where the court specifically found against the application. When the court overruled the application the presumption is conclusive that the ruling of the court was correct.

Under our propositions of law no presumption as to evidence can be made which contradicts the decree, and in the absence of a bill of exceptions it will be presumed that other evidence appeared if necessary to support the judgment (Vol. II Cyc. Plead. & Prac., p. 437). However, in this case it is not even necessary to presume that other evidence was adduced for the

reason that it will be presumed that the finding of the court is correct, and in the absence of a bill of exceptions same can not be challenged or denied. We feel certain, therefore, that it will not be necessary for the court to even decide whether the statute in question is constitutional or not; however, if the court should ever reach this point we call its attention to the cases already cited in this and our former brief and some hereafter cited to the effect that in this particular case if the statute is mandatory it was absolutely necessary for the court to pass upon its constitutionality. This is true for the reason that appellant bases his whole contention and his rights upon a single section of the statute and therefore its construction is necessarily and specifically involved and may be urged for the first time on appeal.

Appellants insist that the only question for the court to decide in this case is the constitutionality of the statute involved, but, as we pointed out, there are many other issues to be decided before the court reaches the constitutional question. However, if the court does reach this question we are satisfied that under the holdings of this court and under the Nebraska Constitution that the powers of the chancery court can not be limited by the legislature and that the appointment of a receiver is peculiarily within the chancery jurisdiction of the court.

The most illogical statement or argument made by appellants in their brief and in their oral argument is that if the court should find Section 8-192 unconstitutional, then that we would be back under the Guarantee Law and no receiver could be appointed because there would be no Guarantee Fund Commisison to nominate a receiver. The law creating the Guarantee

Fund Commission was absolutely and unconditionally repealed, and if Section 8-192 should be found unconstitutional we would be in exactly the same position as we were before this section of the act creating the Guarantee Fund Commission was enacted, to-wit: the court would appoint a receiver under its equity jurisdiction.

We wish to challenge two statements made by counsel for appellants in oral argument and in their brief. First, they state with great vehemence that every court, except Judge Carter's district, had held this section constitutional and mandatory. The writer of this part of the brief was present at these hearings and he specifically denies said statement. Many of the courts doubted the right of the legislature to tell them what to do and one judge in a written opinion said he believed the statute to be unconstitutional and all the rest with one exception said it was not necessary to pass on that phase of the question for the reason that it was at least discretionary and they could appoint Mr. Luikart and keep the matter under one head. However, in all those hearings before the district courts there was no necessity for construing the statute in question, for outside of the first hearing where objection was made that the application for Mr. Luikart could not be made by the Governor, no objection was made to the appointment of Mr. Luikart and the only issue presented was whether the old receiver could be discharged by the Governor and the assets turned over to a new receiver before the old receiver had opportunity to file final reports and be discharged in a regular and lawful manner.

There was a time no doubt when there was some advantage in handling the whole matter from the State

House, but in our opinion that time has long since passed and under existing conditions those conversant with the situation know that the assets of a failed bank, especially four hundred miles from the State House, can be liquidated at far less expense by a local receiver and more satisfactory to the depositors than to have a receiver in name only acting at the State House. But this question is not before the court. It is not for this court to decide what is the best policy and this question is not involved in this appeal.

A Receiver is an Officer of the Court.

We think there can be no question, in fact no argument, that a receiver appointed by a court of equity is the officer and agent of the court. An examination of the cases cited under our third proposition of law herein shows that this is practically the universal rule. In some of these cases the receiver is referred to as "an officer of the court." A receiver "is an arm of the court by which it administers the trust for the benefit of the creditors."

> "A receiver is merely the creature of the court. He has no powers save such as are conferred on him in the course and practice of the court."
>
> *Blair* v. *Core,* 20 W. Va. 265.

> "A receiver is an officer or creature of the court appointing him, his acts are those of the court. His jurisdiction may be aided but in no wise enlarged or extended by his appointment. His power is only co-extensive with that of the court which gives him his character."
>
> *Grey* v. *Covert,* 58 N. E. 731-732.

> "A receiver is the hand of the court of which he is an officer."
>
> *Jackson* v. *King,* 58 Pac. 1013 (Kan.).

In the recent case of *State ex rel Spillman, Attorney General* v. *American State Bank of Scottsbluff,* 239 N. W. 214, decided by this court, on page 216 the court says:

> "In the case of *State* v. *Farmers' & Merchants' Bank,* 114 Neb. 378, 207 N. W. 666, 667, this court said: 'The receiver is at all times an officer of the court, subject to its orders and directions, an agent, the scope of whose authority is limited by law. *State* v. *Bank of Hemingford,* 58 Neb. 818, 80 N. W. 50, 23 Cyc. 1065. Thus every one dealing with such receiver knows of the limitations, or lack of limitations, to his power to transact the business of the institution. He cannot, without approval of the court relinquish any of the rights of the trust."

Upon the Resignation of a Receiver the Court May Appoint a Successor on Its Own Motion.

Upon the resignation of the former receiver, the court determined it would not appoint Mr. Luikart as his successor and denied Mr. Luikart's application and appointed one A. E. Torgeson as its officer to carry on the administration of these failed banks. The rule is stated in 53 C. J. on page 93, as follows:

> "Upon the removal, resignation or death of a receiver, his successor may be appointed by the court having jurisdiction of the cause *ex mero motu* without further notice, and without consulting an intervener as to the selection."

In re Graff, 86 Neb. 535, this court held:

> "A district court having jurisdiction over the receivership of an insolvent state bank may, without notice accept the resignation of the receiver and appoint his successor."

The Construction and Interpretation of Section 8-192 Necessarily Considered by the Court on the Application of Mr. Luikart for Appointment as a Receiver.

The only possible right that Mr. Luikart could claim to be appointed receiver was because of Section 8-192, Compiled Statutes of Nebraska, 1929, which provides that:

> "the Secretary of the Department of Trade and Commerce shall be the sole and only receiver of failed or insolvent banks."

Mr. Luikart invoked this statute as the ground and authority for his appointment and consequently the construction and interpretation of this section of the statute was necessarily involved and considered by the court and the court had the right and it was its duty to pass on the constitutionality of this section as it applied to the matters before it for decision and was sought to be enforced by Mr. Luikart (6 R. C. L. par. 87, p. 90). This section of the statute is either directory or mandatory. If construed as directory the trial court was in the exercise of its sound discretion when it refused to appoint Mr. Luikart. If construed as mandatory this section of the statute, as will be hereinafter pointed out, was a direct invasion of the judiciary and is unconstitutional and void.

