

Objection was made to "statements made by counsel for the plaintiff in regard to testimony claimed by counsel for the plaintiff to be in evidence;" but, while the record shows the subject, it does not show the substance or character of the statements complained of, and for that reason presents no question for our consideration.

It was not material error to refuse the request to instruct the jury that it had nothing to do with the conduct of the defendant's engineer on any other occasion than the one in question. The jury was instructed with sufficient clearness that, in order to be entitled to recover, the plaintiff must have proved the defendant guilty of the wrongful acts of negligence or default set forth in the declaration, and it is not to be supposed that in that respect the jury could have misapprehended the issue.

By adducing testimony in its own behalf, the plaintiff in error waived its exception to the overruling of its motion that the evidence adduced in behalf of the plaintiff in the action be withdrawn from the jury, and a verdict directed in behalf of the defendant.

The judgment below is affirmed.

AUBURN SAV. BANK v. HAYES.

(Circuit Court, N. D. New York. May 17, 1894.)

INSOLVENT NATIONAL BANK—PREFERENCE OF SAVINGS BANK—FEDERAL QUESTION.

The question whether a savings bank should be paid in full by an insolvent national bank, pursuant to the state law (Laws N. Y. 1882, c. 409, § 282; *Bank v. Davis*, 26 N. Y. Supp. 200, 73 Hun, 357), or pro rata, as provided by the Revised Statutes (sections 5236, 5242), held, upon a motion to remand, to be a controversy "arising under the laws of the United States." *Tehan v. Bank*, 39 Fed. 577, distinguished.

This was an action by the Auburn Savings Bank against Frank N. Hayes, as receiver, etc., originally commenced in a state court. The plaintiff now moves to remand.

Underwood & Storke, for the motion.

Bacon, Briggs, Beckley & Bissell, opposed.

COXE, District Judge. The plaintiff is a savings bank and had a deposit of \$19,700 in the First National Bank of Auburn at the date of its suspension. This action was commenced in the supreme court of New York to recover the balance due upon said deposit after all dividends have been paid. The defendant, who is receiver of the insolvent bank, removed the action to this court. The plaintiff now moves to remand.

Section 282, c. 409, Laws N. Y. 1882, gives a preference to savings banks having deposits in insolvent banks. The state court has decided that this law, as re-enacted, is applicable to national banks. *Bank v. Davis*, 73 Hun, 357, 26 N. Y. Supp. 200. Section 5236 of the United States Revised Statutes provides for the payment of ratable dividends to the creditors of insolvent national banks on all

claims properly proved or adjudicated, and section 5242 prohibits preferences. The question, then, is whether the plaintiff shall be paid in full pursuant to the state law, or pro rata as provided by the sections of the Revised Statutes referred to. This, it seems to me, is a controversy "arising under the laws of the United States." Were it not for the state law, the plaintiff would, of course, be paid ratably with the other creditors. Whether or not the state can legislate in this manner with reference to national banks is a question which the federal courts and not the state courts should decide. To give the state courts sole jurisdiction to determine whether state legislation is in conflict with the national bank act would, to say the least, tend to throw the national system into confusion. The doctrine of *Tehan v. Bank*, 39 Fed. 577, is hardly applicable to the present cause. In the *Tehan* Case there was no federal question because the rule of the common law applicable to that controversy was controlling alike upon the state and United States courts. Here on the contrary the construction of a United States statute is involved. The plaintiff may be right as to the interpretation of this statute, but that its construction is involved there can be no doubt. Whatever defense the defendant has depends upon the sections referred to. The question presented by this motion is not what the construction of these sections should be, but whether the state courts or the United States courts should construe them. I am of the opinion that this power belongs to the United States courts. *Sowles v. Witters*, 43 Fed. 700; *Grant v. Bank*, 47 Fed. 673; *Walker v. Richards*, 55 Fed. 129. The motion is denied.

MULTNOMAH COUNTY et al. v. OREGON NAT. BANK et al.

(Circuit Court, D. Oregon. June 1, 1894.)

No. 2,091.

BANKS AND BANKING—INSOLVENCY—PREFERENCE—COUNTY—TRUSTS.

A county whose funds are deposited in a bank that fails has no preference over other depositors, as to the bank assets, where the identity of the funds deposited by the county has been lost. *San Diego Co. v. California Nat. Bank*, 52 Fed. 59, disapproved.

Action by the county of Multnomah and the city of Portland against the Oregon National Bank and W. W. Catlin, its receiver.

C. A. Dolph and John H. Hall, for Multnomah county.

G. W. Hazen, for city of Portland.

F. V. Holman and John M. Gearin, for defendants.

BELLINGER, District Judge. This is a suit to decree certain deposits of money made by the sheriff in the bank to be the property of the county, that such bank and its receiver hold the same as trustees for the benefit of the county, and that the county have a lien upon all the moneys, choses in action, and other property in said bank to the amount of \$149,280.05, the aggregate of the