Briefs Re Abie State Bank Case 1928-1930

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Number 34881

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1930

Number 63

ABIE STATE BANK, APPELLANT,

VS.

ARTHUR J. WEAVER, AS GOVERNOR OF THE STATE OF NEBRASKA, CLARENCE G. BLISS, AS SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE, APPELLEES,

WILLIS M. STEBBINS, AS TREASURER OF THE STATE OF NEBRASKA, INTERVENER, AND MARY E. GANDY, ET AL., INTERVENERS, APPELLEES

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

Brief of Arthur J. Weaver, as Governor, Clarence G. Bliss, as Secretary, Etc., and Willis M. Stebbins, as State Treasurer, Intervener, Appellees.

C. A. SORENSEN, Attorney General,
C. E. ABBOTT, Special Counsel,
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1. THE QUESTION OF JURISDICTION—HERETOFORE POSTPONED FOR LATER CONSIDERATION.

The appellants have appealed from a decision of the Nebraska Supreme Court in *Abie State Bank* v. *Weaver*, 119 Neb. 153, 227 N. W. 922.

Appellees, Arthur J. Weaver, as Governor of the State of Nebraska, and Clarence G. Bliss, as Secretary of the Department of Trade and Commerce, have heretofore, in compliance with Rule Twelve of this court, filed a "Statement of Matters Against Jurisdiction" with brief in support thereof and consideration of the same was, by order of this court, postponed until the hearing on the merits.

These appellees respectfully refer to the said Statement and brief and to the abstract of the evidence in this brief. It will conclusively show that the estoppel *in pais* found and adjudged by the Nebraska Supreme Court was established beyond question and that the banks' evidence failed to establish a state of facts putting any constitutional right in issue.

The authorities on this issue are further assembled and discussed under Propositions of Law Numbers 15 to 19, inclusive, of this brief. To these also we respectfully refer on this issue.

Attention is also called to the fact that on "suggestion of diminution of record" there was an additional printed record prepared and it is referred to herein as "Supp. Rec."

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2. STATEMENT OF THE CASE.

This suit was commenced in the District Court of Lancaster County, Nebraska, by the appellants to enjoin the defendant officers from levying and collecting special assessments under the Nebraska Guarantee Fund Law for application on claims against the fund for deposits which

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had been adjudicated against and ordered paid from the fund by the several District Courts of Nebraska during the two years preceding. The law had been fully operative as an adjudicated valid act for seventeen years prior to the institution of this suit.

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3. Appellants' contentions are limited to the special assessment section as having "become oppressive and confiscatory"; they do not attack the other sections of the Guarantee Fund Law under which they exist and enjoy benefits.

Appellants give in outline on pages 4 to 5 of their brief some of the provisions of the Nebraska Guarantee Fund Law. They assail only one section of this law, to-wit, Section 8028, Compiled Statutes of Nebraska for 1922 (as amended by sec. 26, ch. 191, Laws of 1923, page 452), which provides that special assessments, in an amount not exceeding one-half of one per cent of the average daily deposits in any one year, may be levied when the amount in the Depositors' Guarantee Fund is reduced below a specified amount.

The remainder of the law providing for the creation of the Guarantee Fund (Sec. 8024), the regular assessments of one-tenth of one per cent on the average daily deposits (Sec. 8026), the sections relating to the management of the fund and the liquidation of failed banks, and Section 8027 providing that banks operating under the Guarantee Fund Law shall not be required to give depository bonds for public money deposited with them, are not questioned. Only Section 8028 providing for the special assessment is claimed to be unconstitutional (Petition, Rec. p. 1). Their question is one, then, as to degree

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of assessment. The grounds upon which this section is assailed are set forth in substance in appellants' statement.

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4. The answers of defendants and interveners on their own behalf and on behalf of all public and private depositors in failed banks (Ans., Rec., p. 21; Sup. Rec., p. 1):

(a) Denied specifically the averments of fact of plaintiffs petition;

(b) Pleaded acts, representations and conduct of all the banks constituting waiver and estoppel, and especially those inducing the deposits of depositors with adjudicated claims; the latter's vested rights to continuance of assessments; and the prior adjudication of the validity of the act;

The State Treasurer further pleaded specifically his status as claimant and acts inducing his deposits of public funds in banks now failed (Sup. Rec., p. 1).

That no cause of action was stated by plaintiffs, the question presented being in any event a legislative one and not judicial, was raised by motions and timely objection to introduction of evidence.

Defendants Pleaded Affirmatively (Rec., p. 22):

The existence of all statutory prerequisites to the making of the levy.

The existence of large public and private deposits adjudicated as claims against the Guarantee Fund and ordered paid therefrom.

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That the United States Supreme Court's decision in 1911 (*Shallenberger* v. *First State Bank of Holstein, et al.*, 219 U. S. 114, 55 L. ed. 117) was conclusive of every issue involved in this case and was *res adjudicata*.

The recognition by the banks of the Holstein case decision and representation to the public by the banks that said decision was conclusive of the validity of said law and the banks' liability to assessment thereunder.

That all the banks after 1911 applied for licenses under the law; operated thereunder; and received the benefits and exercised the privileges thereof until this suit was filed.

The obligation to pay the Guarantee Fund assessments had become and was a part of the banks' articles of incorporation and charters.

The original maximum special assessment of one per cent adjudicated as valid in the Holstein case was reduced to one-half of one per cent by the legislature in 1923 at the instance of the banks.

The deposits by individuals and of public money by the state and other political subdivisions had been induced by the concerted acts and representations of all the banks that the deposits were protected by the Guarantee Fund Law; that its validity had been adjudicated by the Supreme Court of the United States; that each state bank was subject to assessment under the provisions of the law and that they would each pay the general and special assessments under the law until any deposits made under it were fully paid by said banks, and made other representations and statements (more fully set out in the

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quotation of evidence hereinafter); that the plaintiff and said other banks each and all, continuously gave their representations and statements large publicity in their respective communities and throughout the state by newspaper advertisements, printed recitals on the stationery of the respective banks, personal solicitation and argument, by circulization of the public and by signs on the interior and exterior of the state banks generally; and otherwise.

All the state banks knew of and acquiesced in all of the representations and acts of each other.

Every state bank demanded and received deposits of public funds for more than fifteen years without bond on the "security of the Guarantee Fund" under an option given by the law to do this or to give bond and avoid assessments.

The legislature in 1923 at the instance of the banks intrusted the management of the Guarantee Fund to a commission selected from persons chosen by the state banks and the banks thereby actively participated in the administration of the law.

In 1923 the legislature at the request of the banks reduced the maximum rate of interest permitted to be paid on deposits from 5 per cent to 4 per cent on account of the Guarantee Fund assessments and the protection of deposits by the law and the obligations assumed by the banks thereunder.

Through the Guarantee Fund Law and the utilization thereof, the state banks more than trebled their deposits, increased their earnings, bank conditions were stabilized and banking rendered profitable.

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The maximum annual assessment of $6 per $1,000 of deposits had not caused or materially contributed to any bank failure and that the number and extent of failures had been reduced by the operation of the Guarantee Fund Law. That adjudicated claims against the fund aggregated several millions of dollars and those unpaid were adjudicated and became a fixed ant final charge against and liability of the Guarantee Fund after October 1, 1927.

All of the depositors relied on and deposited their money on the faith of the aforesaid acts and representations of the banks.

The depositors in failed banks have a vested right to the payment of the amounts due them out of the Guarantee Fund and a vested contract right as against the banks to the continuation of the payment of said assessments.

The banks having stood by and permitted and actively induced deposits on the strength of the Guarantee Fund Law were guilty of gross laches in standing by without denial of their liability or the validity of the law and that by reason of said representations and statements and acts and laches, the banks are estopped to question the constitutionality of the law or the reasonableness of the assessments thereunder.

The defendant, A. J. Weaver, as Governor, further averred that he answered also on behalf of the private depositors having claims against the Fund, including the state and other governmental subdivisions with over $2,000,000 in failed banks.

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The answer and cross-petition of Willis M. Stebbins, Treasurer of the State of Nebraska (Supplemental Record, p. 1), incorporated all of the foregoing defenses and further alleged:

That said representations and statements were made to him personally and to his predecessors in office by all of the state banks of the State of Nebraska to induce the State Treasurer to deposit the public funds of the state in said respective banks without any bond being given therefor and upon the express demand of each and all of said banks that they receive public deposits without bonds because of the Guarantee Fund Law exempting them therefrom.

That there were public funds in 45 state banks then insolvent and in receivership. That the deposit of these funds was induced by the acts and representations of the state banks and that these deposits had been adjudicated as claims and ordered paid from the Guarantee Fund.

That he had deposited said funds without bonds, relying on the acts and representations and promises of the banks.

That the banks were estopped and had waived their right to object to the constitutionality of the law and assessments thereunder.

That he, as Treasurer, had vested rights against the Guarantee Fund and vested contract rights against the banks for continuation of the payment of the assessments necessary.

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5. The opinion and judgment of the Supreme Court of Nebraska in appellees' favor was a general one on all

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the issues on a trial de novo in that court; such trial de novo in equity suits being a statutory requirement; the opinion and judgment of the Supreme Court therefore necessarily and properly contained no reference to any finding of fact of the trial court (Rec., pp. 58, 59-65).

6. The Supreme Court of Nebraska inter alia expressly found and adjudged that the banks were estopped; the evidence was overwhelming as to all the banks and uncontradicted (Rec., p. 59).

Where the Supreme Court of the State has decided a case on the basis of waiver and estoppel, this court will concern itself only with an examination of the record to determine that there was basis in fact for such finding.

7. The volunteer memorandum opinion of the trial court on which appellants so largely rely on this appeal was wholly ignored by the Nebraska Supreme Court in its trial de novo and has no place in this record; in fact the trial court itself expressly found waiver and estoppel but applied erroneous principles of law thereto as well as to the other facts involved; and wholly ignored controlling undisputed testimony.

The appellant banks quote from the memorandum opinion and decision of the trial court and then seek to carry the deduction that the Supreme Court of Nebraska inferentially adopted some portions thereof. Nowhere in its opinion and decision did the Nebraska Supreme Court expressly or by implication quote or give any weight to any finding of fact by the trial court. The issue of waiver and estoppel and other issue were tried *de novo*.

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The laws of Nebraska (Sec. 9150, Comp. Stat., 1922) provide that on appeal from the district courts to the Supreme Court of Nebraska *in equity cases*

> "It shall be the duty of the Supreme Court to retry the issue or issues of fact involved * * * * and upon trial *de novo* of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and the evidence without reference to the conclusion reached in the district court."

So the opinion and judgment of the Supreme Court of Nebraska is an opinion and judgment in appellees' favor on trial *de novo* of all of the issues presented, both of law and of fact. Appellants' contention that the Nebraska Supreme Court did not pass on waiver and estoppel, although practically the entire syllabus and opinion is devoted to that issue and the evidence establishing it, seems nothing less than frivolous under the record in this case. The major portion of three volumes of evidence was on that issue.

May it here be noted that under the procedure in Nebraska, the syllabi is also prepared by the court and states the law of the case (Proposition of Law No. XVIII).

Appellants refer to *Holliday* v. *Brown*, 34 Neb. 232, as giving controlling importance to the syllabi over the opinion. In this Abie case the syllabi and the opinion are in perfect accord on the issues. However, this court had before it a contention similar to appellants' in the Nebraska case of *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100, in which the court said:

> *"To the state decisions here cited, counsel for the city interposes the objection that they are not well*

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grounded, and that some of them go beyond what is expressed in the syllabus. * * * * *The other branch of the objection is not based upon any statute or rule of court in Nebraska, giving controlling effect to the syllabus. At most it rests upon a statement in Holliday* v. *Brown,* 34 Neb. 232, 51 N. W. 839, *respecting 'an unwritten rule' to that effect, but what was said upon the subject in that case has been so pointedly criticized and so far restrained in Williams* v. *Miles,* 68 Neb. 479, 62 L. R. A. 383, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 151, 4 Ann. Cas. 306, *that it is not controlling."*

In this Abie State Bank case in the very first paragraph of its syllabi in passing on the acts, representations and promises of the banks alleged to constitute estoppel, the Nebraska Supreme Court held (Rec., p. 59):

> "Where a state bank has accepted the benefits arising from the deposits of money pursuant to the terms of the bank Depositors' Guarantee Fund Law, such bank should not be heard, in a proper case, to make complaint of a special assessment which has been levied for the benefit of the Depositors' Guarantee Fund."

A large part of the opinion of the Nebraska Supreme Court is devoted to a discussion of the evidence on estoppel and an application of that evidence to the decision on estoppel as set forth in the syllabus. In reviewing some of the evidence on estoppel that court said (Rec., p. 62):

> "It appears from the evidence of the president of one of the largest Nebraska state banks, that he was active in the publication of 2,000 pamphlets which were distributed generally in respect of the establishment of the guaranty fund. * * * *

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"In 1926, during the months of June, July, August, and September, twenty-six, full page newspaper advertisements, attractively featured with pictures and aptly prepared reading matter, appeared in one of Omaha's leading newspapers. These advertisements stressed the proposed protection that was shortly to be afforded the depositors of money in the state banks throughout Nebraska. And on one page of these advertisements, 336 banks are listed as having paid their pro rata share of the cost of the publication. The largest state bank, located in Omaha, paid between $500 and $600 as its share of the expense of this newspaper publicity. The enterprise was given wide circulation in practically every town and its suburbs where a state bank was located, by illustrated newspapers with reading matter that was calculated to attract favorable attention and the patronage as well, of those having money for bank deposit. Following are some of the headings of the illustrated pages:

"'A Story no other State Can tell'; 'No Mattress Banks in Nebraska;' 'Strong Banks make Strong States;' 'In the Hands of Skilled Bankers;' 'State Banks protect their deposits in Nebraska;' 'Nebraska is a Remarkable State;' 'Pushing your money Through the Window.' 'In Nebraska the Guarantee Works both Ways.' 'All Work together in Nebraska;' 'Safe through the Slump of Deflation Days.' 'The Men Who told the Story that no other State Can Tell' concludes the series of illustrated pages, and is followed by an enumerated list of the 336 state banks that sponsored the depositors guaranty fund enterprise.

"From the evidence it clearly appears that a majority of the state bankers throughout Nebraska, and many others as well, counted the bank depositors guaranty fund, in its inception, a valuable asset, and many predicted that this beneficent plan would add greatly to the stability of the state banks. To illus-

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trate this feature of the guaranty fund law, a brief excerpt from an advertisement which appeared in January, 1928, in one of the Nebraska papers having a large circulation may be noted:

"First, there are a few state bankers here and there who have good banks and who think they are greatly imposed upon by being compelled to pay an assessment to the Guarantee Fund. This is a natural feeling as they are in no way responsible for the banks that fail. * * * * *The guarantee fund, so-called, is merely an insurance company whereby the state banks of Nebraska are the members and must pay through an assessment each other's losses up to the maximum amount of six-tenths of one per cent a year.* * * * * *Any good bank, making a fair profit, can pay this assessment without injury to itself and can do so to the great benefit of the state.*

"*First State Bank* v. *Smith*, 207 N. W. (S. Dak.) 467, is cited by defendants and is in point. The court there observed that the banks had for many years accepted the benefits of the guaranty fund law and in consequence were not then in position to resist the just claims of depositors. The court also observed that the personal rights of the individual must always yield to the 'rightful exercise of the police power.'

"It may here be noted that the maximum amount of the guaranty fund special assessment was reduced by the legislature in 1923 from one per cent, to one-half of one per cent, but subsequently the department of trade and commerce, pursuant thereto, levied the special assessment of one-fourth of one per cent, within the maximum amount now fixed by the legislature, and of which complaint is now made by the plaintiff bank on its own behalf and in behalf of 556 other state banks, as above noted.

"The paramount object, and clearly the legislative intention in the creation of the depositors bank guar-

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anty fund law was first for the protection of the depositors' money in the state banks. And from the fact that, under normal banking conditions, such act would likewise benefit the state banks such banks were, at least, not unfriendly to the enactment of the law in question. But it goes without saying that there never was, nor could be, any compulsion upon the state banks to accept deposits of money on the bank guaranty basis. But money was accepted by the state banks, pursuant to the terms of the depositors guaranty fund law, and by that law such banks are clearly bound.

"The demands on the guaranty fund are burdensome but the situation before us was created, or in any event was made possible, by the legislature in the enactment of the law. It is a basic principle that it is, ordinarily, not within the province of the courts to annul a legislative act except as a last resort and in a case where no other remedy is at hand. In view of the benefits arising from the deposits of large sums of money in state banks, pursuant to the terms of the bank depositors guaranty fund, should the banks now be heard to make complaint of the special assessment of one-fourth of one per cent upon their deposits?"

In discussing its finding *that the Guarantee Fund assessments had not been a material factor in causing bank failures during the six years prior to the bringing of the suit and were not oppressive or confiscatory,* the Nebraska Supreme Court in its opinion further said (Rec., p. 62):

"In respect of the many failures of banks about this time, the cashier of a Lincoln state bank testified that, in his opinion, the failure of nearly 300 Nebraska state banks was caused largely by the general economic condition existing prior to 1928; that he did not think the bank assessments from 1923 to July 1, 1928, were a contributing factor in the failure of

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banks during that period, and that, in his opinion, the guaranty fund law and the assessments collected thereunder had a steadying influence on the deposits of every state bank. Continuing, he testified that 'it is no exaggeration to say that it has accounted for at least one hundred million dollars deposited in the state banks of Nebraska which would not otherwise have been made except for the bank guaranty law.' In his opinion, the conditions of the banks and their ability to pay the assessments is 'incomparably better than in 1923'."

In concluding its opinion that court stated (Rec., p. 65):

"In view of the benefits which arose from the deposits of large sums of money in state banks, pursuant to the terms of the bank depositors' guaranty fund, should the banks now be heard to make complaint of the special assessment of one-fourth of one per cent upon their deposits? Have the observations of Mr. Justice Holmes in the Noble State Bank Case, above cited, ever been answered? If so, our attention has not been directed thereto."

Sections 1074 and 1075, Compiled Statutes of Nebraska for 1922, require the Nebraska Supreme Court to cause all of its opinions to be reported and published and they are therein referred to as the decision (Propositions of Law, Numbers 18 and 19, *infra).* This has always been the practice in that court and in this case as in all others coming to this court on appeal, the opinion as incorporating the decision was included as a part of the record by the appellants and appears at pages 59 to 65 of the Record.

Where the Supreme Court of the State has decided a case on the basis of waiver and estoppel, this court will concern itself only with an examination of the record to determine that there was basis in fact for such finding.

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We understand this to be the rule in *St. Louis Malleable Casting Co.* v. *Prendegrast Construction Co.*, 43 Sup. C. Rep. 178, 260 U. S. 469 (Proposition of Law Number XV).

In that case as here, the appellants were urging that the decision of the Missouri Supreme Court on the question of waiver and estoppel was a mere statement of abstract law not applied. In the opinion by the court Justice McKenna said:

> "The only reply that counsel makes is that the court meant nothing more by its conclusion and the cases cited 'than the statement of an abstract legal principle' which was 'in no way connected up with the evidence.' It is further said that:
>
> " 'Nowhere in the statement does the Supreme Court find any facts constituting an estoppel.'
>
> "The comment is not justified. Our quotations from the court's opinion established the contrary, and that the plaintiff did something more than stand by and make no protest; it availed of the benefits of the sewer."

In addition to its finding and decision with respect to waiver and estoppel, the Nebraska Supreme Court expressly held that under the facts disclosed by the Record, the special assessments as levied were not confiscatory or in violation of the 14th amendment as taking private property without due process.

Paragraph two of the syllabus is (Rec., p. 59):

> "Where a special assessment has been levied upon the state banks pursuant to the provisions of Section 8028, Comp. St. 1922, as amended by Section 26, c. 191, Laws, 1923, such assessment does not constitute the taking of private property without due process."

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The memorandum opinion of the trial court as hereinbefore pointed out has no place in this record.

But in view of the extensive quotations made therefrom by the appellants, we shall necessarily devote some space in this brief to it.

The figures used by the trial court in arriving at some of its indisputably erroneous conclusions will later be clearly pointed out under appropriate headings. The trial court held that the banks had waived the right to question the constitutionality of the depositors guaranty fund law and were estopped to repudiate their obligations to the depositors with accrued claims. This conclusion was unavoidable on the evidence. In his opinion the trial judge said (Rec., p. 52):

> "I am of the opinion that the banks have waived the right to raise the constitutionality of the Depositors' Guarantee Fund Law."

However, he erroneously (as later decided by the Nebraska Supreme Court) held that public policy denied the banks the right to waive or to be estopped to question the constitutionality of the law (Rec., p. 54). He based this latter deduction on the premise that the banks were unable to pay the special assessments, charge off old losses and at the same time pay what he terms "compensatory dividends". This deduction was wholly unsupported by the evidence and not in harmony with the court's own figures. This proposition was also premised on the court's conception that the stockholders of banks as a whole were entitled to demand and receive "compensatory returns" after the banks had charged off large unrelated losses before the banks should be required to pay the Guarantee Fund Assessments required to pay the depositors with vested adjudicated claims. The premises of fact were incor-

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rect and the conclusion of law erroneous. The court wholly ignored the rights of claimant depositors. The angle from which the court approached the matter will be evidenced by a few quotations from its opinion.

The trial court said (Opinion, Rec., p. 46):

> "The figures I have already given deal with the banks as a whole. They plainly show that a majority of the banks are not receiving compensatory returns upon their investment, while a fourth are receiving rather extravagant profits.
>
> WHAT IS MEANT BY CONFISCATORY?
>
> "In order that the assessments levied shall be declared confiscatory it is not neecssary to show the banks in the red; it is sufficient that they do not bring results commensurate with the capital invested. This question has been before the Supreme Court of the United States in connection with the different public utilities and that court has held that the rate established must be such as will bring returns equal to those of kindred organizations operated in the same general locality.
>
> "Now the only possible purpose in levying special assessments under the Guarantee Fund Law is to pay depositors in failed banks whose claims have already been adjudicated."

The only persons who ever have need of recourse to the Guaranty Fund are those who become adjudicated claimants.

Noting the item of "other real estate" in the reports of going banks and disregarding the evidence that such real estate was in value all that it was carried at, the trial court said in the opinion (Rec., p. 45):

> "If the banks had not been required to pay the special assessment they would have been able to charge off part or all of this 'other real estate'."

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As will hereinafter appear the trial court clearly disregarded the evidence as to the benefits that the banks had received from the operation of the Guarantee Fund Law during the period when the claims had been maturing and this "Other Real Estate" item accruing; he wholly disregarded the evidence that but for the Guarantee Fund Law many of the banks that are carrying this item of "other real estate" would not be existent.

The trial court, while recognizing the large earnings of the banks as a whole, recites the fact of the large losses and "charge-offs" arising and the reasons therefor and recites the advisability of "charging-off" "other real estate" acquired through the liquidation period. He then in effect imposes the responsibility for all this on the present claimant depositors, and holds that the enforcement of their right to special assessments for their benefit should be enjoined until the banks can, after charging off *said losses* and *real estate*, "receive in addition compensatory returns upon their capital" (Judgment, Rec. p. 57).

These findings and decision were made in the face of the trial court's own prior finding and decision (a decision beyond controversy required by the evidence), that the banks by their acts and conduct were chargeable with waiver and estoppel. But these he permittd them to avoid in the alleged public interest.

The opinion of the trial court is mainly premised on the figures prepared by the banks attempting to show the number of banks that did not make 6 per cent on their capital and surplus *after charging off all losses and paying all Guarantee Fund assessments.* This was the theory upon which the trial court tried the case. It is not practical to take up and devote large space to analyzing

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the opinion. Some of the figures used in the trial court's calculation were clearly erroneous as will hereinafter appear, but we can not at this point go further into the facts found by and theories of the trial court without unduly burdening this brief. The extensive quotations from the record hereinafter will show how clearly erroneous how clearly erroneous were the trial court's premises were the trial court's premises.

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8. The status of this case in the Supreme Court of the United States:

(a) The decisions of this Court in the Bank Guarantee Fund cases, Oleomargarine cases and cases similar in principle are conclusive of this case on the pleadings and on the facts;

(b) The evidence of the banks wholly failed to support their contentions, even on their theory; in fact, a contrary state of facts was conclusively established by defendants' evidence;

(c) The evidence of defendants and interveners supporting estoppel was overwhelming as against all the banks; (estoppel was found by both Nebraska Supreme Court and trial court).

(d) The Nebraska Supreme Court adjudication on basis of estoppel in pais is final and conclusive.

The enactment of the Guarantee Fund Law was a proper exercise of the "police power" by the legislature. That was decided by this court in 1911 in the Holstein Bank case. Any modification or repeal of the law, especially

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as against those with vested rights, must be, if at all, by the further exercise of that power. For these reasons and others set out in the "Propositions of Law" in this brief, defendants and interveners were entitled to judgment on the pleadings, independent of any question of fact involved.

The Bank Guarantee Fund cases, the Oleomargarine cases and others cited and quoted from hereinafter are conclusive of this case on the pleadings.

As disclosed by the record, defendants and interveners properly raised these legal questions by objections to the introduction of evidence, Record, page 80, and by motion for judgment at the conclusion of plaintiff's testimony, Record, page 213.

The detailed argument and presentation of evidence and facts as to these propositions will follow later in the brief.

SUMMARY OF THE EVIDENCE

9. There was a complete failure of proof by the banks on their contentions of facts; a contrary state of facts was conclusively established.

The appellants have omitted defendants' Exhibit 37 from the transcript brought to this court, and which contained the only data on each of the 726 banks separately.

No state bank of Nebraska, aside from the small Abie bank, appeared in the case or offered any detailed facts and figures as to its income and operating expense and the distribution thereof. *No evidence was offered by any*

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bank or on its behalf as to the actual operation of or effect of the Guarantee Fund Law within that bank, or the effect of the law and its assessments upon its operations or its income, or of the relation of its assessments to its operations.

No attempt was made by plaintiffs to show normal income and disbursements and the distribution thereof; or the Guarantee Fund assessments' relation to and effect on the banks' income. No effort was made to show that banks actually operating could not pay the assessment or that the operation of the Guarantee Fund law detrimentally affected the banks' operations, earnings, etc.

Appellants do not point out any evidence of the foregoing character.

The plaintiff banks had it wholly within their power to have furnished readily and conveniently to auditors or accountants figures with respect to the details of the operation of the Guarantee Fund within their respective banks and to have made compilations thereof in a sufficient number of banks to support their contentions in this case, if such contentions were susceptible to proof. Their failure to supply a scintilla of evidence in this regard as to the relative benefit of the Guarantee Fund to banks and its effect on the operating income, raises the unavoidable deduction that their contentions were not susceptible to proof.

The plaintiffs undertook to treat the assessments paid by banks in the past as wholly without compensatory benefits and to disclaim all responsibility for accrued liabilities. They undertook arbitrarily to treat the amount of the assessment as a total loss.

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They relied simply on showing the gross receipts and then the expenditures (including the Guarantee Fund assessments).

Even this evidence was not produced as to individual banks. The plaintiffs produced their Exhibits 6, 7 and 8 made up by the grouping of numbers of banks as to net earnings in each six months period. Even these exhibits were thoroughly discredited and appellants omit them from the transcript of the record in this court. This matter is covered hereinafter in detail.

The trial court having ruled adversely to the defendants on their objection to the sufficiency of the character of proof offered by the banks (motion for judgment, Rec., p. 213), the defendants then produced evidence to meet this class of evidence introduced by plaintiffs and to show the actual earnings of the banks and the cause of reduced earnings, and that these causes were unrelated to the Guarantee Fund.

We challenge especial attention of the court at this time to this complete lack of any evidence that could have supported plaintiffs' case under their theory of the principle applicable to rate cases.

The only evidence with respect to the individual bank was Exhibit 37, prepared by the banking department and introduced by defendant officers and the interveners. This exhibit consisted of data taken from the reports of the individual banks to the banking department for the period of eighteen months from January 1, 1927, to June 30, 1928, the fiscal period immediately preceding this suit. This was prepared by Payson D. Marshall, Chief of the Bureau of Banking, and was a correct reflection of the report of each of the 726 banks separately enumerated

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(Mr. Marshall's testimony, Rec., pp. 427-31). This exhibit was introduced in evidence (Rec., p. 432). This was the only evidence and data on each individual bank separately named and appellants have omitted this exhibit from their record in this court. A recapitulation of Exhibit 37 showing the totals as to all the banks, appearing as Exhibit 38 (Rec., 437) and reproduced later in this brief, was prepared and introduced by defendants (pp. 431-2). This exhibit completely negatives the contentions of the plaintiffs. Exhibit 37 as stated showed the data with respect to individual banks.

Plaintiffs' witnesses and accountants, Fulk and Mooney, whose testimony is hereinafter referred to, were given free access to all the records of the banking department (Rec., pp. 132-3, Qs. 357-9), and the statement of appellants' brief that "the Department of Trade and Commerce refused at all times to permit the banks or their representatives to see or have access to the records" is untrue; there is no evidence whatever to that effect.

The defendant state officials in the public interest assumed a burden not properly required of them in a case involving the constitutionality of an act, and affirmatively showed from records of the banking department and otherwise, facts completely negativing each contention of the banks. They further showed acts and representations of the banks inducing deposits and especially the deposits of claimant depositors, that are more forcible in support of the equities of the depositors than any argument that could be advanced.

May it at this time be stressed that not only did the evidence show that the acts and representations were

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by all the banks, but no attempt was made by any bank or banks to show that such bank or banks were not participants.

Appellants' brief omits important evidence and inaccurately abstracts material parts of the record. It is not practical to take up and analyze each erroneous statement; so appellees will brief this case by copying freely from the evidence and letting such quotations show the errors of appellants' brief.

---

10. The Guarantee Fund Law and its small assessments never caused nor contributed materially to the failure of a single Nebraska state bank, but diminished the number of failures and was of inestimable benefit to the banks generally during the period of failures; the cause of excessive losses in going banks, and of "charge-offs" and failures are not attributable to Guarantee Fund assessments.

The whole case of the banks was premised and argued and is presented in this court on the theory that there were Guarantee Fund assessments and that there were bank failures and from those two facts they argue that the Guarantee Fund assessments were responsible for bank failures.

There was no evidence supporting their deduction.

Before affirmatively showing the cause of failures and the great benefit of the operation of the Guarantee Fund in reducing failures, let it be said that no witness testified as to any bank in the State of Nebraska, either heretofore failed or now financially embarrassed, whose condition was caused or materially contributed to by the Guar-

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antee Fund assessments. In the case of the banks that failed the amount of the previous payments to the Guarantee Fund compared to their total liabilities was insignificant.

Dan V. Stephens, president of the Fremont State Bank, principal witness for plaintiffs and one of the three sponsors of the suit, was asked to name a single bank that was in receivership or in the hands of the Guarantee Fund Commission whose condition was the result of the Guarantee Fund assessments, but he could not name a single one. We quote his testimony (Rec., pp. 541-2), Qs. 3466-7-8):

> Q. "You can't name a single bank, can you, Mr. Stephens, that is in receivership or in the hands of the Guaranty Fund Commission, whose condition is the result of the Guaranty Fund assessment?"
>
> A. "I don't know whether I could or not. By refreshing my mind I might."
>
> Q. "Will you take two or three minutes and think?"
>
> A. "Now what is the use of thinking when I told you I didn't recall any?"
>
> Q. "That is your final answer, is that, that you can't recall?"
>
> A. "I can't recall it, I haven't made a specialty of that."

No other witness even attempted to name one bank whose failure was attributable to the assessments.

Referring to the condition of some banks as existing in May, 1927, and those then having capital impairment or capital impairment if criticized items were charged off, Mr. Bliss stated that the Guarantee Fund assessments paid by those banks had cut no appreciable figure in their then

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condition as he found them (Rec., p. 199, Q. 941) and that as to existing banks they had charged the assessments out of their earnings and taken care of them from year to year (Rec., p. 202, Q. 965).

Mr. Woods, a banker, and highly qualified witness, as will hereinafter appear, testified (Rec., p. 246, Q. 1263):

> Q. "In your opinion, Mr. Woods, has the Guarantee Fund assessments of six-tenths per cent from 1923 to July 1, 1928, been a materially contributing factor in the failure of banks during that period?"
>
> A. "I think not."

In January, 1928, the state banks through their spokesman, Dan V. Stephens, chief witness in this case, and by paid advertising broadcast the following statement (Orig. Trans., p. 474, vol. 3, Exh. P):

> "This limit (of assessment) in the case of the Bank Guarantee Fund, which fund is used for the benefit of paying depositors in failed banks, is fixed at 6/10 of 1%. * * * * *In other words, a bank that fails fails not because it had to pay $6 a thousand to the Guarantee Fund, but for other and vital reasons."*

The evidence with respect to bank failures and heavy losses in going banks for the period from 1920 to 1927 and the beneficial influence of the Guarantee Fund in diminishing each is more logically covered under later subdivisions of this brief, where evidence will be quoted. This will show without dispute that "in every respect and without any exception the condition of the banks is incomparably better than at any time since 1923" (Subdivisions 16, 17 and 18).

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11. The law was determined constitutional in 1911 in Shallenberger v. Holstein; the special assessment was then double the one of which complaint is now made.

12. Every issue made in this Abie case was fully pleaded and determined in the Holstein case.

A complete analysis of the issues represented and determined in the Holstein bank case appears under Proposition of Law Number V of this brief and the petition therein is quoted from at some length. To avoid duplication, we shall omit further reference thereto at this point.

ACTS AND REPRESENTATIONS OF BANKS CONSTITUTING WAIVER AND ESTOPPEL; ESPECIALLY AS TO DEPOSITORS WITH MATURED UNPAID CLAIMS.

13. All the banks thereafter specifically accepted this adjudicated valid law and its benefits and its obligations and have operated thereunder without question for seventeen years.

The decision of the United States Supreme Court upholding the Guarantee Fund Law was announced in January, 1911. The state banks then had their option of doing any one of three things:

1. Liquidate and invest their capital in some other business.

2. Nationalize if they thought it would be more profitable to operate under a charter from the federal government.

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3. Apply to the state banking department for a certificate of authority to operate under the new Depositors' Guarantee Fund Law.

The banks exercised their choice; they filed with the banking department their application in which they agreed to comply with all the terms and conditions of the law. In due course each of the banks received a certificate of authority permitting it to operate under the law and to accept deposits to be "secured and protected" by the Guarantee Fund. The law directed that this certificate be posted in the bank. Several state banks had nationalized pending the decision of the United States Supreme Court, but thereafter, during the operative period of the law up until the trial of this case, only nine state banks nationalized while fifty national banks converted into state banks and filed their applications for license to do business under the state bank law (Rec., p. 396, Qs. 2344-50). These state banks have operated under the law after their acceptance thereof and without question for seventeen years up to the time of starting this suit.

---

14. The banks continuously and extensively from 1911 to time of suit in 1928 untilized the Guarantee Fund Law by representing and advertising its adjudicated validity by the United States Supreme Court, that it was a mutual insurance plan for depositors' protection, and their own express obligations and agreements to pay assessments, etc., to induce deposits of public and private funds; this was accomplished by continuous and extensive newspaper publicity, by signs on the interior and exterior of banks, pamphlets, statements on checks and certificates of deposit and on deposit slips, by moving pictures, public speakers, resolutions at bankers' conven-

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tions, personal solicitation and argument; the largest exploiting was in the three years immediately preceding the filing of this suit.

The evidence supporting this statement of fact is the principal part of three large volumes of the transcript and is so voluminous that we will burden this brief with but partial reference thereto and by the insertion of exhibits typical of those in general use. The activities were general with all the banks through the period in varying degrees of intensity as will appear. The largest activities in this regard were in the last three years, and were headed by the large state banks whose officers now sponsor this suit. For the court to have an accurate perspective of the relations that exist between the claimant depositors and these existing state banks, it is indispensable that the court read the representations and statements that were made by these banks to the depositors. The arguments that the banks used to get the deposits of these depositors are more forceful in support of the equities of the depositors than any argument that the writers of this brief can advance.

The evidence is overwhelming and undisputed of representations and conduct of the state banks, and which will be hereinafter quoted, which operated as an effective and complete waiver and estoppel of any right to assert the unconstitutionality of the special assessments. This applies especially to the existing depositor claimants who believed in and relied on said representations and conduct in making the deposits on which the *claims are founded*. This portion of the brief therefore will be almost wholly devoted to the acts and conduct of the banks during the last five years which directly induced the deposits of the

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present claimants against the Guarantee Fund. The assessments levied and to be levied for a period of years will naturally go to these particular depositors.

The principal acts were the inducing of deposits by the following means:

1. The use of conspicuous signs of varying sizes on the interior and/or exterior of the banks.

2. The issuance by the banks of certificates of deposit for deposits with a recital thereon that the deposits were protected by the Depositors' Guarantee Fund; similar recitals on check forms, deposit slips, letter-heads, and other printed matter, delivered to depositors.

3. The general and universal imparting to the public and depositors by word of mouth, circulars, questionnaires and extensive and large newspaper advertisements and other means **that all the state banks in Nebraska were associated together for the mutual protection of depositors; that the banks were a giant co-operative insurance association under the law; that each would pay assessments until all claims were paid; that their liability had been adjudicated by the Supreme Court of the United States; that a depositor in a failed bank would be paid in any event by the existing banks; that the administration of the law was in their hands; that there was no longer any need to keep money in mattress banks; and that the receiving bank and all other banks were back of the deposit, and other similar representations.**

Some newspaper advertisements were illustrated and headed with pictures of the United States Supreme Court in session determining the validity of the law, the Nebraska

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State Capitol, Abraham Lincoln, the American flag and similarly effective illustrations.

The largest publicity and exploiting of the Guarantee Fund was during the three years preceding the filing of this suit, and by all the means recited above. Included therein were twenty-six full-page advertisements over a period of months, in the Omaha Bee, with a large circulation covering the whole state. These advertisements were procured to be published, contracted for and paid for by 336 state banks. The details of arrangements therefor were made at several meetings of bankers at Fremont. The last advertisement carried the names of the banks with the heading "The Men Who Told the Story That No Other State Can Tell."

The only legal requirement of the banks was to hang a certificate in their bank to the effect that they had complied with the provisions of the law. All other acts, representations, advertisements and promises on the part of the banks were purely voluntary and for the advancement of their own interests.

(a) Representations on printed matter in use and circulated; and by signs on and in bank buildings; and public addresses, etc.

The testimony showed and was uncontradicted that all the state banks of Nebraska were featuring and representing on some portion or all of their stationery, and almost universally on their checks and by advertisements on certificates of deposit, windows of bank buildings and on the exterior of the banks, the fact that their deposits were guaranteed.

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Ray W. Hammond, for twenty-five years manager of the Hammond Printing Company, which had printed supplies for two or three hundred of the banks, testified in this regard and produced typical printed samples of checks and certificates of deposit printed by his firm for these banks (Exhs. L-1 to L-5, inc., p. 435, vol. 3, Orig. Trans.). Robert Chappel, manager of the Chappel Printing Company, commercial and bank printers, also testified (Rec., p. 325) that he traveled for his firm throughout northern Nebraska and six counties in southern Nebraska and that practically all the banks used the circle insignia "Deposits Protected by the Guarantee Fund of the State of Nebraska" and other signs featuring the Depositors' Guarantee Fund (Rec., p. 328, Q. 1877). He identified Exhibits H-1 to H-9 as samples of checks and certificates of deposit with "Protected by Depositors' Guarantee Fund" thereon printed and sold by his firm (Rec., p. 327, Q. 1867). The exhibits appear at page 432, volume 3, orig. transcript. The foregoing exhibits have been omitted in printing record.

Mr. Chappel stated that Guarantee Fund signs were displayed on practically all of the windows and inside the cages of the banks and that practically all the checks, letter-heads and printing that was distributed to his customers had the Guarantee Fund "cut" on them (Rec., pp. 331-2, Qs. 1903-33).

STIPULATION AS TO CHECKS, DRAFTS, etc.: At page 583, volume 3, original record, are 100 different forms of checks, certificates of deposit and deposit slips (omitted in printing), featuring the Guarantee Fund protection, and which it was stipulated were those in use for many years last past by the respective banks named thereon and furnished to their customers for their use and used by

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them in their business relations with the respective banks (Stipulation, Rec., p. 399).

Referring to the photographs of exterior signs (Exhibits 27 to 33, p. 586, Vol. 111, Orig. Trans.), Secretary Bliss of the Banking Department stated that they were characteristic pictures of the signs used generally by the state banks of Nebraska throughout the period referred to and that the 100 forms of certificates, deposit slips and checks (Exhibits 24-1 to 24-100, p. 583, Vol. 3, Orig. Rec.) were those used generally by the state banks of the state (Rec. pp. 407-8, Q. 2439-41). These have been omitted in printing and the court's attention is especially urged thereto in the transcript. One feature of the publicity used was that of bankers addressing public and other meetings of citizens advocating the protective feature of the Guarantee Law and showing that it existed in favor of state banks and not national banks. These addresses received publicity through the newspapers (Rec., pp. 408-9, Qs. 2442-46).

The foregoing mentioned publicity had a favorable and stimulating effect on state banks generally, more particularly in the country towns (Rec., p. 409, Q. 2447).

These exhibits contained the above referred to wording as to the deposits being guaranteed. Typical of these exhibits are those reproduced on the immediately succeeding pages. In view of the arrangement of the words thereon and the variation in size of type (please note) some of the people came to rely on the deposits as guaranteed by the State.

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May we call attention to the fact that no attempt was made to show that there was any bank in the state either plaintiff or other, which was not using this character of advertising and representation, and for that matter the other advertising in this brief referred to.

The certificate of deposit forms in use by the State Bank of Omaha, Nebraska's largest state bank, from the time of its organization to the time of the trial are also reproduced here. It will be noted that the last one is dated within ninety days of the trial. The organization of this bank under the Guaranty Fund Law, its featuring of the law and its enormous growth and prosperity will be hereinafter specifically adverted to.

We here reproduce a few of the more than one hundred exhibits of similar character referred to above by exhibit numbers:

(b) Forms of checks, certificates, deposits, etc., in use (exhibits);

(c) Form of certificate of deposit of State Bank of Omaha up to time of instituting suit (exhibits);

(d) Typical signs and letterheads (facsimile exhibits);

As follows:

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DEPOSITS IN THIS BANK ARE PROTECTED BY GUARANTY FUND OF THE STATE OF NEBRASKA

FARMERS STATE BANK

DEPOSITED BY

DEPOSITS IN THIS BANK ARE PROTECTED BY GUARANTY FUND OF THE STATE OF NEBRASKA

KEARNEY, NEB. 192 No.