This court has held in the case of *State ex rel Barton* v. *Farmers and Merchants Ins. Company,* 90 Neb. 64, that:

> "The power to appoint a receiver by a court of equity in a proper case is one which exists in such court independent of the statute.

"The receiver being an officer or arm or hand or the agent of the court the appointment by the court is a judicial act 'exercised in aid of its jurisdiction in order to enable it to accomplish, as far as practicable, complete justice between the parties before it. It is regarded as being inherent in all courts exercising chancery jurisdiction, and is not dependent on statute."

23 R. C. L. 32, par. 30.

The legislature cannot prescribe what officers and agents shall be selected by the court as its assistants.

Under Article II of the Constitution of Nebraska,

"the powers of the Government of this State are divided into three distinct departments, the legislative, executive and judicial and no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others except as hereinafter expressly directed and permitted."

Any infringement or invasion by one department upon another is unconstitutional and absolutely void:

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

Norton v. *Shelby County,* 118 U. S. 425, 442.
Whetstone v. *Slonaker,* 110 Neb. 343.

In *Re*: *Supreme Court Commissioners,* 100 Neb. 426, this court on page 428 laid down the rule as follows:

"Objection is made in some of the briefs because the act authorizes the judges of the supreme court

to appoint three supreme court commissioners, 'who shall first be recommended for such appointment by the governor.' The court is under no obligation to appoint commissioners at all. Unless the men whose names were suggested by the governor had commended themselves to the court as proper and fit persons in point of character and ability to fill such responsible positions they would never have been appointed.

"Justice delayed is often justice denied. The serious condition in which the people of the state have been placed by the absence of restriction upon the right of appeal and the consequent delay convinced us that it was for the public welfare that the court be not unduly sensitive as to its clear and undoubted constitutional right to ignore or reject all recommendations for the appointment, by whomsoever made, and, when the names of fit and proper men were suggested, to make the appointment from the list. The work of the commission has justified the selection made. *That portion of the act which attempts to confine the right to appoint the nominees of the governor is clearly void. Neither the legislature nor the governor has the right to dictate whom the court shall appoint as its referees or assistants.* The court might as well assume to appoint the chief clerk or sergeant at arms of each house of the legislature. The court, the legislature, and the executive are co-ordinate branches of the state government, and under the constitution neither can exercise powers conferred by the people upon the other." (Italics ours.)

The reasoning in this case is directly applicable to the case at bar. The legislature cannot dictate whom the court shall appoint as its officers or assistants.

In *State* v. *Neble,* 82 Neb. 267, it was held that that part of the act relating to cities of metropolitan class

which provided for the appointment of park commissioners by the judges of the district court was unconstitutional and void, because it attempted to confer executive duties upon the judiciary and in support of the conclusion reached by the court, the court cites *State* v. *Brill,* 100 Minn. 499, and on page 277 says:

> "In *State* v. *Brill, supra,* the legislature of Minnesota passed an act requiring the judges of the district court, or a majority of them, to appoint the members of the board of control of the county of Ramsey. After making a number of successive appointments, the judges became convinced that the act imposing the duty upon them was unconstitutional and refused to make other appointments. The attorney general sought a writ of mandamus from the supreme court to compel action. The writ was denied; the court holding, after an exhaustive examination, that the part of the act which required the judges to make the appointment was unconstitutional and void because it assumed to impose upon the members of the judiciary powers and functions which by the constitution were assigned to another department of the government."

In the case of *Searle* v. *Yensen,* 118 Neb. 835, this court held unconstitutional an act which attempted to impose upon the courts the performance of non-judicial duties in the matter of the organization of hydro-electric light and power districts, and on page 841 it is said:

> "The division of governmental powers into executive, legislative and judicial in this country is a subject familiar, not only to lawyers and students, but is a part of the common knowledge of the citizen. It represents, probably, the most important principle of government declaring and guar-

anteeing the liberties of the people, and has been so considered, at least, since the famous declaration of Montesquieu that 'There can be no liberty * * * if the power of judging be not separated from the legislative and executive powers. * * * Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be the legislator: Were it joined to the executive power, the judge might behave with all the violence of an oppressor.' In fact, the above proposition is declared in direct language by section 1, art. II, of our constitution:

" 'The powers of the government of this state are divided into three distinct departments, the legistive, the executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others except as herein expressly directed or permitted.'

"The question submitted, therefore, is of supreme importance, and requires our most serious consideration, notwithstanding the strongest presumptions of validity to which a legislative act is entitled, and the extreme disinclination on the part of one of such departments to criticise or interfere with the acts of another. As the constitutions of the respective states are the supreme law within their respective jurisdictions and are limitations of power, it is necessary that authority exist somewhere to determine whether or not the limitations have been exceeded. From the early history of this country and after much clash of opinion and sometimes bitter argument, the doctrine is now firmly established that this delicate duty devolves upon the judiciary. We, therefore, approach the question with an earnest desire to sustain the

validity of the act, but with a profound sense of our duty to preserve the supremacy of the constitution."

In *Gordon* v. *Lowry,* 116 Neb. 359, it was held the statute making federal census report conclusive evidence in respect to the population of a county was unconstitutional and was a usurpation of judicial power and that:

"The legislature is not clothed with power to infringe upon exclusive province of the judiciary in the matter of the investigation of facts which have to do with the determination of controverted facts in litigation."

In *Witter* v. *Cook County Commissioners, et al.,* 100 N. E. 148 (Ill.), it was held that the power to appoint probation officers is judicial and that a provision is an act that the county has a population of over five hundred thousand, the board of county commissioners shall appoint probation officers is in conflict with the constitution, dividing the powers of government into legislative, executive and judicial and prohibits exercise of any power belonging to either department by any person of other departments. In the course of the opinion the Supreme Court of Illinois, on page 150 says:

"Courts of chancery have always appointed guardians ad litem for minors who are parties to suits and controlled them by compelling performance of their duties. The probation officer is practically a guardian ad litem for each child brought into the court and has enlarged duties under the statute. *Like attorneys, masters in chancery, receivers, commissioners, referees and other similar officers, pro-*

> *bation officers are mere assistants of the court in the performance of judicial functions.* The power to appoint and remove such officers is necessary to the independent exercise of judicial power and the separation of the judicial department from the other departments of the government which are prohibited from exercising its functions. *The judicial power includes the authority to select persons whose services may be required as assistants to the judge in the performance of judicial duties and the exercise of judicial power.*" (Italics ours.)

