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No. _____

Supreme Court of Illinois

Hale

vs.

Barrett

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STATE OF ILLINOIS
SUPREME COURT,
Third Grand Division.

No. 253.

Hale
vs

Burch

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13567

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SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION, }
APRIL TERM, A. D. 1861. }

JOSEPH BARRET, et al.,	} Appellees,
VS.	
FRANKLIN M. HALE, et al.,	} Appellants.

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~~APPELLANTS~~ APPELLANTS' POINTS.

The following are the facts in this case :

Barret & Cutting shipped from Massachusetts a *lathe* to Kendal of Chicago, to be sold on commission. At the same time Ball & Ballard, of Massachusetts, also sent to Kendal a quantity of merchandise to be sold on commission; both lots of goods were sent by same vessel and came to Hale's warehouse in Chicago. Hale delivered the goods to Kendal in his absence in the country. Before Kendal went into the country he directed his clerk, Prouty, to pay the charges on the goods. When Kendal returned from the country, and some-days after the goods were received, he found

the bill had not been paid and gave Hale his note for the charges ; after the note was given, Prouty, without the knowledge or consent of Kendal, gave Hale a warehouse receipt for the goods. The goods remained in Kendal's possession from early part of the Summer till the next February ; then, Kendal quit business and one Manning went into his store. After this, Hale took the goods and removed them to another warehouse.

The bill presented by Hale to Kendal, embraced the charges on the lathe and also on the merchandise sent by Ball & Ballard, in gross, and Kendal's note was given for the whole amount.

Afterwards Doane, the plaintiffs' agent, called upon the defendants, Hales, and found the lathe in their possession, and offered to pay the freight and charges and demanded the goods ; they refused to deliver them unless he would also pay the charges on the goods sent by Ball & Ballard. Doane frequently made a like demand, and several times asked them for a bill of the charges on the lathe ; they made him out three different bills, each varying in amount, but each embracing the freight and charges on the bill sent by Ball & Ballard as well as the lathe, and at all times refused to deliver the lathe unless the charges on the goods of Ball & Ballard as well as of Barret & Cutting were paid.

There is also evidence, that Doane at one time actually tendered them \$105 or \$110 for the charges, though the charges on the lathe were only about \$28 to \$38 ; there is, however, contradicting evidence as to this tender.

I.

No tender of the charges was necessary, because :

FIRST—The defendants had parted with their lien, by delivering

the goods to Kendal. The warehouse receipt and note shows clearly that they intended to part with their lien and rely upon them instead of their lien.

SECOND—The tender was waived by defendants claiming to hold them not for the lien, but upon another ground, to-wit: for the payment of charges due from other parties upon other goods.

Dirks vs. Richards, 43 Eng. C. L. R. 298.

Jones vs. Tarlton, 9 Meeson & Wellsby,

4 Man. & Gr. 574.

4 Man. & Gr. 675.

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THIRD—The tender was waived, because he had taken other security, to-wit: Kendal's note.

If a lien commences under an implied contract, and a contract is made for payment, in the nature of things one contract destroys the other.

Raitt vs. Mitchell, 4 Camb. R. 149.

4 B. & Ald. R. 50.

16 Vesey R. 275.

FOURTH—The plaintiff, by his agent Doane, repeatedly offered to pay the charges, which the defendants refused to take, and so stated to him; therefore, no tender was necessary—it would have been an unnecessary act, which the law does not require.

II.

The warehouse receipt gave defendants no lien upon the goods, because :

FIRST—It was given several days after the lathe had been delivered — Kendal gave his note some days after the lathe was

(+)

delivered — and the warehouse receipt was given after that. A lien once lost can not be revived, except by the parties.

SECOND—Because the clerk had no authority to give it. Kendal says he did not know anything of it until 'some months afterwards.' Kendal himself could not give a warehouse receipt; he received the property to sell on commission; he could not, therefore, pledge it or incumber it by a warehouse receipt, no more than he could bind it by a chattel mortgage; his agency was limited.