FARMERS STATE BANK 76-41

PAY TO THE ORDER OF

GUARANTY FUND BANK

INLAND, NEBR. 192 No

FARMERS STATE BANK 76-7

DEPOSITS OF THIS BANK ARE GUARANTEED BY THE BANK DEPOSITORS GUARANTY FUND OF THE STATE OF NEBRASKA OFFICIAL

HARDY, NEBRAS 191 No.

BANK 76-441

Hartington, Nebr., 191 No.

Cedar County State Bank 7

Pay to the order of $

DEPOSITS ARE PROTECTED BY THE DEPOSITORS GUARANTY FUND OF THE STATE OF NEBRASKA

Do

Typical Certificate of deposit forms, check forms, and deposit slip forms in use (Ex. 24-51 to 24-100, P. 583, V. 3 and P. 432, V. 3, H1 to H9, Ex. 17, P. 432, Orig. Trans.)

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27-57

DEPOSITS ARE PROTECTED BY THE DEPOSITORS GUARANTEE FUND OF THE STATE OF NEBRASKA

The State Bank of Omaha

No. 15700

OMAHA, NEB. MAR 20 1923

HAS DEPOSITED IN THIS BANK

EXACTLY EXACTLY ONE THOUSAND DOLLARS

DOLLARS $1000 00

PAYABLE TO THE ORDER OF Himself

IN CURRENT FUNDS

ON THE RETURN OF THIS CERTIFICATE, PROPERLY ENDORSED 6 MONTHS AFTER DATE WITH INTEREST

AT 4 PER CENT PER ANNUM. NO INTEREST AFTER MATURITY.

CERTIFICATE OF DEPOSIT.
NOT SUBJECT TO CHECK

J. H. Donnelly
PRESIDENT CASHIER

27-57

DEPOSITORS IN THIS BANK PROTECTED BY GUARANTEE FUND IF INTEREST IS NOT PAID INCREASES TO 4 PER ANNUM

The State Bank of Omaha

No. 23559

OMAHA, NEB. OCT 1 1928

HAS DEPOSITED IN THIS BANK

DOLLARS $1100 00

PAYABLE TO Himself $1100 AND 00 CTS

OR ASSIGNS IN CURRENT FUNDS

ON THE RETURN OF THIS CERTIFICATE PROPERLY ENDORSED -6- MONTHS AFTER DATE WITH INTEREST

AT -3- PER CENT PER ANNUM. NO INTEREST AFTER MATURITY.

CERTIFICATE OF DEPOSIT
NON-NEGOTIABLE
NOT SUBJECT TO CHECK

PRESIDENT CASHIER

Certificate of deposit froms continuously in use by State Bank of Omaha since its organization (Stipulation P. 225, Vol. 2, Ex. 31 and 32, P. 269, Orig. Trans.); the lower one being in use in 1928 at time of starting suit.

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JABE B GIBSON PRES
J W RANSOM V PRES

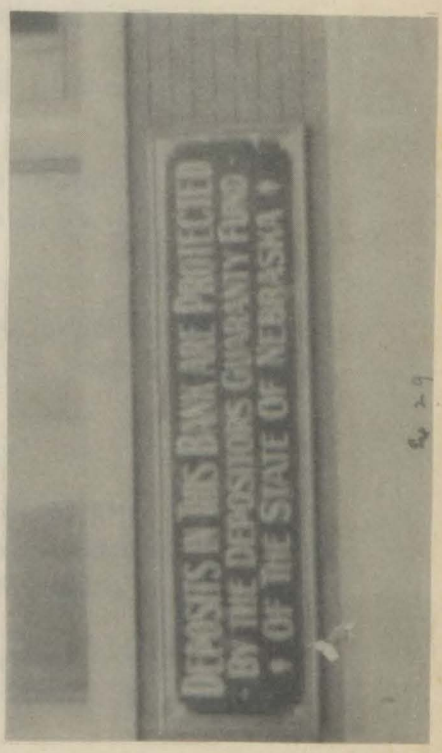
D P V

TAE NEBRAS

CAPITAL
SURPLU

NORFOLI

Sample of letter head in use (Ex. 41, P. 684, V. 4, Orig. Trans.)--on the letter head are also printed the words "All Deposits Guaranteed" in red letters one-fourth inch high and four inches long.



(Ex. 27 and 29, P. 586 and 587, V. 3, Orig. Trans.)--typical signs on exterior of bank buildings.

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Other typical signs:

In 1929 after this suit was started (in December, 1928) the defendants took the deposition of President Schantz of the State Bank of Omaha in Omaha. This is Nebraska's largest state bank. Mr. Schantz and Mr. Stephens were the two witnesses for the banks at the trial in this case. Mr. Schantz was chairman of the committee of three instituting this suit. At the time of taking these depositions large signs were conspicuously displayed on both the exterior and interior of the banking room. They were as follows (Rec., pp. 230-2, Qs. 1184-94):

On the door of the Harney Street entrance to the bank in large letters were the words:

"Deposits Protected by the Depositors Guarantee Fund of the State of Nebraska"

Over each the customers' counters inside the bank, *six* in number, were signs *fifteen inches high and twenty inches wide*, as follows:

"SAFETY FIRST

The Deposits in This Bank Are Protected by the Depositors Guarantee Fund of the State of Nebraska."

Over the discount and paying tellers' windows was a sign *six feet ten inches long and three inches* high, as follows:

"Deposits Protected by the Depositors Guarantee Fund of the State of Nebraska."

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And over each of the receiving tellers' and statement windows appeared a sign of the same size and lettering.

Over the entrance on the 16th Street side was a large sign.

"Deposits Protected by the Depositors Guarantee Fund of the State of Nebraska."

And above the doors on a large glass in the way of a transom entering from the lobby on the Sixteenth Street side was a large sign *thirty inches high and forty-eight inches wide:*

"STATE BANK OF OMAHA
Deposits Protected by the Depositors Guarantee Fund of the State of Nebraska."

The bank occupied a business corner at Sixteenth and Harney Streets, and the foregoing advertisements on the doors appeared on the main entrance doors, and *had been there since October, 1915* (Mr. Shantz, Rec., p. 232, Q. 1195).

(e) The advertising in The Omaha Bee:

The representations and advertisements by the banks reached their highest peak in a number of pamphlets broadcast by them over the state and a series of twenty-six full-page advertisements in the Omaha Daily Bee. These were published and paid for by 336 state banks in 1926. Similar advertising was carried in other papers throughout the state until shortly prior to filing of the suit.

These 336 banks procured and paid for the publication and each had a written contract providing each pay its

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pro rata cost of the publication (Mr. Wilson of the Bee, Rec., pp. 217-8, Qs. 1079-83). The State Bank of Omaha contributed between $500 and $600 (Rec., p. 604, Q. 3864).

Mr. Stephens and Mr. Shantz of the Fremont State Bank and First State Bank of Omaha respectively were the prime movers in procuring these publications. Mr. Stephens caused a part of the series to be reinserted in the Fremont Evening Tribune (Rec., p. 315, Qs. 1744-5). The series of advertisements in the Bee were approved and endorsed and publication authorized by a representative group of the state bankers at Fremont. Mr. Shantz and Mr. Stephens were among those present (Rec., pp. 604-5, pp. 647-48). Mr. Wilson, representative of the Bee, conferred with them several times (Rec., p. 221, Qs. 1111-3).

Mr. Kirk Griggs, the then Secretary of the Department of Trade and Commerce, was consulted for the purpose of avoiding conflict with the national banks (Rec., p. 652, Q. 4234) but he had nothing to do with advertisements and furnished none of the material. (Mr. Griggs, Rec., p. 649, Qs. 4215-7).

Appellants' statement that the Bee newspaper advertisements were initiated, sponsored and recommended by the State Departments is wholly without support in the record and was not a fact.

A letter signed by the bankers was sent out to the state banks commendatory of the plan and Mr. Shantz's name headed the list, as Mr. Griggs recalled (Rec., p. 650, Qs. 422-4).

The Omaha Bee had a daily circulation inside the city of 29,940, and outside of the city of Omaha in Nebraska of 22,000, and the list of towns served by it was sub-

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stantially the same as the list of towns having state banks. An audit of the circulation of the Bee was introduced (Rec., p. 219, Ex. 28) and showed the list of towns and the distribution.

Facsimiles (in reduced size) of these 26 page advertisements appear inserted following page 238, Record, and twelve of them are reproduced in this brief on a miniature scale. Exact reproductions are at pages 240 to 265, Vol. II, Original Record. We hope the court will inspect the originals as contained in the original record.

This series was entitled "The Story No Other State Can Tell." The last of the series contained a list of the 336 banks which sponsored and paid for them. It was headed "The Men Who Told The Story That No Other State Can Tell." The plaintiff, Abie State Bank, headed the list. In the last of the series the 336 banks listed themselves and said of themselves (Exh. 27 of Exh. 13, inserted following page 238, Record; facsimile reproduced as twelfth of exhibits next following):

> **"They (the banks) raised the funds, they laid out the plans and directed the writing of the chapters in this Nebraska story that has gripped the attention of the nation."**

Certainly there can be no question of the authorship and responsibility of the banks for these advertisements, in view of such a statement.

Want of space above prevents our including the entire 26 in this brief. The following are typical:

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Federal Reserve Bank of St. Louis

A Story no other State can tell

NEBRASKA today tells a story to her sister States that no other State can tell. It is a story with a background of shadow but with highlights of courage and stamina.

The Shadows came with deflation days, but back of those shadows there was a sound law and sound bankers in Nebraska. They had the courage and the grit to see it through.

Were a title needed for this story it might be written, "Seeing It Through." Under the operation of Nebraska's sound law, the Bank Guarantee law, and in the hands of Nebraska's sound bankers, not a dollar has been lost to the depositors in Nebraska's state banks. The funds of these depositors are intact. As the liquid capital of the business firms, of the farmers, and of the workers these protected deposits are continuing to do the work of the state.

Seeing it through has called for the payment of millions of dollars to the Guarantee Fund by the state bankers of Nebraska. Under efficient supervision, with the finest spirit of co-operation and with a sacrifice of personal gain that has proved the mettle of every state banker, the Nebraska plan has been carried on until it is possible to tell this story that no other state can tell.

Each Sunday and Wednesday will appear in THE OMAHA BEE this story of Nebraska's financial strength.

It will hold a thrill for the people of Nebraska, for the men and women in business, for the farmers and the workers in field and factory. Read the chapters told in graphic form as the story unfolds. Mail them to friends in other states that they may learn of the strength and courage that has made it possible.

Chapter I—A Story No Other State Can Tell. Omaha Bee, June 27, 1926. (Full page Omaha Bee (Ex. 2 of Ex. 13, P. 240 Vol. 2 D. of Ex.) Copyright, Omaha Bee, 1926.

(U. S. Sup. Rec., P. 240)

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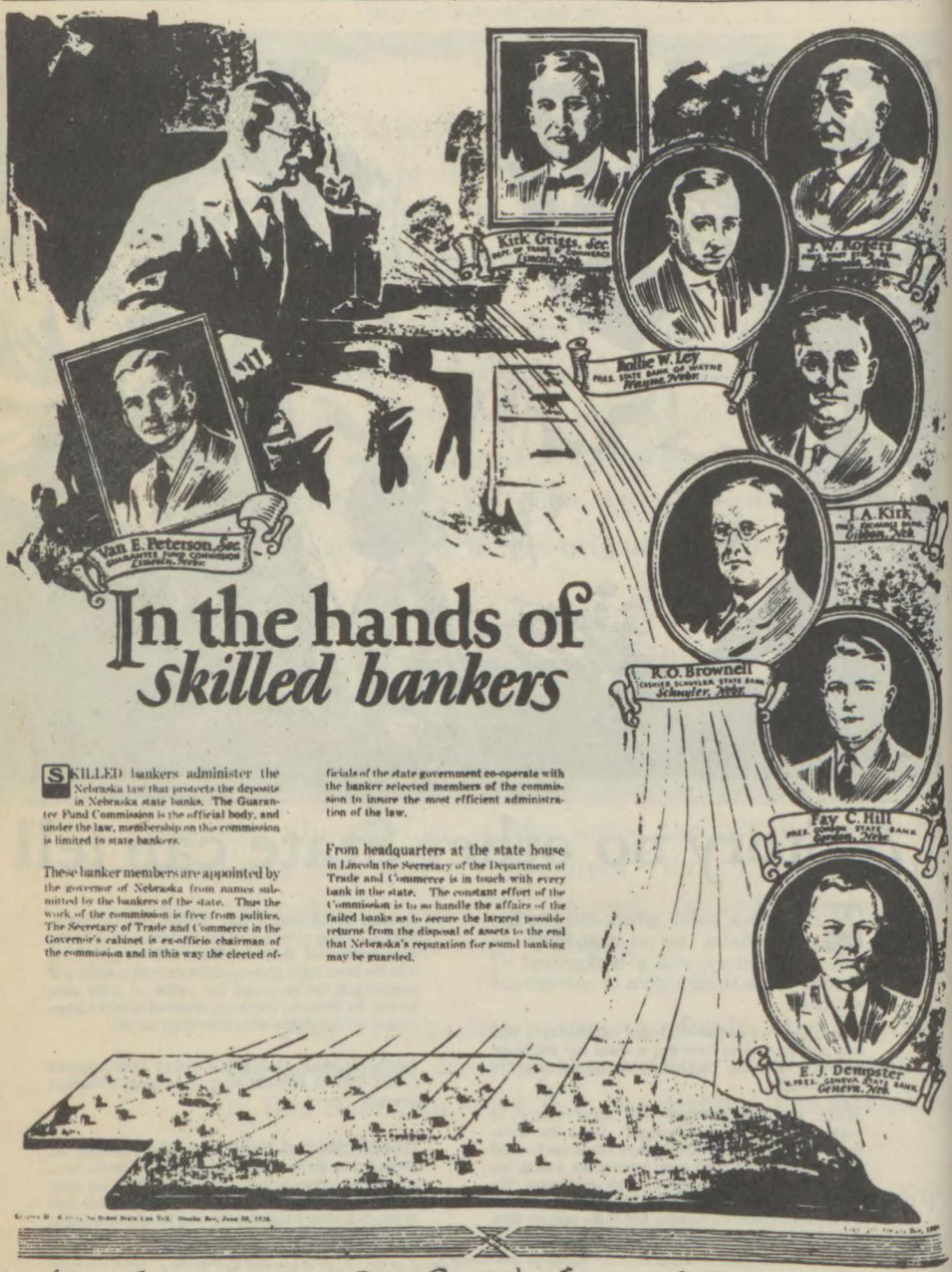


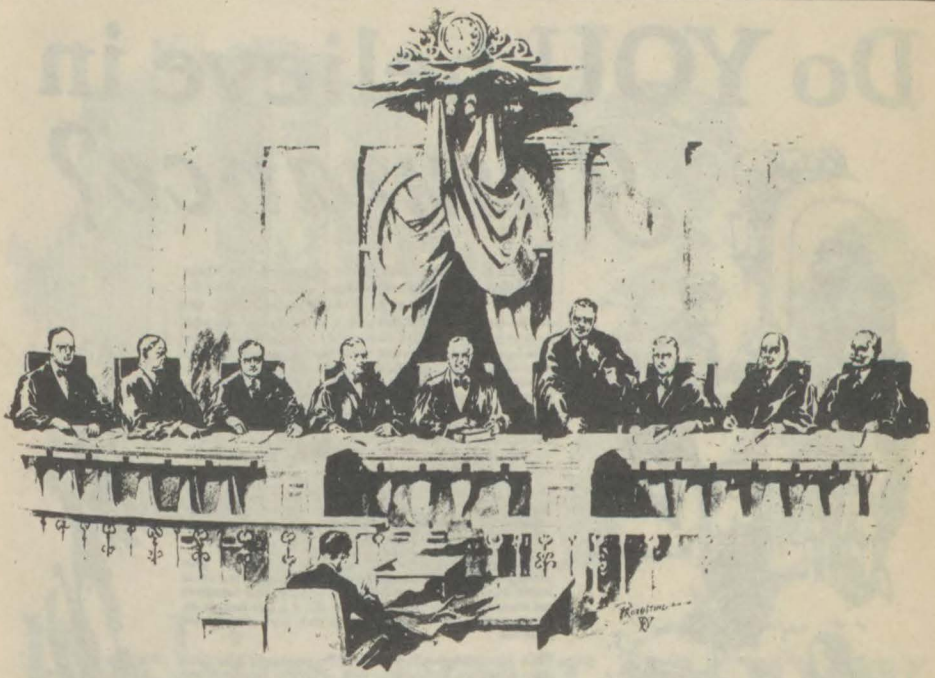
In the hands of *skilled bankers*

SKILLED bankers administer the Nebraska law that protects the deposits in Nebraska state banks. The Guarantee Fund Commission is the official body, and under the law, membership on this commission is limited to state bankers.

These banker members are appointed by the governor of Nebraska from names submitted by the bankers of the state. Thus the work of the commission is free from politics. The Secretary of Trade and Commerce in the Governor's cabinet is ex-officio chairman of the commission and in this way the elected officials of the state government co-operate with the banker selected members of the commission to insure the most efficient administration of the law.

From headquarters at the state house in Lincoln the Secretary of the Department of Trade and Commerce is in touch with every bank in the state. The constant effort of the Commission is to so handle the affairs of the failed banks as to secure the largest possible returns from the disposal of assets to the end that Nebraska's reputation for sound banking may be guarded.

(U. S. Sup. Court Rec. P 241) Ex 3 of Ex 13, p 242, Bf



The Opinion of the Highest Court

THE constitutionality of the Bank Guarantee law of the State of Nebraska was submitted to the highest court in the nation.

In sustaining the law the court said:

> *"When the legislature (of Nebraska) declares in its banking laws that incorporation, inspection and co-operation for the protection of deposits are necessary safeguards, this court certainly cannot say that it is wrong. The power to compel beforehand, co-operation and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized if government is to do its proper work.*
>
> *"In our opinion the statute before us is well within the state's constitutional power."—United States Supreme Court.*

Under the laws of the state of Nebraska the banks within the state banking system "co-operate for the protection of deposits" as outlined in the excerpts here printed from the opinion of the Supreme court of the United States.

The purpose of the laws of Nebraska and of the co-operation among the state banks is to "make a failure unlikely and a general panic almost impossible."

The prevention of individual failures has not yet been accomplished by the state banking system, but not a depositor in a State bank in Nebraska has lost a dollar since the law was enacted. Further experience and further operation of the Nebraska banking laws are moving in the direction of cutting individual failures to a minimum by bringing to the state banking system the counsel and experience of the state's best bankers. The program of bank co-operation has, however, made a general financial panic "almost impossible." The protected deposits in the failed banks have been kept intact and thus large portions of the liquid capital of the people of the state, have been continued at work in the business life of the state. It has increased safety and built confidence, the foundation stone of prosperity.

(Full page Omaha Ad (Ex. 5 of Ex. 13, P 243, U.S. Sup Ct Ex.)

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(U.S. Sup. Court Rec., P. 243)

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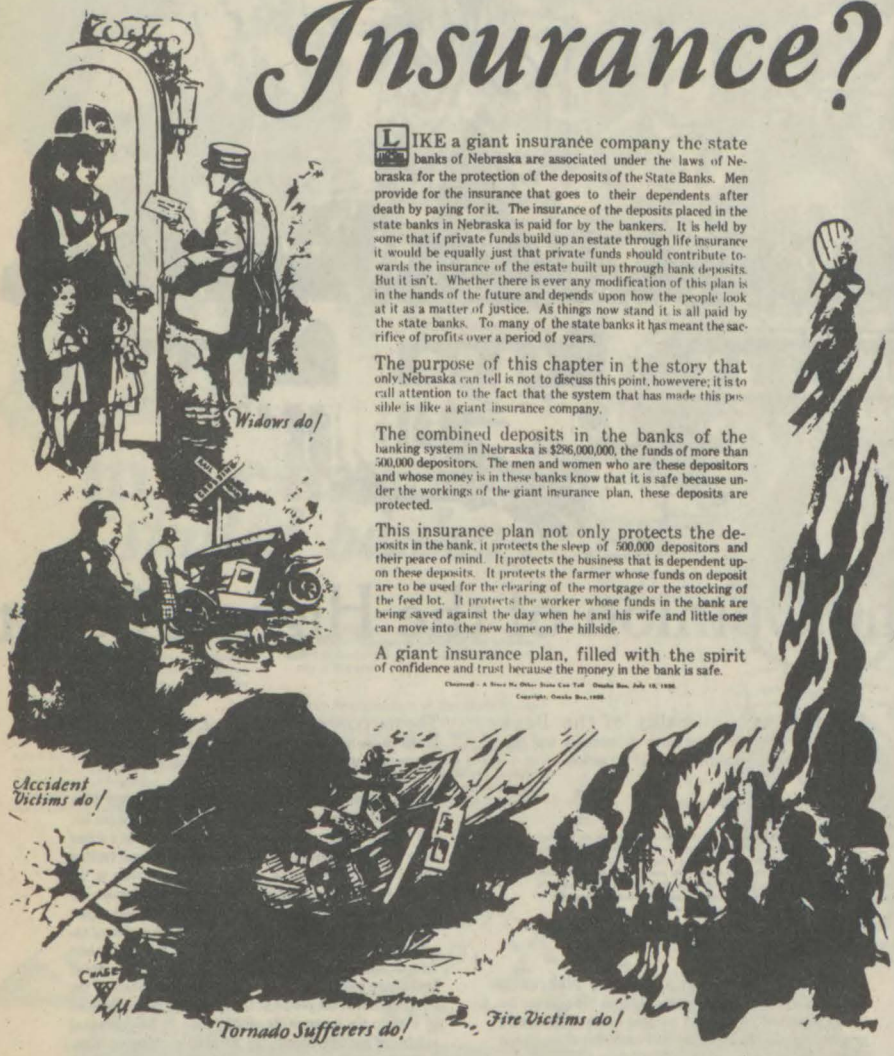
Do YOU believe in *Insurance?*



LIKE a giant insurance company the state banks of Nebraska are associated under the laws of Nebraska for the protection of the deposits of the State Banks. Men provide for the insurance that goes to their dependents after death by paying for it. The insurance of the deposits placed in the state banks in Nebraska is paid for by the bankers. It is held by some that if private funds build up an estate through life insurance it would be equally just that private funds should contribute towards the insurance of the estate built up through bank deposits. But it isn't. Whether there is ever any modification of this plan is in the hands of the future and depends upon how the people look at it as a matter of justice. As things now stand it is all paid by the state banks. To many of the state banks it has meant the sacrifice of profits over a period of years.

The purpose of this chapter in the story that only Nebraska can tell is not to discuss this point, however; it is to call attention to the fact that the system that has made this possible is like a giant insurance company.

The combined deposits in the banks of the banking system in Nebraska is $286,000,000, the funds of more than 500,000 depositors. The men and women who are these depositors and whose money is in these banks know that it is safe because under the workings of the giant insurance plan, these deposits are protected.

This insurance plan not only protects the deposits in the bank, it protects the sleep of 500,000 depositors and their peace of mind. It protects the business that is dependent upon these deposits. It protects the farmer whose funds on deposit are to be used for the clearing of the mortgage or the stocking of the feed lot. It protects the worker whose funds in the bank are being saved against the day when he and his wife and little ones can move into the new home on the hillside.

A giant insurance plan, filled with the spirit of confidence and trust because the money in the bank is safe.

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Full Page in Omaha Bee Ex. 8 of Ex. P. 246. Vol 2 D. of Ex
(Sup. Court Rec. P. 246)

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Federal Reserve Bank of St. Louis

Pushing your money *through the Window!*

CONFIDENCE in the banks of the United States is the greatest expression of confidence of which there is any record. It is a confidence well placed. The great banking structure of the nation is sound. Bank failures, whether they result from poor banking practices, from runs on banks, which if continued, no bank can withstand, or from dishonesty on the part of bank officials, are relatively few in number. As an expression of confidence in State banks in Nebraska these banks have total deposits of nearly $288,000,000. The deposits in the state banks in Nebraska that have failed during the last fifteen years—during which time the nation has gone through one of the greatest financial crises in its history—amounted only to about $25,000,000, less than 10 per cent of the total.

Those who pushed their money through the teller's window of these failed banks may have had in their deposits the total of their life savings. It may have been the bulk of the capital with which their business was conducted. To them, the loss of these deposits would have meant real hardship and in many cases disaster.

In the State Bank System of Nebraska happily, the depositors who pushed their money through the windows of the failed banks, as well as those who pushed their money through the windows of the sound banks, have not lost a dollar.

The sound character of the state banking system in Nebraska has been built up under the Nebraska Bank Guarantee law. It is the one law of its kind that has stood the test of the financial crisis that came with the deflation period. The Nebraska state banking system stands alone with its record of not a dollar lost to depositors. When you push your money through the window remember that the story of the Nebraska state banks—

Is a Story That No Other State Can Tell

Chapter 11, "A Story No Other State Can Tell." The Omaha Bee, July 31, 1925.

(Ex. 12 of Exh. 13, P250, ½ D. of Ex.)

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(U. S. Sup. Court Rec., P250)

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Where have we got our money *John?*

Mother--"I notice in the paper John that some banks down south have failed. Think of all the money those people down there will lose. I'm just wondering where we've got our money."

Father--"It's all right Mary, the money is in the State bank in town. I tell you that Guarantee law in Nebraska is a mighty fine thing. We can go on about our affairs and know that even if our bank goes under we will get all our money because the other state banks will make it good."

When the news was printed recently of the failure of a group of banks in two southern states it is probable there were conversations similar to that reproduced here all over Nebraska. The sense of security that is the possession of the depositors in state banks in Nebraska is one of the greatest benefits of the Nebraska Bank Guarantee law. In the old days, before the Guarantee law, a feeling of terror ran through a community whenever there was a rumor that a bank was in danger.

Now there are only a few casual inquiries. The depositors go about their business without uneasiness and without worry. They know that the deposits in the state banks in Nebraska are protected deposits and that even if a bank is closed and finally liquidated they will have their money returned to them in full under the operation of the Nebraska Bank Guarantee law, to which all state banks in the Nebraska state system subscribe.

This is a Story No Other State Can Tell

Chapter 12, "A Story No Other State Can Tell." The Omaha Bee, August 4, 1926. Copyright, 1926, The Omaha Bee.

Lucas Geo. Omaha Bee (Ex. 19 of Ex. 13, P 251, 4th Day Ex.)

(U. S. Sup. Court Rec., P. 251)

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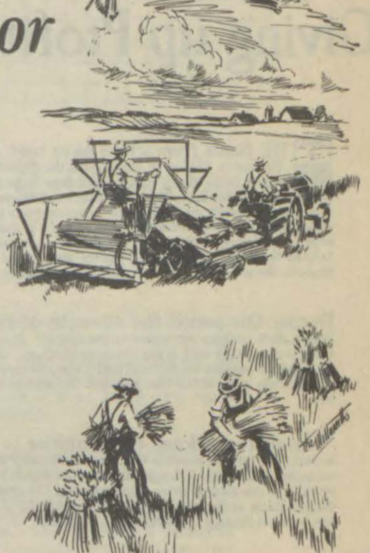
Federal Reserve Bank of St. Louis

95,000 *Years of Labor*



MONEY is a medium of exchange we are told. But it is much more than that. If we will remember the means through which we get money—profits—salary, wages—we will realize that money is that thing which represents our services, our labor. We do not get any money unless we render service of some sort, unless we do some sort of labor. We cannot work for everyone, but the money we get for our labor at the place where we work, either as proprietor or as employee, enables us to trade that money to others for what their labor has created.

Some of the money we get we save. In saving our money we save a part of our labor. Thus our money in the bank is saved up labor that we can take out when we need it to trade to others for the fruits of their labor.

In the state banks of Nebraska there is on deposit the stored up labor of men and women, represented in $288,000,000. If one man could earn this sum at the rate of $10 a day, it would take him 28,800,000 days. That is impossible of course. But if we could command the labor of 95,000 men and women and put them to work at $10 a day it would take them all of the 300 working days of a year.

They could use none of their earnings during that time but would have to put it all in the bank.

Thus the money on deposit in the state banks in Nebraska represents a huge total in stored up labor. It has been stored away in the state banks for use some day when the depositors need it.

Now we begin to realize why it is so important that these stored up millions of dollars, these stored up centuries of labor of men and women, which the state banks in Nebraska have in their custody, shall be at all times safe and certain.

When state banks fail in Nebraska the money of the depositors is not lost. Under the operation of the Nebraska Bank Guarantee law all of the banks join together to absorb the losses. This Guarantee law has been in operation in Nebraska for fifteen years and during that time the deposits in failed banks have totaled $26,000,000. This in itself is nearly 9,000 years at $10 a day of the saved up labor of the men and women of Nebraska.

Small wonder that in the fifteen years the Guarantee law has been in operation among the state banks in Nebraska the deposits in these banks have grown from a little more than $70,000,000 to nearly $288,000,000.

It is a splendid thing to live in Nebraska and to know that the money placed in the state banks in this state is safe. As a Nebraskan, too, it is a splendid thing to know that this is—

A STORY NO OTHER STATE CAN TELL

Full page Omaha Bee (Exp. 16 of Ex. 12, P254 V4 B of Exp)

Chapter 18, "A Story No Other State Can Tell." The Omaha Bee, August 15, 1926.

Also pub. Fremont Tribune, names of banks attached (Ex. N4, P444 V2 B of Ex)

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(U. S. Sup. Court Rec., P 254)

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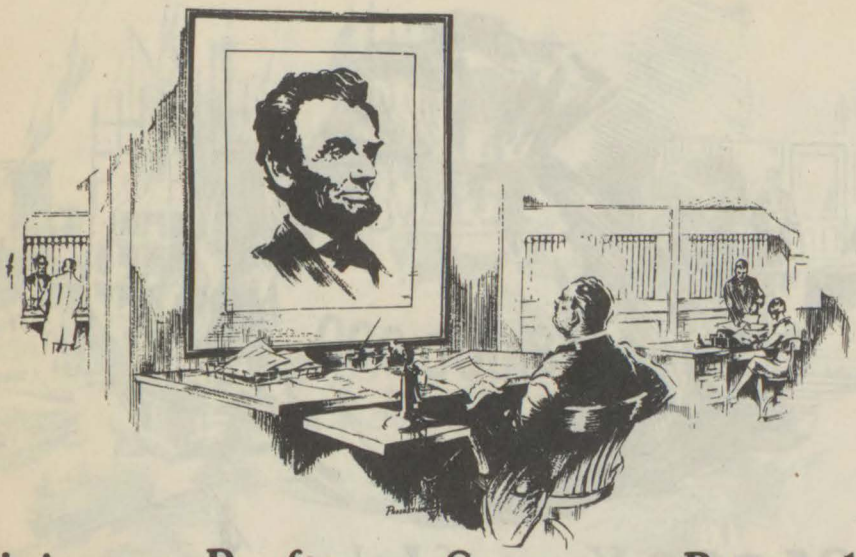

Giving up Profits to Support a Principle

THE funds from which have been drawn the money needed to make good the deposits in the failed state banks in Nebraska have come from the profits of the banks in the Nebraska state banking system. To many of these banks the payment of the assessments needed to make good these protected deposits has taken all of their profits over a period of years. In some of the state banks not only did it take all the profits, but the stockholders were called upon to make up the needed funds out of their personal resources.

During this period the strength of the Nebraska state bankers was tested to the utmost. It is no easy thing to see profits used to pay the losses of others. One of the leading state bankers has declared that it was a picture of Abraham Lincoln in his office that gave him the courage to stick it out.

"Lincoln had a dozen opportunities to quit," he said, "but because he stuck to it, America is today the greatest nation in the world." Because the state bankers in Nebraska stuck to it, this state is today famous among the great sisterhood of states as the only state in which not a dollar of deposits has been lost through the failure of state banks.

When the people of Nebraska realize the full meaning of this they will have an even greater pride in their state bankers.

There are those unfamiliar with the workings of the Bank Guarantee law who have believed that the payment of the deposits in the failed state banks was made out of state funds. Some, even, have believed that money for this purpose has been raised through taxation. Others have believed that the state bankers increased their interest rates or in some other way "passed on" this obligation to their borrowers.

No, the money to make good these protected deposits has come out of the profits of the individual banks. Interest rates in the state banking system in Nebraska are the same as the interest rates in all banks in Nebraska. The state banks in Nebraska give to their depositors all the courtesies, all the benefits that are given by all banks. The customers of the state banks in Nebraska have had none of this great load passed on to them. The people of Nebraska have paid none of these losses through taxes or in any other way. The money has come out of profits and only out of profits.

A STORY NO OTHER STATE CAN TELL

(Full page in Omaha Bee. Ex. 20 of Ex. 13, P. 258 of Tr. of Ev.)
(Also published Fremont Tribune with names of banks attached
Ex. No. P-446, Tr. of Ev.)

Chapter 18, "A Story No Other State Can Tell," The Omaha Bee, August 29, 1926.

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(U. S. Sup. Court Rec., P. 258)

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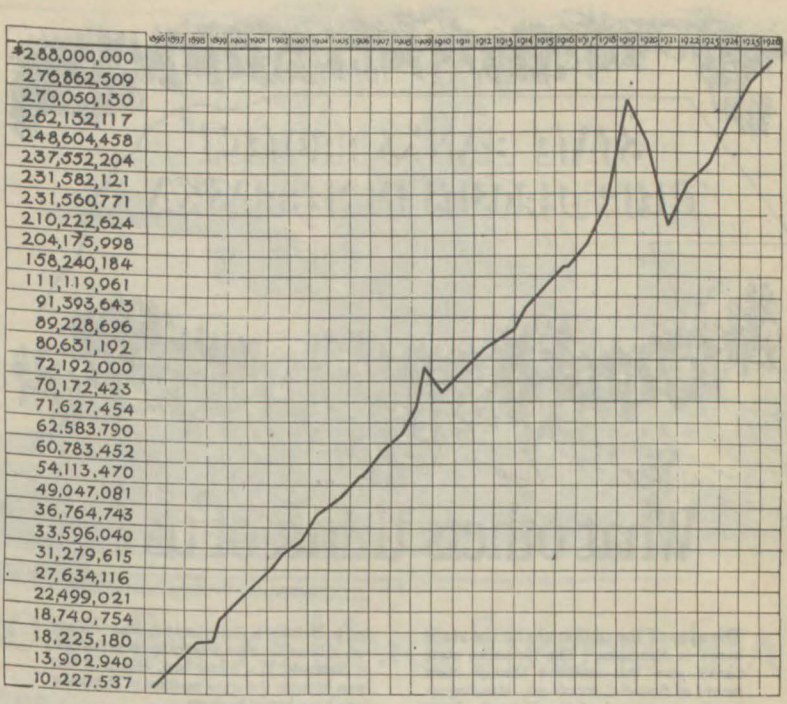

Safe Through the Slump of Deflation Days

The test of men and of institutions comes with adversity. If all days were fair days the record of life might be a record of constant climb without ever a setback. But all days are not fair days. Dark days come when strength and courage are put to the test. The state banks in Nebraska have gone through this test. They have come out of it stronger and better.

It took 14 years, without the guarantee law to climb from $10,000,000 to $71,000,000. Under the law, only 9 years were needed to climb from $72,000,000 to $270,000,000. The slump of deflation lasted 5 years, through the last three years of which period there was a steady climb upward from the low point of 1921. Then came a new high record in 1925 and a still further climb in 1926.

During this period, in which the largest number of state banks were forced to suspend, 1921-26, the state banking system, operating under the guarantee law, made good to the depositors of these failed state banks some $26,000,000.

With a fine courage and a strength of character developed by adversity, the Nebraska state banks have climbed back to the level of pre-deflation days and passed on beyond that level. They have won a reputation for financial soundness that has earned the praise of the nation.

A STORY NO OTHER STATE CAN TELL

(Full page in Omaha Bee. Ex. 31 of Ex. 13, R. 259 Vol. B. of Ex.)

Chapter 20, "A Story No Other State Can Tell," The Omaha Bee, Sept. 1, 1926.

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(U. S. Sup. Court Rec., P. 259)

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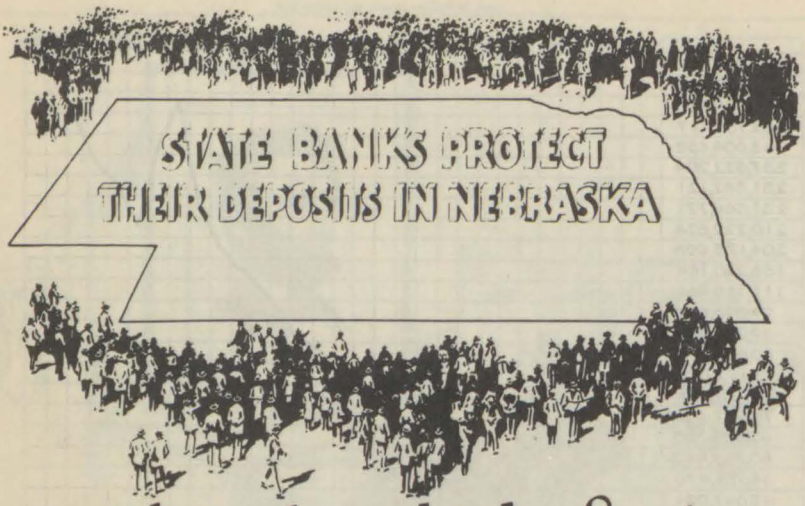

What others think of us!

The eyes of the nation are on the state banks in Nebraska. The Nebraska state banks won this attention through their record of financial soundness—standing up loyally in support of the Nebraska Bank Guarantee Law.

In every section of the country the record of the Nebraska state banks is known but in many places only in a general way. Because it was a record to be proud of, a group of state bankers in Nebraska determined to tell the story in full—a story that no other state can tell.

As the story has unfolded there has been an increasing demand for copies of the various chapters. All around our borders and in distant states the interest in this story has been keen and active.

As a result of its telling, figuratively, there has been written across the state in letters that all may read, the words: "State Banks in Nebraska Protect Their Deposits." Other states have sought to provide by law for the protection of deposits in state banks, but in Nebraska alone has the plan worked out. It has not been wholly because the law of Nebraska is a better law, chiefly it has been because the state bankers in Nebraska have been better bankers.

The state bankers in Nebraska realized that the law placed an obligation upon them and that when the word went out that state bankers in Nebraska were associated under the law to protect depositors there was but one thing to do—protect them. They have protected them. The weathering of the financial stress of deflation has brought a new fame to the state bankers in Nebraska. Sound banking, loyalty in meeting obligations and the courage to make the Guarantee law means what it says, has come to be known as the Nebraska Idea.

This is what others think of us. The state bankers in Nebraska are proud that it is so. They are proud of their record. It is a record of which all the people in Nebraska may be proud. It has brought added fame to a great state.

"A Story No Other State Can Tell"

(Full page in Omaha Bee. Ex 2 of Ex. 13, P. 261 U. S. Sup Ct. Rec.)

Chapter 22. "A Story No Other State Can Tell," The Omaha Bee, Sept. 8, 1926.

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(U. S. Sup. Court Rec., P. 261)

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Federal Reserve Bank of St. Louis

STRONG BANKS MAKE STRONG STATES

THE banks of Nebraska are the custodians of the working capital of the people of Nebraska. This working capital is the life blood of the business of the state. Business cannot be carried on without capital. Banks as the custodians of capital are inseparably connected with every business in the state. Whether the business enterprises be large or small, whether they be in cities, in towns or on the farms the banks of the state are a part of those businesses.

The importance of the state banks in Nebraska is fully appreciated when we realize the part they thus play in the life of the state. The strength and solidity of the state banks is reflected in the strength and solidity of the state. Strong banks make strong states.

The state banks in Nebraska are strong banks. They have proven their strength by their conduct during the deflation period. In Nebraska the strength of the state banks does not depend upon the strength of any individual bank. They are associated together under the Bank Guarantee law. The strength of the individual banks therefore is the strength of all the banks.

During the deflation period a few individual state banks were not able to meet the situation and they were closed. United together under the law, the banks in the Nebraska state system met the losses of deflation days however, and conquered them. Those depositors who had their working capital in the individual banks that failed, were paid dollar for dollar by the state banks, acting together, under the Guarantee Law.

The strength of these banks has kept the working capital of the state intact. Their strength has made the state strong.

Farmers in other states, business men in other states, men and women everywhere who know the value of strong banks can find that strength in Nebraska.

"A Story No Other State Can Tell"

Chapter 22, "A Story No Other State Can Tell," The Omaha Bee, Sept. 12, 1926.

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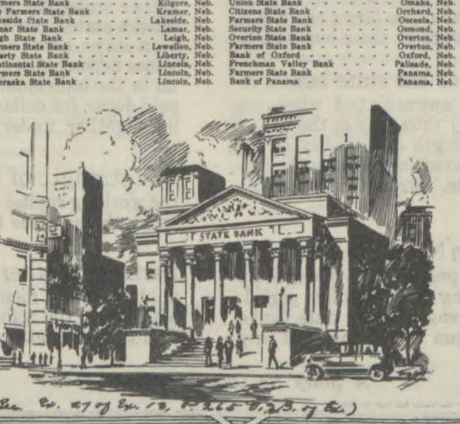
(Full page in Omaha Bee Ex. 24 of Ex. 13, P. 262, Vol. B, J. Ex.) (Also published in Fremont Tribune; with names of banks attached. Ex. No. 8, P. 148 Vol. B of Ex.)

(U. S. Sup. Court Rec., P. 262)

The MEN who told the story that no other state can tell

THE men who told the story that no other state can tell are the men who control and operate the state banks in Nebraska. A group of these Nebraska state bankers felt that this story should be told to the people of the state and to the people of other states. They felt that such a record should be known to all, that there might come to Nebraska the benefits to which a strong financial foundation rightfully entitled her. They raised the funds, they laid out the plans and directed the writing of the chapters in this Nebraska story that has gripped the attention of the nation. The names of the banks which they control and operate are therefore here presented in bringing to a close the story that no other state can tell.