The statute of South Carolina covering the matter of the liquidation of failed banks provided that the bank examiner upon consultation with the state treasurer should take and retain possession of the assets and property of every description belonging to such bank or banking institution providing he shall have first applied for and obtained an order of this effect from a circuit judge. It made it the duty of the bank examiner

> "to make proper application to the court for the appointment of himself or some other person as receiver to wind up and settle the affairs of such bank or banking institution."

The Supreme Court of South Carolina in the case of *Ex Parte Faust*, 81 S. E. 7, in construing this statute says:

> "This language is plain and unambiguous. It does not mean, as appellant's counsel contends, that the court is compelled to name as receiver the bank examiner, or some one named by him; but the court can name its own receivers. In the exercise of its discretion and its inherent power it can appoint its own officers either the bank examiner,

> the bank examiner's nominee, or any other suitable person that the court sees fit, and after such appointment is made, the court, for sufficient cause shown, such as neglect of duty, incompetency, dissipated habits, etc., removes its appointee and puts in a suitable person."

In the case of *State* v. *Noble,* 21 N. E. 244, the Supreme Court of Indiana had before it the question of the constitutionality of "An act providing for the appointment of commissioners of the supreme court." The act provided that

> "if a vacancy shall occur in any one of said commissionerships hereby provided for, during a recess of the general assembly, the governor shall appoint some suitable person to fill said office until the next session of the general assembly."

The court held that this act was unconstitutional by reason of the constitutional provision dividing the powers of the government into legislative, executive and judicial departments, and in the course of the opinion says:

> "This court has ever been consistent and firm in maintaining the independence of the judiciary, and in enforcing the provisions of the constitution, which distribute the governmental powers. In *Wright* v. *Dufrees,* 8 Ind. 298, it was said: 'The powers of the three departments of government are not merely equal,—they are exclusive in respect to the duties assigned to each, they are absolutely independent of each other.' The court said, in the case of *Railroad Co.* v. *Geiger,* 34 Ind. 197, that 'These departments of government are equal, co-ordinate, and independent.' This doctrine has been asserted and enforced again and again. *Kuntz*

v. *Sumption,* 117 Ind. 1, 19 N. E. Rep. 474, and cases cited (this term) *In re Griffiths,* 20 N. E. 513 (this term) *Smith* v. *Myers,* 109 Ind. 1, 9 N. E. Rep. 692. This court has not only maintained the independence of the judiciary, but it has, with equal firmness and consistency, asserted the independence of the other departments. In *Butler* v. *State* 97 Ind. 373, we held that the courts could not suspend a sentence, because the power to grant pardons and respites is vested in the executive, and in cases much too numerous for citation it has been held that the court will neither perform a legislative act, nor assume to interfere with matters of governmental policy or expediency. But it is not the courts alone that assert these doctrines. They are found in the works of every philosophical writer on government. Lieber's Civil Liberty, Montequies' Spirit of the laws, Ingersoll's tears for a democracy, Wilson's Congressional Government, 1 Bryce's American Commonwealth, 31.

"We have, perhaps, devoted more time than necessary to discussing and illustrating the proposition that the judiciary is an independent department of the government, and that the whole judicial power of the state is exclusively vested in the courts, since the proposition is one that neither lawyer nor publicist will challenge, but the importance of the proposition supplies an apology, if, indeed, apology be needed. The principle embodied in our proposition controls many phases of the case. Among other conclusions to which it leads is this central and ruling one. Neither the executive nor legislative can select persons to assist the courts in the performance of their judicial duties. Grant—and this cannot be granted, save for mere argument's sake—that it is true that the act before us contemplated that the commissioners shall be mere assistants of the court,

occupying, as is so earnestly and at so much length insisted, positions analagous to those of master commissioners or masters in chancery, and it must follow that such assistants shall be selected by the court, and that neither the governor nor the legislature can choose them for the court. From this conclusion there is no escape, save by a denial of the independence of the judiciary and the overthrow of the fundamental principle that the whole judicial power of the commonwealth is in the courts. A department without the power to select those to whom he must intrust part of its essential duties cannot be independent. If it must accept as 'ministers and assistants' as Lord Bacon calls them, persons selected for them by another department, then, it is dependent on the department which makes the selection. To be independent the power of the judiciary must be exclusive, and exclusive it cannot be if the legislature may deprive it of the right to choose those with whom it shall share its labors or its confidences. If one kingdom possesses the right to send into another ministers and assistants, to share with the governing power its functions and duties, the latter kingdom is in no sense independent. If it be conceded that the right to make choice of ministers and assistants for the court is a legislative power, then neither the judiciary nor the executive can limit its exercise, nor impose restraints upon the legislative discretion. To but grant the existence of the power, then, the extent and the mode of its exercise is and must necessarily be entirely a matter for legislative determination. If this be so, then the legislature may select any number of assistants, assign to them whatsoever duties they may see fit, give them access to the records of the court, and surrender to them the right to share with it all labors and

duties. Surely a court thus subject to legislative rule would be a mere dependent without a right to control its own business and records. But a constitutional court is not subject to any such legislative control. The legislature cannot for any purpose cross the line which separates the departments and secures the independence of the judiciary. It is not the length of the step inside the sphere of the judiciary that summons the court to assert their constitutional right, and demands of them the performance of their sworn duty, for the slightest encroachment is a wrong to be at once condemned and resisted. As Daniel Webster said, and Mr. Calhoun substantially repeats, the 'encroachment must be resisted at the first steps.' A thoughtful English writer, who has studied our governmental treatises and judicial decisions with great care, and who has calmly surveyed the subject from the point of view of a disinterested and impartial observer, says, in speaking of our state constitutions: 'But in America a legislature is a legislature, and nothing more. The same instrument which creates it creates also the executive governor and the judges. They hold by a title as good as its own. If the legislature should pass a law depriving the governor of an executive function under the constitution, that law would be void. If the legislature attempted to interfere with the jurisdiction of the courts, their action would be even more palpably illegal and ineffectual.' 2 Bryce, Amer. Com. 429. The principle that it is the right of the courts to select their own assistants was held to extend to the appointment of janitors by the supreme court of Wisconsin, *In re Janitor,* 35 Wis. 410. The supreme court of Missouri has held that the exclusive power of the legislative courts does not go to that extent, but it does not deny the general right of the courts to