III.

If no tender was necessary then no instruction upon that abstract question, whether right or wrong, amounts to anything; in other words, even if it is wrong it is no error.

VAN BURENS & GARY,

Attorneys for Appellees.

Supreme Court.

Joseph Barrett, et al.
Appellus,
vs.

Franklin M. Hall, et al.
Appellants

Appellus Points.

Van Buren, Gary,
Attys for Appellus.

Filed Apr 18. 1861
L. L. Linn
Clerk

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L. Leland.

Clerk

SUPREME COURT OF ILLINOIS.

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APRIL TERM, A. D. 1861.

FRANKLIN M. HALE, THOMAS HALE
AND MARTIN C. HALE,

Appellants.

VS.

JOSEPH BARRETT & CALEB CUTTING,

Appellees.

APPEAL FROM THE
SUPERIOR COURT OF CHICAGO.

This was an action of Trover brought to the January Term 1860, by the Appellees *vs.* the Appellants, to recover the value of a ten-foot Engine Lathe with counter shaft and hangers, consigned to James Kendall, and received by Hale & Co. in the regular course of their business as receiving and forwarding merchants at Chicago, June 29th, 1857, from one of a line of propellers for which they were agents, and held by them for charges, &c.

Record page 8.

Record p. p. 5, 6 & 7.

Record p. 12.

Record p. 13.

Record p. 14.

The declaration was in the usual form in trover to which the appellants pleaded, severally, the general issue. The cause was tried at the February Term, 1861, before Grant Goodrich, Judge, and a Jury. Verdict for the plaintiffs below for \$425, against all the defendants who entered a motion for a new trial, which was overruled and judgment entered on the verdict at the March Term, March 15th, 1861. Appeal prayed and allowed on filing bond in \$600, to be approved by a Judge of the Court in thirty days, and bill of exceptions by the 29th of March, which was done.

The first witness introduced by the plaintiff in the trial below was James ^{Kendall} ~~Randall~~, who testified as follows:

I resided in Chicago in the year 1857; I was selling machinery on my own account and as Commission Merchant; my place of business was at the north end of Wells street, just over the bridge; it was in the building occupied by the Hales; I rented a store in that building; I know the defendants Franklin M. Hale and Martin C. Hale; they were, in the summer of 1857, doing business under the name of Hale & Co.; I can't say of my own knowledge that they were partners; they were doing business in the same office; Franklin generally did the business; Martin was there; I supposed they were doing business under that name; I know the lathe and counter shaft in controversy; I think it was about twelve feet long; the counter shaft and weights came with this lathe; the lathe was consigned to me by the plaintiffs Barrett & Cutting, for sale on commission; when it arrived, it came with some other machinery in boxes; Ball & Ballard consigned the machinery to me; when the bill for the charges was presented I told Prouty, my clerk, to pay the charges and money coming; told him to apply it for charges and supposed he had done so until some time

afterwards; I had occasion to go into the country about that time, and I was surprised on my return to find he had not done so; in my absence, Prouty got the lathe and counter shaft into my store, and it remained there until the next February, in 1858; the lathe and machinery came early in the summer in the previous year, in 1857; in February, 1858, I removed from that store to 86 Lake street; all the machinery in that store was taken to 86 Lake street, in February, 1858, except this lathe; that was left in the store on Wells street; I rented the store on Wells street of one of the Hales; my lease was with the young man, Franklin M. Hale; the store was in the same building occupied by the Hales; I saw the lathes there several times; not long after I left, Mr. Manny went into the store; I have not seen the lathe since; I was there afterwards; it had been removed; I don't know who removed it.