Abie State Bank	Abie, Neb.
Citizens State Bank	Ainsworth, Neb.
Allen State Bank	Allen, Neb.
First State Bank	Alliance, Neb.
Guardian State Bank	Alliance, Neb.
Farmers State Bank	Altona, Neb.
Commercial State Bank	Amherst, Neb.
Boyd County State Bank	Anoka, Neb.
Farmers State Bank	Ansley, Neb.
Arlington State Bank	Arlington, Neb.
Arnold State Bank	Arnold, Neb.
Security State Bank	Arnold, Neb.
Bank of Ashton	Ashton, Neb.
Ashton State Bank	Ashton, Neb.
Auburn State Bank	Auburn, Neb.
Bank of Avoca	Avoca, Neb.
Farmers State Bank	Avoca, Neb.
Citizens State Bank	Bancroft, Neb.
Commercial Bank	Bassett, Neb.
State Bank of Bassett	Bassett, Neb.
Battle Creek Valley Bank	Battle Creek, Neb.
Farmers State Bank	Battle Creek, Neb.
First State Bank	Bazile Mills, Neb.
State Bank of Beaver Crossing	Beaver Crossing, Neb.
Beemer State Bank	Beemer, Neb.
Farmers State Bank	Beldon, Neb.
Bank of Belgrade	Belgrade, Neb.
Bank of Benkleman	Benkleman, Neb.
Citizens State Bank	Benkleman, Neb.
Bennington State Bank	Bennington, Neb.
Mangold & Glandt Bank	Bennington, Neb.
First State Bank	Bethany, Neb.
Farmers State Bank	Big Springs, Neb.
The State Bank	Blair, Neb.
Neb. State Bank	Bloomfield, Neb.
Farmers State Bank	Bloomington, Neb.
Farmers and Merchants State Bank	Bloomfield, Neb.
Bloomington State Bank	Bloomington, Neb.
Blue Springs State Bank	Blue Springs, Neb.
Boelus State Bank	Boelus, Neb.
Farmers State Bank	Boelus, Neb.
Boone State Bank	Boone, Neb.
Farmers State Bank	Bradish, Neb.
Nebraska State Bank	Bridgeport, Neb.
Bridgeport Bank	Bridgeport, Neb.
Union State Bank	Broadwater, Neb.
Farmers and Merchants Bank	Bruno, Neb.
Bruno State Bank	Bruno, Neb.
Farmers State Bank	Brunswick, Neb.
The American Bank	Burr, Neb.
Burton State Bank	Burton, Neb.
Citizens State Bank	Butte, Neb.
Cairo State Bank	Cairo, Neb.
Farmers State Bank	Cairo, Neb.
Chadron State Bank	Chadron, Neb.
Chappell State Bank	Chappell, Neb.
Deuel County State Bank	Chappell, Neb.
Bank of Cheney	Cheney, Neb.
Clatonia State Bank	Clatonia, Neb.
Clarkston State Bank	Clarkson, Neb.
State Bank of Clearwater	Clearwater, Neb.
Bank of Cody	Cody, Neb.
Ranchers State Bank	Cody, Neb.
Columbus State Bank	Columbus, Neb.
Farmers State Bank	Concord, Neb.
Concord State Bank	Concord, Neb.
Cook State Bank	Cook, Neb.
Farmers Bank of Cook	Cook, Neb.
Cordova State Bank	Cordova, Neb.
Cornlea State Bank	Cornlea, Neb.
First State Bank	Cotesfield, Neb.
Farmers State Bank	Craig, Neb.
The Security State Bank	Creighton, Neb.
Citizens State Bank	Creston, Neb.
Farmers State Bank	Crofton, Neb.
Farmers State Bank	Crookston, Neb.
Curtis State Bank	Curtis, Neb.
Cushing State Bank	Cushing, Neb.
Dalton State Bank	Dalton, Neb.
Farmers State Bank	Dalton, Neb.
Dannebrog State Bank	Dannebrog, Neb.
State Bank of Decatur	Decatur, Neb.
State Bank of Dewesse	Dewesse, Neb.
First State Bank	Dickens, Neb.
Dixon State Bank	Dixon, Neb.
Dodge State Bank	Dodge, Neb.
The Dunbar State Bank	Dunbar, Neb.
The Bank of Eagle	Eagle, Neb.
Farmers State Bank	Eagle, Neb.
Farmers and Merchants Bank	Edison, Neb.
Bank of Edison	Edison, Neb.
Culbertson Bank	Culbertson, Neb.
Elba State Bank	Elba, Neb.
Farmers State Bank	Elba, Neb.
Eldorado State Bank	Eldorado, Neb.
Elgin State Bank	Elgin, Neb.
Farmers and Merchants Bank	Elgin, Neb.
Your Bank of Eli	Eli, Neb.
Farmers State Bank	Elkhorn, Neb.
State Bank of Elkhorn	Elkhorn, Neb.
American Exchange Bank	Elmwood, Neb.
Elmwood State Bank	Elmwood, Neb.
The Home Bank	Elwood, Neb.
Farmers State Bank	Emerson, Neb.
Farmers State Bank	Ericson, Neb.
Pioneer State Bank	Ewing, Neb.
Ewing State Bank	Ewing, Neb.
The Citizens Bank	Fairfield, Neb.
Farmers and Merchants Bank	Fairfield, Neb.
Fordyce State Bank	Fordyce, Neb.
Fort Calhoun State Bank	Fort Calhoun, Neb.
Washington County State Bank	Fort Calhoun, Neb.
Fremont State Bank	Fremont, Neb.
Friend State Bank	Friend, Neb.
Mechanics and Farmers Bank	Friend, Neb.
Farmers State Bank	Fullerton, Neb.
Farmers and Merchants Bank	Garrison, Neb.
Geneva State Bank	Gevena, Neb.
Exchange Bank	Gibbon, Neb.
Commercial Bank	Gibbon, Neb.
Goehner State Bank	Goehner, Neb.
American Bank of Gordon	Gordon, Neb.
Gordon State Bank	Gordon, Neb.
First State Bank	Gothenberg, Neb.
Farmers State Bank	Gothenberg, Neb.
Gothenberg State Bank	Gothenberg, Neb.
Commercial Bank of Grant	Grant, Neb.
Greenwood State Bank	Greenwood, Neb.
The Farmers State Bank	Gurley, Neb.
Farmers State Bank	Hamlet, Neb.
Banner Conuty State Bank	Harrisburg, Neb.
Cedar County State Bank	Hartington, Neb.
Union State Bank	Harvard, Neb.
State Bank of Hastings	Hastings, Neb.
Farmers and Mechanics Bank	Havelock, Neb.
Farmers State Bank	Hazard, Neb.
Heartwell State Bank	Heartwell, Neb.
Bank of Henderson	Henderson, Neb.
Plateau State Bank	Herman, Neb.
Bank of Holbrook	Holbrook, Neb.
Security State Bank	Holbrook, Neb.
State Bank	Holdrege, Neb.
First State Bank	Holstein, Neb.
Horace State Bank	Horace, Neb.
First State Bank	Hordville, Neb.
The Bank of Howe	Howe, Neb.
The Howells State Bank	Howells, Neb.
Bank of Ottis & Murphy	Humphrey, Neb.
State Bank of Indianola	Indianola, Neb.
Inman State Bank	Inman, Neb.
Jackson State Bank	Jackson, Neb.
State Bank of Juniata	Juniata, Neb.
American State Bank	Kearney, Neb.
Farmers State Bank	Kearney, Neb.
First State Bank	Kenesaw, Neb.
Kenesaw State Bank	Kenesaw, Neb.
Farmers and Merchants Bank	Kennard, Neb.
Home State Bank	Kennard, Neb.
Farmers State Bank	Kilgore, Neb.
The Farmers State Bank	Kramer, Neb.
Lakeside State Bank	Lakeside, Neb.
Lamar State Bank	Lamar, Neb.
Leigh State Bank	Leigh, Neb.
Farmers State Bank	Lewellen, Neb.
Liberty State Bank	Liberty, Neb.
Continental State Bank	Lincoln, Neb.
Farmers State Bank	Lincoln, Neb.
Nebraska State Bank	Lincoln, Neb.
Farmers and Merchants Bank	Linwood, Neb.
Lisco State Bank	Lisco, Neb.
State Bank of Litchfield	Litchfield, Neb.
First State Bank	Lodgepole, Neb.
Nebraska State Bank	Long Pine, Neb.
Farmers State Bank	Loomis, Neb.
Loretto State Bank	Lorreto, Neb.
Bank of Lorton	Lorton, Neb.
Loup City State Bank	Loup City, Neb.
Citizens State Bank	Lyons, Neb.
Bank of Lynch	Lynch, Neb.
Farmers State Bank	Lynch, Neb.
McLean State Bank	McLean, Neb.
State Bank of Madison	Madison, Neb.
Madrid Exchange Bank	Madrid, Neb.
Marion State Bank	Marion, Neb.
Marsland State Bank	Marsland, Neb.
Maxwell State Bank	Maxwell, Neb.
State Bank of Maywood	Maywood, Neb.
Security Bank	Meadow Grove, Neb.
Mt. Clare State Bank	Mt. Clare, Neb.
Meadow Grove State Bank	Meadow Grove, Neb.
The Bank of Merna	Merna, Neb.
The Anchoe Bank	Merriman, Neb.
The First Bank of Miller	Miller, Neb.
State Bank of Minatare	Minatare, Neb.
Minden State Bank	Minden, Neb.
Mitchell State Bank	Mitchell, Neb.
The American Bank	Mitchell, Neb.
Ponca Valley State Bank	Monowi, Neb.
Bank of Monroe	Monroe, Neb.
Murray State Bank	Murray, Neb.
First State Bank	Nacora, Neb.
Naponee State Bank	Naponee, Neb.
Security State Bank	Neligh, Neb.
Antelope State Bank	Neligh, Neb.
Nenzel State Bank	Nenzel, Neb.
American State Bank	New Castle, Neb.
Farmers State Bank	New Castle, Neb.
Farmers State Bank	Newport, Neb.
Rock County State Bank	Newport, Neb.
State Bank of Niobrara	Niobrara, Neb.
The Nebraska State Bank	Norfolk, Neb.
Norman Exchange Bank	Norman, Neb.
First State Bank	North Bend, Neb.
Farmers State Bank	North Loup, Neb.
McDonald State Bank	North Platte, Neb.
Platte Valley State Bank	North Platte, Neb.
The Oakdale Bank	Oakdale, Neb.
Oakland State Bank	Oakland, Neb.
Farmers State Bank	Ogallala, Neb.
Nebraska State Bank	Ohiowa, Neb.
Commercial State Bank	Florence, Neb.
Bank of Benson	Benson, Neb.
Farmers & Merchants Bank	Benson, Neb.
Security State Bank	Omaha, Neb.
The State Bank of Omaha	Omaha, Neb.
Union State Bank	Omaha, Neb.
Citizens State Bank	Orchard, Neb.
Farmers State Bank	Osceola, Neb.
Security State Bank	Osmond, Neb.
Overton State Bank	Overton, Neb.
Farmers State Bank	Overton, Neb.
Bank of Oxford	Oxford, Neb.
Frenchman Valley Bank	Palisade, Neb.
Farmers State Bank	Panama, Neb.
Bank of Panama	Panama, Neb.
State Bank of Papillion	Papillion, Neb.
Parks State Bank	Parks, Neb.
First State Bank	Pawnee City, Neb.
Commercial State Bank	Paxton, Neb.
Farmers & Merchants State Bank	Pender, Neb.
Pender State Bank	Pender, Neb.
Petersburg State Bank	Petersburg, Neb.
Pierce State Bank	Pierce, Neb.
Pilger State Bank	Pilger, Neb.
Security State Bank	Plainview, Neb.
Farmers State Bank	Platte Center, Neb.
Platte County Bank	Platte Center, Neb.
Pleasonton State Bank	Pleasonton, Neb.
Farmers State Bank	Polk, Neb.
Exchange Bank	Ong, Neb.
Farmers State Bank	Ponca, Neb.
Bank of Dixon County	Ponca, Neb.
Princeton State Bank	Princeton, Neb.
Farmers State Bank	Raeville, Neb.
Farmers & Merchants Bank	Randolph, Neb.
Richland State Bank	Richland, Neb.
Farmers State Bank	Rising City, Neb.
Rising City Bank	Rising City, Neb.
State Bank of Riverdale	Riverdale, Neb.
Rosalie State Bank	Rosalie, Neb.
Farmers State Bank	Rosalie, Neb.
Roseland State Bank	Roseland, Neb.
Royal State Bank	Royal, Neb.
Union Bank	Rushville, Neb.
Sarben State Bank	Sarben, Neb.
Farmers State Bank	Sargent, Neb.
Sargent State Bank	Sargent, Neb.
Bank of Scotia	Scotia, Neb.
Farmers State Bank	Scotia, Neb.
Platte Valley State Bank	Scottsbluffs, Neb.
American State Bank	Scottsbluffs, Neb.
Scribner State Bank	Scribner, Neb.
Farmers State Bank	Scribner, Neb.
State Bank of Nebraska	Seward, Neb.
Shelby State Bank	Shelby, Neb.
Meisner's Bank	Shelton, Neb.
The American Bank	Sidney, Neb.
Liberty State Bank	Sidney, Neb.
Silver Creek State Bank	Silver Creek, Neb.
Snyder State Bank	Snyder, Neb.
Bank of South Sioux City	South Sioux City, Neb.
Security State Bank	Spalding, Neb.
Spencer State Bank	Spencer, Neb.
Corn Exchange Bank	Spencer, Neb.
Blue Valley State Bank	Springranch, Neb.
Elkhorn Valley State Bank	Stanton, Neb.
Farmers and Merchants Bank	Sterling, Neb.
The First State Bank	Sterling, Neb.
Stockham State Bank	Stockham, Neb.
Farmers State Bank	St. Edwards, Neb.
St. Libory State Bank	St. Libory, Neb.
Farmers State Bank	Stromsburg, Neb.
Citizens Bank	Stuart, Neb.
Farmers State Bank	Sunol, Neb.
Citizens State Bank	Superior, Neb.
Surprise State Bank	Surprise, Neb.
American State Bank	Sutherland, Neb.
Farmers State Bank	Sutherland, Neb.
Bank of Swanton	Swanton, Neb.
Farmers Exchange Bank	Tamora, Neb.
Liberty State Bank	Thurston, Neb.
Burt County State Bank	Tekamah, Neb.
State Bank of Tilden	Tilden, Neb.
Farmers Exchange Bank	Trumbull, Neb.
Farmers State Bank of Ulysses	Ulysses, Neb.
Bank of Union	Union, Neb.
Merchants Bank	Utica, Neb.
Nebraska State Bank	Valentine, Neb.
Farmers State Bank	Valley, Neb.
Venango State Bank	Venango, Neb.
Farmers State Bank	Venango, Neb.
Farmers State Bank	Verdel, Neb.
Knox County Bank	Verdigre, Neb.
Vesta State Bank	Vesta, Neb.
Farmers and Merchants Bank	Wahoo, Neb.
Security State Bank	Wakefield, Neb.
Farmers State Bank	Wallace, Neb.
Waterbury State Bank	Waterbury, Neb.
State Bank of Waterloo	Waterloo, Neb.
Peoples Bank	Wauneta, Neb.
Wauneta Falls Bank	Wauneta, Neb.
Lancaster County Bank	Waverly, Neb.
State Bank of Wayne	Wayne, Neb.
Nebraska State Bank	Weeping Water, Neb.
Western State Bank	Western, Neb.
Nebraska State Bank	West Point, Neb.
State Bank	Winnebago, Neb.
Wisner State Bank	Wisner, Neb.
State Bank	Wolbach, Neb.
Peoples State Bank	Wolbach, Neb.
Farmers State Bank	Wolbach, Neb.
Citizens State Bank	Wood Lake, Neb.
Wood Lake Bank	Wood Lake, Neb.
Farmers and Merchants Bank	Wymore, Neb.
American State Bank	York, Neb.
Farmers State Bank	York, Neb.



(Full page in Omaha Bee. Ex. 27 of Ex. 12, P. 265 V. 23. of Ex.)

Chap 26

(U. S. Sup. Court Rec., P. 265)

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(f) **The questionnaire circulated by the banks:**

This questionnaire printed and circulated by many of the banks constituted one of the most effective inducements to deposits. It was written by Mr. Stephens, chief witness in this case, and it so effectively meets the position of the banks in this case that we reproduce it on the following page in full. For the State Bank of Omaha the Chappell Printing Company printed one order of these questionnaires and the Hammond Printing Company printed four different orders, to-wit: December 4, 1925, 2,000; January 25, 1926, 2,000; July 7, 1926, 2,000; January 5, 1927, 2,000; (Rec., p. 336, Qs. 1952-6) and printed for the Fremont State Bank 10,000 (Rec., p. 336, Q. 1957). The Chappel Printing Company printed copies of the questionnaire for the Fremont State Bank and for other state banks and identified Exhibits I, J and K as some of those that were printed (Rec., p. 329, Qs. 1881-91).

These questionnaires contained on one page thereof a financial statement of the particular bank circulating it. The one here reproduced is the one circulated by the State Bank of Omaha.

It follows:

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Nebraska Guarantee Fund

PROTECTING DEPOSITS
IN STATE BANKS

COMPLIMENTS OF THE
STATE BANK OF OMAHA
Omaha, Nebraska
The Largest State Bank in Nebraska

QUESTION: What is the object of this questionnaire on the subject of the Guaranty of Bank Deposits?

ANSWER: Its object is education. So many do not understand what it means, whom it protects, and who pays for the protection, that it seems timely and proper to set out the facts.

QUESTION: Do the State Banks pay for the cost of the protection given depositors under the Guaranty Law?

ANSWER: The State Banks pay the entire cost of the protection given to Depositors and because they do pay this heavy tax for the benefit of all, they feel they are entitled to have the people whom they protect know that they are protected and that the State Banks pay the entire cost of it.

QUESTION: Then what is the Nebraska Guarantee Fund Law?

ANSWER: It is a law creating in effect a gigantic insurance company composed of all of the State Banks of Nebraska for the purpose of insuring bank deposits.

QUESTION: Has the law been in effect long enough to prove its practical value to the state?

ANSWER: Yes, it has been in effect 16 years and during that time not a single depositor has lost a single dollar in a single State Bank in Nebraska.

QUESTION: Has there been a money panic or depression during that period?

ANSWER: Yes, from 1920 to 1923 was probably the greatest financial depression ever known in the history of this country.

QUESTION: Did this put a heavy strain on the Guarantee Fund?

ANSWER: Yes, but the Guarantee Fund proved capable of sustaining every strain that was put upon it and successfully met every emergency that arose during, before and since that distressing period?

QUESTION: Did the Guarantee Fund pay any losses to depositors during that period?

ANSWER: It certainly did. More than Eleven Million Dollars were paid to depositors in banks that were liquidated, who would have otherwise lost their money had there been no Guarantee Fund.

QUESTION: What is the condition of the Guarantee Fund at the present time?

ANSWER: The Guarantee Fund at the present time has more than Ten Million Dollars of resources, which are gradually being made available for the payment of losses and in addition to this large reserve it has the power to raise more than One and One-half Millions in assessments each year against the State Banks of Nebraska. These funds are ample to meet all possible losses that may occur.

QUESTION: How are the assessments made for maintaining the State Guarantee Fund?

ANSWER: The law authorizes the Secretary of the Department of Trade and Commerce to make an annual levy on the average deposits of the State Banks of not more than one-half of one per cent, plus, one-tenth of one per cent, which makes an aggregate assessment of six-tenths of one per cent on the average deposits of all the State Banks of Nebraska. The average deposits of State Banks at the last report amounted to nearly 290 million dollars.

QUESTION: Is this method, then, similar to the processes of levying taxes on property for the payment of the running expenses of the Government?

ANSWER: It is.

QUESTION: Is it a fact, as often claimed, that the Guarantee Law protecting depositors in State Banks from loss, actually saved the State from financial disaster during the recent deflation period.

ANSWER: It is beyond question a fact, because Nebraska has recovered from the depression of that period with greater rapidity than has any other neighboring state, which has not had the benefit of a practical Guarantee of Deposits Law.

QUESTION: Do the depositors in State Banks have absolute confidence in the protection of their deposits?

ANSWER: They certainly do. There has never been a case of a run on a State Bank caused by uneasiness, misrepresentation or fear of the safety of their funds since the law was enacted in 1909. Depositors in State Banks do not withdraw their deposits from fear of loss, no matter what may be the condition of the Bank, for the reason that they know beyond question of doubt their deposits will be paid in full either by the Bank itself or by the State from the Guarantee Fund, in the event the bank is unable to do so.

QUESTION: Is it a fact, then, that when a depositor places his money in a State Bank, that all of the State Banks in Nebraska guarantee its return to him regardless of what may happen?

ANSWER: In effect that is exactly the situation. Nearly a thousand State Banks will be taxed by the State annually to the extent of six-tenths of one per cent on their average deposits until every dollar deposited in any failed bank is paid in full.

QUESTION: Can there be any greater security than this given to a depositor?

ANSWER: No better security is known to have yet been devised to protect a depositor from loss. It has survived 16 years including three years of the most depressed financial conditions ever known in the history of the country. It is safe to assume, therefore, that it will survive through the piping times of peace and prosperity that lie ahead of us.

QUESTION: How many State Banks are there in Nebraska?

ANSWER: Approximately 913.

QUESTION: How many National Banks are there?

ANSWER: Approximately 170.

QUESTION: Does the Guarantee Fund protect the depositors against loss in National Banks?

ANSWER: It does not. The state does not have control over National Banks. The law only applies to State Banks and deposits only are insured against loss in State Banks.

QUESTION: Are the National Bank depositors protected by a National Bank Guarantee Law?

ANSWER: They are not so protected. There is no such thing as a National Guarantee Law affecting National Banks.

QUESTION: Why has there not been enacted a National Guarantee Law protecting National Bank depositors?

ANSWER: Because National Bankers, as a rule, are opposed to the passage of such a law and Congress has not seen fit to overcome their opposition.

(Ex. 29 of Ex. 13, P. 267 Vol. 2 B. of Ev same Exhibit published and circulated by other State Banks, with change of name and Statement)
(Orig. U.S. Sup. Transcript Vol 2 Page 267)

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QUESTION: Why do they oppose it?

ANSWER: Because they do not wish to pay for the expense of maintaining it. It costs a great deal of money to insure the depositors against loss in banks. The State Banks in Nebraska have paid up to date over Eleven Million Dollars.

QUESTION: Does the Federal Reserve Act in any way protect depositors from loss in National Banks in case of failure?

ANSWER: It does not in the least. The Federal Reserve is a great credit reservoir for National Banks as going concerns and is of great service to the country. It mobilizes the reserves of National Banks and makes them available for credit so that National Banks can borrow money freely from it, thus enabling them to meet the demands of their customers in an emergency, but it does not pay depositors in case of loss or failure.

QUESTION: Do not National Bankers sometimes claim that it does?

ANSWER: Some may do so, but they do it through ignorance or in an attempt to mislead their customers. High class National Bankers make no such false claims, nor do they wish to profit through a misrepresentation of that kind.

QUESTION: Has the Federal Reserve Act strengthened sound banking among National Banks by exacting better practices?

ANSWER: It certainly has. It has made examinations of banks more rigid than formerly and has created higher ideals of banking than formerly existed.

QUESTION: Has the Guarantee Fund Law strengthened sound banking in the State Banks by exacting better practices?

ANSWER: It certainly has. As a result of banks being compelled to guarantee each other's losses in case of failure, they have demanded stricter and more rigid examinations and have insisted upon licenses to Bankers being issued only to men of high character and known integrity.

QUESTION: Then if the banking situation has been greatly strengthened by The Guarantee Fund Law and the Federal Reserve Act, is there any use of a Guarantee of Deposits Law any longer?

ANSWER There is as much use for a Guarantee of Deposits Law as there is for fire insurance. One can get along without either but he sleeps better for having them and in case of loss he is better able to go head with his business as a result of being able to have his money returned to him in full.

QUESTION: What effect has the Guarantee Law had on the prosperity of the state?

ANSWER: Without the Guarantee of Deposits Law, which has made possible the payment to the depositors of banks that have liquidated in Nebraska during the last sixteen years, their deposits in full, thousands of people would have been more or less impoverished through their losses, but this has been entirely avoided and absolute confidence maintained enabling the people to go on with their business without any financial disturbances whatever. When a merchant's store is destroyed by fire the insurance he carries enables him to immediately replace his stock and continue his business. When a bank fails anywhere in the State system all of the depositors are paid in full out of the Guarantee Fund with the result that the depositors continue their business without any interruption. The confidence of the people in their banks is maintained and their money is constantly flowing through the

banks for the purpose of carrying on the commerce of the state without any interruption. Industry is stimulated with the funds that are conconstantly available in the banks and the prosperity of the state has gone forward without let-up or hindrance in spite of the greatest price depression in all history. No surrounding state has prospered to the extent that Nebraska has. That has been the effect of the maintenance of public confidence in our financial institutions through the payment of depositors in full for every dollar they had on deposit in State Banks that were closed.

QUESTION: What is the financial situation now in Nebraska?

ANSWER: It was never sounder or better than at the present moment. Deposits in banks are increasing at a very rapid rate, indicating that the people are accumulating a surplus and gradually paying their debts. The banks never have been in such a sound position as they are now and there has never been a time when there was more available credit for business and industry than at the present.

QUESTION: What would have been the effect on the state if there had been no Guarantee of Deposits Law?

ANSWER: The effect would have been similar to that existing in one or two neighboring states, that cannot with propriety be mentioned, whose financial status is now in a state of chaos as a result of the lack of confidence due wholly to the fact that there is no insurance backing their financial institutions.

QUESTION: Does the law in Nebraska recognize State Banks as depositories for public funds?

ANSWER: It does. Every State Bank may be used as a depository for public funds for unlimited amounts without bonds of any kind.

QUESTION: Does the State law authorize National Banks as depositories without bonds?

ANSWER: It does not. A National Bank must give bonds for public funds held on deposit because its deposits are not insured, as they are in State Banks under the Guarantee Law.

QUESTION: Do National Bankers object to the Nebraska Guarantee Law?

ANSWER: Some of them do. Others recognize the great value of the law as a stabilizer of the financial situation in the state and heartily approve it. Those who do not have the broader view try to discredit the Guarantee Law so as to avoid its competition, notwithstanding the fact it has made Nebraska prosperous beyond that of any of its sister states not so protected. The solvent banks of the state have paid to depositors of failed banks more than Eleven Millions of Dollars in losses, which is a great sacrifice for them to make in the interests of the maintenance of the high honor and trust that banks deserve as depositories of the people.

QUESTION: Is this statement concerning National Banks a criticism?

ANSWER: It is not a criticism. Our National Banking System ranks with any system of banking known in the world. The only object of this educational program is to acquaint the people with the two kinds of commercial banks we have in this state, namely the State and National, and to make clear the fact that the Nebraska Guaranty Law protects only the Depositors in Nebraska State Banks and not in National Banks.

A STRONG BANK STATEMENT

ALBERT L. SCHANTZ, President
JOHN S. McGURK, Vice-President and Cashier
A. A. NELSON, Assistant Cashier
W. L. IDELL, Assistant Cashier

The State Bank of Omaha

Report of Condition at Close of Business Sept. 28, 1925

RESOURCES

Loans and Discounts	$4,502,678.71
Bonds	1,125,528.82
Real Estate	104,286.55
Furniture and Fixtures	30,000.00
Overdrafts	127.46
Cash	1,008,113.32
	$6,770,734.86

LIABILITIES

Capital Stock	$ 300,000.00
Surplus	130,000.00
Undivided Profits	39,048.70
Depositors Guarantee Fund	24,366.86
Bills Payable	None
Deposits	6,277,319.30
	$6,770,734.86

All Deposits in This Bank Are Protected by the Depositors' Guarantee Fund of the State of Nebraska

WE INVITE YOUR BUSINESS

THE LARGEST STATE BANK IN NEBRASKA

Safe Deposit Boxes $5.00 Per Year and Up

DIRECTORS

Albert L. Schantz — John S. McGurk
Oscar Keeling — D. C. Eldredge
Frank H. Gaines

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(g) Other newspaper advertising in a typical county and the plight of its claimant depositors.

The undisputed situation in Dodge county, Nebraska, and surrounding territory affords a striking and unanswerable illustration of the main points that we are attempting to make by this brief. It is fairly typical of the conditions throughout Nebraska.

Dodge county had fourteen state banks, the outstanding one of course being the large and prosperous Fremont State Bank. In 1926, they all joined in THE OMAHA BEE advertising campaign. For many years past, under the leadership of the Fremont State Bank, they have advertised the Guarantee Fund and induced and procured deposits by the use of the means in this brief set forth. This advertising continued up until in the year 1928.

They participated in the advertising campaign in 1926 carried on in THE OMAHA BEE; they published in facsimile in THE FREMONT DAILY TRIBUNE in the latter part of 1926 ten of the page advertisements published in the OMAHA BEE. *At the bottom of each advertisement were the names of all the Dodge county state banks.*

They induced and persuaded deposits on their joint representations carried on over a long term of years.

Of the fourteen banks, four have now failed. After the exhaustion of all the assets claims against the Guarantee Fund will approximate $278,000 (Ex. 35, p. 589, Orig. Rec., omitted in printing).

The arguments used in the advertising campaign carried on are persuasive; we feel that while it burdens

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this brief, it is of overwhelming importance that this court read it as indicating the means used to persuade and induce depositors, not only in Dodge county, but in other counties of the state. We have selected typical advertisements through the years to reproduce in this brief, commencing in 1923 and ending in 1928. They were published in THE FREMONT DAILY TRIBUNE which has a circulation of approximately 7,000 extending over Fremont, Dodge county, and the surrounding counties (Manager Hammond, Rec., p. 338). Mr. Hammond stated that he knew there was an average of four adult readers for each copy of the circulation (Rec., p. 350, Q. 2040).

The Fremont State Bank published February 2, 1923, an advertisement occupying three columns wide, full length of the page, headed "The Community Service" at the top, and "Fremont State Bank" at the bottom, and among other things stated (Rec., p. 340):

> "If you put your money in our savings department you will not only receive compound interest but *also have absolute insurance. One thousand state banks are assessed by law for the purpose of protecting your deposits.* You cannot lose a dollar in this bank by fire, flood, theft or failure.
>
> "Let us make this community prosper by placing our surplus funds in our own banks for the use of our own people. We do not expect to get all of the people's money into the Fremont State Bank, although we have paid $11,500 the last year for the purpose of insuring our depositors against possible loss. This is the measure of safety offered our depositors for the sake of inducing them to patronize home industry where safety and profits are greatest by leaving their money here for the use of the people who are making the community a fit place in which to live."

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Later in the same year was an advertisement headed "Safety and Service" wherein the bank extolled its size and strength, and among other things stated (Rec., p. 342):

> "Notwithstanding this unparalleled solvency and ability to meet all demands, we have the added safety of having our depositors protected by the Guarantee Fund of the state of Nebraska. Approximately a thousand state banks are taxed not more than one and one-tenth per cent a year if need be on their deposits of 220 millions, for the purpose of paying depositors in full in the event of failure.
>
> "This Guarantee Fund now consists of more than two millions in cash and eight millions in assets, making a total of resources belonging to the Guarantee Fund of ten million dollars, available only for the security of depositors.
>
> "This vast sum is sufficient to pay all the depositors of fifty ordinary banks without collecting an additional dollar under the power of the state to levy a one and one-tenth per cent tax on deposits against the banks each year. *It is the largest insurance fund available to pay depositors anywhere and available for state banks only. National banks are not protected by this fund.*" (Italics are ours.)

In the same year (Rec., p. 344) there was the following advertisement two columns wide, headed "Safety First", and signed at the bottom "Fremont State Bank":

> "Today the bankers in Nebraska are meeting in the various districts to choose a body of men from which the governor will select the personnel of the Nebraska Guarantee Fund Commission. This action will conclude the preliminary steps in perfecting the Guarantee of Deposits Law which has rendered the people of Nebraska a tremendous service during the recent money stringency when business failures were re-

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ported daily by the hundreds and banks failed here and there, our depositors were undisturbed *because their money in our state banks was insured and could not be lost.* The test of a great disaster proved it.

"In brief, a practical, workable, mutual insurance company has been perfected that absolutely protects the money of the people when placed in the state banks of Nebraska. It builds confidence, relieves the depositor and his family from worry over the safety of the nest egg they are adding to, bit by bit, for the building of a home of their own, and it will encourage the wary to bring their money out of hiding and put it to work. It develops faith in industry and inspires the farmer and business man to bigger enterprises. It will maintain prosperity.

"Everybody appreciates the advantage of insurance in other fields as a safeguard of the people's wealth but never before has the public in any state, through a safe, sane and practical law tested by years of hard knocks, been afforded the advantage of safe insurance where their money is concerned.

"We are proud to be a part of this beneficial plan and are glad that we can offer the people of Fremont through our bank the protection the Nebraska Guarantee Fund affords.

"Both our savings and checking accounts are included under this act, and their safety is given to you as a part of our service.

"Remember that every dollar you deposit in this bank has in effect a dollar's worth of insurance backed by practically a thousand other banks. Nebraska has a wonderful banking system. It has no equal in all the states. It is better today than ever after a two-year deflation period when financial disaster overtook

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large numbers of people, but not a single dollar was lost by a depositor in a state bank.

"FREMONT STATE BANK

"Deposits protected by the Depositors Guarantee Fund of the State of Nebraska.
"DAN V. STEPHENS, *President.*"

(Names of other officers also attached.)
(Italics are ours.)

Other advertisements were identified in the immediately succeeding pages of the record.

On December 31, 1923, an advertisement four columns wide and the full length of the page appeared, headed with the words: "Rest in Security", and signed by The Fremont State Bank by Dan V. Stephens, president, in which the following paragraph appeared (Rec., p. 347):

> "The second protection is that offered by the Guarantee Fund of the State of Nebraska to the depositors of this bank. The state of Nebraska collects assessments from all of the state banks of Nebraska, which assessment is used to pay depositors, who lose their deposits through state bank failures. In the thirteen years that this law has been in effect, not a single depositor in a single bank in the state of Nebraska has lost one penny of the money he had on deposit in a bank that failed. *Therefore, this insurance, carried by this bank at a very great expense, protects absolutely every dollar that is carried on deposit in this bank from loss. No greater protection for depositors can be offered than this.*" (Italics are ours.)

On Saturday, November 7, 1925, four-fifths of a page of THE FREMONT TRIBUNE contained in large letters the questionnaire herein elsewhere set forth headed with a heading across the page "The Nebraska Guarantee Law

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for Insuring Deposits in Banks" and signed by Fremont State Bank, by Dan V. Stephens, president (Rec., p. 348). This appears as Exhibit "O," in Orig. Rec. at page 471, Vol. III, and is omitted in printing).

Advertisements of similar kind and character, as shown elsewhere in the Record, continued for many years, and until in 1928, the year of the institution of suit.

The fourteen banks of Dodge county, from September 11, 1926, to November 3, 1926, ran the duplicates of THE BEE advertisements in THE FREMONT DAILY TRIBUNE, with the names of the Dodge county banks attached (Exhibits N-1 to N-10 inclusive, p. 441, Vol. III, Orig. Rec.). These advertisements included:

N-1. "Building Business on a Certainty"

N-2. "Surely, That Check is Drawn on a Nebraska State Bank"

N-3. "A Message of Strength"

N-4. "95,000 Years of Labor"

N-5. "No Mattress Banks in Nebraska"

N-6. "Giving Up Profits to Support a Principle"

N-7. "All Work Together in Nebraska"

N-8. "Strong Banks Make Strong States"

N-9. "In Nebraska the Guarantee Works Both Ways"

N-10. "It Has Been a Wonderful Story".

Mr. Stephens prepared the questionnaire, Exhibit D, about November 7, 1925, and the Fremont State Bank circulated 5,000 copies of it; he prepared the circular

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Exhibit F (p. 406, vol. III, Orig. Rec., also Ex. 30, p. 268, vol. II, Orig. Rec.) in 1926, entitled "The Bank Guarantee Law Challenged and a Red-Hot Answer by a Nebraska Banker" (Rec., p. 317). In 1923 Mr. Stephens was a member of the legislative committee of the State Bankers Association which presented the Guarantee Fund Commission Act to the legislature and secured the passage of the bill with but minor amendments (Rec., p. 318, Qs. 1772-7).

At pages 445 and 449, vol. III, Orig. Rec., is facsimile of two of the ten-page advertisements run by the Dodge county banks in THE FREMONT EVENING TRIBUNE, generally similar in size and appearance to the entire ten run as a part of THE BEE series. As Ex. P, p. 474, Vol. III, and Ex. 50, p. 727, Vol. IV, Orig. Rec., are two letters by Dan V. Stephens, published January, 1928, *in full pages* of THE FREMONT EVENING TRIBUNE, which state the condition of the depositors in the banks graphically; they were published in the same year of the filing of this case and at a time when Mr. Stephens knew all the facts as to the Guarantee Fund and the respective obligations of the banks to the depositors as well as he did when in the same year he caused this suit to be filed. They are quoted from hereinafter.

(h) Resolution of Meeting of State Bankers.

In August, 1926, at a meeting of bankers in Omaha at which representatives were present from each county the following resolution was adopted and received publicity (Rec., p. 416, Q. 2492):

> "We re-affirm our strict adherence to the Guarantee Fund Law, under which no depositor in any

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Nebraska bank has suffered loss. We are opposed to any change in the law which will in any wise tend to obstruct, hinder or delay any depositor in Nebraska."

(i) Pamphlet "The Bank Guarantee Law Challenged and a Red Hot Answer by a Nebraska Banker."

One of the most effective pamphlets issued and circulated was one entitled "The Bank Guarantee Law Challenged and Red Hot Answer by Nebraska Banker" (Ex. 30 of Ex. 13, p. 268, Vol. II, and Ex. F, p. 406, Vol. III, Orig. Rec., omitted from the printed record).

Among other banks the State Bank of Omaha circulated the pamphlet. There were about 2,000 of these distributed by it over the customers' counters to customers with a printed endorsement on the back "With the Compliments of the State Bank of Omaha, the Largest State Bank in Nebraska" (Rec., p. 228, Qs. 1170-6).

This pamphlet was an answer to an article by one R. B. Clark of North Carolina appearing in the Bankers Association Journal. This article was printed and circulated in April, 1925. It is so typical of the propaganda and representation of the state bankers as testified to and as shown by other exhibits herein that we quote some typical paragraphs from its eight pages.

Taking up Mr. Clark's statements, he was answered in the pamphlet:

"FOURTH, his statement, 'that to compare guarantee of deposit laws with legitimate insurance is without reason and absurd,' is not in harmony with

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the thousands of mutual insurance organizations, that have been conducted successfully throughout the country and that are now carrying uncounted millions of risk on the property of the people and paying their losses promptly. *The state banks of Nebraska are bound together into a mutual insurance company carrying their own risks and paying their own losses.* There is nothing about this that is unreasonable or absurd. It is Mr. Clark's position that is absurd." (Italics are ours.)

"FIFTH, his statement, 'that it jeopardizes the solvency of all banks and the safety of all depositors for the theoretical safety of a few,' is not supported by the facts because the Guarantee Law has not assessed the banks of Nebraska at a higher rate even in the peak of our losses during the period following the war than the ordinary bonding companies charge for the protection of special favored depositors in these banks. Mr. Clark's idea seems to be that it is absurd to insure the deposits of an ordinary citizen but perfectly proper to insure the deposits through a bonding company of favored depositors, who will not trust banks without this insurance. Prior to the war and during the long period of peace and prosperity the assessments of the banks of Nebraska amounted to one-fifth of one per cent on their deposits. Bonding companies charge ordinarily one-half of one per cent for the same protection and banks other than state banks in Nebraska are constantly insuring their special depositors, such as insurance companies, cities, counties and states while at the same time making hypocritical speeches against guaranteeing the deposits of the ordinary citizen.

"SEVENTH, * * * * In Nebraska, instead of there being applications for state banks to nationalize, there have been scores of applications from national banks to take out state charters during the last two years and so far as we have any record, there has been only one application for a national charter made

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since the deflation period began and we have every reason to believe that other reasons than the Guarantee Law caused the change.

"EIGHTH, his statement, 'that guarantee schemes always have been, are and always will be impotent, futile and disastrous,' is disproven by the experience of tens of thousands of mutual insurance companies and by Nebraska's own experience as a state with a guarantee of bank deposits that has been successfully administered and is entirely satisfactory to the state banks of Nebraska, as proven by the fact that they have not taken out national charters and that there are no applications pending, that I have ever heard of, or of one of them desiring to do so, excepting as above indicated.

"TENTH, his statement, 'that well paid, intelligent, competent supervision will afford all the guarantee the depositing public is entitled to, as compared with all other human affairs,' is not supported by any facts at all, because all other human affairs are supported by insurance of every kind and character and it is only the depositors in banks that are not, generally speaking, insured. Good bankers everywhere, refuse to carry the risks of men who will not support their business solvency by insurance. It is the rankest inconsistency to apply the principle of insurance to everything that a banker does for himself and in the same breath refuse to protect the depositors who do business with him. It is not only inconsistent but it smacks of unfairness and dishonesty.

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15. Growth of banks and benefits received from 1911 to 1928 (to time of suit).

The Department of Trade and Commerce (Banking Department) produced on request of defendants and Intervener, Stebbins, in compiled form a printed and statistical abstract of data as to all the banks from 1911 to 1928, a

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period of eighteen years. This showed the growth of the banks through the period and is reproduced on the next page, being Exhibit 10, Rec., p. 422.

This abstract shows that the deposits in state banks increased three and one-half times, from approximately seventy-four million dollars in 1911 to two hundred fifty-two million dollars at the end of 1928. This amount at the end of 1928 did not take into account thirteen million dollars then on deposit in the Commission-operated banks which would increase the total accordingly. While a slight diminution of deposits is shown by this statement commencing with December 31, 1926, it is explained by the separating of the deposits in the Commission-operated banks. With these added there has been, except for two years, a consistent increase for the eighteen years operation of the Guarantee Fund Law.

The 669 banks in December, 1911 (effective beginning of Guarantee Law), had surplus and undivided profits of $4,306,768. The 726 banks on December 31, 1928, had surplus and undivided profits of $8,975,755, having doubled. This increase was after paying all assessments to the Guarantee Fund and dividends to stockholders and charging-off against the earnings the shrinkage in value of assets during the deflation period.

There was an increase in the number of banks and then a decrease but neither the increase nor the decrease operated to affect the steady growth of deposits through the period, with the exceptions stated. The reduction in number of banks was partly attributable to seventy-one consolidations that have taken place (Rec., p. 405, Q. 2422).