select those who share its duties as ministers and assistants. *State* v. *Smith,* 82 Mo. 51. The court of appeals, in a strongly reasoned case, declared a different doctrine, holding that the court had a right to select its janitor, and that court supported its decision by authority and by weighty arguments. *Smith* v. *State,* 15 Mo. App. 412. But, conceding the soundness of the decision in *State* v. *Smith,* 82 Mo. 51, it must still be affirmed that it is not applicable here, for that decision proceeds entirely upon the ground that the criminal court (the court which asserted the right to appoint a janitor) was a statutory tribunal, and not a constitutional court. The decision in *Commissioners* v. *Hall,* 7 Watts. 290, in principle strongly supports the judgment of the court of appeals as does the decision in *State* v. *Smith,* 5 Mo. App. 427. But the case before us does not require us to do more than affirm that where assistants are necessary to enable judges to discharge their duties as judges the court must choose those assistants. Since the time of Queen Elizabeth courts have appointed masters in chancery, and masters in chancery and master commissioners now are, and have always been, appointed by the federal courts. Our own law has from the ealiest years of the state recognized, as it does still, the right of judiciary to select masters in chancery and master commissioners. The acts of 1881 and 1883, under which commissioners for this court were appointed, expressly recognized this right as one vested in the courts. If practical exposition of a constitution is ever of force, and no one will deny its force, it is here of controlling effect, for the practice has been uniform and unbroken. For centuries before the adoption of the constitution, and for all years that have followed its adoption, courts have pos-

sessed and exercised, as part of the judicial power, the right to select assistants. Proceeding still further upon the concession which we have provisionally made, and made simply for argument's sake, we affirm that the power to appoint the 'ministers and assistants' of the judges is a judicial power, and was a judicial power when the constitution was adopted.

"We assert as a conclusion necessarily following from the proposition we have affirmed that when the framers of the constitution declared that the judicial power was vested in the courts they invested this power in the judiciary as it then existed and that this investment conferred upon the courts the exclusive power to choose their own ministers and assistants. *We suppose no one will deny that the courts, from the earliest ages of the law, have possessed the power to appoint referees, receivers, commissioners, and all other like ministers or assistants, and that they possessed this power because it was a judicial power.* If it was not a judicial power, it could not have resided in the courts, for courts have no other power. It is a mistake to suppose that a court possesses merely the power to hear and decide causes. The power is much more extensive." (Italics ours.)

In the case of *Corrington* v. *Crosby,* 210 N. W. 342, the Supreme Court of North Dakota, on page 345, says:

"The appointment of a receiver and the administration of the affairs of an insolvent bank is the prerogative of a court of equity."

In *State ex rel Howell* v. *Wildes,* 116 Pac. 595, the Supreme Court of Nevada held that the act regulating affairs of a bank and providing a state bank exam-

iner shall take possession of all banks and property, and accounts in the custody of any receiver previously appointed was unconstitutional as an interference with the duties and prerogatives of the court appointing such receiver was a violation of the constitution dividing the powers of the government.

As pointed out in our brief heretofore filed in this matter the equitable or chancery jurisdiction of the district courts is beyond the power of the legislature to limit or control and in this connection we respectfully call the court's attention to the authorities cited in support of this proposition in our other brief. This court has held that the power to appoint a receiver by a court of equity is one which exists in such court independent of any statute.

The conclusion is inevitable that if Section 8-192, Compiled Statutes of Nebraska, 1929, is mandatory it is unconstitutional for the reason it is a direct invasion of the powers of a court of equity and is prohibited by the constitutional provision of the state of Nebraska dividing the powers of government into three distinct departments.

If it is merely directory the appellants cannot prevail in these appeals for the reason that this court cannot disturb the exercise of discretionary powers conferred upon the district courts so long as there is no abuse of the exercise of any discretion. The record shows no abuse of that discretion. The trial court

decided that these banks could be administered more efficiently by the appointment of a local man who is familiar with the affairs of these banks.

We submit that all of these cases should be affirmed.

Respectfully submitted,

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28195-6-7-8-9
28203-204

28197, 28196, 28198, 28199, 28204, 28203, 28195.

In The
Supreme Court of Nebraska

THE STATE OF NEBRASKA, EX REL.
C. A. SORENSEN, ATTORNEY GENERAL, AND
E. H. LUIKART, SECRETARY OF THE
DEPARTMENT OF TRADE AND COMMERCE,
APPELLANTS,

VS.

IRRIGATORS' BANK, SCOTTSBLUFF, NEBRASKA,
ET AL, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF SCOTTS BLUFF COUNTY.
HON. E. J. CARTER, *Judge.*

BRIEF IN SUPPORT OF MOTION TO DISMISS.

MOTHERSHEAD & YORK, *Scottsbluff, Nebraska,*
SKILES & SKILES, *Lincoln, Nebraska,*
I. D. BEYNON, *Lincoln, Nebraska,*
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SERVICE BRIEF COMPANY, 1331 P STREET, LINCOLN, NEBRASKA

General Numbers

28197, 28196, 28198, 28199, 28204, 28203, 28195.

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I. D. BEYNON, *Lincoln, Nebraska,*

Attorneys for Appellees.

STATEMENT.

The transcript on file and record herein shows that A. E. Torgeson was duly appointed receiver of the above named bank on November 2, 1931, and that on the same day the trial court denied the application for the appointment of E. H. Luikart, alleged to be Secretary of the Department of Trade and Commerce, as receiver. There is nothing in the transcript to show the order in which these matters occured, but the affidavit of I. D. Beynon attached to motion to dismiss shows that A. E. Torgeson was appointed receiver of said bank and that he duly qualified as said receiver prior to the filing of the application of said E. H. Luikart for appointment as receiver. The record discloses that no notice of appeal was served upon A. E. Torgeson, receiver of said bank, nor upon anyone authorized to act for said bank and that no brief has been served upon A. E. Torgeson and the time has now gone by for filing same. The record shows that A. E. Torgeson, receiver of said banks, has not been made a party to said appeal. There is nothing in the record to show that E. H. Luikart is the Secretary of the Department of Trade and Commerce, there is no Bill of Exceptions preserved, settled or allowed, therefore no abuse of discretion shown in the appointment of A. E. Torgeson as receiver of said bank.

This appeal should be dismissed and the appointment of A. E. Torgeson as receiver affirmed for the following reasons:

1. E. H. Luikart has no appealable interest herein.

2. No notice of appeal and no brief of appellant has been properly served upon appellee, or the receiver of said bank.

3. The receiver of said bank has not been made a party to this appeal.

4. There is no Bill of Exceptions on file and no evidence preserved in reference to the appointment of the receiver herein.

5. There is no evidence in the record or on file showing or attempting to show that E. H. Luikart is the Secretary of the Department of Trade and Commerce.

