Briefs re Hubbell Bank case [2 of 2]

GENERAL NO. 28303

IN THE

Supreme Court of Nebraska

HUBBELL BANK, HUBBELL, NEBRASKA, ET AL.,
Appellants

VS.

CHARLES W. BRYAN, AS GOVERNOR OF THE STATE OF NEBRASKA AND EX OFFICIO SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE OF NEBRASKA, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

HON. E. B. CHAPPELL, *Judge Presiding*

SUPPLEMENTAL BRIEF OF APPELLANTS.

PETERSON & DEVOE,
Attorneys for Appellants.

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Attorneys for Appellants.

Supplemental Brief of Appellants

Since the original argument in this case two important elements have intervened which seem to justify the filing of a supplemental brief. First, is the decision of this court in *Bliss* vs. *Bryan* (Superior Bank case) which decision was rendered since the original argument, and second, the progressively devastating effect of the economic forces discussed in the original brief during the intervening period as disclosed by public records of which the court takes judicial notice.

Recognizing the difficulties incident to an adequate presentation of these matters in oral argument, we beg leave to file this supplemental brief.

I

THE SUPERIOR BANK CASE.

This case is so recent and the issues so definite that a restatement seems unnecessary. The effect of that decision, however, on the issues in the case at bar and the necessary implications resulting from the principles therein enunciated deserve careful analysis.

The gist of the decision in the Superior Bank case is that the "assets" of the guaranty fund remain subject to the lien of judgment rendered in favor of depositors of failed banks notwithstanding the legislative act of the special session in 1930, and that until these judgments are satisfied the legislature is without constitutional power to transfer those assets to another fund sought to be created by legislative decree and designated Depositors Final Settlement Fund. In view of the fact, universally recognized, that the outstanding judgments exceed by many millions of dollars the most liberal estimate of the "assets" of the guaranty fund, the decision in the Superior Bank case is, in effect, that whatever assets belonged to the guaranty fund when the guaranty fund act was repealed in April, 1930, remain in that fund to be distributed in the manner and for the purposes provided by the guaranty fund act.

The purpose of the litigation in the Superior case was to enjoin a proposed transfer of the "assets" from the guaranty fund to the depositors final settlement fund. By the decision of this court, that injunction is allowed. Neither the issues in the Superior Bank case nor the decision of this court in

that case involve a determination of the question of what those assets consist of. The actual assets in possession of the guaranty fund in 1930, and at the present time, are certain items in insolvent banks taken over as a part of the guaranty fund after the payment of depositors. In the brief for rehearing in the Superior Bank case the Attorney General stated these assets to be $160,000. (See page 5 Appellees Brief for rehearing). In the same brief it is stated (p. 10) that $278,775.60 has been disbursed out of said fund since said date, the difference representing sums realized from stockholders' liabilities.

In the case at bar there is no attempt by the state governmental agencies to collect any funds from the defendant banks for the benefit of the guaranty fund. The demand for payment here is for the benefit, not of the guaranty fund, but of the final settlement fund. The perfectly obvious reason for this position is that the guaranty fund act was repealed by the special session in 1930 and no authority exists at the present time, nor at any time after the passage of said act, for the collection of any assessments for the guaranty fund. The legislative decision in the special session of 1930 was expressly *against* the collection of any unpaid assessments for the guaranty fund. As to the guaranty fund the situation is exactly as it would have been had the act of the special session of 1930 consisted solely in a repeal of the Guaranty Fund Act.

On March 18, 1930, the amount claimed to be due the guaranty fund from banks which were then going concerns was approximately $2,250,000.00. Of this sum approximately $1,350,000.00 is now held as a reserve in banks which have remained solvent and approximately $900,000.00 is held by receivers of banks suspended since March 18, 1930, and in reorganized banks.

If the old assessments were to be collected and distributed under the decision of the Superior Bank case there would be taken from depositors in the banks which have failed since March 18, 1930, approximately $900,000.00 and from banks which have remained solvent about $1,350,000.00 for the exclusive benefit of depositors in banks whose judgments have priority under the Superior Bank decision and have already received a distribution of the entire assets of the bank, in some cases upwards of 90% of the total deposits. It requires no gift of prophecy to foretell that if this collection were to be made, the ratio of the above figures would change radically and there would be more of the contingent liability fund found in the hands of receivers than in going banks.

II

THE PRESENT STATUS OF STATE BANKS

The Final Settlement Fund Act became effective March 18, 1930. Since then 157 banks have closed. Of this number 32 have reopened on some plan of reorganization. The total amount set up in the 125 failed banks (not reopened) as a contingent liability for the Depositors Final Settlement Fund is $680,394.21 and of the reopened banks, $226,052.82.

The banks not reopened, with date of closing, amount of deposits and amounts in contingent fund, are as follows:

Date	Name of Bank	Location	Deposits	Contingent liability for Final Settlement Fund
4-7-1930	Farmers State	Newport	$ 45,097.20	$1,345.98
4-15-30	Nebr. State Savings	Wahoo	244,507.91	4,391.61
4-15-30	State Bank of	Touhy	38,539.56	560.09
4-15-30	F. & M.	Weston	167,033.61	3,337.17
4-17-30	Citizens State	Wahoo	363,546.10	6,926.05
6-27-30	Ponca Valley Bank	Monowi	84,992.56	1,112.72

Date	Name of Bank	Location	Deposits	Contingent liability for Final Settlement Fund
7-3-30	Denton State	Denton	62,254.97	1,498.91
9-8-30	Washington Co. Bank	Ft. Calhoun	131,701.65	2,385.92
10-4-30	Farmers State	Wabash	517.50	511.44
10-7-30	Knox Co. Bank	Verdigre	254,688.43	5,141.19
10-7-30	Citizens State	Pierce	106,719.41	4,966.06
10-13-30	Battle Creek Valley Bk.	Battle Creek	297,219.79	9,151.38
11-22-30	Bank of Orleans	Orleans	170,693.57	3,881.18
12-1-30	Citizens Bank	Stuart	310,449.44	8,557.33
12-30-30	Farmers State	Platte Cent'r	129,600.84	4,660.44
12-13-30	Nebraska State	West Point	261,073.68	8,489.63
12-16-30	State Bank of	Niobrara	178,936.49	5,180.94
1-13-31	State Bank of	Madison	158,057.22	5,631.50
1-13-31	Tecumseh State	Tecumseh	124,519.19	4,287.71
1-21-31	Farmers State	Nelson	120,117.52	3,238.38
2-9-31	Home Savings	Columbus	76,185.74	2,108.92
2-12-31	Columbus State	Columbus	430,973.11	13,262.85
4-6-31	State Bank	Bassett	25,204.03	887.76
4-6-31	F. & M. Bank	Exeter	76,395.95	2,133.81
5-22-31	State Bank of	Bee	149,796.53	4,881.13
5-22-31	German Bank of	Millard	142,089.32	3,582.14
5-23-31	Nebraska State	Long Pine	68,612.43	3,394.36
6-1-31	State Bank of	Verdigre	176,720.96	5,253.95
6-1-31	Citizens State	Creston	188,550.73	5,472.71
6-5-31	Farmers State	Mason City	112,252.69	2,803.93
6-5-31	First State	St. Edward	189,378.36	3,797.60
6-8-31	Nebraska State	Bloomfield	273,176.18	4,978.69
7-18-31	Bank of	Lynch	182,807.09	3,843.82
7-29-31	Bk. of Lincoln Co.	Hershey	161,158.63	4,312.86
8-3-31	Farmers State	Sutherland	104,005.38	3,349.66
8-10-31	State Bank of	Omaha	2,855,176.30	85,100.41
8-14-31	So. Omaha State	Omaha	1,079,203.44	22,299.51
8-17-31	First State	Pleasant D'e	140,114.21	3,221.81
8-17-31	Dwight State	Dwight	178,816.51	5,142.05
8-17-31	Brainard State	Brainard	267,607.40	3,456.40
8-17-31	State Bank	Bruno	135,171.40	4,439.74
8-17-31	Butler Co. State	David City	168,400.66	6,940.70
8-17-31	State Bank	Leigh	188,442.54	7,020.87
8-26-31	Farmers State	Inland	77,756.34	1,748.66

Date	Name of Bank	Location	Deposits	Contingent liability for Final Settlement Fund
9-4-31	Bank of Gretna	Gretna	236,128.00	7,216.15
9-5-31	State Bank	Shelby	123,562.45	4,585.95
9-8-31	Farmers State	Wynot	126,857.13	4,164.53
9-15-31	Page State	Page	80,369.12	2,935.73
9-21-31	Bank of	Ragan	110,734.74	2,706.10
9-25-31	Cedar Co. Bank	Hartington	198,654.09	5,770.72
9-25-31	F. & M.	Benkelman	441,019.92	4,598.76
9-28-31	Farmers State	Napier	46,162.29	1,471.71
9-29-31	State Bank	Fordyce	341,689.37	7,209.26
9-30-31	State Bank of	Ravenna	199,981.49	6,757.45
10-1-31	Peoples State	Gd. Island	218,963.04	8,307.64
10-5-31	State Bank	Harrison	224,924.55	4,975.03
10-5-31	State Bank	Venango	68,481.94	2,747.00
10-5-31	Citizens State	Orchard	129,262.35	5,244.41
10-6-31	State Bank	Riverton	111,015.20	3,396.69
10-7-31	Commercial Bank	Grant	51,656.67	816.32
10-8-31	Farmers State	Glenvil	203,916.31	5,597.03
10-8-31	Clay Center State	Clay Center	118,991.50	3,530.12
10-13-31	First State	Holstein	64,782.87	2,807.99
10-13-31	State Bank of	Orleans	170,693.57	3,137.90
10-13-31	American State	Springfield	173,503.89	4,810.76
10-13-31	Farmers State	Hemingford	181,531.12	7,127.04
10-13-31	Bank of	Otoe	131,024.65	3,612.14
10-14-31	State Bank	Naponee	110,693.63	3,839.46
10-15-31	Weston Bank	Weston	272,074.66	7,344.23
10-15-31	Franklin Exchange	Franklin	140,199.86	4,023.45
10-16-31	State Bank	North Loup	172,886.28	3,777.00
10-16-31	Peoples Bank	Upland	117,779.13	3,417.10
10-16-31	Upland Banking Co.	Upland	169,928.12	4,579.32
10-16-31	Bank of	Campbell	118,736.78	4,654.67
10-20-31	State Bank of	Ord	161,845.63	5,456.47
10-20-31	State Bank of	Swedeburg	47,803.05	3,005.70
10-24-31	Far. & Mer.	McCook	288,862.40	11,446.81
10-22-31	Commercial State	Crawford	542,482.65	13,373.73
10-30-31	Ger. Am. State	Chalco	98,420.30	1,904.30
11-2-31	State Bank	Marsland	26,952.10	780.25
11-2-31	State Bank	Anselmo	98,703.56	3,377.71
11-6-31	Farmers State	Crookston	104,019.09	2,699.51

Date	Name of Bank	Location	Deposits	Contingent liability for Final Settlement Fund
11-7-31	Sec. State	Ravenna	87,123.99	1,959.41
11-16-31	State Bank	Wisner	297,274.59	8,348.79
11-24-31	Bank of	Holbrook	189,772.09	6,086.92
11-25-31	Peoples Bank	Wauneta	108,885.83	2,483.05
11-27-31	City Bank	Elm Creek	66,864.97	3,043.83
11-3-31	Norfolk Savings	Norfolk	161,018.68	4,399.80
11-30-31	State Bank	Hoskins	209,801.67	6,972.73
11-30-31	Bank of	Syracuse	122,265.09	3,268.02
11-20-31	Mason City B'king Co.	Mason City	103,239.32	3,584.50
11-2-31	Farmers State	Wood River	336,136.38	8,572.34
12-7-31	Security State	Neligh	281,175.11	8,011.21
12-10-31	Merchants State	Winside	252,970.12	6,966.94
12-15-31	Liberty State	Sidney	338,467.79	11,121.54
12-15-31	F. & M.	Lindsey	97,048.80	4,144.84
12-17-31	Citizens State	Beaver Cr'ng	87,047.90	2,904.66
12-19-31	F. & M.	Ceresco	(Not in Receivership yet)	6,796.17
12-21-31	F. & M.	Elgin	(Not in Receivership yet)	5,038.87
12-24-31	Farmers State	Cortland	115,967.17	3,963.48
12-29-31	F. & M.	Sumner	137,875.19	3,130.36
12-30-31	Farmers State	Stapleton	94,319.77	2,849.75
1-2-32	F. & M.	Deshler	225,327.68	8,446.72
1-23-32	State Bank	Sargent	122,187.09	4,442.59
1-23-32	State Bank	Pauline	26,674.97	767.69
1-23-32	Farmers State	Lynch	47,753.44	3,244.34
2-15-32	Brewster State	Brewster	42,029.98	1,312.04
2-22-32	State Bank	Walton	26,935.95	1,696.85
2-23-32	Plateau State	Herman	251,645.29	10,160.28
3-7-32	Farmers State	Concord	159,150.78	4,940.35
3-8-32	State Bank	Horace	31,474.40	1,186.66
3-18-32	Bank of	Benkelman	(Sold to F. & M.)	3,342.43
4-2-32	Bank of	Graf	63,232.16	1,597.51
4-7-32	Security State	Spalding	222,134.17	9,134.94
5-16-32	Oakland State	Oakland	217,900.01	6,053.99
5-17-32	Macon State	Macon	24,698.82	907.48
6-1-32	Firth Bank	Firth	140,624.39	5,174.85
6-17-32	State Bank	Ruskin	(Still pending)	3,689.09
6-24-32	State Bank of	Irvington	25,780.63	1,576.56