(a) **Tabular departmental compilation by years for the period, Exhibit 10, as follows:**

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STATE OF NEBRASKA

DEPARTMENT OF TRADE AND COMMERCE

BUREAU OF BANKING

LINCOLN

Report of Last Call Reports for the Years 1911 to 1928, Inclusive

Date	No. of Banks	Capital Stock	Surplus	Net Undivided Profits	Total Deposits	Other Real Estate Owned	Total Dividends paid to Stockholders	Total Assessments paid by Stockholders	Total losses charged off annually from sources other than assessments on Stockholders
Dec. 5 1911	669	$12,827,240.00	$2,582,299.39	$1,724,469.27	$73,886,047.05	$211,001.37	Figures below were compiled from Special Report on 618 Banks		
Nov. 26 1912	695	$13,833,500.00	$2,950,844.20	$1,818,039.69	$82,454,163.90	$286,747.70	.....	.....	.....
Oct. 31 1913	695	$14,455,100.00	$3,295,242.03	$1,729,459.69	$91,738,896.74	$352,434.21	.....	.....	.....
Oct. 31 1914	719	$15,798,100.00	$3,807,242.84	$1,857,808.81	$93,490,843.95	$428,572.39	.....	.....	.....
Dec. 9 1915	762	$17,118,600.00	$4,170,852.50	$2,234,466.71	$114,470,498.08	$534,475.15	.....	.....	.....
Nov. 17 1916	809	$18,461,300.00	$4,713,018.46	$2,628,597.09	$165,507,506.95	$580,817.25	.....	.....	.....
Nov. 20 1917	842	$21,056,300.00	$5,383,109.58	$2,925,914.11	$223,469,644.05	$622,791.64	.....	.....	.....
Nov. 1 1918	928	$22,210,800.00	$6,266,807.29	$2,924,063.97	$240,264,131.65	$606,585.88	.....	.....	.....
Nov. 15 1919	937	$24,881,800.00	$7,400,255.30	$3,797,555.21	$276,429,320.93	$641,450.88	.....	.....	.....
Nov. 13 1920	1012	$26,349,700.00	$8,174,341.33	$3,742,631.54	$256,839,662.43	$818,514.10	$1,545,533.48	$6,044.01	$366,109.35
Dec. 31 1921	1010	$25,699,800.00	$7,954,163.56	$1,051,998.12	$204,886,633.74	$1,541,575.78	$968,586.70	$175,961.24	$719,205.29
Dec. 30 1922	986	$24,754,700.00	$7,449,463.40	$1,040,086.91	$238,542,626.29	$3,514,291.12	$680,064.90	$258,378.24	$852,400.02
Dec. 31 1923	938	$24,300,700.00	$7,070,117.31	$1,512,383.19	$242,965,383.55	$6,217,645.03	$591,140.06	$225,435.75	$901,517.17
Dec. 31 1924	928	$24,108,700.00	$7,062,881.44	$1,643,161.24	$271,477,988.34	$9,101,185.36	$738,743.31	$220,056.51	$913,874.84
Dec. 31 1925	872	$22,482,700.00	$6,736,397.92	$1,154,274.37	$272,367,328.23	$10,794,120.19	$877,260.41	$404,738.29	$986,751.39
Dec. 31 1926	839	$21,866,500.00	$6,586,830.84	$1,911,250.03	$265,430,844.71	$11,588,295.72	$857,416.08	$164,843.27	$1,093,116.13
Dec. 31 1927	793	$20,648,500.00	$6,327,996.66	$2,077,474.40	$261,311,586.83	$11,494,098.79	$866,470.43	$196,458.12	$1,356,931.72
Dec. 31 1928	726	$19,001,000.00	$6,075,741.87	$2,900,014.22	$252,375,577.95	$9,872,647.21	$629,556.30	$454,766.72	$1,158,042.49
						Totals.....	$7,754,771.67	$2,106,682.15	$8,347,948.40

The banks listed below for 1925, 1926 and 1927 were operated by the Guarantee Fund Commission as going concerns and are not included in figures above.

				†Profit Account Overdrawn		
Dec. 31 1925	31	$855,000.00	$149,605.85	$588,783.68	$9,158,019.28	$1,424,474.21
Dec. 31 1926	44	$1,182,700.00	$178,698.60	$1,402,849.12	$10,086,352.49	$2,087,597.89
Dec. 31 1927	62	$1,615,700.00	$216,942.01	$1,673,699.17	$13,150,075.19	$2,366,971.50

†Represents losses and expenses paid in excess of earnings.

(Ex. 10, P581, U2. Bof Ev.)

(U. S. Sup. Court Rec. P.422)

Statistics Relating to Depositors' Guarantee Fund

Total levies paid to Guarantee Fund	Total Refunds to Guarantee Fund	Total Drafts against Guarantee Fund
$176,863.36	.....	.....
$406,858.07	.....	.....
$271,806.68	.....	.....
$140,647.34	.....	$54,526.17
$144,684.92	.....	.....
$421,471.81	.....	$79,051.81
$219,904.49	.....	.....
$318,028.79	$23,715.55	.....
$802,476.74	.....	.....
$639,243.93	.....	$737,709.25
$2,317,807.70	$35,550.09	$2,697,222.35
$1,971,579.92	$370,927.42	$2,172,765.40
$2,046,320.39	$182,658.71	$2,061,961.62
$1,004,860.01	$193,286.78	$1,010,025.65
$1,616,329.85	$533,700.11	$3,586,093.35
$1,672,338.75	$427,282.82	$2,625,757.27
$1,653,206.76	$157,219.92	$2,270,436.26
$885,412.60	$257,716.76	$1,256,909.74
$16,709,842.11	$2,182,058.16	$18,552,458.87

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(b) Increased Deposits.—$100,000,000 of deposits carrying annual earnings of $2,000,000 to $4,000,000 are attributed solely to the Guarantee Fund.

While the Guarantee Fund is by its terms primarily *for the protection of depositors in state banks* specific and large benefits to the banks were disclosed by the evidence aside from the general benefits to the public. It was authoritatively testified to and undisputed that $100,000,000 of deposits, carrying an annual earning of $2,000,000 to $4,000,000 to the banks, were solely attributable to the Guarantee Fund.

Mr. George W. Woods, then a banker of Lincoln and a wholly disinterested and highly qualified witness, testified in detail and convincingly as to the large benefit to the banks by way of increased deposits and otherwise; and later testified in detail and from his intimate knowledge as to the causes of failures and heavy losses and charge-offs to the banks. This latter testimony will be quoted later, but at this point it is well that we refer to the qualifications of Mr. Woods before here and also later quoting him.

Mr. Woods had lived in Lincoln thirty years; had been an officer of both state and national banks; was secretary of the Lincoln Clearing House Association and had been for twelve years (Rec., p. 281, Qs. 1459-61); at the time of the trial was the cashier of the Lincoln State National Bank and Trust Company; prior to that he had been cashier of the Lincoln State Bank, which bank had on deposit money of the various country banks, and was their city correspondent; he was familiar with banking conditions generally in Nebraska (Rec., p. 241, Q. 1239). From 1901 to 1917 he was a representative of R. G. Dun

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& Co. (Rec., pp. 238-9, Qs. 1225-7). Being city correspondent for the country banks meant that the country banks carried a portion of their reserve with his bank in the form of deposits and from time to time the banks would borrow money from it. Such connection had brought him in very close and confidential connection with these correspondent banks and he would call on them and go through their note cases and familiarize himself with their profits and losses, charge-offs, expenses, etc. (Rec., p. 239, Qs. 1228-30).

He had been on the legislative committee of the Nebraska Bankers' Association for ten years, and had served on the council of the Association which was equivalent to the board of directors and which determined the general policies of the State Association (Rec., p. 239, Qs. 1231 to 1235). As a member of the legislative committee for the ten years preceding, he with the other members had drawn the bills enacted into laws which provided for the present Guarantee Fund Commission, the reduction of the maximum assessments on state banks from 1.1 per cent per annum to .6 per cent per annum, the licensing of state bankers and discretionary powers in the banking department in granting charters (Rec., p. 240, Q. 1237).

As to his service on the Agricultural Loan Association he further testified that as a member of the Association he dealt with failed banks in practically the same manner as the Guarantee Fund dealt with them, issuing receiver's certificates which were endorsed and guaranteed by the Association and that in fact the only difference between what the Association did and what has been done since by the Guarantee Fund Commission was that under the latter the proceedings were legalized by law, while the former was more or less voluntary (Rec., p. 240, Q. 1238).

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Testifying as to growth of deposits and earnings Mr. Woods said (Rec., p. 247):

Q. 1265. "Now, Mr. Woods, you state that the Bank Guarantee Law had an influence on deposits; in your opinion what effect, if any, has the Guarantee Fund Law and its operation had on the amount of money deposited in state banks? From 1910 up to July 1, 1928?"

A. "It is no exaggeration to say it has accounted for at least one hundred million dollars deposited in the state banks of Nebraska which would not otherwise have been made except for the Bank Guarantee Law. I do not think there is any exaggeration in that statement at all."

Q. 1312. "Now, Mr. Woods, when you stated that in your opinion the Guarantee Law had added a hundred millions to deposits in state banks, did you mean that otherwise those deposits would have been in national banks or in building and loan companies?"

A. "Yes, and other investments; they would have been either in national banks, or building and loans or stocks."

And in answer to question (Q. 1318, p. 257, Rec.), he said:

* * * * "I have made studies of the increase of deposits in state banks, perfectly marvelous growth, in places where there were splendid state banks, Hastings for example, and I have studied the general trend of the national banks in denationalizing, in going over to the state banks where of course they could benefit by that, and I have also made studies of the individual deposits in state banks in Nebraska where from first hand knowledge I know that excessively large deposits were made in lieu of other investments because more confidence was felt; they were

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considered just as good as government bonds and paid more interest. This is taking all the comparisons I have made up to a year ago, I couldn't say the exact date because this has been true generally under the law."

He testified further (Rec., pp. 276-7):

Q. 1434. "Would you be able to make an estimate as to the amount of profit that has accrued to the banks from such additional deposits which you estimated at one hundred millions of dollars over the period?"

A. "I have made no calculation; that runs into very large figures; if my assumption is correct it runs into very large figures, the total. I would have to do quite a little figuring. I couldn't answer that off hand, what that amounts to."

Q. 1438. "Under normal conditions before the inflation period and under the operation of the Guarantee Law and taking normal banks and then basing it on capital stock, plus surplus what would you say would be the average that such banks made on their deposits?"

A. "On their deposits?"

A. "I would say from 2 per cent to 4 per cent on the deposits."

Q. 143. "You were speaking annually?"

A. "Yes, annually. Some made more than 4 per cent but that would be conservative for the average."

Mr. Woods' testimony that state banks had gained 100 million dollars in deposits on account of the Guarantee Law and the average they made on such deposits was not disputed, and the cross-examination of him emphasized the sound basis for his statements. Among other things, he noted the rapid growth in the number of state banks, the

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conversion of national banks into state banks, and the steady increase in deposits of state banks (Rec., p. 282, Q. 1471).

Testifying as to the competition for deposits Mr. Woods said (Rec., p. 247):

> Q. 1266. "Now what effect, within your knowledge, has the Guarantee Fund Law had on the competition for deposits between national banks and state banks from 1910 to July 1, 1928?"
>
> Q. 1267. "Just generally?"
>
> A. "I know from first hand knowledge that depositors who have changed their location to other places and made inquiry with regard to banks have met the banker with this question, 'Are deposits in this bank guaranteed by the state of Nebraska?' and if they were told 'No' that particular bank didn't get the deposit. That has been commonplace in the last six or seven years all over Nebraska."

Mr. Woods added (Rec., p. 282, Q. 1472):

> " * * * * in the larger cities the national banks continued to grow and on the whole made a very satisfactory growth right along, notwithstanding the Guarantee Fund Law. In the smaller towns, towns below the size of Fremont, Grand Island, Hastings, Beatrice and towns of that size, for the most part the state banks had a very material advantage and have made the larger growth in deposits."

(c) Public funds were demanded by the banks and received for deposit by every state bank in Nebraska without bond on the "Security of the Guarantee Fund" under an option in the law to do this or to give bond and avoid assessment on such deposit of public money.

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There are two million dollars of state, county, school district, township, city, village and other public funds in failed state banks (Rec., p. 426, Ex. 36).

The Governor on behalf of the State and its municipal subdivisions and the State Treasurer in his own behalf each pleaded the rights of the State and its governmental subdivisions based on these public deposits as against the Guarantee Fund and plaintiff banks.

The Guarantee Fund law gives the State Banks the option to demand public funds as "secured by it" without giving bonds, or in lieu thereof, to "otherwise secure public deposits" and such deposits would thereupon be exempt from levies for the Guarantee Fund (Secs. 8027, 8025, Compiled Statutes, Nebr. 1922). The state banks of Nebraska for seventeen years have elected to demand and receive the public funds under the "security" of the Guarantee Fund instead of giving bonds.

In 1911, concurrently with the decision of this court holding the Nebraska Guarantee Fund law valid, the Legislature of Nebraska amended the law (Session Laws 1911, p. 84) by adding the following *proviso* (Comp. Stat. of Nebr. 1922, Section 8027):

> "Provided further, that no bank which has complied in full with all of the provisions of this act shall be required to give any further security or bond for the purpose of becoming a depository for any public funds, but depositary funds shall be secured *in the same manner that private funds are secured.*" (Italics are ours.)

Another section of the law (Section 8025, Comp. Stat. of 1922), exempted "public money otherwise secured" from

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assessment. So a bank thus had the option to demand deposits "under the security of the Guarantee Fund Act" or "otherwise secure them."

Every state bank in Nebraska had public deposits at the time of the institution of this suit save one and it had but recently had them (Rec., p. 456, Qs. 2738-4). Witness Bliss, Secretary of the Banking Department, testified that prior to the institution of this suit and notice of the fact that it was to be instituted, the banks of the state were not giving bonds for public deposits so far as his information went and the records of the department disclosed (Rec., p. 456, Q. 2742). Isolated instances of banks recently giving bonds appeared; but no bank was cited that had not availed itself of the right to demand public deposits on the security of the Guarantee Fund.

The Abie State Bank had county deposits continuously from 1912 down to July, 1928, without giving any bonds therefor (Rec., p. 184, Qs. 838-9). About the time of the commencement of this suit it had given bond (Rec., p. 186, Q. 859).

After public notice that this suit was to be filed the State Treasurer commenced to demand bonds (State Treasurer Stebbins', Supp. Rec., p. 57); as did some other officials; though under the Guarantee Fund Law such bonds could not be demanded.

Witness Shantz's State Bank of Omaha had state, city and county money, and for fifteen years gave no bond for any public moneys (Rec., p. 226, Q. 1156). Witness Stephens' Fremont State Bank had some public funds for years without giving depository bonds and had been giving security for about a year before the trial (Rec., p. 313, Qs. 1726-32).

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Willis M. Stebbins, state treasurer and intervener, has occupied that office since January, 1927; all his deposits had been made on the faith of the Guarantee Fund protection. (Mr. Stebbins, Supp. Rec., p. 64). He had adjudicated claims against the Guaranty Fund for $104,561 (Orig. Rec., p. 702, omitted in printing).

The 726 banks in Nebraska had state treasurer deposits of $984,399.59, county deposits of $10,230,619.10, and city deposits of $2,739,695.96, making a total of $13,954,514.55 (Exhibit 38, Rec., p. 437; reproduced in this brief). These figures do not include other public deposits.

(d) The surety company rates to national and state banks on depository bonds (thus avoided by state banks) were higher than the Guarantee Fund assessments.

The banks demanding and receiving public funds for deposit without giving bonds paid less to the Guarantee Fund with reference to said deposits, than they would have had to pay for bonding premiums to surety companies, had they given bond. For at least six years prior to the trial the surety company rate on bank bonds for public deposits had been unchanged and had been uniform over the state and varied from one-half of one per cent to one per cent on deposits, depending on the capital of the bank. The average annual rate was seven-tenths of one per cent or $7.10 per thousand dollars of deposits as against the maximum aggregate general and special Guarantee Fund assessments of six-tenths of one per cent or $6 per thousand dollars of deposits. The Surety Company rate on national banks was the same as on state banks. (Rec., pp. 496-7.)

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The national banks thus pay an average of $7.10 a thousand to a bonding company to insure public funds. They also pay interest as do the state banks. As between paying $7.10 a thousand to a bonding company and $6.00 a thousand to a Guarantee Fund on public funds, the balance is in favor of the Guarantee Fund aside from all other benefits attached to the Guarantee Fund. The Guarantee Fund, incidentally, puts all depositors, both public and private, on the same plane with public deposits in the matter of security; and at less percentage of cost than surety bond protection.

We submit, that if the banks can pay $7.10 per thousand dollars of deposits to bonding companies for bonds insuring public deposits, on all of which deposits they are also paying interest, it is reasonable to pay $6.00 a thousand dollars to a Guarantee Fund to insure and put all depositors on the same basis when as to a substantial share of such private depositors they pay no interest.

The statute exempting state banks from giving bonds for public deposits provides that such depository funds shall be thus "secured in the same manner that private funds are secured" (Sec. 8027, Comp. St., 1922). That is, by the Guarantee Fund.

The "security of the Guarantee Fund" was the obligation of the going banks to contribute a maximum of $6.00 per thousand of deposits annually to a fund to pay public deposits and others in those of their number that failed. Such was the contemplated and actual operation of the law; otherwise there would be no security; there was no necessity for security except as applied to a bank that failed. The banks state and reiterate that the Depos-

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itors Guarantee Fund is for the protection of deposits in going banks, a most fallacious statement. There could be no matured liability ever except to those depositors in banks that fail.

These public deposits were made in the state banks of Nebraska under the foregoing law and under all the representations in this brief set forth and while the law was admittedly constitutional and valid and operative. Appellants now assert no equitable or appealing reason why a court of equity should cancel their obligation to contribute $6 per thousand dollars of deposits to the Guarantee Fund to apply on the claims arising as aforesaid.

(e) State banks under the Guarantee Law are given twice the loan limit available to national banks; state banks carry their reserves in other banks at interest while national banks are required to carry funds in federal reserve banks without interest; under the law existing state banks have a practical monopoly in towns they serve; each of these facts adds to the value of a state charter.

The loan limit of national banks to one customer is 10 per cent of the bank's capital as provided by federal law (Sec. 84, Ch. 2, Title 12, U. S. C. A.). They are required to carry 3% of time deposits and 7% of demand deposits in Federal Reserve Banks without interest. (Secs. 461, 462, Ch. 3, Title 12, U. S. C. A.).

On the other hand under the Nebraska Guarantee Fund Act the loan limit of state banks to one customer is 20 per cent of the bank's capital (Session Laws of Nebraska,

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1923, Sec. 45, Ch. 191). Thus a state bank can loan twice as much to one customer as a national bank with the same capital, enabling a state bank to do business on less capital investment.

There is no requirement of a state bank to be a member of or carry any balance in the Federal Reserve Banks so the state banks carry their reserve at interest in Reserve cities.

Again under existing law, a state bank charter amounts to a state bank monopoly in almost every community in view of statutory power vested in the banking department to deny charters except upon proof of public necessity (Sec. 7990, Comp. St., 1922).

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16. The cause of failures and heavy losses in going banks. From 1920 to 1927 there were a large number of bank failures and losses to going banks through gradual liquidation by banks of previously acquired loans and after shrinkage of values.

17. By the maximum exploitation and featuring of the Guarantee Fund during this liquidation period there were large benefits to the banks, the banking situation was stabilized, and many of the present strongest banks were able to survive.

The banks as a whole through the entire operative period of the Guarantee Fund Law have each year made large earnings. However, the net earnings during recent years have been materially affected by losses developing because of loans made during the period of high prices prior to 1920, and the depreciation of securities following.

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These loans were in a greater or less degree in all banks. The losses as arising through the years following have been absorbed by earnings, generally in this brief designated as "charge-offs". The banks have been applying their earnings to the extent necessary to liquidate these developing losses, which to that extent reduced their net earnings and dividends. The stabilizing influence of the Guarantee Fund made possible this gradual absorption.

This absorption was retarded to some extent in 1925 and 1926 by a partial state crop failure in 1925 and a similar condition over a large part of southern Nebraska in 1926 (Rec., p. 653, Qs. 4239-40).

Mr. Woods, whose high qualifications have been hereinbefore referred to, and a disinterested witness, graphically outlined the conditions producing the losses and the influence of the Guarantee Fund in permitting their absorption.

Mr. Woods, referring to the banking conditions in Nebraska from 1910 down to July 1, 1928, testified (Rec. p. 241, Q. 1240 *et seq.*):

That from his knowledge and experience he was able to state the general banking conditions from 1910 down to July 1, 1928; that he knew the cause of bank failures generally, the amount, the general extent, and the cause of charge-offs by banks during that period; that he knew the financial condition of the banks of the state during the period and the reasons for the conditions that existed; that during the period from 1910 to 1920, prices increased and all banks made money; that loans were made on equities and on basis of character and the giving of banking credit generally was ex-

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cessive; that in 1920 livestock and grain prices dropped which very quickly had an effect on land prices; that as to losses on real estate mortgages the same did not become evident, or rather acute, until later; that in the year 1919 many mortgages were written to secure loans for five or more years and that as to them the foreclosures began from 1924 to 1927 as the mortgages became due and delinquent; that the foreclosures were much larger in number in those years than in the previous years.

Van Peterson, secretary of the Guarantee Fund Commission, testified (Rec., p. 107, Q. 213):

That in his judgment perhaps 75 per cent of the banks taken over by the Department incurred their losses during the years preceding 1923 and that said losses developed during the ensuing years.

On cross-examination, Mr. Schantz stated that from 1920 to 1928 was an abnormal period so far as banks and bank losses were concerned. He refused to state how much he would add to the percentage of losses on account of deflation (Rec., p. 623, Qs. 4048-51).

The foregoing evidence of the origin in the period of high prices of the loans that through the past seven or eight years have gradually developed into losses was not disputed and is not controverted in the record.

The Nebraska Supreme Court in its opinion adopted the uncontradicted evidence of Mr. Woods; we quote from the opinion (Rec., p. 62):

> "In respect of the many failures of banks about this time, the cashier of a Lincoln state bank testified that,

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in his opinion, the failure of nearly 300 Nebraska state banks was caused largely by the general economic condition existing prior to 1928; that he did not think the bank assessments from 1923 to July 1, 1928, were a contributing factor in the failure of banks during that period, and that, in his opinion, the guaranty fund law and the assessments collected thereunder had a steadying influence on the deposits of every state bank."

(a) The stabilizing influence of the Guarantee Fund through the period of readjustment.

The Bank Guarantee Fund Law has been of inestimable stabilizing benefit to the existing banks through the last eight years in preventing runs and withdrawal of funds and by instilling confidence, permitting a large number of the existing banks to survive and all of the existing banks to hugely profit in improved financial condition. This testimony was not controverted upon the trial and we need not go into it in detail. The Nebraska Supreme Court recognized this stablizing influence in the above quotations from its opinion.

Mr. Bliss, head of the Department of Trade and Commerce, testified in this connection (Rec., p. 411):

Q. 2455. * * * * "Now, Mr. Bliss, there have been some failures in Nebraska banks that have been testified to. Now, what effect if any, has the existence of the Guarantee Fund Law had upon the going banks in the particular town or location where these failures have occurred from time to time, that is with respect to the deposits of going banks?"

A. "It has been common knowledge that whenever a bank fails that the going bank has not suffered; right across the street from the bank that failed the going bank has gone right along."

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Q. 2457. "Is there any general reason for that aside from, perhaps, the strength of the going bank? Has the Guarantee Fund had any application in that respect?"

A. "It certainly has."

Q. 2458. "What has been that effect, Mr. Bliss?"

A. "It has given those depositors and customers in the town where the bank failed—it has given them confidence in the banking situation that they would be taken care of and has been relied upon."

Q. 2459. "And what would you say, Mr. Bliss, as to the conditions that prevailed from 1911 down until immediately prior to the filing of this suit, as to the element of confidence in banks generally, incident to this Guarantee Fund Law?"

A. "It has been very general during that period."

Q. 2460. "In other words, the Guarantee Fund Law has instilled general confidence in the people as to the status of their banks?"

A. "Yes."

Mr. Woods testified (Rec., p. 275, Qs. 1430-33):

That in his opinion this confidence or belief in the Guarantee Fund had been a stabilizing factor in preventing runs on state banks and also had prevented withdrawal of deposits.

He further testified (Rec., p. 284, Qs. 1481-3):

That the operation of the Guarantee Fund Law from 1923 up to the end of the last six months made possible an orderly adjustment of the banking situation and made possible the recovery of a good many banks that otherwise would have gone under; that bankers now owning sound banks had told him that they could not have withstood

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the heavy withdrawals in 1923 because they had so much frozen paper at that time and that the law gave them sufficient time to earn money, charge off losses, and get their banks into good shape; that it gave banks a few years to realize on frozen assets.

That this stabilization based on confidence in the Guarantee Fund was real is indicated by the consistent increase in deposits, notwithstanding the number of banks that were failing.

Is it conceivable that these going banks which promoted and featured the Guarantee Fund to the extent they did to stabilize the banking situation for their profit and for their preservation can now say to the depositors that helped them over the hill that they owe them no legal or equitable obligation?

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18. Condition of banks has steadily improved since 1923; present condition incomparably better than in 1923.

The undisputed evidence is that there has been a gradual improvement in the condition of the going state banks since 1923 and that they are now in the best condition they have been during the post-war period. Mr. Woods testified (Rec., p. 248, Qs. 1270-75):

> Q. 1270. "What was the relative financial condition of the state banks in Nebraska as of July 1, 1928, as compared with previous years since 1923?"
>
> Q. 1271. "Not figures, just generally?"
>
> A. "Well, if I may supply my own data for comparison, I think maybe I could answer—I don't know how to answer it."

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A. "If I understand the question I would say that comparing the ability of the state banks of Nebraska on the whole now to pay depositors upon demand, to meet expense of any kind and to make earnings and pay dividends that the situation in 1928 is vastly improved over 1923. *In every respect, without any exception, their condition is incomparably better than in 1923.*"

Q. 1273. "You have testified as to the comparison between the situation as of July 1, 1928, and 1923?"

A. "Yes."

Q. 1274. "Would you make the same comparison for the succeeding years?"

A. "The degree would go down because there has been more or less steady improvement since 1923. Let me make it plain, I am talking about surviving banks. There have been bank failures and there may be more, because of conditions or what not, but surviving banks have been improving their conditions and are now better able to meet all obligations of whatever nature than they have been at any time since 1923."

Q. 1275. "In other words, there has been a steady improvement from 1923 up to 1928?"

A. "That is my judgment."

The testimony of Mr. Woods was not controverted.

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19. Present claimant depositors (private and public) with adjudicated claims are those who relied on and yielded to the acts and representations of the banks during the last three years. There are $2,000,000 of public funds in failed banks.

The bankers state they were not responsible for their losses on loans developing through deflation and that the

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depositor lost in the same manner through the shrinkage of assets.

If this could have any weight as an argument, its weakness is that neither the claimant depositors nor the depositors in going banks are wartime depositors. They made their deposits in the last few years. They are not identified in any way with the developing losses on old loans that these banks have been charging off against earnings.

These individual depositors took losses in their respective business activities during the years immediately subsequent to the war, and there could be no reason in equity or good conscience to nullify their claims against the guarantee fund on deposits that they made in banks in the years subsequent, to-wit, 1926, 1927 and 1928, in order that the going banks may take the earnings that would otherwise be applicable on assessments to pay their own losses and have compensatory to extravagant profits.

Appellants say that "the depositors in failed banks have had the full benefit of all the assessments levied under the law while they were depositors". There is no evidence of and it is not a fact that the claimant depositors in failed banks have received any payment of any sum from assessments.

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20. Material facts with reference to the status of the individual claimant depositor were stipulated.

Rev. J. C. Peterson, of Dannebrog, a depositor, testified as to his deposit and the representations inducing same and his reliance thereon and other related facts as follows (Rec., p. 352):

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That he lives at Dannebrog, in Howard county, Nebraska, where he has lived since 1892; that he has been minister of the gospel during all those years; that he was a depositor in the failed Boelus bank and in the failed First State Bank of Dannebrog, then in the hands of receivers and wherein he had been allowed his claims, the major one for $5,460.35 on which he would receive $900 to $1,000 from bank assets; that while they were going banks he was told by the bankers and by people interested in the bank, directors, etc., that his money was perfectly safe; that its repayment was guaranteed by the State Guarantee Fund and that if the bank should fail it would only be a matter of from thirty to sixty days until he would have his money; that two banks in which his deposits were made had signs similar to those introduced in evidence advertising the Guarantee Fund and the safety of the depositors' money; that the signs stated "Your money is guaranteed by the State Guarantee Fund of Nebraska"; that on their checks they had printed the same thing; that Exhibit 18, page 490, volume 3, original record (omitted in printing), is a check drawn by witness on the forms of the First State Bank of Boelus on which it says "Deposits are guaranteed by the Guarantee Fund of the State of Nebraska"; that some of the advertisements in THE FREMONT TRIBUNE that had been previously read at the trial that afternoon were some that he had read. (These exhibits included those in which the banks had represented the Guarantee Fund as a *giant mutual insurance company in which the banks paid the premiums* for the protection of all depositors. They also contained positive statements to the effect that the banks *pledged themselves to pay the assessments* necessary to protect all depositors.) He testified there was one about depositors not losing a cent that he remembered especially and that it

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applied to him; that he believed these signs and statements and advertising to be true with reference to the Guarantee Fund; that he relied upon these representations in making his deposits in the banks and that he would not have made the deposits but for the representations about which he testified; that all the banks in Dannebrog had failed; that he renewed his certificates of deposit from time to time after reading the advertisement Exhibit 27 of Exhibit 13 and other advertisements. (The named exhibit is the last one of a series in THE OMAHA BEE publishing the names of the state banks of Nebraska publishing the series, and reproduced in this brief).

After Mr. Peterson had testified and Mr. Carl M. Jorgensen had been called and sworn (Rec., p. 358) the plaintiffs asked the court for a rule fixing the number of depositor witnesses who might testify, stating that an immense number of witnesses might be called on this same proposition. Counsel for defendants stated that they cared only to bring such number of depositors to testify as would show beyond a doubt the representations of the banks hereinbefore set out (referring to the advertisements and representations that the banks were united into a giant mutual insurance company, that they positively promised to pay the assessments and their other similar statements and that the depositors were protected by the Guarantee Fund of the State of Nebraska), that the depositors relied upon these representations and made deposits in these banks which they otherwise would not have made etc. (Rec., p. 358). The interveners expressed willingness to not unnecessarily encumber the record with a number of witnesses if there was a stipulation that they made their deposits upon representations of the banks in which they had their funds when the banks were taken over by the Guarantee Fund Commission (Rec., pp. 358-9).

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It was thereupon stipulated by the parties to that effect (Rec., p. 359), to-wit:

That defendants and interveners were able to and would forthwith produce as witnesses, a large number of depositors in different failed state banks throughout the state, who had adjudicated unpaid claims ordered paid from the Guarantee Fund.

That these witnesses if called would testify that prior to making their deposits in the several banks they had seen the same signs exhibited and had had the same representations made to them as had been made to the witness Peterson; that they had read and relied upon the same advertisements as testified to by Peterson (referring to the representations that the state banks under the Guarantee Fund Law constituted *a giant insurance company, wherein the banks paid the premiums for the protection of all the depositors; that the banks pledged themselves to the payment of the assessments necessary to protect all deposits in state banks;* that no depositor could lose one cent, etc.).

That these depositors believed and relied upon these representations, advertisements, etc., and would not have so deposited their money except for their reliance upon them; that the said witnesses were in the same situation as the witness Peterson with respect to their respective deposits and banks; and that the stipulated testimony of said witnesses should be treated and given the same effect as if they had been sworn and testified to the stipulated facts.

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21. Reliance by depositing public on acts and representations.

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It is, of course, apparent that the intention of the bankers was that the depositing public should rely upon all the representations that were made to them. Being interrogated specifically as to THE BEE advertisements, Mr. Stephens testified that the purpose of himself and the other bankers in publishing THE BEE and TRIBUNE advertisements was among other things to impress the people with confidence in the banking situation in Nebraska *and confidence in the Guarantee Fund* so that it might have the effect of causing the people to leave deposits they then had in state banks and place other funds on deposit (Rec., p. 534, Qs. 3389-90); that he intended the people to believe the statements in the advertising and never indicated to the public by advertisement or otherwise that the statements were not true or withdrew them in any way; and that the public continued to rely upon them (Rec., p. 535, Qs. 3400-3).

Mr. Schantz stated that he had never repudiated any part of the advertising or told any of the depositors or customers that there was anything in the same that he disapproved of (Rec., p. 606, Qs. 3892-3).

In attempting to excuse the running of the advertisements in THE OMAHA BEE, Mr. Stephens testified that he believed at the time that the accrued liabilities of the Guarantee Fund were not more than two or three million dollars. Just what they were at that time does not appear. It is in evidence that in May, 1927, he knew they were seven million dollars. Mr. Stephens' belief in that regard would not in any sense be a defense to waiver and estoppel created by his acts.

But a more forceful answer to his contention is a reference to his two-page advertisement published in THE

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FREMONT TRIBUNE in January, 1928, at a time when he did know what the liabilities were, wherein he continued the same character of advertising and the same representations and which have been hereinbefore quoted from.

Referring to the advertising, personal solicitation, and signs, using the Guarantee Fund feature, and the protective feature, Mr. Woods said (Rec., p. 275):

> Q. 1426. "Mr. Woods, what has been your observation covering the period of the operation of the law, from 1912, as to the influence that such representations by the state banks have had upon depositors in inducing them to make their deposits in the state banks."
>
> A. "It has been effective."

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22. The maximum special assessment was reduced from one per cent to one-half of one per cent by the legislature of Nebraska, 1923, at the instance of the banks.

23. The administration of the Guarantee Fund has been in the hands of the state bankers since 1923.

24. The maximum interest rate on time deposits was reduced from 5 per cent to 4 per cent in 1925 at the instance of the banks on account of Guarantee Fund assessments and the resulting increased annual earnings aggregated one-half the total annual assessments.

The activities of the bankers as a whole in the legislature in procuring such amendments to the law as they desired, and increasing the benefits to them of the Guarantee Fund Law, are clearly established by the evidence and undisputed.

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Hon. Charles W. Bryan, governor of Nebraska in 1923, and again elected governor in 1930, called by the interveners, testified, among others, as to the activity of the banks in procuring control of the administration of the Guarantee Fund. He declared that it was during his administration that the Bank Guarantee Fund Law was amended, the Guarantee Fund Commission created and the special assessment reduced from one per cent to one-half of one per cent; that he was familiar with the manner in which the legislation was advocated and finally passed; that the banking committees and groups met in the governor's office; that it was his observation that the bills were pushed and advocated by the bankers of the state; and who demanded that the Guarantee Fund Commission be composed of bankers of their own nomination (Sup. Rec., p. 52).

The legislature of 1925 at the solicitation of the banks and to aid them in paying the Guarantee Fund assessments amended the banking act to reduce the maximum rate of interest permitted to be paid on time deposits from five per cent to four per cent; thereby adding to the earnings of the banks more than $750,000 per year; this amounts annually to approximately one-half of the gross assessments that they were paying to the Guarantee Fund, both general and special.

The facts were also testified to more in detail by Mr. Bliss, now secretary of the department of trade and commerce, who was chairman of the banking committee in the senate in the 1923 and 1925 sessions. The attempt to amend the act was made in the sessions of 1921 and 1923, but finally successful in 1925.

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His testimony in this connection was as follows (Rec., p. 379):

Mr. Bliss testified that he had been in the banking business since 1907 and a member of the State Bankers Association; was its president in 1926 until he took the office of secretary of the Banking Department; he served in the state senate in the sessions of 1921, 1923 and 1925; was chairman of the banking committee in 1923 and 1925; that all the bankers of the state, with possibly twenty to twenty-five exceptions, are members of the State Association; that the Association maintains a permanent office in Omaha with a force of employees and has for twenty years; that he was in the legislature of 1923 that amended the Guarantee Fund Act by reducing the rate of interest paid by the state banks on certificates of deposit and interest bearing funds; that the effective date of the act was April, 1926; that he had examined the records of his office (state banking department), and on June 30, 1926, there was on deposit in the state banks of Nebraska $167,462,943.00, interest bearing deposits; that a year later, on June 30, 1927, such interest bearing deposits were $173,203,955.00 (Rec., p. 384, Q. 2275). Notwithstanding the reduction of one per cent in the interest rate, interest bearing deposits had increased $6,000,000.

Mr. Bliss, continuing, testified that in the sessions of the legislature of 1921, 1923 and 1925 there were extensive hearings on the act before the committee on banking; that prominent bankers appeared in promotion of the legislation during the session of 1925 (Rec., p. 388, Qs. 2309-10); that he did not recall that anyone other than bankers appeared in favor of the reduction (Rec., p. 389, Q. 2311); that the bankers felt, and agitated to the committee in

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1923 that by paying four per cent for money, plus the then one per cent special assessment, it would make their time money cost them too much; that the bankers generally requested this reduction and that the committee thereupon made a favorable report to the senate upon the bill (Rec., p. 390).

Mr. Bliss stated that at the time of the enactment of the law, 646 of the state banks were paying as high as 5% interest on deposits and that these banks had $110,520,583 of deposits at interest, and that he was able to state with reasonable accuracy the amount of these deposits then drawing 5% (Rec., p. 449, Qs. 2703-13). The trial court sustained an objection to his answering and defendants offered to prove that more than two-thirds of the deposits, to-wit, at least $74,000,000 of deposits were bearing 5% interest (Rec., p. 451, Q. 2714). The interest bearing deposits increased instead of diminished thereafter so there was a saving to the banks of approximately $740,000 a year on this item.

CONDITION AND EARNINGS OF BANKS

25. The earnings of and data on all state banks as shown by their reports for the eighteen months, January 1, 1927, to June 30, 1928, the fiscal period immediately preceding this suit (Ex. 37 and 38 produced by defendants).

The operating expenses, income and net earnings of the state banks of Nebraska were shown by their reports for two and one-half years preceding the suit (Ex. 37, 38 and 39, produced by defendants). The Department of Trade and Commerce produced comprehensive tabular statements

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covering all the banks of the state (Exhibits 37 and 38); the last available data on the banks, covering the period of eighteen months, January 1, 1927, to June 30, 1928, the fiscal six months period immediately preceding this suit. Exhibit 39 covered the twelve month period from July 1, 1925, to June 30, 1926.

These three exhibits give all the available official data for the two and one-half year period.

Inasmuch as the tabular statements for the eighteen months ending June 30, 1928, gave the figures of the department for the last available period, we will refer to them first.

As hereinbefore shown, Exhibit 37 contained the data as to each bank individually by name. The appellants have omitted that exhibit from the record in this court.

Eight employes in the Department of Trade and Commerce worked two weeks in getting out this Exhibit 37 (Rec., p. 424, Q. 2567). It was the desire of defendant officials to make a complete showing of all the available facts. Exhibit 37 was recapitulated by the department in Exhibit 38 (Rec., p. 431, Qs. 2587-8). Exhibit 38 is reproduced immediately hereafter in this brief. It will therefrom be noted that in Exhibits 37 and 38 the facts were compiled separately on those banks organized prior to 1909, the date of passage of the Guarantee Fund Law and those organized since. It appears that of the banks now operating in Nebraska, 435 were organized prior to 1909 and 291 since. As to those banks organized since 1909 their growth and profits have been under the protective period of the Guarantee Fund Law. We are unable to

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refer to specific banks by reason of the omission of Exhibit 37, but sufficient appears in Exhibit 38, the recapitulation, to completely negative the contention of the banks herein. Following Exhibit 38 is an analysis thereof.

(a) Exhibit 38 is as follows:

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RECAPITULATION

(Exhibit 38, Page 610, Vol. 2, B. of Ex.)

(Note--Being a totaling of the data as to all of the 726 Banks of Nebraska listed and itemized by individual banks in 16 sheets, Ex. 37, P. 60, V. 2, and each bank there set forth in detail.)

Capital --		
435 banks organized prior to 1909	$10,856,000.00	
291 " " 1909 and after	8,019,500.00	
Total 726 banks		$18,875,500.00
Surplus --		
435 banks organized prior to 1909	$ 4,058,280.22	
291 " " 1909 and after	2,024,777.40	
Total 726 banks		6,083,057.62
Total Capital and Surplus 726 banks		$24,958,557.62
Total State deposits in 726 banks		$ 984,399.59
Total County deposits in 726 banks		10,230,619.10
Total City deposits in 726 banks		2,739,695.96
Total Dividends for all banks 12 months ending 12/31/27	$ 867,231.76	
Total Dividends for all banks 6 months ending 6/30/28	540,036.91	
Total for 18 months		$ 1,407,268.67
Total Net Profits after charge-offs since organization to 6/30/28:		
435 banks organized prior to 1909	$18,063,801.62	
291 " " 1909 and after	6,227,088.43	
Total for 726 banks		$24,290,890.05
Total Net Earnings before charge-offs, 18 months ending 6/30/28:		
435 banks organized prior to 1909	$ 2,450,067.56	
291 " " 1909 and after	1,719,420.04	
Total for 726 banks		$ 4,169,487.52
Gross Charge-offs 18 months ending 6/30/28:		
435 banks organized prior to 1909	$ 1,324,509.22	
291 " " 1909 and after	909,459.18	
Total for 726 banks		$ 2,233,968.40
Net Earnings after charge-offs, 18 months ending 6/30/28:		
349 banks organized prior to 1909	$ 1,474,408.22	
221 " " 1909 and after	1,019,910.72	
Total for 570 banks		$ 2,494,318.94
Net Deficits in earnings after charge-offs 18 months ending 6/30/28:		
86 banks organized prior to 1909	$ 348,849.88	
70 " " 1909 and after	209,949.66	
(Total charge-offs in above 156 banks were $851,433.22, creating this deficit)		
Total 156 banks		$ 558,799.54
Total Net Earnings after charge-offs, 726 banks		$ 1,935,519.40

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Net Undivided Profits and Surplus:	
435 banks organized prior to 1909-$ 5,344,850.24	
291 banks organized 1909 and after 3,003,563.62	
Total 726 banks----------$	8,348,413.90
Percentage Net Earnings before charge-offs,18 months ending 6/30/28 to Capital:	
435 banks organized prior to 1909----------	23.49%
(Note - Annual average is 15.66%)	
291 banks organized 1909 and after----------	21.44%
(Note - Annual average is 14.29%)	
Percentage Net Earnings after charge-offs, 18 months ending 6/30/28 to Capital:	
(349 banks less 86 deficits) prior to 1909------	10.36%
(Note - Annual average is 6.91%)	
(221 banks less 70 deficits) 1909 and after-----	10.99%
(Note - Annual average is 7.33%)	
Gross Earnings for year 1927 in 435 banks organized prior to 1909----------$	9,310,984.34
Gross Earnings for 6 months period ending June 30, 1928, in 435 banks organized prior to1909	4,997,139.78
Gross Earnings for year 1927 in 291 banks organized since and including 1909----------	6,359,891.23
Gross Earnings for 6 months period ending June 30,1928 in 291 banks organized since and including 1909----------	3,303,646.64
Total Gross Earnings 726 banks, 18 months ending June 30, 1928----------$	23,977,661.98
(Note - Annual average is $15,985,107.99: or 85% of capital and 64% of capital and surplus.)	
Total assessments paid into Depositors' Guaranty Fund by 726 banks for 18 months ending June 30, 1928----------$	2,412,324.78
(Note - Annual average is $1,618,216.52)	
Percentage of assessments paid into Depositors' Guaranty Fund to gross earnings of 726 banks totalling $23,749,077.47 for 18 months ending June 30. 1928----------	10.06%

(Copy of Exhibit 38; except in several instances where figures are shown for 18 months we have added also for convenience of Court as a "Note" a calculation of the annual average of the 18 months' figure.)

