Briefs Re Abie State Bank Case 1928-1930 [2 of 2]

27070

General Number 27070.

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In the

SUPREME COURT OF NEBRASKA

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ABIE STATE BANK, ABIE, NEBRASKA,
Plaintiff and Appellee,

vs.

ARTHUR J. WEAVER, as Governor of the State of Nebraska, and CLARENCE G. BLISS, as Secretary of the Department of Trade and Commerce,
Defendants and Appellants.

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MOTION FOR RE-HEARING AND BRIEF IN SUPPORT THEREOF.

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We respectfully ask a re-hearing in this case. The effect of this court's decision is so momentous and the grounds of the decision so uncertain that we feel we would be derelict in our duty to our clients and the public if we did not ask this court to give a further consideration to this most important case. If the decision of this court stands, it means the end of the state banking business in Nebraska. It is idle to urge

that individual banks can pay this tax and continue in the banking business. The banking system cannot pay the tax and survive. The solvent banks that can must of necessity nationalize and the others will be forced to liquidate. Such a result would be so disastrous to every line of industry that its harmful effects cannot be measured. Does the court realize the gravity of the situation and the effect of its decision? If so we have nothing further to offer. No act of the legislature can help now. It is too late. Already three special assessments have been levied and four more will be due before an act of repeal could be passed. The accumulated taxes would approximate between three and five million dollars. The payment of so enormous an amount would crush a majority of the state banks under their present weakened condition.

An appeal to the Supreme Court of the United States would be equally ineffective even though successful, because of the long delay before a decision could be rendered. No power on earth except this court can save the state banking system to the state of Nebraska. This is strong language but expresses the real situation that confronts this court and this state.

In support of our motion for a re-hearing we submit the following brief and argument:

I.

The collection of this confiscatory tax will destroy a large number of state banks with enormous losses to their depositors.

II.

If the assessments which have accumulated now to over $2,264,000.00 are enforced and an additional assessment of $1,508,000 which is due, it will put an end to the state banking system. If the judgment of the trial court is affirmed and these assessments enjoined, the state banking system can and will survive.

III.

The public interest is so vitally involved in the preservation and solvency of the state banking system that questions of waiver and estoppel are not applicable, since the paramount public interest is controlling.

IV.

The collection of these assessments takes from the assets of the present banks and the protection of their depositors and turns these assets over to the payment of depositors in other banks which failed more than two years ago. It thus takes from one and gives to another by legislative enactment contrary to constitutional restrictions.

V.

There is no remedy for the banks except through this court. Even a special session of the legislature could not relieve against the present accumulated tax of $2,264,000.00 and an additional $1,508,000.00 which would accumulate before the legislature could act. None of these assessments could be set aside by the legislature.

VI.

The opinion of the Supreme Court of the United States decided twenty years ago under conditions then existing has no application to present conditions. Both that court and this court have held in other cases that the constitutionality of a law must be tested by conditions existing at the time the suit is brought.

VII.

An appeal to the Supreme Court of the United States would be ineffective because the banking system would be wrecked before a decision could be rendered.

VIII.

The opinion in this case is so doubtful and uncertain that it is capable of a construction which would bar a review by the Supreme Court of the United States.

IX.

In a case of this vast importance the grounds of the court's decision should not be uncertain.

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THE EMERGENCY TAX IS CONFISCATORY.

The opinion contains the following excerpt from the testimony of Mr. Woods:

> "In his opinion, the conditions of the banks and their ability to pay the assessment is 'incomparably better than in 1923.' "

Does this court feel that the banks can pay this assessment if they would and are simply trying to escape payment through legal technicalities? If the court so believes, then we have failed lamentably in presenting this case. Mr. Woods did not know the real condition of the state banks of Nebraska. He was looking at the situation through the glasses of a national banker, and no one questions but that the national banks are in incomparably better financial condition than in 1923 when the period of deflation was at its peak. The record shows, however, that if the national banks had been compelled to pay the same special assessments that the state banks have paid for a period of eight years, a large percentage of the national banks would now be in the red. The national banks have been able to use all their profits towards cleaning their note cases and to recover from the disastrous effect of the deflation period. The state banks have been compelled for eight years to take practically all their earnings towards the liquidation of the losses of other state banks. Mr. Stephens, who had personal contact with a great many of the bankers of this state, stated,

> "Only about one-third of the banks have been able to clean their note cases; the others have used up their earnings to pay the assessments in the Guaranty Fund." (B. of Ex., Q. 3301)

In 1919, 937 of the state banks of Nebraska had a capital investment of $24,881,800.00 and owned real estate not used in the banking business amounting to $641,450.88. In 1928, 726 banks with a capital of $19,001,000.00 owned real estate not used in the banking business of $9,872,647.21. In addition to this the same banks held real estate for bank buildings amounting to $6,174,432.86. Such real estate is unproductive, and the proof shows that it had a realizable cash value of approximately 40% of what it was carried on the books of the bank. All agree that such enormous real estate holdings do not show a healthy condition. In commenting upon this situation the trial court said,

> "If the banks had not been required to pay the special assessments, they would have been able to charge off part or all of this 'other real estate'." (Original brief, page 83, Opinion of Judge Frost)

If the opinion of any individual is of value, it would be that of Mr. Bliss who, as Secretary of the Department of Trade and Commerce should know the real condition of the state banks. He said:

> "If the special assessments are continued, it will result in practically two-thirds of the state banks being wiped out." (B. of Ex., Q. 1639).

Expert accountants were called by both sides to make a searching analysis of the bank records in order

to disclose the present condition of the state banks. Insofar as the plaintiffs were concerned they were compelled to rely upon published statements for their evidence, as access to the examiners' reports which would disclose the real situation was denied them. These published statements present the condition of the banks in their most favorable terms, as no bank wants to disclose a weakened condition. The results of the examination by expert accountants were submitted in evidence to the trial court. Judge Frost heard the testimony, all of it, and gave many weeks to a searching analysis of the evidence and his conclusion was that under present conditions the emergency tax is confiscatory. No other conclusion was possible from the evidence, and this court should accept that conclusion as a basis of fact upon which to rest this case.

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NO REGULATORY TAX SHOULD BE HELD VALID THAT WILL CAUSE THE DESTRUCTION OR SERIOUS IMPAIRMENT OF STATE BANKS.

We cannot conceive that the law could be otherwise. The trial court held that the tax is confiscatory, and it is confiscatory in the largest sense of the word for its effect is destructive. Take a bank whose assets have not been seriously depleted and which is still solvent as a going concern. What will happen when a confiscatory tax is levied against it? It has a capital of $50,000.00 and deposits of $750,000.00, the deposits being fifteen times the bank's capital which is normal.

The bank earned in 1928 $4,000.00 which would be 8% on its capital,—an earning above the average earnings of the banks in the smaller cities in this state. The tax imposed for the Guaranty Fund amounts to six-tenths of one per cent of its deposits or $4,500.00. If the bank was solvent and no more, and such is the condition of a great majority of the banks, then the enforcement of the Guaranty Fund tax would put the bank in the red and compel the state officials to take over the bank because its capital would be impaired. Mr. Van Peterson, with an experience reaching over ten years and involving hundreds of failed banks, testified that when a bank fails there is a loss to its depositors of six times the bank's capital. This would not be true in the case cited, for the bank would be solvent at the time the tax was imposed. Its insolvency is caused by the tax. There would be a shrinkage in its assets under receivership through enforced collections and through depreciation of its real estate and bank fixtures of not less than twenty per cent, so that there would be a loss to its depositors of $150,000.00 and a loss to the bank's stockholders of $50,000.00. *In other words, the collection of a confiscatory tax of* $4,500.00 *would entail a loss upon innocent persons of* $200,000.00 *at least.* This is not an extreme case but the inevitable consequences of the enforcement of this confiscatory tax against the state banks of Nebraska. According to the findings of Judge Frost, in 1927 and 1928 two-thirds of the banks earned no dividends and one hundred fifty-eight banks are in the red because of this confiscatory tax.

We submit that every effort should be made to save the banking system because of public interests involved. This enormous tax points a threatening finger to every state bank and destroys the confidence of the public in it as a safe place to put savings and, therefore, threatens its ruin. It is not the tax alone which weakens the ability of the banks to pay but the power of the banks to earn money will be gone. The great deficit in the Guaranty Fund and the utter inability of the banks to pay because of weakened condition stands as a menace to the banking system. The depositors in banks and the public know that the banks cannot pay this tax and meet their obligations to their depositors and remain solvent. Instead of the Guaranty Fund being a protection to depositors it is a menace to their deposits and to the banking system. When the banking system fails or any individual bank fails, others are vitally concerned besides the bank officials and the bank's stockholders. The debtors of failed banks are compelled at once to liquidate their debts and this involves untold sacrifices. The trial court held that the depositors in going banks and the public generally were interested in the continuance of the solvency of the system and hence nothing that the banks might say or do could estop the banking system from challenging an assessment which is confiscatory.

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NO REGULATORY TAX OR SPECIAL ASSESSMENT SHOULD BE PERMITTED WHICH WILL WEAKEN THE BANKING SYSTEM SO THAT IT WILL BE UNABLE TO MEET ITS OBLIGATIONS.

This was the thought in the mind of the trial court when he held that an estoppel against a confiscatory assessment would not lie. Does this court hold that the position of the trial court was erroneous and that the banks are estopped because of past conduct or utterances in now questioning the validity of the regulatory tax as confiscatory? The rule is stated in 27 R. C. L., Page 907, as follows:

> "A waiver is not, however, allowed to be operative where it would infringe upon the rights of others, or would be against public policy or morals. Where the object of a law is the good of the public as well as of the individual, such protection to the state cannot, at will, be waived by any individual, an integral part thereof. The fact that the individual is willing to waive his protection cannot avail. The public good is entitled to protection and consideration."

We submit the foregoing is a correct statement of the law and that an estoppel or waiver cannot be urged as against a confiscatory tax upon a quasi-public institution. If the emergency tax is confiscatory, as the trial court found, the public good and general welfare is the first consideration for the court. If this emergency tax threatens the existence of the banking system, and it does, then it became the duty of the court to enjoin it to protect the public and depositors in such

banks. No acts or utterances of the banks by way of estoppel or waiver should be permitted to destroy or impair the banking system.

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THERE IS NO BASIS IN FACT OR LAW TO URGE AN ESTOPPEL.

While the opinion does not declare that there is an estoppel against the banks to urge the constitutionality of the law, it refers to certain newspaper articles published in The Omaha Bee in the summer of 1926 and places emphasis upon the fact that Mr. Schantz of the State Bank of Omaha, a single banker, issued two thousand pamphlets and that Mr. Stephens in 1928 wrote an article which was given newspaper publicity. The elements of estoppel are entirely lacking.

In order to have an estoppel, as we pointed out in our original brief, it must be shown that the banks with knowledge of their falsity, made representation of facts, which was relied upon by others, and there is no such proof. There is no proof that the representation of facts in the published articles was not true at the time insofar as the banks knew.

If the opinion was to be based upon estoppel, then the legal rules governing estoppel in a case of this vast importance should certainly have been discussed, the conclusions of fact set forth and rules applied. Of course, the action of Mr. Schantz in issuing pamphlets and the action of Mr. Stephens in publishing state-

ments could not estop the banks nor could the action of one-third of the banks which paid for the publication of the newspaper articles estop the banking system. In our view such testimony was not even relevant.

Inasmuch, however, as the opinion refers to the newspaper articles which appeared in The Omaha Bee during the summer of 1926, we feel that the court's attention should be again called to the circumstances under which such articles were published.

Shortly prior to the publication, the state banking system in South Dakota had collapsed because of the so-called Guaranty Fund. It was feared that deposits would be withdrawn in large amounts from the state banks of Nebraska, thereby causing a panic.

An enterprising newspaper man visualized the situation and saw an opportunity for profit. He conferred with the heads of the Department of Trade and Commerce in Lincoln. A plan was devised of publishing a series of articles to reassure the public in the solvency of the state banks of Nebraska and the beneficent effects of its so-called Guaranty Fund law. This plan received the approval of the heads of the Department of Trade and Commerce.

1103 Q. "The idea was submitted to the Department of Trade and Commerce before?

A. Yes, sir.

1104 Q. And the banks were told it received their approval?

A. Yes, sir.

1109 Q. Who furnished you the information from which you prepared the advertisements?

A. The members of the Guaranty Fund Commission and Kirk Griggs."

Each article published in The Omaha Bee was submitted to state officials and received their censorship and sanction before publication. *Not a single argument or statement contained in such publication was contributed by a banker in this state.* Certain bankers were told that the Department of Trade and Commerce desired such articles to be published and that the banks should pay for the same. The banks were not advised of the real condition of the Guaranty Fund but were told and belived that the fund was not in serious jeopardy and that one or two payments at most of the emergency tax was all that would be required. The advertisements were published at a time when the Guaranty Fund had met every demand upon it and the bankers were told that the banks then in the hands of the Commission had enough assets on hand to take care of all probable liabilities. The real sufferers were not the depositors in insolvent banks which had already failed or were soon to pass into receivership. If the articles had not been published, their losses would have been the same. In fact, they have profited because the banks were induced to contribute several million dollars towards payment of such losses. The real sufferers have been the state banks of Nebraska, which were induced to pay and continued to pay for nearly three years the emergency tax upon the assurance of state officials that one or two further con-

tributions was all that would be required of them to pay the losses of banks that had failed. If harmful effects came from the publication of such articles, the department of banking alone was to blame and certainly blame should not be attached to the banks for doing what the department advised.

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WAIVER: COMPLIANCE WITH OR CONTINUANCE UNDER THE SO-CALLED GUARANTY FUND ACT DOES NOT CONSTITUTE A WAIVER OF CONSTITUTIONAL GUARANTIES.

If the opinion of the court in this case was intended to conclude that the banks should not be allowed to make complaint because they had waived the right to raise the constitutional questions, the elements of legal rules governing waiver have not been recognized nor discussed in the opinion. The opinion does not declare that the banks have waived their rights. Waiver at most could only take place where the banks had the election to adopt the law or waive the acceptance of it.

The law was compulsory; the banks had no election. Over four hundred of the banks had their investment in banking houses and their business in full swing at the time of the adoption of this law in 1919. They could not avoid operation under the law; the law compelled it. They could not quit the banking business without sacrifice of their banking investment, without sacrifice of the value of the use of their banking buildings and equipment, and without the entire loss of the

good will of their business. Such resultant loss would constitute confiscation. They were compelled to accept and to operate under the law. Operation under the law could not constitute a waiver.

The unanswerable reasoning of the late Chief Justice White of the Supreme Court of the United States is particularly applicable, that where a company has been permitted by the state to engage in business, make investment, and where the value of the investment depends upon the right to use the property for the purposes for which it was acquired, then the state cannot impose an unconstitutional and confiscatory burden upon the condition that such burden be discharged or the business be abandoned. The state has no power in such a case to say the confiscatory tax must be paid or the company quit business.

It is pointed out by that eminent judge that a state may exact the burden as a condition to the commencement of business in the state, but that the state could not, in the same fashion, treat a company already admitted as if it had never been admitted, and as if the burden were exacted as a condition to its being permitted to commence business. He said:

> "But I cannot assent to the correctness of the contention in so far as it asserts that a state may suffer a corporation to come into its borders, invest in property therein and then, after having allowed by acquiescence or implied invitation such a situation to arise, the state may treat the corporation as if it had never come in and its property

within the state as if it were wholly out of the state and despoil the corporation of its rights and property upon such false assumption."

This rule is particularly applicable in the case here, where four hundred ten of the complainant banks were engaged in business, had made their investments and were operating with permission of the state before the guaranty fund law was passed. It is no answer to them to say—"You must either pay the unconstitutional and confiscatory burden or quit business."

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PARAGRAPH THREE OF THE SYLLABUS.

The third paragraph of the syllabus reads:

"Where a state bank has accepted the benefits arising from the deposits of money pursuant to the terms of the bank depositors' guaranty law, such bank should not be heard, in a proper case, to make complaint of a special assessment upon such deposits which have been levied for the benefit of the depositors' guaranty fund."

In support of the rule thus announced the opinion contains the following:

"The paramount object, and clearly the legislative intention in the creation of the depositors' bank guaranty fund law, was first for the protection of the depositors' money in the state banks."

With that statement we concur.

Then follows:

"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."

We do not concur in that statement for the proof shows that the banking system as a whole immediately challenged the legislative enactment as violative of their rights under the federal Constitution. When the law was declared constitutional, however, the banks accepted the situation and did their best to comply with it and make it effective.

Then follows:

> "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."

We are not sure that we understand what the court means by that statement. The banks must either accept moneys for deposit or refuse them and thereby cease doing a banking business. When deposits were made, they all came alike under the bank guaranty fund and the bank had no option.

The last paragraph of the opinion referred to is, as follows:

> "But money was accepted by the state banks, pursuant to the terms of the depositor's guaranty fund law, and by that law such banks are clearly bound."

The opinion overlooks the nature of the act as a police regulation and considers it rather as a contract obligation. It construes a legislative act as though it

The duty to continue the tax ceases when the solvency of the banking system is jeopardized. A far higher duty is owing to the public and the depositors in going banks than to the depositors in failed banks. The continuance of the tax will not pay their losses and will cause inestimable damage to present depositors and the public by wrecking the banking system.

was an indenture made by each individual bank with the depositors of all other banks to see that such depositors are paid. The bank owes a duty, a contract obligation, to its own depositors to see that they are paid, but it owes no such duty to the depositors of other banks. The depositors in banks are held to knowledge of the law as well as the banks and that when the Guaranty Fund tax becomes so oppressive as to be confiscatory the banks have a right to resist its payment, and it will be their duty to do so to protect their own depositors. The law is a police regulation. Compliance with a police regulation does not create an estoppel from urging that its regulations have become unreasonable or confiscatory. Whenever a police regulation becomes unreasonable or confiscatory, the individual affected by it has the right *then* to challenge its constitutionality. In its inception and for a long time thereafter it may not be unreasonable. There may come a time, however, when its burden becomes confiscatory and when such condition exists, the right to invoke the protection of the Constitution arises. An apt instance is the so-called two cent passenger rate. In 1909 the legislature of Nebraska as a police regulation passed a law requiring the railroads to carry passengers in this state at two cents per mile. It was undoubtedly the thought that such a low rate would be a boon to the citizens of this state and that the railroads would not be injured by such low rate because of the increased traffic. Such rate was in effect for many years and then it was challenged upon the ground that such a rate was confiscatory. Could it have been urged that the railroads

were estopped from challenging the law because they had accepted its benefits for many years and were, therefore, clearly bound? The courts did not so hold. The rule has always been that when a police regulation becomes confiscatory, then the individual affected by it has the right to challenge its constitutionality even though he may have complied with it for many years.

In the inception of the so-called Guaranty Fund law and for many years regular assessments of one-tenth of one per cent only were required. Such assessment is small in amount. It was not anticipated that the emergency tax now in question would be resorted to except infrequently, as it was to be levied only to fill up a deficiency in the Guaranty Fund. Certainly it was never contemplated that special assessments should become regular, continuous and confiscatory and not to be used to create a Guaranty Fund or to fill a deficiency in it but to pay the enormous losses of failed banks. The banks could not challenge the validity of a special assessment in the inception of the law as confiscatory, for it might never be levied. They might not be able to challenge the first or several special assessments if the same were to be used to fill up a deficit in the Guaranty Fund. When, however, the Guaranty Fund no longer exists and such special assessments become confiscatory the right to question them as contrary to constitutional restrictions arises, and we feel that this court should so hold.

Even though the statute is to be considered in the nature of a contract relation, the result would be the

same. The law which required the banks to pay the regular assessment and, much more, the special assessment promised a Guaranty Fund which should stand as a protection to deposits and give stability to the banking business. The benefits promised were as much a part of the law as the obligations to pay the assessments. Would this court hold that one party is bound to certain payments called for by a contract when all benefits are withdrawn through no fault of his? Is it not the law rather that when the payments no longer yield the promised benefits the right to require the payment ceases? In our original brief, page 112, we set forth the comparative obligations arising from the so-called Guaranty Fund law. Under that law the entire banking system was placed under the supervision of the state and the bank was declared to be a quasi-public business. The purpose of the law, as this court has said, was to create a Depositors' Bank Guaranty Fund for the protection of depositors. In state banks in the inception of the law and for a number of years a fund was created amounting to several millions of dollars which stood as a security to depositors in state banks and thereby gave confidence to the public in state banks. Such conditions no longer exist. Not one penny that is exacted from the banks by this special assessment is to be used towards the building up of a Depositors' Guaranty Fund but every penny is to be used to pay the losses of banks that have failed. The banks might have no just cause of complaint against assessments if such assessments were to be used towards the building up or maintaining a Depositors' Guaranty Fund to stand as protection to depositors in banks

contributing such fund, but when the fund has failed and the imposition of the tax no longer affords any protection to the banks' depositors but will inevitably destroy the banks, the right to exact such tax ceases. Have not the banks and their depositors a right to complain of special assessments which are to be used not for the purpose of creating a Guaranty Fund to protect depositors and to inspire the public's confidence in banks and to stabilize the banking business but are to be used to pay losses of banks that have failed and when the continuance of such a tax will inevitably destroy confidence in the soundness of State Banks? *No one can truthfully say that the banks are in the slightest way to blame for the failure of the Depositors' Guaranty Fund.* To hold that the banks must continue to pay a large emergency tax which is confiscatory when no benefit whatever inures to the bank or to the public by such payment is to require an unjust thing. The contract obligation of the banks to pay the emergency tax, if there was such a contract, ended when the protection of the Depositors' Guaranty Fund ceased. The duty of the banks to pay rests upon the benefit that would accrue to the banks by the protection to its depositors from a Guaranty Fund created and maintained by such payment. There is no longer a Guaranty Fund and never again can be, so that there is no protection to depositors in banks by such payment but a distinct menace, for the payment of the emergency tax under present conditions confiscates the property of the bank and thereby injures its depositors and the public and serves no useful purpose to the state. The legislative act, however, does not create a contract obligation.

Wirtz vs. Nestos, 200 N. W. 524.

Standard Oil Co. vs. Engel, 212 N. W. 822.

The Guaranty Fund tax was sustained in *Noble vs. Haskell* purely as a police regulation. It has been so held by every court. (Brief, page 101)

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THIS COURT ALONE CAN ENJOIN THE CONFISCATORY TAXES ALREADY LEVIED AND THEREBY SAVE THE STATE BANKING SYSTEM.

The opinion states:

> "It is 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.*"

This is a case which commands protection from this court. Relief cannot be procured elsewhere. This court is the only tribunal that can relieve as against the confiscatory taxes already levied and the assessments for 1930. As we have stated, $2,264,000.00 of assessments against the banks have already accumulated and an additional assessment of $1,508,000.00 is due. These assessments have been held up by the injunction granted by the trial court, but if the opinion of this court stands, those assessments are released as a burden on the banks. If the banks are compelled to pay such assessments, there is no need to look beyond. The State of Nebraska will face the most serious catastrophe in its history. Under such conditions certainly this court is not helpless to grant relief.

The opinion says that legislative acts must not be declared invalid except where no other remedy is at hand. What other remedy can possibly be referred to? Is it possible that the writer of that statement means that the other remedy is to go to the legislature? If it is true that a court cannot declare a law unconstitutional when the remedy of going to the legislature and asking for the law's repeal is at hand, then no law can ever be declared unconstitutional.

Where a law is mischievous in its consequences, where its operation defeats its very purpose, where it becomes confiscatory and oppressive, where it becomes unreasonable in that it favors one class of depositors as against another, where it takes away from the protection of depositors in existing banks assets to which they are entitled and drains the banks of moneys which are sorely needed for the protection of their own depositors, when such a law under such conditions *destroys* the banking system so necessary to the public welfare, it is the duty of the court to declare it void and to enjoin its further operation. Unless such rights are given constitutional protection in that manner and by this court, then there are no constitutional rights and every legislative enactment is valid.

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THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN NOBLE STATE BANK VS. HASKELL WAS RENDERED MORE THAN TWENTY YEARS AGO AT THE INCEPTION OF THE LAW AND BEFORE IT HAD BEEN TESTED BY EXPERIENCE. THE QUESTION INVOLVED HEREIN OF CONFISCATORY ASSESSMENTS WAS NOT BEFORE THAT COURT OR CONSIDERED BY IT.

The opinion of this court contains the following:

> 'Substantially *like* questions as herein involved were considered and decisions were rendered by the Supreme Court of the United States in Noble State Bank vs. Haskell, 219 U. S. 104, and Assaria State Bank vs. Dolley, 219 U. S. 121, and in both cases it was held that the act was not repugnant to the provisions of the Constitution.''

How the writer of this opinion can say or anyone can say that substantially like questions are involved in this case as were considered by the Supreme Court of the United States in Noble Bank vs. Haskell, we cannot understand. None of the facts in this case or conditions which have arisen from twenty years experience under the law were before that court. The special assessments now before this court could not be tested in that suit. Special assessments had not been levied and might never be levied. The confiscation of the banks' assets by the present enormous assessments to pay the losses of banks that had failed more than two years ago certainly was not before that court.

The sole question before the Supreme Court of the United States in Noble State Bank vs. Haskell was whether or not the state had the *right by legislative enactment* to make an assessment against banks to *build up a Guaranty Fund* out of which the losses of banks which failed might be paid. It was urged in that case that a tax levied for such purpose was taking the property of one by legislative enactment to give to another, contrary to constitutional restrictions. The court held:

> "First, It was not certain that any part of a bank's property would be taken from it;
>
> "Second, While the operation of the law might result in taking a comparatively insignificant part of a bank's property to give to the debtors of a failed bank, such taking could be sustained upon the ground that it was a *police regulation for the public good.*"

The court gave its reasons for justifying the law.

The assessments contemplated at that time were not to be taken from the banks absolutely, for they became part of a fund in which the banks had a common ownership. "The bank", as the opinion states:

> "Would retain a reversionary interest in its contribution to the fund so as to be entitled to a return of what remained of it if the purpose were given up."

Should a bank fail, the court pointed out, and its depositors be paid out of the fund, the fund would be

replenished by the liquidation of the bank's assets and only a small loss (if any should occur to the Guaranty Fund), was contemplated. The court also pointed out that the banks would receive a benefit and the public would receive a benefit, because the fund standing for the protection of depositors in banks would make checks pass current, and stabilize the banking business. This would be a public benefit, as it would protect depositors and give the public confidence in banks. Such public benefit justified the insignificant taking that might result from loss to the banks, if any should occur by reason of a bank failing and its assets be insufficient to fully replenish what its depositors had taken from the fund. The court said:

> "An ulterior public advantage may justify a *comparatively insignificant* taking of private property for what in its immediate purpose is a private use."

The decision of the Supreme Court of the United States was based upon those conditions. If those conditions still continued today, the banks would not be heard complaining of confiscation of their properties and pointing out that the burdensome operation of the law now meant destruction of the state banking system. Had the law worked under the conditions set forth in the opinion of the Supreme Court, unquestionably the law under that decision would now be held constitutional, but that is not what transpired. That case did not consider nor pretend to consider a situation such as we have here where the tax under present conditions is confiscatory. Suppose it had been urged that under

the operation of the law bank failures would be so great that the Guaranty Fund would be exhausted and that a deficit would arise of over $20,000,000.00 and that state officials would levy and continue to levy special assessments against the banks until the banks would be so weakened that such special assessments would destroy the banking system, what would the Supreme Court have said to such an argument or contention? It would have replied: "Those questions are not before this court at this time. When such conditions arise *then* you have the right to invoke your constitutional guaranties, and this court will consider them."

The case now presented to this court and the case presented to the Supreme Court of the United States in Noble State Bank vs. Haskell are entirely different. The right to invoke protection of the federal Constitution in consequence has now arisen. New conditions and new sets of facts under repeated holdings of this court and the Supreme Court of the United States give the right to invoke the protection of the federal Constitution. Changed conditions are admitted. No one will deny that they exist. No one denies that the operation of the law has a mischievous effect and that it is destructive of the state banks at the present time. No one denies that it does not protect depositors in present banks but that it takes away from them protection. *In fact, the whole gist of our case is these changed conditions.* If it were not for them, this case would not have been brought. It is the whole matter

upon which we seek relief. The opinion of this court does not consider such changed conditions at all. We feel that under the decisions of the Supreme Court of the United States and the decisions of the Supreme Court of the State of Nebraska we are entitled to have our case determined not by conditions which existed twenty years ago but by and upon conditions which exist today.

The court in the Noble case was not dealing with a situation resulting from the operation of the law whereby confiscatory sums were being exacted solely to pay the losses of banks which failed two years ago but the court was dealing with the theory under which the law was passed whereby it was believed that the creation of a Guaranty Fund by comparatively small contributions would make failure of banks unlikely and a general panic almost impossible,—a theory also which promised a return to the banks from a reversionary interest in the Guaranty Fund of probably the entire amount that might be contributed towards it. There is no possibility of any return to the banks now of any part of the assessments thus sought to be enforced against them. There is thus a most vital change of facts bearing upon the validity of this law from the facts as they existed when the Supreme Court of the United States passed upon it. Under the facts as passed upon by the Supreme Court the general assessment went into a fund, and the fund protected depositors in going banks and the banks' ownership in that fund was a benefit to it,—a reciprocal benefit in

a common fund, by the establishment and maintenance of such fund the depositors in going banks were protected and the public was given confidence in the stability of the state banking system. These conditions now have been entirely swept aside. They have reversed themselves. There is no fund. There is an immense deficit which can never be paid up. The depositors in going banks are not protected by the payment of these assessments. The purpose of the law was to create a Guaranty Fund to protect depositors in State Banks, the object of these assessments is not to create a guaranty fund, to protect depositors in banks but to take the bank's assets to pay the losses of Banks which have failed, thereby impairing the capital of the Banks and jeopardizing the security of the depositors. The protection of depositors in going banks is entitled to first consideration, for it is the protection of these depositors that strengthens the state banking system and creates public confidence. The operation of the law now destroys the confidence of the public so that every benefit which the banks were to receive by their contribution to the Guaranty Fund is gone and instead every contribution by the levying of a confiscatory tax injures the depositors in going banks and is harmful to the public good. The banks have already paid more than $14,000,000.00. Over $3,000,000.00 more is demanded of them. Their condition is such that this enormous tax will destroy the banking system with enormous losses to their depositors.

In *Noble State Bank vs. Haskell,* 97 Pac. 590, the court said:

> "There is no contention that the reasonable estimated assessments will be so large as to prevent the banks annually from earning a sufficient amount to pay this assessment and also a reasonable dividend."

The question, accordingly, of confiscation of the bank's property to pay the losses of failed banks was not before the court.

This court has passed upon the specific question in *Erickson vs. Nine Mile Irrigation District,* 109 Neb. 189, in which it said:

> "The constitutionality of an act may depend upon the result of its practical operation. * * * The acts in question in these cases were not void ab initio, but were only void when and in so far as they operated to take away constitutional rights. The act in question in this case should be obeyed. If in its practical operation it deprives the bondholders of rights protected by the Constitution, *when such facts are made to appear, the courts are open to afford relief.*"

Again in *Davison vs. Chicago & N. W. R. Co.,* 100 Neb. 462, the court said:

> "A statute may be upheld as against an attack made by one party claiming it to be invalid upon one ground, and still it may be declared unconstitutional in a later attack by another litigant for reasons not called to the attention of the court, or not shown to exist, on the first attack."

In *Dahnke-Walker Co. vs. Bondurant,* 66 L. Ed. 239, 257 U. S. 282, the court said:

"A statute may be invalid as applied to one state of facts, and yet valid as applied to another."

In Corpus Juris, Vol. 34, Page 905, the rule is stated:

"The estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a reexamination of the *same questions* between the same parties where *in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants.*"

See other cases cited in our brief, page 163, et al.

In Noble State Bank vs. Haskell the court justified the tax as a *police regulation* which is always subject to review whenever it becomes oppressive or confiscatory and no longer serves a public purpose. A tax or burden imposed under a police regulation may be constitutional at one time and unconstitutional at a later time. The right to invoke the protection of the Constitution arises when the tax becomes confiscatory. This may be years after the passage of the law. The decisions all hold that the constitutionality of a law enacted under the police power must be tested as to its validity by the conditions which exist at the time the suit is brought, and that a law, held constitutional at one time, under one condition of facts, will be held to be unconstitutional when the conditions under which it operates change so that, by its operation under changed conditions, it violates constitutional restrictions.

The two-cent rate cases are directly in point. In 1909 the legislature passed a law that the railroads in Nebraska should not collect to exceed two cents per mile for carrying passengers. Similar legislation was passed in many states. At once the question was raised by the railroads that the law was unconstitutional. The Supreme Court of the United States held the legislative acts valid. Later, however, when it was shown that the two cent rates did not yield reasonable returns the courts did not hesitate to enjoin their enforcement. The same law and the same rates were before the courts. Here, however, the situation is far stronger. The special assessment as a confiscatory rate was never before the Supreme Court of the United States and never passed upon by it. Even if it had been, the banks would have the right now to assail the tax because changed conditions have made it confiscatory.

—o—

THE GROUNDS OF THE DECISION OF THE COURT ARE UNCERTAIN. THE OPINION SHOULD STATE CLEARLY THE GROUNDS UPON WHICH THE DECISION RESTS.

We have read the opinion of this court a number of times and must confess our inability to determine upon what grounds it rests. *This is important because of federal questions involved, for if the court's decision rests upon non-federal grounds, and there is substantial evidence to support them, it will*

bar plaintiffs' right to an appeal to the Supreme Court of the United States. Accordingly, this court should state clearly and positively upon what specific grounds its decision rests. If this court holds that the controversy herein has been decided in Noble State Bank vs. Haskell, it should be so stated. If the court holds that the plaintiffs cannot raise the constitutionality of the confiscatory tax, the opinion should so state and give the reasons therefor.

Plaintiffs' case rests upon the following grounds:

First, The tax is confiscatory and, therefore, violates the federal Constitution. No regulatory tax imposed under the exercise of the police power can be valid which destroys or impairs the banking system,—necessary to the public welfare. When such tax is attempted to be enforced questions of waiver or estoppel are not involved.

Second, The so-called Guaranty Fund law was passed to accomplish certain results, namely: to protect depositors in banks and to give stability to the banking business. Every purpose sought to be accomplished by the law has failed. No conceivable benefit now inures to the banks, their depositors, their debtors or the public by the imposition of this enormous tax to pay the losses of failed banks. Inasmuch as the purpose of the law

has utterly failed, it should cease to be valid as a police regulation.

Third, The purpose of the emergency tax is no longer to build up a Guaranty Fund to protect depositors in banks or to stabilize the banking business but every penny is to be used to pay the losses of banks that have failed. The present going banks are in no way to blame for such failures. To take their property now by legislative enactment to pay such losses violates constitutional restrictions.

Fourth, The law was held valid in the first instance as a police regulation. Such regulation "for an ulterior public advantage may justify a comparatively insignificant taking of private property for what in its immediate purpose is a private use," but will not justify an enormous taking such as is demanded here. In our judgment a clear case of violation of constitutional restrictions has been made whereby the plaintiffs are entitled to have these confiscatory assessments enjoined.

We again urge this court to give further consideration to this important case and prevent the collapse of the state banking system. If the court feels that its decision must stand, we ask that it state clearly and certainly the grounds upon which it rests so that we

can determine whether or not the decision is final or the way left open for an appeal to the Supreme Court of the United States.

Respectfully submitted,

FRANK H. GAINES,

LEONARD A. FLANSBURG,

S. S. SIDNER,

For Appellees.

General Number 27070.

In The
Supreme Court of Nebraska

ABIE STATE BANK, ABIE, NEBRASKA, Plaintiff and Appellee,

VS.

ARTHUR J. WEAVER, as Governor of the State of Nebraska, and CLARENCE G. BLISS, as Secretary of the Department of Trade and Commerce, Defendants and Appellants.

WILLIS M. STEBBINS, as Treasurer of the State of Nebraska, Intervenor and Appellant,

MARY E. GANDY, JAMES H. COVEY, THEODORE H. BUELT, HUFFMAN & SEYMOUR, INC., (a corporation), LEONARD N. SEYMOUR, JOHN HALBUR AND FRANK A. HEBENSTREIT, Intervenors and Appellants,

FRANK PALMER, JAMES M. STEPHENS, ROBERT L. BROWN, LAURA A. SMITH, FRED WOODRUFF, BURR R. STROMAN, MATTA PALMER, BLANCHE MODLIN, J. J. BROWN, Executor of the Last Will and Testament of William R. Brown, Deceased, LILLIAN W. PALMER, ARTHUR M. SMITH, Trustee, JAMES D. WOLFE, JOHN D. MODLIN, CATHERINE L. STROMAN AND OSA STEPHENS, Intervenors and Appellees,

EDWARD LINCOLN, GEORGE W. HARDING, AND HENRY M. LUBBE, Intervenors and Appellees.