Date	Name of Bank	Location	Deposits	Contingent liability for Final Settlement Fund
7-18-32	Nebraska State	Beatrice	120,622.71	5,752.54
7-30-32	State Bank	Winslow	257,601.67	8,980.98
8-11-32	State Bank	Chester	(Not in Receivership)	3,957.99
8-15-32	Fidelity State	Aurora	(Not in Receivership)	12,774.11
8-15-32	Farmers State	Hampton	(Not in Receivership)	3,310.05
9-12-32	State Bank	Hooper	(Not in Receivership)	8,400.85

The banks closed which have since reopened on some plan of reorganization with the amount held by them as a contingent liability for the Final Settlement Fund are as follows:

Date Failed	Bank	Location	Date Reopened	Contingent liability for Final Settlement Fund
4-1-30	Citizens State	Thedford	5-7-30	1,173.01
4-16-30	State Bank	Colon	7-3-30	4,748.65
4-16-30	Oak Creek Valley	Valparaiso	7-26-30	4,976.31
5-9-30	Bank of Florence	Omaha	6-21-30	7,215.06
6-16-30	State Bank	Arnold	9-15-30	6,128.58
6-19-30	Security State	Arnold	9-15-30	2,059.21
7-23-30	Nebr. State	Norfolk	(Not shown)	30,420.41
8-22-30	Farmers State	Plymouth	(Not shown)	4,234.74
9-1-30	State Bank	Alexandria	11-3-30	7,227.07
9-22-30	Bk. of Creighton	Creighton	12-24-30	12,653.96
10-20-30	Center State	Center	2-16-31	2,612.99
12-5-30	State Bank	Guide Rock	2-12-31	5,117.04
8-10-31	F. & M.	Omaha	4-30-32	14,513.86
8-15-31	Union State	Omaha	11-16-31	33,536.73
10-10-31	State Bank	Huntley	11-6-31	1,443.87
10-16-31	Farmers State	Wallace	11-17-31	3,241.93
10-19-31	Franklin Co. Bank	Hildreth	12-7-31	6,340.65
10-19-31	State Bank	Bloomington	1-28-32	2,823.34
10-21-31	State Bank	Crawford	1-2-32	4,855.62
10-22-31	Clay Co. State	Edgar	12-15-31	5,433.18
10-22-31	State Bank of	Edgar	12-15-31	5,722.22
11-9-31	Security State	Broken Bow	12-23-31	6,170.11
11-12-31	State Bank	Arapahoe	2-9-32	6,463.86
11-17-31	Bank of	Miller	1-14-32	2,575.81

Date Failed	Bank	Location	Date Reopened	Contingent liability for Final Settlement Fund
11-20-31	State Bank	Elba	4-19-32	2,729.66
11-20-31	First State	Beaver City	5-10-32	7,892.20
11-6-31	State Bank	Dalton	9-8-32	3,208.32
1-5-32	Bank of	Morse Bluffs	8-4-32	5,949.56
1-11-32	Farmers State	Rising City	7-11-32	11,468.79
2-1-32	Farmers State	Sargent	9-3-32	9,471.05
3-9-32	Nebraska State	Bristow	6-18-32	2,193.26
1-8-32	State Bank	Tryon	(Not shown)	1,451.77

Under the decision in the Superior Bank case all assets of the guaranty fund will be distributed in the order of priority of judgments.

The amounts of the unpaid claims of depositors in the first twelve banks to be certified, after the depositors had been paid in full in the last bank to be paid out, are more than sufficient to absorb all of the assets of the old Guaranty Fund.

The unpaid claims in the twelve banks holding priority under the decision in the Superior Bank case are listed in the following table:

	Date of Failure	Date Claims Certified	Total Liabilities	Amount Paid	Unpaid Claims
Royal, Royal State	10-9-25	12-9-27	120,762.59	45,265.45	77,497.14
Bazille Mills, First State	1-7-26	12-10-27	361,313.26	355,885.05	5,428.21
Rosalie, Farmers State	4-24-25	12-16-27	163,554.13	53,329.96	110,224.17
Ansley, Farmers State	7-9-25	12-21-27	202,619.78	43,408.60	159,211.18
Elba, Farmers State	6-1-26	12-22-27	165,651.99	29,047.90	136,604.09
Silver Creek, State Bank	2-27-25	12-22-27	344,778.85	206,538.84	138,240.01
Superior, State Bank	3-23-27	1-20-28	730,926.62	166,011.03	564,915.59
Lakeside, State Bank	6-3-27	1-25-28	58,296.82	38,363.19	19,933.63
Angora, State Bank	3-27-25	2-9-28	68,496.45	63,436.45	5,060.00
Harvard, Nebr. State	5-9-27	2-14-28	410,109.24	132,447.30	277,661.94
Bridgeport	5-18-25	2-28-28	409,691.27	68,300.24	341,391.03
North Platte, State Bank	1-14-27	3-14-28	926,961.14	300,959.74	626,001.40

Total unpaid claims in these twelve banks.....$2,462,168.39

If collection is made from receivers in the 125 banks which have failed since March 18, 1930, and not reopened and from reorganized banks as well as from banks which have remained solvent the depositors in eleven banks would be paid in full and a part of those in the twelfth. If the assessments are collected only from solvent banks the first ten will get it all.

Appellants urge now, as in the original brief and original argument, that under the facts alleged which stand admitted by the demurrer the assessments sought to be collected are confiscatory and in violation of the constitutional rights of appellants. Every argument presented in support of appellants position has been strengthened by the events of the intervening months. The struggle to maintain the financial integrity of our institutions has steadily become more intense. Every agency possible has been marshalled to avoid a total collapse. Distress in Nebraska has been aggravated in very large part by the failure of banks not only because of actual losses but also, and to a greater degree, by fear causing solvent institutions to withhold legitimate credit in order to be prepared for withdrawals.

It is only repeating common knowledge to say that no single factor in our present situation transcends in its importance the proper solution of this litigation. A failure to give recognition to the confiscatory character of the burdens sought to be imposed spells nothing short of disaster. On the contrary a recognition thereof is destined to stabilize the economic structure in Nebraska vastly beyond the sums involved.

On the face of it we find ourselves in a situation where the legislative decision of 1930 cannot be carried out, first

because the burden imposed is confiscatory and second because, under the decision in the Superior Bank case, the legislature lacked constitutional power to effect a transfer of assets. A collection of assessments for the benefit of less than a dozen banks is violative of the legislative mandate and a collection of assessments for the benefit of the other group determined by the so-called step-up plan is violative of the judicial mandate.

A recognition of the confiscatory character of the assessments conforms to the constitutional guarantees on which, in the last analysis, the perpetuity of our institutions must rest.

PETERSON & DEVOE,
Attorneys for Appellants.

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BRIEF OF APPELLEES

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Attorneys for Appellees.

STATEMENT OF CASE

NATURE

This suit was instituted in the district court of Lancaster county, Nebraska, by the plaintiff banking corporations to enjoin the collection of two "regular" and three "special" assessments levied under the provisions

of the Depositors' Guaranty Fund Law; and also to enjoin the assessments levied and to be levied under the provisions of the law passed by the Special Session of the Legislature of Nebraska in March, 1930, pertaining to the "Depositors' Final Settlement Fund." By cross-petition the defendants prayed for individual judgments against the plaintiff banks, respectively, in the amounts of said assessments which were levied and unpaid with interest thereon.

The brief of appellants herein, plaintiffs below (Appellants' Brief, pp. 6-41), sets out the pleadings in the trial court in considerable detail. We will, therefore, confine ourselves to a short statement of the issues.

PLAINTIFFS' CASE

I. Plaintiffs' first cause of action attacks the Depositors' Final Settlement Fund Law, and especially the sections thereof now compiled as sections 8-171, 8-172, 8-176, Compiled Statutes of Nebraska, 1929, and the assessments provided for therein, on the grounds that they

(a) Violate the "due process" and "equal protection" clauses of the federal constitution (14th Amendment) and the "due process" clause of the Constitution of Nebraska (Sec. 3, Art I).

(b) Violate Section 18, Article III of the Nebraska Constitution as class legislation.

Plaintiffs attack Section 8-179 of the law, *first,* as violative of the "equal protection" and "due process"

clauses of the federal constitution; *second,* as violative of the due process clause of the Nebraska Constitution; *third,* as violative of Article II of the Nebraska Constitution as an attempt to invade the functions of the judiciary; *fourth,* as violative of Section 14, Article III of the Nebraska Constitution, the title to the act not being broad enough to cover subject matter in the body of the act.

II. Plaintiffs' second cause of action attacks the Depositors' Final Settlement Fund Law and especially those sections thereof now compiled as Sections 8-171, 8-174, 8-175, 8-176, 8-177 and 8-181, which provide for the collection and distribution of two unpaid "regular" assessments and three unpaid "special" assessments levied against the plaintiff banks under the Depositors' Guarantee Fund Law (Secs. 8024, 8025, 8026, 8027, Comp. St. Neb., 1922, and Section 8028 as amended by Sec. 26, Ch. 91, Laws of 1923). The grounds for plaintiffs' attack are that said sections and the collection and disbursement of said assessments:

(a) Violate the "due process" and "equal protection" clauses of the federal constitution.

(b) Violate the "due process" clause of the Nebraska Constitution.

(c) Violate Section 18 of Article III of the Nebraska Constitution as class legislation.

Plaintiffs attack Section 8-179 on the constitutional grounds: *first,* that it invades the functions of the judiciary, in violation of Article II of the Nebraska Con-

stitution; *second,* that it violates the "due process" and "equal protection" clauses of the federal constitution and the "due process" clause of the Nebraska Constitution; and *third,* that it violates Section 14, Article III of the Nebraska Constitution, the subject matter in the body of the section being broader than its title.

III. Plaintiffs in their answer to the defendants' cross-petition attack Sections 8024, 8025, 8026 and 8027, Compiled Statutes of Nebraska, 1922, and Section 8028, Compiled Statutes of Nebraska, 1922, as amended by Section 26, Chapter 191, Laws of Nebraska, 1923, being that part of the Depositors' Guarantee Fund Law under which the regular and special assessments involved in this case were levied, and plaintiffs also attack said assessments—all on the grounds that said assessments at the respective times of levy were and now are confiscatory and in violation of the "due process" clauses of the federal and state constitutions.

DEFENDANTS' CASE

I. The defendants assert and rely upon the constitutionality and validity of the Depositors' Guarantee Fund Law under which the "regular" and "special" assessments in question were levied, the constitutionality and validity of the Depositors' Final Settlement Fund Law under which the assessment of January 1, 1931, was levied, and the constitutionality and validity of said assessments in question.

II. The defendants, as to each of plaintiffs' two causes of action, assert that all contentions made by

plaintiffs, except their claim of the right of set-off of payments made to the Bankers' Conservation fund against the five regular and special assessments in question, were and are *res adjudicata* in the case of *Abie State Bank* v. *Weaver,* 119 Neb. 153, 227 N. W. 922, 282 U. S. 765, 51 Sup. Ct. 252, 75 U. S. (L. Ed.) 690.

III. (a) The defendants, by cross-petition, prayed for individual judgments against the plaintiff banks, respectively, in the amounts of the assessments, duly levied under the Guarantee Fund Law and unpaid by the plaintiff banks, as follows:

(1) Special assessment of one-fourth of one per cent of average daily deposits, levied December 15, 1928.

(2) Special assessment of one-half of one per cent of average daily deposits, levied April 17, 1929.

(3) Regular assessment of one-twentieth of one per cent of average daily deposits, levied July 1, 1929.

(4) Regular assessment of one-twentieth of one per cent of average daily deposits, levied January 1, 1930; and

(5) Special assessment of one-half of one per cent of average daily deposits, levied January 2, 1930.