(U. S. Sup. Court Rec. P 437-8)

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The foregoing exhibit 38 discloses that

(b) The banks earned an average profit of 7.12 per cent per annum on their capital after all Guarantee Fund assessments had been paid and after "charging off" over $2,200,000 (about 7.72 per cent per annum of capital) to losses.

(c) 570 of the 726 banks had net earnings ranging up to "extravagant profits"; the other 156 banks were affected by "charging off" excessive amounts; four-fifths could have paid dividends; the other one-fifth could have except for their extraordinary "charge-offs" through liquidation of wartime acquired assets.

The capital is shown to be $18,875,500 and surplus $6,083,057.

EARNINGS. Attention is especially called to the fact that *after all charge-offs of losses* and after the deduction of all deficits of those banks that showed a deficit, the net earnings on capital for the 18 months period of the 726 banks were 10.36 per cent as to those banks organized prior to 1909 and 10.99 per cent as to those banks organized since 1909, or an average of 10.67 per cent for all the banks on their capital for the eighteen months period, equal to 7.12 per cent per annum on their capital. If we figure the net earnings of the 726 banks on both capital and surplus we find that the capital and surplus of all the banks after paying all Guarantee Fund assessments and making all charge-offs was $1,935,519, amounting to 7.75 per cent on the entire capital and surplus for the eighteen months or 5.17 per cent per annum.

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CHARGE-OFFS. It is especially to be noted that the banks "charged off" to losses during the 18 months period $2,233,968, an amount practically equivalent to 7.72 per cent on capital and 6 per cent annually on their capital and surplus; and all charged out of earnings. We have elsewhere in this brief shown that these extraordinary losses were the liquidation losses through realization on assets acquired in the inflation period long prior to the making of the deposits on which present claims are based. These losses were in effect stockholders' investment losses, and were in no sense attributable to the Guarantee Fund Law.

NET EARNINGS BEFORE CHARGE-OFFS. After paying Guarantee Fund assessments and before making these charge-offs, the 435 banks organized prior to 1909 had net earnings on their capital of 23.49 per cent, or an annual average of 15.66 per cent. Those organized after 1909, 21.44 per cent or an annual average of 14.29 per cent. On both capital and surplus, the earnings were one-fourth less.

GUARANTEE FUND. As disclosed, the payments to the Guarantee Fund were 10.06 cents out of each dollar of gross earnings for the entire eighteen months.

BANKS WITH NET DEFICITS. It will be noted that 570 of the 726 banks reporting had total earnings of $2,494,318 after all "charge-offs" of bad debts, and after paying Guarantee Fund assessments. There were, however, 156 banks that failed to make net earnings after heavy charge-offs of bad debts, their net deficit being $558,799 for the eighteen months. During that period they charged off as bad debts $851,433.22, making their actual earnings $292,633, the difference between their

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"charge-offs and their net deficit". It is not denied that this deficiency was attributable to excessive charge-off of bad debts instead of to the payment of the Guarantee Fund assessments. The banks would still have had to charge off these losses occasioned as above even if there had been no Guarantee Fund Law.

DIVIDENDS. Appellants make some point of the fact that only one-third of the banks of the state paid dividends in 1927 and 1928. They carefully ignore the earnings of the banks. The foregoing statement shows that four-fifths (570) of the banks of the state had net earnings for the eighteen months period ending June 30, 1928, *after all charge-offs and the payments of the Guarantee Fund assessments,* so that four-fifths of the banks could have declared dividends in some amount ranging up to "extravagant profits" had they elected to do so (Exhibit 38). The amount of earnings is the important fact.

Again, these net earnings were after the large "charge-offs" against earnings to absorb losses arising during deflation; to which the going banks had so largely devoted their earnings (Bliss, Rec., p. 208, Qs. 1043-4).

The banks actually paid dividends for the eighteen months of $1,407,268.00, which was an average for all the banks of 7.45 per cent on the capital of $18,875,500.00 and 5.62 per cent on total capital and surplus of $24,958,557.00. Figured on an annual basis the percentage would be reduced one-third.

In their brief, plaintiffs stress their Exhibit 52. Witness E. L. Fulk, certified public accountant, checked up defendants' Exhibit 37, and prepared, and plaintiff introduced in evidence, the compilation identified as Exhibit 52 (Rec.,

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p. 567). The accuracy of the net earnings as shown in Exhibit 37 are not questioned, but in this Exhibit 52 of Mr. Fulk the computations and compilations are made up by him on *percentage of numbers of banks,* which of course is not a fair criterion. For instance, he shows that 24.24 per cent of the total banks in number earned 76.21 per cent of the total net earnings of all the banks for the eighteen months period ending June 30, 1928, but he fails to indicate anywhere on his exhibit the ratio of the capital and surplus of those 176 banks to the total capital and surplus, or the ratio of the deposits of those 176 banks to the total deposits. Such information is indispensable. As illustrative of the point, the strong and prosperous State Bank of Omaha, in capital and surplus, is equal to 30 banks like the Abie State Bank and has forty-nine times the deposits; and still a larger ratio of earnings.

(d) The Trial Court Misled.

An unfair and deceptive statement in Exhibit 52 and one which misled the trial court is the statement "that 410 banks, whose net earnings after charge-offs for the eighteen months period ending June 30, 1928, were less than 6 per cent on combined capital and surplus, had a loss of $179,170.00." In these 410 banks is included the list of banks that had profits up to 6 per cent, and 156 banks that had excessive charge-offs as above noted; these latter are combined with the profit-earning banks to produce a net red figure for the 410. As a matters of fact plaintiffs' own exhibit shows in another place in harmony with the defendants' exhibit that 156 banks had excessive bad debts of $558,889.00. Throwing these banks in with the banks earning less than 6 per cent wipes out the earnings of the other 254 banks included. This juggling of figures is clever but unfair and misleading.

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The trial court evidently was misled, for he stated in his opinion: "56.47 per cent of the total banks were not only earning less than 6 per cent per annum on their combined capital and surplus, as of June 30, 1928, but also show their earnings in the red, in the sum of $179,170.00." The trial court also said: "These same banks paid assessments into the Depositors' Guarantee Fund for the eighteen months period of $2,412,724.78, which sum is $476,805.38 more than the total net earnings of said banks for the same period."

This statement is liable to be misunderstood and the trial court apparently misunderstood the record in that regard. The net earnings of the banks, *after paying the Guarantee Fund assessments* and before making charge-offs for bad debts, were $4,169,487.52. Against this the banks charged off bad debts of $2,223,968.40, leaving net earnings, after bad debt charge-offs and after payment of Guarantee Fund assessments, of $1,935,519.12. The net earnings after charge-offs and after paying Guarantee Fund assessments of 570 of the banks were $2,494,318.94.

Appellants state in their brief that Mr. Marshall, a deputy in the office of the Secretary of the Department of Trade and Commerce, testified to the necessity of "charge-offs" during the eighteen months period which would have wiped out entirely the net earnings for that period. Mr. Marshall did not testify to any such facts.

The supposed basis for appellants' statement is the examiner's criticism of items in different going banks; which criticisms were made in the ordinary course of examination and which were taken care of by the banks; the evidence of Mr. Marshall and Mr. Bliss with reference to this is fully covered under subdivision No. 35 of this brief.

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Plaintiffs prepared and introduced Exhibits 6, 7 and 8. They purported to reflect the condition of the state banks for three six-months periods beginning January 1, 1927, and ending July 1, 1928.

These exhibits were prepared by Witness Mooney (an employee of Mr. Fulk). They were compiled from the records of the banking department to which he was given access. As collected together they were grossly unfair and misleading as will hereafter appear. They were the only data produced by appellants at the trial from the official records of the banking department, nor for that matter was any produced from the records of the banks (except Abie State). *These Exhibits 6, 7 and 8 are not even included in the record brought to this court,* but appellants refer to them on page 28 of their brief by quoting Witness Mooney with reference to these exhibits as follows:

> "His testimony from his examination was that during the period from January 1, 1928, to June 30, 1928 (Rec., p. 134, Q. 369), 353 of the 726 banks showed earnings to each of less than 6 per cent per annum (Rec., p. 135, Q. 380), and that the combined aggregate net loss of this class of banks was $356,076.18 (Rec., p. 136, Q. 391), and that these 353 banks contributed to the Guarantee Fund in assessments during that same period $301,006.98 (Rec., p. 137, Q. 392).
>
> "During the period from January 1, 1927, to June 30, 1927, he testified that there were 413 banks (Rec., p. 138, Qs. 395-397) of the 726 existing banks, each which made less than 6 per cent per annum on its capital.
>
> "He further testified that, during the period from July 1, 1927, to December 31, 1927, of the 726 existing banks there were 376 (Rec., p. 139, Q. 407; p. 140, Q. 411), each of which received less than 6 per cent per annum earnings.

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A full disclosure of the method of compilation is prevented by the omission of these exhibits from the record, but sufficient appear from the oral testimony of the Witness Mooney, commencing on Record, page 137, question 357, to give a substantial insight.

Mr. Mooney was given access in the department to the semi-annual reports of *all the banks* for each of the three six months periods. Instead of listing them all for the eighteen months, or for that matter listing such banks as he desired for the entire eighteen months, or even for a year, he picked out a different list of banks for each six months period; for instance, making one list as Exhibit 6, another as Exhibit 7, and another as Exhibit 8. By this method if a bank's net income was largely contained in the first six months period of the year, and its outgo in the second six months' period, or vice versa, Mr. Mooney listed it in the six months' period in which it had earnings of less than 6% and omitted it from the other period. In this way he made banks which had good or high average net earnings for a year or more appear among the list of losing banks. Thus the above 353 banks were picked for one six months' period, a different list of 376 banks was picked for another six months' period and still a different list of 413 banks for another six months' period.

There were only 112 banks that appeared in all of the lists as earning less than 6% (Rec., p. 43).

Now these reports in the Department he thus juggled show the income and earnings of all 726 banks of Nebraska for the full eighteen months. Defendants compiled its Exhibits 37 and 38 from them. Why did the banks thus seek to avoid the full disclosure? Because for the

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eighteen months' period four-fifths (570) of the banks had net earnings, ranging from fair to "extravagant profits" after charging off bad debts and paying Guarantee Fund assessments. It appeared that the only reason the other one-fifth did not have net earnings was on account of exorbitant bad debt charge-offs.

Again as to this evidence please note Mr. Mooney showed that the 353 banks covered in one six months' period had aggregate net losses of $356,076; but only cross-examination developed that these same banks had $636,000 of undivided profits accumulated against which these losses were charged (Mooney, Rec., p. 143, Q. 450). A fair reflection of the full facts is the compilations, Exhibits 37 and 38, made from the same bank reports, but for a period of 18 months. The accuracy of these exhibits is unquestioned.

In the brief of plaintiffs and in the opinion of the trial court frequent comparison is made as between assessments paid and net earnings and the statement is made that the assessments were more than the earnings or total net earnings by a specified amount.

The court's attention is especially called to the fact that this statement does not mean that there was a shortage in earnings of that amount. The TOTAL REMAINING NET EARNINGS, AFTER the payment of Guarantee Fund assessments, charging off losses, etc., was by comparison less than the amount theretofore paid to the guarantee fund, by the amount stated.

For instance, in the trial court's opinion, in apparently drawing a deduction favorable to the 726 banks, the court says (Rec., p. 44):

> "These same banks paid assessments into the depositors' guarantee fund for the eighteen months of

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$2,412,324.78, which sum is $476,805.38 more than the total earnings of said banks for the same period."

Now what are the illustrative facts (see Exhibit 38)? For the eighteen months the total net earnings *after* paying guarantee fund assessments and before charging off bad debts was $4,169,487.52; the guarantee fund assessments had been $2,412,324.76. So the earnings before paying guarantee fund assessments and charging off bad debts were a total of $6,681,812.28.

So we have this situation:

Total earnings 726 banks before paying guarantee fund and charging off of bad debts	$6,681,812.28
Paid to guarantee fund	2,412,324.76
Net earnings 726 banks before charge-offs of bad debts	4,169,487.52
Charge-off of bad debts	2,233,968.40
Net remaining after both deductions	$1,935,519.12

While the guarantee fund assessments theretofore paid were greater in the aggregate than the net earnings remaining, it is also true that the bad debts charged off were about $300,000 greater than the net remaining. The important thing is that $1,935,512 *remains after* deducting both assessments and losses.

It is important to note that of the $2,233,968 charged off by all the 726 banks in the eighteen months as bad debts, $851,432 was charged off by 156 banks, and the remainder ($1,382,535.18) by 570 banks. The 570 banks all had net earnings remaining after these charge-offs and payment of guarantee fund assessments, and ranging up

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to "extravagant profits". The 156 banks with charge-offs of $851,433.22 had net losses of $558,799.54, so their profits before charge-offs had been $292,633.68. Manifestly these 156 banks are now in improved condition. There is no evidence that they are not in good condition, and the court of course could not presume the contrary. The 570 banks earned $3,876,854.12 after paying guarantee fund assessments, took losses of $1,382,535.18, and had $2,494,318.94 remaining; and all had net earnings thereafter.

Some effort was made to show that the charge-offs made during the eighteen months were only normal ones, but this argument completely disappears in the face of the tables of operations in other jurisdictions, and especially in the face of the fact that it was the 156 banks that charged off the huge and excessive losses, and they were the ones that had the losses exceeding earnings, and that the losses of these 156 were 60 per cent of the losses of the 570, conclusively showing the very excessive character of the losses of the 156 banks. If 156 banks with $292,633.68 of net earnings before charging off bad debts charged off $851,433.00, or an amount equivalent to 60 per cent of what the 570 banks charged off against their $3,876,854.00 of earnings, the experience of the 156 is certainly not to be the criterion for judging this case and relieving the entire 726 banks of the state from their obligation to the guarantee fund. The logical and inevitable deduction to be drawn from the figures is that 570 of the banks were during the preceding period on a solid footing and earning net profits over and above all obligations, including payments to the guarantee fund and the losses charged off, and that the other 156 improved their condition during the eighteen months and did so as against accumulated earnings. In no event can it be said that the guarantee fund was an adverse factor.

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(e) The "Other Real Estate" item is worth amount at which carried by banks; it was not increased but has been minimized by the Guaranty Fund and the featuring of it by the banks.

While the item "Other Real Estate" shown in the reports of the state banks is not a desirable asset the fact is, as Mr. Bliss testified, that many of the banks have a profit in the real estate they are carrying and neither his records nor the examiners' reports show that this item of real estate is carried at an excessive value (Rec., pp. 157-8, Qs. 580-1). There is no evidence that it is worth less than the amount carried at in the reports of the banks, and appellants cite no evidence to support their statement that it is of less value.

Appellants take Secretary Peterson's testimony as to the Guarantee Fund Commission's realization of 43% on real estate in failed banks in receivership and uses this as a basis for estimating the value of real estate in the going banks. By the same token they could take the realization on other assets of insolvent failed banks and state that the assets in the going banks were of the same percentage of value.

The item "Other Real Estate" largely grows out of the taking over by the banks of property upon which they had liens. The origin of the loans admittedly nearly all date back to the inflation period and this item has been swelled since by the liquidation and conversion of such loans.

This item has no relation to the Guarantee Fund, or the adjudicated claims of depositors.

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It has been argued that but for the Guarantee Fund the assessments paid thereon could have been applied to reduce this item. This ignores the benefits and earnings accruing from and by reason of the Guarantee Fund, disregards the fact that the real estate is not carried at an excessive figure and wholly disregards the priority of right of the claimant depositor over that of the stockholder.

A large number of the banks now asked to pay these assessments would admittedly not have been in existence but for the Guarantee Fund. But for the fact of the Guarantee Fund and its benefits and the faith of the depositors in the Fund and their reliance thereon inducing them to keep their deposits in the existing banks many of the banks that now hold "Other Real Estate" would admittedly now not be open. The amount used to pay Guarantee Fund assessments could not have been applied to reduce this item, because the earnings that paid the Guarantee Fund assessments largely came by reason of the Guarantee Fund Law and its operation. Without the benefits of that law there would not have been the earnings.

So it is unsound to state that the amount applied to pay Guarantee Fund assessments could have been used to reduce real estate or charge off bad loans. The benefits of the Guarantee Fund are admitted of record and cannot be fairly measured in dollars and cents.

It is the theory of the banks, shared by the trial court, that on this record the banks *as a whole* are entitled to charge off old bad debts from earnings, then reduce to extinction the amount at which "other real estate" is carried (though not shown to be excessive), then pay compensatory returns to stockholders, and lastly pay the guar-

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antee fund assessments, and that any other course is confiscatory. This also ignores the fundamental principles of the law.

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26. The earnings and data on all state banks for the year ending June 20, 1926, classified according to capital arranged from 4.47 per cent to 11.45 per cent (not including Omaha State Bank with its larger earnings).

The defendants produced at the trial a compiled statement of data as to all the state banks showing their expenses, income and net earnings for the year ending June 30, 1926, being for a period immediately preceding the foregoing 18 months except for an interval of six months for which figures were not available. This exhibit had been prepared in the latter part of 1926 by Epes Corey, auditor of the banking department from answers to a questionnaire to the banks and was published at that time (Rec., p. 489).

The banks are classified as to capital up to $200,000. There was one bank omitted from this compilation,—the State Bank of Omaha with a capital in excess of $200,000, on account of its being the only bank in that classification. Its large profits and earnings as herein elsewhere set forth would increase, rather than decrease the percentages in Exhibit 39.

We here reproduce Exhibit 39 and follow it with an analysis thereof:

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Analysis of Operating Expenses and Income of 845 Nebraska State Banks

From July 1, 1925 to June 30, 1926

CAPITAL	10,000 to 20,000	20,000 to 40,000	40,000 to 75,000	75,000 to 100,000	100,000 to 200,000	
	206 Banks	426 Banks	177 Banks	18 Banks	18 Banks	845 Banks†
Interest on Deposits and Savings	$800,024	$3,295,204	$2,583,324	$348,366	$598,033	$7,624,951
Interest on Borrowed Money	30,254	115,483	92,060	11,196	7,132	256,125
Guarantee Fund Assessments	166,120	636,258	486,573	63,844	142,813	1,495,608*
Salaries and Wages	496,890	1,721,821	1,267,654	155,450	294,061	3,935,876
Other Expenses	332,321	1,377,074	1,069,137	142,491	232,070	3,153,093
Total Expenses	$1,825,609	$7,145,840	$5,498,748	$721,347	$1,274,109	$16,465,653
Total Income	$1,965,140	$7,735,871	$6,082,979	$807,239	$1,539,315	$18,130,544
Net Income	$139,531	$590,031	$548,231	$85,892	$265,206	$1,664,891
Total Deposits	$27,131,711	$111,344,441	$86,517,996	$12,219,191	$22,710,445	$259,923,784
Average Deposits	$131,773	$261,372	$488,802	$678,844	$1,261,691	$307,602
Average Capital Per Bank	$15,157	$27,963	$52,484	$80,921	$128,639	$33,250
Net Profit on Capital and Surplus	4.47%	4.95%	6.28%	5.90%	11.45%	5.924%
Average Income Per Bank	$9,539	$18,159	$34,367	$44,846	$85,517	$21,456
Average Expense Per Bank	$8,862	$16,774	$31,066	$40,075	$70,784	$19,486
Average Net Profit Per Bank	$677	$1,385	$3,301	$4,771	$14,733	$1,970
DISTRIBUTION OF $1.00 OF EXPENSE						
Interest on Deposits and Savings	43.82c	46.11c	46.98c	48.30c	46.94c	46.31c
Interest on Borrowed Money	1.66c	1.61c	1.67c	1.55c	0.56c	1.56c
Guarantee Fund Assessments	9.09c	8.90c	8.85c	8.85c	11.21c	9.08c
Salaries and Wages	27.22c	24.10c	23.06c	21.55c	23.08c	23.90c
Other Expenses	18.21c	19.28c	19.44c	19.75c	18.21c	19.15c
	100.00c	100.00c	100.00c	100.00c	100.00c	100.00c
EXPENSE (Per Cent of Deposits)						
Interest on Deposits and Savings	2.947%	2.959%	2.983%	2.850%	2.633%	2.931%
Interest on Borrowed Money	.111%	.103%	.106%	.091%	.032%	.099%
Guarantee Fund Assessments	.611%	.571%	.562%	.522%	.630%	.575%
Salaries and Wages	1.831%	1.547%	1.464%	1.271%	1.294%	1.513%
Other Expenses	1.225%	1.237%	1.235%	1.170%	1.021%	1.212%
Average Per Cent of Expense on Deposits	6.725%	6.417%	6.350%	5.904%	5.610%	6.330%
Average Per Cent of Income on Deposits	7.23%	6.947%	7.03%	6.614%	6.777%	6.97%
Average Per Cent Net Profit on Deposits	.51%	.53%	.68%	.71%	1.167%	.64%

†Thirty-eight Guaranty Fund Commission Banks and ten delayed reports not included. 893 State Banks in Nebraska June 30, 1926.
*Total assessments levied during period aggregate six-tenths of one per cent. Deficiency arises because of different dates assessments were entered.

(Ex. 39 P 710. U3, B of Ex.)
(U. S. Sup. Court Rec., P 494 + 495)

COMPILED BY
DEPARTMENT OF TRADE AND COMMERCE
LINCOLN, NEBRASKA

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With this compilation for the year ending June 30, 1926, and the compilation, Exhibit 38, we have definite reports by the banks on their income and disbursements from July 1, 1925, to June 30, 1928, with the exception of one six-months period between the two reports (for which no reports were available). A striking similarity as to income is evidenced by a comparison of the two. Exhibit 39 as will be noted, is classified between banks as to size.

The banks shown in this Exhibit 39 had gross income for the twelve months of $16,465,653. Exhibit 38 shows that the income of all the banks for the eighteen months period referred to therein was $24,958,557. The one period being twelve months and the other eighteen, it will be noted that their annual averages are about the same. During the fiscal year July 1, 1925, to June 30, 1926, there were more banks and with the addition of the State Bank of Omaha there would be a little larger relative income for the period but about the same considering the number of banks. The exhibit discloses that the net profit on capital and surplus of all the banks for the fiscal year ending June 30, 1926, was an average of 5.924 per cent; this after paying all Guarantee Fund assessments. The banks with capital of $10,000 to $20,000 earned 4.47 per cent; those between $20,000 to $40,000 earned 4.95 per cent; those between $40,000 and $75,000 earned 6.28 per cent; those between $75,000 and $100,000 earned 5.90 per cent; and those between $100,000 and $200,000 earned 11.45 per cent. Mr. Schantz's State Bank of Omaha far exceeded this latter figure, as herein otherwise appears.

It will be noted also that of each dollar of disbursements an average of only 9.08 cents went to the Guarantee Fund.

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and that the banks in the highest capital classification paid the highest percentage to the Guarantee Fund, to-wit, 11.21 cents on the dollar.

It further appears that the average income per bank and the average expense per bank in each classification bears approximately the same ratio to capital. *This average of 5.924 per cent net profit of all the banks was on both capital and surplus and after paying $1,495,698.00 to the Guarantee Fund on deposits of $259,923,784.00.*

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27. Present condition of the banks; their reports at the time of institution of suit showed healthy condition.

This case was filed in the latter part of December, 1928.

In connection with the then condition of the state banks especial reference is called to exhibits showing their condition as of June 30, 1928 (Rec., p. 664, Ex. 61), and December 31, 1928 (Rec., p. 423, Ex. 22), being compilations of their semi-annual call reports as of those dates. The last one being within 10 days after the filing of this suit, and showing a very healthy condition. Inspection and analysis thereof shows that on December 31, 1928, the banks had more than twenty per cent cash reserve, to-wit, $48,792,700 in cash and cash in banks and in addition had $36,900,831 in bonds and securities which are readily convertible and which banks are now carrying largely as the equivalent of cash. The banks thus had in cash and its equivalent $85,692,531 or about 33⅓ per cent of their deposits. This splendid showing confirmed the testimony of Mr. Woods and Mr. Bliss as to the condition of the banks.

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The December 31 reports, compared with the June 30, 1928, reports (Ex. 61) show that while the number of banks had declined nineteen in the six months' period the aggregate surplus and profits had increased: $8,603,791.14 for 745 banks on June 30, 1928, as against $8,951,829.06 for 726 banks on December 31, 1928.

The condition of existing banks has improved consistently and steadily since 1923. As the witness, Mr. Woods, heretofore quoted, put it, "In every respect, and without any exception, their condition is incomparably better than in 1923." This evidence was not questioned. It stands admitted.

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28. The large profits and prosperity of the three large banks sponsoring this suit.

It appears from the evidence that the principal bankers sponsoring this suit are officers of a few state banks which have highly prospered largely because of and by virtue of the Guarantee Fund Law and who have been its foremost advocates. It affirmatively appears that their banks are amply able to pay the Guarantee Fund assessments from large earnings. These men are A. L. Schantz, president and majority owner of the State Bank of Omaha, Nebraska's largest state bank; Dan V. Stephens, president and majority owner of the Fremont State Bank; and William Seelenfreund, president of the Continental State Bank of Lincoln. With the exception of an Abie bank officer, they were the only bankers appearing in the trial of the case. Dan V. Stephens, president of the Fremont State Bank, called a meeting of a few bankers, including Mr. Schantz of the State Bank of Omaha, at Fremont, where a com-

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mittee was appointed to have charge of this suit (Rec., p. 307, Qs. 1662-72). The use made by these banks of the Guarantee Fund Law as an effective ladder upon which to climb is elsewhere referred to in this brief, but it is desirable at this point to quote some figures as to their enormous growth and enormous profits under the Guarantee Fund Law.

STATE BANK OF OMAHA: This bank was organized in 1912. Its original capital was $300,000.00 and surplus $37,500.00. At the time of the trial, 17 years after organization, the surplus was $200,000.00, of which $112,500.00 was from earnings. During the same period the bank paid $294,000.00 in dividends. For seven years before the trial it had been paying 10 per cent dividends on the capital besides the amount that had been passed to surplus (Rec., p. 224, Qs. 1138-43). Its deposits have grown to approximately seven million dollars. In 1915 it absorbed another bank with two million, two hundred thousand dollars of deposits (Rec., p. 361, Q. 2097).

FREMONT STATE BANK OF FREMONT: Dan V. Stephens was majority owner of this bank. He became actively connected with the Fremont State Bank in 1920 and from then on down to practically the commencement of this suit he was an active exponent of the Guarantee Fund Law and his bank probably one of the chief beneficiaries of the law. He gave wide circulation to his views; during the two years preceding the suit, his bank used from 1,200 to 1,500 inches of advertising space a year in THE FREMONT EVENING TRIBUNE, in advancing its interests by featuring the Guarantee Fund Law (Mr. Sorensen, vice-president, Q. 1838, p. 324, Rec.).

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In November, 1920, when Mr. Stephens began promotion of the Guarantee Fund Law, his bank had capital, surplus and undivided profits of $68,277 and deposits of $390,037 (Ex. A, p. 412, vol. 3, Orig. Rec.). The aggregate capital and surplus September 20, 1928, was $136,704.00. Of this the stockholders had paid in $87.500, possibly $5,000 more, leaving $44,204 accumulated from earnings and more than $30,000 of which had been accumulated since 1920. Furthermore, the bank had continuously paid dividends of 8 per cent per annum (p. 311, Rec., Qs. 1700-7). The bank in September, 1928, had deposits of $1,744,684, four and one-half times its deposits eight years prior. Mr. Stephens testified that his bank had prospered during the last eight years and it had become the largest bank in the city of Fremont, measured by deposits (Rec., 375-6, Qs. 2202-6).

CONTINENTAL STATE BANK OF LINCOLN: This bank was organized in 1909, concurrently with the enactment of the Guarantee Fund Law (Rec., p. 14). On November 13, 1920, it had deposits of $1,313,908; seven and one-half years later, on June 30, 1928, it had deposits of $4,056,056 (Rec., p. 398, Qs. 2369-70). By reason of the omission by the appellants of Exhibit 37 from the record, we are unable to give further details in this brief as to its net earnings for the eighteen months period ending June 30, 1928, immediately prior to the institution of this suit. In that exhibit this information appeared as to each of the individual banks. Recapitulated as to all banks in Exhibit 38. (Mr. Marshall, Rec., pp. 429-30, Qs. 2568-78).

It is fairly inferred from the record that but for these few large state banks, the present suit would not have started.

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29. The small Abie State Bank in a town of 200 people earned and paid dividends of 10 per cent to 15 per cent until causes other than the Guarantee Fund stopped them; the bank in its environment was not a typical membor of any class of banks.

The Abie State Bank is really not the plaintiff in this suit; it fairly appears that it is but the screen under which several large city state banks prosecute this suit. It is not a representative bank and it is ridiculous to treat it as illustrative of banking conditions generally in Nebraska. It was the only state bank with reference to which plaintiffs made any attempt to show any details of operation and even as to it, the facts in no degree supported plaintiff's case. In view of its position as the only bank offering some details of operation, we have abstracted the testimony as to it fully as follows:

Mr. Svoboda, cashier of the Abie State Bank for seventeen years and its chief acting officer, testified (Rec., p. 167, Qs. 650, *et seq.*):

That the Abie State Bank did not know of the filing of the suit in its name until the president was so informed by some person who had heard the fact stated over the radio; that he was willing to have it continued inasmuch "as it was already filed"; that he had received a circular stating that 100 or more banks had joined in the filing of the suit and if his bank wanted to join all right and if not all right; that it joined in; that he had never read the petition filed in the case and did not know its contents.

That Abie is a town of 200 people, located in Butler county; that the bank has capital of $15,000 and surplus of $2,500; that it was organized in 1904 with $10,000 capi-

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tal and started paying dividends after the first year; that the capital was increased from $10,000 to $15,000 in 1917 *from the earnings; that $2,000 was added to the surplus from earnings*—$1,000 in 1920, $500 in 1921, $500 in 1926; that the bank declared dividends of 10 per cent and sometimes 15 per cent per annum after he went in as an officer in 1912; that he owned 112½ of the 150 shares of stock of the bank; that annual dividends continued to be paid up to 1921 and then ceased until 1926 when a 6 per cent dividend was paid; that the officers did some land and insurance busines and paid the proceeds therefrom, which were small, into the bank.

No evidence was offered on the trial as to the loans and discounts of the Abie State Bank, or the rate of interest it received on loans. No statement of its assets and liabilities, nor any other evidence was introduced to show what percentage of its assets were productive or "frozen" and non-productive. No evidence was offered that its condition had been normal during the last several years. It affirmatively appeared, however, that it had a number of notes, criticised by the banking department, made by relatives of officers, amounting to more than $4,000.00 and that it had an equity in a real estate mortgage taken from a brother-in-law or brother, of the managing officer, Mr. Svoboda (Rec., p. 174, Qs. 801-5).

Mr. Svoboda testified further (Rec., p. 175, Q. 762):

That for the six months ending June 30, 1928, the bank had gross earnings of $6,860.13, of which $332.10 was real estate and insurance commissions; that it disbursed to salaries, $1,590.00; interest on borrowed money, $115.50; interest on deposits, $3,972.50; taxes, $157.08; Guarantee Fund $596.24, and other expense, $425.80; that for the six

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months ending December 31, 1928 (Rec., p. 174, Q. 744), the bank had gross earnings of $5,343.55, of which there was derived from interest on loans, $5,088.36; commission on farm lands, $106.71; commission on insurance, $148.58; that of this amount there was paid in salaries, $1,590.00; interest on deposits, $1,834.88; Guarantee Fund, $91.88; other expense, $1,439.75; and that the net profit for the year was $333.05, after charging off bad debts of $690.70.

It will be noted that its gross income for the year was $12,203.68, of which $5,707.38, or almost 50 per cent, was paid as interest on deposits; and the bank paid more than 25 per cent of gross receipts as salaries.

Mr. Svoboda further testified that the surrounding towns were strong competitors for deposits, the town of Abie being within four miles of Bruno, where there are two banks, six miles of Linwood, where there is one bank, and within nine miles of another town, where there is another bank (Rec., pp. 174-5, Qs. 749-58).

The deposits at the end of 1928 were $182,000.00 (Rec., p. 173, Q. 739). The bank was paying interest on so large a percentage of its deposits that it amounted in the aggregate to an average of more than three per cent on all the deposits, a condition manifestly due to competition. Had the bank paid the full Guarantee Fund assessment, it would have been about nine cents on the dollar of its gross income, which is the same relative proportion paid by the other banks of the state.

Mr. Svoboda further testified that his bank had had county deposits continuously from 1912 down to July, 1928, without giving any bonds therefor; after the commencement of the suit, they had given a bond; that he stated to his

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depositors that they were protected by the Guarantee Fund (Rec., p. 184, Qs. 839-42).

The Abie State Bank was one of the banks joining in the state-wide Omaha Bee advertising herein referred to. Its name headed the list of banks on the last advertisement.

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30. A comparison with national banks in Nebraska as to earnings and losses:

National banks have declined one-fourth in number; their increase in deposits has not been comparable to the state banks; fifty have converted into state banks.

In recent years the percentage of earnings of national banks has been approximately one-half that of the state banks and the percentage of losses almost double.

In connection with the progress of the state banks during the period of the Guarantee Fund Law it is important to note the history of the national banks during the same period, in number, earnings and losses.

It appears that the number of national banks on October 1, 1909, was 219, and on June 30, 1928, 158; a decline of more than 25 per cent (Rec., p. 397, Qs. 2358-60). During the same period there had been a net increase of state banks (Ex. 10, Rec., p. 422).

Since the Guarantee Fund Law became operative in 1911, 50 national banks have been converted into state banks, two of which were in the year ending June 30, 1927. On the other hand, while some state banks were converted into national banks before the law became operative,

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only nine have converted from state to national banks during the period that the fifty banks were converted from national into state banks (Rec., p. 396, Qs. 2348-9).

From 1911 to the close of 1927 deposits of state banks increased from $73,886,000 to $261,311,000 (Ex. 10, Rec., p. 422, also in this brief) while national banks increased from $83,360,000 to $193,621,000 (Rec., p. 397, Q. 2356).

Thus while the national and state banks increased their deposits 353 per cent during the period, national banks increased theirs 232 per cent.

Appellants seek to make some point of the amount of deposits per bank, but of course, the important consideration is the total deposits in each class of banks and the relative growth.

John Flannigan, a well known banker, former presiden of the state association, denationalized within the last three years; Phil Hall, present president of the Nebraska Bankers Association, Greenwood State Bank, denationalized in the last three years; both on account of the Guarantee Fund (Rec., p. 257, Q. 1319). Minick Crawford, former president of the Bankers Association, Crawford, Nebraska, also denationalized (Rec., p. 278, Qs. 1441-2). The list of nationalizations included two past presidents of the Nebraska Bankers Association and the present president (Rec., p. 279, Qs. 1444-5).

EARNINGS. The *slump* of national bank net earnings during the deflation period in Nebraska, was greater than that of state banks, *and shows strikingly that the Guarantee Fund minimized the loss of state banks rather than enhanced it.*

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During the period from 1922 to 1928, inclusive, the national banks of Nebraska outside Lincoln and Omaha earned annually an average of 2.74 per cent, or less than 3 per cent net on their capital and surplus, and during the last five years averaged only 2.01 per cent per annum (Compilation from comptroller's report, *plaintiff's* Exhibit 56, page 910, vol. 4, Orig. Rec.; omitted in printing).

A striking comparison with the earnings of state banks for the year June 1, 1925, to June 30, 1926 (Exhibit 39), and for the 18 months ending June 30, 1928 (Exhibit 38).

LOSSES. That the national banks took larger losses in Nebraska through the deflation period compared to the average of the balance of the United States and about double the percentage of Nebraska state banks is indicated by a comparison of the losses of state banks hereinbefore given and the losses of national banks on *plaintiff's* Exhibit 56 from comptroller's reports.

THE LOSS OF NATIONAL BANKS (EX. 56, VOL. 4, PAGE 910, ORIG. REC.):

Per Cent Net Losses to Gross Earnings

	Nebraska	Lincoln	Omaha	Total U. S.
1921	6.2	11.7	16.1	12.8
1922	12.4	14.4	18.4	14.1
1923	10.1	12.9	20.6	10.4
1924	20.2	—0.7	32.5	10.5
1925	17.2	6.7	14.0	9.0
1926	19.3	11.2	19.4	8.5
1927	18.5	13.0	22.3	8.7
1928	12.7	13.3	5.8	8.7

The year 1921 in Nebraska indicates the normal losses; then, as in state banks, comes the peak percentages through 1924, 1925, 1926 and 1927, with a recession in 1928.

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Especially note that the percentage of net losses to gross earnings of national banks in Nebraska in 1926 was 19.3 per cent, and 1927, 18.05 per cent, and that as against this, the percentage of gross charge-offs or bad debts by the state banks of Nebraska for the 18 months, including the entire year 1927 was $2,233,968 out of gross earnings of $23,977,661, or at the rate of approximately 10 per cent of gross earnings. In other words, the losses in national banks were approximately twice what they were in state banks and the loss in national banks was almost equivalent in percentage to the charge-offs in state bank, plus the payments to the Guarantee Fund. The stabilizing influence of the Guarantee Fund was effective.

The losses of national banks in the Kansas City Reserve District as compared with the United States as a whole is further shown by data from page 877, Federal Reserve Bulletin for December, 1928 (Exh. 60, Orig. Rec. p. 912-a), and data from page 879, same exhibit; only partially printed in record):

	Losses on Loans per $100 of Loans	Loss on Investments per $100 of Investment
Kansas City District		
1928	1.12	.33
1927	1.57	.39
All Member Banks		
1928	.52	.40
1927	.53	.40

A comparison shows that the Kansas City District on its investments—bonds—runs lower than the averages. The substantial purchase of bonds is a recent development in this agricultural country. The losses on loans in the Kansas City District appears double and treble the averages in the country as a whole; another evidence of deflation.

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A striking drop appears in the year 1928; further confirmation that in national as well as in state banks, the deflation losses have been practically eliminated.

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31. The relatively small amount of the annual Guarantee Fund assessments through the years; no special assessment levied in each of seven years.

The law as originally enacted and as held valid by the United States Supreme Court provided for regular assessments of one-tenth of one per cent and maximum special assessments of one per cent on average deposits. *The bankers of the state procured legislation in 1923, cutting the authorized assessments practically in half by reducing the maximum special assessment to one-half of one per cent.*

The maximum special assessment that this court now has under consideration is exactly one-half of the amount held valid by the Supreme Court of the United States.

There is included in the printed record an exhibit showing a list of the regular and special assessments, the rate, total assessment and the average deposit for the years 1911 to 1928, inclusive (Rec., p. 487, Exh. 44).

Then the act was amended at the instance of the banks to reduce the maximum special assessment from one per cent to one-half of one per cent. Since the amendment of the act only five-tenths per cent special assessment could be levied in any one year.

It is worthy of note that for the nine years, 1919 to 1927, inclusive, including the three years above when the largest amount was levied, the average special assessment for the

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nine years was five-tenths of one per cent ($500 on $100,000 of deposits), and that for the four years 1924 to 1927, inclusive, the average special assessment was .045 per cent ($450 on each $100,000 of deposits).

During the eighteen years from 1911 to 1928, both years inclusive, and including the last unpaid assessment now in controversy, the average assessments for the period, including *both regular and special,* have averaged less than four-tenths of one per cent ($400 a year per $100,000 of deposits): to-wit, sixty-nine-tenths for the eighteen years and less than a million a year for the period.

AMOUNT AGAINST EACH BANK OF THE SPECIAL ASSESSMENT IN ISSUE. The interveners offered in evidence Exhibit A, Record, page 568, showing the amount of the current enjoined assessment assessed against each bank listed in Exhibit A attached to plaintiff's petition.

We challenge the court's attention to this exhibit as showing how small, relatively, is the amount to be paid by each bank.

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32. Threats of the banks to liquidate or nationalize.

The argument that certain banks will possibly liquidate or nationalize affords no reason for judicial nullification of the law. The court is asked to take into consideration and speculate as to the effect thereof. There is no evidence on the proposition. This same threat was made at the time of the enactment of the law but a very few banks did withdraw. But that question is not in this case.

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Mr. Schantz on cross-examination testified that he was unable to name any strong state bank that would nationalize or any state banks that would liquidate if the assessments were continued (Rec., p. 637, Qs. 4158-60). He refused to express and had no opinion as to when such assessments would have that effect (Rec., p. 637, Q. 4161).

A fair consideration of this matter, if the same were pertinent, would involve broad and extensive evidence as to the advantages and disadvantages of the national and state banking systems, and an appraisal of the various benefits attaching to a state banking charter as distinguished from a national. There are many advantages attached to a state charter as distinguished from a national one. Some of these are statutory of which the court will take judicial notice. Among these are: A national bank is required to keep a certain percentage of its deposits with a federal reserve bank without interest. A state bank is not under this obligation; it gets interest from its depository. A state bank may loan to one borrower 20 per cent of its capital and surplus; a national bank only 10. A state bank can make individual loans to its customers as large as a national bank with twice the capital.

These and other benefits and advantages the legislature conferred on state banks in imposing the Guarantee Fund obligation are illustrative of the impossibility of a court judicially inquiring into and passing on the matter. Manifestly an inquiry into the matter of the continuance of the Guarantee Fund Law involves an inquiry into all related matters and the law as a whole.

Such threats are no more competent now than they were twenty years ago, at which time they were made freely.

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Take the case of these unorganized thousands of claimant depositors; men and women who trusted these banks; believed their representations; relied on the decision of the Supreme Court of the United States; men and women who respect their own legal and moral obligations; depositors in the plight of Rev. Peterson and the stipulated witnesses. On what tenable theory of law or equity or good conscience can they thus be judicially deprived of such percentage of relief as the assessments to be paid by go banks in the system will afford?

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33. The "Eight Per Cent of Capital" Deception.

The banks have adopted as a slogan in this case and constantly reiterated the misleading statement that they pay eight per cent tax on their capital to the Guarantee Fund. They pay nothing on their capital to the Guarantee Fund. The Guarantee Fund payment is an expense of operation, a charge against operation and for the privilege of doing business as a bank. It is no more to be figured as a per cent on capital than is any other expense of operation.