Being cross-examined he testified as follows:

Ball & Ballard and Barrett & Cutting lived in Worcester, Massachusetts; the lathe and boxes of machinery came in bill of lading under one charge; my impression is that the charge upon the lathe was \$42, though I am not positive; I executed the due bill now shown to me, (here was shown to the witness the exhibit marked "Exhibit A," attached to the deposition of Judson M. Bemis, and afterwards read in evidence); that was for the amount of freight and charges paid by Hale on the lathe and boxes of machinery and the dockage in Chicago; I have no recollection of signing it, but it is in my hand-writing; the warehouse receipt now shown to me is signed by Mr. Prouty, who was my clerk at that time, (here was shown to the witness the exhibit marked "Exhibit B," attached to the deposition of Judson M. Bemis, and afterwards read in evidence); Prouty had the money with which to pay the charges on the lathe and machinery, but he paid it on one of the notes I was owing at that time; the lathe and machinery were consigned to me at Chicago; they came by the same boat and at the same time; I did not have any sign up as Commission Merchant; the warehouse receipt was given without my knowledge; I did not know of it till months afterwards.

The plaintiffs then introduced as a witness William H. Doan, who proved the signatures to a Power of Attorney, given on pages 16 and 17 of the Record, and which was read to the jury, and the witness proceeded as follows: I know the Hales by sight; the two Hales that are present—Martin C. Hale, and Franklin M. Hale; I know Thomas Hale; I have had repeated conversations with the Hales about the lathe; it was a long time before I could find the lathe; I finally found it in an old building on the North Side; it was in the warehouse of Sanford & Hall; I first saw Franklin, and then Martin, and all together; Franklin at first seemed to think I had no business with it; I showed them my Power of Attorney; their business was all done together; I applied to the Hales to get the charges on the lathe, and told them I would pay all proper charges upon it; they finally gave me a bill for about \$140, for advanced charges in gross; I told them there was some mistake, and wanted them to give me the items; they afterwards gave me another bill for about \$110, including the boxes; I objected to paying charges on another man's property; my talk was with all of them; I then proposed to give them seventy-five dollars, and close it up; they said they would write to Buffalo; they finally said if I would pay the whole bill they would deduct nine dollars; I made them a tender of from \$100 to \$105, in bank bills; they refused to let me have the lathe unless I paid them the whole amount of their bill; I have been in the machinery business five years, and know the value of this lathe; I could have sold the lathe repeatedly for \$475; I had already sold it for \$475; when the lathe was shipped the usual price for freight from Worcester to Chicago was from sixty cents to one dollar; there would have been no difficulty in ascertaining the freight on the lake by weighing it.

And being cross-examined said witness testified as follows: I have been acting as salesman for myself and others for nearly ten years; am acting as salesman for Fay & Co. and for myself; my brother, James T. Doan, went with me to the Hales when I made the tender of which I have spoken; I saw Hales' book-keeper, or the person I took to be the book-keeper; I can't say that I saw any one else; I don't think any of the Hales were in; I did not see either of them; I tendered the money to the book-keeper; it was in bank bills; I laid it on the counter; he said he had no instructions to take anything less than the amount of the bill, and that I had better see Mr. Hale; I did not see Mr. Hale; I know it was over one hundred dollars that I tendered, but how much over I can't say; I know it because we went

right from Mr. Van Buren's office to the Hales to make the tender; I had \$100 when I was in Mr. Van Buren's office, and he said I had better be sure and tender a little more, and I borrowed some more on the way, from my brother, who went with me; I can't say how much more—four or five dollars perhaps; this was a short time before this suit was commenced; a week or two perhaps before it was commenced; I first saw the Hales about this lathe in the summer or fall of 1858; I can't say which of them I first saw, it is so long ago; I saw them a good many times; I can't state the substance of any particular conversation I had with either of them before I went to Mr. Van Buren's office with Martin C. Hale, it is so long ago; I can't state what I said or what they said in any particular conversation; I had learned where the lathe was before I went to the Hales; I had learned this from Kendall; I wanted to know of the Hales what their charges were on the lathe; I have the bills they rendered to me from time to time of the amount of their charges; the following was the first bill they rendered to me in the fall of 1858.