BRIEF OF APPELLANTS, ARTHUR J. WEAVER, as Governor of the State of Nebraska, CLARENCE G. BLISS, as Secretary of the Department of Trade and Commerce, and WILLIS M. STEBBINS, as Treasurer of the State of Nebraska.

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C. A. SORENSEN, Attorney General,
C. E. ABBOTT, Special Counsel.

STATEMENT OF THE CASE

The plaintiff, Abie State Bank, brought this suit in the District Court of Lancaster county, Nebraska, on its own behalf and *allegedly* on behalf of the 558 other banks whose names are attached to the petition as Exhibit "A" to enjoin Adam McMullen as governor of the State of Nebraska and constituting the Department of Trade and Commerce, and Clarence G. Bliss as secretary thereof, from collecting from the state banks a special assessment levied by the Department in December, 1928, against the banks for the Depositors Guarantee Fund of the State of Nebraska, and from levying and collecting any further special assessments for said fund. The levy and collection of the regular assessment was not challenged. Arthur J. Weaver, as governor, successor in office, was substituted as defendant by stipulation. Willis M. Stebbins, as treasurer of the State of Nebraska, with funds in failed state banks, and adjudicated claims against the Guarantee Fund, and a number of individual depositors in like situation intervened adversely to the plaintiff and are named in the title of this suit as intervenors.

The two defendants by law are trustees for all depositors in failed state banks. The case therefore is actually one between some state banks and all said depositors.

THE ISSUES TRIED

(a) PETITION OF PLAINTIFF (Trans., p. 2): The plaintiff filed a petition December 24, 1928, averring that it is a banking corporation in the village or town of Abie, in Butler county; that it brought the suit on its own behalf and on behalf of each of 558 banks whose

names were set out in Exhibit "A" attached, and averred that the statements with respect to itself were equally applicable to the other banks; that defendants, claiming to act under Section 8028, Compiled Statutes, as amended, made a levy on December 15, 1928, against the state banks of Nebraska of ¼ of 1 per cent of their average daily deposits for the year 1928 for the Depositors Guarantee Fund, and made demand of the plaintiff and other state banks to pay the same on or before December 26, 1928.

Plaintiff further averred that said special assessment is illegal, invalid, unjust and confiscatory, for the following reasons:

That it is not a debt or liability of the plaintiff, but is directed against its capital stock; that if paid by the state banks it will destroy the state banking system; that it is discriminatory because not levied or collected from national banks engaged in the same business; that the assessments exceed 8 per cent of the entire capital stock of the state banks of Nebraska and exceed the net annual earnings and if required to be paid would deplete or wipe out the capital stock; that the state banks have acquired properties and property rights which depend largely for their value on continuation of banking use and have accumulated vested rights therein which they would be deprived of if compelled to abandon the banking business; that the assessments since 1920 aggregate $16,000,000; that 270 banks have ceased business because of insolvency brought about in part by the payment of said assessments; that the regular and special assessments, if required to be paid, would be $1,600,000

per year, and if continued for three years would result in practically two-thirds of the state banks being thrown into receivership; that the capital stock of the state banks is $19,738,500 and the liability of the Guarantee Fund, $10,000,000; that the Guarantee Fund Commission has taken over and is operating a large number of banks which will take a long time to liquidate and that the Depositors Guarantee Fund has in cash only $2,000 and that the ultimate deficit will be upwards of $16,000,000; that there are 150 competing national banks not required to pay assessments to the Guarantee Fund, which is discrimination and a denial to state banks of the equal protection of law as guaranteed by the 14th amendment to the Constitution of the United States; that the special assessment violates the 5th and 14th amendments to the Constitution of the United States in that it tends to deprive the plaintiff and other state banks of their property without due process of law and denies them the equal protection of the law and violates Section 3, Article 1, Nebraska Constitution, in depriving them of their property without due process of law; that the special assessments are not now being levied for any public purpose, but for the sole and only purpose of paying claims of depositors in failed banks that are already allowed and not for the purpose of creating a stabilizing fund; that public officials having custody of public moneys are demanding bonds and that to require solvent banks to pay said special assessments will not protect the depositors in the going banks but constitutes a menace to solvent banks. Plaintiff prays for temporary and permanent injunction against the collection of said special assessment and any future assessment.

(b) ANSWER OF DEFENDANTS (Trans., p. 42): Answer was filed by defendants Arthur J. Weaver as governor, and Clarence G. Bliss as secretary of the Department of Trade and Commerce; said Arthur J. Weaver as governor of the State of Nebraska also making and filing said answer for and on behalf of the public officials of the State of Nebraska and municipal and other public corporations of the state, depositors in failed banks with adjudicated claims against the Guarantee Fund. Defendants admitted and averred their official character and the levy and demand for payment of the special assessment; that there were several million dollars due to depositors in failed state banks; that the money in the Guarantee Fund was less than 1 per cent of the average daily deposits and less than required to pay the claims of depositors against said Guarantee Fund and that defendants intended to enforce payment of said special assessment; that one of the purposes and objects of the said Guarantee Fund Law was to protect the depositors of state banks that might become insolvent, and that there were national banks in Nebraska not required to pay the assessment. Defendants denied each and every other allegation in said petition contained.

Defendants further averred that there were depositors' claims adjudicated and ordered paid by the district courts of the state from said fund which were unpaid and certified to the Department, and that all statutory prerequisites to the levy and collection of said special assessment had been had and done and that among said claims adjudicated and ordered paid were claims of the State of Nebraska for deposits in more than thirty failed banks and that there were other public funds of lesser subdivisions in failed banks in large amounts.

Averred the enactment of a complete and comprehensive banking law in 1909, being Chapter 10, Page 66, Laws of 1909 providing for a guarantee fund and regular assessment of 1/10 of 1 per cent and maximum special annual assessment of 1 per cent *and the reduction of the latter assessment to ½ of 1 per cent by amendment in 1923 at the instance of the state banks of Nebraska.*

Averred the application for and the licensing of all state banks under said law and their operation thereunder for approximately twenty years and their invoking and exercising of the benefits and privileges thereof, and that the obligation to pay the Guarantee Fund assessments had become and was a part of their articles of incorporation and charter.

Averred that the plaintiff and other banks each and all continuously since 1909 (and from their organization if organized since) had advertised said Guarantee Fund throughout the state and in their respective communities by newspaper advertisements, printed recitals on the stationery of the respective banks, personal solicitation and argument, circularization of the public and signs on the interior and exterior of the banks generally, and had thereby and otherwise individually and collectively and continuously represented and stated to the depositing public that the deposits in each and all of the state banks were protected by the Depositors Guarantee Fund Law; that its validity had been adjudicated by the Supreme Court of the United States; that each and all of said banks were subject to assessment and would be assessed under the provisions thereof for any sums becoming due to any depositor of any of said banks under

the provisions of said law until said depositors were fully paid by said banks and that they would pay any assessment for such purpose since they constituted in effect a mutual insurance association.

Averred that thereby said state banks of Nebraska led and induced the people of said state and said depositors among them to believe their said statements and representations and each of them as set forth; that said depositors relied on said acts and representations and believed the same to be true, and that said acts were done and said representations were made for the purpose and with the intent on the part of said banks and each of them (including the plaintiff) of being relied on by persons and corporations having money to deposit, and relying thereon the people of the state, and especially the depositors mentioned, did deposit large sums of private and public money in the state banks of Nebraska thereafter placed in receivership, which deposits have been adjudicated as claims and are unpaid.

Averred the decision of the Supreme Court of the United States in January, 1911, in the case of *Ashton C. Shallenberger, Governor of the State of Nebraska, et al.*, v. *First State Bank of Holsten, et al.*, brought by the state banks of Nebraska, to which said Abie State Bank was a party plaintiff; alleged that the case involved the same subject matter, that the same claimed facts and contentions were averred in said case, and that the decision in said case is *res adjudicata*, and that the plaintiff bank and all other banks had for twenty years recognized and held out and represented to the public said decision as a complete adjudication of the validity of said law and their liability to assessment thereunder.

Averred that in 1923 the plaintiff and the other banks of Nebraska acting in cooperation caused the Legislature of Nebraska to reduce the maximum special assessment from 1 per cent to ½ of 1 per cent and to create a Guarantee Fund Commission, the members of which were thereafter by law selected from names chosen by the state banks of Nebraska, and that said banks had thereby actively participated in the administration of the Guarantee Fund Law.

Averred the demand and receipt by each and every state bank in Nebraska of public funds for more than fifteen years under the provisions of said Guarantee Fund Act that any bank which complied with its provisions should not be required to give further security or bond for the purpose of becoming a depository for public funds.

Averred that on the initiative and solicitation of said state banks of Nebraska the Legislature of 1923 amended the banking laws to reduce the maximum rate of interest on deposits from five per cent to four per cent, thereby increasing the earnings of said banks, and that the reason urged by the banks for said change was the obligation and liability of all banks for the payment of the Guarantee Fund assessments and that as a result of said reduction and their acceptance of reduced interest rates the depositors in state banks have in fact materially contributed to said Guarantee Fund.

Averred that by reason of the representations and acts of said banks deposits in state banks have trebled in Nebraska since 1909, on a capital increase of only approximately 50 per cent.

Averred that by reason of and on account of said Guarantee Fund Law and said representations and acts made with reference thereto each and all of the state banks have largely increased in each year their earnings and have acquired large property and property rights; that the banking conditions in Nebraska have been stabilized and said banking business rendered highly profitable by said law and the earnings of banks have been in an amount sufficient to pay all operating expenses, the maximum Guarantee Fund assessment and a fair return upon the capital; that the maximum amount of assessment that can be levied in any one year can not exceed 6/10 of 1 per cent, to-wit, $600 per $100,000 of average daily deposits; that the maximum annual assessments at such rate take less than one-tenth of the gross earnings of the respective banks of the state in any one year; that such bank failures as have occurred in the state of Nebraska have not been influenced in any degree by the assessments paid by any bank, but the number and extent of bank failures have been reduced by the existence and operation of the law.

Averred that the deposits of moneys in failed Nebraska state banks in receivership herein referred to as adjudicated claims, all of which are now unpaid and aggregate several millions of dollars, were thus adjudicated and ordered paid from and became a fixed and final charge against and liability of said Guarantee Fund after May 1, 1927, prior to the institution of this suit; that said deposits were made in said banks while the same were in regular operation by many thousands of persons, corporations, co-partnerships and officials of Nebraska cities, villages, townships, school districts and other bodies,

and the treasurer of the State of Nebraska, and by which depositors respectively said deposits and claims thereon are now owned; that all the state banks of the state at all times knew of all the acts and representations of each other, acquiesced therein, approved the same and offered no protest or objection to the making of said representations and to the respective deposits thereunder; that each and all agreed with the respective depositors that in event of default in payment by any receiving bank and said deposit being adjudicated a claim against and ordered paid from said Guarantee Fund, that they would pay the general and special assessments provided by said Guarantee Fund Law, to the extent necessary to pay said deposits; that in case of deposits evidenced by certificates of deposit, said banks each and all endorsed thereon as a part thereof and as further evidence of said agreement the words "Protected by the Depositors Guarantee Fund of the State of Nebraska."

Averred that said depositors in failed banks in receivership number many thousand and depositors in banks now being operated by the Guarantee Fund Commission aggregate many thousand and all aggregate more than fifty thousand, and that therefore it is impracticable for them or for any substantial number to individually intervene and defend this suit; that these defendants make and file their answer also for and on behalf of said depositors and claimants and each of them and particularly does Arthur J. Weaver, as governor of the State of Nebraska, also make and file his answer for and on behalf of the public officials of the State of Nebraska, and the municipal and other public corporations of the state, depositors and claimants aforesaid; that the amounts of public

moneys on deposit in failed banks aggregate $2,005,228.94 divided between county treasurers, state treasurer, cities and villages, townships, school districts, and other public bodies.

Averred that the plaintiff and each and all of the other state banks of Nebraska have at all times represented and stated that the provisions for a special assessment as contained in Section 47 of said original pact, and as thereafter amended, provided a special assessment against said banks and each of them and continuously for approximately twenty years have construed, represented, treated and held out said section as providing for special assessment against said banks and each of them and the words "special assessment against the capital stock" as being synonymous with and meaning assessment against said banks, and that all of the many special assessments since the enactment of said law have been assessed against the banks and been paid by them without protest.

Averred that each and all of said depositors in failed banks have a vested right to the payment of the sums due them out of the Guarantee Fund of the State of Nebraska and a vested right to the continuance of said regular and special assessments annually hereafter for the payment thereof, to the extent of the funds derived from the said regular and special assessments; that the plaintiff and other state banks have stood by and permitted and actively induced persons to deposit their moneys under said Guarantee Fund Law and the Guarantee Fund to become indebted to depositors as hereinbefore recited and have been guilty of gross laches in standing by without denial of their liability or the validity of law while the depositors

aforesaid entrusted their funds to the said state banks in reliance upon the protection of said Guarantee Fund and their acts as aforesaid; that by reason of said representations and statements and acts and laches the plaintiff and each and all the other state banks named in plaintiff's petition are estopped: To question or assert the invalidity or unconstitutionality of the law under which they are acting; to question or assert the invalidity or unconstitutionality of the Guarantee Fund Law; to question or deny the reasonableness of any assessment authorized thereby or levied thereunder; to question or deny liability to pay assessments levied in the manner and to the extent provided by said Guarantee Fund Law; to make or assert the alleged claims or any of the alleged claims set forth in their petition filed herein; to maintain this suit.

Defendants prayed dismissal of the suit.

(c) ANSWER was filed by Willis M. Stebbins, treasurer of the State of Nebraska, as intervening defendant (Trans., p. 74). Said treasurer pleaded at length the facts set forth in the answer of defendants hereinbefore referred to and hereby made a part hereof; averred 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 of Nebraska in said respective banks without any bonds being given therefor, upon the express demand of each and all of said banks that they receive public deposits without bonds because of the provisions of said Guarantee Fund Law exempting them from the giving of bonds.

He further averred that there are forty-five state banks insolvent and in process of liquidation through receiverships in the district courts of the various counties of the state in which during their regular open operation said treasurer and his predecessors in office as treasurer of the State of Nebraska deposited moneys therein of the State of Nebraska; that said deposits are unsecured and unpaid; that in said receivership proceedings said deposits have been adjudicated as claims and ordered paid from the Depositors Guarantee Fund of the State of Nebraska; that in a like manner deposits have been made in thirty-two state banks which are in a failing condition and in the hands of the Guarantee Fund Commission but not yet in receivership; that the assets of said banks are insufficient to pay the depositors therein more than 50 per cent; that the plaintiff and all of the banks of the state have individually and collectively and continuously through the years made representations and statements to the state treasurer and his predecessors in office as set forth in answer of defendants; that each and all of the deposits of money were made by the treasurer and his predecessors in office without requiring bond for the payment thereof in reliance on said statements and representations and acts of said banks and that they would not have made the same except therefor; that at the time of the making of said deposits and each of them by this intervening defendant and his predecessors in office and to induce the making thereof said state banks receiving deposits agreed with the state treasurer that the deposits and repayment thereof were "protected by the Depositors Guarantee Fund of the State of Nebraska" and thereby guaranteed by all of said state banks and that in the event of default in payment by said receiving banks and said

deposits or any of them being adjudicated claims against and ordered paid from said Guarantee Fund that they would pay the general and special assessments provided by said Guarantee Fund Law to the extent necessary to pay said deposits; that in case of deposits evidenced by certificate of deposit said banks endorsed thereon as a part thereof and as further evidence of said agreement the words "protected by the Depositors Guarantee Fund of the State of Nebraska."

He further averred that at the time said respective deposits were made in said banks by this intervening treasurer and his predecessors the banks named in Exhibit "A" attached to plaintiff's petition and all the other state banks of Nebraska knew of all the acts and representations of said receiving banks and other banks in procuring and receiving said deposits upon the representations aforesaid that each and all of the state banks of the State of Nebraska were liable for the Guarantee Fund assessments both general and special and all of said banks agreed to abide by said law and pay said assessments and all of said banks acquiesced therein and approved the same and offered no protest or objection to the making of said representations and to the deposit of said moneys; that this intervening treasurer and his predecessors in office each relied on the aforesaid referred to acts, representations and agreements of said banks and relying thereon made said deposits therein and would not have made the same except therefor.

The treasurer pleaded estoppel and waiver thereby and prayed the dismissal of said petition.

(d) ANSWERS AND CROSS-PETITIONS of Other Intervenors (Trans., pp. 60, 133, 139): Were filed, averring that they were depositors with claims for deposits on failed banks in receivership, and in amounts stated, and pleading the facts incorporated in the foregoing answers set forth at length herein, and pleading estoppel and waiver as such depositor claimants and praying dismissal of plaintiff's petition.

(e) Abie State Bank joined issue on said various pleadings by answers to cross-petitions and replies in effect general denials (Trans., p. 93; Trans., p. 94; Trans., p. 96).

HOW ISSUES WERE DECIDED

The trial court on April 24, 1929, rendered its decree (Trans., p. 98), finding generally on each and all the issues "in favor of the plaintiff and against the defendants, and in favor of the plaintiff and against the said intervenors"; and further:

> "The court further finds that the special assessment levied against the plaintiff banks under the provisions of Section 8028, Compiled Statutes 1922, which levy was made on December 15, 1928, and which the defendants were taking steps to collect, and that each of the special assessments provided for by said section of the statutes, is, under the facts and conditions shown by the evidence in this case, unjust, oppressive, unreasonable in amount and confiscatory of the earnings and property of the plaintiff bank and of the banks in behalf of whom this suit is brought, as is more particularly shown by the facts, conditions, findings and conclusions set forth in the memorandum opinion filed herein.

"The court further finds, as is more particularly set forth in said memorandum opinion, that owing to the condition of the Guarantee Fund and the fact that there is a deficit in said fund of near $16,000,000.00, that the depositors in existing banks, and the existing and operating banks themselves, now receive no benefit from the payment of such assessments, but that the payment of such assessments must be used to pay, and will be insufficient to meet, the said deficit which now exists in said Guarantee Fund, and that the burden of paying such assessments by the state banks, instead of strengthening the state banking system and protecting depositors of state banks, has just the contrary effect, and, to the extent of the burden imposed by such assessments, makes said banks less able to meet the demands of their current depositors and less able to keep their banks solvent; that the said special assessment is not now being levied for any public purpose, but is being levied for the sole and only purpose of paying claims of depositors in failed banks, which claims have been allowed, and will not and cannot be used for the purpose of creating a fund for the stabilizing of banking conditions in the State of Nebraska.

"The court further finds that the levy and collection of such special assessments, including the assessment specifically complained of in the plaintiff's petition, is unreasonable, unjust, oppressive and confiscatory and not, under present conditions, a proper exercise of nor justified by the police power of the state, and that the provisions of Section 8028, Compiled Statutes 1922, providing for such special assessments, is, under the facts and conditions shown to exist in this case, unreasonable, unjust, oppressive and confiscatory and void and unconstitutional, and

in violation of the 5th Amendment of the Constitution of the United States and of the 14th Amendment of the Constitution of the United States, in that it deprives the plaintiff, Abie State Bank, and the state banks on behalf of whom this suit is brought, of their property without due process of law, and denies them the equal protection of the law, and further, that the provisions of said law are in violation of Section 3, of Article I, of the Constitution of the State of Nebraska, in that said Section and provision for special assessment deprives the said plaintiff banks of their property without due process of law.

"The court further finds that the plaintiff is entitled to an injunction as prayed.

"Wherefore, it is considered, ordered, adjudged and decreed that the injunctive order heretofore issued shall be made permanent and the said defendants, and each of them, be and the same hereby are enjoined from collecting or taking any further steps to collect the said special assessment levied on December 15, 1928, under the provisions of said Section 8028, Compiled Statutes 1922, and all other and subsequent special assessments under the provisions of said law. This order, however being without prejudice to the right of the defendants to apply for a vacation of this injunction should at some future time the conditions so change that such special assessments can be paid by the state banks, and at the same time said banks receive in addition compensatory returns upon their investment."

The cross petition of the intervenors was dismissed at their costs.

The court filed a twenty-page written opinion which appears in the transcript, commencing at page 101.

Separate motions for new trial were filed by defendants and by Intervenor Willis M. Stebbins, as state treasurer, April 24, 1929 (Trans., pp. 121, 122, and 123), which were overruled (Trans., p. 127). Motions for new trial were filed by Intervenors Mary E. Gandy, James H. Covey, Theodore H. Buelt, Huffman & Seymour, Inc., (a corporation), Leonard N. Seymour and Frank A. Hebenstreit, on April 26, 1929, (Trans., pp. 124 and 125), which were overruled (Trans., p. 129). Notices of appeal were filed in the district court of Lancaster county, Nebraska, (Trans., pp. 126, 129, 130, 131).

ASSIGNMENT OF ERRORS

Each of the appellants, Arthur J. Weaver, as governor, and Clarence G. Bliss, as secretary of the Department of Trade and Commerce, separately assign the following errors, and each of them, of the trial court:

1. The court erred in its finding and decision that the state banks of Nebraska are entitled to receive compensatory returns upon their investment *prior* to the payment of any special assessment under the provisions of Section 8028, Compiled Statutes of Nebraska, 1922, as amended.

2. The trial court erred in holding that the special assessment levied and each of the special assessments provided for by Section 8028, Compiled Statutes of Nebraska, 1922, are unjust, oppressive, unreasonable in amount, and confiscatory of the earnings and property of the state banks of Nebraska.

3. The trial court erred in holding that the levy and collection of the special assessments provided for by Section 8028, Compiled Statutes of Nebraska, 1922, is unreasonable, unjust, oppressive and confiscatory and not a proper exercise of or justified by the police power of the state.

4. The trial court erred in holding that the provisions of Section 8028, Compiled Statutes of Nebraska, 1922, are, under the facts, unreasonable, unjust, oppressive, and confiscatory, and void and unconstitutional, and in violation of the fifth amendment and of the fourteenth amendment to the Constitution of the United States, and of Section 3, Article I, Constitution of Nebraska.

5. The decision of the district court in favor of the plaintiff and against the defendants is not sustained by sufficient evidence.

6. The decision of the district court in favor of the plaintiff and against the defendants is contrary to law.

7. The court erred in its decision in enjoining the defendants from collecting or taking any further steps to collect the Guarantee Fund special assessment levied December 15, 1928, under the provisions of Section 8028, Compiled Statutes of Nebraska, 1922, as amended.

8. The court erred in its decision in enjoining the defendants from collecting or taking any steps to collect all other and subsequent assessments under Section 8028, Compiled Statutes of Nebraska, 1922, as amended.

9. The court erred in overruling the motion of defendant Arthur J. Weaver, as governor, for a new trial.

10. The court erred in overruling the motion of defendant Clarence G. Bliss, as secretary of the Department of Trade and Commerce, for a new trial.

11. The court erred in the trial of said cause in excluding evidence offered by the defendants, and Intervenor Willis M. Stebbins as state treasurer, as more fully and specifically hereinafter set forth.

12. The court erred in admitting, over the objections of these defendants and Intervenor Willis M. Stebbins, as state treasurer, testimony offered by the plaintiff, as more fully and specifically hereinafter set forth.

13. The court erred in overruling the motion of defendants for judgment, made at the close of the introduction of plaintiff's evidence in chief and plaintiff's resting.

14. The decision of the district court takes the private property of all depositors with claims against the Guarantee Fund for an alleged public use without just compensation in violation of the fifth amendment to the Constitution of the United States and of Section 21, Article I, Constitution of Nebraska, in that the depositors with adjudicated claims against said Guarantee Fund are wholly deprived without compensation of their right to participate and share in the proceeds of the special assessment heretofore levied and the future special assessments enjoined by the trial court.

15. The decision of the district court deprives the depositors with adjudicated claims against the Depositors' Guarantee Fund of their property without due process of law in violation of Section 3, Article I, Constitution of Nebraska, and of the fifth and fourteenth amendments to the Constitution of the United States in that said depositors are deprived of their right to participate and share in the proceeds of the special assessment heretofore levied and the future special assessments enjoined by the trial court, for no public purpose, but in fact for the private use and benefit of the state banks of Nebraska and their stockholders.

16. The decision of the district court denies to depositors with adjudicated claims against the Guarantee Fund the equal protection of the laws in violation of the fourteenth amendment to the Constitution of the United

States in that said depositors are deprived of their rights to participate and share in the proceeds of the special assessment heretofore levied and future assessments enjoined by said court, for the private benefit of the state banks of Nebraska and their stockholders.

Intervenor and Appellant Willis M. Stebbins, as Treasurer of the State of Nebraska, Assigns the Following Errors and Each of Them:

1. The decision of the district court in favor of the plaintiff and against this intervenor is not sustained by sufficient evidence.

2. The decision of the district court in favor of the plaintiff and against this intervenor is contrary to law.

3. The court erred in overruling the motion of this intervenor for a new trial.

4. The court erred in overruling the motion of this intervenor for judgment made at the close of plaintiff's evidence in chief.

5. The decision of the district court deprives this intervenor Willis M. Stebbins, as treasurer of the state of Nebraska, of his rights to participate and share in the proceeds of the special assessment heretofore levied and future assessments enjoined by said court on his adjudicated claims against the Guarantee Fund, thereby taking the property of this intervenor for an alleged public use without just compensation in violation of the fifth amendment to the Constitution of the United States and of Section 21, Article I, Constitution of Nebraska,

and thereby depriving him of his property without due process of law in violation of Section 3, Article I, Constitution of Nebraska, and of the fifth and fourteenth amendments to the Constitution of the United States, and thereby denying him the equal protection of the law in violation of the Fourteenth amendment to the Constitution of the United States in that he is deprived of his said property rights for no public purpose but for the private benefit of the state banks of Nebraska and their stockholders.

6. This intervenor and appellant assigns each of the errors above assigned by the defendant appellants, the same as if they were repeated here; said appellant defendants being trustees for this intervenor and other depositors.

PROPOSITIONS OF LAW

I.

No law will be held unconstitutional by the judiciary if under any construction of the law or any possible state of facts its operation will not violate the provisions of the constitution.

6 R. C. L. Sec. 12, page 12.

State v. *Nolan,* 71 Neb. 136.

Brady v. *Wattern,* 100 N. W. (Ia.) 358.

In re Southern Wisconsin Power Co., 122 N. W. (Wis.) 801.

McGuire v. *C. B. & Q. R. R. Co.,* 108 N. W. (Ia.) 902.

Shallenberger v. *First State Bank of Holsten,* 319 U. S. 114.

Noble State Bank v. *Haskell,* 219 U. S. 104.

First State Bank of Claremont v. *Smith,* 207 N. W. (S. D.) 467.

State v. *Adams Express Co.,* 85 Neb. 25.

Davis v. *State,* 51 Neb. 301.

State of Nebraska v. *Heldenbrans,* 62 Neb. 136.

Freadrich v. *State,* 89 Neb. 343.

Dartmouth College v. *Woodward,* 4 Sheaton 518, 4 U. S. 629.

Von Hoffman v. *Quincy,* 4 Wall. 535, 18 U. S. (L. Ed.) 403.

Nashville v. *Cooper,* 6 Wall. 247, 18 U. S. (L. Ed.) 851.

Union Pacific R. R. Co. v. *U. S.,* 99 U. S. 700, 25 U. S. (L. Ed.) 496.

Fairbanks v. *U. S.,* 181 U. S. 283, 21 S. Ct. Rep. 648, 45 L. Ed. 862.

II.

The Depositors' Guarantee Fund Law 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.

Sec. 8024 C. S. Neb. 1922, Sec. 44, Ch. 10, Laws 1909.

Citizens Bank of Stratton v. *Strayer,* 114 Neb. 567.

Shallenberger v. *First State Bank of Holsten,* 31 S. Ct. Rep. 189, 55 U. S. (L. Ed.) 217, 219 U. S. 114.

Chapman, Commission v. *Guaranty State Bank,* 257 S. W. Rep. (Tex.) 690.

Farmers State Bank of Mineola v. *Mincher,* 267 S. W. Rep. (Tex.) 996.

First National Bank v. *Hirmig,* 204 N. W. (S. D.) 903.

Farmers State Bank v. *Smith,* 209 N. W. (S. D.) 359.

III.

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,* 207 N. W. (S. D.) 467.

Shallenberger v. *First State Bank of Holsten,* 219 U. S. 114.

IV

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.

Noble State Bank v. *Haskell,* 219 U. S. 104.

Shallenberger v. *First State Bank of Holsten,* 219 U. S. 114.

Wertz v. *Nestos,* 200 N. W. (N. D.). 528.

First State Bank of Claremont v. *Smith,* 207 N. W. (S. D.) 467.

Farmers State Bank v. *Smith,* 209 N. W. (S. D.) 358.

V.

Where a Guarantee Fund Law is enacted, adjudicated to be constitutional and a valid exercise of the police power, remains in operation for twenty years while the banks and the public receive benefits from it and depositors acquire matured 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 the courts can not exercise, the question being one exclusively for the legislature.

Claremont v. *Smith, et al.*, 207 N. W. (S. D.) 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.

State v. *Harrington,* 34 L. R. A. (Vt.) 104.

Wurtz v. *Hoagland,* 114 U. S. 615.

VI.

Where a law is enacted by 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 or of Sections 2, 21 or 25 of Article I, Constitution of Nebraska, 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 real or sub-

stantial relation to the public good with every possible presumption indulged in the law's favor.

Halter v. *State,* 74 Neb. 757.
Mugler v. *Kansas,* 123 U. S. 623.
Lochner v. *New York,* 198 U. S. 45, 25 Sup. Ct. Rep. 539.
C. B. & Q. Ry. Co. v. *State,* 47 Neb. 549.
Anderson v. *State,* 69 Neb. 686.
State v. *Drayton,* 82 Neb. 254.
State v. *Withnell,* 91 Neb. 101.
6 R. C. L., Sec. 230, page 243.

VII.

Where a Guarantee Fund Law was constitutional and a valid exercise of police power when enacted as the statute in controversy is admitted to have been, no change of economic or business conditions will render it or assessments made under it unconstitutional.

Thompson v. *Bone,* 251 Pac. (Kan.) 178.
First State Bank of Claremont v. *Smith,* 207 N. W. (S. D.) 467.

VIII.

The banks which are making fair or "extravagant profits" as found 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. Co.,* 92 Neb. 253.
Ohio River Ry. Co. v. *Dittey,* 203 Fed. 237.

IX.

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 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.

Claremont v. *Smith, et al.*, 207 N. W. (S. D.)) 367.

Noble State Bank v. *Haskell*, 219 U. S. 104.

X.

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 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.

City of Fremont v. *Postal Telegraph Co.*, 103 Neb. 426.

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 U. S. S. Ct. 113, 72 U. S. (L. Ed.) 356.

XI.

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 Deposit Guarantee Fund Law have waived their 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 769-71 (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, 48 L. Ed. 598, 604.

Daniels v. *Tierney,* 102 U. S. 415, 26 L. Ed. 187, 189.

Mellen Lumber Co. v. *Industrial Commission of Wis.* (Wis.) L. R. A. 1916-A, pages 374, 377.

Chas Simmons Co. v. *Maryland Telephone & Telegraph Co.,* (Md.) 63 L. R. A. 729, 736.

American Life Ins. Co. v. *Balmer,* 214 N. W. (Mich.) 208.

Meyer v. *City of Alma,* 221 N. W. (Neb.) 438.

Booth Fisheries Co. v. *Industrial Commission,* 46 S. Ct. 491.

In re Tarnowski, 210 N. W. (Wis.) 836.

People v. *Fidelity & Casualty Co.,* 192 N. W. (Mich.) 658.

Bank of Claremont v. *Smith,* 207 N. W. (S. D.) 467.

XII.

The decree of the United States Supreme Court in the case of Shallenberger v. First State Bank of Holsten, 219 U. S. 114, 31 S. Ct. 189, 55 U. S. (L. Ed.) 117, is a bar to the maintenance of this suit by the plaintiff, either on its own behalf or on 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. unof.)

Parrotte v. *Dryden,* 73 Neb. 291.

XIII.

The depositors with matured claims against the Guarantee Fund are by the decision of the trial court divested of their rights to participate and share in the proceeds of the special assessment heretofore levied and future assessments enjoined by said court and thereby of their property without due pro-

cess of law, and denied the equal protection of the law, their property taken for an alleged public use without just compensation and in fact for no public purpose but for the private use and benefit of state banks of Nebraska and their stockholders, all in violation of Sections Three, Twenty-one, and Twenty-five, Article One, Constitution of Nebraska, and the Fifth and Fourteenth Amendments to the Constitution of the United States.

Constitution of Nebraska, Secs. 3, 21, and 25, Art. I.

Constitution of United States, 5th and 14th amendments.

Compiled Statutes of Nebraska, 1922, Title Banks, Sec. 7982, *et seq.*

Authorities cited under Proposition I and Guarantee Fund Bank cases under other preceding propositions.

THE EVIDENCE

The evidence in this case is included in three large volumes. In view of its extent we have increased this brief to unusual lengths to include therein many of the principal exhibits introduced upon the trial and extensive references to and quotations from the bill of exceptions. Advertisements, circulars and printed matter issued and circulated by the banks to induce deposits and other representations and acts are set forth herein in larger volume than would at first thought seem justified. But on reflection it is apparent that 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.

I. CONDITION OF THE BANKS, PAST AND PRESENT

We challenge the court's attention to the fact that the evidence offered by plaintiff is confined almost entirely to general matters and is especially deficient in that no state bank, aside from the small Abie bank, appeared individually in the case or offered any detailed facts and figures as to its income and operating expenses and their distribution.

There was no evidence that the Guarantee Fund ever caused or contributed to the failure of any bank; nor any evidence, specific as to any bank, or generally as to

banks, as to the comparative effect of assessments paid and benefits received from the Guarantee Fund. That there are benefits is unquestioned. No detailed statement of the condition or the operating expense of any bank was offered in evidence. No evidence was offered by any bank as to the actual operation of the Guarantee Fund Law as to that bank, or the effect of the Guarantee Fund Law generally upon its operations and income, except that as to the Abie bank there were offered some details of expense and receipts, wholly insufficient for the purpose of this action.

The plaintiff elected to ignore the benefits of the Guarantee Fund Law and treat the assessments as a charge wholly without compensatory benefits.

The banks as a whole through the entire operative period of the Guarantee Fund Law have each year made large gross earnings. However, the net earnings during the last nine years have been materially affected by losses developing because of loans made during the period of high prices and the depreciation of securities following. 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 (B. of Ex., p. 921, V. 3).

During this period, 265 banks with excessive losses thus occasioned and supplemented by other losses and by the influence of the crop failures of 1925 and 1926, failed. But during the nine years the existing banks because of the influence and benefit of the Guarantee Fund Law each year improved their condition. The record evidence supporting the foregoing general statement will be quoted in detail.

Before referring specifically to the large earnings and condition of the banks, we wish to call attention briefly to the evidence as to the nature and cause of these losses. They are generally denominated as "charge-offs" because the banks charge them off against earnings. They will be frequently hereinafter referred to by that designation.

A. Causes of Losses and "Charge-offs"

Mr. George W. Woods, then a banker of Lincoln, but now state banking commissioner, a disinterested witness, testifying on the trial rather graphically outlined the conditions producing these losses and the influence of the Guarantee Fund in permitting their absorption. In view of this and other testimony of Mr. Woods to be herein quoted reference should be made to his qualifications.

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 (Qs. 1459-61, p. 338); 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, and he was familiar with banking conditions generally in Nebraska (Q. 1239, p. 284, V. 2). From 1901 to 1917 he was a representative of R. G. Dun & Co. 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., (Qs. 1228, 1229, 1230, p. 282, V. 2).

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 (Qs. 1231 to 1235, p. 283, V. 2). 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 (Q. 1237, p. 283, V. 2).

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 (Q. 1238, p. 284).

Mr. Woods, referring to the banking conditions in Nebraska from 1910 down to July 1, 1928, testified (Qs. 1240, *et seq.*, p. 285, V. 2):

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 during that period, 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 excessive; 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; that he had checked a few counties and the records bore him out; that the post-war deflation caused some bank failures which would not have otherwise occurred and increased the losses of other banks which would have failed anyway on account of recklessness in

making loans; that between 1920 and July 1, 1928, land made very little if any recovery in value, and that the effect of the foreclosures on the banks was to steadily increase the item of "other real estate" in their statements; that there were other contributing causes, such as individual incompetency and occasional betrayals of trust; that the excess number of banks was also a contributing factor; that in his opinion the banking troubles were largely due to the general situation indicated, plus over-banking, plus inefficient management, and plus unwarranted and aggressive loaning (Q. 1407, p. 324).

Van Peterson, secretary of the Guarantee Fund Commission, testified:

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 seven or eight years (pp. 44-5, V. 1, B. of Ex.).

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 (Qs. 4048 to 4051, p. 884, V. 3).

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 depositors' claims matured in 1927 and 1928. There is no evidence that they date back many years and no fair inference that they do.