(b) The defendants in their cross-petition also prayed for individual judgments against the plaintiff banks, respectively, in the amount of the assessment levied on January 1, 1931, under the provisions of the Depositors' Final Settlement Fund Law, and especially under the

provisions of Section 8-172, Compiled Statutes of Nebraska, 1929.

STIPULATIONS

The parties filed in the trial court several stipulations of facts which, by reference, were made a part of the pleadings, and, therefore, form an integral part of the case for all purposes of the defendants' demurrer to (a) plaintiffs' reply to defendants' answer and to (b) plaintiffs' answer to defendants' cross-petition. These stipulations are found in the Transcript on pages 13 to 26, 43 to 50, 50 to 52, 76 to 85 (including Exhibits A, B, C, D and E, and Exhibits 2, 3, 4, 5, 6, 7 and 8), and 87.

THE JUDGMENT OF THE TRIAL COURT

The trial court sustained the defendants' demurrer (Tr. pp. 86, 94), and the plaintiffs having refused to plead further and having elected to stand on their pleadings as amended or supplemented by stipulations of the parties, the trial court entered judgment against the plaintiffs, dismissed their amended petition and entered judgments for the defendants upon their cross-petition against the plaintiff banks, respectively, in the aggregate amount of the five regular and special assessments levied under the Depositors' Guarantee Fund Law and the amount of the assessment of January 1, 1931, under the Depositors' Final Settlement Fund Law (Tr., p. 102, consisting of 20 sheets). Correctness of computation of these judgments is stipulated on page 100 of the transcript.

This is an appeal from that judgment prosecuted by the plaintiff banks.

PROPOSITIONS RELIED UPON FOR AFFIRMANCE

1. The Depositors' Final Settlement Fund Law and the assessments levied thereunder are constitutional and valid.

2. The Depositors' Guaranty Fund Law as modified by the Depositors' Final Settlement Fund Law is constitutional.

3. Each and all of the two "regular" assessments of July 1, 1929, and January 1, 1930, the three special assessments of December 15, 1928, April 17, 1929, and January 2, 1930, and the Depositors' Final Settlement Fund assessment of January 1, 1931, were, when levied, and now are constitutional and valid.

4. All matters relied upon by plaintiff banks in this case, except their claim of the right of set-off of payments to the Bankers' Conservation Fund and their adjudicated claims on deposits in other state banks against assessments for the Depositors' Guaranty Fund (now Depositors' Final Settlement Fund), were and are *res adjudicata* in the case of *Abie State Bank* v. *Weaver,* 119 Neb. 153, 227 N. W. 922, 282 U. S. 765, 51 Sup. Ct. 252, 75 L. Ed. 690.

5. Section 8-179, Compiled Statutes, 1929, being that part of the Depositors' Final Settlement Fund Law which conditionally repeals the Depositors' Guaranty Fund Law, is constitutional and valid.

6. Section 8-179, Compiled Statutes, 1929, is not nullified by Section 8-180, Compiled Statutes, 1929.

7. The plaintiff banks are not entitled to set-off adjudicated claims for deposits in failed banks or payments made to Bankers' Conservation Fund against the five "regular" and "special" assessments levied under the Depositors' Guaranty Fund Law and carried forward into the Depositors' Final Settlement Fund Law.

8. The several judgments rendered by the trial court in favor of the defendants and against the plaintiff banks, respectively, in the aggregate amounts of the assessments involved herein are right and should be affirmed.

PROPOSITIONS OF LAW

1. **"It is a firmly established principle of law that the constitutionality of a statute may not be attacked by one whose rights are not affected by the operation of the statute."**

12 C. J. 760.

State, ex rel. Ridgell v. *Hall,* 99 Neb. 89, 96, 156 N. W. 16.

Cram v. *C. B. & Q. Ry. Co.,* 85 Neb. 586, 123 N. W. 1045.

Ericson v. *Nine Mile Irrigation District,* 109 Neb. 189, 195, 190 N. W. 573.

Urbach v. *City of Omaha,* 101 Neb. 314, 163 N. W. 307.

Ruwe v. *School District No. 85 of Dodge County,* 120 Neb. 668, 234 N. W. 789.

Assaria State Bank v. *Dolley,* 219 U. S. 121.

Arizona Copper Co. v. *Hammer,* 250 U. S. 429.

Cooley, Const. Lim., Vol. I (8th Ed.), pp. 339-341.

West Digest System, "Constitutional Law" ("Key Number") 42.

2. "It is elementary that it is not within the province of the courts to annul a legislative act unless its provisions so clearly contravene a provision of the fundamental law, or it is so clearly against public policy, that no other resort remains."

Abie State Bank v. *Weaver,* 119 Neb. 153, 227 N. W. 922.

Weaver v. *Koehn,* 120 Neb. 114, 231 N. W. 703.

3. The "assessment, creation and administration" of the Depositors' Guaranty Fund, "from whatever standpoint considered, are made pursuant to a legislative policy, which may be changed at will."

Wirtz v. *Nestos,* 51 N. D. 603, 200 N. W. 524.

Abie State Bank v. *Bryan,* 282 U. S. 765, 51 Sup. Ct. 252, 75 U. S. (L. Ed.) 690.

Assaria State Bank v. *Dolley,* 219 U. S. 121.

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

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

City of Jackson v. *Deposit Guaranty Bank & Trust Co.,* 133 So. (Miss.) 195.

Love v. *Mangum,* 135 So. (Miss.) 135.

State ex rel. Sharpe v. *Smith,* 234 N. W. (S. D.) 764.

State v. *Bone,* 120 Kan. 620, 244 Pac. 852.

Spokane & Eastern Trust Co. v. *Hart,* 127 Wash. 541, 221 Pac. 615.

Lacy v. *State Banking Board,* 118 Tex. 91, 11 S. W. (2d) 496.

4. The constitutionality of Depositors' Final Settlement Fund Law (Ch. 6, Laws of Nebraska, 1930) as a modification of the Depositors' Guaranty Fund plan (Secs. 8024, 8025, 8026, 8027, Comp. St., 1922, and Section 8028, as amended by Section 26, Ch. 191, Laws of 1923) is res adjudicata.

Abie State Bank v. *Weaver,* 119 Neb. 153, 227 N. W. 922.

Abie State Bank v. *Bryan,* 282 U. S. 765, 75 L. Ed. 690, 51 S. Ct. 252.

5. Section 18, Article III, of the Nebraska Constitution is not applicable to this case. It is "*not* a restriction upon the power of the legislature over the *subject* involved, but rather a limitation with respect to the *manner of exercise* of such power."

Smiley v. *McDonald,* 42 Neb. 5, 60 N. W. 355.

State v. *Gering Irrigation Dist.,* 114 Neb. 329, 207 N. W. 525.

City of Jackson v. *Deposit Guaranty Bank & Trust Co.,* 133 So. (Miss.) 105.

Baird v. *Rash,* 234 N. W. (N. D.) 651, 653, 654.

6. " 'The banking business, carried on pursuant to a state charter, is quasi-public and, for protection of

the public and its interests, is subject to reasonable regulations by the state.' "

Abie State Bank v. *Bryan,* 119 Neb. 153, 227 N. W. 922, 282 U. S. 765.
Citizens State Bank v. *Strayer,* 114 Neb. 567.
State v. *Smith,* 234 N. W. (S. D.) 764, 778.
Noble State Bank v. *Haskell,* 219 U. S. 104.
Shallenberger v. *First State Bank,* 219 U. S. 114.
Assaria State Bank v. *Dolley,* 219 U. S. 121.

7. "The legislative intent is the cardinal rule in the construction of statutes."

"The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature."

King of Trails Bridge Co. v. *Plattsmouth Auto & Wagon Bridge Co.,* 114 Neb. 734, 209 N. W. 497.
State v. *School District,* 99 Neb. 338, 156 N. W. 641.
36 Cyc. 1106.

8. Whether or not the assessments imposed under the Depositors' Final Settlement Fund Law are so burdensome as to be legally confiscatory can only be determined by their effect on banks during normal business times; confiscation cannot be predicated upon the experience of banks in abnormal years.

Kings County Lighting Co. v. *Lewis,* 180 N. Y. Sup. 570.
Darnell v. *Edwards,* 244 U. S. 564, 34 Sup. Ct. 701.

9. **The legislature has the general power "to make such regulations and conditions as it pleases with regard to the taking effect or operation of laws. They may be absolute, *or conditional or contingent; and if the latter, they may take effect on the happening of any event which is future and uncertain.*"**

Cooley on Constitutional Limitations, Vol. 1 (8th Ed.), pp. 241, 242.

Smith v. *Janesville,* 26 Wis. 291.

State v. *Liedtke,* 9 Neb. 490.

Barto v. *Himrod,* 8 N. Y. 490.

The Cargo of the Brig Aurora v. *United States,* 7 Cranch. 382.

Ex Parte Wall, 48 Cal. 279.

See: 36 Cyc. 1099.

25 R. C. L., pp. 908-909, 913, 914.

10. **"When one section of a statute treats specially and solely of a matter, that section prevails in reference to that matter over other sections in which only incidental reference is made thereto; not because one section has more force as a legislative enactment than another, but because the legislative mind, having been in the one section directed to the particular matter, must be presumed to have there expressed its intention thereon rather than in other sections where its attention was turned to other things."**

25 R. C. L. 1011.

State v. *Nolan,* 71 Neb. 136, 98 N. W. 657.

Kountze v. *City of Omaha,* 63 Neb. 52, 88 N. W. 117.

11. It is a well recognized rule of statutory construction that "the several parts of an act are to be construed together in order to ascertain the intention of the legislature."

Follmer v. *Nuckolls County,* 6 Neb. 204.
City of Lincoln v. *Janesch,* 63 Neb. 707, 89 N. W. 280.

12. "When the title of an act fairly gives expression to the general subject-matter contained in the act, such act will not be held invalid as being broader than its title."

Mehrens v. *Bauman,* 120 Neb. 110.

ARGUMENT

DEPOSITORS' FINAL SETTLEMENT FUND LAW IS CONSTITUTIONAL

(a) Appellants' Premise and Theory Erroneous.

At the outset we must say that the contentions of the plaintiff banks, appellants herein, concerning the nature and purpose of the Depositors' Final Settlement Fund Law as passed by the Special Session of the Nebraska Legislature in March, 1930, are based upon an entirely false premise, to-wit, that this law is an entirely *new plan,* unrelated to the old guaranty fund system. Consequently their argument on the constitutional questions involved is for the most part beside the point.

Counsel for the banks utterly ignore the true situation that faced the Legislature in March, 1930, when called in special session by the Governor to enact proper

and necessary legislation pertaining to the business of banking in this state. The Depositors' Guaranty Fund had become hopelessly involved due to the ever-mounting claims of depositors outstanding and unpaid. The banks were refusing to pay the five accrued assessments levied by the Department of Trade and Commerce under the law, and were demanding relief from these and all future assessments. Holders of adjudicated claims against the fund were clamoring for relief. Depositors of going banks and the public generally were nervous and distrustful of the soundness of the banking system. In fact, the entire situation called for quick and efficient legislative action.

The Legislature in that special session responded by adopting a "middle-ground" policy. The law passed by that session, now under attack in this case, was and is necessarily a *compromise* measure. *"Final settlement"* was the purpose of the legislature in adopting the law and *final settlement* is the result and effect of the law thus passed.

The repeal of the guaranty fund sections so eagerly seized upon by appellants in this case to show a break or lack of continuity between the guaranty fund and the final settlement fund, was no more than a necessary incident to the winding-up process contemplated and effected by the Legislature in the *final settlement* of all rights and liabilities as between banks, depositors and claimants. Treating the outstanding and unpaid assessments as valid and subsisting obligations and charges

against the banks as a fund proper for collection and distribution among claimants so far as the fund would reach, the legislature added thereto, *not* as a levy "to pay for a dead horse", as counsel would have the court believe, but as a *reduction* of the heavy load theretofore carried, a nominal charge, payable over a ten-year period, to meet an insignificant part of the outstanding claims against the guaranty fund. With this adjustment and *final settlement,* the guaranty fund plan will come to an end—the banks to have no further liability regardless of the size of the deficit in the guaranty fund and the claimants to have the dividends thus available as a full discharge of their claims. Far from inaugurating a "New Plan", as appellants' counsel contend, the Legislature was bringing an old plan to a fair and equitable conclusion.