Here was presented the bill referred to by him, in the words and figures following:

HALE'S DOCKS,

CHICAGO, NOVEMBER 19TH, 1858.

MR. JAMES KENDALL, or whom it may concern,

To THOMAS HALE, DR. *North Water St., between Wells and La Salle Sts.*

Storage on Lathe	-	-	-	-	-	-	-	-	-	-	\$17 10
Bill rendered June 29	-	-	-	-	-	-	-	-	-	-	106 01
Advances for	-	-	-	-	-	-	-	-	-	-	2 60
Interest	-	-	-	-	-	-	-	-	-	-	8 61
Cart account	-	-	-	-	-	-	-	-	-	-	3 50
											————— \$137 82

When they handed me this bill I told them the charges ought not to be so high; that I wanted a bill of the items; that there was one charge of \$106.01 all in one lump, and I wanted the items. I think it was Martin C. Hale that handed me the bill, and afterwards they made out and handed me this bill.

Here the witness produced the bill referred to by him, in the words and figures following:

HALE'S DOCKS,

CHICAGO, NOVEMBER 19TH, 1858.

MR. JAMES KENDALL,

To THOMAS HALE, for F. M. HALE, DR.

North Water Street, between Wells and La Salle Streets.

[For Freight and Charges on Goods per Propeller Galena, June 29th, 1857.]

Seven boxes Machinery	-	-	-	-	-	-	-	-	-	3,216
One Engine Lathe, Counter Shaft attached										
One Box, one Weight,	-	-	-	-	-	-	-	-	-	3,800
Advances,	-	-	-	-	-	-	-	-	-	\$24 90
Freight to Chicago	-	-	-	-	-	-	-	-	-	77 61
Dockage	-	-	-	-	-	-	-	-	-	3 50—\$106 01

(Duplicate Bill.)

The above bills were read to the jury, and the witness further testified as follows: I thought the charges were too high; they insisted that they had a right to hold the lathe and counter shaft, &c., until the charges on the seven boxes of machinery were paid; I insisted that they had no such right, and told them I was willing to pay the charges on the lathe, but that they had put it all in one bill; I recollect Martin C. Hale saying something about their having to write to Buffalo to see how much the charges were on the lathe; that they could not separate it from the charges on the machinery; Martin C. Hale said if my lawyer would satisfy them that they had no right to keep the lathe for the charges on the boxes of machinery, then he would not insist upon it, and I went with him to Mr. Van Buren's office;

we saw Mr. Van Buren there, and he said to Mr. Hale that they had no right to keep one man's goods for the charges on another man's goods; Mr. Hale, after talking some time, said he wanted to see his lawyer, and went out; Mr. Hale then rendered to me this bill.

Here the witness produced the bill referred to by him, in the words and figures following:

HALE'S DOCKS,

CHICAGO, SEPTEMBER 3RD, 1859.

MR. THOMAS, KENDALL, CHICAGO,

TO THOMAS HALE, ASSIGNEE OF F. M. HALE, DR.

North Water Street, between Wells and La Salle Streets.

June 29th. For freight charges, &c.

"	"	Lathe, &c.	-	-	-	-	3,800	
"	"	Freight advanced N. Y. C. R. R.	-	-	-	-		\$61 14
"	"	2½ per cent. for advc'g	-	-	-	-		1 52
"	"	Interest 10 per cent. to date (2 years 2 2-12 months)	-					13 42
"	"	Paid 3 Cartages	-	-	-	-		6 00
		Storage	-	-	-	-		27 00
								———— \$109 08

Record p. 23.

Which last mentioned bill was read to the jury, and the witness further testified as follows: This bill was rendered after Martin C. Hale and I went to Mr. Van Buren's office; I told Mr. Hale that I thought the bill was large; that when the lathe and counter shaft weighed only 3,800 pounds, and the machinery weighed 3,216 pounds, I could not see how the charges on the lathe were \$109.08, when the charges on the whole were only \$137.82; he insisted that the bill was right and said that they had advanced the \$61.14 for freight as stated in last bill, and that the other charges were correct; I think he said he had written to Buffalo and found out, though I don't recollect that he showed me the letter; I don't know but that the building of Sanford & Hall was good enough to keep the lathe in.