6. Under Sections 8-192 and 8-196 Comp. Sts. of Nebr. 1929, the naming and appointment of a receiver rests in the sound discretion of the court and no abuse of discretion is shown.

7. Section 8-192, Comp. Sts. of Nebr. 1929, is directory only, and if mandatory, said section is unconstitutional and void as an attempt of the legislature to limit the chancery powers of the court.

PROPOSITIONS OF LAW.

I.

a. *E. H. LUIKART HAS NO APPEALABLE INTEREST.*

Tardy's Smith on Receivers, Vol. 11 (2nd Ed.) Sec. 802;

Ex Parte Jonas, 64 So. 960 (Ala.);

Edwards vs. Western Land and Power Company, 151 Pac. 16;

Guardian Trust Company vs. Shedd, 240 Fed. 689;

Monumental Mutual Life Insurance Company vs. Wilkinson, 59 Atl. 125 (Md.);

Clark on Receiverships, Vol. I, pg. 52.

b. *THE APPOINTMENT OR REFUSAL TO APPOINT A RECEIVER IS WITHIN THE SOUND DISCRETION OF THE COURT AND WILL NOT BE INTERFERRED WITH ON APPEAL, EXCEPT IN CASE OF ITS ABUSE.*

3 Cyc. 330, citing a long list of cases from many states.

2 Cyc. 611, and cases cited.

Hilliard vs. Railway Company, 221 Pac. 503, 506;

Northern Brewery vs. Princess Hotel, 79 Ore. 453, 153 Pac. 37.

II.

IN THE ABSENCE OF A BILL OF EXCEPTIONS PRESENTING THE EVIDENCE THE COURT WILL

PRESUME THAT THE DISTRICT COURT CORRECTLY DETERMINED EVERY ISSUE OF FACT PRESENTED BY THE PLEADINGS.

In Re Estate of Lauderback, 106 Neb. 461, 184 N. W. 128;

Bolton vs. Bliss, 238 N. W. 358 (Neb.);

Travelers Insurance Company vs. Sawicki, No. 28005, decided December 16, 1931 (Neb).

III.

SECTION 8-191, *COMP. STS. OF NEBR.* 1929, *PROVIDING FOR THE APPOINTMENT OF THE SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE AS SOLE RECEIVER IS NOT MANDATORY AND SAID SECTION DOES NOT CREATE A CIVIL OFFICE UNDER THE EXECUTIVE BRANCH OF THE GOVERNMENT.*

Andrew vs. Bevington Savings Bank, 221 N. W. 668, (Ia).

Rhome vs. Bank of Brunson, 81 S. E. 7 (S. C.);

State vs. Ryan, 204 Pac. 69 (N. M.);

Baird vs. Lefor, 201 N. W. 997-999 (N. D.).

IV.

THE EQUITABLE OR CHANCERY JURISDICTION OF THE DISTRICT COURTS IS BEYOND

THE POWER OF THE LEGISLATURE TO LIMIT OR CONTROL.

Matteson et al vs. Creighton University, 179 N. W. 1009 (Neb.);

Bank of Crab Orchard vs. Myers, 231 N. W. 513 (Neb.);

Constitution of Nebraska, Article 6, Section 9;

Lacey vs. Zeigler, 98 Neb. 380, 152 N. W. 792;

Burnham vs. Dennison, 236 N. W. 745 (Neb.);

Fidelity etc. Trust Company vs. Schenley etc. Railroad Company, 189 Pa. St. 863. 69 A. S. R. 815;

Cameron vs. Groveland Improvement Company, 72 A. S. R. (note pg. 52).

V.

THE ACTS OF DE FACTO OFFICER ARE VALID AS RESPECTS THE RIGHTS OF THIRD PERSONS, BUT ARE VOID AS TO HIMSELF AND HE HIMSELF CAN ACQUIRE NO RIGHTS BASED UPON HIS DEFECTIVE TITLE.

Mecham on Public Officers, Sec. 331-342;

People vs. Nostrand, 46 N. Y. 375;

Nichols vs. Maclean, 101 N. Y. 526, 54 Am. Rep. 730;

People vs. Weber, 89 Ill. 348;

Patterson vs. Miller, 2 Met. (Ky.) 493;

Turner vs. Keller, 38 Mo. 332;

Carpenter vs. Clark, 217 Mich. 63, 185 N. W. 868;

Gregory vs. Woodberry, 43 S. 504 (Fla.);

In Re Berger, 133 S. W. 96 (Mo.);

22 R. C. L. Sec. 323.

VI.

E. H. LUIKART IS NOT THE SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE OF NEBRASKA AND THE BURDEN OF SHOWING SAME IS UPON THOSE ASSERTING THAT FACT.

Section 81-110 Comp. Sts. of Nebr. 1929;

State vs. Rareshide, 32 La. Ann. 934;

People vs. Fitch, 1 Cal. 519;

Kimball vs. Alcorn, 45 Miss. 151.

ARGUMENT.

We will now discuss the above propositions, but combine same under fewer heads.

It will be admitted that no notice of appeal and no

briefs have been served on A. E. Torgeson, the duly appointed, qualified and acting receiver of the above named bank. The record discloses that the only service had, either of the appeal or as to briefs, was on a former officer of the bank. Our contention is that the bank, being in receivership, has really no power to act, except through its legal appointed and acting receiver.

No Bill of Exceptions Preserved or Filed.

It will be conceded that no bill of exceptions was preserved, or filed in this case, or ordered, settled or allowed and our court has held in the cases cited under proposition of law No. 2 that:

> "In the absence of a bill of exceptions presenting the evidence the court will presume that the district court correctly determined every issue of fact presented by the pleadings."

The identical question was raised in Travelers Insurance Company against Sawicki, No. 28005, December 16, 1931. An appeal was taken from an order overruling a motion by defendants to vacate an order appointing a receiver. The plaintiff filed a motion to dismiss. In this case the court said:

> "There is no Bill of Exceptions. We are not advised as to what evidence was presented to the court either upon the application for the appointment of a receiver or upon the motion to vacate. There may have been evidence showing that de-

fendants, at the hearing on the application for appointment of a receiver, appeared and resisted the appointment; in fact, there improperly appears in the transcript certain affidavits indicating that such was the fact; or the evidence may have indicated that defendants had been duly served with notice of the hearing or had waived such notice. We are unable to say what the fact is.

"A finding of fact by the trial court, based upon evidence, cannot be reviewed in the absence of a Bill of Exceptions; but it will be presumed that the finding is supported by sufficient evidence."