For instance, take the analysis of operating expense and income of the banks for the year ending June 30, 1926 (Exhibit 39). This shows that of each dollar of income of the banks there was paid to the Guarantee Fund nine and eight-tenths cents, or about one-eleventh of the income and that there was paid as salaries and wages 23.90 cents out of each dollar, or approximately one-fourth of all income. Inasmuch as the salaries and wages amount to about two and one-half times the contributions to the Guarantee Fund it would be just as relevant and reasonable to state that the banks paid twenty per cent of their capital as wages

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and salaries as to say that they paid eight per cent of their capital as contributions to the Guarantee Fund. The same illustration will apply and the same figures hold good with respect to interest on deposits on savings accounts paid by the banks and which amount to more than five times the payments to the Guarantee Fund. With the same reasoning they could state that they paid forty per cent on their capital as interest on deposits and savings.

These assessments are an expense of operation; a charge against earnings for the privilege of doing business as banks, *and largely and actually come out of the earnings which the Guarantee Fund itself creates.* The annual gross income of the banks is approximately the same amount as the capital (Exh. 39). The banks pay from nine cents to ten cents out of each dollar of gross earnings to the Guarantee Fund.

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34. The assets and liabilities of the Guaranty Fund; and its aggregate net liabilities; there was no concealment of amount; the bankers' knowledge was greater than that of depositors; extent of knowledge immaterial; the amount adds nothing to the maximum permissible annual assessment against the banks; it affects only the claimant deposits; no interest is paid on claims.

It appeared at the time of the trial that the gross book value of the assets in the hands of the Guarantee Fund Commission was $39,511.701. The liability in receivership banks was fixed but the liabilities in commission—operated banks and the probable realization on their assets was a matter of estimate. The evidence fairly disclosed that the net liabilities would be less than $12,000,000.

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Secretary Peterson of the Guarantee Fund Commission made an estimate of net liabilities of $16,000,000 in his statement prepared for plaintiffs (Rec., p. 122, Exh. 1).

His cross-examination thereon, however, developed:

That he omitted the asset of stockholders' liability (Rec., p. 120, Q. 316), which in a previous statement he had included and expected a realization on, of 25 per cent; the experience of his department showed a realization of 20 per cent on such assets (Rec., p. 114, Q. 268); this realization would be more than $1,000,000 as the assets in the hands of the commission were much larger than at the date of the previous statement. In this Exhibit 1 he admitted he listed the item of "sale assets" at about half their value (Rec., p. 95, Qs. 112 to 118, inc.).

The assets on hand (book value) had increased from $28,700,000 to $39,500,000 between his statement of May, 1927 (Rec., p. 126, Exh. 4), and his statement of December 31, 1928 (prepared for the trial), (Rec., p. 122, Exh. 1); still he placed the expected realization at the same amount in each, to-wit, approximately $10,000,000. In the latter statement Mr. Peterson did not disclose that $2,239,691 of the assets listed in said Exhibit 1 were cash until he was recalled to the stand and specifically asked the amount of money therein (Rec., p. 196, Q. 916). Of the $39,000,000 listed as gross assets of which he expected a realization of only 25 per cent or $10,451,932, approximately one-fourth of said realization was already in cash and $17,000,000 of the $39,000,000 of assets was in going banks being operated by the commission (Rec., p. 122, Exh. 1.). In referring to Exhibit 1 it should also be noted that the number of banks is duplicated and that 70 banks in which there were "sale assets" are the same banks included in the other banks listed (Rec., p. 99, Qs. 145-6).

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However, the aggregate net liabilities primarily concerns the depositor in a failed bank, for it affects the time when, and the extent to which he will receive his money; it does not increase the bank's annual assessment or contribution for that is fixed by law.

The regular and special assessments approximate $1,600,000 per annum and would pay this liability in about seven and one-half years.

As showing the comparative value of the Guarantee Fund, it appeared that the total liabilities of all failed banks since June 30, 1914, had been $75,650,933 and of which $50,000,000 had been liquidated and paid; 70 per cent having been paid from the assets of the failed banks and 30 per cent from the Guarantee Fund (Rec., p. 121, Qs. 320-4) leaving, roughly, $26,000,000 of liabilities as against which there are the assets of book value of $39,031,605.

CAPITAL ASSESSMENTS ON STOCKHOLDERS. Comment is made by appellants on the fact that $2,000,000 of capital assessments have been paid by stockholders. There is not the slightest evidence that the cause for these payments was in any wise related to the Guarantee Fund assessments; on the contrary the evidence hereinbefore quoted was that the Guarantee Fund had been a stabilizing influence and prevented losses and the inevitable conclusion is that but for the Guarantee Fund the banks in which these capital assessments were collected, being weak by reason of losses, would many of them have failed or had runs on account of their apparent weakened condition. As one witness expressed it, it was common knowledge that under the operation of the Guarantee Fund law and

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through the period of stress a bank on one side of the street could fail and close without causing the slightest embarrassment to the bank on the other side because of the confidence in the fund (Evidence hereinbefore quoted).

INTEREST ON LIABILITIES. In line with plaintiffs' policy of exaggeration they say it will take the assessments to pay the interest on the liabilities.

The interest on adjudicated claims, if paid, would be *less than one-half the amount thus extravagantly stated, and the same claimants would get it,* and in the same proportion, and benefit thereby in the same amount as if it were paid as principal.

But, quite important, the guarantee fund has not been paying, nor the depositors asking, interest except in a few isolated litigated claims reaching the supreme court, as was testified to. In fact adjudicated claims were paid up until October 1, 1927, and those now unpaid have been allowed since from that time down to the time of the trial (Exh. 54, p. 820, vol. 4, Orig. Rec.)

Again, if the item of interest becomes important, it is within the power of the legislature to provide that all assessments paid shall apply on principal of deposits.

Reference is made in the governor's message to accrued interest on certificates of deposit, and accrued interest on liabilities of the guarantee fund. The reference to accrued interest on certificates of deposit had reference to that accrued at the time the bank went into receivership, as of course no interest is allowable on deposits while a bank is in receivership and pending adjudication; it is *in custodia legis.*

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KNOWLEDGE OF EXTENT OF LIABILITIES. Appellants state their lack of knowledge of the net liabilities of the Guarantee Fund. Failed banks have been under the control of the Guarantee Fund Commission since 1923, and it has operated a large number of banks taken over. The members of the Commission are appointed by the governor from names chosen by the state bankers.

Mr. Kirk Griggs, secretary of the Department of Trade and Commerce in 1925 and 1926, testified: That about January 20, 1925, he had a meeting with Mr. Schantz and other representative bankers in Lincoln and that he had made a resume of conditions and asked them their advice and he told them that he "figured the losses then existing payable out of the Guarantee Fund would amount to over $6,000,000 (Rec., pp. 650-1, Qs. 4226-32) and that he meant net losses (Rec., p. 653, Q. 4241); and he told them that in his judgment the number of banks probably involved would amount to 215 (Rec., p. 652, Q. 4233).

In May, 1927, the bankers' committee met in Lincoln and an estimate was made at that time of the assets and liabilities; the assets then being $28,720,257 and it was estimated that the net loss would be over $6,000,000 (Rec., p. 126, Exh. 4).

As will be noted, the amount of the net liability of the fund from time to time is a matter of opinion, largely based on estimate and value of assets. The book value of the assets of the fund has at all times been vastly in excess of the liabilities. At the time of the trial the book value of the assets of the Guarantee Fund was $39,000,000 and the liabilities about $26,000,000. So the net amount was a matter of judgment as to realization on assets.

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At the time the advertising was done in 1926 the bankers apparently then knew that the net liabilities of the fund were in excess of $7,000,000.

In March, 1928, Mr. Schantz prepared and circulated two thousand copies of a pamphlet concerning the Guarantee Fund Law (Rec., p. 627, Qs. 4096-4105). He quoted in this document "The Story No Other State Can Tell". He therein referred to the total net liabilities of the fund as ten million dollars and recommended a system of paying the depositors with receiver's certificates in order to make the claim available as security for loans and give the depositors the use of their deposits. There was then no question about ability of the banks to pay assessments, or of repudiation of liabilities or of diminishing benefits.

Mr. Bliss, a state banker, has been in active charge of the banks. There is absolutely no evidence that either Secretary Bliss or Secretary Peterson deceived the bankers, or anyone else, in the premises. But of course the extent of the losses and the character of liability cannot under any proper theory of the law be a basis for the banks denying liability for the fixed maximum assessment.

Plaintiffs state: "Estoppel must be based on acts performed by one party with knowledge to the detriment of another party having no knowledge or means of knowledge." To support this statement they argue voluminously as to the time when they ascertained the liabilities of the guarantee fund.

They had knowledge in fact; but the knowledge or lack of knowledge apparently cuts no figure in the principle applicable.

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The aggregate of the net liabilities did not add anything to the permissible assessment against the banks. It merely went to the question of the time when and the amount of the payments on accrued claims. It chiefly concerned the claimant depositor.

Certainly, there is no evidence that the depositors knew anything about the extent of the liabilities.

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35. The alleged conversational guesses as to future losses and failures; and possible future losses as indicated by statements in Examiners' Reports.

Much time was devoted by appellants to a cross-examination of Mr. Bliss, secretary of the Department of Trade and Commerce, with reference to what he might have theretofore said in conversation with their Witnesses Stevens and Schantz with respect to the number of banks which might have capital impairment and might thereafter fail, and to Stevens and Schantz recollection thereof. Mr. Bliss did not recall making the statements. Appellants have picked out a few isolated questions and answers from this testimony. A fair analysis of such testimony would require its quotation here verbatim. We will not burden this brief with it.

We submit that such testimony of conversations was wholly incompetent. If held competent for any purpose they would not be binding upon the banks from any angle and would not be binding upon the depositors. Manifestly such expressions of opinion if made as to what could or might happen would have slight weight. Mr. Bliss explained it all by his statement that anything he might have said had reference to his estimate as incorporated in the bankers' committee's report of May, 1927, that after that report 100 banks had been closed; that other banks

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had taken care of their losses by assessment or otherwise (Rec., p. 192, Q. 898), and that at the time of the trial nearly all the banks that he had referred to in said report as having probable capital impairment had been cleaned up and disposed of in some way (Rec., p. 198, Q. 934).

As a matter of fact, the testimony of Mr. Bliss and all other witnesses as to facts and figures on earnings, condition, etc., negative the probability of his ever having made any such a statement. Manifestly, an isolated statement of that character, if made in a conversation, would have no substantial evidential value in any event and should have no prejudicial bearing on the rights of depositors.

Analogous are the statements of Mr. Stephens and Mr. Schantz that they thought if the assessments were continued the majority of the banks would operate with impaired capital or be forced into liquidation. Neither of them gave a single figure that would support such a guess. In fact, the acts, conducts, representations and statements of each prior to the trial had been just the reverse of such a position.

Examiner's Estimates of Probable Losses in Going Banks

Long after the plaintiffs had rested their case they asked Mr. Marshall of the banking department to run on an adding machine from examiners' reports made from time to time during a fifteen months period, the total amounts noted by the examiners as losses and probable losses, the amount of loans and discounts in all the banks six months due and demand paper carried twelve months or more. This was done. Appellants stress such figures; but do not include the related facts.

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It appeared that none of these examinations had been made at the same time nor for the same period. Some items objected to by the examiners had been collected in or otherwise removed; some of the objections were disputed by the banks. The criticized items were distributed through the state banks without reference to whether the bank was strong or weak, dividend paying or non-dividend paying (Rec., p. 559, Qs. 3608-9).

Mr. Marshall testified that in the case of the notes six months past due and demand notes carried 12 months or more, it was merely a classifying and the question of whether they were good or bad did not enter in (Rec., p. 560, Qs. 3615-7). Plaintiffs had referred to these as "statutory bad debts."

There was no foundation for the introduction of the totals from these examiners' reports and they should not have been admitted without an opportunity to examine them and cross-examine in detail with reference to them. The total amount thereof based on the total loans and investments of $216,342,687 was 1.82 per cent (June 30, 1928, statement, p. 664, Record). As stated, testimony of Mr. Bliss was offered that more than one-third of this had been disposed of. It was further testified to that many of the items were not admitted by the banks to be loss or probable loss.

Having in mind the commendable disposition of examiners to closely scrutinize and criticise with a view to keeping the banker diligent in the matter of his loans and discounts, we think it is a fair statement that the percentage of items criticised as above would prevail under any conditions in the banking business. The strong banks get the criticisms as well as the weak.

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We submit this evidence was entitled to little probitive force on the issues. The trial court in its opinion did not refer to it.

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36. The benefits of the law to the banks—past and future; the courts can not measure them.

The evidence is overwhelming and not denied as to the benefits of the Guarantee Fund to both depositors and banks. The only reason suggested by the plaintiff as to why it would not be of a continuing benefit was its large liability. This the banks urge by way of argument rather than by way of evidence. The public does not urge it; the public authorities do not assert it. The extent of the liabilities did not add a dollar to the maximum $600 per $100,000 of deposits annual payment of assessments by the banks.

The banks admit past benefits *to them* from the Guarantee Fund. The evidence of impaired benefits now is scant. They raise it by inference and imply it from the amount of the accrued liabilities of the Fund; this is a matter of argument and is covered hereafter. It is in evidence that the acts of the banks in giving notice of their intention to file, and the filing of this suit was the disturbing factor. It is the only tangible evidence of reduced confidence.

Inasmuch as the Guarantee Fund provisions were created *for the benefit of depositors* the benefits to the banks necessarily arise indirectly although, as has been herein shown, there were large benefits to the banks. Manifestly, *the extent of the benefits to depositors* in the past has not been at any time a matter for judicial computation and

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is not susceptible to judicial measurement. In considering the present and future the court is asked to nullify the law on the ground that it has ceased to be beneficial to the depositors in existing banks and to the banks. We submit that the future benefits of the law to the depositors or the banks cannot be judicially measured or ascertained. No authority has been or can be produced supporting such course.

The fact of whether the fund has accumulated liabilities has two effects; it affects the time within which depositors in failed banks will receive payment, and it no doubt diminishes some the extent to which a present day depositor relies on the protection of his deposits. But it adds nothing to the maximum assessment to be paid by the banks. If the liability of the bank was unlimited a different question might be presented.

If the law is for the benefit of depositors in failed banks it would seem absurd to contend that they should forego their claims because of the extent of the claims arising. They are not responsible for that situation.

Appellants contend that the fund is for the benefit of existing depositors in going banks. *It is of course for the benefit of all depositors.* From the depositors in going banks today trusting in and relying on the law, its adjudicated validity and the express and implied promises of the banks, come the claimant depositors of tomorrow—including public officials with unsecured public deposits. Such are the claimant depositors as now exist in many thousands—public and private.

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Claimant depositors are the only ones that have occasion to actually participate in the fund or opportunity to participate in the assessments levied and now enjoined; in that sense the depositors are the real defendants; in that sense they avail themselves of its protection.

At the time this suit was started, there were depositors' adjudicated claims of $10,536,518.59 (Rec., p. 87, Qs. 56-7). The annual regular and special assessments of $6 per $1,000 of deposits produces anuually around $1,600,000, which is equivalent to 15 per cent of these adjudicated claims.

In determining the benefits of the guarantee fund law, relatively, at any stage, as between depositors who had become claimants through failure of banks and the depositors in going banks, the benefit to the former is the more tangible and visible, and definitely ascertainable. This is necessarily so. Only a portion of the depositors in going banks ever become claimants against the fund. The depositor in a going bank places reliance on the fund to the extent of depending on the measure of security which the assessments will give in the event that he is added to the existing claimants.

This benefit to the depositor in the going bank or in the closed bank is not in the same degree that it would be if the Fund had no accrued liabilities. But the depositor in the going bank has exactly the same benefit and protection as the depositor in the failed bank, in that he knows that should the bank fail, he will participate *eo instanti* in the depositors' guaranty fund.

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The enjoined assessment for the last half of 1928 was $622,947.76. The regular and special assessments since then amount to less than $2,400,000, none of which the banks have paid, so that the total assessments now in issue are little less than $3,000,000. The banks have accumulated the same in their hands pending the determination of this suit.

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37. The bringing of this suit by the banks and their attempted repudiation of their liability has impaired public confidence in the banks; has been the principal source of reduced benefits from the Guarantee Fund and has resulted in bank failures.

The State Bankers Association meeting was held in Omaha, Nebraska, in November, 1928, and the newspapers carried the report that certain state banks would contest the assessment and refuse to pay it. The president of the association announced that the banks were not going to pay the assessment. The banks thereafter did commence a suit and the agitation, including the suit, created nervousness and distrust in the people (Rec., p. 285, Qs. 1486-90; Rec., pp. 469-70, Qs. 2862-3).

Thereupon public officials commenced to demand bonds and in December, 1928, about the time the suit was filed, State Treasurer Stebbins learned of the proposed contest of assessments and as he stated, he "played safe and asked for bonds" in the latter part of December, 1928 (Supp. Rec., pp. 60 and 61); public officials also had commenced to ask for bonds insuring public deposits (Bliss, Rec., pp. 469-70, Qs. 2862-3).

Appellants have gone outside of the record and stated the alleged number of banks that have failed in 1929 and 1930; the number is grossly exaggerated; and the bank

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failures that have occurred are largely attributable to the bringing of this suit. Reference to Exhibit 10 will show that the banks, through the period from 1920 to 1928 held their deposits substantially intact, notwithstanding the large number of failures. Whatever losses they have suffered since the bringing of this suit are solely attributable thereto.

There is no evidence of any diminution in the benefit of the law to them until they precipitated this controversy. Until then the depositors in failed banks had confidence in them; and the depositors in going banks gave no evidence of impaired confidence.

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38. The alleged "Public Interest" asserted by the banks is but the camouflage of the large state banks; they only sponsor this suit; the defendants' public officials are asserting the public interest.

39. Messages of the outgoing and incoming governors are in harmony with the statements of this brief.

But, say the banks, these liabilities having accrued to claimant depositors of failed banks, the present-day depositors in going banks will receive no future benefit and the payment of existing obligations will affect the public interest and decrease the ability of the banks to meet their obligation to present-day depositors and to make compensatory earnings. Thus hiding under the cloak of the public interest and that of the present-day depositors, their asserted grave concern for both is purely camouflage to increase their own earnings at the expense of the depositor.

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Appellants have quoted a few isolated excerpts from the inaugural address of Governor Weaver. That both Governor Weaver, the incoming governor in January, 1929, and Governor McMullen, the retiring governor, held views wholly in harmony with the position of appellees in this case is shown by the following quotations from their respective addresses on that occasion.

Governor McMullen, in his farewell message to the 1929 legislature, in concluding his reference to banking conditions and these assessments, said (Exh. 11, Senate Journal, p. 197, vol. II, Orig. Rec.):

> "So long as these bank losses remain unpaid, the guarantee law should not be repealed and its provisions should be protected from nullification. Depositors of failed banks are legally and morally entitled to their money. They have taken the word of the banks that their deposits would be secure and they have depended on the integrity of the state to see that the guarantee laws are carried out in good faith."

And prior thereto, in the course of the address, he had stated (pp. 42-43, vol. II, Orig. Rec., Senate Journal):

> "When the bank guarantee bill was under discussion by the legislature of 1909, the point was stressed that only the small depositor, such as the day laborer, the widow with her meager savings, and similar accounts, should come under its provisions, but as the bill passed it included all deposits of whatever size or kind. According to available records, the measure met the opposition of three-fourths of the state bankers. Counsel was retained by opposing bankers and the constitutionality of the law tested in the federal supreme court. The law was sustained by that body in a decision rendered in 1911 and state bankers have

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paid their assessments as levied annually until the second half of the special assessment for the year 1928 just closed. On December 21, 1928, notice was served on the state that payment of the special assessment mentioned would be resisted and a restraining order asked of the courts on the ground that the assessment is confiscatory. While many state bankers opposed the law when it was first enacted, there were others who engaged in the banking business because of the law and in spite of the payment of assessments for nearly a score of years have been benefited to the extent that their banks have grown into large and substantial institutions. During the years of the development of their banks under the guarantee law, they were outspoken advocates of the equitable and protective features of the measure and emphasized the advantage to the depositor in having his account secured. However, when banks to be closed increased in number and losses to the guarantee fund grew in volume, it was the larger banks, those that formerly had extolled the law, that first protested against paying their proportion of the special levy and proposed to other state bankers that organized effort be made to have the special assessment feature of the law declared null and void. These protestants assert their willingness to pay the regular assessment, which is one-tenth of one per cent, but are anxious to be relieved of the special assessment, constituting five-tenths of one per cent. If the courts hold the special assessment unconstitutional and the regular assessment is not increased to make up for it, the guarantee law is doomed.

"In 1909, before the guarantee law was in full operation, the 659 state banks reported $71,000,000 of deposits with a capital investment of $12,000,000. In 1920 with 1,012 banks reporting there were $243,000,000 of deposits with a capital of over $26,000,000. In 1928 from the latest compiled reports of the 730 state banks there are $268,000,000

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of deposits with a reserve in cash and bonds of over $97,000,000 and a total capital stock of $19,000,000. In other words, 273 fewer state banks in 1928 than in 1920 and $7,000,000 less capital investment, the deposits have increased $20,000,000. The low reserve position of the banks of 1920-1921 compared to the large volume of deposits has been completely changed. The banks now show cash and bonds of $97,000,000, which when added to their commercial and feed lot loans, should enable the average state bank to pay one-half of its deposits practically on demand. Excluding the sixty-one banks in receivership and the seventy-four banks in the hands of the guarantee fund commission, together with an estimated number that may be taken over in the future. It may be said that the remaining banks are stronger, more prosperous, more elastic and more able to meet demands than any time in the history of the state."

Governor Weaver, in his inaugural message to the 1929 legislature, and in commencing his reference to the state banks and the guarantee fund said Exhibit 11, Senate Journal (p. 197, Orig. Rec.):

"Both the republican and democratic state platforms declared in opposition to the repeal or weakening of the bank guarantee law. Regardless of either the merits or defects of the law, and the guarantee system thereunder, general assent as to its need and usefulness has been given by our people for more than seventeen years. Undoubtedly the protective purposes and features of this agency accepted by the people until recently as adequate, have served as a great stabilizing influence in both the banking and other business of the state, and especially during the adverse financial conditions of recent years. During this trying period the benefit to all business was so apparent that I feel sure that the business of the state could well have afforded and would have been willing

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> to have generously contributed to sustain the guarantee fund, had its solvency been then threatened. In view therefore of the expressed opinion of both political parties in this state and of the recognized benefits which have already accrued, we should seek only legislation pertaining thereto which aims to strengthen and protect the bank guarantee system. Our joint efforts in this public endeavor should be undertaken in spirit entirely free from partisan bias, and for the sole purpose of serving the state and its people."

Governor Weaver, in a special message to the 1929 legislature, on February 4, 1929, of which the court takes judicial notice, said that since his inauguration message, conferences had been had with committees of both houses, as well as with many citizens; and said among other things in discussing banking and the guarantee fund:

> "In taking stock of this whole situation, our officials and citizens should be firm in meeting the attack made upon our present laws by a large number of state banks. The operation of banks under the laws of Nebraska is based on a franchise right granted by the state. A corporation which has sought, obtained, and used such a franchise cannot be heard to assert that it will keep only a part of the contract. It must always operate under the laws of the state whatever they are. Any modifications as to the present law should be made, not because modifications are demanded by the banks, but because the interest of the state will be better served thereunder. Until we go to a new basis for the new guarantee fund, the present rate of assessment should stand."

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40. **The Nebraska legislature, in March, 1930, after the decision in this case, passed an act reducing the future** total annual assessments from six-tenths of one per cent

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to two-tenths of one per cent, and limiting the latter to a period of ten years, and to application on accrued liabilities (Sen. File No. 3, 46th Spec. Ses.).

We can not in this case consider the reasons which prompted the Nebraska legislature to take this action in March, 1930, over fifteen months after this suit was brought, nor consider the sufficiency of such reasons. This act and its effect are further discussed under Proposition of Law Number 20.

ARGUMENT AND PROPOSITIONS OF LAW

Cases testing the validity of Guarantee Fund laws have always heretofore been submitted on demurrers to the banks' petitions. Invariably the laws have been sustained. The defendant state officials in this case, however, were of the opinion that the interests of the state and its people would be served best by a complete showing of how untrue and how groundless the contentions of the banks were, as well as raising the legal questions.

In this, we believe, the court will appreciate that Governor Weaver and the other officials were right. The public interests and business interests of the state are better served by a full and complete showing of the facts than by a tacit admission of the groundless economic contentions of the banks, as a demurrer would have done. Even a technical admission of these untrue assumptions and complaints would have been seriously injurious from an economic standpoint.

Upon the trial, as the court will appreciate, the banks failed wholly to show that the Guarantee Fund assessments

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ever materially influenced the failure of any bank or that the assessments are now oppressive. A contrary state of facts was conclusively established. We have summarized and quoted the evidence at length in this brief; perhaps too much. But it is in line with the policy of the Nebraska state officials to have the case fully and fairly tried on the facts as they exist and not from a fictitious assumption of conditions.

Appellants by ingenious argument, attempt to submit the issue in this case as one between the depositors with unpaid claims against the Guarantee Fund and present depositors in going banks. They contend that payment of the assessments by going banks is unfair to present depositors because such payment does not give them protection.

This is not a correct statement of the practical issue presented by facts and conditions as they now are and were when this suit was brought.

The true controversy is whether or not the present stockholders in going banks are entitled to have the court by injunction suspend the operation of the Guarantee Fund Law (admitted and adjudicated a proper police measure), until all losses, current and those caused by the deflation period, are charged off, and the stockholders receive larger earnings than the banks were earning (average annual net earnings in excess of 7.12 per cent on capital and 5.26 per cent on combined capital and surplus) before the banks are required to meet their obligations to depositors with unpaid deposits. If relieved of these assessments the stockholders would admittedly, after both current and deflation period losses

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are charged off, receive an average annual return of in excess of 11.18 per cent on the combined capital and surplus of their banks.

The Nebraska Supreme Court in its opinion and syllabus sets out in detail part of the evidence showing that the Guarantee Law had been of tremendous benefit to the state banks; that it never has been a materially contributing cause of bank failures; that it is not confiscatory or burdensome and that a complete case of waiver and estoppel was made out against the banks. That court was clearly right on the facts and we believe our full presentation of those facts and the evidence to that court and to this, the highest court of the country, has been the best policy.

PROPOSITION OF LAW NUMBER ONE

Where the legislature has had before it the question of the benefits of a guarantee fund law to the depositors, to the banks themselves and to the general public, and the question of the obligations to be imposed for the public good as conditions to engaging in the banking business, and the legislature under its police power has determined that the good of the public justifies the enactment of the law with its reciprocal benefits and obligations, the judiciary, under the rule applied by this court in the oleomargarine and bank guarantee fund cases, will not undertake to weigh benefits which have been and will be derived from the law against the obligations imposed by it or "to determine whether the law is unwise or unnecessarily oppressive" in its operation.

Powell v. *Pennsylvania,* 127 U. S. 678.
Sinking Fund Cases, 99 U. S. 700.

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Fairbank v. *U. S.*, 181 U. S. 283, 21 S. Ct. Rep. 648.

Purity Extract Co. v. *Lynch*, 226 U. S. 192.

6 R. C. L., section 12, page 12.

Shallenberger v. *First State Bank of Holstein*, 219 U. S. 114, 31 S. Ct. Rep. 189, 55 L. ed. 217.

C. B. & Q. R. R. Co. v. *State*, 170 U. S. 57, 47 Neb. 549.

State v. *Richcreek*, 167 Ind. 217, 77 N. E. 1085.

Lubetich v. *Pollock*, 6 Fed. (2nd) 237 Dist. Ct. W. D. Wash.

Schaake v. *Dolley*, 85 Kan. 598, 118 Pac. 80.

Many elements which must obviously have been of great importance with the legislature in the determination of the provisions and the enactment of the Guarantee Fund law, are not and never could become proper subjects of investigation by the courts. The determination of facts on which the validity and advisability of the adoption and operation of such statutes may depend, is primarily for that body.

The Supreme Court of the United States has steadfastly refused to usurp the legislative functions by attempting to review the questions of fact and public policy upon which a statute grounded upon the police power is based and is operating. The respective advantages to the depositors, banks and public, arrayed against the obligations imposed by the law, present questions of policy for the discretion of the lawmaking body or for the voters at the ballot box.

And the evidence in this case must convince any one who has reviewed it, that the banks' claim that the law

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has become oppressive and burdensome, has no foundation in fact.

This court and numerous state courts have adhered to the principle under consideration in all bank Guarantee Fund cases. It is forcefully stated in the oleomargarine case, *Powell* v. *Pennsylvania,* 127 U. S. 678:

> Whether the manufacture of oleomargarine, or imitation butter of the kind described in the statute, is or may be conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxous ingredients, are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has in the employment of means to that end, is very large.
>
> The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the

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sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk, or cream from unadulterated milk, to take the place of butter produced from unadulterated milk, or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. *If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary.* The latter cannot interfere without usurping powers committed to another department of government.

In *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, in an opinion by Justice Hughes, this court said:

The court has no concern with the wisdom of exercising the police power, and unless the enactment has no substantial relation to a proper purpose, cannot declare that the limit of legislative power has been transcended.

The question is whether the legislature had power to establish it. The exercise of this power, as the authorities we have cited abundantly demonstrate, is not to be denied simply because some innocent articles or transactions may be found within the prescribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a mere arbitrary fiat.

In *Sinking Fund Cases,* 99 U. S. 700, it was said:

Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One

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branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.

In *Chicago B. & Q. R. Co.* v. *State,* 47 Neb. 549, affirmed by the Supreme Court of the United States in 170 U. S. 57, it was said:

> It is enough that the courts will not interfere to prevent the enforcement of the statutes on account of any mere difference of opinion between them and the law-making branch of the government respecting the wisdom or necessity of particular measures.
>
> Nor is such legislation violative of any contract obligation, since the power to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety cannot be bartered away by contract or otherwise.

The principle is well stated in *State* v. *Richcreek,* 167 Ind. 217, 77 N. E. 1085:

> The circumstances that for a time it may inflict hardship, inconvenience, and possibly loss to certain individuals does not amount to a constitutional objection so long as such burdens or losses are not needlessly and unreasonably imposed, but result as an incident of a general enactment fairly designed to subserve the public welfare. If the mere fact of resulting inconvenience and loss to an established business, admittedly subject to public control, were sufficient to preclude control under the police power, then regulation would be practically impossible, and this most salutary and necessary power of sovereignty be seriously abridged or wholly destroyed.

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In *Schaake* v. *Dolley,* 85 Kan. 598, 118 Pac. 80, it was said in upholding the bank law of Kansas:

> When once a subject is found to be within the scope of the state's police power, the only limitations upon the exercise of the power are that regulations must have reference in fact to the welfare of society, and must be fairly designed to protect the public against evils which might otherwise occur. Within these limits, the legislature is the sole judge of the nature and extent of the measures necessary to accomplish its purpose. It may even go so far as to establish a monopoly. Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Re Lowe, 54 Kan. 757, 762, 26 L. R. A. 545, 39 Pac. 710.

This issue in the Noble State Bank case, *supra,* was disposed of by the following statement:

> We fully understand the practical importance of the question and the very powerful argument that can be made against the wisdom of the legislature, but on that point, we have nothing to say, as it is not our concern.

If the court were to undertake to review and adjudicate the weight to be given to the various considerations which induced this legislation in the first instance or the economic fairness of its operation as between different classes affected thereby, it would be a radical departure from the attitude heretofore taken by this court on those questions. Omitting for the moment the complete failure of the evidence of appellants, the questions urged are fundamentally legislative and not within the province of the courts.

PROPOSITION OF LAW NUMBER TWO

Where a guarantee fund law is enacted, adjudicated to be constitutional and a valid exercise of the police power,

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remains in operation for twenty years while the banks and the general public receive benefits from it and depositors acquire matured, adjudicated claims under it against the fund, if the authority exists at all to divest these depositors of their rights and to relieve the banks from an assessment made and from future assessments on alleged grounds of public need or welfare, it lies wholly with the legislature in the further exercise of the police power; for the matured claims of these depositors acquired while the law was admittedly constitutional and properly operative and while the banks and the public were receiving the benefits of the law, can, because of the rights guaranteed under the constitution, be taken away, if at all, only through the exercise of the police power, which power the courts can not exercise.

Lankford v. *Platte Iron Works,* 235 U. S. 461.
Mugler v. *Kansas,* 123 U. S. 623.
First State Bank of Claremont v. *Smith, et al.,* 49 S. D. 518, 207 N. W. 467.
Thompson v. *Bone,* 251 Pac. (Kan.) 178.
Noble State Bank v. *Haskell,* 219 U. S. 104.
6. R. C. L., Sec. 105, Page 106.
6 R. C. L., Sec. 230, Page 242.
Cooley, Const. Lim. 200, 587, 706 and notes.
Wurtz v. *Hoagland,* 114 U. S. 606.
Dartmouth College v. *Woodward,* 17 U. S. 518, 4 Wheat. 518, 4 L. Ed. 629.
Hendrick v. *Lindsay,* 93 U. S. 143.
Meyer v. *Shamp,* 51 Neb. 424.

The Guarantee Fund Law prescribes a contract between the banks and depositors. Practically all deposits involved originated during the past few years and while

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the law was admittedly valid and operative. Thousands of these deposits have been reduced to judgment and ordered by the courts paid out of the Guarantee Fund.

These depositors have a vested contract right under the law against the banks of the state bank system. This contract is a valuable property right which cannot be taken or divested by judicial decree.

This court has passed squarely upon the question of the rights acquired by depositors under Guarantee Fund laws. The case of *Lankford* v. *Platte Iron Works*, 235 U. S. 461, was decided upon the proposition that the State of Oklahoma was a necessary party to the suit and could not be sued without its consent. But in a dissenting opinion by Justice Pitney, concurred in by Justices Day, Van de Vanter and Lamar, the unanimous opinion of the court on this issue was stated as follows:

> It is submitted that for the proper interpretation of the statute—or for its construction, if construction be needed—we should observe the fundamental rules that apply to contracts; for while there is disagreement upon the question whether the state is a party to it, *we all agree that the act prescribed a contract, and one of wide importance, between the banks and the depositors, and that the public interest is as much concerned in seeing it carried out and enforced according to its true intent and meaning as in requiring that the contract be made.* Not only has the state obliged the banks to make this contract with their depositors, but in the law it has expressed the terms in which it shall be made. *The courts, therefore, ought by all means to adopt an interpretation such as reasonably would have been placed and presumably was placed upon the statute by ordinary bankers and bank depositors in advance of judicial interpretation;* read-

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ing it according to the fair import of its terms, without resort to legal subtlety in order to overthrow or weaken it, but seeking rather to uphold it and give it effect, *"ut res magis valeat quam pereat;" and if construction be needed adopting that meaning which the promisor had reason to believe the promisee relied upon in accepting the offer.*

The state banks claim that there is no contractual relation between them and the claimant depositors.

The rule of property pertains in this court and in Nebraska, that a contract between two parties for the benefit of a third, is enforcible for the benefit of the third party, either at the instance of one of the parties to the contract or at the instance of such third person. There can be no question about this rule.

Hendrick v. *Lindsay,* 93 U. S. 143.
Meyer v. *Shamp,* 51 Neb. 424.

The banks contend, and rightfully so, that their charters and the provisions of the law pertaining to the same constitute a contract between the state banks and the state. This proposition has been recognized ever since the famous Dartmouth College case and is unquestionably the rule in Nebraska. Therefore, we have in this instance, a contract between the State of Nebraska and every state bank in the state, by which the banks under the operation of the law prior to the commencement of this suit, became obligated to pay assessments to a fund for the benefit of these claimant depositors. That contractual right is enforcible by the depositors for their own benefit or by the officers of the state as trustees for the benefit of these depositors.

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The contract right of the depositors with matured claims against the state banks is of the same nature as the right of the insured under an insurance policy to demand and receive payment from the insurer. The state banks prior to the institution of this suit continuously represented to the depositors that the Guarantee Fund law was *"like a giant insurance company."* Here was their construction of the rights of the depositors at that time, as published and signed by them in the OMAHA BEE series, "The Story No Other State Can Tell" and other advertising.

> "The purpose of this chapter in the story that only Nebraska can tell is not to discuss this point, however, *it is to call attention to the fact that the system that has made this possible is like a giant insurance company."* (Rec., p. 246, Exh. 8 of Exh. 13.)

> *"A giant insurance plan, filled with the spirit of confidence and trust because the money in the bank is safe."* (Rec., p. 246, Exh. 8 of Exh. 13.)

> *"If you put your money in our savings department you will not only receive compound interest, but also have absolute insurance. One thousand state banks are assessed by law for the purpose of protecting your deposits. You can not lose a dollar in this bank by fire, flood, theft or failure."* (Rec., p. 340.)

In *Farmers State Bank* v. *Smith* (S. D.), 209 N. W. 358, the assessments due from the banks to the Guarantee Fund were held to be similar to "loss payments due from the insurer to the insured."

In its opinion the court said:

> "Treating the depositors' guarantee fund law as an insurance scheme, *the assessments are not insurance*

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> *premiums due from the insured, but in the present state of the fund are loss payments due from the insurer to the insured*; payment to the fund being a means of payment to insured depositors who are not appellant's debtors.

The banks' own interpretation of their own obligations and the depositors' rights under the law is entitled to great weight. As said by this court in the Lankford case, *supra:*

> "The courts, therefore, ought by all means to adopt an interpretation such as reasonably would have been placed and presumably was placed upon the statute by ordinary bankers and bank depositors in advance of judicial interpretation; * * * * and if construction be needed *adopting that meaning which the promisor had reason to believe the promisee relied upon in accepting the offer.*"

Appellants cite the case of *Wirtz* v. *Nestos* (N. D.) 200 N. W. 524, as authority against the holding by this court in the case of *Lankford* v. *Steele, supra.* Analysis of that decision, however, supports the propositions we have been discussing.

The Guarantee Fund Law of North Dakota providing that depositors should be paid in the order the banks closed, was by the legislature of that state amended in 1923 to provide that the commissioner should pro rate payments to depositors in all closed banks without regard to the order of closing. That court held that the legislature of North Dakota had enacted the Guarantee Fund law in the exercise of the police power and that the law could be modified *by the legislature* as against those who had not perfected their claims.

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The North Dakota legislature in the further exercise of police power changed the order in which the depositors should be paid from the guaranty fund and to this extent modified the rights acquired by depositors. But no court could divest these rights by judicial decree.

In *Standard Oil Co.* v. *Engel* (N. D.), 212 N. W. 822, cited by appellants, the court held that the Guarantee Fund law properly vested final judicial authority to pass upon claims against the fund, in the commission, although no appeal would lie to the courts from the decision of the commission, and that mandamus would not lie to control the judicial discretion of the commission in passing on claims.

In both of these cases cited by appellants, reference is made by dictum to the nature of the rights of the depositors. Neither of these cases were, however, decided upon that issue and are not authority upon it.

It is urged since the banks at the time suit was brought had an average annual earning of only 5.26% on combined capital and surplus after charging off in 18 months over two million two hundred thousand dollars of current and deflation period losses, that there has been a change of economic conditions which will warrant the court in divesting these depositors of their vested contract rights. This proposition is neither sound in fact nor in law. But if this were a sound economic proposition and if some economic necessity for change did exist, the courts would not for that reason be empowered to divest or diminish these depositors' vested contract rights.

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In the case of *Thompson* v. *Bone*, 251 Pac. (Kan.) 178, an attempt was made to invoke court action because the Guarantee Fund Law of that state had large accumulated claims and it appeared that some of the depositors by reason of claims being paid in the order of their priority would not receive payment for a long period. The court held that the question was one for the legislature and that the court could not exercise a judicial function with respect to it. In the opinion it was said:

> "It is argued on behalf of defendant that the Bank Guarantee Law contemplates unity of treatment of depositors, that the fund is hopelessly insolvent and that some method of equitable distribution of the fund should be devised and carried out. This is a legislative problem rather than a judicial one.
>
> "The bank depositors' guarantee fund is insolvent in the sense that certificates thereon have been issued to depositors of failed banks greatly in excess of the fund now on hand to pay them, but this is a situation made possible by the Bank Guarantee Law—although that situation, perhaps, was not anticipated when the law was enacted. Even if this court should ignore the statute above quoted, a thing it would not be justified in doing, and attempt to disburse the bank depositors' guarantee fund among all holders of certificates thereon, we could not do it without ordering a termination of the operation of the Bank Guarantee Law—an order we would have no authority to make."

If the Guarantee Fund Law had not fixed the exact amount of the special assessment but had left that to the discretion of the Department of Trade and Commerce and the Department of Trade and Commerce were about to levy an assessment greatly in excess of the assessments that had been levied in the past, then there might be

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something to the argument of the plaintiff bank with reference to changed conditions. But the maximum amount of the assessment is set out in the statute and the plaintiff bank when it decided in 1911 to come under this law knew exactly how much it might be required to pay. When the law was before the United States Supreme Court that court knew the maximum liability that the law placed on banks. There has been a change in conditions since 1909, but that change consisted of the legislature in 1923 reducing the maximum assessment from 1 per cent to one-half of 1 per cent.

This court has held the enactment of the law was a proper exercise of the police power. Under the operation of the law vested contract rights have been acquired by depositors. The legislature of Nebraska has seen fit to modify the law so that the banks will have to pay only the unpaid assessments now levied and a very small assessment for a limited term of years. At the expiration of that time the whole law becomes inoperative.

But action by the legislature is the *only way,* if any, their vested contract rights can be affected. Once vested as they are, they cannot be divested by judicial decree.

PROPOSITION OF LAW NUMBER THREE

The right of stockholders to receive dividends is inferior to the right of depositors with matured claims for deposits to have the banks pay the assessments provided by the law and upon the strength of which their deposits were made.

Sinking Fund cases, 99 U. S. 700.

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Mobile R. Co. v. *Tennessee,* 153 U. S. 486, 14 Sup. Ct. 968, 38 L. Ed. 793.

Lexington Life Ins. Co. v. *Page,* 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165.

Appellants urge that the rights of the stockholders in state banks in Nebraska to receive a fully compensatory return on their investment, after charging off all losses, is of prime and controlling importance. These rights, however, have always been held subject and inferior to the rights of other parties having contract rights against the corporation.