Thereupon the plaintiffs called as a witness T. Rogers, who testified as follows:

I am selling machinery; have been engaged continually for two years; I have seen the lathe; I have not examined it particularly; think a ten foot lathe is worth from \$450 to \$500.

On his re-examination in chief, he said: When each of these bills were presented, I offered to pay them all charges on the lathe if they would let me have it, and at each time they refused, unless I would pay for the charges on the other goods.

The plaintiffs here rested.

Record p. 24.

And, thereupon, the defendants read in evidence the deposition of Judson M. Bemis, taken in said cause, whose testimony, as read to the Jury, was as follows:

I am 27 years old in May next, and live in St. Louis; occupation, manufacturing bags; in 1857, I was clerk for Hale & Co; they (Hale & Co.) received seven boxes of machinery; one engine-lathe, counter shaft attached, one box and one weight, June 29, 1857; Hale & Co. were at that time Receiving and Forwarding Merchants; the said property was received in the ordinary course of their business; the property was all consigned to James Kendall; the charges which Hale & Co. paid on it were \$102.51, the amount of the dock charges was \$3.50,—total \$106.01; these were the charges upon the whole property in that consignment; Mr. Kendall gave us a warehouse receipt for the property, subject to the order of Hale & Co., for the purpose of holding the property to secure the above charges, \$106.01; the paper now shown me and marked "Exhibit 1," is the warehouse receipt above referred to; the receipt is signed by Mr. Prouty who was at that time clerk for Mr. Kendall; I saw him sign it; the arrangement that this property was to be held as security for the charges was made by Mr. Kendall; there was a due bill given by Kendall for the same amount of charges at the same time; the paper now shown to me and marked "Exhibit 2," is the due bill referred to above; the property remained in Mr. Kendall's store for how long a time I don't know; the lathe and weight and box were afterwards sent to Sanford & Hall for storage by Thomas Hale; I saw it there afterwards; Franklin M. Hale composed the firm of Hale & Co.; no

Record p. 25.

one else to my knowledge; I remained in their employment until the 1st of January, 1858, and was there with Thomas Hale until the 1st of January, 1859; I suppose the property came into the hands of Thomas Hale as the assignee of Hale & Co.; I don't know what became of the seven boxes of machinery; there was no division of the charges to Hale & Co. on the bills of lading on the several pieces of property; it was one gross charge on the whole property; there were no minutes by which we could apportion the charges on the different lots; we might have done so by weighing each piece, if we had known the rates; the property was shipped from Buffalo on the New York Central line of Propellers, of which Hale & Co. were agents; Mr. Kendall had several other lots of freight sent that year; his freight was usually shipped by said line of Propellers and came into Hale and Co.'s hands, as the agents; the goods were marked *James Kendall, Chicago*; he came frequently with duplicate bills of lading to inquire after his goods; some time in the fall of 1858, Mr. Doan came in and inquired if we had a lathe; Mr. Doan claimed to have some letters regarding the disposition of the property, or something to that effect. (Any conversation with Doan objected to.) The goods were not claimed by anybody but Kendall before the fall of 1858 to my knowledge; Mr. Kendall never paid these charges to my knowledge.

Record p. 26.