The same identical situation is present to the court in the case at bar. There is no evidence that E. H. Luikart is the duly appointed, qualified and acting Secretary of the Department of Trade and Commerce, and the court will not take judicial notice that he is. It might be that in this case Mr. Luikart, even though he was Secretary, was disqualified to act as receiver. Let us presume a situation where the Secretary was, himself, interested in the assets of the bank. He, himself, might have been an officer of the bank. He might have been a debtor of the bank. It is universally held that a receiver must be one who is not interested, and unbiased.

Hilliard vs. Railroad Company, 221 Pa. 503, 506;

"It goes without saying that a receiver, who is an officer of the court, and whose actions are

> under its control, ought to be disinterested, unbiased and impartial as between the parties and where any breach of propriety in any such respect occurs, it is the duty of the court to remove the receiver and substitute another. But in the exercise of this power the court must be guided by sound discretion under the circumstances of the particular case."

Northern Brewery vs. Princess Hotel, 79 Ore. 453, 153; Pac. 37, 39:

> "No one should be appointed receiver whose duties as receiver would conflict with his own interest."

Section 8-192, Comp. Sts. of Nebr. 1929, Is Not Mandatory and Does Not Create a Civil Office.

We call the court's attention to sections 8-190 to 8-196 inclusive, Comp. Sts. of Nebr. 1929. Section 8-190 has reference to the first insolvency of the bank and the first appointment of a receiver and provides that the Attorney General shall apply to the District or Supreme Court determining the insolvency and "the appointment of a receiver." If section 8-192 creates a civil office why should the Attorney General apply to any court for the appointment of a receiver?

Sestion 8-193 provides that "liquidation shall thereafter be had *under order of court,* in the manner provided by law." Section 8-196 provides that receiverships pending when this Act takes effect shall be transferred to the Secretary of the Department of

Trade and Commerce as receiver upon his application to the court, "unless the court in a given case shall determine that final liquidation is so near at hand that a transfer will be subversive for the best interests of the creditors of the bank."

We have before us a condition, or a situation, not governed by statute. As above shown section 8-190 has reference to a condition where the bank is first adjudged insolvent and a receiver appoined. Section 8-196 especially confers discretion of the court on banks already in receivership when the act in question (1929) took effect.

On November 2, 1931, when A. E. Torgeson was appointed receiver and the court refused to appoint E. H. Luikart this bank had already been in receivership, the receiver had resigned, and certainly, as we contend, it was in the discretion of the court to appoint a local receiver who could give his full time and attention to the liquidation of the banks, instead of having employees nearly four hundred miles distant to look after same.

We do not believe that section 8-192 is mandatory, and we take the view that it is a mere nomination by the legislature or a request that the Secretary of the Department of Trade and Commerce be appointed receiver.

We also contend that the legislature has shown by the sections above cited that they did not intend to

create a civil office or make the receiver a civil officer with power to act without reference to the courts.

We find this matter has been before other courts. Iowa has a law similar to ours, which reads as follows:

> "The Superintendent of Banking henceforth shall be the sole and only receiver or liquidating officer for state incorporated banks and trust companies."

This language is just as strong, or stronger, than section 8-192, Statutes of Nebraska.

In the case of *Andrew vs. Bevington Savings Bank* (supra) the court said:

> "If the legislature had intended to interrupt this officer of the court in the execution of his trust, it would have provided for his removal and the substitution of the Superintendent of Banking. No such operating machinery was furnished. Moreover application for a change of liquidating officers has not been made in the district court having jurisdiction of the subject matter."

The argument presented in the above case is strikingly similar to the argument which will no doubt be made by the appellant herein. In the Iowa case the court said:

> "That is to say, appellant's idea is that, in view of the new legislation, the superintendent of banking automatically became the receiver of the

> Bevington Savings Bank, and Thomas Enright, who was previously legally and duly appointed as such, was thereby ousted without the necessity of a resignation or a court proceeding."

Answering the above, the court said:

> "With this logic we are persuaded to disagree. 'Henceforth' as used in the legislative enactment, has its significance. Manifestly it was the intent of the lawmakers that in the future when the district court appointed a receiver for an insolvent banking institution "the superintendent of banking" should be named, rather than any other person. Even without the word 'henceforth' that would be the effect of such change in the law."

The case of *Baird vs. Leford,* 210 N. W. 998 (N. D.) is the case where a receiver was appointed under laws similar to the Nebraska laws and the court said:

> "A receiver is an officer of the court in the sense that he is the agent or representative of the court in holding any property that the court may acquire jurisdiction over and in disposing of the same; the hand and arm of the court through whom the court acts. He is appointed by and is removable at, the pleasure of the court. He is responsible to no one but the court. His compensation is fixed by the court. He can sue or be sued, but only under the direction and with the permission of the court. His authority comes from the court and in its exercise he has no discretion independent of the court. He exercises none of the powers of civil government. He is no more a civil officer than is an attorney at law, or a

> guardian, or a referee, or a jury commissioner, or a juryman, of any 'officer' appointed by the court to enable it to properly function as a court.

Similarly our Supreme Court has held in the case of *State vs. Bank of Hemingford,* 58 Nebr. 81, 80 N. W. 50.

> "The receiver is at all times an officer of the court subject to their orders and directions, an agent the scope of whose authority is limited by law."

In *State vs. Ryan,* (New Mexico) 204 Pac. 69, the subject was under discussion and the court refers to the statute of New Mexico which provides:

> "The attorney general shall institute forthwith proper proceeding in the proper court for the purpose of having a state bank examiner appointed receiver to take charge of such bank, wind up its affairs and the business thereof for its depositors."

And in that case the court said:

> "The bank examiner is not by statute made receiver of insolvent banks, nor is he a receiver for insolvent banks appointed by the executive department. Under this statute he applied to the court to be appointed receiver and is not in any better position by virtue of his office as state bank examiner than any other applicant.

In the case of *Rhome vs. Bank of Brunson,* 81 S. E.

7, the court quoting from the law of South Carolina, said:

> "He, (the bank examiner) shall have full power to take possession of assets and property of every description belonging to said bank and it is his duty and he is hereby authorized and empowered to make proper application to the court for the appointment of himself as receiver to wind up the affairs of such bank, or banking institution." As to this law the court said the language is plain and unambiguous. "It does not mean, as appellant's counsel contends, that the court is compelled to name as receiver the bank examiner, but the court can name its own receiver. In the exercise of its discretion and its inherent powers it can appoint its own officers."