B. Condition of the Principal Banks Sponsoring Suit

It appears from the evidence that the principal bankers sponsoring this suit are officers of a few state banks which have highly prospered partly because and by virtue of the Guarantee Fund Law and who have been its foremost advocates. It is not denied but 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 committee was appointed to have charge of this suit (Qs. 1662-72, p. 380, V. 2, B. of Ex). 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 and $50,000.00 from sale of a lease. 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 (Qs. 1138 to 1143, p. 215, V. 1, B. of Ex.). Its deposits have grown to approximately seven million dollars. In 1915 it absorbed another bank with two million two hundred thousand dollars of deposits (Q. 2097, p. 491, V. 2, B. of Ex.).

CONTINENTAL STATE BANK OF LINCOLN: Reports of the department show that the Continental State Bank in Lincoln had deposits on November 13, 1920, of $1,313,908.00, and on June 30, 1928, $4,056,056.00; Exhibit 37, page 609, shows that this bank organized in the year 1909 concurrently with the enactment of the Guarantee Fund Law with a capital of $100,000.00 has made net profits after charging off all bad debts of $337,675.00. It now has a surplus of $100,000.00. It does not appear how much of this surplus has been created out of earnings but it does appear by the aforesaid Exhibit 37 that on a capital and surplus of $200,000.00 the bank has had net earnings after all charge-offs for the 18 months ending June 30, 1928, of $69,642.20, or at the rate of $46,430.00 a year, which is 23.20 per cent net on both its capital and surplus (Mr. Bliss, p. 546, V. 2, B. of Ex.).

FREMONT STATE BANK OF FREMONT: Dan V. Stephens, majority owner of this bank, helped to initiate this suit and is perhaps its chief sponsor. He became actively connected with the Fremont State Bank in 1920 and from then on down practically to 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 praise of the Guarantee Fund Law (Mr. Sorensen, vice-president, Q. 1838, p. 414, V. 2, B. of Ex.).

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, pp. 411-2, V. 2, B. of Ex.). 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. 394, V. 2, B. of Ex.). The bank in September, 1928 had deposits of $1,744,684, four and one-half times its deposits eight years prior. Mr. Stephens testified (p. 512, V. 2, B. of Ex.) 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.

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

C. The Abie State Bank

The Abie State Bank is really not the plaintiff in this suit; it is not a representative bank and it is ridiculous to treat it as illustrative of banking conditions generally in Nebraska. However, before taking up the evidence with respect to the banks generally, it may be well though somewhat out of order to here set out all the

testimony that was introduced with respect to the Abie bank.

Mr. Svoboda, cashier of the Abie State Bank for seventeen years and its chief acting officer, testified (Q. 650 *et seq.,* p. 127, V. 1, B. of Ex.):

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 capital 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 business 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 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 (Qs. 801-5, p. 114, V. 1, B. of Ex.).

Mr. Svoboda testified further (p. 127, V. 1, B. of Ex.):

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 months ending December 31, 1928 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 one-half, was

paid as interest on deposits. 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.

The deposits at the end of 1928 were $182,000.00. 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 depositors that they were protected by the Guarantee Fund (Qs. 842-3, p. 150, V. 1, B. of Ex.).

The Abie State Bank was one of the banks joining in the state-wide Omaha Bee advertising hereinafter referred to.

D. Operating Expenses, Income and Net Earnings of Nebraska State Banks for the Eighteen Months January 1, 1927 to June 30, 1928, and Twelve Months July 1, 1925 to June 30, 1926.

The Department of Trade and Commerce produced comprehensive tabular statements covering all the banks of the state for the above periods, a total of two and one-half years and including the last available data on the banks up to June 30, 1928.

E. For Eighteen Months Ending June 30, 1928

Inasmuch as the tabular statement for the 18 months ending June 30, 1928, gave the figures of the department for the last available period, we will refer to them first. These figures appear as Exhibit 37, at page 610, volume 2, Bill of Exceptions. We earnestly urge the attention of each member of the court to the showing of the individual banks as there disclosed, it not being practical to set out in this brief more than a general abstract thereof.

The figures have been classified as to those banks organized prior to 1909, the date of the 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 gross net profits were earned during the protective period of the Guarantee Fund Law. We therefore invite special attention to these banks.

Exhibit 37 has been recapitulated by the department in Exhibit 38 at page 610, volume 2, Bill of Exceptions, and is reproduced herein. This recapitulation shows the

condition of all the banks as a whole. Eight persons in the Department of Trade and Commerce worked two weeks in getting out this Exhibit 37. It was the desire of the counsel for the state to make a complete showing of all the available facts.

Exhibit 38 follows:

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

EXHIBIT 38

Pages 47 and 48

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 to 1909		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%
~~(Note - Annual average is 6.71%)~~		

(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.)

EARNINGS. Attention is especially called to the fact that *after all charge-offs* 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 $1,935,519.00 amounting to 7.75 per cent on the entire capital and surplus for the eighteen months or 5.17 per cent per annum.

CHARGE-OFFS. It is especially to be noted that the banks charged off in bad debts during the eighteen months' period $2,233,968, an amount practically equivalent to 10 per cent of their capital and surplus and all charged off out of earnings.

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 the 726 banks reporting had total earnings of $2,494,318 after all charge-offs of bad debts. 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 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 bad loans even if there had been no Guarantee Fund Law.

DIVIDENDS. Some point has been made of the fact that only one-third of the banks of the state paid dividends in 1927 and 1928. The foregoing statement shows that four-fifths of the banks of the state had net earnings for the eighteen months' period ending June 30, 1928, *after all charge-offs and the payment of the Guarantee Fund assessments,* so that four-fifths of the banks could have declared dividends in some amount had they elected to do so (Exhibit 38). With less than a dozen exceptions, each of the banks could have declared from compensatory to extravagant dividends except for the extraordinary charge-offs.

The banks actually paid dividends for the eighteen months of $1,407,268.00, which was 7.45 per cent on the capital of $18,875,500.00 and 5.62 per cent on total capi-

tal and surplus of $24,958,557.00. Figured on an annual basis the percentage must be reduced by one-third.

PLAINTIFF'S EXHIBIT 52. Witness E. L. Fulk, certified public accountant, checked up Exhibit 37, and prepared, and plaintiff introduced in evidence, the compilation identified as Exhibit 52 (p. 819, B. of Ex.). The net earnings are shown to be correctly stated in Exhibit 37 but in this exhibit 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. Referring to his statement as to the number of banks that failed to make 6 per cent per annum on their combined capital and surplus he does not indicate what percentage of the capital and surplus such banks have, nor their losses or charge-offs.

An unfair and deceptive statement in Exhibit 52 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 are combined with these profit-earning banks to produce a net red figure for the 410. As a matter of fact his 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.

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 we think perhaps the trial court 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 $2,233,968.40 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.

F. For the Year Ending June 30, 1926.

The defendants produced at the trial a compiled statement relative to all Nebraska state banks showing their operating expenses, income, profits and earnings, which had been prepared in the latter part of 1926 upon data

obtained from the banks and then published. This exhibit appears at page 710, Volume 3, and is here reproduced. It is based on a questionnaire submitted to the banks at that time and was compiled by Mr. Corey, auditor of the banking department (pp. 704-5, V. 3).

The banks are classified as to capital up to $200,000.00. There was one bank omitted from this compilation,—the State Bank of Omaha with capital far in excess of $200,000.00. Its large profits and earnings as herein elsewhere set forth would increase, rather than decrease, the percentages in Exhibit 39.

Exhibit 39 follows:

EXHIBIT 39

Pages 55, 56, 57 and 58

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 7/10. U3, Bof Ex.)

COMPILED BY
DEPARTMENT OF TRADE AND COMMERCE
LINCOLN, NEBRASKA

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. 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. One bank, the First State Bank of Omaha, being beyond the $200,000 classification, was omitted from the exhibit as standing alone it would fully divulge its affairs. Its profitable and prosperous condition, however, is in evidence and the addition of that bank to the list would increase the average percentages of all the banks.

The 845 banks 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 First 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' First 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, 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.*

G. A Comparison With National Banks.

National banks have decreased one-fourth in number. Fifty have been converted into state banks, and in recent years the percentage of earnings of national banks has been approximately one-half that of 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 interesting 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 (pp. 543-4, V. 2, B. of Ex.). During the same period there had been a net increase of state banks (Ex. 10, p. 581, V. 2; also in

this brief). 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 only nine have converted from state to national banks during the period that the fifty banks were converted from national into state banks (p. 543, V. 2, B. of Ex.).

From 1911 to the close of 1927 deposits of state banks increased from $73,886,000 to $261,311,000 (Ex. 10, p. 581, V. 2, also in this brief) while national banks increased from $83,360,000 to $193,621,000 (pp. 544-5, V. 2, B. of Ex.).

John Flannigan, a well known banker, former president 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 (Q. 1319, p. 307, V. 2). Minick Crawford, former president of the Bankers Association, Crawford, Nebraska, also denationalized (Qs. 1441-2, p. 335). The list of nationalizations included two past presidents of the Nebraska Bankers Association and the present president (Qs. 1444-5, p. 336, V. 2).

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.*

We quote from *plaintiff's* Exhibit 56, the compilation on national banks of the H. N. Stronk Company from the comptroller's reports (Ex. 56, p. 910, V. 3):

PER CENT NET EARNINGS TO CAPITAL AND SURPLUS.

	Nebraska*	Lincoln	Omaha
1921	9.29	8.44	7.96
1922	3.02	4.32	4.26
1923	6.12	5.04	1.56
1924	.15	9.03	—6.26
1925	1.50	7.53	4.93
1926	.82	6.53	8.04
1927	2.16	6.71	1.74
1928	5.43	8.64	11.07

* Without Lincoln and Omaha.

Thus all the national banks of Nebraska outside Lincoln and Omaha during the deflation period, 1922 to 1928 inclusive, earned 3.02 per cent, 6.1 per cent, .15 per cent, 1.50 per cent, .82 per cent, 2.16 per cent and 5.43 per cent, total 19.20 per cent for seven years, or an average of 2.74 per cent, less than 3 per cent a year, *and during the last five years a total of 10.06 per cent, or 2.01 per cent per year.*

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 (Exhibits 37 and 38) is formed by this record of the national banks.

LOSSES. That the national banks took large losses in Nebraska through the deflation period in Nebraska as compared to the average of the balance of the United

States and about double that of Nebraska state banks is indicated by the comparison on plaintiff's Exhibit 56 (H. N. Stronk computation):

PER CENT NET LOSSES TO GROSS EARNINGS.

	Nebraska	Lincoln	Omaha	Total All Non-member Banks	Total U. S.
1921	6.2	11.7	16.1	3.5	12.8
1922	12.4	14.4	18.4	6.8	14.1
1923	10.1	12.9	20.6	3.5	10.4
1924	20.2	—0.7	32.5	2.7	10.5
1925	17.2	6.7	14.0	7.2	9.0
1926	19.3	11.2	19.4	3.9	8.5
1927	18.5	13.0	22.3	4.6	8.7
1928	12.7	13.3	5.8	9.2	8.7

The year 1921 in Nebraska indicates the normal pre-slump; then, as in state banks, comes the peak percentages through 1924, 1925, 1926 and 1927, with a recession in 1928. The last figures covering the United States strikingly show how the country as a whole progressively declined in loss ratio from 1922 on; and had losses each year less than one-half those of Nebraska.

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 banks, 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 (Ex. 60, p. 912, V. 3) and data from page 879, same exhibit, read into the record and compiled as follows:

	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
National Member Banks		
1928	.63	.43
1927	.63	.45
State Member Banks		
1928	.33	.34
1927	.38	.29

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. 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.

H. Growth of Banks from 1911 to 1928.

The Department of Trade and Commerce produced on request in compiled form a printed and statistical abstract of data as to all the banks from 1911 to 1928, a period of eighteen years. This showed the growth of the banks through the period and is reproduced on the next page, being Exhibit 10, page 581, Volume 2, Bill of Exceptions.

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. 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 (Qs. 2423, p. 556, V. 2, B. of Ex.).

EXHIBIT 10

Pages 67, 68, 69 and 70

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 of 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

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

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. V2. B of Ex.)

here

1/9 = 11%

I. Present Condition of the Banks.

In connection with the present condition of the state banks special reference is called to exhibits showing their condition as of June 30, 1928 (Ex. 61, p. 937, V. 3, B. of Ex.) and December 31, 1928 (Ex. 22, p. 582, V. 2, B. of Ex.). Inspection and analysis thereof shows that on December 31, 1928, the banks had more than twenty per cent cash reserve, to-wit, $48,792,700.00 in cash and cash in banks and in addition had $36,900,831.00 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,-531.00 or about 33 1/3 per cent of their deposits. This splendid showing confirmed the testimony of Mr. Woods and Mr. Bliss as to the present bettered condition of the banks.

The consolidated reports of the 726 banks as of December 31, 1928, showed a very healthy condition (Ex. 22). Compared with the June 30, 1928 report (Ex. 61) it shows 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.

Exhibit 22 follows:

DECEMBER 31ST BANK CALL REPORT

(Ex. 22, p. 582, Vol. 2, B. of Ex.)

The December compiled report compared with the same report of September 20th shows the continued ratio of reserve on hand in the average state bank of more than one-third of the deposits in cash and bonds.

Loans are $180,000,000 compared with $182,000,000 in September. Deposits are $252,000,000 compared with $268,000,000 in September.

Seasonable movement in corn and livestock is now taking place and will liquidate loans and increase cash and deposits.

Abstract of the Reports of the Commercial and Savings Banks of the State of Nebraska at the Close of Business December 31, 1928.

726 Banks Reporting.

Resources		
Loans and Discounts		$180,410,045.32
Overdrafts		423,531.20
Bonds and Securities		36,900,831.71
Judgments and Claims		994,194.24
Banking House, Furniture and Fixtures		6,174,432.86
Other Real Estate		9,872,647.21
Due From Banks		37,520,474.06
Cash		11,272,226.96
Bankers' Conservation Fund		442,386.67
Current Expenses, Taxes and Interest Paid		60,023.97
Total		$284,070,794.20
Liabilities		
Capital Stock		$ 19,001,000.00
Surplus Fund		6,075,741.87
Undivided Profits		2,876,088.19
Dividends Unpaid		83,950.00
Individual Deposits Subject to Check	$101,224,713.88	
Demand Certificates of Deposit	9,210,500.98	
Time Certificates of Deposit	115,360,753.33	
Savings Deposits	18,864,194.57	
Due to Banks	7,715,415.19	252,375,577.95
Notes and Bills Rediscounted		755,733.65
Bills Payable		2,872,275.55
Depositors' Guarantee Fund		30,426.99
Total		$284,070,794.20

CONDITIONS OF THE STATE BANKS HAVE GREATLY IMPROVED SINCE 1923—INCOMPARABLY BETTER. 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 (Q. 1270, p. 293, V. 2, B. of Ex.):

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."

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 on the trial.

OTHER REAL ESTATE. 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 (pp. 112-3, V. 1, B. of Ex.). There is no evidence that it is worth less than the value fixed by the banks.

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 dates 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.

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.

A large number of the banks now asked to pay these assessments would admittedly not have been in existence but for the Guarantee Fund. The annual earnings of all the banks would have been less but for the Guarantee Fund. 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.

EXAMINERS' ESTIMATE OF LOSSES AND PROBABLE LOSSES ON PRESENT ASSETS OF GOING BANKS. Long after plaintiffs had rested their case they called Mr. Marshall of the banking department to the stand and asked him to refer to the examiners' reports of each of the 726 state banks of Nebraska on their last examination and therefrom add up and produce in court: (1) The total amount of all loans and discounts in all the banks six months past due and demand paper carried twelve months or more; (2) the total of examiners' estimate of worthless items; and (3) the examiners' estimate of probable loss on doubtful items. Mr. Marshall did so and the totals were introduced in evidence over objection.

No examiner was present in court, no testimony was offered as to the then state of the items, and it appeared affirmatively that the reports were made over a fifteen months' period extending back into 1927 and were merely the examiners' estimates at the time of examination of particular banks. None of these reports were made up for the same period; the banks had largely collected in, secured, or otherwise removed objectionable items after same were criticised; others had paid in assessments; and

the merits of some of the complaints were in dispute. This particular evidence can not be considered as relevant testimony as to the liability of the banks *at the time of the trial.*

It is a fact of which the court takes judicial notice that the banking business is such that on the vast volume of loans and discounts and investments there is necessarily always in prospect probable loss on some items and accretion on others. These items that the examiners call attention to as probable losses are items that either do or do not subsequently develop to be losses and if losses are taken care of. In fact, it appeared that at the respective times the examiners' reports were made 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 (p. 798, V. 3).

The total face of the notes six months past due and demand notes was placed at $1,022,625. There was nothing in the examiners' report to indicate any loss—it was an arbitrary classification (Q. 3663, p. 822, V. 3, B. of Ex.). The probable loss on notes was placed at $2,938,878 and worthless paper at $1,000,174.

Immediately following the respective reports through the fifteen months the foregoing items had been taken up for adjustment by the Department with the banks.

Mr. Bliss testified that following the filing of these examiners' reports as they came in each report was taken up with the bank and that there had been adjustments and renewals and security. He testified that he

checked up two-thirds of the banks since the reports on file in his office but the court refused to let him state the results of said examination. The data with reference thereto covered an immense amount of correspondence that he handled personally and that from his personal knowledge and independent of any reference to the record he could state the approximate amount and percentage of the two items classified as worthless and probable loss that had been disposed of by security and payment. But the court refused to let him answer (pp. 932-3, V. 3). Defendants offered to prove by him that of approximately four million dollars estimated as worthless and probable loss by examiners, more than one-third was either secured or paid or determined by the Department not to be worthless or probable loss, prior to the commencement of the suit (p. 934, V. 3).

This is assigned as error.

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. 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. 937, V. 3, B. of Ex.). 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. We submit that this evidence should be wholly disregarded.

CONVERSATIONS WITH REFERENCE TO CAPITAL IMPAIRMENT. A score or more of pages through the bill of exceptions were taken up with examination and cross-examination as to what Mr. Bliss, secretary of the Department of Trade and Commerce, might have theretofore said with respect to the number of banks which might have capital impairment and might thereafter fail. A fair reflection of such testimony would require its quotation here verbatim.

We submit that such testimony of conversations was wholly incompetent. If held, 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 had taken care of their losses by assessment or otherwise (p. 161, V. 1, B. of Ex.), 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 (Q. 934, p. 169, V. 1, B. of Ex.).

II. BENEFITS TO THE BANKS OF 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 (evidence quoted hereinafter).

For approximately twenty years every state bank in Nebraska has had the use of all public funds without giving bonds at an enormous saving in bonding company premiums.

The stabilizing influence and benefit of the Guarantee Fund especially through the past eight years has been hereinbefore referred to. Further specific evidence follows:

A. Stabilizing Influence.

The Bank Guarantee Fund Law has been of inestimable stabilizing benefit to the existing banks 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.

Mr. Bliss, head of the Department of Trade and Commerce, testified in this connection (Qs. 2456-2460, p. 564, V. 2, B. of Ex.):

Q. "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."

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 (Qs. 1430-33, p. 331, V. 2, B. of Ex.):

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 (Qs. 1481-3, p. 342, V. 2):

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 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 from this 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?

B. Benefit of Use of Public Funds Without Giving Bonds.

For approximately twenty years, every state bank in Nebraska has had the use of all the state, county, city, village, township, school district and other public funds of Nebraska, without giving bonds.

The surety company rates on public depository bank bonds average higher than the Guarantee Fund assessments.

The Guarantee Fund Act provides that state banks shall not be required to give bonds for public deposits. Every state bank in Nebraska claimed and exercised this benefit and privilege.

Exhibit 37, the large exhibit sheets prepared by the Department of Trade and Commerce, shows among other things that every state bank in the state save one then had on deposit public funds. The 726 banks of Nebraska as disclosed by Exhibit 38 had state 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. *This does not take account of other public deposits.*

Mr. Bliss 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 and the records of the department disclosed (pp. 645-6, V. 3, B. of Ex.).

Isolated instances of banks giving bonds during the year 1928 and mostly around the time of the institution of the suit appear in evidence. The state treasurer started demanding bonds and some other public officials did after public notice that the suit was to be filed.

Mr. Schantz's State Bank of Omaha had state, city and county money, and for fifteen years prior to 1926 had given no bond for any public moneys (Qs. 1156, etc., p. 219, V. 1, B. of Ex.). Mr. Stephens' Fremont State Bank had continuously county and city public funds without giving depository bonds (p. 397, V. 2, B. of Ex.). There is now on deposit in failed state banks more than two million dollars almost wholly deposited without bonds and in reliance by public officers on the Guarantee Fund Law and on the representations and acts of the banks. These funds in failed banks are distributed as follows:

County treasurer accounts	$1,196,916.84
State treasurer accounts	161,018.92
City or village treasurer accounts	254,815.67
Township treasurer accounts	24,093.91
School district treasurer accounts	268,630.07
Other public funds	99,752.94
Total	$2,005,228.94

(Exhibit 36, p. 590, V. 2, B. of Ex.)

BONDING PREMIUMS. The banks receiving public funds on deposit without giving bonds paid less to the Guarantee Fund with reference to said deposits than they would have had to pay as bonding premiums to surety companies for bonds had there been no Guarantee Fund assessments and they had given surety company bonds for such public deposits.

M. L. Springer, secretary and treasurer of the Commerce Trust Company of Lincoln, Nebraska, in charge of the bond department, testified (p. 716, V. 3):

That he had charge of the issuance of bonds for that company since January 1, 1924, and was acquainted with the rates in force in the state of Nebraska for depository bonds to secure deposits in banks of public funds; that they were uniform over the state; that he had the rate sheet of the companies and that the rates from September 1, 1924 to January, 1929, were as follows (p. 718, V. 3):

Upon banks of a capital of less than $50,000.00, $10.00 per thousand (1 per cent).

Upon banks of a capital of $50,000.00 and less than $100,000.00, $7.50 per thousand (.75 per cent).

Upon banks of $100,000.00 capital and less than $200,000.00, $6.00 per thousand (.6 per cent).

Upon banks of $200,000.00 capital and over, $5.00 per thousand (.5 per cent).

That the rates on national banks were exactly the same (Q. 3121, p. 718, V. 3).

It will be noted that the rate varies from ½ of 1 per cent to 1 per cent, and that the average of the four rates is .71 per cent, or $7.10 a thousand, as against the average general and special Guarantee Fund assessment of $6.00 a thousand.

C. Increased Deposits.

$100,000,000 of deposits carrying annual earnings of $2,000,000 to $4,000,000 to the banks are solely attributable to the Guarantee Fund.

Testifying as to the large benefits of the Guarantee Fund *to the banks,* Witness Woods testified (p. 291, V. 2, B. of Ex.):

Q. 1261. "What effect, in your opinion, have the Bank Guarantee Fund assessments had on the banking situation in Nebraska since 1923 to July 1, 1928?"

A. "Well, depends on how you start to analyze and how many related facts you take in."

Q. 1264. "What influence, in your opinion, has the Guarantee Fund and the assessments collected under that law had on the banking situation from 1920 to 1928, on deposits?"

A. "It has had a steadying influence on the deposits of every state bank in Nebraska and it has resulted in a steady and material increase of the deposits of those banks which were advantageously situated with respect to competition."

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."

Q. 1318. "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 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."

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 bas-

ing 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. 1439. "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 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 conversion of national banks into state banks, and the steady increase in deposits of state banks (p. 339, Q. 1471).

Testifying as to the competition for deposits Mr. Woods said (p. 292, V. 2, B. of Ex.):

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 (Q. 1472, p. 340, V. 2):

> " * * * * * 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."

III. AMOUNT OF AND EFFECT OF ASSESSMENTS

A. Amount of Assessments.

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.

No maximum levy was made any year that the 1 per cent special assessment section was in force; no special was levied in each of seven years; three-tenths or less was levied in all but three of the remaining years; less than one-third of one per cent. In those three years the assessments were eight-tenths per cent in 1921, eight-

tenths per cent in 1922, and seven-tenths per cent in 1923. 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 can be levied in any one year.

It is worthy of note 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 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.

The distribution is perhaps made clearer by showing the assessments and distribution by years (with total average deposits added) as follows (Exhibit 44):

REGULAR AND SPECIAL ASSESSMENTS MADE

	Assessment	Aver. Deposits
1911		
Reg. Assess.----------	$ 176,863.36	$ 66,153,342.22
1912		
Reg. Assess.----------	406,858.07	75,071,384.16
1913		
Reg. Assess.----------	271,806.68	82,141,983.87
1914		
Reg. Assess.----------	140,647.34	87,909,728.60
1915		
Reg. Assess.----------	144,684.92	88,933,427.25
1916		
Reg. Assess. 1/10 of 1%--$196,836.65		
Spec.Assess. 1/10 of 1%-- 224,635.16	421,471.81	111,644,907.96
1917		
Reg. Assess.----------	219,904.49	164,487,391.88
1918		
Reg. Assess.----------	318,028.79	223,774,592.42
1919		
Reg. Assess. 1/10 of 1%--$290,868.39		
Spec.Assess. 2/10 of 1%-- 511,608.35	802,476.74	245,548,721.50
1920		
Reg. Assess. 1/10 of 1%--$292,462.61		
Spec.Assess. 2/10 of 1%-- 346,781.32	639,243.93	256,839,662.43
1921		
Reg. Assess. 1/10 of 1%--$302,692.58		
Spec.Assess. 8/10 of 1%-2,015,115.12	2,317,807.70	228,994,403.69
1922		
Reg. Assess. 1/10 of 1%--$228,345.36		
Spec. Assess.8/10 of 1%-1,743,234.56	1,971,579.92	217,280,560.79
1923		
Reg. Assess. 1/10 of 1%--$245,341.12		
Spec.Assess. 7/10 of 1%-1,800,979.27	2,046,320.39	235,357,188.26
1924		
Reg. Assess. 1/10 of 1%--$249,259.49		
Spec.Assess. 3/10 of 1%-- 755,600.52	1,004,860.01	241,582,708.71
1925		
Reg. Assess. 1/10 of 1%--$281,972.60		
Spec. Assess.5/10 of 1%-1,334,357.25	1,616,329.85	267,880,776.50
1926		
Reg. Assess. 1/10 of 1%--$290,244.16		
Spec.Assess. 5/10 of 1%-1,382,094.59	1,672,338.75	278,604,814.05
1927		
Reg. Assess. 1/10 of 1%--$285,717.88		
Spec.Assess. 5/10 of 1%-1,367,388.88	1,653,206.76	276,374,797.54
1928		
Reg. Assess. 1/10 of 1%--$263,937.03		
Spec.Assess.2½/10 of 1%-- 621,475.57	885,412.60	257,021,002.47
Total----------	$16,709,842.11	
Spec. Assess. 2½/10 of 1%,levied Dec. 15, 1928 (not paid)-------$	622,947.76	

(Exhibit 44, P. 687, V. 3, B. of Ex., with average daily deposits each year added in last column)

EXHIBIT 44

C. Effect of Assessments.

We feel that it is clear from the evidence heretofore quoted that the small maximum assessment on each bank is a fair non-burdensome operating expense. No witness on the stand 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 Guarantee 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, principal witness for plaintiff and one of the 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 caused by the Guarantee Fund assessments but he could not name a single one (Qs. 3466-7-8, p. 779, V. 3, B. of Ex.). As to the ability to pay assessments, Mr. Stephens said (Q. 3473, p. 780, V. 3):

> Q. "Well, would this be a fair statement: take any good bank, making a fair profit, can it pay this assessment without injury to itself and can do so to the great benefit of the state?"
>
> A. "That would be a fair statement if a 'good bank' meant a bank properly conducted, with adequate capital."

Referring to the condition of the banks as existing in May, 1927, and those then having capital impairment or capital impairment if criticised items were charged off, Mr. Bliss stated that the Guarantee Fund assessments

paid by those banks had cut no appreciable figure in their then condition as he found them (Q. 941, p. 171, V. 1, B. of Ex.) and that as to existing banks they had charged the assessments out of their earnings and taken care of them from year to year (Q. 965, p. 174, V. 1, B. of Ex.).

Mr. Woods testified (Q. 1263, p. 29, V. 2, B. of Ex.):

> 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."

D. Amount Against Each Bank of the Special Assessment in Issue.

The intervenors offered in evidence and there is attached to the bill of exceptions as Exhibit 53, at page 819, volume 3, 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.

E. The "Eight Per Cent on Capital" Deception.

The banks have adopted in this case and constantly reiterated the misleading statement that they pay eight per cent of their capital to the Guarantee Fund. They pay nothing of their capital to the Guarantee Fund. The Guarantee Fund payment is an expense of operation, a charge against operation and for the privilege of do-

ing 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 pat and reasonable to state that the banks paid twenty per cent of their capital as wages 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 in savings 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.

In this connection we again challenge attention to the figures already quoted from Exhibit 38. During the eighteen months ending June 30, 1928, the payments to the Guarantee Fund were ten cents out of each dollar of gross earnings and during the year ending June 30, 1926, were a fraction over nine cents out of each dollar of earnings.

F. Liquidating and Nationalizing.

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 and some banks did withdraw. But that question is not in this case and should not be permitted to prejudice it.

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 (p. 903, V. 3, B. of Ex.). He refused to express and had no opinion as to when such assessments would have that effect (p. 904, V. 3, B. of Ex.).

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—7 per cent for instance of the deposits. 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.

IV. PRESENT AND FUTURE BENEFITS

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 condition 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.

Mr. Woods testified (p. 343, V. 2):

> Q. 1486. "What happened in October and November?"
>
> A. "The State Bankers Association was held in Omaha and the newspapers carried a report that certain state banks would contest the assessment and refuse to pay the assessment."

Q. 1487. "Was the report spread that the bankers would refuse to pay the assessments?"

A. "I think that was carried in the papers in Omaha."

Q. 1488. "What effect did this announcement have that a large number of bankers were going to refuse to pay their assessment?"

A. "I can't tell what effect it had for the Lincoln papers touched it rather light, probably many people wouldn't see it, but the Omaha papers played it up with large captions."

Q. 1489. "What effect would such an announcement have?"

A. "It would tend to check confidence if it was read and its full significance understood."

Q. 1490. "Mr. Woods, you are familiar with the fact that the banks did refuse to pay the assessment and did bring this suit involving the Department of Trade and Commerce. What effect did this act have on the situation?"

A. "I can only make an estimate from information that has reached me that some of the best bankers in the state have told me the agitation, including the suit, has created some nervousness."

The commencement of the demand of public officials for bonds for public deposits occurred in September, 1928. At that time the State Bankers Association met in Omaha and the president announced that the banks were not going to pay the next assessment (p. 661, V. 3, B. of Ex.).

State Treasurer Stebbins testified that after he learned of the proposed contest of assessments he played safe and asked for bonds in the latter part of December, 1928 (Qs. 3031-3, pp. 697-8; Qs. 3005-6, p. 693, V. 3, B. of Ex.).

In several questions, commencing with Question 1363, page 315, Volume 2, Bill of Exceptions, Mr. Woods was asked as to the effect of the continuance of the Guarantee Fund assessments. This called for an opinion. Mr. Woods answered this question by stating that he could not tell what the effect would be, considering the complication caused by the suit, and that it was his theory that it was a matter for the legislature. The court by sustaining objections struck out the reference to legislative relief and the filing of the suit (Qs. 1368-9, pp. 316-7, V. 2, B. of Ex.). The court erred in so doing.

Manifestly questions as to the effect of the Guarantee Fund in the future were calling for wholly speculative and incompetent evidence. But if the answers could stand they certainly should contain the elements the witness took into consideration.

Mr. Woods testified (p. 356, V. 2, B. of Ex.):

> A. "I said that I thought the assessments for the years 1921, 1922, 1923 at the rate of 1 1/20 per cent was perhaps a minor contributing factor to the failure of some of the banks at that time, but since 1923 and since the maximum assessment amounted to only .6 per cent, I do not believe that lower and reduced assessment could be considered a material, contributing factor to the failure of these banks. I don't say it doesn't affect the earnings and I analyzed the figures to show the whole amount for five years and was only about one twenty-fourth of the loss as determined by Mr. Peterson in his experience with failed banks."

(p. 358, V. 2, B. of Ex.):

Q. 1564. "I asked for your opinion, if you know of any benefits?"

A. "Because of my inability to read the minds of the people throughout Nebraska I am unable to answer."

Q. 1565. "Can you think of any benefits they would derive from a continuation of these assessments?"

A. "That is to the banks?"

Q. 1566. "Yes, sir."

A. "Well, I think, I don't know how widespread the feeling is; it may not be widespread but I know there is some sentiment in the state that regardless of whether it is injurious or not the banks ought to pay the assessments. Now, if that is widespread and is sincerely held, if the banks can pay until relieved by the legislature, there would be some benefits in paying it."

In March, 1928, Mr. Schantz prepared and circulated 2,000 copies of a pamphlet concerning the Guarantee Fund Law. He quoted in this document "The Story No Other State Can Tell." He referred to the total liability of the Fund as twenty million dollars and recovery of ten million, leaving ten million net deficit and recommended the following (pp. 891-3, V. 3, B. of Ex.):

"Ask the coming legislature to amend the present law whereby the Guarantee Fund Commission can pay the depositors with receivers' certificates without interest. In any event not to operate a bank as a going concern longer than two years; pay the present closed banks off in their respective turn and then proceed to liquidate the present so called going banks now under their management and such others as are

turned over to them hereafter. Then as fast as funds are realized from the assessments against the solvent banks and realized from the assets of the closed banks, call in and retire these certificates as fast as possible. In the meantime should sufficient be realized from collections and assets in any specific bank that will justify it, allow the receiver to pay a dividend to the depositors in that particular bank and endorse such dividend on the certificate when presented in due form. Furthermore, this will give the depositor a negotiable piece of paper which he can sell, dispose of or use as collateral, as might be. With this plan in operation I believe any banker in the state will gladly loan his customers or the holder of one of these certificates fifty per cent of its face value. It gives the depositor something he can use and he will gladly await his turn to receive ultimate and full payment. With this plan in effect, I believe both the public and the bankers will be satisfied and with favorable conditions prevailing over the state as it now appears to be, that the entire obligation can be paid off and out of the way in four or five years and we can continue to say 'The story no other state can tell'."

V. CONDITION OF THE GUARANTEE FUND

A. Guarantee Fund Commission

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

The Guarantee Fund Commission Act was drafted by the bankers legislative committee and passed on the demand of the bankers in 1923.

By the terms of the act, the bankers submit a list of names of state bankers to the governor from which list

he selects the members of the Commission. The Commission in turn selects its secretary. The state of Nebraska is divided into divisions, or groups, as they are called, and each group of bankers has its representative on this Commission.

Hon. Charles W. Bryan, governor of Nebraska in 1923, called by the intervenors, testified among others, as to the activity of the banks in procuring control of the administration of the Guarantee Fund (p. 712, V. 3, B. of Ex.). 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 who demanded that the Guarantee Fund Commission be composed of bankers of their own nomination.

B. Assets and Liabilities.

The total net liability of the Guarantee Fund, adjudicated in receivership banks and prospective in Commission-operated banks, is estimated as between eleven million dollars and sixteen million dollars.

Mr. Peterson estimated it at about the latter figure but it appeared that in his statement he had failed to include stockholders' liability in the failed banks (Q. 316, p. 62, V. 1, B. of Ex.) and that the experience of the

Department had been a realization of twenty per cent on this asset (Q. 268, p. 55, V. 1). It also appeared that there had been an increase of ten million dollars of assets based on book value between his estimate of May, 1927 (Exhibit 4, p. 67, V. 1) and his estimate as of December 31, 1928, (Exhibit 1, p. 65, V. 1), apparently without corresponding reflection in the estimated total recovery.

On the evidence, a conservative net liability would probably be around thirteen million dollars.

However, the amount 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 banks' annual assessment or contribution for that is fixed by law.*

VI. ACTS OF WAIVER AND ESTOPPEL

The banks are estopped as a matter of law to bring this action by their specific acceptance of the Guarantee Fund Act and their operation thereunder and the receipt of its benefits through the years. This point is separately covered hereafter. At this point we want to show that the evidence is overwhelming and undisputed of representations and conduct of the state banks for approximately twenty years, *and particularly during the later years,* which operate as an effective and complete waiver and estoppel of any right to assert the unconstitutionality of the special assessments, *especially and doubly so as to the existing depositor claimants who believed in and relied on said representations and conduct in making the deposits on which their*

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 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 through the advocacy and advertising of the Guarantee Fund and its protective insurance plan 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 distribution of circulars and questionnaires and other printed matter in praise of the Guarantee Fund.

4. The general and universal imparting to the public and depositors by word of mouth and extensive and large newspaper advertisements that all the state banks in Nebraska were associated together for the mutual protection of deposits; 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

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. Newspaper advertisements were illustrated and headed with a picture of the United States Supreme Court rendering the decision and of Nebraska's new capitol building and similar effective illustrations.