In *Abie State Bank* v. *Bryan,* 282 U. S. 765, 51 Sup. Ct. 252, 75 L. Ed. 690, a case to which we will have occasion to refer later, the Supreme Court of the United States thoroughly appreciated, construed and *adjudicated* the objects and purposes of this Depositors' Final Settlement Fund Law. The court in that case, speaking through Mr. Chief Justice Hughes, clearly recognized the law for just what it is, *not* a new plan or scheme of bank guaranty, but a winding-up process, a *liquidation* of the old plan. The court, therefore, refers to the new law as *"modifying legislation* which has *restricted* in an important degree their (the banks') liability to assessments", which "has provided for what is, in substance, a *liquidation of the guaranty scheme":* based upon the

"freedom in the legislature to *modify its regulation*" (guaranty fund law) "when the *public welfare was deemed to require a change*". Further exerpts from that opinion are along the same line:

> "We see no reason to doubt the power of the legislature to *extricate* the banks and administration of the guaranty fund from the serious plight in which they were found under the operation of the old plan and to exercise a reasonable discretion in seeking this result.
>
> "* * * For the future, there is a *limitation of the obligation* to a total assessment of two-tenths of one per cent of average daily deposits instead of assessments aggregating six-tenths, as were made possible by the previous law. The future assessments, to this *restricted* amount, are limited to a period of ten years.
>
> "Considering the *reduction in the extent of the obligation* as to future assessments, we are unable to say that the *statute in this modified form* is confiscatory, or other than a reasonable method of *liquidating the guaranty plan*."

Defendants, therefore, base their case upon the premise thus announced and adjudicated by the highest court in the land. The plaintiffs' case is utterly unsound in its very foundation.

Since, therefore, the defendants, appellees herein, base their defense and cross-action upon an entirely different premise from that mistakenly adopted by the plaintiff banks, a considerable part of the argument made by the plaintiffs on constitutional questions becomes academic and of no application in this suit.

(b) Depositors' Final Settlement Fund Law a valid exercise of the police power.

With the abstract Propositions of Law, Numbers I, II, III and IV of appellants' brief, we are in hearty accord.

Both this court and the Supreme Court of the United States have clearly held the guaranty fund plan to rest for its constitutional support on the police power of the state exercised by its legislature. *Abie State Bank* v. *Weaver,* 119 Neb. 153, 227 N. W. 922, 282 U. S. 765; *Noble State Bank* v. *Haskell,* 219 U. S. 104; *Shallenberger* v. *First State Bank,* 219 U. S. 114. There can be no serious question that the police power, thus exercised, must not be arbitrarily exercised and that its exercise must bear a reasonable relation to some public purpose.

We agree with counsel for the plaintiffs that if the Depositors' Final Settlement Law had been passed as an entirely new measure, unrelated to the creation, administration and distribution of the Depositors' Guaranty Fund, there would be little doubt of its unconstitutionality on the ground, so well stated by this court in *Weaver* v. *Koehn,* 120 Neb. 114, 231 N. W. 703, that it would

> "Constitute the taking of money belonging to one class to pay the claims of those of another class."

When, however, the law is considered in its true aspects, so well recognized by the Supreme Court of the United States in the *Abie State Bank* case, as a "liqui-

dation of the guaranty scheme" and a "limitation of the obligation" with which the banks were theretofore burdened and with which they, but for this legislation, were faced in the future, its public purpose is evident.

To have wholly absolved the banks not only from any further obligation to mitigate the distressed condition of the guaranty fund by assessments of comparatively small proportions, but also from their *accrued* obligation to pay the five assessments they already owed but had refused to pay, would not only have been a harsh and unconscionable disregard of the adjudicated claims of the thousands of depositors who, equally with the banks, had been a part and parcel of the guaranty fund plan, but would have had a most deleterious effect upon the banking system.

The standing and good will of banks is a matter of vital public concern. The attitude of the public generally toward the banks through which a large part of the commercial transactions of the state is handled is of great importance in the economic life of all the people. If the legislature had made no effort to work out an equitable plan of winding up the guaranty fund system in a spirit of compromise but, by a sweeping, blanket release to the banks, had relieved them of all further liability for assessments, including those already levied and long past due, can it be doubted that the banks themselves would have greatly suffered in prestige and in the confidence and respect of a large body of the citizenry, with consequent injury to the structure of our credit system? The debtor's frank acknowledgment and prompt payment of a just obligation is a distinct

pecuniary advantage to the debtor himself, if he would continue in affairs of commerce and trade. This is especially true of banks. The Legislature in enacting the Depositors' Final Settlement Fund Law exercised its police power to "extricate the banks and the administration of the guaranty fund from the serious plight in which they were found under the operation of the old plan." *Abie State Bank* v. *Bryan, supra.* The "public purpose" intended and effected by the measure is beyond question.

(c) The same police power exercised by the legislature in the origination and execution of the guaranty system is exercised in its modification.

In their brief, counsel for appellants go far afield to seek analogies in order to show that the Depositors' Final Settlement Fund Law is unconstitutional. The authorities they cite, however, have no bearing or applicability to the issue at hand. The whole structure built up by counsel in their argument fails because of its false foundation.

So far as we have been able to find the courts which have been called upon to pass upon the constitutionality of similar statutes have unanimously upheld the legislation as a constitutional and valid exercise of the police power.

In *Abie State Bank* v. *Bryan,* 282 U. S. 765, 782, 783, the court, speaking of the identical law here under attack, said:

> "The Bank Guaranty Law provided for a fund to be raised by assessments upon all the state banks, and while

this was regarded as an important safeguard for all depositors, it was but a police regulation, the sanction of which lay in the constitutional power of the state and not in contract. *And this is the view that has been taken by state courts which have had occasion to consider this question in connection with legislation by which relief has been sought from the difficulties encountered in the continued operation of bank guaranty plans.* *Wirtz* v. *Nestos*, 51 N. D. 603, 616, 621; 200 N. W. 524, 529, 531; *Standard Oil Co.* v. *Engel*, 55 N. D. 163, 170, 174; 212 N. W. 822, 824, 826; *South Dakota ex rel. Sharpe* v. *Smith*, 234 N. W. 525. * * *

"The origin of rights under the Bank Guaranty Law was wholly statutory,—an act of grace by the legislature, so far as depositors were concerned, with the purpose of promoting the public welfare and *with freedom in the legislature to modify its regulation when the public welfare was deemed to require a change.*"

In *City of Jackson* v. *Deposit Guaranty Bank & Trust Co.*, 133 So. 195, the Supreme Court of Mississippi had under consideration a statute passed by the legislature of that state in 1930. There was then a large deficit in the guaranty fund of that state. The law of 1930 (Ch. 22, Laws of Miss., 1930) provided that until all claims certified against the fund and due to be issued, *up to the date of the passage of the act,* were paid, the guaranty features of previous acts should be suspended, and no further guaranty certificates issued. For the retirement and liquidation of said outstanding certificates, the 1930 law further provided that assessments not to exceed five in one year, of one-twentieth of one per centum of the average unsecured deposits of the bank, less capital and surplus, should be made and col-

lected. It will be seen that the situation in Mississippi was quite similar in its general nature to that involved in the case at bar.

While the precise point herein raised was not directly at issue in the *City of Jackson* case, the following statement of the court is most significant:

> "The general power of the legislature to enact legislation of this sort is sustained by the Supreme Court of the United States in the recent case, *Abie State Bank* v. *Weaver*, 51 S. Ct. 252, 75 L. Ed. 690 (decided Feb. 24th, 1931."

In the later case of *Love* v. *Mangum,* 135 So. 135, the Mississippi Supreme Court passed squarely upon the constitutionality of the 1930 law above mentioned. The particular point in issue was the claim asserted by a depositor to vested rights under the old guaranty law which authorized interest-bearing certificates, whereas the new law provided for non-interest bearing certificates. Citing and following the *Abie State Bank* case, *supra,* and *State* v. *Smith, infra,* the court held that the claimant had "neither a contract right, nor a vested right, under the suspended guaranty statute." The court further said:

> "Both the old and the new bank guaranty statutes are mere police regulations."

State, ex rel. Sharpe, Atty. Genl. v. *Smith,* 234 N. W. (S. D.) 764, contains a complete and powerful exposition of the whole subject of guaranty fund legislation. In 1927 the legislature of South Dakota repealed the Depositors' Guaranty Fund Law of that state which had

been in effect since 1915. In lieu thereof the Legislature by repealing some old sections and amending others established a new guaranty fund system with like assessments of one-fourth of one per cent of average daily deposits, payable into the state treasury in cash or securities, but for the protection only of depositors in the individual banks, respectively. This fund is to thus accumulate as to each contributing bank until it reaches the amount of such bank's capital stock, to be administered, in case of such bank's failure, by the guaranty fund commission. While the new (1927) law in South Dakota differs from the Depositors' Final Settlement Fund Law of this state in that no provision was made for any further assessments to pay off outstanding claims against the old guaranty fund, the court's discussion of the change in the law as a proper exercise of the police power is most valuable in its application to the situation now existing in this state. The following is one of the many powerful statements of the court in its lengthy exposition of the police power in this connection:

> "It seems plain that a duty arising from operation of law is not a contract in any such sense as is defined in Sections 803 and 804 (defining 'obligations'), *supra*, and there is no necessity for using the language of contract concerning it. So in the instant case the plain truth is that the duty to pay assessments and the other duties imposed upon the banks of this state by the guaranty fund law are no more and no less than duties imposed by operation of law by the legislature of this state in the valid exercise of its police power."

In *Wirtz* v. *Nestos*, 51 N. D. 603, 200 N. W. 524, one of the leading cases on the subject of Depositors' Guar-

anty Fund Laws and the nature of the same as police measures, the court said:

> "The assessment, creation, and administration of the fund, from whatever standpoint considered, are made pursuant to a legislative policy, *which may be changed at will;* the payment of the assessment is compulsory (failure to pay it is followed by results substantially identical with those that follow when special assessments against property are not paid, the property — here the right to do a banking business — may be taken), does not rest upon contract in any respect, and *the legislative wisdom which dictated the adoption of that policy may likewise alter or abandon it.*" (Italics ours.)

Texas repealed its Bank Deposit Guaranty Law (Vernon's Ann. Civ. St., 1925, Arts. 437-489) in 1927 (Gen. & Sp. Acts 40th Leg., 1927, Ch. 12). At the time of this repeal, all bank members of the system had paid the assessments levied against them for the fund. The guaranty law allowed emergency assessments of not exceeding two per cent of average daily deposits of each member bank, in one year. The repealing statute of 1927 provided that

> "the passage of this act shall not affect the liability of state banks for assessments to the guaranty fund as such liability existed at the time this act takes effect."

In construing this provision, with reference to the continuing obligation of the banks to pay the two per cent assessments, the Commission of Appeals of Texas, in the case of *Lacy* v. *State Banking Board,* 118 Tex. 91, 11 S. W. (2d) 496, said:

> "Tested by these rules, we think the provision in question contemplated that banks which were members

> of the system on February 11, 1927, at the time the repealing act took effect, would be liable for the two per cent assessment for the current year" (ending November 1, 1927; "that it was only intended to give the banking board power to assess such banks for the liability which had accrued at that time, and did not contemplate a contingent liability of future assessments so as to authorize assessments over an unlimited number of years."

See also companion cases: *First Natl. Bank* v. *State Banking Board,* 118 Tex. 168, 11 S. W. (2d) 505; *Lydick* v. *State Banking Board,* 11 S. W. (2d) 505; 12 S. W. (2d) 954; *Smythe* v. *Cochran,* 14 S. W. (2d) 821.

It is significant that the Texas court regarded an assessment of two per cent after the effective date of the repealing law as a very fair method of winding up the system. This two per cent is the same as the entire assessment chargeable, *over a period of ten years,* to Nebraska banks under the Depositors' Final Settlement Fund Law.

The Texas cases are also important in their holding, *without* express provision of the repealing law, that no preferences should be allowed as between unpaid claims of depositors, notwithstanding the time of failure of the bank. The equitable principles of the "step-up" plan, so called, in the Depositors' Final Settlement Fund Law (Sec. 8-177, Comp. St. Neb., 1929) are thus recognized and enforced by the Texas courts *in the absence of statute.*

Kansas repealed its guaranty fund law in 1929 (Laws of 1929, Ch. 89). The system in that state was volun-

tary on the part of the banks which on becoming members were required to deposit bonds with the state bank commissioner to secure the payment of assessments to be levied under the law. The law also allowed the banks to withdraw voluntarily from the system on six months' notice, the bonds deposited to be returned to such withdrawing members "when the affairs of all failed banks in liquidation at the expiration of said six months shall have closed up and the bank shall have paid its assessments on account of same".

In *Smith* v. *Koeneke,* 128 Kan. 805, 280 P. 767, certain banks sought to compel the bank commissioner, by mandamus, to return to them the bonds deposited under the old law, the banks contending that since they had paid assessments levied up to the time of the repeal of the guaranty law, for the commissioner to use the bonds for the purpose of liquidating claims on the guaranty fund after such payment by the banks of the required assessments would be a different use from that for which the bonds were pledged. While the case is not strictly in point due to the voluntary nature of the Kansas plan and the specific pledge of bonds to secure payment of assessments, the case is significant in its holding that the repeal of the law did not effect the validity of the pledge of bonds for a specific purpose—that the repeal of the guaranty law was valid except "insofar as it attempted to authorize the return of the bonds in question".