We contend therefor that the appointment of a receiver, especially the appointment of a second receiver of a bank rests in the sound discretion of the court. There are a few cases which by a casual reading might seem to be opposed to the cases we have cited, but we contend that these cases are under statutes which specifically provide that the liquidation of failed banks shall be exclusively in the hands of the executive branch of the government—a condition that does not exist under our statutes. For example:

In the case of *State vs. Norman,* 206 Pac. 522, which has been frequently cited by counsel, it is specifically stated that it is only because of the provision in the constitution of Oklahoma which gives the legislature the power to have complete control of banks both

operating and in liquidation to the executive branch of the government of that state. It was held there that the receiver appointed by the executive could also be discharged by the executive. It is doubtful under our constitution which gives the courts chancery powers whether the legislature could even provide for liquidation of banks exclusively as an executive function but it has not attempted this.

It is not necessary therefore to discuss the question whether the legislature has the power or not as it is clear under the law that they did not contemplate taking the power away from the courts because before a receiver can be appointed under our procedure an application must be made to the courts and where an application is made to the court the discretionary powers of the court are invoked.

In the note to *Cameron vs. Groveland Improvement Company* (supra), the author, after reviewing many cases, concludes as follows:

> "But the prevailing view, as elsewhere shown throughout this subdivision, is that the jurisdiction to appoint receivers, resides in courts of equity independently of statutory provisions and is conducted according to the principles of equity practice."

In one or two other states the constitution and the statutes are to the effect that a civil office is created, but no case can be cited contrary to the authorities we have quoted herein, except where the constitution

or statutes plainly and specifically provide that a civil office is created.

Section 8-192 Compiled Statutes of Nebraska, 1929, if construed to be mandatory is unconstitutional and void.

Article 5 of our present constitution, section 9, provides that:

> "The district courts shall have both chancery and common law jurisdiction."

and we quote from the cases cited under proposition IV of law as follows: The court said in *Matteson vs. Creighton University* (supra):

> "The chancery or equity powers of the district courts come from a higher sourse than legislative enactment."

The constitution declares (quoting article 5, section 9):

> "The equity jurisdiction thus conferred may be exercised without the aid of legislation."

"In the case of *Lacey vs. Ziegler* (supra) the court said:

> "It is beyond the powers of the legislature to limit or control this constitutional provision."

In the case of *Burnham vs. Dennison* (supra the court said:

> "It may be said that by the terms of the constitution district courts in Nebraska are vested with chancery and common law jurisdiction. This we have construed as vesting district courts with equity jurisdiction which they may exercise without legislative enactment and the power thus conferred is beyond the power of the legislature to limit or control."

Other cases cited under our proposition of law are to the same effect. We contend therefore that if section 8-192 is to be construed as mandatory that the result would be an attempt to limit the powers of the chancery jurisdiction of the district courts conferred upon them by the constitution itself and our court has specifically held the legislature cannot limit this power.

Does the record show that E. H. Luikart is the duly appointed, qualified and acting Sesretary of the Department of Trade and Commerce of Nebraska?

Section 81-110, Comp. Sts. of Nebr. 1929, provides that:

> "Each secretary of each department created by this act shall be appointed by the governor, by and with the advice and consent of the senate. In any case of vacancy in such offices during the recess of the senate, the governor shall make a temporary appointment until the next meeting of the senate when he shall nominate some person to fill such office."

Mechem ~~of~~ on Public Officers says:

> "It is frequently provided by the constitutions of the States, as by that of the United States, that the executive—the governor or president—shall have power to fill certain vacancies by appointments made by and with the advice and consent of the senate. Where such a provision exists the excutive can only exercise the appointment without such advice and consent where, since the adjournment of the senate, a vacancy exists or has occurred (words held to mean the same thing) by the death or resignation of the incumbent or by the happening of some other event by reason of which the duties of the office are no longer discharged. If the senate be in session when the vacancy occurs, it can be filled only by and with the advice and consent of that body, unless the senate has adjourned before the vacancy is filled."

In support of this proposition the author cites the following cases:

State vs,. Rareshide, 32 La. Ann. 934;
People vs. Fitch, 1 Cal. 519;
Kimball vs. Alcorn, 45 Miss. 151.

De Facto Officers.

It may be argued however that even though Mr. Luikart has not been legally appointed Secretary that he has assumed the duties of Secretary under the color has assumed the duties of Secretary under the color

of title given by his illegal appointment. It may be argued that he is a de facto officer and that in this proceeding we cannot challenge his right to the office. The rule of law with respect to defacto officers was created to protect innocent third parties and especially the public who deal with a man in office and have the right to assume that he is properly appointed and qualified.

The rule has been invoked for instance in a suit on a note where the clerk who filed the petition was not properly qualified and the defendant maker of the note was not allowed to raise the matter as a defense. In such a case it was held that the validity of the acts of the officer could not be collaterally questioned in a proceeding to which he was not a party.

> "But," says Mechem on Public Officers, Section 331, "While the acts of the de facto officers are thus valid as to third persons, he cannot himself acquire rights based upon his defective title."

See also Mechem on Public Officers, Section 342.

> "But though the acts of the de facto officer are valid as respects the rights of third persons, they are void as to himself. He can not, therefore, as has been seen, build up rights in himself based upon his occupancy of the office."

As an illustration of this rule, we direct the court's attention to *People vs. Nostrand,* 46 N. Y. 375. This was an appeal from an order directing a mandamus to issue in an action brought by a board of three com-

missioners with respect to an application of certain funds provided by law to lay out and construct a public road.

> "The second ground relied upon by the appellant is that one of the commissioners had vacated the office and that the other two had no right to act until the vacancy was filled. It appears that one of the commissioners before the demand for money was made, had been elected to and had accepted the office of sheriff of the county. Sec. 1 of article 10 of the constitution provides that sheriffs shall hold no other office. It is, however, claimed that Mr. Henry was a commissioner de facto; that his acts are valid as to the public and that the defendant cannot question his title.
>
> "*When a person sets up a title to property by virtue of an office and comes into court to recover it he must show an unquestionable right.* It is not enough that he is an officer de facto, that he merely acts in the office; but he must be an officer de jure and have the right to act. And this is especially so when he acts against the express mandate of the constitution that he shall not hold office."

And again the rule is briefly stated in *Nichols vs. Maclean,* 101 N. Y. 526, 54 Am. Rep. 730.

> "The act of an officer de facto when it is for his own benefit is void, because he shall not take advantage of his own want of title which he must be cognizant of but where it is for the benefit of strangers or the public who are presumed to be ignorant of such defect of title, it is good."