The Guarantee Fund Law places the rights of the depositors above even those of general creditors. Sec. 8033, C. S. Neb., 1922, provides:

> *Priority of Claims.* The claims of depositors, for deposits (not otherwise secured), and claims of holders of exchange, shall have priority over all other claims, except federal, state, county and municipal taxes, and subject to such taxes, shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation from which they are due and thus under receivership, including the liability of stockholders, * * * * .

And Sec. 7, Art. XII, Constitution of Nebraska, provides:

> Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder, and all banking corporations shall publish quarterly statements under oath of their assets and liabilities.

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These provisions were in force when the stockholders went into the banking business in the state bank system. They were chargeable with knowledge of these provisions for the protection of depositors. The proposition of law we have just stated is for these reasons doubly applicable to the relative rights of depositors and stockholders in this case.

The Sinking Fund cases, 99 U. S. 700, is conclusive on the issue we have stated. In that case it was said:

> If a state under its reserved power of charter amendment were to provide that no dividends should be paid to stockholders from current earnings until some reasonable amount had been set apart to meet maturing obligations, we think it would not be seriously contended that such legislation was unconstitutional, either because it impaired the obligations of the charter contract or deprived the corporation of its property without due process of law. Take the case of an insurance company dividing its unearned premiums among its stockholders without laying by anything to meet losses, would any one doubt the power of the state under its reserved right of amendment to prohibit such dividends until a suitable fund had been established to meet losses from outstanding risks? Clearly not, we think, and for the obvious reason that while stockholders are entitled to receive all dividends that may legitimately be declared and paid out of the current net income, their claims on the property of the corporation are always subordinate to those of creditors. The property of a corporation constitutes the fund from which its debts are to be paid, and if the officers improperly attempt to divert this fund from its legitmate uses, justice requires that they should in some way be restrained. A court of equity would do this, if called upon in an appropriate manner; and it needs no argument to show that a legis-

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lative regulation which requires no more of the corporation than a court would compel it to do without legislation is not unreasonable.

Under these circumstances, the stockholders of today have no property right to dividends which shall absorb all the net earnings after paying debts already due. The current earnings belong to the corporation, and the stockholders, as such, have no right to them as against the just demands of creditors.

In *Lexington Life Ins. Co.* v. *Page,* 17 B. Mon. (Ky.) 412, discussing this principle the court said:

The board of directors, in making the dividends in question, considered as profits the premiums on unexpired risks, and unless this was proper, the dividends which were made were not authorized by the charter, inasmuch as, independent of these premiums, the means of the corporation, over and above its liabilities, were insufficient for their payment. We think it is very evident that these premiums could not be properly regarded as profits. Only so much thereof as might remain after paying the amount of such losses as should occur would in reality constitute the actual profits on the insurances upon which they had been paid.

The right to dividends, essential as it is in the operation of business, cannot be used as an excuse for refusal to fulfill obligations imposed upon the banks both by the law under which they operated and by their own voluntary acceptance and promises. If an annual net earning of 7.12% on capital and of 5.26% annually on capital and surplus after charging off current and deflation period losses, could possibly be said to amount to confiscation, we still submit the contract rights of these depositors with matured claims would take precedence over the right of stockholders to dividends.

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PROPOSITION OF LAW NUMBER FOUR

Change of conditions, even if material, as to the future operation of the law, will not affect the validity of the law as to rights acquired thereunder, while the law was admittedly valid and operative and the banks were receiving benefits from it.

Thompson v. *Bone* (Kan.) 251 Pac. 178.
First State Bank of Claremont v. Smith, 49 S. D. 518, 207 N. W. 467.
Lankford v. *Platte Iron Works,* 235 U. S. 461.
Noble State Bank v. *Haskell,* 219 U. S. 104, 32 L. R. A. (N. S.) 1062.

This court has held that a regulation compelling contributions to a Guarantee Fund for the safety of depositors was a regulation having a rational relation to the public good and that the advisability of the imposition of the condition or its continuance was an economic question for the legislature. This proposition was decided in *Noble State Bank* v. *Haskell,* 219 U. S. 104, 32 L. R. A. N. S. 1062, in which the court, in discussing the propriety of compulsory contribution to the Guarantee Fund, said:

> "So far is that from being the case, that the devise is a familiar one. It was adopted by some states the better part of a century ago and seems never to have been questioned until now.
>
> "We fully understand the practical importance of the question and the very powerful argument that can be made *against the wisdom of the legislation, but on that point we have nothing to say, as it is not our concern.*"

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After the adjudication by this court in the case of *Shallenberger* v. *First State Bank of Holstein, supra,* that an assessment of one per cent was reasonable, the banks did not and do not claim that the assessment was unreasonable or excessive prior to 1928.

Assume for the purpose of argument only, that the future operation of the Guarantee Fund Law would result in the imposition of an unreasonable burden upon the banks. Certainly the court cannot relieve the banks from their obligations arising during the period when the regulation was admittedly reasonable.

As we have said earlier in this brief, the legislature may perhaps, in a proper case and in the further exercise of the police power, affect the rights of depositors. But beyond question, the court cannot do so. These depositors have *vested contract rights* as this court said in *Lankford* v. *Platte Iron Works,* 235 U. S. 461.

If the continued operation of the law were to be held by this court to have no rational relationship to the public safety and public good, the court would be compelled to do so in the face of all precedent and all judicial interpretation of the Guarantee Fund Laws. But even if the court were to do this, it could not relieve the banks from the obligations incurred while the regulation was admittedly a proper and reasonable one.

If 1 per cent and later ½ of 1 per cent on the average daily deposits was not confiscatory prior to 1929, it is not confiscatory or prohibitive at the present time. The strongest basis of estoppel in this case is the positive representations of the banks, not that they would pay all

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losses which might occur in the state banking system, *but that they would pay the amount which could be assessed against them, namely $6 on every $1,000 deposited.* They frankly stated in their advertisements that this assessment would not affect the solvency of any bank and that *"no bank ever failed because of the insignificant assessments of 6/10 of 1 per cent.*

That fact is as true as it ever was and if we can believe the bankers themselves, it is beyond controversy. The assessment of 6/10 of 1 per cent is not, never has been, and never will be confiscatory or unreasonable. This court has passed upon that question and the evidence in this case establishes it beyond question. It is not open for discussion here.

This brings us again to the case of *First State Bank of Claremont* v. *Smith* (S. D.), 207 N. W. 467. Apparently the attorneys for the banks do not understand the import of this case, since they have selected one isolated sentence from the opinion which is not essential to the decision in the case and have ignored the real basis of the court's decision. And their statement that the South Dakota court has flown "right in the face of the decisions of the Supreme Court of the United States and of the Supreme Court of the state of Nebraska" conclusively shows their misapprehension of the import of the decision. There is no conflict whatever between the decision in that case and the holdings of this court. In the following paragraph is stated the real basis of the decision of the South Dakota court:

> "While counsel for plaintiff do not expressly admit that the law was constitutional at its inception, they have not devoted much time in argument on that

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point. They contend that, even though it may have been constitutional when enacted, changed conditions now render the act violative of the constitution. *They reason from railroad rate cases which have at one time been held constitutional because the rates fixed by statute are reasonable and not confiscatory, and later under changed conditions such rates became unconstitutional. But there does not appear to be any analogy between those cases and this. It is well known that in trade and commerce prices are subject to fluctuation, and what is a reasonable charge for a service today may not be tomorrow, because not in just proportion to other prices and charges.* In this case the objection is not to the amount of the charge, but to the purpose for which it is made. Changed conditions have not changed the purpose. *If the purpose of the law was legitimate, and the act therefore constitutional at the time of its enactment, perforce it must remain so, although because of changed conditions its purpose is no longer useful or desirable. Its uselessness may be a cogent reason for its appeal by the lawmakers, but it can have no weight with the court, in construing it.* If the law was constitutional when enacted it now is, and all that portion of the complaint pertaining to changed conditions is immaterial in the inquiry now before us." (Italics ours.)

This court in the case of *Shellenberger* v. *First State Bank of Holstein, supra,* decided that the condition that the state banks be required to pay the special assessment of one per cent on their average daily deposits to the Guarantee Fund was reasonable and within the police power of the legislature. That proposition is concluded. The reduction from 1 per cent to ½ of 1 per cent was in favor of the banks.

And so the banks in this case are in exactly the same position the banks were in South Dakota, in that they

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cannot again litigate the reasonableness of the assessments, but only insist that by reason of changed conditions the law has ceased to perform its purpose. *Changed conditions have not changed the purpose.* If the law has failed to accomplish its purpose, that may be a *cogent reason for its repeal by the lawmakers, but it can have no weight with the court in construing* it. Instead of being contrary to the decisions of the other courts, the South Dakota case is wholly in harmony with them.

PROPOSITION OF LAW NUMBER FIVE

The decree of the United States Supreme Court in the case of Shallenberger v. First State Bank of Holstein, 219 U. S. 114, 31 S. Ct. 189, 55 L. ed. 117, is a bar to the maintenance of this suit by the plaintiff either on its own behalf or on the behalf of other banks; and is res adjudicata.

34 C. J. (*Res Adjudicata*) page 742, Sec. 1154; page 799, Sec. 1220; page 988, Sec. 1407; page 1028, Sec. 1459.

Battle Creek Valley Bank v. *Collins,* 90 N. W. 921 (Neb.).

Parrotte v. *Dryden,* 73 Neb. 291, 102 N. W. 610.

Noble State Bank v. *Haskell,* 219 U. S. 104, 155 L. ed. 117.

It is important in this connection to determine just what matters were before this court for decision in the Holstein case. That case was decided by this court on demurrer to the petition of the banks; and controlled by *Noble State Bank* v. *Haskell.* The petition of the banks in the case of *Shallenberger* v. *Holstein* is set forth in full as Exhibit 49, page 724, Vol. 4, Original Record, but omitted in printing

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the record. Since it was submitted on demurrer, every fact alleged in the petition stood admitted. The able attorneys for the banks in that case pleaded specifically and fully the facts which they contended made the assessments unreasonable and confiscatory.

In this connection it must be remembered that at that time the maximum special assessment which could be levied was 1% and that before this Abie Bank case was brought, it had been reduced to one-half of 1 per cent. At time the Holstein case was determined deposits in state banks were a little over $75,000,000, whereas at the time this suit was brought these deposits had increased to over $252,000,000.

The issues presented in the Holstein case as abstracted from the pleadings were:

> "1. The banks alleged that the guarantee fund act impaired the obligations of their charters which constituted contracts between the banks and the state.
>
> "2. They alleged the property rights of the individuals engaged in banking were divested by the requirement that only corporations should carry on the banking business.
>
> "3. They alleged that their property was taken without due process of law, because their banking buildings and fixtures acquired under the prior existing law would be rendered less valuable or confiscated.
>
> "4. They alleged that there was no reserve power in the constitution of the state to alter or amend corporate charters when once granted.

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"5. *They alleged that the total deposits in the state banks amounted to $76,644,015.00, and that the special assessment provided for would amount to the sum of $766,440.15 annually, and that the said special assessment was unreasonable and confiscatory.*

"6. They further alleged that all of the banks would be made 'to contribute out of their assets the sums of money to be assessed against them, *not for the payment of their own liabilities, but for the payment of liabilities of some other bank or banks.*'

"7. They further alleged that the effect of the law would be to extend the credit of some of the banks for the benefit of the weaker banks and that the public credit was being extended for private purposes."

It is fundamental that a judgment is conclusive on the parties thereto as to *all matters or claims which either party could make or might have made relative to the matter in controversy.* It is perhaps unnecessary to cite authorities on this point.

The demurrer to the petition admitted all facts well pleaded and so this court had before it the contention that the special annual assessment of $766,440.15 on banks having deposits of only $76,644,015.00 was confiscatory and unreasonable. This issue as well as every other issue presented by the pleadings was adjudicated against the banks by the sustaining of the demurrer and the dismissing of the case. The Abie bank was then in existence, and accepted the adjudicated act. The allegations and the proof offered by the banks in the instant case on this question of the reasonableness or oppressiveness of the special assessment are much weaker than those admitted by the demurrer in the Holstein case. In the instant case, with

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deposits of over $252,000,000.00, the special assessment can be only ½ of 1 per cent or a little over $1,250,000 annually. The relative amount is just one-half.

In the Holstein case too, the banks pleaded that they would be forced to contribute out of their assets sums of money to be used in the payment of liabilities of other banks. That also was admitted by the demurrer and that issue adjudicated by the court. That objection was of just as much force and entitled to just as much consideration then, as it is now.

Likewise, the questions as to the authority of the state to regulate the banks as proposed, after a charter had been granted, the possible loss of the value of the bank buildings and fixtures by reason of their being adapted to no other purpose, and that the public credit was being extended for the benefit of private enterprise, were all presented and decided in that case. Only the legislature can alter the law fixed by that decision. All these matters are adjudicated and concluded under the existing law.

Appellants contend vigorously in their brief that this court did not have before it in the Holstein case in passing upon the validity of the Guarantee Fund Law, the question of the oppressiveness nor the confiscatory character of the assessments. They also contend that this court did not have before it in that case the contention that the assessments would be taken to pay depositors in other banks than the banks contributing such assessment.

These are exactly the issues which the court did have before it. The pleadings in that case amply presented these very propositions. The decision of this court in the

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Holstein case decided all the legal questions presented in this case. All other matters are purely economic and are solely for the decision and action of the legislature. The wisdom of the legislation is not for the court. The Guarantee Fund Law is sound as a legal proposition and is not confiscatory. That has been decided. If it were an economic hardship or were unsound from a business standpoint, that is an entirely different matter and one with which the courts are not concerned.

The phrase "insignificant taking" as used in Noble State Bank case.

The appellants refer to this phrase from the opinion of Justice Holmes in the Noble State Bank case. In explaining the fallacy of the Oklahoma bank's argument in that case, that the property of the banks was being *taken* in violation of Art. 1, Sec. 10 and the 14th amendment to the Constitution of the United States, Justice Holmes said that even in those cases *where the police power was not involved* and private parties *were actually deprived of their property for public use, a comparatively insignificant taking was justified for a purpose which was primarily a private use, but which had some ulterior public advantage.*

As illustrating the meaning of this statement in his opinion Justice Holmes cited the cases of *Clark* v. *Nash*, 198 U. S. 361, *Strickley* v. *Highland Boy Gold Min. Co.*, 200 U. S. 527, and other cases of similar nature. Both of these cases referred to had to do with the constitutionality of statutes of the state of Utah authorizing private individuals to condemn right of way across other private land for the purpose of irrigation or mining. While the property of one person was *taken* for the immediate benefit of

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another private person, still the court held that it was not in a position to say but that there was some ulterior public purpose, because of peculiar natural and economic facts and circumstances, such as would suffice to sustain the law. And the decision was that, although the property of the individual was taken under a statute having no relation to the police power, still there appeared to be a sufficient relation to the public good to justify a comparatively insignificant taking.

Justice Holmes then proceeded to the discussion of the police power of the state upon which the decision was based. The case of *Camfield* v. *U. S.*, 167 U. S. 518, was cited. This case had to do with police power and did not refer at all to the extent to which the value of private property might be affected in the exercise of that police power.

Apparently the extent to which the value of the property and property rights will be affected never has been and was not intended by the court to be a test as to the validity of a law passed in the exercise of the police power.

In the case of *Shallenberger* v. *First State Bank of Holstein*, following the Noble State Bank case, the court held that a special assessment of one per cent annually did not affect the validity of the Guarantee Fund Law; such assessment was double the one now contested.

If ever there was an occasion where the court was urged to invade the province of the legislature, it is in this Abie case. It is indeed not always an easy matter to mark the line where the police power of the state is limited by the

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federal and state constitutions. As stated by Justice Holmes in the Noble State Bank case, judges should be slow to undertake to place their conception of the necessity or expediency of measures above the opinion of the law-making body as to those questions. In the opinion he said:

> "We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the constitution of the United States, judges should be slow to read into the latter a *nulumus mutare* as against the lawmaking power."

Not only was this Holstein case determined on demurrer, *but every other Bank Guarantee Fund case that we have examined* has been determined on demurrer—in favor of the law and some of them as in this case, after large liabilities had accrued. These cases form a consistent record, holding that the questions involved are all a matter of legislative wisdom and policy.

The depositors relied upon and acted under the Holstein decision. The banks featured it to obtain public and private deposits, some of which have resulted in claims against the Guarantee Fund. It does not seem conceivable that such claims, so arising, can now be cancelled by judicial decree.

PROPOSITION OF LAW NUMBER SIX

The plaintiff bank and those banks for which it purports to bring this action by voluntarily and without protest operating under and accepting the benefits and privileges of the bank depositors' guarantee law have waived their

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right, if any, and are estopped, to bring this suit; and especially by their acts, representations and conduct during the last several years of inducing deposits on the strength of alleged guarantee fund protection, have said banks waived their right, and are now estopped to maintain this suit against depositors with matured claims against said fund.

12 C. J., Sec. 190, 194, pages 169-71 (Constitutional Law).

10 R. C. L., Sec. 140, page 836 (Estoppel).

21 C. J., page 1216, Sec. 220 (Estoppel).

Winthrop v. *Fellows,* 230 Fed. 702.

Grand Rapids & Indiana Ry. Co. v. *Osborn,* 193 U. S. 17, 49 L. Ed. 598, 604.

Daniels v. *Tearney,* 102 U. S. 415, 26 L. ed. 187, 189.

Mellen Lumber Co. v. *Industrial Commission of Wis.,* 154 Wis. 114, L. R. A. 1916-A, pages 374, 377.

American Life Ins. Co. v. *Palmer,* 238 Mich. 580, 214 N. W. 208.

Meyer v. *City of Alma,* 117 Neb. 511, 221 N. W. 438.

Booth Fisheries Co. v. *Industrial Commission,* 271 U. S. 208, 46 S. Ct. 491.

In re Tarnowski, 191 Wis. 279, 210 N. W. 836.

People v. *Fidelity & Casualty Co.,* 222 Mich. 296, 192 N. W. 658.

First State Bank of Claremont v. *Smith,* 49 S. D. 518, 207 N. W. 467.

Parties will not be allowed to operate under a law as long as they deem it to be advantageous and then as

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against persons with whom they have dealt, claim the same law to be invalid when it appears to them that they may be able to escape liabilities incurred while operating under it. This matter of estoppel and waiver applies with equal force to constitutional questions. The courts are unanimous on the subject. We shall cite the authorities without further discussion.

Booth Fisheries Co. v. *Industrial Commission*, 46 U. S. S. Ct. 491, 70 L. Ed. 908, in an opinion by Chief Justice Taft:

> "More than this, the employer in this case having elected to accept the provisions of the law, and such benefits and immunities as it gives, *may not escape its burdens by asserting that it is unconstitutional. The election is a waiver and estops such complaint.*"

In the case of *People* v. *Fidelity & Casualty Co.*, 222 Mich. 296, 192 N. W. 658, the validity of a law was involved which required persons who desired to engage in the business of selling foreign steamship tickets to obtain a certificate of authority from the commissioner of banking of the state and to file a bond. One Weinberger tendered the bond of the defendant insurance company and received the certificate. Ostapow paid Weinberger for two tickets. The money was misappropriated. Suit was brought on the bond and the insurance company answered by attacking the constitutionality of the act providing for the giving of the bond. In its opinion, the court said:

> "Defendant cannot under the facts of the case question the constitutionality of the act. Both it and its principal, Weinberger, have had the benefits of it, and under such circumstances cannot question its validity. Defendant has had its premiums for executing the bond and Weinberger, until he absconded, all

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the benefits the act conferred; by the favorable action on his application to the commissioner of banking he obtained a certificate from that officer representing the state authorizing him to engage in the business of selling steamship and railroad tickets for transportation to or from foreign countries. *The fact this particular customer did not deal with him with knowledge of the statute is unimportant. Under the law the certificate was displayed in his place of business; it was in effect a certificate of moral character and financial stability. Neither he nor his surety can now claim the act is unconstitutional.*" (Italics ours.)

In the case of *Grand Rapids & Indiana Railway Co.* v. *Osborn,* 193 U. S. 17, 49 L. Ed. 598, 604, the court said:

"It results from the foregoing that Sims—the purchaser of the railroad property in question at the sale under foreclosure—and his associates could not demand to be incorporated under the statutes of Michigan as a matter of contract right. Possessing no such contract right, they or their privies cannot now be heard to assail the constitutionality of the conditions which were agreed to be performed when the grant by the state was made of the privilege to operate as a corporation the property in question. Having voluntarily accepted the privileges and benefits of the incorporation law of Michigan the company was bound by the provisions of existing laws regulating rates of fares upon railroads, and it is estopped from repudiating the burden attached by the statute to the privilege of becoming an incorporated body."

In *Winthrop* v. *Fellows,* 230 Fed. 702, an attack was made upon a two-cent passenger fare rate statute. The court said (p. 704):

"It follows that the railroad company, its stockholders, as such, and all claiming under it by right of representation, are effectually estopped to question

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the validity of the statute here under consideration. Having sought and accepted the rights and privileges thereby granted and conferred, they must perform the duties and obligations therein imposed. *Grand Rapids & Indiana Ry. Co.* v. *Osborn*, 193, U. S. 17, 24 Sup. Ct. 310, 48 L. Ed. 598; *Commissioner of Railroads* v. *G. R. & I. Ry. Co.*, 130 Mich. 248, 89 N. W. 967; *Interstate Ry. Co.* v. *Massachusetts*, 207 U. S. 79, 28 Sup. Ct. 26, 52 L. Ed. 111, 12 Ann. Cas. 555. The last word upon this subject is found in the decision of the supreme court in the very recent rate case of *Northern Pacific R. R. Co.* v. *North Dakota*, 236 U. S. 585, 35 Sup. Ct. 429, 59, L. Ed. 735."

In *Daniels* v. *Tearney*, 102 U. S. 415, 26 L. Ed. 187, 189, the question involved was the effect of receiving the benefits of an invalid bond given under an unconstitutional statute. The court said:

"It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he cannot in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principal of estoppel applies with full force and conclusive effect. *Ferguson* v. *Landram*, 5 Bush 230; see *Same* v. *Same*, 1 Bush 548; *Vanhook* v. *Whitlock*, 26 Wend. 43; *Lee* v. *Tillotson*, 24 Wend. 337; *People* v. *Murray*, 5 Hill 468; *Burlington* v. *Gilbert*, 31 Iowa 356; *R. R. Co.* v. *Stewart*, 39 Iowa 267."

In *Mellen Lumber Company* v. *Industrial Commission of Wisconsin*, 154 Wis. 114, 142 N. W. 187, 1916 L. R. A. 374, 377, an employer questioned the constitutionality of the Workman's Compensation Act. The court said:

"The argument that the provision under discussion is violative of the 'due process of law' clause of the

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Federal Constitution, cannot prevail. It was optional with the appellant to come in under the compensation act or stay out. It accepted the provisions of the act as they were, the burdens as well as the benefits, and so long as it remains under the law it must take the statute as it finds it. *Daniels* v. *Tearney*, 102 U. S. 415, and cases cited page 421, 26 L. ed. 187, 189; *Grand Rapids & I. R. Co.* v. *Osborn*, 193, U. S. 17, 29, 48 L. ed. 598, 604, 24 Sup. Ct. Rep. 310."

Exactly the same issue of estoppel was involved as in the case at bar in the case of *First State Bank of Claremont* v. *Smith*, 49 S. D. 518, 207 N. W. 467:

> *"State Banks, who for ten years have operated under the benefits of depositors' Guarantee Law, giving them the right to hold public money and deposit without additional security, and other benefits, held, not in a position to now claim that they have not consented thereto.*
>
> "So far as the banking corporations are concerned the assessment sought to be prohibited is not a tax or involuntary taking of their property, but a part of the consideration exacted by the state for the corporate franchise. So, also, is the law a part of the privileges and conditions under which the unincorporated banks were organized and have been doing business. *Such banks for ten years, accepted the benefits of the depositors' guarantee fund, which gave to them the right to hold, on deposit, public moneys without additional bond or security, to enjoy the confidence of the public by reason of the existence of such guarantee fund, and all other benefits, real or supposed, emanating therefrom, and they are not now in a position to claim they have not consented thereto."* (Italics ours.)

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Typical representations made by the Banks.

At the risk of unnecessarily extending this brief we have assembled some of the most typical representations made by the banks in regard to the benefits they were receiving from the operation of the law *and their repeated pledges to meet and pay their obligations to depositors in failed banks.*

The banks now attempt to minimize their utilization of the law and the benefits they were obtaining from it during the period prior to this suit. During those years when they were using the law as a most effective weapon and were bending every effort to increase the deposits in the state bank system, these banks spoke openly and often boastingly of what the law had done for them.

Their own words, uttered when flushed with their success made possible by the guarantee fund law, and in an attempt to further advance their interests, are perhaps entitled to greater weight than the view expressed in their brief. At that time they advertised with appropriate and appealing illustrations.

The twenty-six BEE advertisements are reproduced in printed Record, but without page numbering, and inserted betwen pages 238 and 239.

In Exhibit 21 of Exhibit 13, Record, page 238, insert, full page advertisement of the banks in OMAHA BEE:

> "It took 14 years, without the guarantee law to climb from $10,000,000 to $71,000,000. Under the law, *only nine years were needed to climb from* $72,000,000 to $270,000,000."

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In Exhibit 22 of Exhibit 13, Record, page 238, insert, full page advertisement in OMAHA BEE:

> "First, the guarantee law was strong because the state banking system was strong. *Second, the state banking system had been developed to an even stronger position through the operation of the law.*"

In Exhibit 29 of Exhibit 13, Original Record, volume II, page 267, a questionnaire given large circulation by the banks, and reproduced in this brief, they said:

> "QUESTION: What would have been the effect on the state if there had been no guarantee of deposits law?
>
> "ANSWER: *The effect would have been similar to that existing in one or two neighboring states, that cannot with propriety be mentioned, whose financial status is now in a state of chaos as a result of the lack of confidence due wholly to the fact that there is no insurance backing their financial institutions.*
>
> "QUESTION: Does the law in Nebraska recognize state banks as depositories for public funds?
>
> "ANSWER. *It does. Every state bank may be used as a depository for public funds for unlimited amounts without bonds of any kind.*"

In another pamphlet, "The Bank Guarantee Law Challenged and a Red Hot Answer by a Nebraska Banker" (Exh. 30 of Exh. 13, p. 268, Orig. Rec.), circulated by them, they said:

> "In Nebraska, instead of there being applications for state banks to nationalize, there have been scores of applications from national banks to take out state charters during the last two years and so far as we have any record, there has been only one application for a national charter made since the deflation period

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began and we have every reason to believe that other reasons than the guarantee law caused the change."

In Exhibit 16 of Exhibit 13, Record, page 238, insert, a full page OMAHA BEE advertisement had a picture of a money pouch with $288,000,000 thereon, and underneath:

"95,000 Years of Labor

"Small wonder that in the fifteen years the guarantee law has been in operation among the state banks in Nebraska the deposits in these banks have grown from a little more than $70,000,000 to nearly $288,000,000.

"*It is a splendid thing to live in Nebraska and to know that the money placed in the state banks in this state is safe.* As a Nebraskan, it is a splendid thing to know that this is A STORY NO OTHER STATE CAN TELL."

From Exhibit 7 of Exhibit 13, Record, page 238, insert, a full-page OMAHA BEE advertisement, in quote:

"A Message of Strength

"The bankers in Nebraska's state banking system send a message of strength to the people of the nation. Fifteen years ago the state banks of Nebraska associated together under the law for the purpose of making certain that in this state depositors should no longer be dependent upon the turn of the business cycle, nor upon the skill or lack of skill of the individual banker for the safety of his capital or of his savings, entrusted to their care."

In Exhibit 6 of Exhibit 13, Record, page 238, insert, another OMAHA BEE advertisement, appropriately illustrated, appears:

"No Mattress Banks in Nebraska

"In Nebraska there is no longer any need to keep the money in the mattress, in an old woolen sock or

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hidden away in a tin can. The state banks in Nebraska are associated together under the law for the mutual protection of their deposits. There have been bank failures in Nebraska. *But there has been a lower proportion of failures in Nebraska than in most states.*"

In Exhibit 4 of Exhibit 13, Record, page 238, insert, an OMAHA BEE advertisement, is a conversation between travellers, and illustrated, from which we quote:

"Third Traveler—'But that is not the whole story. Nebraska's financial institutions are on a solid foundation. *Bank failures have been fewer here,* and under the state law the deposits in state banks are protected'."

Did the state banks benefit to the extent of over $100,000,000 of deposits because of the guarantee fund law? Did the whole state bank system benefit by the stability created by that law? Were many of the state banks saved from ruin and all strengthened by the operation of the law? Was it of any benefit to the state banks to carry millions of deposits of public funds without bonds?

Certainly the statements of the banks at that time are worthy of belief. They said they were the facts. Most certainly they were. And they stated then one further fact which time alone will determine to be true or false. They stated repeatedly, directly and by subtle implication, designed most surely to inspire the confidence of the depositor whose deposit they sought to secure, *that they would keep faith with the depositor and would make payment to the depositor as they had represented and promised they would.*

The banks are estopped by their representations of fact and by their representations and promises that they would pay depositors in state banks.

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The banks now say in their brief they are not estopped because they were not aware of all the facts regarding the condition of the guarantee fund. They were in a better position to know the facts than anyone else. In their advertisements and representations to the public they claimed to know what the facts were. Through newspapers and pamphlets, they spoke positively of the facts as being within their knowledge, proclaimed that a committee of "skilled bankers" from their own ranks and nominated by them was administering the guarantee fund law, *and again and again pledged themselves to meet and pay their obligations to the depositors in failed banks.*

Here let us use their own words again, spoken at a time when worthy of the greatest credibility, spoken at a time when thousands of the present claimant depositors had not yet entrusted their savings to the member state banks. Their representations were not as to how much the guarantee fund owed or what its assets were, but as to the intention, purpose and pledge of the state banks to meet the obligations which the operation of the law placed upon them, and assurance to the depositors that they would be able to meet these obligations and that they would do so. Without comment we quote further their statements at that time in various OMAHA BEE advertisements, all aptly illustrated and some of them reproduced in miniature in this brief.

From Exhibit 3 of Exhibit 13 of insert, at Record, page 238:

"In the Hands of Skilled Bankers

"Skilled bankers administer the Nebraska law that protects the deposits in Nebraska state banks. The guarantee fund commission is the official body, and

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under the law membership on this commission is limited to state bankers."

From Exhibit 5 of Exhibit 13, page 238, insert:

"Further experience and further operation of the Nebraska banking laws are moving in the direction of cutting individual failures to a minimum by bringing to the state banking system the counsel and experience of the state's best bankers."

From Exhibit 6 of Exhibit 13, inserts at Record, page 238:

"The deposits of the big business house, the money that is being laid away for the purchase of a home and the dimes and pennies that are deposited in the baby's savings account *are all safe in the state banks of Nebraska because deposits are protected.*" (Rec., p. 244.)

From Exhibit 8 of Exhibit 13, inserts at Record, page 238:

"Do You Believe in Insurance?

"The purpose of this chapter in the story that only Nebraska can tell is not to discuss this point, however; *it is to call attention to the fact that the system that has made this possible is like a giant insurance company.*

"The combined deposits in the banks of the banking system in Nebraska is $286,000,000, the funds of more than 500,000 depositors. The men and women who are these depositors and whose money is in these banks *know that it is safe because under the workings of the giant insurance plan, these deposits are protected.*

"This insurance plan not only protects the deposits in the bank, it protects the sleep of 500,000 depositors

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and their peace of mind. It protects the business that is dependent upon these deposits. It protects the farmer whose funds on deposit are to be used for the clearing of the mortgage or the stocking of the feed lot. It protects the worker whose funds in the bank are being saved against the day when he and his wife and little one can move into the new house on the hillside."

From Exhibit 9 of Exhibit 13, insert at Record, page 238:

"Your deposits in this bank are protected under a plan whereby the state banks as a whole are associated under the law and through a system of assessments and central control, your deposits are safe. *If a bank fails for any reason we jointly pay the loss.*" (Rec., p. 247.)

From Exhibit 23 of Exhibit 13, insert at Record, page 238:

"The state bankers in Nebraska realized that the law placed an obligation upon them and that when the word went out that state bankers in Nebraska were associated under the law to protect depositors there was but one thing to do—protect them. They have protected them. The weathering of the financial stress of deflation has brought a new fame to the state bankers in Nebraska. *Sound banking, loyalty in meeting obligations and the courage to make the guarantee law mean what it says, has come to be known as the Nebraska Idea.*"

From Exhibit 25 of Exhibit 13, insert at Record, page 238:

"Building Business on a Certainty

"When the balance in the bank is always assuredly a balance, and not in danger of being wiped out

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through bank failure, business can build on a certainty. *This is the guarantee that the state banks in Nebraska furnish to business.*

"Under the bank guarantee law the state banks of Nebraska absorb the losses of individual banks that go under, thus furnishing to business the certainty that their bank balances will always be balances, so long as the business is sound and balances are maintained. If there is any wavering, any loss of balances, it will be the individual business that wavers, it will be the individual business that loses its funds, it will not be the state banking system."

And to show who were making these promises and representations they published a final page article of THE OMAHA BEE series to which the names of 336 banks were attached in which they said (Exh. 27 of Exh. 13, insert at Record, p. 238):

"*The men who told the story that no other state can tell are the men who control and operate the state banks in Nebraska.* A group of these Nebraska state bankers felt that this story should be told to the people of the state and to the people of other states. They felt that such a record should be known to all, that there might come to Nebraska the benefits to which a strong financial foundation rightfully entitled her. *They raised the funds, they laid out the plans and directed the writing of the chapters in this Nebraska story that has gripped the attention of the nation.*"

Then followed other articles, pamphlets and propaganda, published and broadcast by banks to further enlighten the prospective and existing depositor, to disparage the national banks and to render assurance of the ability and

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intention of the state banks to keep their promises to depositors:

In Exhibit 29 of Exhibit 13, page 267, volume II, Original Record, one of the pamphlets of the banks:

> "QUESTION. Is it a fact then, that when a depositor places his money in a state bank, that all of the state banks in Nebraska guarantee its return to him regardless of what may happen?
>
> "ANSWER. *In effect that is exactly the situation.*"
>
> "QUESTION: Does the guarantee fund protect the depositors against loss in national banks?
>
> "ANSWER: It does not. The state does not have control over national banks. The law only applies to state banks and deposits only are insured against loss in state banks."
>
> "QUESTION: Are the national bank depositors protected by a national bank guarantee law?
>
> "ANSWER: They are not so protected. There is no such thing as a national guarantee law affecting national banks."

From a FREMONT EVENING TRIBUNE advertisement (Rec., p. 340):

> "If you put your money in our savings department you will not only receive compound interest but also have absolute insurance. One thousand state banks are assessed by law for the purpose of protecting your deposits. *You cannot lose a dollar in this bank by fire, flood, theft or failure.*"

From Exhibit 30 of Exhibit 13, page 268, volume II, original record, The Red Hot Answer by a Nebraska Banker pamphlet, circulated by the banks:

> "The state banks of Nebraska are bound together unto a mutual insurance company carrying their own risks and paying their own losses."

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These advertisements of the banks took on various forms intended to affect most strongly the public mind with reference to the guarantee fund law. On July 6th, 1926, they published as a part of their propaganda a representative picture of the Supreme Court of the United States and under it in bold type (Exh. 5 of Exh. 13, insert at Rec., p. 238, an OMAHA BEE advertisement):

"The Opinion of the Highest Court"

Then followed an excerpt of the opinion of that court in the Holstein case:

"In sustaining the law the court said:

"'When the legislature (of Nebraska) declares in its banking laws that incorporation, inspection and cooperation for the protection of deposits are necessary safeguards, this court certainly cannot say that it is wrong. The power to compel beforehand, cooperation and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized if government is to do its proper work.

"'In our opinion the statute before us is well within the state's constitutional power.'—United States Supreme Court."

And on September 12th, 1926, they published a cut of the imposing capitol building of Nebraska. And under this picture, representing the ultimate in stability, strength and progress, they said (Exh. 24 of Exh. 13, insert at Rec., p. 238, a full-page OMAHA BEE advertisement):

"Strong Banks Make Strong States"

"The state banks in Nebraska are strong banks. They have proven their strength by their conduct during the deflation period. In Nebraska the strength of the state banks does not depend upon the strength of any individual bank. They are associated to-

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> gether under the bank guarantee law. The strength of the individual banks therefore is the strength of all the banks."

We must admit that the banks in this form of advertising displayed a most thorough understanding of the psychology of the great mass of depositors. Nothing could better tend to engender a feeling of security in the public mind than the use of the likeness of Nebraska's capitol. Nothing could better lull to rest any incipient fears arising in the public mind, than the assurance that the supreme court had sanctioned the law and held it constitutional.

In order to impress indelibly upon the mind of the depositor their sincerity and steadfastness of purpose in promising to perform their obligation to the depositors, they printed on August 26, 1926, in the Sunday OMAHA BEE, a large portrait of Abraham Lincoln and compared their adherence and promise to perform their duty under the Guarantee Fund Law to the loyalty and steadfastness of Lincoln. Here, most certainly, was an appeal which the average depositor with his small earnings and small savings could not withstand. Here is what they said in bold letters under the picture of Abraham Lincoln (Exhibit 20 of Exh. 13, insert at Rec., p. 238, a full-page OMAHA BEE advertisement):

> **"Giving Up Profits to Support a Principle"**
>
> "One of the leading state bankers had declared that it was a picture of Abraham Lincoln in his office that gave him the courage to stick it out.
>
> "'Lincoln had a dozen opportunities to quit,' he said, 'but because he stuck to it, America is today the greatest nation in the world.' Because the state bankers in Nebraska stuck to it, this state is today

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famous among the great sisterhood of states as the only state in which not a dollar of deposits has been lost through the failure of state banks."

A more potent means of inculcating confidence would be difficult to imagine. To the average depositor no name would be so impressive in imparting a feeling of security. It must be admitted the banks were quite astute observers of human nature.

Their representations went further than as to the condition of the Guarantee Fund Law or the facts involved in its operation. They amounted to a positive statement that the banks would make good their promises. In Exhibit 13 of Exhibit 13, insert at Rec., p. 238 (an OMAHA BEE advertisement), they ostensibly put their words upon the lips of a mother and father who were discussing the probable safety of their savings. Under a caption,

"Where Have We Got Our Money, John?"

they publish this mythical conversation, conceived in their own minds and intended ingeniously to inspire confidence in the minds of depositors.

"Mother—'I notice in the paper John that some banks down south have failed. Think of all the money those people down there will lose. I'm just wondering where we've got our money.'

Father—'It's all right, Mary, the money is in the state bank in town. I tell you that guarantee law in Nebraska is a mighty fine thing. We can go on about our affairs and know that even if our bank goes under we will get our money because the other state banks will make it good'."

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> "When the news was printed recently of the failure of a group of banks in two southern states it is probable there were conversations similar to that reproduced here all over Nebraska."

Is it any wonder the state banks thrived under the operation of the Guarantee Fund law, utilized and exploited as it was? Is it strange that, as they say,

> "It took 14 years without the guarantee law to climb from $10,000,000 to $71,000,000. Under the law, only 9 years were needed to climb from $72,000,000 to $270,000,000."

All that the state of Nebraska and the depositors are asking in this case is that the banks fulfil their parts of the undertaking as they promised and as the depositors relied upon.

The few banks now prosecuting this suit claim that the banks cannot afford to pay the assessments and that its collection would mean a wrecking of the state banking system. The facts established by the evidence absolutely fail to show any semblance of foundation for such contention. Here again the representations made by the banks to the depositors are very material. Here was their position before they started this suit in January, 1928 (Exh. P, p. 474, vol. III, Orig. Rec.):

> "This limit, in the case of the bank guarantee fund, which fund is used for the purpose of paying depositors in failed banks, is fixed at 6/10 of 1 per cent. Therefore for each thousand dollars of deposits that a bank has, it must pay annually a tax of not to exceed $6.00 for the support of the guarantee fund. *You can readily see that such an assessment, can be paid by any bank that is solvent. In other words, a bank that fails, fails not because it had to pay $6.00*

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a thousand into the guarantee fund but for other and vital reasons. No bank fails as a result of the losses sustained in other banks.

"If a bank loans $1,000 to a customer at 8 per cent interest it would collect $80.00 interest in the course of a year. In comparison, with this income of $80.00 we have the same $1,000 taxed by the state the sum of $6.00, which must go into the guarantee fund. Therefore, the bank's earning of $80.00 has been reduced to $74.00 as a result of the tax, which must be paid into the state guarantee fund.

"This gives a very vivid comparison of just what it means to the bank to pay the highest tax that can be possibly levied against it under the present law. It is a comparison that ought to convince you, and every other stockholder, that your property cannot be confiscated, and going banks cannot be hurt materially through the payment of this tax. *In fact, the banks can pay this tax as easily as you can pay your school tax."*

We have perhaps quoted enough. Every possible element of estoppel exists, representations of alleged facts as such, representations of their intention to perform and an absolute promise to do so, representations as to their ability and intentions to pay. And now they ask the aid of the court to relieve them from the consequences but with no offer to do equity, no offer to make whole these depositors whom they attempt to divest of their right to recover their deposits.

PROPOSITION OF LAW NUMBER SEVEN

The depositors' guarantee fund was not enacted primarily for the welfare of the banks but specifically for the protection of depositors in state banks.

Sec. 7983, C. S. Neb. 1922, Sec. 1, ch. 10, Laws 1909.

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Sec. 8024, C. S. Neb. 1922, Sec. 44, ch. 10, Laws 1909.

Citizens State Bank of Stratton v. *Strayer,* 114 Neb. 567.

Shallenberger v. *First State Bank of Holstein.* 31 S. Ct. Rep. 189, 55 U. S. (L. ed.) 117, 219, U. S. 114.

First National Bank v. *Hirning,* 204 N. W. (S. D.) 901.

Farmers State Bank v. *Smith,* 209 N. W. (S. D.) 358.

The courts have said:

"The paramount purpose of Bank Deposit Guarantee Law is to secure depositors and guarantee prompt payment; * * * * It must be liberally construed to accomplish its paramount purpose."

Chapman, Commission v. *Guarantee State Bank,* 267 S. W. Rep. (Tex.) 690.

Farmers State Bank of Mineola v. *Mincher,* 267 S. W. Rep. (Tex.) 996.

"It is a fund created by statute, derived from assessments of the banks operating under the law, to insure the depositors of such banks against loss."

First National Bank v. *Hirning,* 204 N. W. (S. D.) 901.

Farmers State Bank v. *Smith,* 209 N. W. (S. D.) 358.

Section 1 of the Nebraska act of 1909 made this fundamental declaration:

"Sec. 1. (Banking a quasi-public business.) The business of banking * * * * is hereby declared

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to be quasi-public business and subject to regulation and control of the state."