A. Individual Claimant Depositors, and Stipulation as to Their Testimony.

THE FACTS AS TO THE INDIVIDUAL CLAIMANT DEPOSITOR, AS 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 (pp. 478, *et seq.* V. 2, B. of Ex.):

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; that 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 the banks had signs similar to those introduced in evidence advertising the Guarantee Fund and the safety of the depositors' money; that they had quite an influence on him in

leaving his money because he believed in these signs and advertisements; 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 2, Bill of Exceptions, 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 of THE FREMONT TRIBUNE that had been previously read at the trial that afternoon were some that he had read; that there was one about depositors not losing a cent that he remembered especially and that it 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.)

After Mr. Peterson had testified and Mr. Carl M. Jorgensen had been called and sworn (p. 488, V. 2, B. of Ex.) 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. The attorney general stated that he was only interested in bringing such number of depositors to testify as would show beyond a doubt the

representations with respect to the Guarantee Fund by the banks, namely, that the depositors were protected by the State of Nebraska, and they relied upon these representations and made deposits in these banks which they otherwise would not have made (p. 486, V. 2, B. of Ex.). The intervenors 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 (p. 487, V. 2, B. of Ex.).

It was then stated that in the matter of the failed First State Bank of North Bend, the Scribner State Bank, the Dodge State Bank, which banks were included with other banks in the advertising published in Dodge county, it was the purpose of the defendants to produce witnesses to show that they had read and relied on the advertisements, and relying thereon deposited money in these particular banks, and that if counsel was willing to stipulate as to these witnesses they would not be called.

Whereupon the following stipulation was entered into (p. 488, V. 2, B. of Ex.):

> "It is stipulated and agreed by and between the parties to this action that the defendants have in court and on the way twenty-five depositors from different banks in the state, engaged in different occupations, who were depositors in different state banks now in the hands of receivers and that each and all of these depositors have adjudicated claims that are final and unpaid and ordered paid by the courts out of the Depositors' Guarantee Fund; and that these witnesses, if called to the stand, would testify as follows:

"1. That prior to depositing their money in said state banks the officers of the said state banks made the same representations to them with reference to the Guarantee Fund as the witness Peterson testified were made to him by the officers of the banks in which he had deposited his money and that they read the same advertisements as Peterson testified that he read and that the said banks displayed the same signs and printed matter as Peterson testified were displayed by the banks in which he deposited his money.

"2. That these depositors relied on said representations by state bank officials and on said advertisements and signs and printed matter and would not have deposited their money in said state banks but for said representations and advertisements and signs and printed matter.

"3. That said witnesses are in the same situation as the witness Peterson with reference to their respective deposits and banks.

"4. That the evidence of said twenty-five witnesses shall be treated the same as though they had been present in court and testified to the effect.

"5. That the witness fees of those present of said twenty-five witnesses shall be taxed the same as though they had been sworn and testified.

"6. That the defendants are able to produce four witnesses from Dodge county who are depositors in the First State Bank of North Bend, now in the hands of the Guarantee Fund Commission and ordered by the district court into receivership. And that they severally have deposits in said bank, made while it was a going concern and under circumstances similar to those of the witness Peterson and that the testimony of such witnesses is to be considered as offered the same as if they had personally appeared and testified.

"7. That the above stipulations shall apply to intervenors and be treated and considered as evidence on our behalf, subject to the objections made."

(C) Representations and Advertising of Banks

(1) BEE AND OTHER ADVERTISEMENTS

In June, July, August and September, 1926, 336 state banks of the state ran a series of twenty-six page advertisements in THE OMAHA DAILY BEE, practically all full page (p. 205, V. 1, B. of Ex.). These advertisements appear as defendants' Exhibits 2 to 27, inclusive, of Exhibit 13, and at pages 240 to 265, Volume 1, Bill of Exceptions. The publication thereof was procured and paid for by the 336 banks listed on the last advertisement, Exhibit 27 of Exhibit 13, at page 265. There was a written contract with each of the banks for the publication and each paid its prorata share (Qs. 1079 to 1083, pp. 206-7, V. 1, B. of Ex.). Mr. Leo R. Wilson, advertising manager of THE BEE, handled the matter for THE BEE, and he produced an audit of the circulation of THE BEE made by the auditor of circulation, Chicago, which he stated showed the distribution of THE BEE at the time these advertisements were published (p. 209, V. 1, B. of Ex.).

The auditor's report appears at page 266 and shows the distribution of THE BEE by towns in the state of Nebraska. An inspection of pages six to eleven of said audit shows that the list of towns is substantially the same as a list of state banking towns and that the daily circulation in said towns is representative and in the small towns of the state, outside of Omaha, aggregated 29,798 daily and that said advertisements carried their

publicity into practically every state banking town in the state. Facsimiles of these advertisements appear hereinafter in this brief on a miniature scale. We invite the court's attention to the original advertisements as contained in the record. Ten of these advertisements were likewise printed in THE FREMONT EVENING TRIBUNE, and it is noted on THE BEE advertisements which were published in THE FREMONT TRIBUNE.

Attached to those published in THE TRIBUNE were the names of the fourteen state banks of Dodge county. THE TRIBUNE is a daily paper of large circulation, circulating in Dodge and surrounding counties, and completely covering its territory of Dodge county and surrounding counties as testified to by Ray L. Hammond, manager thereof (p. 399, V. 2, B. of Ex.). Hereinafter are facsimiles of the advertisements as published in THE BEE *and* THE TRIBUNE.

In the preparation of the advertisements, Advertising Manager Wilson talked to Dan Stephens, of Fremont, and Mr. Schantz of Omaha a number of times (Qs. 1111 to 1113, p. 212, V. 1, B. of Ex.) and obtained the data (supposedly figures) from the Guarantee Fund Commission (Q. 1109, p. 212, V. 1, B. of Ex.). The cost of publishing the advertisements was apportioned to the banks in accordance with their deposits, and Mr. Schantz of the First State Bank of Omaha, as the largest bank in the state, contracted in writing for their publication and paid his share, between $500 and $600 (p. 853, V. 3; p. 213, V. 1).

Prior to their publication, there was a letter signed by Mr. Schantz and others relative to the publication, which

letter was circulated generally endorsing the move. Mr. Schantz' name headed the list as Mr. Kirk Griggs recalled; Mr. Griggs made an effort to find a copy of the letter but was not able to do so (p. 916-7, V. 3, B. of Ex.). Mr. Schantz, however, did not deny such activity on his part.

The advertisements were displayed to bankers one by one in conference with Mr. Stephens at Fremont, and at which conference Mr. Schantz and others were present (p. 857, V. 3, B. of Ex.); there were about half a dozen others present and the advertisements were read to them (p. 568-72, V. 3, B. of Ex.). It fairly appears from the evidence that Mr. Stephens and Mr. Schantz were the prime movers in the activities resulting in the publication of these BEE advertisements. Mr. Stephens testified that he caused the re-insertion of duplicates of them in THE FREMONT EVENING TRIBUNE and that his Fremont State Bank paid half the cost and the other state banks of the county paid the remaining half (Q. 1745, p. 399, V. 2, B. of Ex.) Mr. Kirk Griggs, former secretary of the Department of Trade and Commerce during the period January, 1925, to January, 1927, discussed with him the matter of THE BEE advertisements from the standpoint of not causing a conflict between state and national banks but he had nothing to do with the preparation of the advertisements and furnished none of the written matter that was to go into them (p. 920, V. 3, B. of Ex.).

These advertisements were as follows:

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. (Fullpage Omaha Ad (Ex. 2 of Ex. 13, P. 240 Vol. 1 B. of Ex.)

EXHIBITS 2 AND 3 OF EXHIBIT 13

Pages 110 and 111

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 the 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.

Full Page Omaha Bee Ex 3 of Ex 13 - P-241 V.1- B. of Ex.

Nebraska is a *Remarkable* State!

First Traveler—"I was reading the business chart the other day and I noticed Nebraska listed as one of the bright spots, do you know the reason?"

Second Traveler—"Yes, Nebraska is really a remarkable state. In agricultural products there is raised here a surplus of four out of five of the world's basic needs, corn, wheat, cattle and hogs."

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. This law has been in effect about 15 years and during that time some $26,000,000 in deposits in failed banks have been paid back to depositors under that law.

Nebraska was hit by the depression, of course, but while it had to stand the gaff of low prices, its financial structure has come through more solid than ever and the people still have the saved-up wealth represented by their protected bank deposits. A check drawn against a deposit in a state bank in Nebraska is as safe as a banknote."

The Record of Nebraska's Financial Stability:

898 State Banks - - - - - - -	-$285,000,000 deposits.
170 National Banks - - - - -	202,000,000 deposits.
66 Insurance Companies - - -	182,000,000 assets
84 Building & Loan Assns. -	142,000,000 assets
24 Trust Companies - - - - -	60,000,000 assets

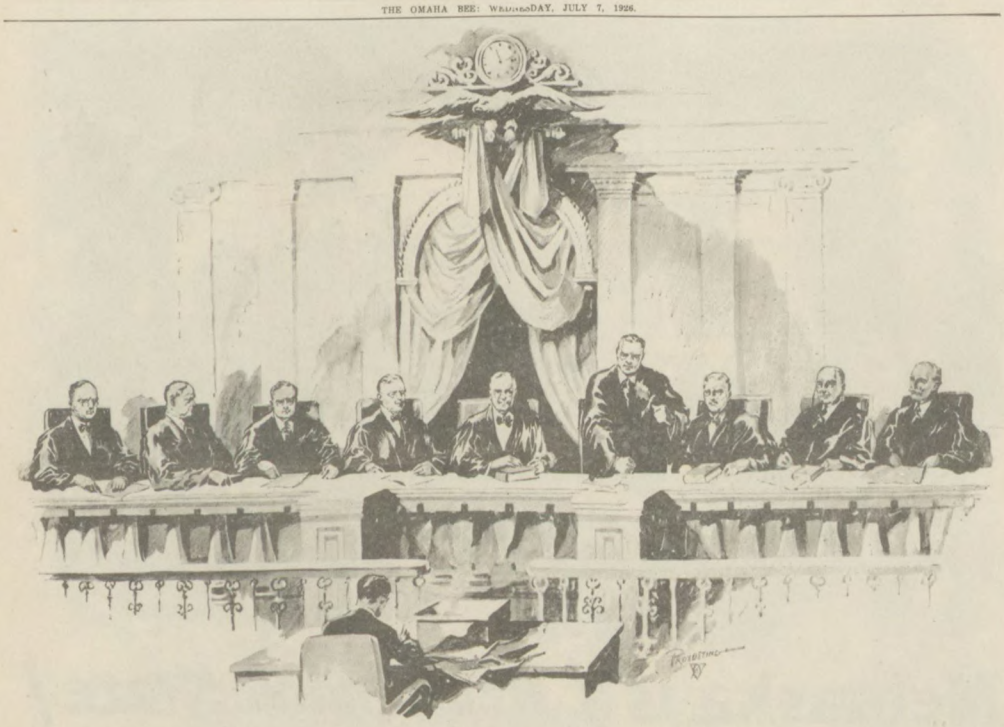
Nebraska produces in new wealth each year: Farm products, $500,000,000; products of industry, $800,000,000.

The wealth of Nebraska in men and materials is covered by insurance; life, fire and casualty, to the amount of $5,000,000,000 for which its people pay in annual premiums more than $45,000,000.

Chapter 3. "A Story No Other State Can Tell." The Omaha Bee, July 4, 1926. Fullpage, Omaha Ra (Ex. 4 of Ex. 13. P 242 Vol 1, Bof Ex.)

EXHIBITS 4 AND 5 OF EXHIBIT 13

Pages 112 and 113



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 (or 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 Bee, Ex. 5 of Ex. 13, P 243, V. 1 Bk of Ex.)

No Mattress Banks in Nebraska

ONCE upon a time money and valuables were kept in strong boxes in the home. There was no other place to keep them. There were no banks as we know them today. With the coming of banks, money was placed on deposit and valuables of other kinds were put into safe deposit boxes.

In the early days of banking there was naturally a backwardness about placing money on deposit. As banks grew stronger and banking systems better organized this timorousness about entrusting money to banks practically disappeared.

In Nebraska there is no longer any need to keep the money in the mattress, in an old woolen sock or 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. A strict system of State bank examination is constantly improving conditions. Under the Nebraska Bank Guarantee Law, those who once were fearful of banks and kept their money hidden away in the mattress have brought it out and put it to work as part of the capital included in the general bank deposits, for use in the development of the state.

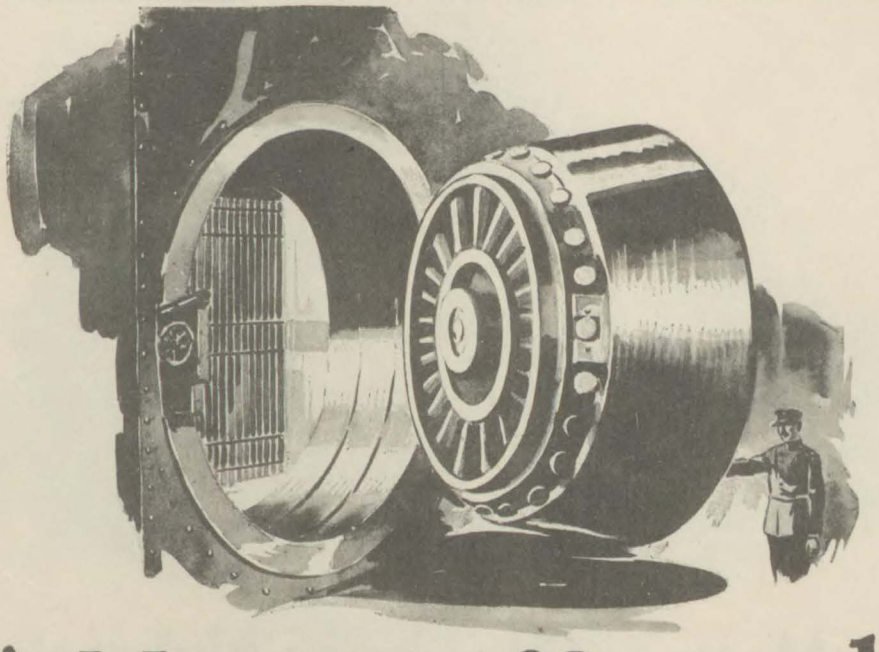
The deposits of the big business house, the money that is being laid away for the purchase of a home and the dimes and pennies that are deposited in the baby's savings account are all safe in the State banks of Nebraska because deposits are protected.

Full page, In Omaha Bee Ex. 6 of Ex. 13, P 244 U.S. D. of Ex.)

Chapter 5, "A Story No Other State Can Tell." The Omaha Bee, July 11, 1926. (Published also in Fremont Tribune with names of 12 Bodge County Banks attached Ex. 13 P 246, U.S. D. of Ex.)

EXHIBITS 6 AND 7 OF EXHIBIT 13

Pages 114 and 115



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.

During this period the world war came upon us with its dislocation of business. Following this came the period of inflation preceding our own entry into the war. Then our own war years with their immense loan drives and the hectic financing that accompanied those years.

Then came the post-war inflation period when the nation lost its financial balance and industry and agriculture from the heights of inflation were precipitated into the depths of deflation.

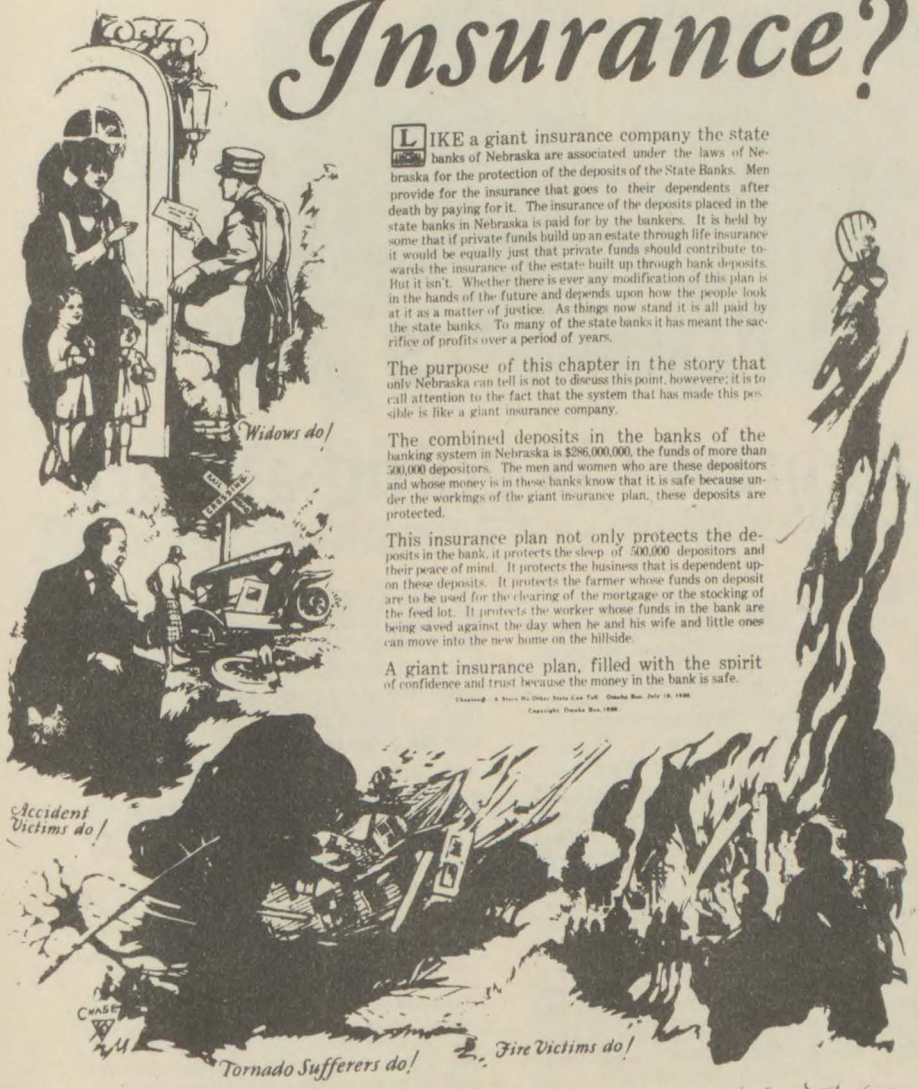
The experience of those years was more than the ups and downs of the business cycle; it was the twistings and turnings of a world flushed with success on one day and chilled with depression the next.

Here and there individual banks in the Nebraska state system were unable to stand the strain and went under. There were losses in Nebraska as there were losses in every state in the Union.

Of all the state systems, however, the Nebraska system alone came through solid, solvent and without loss to a single depositor. The Nebraska state bank system as a whole absorbed the losses of the unit state banks that went under and on the surface of the financial sea of Nebraska's state banking system there were only a few ripples that told of the depths of the currents underneath.

Fullpage in Omaha Bee (Ex. 7 of Exh. 13, P 245 Vol. B of Ex.)
(Also published Fremont Tribune with names of 12 Dodge County Banks attached. Ex N3, Vol. 2, P 443, Bof Exh.)

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, howevere; 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.

Full Page in Omaha Bee Ex.8 of Ex. P246 Vol 1. B of Ex

EXHIBITS 8 AND 9 OF EXHIBIT 13

Pages 116 and 117

Nebraska is going ahead

State Banker

"Nebraska is glad to have you gentlemen come here to make this state your home. 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."

New Business Man

"This plan of protecting deposits, operating for state banks under the laws of Nebraska is the thing that has finally determined my selection of Nebraska as the state where I want to establish my business. Because of this I expect to find a confidence in your financial institutions that will make business here a pleasure as well as a matter of profit."

New Farmer

"It settles the matter for me, the safety of my bank deposit is vital. We farmers do not have a quick turnover and cannot change our course as the markets change. I am glad I can come to Nebraska and put my cash in the bank and go to sleep at night, without worry."

The funds in the State Banks of Nebraska are intact. In plans for business expansion and future development much depends upon the ready cash in hand. In Nebraska the ready cash of the people deposited in State Banks is intact, ready for use in the business life of the state.

As in all the states in the Nation, Nebraska had its bank failures, particularly during the deflation period. In Nebraska however, there were no losses to depositors in state banks. The funds of these depositors, big and little, are intact. They were paid back dollar for dollar under the workings of the Nebraska Guarantee law. Under this law the state banks assess themselves for the amount of the deposits in the failed banks and make it good to the depositors. Therefore, because this has been done by the state banks and because the deposits of the people of Nebraska are intact, Nebraska is at all times ready to go ahead. Nebraska is now going ahead and Nebraska invites business men, farmers and all other home seekers to come here, make their homes here and take part in the work of developing Nebraska toward an ever brighter future.

Full page Omaha Bee (Ex. 9 of Ex. 13, P. 247, Vol. B. of Ex.)

Surely,
That Check is drawn on a Nebraska State Bank

Salesmanager: (a conversation in 1922). "Chief, I've been hearing more disquieting rumors about business conditions in the agricultural states and I think we ought to be more careful than usual. Here is an order and a check from Jones & Company; do you think we should ship the goods until we can find out something about the bank on which this check is drawn."

President: (examining check) "Surely, ship it. This check is drawn on a state bank in Nebraska. We've been doing business with Jones for years and we know they have ample deposits, also we know that in Nebraska the state bankers protect each others' deposits under the State Bank guarantee law. That check is good."

Many conversations like the above in many business houses, took place in 1922, when the depression days were darkest. But, then as now, the Nebraska merchant who draws his check on a deposit in a state bank, in Nebraska, had that check honored.

This illustrates the soundness of Nebraska finance, even in the darkest days. It shows as nothing else can the value to the state as a whole of the state bank Guarantee law. It illustrates the manner in which this guarantee system keeps business going as usual. It is part of the story that no other state can tell.

Full page in Omaha Bee (Ex. 10 of Ex. 13, P 243, Vol. B. of Ex.)
(also published Fremont Tribune, with names of 12 Dodge County Banks attached. Ex. Nos 11 & 12, Pages 72 & 73 of Ex. Vol.

Chapter 8, "A Story No Other State Can Tell." The Omaha Bee, July 25, 1926. ...ugust 1926, The Omaha Bee.

EXHIBITS 10 AND 11 OF EXHIBIT 13

Pages 118 and 119

In the "Shin Plaster" Days

The photographic reproductions of the "shin plasters" shown above are from an extensive collection of these memories of the days of wild cat banking, in the possession of Mr. A. L. Schantz, Omaha.

TIME was when there was practically no government control of banks or banking practices. Those were the days of "free banking" and money was issued with no segregated reserves behind them. When banks went under there was not only put in jeopardy the funds on deposit, but the money issued by the failed banks was usually worthless. Those were the "shin plaster days. In hundreds of attics in Nebraska homes there are old trunks in which are hidden away samples of this oldtime shin plaster money.

The strong men in both the banks and the government realized that such a situation could not be permitted to continue. The result was the banking laws of today in both state and nation. We never worry now about the money in our billfold. Sound banking laws guarantee their payment out of segregated reserves and it makes no difference to the holder whether the bank that issued them is a strong bank or a weak bank. The bank can fail, but the money is good. Because the system back of the money is sound.

In Nebraska, the bankers and the state legislature realized that safety of bank deposits was as essential as safety of money issued by banks. Both are forms of credit, necessary to modern business. The check that is drawn against a deposit is even more widely used as a form of credit than the money issued by the banks. Nebraska has organized a system to protect these checks, by protecting the deposits against which they are drawn. State banks authorize checks and under the Nebraska state system of protecting deposits, these checks, drawn on deposits in state banks in Nebraska, are as safe as money. The safe, confident conduct of business makes it necessary that as far as the systems of men can make them, all forms of credit should be safe, bank deposits and the checks drawn against them, as well as money.

Deposits in this Bank protected under Nebraska Bank Guarantee Law

Bullpen, Omaha Bee Ex. 11 of Ex. 13, P 249, V 1, D. of Ex.)

Chapter 10, "A Story No Other State Can Tell" The Omaha Bee, July 28, 1926.

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 $26,000,000, 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, 1926

Defendants' Exhibit 12 of Exh. 13, P250, V1, B. of Ev.)

EXHIBITS 12 AND 13 OF EXHIBIT 13

Pages 120 and 121

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."

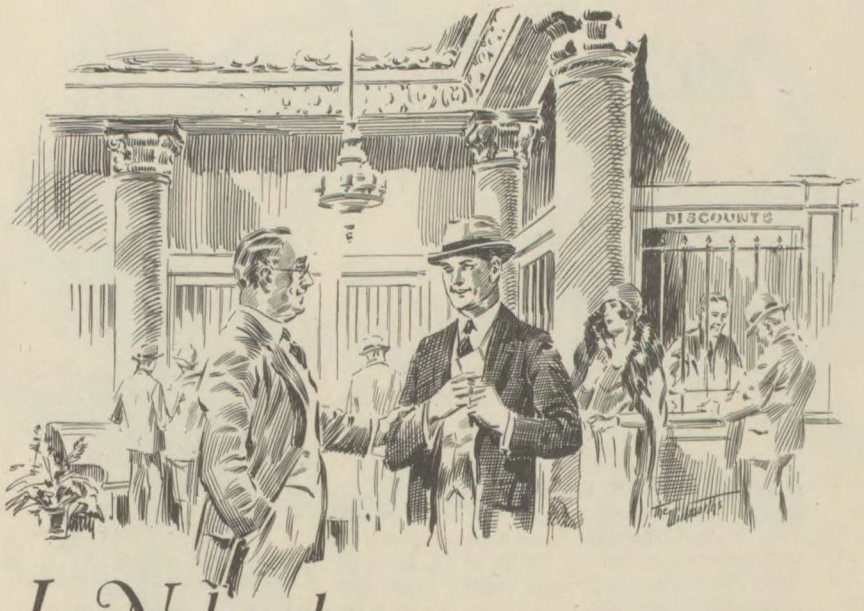
When the news was printed recently of the failure of a group of banks in two southern states it is probable there were conversations similar to that reproduced here all over Nebraska. The sense of security that is the possession of the depositors in state banks in Nebraska is one of the greatest benefits 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 13, "A Story No Other State Can Tell." The Omaha Bee, August 4, 1926.

Lee page. Omaha Bee (Ex. 13 of Ex. 13, P251, 41, Bof Ex.)



In Nebraska
the guarantee works both ways!

STATE BANKER: "There's an interesting thing about this little transaction we have just closed. We are both protected. We have on deposit in this bank $5,000 of your money. Under the laws of the state of Nebraska, this state bank is joined with all other state banks in protecting that deposit, and in protecting all of the deposits in all of the state banks.

"I have just loaned you an additional $5,000 and you have given me security for it in the shape of collateral that I, as a banker, know is good. I know that this bank will get that loan back, no matter what happens to you. You know that your deposit is safe, no matter what may happen to this bank. It is a fair deal both ways."

BORROWER: "You know the biggest thing about that for both of us? We can both sleep at night."

Here we have another chapter that illustrates the confidence and the peace of mind that good banking has brought to Nebraska, to both bankers and depositors. It is worth more than a gold mine to Nebraska. The depositors and the borrowers from Nebraska state banks know that the guarantee works both ways.

IT'S A STORY THAT NO OTHER STATE CAN TELL!

Full page in Omaha Bee (Ex. 14 of Ex. 13, P. 242, U. S. Ex.)
(Also published Fremont Tribune, with names of 12 Dodge County banks attached. Ex. No. PH 4972, U. S. Ex.)

Chapter 13, "A Story No Other State Can Tell." The Omaha Bee, August 8, 1926.

EXHIBITS 14 AND 15 OF EXHIBIT 13

Pages 122 and 123

The Money in your Pocket!

Run your hand into your pocket and take out the money you have there. Look at it for a few minutes while you read this story. That $5 bill; maybe it is a United States treasury note, maybe it was issued by the Federal Reserve System; maybe it is a National Bank note. We will forget the coins for a minute.

But that paper money? There is no intrinsic value in the paper, yet you never worry about it. You know that a piece of paper marked $5 or $10 or any other amount, so long as it is a part of Uncle Sam's system of currency, is good. Now why is it good? Because under our banking laws the national banks of the country have deposited in reserve, enough securities to take up whatever amount of these pieces of paper might at any time be presented for payment. If that $5 bill is a bank note, you do not worry about the bank that issued it, and it doesn't make any difference to you nor to the value of that bank note, whether the bank is solvent or is on the verge of going under.

All of this is as it should be because if we had to worry about the value of the money in our pockets we could never do business of any sort.

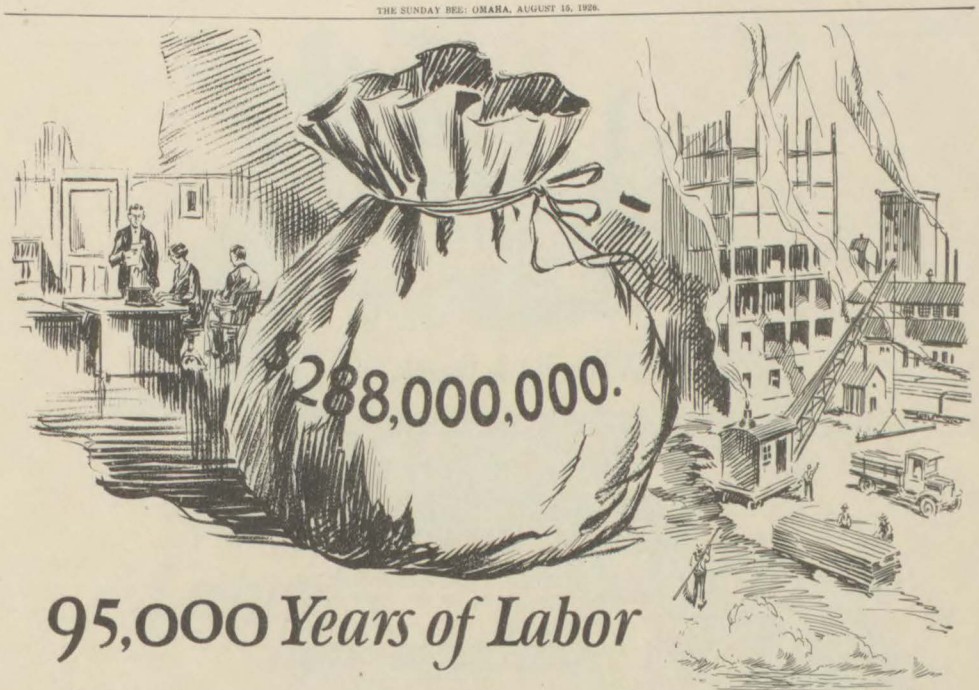
Now how about that check you gave to your dealer when you bought an automobile? You have plenty of funds in the bank, many times more than enough to meet that check, but suppose the bank fails before the check is paid?

In Nebraska, under the Nebraska Bank Guarantee Law, the state banking system protects deposits and so protects checks drawn against deposits. It compels the setting up of reserves by the state banks to meet any demand that may be made for the payment of checks drawn on deposits in state banks. In Nebraska you need not worry about the check drawn against your deposit in state banks any more than you need worry about the money in your pocket.

THIS IS A STORY NO OTHER STATE CAN TELL

(Ran 15 of 52 in P2 53 Yr. By Ed.) Full page in Omaha Bee.

Chapter 14, "A Story No Other State Can Tell." The Omaha Bee, August 11, 1926



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.

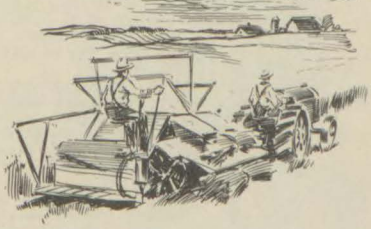
Thus the money on deposit in the state banks in Nebraska represents a huge total in stored up labor. It has been stored away in the state banks for use some day when the depositors need it.

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 (Ex. 16 of Ex. 13, P254 V, 18 of Ex.)
also pub. Fremont Tribune, names of towns omitted (Ex. 44, P444 V2 5 of Ex.)

EXHIBITS 16 AND 17 OF EXHIBIT 13

Pages 124 and 125

What is a Bank ?

Modern business requires great reservoirs of capital from which to draw the funds with which to keep going the wheels of business. These reservoirs of capital are made up of deposits of the people, big and little deposits.

These funds of the people, on deposit in the banks, are loaned to business men, for the conduct of business big and little. Our present day social structure would be impossible, were it not for these great reservoirs of capital.

From the standpoint of the men and women who deposit their money in banks, the chief consideration is that it shall be safe.

In the state banks in Nebraska, the deposits, of more than 550,000 men and women go to make up the total of the funds on hand. In view of the fact that the banks make use of these funds as loans to aid in carrying on business within the state, it is but natural that banks are looked upon as rendring the greatest of public service.

Rendering a public service as they do, and in doing so using the money of the people that is placed with them, the laws of Nebraska provide that the members of the state banking system shall set aside reserves, which they do in the form of assessments, to cover any losses to depositors which may follow the failure of individual banks.

Thus the state banks in Nebraska protect the deposits in state banks and since the starting of this system some fifteen years ago the state banks in Nebraska have paid back to depositors in failed state banks all of the funds which the people had on deposit there, a total of $26,000,000.

With these facts in mind we realize that answering the question, "What is a Bank?" is a different proposition in Nebraska than in another state.

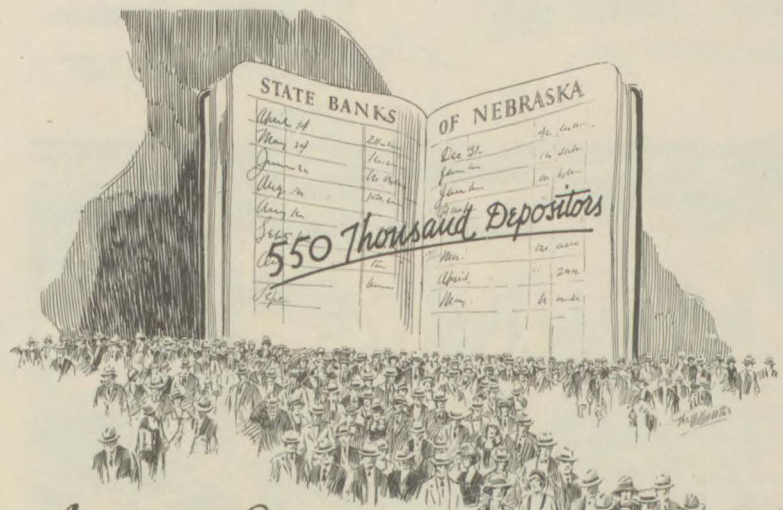
In Nebraska a state bank is a financial institution that takes the deposits of the people; loans out these funds to manufacturers, farmers and merchants and in return joins with the other state banks in the Nebraska State Bank System, to guarantee that if for any reason---dishonesty, careless banking or financial depression, individual banks here and there in the system, shall fail, the funds on deposit will be returned in full to those who made the deposits.

Because of this system Nebraska offers a better field for the doing of business and for the laying away of funds in the bank by those who seek through their savings to build financial independence for themselves.

This Is a Story No Other State Can Tell

Chapter 16, "A Story No Other State Can Tell." The Omaha Bee, August 16, 1926.

Allegge in Omaha Bee (Ex. 17 for ID, 13 Pass'd ID, 13 by Gr.)



A city of half a million

OMAHA, the metropolis of Nebraska, is a city of 215,000. It is difficult to realize what a big group of people this is. If they were all gathered into one place we might be able to get an idea of the size of Omaha. But we cannot get them into one place. There is one way; however, to get an idea of how big is Omaha. Get into an automobile and drive over the city and see the hundreds of apartment buildings and the thousands of homes where the people live.

While we are on this auto trip around Omaha, trying to understand how big is a population of 215,000, let's turn our thoughts for a moment to a still bigger group—the men and women who carry their deposits in the state banks in Nebraska. They number nearly 550,000, or more than twice the total population of Omaha.

This great group of people have their money in the state banks in Nebraska. The deposits of some are commercial deposits, of others savings deposits. Their business lives, their home lives, their plans for the present and their hopes for the future are tied up in the safety of the money they have entrusted to these state banks.

It is a trust well placed. The money they have put in the state banks is safe. They know it is safe because they know that deposits in the state banks in Nebraska are protected deposits. They have seen the Bank Guarantee law in operation. Some of these depositors live in cities and towns where state banks have failed. Some of them have had deposits in failed state banks. Many of them have had deposited funds returned to them under the operation of the Bank Guarantee Law. Many have friends who have had deposits returned to them.

What better thing has ever been done for the people of Nebraska than what the state banks have done for them, holding their money safe in the bank for them. What better thing can these depositors do for their friends in other states than to tell them this story of Nebraska's state banks!