In *State* v. *Bone,* 120 Kan. 620, 244 P. 852, the court, speaking of the guaranty fund law of that state, said:

> "The statute is hardly contractual in its nature anyway. It was originally enacted, and *the successive*

changes from time to time have been made in it, under and by virtue of the police power of the state. Noble State Bank v. *Haskell*, 31 S. Ct. 186, 219 U. S. 104, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912 A 487; *Assaria State Bank* v. *Dolley*, 31 S. Ct. 189, 219 U. S. 121, 55 L. Ed. 123; *Spokane & Eastern T. Co.* v. *Hart*, 221 Pac. 615, 127 Wash. 541; *Wirtz* v. *Nestos* (N. D.) 200 N. W. 524."

The Legislature of the state of Washington passed a guaranty fund act in 1917, membership in the system on the part of the banks being voluntary. Banks could withdraw from the system on six months' notice and upon doing certain other things provided for. In 1921 certain amendments were made and certain changes were adopted with reference to assessments and their amounts. In *Spokane & Eastern Trust Co.* v. *Hart,* 127 Wash. 541, 221 Pac. 615, the Supreme Court of Washington had occasion to pass upon the validity of these amendments as they affected a member bank who had given notice of withdrawal less than 6 months before the amendatory provisions of 1921 went into effect. The constitutional question was much more complicated than that in the case at bar because of the voluntary nature of the membership of banks in the guaranty system. This naturally raised the question of proper classification in the amendatory laws of 1921 of member banks as distinguished from non-member banks, a complication from which the case at bar is entirely free. After holding that if the amendatory act be construed as applying only to member banks and if the law be given a compulsory effect, it would be unconstitutional as class legislation, the court went on to hold that, since the new assessments were not substantially increased and no new burdens were added,

the amendatory act was valid. The court refutes the bank's contention that it was relieved from further assessments after the passage of the amendatory law, in the following language:

> "It has been the position of the respondent, ever since the amendatory act was passed, that it was relieved from all obligations, because the state was seeking to enforce certain provisions which were not contained in the original act under which it voluntarily became a member of the system. We are not convinced that the rule which the respondent invokes is applicable to the present situation. The state, in passing this law and creating the guaranty fund, was not acting in a private or proprietary capacity. *It was attempting to do something which it could only do in the exercise of the police power.* It is true that in a sense the arrangement under which a bank becomes a member of the association is in effect an agreement between it and the guaranty fund board, but, notwithstanding this fact, we are of the opinion that the strict doctrine of the rescission of contracts between individuals, where one party refuses to perform unless new terms are consented to by the other, should not be applied in a case of this kind."

The foregoing citations are ample authority to sustain defendants' contention that the Depositors' Final Settlement Fund Law is a proper exercise of the police power and bears a reasonable relation to a public purpose.

(d) The Depositors' Final Settlement Fund Law is not class legislation.

(1) Section 18 of Article III of Nebraska Constitution not applicable.

Appellants' argument that the law is invalid as class legislation is groundless. Strangely enough they rely

on Section 18 of Article III of the Constitution of Nebraska, which provides, in part, that

> "The legislature shall not pass any local or special laws in any of the following cases, that is to say: * * * Granting to any corporation, association or individual any special or exclusive privileges, immunity or franchise whatever."

This section of the constitution has nothing whatsoever to do with the *substantive* right of equal protection of the laws. It pertains to *form* of legislation, that is to say, it strikes at *local* or *special* legislation on special or local subject matter, as distinguished from *general* laws. This is illustrated in a citation on page 83 of appellants' brief from the case of *State* v. *Gering Irrigation Dist.*, 114 Neb. 329, 207 N. W. 525, as follows:

> "The classification is arbitrary and limits its application as clearly as though it had by name designated the district to which it was to apply. *A general law could have been framed applicable to the future if the legislature had desired to do so.*"

The true intent and scope of this section of the Nebraska constitution is set out in *Smiley* v. *MacDonald*, 42 Neb. 5, 60 N. W. 355, wherein this court held this section

> "*Not* a restriction upon the power of the legislature over the *subject* involved, but rather as a limitation with respect to the *manner of the exercise* of such power."

In *City of Jackson* v. *Deposit Guaranty Bank & Trust Co.*, 133 So. 195, above discussed in another connection, the Mississippi Supreme Court squarely answered the objection raised by appellants here. Speaking of a

similar section of the Mississippi constitution (Sec. 87) which also forbade suspension of general laws by special laws, as applied to the law suspending the operation of the guaranty fund law, the court said:

> "A law is general in the sense of a constitutional provision when it applies to and operates uniformly on all members of any class of persons, places, or things requiring legislation peculiar to the particular class dealt with by the law."

In the syllabi, the court held:

> (Syl. 2) "General law may be suspended by another general law.
>
> (Syl. 3) "Statute suspending operation of bank guaranty law until bank guaranty certificates are paid is general, and not prohibited by constitution."

In *Baird* v. *Rash,* 234 N. W. (N. D.) 651, 653, 654, the court said:

> "Legislation dealing alone with insolvency of state banks is, in our opinion, no more to be regarded as a special law than legislation which would deal with their organization or regulation in other respects." Citing *State* v. *First State Bank of Jud*, 52 N. D. 231, 250; 202 N. W. 399; 12 C. J. 1128."

Counsel for appellants surely will not contend that the law under attack is not *"general"* as distinguished from *"special",* within the meaning of Section 18 of Article III of the Constitution of Nebraska. They have simply confused the "equal protection" clause of the 14th amendment to the federal constitution with this section.

(2) "Equal protection" of claimants against fund does not concern appellants as a matter of constitutional right.

Appellants' argument wanders to a complaint that, under the law, holders of claims against state banks failing after March 18, 1930, the effective date of the act, are subjected to an unconstitutional discrimination—that the law is, therefore, invalid as class legislation.

That complaint is not within the scope of appellants' constitutional rights. That complaint, even if valid, would be available only to the claimants themselves.

> "It is a firmly established principle of law that the constitutionality of a statute may not be attacked by one whose rights are not affected by the operation of the statute." 12 C. J. 760. See other authorities cited under Propositions of Law No. 1, *supra*.

(3) The law concerns all state banks alike and is not class legislation.

Appellants make no attempt to show that banks *as a class* are not subject to proper police regulation. That they *are* a proper and reasonable class for particular police regulation is clearly established.

In *State* v. *Smith,* 234 N. W. (S. D.) 764, 778, the court said:

> "It is further true that, when operating in the field of the police power, a considerable amount of discretion is necessarily vested in the Legislature. The courts will determine whether or not the field is a proper one for the exercise of the police power, that is, whether or not the subject-matter of the legislation is so affected

with a public interest as to justify the exercise of the police power with relation thereto. If an act of the police power operates, as it customarily does, upon one class of citizens, and not upon all citizens, the courts will determine whether the classification is a reasonable one, bearing in mind the particular and relating to public health, morals, or welfare which the act is intended to accomplish. *But, if the classification is reasonable, and if the field is a proper one for the exercise of the police power, what the Legislature sees fit to do in that field in the nature of police regulation is very largely in its discretion.* It might very well be argued, and it is argued by the defendants in this case, that the same discretion in the exercise of the police power, which in 1915 authorized the Legislature to enact the old Guaranty Law because the Legislature deemed it to be for the public welfare, and notwithstanding the fact that it meant taking the money of one bank to pay the debts of another, was equally sufficient in 1927 to authorize the Legislature, when it deemed the repeal of the old Guaranty Law to be for the public welfare, to accomplish the repeal, notwithstanding the fact that it meant depriving the petitioners of certain theretofore existing rights."

In *Abie State Bank* v. *Bryan,* 119 Neb. 153, 227 N. W. 922, this court, quoting from *Citizens State Bank* v. *Strayer,* 114 Neb. 567, held:

> " 'The banking business, carried on pursuant to a state charter, is quasi-public and, for protection of the public and its interests, is subject to reasonable regulations by the state.' "

See other cases cited under Proposition of Law No. 6, *supra.*

(e) Depositors' Final Settlement Fund Law does not divert the five (two regular and three special) assessments accrued under the Guaranty Fund Law to a private purpose.

Appellants attack the Depositors' Final Settlement Fund Law (Chapter 6, Laws 1930) on the ground that the Legislature having wholly done away with the Guaranty Fund Law, the entire public purpose contained therein wholly vanished and the retention in the new law of the five accrued assessments levied under the Guaranty Fund Law becomes a diversion of these assessments to a purely private purpose (Appellants' Brief, pp. 84-93).

Appellants' argument is necessarily founded on two main premises: *first*, that the five assessments in question were levied for a public purpose, and *second*, that under the 1930 law they are diverted from this purpose.

The first premise is sound. The second is false. Much of our above argument in reviewing the objects and purposes underlying this legislation applies to this point and will, therefore, not be repeated. Appellants' contention here is still founded on the idea, persistently stated, that the Depositors' Final Settlement Fund Law has wiped out the entire guaranty principle—that all rights and obligations under the old plan were wholly done away with. As we have above shown, this theory is wholly erroneous.

As stated by Mr. Chief Justice Hughes in the *Abie State Bank* case, *supra*,

> "Under the modifying act of 1930, only three of these special assessments and two regular assessments *remain effective.*"

Again, in the sylabus of that opinion, the Depositors' Final Settlement Fund Law is referred to and construed as *"retaining in force the assessments* immediately complained of."

Far from being a diversion of the proceeds of these five assessments, the law *kept them alive for the identical purpose to which they were devoted under the Guaranty Fund Law.* True, certain adjustments were made as between the holders of claims against the fund, but these adjustments were made only to provide for a more just and equitable distribution of the fund—to obviate some of the glaring injustices that had arisen as between the direct beneficiaries of the guaranty fund.

The situation in Nebraska in 1930 was practically identical to that existing in the other states which had adopted the guaranty plan. The law as originally enacted did not contemplate insolvency of the guaranty fund and, therefore, was silent as to priorities and preferences in the event of such insolvency. Consequently, the holders of adjudicated claims arising from deposits in banks failing first had been paid in full. Such payments wholly depleted the fund so that the depositors in banks failing after that condition arose were without recourse. The Legislature, therefore, having in mind the basic purpose behind the guaranty scheme, to-wit, that *all* depositors should be treated without preference or discrimination, applied to the situation the equitable principle obtaining in the general law of insolvent estates, to-wit, *pro rata* distribution among claimants, so that in so far as possible each depositor would eventually receive the same proportion of his original deposit.

This is the so-called "step-up" plan now appearing in Section 8-177, Compiled Statutes of Nebraska, 1929, an integral and vital part of the Depositors' Final Settlement Fund Law. As already pointed out in this brief, the Texas courts have approved such *pro rata* distribution in winding up the administration of the guaranty fund of that state *in the absence of statute.*

It should be said here also that the appellants are in no position to complain of the unconstitutionality of the law on the ground under discussion (See Proposition of Law No. 1, *supra*).

THE ASSESSMENTS HERE INVOLVED ARE NOT CONFISCATORY

Appellants attack both the Guaranty Fund Law (Secs. 8024, 8025, 8026 and 8027, Comp. St., 1922, and Sec. 8028, Comp. St., 1922, as amended by Sec. 26, Ch. 191, Laws of Neb., 1923) under which the two "regular" and three "special" assessments were levied, and also the assessments thus levied, on the ground that the same are violative of the due process clauses of the federal and state constitutions, in that said assessments, when levied, were and are confiscatory. The same contention is made as to the assessment of January 1, 1931, levied under the provisions of Section 8-172, Compiled Statutes of Nebraska, 1929, a part of the Depositors' Final Settlement Fund Law.

To meet the defendants' contention that these questions were *res adjudicata,* a contention more fully discussed later in this brief, the appellants assert that "changed conditions" have rendered the assessments

confiscatory. Plaintiffs are in error in stating that the demurrer admits the existence of the changed conditions asserted by the plaintiffs in their pleadings. The demurrer searches the whole record and the pleadings, it must be remembered, are supplemented by a considerable part of the record in the *Abie State Bank* case, which in itself furnishes substantial refutation, in fact and in law, of the "changed conditions" set out in the plaintiffs' pleadings.