On his cross-examination his testimony, as read to the Jury, was as follows: I know the lathe I have been testifying about is the one which is in controversy in this suit; I know it, because it was first received in store and sent to Sanford & Hall's; I saw it afterwards at Sanford & Hall's, and when Mr. Doan came to inquire after it, I told him it was there; I think I went with Mr. Doan to Sanford & Hall's to see it; when the propeller Galena discharged this freight, she was lying at Hale & Co.'s dock on the North side of the river, next East of Wells street bridge; the lathe was first discharged at Hale & Co.'s dock; it was first moved from the dock to James Kendall's store, next adjoining Wells street bridge; his store was a separate room from any warehouse of Hale & Co.'s; he rented of Hale & Co.; the lathe was put into his store before the said warehouse receipt (Exhibit 1) was given; the vessel had a bill of lading; there was no other bill; the charges on the book were made up from that bill of lading; the book is a copy of the bill of lading, so far as relates to the marks of the goods, the articles, weight and charges; the bill of lading was delivered to the vessel by Hale & Co., after they had receipted it; the amount of the due bill (Exhibit 2) was taken from Hale & Co.'s book; I did not keep the book; Mr. Holliday did; the warehouse receipt is in my hand writing, with the exception of the signature; the due bill is not; I have such a recollection of amounts, dates and weights that I could have sworn to about the amount of the charges, without referring to the books; I do not know what became of the other things mentioned in exhibit "1" besides this lathe.

Record p. 27.

On his re-examination his testimony, as read to the Jury, was as follows: My recollection is that the warehouse receipt was given the same day Kendall took the lathe; the arrangement to give the warehouse receipt was made between the time of delivery of the goods on the dock and the delivery to Kendall. [SIGNED.] JUDSON M. BEMIS.

The defendants, by their counsel, thereupon read to the Jury the receipt and the due bill referred to by said witness in his deposition, and marked respectively Exhibits 1 and 2, which are in the words and figures following:

EXHIBIT 1.

CHICAGO, July 1, 1857.

Record p. 28.

Received in store from Prop. Galena, subject to the order of Hale & Co.:

7 Boxes Machinery; 1 Engine Lathe, Counter Shaft attached; 1 Box; 1 Weight.

JAMES KENDALL, BY B. T. PROUTY.

EXHIBIT 2.

Due Hale & Co. for freight received per Propeller Galena One Hundred and Six

⁹¹/₁₀₀ Dollars, June 29, 1857.

JAMES KENDALL.

\$106.01.

The defendants thereupon introduced as a witness Wm. Howe, who testified as follows:

I am in the Forwarding and Commission business in Chicago; have been so engaged for the last seven years; in 1857, the customary charge in Chicago by warehousemen as commissions for advancing and paying charges for freights upon goods which came subject to such charges, was $2\frac{1}{2}$ per cent.

Thereupon the counsel for the defendants asked the witness the following question: "State whether it was then customary for warehousemen in Chicago to make any further charges as interest upon the advances so made by them, when such advances were not repaid to them within a short time after they were made." Counsel stated his object was to prove
 Record p. 29. a custom to charge ten per cent. interest. To which question, the plaintiffs, by their counsel, then and there objected, and the Court sustained said objection and refused to allow the witness to answer said question; to which ruling and decision of the Court, the defendants, by their counsel, then and there excepted.

Said witness further testified as follows: The established rate for storage then was one dollar per ton for the first month and fifty cents per ton after that time, until taken away; I think the cartage would be worth one dollar for each removal; I am acquainted with Sandford & Hall's warehouse, which has been referred to; I consider it a good building, better, if anything, than that of Mr. Hale's, and a suitable place for storing:

Thereupon the defendants introduced as a witness Mr. Wm. Clary, who testified as follows:

I am engaged in the Forwarding and Commission business in Chicago; have been so engaged for nine years; in 1857, a proper charge by warehousemen, by way of commission for advancing freight and charges was $2\frac{1}{2}$ per cent.; there was then, and now is, a custom among warehousemen in Chicago, regarding the rate of interest to be charged upon advances thus made.

The counsel for the defendants thereupon asked the witness the following question: "What was the custom?" and stated that his object was to prove a custom to charge ten per cent. interest; to which question, the plaintiffs, by their counsel, then and there objected, and the Court sustained said objection and refused to permit said question to be answered; to which ruling and decision the defendants then and there excepted.
 Record p. 30.