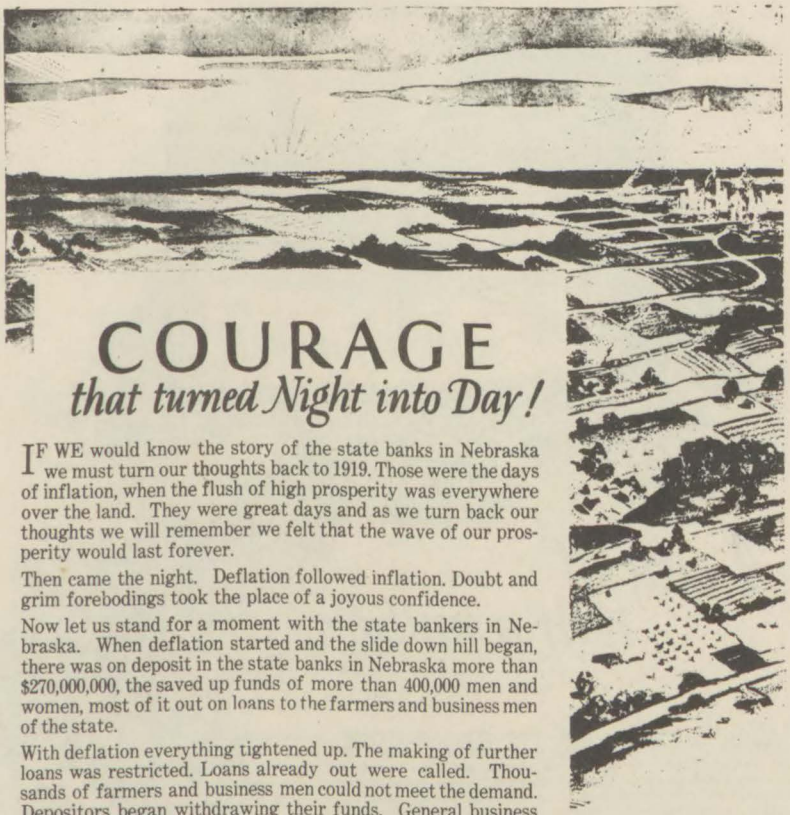
The story of Nebraska's state banks, properly told, will bring to Nebraska more people who will come here to make their homes. It will bring more men of business who will come here to establish industry. Nebraska stands alone on the safety and soundness of its state banking system.

IT'S A STORY NO OTHER STATE CAN TELL

Chapter 17, "A Story No Other State Can Tell," The Omaha Bee, August 22, 1926. Full page in Omaha Bee (Vol. 18 of Vol. 13, Page 6 of 1, By Gr.)

EXHIBITS 18 AND 19 OF EXHIBIT 13

Pages 126 and 127



COURAGE
that turned Night into Day!

IF WE would know the story of the state banks in Nebraska we must turn our thoughts back to 1919. Those were the days of inflation, when the flush of high prosperity was everywhere over the land. They were great days and as we turn back our thoughts we will remember we felt that the wave of our prosperity would last forever.

Then came the night. Deflation followed inflation. Doubt and grim forebodings took the place of a joyous confidence.

Now let us stand for a moment with the state bankers in Nebraska. When deflation started and the slide down hill began, there was on deposit in the state banks in Nebraska more than $270,000,000, the saved up funds of more than 400,000 men and women, most of it out on loans to the farmers and business men of the state.

270-210-208

With deflation everything tightened up. The making of further loans was restricted. Loans already out were called. Thousands of farmers and business men could not meet the demand. Depositors began withdrawing their funds. General business shrunk. Banks began to break, failures and bankruptcies followed.

The state bankers in Nebraska watched this tumbling of values, knowing full well that under the Nebraska Bank Guarantee Law they not only had to stand their own losses, but they had to make good the deposits in the state banks that failed. They watched their total deposits fall from $270,000,000 to $210,000,000 within the short period of two years. They watched the mounting total of the deposits in failed banks, deposits they were pledged to make good.

Courage and loyalty and a determination to see it through, governed the state bankers in Nebraska and every dollar of deposits in the failed state banks has been paid.

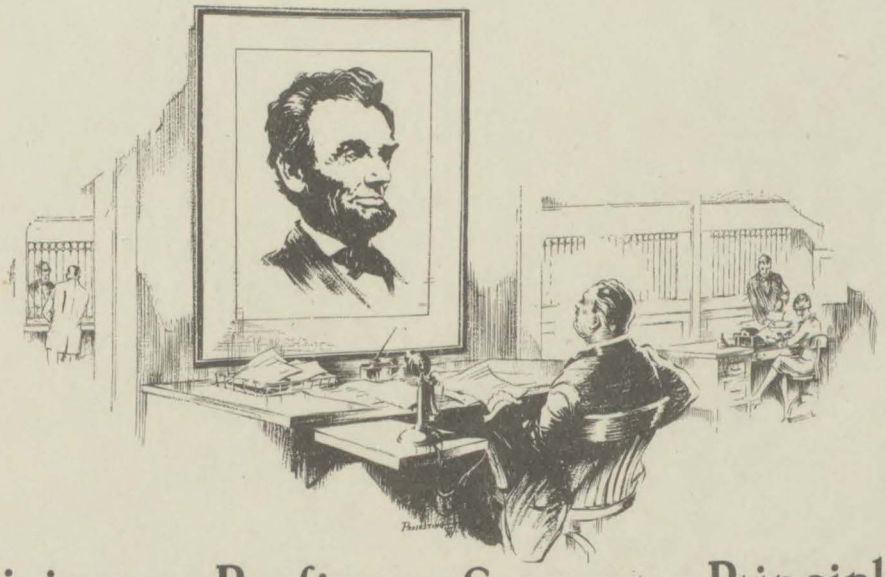
The deposits made good amounted to more than $26,000,000. The harshness of the deflation days, its losses and failures were lessened in Nebraska because the state bankers had the financial resourcefulness and the courage to see it through. With night all around them, they knew that day was just around the corner if they but stuck it out. Because they stuck it out Nebraska is in better financial condition today than it has ever been. Deposits that tumbled to $210,000,000 in 1921, have climbed back to $288,000,000 in 1926, a new high level.

Courage turned our financial night into day in Nebraska. Courage made possible the telling of this story. The state bankers in Nebraska have earned the praise of the people of Nebraska and of the nation. Theirs is a record that brings a sense of pride to us all.

It Is a Story No Other State Can Tell

Chapter 18, "A Story No Other State Can Tell," The Omaha Bee, August 25, 1926.

(Full page in Omaha Bee (Ex. 19 of Ex 13. P257 V1, Bof Ex.)



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.

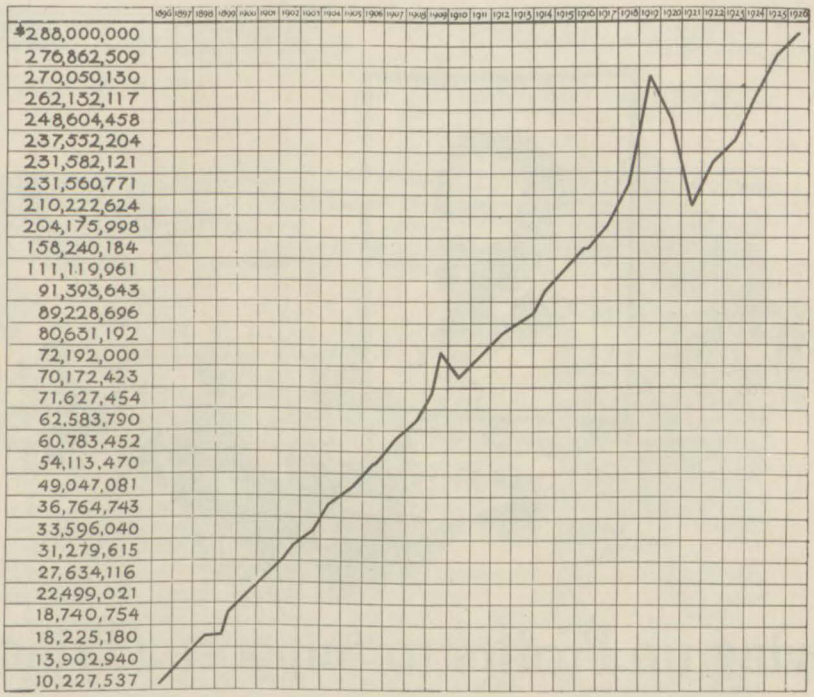
A STORY NO OTHER STATE CAN TELL

(Full page in Omaha Bee. Ex. 20 of Ex. 13, P 255 V 1 B of Ex.)
(Also published Fremont Tribune with names of banks attached Ex. 46, P 446, V 2, B of Ex.)

Chapter 19, "A Story No Other State Can Tell," The Omaha Bee, August 29, 1926.

EXHIBITS 20 AND 21 OF EXHIBIT 13

Pages 128 and 129



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.

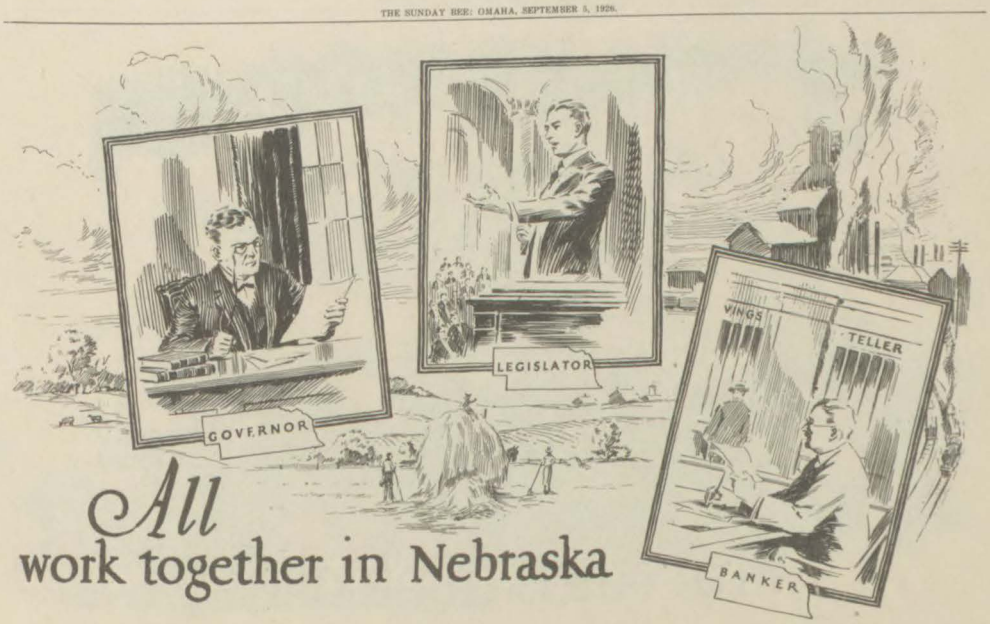
During this period, in which the largest number of state banks were forced to suspend, 1921-26, the state banking system, operating under the guarantee law, made good to the depositors of these failed state banks some $26,000,000.

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. 21 of Ex. 13, P. 259 Vol. B. of Ex.)

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



All work together in Nebraska

THE CHICAGO TRIBUNE recently sent to Nebraska one of its most capable investigators to learn the state of affairs here. Among other things that attracted his attention was the strength of the state banking system. Inquiry brought out the fact that this strength was tied up with the successful operation of the Nebraska Bank Guarantee Law. 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.

This Investigator, Mr. Arthur Evans, reported the result of his inquiries and in an article in The Chicago Tribune called attention to the fact that the success of the Nebraska Guarantee Law was due to the fact that its operations had been kept out of politics. Here is what he said:

"Nebraska kept the Guarantee Law out of politics. Analyzing the bank guarantee situation in Nebraska in contrast with other states leading bankers say: 'Unless properly administered, free from politics, the Guarantee Law is one of the worst that can be passed; but if properly operated and kept out of politics it is one of the best.'"

This is a splendid tribute to Nebraska bankers and above all to Nebraska governors and the members of Nebraska legislatures.

The law has been a process of evolution. As its operation brought out improvements that should be added, Nebraska governors have helped and Nebraska legislatures have passed the needed laws. Other improvements are required to make it better and stronger. The bankers of the state banking system have shown by their loyalty and by the strength of the state banks which they operate, that their recommendations should be heeded in any plans for the strengthening of the Guarantee Law. The law has meant much to Nebraska. It will mean more as the years go by

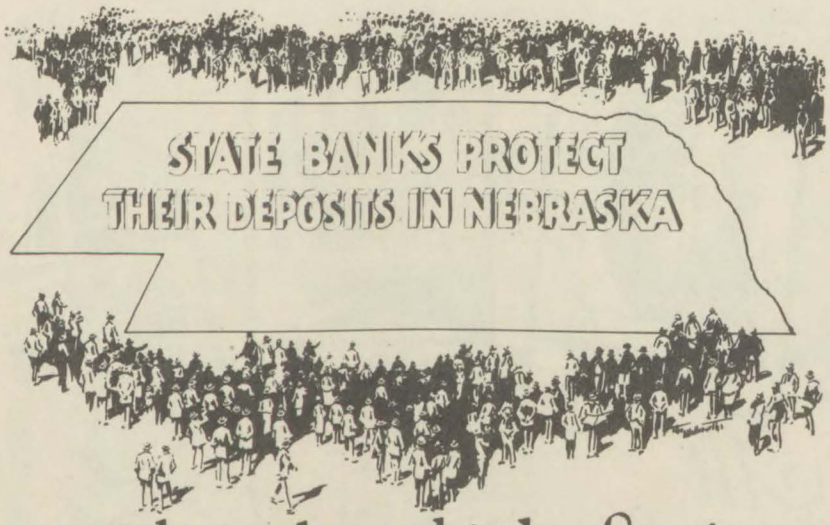
"It's a Story No Other State Can Tell"

(Full page in Omaha Bee to 22 of 12 Pabst B. of W.
(also published Fremont Tribune, with names of banks attached.
Ex. NT. P 447 Ø2 13 of W.)

Chapter IV. "A Story No Other State Can Tell," The Omaha Bee, Sept. 5, 1926.

EXHIBITS 22 AND 23 OF EXHIBIT 13

Pages 130 and 131



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.

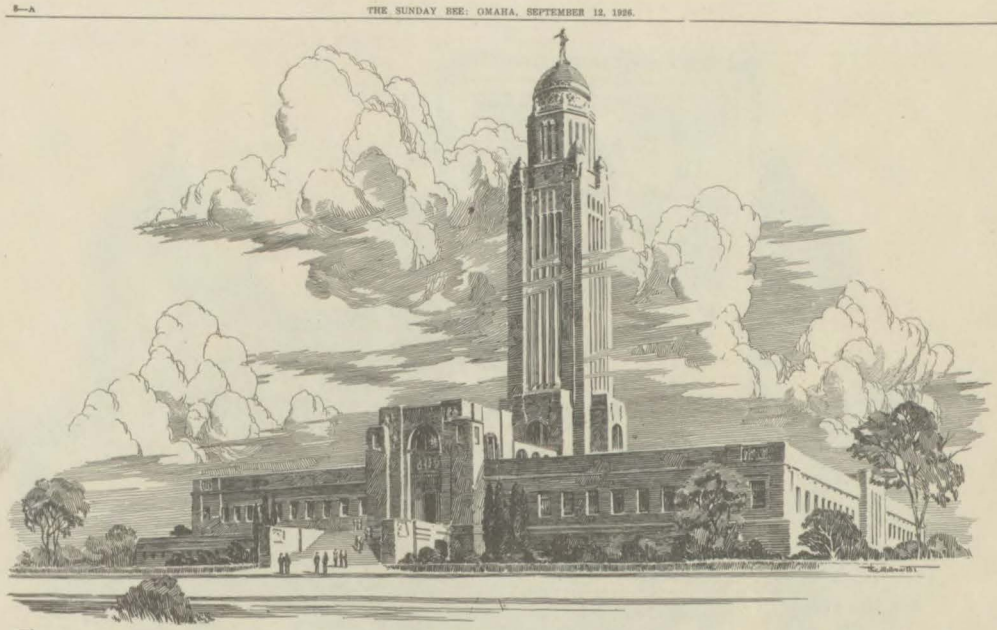
The state bankers in Nebraska realized that the law placed an obligation upon them and that when the word went out that state bankers in Nebraska were associated under the law to protect depositors there was but one thing to do—protect them. They have protected them. The weathering of the financial stress 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. 261-61 Bof Ex.)

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



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.

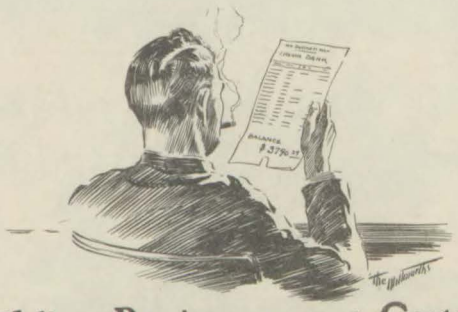
The strength of these banks has kept the working capital of the state intact. Their strength has made the state strong.

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"

(Full page in Omaha Bee Ex. 24 of Ex. 13, P. 26 of Ex. 13, Ex. 24 of Ex. 13, taken individually from Omaha Tribune, with some of Xerox otherwise. Pages 8 & 9 of Ex. 24 of Ex. 13)

EXHIBITS 24 AND 25 OF EXHIBIT 13



Building Business on a Certainty

WHEN the balance in the bank is always assuredly a balance, and not in danger of being wiped out through bank failure, business can build on a certainty. This is the guarantee that the state banks in Nebraska furnish to business. Individual businesses may fail because of poor management or for other causes, but the great structure of business moves ahead. In Nebraska individual banks may fail through poor management or for other causes but the great structure of the Nebraska state banking sytem moves ahead.

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.

This outstanding fact means that Nebraska offers a solid foundation for business. The business man, looking for a location, may find in this fact the determining factor, the one big thing that will turn his decision in favor of Nebraska.

Building business on a certainty, a certainty that funds are safe, a certainty that the faith placed in the state banks in Nebraska is a solid faith, is a fact that business men, both big and little, cannot lose sight of.

'It's a Story No Other State Can Tell"

(Full Page in Omaha Bee. Sept 13, 1926 p. 1, 2 & 9 V. 1, A. D. Borg Summit Sitting with names of banks attached. Ex 1/ 6/2 p. 441, A. D. Borg

It has been a Wonderful Story

IT has been a wonderful story,---this story that no other state can tell. Strength and courage and loyalty to principle stand out in high light.

The people of Nebraska have felt the thrill of it. People in other states have been eager for its details.

A bank guarantee law under which the state banks in Nebraska are associated together to protect deposits.

War, inflation, visions of fabulous prosperity.

The war ended, deflation, losses on every hand and tumbling values.

Failed banks, deposits withdrawn, black clouds on the financial horizon, tell-tale marks of a panic.

State bankers standing shoulder to shoulder, working loyally under the Guarantee Law. Deposits in failed state banks all made good, depositors paid dollar for dollar; state bankers making good these losses out of profits, gritting their teeth, but seeing it through. Depression, but no panic in Nebraska; the black clouds roll away and reveal the sun.

Nebraska on the march again, the working capital of her people safe and doing the work of the state.

Greater wealth than ever before, $500,000,000 in products of the farm; $800,000,000 in the products of industry. Insurance on the men and materials of the state, life, fire and casualty of $5,000,000,000 paid for by annual premiums of $45,000,000.

The state banking system, that weathered and conquered the storm, stronger than before the deflation. Deposits of $288,000,000, a new high peak in the history of the state banks in Nebraska.

Confidence of the people. Working together, building together---strong banks, a strong state---truly a wonderful story.

("Full page in Omaha Bee "A Story No Other State Can Tell"
Also published Fremont Tribune with memorial of banks attached.
Ex. No. P460 Vol B of Ex)

EXHIBITS 26 AND 27 OF EXHIBIT 13

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 Deweese - - - - - - Deweese, 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 Ell - - - - - - - - Ell, 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 County 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.
Maryland State Bank - - - - - - - Maryland, 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.
Pleasanton State Bank - - - - - - Pleasanton, 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 - - - - Staley, 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 - - - - - - - Scott, 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.
Winner State Bank - - - - - - - - Winner, 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.

(Bull page in Omaha Bee Ed. 27 of Ed. 12, P. 265-6, B. 27 Ed.)

Chap 26

(3) "THE STORY NO OTHER STATE CAN TELL"

The bankers adopted this as a slogan and carried it in their advertisements featuring the Guarantee Fund. They drew a contrast between the conditions in Nebraska and those in all other states that have no guarantee fund laws. They were correct in their statements that there was no comparison between Nebraska and any other state. They told the people why; and it was true. Nebraska does have a story no other state can tell in its Guarantee Fund Law and its operation. The bankers themselves in their publications included in this brief set it forth more fully and accurately than we can do.

(4) ADVERTISING ON PRINTED MATTER GENERALLY, AND ON BANK BUILDINGS

The testimony showed and was uncontradicted that all of the state banks of Nebraska were featuring on some portion or all of their stationery, certificates or checks, bank windows and exterior of banks the Depositors' Guarantee Law.

Ray W. Hammond testified that he had been for twenty-five years manager of the Hammond Printing Company, doing commercial business over Nebraska and Iowa and several surrounding states, employing fifty people, and had been doing bank printing for twenty-five years. He identified Exhibits L-1 to L-5 inclusive (p. 435, V. 2, B. of Ex.) as samples of some of the printing by his firm of checks and certificates of deposit which featured the Guarantee Fund.

His firm did business with approximately two to three hundred banks with Bank Guarantee Fund insignia in common use.

Mr. Chappell, manager of the Chappell Printing Company, commercial and bank printers of Fremont, testified (p. 417, V. 2, B. of Ex.) 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 (Q. 1877, p. 421, V. 2, B. of Ex.). 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 (p. 432, V. 2, B. of Ex.).

Mr. Chappell 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, letterheads and printing that was distributed to his customers had the Guarantee Fund cut on them (pp. 426-7, V. 2, B. of Ex.).

STIPULATION AS TO CHECKS, DRAFTS, ETC.: At page 583, volume 2, Bill of Exceptions, are 100 different forms of checks, certificates of deposit and deposit slips, featuring the Guarantee Fund, 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 them in their

business relations with the respective banks (Stipulation, p. 548, V. 2, B. of Ex.).

Referring to the photographs, Exhibits 27 to 33, Mr. Bliss 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, V. 2, B. of Ex.) were those used generally by the state banks of the state (p. 561, V. 2). 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 that existed in favor of state banks and not national banks (p. 561, V. 2, B. of Ex.), which addresses received publicity through the newspapers.

The foregoing mentioned publicity had a favorable and stimulating effect on state banks generally, more particularly in the country towns (p. 562, V. 2, B. of Ex.).

Facsimiles of the certificates, checks, deposit slips and letter-heads in universal use follow:

EXHIBITS 24-51 TO 24-100

Pages 141-146

Hartington, Nebr., _____ 191__ No. _____

Cedar County State Bank 76-1034

Pay to the order of _____ $ _____

_____ DOLLA

GUARANTY FUND BANK

INL

PAY TO THE ORDER OF _____

FOR _____

DEPOSITS OF THIS BANK ARE GUARANTEED BY THE STATE OF NEBRASKA

HARDY, NEBRASKA, _____

HARDY

PAY TO THE ORDER OF _____

FOR _____

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

FARMERS STATE BANK

DEPOSITED BY

HEMINGFORD, NEB. _____ 192__

DOLLARS | CENTS

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

JACKSON STATE BANK

DEPOSITED BY

THE

DEPOSITS IN THIS BANK ARE PROTECTED BY THE STATE GUARANTY LAW

payable to th

on return of

CERTIFICATE OF DEPOSIT

NEBRASKA STATE BANK

NOT SUBJECT TO CHECK

pay a

on ther

date

time

CERTIFICATE OF DEPOSIT

NOT SUBJECT TO CHECK.

AMER

DEPOSITORS IN THIS BANK ARE PROTECTED BY THE DEPOSITORS GUARANTEE FUND OF THE STATE OF NEBR A.

AMERICAN STATE BANK

DEPOSITS GUARANTEED

GOLDEN RULE

LONG PINE, NEBRASKA

pay

on the

after date with

time specified

PAY TO THE ORDER OF _____

THIS DEPOSIT IS PROTECTED BY THE DEPOSITORS ... FUND OF THE STA

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

THE LESI

LESHARA,

PAY TO THE ORDER OF _____

Samp

10

JACKSON, NEBR. _____ 192__

CREDITED SUBJECT TO FINAL PAYMENT

PLEASE LIST EACH CHECK SEPARATELY

	DOLLARS	CENTS	DOLLARS	CENTS
Currency.				
Gold.				
Silver.				
Checks.				
TOTAL				

SEE THAT ALL CHECKS AND DRAFTS ARE ENDORSED

Certificate of deposit forms, check forms and deposit slip forms in use by the State Banks of Nebraska. (Ex. 24-51 to 24-100, P. 583, V.2, B. of Ex.) See also 100 other sample forms at same page and at Page 432, V. 2, B. of Ex., H1-H9, Ex. 17, P.432, B. of Ex.

Pay to the order of _____

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

AMERICAN STATE BANK

DEPOSITS GUARANTEED

GOLDEN RULE

LONG PINE, NEBRASKA.

LONG PINE, N

AMER

PAY TO _____

DEPOSITS IN THIS BANK ARE PROT

FOR _____

DEPOSITORS IN THIS BANK ARE PROTECTED BY GUARANTEE FUND IN EXCESS OF FOUR PER CENT PER ANNUM

MA

PAY TO THE ORDER OF _____

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

KEARNEY, NEB.

FARMER

JAKE B GIBSON PRES
J W RANSOM V PRES
D P WETZEL, CASH
A. H. STEFFEN, ASST. CASHIER
PAUL ZUTZ, ASST. CASHIER

THE NEBRASKA STATE BANK

CAPITAL $100,000.00
SURPLUS $20,000.00

NORFOLK, NEBRASKA

(Ex. 41, P. 684, V. 3, B. of Ex.-- A letterhead in use; at the bottom are the printed words "All Deposits Guaranteed" in red letters one-fourth inch high and four inches long.)

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 1929

EXACTLY EXACTLY ONE THOUSAND DOLLARS

HAS DEPOSITED IN THIS BANK

DOLLARS $1000 00

PAYABLE TO THE ORDER OF

IN CURRENT FUNDS

ON THE RETURN OF THIS CERTIFICATE, PROPERLY ENDORSED

MONTHS AFTER DATE WITH INTEREST

AT PER CENT PER ANNUM NO INTEREST AFTER MATURITY

CERTIFICATE OF DEPOSIT
NOT SUBJECT TO CHECK

PRESIDENT CASHIER

27-57

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

The State Bank of Omaha No. 23559

OMAHA, NEB. OCT 1 1928

HAS DEPOSITED IN THIS BANK

PAYABLE TO $1100 AND 00 CTS

DOLLARS $1100 00

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.

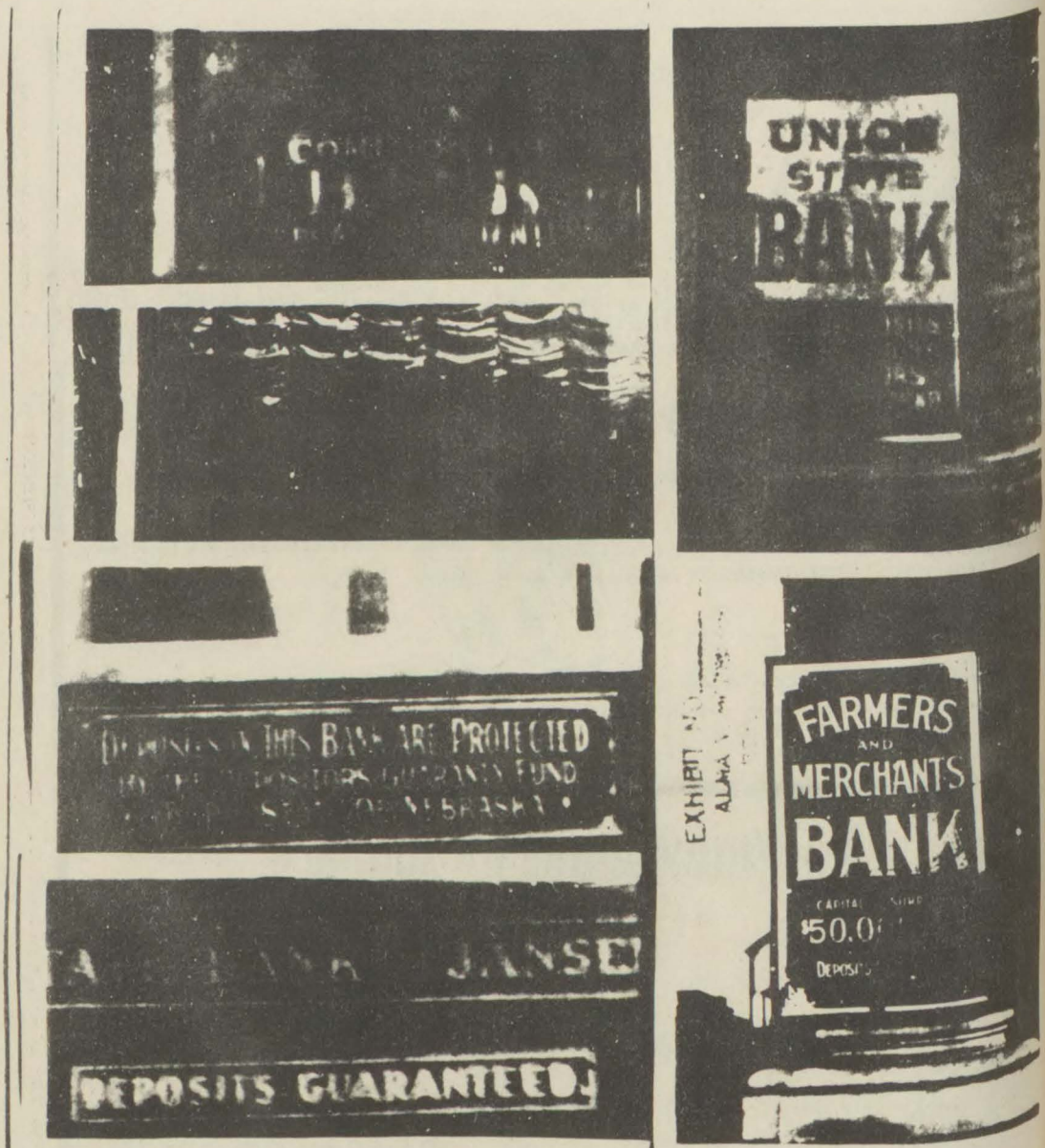
CERTIFICATE OF DEPOSIT
NON-NEGOTIABLE
NOT SUBJECT TO CHECK

PRESIDENT CASHIER

Certificate of Deposit forms continuously in use by State Bank of Omaha since its organization (Stipulation P. 225, V. 1, Exhibits 31 and 32, P. 269.)

EXHIBITS 27, 28, 29, 30, 31, 32 and 33

Pages 147-152



Character of advertising used by the State Banks on the windows and corners of their bank buildings. (Exhibits 27, 28, 29, 30, 21, 32 and 33, P. 586 and 587, V. 2, B. of Ex.)

(7) 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:

> "We re-affirm our strict adherence to the Guarantee Fund Law, under which no depositor in any 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."
>
> (Pp. 571-2, V. 2, B. of Ex.)

(8) OTHER ADVERTISING OF STATE BANK OF OMAHA.

In 1929, at the time of taking the deposition for this trial of President Schantz, of the State Bank of Omaha, the exterior and interior of the banking room of that bank in Omaha had large advertisements of the Guarantee Fund. This is Nebraska's largest state bank, organized and grown rich under the Guarantee Fund Law. 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 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."

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."

(Pp. 226, 227 and 228, V. 1, B. of Ex.)

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* (p. 228, V. 1, B. of Ex.).

We have attached to the Bill of Exceptions at page 269, Volume 1, the certificate of deposit form of the State Bank of Omaha, in use from the time of its organization up to the time of the trial. Facsimiles of these certificates appear in this brief. It will be noted that

both certificates produced are those issued to customers, and that the last one is dated October 1, 1928.

The State Bank of Omaha printed and circulated the questionnaire which was prepared by Mr. Stephens and which so effectively meets the arguments of the banks in this case that we quote it on the following page in full.

This questionnaire was largely circulated by other banks. 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; and printed for the Fremont State Bank 10,000 (p. 437, V. 2, B. of Ex.). 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 (p. 432, V. 2. B. of Ex.).

Mr. Schantz circulated the pamphlet "The Bank Guarantee Law Challenged and a Red-Hot Answer by a Nebraska Banker" (Exhibit 30, p. 268, V. 1, B. of Ex.). There were about 2,000 of these distributed 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" (p. 223, V. 1, B. of Ex.).

The questionnaire printed and circulated so largely by the First State Bank of Omaha, is reproduced here in facsimile:

Nebraska Guarantee Fund

PROTECTING DEPOSITS
IN STATE BANKS

HAMMOND PRINTING CO., FREMONT, NEBR.

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. 1, B. of Ex same exhibit published and circulated by other State Banks, with change of name and statement)

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.

EXHIBIT 29 OF EXHIBIT 13

Pages 157-162

(10) ADVERTISING OF THE FREMONT STATE BANK ESPECIALLY AND OF THE OTHER DODGE COUNTY BANKS—A FORCEFUL ILLUSTRATION.

The undisputed situation in Dodge county 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 there will be claims approximating $278,000 against the Guarantee Fund (p. 589, V. 2, B. of Ex.).

The arguments used in the advertising campaign carried on are persuasive; we feel that while it burdens 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, p. 399, V. 2, B. of Ex.). Mr. Hammond stated that he knew there is an average of four adult readers for each copy of the circulation (Q. 2040, p. 475, V. 2, B. of Ex.).

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 (p. 453, V. 2, B. of Ex.).

> "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 de-

positors 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."

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 (p. 457, V. 2, B. of Ex.):

"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."

In the same year (pp. 459-460, V. 2, B. of Ex.) 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 reported 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 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.)

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:

"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."

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 for Insuring Deposits in Banks" and signed by Fremont State Bank, by Dan V. Stephens, president (p. 471, V. 2, B. of Ex.). This appears as Exhibit "O".

Advertisements of similar kind and character, as shown by the record, continued for many years. On January 25, 1928, THE TRIBUNE carried a four-fifths page advertisement "More Light on the Bank Guarantee Law". This is signed by the Fremont State Bank. We have reproduced a facsimile of Exhibit "P", page 474 of Volume 2, Bill of Exceptions, in this brief. This page advertisement was during the year of the institution of this lawsuit.

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, pp. 441-50, V. 2, B. of Ex.). 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 Exhibit F, (p. 406) in 1926, entitled "The Bank Guarantee Law Challenged and a Red-Hot Answer by a Nebraska Banker" (pp. 400-1, V. 2, B. of Ex.). 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 (Qs. 1772-7, p. 402, V. 2, B. of Ex.).

We here attach 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. Following it are two letters by Dan V. Stephens, published in 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 follow:

More Light on the Bank Guaranty Law

We are in receipt of another letter regarding the Guaranty Law and this time from a patron of the Scribner State Bank. We take the liberty of printing this letter without names for the benefit of others who may be seeking the same information:

Scribner, Neb.
January 20, 1928.

Fremont, Nebraska

Dear Mr. Stephens:

I read your correspondence with a North Bend man, which you printed in the Fremont Tribune last week and was very thankful to you for giving us the information that you did. We hear so many rumors we hardly know who to listen to because so many people really don't know what they are talking about. Your letter to the North Bend party convinced us that many of the things we hear are not only false but they are very discouraging and injurious to the people and the community.

I am a stockholder in one of the banks in this community and I didn't know that 6 10 of 1% was all that the State banks had to pay for the losses that occur in banks that are closed. I was led to believe that the going banks would be compelled to pay the losses, no matter how great they were, but I see now from your letter that this is not true; that the banks only pay 6 10 of 1% or $6.00 on each thousand of deposits, which wouldn't hurt any bank very much. Your letter is very convincing on this point but I wish you would write me just what 6 10 of 1% means in dollars and cents to a bank, so that I can show it to others. But I sure am glad that my bank cannot be assessed any more than $6.00 a thousand for the losses that take place in other banks.

Yours very truly,

.....

Dear Mr. Blank:

In response to your kind favor of the 20th inst., I am glad to answer your question further as to what an assessment of 6/10 of 1% on a bank, in payment of losses in banks that are closed, actually means.

The state has the power to levy taxes upon a citizen for any and all purposes for the support of the state government and for the maintenance of the University and Normal Schools and for the State Institutions of various kinds. The sub-divisions of the state, such as county, school districts and townships, have the power to levy taxes for the support of local institutions such as schools, roads, etc., but, in every case, there is a limit in the amount of taxes that can be levied. This is a constitutional limit put in to prevent the confiscation of property through taxation.