We have no fault to find with the abstract proposition of law that changed conditions may cause a law constitutional when enacted to become unconstitutional when viewed in the light of the experience under such changed conditions. The application of that principle, however, has no place in this suit. In considering this matter of "changed conditions" as effecting unconstitutionality where constitutionality formerly existed, several outstanding weaknesses in appellants' position at once present themselves. Counsel seek to show confiscation because of alleged changed conditions by comparative statements of the condition of the plaintiff banks as of January 1, 1928, December 15, 1928 (the date of the first special assessment involved herein), and January 1, 1931 (the date of the 2-10 of 1 per cent assessment under the Final Settlement Fund Law). (Appellants' Brief, pp. 101-103). On page 100 of their brief, appellants state that

> "The computations therein are based upon the proposition that the net result of operations is reflected by the change in the *net worth of the banks in question as between the beginning of the period and the end of the period*, taking into account factors tending to increase

or decrease the net worth which have no relation to current operations."

Just how any computation as of January 1, 1931, which also contemplates and calculates losses in real estate account as of *June 1st,* 1931 (See Appellants' Brief, bottom of p. 100) can have any bearing on the confiscatory character of assessments made on the several dates, December 15, 1928, April 17, 1929, July 1, 1929, January 1, 1930, and January 2, 1930, there is no attempt to explain. "Statement Number 2" on page 103 of appellants' brief is, even if it were accurate, a purely academic manipulation of figures.

In order to be certain to arrive at a "net loss from operations from December 15, 1928, to January 1, 1931", appellants, in said Statement No. 2, with one bold stroke deduct a 60 per cent loss on real estate account as of June 1, 1931, whereas they struck only a 40 per cent loss from the book value of real estate carried on December 15, 1928. The defendants' demurrer admits only facts well pleaded. Therefore, we may also look to the statements and proof made by the appellants in the *Abie State Bank* case which are also, by stipulation and reference, a part of the pleadings in this case. For example, on page 21 in Exhibit 6 (reply brief of these appellants in the *Abie State Bank* case in the Supreme Court of the United States), the real estate carried on the bank's books in December, 1928, "had a realizable value of 43 per cent". (See also p. 23 of Exhibit 6.) Instead, therefore, of the 40 per cent shrinkage of such value as of said date as alleged in the appellants' pleadings in this case, the *proven facts* show a 57 per cent

shrinkage as of December, 1928. This item alone throws appellants' "Statement No. 1" and "Statement No. 2" on pages 102 and 103 of their brief all out of line and renders the comparison attempted worthless.

Again, said "Statement No. 2" shows "dividends paid" in the sum of $1,222,122.78. Presumably and without refutation, so far as this record goes, those dividends were legally paid, that is to say, that they were paid only after (a) all earnings and surplus funds, in turn, had been charged with losses, and (b) after the surplus thus diminished by losses had been restored from earnings, and that the dividends then paid did not exceed one-half of net earnings "until said surplus fund shall be fully restored to its former amount, or an amount equal to twenty per cent" of paid up capital. Sec. 8-144, Comp. St., 1929, effective since 1923.

Another interesting test of the accuracy and weight of appellants' "Statement No. 2" is to compare that statement of "net worth" of appellant banks on December 15, 1928, showing surplus of $4,101,685.89 and undivided profits of $2,361,387.63 with their statement made in said Exhibit 6 (reply brief in *Abie State Bank* case), wherein on page 22 it was said, as of December, 1928, that

> "If the banks were compelled to cash in real estate as the law requires, and to clean the note cases of doubtful and worthless notes, *it would practically wipe out their entire surplus and undivided profits.* * * *"

What competent proof, we ask, is there in the comparison sought to be made in appellants' said "Statement No. 2" in the light of the foregoing facts and the statement just quoted from?

One important item, as of January 1, 1931, in "State ment No. 2" shows a distinctly improved appearance as compared with the same item as of December 15, 1928. That item is "real estate"—carried at $3,864,-025.47 on January 1, 1931, as against $5,927,734.24 on December 15, 1928—a decrease of over two million dollars for the period! Aside from the requirements of the banking statutes strictly limiting real estate holding by state banks (See Sec. 8-145), it is a matter of common knowledge that a large real estate account means "frozen assets" and is a danger signal in the life of any commercial bank. In fact, as shown by the record in the *Abie State Bank* case (See Exh. 4, Brief of Appellants in the Supreme Court of the United States, pp. 20 to 24), the burden of excessive real estate accounts and losses therein was an outstanding phase of the difficulties experienced by the banks in the year 1928. The item "Other Real Estate" alone aggregated, in the 726 banks existing in December, 1928, when the *Abie State Bank* case was started, the sum of $9,872,647.21. They also carried "Real Estate" (bank buildings) at $6,174,-432.86, which item, added to the "Other Real Estate" item above, built up a staggering total of $16,047,080.07 (Exh. 4, p. 22), considerably over three-fourths of the combined capital stock of the banks! The capital stock of all going banks in 1928 was $19,100,000.00 (Exh. 6, Reply Brief in *Abie State Bank* case, p. 22). It would therefore appear from the face of the record that the appellants can find little support for their theory of confiscation from the real estate account in any of its phases.

Another comparison attempted to be made by appellants is found on page 104 of their brief wherein they refer to the Lancaster county district court's finding in the *Abie State Bank* case that the going banks made an "operating return to invested capital of 7.9 per cent for a period of 18 months preceding June 30, 1928." Counsel then, still using their Statement No. 2 above discussed, point to confiscation by "changed conditions" by comparing that return to the "net operating loss of $23,576.09" in said "Statement No. 2". Let us now turn to the appellants' own analysis of the situation as found in their Reply Brief in the *Abie State Bank* case, Exhibit 6. On page 21 of that brief they insist that the "actual net earnings of all the banks for the year 1927 and the first half of 1928 did not exceed 3 per cent upon invested capital." For further purposes of analyzing the comparison attempted to be made by appellants let us now apply to their "Statement No. 2" the 57 per cent shrinkage in Real Estate, as of December 15, 1928, the *proven* shrinkage, as above shown, instead of the 40 per cent used in their statement. Taking the rest of their calculations as correct, we have the following distinctly different aspect.

STATEMENT NO. 2 (REVISED VERSION)

Period December 15, 1928, to January 1, 1931

Net Worth December 15, 1928

Total Capital Stock	$12,451,500.00
Surplus	4,101,685.89
Undivided Profits	2,361,387.63
	$18,914,573.52

Less: Loss on Real Estate *57%* of $5,927,734.24	3,378,808.52
Total Net Worth December 15, 1928	$15,535,765.00

Net Worth January 1, 1931

Total Capital Stock	$12,180,500.00
Surplus	4,099,274.51
Undivided Profits	1,488,427.16
	$17,768,201.67
Less: Loss on Real Estate *60%* of $3,864,025.47	2,318,415.28
	$15,449,786.39

Results from Operations December 15, 1928, to January 1, 1931

Net Worth December 15, 1928		$15,535,765.00
Net Worth January 1, 1931		15,449,786.39
Reduction in Net Worth		$ 85,978.61
Add:		
Stockholders Assessment Paid In		$ 1,217,202.52
Operating Losses		$ 1,303,181.13
Dividends Paid	$1,222,122.78	
Guarantee Fund Assessments Charged Against Profits	794,197.08	
Decrease in Capital Stock	271,000.00	
		$ 2,287,319.86
Deduct Operating Losses		1,303,181.13
Gain		$ 984,138.73

Instead of a net operating loss of $23,576.09, we have for the period a net operating gain of $984,138.73. There is a total lack of showing of such changed conditions as to warrant any finding of confiscation.

In connection with this question of confiscation it needs to be remembered that when a law is enacted in the exercise of the police power, as was the Bank Guaranty Fund Law, 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 without violation of the fifth or fourteenth amendments to the constitution of the United States, for it is not taken for public use without compensation or without due process of law, since it is not taken by the public at all, and the court will consider and determine only whether or not the law as enacted has any rational relation to the public good with every possible presumption indulged in the law's favor. *Powell* v. *Pennsylvania,* 127 U. S. 678; *Mugler* v. *Kansas,* 123 U. S. 623; *Lochner* v. *New York,* 198 U S. 45, 25 Sup. Ct. Rep. 539; *State* v. *Drayton,* 82 Neb. 254, 117 N. W. 768; *State* v. *Withnell,* 91 Neb. 101, 135 N. W. 376, 6. R. C. L., Sec. 230, page 243.

The distinction between rate and taxation cases and the case at bar is that the Guaranty 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 Guaranty Fund assessment being a con-

dition precedent to the operating of a state bank regardless of the earnings of the bank.

In the case of *First State Bank of Claremont* v. *Smith,* 49 S. D. 518, 207 N. W. 467, the court said:

> "So far as the banking corporations are concerned, the assessment sought to be prohibited is not a tax or involuntary taking of their property, but a part of the consideration exacted by the state for the corporate franchise. So, also, is the law a part of the privileges and conditions under which the unincorporated banks were organized and have been doing business."

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."

The question of changed conditions was squarely before the court in *First State Bank of Claremont* v. *Smith, supra.* On that question the court said:

> "They contend that, even though it may have been constitutional when enacted, changed conditions now render the act violative of the constitution. *They reason from railroad rate cases which have at one time been held constitutional because the rates fixed by statute are reasonable and not confiscatory, and later under changed conditions such rates became unconstitutional. But there does not appear to be any analogy between those cases and this. It is well known that in trade and commerce prices are subject to fluctuation and what is a reasonable charge for a service today may not be tomorrow, because not in just proportion to other prices and charges.* In this case the objection is not to the

> amount of the charge, but to the purpose for which it is made. Changed conditions have not changed the purpose. *If the purpose of the law was legitimate, and the act therefore constitutional at the time of its enactment, perforce it must remain so, although because of changed conditions its purpose is no longer useful or desirable. Its uselessness may be a cogent reason for its 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." (Italics ours.)

Even if we were to assume that the rule in rate and taxation cases is applicable the position of the appellants is not sustained. The effect upon the banks of the assessments during abnormal times cannot be the test of whether or not there is confiscation. In *Municipal Gas Company* v. *Public Service Commission,* 225 N. Y. 89, 98, 121 N. E. 772, 774, Judge Cardozo, now a member of the United States Supreme Court, in a gas rate case said in terse language:

> "For more than nine years the statutory rate was adequate. Abnormal conditions brought about a change, and now, when the rate is figured upon the value of the property, the outcome is said to be a deficit. * * * It will seldom be important that rates have been inadequate for a day or week or a month. Fleeting losses may be suffered, and yet the balance sheet may show a profit. * * * It is by the average of the year that business commonly reckons its losses and its gains. *On the other hand, there may be times when the average must be distributed over periods still longer.*"

Confiscation or lack thereof may not be predicated upon the operation of banks during the abnormal years of 1929, 1930, 1931, and 1932. In *Kings County Lighting Company* v. *Lewis*, 180 N. Y. Sup. 570, 593, the court said:

> "Rates fixed by law for a public utility are not necessarily 'confiscatory', because for an abnormal year its income is to be reduced below what would ordinarily be deemed an adequate rate on the investment."

In *Darnell* v. *Edwards*, 244 U. S. 564, 37 Sup. Ct. 701, 61 L. Ed. 1317, the court affirmed a decree dismissing the bill on the ground that the "evidence for complainant, tending to show they were non-remunerative, while based upon actual experience in the operation of the road, yet relates to only a brief period when conditions were abnormal."

In *Village of Saratoga Springs* v. *Saratogo Gas, Electric Light & Power Co.*, 83 N. E. 693, at page 701, 18 L. R. A. (N. S.) 713, Chief Judge Cullen, speaking for the court, said:

> "We have no difficulty in upholding the provision that the rate shall remain as established for the term of three years. It is urged that circumstances might so alter that before the expiration of three years a rate which was reasonable at the time it was established would become unreasonable. This is possible; nevertheless, we think the Legislature was justified in enacting some period of repose during which the rate should remain stable. In answer to this objection we cannot do better than quote the reply made by Chief Justice Holmes to a similar objection in the Massachusetts case cited (Matter of Janvrin). He said: 'But supposing a party aggrieved should obtain an injunction, obviously the

> decree would be drawn so as to bind the defendant for a reasonable time, or if it were drawn in the common form, subject to review on a change of circumstances, the court would not be likely to grant leave to file a bill of review until a reasonable time had elapsed, and if the Legislature should say that in these cases five years was a reasonable time, we could not say that it was wrong.' "

The allegation that the assessments are confiscatory is a mere conclusion. Even if the rule in the rate and taxation cases were applicable to the case at bar as contended by appellants, which we deny, appellants would have to allege and prove 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 economic conditions complained of are 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 is not sufficient to show confiscation. *City of Grand Island* v. *Postal Telegraph Co.,* 92 Neb. 253, 138 N. W. 169; *City of Fremont* v. *Postal Telegraph Co.,* 103 Neb. 476, 172 N. W. 525, affirmed in 255 U. S. 124; *Powell* v. *Pennsylvania,* 127 U. S. 678; *Ohio River and W. Ry. Co.* v. *Dittey,* 203 Fed. 537; *Western Union Telegraph Co.* v. *Borough of New Hope,* 187 U. S. 419; *Aetna Insurance Co.* v. *Hyde,* 47 S. Ct. Rep. 113, 72 U. S. (L. Ed.) 357.