The following cases lay down this rule of law:

People vs. Weber, 89 Ill. 348;

Patterson vs. Miller, 2 Met. (Ky.) 493;

Turner vs. Keller, 38 Mo. 332;

People vs. Weber, 86 Ill. 283;

People vs. Weber, 89, Ill. 347;

Carpenter vs. Clark, 217 Mich., 63, 185 N. W. 868;

Pack vs. U. S., 41 Ct. Cl. 414;

Gregory vs. Woodberry, 53 Fla. 566, 43 S. 504;

In re Berger, 152 Mo. A. 662, 670, 133 S. W. 96;

Jordan vs. Wash, 225 Pa. Super 564;

State vs. Perkins, 139 Mo. 106, 401 S. W. 650.

From these authorities it is clear that in an action where a de facto officer is a party he cannot claim anything by virtue of his alleged office unless he can show that he is not only a de facto officer but is the regularly legally appointed and qualified officer.

In the instant case Mr. Luikart comes into court and on the strength of his alleged office of Secretary of the Department of Trade and Commerce seeks to be appointed as receiver in these cases. The burden is upon him, he having alleged that he is secretary

and claiming the right to be receiver by virtue of the said office of secretary to prove to this court that he is Secretary of the Department of Trade and Commerce having been appointed by the Governor with the advice and consent of the senate for as the above authorities have said "no de facto officer can build up any rights in himself by virtue of his defective title to the office."

The general rule is laid down in 22 R. C. L., Sec. 323 to the effect that:

> "The general rule of law is, when officer justified an act complained of, purporting to be done in his official capacity, that it is necessary that he should aver and prove in his defense, not only that he was an acting officer, but that he was an officer in truth and right, duly commissioned and qualified to act as such. The acts of a de facto officer as far as he himself is concerned are void and where a party sues or defends in his own right as a public officer, it is not sufficient that he be merely an officer de facto but he must show that he is an officer de jure. The reason for this rule has been expressed by saying that his acts are invalid 'for the discouragement of the seizure of public offices'."

Many cases are cited holding this general rule.

Mr. Bliss ceased to be Secretary of the Department of Trade and Commerce January 15, 1931, at a time when the legislature was in session. No attempt was made to appoint Mr. Luikart Secretary until July 8,

1931. The vacancy in this office occurred while the legislature was in session and the alleged appointment on July 8th was invalid because the vacancy did not occur after the legislature adjourned.

CONCLUSION.

We submit therefor that this appeal should be dismissed and the decision of the district court affirmed for the following reasons:

1. Mr. Luikart has no appealable interest.

2. Proper notice and briefs have not been served or filed and there is defect of parties before the court.

3. There is no Bill of Exceptions preserved, set tled, allowed, served or filed in this case, making it impossible for the court to determine the issues herein.

4. Section 8-192 Comp. Sts. of Nebr. 1929, in reference to the appointment of a receiver is not mandatory, but rests in the sound discretion of the court.

5. If said section 8-192 is to be construed as mandatory then same is unconstitutional and void as a limitation on the equity powers of the court.

6. There is nothing in the record to show that E. H. Luikart is the duly appointed, qualified and acting Secretary of the Department of Trade and Commerce of Nebraska.

7. Since he is asking to be appointed receiver by virtue of his office he must allege and prove that he is such officer.

We respectfully submit that this case should be dismissed and the decree of the district court affirmed.

Respectfully submitted,

MOTHERSHEAD & YORK,

SKILES & SKILES,

I. D. BENYON,
Attorneys for Appellee.

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In The
Supreme Court of Nebraska

THE STATE OF NEBRASKA, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, AND E. H. LUIKART, SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE, APPELLANTS,

VS.

STATE BANK OF MINATARE, MINATARE, NEBRASKA, APPELLEE.

APPEAL FROM DISTRICT COURT OF SCOTTS BLUFF COUNTY
HON. E. F. CARTER, *Judge*

BRIEF OF APPELLANTS

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General Number 28195

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F. C. RADKE, Lincoln, Nebraska,
ARTHUR F. MULLEN, Omaha, Nebraska,
Attorneys for Appellants.

STATEMENT OF THE CASE

The appellant, E. H. Luikart, Secretary of the Department of Trade and Commerce, filed a petition and application in the instant proceeding, which is a proceeding to liquidate the business and affairs of the State Bank of Minatare, Minatare, Nebraska.

The object and prayer of said application and petition was to have E. H. Luikart, Secretary of the Department of Trade and Commerce, appointed receiver of the appellee bank; the trial court overruled and denied said application and petition and refused to appoint the said E. H. Luikart, Secretary of the Department of Trade and Commerce, as Receiver of the appellee bank.

On the same day, without application being made by State of Nebraska or the appellee bank, the trial court entered an order appointing A. E. Torgeson receiver of said bank.

This appeal is taken by E. H. Luikart, Secretary of the Department of Trade and Commerce, from the rulings and orders entered on November 2, 1931, in which the trial court denied the application of E. H. Luikart, Secretary of the Department of Trade and Commerce, and refused to appoint the said E. H. Luikart, Secretary of the Department of Trade and Commerce, receiver of the appellee bank, and appointed A. E. Torgeson receiver of said bank.

ASSIGNMENTS OF ERROR

1. The trial court erred in overruling and denying the petition and application of E. H. Luikart, Secretary of the Department of Trade and Commerce, and in refusing to appoint the said E. H. Luikart, Secretary of the Department of Trade and Commerce, receiver of the said State Bank of Minatare, Minatare, Nebraska.

2. The trial court erred in appointing A. E. Torgeson receiver of the State Bank of Minatare, Minatare, Nebraska.

PROPOSITION OF LAW AND AUTHORITIES

It is the duty of the trial court to appoint E. H. Luikart, Secretary of the Department of Trade and Commerce, Receiver of the said State Bank of Minatare, Minatare, Nebraska.

> "Secretary, Receiver of Insolvent Banks. The Secretary of the Department of Trade and Commerce shall be the sole and only receiver of failed or insolvent banks, and shall serve as such without compensation other than his compensation as Secretary of said Department."
>
> Sec. 8-192, Compiled Statutes of Nebraska, 1929.

ARGUMENT

The law relating to the appointment of receivers, and the liquidation of insolvent banks is set out in Sections

8-190 to 8-196, inclusive, of the Compiled Statutes of Nebraska for 1929.

The order entered is unlawful and should be reversed.

Respectfully submitted,

F. C. RADKE,
ARTHUR F. MULLEN,
Attorneys for Appellants.

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