Now the same rule holds in the matter of assessing state banks for the support of the Guarantee Fund. There is a limit above which the state cannot go under the law. Therefore state banks are protected against excessive assessments in exactly the same manner that real estate and personal property are protected against excessive assessments for the raising of other kinds of taxes.

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%. 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 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 banks 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, and in saying this I am not speaking of the justice of the Bank Guaranty tax and whether such a tax ought to be levied against the banks, but it is levied and depositors are paid in banks that are closed as a result of its being levied and tremendous benefits have resulted to the state at the expense of solvent banks like our own.

Those, who attempt to discredit the working of the law and thereby destroy the confidence of the people in their own banking institutions, are certainly unpatriotic and destructive in their criticisms and are not doing their share in a constructive way for the upbuilding of this state.

GUARANTEE FUND PAYS EIGHT MILLIONS

I have new facts concerning the letter that I wrote to the North Bend party, which will interest you.

Mr. Van E. Peterson, Secretary of the Guarantee Fund Commission, called at this bank in passing through the city the other day, and, while here, we asked him to read the letter, which we had printed in The Tribune on this subject. When he had finished reading it he was so pleased with the presentation of the facts; so pleased with the interpretation of the procedure of his Department in settling the losses of failed banks, that he immediately ordered 11,000 copies of this advertisement reprinted by The Tribune for the purpose of distributing them throughout the state.

He said that I not only had not over-stated the facts in regard to the situation but, if anything, I had understated them in one particular. Where I stated the Guarantee Fund had an income of about 2 Million a year he said it was over 2½ Million and, as a matter of fact, it was nearer 3 Million than 2½ Million but that he always used the amount 2½ Million in order to be conservative. This income is made of the $6.00 a thousand annual assessment that the state makes against the average deposits of all of the state banks of Nebraska, together with the sale of assets in what they call the old receiverships, i. e., the banks that were closed several years ago. These assets are continually being sold from time to time and as the sales take place the proceeds are turned into the Guarantee Fund. These sums, together with the assessments, make the 2½ Million Dollars that are annually available for the payment of losses.

After correcting me in this particular and increasing our income a half million dollars or more, he reminded me that I had overlooked another very important fact also, viz., that the Guarantee Fund would receive in the course of the year a total of 5½ Million Dollars from the sale of new assets, i. e., from the sale of the banks that they have been operating. These assets go into the Guarantee Fund and will be used to pay depositors between now and July 1st. In other words, the Guarantee Fund Commission will pay out this year from July to July the tremendous sum of 8 Million Dollars to the depositors of the banks that have been closed. This ought to put a little bit of heart into those who have been discouraged by the wild and unfortunate rumors that are constantly being put into circulation. Suppose there was no Guaranty Fund? Then there would be less money for depositors.

COULD PAY SOON

The people who owe these two banks, that have been closed at Scribner and North Bend, may possibly be able to pay in a very short time fully half of the face of their notes. At least they should be able to pay that amount by arranging with other banks for credit or by selling stuff that is ready for the market. If they do this, then the depositors in these two banks will be able to receive immediately in cash 50% of their deposits, or whatever per cent the bank is able to realize in its collections. The remaining portion of the notes, that are frozen and cannot be immediately paid, will be handled in the best manner possible by the Guarantee Fund Commission and collected as soon as they can possibly be collected. Whenever the Guarantee Fund Commission finds it cannot collect any more of these notes it will then proceed to close up the receiverships and pay the remaining depositors out of the State Guarantee Fund. This will take some time because there will no doubt be very much litigation.

MUST ALL WORK TOGETHER NOW

Everyone now is interested in seeing that the banks get the money that is due them, because it is out of the assets of these banks that the depositors must secure their first payments. When a depositor doesn't get his money now he knows that he doesn't get it because those, who owe the banks do not pay their notes. The Guarantee Fund is just like an endorser on a note. It pays only after the maker of the note has exhausted his security.

Every citizen should guard with the greatest jealousy his integrity, his solvency and his patriotism. It is only through the observance of these fundamental principles that our government and its institutions can survive.

If there is anything further that I can say to you on this subject, that will be helpful, I will be very glad to have you write me.

Yours very truly,

FREMONT STATE BANK

By DAN V. STEPHENS, President

Ex. P, Page 474,
V. 2, B. of Ex.,
Page from the
Fremont Evening
Tribune, January
25, 1928.

Bank Guarantee Law

New Method of Proceedure

We are in receipt of the following letter from a friend in North Bend:

"North Bend, Neb., Jan. 14, 1928.

Fremont State Bank,
Fremont, Neb.

Gentlemen:

Knowing that your bank is one of the strongest banks in Nebraska and knowing that you have the facts about the Bank Guaranty Law thoroughly in mind I am writing you for information.

You are aware of the fact that the First State Bank here was taken over by the Guarantee Fund Commission a few days ago and is now being operated by it.

All kinds of rumors are afloat here about the length of time it is going to take for the Commission to pay the depositors. Some say years and some say never. Some say the assets are worthless and others say the Guarantee Fund is busted; and still others say it isn't.

Won't you please tell me what is the status of our case and what you think of our future prospects in regard to this bad mess we are now in.

Your Friend."

Our reply to our North Bend correspondent is as follows:

DEAR FRIEND:

In response to your query about the status of the First State Bank at North Bend and its depositors, we are glad to be able to give you what appears to be a reasonably exact answer to your questions.

Under the new plan of the Guarantee Fund Commission, according to a book of instructions which it sent out to its agents, it proposes to proceed in the liquidation of banks it is now operating in about the following manner:

First, as fast as it can practically do so the Commission proposes to close the banks it is operating and sell the liquid assets at once and distribute the proceeds of the sale to the depositors. This will enable the depositors to receive a portion of their deposits at once. The amount they will receive will be dependent wholly upon the amount of liquid assets the bank owns. If it has say 50% of its notes in good bankable form and they are made by people who are able to pay them, it ought to be able to sell these notes for cash at their face value and this cash then, of course, would be available for the depositors at once. The remaining assets of the bank, as we understand it, are then to be sold as rapidly as possible for what they will bring and the proceeds, as rapidly as they are accumulated, will be distributed to the depositors. The experience of the Guarantee Fund Commission in the past in its liquidation of banks that it has handled, has been to return to the depositors out of the assets of the banks 67% of the total. This is a remarkable showing for the Commission and, if this average holds good in the case of the First State of North Bend, the Commission will be able to pay the depositors of that bank 67% of the total deposits out of sale of the bank's assets. The remaining 33% due the depositors will then be paid out of the Guarantee Fund as rapidly as this fund is accumulated.

Second, after the liquid assets are sold and a dividend immediately paid to the depositors, the Commission then proceeds to take up the remaining assets, which are classified as slow, doubtful and worthless. The process of disposing of these assets will be slower as the Commission makes every effort to collect the last dollar possible out of them for the depositors. It may take one year, two years or three years to close up these slow assets as no doubt much litigation will be necessary.

Third, after all the assets of the bank have been exhausted the balance remaining unpaid to the depositors then will be paid out of the Depositors' Guarantee Fund, which the state collects through assessments made upon the going banks of the state.

The above is a brief outline of just about the steps, as we understand it, the Commission will take in the settlement with depositors in the case of North Bend Bank or any bank they take over. It has already closed out a few banks along these lines of procedure and this is in harmony with the recent publication issued by the Guarantee Fund Commission to its agents.

Heretofore the Commission has proceeded under an entirely different method, which has been very expensive to the Guarantee Fund. This practice was to pay the depositors in full in spot cash as soon as their claims were approved. As soon as the depositors got their money they were satisfied. If the bank had been mismanaged, exploited and robbed by some one of its officers, no jury in the neighborhood could be found that would convict the guilty party. In one case the banker wrecked the bank and ran away. As soon as the three-quarters of a million had been paid out to depositors by the Guarantee Fund Commission the banker returned and had a great reception from the people, accompanied by a brass band, and then followed years of litigation in which the Guarantee Fund Commission tried to collect the notes the people owed the bank. They conspired with one another; lied about their obligations; said their names had been forged; and made every sort of a plea that could be made to escape payments and the juries were always in sympathy with them, and often so were the courts, and rendered judgments against the Guarantee Fund Commission at practically every opportunity. This result of this sort of procedure convinced the Guarantee Fund Commission that other steps were necessary in order to protect itself from all sorts of impositions and fraud.

Now the depositors will no longer be interested in having the note owners escape the payment of their notes in a bank that is being liquidated. Every depositor knows that if he doesn't get his money promptly it is because the people, who owe notes at the bank, do not pay them and they are not going to feel very good about it. They are going to encourage the payment of these notes. In short, the present policy, as soon as the people understand it, will guarantee the Commission their hearty support in working out the liquidation in as economic manner as possible.

Now as to your "prophets of evil," who say the Guarantee Fund is busted. They are mostly made up of two very small classes of men.

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. They are in no way responsible for the excessive number of banks that have been chartered, yet the State has assumed to compel them to pay an assessment of six-tenths of one per cent on their deposits, the proceeds of which assessments are to be used to pay the losses in failed banks.

The second class of critics are national bankers themselves, who feel that state bankers have a great advantage over them through the operation of the Guaranty of Deposits Law. They, of course, naturally oppose the law and prophesy its downfall because of their selfish interest. These short-sighted critics are foolish enough to think that the failure of the Guaranty Law would benefit them, which, of course, is a great delusion. Most criticisms of the Guaranty Law originate with these two classes.

Now what is the truth about the matter. The facts are that the Guarantee Fund Commission has paid to its depositors in failed banks in this state since its organization approximately $40,000,000. This sum has been paid from two sources, viz. the assets of the banks that have been liquidated, and from the Guarantee Fund. Had it not been for the Guarantee Fund Commission at least 33% of this sum of $40,000,000 would have been lost, and probably a great deal more.

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. Under no circumstances can the state collect from the going banks more than six-tenths of one per cent of their deposits in any one single year. This provision is placed in the law for the purpose of preventing the assessments of the banks being confiscatory. 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. This does not in any way consider the fairness of the assessment on the banks. The people themselves should pay for a portion of this insurance, but that's another question!

Under the Guaranty Law, an assessment of six-tenths of one per cent, which the banks have been paying for many years, will raise each year, together with the salvage from the failed banks, approximately Two Million Dollars. This Two Million Dollars is used by the Guarantee Fund Commission to pay the depositors of banks that they liquidate. No one but an ignorant person, who does not understand the facts, will spread the false statement that the Guarantee Fund is "busted." There is no way the Guarantee Fund can be "busted." Each year it will have two million dollars approximately with which to pay losses and that will run on indefinitely or until the law is repealed or amended and that cannot take place morally until its debts are paid. And a concern that has two million dollars a year income is not "busted."

It is true that there may be more losses some years than the Fund will pay but some day some time it will catch up with the procession of failures with all depositors paid in full. The depositor should be thankful that he is to ultimately get his money even though he may have to wait a time for it.

The worst enemy the people have in a case of this kind is themselves. Hundreds of them stand around on street corners peddling gossip that is nothing short of criminal libel, injuring their own institutions and making the situation more difficult by their doubtings and misgivings. It is a criminal offense to peddle a lie about the solvency of a bank and those, who do it, can be prosecuted for it and I sometimes think the law should be vigorously enforced for the protection of the people. There are hundreds of cases where the greatest possible damage has been done by idle rumors and, sooner or later, they are reflected in great losses to the very people who peddle them. No one should peddle rumors when he doesn't know anything about their truthfulness. People should understand that everything is being done to protect their interests that can be done and it does no good to get excited and run from one to another with pessimistic stories.

We are very glad indeed to be able to answer your letter in a way that ought to convey to you confidence in the situation. There are plenty of banks in Dodge County that are not going to be blown over by a passing breeze. It is a matter of great pride to us to be able to say publicly at every opportunity that the Fremont State Bank is so strong and solvent that it can pay its demand depositors in spot cash as fast as they can line up in front of our windows and not borrow a dollar with which to do it. We have always been able to do it and we expect to hold as nearly to that impregnable position as possible as long as we conduct a bank

We are taking the liberty of publishing your letter and our reply for the benefit of the people who are interested in this subject.

Yours very truly,

FREMONT STATE BANK

By DAN V. STEPHENS, President.

Ex. 50, P. 727, V. 3, B. of Ex.,
Page from Fremont Evening Tribune
Tuesday, January 17, 1928.

EXHIBIT P AND EXHIBIT 50

Pages 171-178

Ex. HD, P. 445, V. 8, B. of Ex., facsimile of series of Bee advertisements as reproduced in the Tribune, and all of which carried the names of the Dodge County Banks, as on this Exhibit.

NoMattress Banks in Nebraska

ONCE upon a time money and valuables were kept in strong boxes in the home. There was no other place to keep them. There were no banks as we know them today. With the coming of banks, money was placed on deposit and valuables of other kinds were put into safe deposit boxes.

In the early days of banking there was naturally a backwardness about placing money on deposit. As banks grew stronger and banking systems better organized this timorousness about entrusting money to banks practically disappeared.

In Nebraska there is no longer any need to keep the money in the mattress, in an old woolen sock or 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. A strict system of State bank examination is constantly improving conditions. Under the Nebraska Bank Guarantee Law, those who once were fearful of banks and kept their money hidden away in the mattress have brought it out and put it to work as part of the capital included in the general bank deposits, for use in the development of the state.

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.

"A STORY NO OTHER STATE CAN TELL"

Farmers State Bank, Dodge
Farmers State Bank, Scribner
Logan Valley Bank, Uehling
First State Bank, North Bend
Dodge State Bank
Hooper State Bank
Farmers State Bank, Nickerson
Fremont State Bank
Snyder State Bank
Scribner State Bank
Winslow State Bank
Farmers State Bank, Uehling

TOTAL DEPOSITS MORE THAN 5½ MILLIONS

Ex. N9, I. 449, V. 2, B. of Ex.
Facsimile of Fremont Evening Tribune publication of part of the series of advertisements as also carried in Omaha Bee. Tribune advertisements carried the names of all the Dodge County State Banks at the bottom, as on this Exhibit.

In Nebraska the guarantee works both ways!

STATE BANKER: "There's an interesting thing about this little transaction we have just closed. We are both protected. We have on deposit in this bank $5,000 of your money. Under the laws of the state of Nebraska, this state bank is joined with all other state banks in protecting that deposit, and in protecting all of the deposits in all of the state banks.

"I have just loaned you an additional $5,000 and you have given me security for it in the shape of collateral that I, as a banker, know is good. I know that this bank will get that loan back, no matter what happens to you. You know that your deposit is safe, no matter what may happen to this bank. It is a fair deal both ways."

BORROWER: "You know the biggest thing about that for both of us? We can both sleep at night."

Here we have another chapter that illustrates the confidence and the peace of mind that good banking has brought to Nebraska, to both bankers and depositors. It is worth more than a gold mine to Nebraska. The depositors and the borrowers from Nebraska state banks know that the guarantee works both ways.

"IS A STORY THAT NO OTHER STATE CAN TELL"

Snyder State Bank
Scribner State Bank
Farmers State Bank, Uehling
Winslow State Bank
Farmers State Bank, Dodge
Farmers State Bank, Scribner
Logan Valley Bank, Uehling
First State Bank, North Bend
Dodge State Bank
Hooper State Bank
Farmers State Bank, Nickerson
Fremont State Bank

TOTAL DEPOSITS MORE THAN 5½ MILLIONS

EXHIBIT N5 AND EXHIBIT N9

Pages 179-186

(13) "THE NEBRASKA BANK LAW CHALLENGED AND A RED-HOT ANSWER BY A NEBRASKA BANKER."

Another example of the publicity circulated is the pamphlet Exhibit 30 from Exhibit 13 (p. 268, V. 1, B. of Ex.), headed as above and printed in April, 1925, with the notation at the bottom that the pamphlet is with the "*Compliments of the State Bank of Omaha, A. L. Schantz, President. The Largest State Bank in Nebraska.*" The pamphlet was written by Dan V. Stephens, president of the Fremont State Bank, and answers an article by one R. B. Clark, of North Carolina, appearing in THE BANKERS ASSOCIATION JOURNAL.

The answer is so typical of the propaganda and representations of the state bankers as testified to and shown by the other exhibits herein that we reproduce it:

> "The assurance with which Mr. Clark speaks is interesting indeed: First, because of the flat-footed statements he makes that are unsupported by facts; and second, by the lack of logic contained in his magic 282 words. It was a terrible waste of telegraph tolls and did an injury to North Carolina and slandered Nebraska.
>
> "The bankers of Nebraska resent Mr. Clark's coupling this state's name in with a group of states, including Mississippi, that have been so miserably mismanaged and whose laws have been so loosely and carelessly drawn that their guarantee systems have fallen into disrepute.
>
> "The state bankers of Nebraska have been operating under a guarantee law since 1909, which includes the depression following the panic of 1907 and the recent

deflation period following the war. Certainly, this tremendous change in the economic condition of the country as represented by these two periods has placed upon the Guarantee Law of Nebraska the greatest strain that will probably ever be placed upon it again. Under the Nebraska Guarantee Law not a single depositor has ever lost a dollar deposited in a single state bank, and, instead of the Guarantee Fund being bankrupt, we do not owe a dollar practically speaking today and are capable of raising from the assessments that we can make under the law, annually, together with the salvage from the banks that have been closed and paid for, a sum of approximately two million dollars, or better.

"We will have to pay for a few more banks before we get through the final clean-up, but we have abundant resources, together with power to assess solvent banks, with which to pay these losses and certainly the banks that are paying them ought to be allowed to speak for themselves in refutation of Mr. Clark's wire to North Carolina that Nebraska's Guarantee Law is in the discard along with that of Oklahoma, Texas and Mississippi. Mr. Clark's statements cannot be permitted to pass after being countenanced and given space in the official organ of the American Bankers Association without this correction.

"FIRST, his statement, 'that a bank deposit guarantee law in any form is a snare and a delusion,' does not harmonize with the conditions in Nebraska where the good faith of the banks of this state with the depositors has been kept to the extent of paying them the last nickel that they had on deposit in the failed banks of this state throughout the entire history of the Guarantee Law. It has been no delusion and snare to them but on the contrary **the depositors in the banks of Mississippi, where the stupidity of the lawmakers and the bad advice of bankers has permitted the honor of the**

state to be dragged in the dirt through a repudiation of her honest debts to the people who have entrusted the banks with their money, have certainly been betrayed.

"SECOND, his statement, 'that it creates a sense of security in the minds of the unthinking and uninformed as false and impossible to be realized on ultimately,' is not in harmony with the experience of the depositors in Nebraska banks. We have not failed them. We have not violated their trust. We have maintained the honor and dignity of the banks of Nebraska by paying every man every nickel that he has deposited in their keeping throughout the last fifteen years.

"THIRD, his statement, 'that it tends to debauch one's right and duty to be thoughtful and discriminating,' is inconsistent because certainly a guarantee law, such as the state of Mississippi has, did not create confidence in the minds of the depositor and he could go on discriminating between the good and bad walks without either being in conflict with the practices of the state or with the theories advanced by Mr. Clark that all such laws are futile. But there is no more reason why a depositor in an institution created by the state and designated as a bank should be discriminating than in the case of a depositor in a postoffice savings bank. A bank created by the state should be an institution above reproach and one that the people can trust as a safe depository for their funds. Anything short of this is a disgrace to the state and to the bankers, as a class, who tolerate it.

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

"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.

"SIXTH, his statement, 'that Mississippi has had ten years' experience as a guarantee state and the fund is hopelessly in arrears,' is no doubt supported by the facts for the plain and simple reason that the **lawmakers, aided, and abetted by the bad advice of bankers, did not provide for an assessment large enough to cover the losses and did not create a statute that would permit of sane management of the banks.**

"SEVENTH, his statement, 'that many of the best banks in Mississippi are nationalizing on account of the guarantee law,' is a natural result of the **conduct of the bankers of Mississippi in failing to support their legislature in providing a law that was workable.** 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 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.**

"NINTH, his statement, 'that no well-informed, honest and intelligent mind can accept it in principle or practice,' is not supported by the facts, as will be admitted by Mr. Clark himself, as there are well-informed, honest and intelligent men who do believe in the insurance of deposits and who are successful and who have large banks.

"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 in-**

surance 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 principal 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.

"No article that I can recall has ever come to my notice that contains so many misstatements of facts and wrong conclusions as this message telegraphed to the North Carolina Bankers Association by Mr. Clark.

"Bankers generally are in the unenviable position of opposing all progress as exampled by their opposition to the Federal Reserve System when it was being debated in Congress and to all steps that have been taken proposing the safety of the depositors in our banks. They had the distinction of voting unanimously against the Federal Reserve System in the National Bankers Association preceding the passage of the act. They had the distinction here in Nebraska of unanimously opposing the passage of the Nebraska Guarantee Law before it was enacted. Bankers as a rule have to be clubbed by the people into every reform. It is a pathetic commentary on our profession and we ought to take note of it as a class and try to keep our minds open to the best methods for the conduct of this great business.

"A bank should be an institution beyond reproach, beyond question of doubt. It should be managed by men of high ideals, aims and purposes. A deposit placed in a bank should be so secure that no depositor need give it a thought. Such banks will draw all of the money owned by the people into their vaults increasing credit facilities everywhere. These conditions can be brought

about by bankers themselves, if, instead of forever opposing progress, they would get in step with the best ideas of the country and assist Legislatures in solving these complex problems that harass and distress the people.

"While all of the country was passing through the throes of bank failures, outside of Nebraska, with the people not only in a state of panic but in a state of bankruptcy, Nebraska passed through it all serenely and practically undisturbed so far as bank failures were concerned. We had failures, but the depositors were insured against loss so were able to 'carry on'. People did not withdraw their money from our banks. They had confidence in them with the result that Nebraska did not suffer and is not suffering from the common depression that has affected other rich agricultural states that have not had their banks so securely protected.

"I deplore the constant re-appearance of articles in bankers' journals wherein an attempt is made to discuss the guarantee laws of the various states, which articles are lacking in facts and conclusions that would justify their publication. I have never read a single one of these articles that directed the attention of the bankers to the reason for the various results had in the several states which have enacted guarantee laws.

"There are two principle causes for failure of a Bank Guarantee Law, or any other mutual insurance organization. The first cause is traceable to the improper method of organization and provision for adequate assessments. The second cause is traceable to the incompetency or dishonesty of the administration.

"We have never had a guarantee law in any state in this country that failed where the fundamental principles of mutual insurance were observed in the law. The breakdown in Oklahoma and the debts that have piled up in several of the other states, that have guar-

antee laws are wholly due to the fact that adequate assessments were not made to cover the losses. Oklahoma made an assessment of one-fifth of one per cent which was only one-fifth of the special assessment allowed under the Nebraska law. The results were natural and were to be expected by any intelligent banker. Many bankers aided and abetted in fixing the rate of assessment at one-fifth of one per cent, hoping that it would be a failure.

"Many bankers have stood in the way of strengthening the guarantee laws in the various states for the reason that they did not want them to succeed. They seem to think that it is better to drag their state down into the dirt and disgrace the banks than to pay a nominal insurance premium for the purpose of maintaining the honor, dignity and solvency of the people and the business institutions that deal with banks by guaranteeing to them the return of every dollar that is placed in their care for safe-keeping.

"I hope that the American Bankers Association Journal will give equal prominence to this contribution that it did to the 282 magic words of our friend, Mr. Clark from Mississippi. It is unfair to the bankers of America to permit such a contribution, that is so erroneous not only in facts but in conclusions, to pass without contradiction."

(D) Banks Allowed Reduction of One Per Cent on Interest Bearing Deposits on Account of Guarantee Fund Assessments

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, being approximately one-half of the gross assessments that they were paying to the Guarantee Fund, both general and special.

The facts were testified to by Mr. Bliss, 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.

The testimony in this connection was as follows (p. 519, V. 2, B. of Ex.):

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, 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 (Q. 2276, p. 525, V. 2, B. of Ex.); that notwithstanding the reduction of one per cent in the interest rate, the interest bearing deposits had increased $6,000,000.00.

Mr. Bliss, continuing, testified that in the sessions of the legislatures 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 (p. 532, V. 2, B. of Ex.); that he did not recall that anyone other than bankers appeared in favor of the reduction (p. 532, V. 2, B. of Ex.); that the bankers felt, and agitated to the committee in 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 (p. 535, V. 2, B. of Ex.).

Mr. Bliss stated that from his position as secretary of the Department of Trade and Commerce and as a banker and as a member of the State Banking Association and because of special other information, he was able to state generally what portion of the banks were paying interest at the rate of five per cent on interest bearing deposits prior to the effective date of the law (Q. 2322, p. 535, V. 2, B. of Ex.); that he informed himself as to those locations in the state in which the rate of interest immediately prior to the enactment of the law and that he was able to state the localities in which the banks were paying five per cent interest (Qs. 2325-6 p. 537, V. 2).

After the foregoing foundation, he was asked to state the localities in which the banks were paying five per cent interest immediately prior to the passage of this act.

He testified that on December 31, 1924, the records of the department showed that of the 928 banks then reporting, 646 reported that the highest rate of interest they were paying was five per cent on total interest bearing deposits of $110,520,583.00. Mr. Bliss stated that he was able to state the approximate amount of said deposits that were drawing five per cent on December 31, 1924 (pp. 634-5, V. 3, B. of Ex.) and that with the knowledge that he had gained in his various capacities hereinbefore recited and as head of the Department of Trade and Commerce he was able to state with reasonable accuracy what amount of interest bearing deposits there were on December 31, 1924, bearing a maximum rate of five per cent (Qs. 2713-4, p. 636, V. 3, B. of Ex.).

After all the foregoing foundation as to the witness' ability to testify on the matter the court sustained an objection thereto on the ground of lack of foundation (p. 636, V. 3, B. of Ex.).

The court erred in its ruling in this respect.

Whereupon the defendants and intervening defendant Stebbins offered to prove by the witness Bliss on the stand that more than two-thirds of the interest bearing deposits of the 646 banks referred to were on December 31, 1924, bearing interest at the rate of five per cent. An objection thereto was sustained. This action of the trial court was, we submit, clearly error and that said testimony and offer should be considered.

The evidence disclosed that the legislature met immediately following December 31, 1924, and reduced the interest rate from five per cent to four per cent and that there was no diminution of deposits; in fact, an increase of time deposits (p. 638, V. 3, B. of Ex.). More than two-thirds of $110,000,000.00 would be at least $74,000,000.00 of deposits, and by this reduction a saving to the banks of $750,000.00 interest was effected.

VII. RELIANCE ON REPRESENTATIONS AND ACTS

Of course it needs no argument that it was the intention of the bankers 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 (p. 768, V. 3); 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 (p. 771-2, V. 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 (p. 853, V. 3, B. of Ex.).

In attempting on the trial to excuse the running of the advertisements in THE OMAHA BEE, Mr. Stephens stated 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 advertisements published in THE 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 (see exhibits in this brief).

Referring to the advertising, personal solicitation, and signs, using the Guarantee Fund feature, and the protective feature, Mr. Woods said (p. 330, V. 2):

> 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."
>
> Q. 1427. "And has that been, in your opinion, one of the causes of this estimate of one hundred million dollars of deposits made during that period?"
>
> A. "That has been a contributing factor."
>
> Q. 1428. "What has been your observation in dealing with customers and your observation generally in the banking business as to whether de-

positors believed and relied upon the representation of the banks that their deposits were protected?"

A. "Why, almost—I don't know of any exceptions among depositors in state banks who did not feel that the Guarantee Fund was giving them protection, that is, up until a year ago."

VIII. DEPOSITS OF STATE TREASURER

Mr. Willis M. Stebbins, state treasurer and intervenor, testified (p. 689, V. 3, B. of Ex.) that he had been state treasurer since January, 1927; that he kept his checking accounts in Omaha and Lincoln, and that all his other deposits were on certificates of deposit, excepting one checking account in Beatrice; that as to such certificates of deposit as were existent prior to his coming into office, he had made renewals and taken out new certificates.

That he had state funds in receivership banks and in banks being operated by the Guarantee Fund Commission. He referred to a list showing forty-five receivership banks and funds therein of $104,561.00, and thirty-two Commission-operated banks and funds therein of $57,940.00 (pp. 702-3, V. 3, B. of Ex.).

That prior to Christmas time, 1928, he had made no requirement nor asked for any bond of any depository of state funds; that perhaps a dozen had given bonds because thereby they avoided paying Guarantee Fund assessment on funds thus secured (p. 692, V. 3, B. of Ex.); that about Christmas time, he changed his policy and asked for bonds; that this was the time this suit was filed; that he knew the banks were going to contest the matter through the courts, and would not pay the assessment ex-

cept as the court might order it paid, and in view of the situation he wanted to play safe in asking for bonds (Qs. 3032-3, p. 697, V. 3, B. of Ex.; Qs. 3039-40, p. 699, V. 3).

Mr. Stebbins testified that he renewed the certificates as treasurer on the faith of the Guarantee Fund protection (Q. 3052, p. 701, V. 3, B. of Ex.).

ARGUMENT

The Bank Guarantee Law was passed in 1909 after many years of agitation. It contained the following provisions among others:

Section 7983: (The business of banking is declared to be a *quasi-public business* and subject to regulation and control by the state.)

Section 7984: (Provides that only corporations can do a banking business and requires all corporations to comply with the terms of the act; eliminates private banks.)

Section 8025: (Requires that each bank file verified statements showing its average daily deposits for the preceding six months.)

Section 8026: *(Regular assessment)* * * * * On the first day of July and January of each year the department shall levy on all banks then engaged in banking under this article, which have completed their initial payments of not less than one per cent of their average daily deposits as provided in this section, one-twentieth of one per cent of the average daily deposits as shown by the statements required to be made and filed next preceding such assessments. (Section also provides for preliminary payment by new banks and banks acquiring the business and resources of national banks.)

Section 8028: *Depletion of Depositors' Guarantee Fund—Special Assessment.* If the Depositors' Guarantee Fund shall, from any cause, be depleted or reduced to any amount less than one per cent of the average daily deposits as shown by the last semi-annual assessment statement thereof filed, the Department of Trade and Commerce shall levy a special

assessment against the capital stock of the corporations governed by the provisions of this article, to cover such deficiency, which special assessment shall be based on the said average daily deposits, and, when required for the purpose of immediate payment to depositors, said special assessment may be for any amount not exceeding one per cent of said average daily deposits for the year 1923 and thereafter not exceeding one-half of one per cent of the said average daily deposits in any one year. *(As originally enacted special assessment was 1 per cent. Changed by amendment in 1923 to one-half of 1 per cent.)*

Section 8033: *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, upon proof thereof, they shall be paid immediately out of the available cash in the hands of the receiver. * * * *. (Section numbers are those of the 1922 Compiled Statutes of Nebraska.)

We desire to point out at the outset that the law provides that banking is quasi-public in nature; that *the liability of the banks for assessments is for the protection of depositors in state banks; and that claims of depositors were even given priority over the claims of other creditors.*

THE HOLSTEIN CASE

After the passage of the law an action was promptly brought by the First State Bank of Holstein and a large number of other banks, as plaintiffs, on their own behalf and on behalf of other banks, against A. C. Shallenberger, as governor, to enjoin the enforcement of the law. The lower federal court on demurrer granted an injunction (172 Fed. 999). The case was then appealed to the United States Supreme Court and by that court reversed and the law sustained (219 U. S. 114; 55 L. Ed. 117). The memorandum opinion of the United States Supreme Court stated that the case was governed by the decision in a similar case from Oklahoma entitled *Noble State Bank* v. *C. N. Haskell, as Governor, et al.*, 219 U. S. 104, 55 L. Ed. 112.

The petition filed in the State Bank of Holstein case raised, directly or in principle, practically every question that has been raised in this Abie State Bank case. Inasmuch as the case was determined on demurrer all questions well-pleaded were determined against the banks. The petition therefore is important and a copy thereof is attached to the Bill of Exceptions as Exhibit 49 at page 724, V. 3. Some of the plaintiff banks in that case were private banks. The banks pleaded vested property rights, that their charters were binding contracts and not subject to change, that under the new banking act it was made unlawful to be in the banking business after the effective date of said banking act except by compliance with its terms and receipt of a charter and certificate thereunder, *involving the payment of Guarantee Fund assessments*, regulation, etc.; that the act violated several enumerated provisions of the Constitution of the

State of Nebraska and the Constitution of the United States, *that there was no reservation in the Statutes or Constitution of the State of Nebraska reserving to the State of Nebraska the right to cancel, modify, change or terminate charters theretofore granted to said banks;* that by the terms of said act the Guarantee Fund assessed against the capital stock of each of said banks became a general fund appropriated for the payment of depositors in failed and insolvent banks, thereby making solvent banks contribute out of their assets sums of money to be used, not for the payment of their own liabilities but for the payment of the liabilities of other banks; that the maximum authorized assessments against the state banks would exceed in amount the sum of $766,-440.15; that the purpose and scope of the said act was to extend the credit of the state of Nebraska to individual banks; that to require private bankers to transfer their business to a corporation or in lieu thereof to discontinue their business or to have their affairs wound up by a receiver would result in loss and damage to each and singular of said banks and deprive them of their property; *and that by virtue of said act the claims of depositors took precedence over the claims of other creditors* and thereby impaired the obligations of the contract rights of other persons who might have extended credit, all in violation of state and federal constitutions.

Not only was this 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 HOLMES DECISION

In the Noble State Bank case which also decided the Nebraska case, Justice Holmes, speaking for the United States Supreme Court said:

> "It may be said in a general way that the police power extends to all the great public needs. *Canfield* v. *United States*, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business.
>
> "If, then, the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it.
>
> "Even the primary object of the required assessment is not a private benefit, as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand.
>
> "The priority of claim given to depositors is incidental to the same object, and is justified in the same way the power to restrict liberty by fixing a minimum of capital required of those who would

engage in banking is not denied. The power to restrict investment to securities regarded as relatively safe seems equally plain. It has been held, we do not doubt rightly, that inspections may be required and the cost thrown on the bank. See *Charlotte, C. & A. R. Co.* v. *Gibbes,* 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255. 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 that the means have no reasonable relation to the end. *Bundling* v. *Chicago,* 177 U. S. 183, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633.

"So far is that from being the case that the device 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. *Danby Bank* v. *State Treasurer,* 39 Vt. 92; *People* v. *Walker,* 17 N. Y. 502. Recent cases going not less far are *Lemieux* v. *Young,* 211 U. S. 489, 496, 53 L. ed. 295, 300, 29 Sup. Ct. Rep. 174; *Kidd, D. & P. Co.* v. *Musselman Grocer Co,* 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606.

"It is asked whether the state could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 355, 52 L. ed. 828, 831, 28 Sup. Ct. Rep. 529, 14 A. & E. Ann. Cas. 560. It will serve as a datum on this side, that, in our opinion, the statute before us is well within the

state's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line. *Citizens' L. Asso.* v. *Topeka,* 20 Wall. 655, 22 L. ed. 455; *Lowell* v. *Boston,* 11 Mass. 454, 15 Am. Rep. 39.

"The question that we have decided is not much helped by propounding the further one, whether the right to engage in banking is or can be made a franchise. But as the latter question has some bearing on the former, and as it will have to be considered in the following cases, if not here, we will dispose of it now. It is not answered by citing authorities for the existence of the right at common law. There are many things that a man might do at common law that the states may forbid. He might embezzle until a statute cut down his liberty. 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 safeguards, this court certainly cannot say that it is wrong. *State ex rel. Goodsill* v. *Woodmansee,* 1 N. D. 246, 11 L. R. A. 420, 46 N. W. 970; *Brady* v. *Matters,* 125 Iowa 158, 106 Am. St. Rep. 291, 100 N. W. 358; *Weed* v. *Bergh,* 141 Wis. 569, 25 L. R. A. (N. S.) 1217, 124 N. W. 664; *Com.* v. *Vrooman,* 164 Pa. 306, 30 Atl. 217; *Myers* v. *Irwin,* 2 Serg. & R. 368; *Myers* v. *Manhattan Bank,* 20 Ohio 283, 302; *Atty. Gen.* v. *Utica Ins. Co.,* 2 Johns. Ch. 371, 377"

In this case a petition for rehearing was filed. In denying this motion Justice Holmes said further:

> "Leave to file an application for rehearing is asked in this case. We see no reason to grant it, but, as the judgment delivered seems to have conveyed a wrong impression of the opinion of the court in some details, we add a few words to what was said when the case was decided.
>
> "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. *Clark* v. *Nash,* 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 A. & E. Ann. Cas. 1171; *Strikley* v. *Highland Boy Gold Min. Co.,* 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 A. & E. Ann. Cas. 1174, were cited to establish, not that property might be taken for a private use, but that, among the public uses for which it might be taken, were some which, if looked at only in their immediate aspect, according to the proximate effect of the taking, might seem to be private. This case, in our opinion, is of that sort. 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."