The reasonableness of a license fee or tax cannot be determined by the profit that some individuals make in their business. The fact that they are unable to conduct

their business in such a way as to realize a profit which would warrant the amount of the license tax is no argument as to the reasonableness or unreasonableness thereof.

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 "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a reasonable doubt," *Powell* v. *Pennsylvania*, 127 U. S. 678, the burden is upon the banks as to every one of these issues to allege facts showing 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 and the assessments. The plaintiffs have not met this test.

Proof that a few individual banks are operating at a loss is not proof of the unreasonableness of the special assessment levied. In *City of Fremont* v. *Postal Telegraph Cable Co.*, 103 Neb. 476, affirmed by this court in 255 U. S. 124, the Nebraska Supreme Court said:

> "The proof in support of these allegations shows that during the years 1914 and 1915 defendant's 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 busi-*

> *ness at Fremont, we do not regard this as a satisfactory test of the reasonableness or unreasonableness of the tax involved. Defendant's losses may be due to conditions for which it is itself responsible.*"

Western Union Telegraph Co. v. *New Hope,* 187 U. S. 419:

> "And 'that the courts will not declare such ordinance void because of the alleged unreasonableness of the fee charged, *unless the unreasonableness be so clearly apparent as to demonstrate an abuse of discretion on the part of the municipal authorities.*'"

The special and regular assessments for 1928, 1929, and 1930, in question are a fixed liability. Whether to pay them now will be burdensome is a moot question; the Supreme Court of the United States affirmed the holding of this court that under the circumstances they were not confiscatory. The lawsuit as to them is ended. Under the March, 1930, Depositors' Final Settlement Fund statute (Sec. 8-175, C. S. for 1929) the Department of Trade and Commerce may, as called attention to by Chief Justice Hughes, grant any bank an extension of three years from March, 1930, within which to pay these assessments. If any further extension is necessary an appeal for such relief can be made to the Legislature which convenes next January, one year and three months before the three-year period of grace expires. By that time wheat may be 75 cents per bushel, corn 60 cents, hogs 8 cents per pound, eggs 30 cents per dozen, real estate 20 per cent higher, and Brazilian and German bonds on the road to par. If so, the payment of these old assessments, a certain proportion each year, will work no substantial hardship.

As a matter of fact it is fair to assume that nearly all of the banks are now ready and able to pay these assessments and will do so at once, in order to stop the running of interest, if the judgments entered against them in the district court are sustained.

Of course the banks do not want to pay until compelled to do so. Why should they? Nothing to lose and $3,000,000 to gain. For that much money any one could afford to take a chance in court. Victory will mean enlarged reserves for the banks having difficulty and big dividends for the stockholders of the strong banks. And it should not be forgotten that the overwhelming majority of the banks which have survived the economic storm are sound. If they weren't their doors would not now be open. Bank failures in this state are very much fewer than a year ago.

Assuming that there will be no further radical reduction in prices, a bank today which takes a mortgage on 4,000 bushels of wheat to secure a loan of $1,000 cannot lose by the transaction. The future for the surviving banks is bright. The grief of the banks has not been due to the relatively insignificant guaranty fund assessments but to the violent reduction in farm prices with its resulting impairment of the financial worth of the borrowers. Added to this is the huge loss of many banks in bond investments, the aggregate amount of which is probably more than the total amount of all the assessments.

The remaining assessment of two-tenths of one per cent per annum may be irritating but cannot with a

straight face be said to be confiscatory. The assessments which the banks paid for many years were 300 per cent higher, regular assessment of one-tenth plus special of five-tenths. During the time that the banks were paying six-tenths of one per cent per annum assessments these payments to the guaranty fund constituted only 10.06 cents of each dollar of gross earnings (Exhibit No. 38, U. S. Supreme Court Record, pp. 437, 438). Out of each dollar of disbursements by the banks of Nebraska from July 1, 1925, to June 30, 1926, when the assessments were six-tenths per annum, an average of only 9.08 cents went to the guaranty fund (Exhibit No. 39, U. S. Supreme Court Record, pp. 494, 495). The banks now will only pay one-third of that amount to the Depositors' Final Settlement Fund, approximately three pennies out of each dollar of expenditures. It is unfair to the court to suggest that this small assessment is confiscatory.

For a bank with unsecured deposits of $100,000 it means an assessment annually of $200.00, or $16.66 per month, or 54 cents per day. Assuming eleven stockholders with equal number of shares in the bank, the loss in earnings to each one will be five cents per day. Instead of going to the United States Supreme Court these stockholders could get quicker relief by every second day foregoing the smoking of a ten-cent cigar and placing the unspent dime in the bank to the credit of the Depositors' Final Settlement Fund. We suggest that this method would be cheaper (no contingent fees), beneficial to their health, and improve the standing of banks generally in the eyes of the depositors in failed banks.

THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN THE ABIE STATE BANK CASE IS RES ADJUDICATA OF THE ISSUES HERE PRESENTED

In the foregoing discussion we have dealt with the several issues on the merits. In addition to the support for defendants' position in this case found in the foregoing argument, defendants rely on the decision of this court and of the Supreme Court of the United States in the case of *Abie State Bank* v. *Bryan, supra,* as a final adjudication of all the main issues raised in this case, except the claim on the part of the plaintiff banks to set-off against the five regular and special guaranty fund assessments involved herein the payments made by the banks for the Bankers' Conservation Fund and the adjudicated claims of the banks against the guaranty fund arising out of deposits made by the plaintiff banks in other banks which have failed. Since the plaintiffs (appellants) do not assign as error or discuss in their brief their claim of the right of set-off, we take it that the judgment of the trial court denying such claim is not appealed from or otherwise contested in this court, and we, therefore, will not discuss that point.

Appellants assume a very large assignment when they undertake to show that the Supreme Court of the United States in the *Abie State Bank* case did not have jurisdiction to pass upon the validity of the Depositors' Final Settlement Fund act of March 18, 1930. That decision speaks for itself.

In the opinion the whole law is set out in detail. With reference to it Chief Justice Hughes says:

"This court will take judicial notice of this legislation."

As to that court's jurisdiction in the premises, we know of no better or higher authority than the holding of the court in the case itself.

Here again counsel for the banks start with the false premise that this act was legislation unrelated to the Guaranty Fund Law. As we have already pointed out in this brief, the Supreme Court of the United States took judicial notice of this act as legislation *modifying* the guaranty fund plan and as a *"reasonable method of liquidating"* that plan. Necessarily, in that view of the law, the argument of counsel becomes largely academic.

As we understand appellants' contention, the main point relied on to show that the law of March 18, 1930, was not passed upon and could not lawfully be passed upon by the Supreme Court of the United States in the *Abie State Bank* case, as to the issues herein presented, is that the lower courts had not passed upon the issues of law and fact herein raised, as counsel would have this court to understand, for the first time.

It would unduly lengthen this brief to attempt to review the issues in the *Abie State Bank* case as originally framed and as they broadened out as the case advanced. Exhibits 2, 3, 4, 5, 6, 7 and 8, being a part of the stipulation of facts herein (see Tr., pp. 76, 80), are parts of the record in that case on appeal to the Supreme Court of the United States. They show, without question, that each and all of the issues herein, except the matter of set-off above mentioned, were presented and insisted upon *by these appellants* in that cause. A few excerpts from those exhibits will demon-

strate the truth of this statement. Page references are to the exhibits.

Exhibit 2 (Transcript of Record, United States Supreme Court):

p. 6, Original Petition. "Wherefore, your petitioners pray * * * that the defendants and each of them be further enjoined from levying or attempting to levy any of the special assessments called for in Section 8028, as amended."

pp. 40-41, Decree of District Court of Lancaster County. "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 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."

Exhibit 4 (Appellants' Brief, United States Supreme Court):

p. 11. "These changed conditions were the gist of our action."

p. 18. "Though it is outside the record, there were 77 failures in 1929 and 26 in the first six months of 1930. By reason of the large number of banks that have failed since the commencement of the suit, the deficit has been very largely increased."

Exhibit 6 (Appellants' Reply Brief, United States Supreme Court):

pp. 9, 11, 12. "In their brief counsel for defendant called attention to the act of the Nebraska Legislature,

1930, with the statement that this court will take judicial notice of the modification of the Guaranty Fund Law by the Nebraska Legislature in March, 1930. *With that statement we agree.* * * *" (Italics ours.)

"It will be observed that Section 8028, under which the tax involved herein was levied, has been repealed, and the tax involved herein, with the subsequent tax for the year 1929 and January 1, 1930, together with the regular assessments of July 1, 1929, and January 1, 1930, are to go into a Depositors' Final Settlement Fund to be distributed only to depositors in banks which have failed prior to March, 1930, so that the only purpose of the emergency tax is to take assets from going banks to give to depositors in banks that have failed. The legislative Act of March, 1930, did not change the status of the banks with respect to the payment, because under the law in force in Nebraska at the time, every penny of the tax levied against the banks or the guaranty fund was to go to depositors of banks that had failed, in the order of priority of adjudicated claims, and hence such payment was directly taking the property of the banks and the security of their depositors to give to depositors of failed banks.

"The legislative Act of 1930, however, changed the rule of priority and attempts to distribute such assessments among all the depositors of banks which failed prior to the passage of the Act. * * *

"It can hardly be questioned, accordingly, that under present conditions the levy of the emergency tax against going banks to pay depositors in failed banks violates the Fourteenth Amendment."

p. 34. "The appellees declare in their brief, in their heading on page three, that the appellants question only the special assessments and do not attack the other sections of the Guaranty Fund Law.

"*In that statement the appellees are mistaken.* At the commencement of this suit the only assessments at that particular time sought to be collected were the special assessments. The suit was brought, enjoining collection of those assessments, they being the only ones whose collection was immediately threatened.

"*It is our view that this case tests the validity of the entire operation of the law, both as to regular and special assessments*, since it tests the principle which determines not only whether excessive collections can be made, but whether any collections whatsoever can be made against these banks, when such collections are no longer justified as having any rational relation to any public purpose. If the assessments admittedly defeat the object of the law, and no reciprocal benefits exist, but injury to banking alone results, then the amount of the tax becomes immaterial, for no tax would then be justified and supported in its operation as tending towards the accomplishment of a public purpose." (Italics ours.)

The decision of the Supreme Court of the United States summarizes its decision in the *Abie State Bank* case in the 7th syllabus of the opinion (282 U. S. 765, 766) as follows:

"The present suit was to enjoin collection of a special assessment, recently made, and any other such in the future, on the ground that, through failure of the guaranty scheme such assessments became confiscatory. After the appeal here, a statute was passed for the liquidation of the scheme; only three special assessments and two regular assessments were retained by it, and the future assessments were restricted to 2/10 of 1% of average daily deposits annually, limited to a period of ten years. *Held*, that, *since the law in its modified form can not be regarded as confiscatory, or other than a reasonable*

> *method of liquidating the guaranty plan*, a decree of the state court denying an injunction to restrain collection of assessments should be affirmed." (Italics ours.)

After this decision, the appellants in that case, who are the appellants herein, filed a petition for rehearing, a complete copy of which appears in this record as Exhibit 7, a part of the stipulation on pages 76 to 80, inclusive, of the transcript herein. In that petition for rehearing the appellants presented every objection raised in this case against the law of March 18, 1930, both as to the five accrued assessments carried forward in the act and the assessments for the ten-year period therein provided for. The entire document (Exhibit 7) is replete with the identical arguments set forth in this case, both in the trial court and on this appeal.

On page 17 of this Exhibit 7, appellants, referring to the decision in the *Abie State Bank* case, and as to which a rehearing was prayed for, said:

> "This Decision will be Cited as Res Adjudicata as to the Assessments Complained of.
>
> "The decision of this court will be cited as res adjudicata *upon that question and upon all questions pertaining to the validity of the assessments complained of*, and without our having had opportunity to make a showing of fact in that regard. In fact that is being publicly asserted by the state now.
>
> "This court in its opinion declares that in this case the court *has power to grant appropriate relief*, that the assessments complained of *are before it here* for adjudication, and in view of that declaration it is positively

incumbent upon us to raise the additional questions presented in this brief and ask for their determination.

"In this case *only* can appropriate relief be given. The questions we are raising are proper to be raised here, and since they are proper we must raise them and have them passed upon, or this decision may be held a bar to raising them at any other time. The decision may be a bar not only to questions which are actually raised, but those which should properly be raised.

"Let us forcibly call to the court's attention the position in which the banks will be left if relief is not given. The court has before it the assessments under the old law. The new law provides that *if it is held unconstitutional the old law shall remain in effect*, and this court alone, if the new law is held unconstitutional, is able to grant relief as against the old assessments. In another suit this decision would be urged as a bar against us, in such event, from bringing another suit against the assessments under the old law."