And Section 44 of the act provided:

"Sec. 44. (Guarantee Fund Assessment.) For the purpose of providing a guarantee fund for the protection of depositors in banks, every corporation engaged in the business of banking under the laws of this state, shall be subject to assessment, be levied, kept, collected and applied as hereinafter provided."

The primary purpose of this act is the general protection of the public and the depositors' guarantee fund is "for the protection of depositors in banks". Benefit to the banks is not the principal objective, though such benefits have followed. This theory of the law has been directly affirmed by this court, in the Holstein case. The Nebraska Supreme Court in *Citizens State Bank of Stratton* v. *Strayer,* 114 Neb. 567, passing on a regulatory provision of the banking act, stated that "the banking business carried on pursuant to a state charter, is quasi-public, and for the protection of the public and its interests, and is subject to reasonable regulations by the state."

The issues have been somewhat simplified by the apparent position of the banks that they do not challenge any part of the act except the section applicable to special assessments and that as to such section they challenge it as having *become* confiscatory and as being of no future *benefit to the banks.* The act having been passed for the "protection of the depositors" manifestly its effective benefits could only be available to or be invoked by such depositors as might be depositors in failed banks. Depositors in going banks have no necessity to avail themselves of its provisions. Hence the section might properly have

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read *"for the protection of depositors in failed banks"*. The obligation of the going banks is thus to pay assessments to indemnify and protect depositors in failed banks. So generally and specifically the inquiry in this case has to do directly with the equities and legal rights as between the going banks and the depositors of private and public funds in failed banks.

Whether the assessments levied on the banks are sufficient to pay the depositors in full is not of large concern to the banks. Any payment to the depositors is a benefit regardless of its amount or when paid. The banks are not required by law to pay assessments sufficient to reimburse depositors in full; all the banks have to do is to pay the assessments provided by law even if not enough to pay the depositors.

In *Farmers State Bank* v. *Smith*, 209 N. W. (S. D.) 358, the plaintiff sought to restrain the collection of a guarantee fund assessment claiming the right to set off an amount equal to the assessment upon indebtedness due it. The court in denying the plaintiff's prayer, discussed the Depositors' Guarantee Fund Law as an insurance scheme and the status of depositors holding claims against it and said:

> "Treating the depositors' guarantee fund law as an insurance scheme, the assessments are not insurance premiums due from the insured, *but in the present state of the fund are loss payments due from the insurer to the insured;* payment to the fund being a means of payment to insured depositors who are not appellant's debtors.
>
> "As soon as the assessment was made, it was the duty of appellant to place the money at the disposal of the guarantee fund commission to be distributed

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according to law, *and from that time the money due upon assessment was impressed with a trust, and belonged to those designated by statute as entitled thereto.* The bank became the trustee of such money until delivered to, or placed at the disposal of, the commissions."

The Nebraska state banks repeatedly advertised and represented to the present claimant depositors that the banks constituted one giant insurance company in which the depositors' money was secured. The banks were the insurers, the depositors, the insured. In short they at that time, when seeking depositors, made a true representation. The primary and ultimate of the law was to protect the depositor—to give him insurance on his money. The banks profited incidentally as an incident to their business venture—in the same way an insurance company would from a law prescribing sound statutory insurance regulations.

A depositor needs the protection of this law for the first time when the bank fails. His protection is the primary and ultimate object of the law.

PROPOSITION OF LAW NUMBER EIGHT

Banking is a quasi-public business which the state in the exercise of its police power may take under its control to the extent of prohibiting the business of banking entirely except upon such conditions as it may prescribe.

Noble State Bank v. *Haskell,* 219 U. S. 104.
First State Bank of Claremont v. *Smith,* 49 S. D. 518, 207 N. W. 467.
Shallenberger v. *First State Bank of Holstein,* 219 U. S. 114.

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We do not believe that this proposition is controvertible.

Justice Holmes, in *Noble State Bank* v. *Haskell,* 219 U. S. 104, said with reference to the Bank Guarantee Fund Law that as to banks the legislature "may go on from regulation to prohibition except upon such conditions as it may prescribe." This power of regulation of banks by the legislature has been repeatedly recognized by the courts. We will not encumber the record by further quotations from the cases.

When Nebraska adopted the Guarantee Fund Law in 1909 the act included a section prohibiting private banking.

The state banks then in existence had three courses open to them. *First:* they could nationalize and avoid the law. *Second:* they could comply with and operate under the Guarantee Fund Law. *Third:* they could go out of business along with the individual bankers who did not care to incorporate.

All state banks organizing since 1909 have of course done so with full knowledge of the conditions imposed by the act.

The limit to which the state may go in imposing obligations as a condition to engaging in the banking business in the state is clearly not important in this case. Under the facts it is clearly evident that it is not a question of any bank being compelled to go out of business by reason of the special assessments.

Here it is not a question of banks going out of business because of the special assessments. It is merely a ques-

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tion of some of the banks desiring to make a greater profit than their present earnings which in some cases were characterized by the trial court as "extravagant". It is a question of all the banks of the state bank system desiring to make an average annual net income of more than 11.18 per cent on their combined capital and surplus before complying with the obligation imposed by the legislature of Nebraska as a condition to operating a state bank.

PROPOSITION OF LAW NUMBER NINE

The statutory assessments for the benefit of the guarantee fund are not an involuntary taking of the property of the banks but constitute a charge and contribution, definite and certain and known in advance, the payment of which is a condition precedent for commencing and continuing to do business as a state bank and which at any time can be avoided by going out of the banking business; in order to engage in the banking business the banking corporation had to get a charter from the state and to get the charter and keep it the bank had to comply with the conditions made a part of the charter by the state for the safety and protection of the public; and to obtain the benefits and privileges the law gave.

Noble State Bank v. *Haskell,* 219 U. S. 104.

Shallenberger v. *First State Bank of Holstein,* 219 U. S. 114.

Wirtz v. *Nestos,* 51 N. D. 603, 200 N. W. 524.

First State Bank of Claremont v. *Smith,* 49 S. D. 518, 207 N. W. 467.

Farmers State Bank v. *Smith,* 50 S. D. 250, 209 N. W. 358.

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The legislature in enacting the Guarantee Fund Banking Act created certain privileges and certain obligations. It is quite impossible for a court to compare and to measure them and their relative value and burden. For instance, state banks were permitted to loan one customer up to 20 per cent of the capital of the bank as against one-half that percentage permitted to national banks. The act enabled state banks to accommodate borrowing customers with one-half the capital investment. By the act, state banks were absolved from giving depository bonds for public funds. State bank charters enabled the carrying of reserves at interest while national banks were required to carry reserves without interest in Federal Reserve Banks.

Unquestionably, the best considered opinion on Guarantee Fund law was delivered by Justice Holmes in the case of *Noble State Bank* v. *Haskell,* 219 U. S. 104. The rule above is there vigorously announced and it has not been questioned to this day except as the Nebraska banks are now trying to do so. Several parts of the opinion are relevant:

> "The power to compel, beforehand, co-operation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say the means have no reasonable relation to the end."

The banks now contend that the end Justice Holmes anticipated the law would accomplish has not been realized. To anyone, however, who has observed the effects of the deflation period on the banks of other states throughout the agricultural middle west it is clearly evident that Justice Holmes was not badly mistaken in his predictions.

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The banks' own statements and advertisements during that period and the evidence in this case show that the bank failures in Nebraska would have been many times more disastrous than they would have been if it had not been for the existence of the bank Guarantee Fund Law during the period of deflation. Of course there were failures. There were bound to be failures and always will be failures under the most favorable circumstances during such a period. But there was no panic and the state banks of Nebraska during that period received the benefits of the stability given to the banking system and the confidence of the public.

Of course no one can now tell how many banks would have failed or what the condition of the present banks would be now if it had not been for the existence and operation of the Guarantee Fund Law. No one can tell how much more severe the reaction would have been in Nebraska. But no one can deny but that the state and the banks were saved from the full force of the blow that fell at that time.

Justice Holmes goes on in the opinion to further state:

> "We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the state in taking the whole business of banking under its control. On the contrary, we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe. In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection, and the above-described co-operation are necessary safe-guards, this court certainly cannot say that it is wrong."

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And on petition for rehearing he further said:

> "The analysis of the police power, whether correct or not, was intended to indicate an interpretation of what has taken place in the past, not to give a new or wider scope to the power. The propositions with regard to it, however, in any form, are rather in the nature of preliminaries. For in this case there is no out-and-out unconditional taking at all. The payment can be avoided by going out of the banking business, and is required only as a condition for keeping on, from corporations created by the state. We have given what we deem sufficient reasons for holding that such a condition may be imposed."

We have here no tax upon the property of the banks which amounts to an involuntary taking of property. It is an imposition of a condition under the police power of the state. The property of the banks is not *taken for public use.* It is merely incidentally affected by a proper exercise of the police power.

The Supreme Court of North Dakota in discussing the Guarantee Fund Law of that state in the case of *Wirtz* v. *Nestos,* 51 N. D. 603, 200 N. W. 524, applied the rule laid down by Justice Holmes to the conditions which existed in North Dakota. In the opinion the court said:

> "It was settled early in the history of this state that the legislature could permit it to be conducted upon such conditions and subject to such regulations as it saw fit to prescribe, or even 'forbid it altogether.' In *State* v. *Woodmasnee,* 1 N. D. 246, 46 N. W. 970, 11 L. R. A. 420, this court sustained the validity of the original act providing for the organization and government of state banks, saying, among other things, at page 250, in the official report (46 N. W. 971):

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"'But as a matter of precedent and authority, the legislative perrogative, in the exercise of its police power in promoting the public safety, not only to regulate and restrict the business of banking, but also to grant the right to one class, and to prohibit to others, or even to forbid it altogether, has never been questioned in the courts, and the legislature of other states have frequently exercised the right of supreme control over the business'."

The Supreme Court of South Dakota also applied the rule in the case of *First State Bank of Claremont* v. *Smith, supra.* In this case also the contention was made that the Guarantee Fund was wholly insolvent, served no public purpose and was a burden to the banks to such an extent as to amount to an involuntary taking of their property. But the court followed the reasoning of Justice Holmes and upheld the rule. In the opinion it was said:

"So far as the banking corporations are concerned, the assessment sought to be prohibited is not a tax or involuntary taking of their property, but a part of the consideration exacted by the state for the corporate franchise. So, also, is the law a part of the privileges and conditions under which the unincorporated banks were organized and have been doing business."

PROPOSITION OF LAW NUMBER TEN

The distinction between rate and taxation cases and the case at bar involving the question of whether a special assessment levied under the Guarantee Fund Law is confiscatory is that the Guarantee Fund Law is not a revenue nor rate regulation measure but an act passed under the state's police power to stabilize banking conditions generally and in particular to protect deposits in

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state banks, creating thereby intangible public benefits which cannot be judicially measured, and the payment of the Guarantee Fund assessment being a condition precedent to the operating of a state bank regardless of the earnings of the bank.

First State Bank of Claremont v. *Smith, et al.*, 49 S. D. 518, 207 N. W. 467.
Noble State Bank v. *Haskell*, 219 U. S. 104.

The proposition above set forth has been largely argued in connection with other propositions wherein the two cases referred to and other cases are cited and fully quoted. In the case of *First State Bank of Claremont* v. *Smith*, 49 S. D. 518, 207 N. W. 467, the court said:

> "So far as the banking corporations are concerned, the assessment sought to be prohibited is not a tax or involuntary taking of their property, *but a part of the consideration exacted by the state for the corporate franchise.* So, also, is the law a part of the privileges and conditions under which the unincorporated banks were organized and have been doing business."

And in *Noble State Bank* v. *Haskell*, 219 U. S. 104, the third paragraph of the syllabus is as follows:

> "The police power of a state extends to the regulation of the banking business, and even to its prohibition except on such conditions as the state may prescribe."

Manifestly, it is not competent for a court to consider the assessments wholly from the standpoint of their monetary value to the banks when there were other and controlling reasons of public welfare and benefit prompting the legislature to provide for these assessments and permit

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their continuation. The question of the value of the assessments to the public and to the banks, and the related matter of the amount of and the effect of the assessments on banks must be considered as an entirety by the legislature and by the court.

PROPOSITION OF LAW NUMBER ELEVEN

Where a law is enacted in the exercise of the police power and has for its object the advancement of the public good, public safety or public welfare, there may be an incidental destruction of the value of private property or even destruction of the property itself without violation of the fifth or fourteenth amendments to the constitution of the United States, for it is not taken for public use without compensation or without due process of law, since it is not taken by the public at all, and the court will consider and determine only whether or not the law as enacted has any rational relation to the public good with every possible presumption indulged in the law's favor.

Powell v. *Pennsylvania,* 127 U. S. 678.
Mugler v. *Kansas,* 123 U. S. 623.
Lochner v. *New York,* 198 U. S. 45, 25 Sup. Ct. Rep. 539.
State v. *Drayton,* 82 Neb. 254, 117 N. W. 768.
State v. *Withnell,* 91 Neb. 101, 135 N. W. 376.
6 R. C. L., Sec. 230, page 243.

The Guarantee Fund Law has heretofore been finally determined by the United States Supreme Court to have a rational relation to the public good. The state has always had the right in exercising its police power to enact measures which affect the property rights of citizens. This

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right was inherent in the state before the adoption of the fifth and fourteenth amendments to the Constitution of the United States. And the Supreme Court of the United States has repeatedly held that these amendments are not violated by the proper exercise of the police power by the state.

With regard to statutes enacted by the state under their police power, there is only one question which the courts can determine, and that is whether the law as enacted has any rational relation to the public good, safety or welfare, with every possible presumption indulged in its favor. If it does not effect a palpable invasion of rights secured by fundamental law, judicial inquiry is at end. *Even though the property of an individual may be rendered valueless as an incident to the operation of the law, still there has been no taking of the property for public use without just compensation as prohibited by the 5th amendment to the federal constitution or any taking without due process of law as prohibited by the fourteenth amendment.*

The liquor and oleomargarine cases settled that question.

Mugler v. *Kansas,* 123 U. S. 623, 688, 699.
Powell v. *Pennsylvania,* 127 U. S. 678, 682..
Hadacheck v. *Sebastian,* 239 U. S. 394.
Pierce Oil Corp. v. *City of Good Hope,* 248 U. S. 498.

In *Powell* v. *Commonwealth of Pennsylvania, supra,* plaintiff in error was the owner of machinery and equipment of value only for the manufacture of oleomargarine. He contended that the law of Pennsylvania prohibiting the manufacture and sale of this article, rendered his property of no value and violated the Fifth and Fourteenth

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amendments. This court held that the state had the inherent right under the police power and wholly apart from the provisions of the federal constitution to enact laws for the protection of the public interest and that the Fifth and Fourteenth amendments to the constituion of the United States did not prohibit the exercise of such power even though as an incident to the operation of the law the property of individuals was destroyed or the value of their property diminished. It held that the police power of the state existed before the adoption of the Fifth and Fourteenth amendments to the constitution and that the said amendments were not intended to and do not relate to the exercise of that power.

In the opinion it was said:

> "It is contended that the last statute is void in that it deprives all coming within its provisions of rights of liberty and property without due process of law and denies to them the equal protection of the law,—rights which are secured by the fourteenth amendment to the constitution of the United States. It is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the state for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with that amendment; for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and public morals, *it cannot divest itself of the power to provide for those objects, and that the fourteenth amendment was not designed to interfere with the exercise of that power by the states. Mugler* v. *Kansas*, 123 U. S. 663, Ante, 273; *Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 751, 4 Sup. Ct. Rep. 652; *Barbier* v. *Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064."

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The banks complain in this case that they may by the further enforcement of this law be deprived of their property without just compensation because their buildings are adapted to and are valuable only as banking buildings. Such a result arising from their refusal to abide by the conditions imposed by the state and their going out of the banking business would not be depriving them of their property. It would, as in the above case, merely be a lessening of the value of their property as an incident to the exercise of the police power. That is not *"taking without just compensation"* or *"without due process of law" as forbidden* by the state and federal constitutions.

PROPOSITION OF LAW NUMBER TWELVE

The banks which are making fair or "extravagant profits" as admitted even by the trial court are not entitled to be relieved of their responsibilities to depositors with accrued claims by showing that hardship may be imposed by the operation of the law upon other banks of the state banking system.

Aetna Ins. Co. v. *Hyde,* 72 U. S. (L. Ed.) 357, 47 S. Ct. 113.

City of Grand Island v. *Postal Tel. Cable Co.,* 92 Neb. 253, 138 N. W. 169.

Ohio River Ry. Co. v. *Dittey,* 203 Fed. 237.

The court is confronted in this case with a rather unusual circumstance. The officers of two banks, the State Bank of Omaha and the Fremont State Bank, according to the evidence, initiated and caused this suit to be brought. The officers of these banks were the only bankers except an officer of the plaintiff bank, to appear upon the trial of the case as witnesses for the plaintiff.

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Since its organization in 1912 the Omaha State Bank had accumulated surplus of $112,000.00 from earnings and in addition for seven years consecutively before trial had paid an annual dividend of 10% (Rec., p. 224, Qs. 1138-43). The Fremont State Bank had accumulated more than $30,000.00 additional surplus since 1920 and had continuously in addition paid an annual dividend of 8% (Rec., p. 311, Q. 394).

It hardly seems consonant with equitable principles for these banks with their "extravagant profits" to select one of the smallest banks in the state, one operated under the most adverse trade conditions, and one which is not in the least typical or representative of state banks of Nebraska, to be plaintiff in a suit for their benefit. *The president of the Abie State Bank testified that he did not even know the case had been brought or that his bank was named as party plaintiff until told by someone who heard the fact stated over the radio* (Rec., p. 178, Q. 785).

It is a well settled principle of law that no party is entitled to equitable relief against the enforcement of a law by showing that it works a hardship on others. (Though there was in fact no showing that it worked a hardship on any bank.)

This court in the case of *Aetna Ins. Co.* v. *Hyde*, 72 L. Ed. 357, had before it a case brought by the Aetna Insurance Company on behalf of itself and 155 other stock insurance companies doing business in Missouri, to contest a reduction of rates made under the state statute. The evidence showed that a hardship would be worked upon

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some of the insurance companies of the state, but not upon the plaintiffs. The court in denying equitable relief, said:

> "No company receiving just compensation is entitled to have higher rates merely because of the plight of its less fortunate competitors. Companies whose constitutional rights are not infringed may not better their position by urging the cause of others. *Albany County* v. *Stanley*, 105 U. S. 305, 311, 26 L. ed. 1044, 1049; *Heald* v. *District of Columbia*, 259 U. S. 114, 123, 66 L. ed. 852, 854, 42 Sup. Ct. Rep. 434. As a practical matter of business, it is impossible in the long run for some companies to collect higher premiums than those charged by others in the same territory. *Rates sufficient to yield adequate returns to some may be confiscatory when applied to the business of others.* But the latter have no constitutional right to prevent their enforcement against the former. The 14th Amendment does not protect against competition. Moreover, 'aggregate collections' sufficient to yield a reasonable profit for all do not necessarily give to each just compensation for the contracts of insurance written by it. *It has never been and cannot reasonably be held that state-made rates violate the 14the Amendment merely because the aggregate collections are not sufficient to yield a reasonable profit or just compensation to all companies that happen to be engaged in the affected business.*"

The evidence showed that the state banks as a whole were in a better condition and making more money than they had been for several years past. A few of them may still be in poor condition, but nearly all of them are paying off and charging out their losses incurred during the deflation. Many are making very satisfactory and in some cases unconscionable profits. Will this court in order to enable the real parties instigating this suit to enhance their already "extravagant profits", hold that they can take

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advantage of the condition or fancied condition of a few of the smallest banks operating under the most adverse circumstances to escape payment of the special assessments levied under the Guarantee Fund Law for the benefit of the public generally and depositors in failed banks in particular? We cannot conceive of this being done.

In *City of Grand Island* v. *Postal Telegraph Cable Co.*, 92 Neb. 253, the court said in part:

> "* * * * We are not aware of any case which holds that when the business transacted by one person or corporation of a class has proved largely remunerative, and the business of another of the same was less remunerative, or was in fact conducted at a loss, a court of justice can for that reason declare an occupation tax ordinance void."

In *Ohio River & W. Ry. Co.* v. *Dittey,* 203 Fed. 237, the court said that courts are not arbiters who "may overthrow a law which imposes a tax on privileges and franchises merely because in isolated cases such law imposes a hardship."

As a matter of fact it is the desire of the banks to charge off old bad debts which has prevented them practically all from paying from good to very large dividends.

There are 726 banks. On the matter of earnings it affirmatively appears that 570 of them had net earnings extending up to "extravagant profits", and after paying guarantee fund assessments and charging off admittedly old bad debts; and that these net earnings average with the 570 banks a fair return on the investment. Where in this record will the court find any evidence of the cause for the variation in earnings of the 570 banks; or find any

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evidence as to the distribution to operating expense, operating income or other details with respect to such banks? The fact that they paid a specific amount to the guarantee fund took that amount of their earnings, but that of itself would prove nothing unless accompanied by proof of the effect of the guarantee fund on the earnings, eliminating for the purpose of the argument the main purpose of the guarantee fund, the protection of depositors, and not benefit to the banks.

PROPOSITION OF LAW NUMBER THIRTEEN

Even if the rule in the rate and taxation cases were applicable to the case at bar as contended by plaintiff, then plaintiff would have had the burden of producing detailed proof not attempted in this case to show the volume of business available to the several banks that have failed to make compensatory earnings, the facilities of such banks for handling the business offered, the efficiency and economy of the operation of such banks, that the condition complained of is not unusual or merely temporary, and to exclude all causes other than the effect of assessments paid; mere proof of loss or difficulty of operation for a period of a few years not being sufficient.

City of Grand Island v. *Postal Telegraph Co.*, 92 Neb. 253, 138 N. W. 169.

City of Fremont v. *Postal Telegraph Co.*, 103 Neb. 476, 172 N. W. 525, affirmed in 255 U. S. 124.

Powell v. *Pennsylvania*, 127 U. S. 678.

Ohio River and W. Ry. Co. v. *Dittey*, 203 Fed. 537.

Western Union Telegraph Co. v. *Borough of New Hope*, 187 U. S. 419.

Aetna Insurance Co. v. *Hyde*, 47 S. Ct. Rep. 113, 72 U. S. (L. Ed.) 357.

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It is established that the reasonableness of a tax cannot be determined by the profit that some individuals make in their business. The fact that they are unable to conduct their business in such a way as to realize a profit which would warrant the amount of the tax is no argument as to the reasonableness or unreasonableness of the tax.

Inefficiency in management, peculiar local trade conditions, temporary business depression and in fact numerous simliar matters may affect the ability of one or a limited number of the banks to operate at a profit. Under the rule that "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a reasonable doubt," *Powell* v. *Pennsylvania*, 127 U. S. 678, the burden is upon the banks as to every one of these issues to show that a condition exists which would beyond question make the further operation of the banks impractical and to negative every possible state of facts consistent with the constitutionality of the law.

So, proof that a few individual banks are operating at a loss is not proof of the unreasonableness of the special assessment levied. Proof must be adduced that the loss is not due to mismanagement, lack of available business, abnormal losses due to depression following the war *or other causes*. Furthermore, an operating loss for a few years is not proof of anything; the period of time considered must be long enough to cover various business periods and show normal operating conditions.

In *City of Fremont* v. *Postal Telegraph Cable Co.*, 103 Neb. 476, affirmed by this court in 255 U. S. 124, the Nebraska Supreme Court said:

> "The proof in support of these allegations shows that during the years 1914 and 1915 defendant's Fre-

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mont office was operated at a loss, and that a payment of the tax for these two years would occasion deficits on defendant's intrastate business at Fremont of $143.73 and $128.45 respectively. No figures are offered for any of the preceding years. *But, even if the evidence at hand is sufficient to warrant us in assuming antecedent and prospective losses in the operation of defendant's business at Fremont, we do not regard this as a satisfactory test of the reasonableness or unreasonableness of the tax involved. Defendant's losses may be due to conditions for which it is itself responsible.'*

Western Union Telegraph Co. v. *New Hope*, 187 U. S. 419:

"And 'that the courts will not declare such ordinance void because of the alleged unreasonableness of the fee charged, *unless the unreasonableness be so clearly apparent as to demonstrate an abuse of discretion on the part of the municipal authorities'.*"

The banks failed entirely to produce the necessary proof on these points. No law will be declared invalid or unconstitutional by the courts unless it is manifestly so: unless there is no state of facts upon which it can be held valid. In order for the banks to prevail they must show that conditions as they exist are not the result of other causes than the assessments made under this law. This they have not done.

PROPOSITION OF LAW NUMBER FOURTEEN

Regardless of the general power reserved in the state of Nebraska by its constitution, to alter or amend banks' charters, the state would have this right under the police power; the only restriction being that any measure adopted in the exercise of that power must be rationally

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intended to serve some public purpose. Those questions in respect to the Nebraska Guarantee Fund Law are no longer open to question.

Noble State Bank v. *Haskell*, 219 U. S. 104.
Shallenberger v. *First State Bank of Holstein*, 219 U. S. 114.
Chicago, B. & Q. R. Co. v. *State*, 170 U. S. 57, 47 Neb. 549.
Douglass v. *Kentucky*, 168 U. S. 488.
Stone v. *Mississippi*, 101 U. S. 814.
Northwestern Fertilizing Co. v. *Hyde Park*, 97 U. S. 659.
Boston Beer Co. v. *Massachusets*, 97 U. S. 25.
7 R. C. L., Sec. 105, page 106.
Mugler v. *Kansas*, 123 U. S. 623.
New Orleans Gaslight Co. v. *Louisiana Light & Heat Co.*, 115 U. S. 650.

Appellants devote large space in their brief to the power of the state to alter or amend the charters of the banks by the passage of the Guarantee Fund Law. This is no longer an open question.

The police power is a governmental function which can not be alienated, surrendered or abridged by contract or grant of corporate charter. In *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25, 33, it was said:

> The legislature cannot, by any contract, divest itself of the power to provide for these objects (*the public welfare*). They belong emphatically to that class of objects which demand the application of the maxim, *Salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That dis-

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> cretion can no more be bargained away than the power itself.

The only limitation under the reserve power or police power is that the alteration or amendment must have a rational relation to the public welfare. No one has or does question this. The Shallenberger case decided that issue in the affirmative with respect to the Nebraska law.

The courts are not concerned with any economic hardship or oppressiveness so long as the constitutional provisions are not violated. In *Powell* v. *Pennsylvania*, 127 U. S. 678, it was said:

> If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government.

In 7 R. C. L., Sec. 105, page 106, the principle is well stated:

> "105. Harshness and Unreasonableness.—The general rule is that the question of the reasonableness of an act otherwise within constitutional bounds, is for the legislature exclusively, and in ordinary cases the courts have no revisory power concerning it, or to substitute their opinion for the judgment of the legislature. Courts are not at liberty to declare statutes invalid although they may be harsh, and may create hardships or inconvenience, or are oppressive or are mischievous in their effects and burdensome on the people and of doubtful propriety."

This court has held the enactment of the Nebraska law was a proper exercise of the police power. That ques-

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tion is settled. With that decision the jurisdiction of the judiciary ended. Since it was a proper exercise of the police power only the legislature can alter or repeal the law. The courts are not concerned with the results of the operation of a law enacted in the proper exercise of that power whereas under the record in this case, the evidence has shown conclusively that no constitutional limitations are being transgressed.

PROPOSITION OF LAW NUMBER FIFTEEN

Where the decision of a state court was on the basis of estoppel in pais involving a non-federal question and it appears that there was basis in fact for such holding, the supreme court of the United States will not take jurisdiction although an independent federal question may be involved. This court will not, where such non-federal question has some basis in fact, undertake to decide whether the decision of the state court on such question was right or wrong.

Arkansas So. R. Co. v. *German Nat'l Bank*, 207 U. S. 270, 28 S. C. Rep. 78.

Enterprise Irrigation District, et al. v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 37 Sup. Ct. Rep. 318.

St. Louis Malleable Casting Co. v. *Prendergast Const. Co.*, 260 U. S. 469, 43 S. Ct. Rep. 178.

This question is fully considered and decided in *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 37 Sup. Ct. Rep. 318. In denying jurisdiction it was said:

> "A decision of the highest court of a state adverse to the contention that, consistently with the due

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process of law and equal protection of the laws clauses of U. S. Const. 14th Amend., an adjudication of the state board of irrigation in favor of the asserted right of a canal company, under an alleged priority of appropriation, to divert through its canal a certain amount of water from a stream, could not be treated as binding upon those claiming under other appropriations, because it was made without lawful notice or opportunity to be heard, *is not reviewable in the Federal Supreme Court on writ of error, where the state court also decided that the canal company was entitled to prevail for the reason that its adversaries were estopped by their own conduct to question the canal company's claims.*

"The contention that the highest court of a state, in disposing of some of the questions involved in a clause (case) *including that of a defense of an estoppel in pais, misconceived or misapplied the statute and common law of the state, and thereby infringed the due process of law and equal protection of the laws clauses of U. S. Const. 14th Amend.,—presents no Federal question which will sustain a writ of error from the Federal Supreme Court.*"

In *Arkansas Southern R. Co.* v. *German National Bank*, 207 U. S. 270, 28 S. Ct. Rep. 78, 52 L. ed. 201, the court said:

"Ordinarily this court will not inquire whether the decision upon the matter not subject to its revision was right or wrong."

The Nebraska Supreme Court was right in its findings of fact on the failure of proof by the banks and the question of estoppel. We submit no other decision was possible on the facts and record in this case.

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PROPOSITION OF LAW NUMBER SIXTEEN

Under Section 9150, C. S. Nebraska, 1922, the Nebraska Supreme Court upon appeal in equity cases, is required to try the case de novo and to "reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence."

Colby v. *Foxworthy,* 80 Neb. 239, 115 N. W. 1076.
Sec. 9150, C. S. Neb. 1922 (hereinbefore quoted)
Enterprise Planing Mill Co. v. *Episcopal Church.* 100 Neb. 29, 158 N. W. 386.
Michigan Trust Co. v. *City of Red Cloud,* 69 Neb. 585, 98 N. W. 413.
Omaha Loan & Bldg. Assn. v. *Hendee,* 77 Neb. 12.
Milwaukee Mechanics Fire Ins. Co. v. *Fuller,* 53 Neb. 815.

The interpretation placed upon the Nebraska statute by the Nebraska Supreme Court is well stated in *Colby* v. *Foxworthy,* 80 Neb. 239, 115 N. W. 1076, in which it was said:

> From the citations of authorities it seems quite evident that counsel have overlooked the fact that, *under the statutes and the rules now in force for the trial of appeals in equity cases, we are not at all bound by the findings and judgment of the trial court,* but must try such cases *de novo,* reach our own independent conclusions as to the weight, credibility and effect of the evidence, *and render our judgment without reference to the conclusion reached by the district court, or the fact that the record contains some evidence to support it.*

Furthermore, a voluntary opinion of a trial court under the procedure in Nebraska is not a proper part of the

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record on appeal and will be disregarded. In *Milwaukee Mechanics Fire Ins. Co.* v. *Fuller,* 53 Neb. 815, the court said:

> A second argument here is that the judgment must be reversed because the only issue in the case has not been passed upon or decided by the district court; *but this argument assumes that the opinion of the district judge is an essential part of the record of the case brought here; but it is not.* In reviewing a case brought here, either on error or appeal, while this court is always pleased to have the benefit of the written opinion of the trial judge, still the judgment of the district court must stand or fall *upon the statutory record of the case—that is, the pleadings, the finding and judgment of the district court, and the bill of exceptions made a part of the record.*

So upon this appeal the findings of fact and of law made by the Nebraska Supreme Court are the proper basis for review. The volunteer opinion of the trial court has no proper place at this stage.

PROPOSITION OF LAW NUMBER SEVENTEEN

Where the state supreme court has in the syllabus based its decision upon estoppel and has devoted fully two-thirds of its opinion to the discussion of the evidence and facts establishing estoppel, it is frivolous to contend as appellants do, that because the words "waiver" and "estoppel" were not actually used in the opinion itself that it does not constitute one of the grounds of that court's decision.

Old Colony Trust Co. v. *Omaha,* 230 U. S. 100.
Burbank v. *Ernst,* 34 Sup. Ct. 299, 232 U. S. 162, 58 L. ed. 551.

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Cuyahoga River Power Co. v. *Northern Realty Co.*, 37 S. Ct. 643, 244 U. S. 300.
Egan v. *Hart*, 165 U. S. 188, 41 L. ed. 680.

The banks now contend that the decision of the Nebraska Supreme Court on estoppel as announced in paragraph one of the syllabus should be disregarded as being only an abstract proposition of law not applied to the case. They ask this court to disregard the decision and discussion on estoppel as incorporated in the opinion. In support of this they cite *Holliday* v. *Brown*, 34 Neb. 232. This question, in an appeal coming to this court from Nebraska, was before this court in the case of *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100.

In that case it was contended by the City of Omaha that the opinion of the Nebraska Supreme Court should be disregarded in considering the propositions and findings stated in the syllabus. In deciding against the city on this point the court said:

> *To the state decisions here cited, counsel for the city interposes the objection that they are not well grounded, and that some of them go beyond what is expressed in the syllabus.* We need not say more of the first branch of the objection than that, as the decisions relate to matters of local law, namely, the construction of the state constitution and statutes and the powers of local municipal corporations, they must be regarded by us as controlling, when their application involves no infraction of any right granted or secured by the Constitution of the United States. Such an infraction is not suggested, nor could it reasonably be. *The other branch of the objection is not based upon any statute or rule of court in Nebraska, giving controlling effect to the syllabus. At most it rests upon a statement in Holliday* v. *Brown*,

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34 Neb. 232, 51 N. W. 839, *respecting "an unwritten rule" to that effect, but what was said upon the subject in that case has been so pointedly criticized and so far restrained in Williams* v. *Miles,* 68 Neb. 479, 62 L. R. A. 383, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 151, 4 Ann. Cas. 306, *that it is not controlling. Of course, it ought not to be given greater effect here than in the courts of the state.*

Both the opinion and syllabus by the Nebraska Supreme Court in this case are based on estoppel and they are in perfect harmony.

Clearly both the syllabus and opinion are before this court for consideration on all issues involved on this appeal.

PROPOSITION OF LAW NUMBER EIGHTEEN

The Nebraska Supreme Court is required by sections 1074 and 1075, C. S. Nebraska, 1922, to cause all of its opinions to be reported and published and they are therein referred to as the decision. Appellants have included the syllabus and opinion in the record brought to this court. Such syllabus and opinion are properly referred to in this court to establish the grounds of the judgment.

Old Colony Trust Co. v. *Omaha,* 230 U. S. 100.
Holliday v. *Brown,* 34 Neb. 232.
Williams v. *Miles,* 68 Neb. 790.

Section 1074, C. S. Nebraska, 1922, is in part as follows:

"The court shall cause to be reported with as much brevity as practicable each of its decisions which reverses or modifies the judgment of the district court * * * * *."

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Section 1075, C. S. Nebraska, 1922, as amended by Laws of Nebraska, 1929, chapter 84, insofar as material, is as follows:

> "It shall be the duty of the reporter of the supreme court to prepare the opinions of said court for publication as fast as they are delivered to him. * * * * He shall cause the same to be printed, and bound in a good and substantial manner, equal to volume fifty of said reports."

As shown by these statutes, the opinion is prepared by the court and is required to be published. The syllabus is also prepared by the court. *Holliday* v. *Brown,* 34 Neb. 232.

PROPOSITION OF LAW NUMBER NINETEEN

Where by statute or settled practice the opinion of the state court is a part of the record, this court will examine the grounds of the opinion in order to ascertain the grounds of the judgment.

Thompson v. *Maxwell Land Grant Railway Co.,* 168 U. S. 451, 42 L. ed. 539.

Burbank v. *Ernst,* 34 Sup. Ct. 299, 232 U. S. 162, 58 L. ed. 551.

Cuyahoga River Power Co. v. *Northern Realty Co.,* 37 S. Ct. 643, 244 U. S. 300.

Egan v. *Hart,* 165 U. S. 188, 41 L. Ed. 680.

The decision of the state supreme court with the grounds and reasons for the decision as given in the syllabus and opinion of the court are the basis upon which the Supreme Court of the United States has always decided the question of the grounds of jurisdiction.

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Thompson v. *Maxwell Land Grant Railway Co.*, 168 U. S. 451, 42 L. ed. 539:

> "Whenever a case comes from the highest court of a state for review, and by statute or settled practice in that state, the opinion of the court is a part of the record, we are authorized to examine the grounds of such opinion for the purpose of ascertaining the grounds of the judgment."

The same rule is applied in the following cases:

Burbank v. *Ernst*, 34 Sup. Ct. 299, 232 U. S. 162, 58 L. ed. 551.

Cuyahoga River Power Co. v. *Northern Realty Co.*, 37 S. Ct. 643, 244 U. S. 300.

Egan v. *Hart*, 165 U. S. 188, 41 L. ed. 680.

The Supreme Court of Nebraska is required by sections 1074 and 1075, C. S., Nebraska, 1922, to cause all of its opinions to be reported and published, and they are therein referred to as the decision. This has always been the practice in that court and in this case as in all others coming to this court on appeal, the opinion as incorporating the decision, was included as a part of the record.

PROPOSITION OF LAW NUMBER TWENTY

If, pending a decision on appeal, a statute is enacted or an event occurs which renders a decision unnecessary, the appeal will be dismissed. The occurrence of such event may be shown by extrinsic evidence, or noticed by the court where it is a matter of judicial notice.

Lewis Publishing Co. v. *Wyman*, 228 U. S. 610.
Gulf, etc. R. Co. v. *Dennis*, 224 U. S. 503.

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Wingert v. *Hagerstown First Nat'l Bank,* 223 U. S. 670.
U. S. v. *Evans,* 213 U. S. 297.

The major contention of the banks is that they will be unable to pay the annual special assessment of five-tenths of one per cent *for an unlimited length of time,* and that they will be unable to pay the existing losses to the depositors which they claimed totaled about sixteen million dollars. They do not object to the regular assessment of one tenth of one per cent. The record established that their contentions had no basis in fact or law.

However, for all practical purposes, and independent of this record, the contention of the banks as to the future, if it were a judicial question as they contend, has been rendered a moot question by the action of the Nebraska legislature. This court will take judicial notice of an act of that body. By Senate File Number 3 of the Session Laws passed by the 46th Special Session of the Nebraska legislature in March, 1930, about three months after the case was decided, the Guarantee Fund Law was modified so that the assessments for the future, including both the original regular assessment of one-tenth of one per cent and the special assessment of five-tenths of one per cent, were reduced to a total of two-tenths of one per cent per annum for a period of ten years; a total of $2.00 per thousand dollars of deposits.

Section four of this same act of the Nebraska legislature also provided that the Department of Trade and Commerce might in its discretion, grant to any bank an extension of time not exceeding three years within which to pay any of the assessments theretofore levied. These assessments referred to were the accumulation of the regular and special

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assessments for the years 1928, 1929 and 1930. This accumulation was caused by the banks refusing to pay these assessments after this suit was brought and even after the Supreme Court of Nebraska had held against them. It may be assumed that they have largely set it aside and created a reserve fund against these accruing assessments.

So the only assessments now in issue are the special assessments which had already been levied and which amount to less than three million dollars and a future total assessment of only two-tenths of one per cent for ten years. That is the actual literal effect of the new act.

Assuming for the moment that the issue urged by the banks in this action as to the future were in any sense judicial, the practical effect of this action of the legislature is to render such issue a moot question. Under the facts and the record in this case we do not believe even the banks will contend that the payment of the special assessments already levied and the two-tenths of one per cent for ten years will in any way affect the state bank system of Nebraska.

PROPOSITION OF LAW NUMBER TWENTY-ONE

The judicial notice of the Supreme Court of the United States when reviewing a judgment of a state court is coextensive with that of the court whose judgment it is reviewing and includes notice of all the laws of that state.

Lloyd v. *Matthews,* 115 U. S. 222.

Liverpool, etc., Steam Co. v. *Phoenix Ins. Co.,* 129 U. S. 377.

Chicago, etc. R. Co. v. *Wiggins Ferry Co.,* 119 U. S. 615.

Hauley v. *Donoghue,* 116 U. S. 1.

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Under the foregoing rule this court will take judicial notice of the modification of the Guarantee Fund Law by the Nebraska legislature in March of 1930.

Appellants' statements as to the Guarantee Fund Law in other states are wholly outside the record.

On pages 45 and 46 of appellants' brief, they purport to give some facts and figures with reference to the Guarantee Fund Law in other states. There is not a scintilla of evidence in the record or a word in the pleadings as to any of the matters they refer to and their statements are manifestly made in an attempt to prejudice the issue. We are unable to meet them without likewise going outside the record. We feel their statements under the circumstances will be entirely disregarded; they have no pertinent bearing on the issues.

Whatever the situation of fact is now or through the years in those other states may have been it does appear that **NO COURT IN ANY OF THOSE STATES HAS EVER HELD ADVERSELY TO ANY GUARANTEE FUND LAW OR ANY PART THEREOF.** Every case in every state and every one in the United States Supreme Court has been determined **ON DEMURRER** in favor of the law. The courts have consistently held all questions raised to be legislative matters. Plaintiffs cite no guarantee fund case supporting their theory; there are none; they try to differentiate the cases cited against them. Their own recitals outside the record as to the law in other states show that such action as has been taken has been by the legislature—not by the courts.

In the same connection they quote extensively from a "financial writer" as to the "economic policy" of the law.

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Appellants' whole case in reality is based on the "economic policy" of the law. A matter exclusively for the legislature.

The banks have no standing in a court of equity.

The pitiful plight of depositors with accrued claims like Reverend Peterson and others is sufficiently disclosed by this record.

The old maxim of equity, "He who seeks equity must do equity", applies with special force in this case in favor of those depositors with accrued claims. It is difficult to understand how the banks can ask in equity to be relieved of their responsibilities under the law, when at the same time having received the benefits of the law, they seek to repudiate their liabilities to the depositors; on depositors' claims based on deposits the banks by their acts induced.

The banks are seeking affirmative equitable relief. Courts of equity have always refused to interfere in behalf of any litigant until he himself has done justice, according to equitable rules, to his opponent.

CONCLUSION

For the reasons given these appellees submit that the appeal herein should be dismissed for want of jurisdiction; or the decision of the Supreme Court of Nebraska be affirmed.

Respectfully submitted,

C. A. SORENSEN, Attorney General,
C. E. ABBOTT, Special Counsel,
Attorneys for Arthur J. Weaver, as Governor, Clarence G. Bliss, as Secretary, etc., and Willis M. Stebbins, as Treasurer, Appellees.

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