THE OPINION OF THE TRIAL COURT

In considering the evidence as to the condition and earnings of the banks it is unfortunate to note that the trial court considered the earnings from the standpoint of the banks making "compensatory returns" *prior* to paying Guarantee Fund assessments.

The earnings of the banks as hereinbefore and hereinafter set forth are not controverted. The trial court found that they must be compensatory to the banks before paying Guarantee Fund assessments, and that any less earnings amounted to confiscation, if the assessments were required to be paid. Said the court:

> "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 necessary 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 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."

In the matter of the relative rights of the banks and their stockholders, the court's viewpoint as above quoted

is to be contrasted with this further statement in the opinion:

> "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. Present day depositors cannot possibly receive any benefit therefrom."

The court then enjoined the collection of special assessments until the same could be paid by the state banks and at the same time said banks receive in addition compensatory returns on their investment.

THE REAL PLAINTIFFS

The real plaintiffs in this case are several city state banks that have highly prospered by the maximum use of the law and claims of depositors having vested under it. These banks now seek to divest themselves of their obligations with respect thereto. They selected a small cross-roads bank to put forward as the plaintiff in the case. Aside from the fact that some other banks have on solicitation contributed to the expense there is nothing in this case to indicate their interest. While the Abie bank as plaintiff recites that it brings the case on behalf of other banks, it does not plead any authority to do so. They are not named as plaintiffs and are actually not in court.

The depositors for whose protection this law was enacted are not asking for its judicial nullification; they do not appear in this case; no representative of the public or official is asking for such action in the public interest.

These banks alone assert the "urgent public need". The officials of the state who represent the public so far as the public is represented are opposing any nullification.

CONDITION OF THE BANKS—PAST AND PRESENT

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 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.*

Plaintiff's evidence was almost wholly confined to proving gross receipts, gross disbursements, net receipts, and amount of Guarantee Fund payments. The plaintiff elected to treat the assessments paid by banks as a charge wholly without compensatory benefits to disclaim responsibility for accrued liabilities; and arbitrarily to treat the amount of the assessment as total loss.

The evidence discloses that while the banks through the entire operative period of the Guarantee Fund Law have made large and adequate gross and net earnings and that while at this time and in the years immediately preceding such earnings have been amply sufficient to pay all regular operating expenses and regular operating losses and still pay a fair *to extravagant* return on the investment of the banks as a whole, these have been affected by special losses previously originating which have been and are being charged off against earnings.

It is these losses and not the Guarantee Fund assessments that largely affect the net earnings. *The Guarantee Fund in fact has been the active, effective means of reducing these losses with consequent increase of earnings and effective benefit to the banks.*

Losses (or "charge-offs")

The evidence clearly and undisputedly discloses that during the years of high prices (around 1920) there was a large amount of loans made which during the eight years since have developed into large losses from time to time and that the development of these losses has been for various reasons as testified, prolonged over a number of years. The banks through these years have been absorbing such losses from earnings and charging them off against earnings, supplemented in some instances by contributions of stockholders. It is these excessive losses thus originating that have been such a heavy charge against the otherwise handsome earnings of the existing banks and have largely caused the failure of such banks as have failed. *The present depositors with existing claims of course have no relation to or responsibility for these losses or the cause thereof.*

In considering the large earnings of the banks and the application to be made thereof, we should not lose sight of the fact that the stockholders of these banks laid the basis for their losses years ago and that these losses are their liability and their responsibility. When they are permitted to charge off these losses in these latter days as against earnings, it is in effect for their account, and

these recent claimant depositors should not be prejudiced even by such charge-offs, much less by distributing compensatory earnings to stockholders rather than to Guarantee Fund assessments.

National banks, deprived of the Guarantee Fund, suffered greater losses and less earnings, as herein appears.

The Abie State Bank

The evidence with respect to this bank is set out. It is the only bank in the state of Nebraska with reference to which any detailed facts were shown. It is in a town of two hundred. Banks in nearby towns curtail its territory. It paid 10 per cent to 15 per cent dividends for a period, added largely to its surplus paid a dividend as late as 1926, and passed $500 to surplus in that year. The facts disclosed as to it do not show that its payment of around $1,000 a year to the Guarantee Fund out of annual gross earnings of $12,000 affected its condition adversely. There is not only no evidence of, but no inference can arise. Such evidence as does appear is of notes to relatives and equities in real estate which indicate unsound banking. Every presumption is in favor of the law and even as to this Abie State Bank there is a failure of proof on the part of plaintiff.

We again repeat that as to no individual bank in Nebraska was there any showing that the Guarantee Fund assessments were a material burden, or any showing of any other necessary facts to establish its invalidity as to any bank.

Operating Expenses, Gross Income and Net Earnings of Nebraska State Banks for Twelve Months, July 1, 1925, to June 30, 1926, and the Eighteen Months, January 1, 1927, to June 30, 1928.

The banks of the state made reports of their operating expenses, gross income and net earnings for the foregoing periods to the Department of Trade and Commerce covering a total of two and one-half years, which confirm the statements herein made. These were compiled in tabular form, placed in evidence, and are in this brief as exhibits, with copious references thereto. The one for the 18 months ending June 30, 1928, furnished late available data. It is divided as between the banks organized before the Guarantee Law became effective and those organized since. It shows that all the banks of the state, with a few exceptions, made net earnings for the period before charging off bad debts; that the banks as a whole charged off from their earnings for the period for account of bad debts an amount equivalent to 10 per cent of their earnings and that after charging off this sum and paying the Guarantee Fund assessments, 570 of the 726 banks still had net earnings, and, as the trial court said, some of them had "extravagant profits". The only reason that the remaining banks largely lacked net earnings was because they charged off against their net earnings the huge total of $851,433 of bad debts.

In spite of 10 per cent out of net earnings applied to bad debts on the average for all the banks of the state, said banks still earned at the rate of 7.12 per cent per annum on their capital and 5.17 per cent on both capital and surplus. Four-fifths of the banks (570) could thus

have declared dividends from a small amount to "extravagant" figures. As the trial court put it "A fourth were receiving rather extravagant profits."

During this 18 months' period the banks paid an average of 10.06 cents out of each dollar of gross earnings to the Guarantee Fund.

The compilation of operating expenses and income for the preceding year ending June 30, 1926, appears in this brief. No figures for the six months' period intervening were available. This statement classifies the banks as between those with a capital of $10,000 to $20,000, $20,000 to $40,000, $40,000 to $75,000, $75,000 to $100,000, and $100,000, to $200,000, but omitted a more profitable bank, the First State Bank of Omaha, because it was the only one in its class and if included would have been a manifest publication of its individual operations. This analysis was compiled two years previous to the trial. The gross earnings were shown by classes based on *both capital and surplus* and ranged from 4.47 per cent for those of the lower capital classifications to 11.45 per cent for those of the higher capital classifications, the average for all banks being 5.924 per cent, or within a fraction of 6 per cent, *on both capital and surplus* after paying all Guarantee Fund assessments. Out of each dollar of earnings the banks paid an average of 9.08 cents to the Guarantee Fund. It is interesting to note that the banks with the highest capital classification paid the highest percentage to the Guarantee Fund, to-wit, 11.21 cents on the dollar. Thus those with the largest percentage of earnings paid the highest per cent of such earnings to the Guarantee Fund. The average income per bank and the average expense per bank in each classification bore approximately the same ratio to capital.

Comparison with National Banks

This contrast is striking. In recent years the percentage of earnings of national banks in Nebraska has been less than one-half that of the state banks and the percentage of losses almost double that of the state banks. During the period of the Guarantee Fund Law, national banks decreased one-fourth in number while state banks made a net increase from 1909 to 1928.

Fifty national banks have been converted into state banks since the Guarantee Fund Law became operative in 1911, two of them within the year ending June 30, 1927. Conversions of national banks into state banks within the last three years have included well-known bankers and presidents of the Nebraska State Bankers Association. Since 1911 only nine state banks have been converted into national banks. During the period from 1922 to 1928 inclusive, the national banks of Nebraska earned annually an average of 2.74 per cent, 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. The annual "charge-offs" of the national banks were nearly twice that of the state banks.

Growth of Banks from 1911 to 1928

During this period of the operation of the Guarantee Fund Law, the depositors of the state banks increased three and one-half times. With slight interruptions there was a continuous increase through the 18 years. Surplus and undivided profits were doubled.

Present Condition of the Banks

The condition of existing banks has improved consistently and steadily since 1923. As one witness 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.

The consolidated statement of the banks as of December 31, 1928 shows that they had in cash and readily convertible bonds and securities equivalent to cash, approximately 33 1/3 per cent of their deposits. Their earnings have been hereinbefore set forth.

Other Real Estate

The item "Other Real Estate" shown in the reports is not a desirable asset. But neither the records of the Department nor the Examiners' reports show that this real estate is carried at an excessive value. This property was acquired in the process of liquidating debts. It has no relation to the Guarantee Fund nor to the adjudicated claims of depositors. 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.

Conversations With Reference to Capital Impairment

There is some controversy as to what was said or might have been said by Mr. Bliss in the past with respect to capital impairment of then existing banks and probability of future failures. Mr. Bliss explained this by a statement that all the banks to which he referred had been subsequently cleaned up or disposed of in some way.

Examiners' Estimates of Probable Losses in Going Banks

Long after plaintiff had rested its case it asked the Banking Department to run up on an adding machine from examiners' reports made from time to time through fifteen months the total amounts noted by the examiners as losses and probable losses and the amount of loans and discounts in all the banks six months past due and demand paper carried twelve months or more. This was done. It appeared that none of these examinations had been made at the same time. Mr. Bliss testified that as each report came in it was taken up with the individual bank to have it meet the criticisms. It appeared that the strong banks were criticised in this respect as well as the weak. From the very nature of the banking business there is a percentage of loans and discounts continuously developing some loss under normal operation. The total of these items in all the banks was only 1.82 per cent of the total loans and investments of the banks. The examiner's estimate was in many instances disputed and there were adjustments from time to time. On the whole this evidence was entitled to little probitive force on the issues. The trial court in its opinion did not refer to them.

BENEFITS TO THE BANKS OF THE GUARANTEE FUND

While the Guarantee Fund is by its terms primarily for the protection of the depositors in state banks large and continuous specific benefits to the banks were disclosed by the evidence aside from the general benefits.

Stabilizing Influence

It was testified to and not controverted that the use the existing banks had made of the Guarantee Fund had enabled a large number of them to survive; all of them to gradually absorb their developing losses, and all of them to largely increase their earnings. Numerous banks were failing through the period. As a witness stated, it was common knowledge that a going bank right across the street from a bank that failed did not suffer. The Guarantee Fund gave the depositors and customers confidence that they would be taken care of. How this confidence was instilled and this reliance created by the banks hereinbefore appears. One witness stated that a number of men whom he knew who now had sound state banks, had said to him that they could not have stood heavy withdrawals on account of frozen paper except for the Guarantee Fund. What all this meant to the city banks now complaining of the Guarantee Fund can hardly be estimated. These city banks were correspondents for the country banks. Increased failures among them visited material consequences on the Omaha, Lincoln, Fremont and other depository state banks in the cities.

Benefit of Use of Public Funds Without Giving Bonds

For approximately twenty years every state bank in Nebraska has had the use of public funds without giving

bonds. This right was claimed and exercised under the Guarantee Fund Law. There is now on deposit in failed state banks two million dollars of public funds. The bonding company rate for bonds varies from .5 per cent to one per cent, depending on the capital of the bank. The average bond rate is .71 per cent, or $7.10 a thousand as against the maximum rate of general and special assessments of $6.00 a thousand. 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.

If the banks can pay $7.10 on each thousand dollars of deposits to bonding companies for bonds insuring public deposits, on all of which deposits they are also paying interest, why cannot they pay $6.00 a thousand 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?

Increased Deposits

The evidence was that the Guarantee Fund alone definitely increased the deposits of state banks over $100,000,000. Such banks make an annual average of 2 per

cent to 4 per cent on their deposits, thus causing increase in annual earnings of $2,000,000 to $4,000,000 because of the drawing power of the Guarantee Fund Law.

THE AMOUNT AND EFFECT OF ASSESSMENTS

The benefit of the Guarantee Fund has been referred to. The law as originally enacted and held valid by the supreme court provided for regular assessments of one-tenth of 1 per cent and special assessments of 1 per cent on average deposits. The bankers caused the legislature of 1923 to cut the maximum special assessments in half.

No maximum levy was made any year that the 1 per cent special was in force. None was levied for seven years. A tabular statement of the amount levied each year and the average deposits is included in this brief. For the eighteen years the law has been in force the average of all general and special assessments for the entire period has been $400 per year on $100,000 of deposits. Under the existing law since 1923 it can not and has not exceeded $600 per $100,000 of deposits. No witness testified that any bank had failed or became embarrassed whose condition was caused or materially contributed to by the Guarantee Fund assessments. The amount of previous payments to the Guarantee Fund of the banks that failed compared with their total liabilities was so small as to negative its contribution to their condition. In any consideration of the assessments paid the financial and general benefits should be taken has an offsetting item.

Dan V. Stephens, principal witness for plaintiff, could not name a single bank that was in receivership or in

the hands of the Guarantee Fund Commission whose condition was caused by the Guarantee Fund assessments. Other witnesses testified that the Guarantee Fund assessments have not been a contributing factor to the failure of any banks.

Amount Against Each Bank of the Special Assessment in Issue

How relatively small this is compared to the earnings of each bank is shown by the exhibit offered in evidence by the intervenors whereon is shown the amount against each of the 553 banks whose names are attached to plaintiff's petition.

The "8 Per Cent on Capital" Deception

The banks have adopted as a slogan that they pay 8 per cent on their capital to the Guarantee Fund. The unquestioned deduction from the evidence is that they pay nothing on their capital to the Guarantee Fund. Their 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.* Salaries and wages take 25 per cent of their gross income, equivalent to 25 per cent of the amount of their capital, but the banks do not thereby pay 25 per cent on their capital as salaries and wages. The annual gross income of the banks is approximately the same amount as the capital. The banks pay from nine cents to ten cents out of each dollar of gross earnings to the Guarantee Fund.

Liquidating and Nationalizing

It was urged by the plaintiff that the special assessments will cause the state banks to liquidate or nationalize. There is no evidence to that effect; it is purely a speculative allegation not susceptible of proof even if relevant. The same threat was made at the time of the enactment of the law. Mr. Schantz testified that he was unable to name any strong state bank that would nationalize or that would liquidate if the assessments were continued. It appears from the evidence that there are large advantages incident to operating a state instead of a national bank.

PRESENT AND FUTURE BENEFIT OF THE GUARANTEE FUND

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 will not be of continuing benefit is 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 does not add a dollar to the maximum $600 per $100,000 of deposits annual payment of assessments by the banks.

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 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 can not 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.

No one is asking the banks to pay all the deficit at any one time and under the law they could not be compelled to do so. The money raised by these assessments in a few years will pay a large number of claims of the depositors; but even should it be conceded for the purpose of argument that the maximum assessments possible under the law will never pay in full the claims of depositors, still that is not a reason for denying to these depositors the protection to which they are entitled to that extent of the assessments provided by law.

The Guarantee Fund has an income of nearly $2,000,000 a year. The banks are in the best condition they have been in eight years, notwithstanding constant payment of assessments. The liability of the Fund in any one year may be more than the income, but the next year the income may exceed the losses, so that looking at the operation of the Guarantee Fund not as of any one year or even as of any five years but for a longer period of years it cannot be said to be insolvent. Under the Guarantee Fund Law it is almost inevitable that the depositor in a failed bank will eventually get his money, although for various reasons there may be delay.

The benefit of the payment of the assessments to the depositors who are most vitally interested, to-wit, those with matured claims, is apparent.

No witness testified or could testify but that the benefit to the depositing public and the public generally and even to the banks would be greater by continuance of the law than the impaired confidence of the public by nullification of valid existing claims.

There was evidence that the announcement by the banks that they intended to start this suit and the filing of the suit impaired confidence in the Guarantee Fund Law. The state treasurer testified that shortly thereafter in order to play safe he changed his policy and asked for bonds because he then knew the banks were going to contest the payment of all assessments and would not pay unless so ordered. Other public officials began to demand bonds when the prospective suit was announced in September, 1928.

Mr. Schantz argued in March, 1928, that whether the Guarantee Fund Law should be continued was a legislative question, and his published statement with respect thereto is quoted herein. Both retiring Governor Adam McMullen and Governor Arthur J. Weaver covered the matter in their messages which are herein referred to.

CONDITION OF THE GUARANTEE FUND

The Guarantee Fund Commission Act was drafted by the bankers, passed in 1923, and provided for the selection of the Commission from a list furnished by the bankers and the selection of the secretary by the Commission.

Assets and Liabilities

It appeared that on December 31, 1928, the gross book value of the assets in the hands of the Commission was $39,511,701.78. The liability in receivership banks was fixed. The expected liability in Commission-operated banks and the probable realization on their assets was a matter of estimate. There was some conflict of evidence as to the estimates but an analysis of all the evidence fairly discloses that the net liability was at that time twelve million dollars. The amount of the deficit primarily concerns the depositors in the failed banks for it affects the time and manner in which they will receive their money. The regular and special assessments approximate $1,600,000 per annum and would pay this liability in about seven and one-half years.

The Department never has paid any interest on any claims against the Guarantee Fund except in a few cases where claims were litigated and went to the supreme

court. The probable effect of accruing interest on deferring liquidating liabilities therefore is more theoretical than actual. It is within the power of the legislature to provide that no assessments hereafter levied for the Guarantee Fund shall be applied other than on the principal of deposits .

There will be more failures which will create additional claims against the Guarantee Fund but the Guarantee Fund Law contemplates such a contingency and the legislature in considering the Fund and its continuance will properly take this matter into consideration. Any discussion of that matter here would be purely speculative.

Mr. Stephens' Opinion

In January, 1928, the year this suit was filed, Mr. Stephens published an open letter which is in evidence and covered in an exhibit reproduced herein, wherein among other things he stated:

> "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. Under no circumstances can the state collect from the going banks more than six-tenths of one per cent of their deposits in any one single year. This provision is placed in the law for the purpose of preventing the assessments of the banks being confiscatory. Any good bank, making fair profit, can pay this assessment without injury to itself and can do so to the great benefit of the state. This does not in any way consider the fairness of the assessment

on the banks. The people themselves should pay for a portion of this insurance, but that's another question.

"Under the Guarantee Law, an assessment of six-tenths of one per cent, which the banks have been paying for many years, will raise each year, together with the salvage from the failed banks, approximately two million dollars. This two million dollars is used by the Guarantee Fund Commission to pay the depositors of banks that they liquidate. No one but an ignorant person, who does not understand the facts, will spread the false statement that the Guarantee Fund is 'busted'. There is no way the Guarantee Fund can be 'busted'. Each year it will have two million dollars approximately with which to pay losses, and that will run on indefinitely or until the law is repealed or amended and that cannot take place morally until its debts are paid. And a concern that has two million dollars a year income is not 'busted'.

"It is true that there may be more losses some years than the Fund will pay, but some day, some time, it will catch up with the procession of failures with all depositors paid in full. The depositor should be thankful that he is to ultimately get his money even though he may have to wait a time for it."

The Guarantee Fund Has a Demonstrated Value to the Depositors in the Banks

Under this heading are covered the total liabilities of failed banks since June 30, 1914, the contributions of the banks thereto, and other data. It appears that in this period there have accrued $75,000,000 of liabilities in

failed banks of which $50,000,000 has already been liquidated, 70 per cent having been paid from the assets of the failed banks and 30 per cent from the Guarantee Fund. The Guarantee Fund assessments thus far have paid a little less than 22 per cent of the liabilities of the failed banks. On a reasonable estimate of the realization to be made on the remaining assets when the entire liability has been satisfied the banks will have contributed from 30 per cent to 33 1/3 per cent.

Acts of Waiver and Estoppel

Aside from the estoppel arising through acceptance of the Act itself and operations thereunder, which as a matter of law effects a complete estoppel, the banks made representations and agreements, especially during the last five years, which largely induced the deposits upon which the existing claims are founded and which enabled these existing banks to retain the deposits of these claimant depositors in the state banking system, to the large profit and stability of their own institutions.

These representations were by word of mouth, extensive and large newspaper advertising circulars, conspicuous signs, recitals on certificates of deposit and other printed matter, and otherwise as herein set forth in detail, all assuring and convincing the depositor of the effective protection of the Depositors' Guarantee Fund; that the banks constituted a giant mutual insurance company; that their liability had been adjudicated by the supreme court of the United States; that they and each of them would pay their assessments until depositors in failed banks had been paid; that the receiving and other banks were back of the deposits and would pay the

Guarantee Fund assessments until the same were paid, and other representations similar in principle. The convincing character and effect can only be adequately comprehended by a perusal of the typical actual illustrations herein produced. The personal representations made to depositors were illustrated by the testimony of Rev. J. C. Peterson, a minister of Dannebrog, with a claim of $5,460 in a receivership bank, on which he will realize less than $1,000 if the banks escape payment of the assessments. Mr. Peterson testified graphically as to the representations made to him which induced his deposit and renewals and his reliance thereon and the advertising and printed matter of the banks which he read. It appearing that a large number of witnesses were already present in court and others on the way who would testify to similar experiences, a stipulation was entered into following Mr. Peterson's testimony that there were other witnesses in court and on the way, depositors in different banks throughout the state with adjudicated and unpaid claims; that they would testify to representations to them similar to those testified to by Mr. Peterson and as to their reliance thereon and that said witnesses were in the same situation as the witness Peterson with reference to their respective deposits in banks.

Representations and Advertising of Banks

It stands out clearly from the evidence and is common knowledge that the Bank Deposit Guarantee Law is the ladder on which the state banks have climbed. The banks have not sullenly submitted to this law during the twenty years since its enactment; they have glorified and magnified its advantages in and out of season. By window signs,

pamphlets, statements on checks, deposit slips and certificates of deposit and by word of mouth, the state banks over and over again for now nearly a quarter of a century have told the public that the deposits in their banks were guaranteed by the assessments which the law required them to pay into the Guarantee Fund and that they would make such payment. A large number of the state banks and in particular those which took the lead in bringing this suit, have put on from time to time gigantic advertising programs calculated to induce the public to place deposits with them on the ground that the Guarantee Fund protected all deposits in their banks. The plaintiff bank in this suit and other banks ran a series of such advertisements in THE OMAHA BEE. Each of these advertisements is a masterpiece worthy of framing. The drawing were made by skillful artists and the reading matter prepared by a literary genius. We ask a careful examination of them at pages 240 to 265, Volume 1, Bill of Exceptions.

Omaha Bee Advertising

About two years prior to the trial, THE OMAHA BEE had carried a series of 26 full page advertisements featuring the Guarantee Fund Law. These were inserted and paid for by 336 state banks of Nebraska whose names appeared attached to the last advertisement. These were published just prior to the time that these claimant depositors matured their claims. Each is pertinently illustrated. All are masterpieces of art and carried the weight, prestige and influence of the state bankers. This series of advertisements is reproduced in this brief in

facsimile on a small scale from the page size of the originals. They form a connected series and are each entitled "The Story No Other State Can Tell".

"The Story No Other State Can Tell"

The bankers adopted this as a slogan and carried it in their advertisements featuring the Guarantee Fund and represented that there was no comparison to be drawn between Nebraska's Guarantee Fund Law and its operation and that of any other state.

Advertising on Printed Matter Generally and on Bank Buildings

The universal printing of the Guarantee Fund protective feature on all or some portion of the banks printed matter was testified to and undisputed. Certificates of deposit that the depositors received carried this Guarantee Fund assurance thereon. Facsimiles thereof appear in this brief.

Resolution at a Meeting of State Bankers

Representatives of bankers from each county at a meeting in Omaha on August 12, 1926 passed and gave publicity to this resolution: "We re-affirm our adherence to the Guarantee Fund Law under which no depositor 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."

Other Advertising, State Bank of Omaha

Nebraska's largest state bank was organized and has become prosperous by reason of the use of the Guarantee Fund Law. Since October, 1915, it has occupied the business corner at Sixteenth and Harney Streets, Omaha Continuously from that time down until and during the trial of this case there were upon the Sixteenth Street door, the Harney Street door, and over each of the cages in the bank and over the depositors' counters, large signs stating that "Deposits in this bank are protected by the Guarantee Fund of the state of Nebraska." Over the customers' counters, six in number, are signs fifteen inches high and twenty inches wide: *"Safety First.* The Deposits in this Bank Are Protected by the Depositors' Guarantee Fund of the State of Nebraska." This bank recited the protection of the Guarantee Fund on its certificates of deposit. Facsimiles of these certificates which are typical of the certificates issued by the other banks are included in this brief. One of them is a form which was issued in October, 1928. This bank circulated in 1925, 1926 and 1927, more than 8,000 copies of the questionnaire which was then being circulated by the banks in praise of the Guarantee Fund. It is reproduced in this brief.

Advertising of Fremont State Bank Especially and of the Other Dodge County Banks—a Forceful Illustration

The undisputed situation in Dodge county is a forceful illustration of the points of this brief; we believe it is typical of communities throughout the state. In 1926 all of the fourteen state banks of Dodge county united under the leadership of the Fremont State Bank

of Fremont in an advertising campaign, continuing the advertising theretofore carried on separately. They joined in THE OMAHA BEE advertising, publishing in THE FREMONT TRIBUNE ten reproductions in facsimile of those advertisements. At the bottom of each page were the names of the fourteen Dodge county banks followed by the words "Total Deposits More Than 5½ Million Dollars". They then and thereafter made further representations with reference to the Guarantee Fund to induce deposits. The Fremont State Bank carried on an extensive advertising campaign on its own account and prepared and widely circulated the questionnaire referred to. These banks promised and agreed that they with others were a giant insurance company and that every dollar of deposits in these banks was protected from loss. Mr. Stephens testified that it was the intention that these representations should be relied upon by the depositing public and that he had never retracted his statements or changed them. In fact, in 1928, two full page advertisements were carried by the Fremont State Bank in THE FREMONT TRIBUNE along the same lines. They are reproduced herein.

Subsequent to 1926 four of these state banks failed, and the net losses of the depositors amount to more than two hundred eighty thousand dollars for which they look to the Guarantee Fund. It is stipulated in this case in lieu of letting depositors from these banks testify that they were also in the same position as the witness Peterson and that the same representations had been made to them. We have thus the inducing representations and statements of reliance thereon both by the stipulation and by the other evidence above referred to.

The Nebraska Bank Law Challenged and a Red-Hot Answer by a Nebraska Banker

The pamphlet under this title, written by Mr. Stephens was circulated by his bank and by the State Bank of Omaha with the endorsement on the front page "Compliments of the State Bank of Omaha, A. L. Schantz, President. The Largest State Bank in Nebraska." It is typical of the propaganda and of the representations and inducements to depositors made by state bankers. It also is set forth in full herein.

Banks Allowed Reduction of One Per Cent on Interest Bearing Deposits on Account of Guarantee Fund Assessments

The Legislature of 1925 at the solicitation of the banks and to assist them to pay the Guarantee Fund assessments amended the banking act by reducing the maximum rate of interest that might be paid by any bank on time deposits from 5 per cent to 4 per cent, and thereby added to the earnings of the banks of the state more than $750,000, being approximately one-half of the gross assessments they were paying to the Guarantee Fund, both general and special. The facts in that regard are hereinbefore set forth.

RELIANCE ON REPRESENTATIONS AND ACTS

We will make but a brief reference thereto at this point. The making of all the acts and representations of course is the best evidence of their purpose and the intention that they should be relied upon. The other evidence herein discloses that they were relied upon. There is specific evidence under this heading of the purpose and intent and of the reliance thereon.

DEPOSITS OF THE STATE TREASURER

Mr. Willis M. Stebbins, state treasurer of Nebraska and intervenor and appellant, has been treasurer since January, 1927. He kept his checking accounts in Omaha and Lincoln and all his other deposits throughout the state, with one exception on certificates of deposit. Those certificates existing before he went into office had been renewed by him. He had $104,561 of state money on deposit in banks in receivership and $57,940 in Commission-operated banks. He testified that he renewed his certificates as treasurer without requiring a bond on the faith of the Guarantee Fund but that about last Christmas time he changed his policy and asked for bonds from the going banks upon learning that the banks were going to contest the assessment in the courts.

PROPOSITION OF LAW NO. I

No law will be held unconstitutional by the judiciary if under any construction of the law or any possible state of facts its operation will not violate the provisions of the constitution.

This principle is so well established it is probably unnecessary to cite authorities on the point. We merely wish to call the court's attention to the fact that all presumptions are in favor of the constitutionality of the law and each section thereof. In stating this principle, the language of the courts vary, but the substance is the same. We quote from a few decisions and Ruling Case Law.

> "An act of the Legislature will not be declared unconstitutional unless in plain violation of some

provision of the constitution." *State* v. *Nolan,* 71 Neb. 136, 98 N. W. 657; *Brady* v. *Wattern,* (Iowa) 100 N. W. 358.

"A statute will not be declared unconstitutional unless clearly so, *or so beyond a reasonable doubt." In re Southern Wisconsin Power Co.,* (Wis) 122 N. W. 801; *Wicken* v. *City of Alexandria,* (S. D.) 122 N. W. 597.

"A statute will not be declared unconstitutional unless no doubt exists on the question." *McGuire* v. *Chicago, B. & Q. R. Co.* (Iowa), 108 N. W. 902, 33 L. R. A. (N. S.) 706; *Attorney General* v. *State Board of Assessors* (Mich.), 106 N. W. 698;*Bonnett* v. *Vallier* (Wis.), 116 N. W. 885, 17 L. R. A. (N. S.) 486.

"Judicial Presumption of Facts:—The constitutionality of a law is not to be determined on a question of fact to be ascertained by the court. If under any possible state of facts an act would be constitutional, the courts are bound to presume that such facts exist." (Sec. 112, p. 112, 6 Ruling Case Law.)

PROPOSITION OF LAW NO. II

The Depositors' Guarantee Fund was not enacted primarily for the welfare of the banks but specifically for the protection of depositors in state banks.

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 paramount purpose."

Chapman, Commission v. *Guaranty State Bank,* 257 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. *Hirmig,* 204 N. W. (S. D.) 903.

Farmers State Bank v. *Smith,* 209 N. W. (S. D.) 359.

We especially call attention to the fact that Section One of the Nebraska Act of 1909 made this fundamental declaration:

"Sec. 1. *(Banking a quasi-public business.) The* business of banking * * * * is hereby declared to be a *quasi-public business* and subject to regulation and control by the state."

and that Section 44 of the Act provided:

"Sec. 44. *(Guaranty fund assessments.)* For the purpose of providing a guaranty 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, to be levied, kept, collected and applied as hereinafter provided."

The primary purpose of the 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 objective, though such benefits have followed. This theory of the law has not only been directly affirmed by the Supreme Court of the United States in the Holstein case hereinafter referred to but our own 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 plaintiffs 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 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 aptly 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 of no 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.) 359, the plaintiff sought to restrain the collection of a guarantee fund assessment claiming 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 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 commission. The supreme court of Oklahoma, in the case of *State* v. *Norman,* 86 Okl. 36, 206 P. 522, speaks of the guarantee fund as a legal entity capable of being a creditor of an insolvent bank. But, if it

may be either a creditor or debtor, it is so in a representative capacity only, as the agent through which the rights of the several principals may be the more readily preserved and enforced."

PROPOSITION OF LAW NO. III

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.

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 supreme court of this state and by the supreme courts of the other states of the union. We will not encumber the record by further quotations from the cases.

PROPOSITION OF LAW NO. IV

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.

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, before hand, 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."

Probably the banks will contend strenuously now that the end Justice Holmes anticipated the law would accomplish has not been realized. To anyone, however, who has observed 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. Probably the best example and the most closely analogous situation is that in our sister state of Iowa. There is no reason to believe but that the bank failures in Nebraska would have been many times more disastrous than they were 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 safeguards, this court certainly cannot say that it is wrong"

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 *Wertz* v. *Nestos,* 200 N. W. 528 applied the rule laid down by Justice Holmes to the conditions which existed in North Dakota. In the opinion the court said:

> "The important and necessary place of banking in the present economic and industrial system, its close relation to the general welfare and the public interest, and the universal calamity that would result with its general collapse, have led the Legislature to enact statutes of a regulatory and restrictive nature, but deemed necessary in the interest of public safety. 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. *Woodmansee,* 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):

"'But as a matter of precedent and authority, the legislative perogative, 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 Legislatures of other states have frequently exercised the right of supreme control over the business.'

"The public interest involved is sufficient to warrant the state in exercising control over the banking business, and as said by our court in the case cited, to prohibit the business of banking entirely, except upon such conditions as it may prescribe. See, also, *Weed* v. *Bergh*, 141 Wis. 569, 124 N. W. 664, 25 L. R. A. (N. S.) 1217; *Schaake* v. *Dolley*, 85 Kan. 598, 118 P. 80, 37 L. R. A. (N. S.) 877. Our state has established a thorough-going system of regulation and inspection of banks, charging the cost thereof against the banks, and in 1917, the Legislature enacted chapter 126 of the Session Laws of 1917, known as the Depositors' Guaranty Fund Law. The direct purpose of this law is to insure the repayment of deposits made by individuals in banks chartered and from time to time inspected and examined by state authority. The constitutionality of a law of this general character was sustained, under the police powers, by the Supreme Court of the United States in *Noble State Bank* v. *Haskell*, 219 U. S. 104, 31 S. Ct. 186, 55 L. Ed. 112, 32 L. R. A. 1062, Ann. Cas. 1912 A. 487, and has been many times upheld in the state courts."

The supreme court of South Dakota also applied the rule in the case of *First State Bank of Claremont* v. *Smith*. 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 NO. V.

Where a Guarantee Fund Law is enacted, adjudicated to be constitutional and a valid exercise of the police power, remains in operation for twenty years while the banks and the public receive benefits from it and depositors acquire matured 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 the courts can not exercise, the question being one exclusively for the legislature.

There appears to be two bank cases on the question as to whether or not changing conditions can render an

act invalid when at the time of its enactment it was not objectionable. Manifestly all of the cases involving rates of public utilities and like issues have no relevancy here. In this case which involves the exercise of the police power the only question which the court has jurisdiction to determine is whether or not the enactment of the law was a proper exercise of the police power. That having been decided affirmatively, all other questions as to the effect of the law at any given time is not material on the question of constitutionality.

This question was fully discussed in the case of *First State Bank of Claremont* v. *Smith, et al.*, 207 N. W. (S. D.) 467. In that case the Guarantee Fund of South Dakota was attacked as unconstitutional as in violation of the same provisions of the state and federal constitution which are assigned in this case. One of the main grounds of the attack on the constitutionality was *that conditions had changed since the passage of the law so as to make it at the time of the filing of the suit, unconstitutional.*

The decision of the South Dakota court is squarely in point on the constitutional question and also on the question of estoppel. It was there contended that the total amount which could be assessed and levied against the banks under the laws was "far short of the amount required *to pay interest* on the deposits (of the failed banks) and for that reason the said depositors' Guarantee Fund is so helplessly insolvent that it is now of no use or benefit

to the solvent banks and affords no protection to the depositors therein." The case was submitted on demurrer to the petition. In its opinion the court said:

> "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 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 become unreasonable and confiscatory and therefore 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 therefor 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 repeal 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.*"

Altered or changed conditions may make a law more or less burdensome, but that does not give a corporation any more right to challenge the constitutionality of that

law than when first enacted. The wisdom or benefit arising from the operation of a law is a question for the legislature and not for the courts. The Bank Guarantee Fund Law is not, but even if it were "inconsiderate, illogical or shocking", the judiciary of the state would be powerless to interfere.

State v. *Reeves,* 184 N. W. (S. D.) 993.

The courts appear to be practically unanimous on this proposition. Foremost among the cases on the subject is the case of *Noble State Bank* v. *Haskell,* 219 U. S. 104, in which it was said by Justice Holmes on motion for rehearing:

> "Leave to file an application for rehearing is asked in this case. We see no reason to grant it, but, as the judgment delivered seems to have conveyed a wrong impression of the opinion of the court in some details, we add a few words to what was said when the case was decided.
>
> *"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."*

This is the general rule:

> "Debatable questions as to the wisdom, necessity or propriety of a law and the objections to it, where its constitutionality has been determined, should be addressed to the legislature and not to the courts."
>
> *State* v. *Crosby Bros. Merc. Co.,* 103 Kan. 733, 176 Pac. 371.

"If enforcement of statute results in evil consequences, the remedy is with legislature."

Illinois Western Elev. Co. v. *Town of Cicero,* 282 Ill. 468, 118 N. E. 735.

"The Legislature has power to regulate the executive franchise and, if its regulation is unreasonable, that is a defect for the legislature and not for the courts to remedy."

North v. *Cadey,* 194 Mich. 561, 161 N. W. 377.

"Where a statute is clear and explicit, and its provisions are susceptible of but one interpretation, its consequences, if evil, can only be avoided by a change of the law itself, to be effected by legislative and not judicial action."