On March 23, 1931, the Supreme Court of the United States, in said case, entered its order (Exhibit 8):

"*The petition for rehearing in this cause is denied.*"

Scarcely had the ink dried upon the pen of the Chief Justice of the United States denying this petition for rehearing when the present suit was instituted. In fact, before the mandate had been handed down from this court to the district court of Lancaster county, in response to the mandate of the Supreme Court of the United States in the *Abie State Bank* case, this action was under way. It is inconceivable to us that the doctrine of "changed conditions" as employed in construing

and applying the "due process" clauses of our state and federal constitutions will be carried to the lengths contended for by appellants in this cause. To do so would open up to the banks in this state the right to litigate their liabilities under the laws in question throughout the years, each suit in turn being based on some claim of "changed conditions" since the last preceding suit was started—and so on *ad infinitum.*

We contend and the record shows that the Supreme Court of the United States intended to and did dispose of the issues here presented. If there ever was a case calling for an "end to litigation" this is such a case. By the very accumulation of unpaid assessments and the accruing of interest thereon, the banks have brought upon themselves burdens that prompt payment would have avoided. They should not be permitted now to plead their own default in defense. The *accumulation* of their liabilities is of their own choosing.

SECTION 8-179, COMPILED STATUTES OF NEBRASKA, 1929, IS CONSTITUTIONAL AND VALID

Appellants complain of the provisions in Section 8-179, which section is as follows:

> "The inducement for the passage of Section 18 of this act, (8-179), which repeals various sections of the statutes relating to the bank depositors guarantee fund and assessments therefor, is the passage of sections 1 to 5, inclusive, of this act (8-171, 8-172, 8-174, 8-175, 8-176), and if any one or more of said sections 1 to 5, inclusive of this act, shall for any reason be held unconstitutional or invalid, in whole or in part, then and in that event said Section 16 of this act shall be invalid and of no

> force or effect and the sections of the statutes sought to be repealed by said Section 16 shall be in full force and effect."

Their contention, reduced to its simplest terms, is that the Legislature is without power to pass a statute which repeals a former statute conditionally. Counsel cite no constitutional provisions denying this power in the Legislature. They merely urge that this conditional repeal is an encroachment upon the powers and functions of the judiciary. No one will deny that the Legislature may not deprive the judiciary of its function of construing and declaring the legal effect of laws passed by the Legislature. It is an altogether different matter, however, to contend that the Legislature may not make the effectiveness of its own acts contingent upon the happening of a future event. That is purely a legislative function. Again, the very power and function of construction of legislative acts which is vested in the judiciary is interpretive in its nature. That is to say, the court's function in construing statutes is to arrive at the *intent* of the Legislature—not to revise or in any sense modify or overrule that intent.

> "*The legislative intent is the cardinal rule in the construction of statutes.*" *King of Trails Bridge Co.* v. *Plattsmouth Auto & Wagon Bridge Co.*, 114 Neb. 734, 209 N. W. 497; *State* v. *School District*, 99 Neb. 338, 156 N. W. 641.

> "The great fundamental rule in construing statutes is *to ascertain and give effect to the intention of the legislature.*" 36 Cyc. 1106.

We have no fault to find with the rules laid down in the cases cited in appellants' brief. These cases, however, are not in point. This is not a case where the Legislature has attempted to give binding effect to its declaration that if one section of the statute be held invalid, such holding shall not affect remaining sections of the act. As the cases cited by plaintiffs show, the courts are continually finding that their holding one or more sections or parts of an act invalid so interferes with the validity or effectiveness of the remaining parts or sections that the whole structure must fall with the invalid part; and it therefore becomes the function and duty of the court to strike down the act in its entirety.

In this instance, however, the Legislature has clearly expressed its purpose and intention, not to attempt to dictate in any way to the judiciary as to how any section shall be construed in the event of the holding of another section invalid, but to strike, *under its own legislative power,* all such other sections. In other words, it has plainly made the *passage* of the new sections contingent upon the court's holding each and every of such sections valid.

In Cooley on Constitutional Limitations, Vol. 1 (8th Ed.), pp. 241, 242, quoting from *Smith* v. *Janesville,* 26 Wis. 291, it is said:

> "No one doubts the general power of the legislature to make such regulations and conditions as it pleases with regard to the taking effect or operation of laws. They may be absolute, *or conditional or contingent; and if the latter, they may take effect on the happening of any event which is future and uncertain.*"

The Special Session of the Legislature of 1930 was faced with the grave responsibility of meeting and handling the situation in which the banking system of this state then found itself. The economic welfare of all of the people of the state was most vitally concerned in the entire problem. It was most important that a *unified* plan should be devised and enacted which would provide an equitable and fair compromise and settlement of the then existing obligation of banks as to the accumulated claims against the guaranty fund and thereby to accomplish a great public service. It was realized that the liquidation plan should be contingent upon its standing in its entirety—that if it failed in any of its parts it was worthless. At the same time there was no desire to repeal the Guaranty Fund Law if the new plan should not become entirely effective. The liquidation plan, therefore, was made contingent upon such entire effectiveness, with the old law automatically retained in full force and effect if the liquidation plan went down.

That was a matter solely within the sphere of the Legislature. There was no power except itself which could retain the old plan in the event of the failure of the new law to stand as a whole, as the Legislature intended it should stand.

It is simply absurd to contend that the repealing clause in Section 8-178 will be given effect by the court and that Section 8-179 will be struck down. Such a repeal was attempted and got nowhere. It is likewise folly to urge that the provisions of the Depositors' Final Settlement Fund Law should be separated into parts in

order to allow one part to stand and another to fall, as contended for by counsel. (Appellants' Brief, pp. 145-146). If the court should hold that the assessment provisions of the Depositors' Final Settlement Fund portion of the new law were invalid and that the repealing clause of Section 8-178 was effective, it would be judicial legislation, pure and simple, and not only that, but judicial legislation contrary to the solemn and plain declaration of the Legislature itself.

As so well stated in 36 Cyc. 1099, the rule is:

> "Where an act expressly repealing another act and providing a substitute therefor is found to be invalid, the repealing clause must also be held to be invalid, unless it shall appear that the legislature would have passed the repealing clause even if it had not provided a substitute for the act repealed."

Accord: 25 R. C. L., pp. 913, 914, Sec. 166.

The power here exercised by the Legislature is akin to its power to suspend the operation of a statute for a time. As stated in 36 Cyc. 1099,

> "The power of suspending laws cannot be exercised except by the legislature."

The same rule is applicable to revival of statutes, depending upon some future event.

> "The legislature may make the revival of an act depend upon a future event, and direct that event to be made known by proclamation." 36 Cyc. 1099, 25 R. C. L. 908-909, Sec. 161.

In *State* v. *Liedtke,* 9 Neb. 490, the following item of an appropriation act was under consideration: "J. W. Pearman, for military services, $3,000.00. (That said $3,000.00 remain in the treasury of the state, and not to be paid or drawn out until the general government shall reimburse the said amount to this state.)" In holding the clause valid, the court said:

> "It was competent for the legislature to pass an act depending for its execution, either in whole or in part, upon the happening of such contingency, and such an act is not to be confounded with those acts of legislation which have generally been held void by reason of their being made to depend for their vitality upon their ratification by the voters at a popular election."

Quoting from *Barto* v. *Himrod,* 8 N. Y. 489, 490, the court continued:

> "'The event or change of circumstances on which a law may be made to take effect must be such as, in the judgment of the legislature, affects the question of the expediency of the law, an event on which the expediency of the law, in the opinion of the lawmakers, depends. *On this question of expediency the legislature must exercise its own judgment definitely and finally.* * * *'"

That case, while not strictly in point, is certainly authority for the principle we are asserting. If positive legislation may be made effective upon a contingency named by the Legislature, certainly a repeal may be made thus conditional.

CONFLICT BETWEEN SECTIONS 8-178, 8-179 AND 8-190

It is true that there is a conflict between these sections as to the inducement for the passage of 8-178, the

clause (original section 16) repealing the guaranty fund provisions. However, it is also plain from a careful reading of these sections, that the mention in Section 8-180 of Section 16 (8-178) was a pure inadvertence. Section 8-179 (original section 17) is full and complete in its recital of the legislative intent as to section 16. The court must certainly construe Section 8-180, in view of the explicit requirements of Section 8-179, as though it read:

> "If any one or more of Sections 6 to *15*, inclusive, of this act, for any reason, be held unconstitutional, such decision shall not affect the validity of any other section of this act," etc.

It is a well recognized rule of statutory construction that "the several parts of an act are to be construed together in order to ascertain the intention of the Legislature."

> *Follmer* v. *Nuckolls County,* 6 Neb. 204.
> *City of Lincoln* v. *Janesch,* 63 Neb. 707, 89 N. W. 280.

It is also established that in case of conflict between sections of this act, specific provisions govern over general provision. *State* v. *Nolan,* 71 Neb. 136, 98 N. W. 657. *Kountze* v. *City of Omaha,* 63 Neb. 52, 88 N. W. 117.

As stated in 25 R. C. L. 1011:

> "When one section of a statute treats specially and solely of a matter, that section prevails in reference to that matter over other sections in which only incidental reference is made thereto; not because one section has

more force as a legislative enactment than another, but because the legislative mind, having been in the one section directed to the particular matter, must be presumed to have there expressed its intention thereon rather than in other sections where its attention was turned to other things."

SECTION 8-179 DOES NOT VIOLATE SECTION 14, ARTICLE III OF THE CONSTITUTION OF NEBRASKA

Appellants contend that this section contains matter not expressed in the title of the act and therefore violates Section 14 of Article III of the Constitution of Nebraska.

The point raised is without merit. The title is clear and explicit. Not only the general subject of "banks and banking" is mentioned, but the intent and purpose of the entire legislation as a means of liquidation of the guaranty fund is set out in a fair and concise manner.

As stated in *Mehrens* v. *Bauman*, 120 Neb. 110:

> "When the title of an act fairly gives expression to the general subject-matter contained in the act, such act will not be held invalid as being broader than its title."

Appellants' contention would give to the constitutional provision in question a hyper-technical construction and application altogether unwarranted by the holdings of this court.

CONCLUSION

We hope it will not be considered improper if we call attention to the moral claims of the depositors in this matter. After all the net result of a lawsuit should be the triumph of equity and justice.

Under the stipulations between the parties the record in the former case is before this court. It shows that:

(1) The Guaranty Fund Law was the moving cause for not less than one hundred million of new deposits in the state banks of Nebraska (Geo. W. Woods, Bank Commissioner).

(2) Although disliking the law, the state banks by full-page advertisements, signs on windows, statements on checks and certificates of deposit, and by resolutions at bankers' meetings, glorified and extolled the Guaranty Fund Law as furnishing absolute protection to depositors.

(3) Thousands of persons, particularly laborers, retired farmers, old people, widows, guardians and administrators of estates, and school teachers, relied on these representations of the banks and on the strength thereof became depositors in state banks which later failed.

What about them?

They have rights. They were not responsible for the 1921 depression. It is not their fault that corn is selling for forty cents per bushel, wheat thirty-three, hogs three cents per pound, and eggs eight cents per dozen. They cannot help that the foreign bonds bought by the

bankers have shrunk in value to a small fraction of the price paid.

Why then load the bankers' grief on to them? They too have suffered because of the economic collapse, many of them much more than the banks. Why then ask them to also absorb the losses of the banks? By the handling of the money of these depositors the banks profited immensely. Let them now live up at least in part to their agreement to pay assessments. The Legislature has been exceedingly kind to the banks in this matter. That body was generous with the money belonging to the depositors. It would be grossly unfair to them to still further relieve the banks of their liability.

If the banks may ask to be relieved of a statutory assessment levied for a public purpose because the payment thereof is inconvenient or burdensome, why may not all taxpayers without net income or who have suffered losses during the last few years make the same request? Hundreds of distress tax warrants have been served in Nebraska during the last two years on persons receiving aid from charity. To wage earners out of work and to farmers whose crops have been taken by drought or grasshoppers, taxes for the payment of our salaries and other expenses of government are in fact confiscatory. They cannot enjoin collection of their taxes. Why then in equity should the banks be able to do so?

The equities are not with the plaintiffs. Resting their case largely on allegations of unconstitutionality, the petition of the plaintiffs, in face of the decision of the

Supreme Court of the United States in the Abie State Bank case and the stipulation of the parties, was vulnerable to demurrer.

The trial court held with the defendants on all points, dismissed the plaintiffs' amended petition and rendered individual judgments against the banks, respectively, for the assessments in question. That judgment is right and should be affirmed.

Respectfully submitted,

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