Boseley v. *Mattingly* (14 B. Mon) 53 Ky. 73.

"A statute cannot be ignored by the courts because leading, in its application, to absurd, incongruous or even mischievous results."

Point Roberts Fishing Co. v. *George and Barker Co.,* 68 Pac. 438, 28 Wash. 200.

6 R. C. L., Sec. 105, page 106:

"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 pro-*

priety. The courts are not the guardians of the right of the people against oppressive legislation which does not violate the provisions of the constitution. The protection against such burdensome laws is by an appeal to the justice and patriotism of the people themselves or of their legislative representatives.' "

6 R. C. L., Sec. 230, page 242:

"230. GROUNDS FOR JUDICIAL INTERFERENCE.—In order to sustain legislation under the police power the courts must be able to see that its operation tends in some degree to prevent some offense or evil, or to preserve public health, morals, safety and welfare; and if a statute discloses no such purpose and has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts so to adjudge, and thereby give effect to the constitution. Only in cases, however, where the legislature exceeds its powers, will the courts interfere or set up their judgment against that of the legislature. *Where an act has a real and substantial relation to the police power, then no matter how unreasonable nor how unwise the measure itself may be, it is not for the judicial tribunals to avoid or vacate it upon constitutional grounds; nor will the courts assume to determine whether the measures are wise, or the best that might have been adopted; or whether such laws are invalid on the grounds of inexpediency, or whether they bear any real or substantial relation to the public welfare.*

"But the question is not whether the law is appressive or unjust, but whether it contravenes any provision of the state or Federal Constitution. If it does not, the court has no right to declare the

act void, for the Constitution alone is the boundary of the power of the legislature. * * * It is not sufficient to say that the law violates the spirit of the Constitution.

"Courts are not at liberty to declare a statute unconstitutional because in their opinion it is opposed to the fundamental principles of republican government, unless those principles are placed beyond legislative encroachment by the Constitution; or because it is opposed to a spirit supposed to pervade the Constitution but not expressed in words."

State v. *Corbett,* 57 Minn. 345, 25 L. R. A. 489, 4 Inters. Com. Rep. 694.

It was said in *Youngblood* v. *Sexton* that courts cannot annul tax laws because of their operating unequally and unjustly; that, if they could, they might defeat all taxation.

See

Cooley, Const. Lim. 200, 587, 706, and notes.
State v. *Harrington,* 34 L. R. A. 104, (Vermont).

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 was insolvent 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 was about to levy an assessment greatly in excess of the assessments that had been levied in the past, then there might be 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 of 1923 reducing the maximum assessment from 1 per cent to one-half of 1 per cent. Surely the plaintiff bank cannot ask to have the law declared unconstitutional because its maximum liability has been cut in half.

The supreme court of the United States has held the enactment of the law was a proper exercise of the police power. That question 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.

PROPOSITION OF LAW NO. VI

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 or of Sections 3, 21 or 25 of Article I, Constitution of Nebraska, 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 real or substantial relation to the public good with every possible presumption indulged in the law's favor.

The Guarantee Fund Law has heretofore been finally determined by the United States Supreme Court to have such real and substantial 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 right was inherent in the state before the adoption of the fifth and fourteenth amendments to the Constitution of the United States, or the 3rd, 21st or 25th sections, Article I, Nebraska Constitution. 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 real or substantial relation to the public good, safety or welfare, with every possible presumption indulged in its favor, and if it is not 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 or the corresponding sections of the state constitution.*

Full consideration was given to this question by the supreme court of the United States in the case of *Mugler* v. *Kansas*, 123 U. S. 623. The decision of the court was given by Justice Harlan in a well considered opinion.

The plaintiff in error had been a brewer in the State of Kansas and at the time of the passage of the prohibition law in that state, was possessed of large properties

which were adapted only to the manufacture and sale of beer and other alcoholic beverages. His contention was, and the facts were admitted that these properties were of value only for such purposes and that the prohibition law rendered them wholly valueless. He urged that this resulted in his property being taken without compensation in violation of the fifth amendment to the constitution of the United States and without due process of law as guaranteed by the fourteenth amendment. He also complained that he was deprived of the equal protection of the law. He had been fined under the penal provisions of the law and appealed first to the Kansas supreme court and then to the supreme court of the United States.

In its opinion the court held that the State of Kansas 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 constitution of the United States did not prohibit the exercise of such power, even though as an incident to the operation of the law, persons were divested of property rights or the value of their property was 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.

It held that in such case there has been no taking of private property for public use without compensation. The property was not taken by the state. Its value was simply diminished or destroyed as an incident to the exercise of the police power. It held that there had been no taking of the individual's property without due

process of law, since the property had not been taken by the state, but had merely been incidentally affected by the exercise of the police power.

If space permitted, we would like to copy the full opinion into this brief. It is the most able and best considered opinion on the subject that we have been able to find. Other authorities from the supreme court of the United States and other states are cited freely. We will quote only such parts as seem most closely relevant to this question, but we earnestly request the court read and consider the entire opinion.

The opinion in part is as follows:

> "It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute (Sinking Fund Cases, 99 U. S. 718,) the courts must obey the constitution rather than the lawmaking department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. * * * If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the consti-
>
> "Keeping in view these principles, as governing the relations of the judicial and legislative departtution.

ments of government with each other, it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. There is no justification for holding that the state, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country, are, in some degree at least, traceable to this evil. If, therefore, a state deems the absolute prohibition of the manufacture and sale within her limits, of intoxicating liquors, for other than medical, scientific, and mechanical purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separated departments of government shall not usurp powers committed by the constitution to another department.

"This conclusion is unavoidable, unless the fourteenth amendment of the constitution takes from the states of the Union those powers of police that were reserved at the time the original constitution was adopted. But this court has declared, upon full

consideration, in Barbier v. *Connolly, 113 U. S. 31, that the fourteenth amendment has no such effect.* After observing, among other things, that that amendment forbade the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances, in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the court said: *'But neither the amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the state, sometimes termed "its police power", to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.'*

"Upon this ground, if we do not misapprehend the position of defendants, it is contended that, as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; *as such establishments will become of no value as property, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose,—the prohibition upon their being so employed is, in effect, a taking of property for public use without compensation, and depriving the citizen of his property without due process of law. In other words, although the state, in the exercise of her police powers, may lawfully prohibit the manufacture and sale, within her limits, of intoxicating liquors to be used as a beverage, legislation having that object in view cannot be enforced against those who, at the time, happen to own property, the chief value of which consists in its fitness for such manufacturing purposes,*

unless compensation is first made for the diminution in the value of their property, resulting from such prohibitory enactments.

"This interpretation of the fourteenth amendment is inadmissible. It cannot be supposed that the states intended, by adopting that amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community.

"Again, in *Gas-Light Co.* v. *Light Co.*, 115 U. S. 650, 672, 6 Sup. Ct. Rep. 252: 'The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the excution of such contracts. Rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations.'

"The principle that no person shall be deprived of life, liberty or property without due process of law, was embodied, in substance, in the constitutions of nearly all, if not all, of the states at the time of the adoption of the fourteenth amendment; and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.

"Another decision very much in point upon this branch of the case, is *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 667, also decided after the adoption of the fourteenth amendment. The court there sustained the validity of an ordinance of the village of Hyde Park, in Cook county, Illinois, passed under legislative authority, forbidding any person from transporting through that village offal or other offensive unwholesome matter, or from maintaining or carrying on an offensive or unwholesome business or establishment within its limits. The fertilizing company had, at large expense, and under authority expressly conferred by its charter, located its works at a particular point in the county. Besides, the charter of the village, at that time, provided that it should not interfere with parties engaged in transporting animal matter from Chicago, or from manufacturing it into a fertilizer or other chemical product. The enforcement of the ordinance in question operated to destroy the business of the company, and seriously to impair the value of its property. As, however, its business had become a nuisance to the community in which it was conducted, producing discomfort, and other sickness, among large masses of people, the court maintained the authority of the village, acting under legislative sanction, to protect the public health against such nuisance. It said: 'We can not doubt that the police power of the state was applicable and adequate to give an effectual remedy. *That power belonged to the states when the federal constitution was adopted. They did not surrender it, and they all have it now.* It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases. It rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions.

"*As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation.* A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. *Nor can legislation of that character come within the fourteenth amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprice the owner of his liberty and property, without due process of law.* The power which the states have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, can not be, burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by noxious use of their property to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

It is true, when the defendants in these cases purchased or erected their breweries, the laws of the state did not forbid the manufacture of intoxicating liquors. But the state did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in *Stone* v. *Mississippi*, 101 U. S. 814, the supervision of the public health and the public morals is a governmental power, 'continuing in its nature,' and 'to be dealt with as the special exigencies of the moment may require;' and that, 'for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.' So in *Beer Co.* v. *Massachusetts*, 97 U. S. 32: 'If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer.' "

This case of *Mugler* v. *Kansas*, *supra*, was followed and approved by the Nebraska supreme court and later by the United States supreme court in the case of *Halter* v. *State*, 74 Neb. 757, 205 U. S. 34.

In that case the state of Nebraska passed an act prohibiting the use of the American flag in advertising any article of merchandise. The defendant was arrested and convicted for violation of the penal provisions of the act. On appeal to the state court it was held:

"Notwithstanding the fourteenth amendment to the federal constitution, the state in the exercise of the police power may enact such laws as are calculated to promote the health, comfort, safety and welfare of society, although such laws operate to restrict the liberty of citizens of the United States.

"We come now to the remaining proposition on which the Illinois case rests, namely, that the statute is an infringement upon the personal liberty guaranteed by the state and federal constitutions. The court in that case recognizes the right of the state, in the exercise of its police power, to enact such laws as are calculated to promote the health, comfort, safety and welfare of society, although such laws may operate as an infringement upon the personal liberty of the citizen, but holds that such laws must be in fact calculated to promote those objects, or some of them; otherwise, they are an arbitrary restraint on the citizen and unconstitutional. Such is the generally accepted doctrine. *Lochner* v. *New York,* 198 U. S. 45, 25 Sup. Ct. Rep. 539, contains a discussion of the police power of the states, and an examination of many cases bearing on the subject."

The decision of the Nebraska court was upheld by the supreme court of the United States in the case of *Halter* v. *State of Nebraska,* 205 U. S. 34, in which it was said:

"Another vital principle is that, except as restrained by its own fundamental law, or by the supreme law of the land, a state possesses all legislative power consistent with a republican form of government; therefore each state, when not thus restrained, and so far as this court is concerned, may, by legislation, provide not only for the health, morals, and safety of its people, but for the common good, as involved in the well-being, peace, happiness, and prosperity of the people.

"It is familiar law that even the privileges of citizenship and the rights inhering in personal liberty are subject, in their enjoyment, to such reasonable restraints as may be required for the general good.

"Another contention of the defendants is that the statute is unconstitutional in that, while applying to representations of the flag placed upon articles of merchandise for purposes of advertisement, it does not apply to a newspaper, periodical, book, pamphlet, etc., on any of which shall be printed, painted, or placed, the representation of the flag, disconnected from any advertisement. *These exceptions, it is insisted, make an arbitrary classification of persons, which, in legal effect, denies to one class the equal protection of the laws.*

"It is well settled that, when prescribing a rule of conduct for persons or corporations, a state may, consistently with the 14th Amendment, make a classification among its people based 'upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection.' "

The same question has been before this court in numerous other cases.

Anderson v. *State*, 69 Neb. 686:

"A police regulation, obviously intended as such, and not operating unreasonably beyond the occasions of its enactment, is not invalid because it may affect incidentally the exercise of some right guaranteed by the constitution.

"A police regulation, obviously intended as such, and not operating unreasonably beyond the occasions of its enactment, is not invalid simply because it may affect incidentally the exercise of some right guaranteed by the constitution. In all matters within the police power some compromise between the exigencies of public health and safety and the free exercise of their rights by individuals must be

reached. The test in such cases is whether the regulation in question is a bona fide exercise of the police power or an arbitrary and unreasonable interference with the rights of individuals under the guise of police regulation. *Wenham* v. *State*, 65 Neb. 394. The ordinance in question is clearly a valid police regulation It has no reference to or connection with freedom of speech or of the press, and its plain purpose is, not to interfere with the publication of sentiments and opinions of individuals, but to promote the cleanliness and safety of the municipality."

State v. *Drayton*, 82 Neb. 254:

"The prevention of discrimination in particular localities, in prices of commodities in general use, 'for the purpose of destroying the business of a competitor', by selling such commodities at a lower rate in such locality than is charged for the same elsewhere, is within the police power of the state.

"Within constitutional limits, the legislature is the sole judge as to what laws should be enacted for the protection and welfare of the people, and as to when and how the police power of the state is to be exercised.

"At the beginning of our investigations we are confronted with the oft-repeated and well-settled doctrine that no act of the law-making power of the state can be held unconstitutional unless it is clearly violative of the provisions of the constitution; that, if it is legally possible to sustain legislative enactments, they should not be held void. We are further met with another well-known rule that what is known as the police power is inherent in every government and does not depend upon legislative grants or limitations; that unless the act under consideration is open to attack as in violation of the

written provisions of the fundamental law, or an illegal effort to extend the police power over a subject which cannot be brought within the rightful exercise of that power, the law must be sustained. It must also be remembered that with reference to the latter subject, the legislative department of the state, within well-known and well-defined limitations, is the sole judge as to when and how that power is to be exercised."

Chicago, B. & Q. R. R. Co. v. *State*, 47 Neb. 549.

"The essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the public at large.

"The power of the legislature to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety, is inherent in the sovereignty of the state and cannot be bartered away by contract or otherwise.

"The power of the legislature over private property is not absolute. But while it cannot at will impose upon property burdens so excessive and unreasonable as to work a practical confiscation thereof, the courts will never interfere to prevent the enforcement of statutes on account of any mere difference of opinion between them and the lawmaking power of the government respecting the wisdom or necessity of particular measures."

State v. *Withnell*, 91 Neb. 101.

"In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation.

"In the exercise of police power delegated by the state legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to when and how such police power should be exercised.

"While a city having authority 'to define, regulate, suppress and prevent nuisances', cannot arbitrarily prohibit harmless and inoffensive private enterprises by the exercise of such power, the acts of the city council in dealing with nuisances may be held conclusive, if the subject of legislation might or might not be a nuisance, depending upon conditions and circumstances."

In 6 Ruling Case Law, Section 230, page 243, the general rule, and supporting authorities, is given:

"* * * Where an act has a real and substantial relation to the police power, then no matter how unreasonable nor how unwise the measure itself may be, it is not for the judicial tribunals to avoid or vacate it upon constitutional grounds; nor will the courts assume to determine whether the measures are wise, or the best that might have been adopted; or whether such laws are invalid on the grounds of inexpediency."

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,

and at their own option, 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 NO. VII

Where a Depositors' Guarantee Fund Law was constitutional and a valid exercise of police power when enacted as the statute in controversy is admitted to have been, no change of economic or business conditions will render it or assessments made under it unconstitutional.

It was urged in the case of *First State Bank of Claremont* v. *Smith,* 207 N. W. (S. D.) 467, that economic and business conditions had so changed in the state of South Dakota that the operation of the Guarantee Fund Law had become burdensome to the banks and the purpose of tne law impossible of complete fulfillment. This in substance is exactly what the banks have urged in this case. The substance of the trial court's decision is that by reason of changed economic and business conditions the levy of further assessments will not effectuate the purpose of the law and allow compensatory earnings.

In the above case, *First State Bank of Claremont* v. *Smith*, the court in answering this contention of the banks, said:

> "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 repeal 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.*"

Likewise in the case of *Thompson* v. *Bone,* 251 Pac. (Kan.) 178, the count held that the fact that the effect of the operation of the Guarantee Fund Law was different from that anticipated when the law was enacted, due to changed business and economic conditions, was no reason for declaring the law invalid. In its opinion the court said:

"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.*"

PROPOSITION OF LAW NO. VIII

The banks which are making fair or "extravagant profits" as found 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.

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.

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 some one who heard the fact stated over the radio.

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.

The supreme court of the United States 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 some of the insurance companies of the state but not upon the plaintiff. 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 14th 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.*

"While they may by joint action pursue the remedy given by Sec. 6284, it does not follow that the Constitution safeguards aggregate profits sufficient to constitute just compensation for all the companies. *The complaint fails to show any joint interest or right in or to the business covered by the rates or the protection sought to be invoked. And it fails to show that the business in Missouri of each is so well and economically organized and carried on that petitioners are entitled, as of right protected by the Constitution, to have premiums amounting in the aggregate enough to yield a reasonable return or profit to all the companies.*"

According to the evidence, the state banks as a whole are in a better condition now and making more money than they have for several years past. Of course 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 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 think not.

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."

PROPOSITION OF LAW NO. IX

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 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.*, 207 N. W. (S. D.) 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*, 207 N. W. (S. D.) 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 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.

PROPOSITION OF LAW NO. X

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.

It is established that the reasonableness of a tax can not 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 similar matters may affect the ability of one or a limited number of the banks to operate at a profit. Under the rule that "A statute will not be declared unconstitutional unless no doubt exists on the question", *McGuire* v. *C. B. & Q. Ry. Co.*, 108 N. W. (Ia.) 902, the burden is upon the plaintiff 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.

The general rule is stated in 6 Ruling Case Law, Sec. 112, p. 112:

> "The constitutionality of a law is not to be determined on a question of fact to be ascertained by the court. If under any possible state of facts an act would be constitutional, the courts are bound to presume that such facts exist."

It happens that two of the leading cases on this subject were decided by this court. In *City of Fremont* v. *Postal Telegraph Co.*, 103 Neb. 476, this court held that the Company could not establish that an occupation tax was confiscatory by showing loss in operation for a period of a few years, but that it was incumbent upon the company to show the volume of business available, the efficiency of the company in handling the business it did have, and that its losses were not caused by matters for

which the company was responsible. In other words, if the loss was occasioned by mismanagement, inefficiency or inability to obtain a fair part of the business available, the fact that a loss in operation did exist would not be proof that the law was confiscatory.

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 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, the court said:

> "Mere proof of loss in operation for a period of two years by an individual telegraph company without showing what the volume of business available in the municipality is, or what portion thereof is done by such company, or what facilities it has for handling the business offered, is insufficient to show that an annual occupation tax of $60 imposed for revenue purposes on the privilege of doing an intrastate business in a city of over 8,000 inhabitants is unreasonable.
>
> "The proof in support of these allegations shows that during the years 1914 and 1915 defendant's Fremont 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. The reasonableness of a tax does not depend upon whether or not a hardship may be worked in an isolated case, but upon the general operation of the tax in the class to which it applies. *Ohio River & W. R. Co.* v. *Dittey*, 203 Fed. 537.

"Is the tax in question, when considered as a revenue measure, so unreasonable in amount as to be prohibitory? *Mere proof of loss in operation for a period of two years by an individual telegraph company, without showing what the volume of business available in the municipality is, or what portion thereof is done by such company, or what facilities it has for handling the business offered, is insufficient to show that an annual occupation tax* of $60 *imposed for revenue purposes on the privilege of doing an intrastate business in a city of over 8,000 inhabitants is unreasonable.*"

City of Grand Island v. *Postal Telegraph Cable Co.*, 92 Neb. 253:

"The amount of an occupation tax is not to be measured by the profits of the business taxed, but should be considered as one incident to local self-government, and when thus considered it appears prima facie reasonable in amount, courts of justice should not declare the ordinance void, *unless and until it is clearly shown by competent evidence that the license charge is in fact unreasonable or confiscatory.*

"In considering the first assignment, that the tax in question is unreasonable and confiscatory, we find from the record that defendant maintains an office in the city of Grand Island, where it conducts a large amount of interstate business and considerable intrastate business, but neglects and refuses to pay the occupation tax; that defendant's receipts for intrastate business for the years in question herein were $1,333.17, and that the total tax sought to be collected for those years under the terms of the ordinance was $240. It further appears that, by a system of accounting or bookkeeping adopted by the defendant, it was attempted to be shown that for some of the years in question the expense of conducting the intrastate business reduced the gross receipts to a trifle less than enough to pay the tax of those years. *It was not shown, however, that the method of apportioning the expenses of defendant's entire business was the correct method, or that such apportionment was either just or equitable, and therefore we conclude that the evidence was insufficient to warrant a court of justice in finding arbitrarily that the tax was either unreasonable or confiscatory.*

The city clearly had the power to tax the business in question. The tax was uniform, in that it operated alike on all persons or corporations engaged in that business, *and 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 class 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.* We think no court should say as a matter of law that an occupation tax of $40 a year upon each and every telegraph company doing business within the

limits of the City of Grand Island is manifestly unreasonable and confiscatory. It may be said that the charge is prima facie reasonable. *Western Union Telegraph Co.* v. *Borough of New Hope,* 187 U. S. 419. The amount of an occupation tax is not to be measured by the profits of the business, but should be considered as one incident to local self-government—to supervision, to the expense incident to the issuing of the license, to the probable expense of inspection, regulation and such police surveillance as the municipal authorities can lawfully give to the location, erection and maintenance of poles and wires as provided by ordinance. In the absence of evidence which clearly shows that the license charge, in general effect, is such as to make it confiscatory, the ordinance must be upheld."

Ohio River & W. Ry. Co. v. *Dittey,* 203 Fed. 237:

"The court dealt in that case with a general law and its operation on all corporations of given classes throughout the state, and not with its operation on specific financially weak corporations of any one of those classes. It did not consider the same question as is here presented, and we are constrained to believe that it did not mean to hold that the courts as final arbiters may overthrow a law which imposes a tax on privileges and franchises *merely because in isolated cases such law imposes a hardship, but that it had reference to a law the effect of whose enforcement is to produce that result generally.*"

Western Union Telegraph Co. v. *New Hope,* 187 U. S. 419:

"An ordinance imposing a license fee on telegraph poles and wires within the limits of the municipality is not obnoxious to the commerce clause of the Fed-

eral Constitution when applied to poles and wires used for interstate business, although it yields a return in excess of the amount necessary to reimburse the municipality for the cost of supervision and inspection.

"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.*' And it was said that in many of the cases cited the license fee was the same as that imposed by this ordinance. 16 Pa. Super. Ct. 309. The supreme court affirmed the judgment in a similar case on the opinion given below in this. 202 Pa. 532, 53 Atl. 127."

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 NO. XI

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 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.

The law seems perfectly clear on this point.

Parties will not be allowed to operate under a law as long as they deem it to be advantageous and then claim the same law to be invalid when it appears to them that no further benefit is to be derived from 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.

12 C. J. 769, 771 reads as follows:

> "A person may, by his acts or omission to act, waive a right which he might otherwise have under the provisions of a constitution; and where such acts or omissions have intervened, a law will be sustained which otherwise might have been held invalid, if the party making the objection had not by prior acts precluded himself from being heard in opposition. Thus a person who has participated in proceedings under a statute, or who has acted under the statute and in pursuance of the authority conferred by it, *or who has claimed the benefit of the statute to the detriment of others*, or who asserts rights under it, may not question its constitutionality.
>
> "Where corporations have been organized which proceed to do business under the provisions of a statute, and receive benefits under it, they cannot be heard to allege that such a statute is unconstitutional. The laws under which corporations organize

become a part of their charters and are binding on them. And so a corporation taking a charter subject to all duties and restrictions set forth in general laws relating to corporations of that class cannot complain of the unconstitutionality of a prior enacted statute imposing a burden or regulation on such corporation. Where a corporation has elected to exercise a power or to accept a benefit under a statute, it may not therefore attack the validity of the statute. Thus the acceptance by a corporation of a statute enacted for the purpose of settling disputes between the corporation and individuals over title to lands estops the corporation. * * *".

Meyer v. *City of Alma*, 221 N. W. (Neb.) 438:

"Equity and good conscience will not permit a person to stand by and see acts done involving risk and expense by others, and then permit him to enforce his constitutional rights by means of injunction in a court of equity, when he has an adequate remedy at law."

American Life Ins. Co. v. *Balmer*, 214 N. W. (Mich.) 208:

"But a complete answer to plaintiff's assault on the validity of the act lies in the fact that plaintiff has accepted its provisions and has had the benefit of them. By accepting its benefits it is estopped to deny its validity. People v. *Fidelity & Casualty Co.*, 222 Mich. 296, 192 N. W. 658, and authorities there cited."

Booth Fisheries Co. v. *Industrial Commission*, 46 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 re Tarnowski, 210 N. W. (Wis.) 836:

> "Generally one may not enjoy benefits and privileges of statute and thereafter escape its burdens by attacking its validity."

Sturtevant v. *O'Brien,* 202 N. W. (Wis.) 324:

> "Employer voluntarily submitting to Compensation Act as then existing submits to all amendments constitutionally enacted thereafter while continuing under its provisions."

In the case of *People for Ostapow* v. *Fidelity & Casualty Co.,* 192 N. W. (Mich.) 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 cicumstances cannot question its validity. Defendant has had its premiums for executing the bond and Weinberger, until he absconded, all 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 that 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, and Weinberger had enjoyed the full benefit of it. Neither he nor his surety can now claim the act is unconstitutional.*"

The balance of the opinion contains a full discussion and numerous citations from the federal courts and other state courts in support of this proposition. The opinion however is too long to copy into this brief.

In 10 R. C. L., Sec. 140, page 836 (Estoppel), it is stated:

> "So also, one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens. *Certainly he will not be allowed to retain his advantage or keep his consideration and then repudiate the act as unconstitutional.*"

The principle is stated in 21 C. J., page 1216, Sec. 220 (Estoppel), as follows:

> "After a public service corporation has accepted an ordinance imposing limitations of its rates of charge, it is estopped to deny the validity of the ordinance on the ground that the rates fixed are not reasonable.

> "Likewise the beneficiary of a grant or license who has acquiesced therein and received valuable property under it cannot deny its validity as against the municipal authorities and another beneficiary."

In *Winthrop* v. *Fellows,* 230 Fed. 702, an attack was made upon a two cent passenger fare rate statute. The court said (p. 704):

> "The present Pere Marquette Railroad Company was organized in December, 1907. At that time the statute of 1907 which is attacked was in force, and was a part of the act under which the railroad company was incorporated, and thus constituted a material part of its charter. The amendment of 1911 did not change or affect the rates of fare which the Pere Marquette was permitted to charge for the transportation of passengers. It follows that the railroad company, its stockholders, as such, and all claiming under it by right of representation, are effectually estopped to question 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:

> "As a corporation the owner is subject to the obligations of its charter. As the holder of special franchises, it is subject to the conditions upon which they were granted."

In the case of *Grand Rapids & Indiana Railway Co.* v. *Osborn,* 48 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 burdens attached by the statute to the privilege of becoming an incorporated body. *Daniels* v. *Tearney,* 102 U. S. 415, 26 L. ed. 187, and cases cited. That a railroad corporation may contract with a municipality or with a state to operate a railway at agreed rates of fare is unquestionable. And where the provisions of an accepted statute respecting rates to be charged for transportation are plain and unambiguous, and do not contravene public policy or positive rules of law, it is clear that a railroad company cannot avail of privileges which have been procured upon stipulated conditions, and repudiate performance of the latter at will."

In *Daniels* v. *Tearney,* 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 principle 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 the case first cited, an injunction was applied for to prevent the collection of a tax authorized by an Act of the Legislature passed during the late civil war, to enable the people of a country to raise volunteers and thus avoid a draft for soldiers, and that object had been accomplished. In disposing of the case the court well asked, 'Upon what principle of exalted equity shall a man be permitted to receive a valuable consideration through a statute, procured by his own consent or subsequently sanctioned by him, or from which he derived an interest and consideration, and then keep the consideration and repudiate the statute?'

"In *U. S.* v. *Hodson, supra,* this court said: 'When a bond is voluntarily entered into and the principal enjoys the benefits it was intended to secure, and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense.'

"Not to apply the principle of estoppel to the bond in this case would, it seems to us, involve a mockery in judicial administration and a violation of the plainest principles of reason and justice."

In *Mellen Lumber Company* v. *Industrial Commission of Wisconsin,* L. R. A. 1916-A, pages 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 Federal Constitution cannot prevail. It was optional with the appellant to come in under the compensation act or stay out. It elected to take the former course. 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."

In *Chas. Simon's Co.* v. *Maryland Teleph. & Teleg. Co.,* 63 L. R. A. 729, 736, it was contended by the telephone company that an ordinance was unreasonable in its service regulation. The telephone company had operated under the ordinance and the court held that it had accepted both the benefits and burdens of the ordinance and could not raise the question of reasonableness of rates.

The court said:

> "Now, when the ordinance in question was passed by the mayor and city council of Baltimore and accepted by the appellee corporation, the latter had its charter, and was subject, in making its contracts, only to the limitations which the law imposed. Within these limitations it was free to contract. In passing the ordinance the municipality made no attempt to interfere with the chartered rights of the

appellee, or to abridge its chartered powers. It did not attempt of its own authority and right to impose upon the appellee, *in invitum,* the rates of charge for telephone service specified in the ordinance. The appellee had, at the time of the passage of the ordinance, the right to refuse to accept its terms. In accepting these it was acting within its chartered powers and in the free exercise of its chartered rights. All of the obligations imposed by the ordinance were imposed by the appellee upon itself by its own voluntary action in accepting the ordinance. * * *

"It cannot be here objected by the appellee that the regulation contained in the ordinance here in question as to rates of charge was not a reasonable one. The time to have urged such a consideration was before it accepted the ordinance and availed of the privileges it acquired thereunder. Whatever may have been the description of the service the appellee was to furnish under the ordinance 110, it would seem to be concluded as to the reasonableness of the rates of charge for that description of service by its own voluntary action."

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*, 207 N. W. (S. D.) 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.*"

The evidence showed conclusively and the court found that the banks had actively and positively made use of the law to induce depositors to put their money in state banks. Every element necessary to constitute estoppel and certainly every element of waiver was proven in this case in many different forms.

The trial court, however, held that the interest of depositors in going banks and the public generally were involved and that therefore, in the language of the court, "public welfare denies them (the banks) the right to waive the constitutionality of the law." We cannot find any authority to sustain this proposition. Admittedly no corporation can secure a release from the consequences of its acts resulting in estoppel and waiver by pleading public welfare. The only ones who might possibly so plead would be third parties adversely affected by such estoppel and waiver. But in the case at bar said third parties allegedly adversely affected—depositors in

going banks and the public—are not parties to this action and are not asking that the banks be released from the legal effects of such estoppel and waiver.

The trial court found that the further enforcement of the special assessments should be enjoined until *"conditions so change that such special assessments can be paid by the state banks, and at the same time said banks receive in addition, compensatory returns upon their investments."* The court further found that the state banks for the eighteen months period ending June 30, 1929 (page 4 of the opinion) had, after charging out $2,223,968.40 of old bad debts, made a net earning on their capital and surplus of 7.9 per cent, which would be an annual earning of 5.2 per cent. This was after the payment by the banks of $2,412,324.78 to the Guarantee Fund. Hence, if the banks had been relieved of the Guarantee Fund assessment, their earnings for the eighteen months period would have been 17.6 per cent, or for the year 11.66 per cent. These figures are based on the net earnings of all the state banks, after deducting all losses for the year and all old bad debts charged off by all of the banks.

The effect of the findings of the trial court is that the *public welfare denies the banks the right to waive the unconstitutionality of the law* until they can make a dividend of more than 5.2 per cent annually on their capital and surplus after charging off their old bad debts. We submit that *public welfare does not demand that the banks be assured of an annual dividend on their capital and surplus of more than 5.2 per cent before they fulfill their obligation to depositors with matured claims and*

that public interest does not demand the sacrifice of the matured rights of depositors in order to enable the banks to pay dividends to their stockholders.

PROPOSITION OF LAW NO. XII

The decree of the United States Supreme Court in the case of Shallenberger v. First State Bank of Holsten, 219 U. S. 114, 31 S. Ct. 189, 55 U. S. (L. Ed.) 117, is a bar to the maintenance of this suit by the plaintiff, either on its own behalf or on behalf of other banks; and is res adjudicata.

The doctrine of *res adjudicata* embodies two main rules, which are stated in 34 Ruling Case Law, page 742, section 1154, as follows:

> "(1.) The judgment or decree of a court of competent jurisdiction upon the merits concludes the parties and privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal. (2.) Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not."

In *Battle Creek Valley Bank* v. *Collins*, 90 N. W. 921 (Neb. Unof.), it is stated:

> "A judgment in a former suit will be a bar in a second action between the same parties and their privies, involving the same subject-matter, as to everything which the record shows was within the scope of the issues litigated in the former action."

In the case of *Shallenberger* v. *First State Bank of Holstein,* the subject matter of the suit was, we feel, the same, and the case was brought by fifty-three named banks on their own behalf and on behalf of all other banks similarly situated. The named banks are largely still existing banks and all banks are concluded by that case so far as the matters were there in issue.

A final judgment rendered on a demurrer to a petition in equity is as effectual a bar to the prosecution of another action on the same grounds as is a trial on evidence. In the case of *Parrotte* v. *Dryden,* 73 Neb. 291, there was a demurrer to the complaint because it did not state facts sufficient to constitute a cause of action, and in that case the court said:

> "A demurrer to a complaint because it does not state facts sufficient to constitute a cause of action is equivalent to a general demurrer to a declaration at common law, and raises an issue which, when tried, will finally dispose of the case as stated in the complaint on its merits, unless leave to amend or plead over is granted. The trial of such an issue is the trial of the cause, and not the settlement of a mere matter of form in proceeding. There can be no other trial except at the discretion of the court, and if final judgment is entered on the demurrer it will be a final determination of the rights of the parties, which can be pleaded in bar to any other suit for the same cause of action."

In 34 C. J., p. 799, section 1220, the rule is stated:

> "It is generally held that a judgment sustaining a general demurrer, or a demurrer based on the ground that the complaint does not state facts sufficient to

> constitute a cause of action, is an adjudication on the merits and bars another action on the same facts."

The rule not only extends to the banks that were named as parties to the former suit, but to all other banks. One of the tests applied in determining this latter question is that of mutuality, and the rule is thus stated in 34 C. J., p. 988, section 1407:

> "It is a rule that estoppels must be mutual; and therefore a party will not be concluded, against his contention, by a former judgment, unless he could have used it as a protection, or as the foundation of a claim, had the judgment been the other way; and conversely no person can claim the benefit of a judgment as an estoppel upon his adversary unless he would have been prejudiced by a contrary decision of the case."

This rule well applies in this case.

In the absence of fraud or collusion, a judgment for or against a municipal corporation or a board of officers properly representing it, is binding and conclusive on all residents, citizens and taxpayers, in respect to matters adjudicated which are of general and public interest, it being held that all other citizens and taxpayers are represented in the litigation and bound by the judgment (34 C. J. 1028, section 1459).

In the case of *Shallenberger* v. *First State Bank of Holstein*, the adjudication in favor of the Governor was of course a complete adjudication as against all the banks, and a contrary decision would have been clearly

effective and available to all the banks. It therefore had mutuality and all elements necessary to *res adjudicata* within the rules above stated.

PROPOSITION OF LAW NO. XIII

The depositors with matured claims against the Guarantee Fund are by the decision of the trial court divested of their rights to participate and share in the proceeds of the special assessment heretofore levied and future assessments enjoined by said court and thereby of their property without due process of law, and denied the equal protection of the law, their property taken for an alleged public use without just compensation and in fact for no public purpose but for the private use and benefit of state banks of Nebraska and their stockholders, all in violation of Sections Three, Twenty-one, and Twenty-five, Article One, Constitution of Nebraska, and the Fifth and Fourteenth Amendments to the Constitution of the United States.

The status of depositors with matured claims, and their property rights have been fully argued heretofore; a judicial nullification of the assessments will as to said depositors violate each of their above constitutional rights.

CONCLUSION

We conclude the discussion of issues in this case knowing that the court recognizes the great public importance of the decision it must make. The eyes of thousands of depositors in failed banks are focused on this suit. It should, of course, not influence the court unduly, but the fact remains that if the banks are relieved of their obligation to pay the guarantee fund assessments for the benefit of these depositors there will follow bankruptcy, the blasted hopes of children for education, cheerless and poverty-stricken old age for many, premature deaths from lack of medical care, and worry and untold hardship for thousands. The evidence is overwhelming that a large percentage of these depositors were led to believe and did believe that the State of Nebraska was back of the guarantee fund. This was only true in a very limited sense, but no one representing the state so informed the depositors. The state is under a great moral obligation to these depositors. The foundation of a government is the confidence of the people in that government. As Attorney General, therefore representing this state, we are especially anxious that those who trusted implicitly although ignorantly in the power and willingness of the state to protect them shall not be fated to have their trust displaced by grief, bewilderment and despair. We do not want the faith of these people to be violated.

As we submit this case to the Supreme Court our responsibility in the matter ends and that of the court

begins. We have every confidence that the court will meet this responsibility with high courage and in a spirit of justice to all the parties concerned.

Respectfully submitted,

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