Said witness further testified as follows: The customary charge for storage in 1857 was one dollar per ton for the first month and then fifty cents per ton per month afterwards until the goods were taken away; this I consider a fair and reasonable charge.

Thereupon the defendants introduced as a witness B. T. Prouty, who testified as follows:

I was clerk for James Kendall in the summer of 1857, and had been for about a year; I had charge of his business during his absence; the seven boxes of machinery, the lathe and counter shaft attached, and one box and weight all came together, and subject to one entire charge for freight, as appeared by the bill of charges as presented to us; the freight was not apportioned. Here was shown to witness the warehouse receipt above referred to, and he further testified: I cannot recollect giving this receipt, though the signature to it is in my hand writing, and I must have given it; I do not recollect about giving it, it is so long ago; I think Mr. Kendall had orders for the seven boxes of machinery at the time or soon after it was received, and it was shipped away; the machinery was shipped to Kendall by Ball & Co.; the charges on the lathe and machinery for freight was about \$106; that was the charge on both. The lathe was an old-fashioned lathe and out of order. I think it was worth about \$200. The lathe had been manufactured for other parties and they would not take it, and then it was sent out here. It was a good deal out of order. We had it in the store to see if we could not get an offer for it. But we did not get any offer for it.
 Record p. 31.

On his cross-examination he testified as follows:

I was clerk for Kendall for about a year. I did not know anything about lathes before I came there. I know it was out of order, for I tried to fix it up and get it into shape several times, and could not. It was first entered on our books for sale at \$400; it was so entered because the plaintiffs told us to sell it for that price. Afterwards when we couldn't sell it, they told us to sell it for any price. The gross amount of the charges, about \$100, included the goods shipped by Ball & Ballard and by Barrett & Cutting. The lathe was shipped by Barrett & Cutting, and the rest of the goods by Ball & Ballard.

The defendants thereupon introduced as witness John Simmons, who testified as follows :

I have been selling machinery for five years ; I am acquainted with the kind of machinery in question ; I have seen the lathe in question ; I have seen it within a week ; it is an old-fashioned lathe and out of date ; I do not consider it a saleable lathe ; I consider it worth about \$250. Thereupon the defendants introduced as a witness,

John Onahan, who testified as follows : I am book-keeper of Thomas Hale ; I entered his employment as book-keeper in the summer of 1858 ; Thomas Hale was the assignee of Hale & Co. ; there has been no other book-keeper in the office from that time down to the present time ; I have had the sole charge of the books ; Martin C. Hale has attended to the business in the office as has also Franklin M. Hale ; I know Wm. H. Doan, who has testified in this case ; I have seen him in the office conversing with Mr. Hale about the lathe in question. He never tendered any money to me or offered to tender any money to me on account of this lathe ; nor do I know of his ever tendering or of his offering to tender any in the office to any one ; Mr. Hale had no other office than the one in which I was book-keeper.

Here the defendants rested. The plaintiffs thereupon recalled William Kendall, who testified as follows : This was not a second hand lathe ; there was another lathe in the store that Prouty worked on several times trying to repair it. In his cross-examination he testified as follows : I will not swear that this lathe had not been used any before it was sent out to Chicago. It was sent from the dock to my warehouse.

Here the plaintiffs rested, and the above being all the evidence that was given in the case, the Court at the instance and request of the counsel for the plaintiffs, instructed the jury as follows :

PLAINTIFF'S INSTRUCTIONS.

1. That if the jury believe from the evidence that the lathe in controversy was the property of the plaintiffs, and that the defendants had the possession of it, and that the plaintiffs by their duly authorized agent demanded the lathe of the defendants, and that the defendants refused wrongfully (that is without right) to deliver the same, this is evidence of a conversion by the defendants of the lathe to their own use.

2. That if they believe from the evidence that the defendants took the lathe from the store formerly occupied by Kendall, without any authority from the plaintiffs or from Kendall so to do, and then undertook to keep the same from the plaintiffs as security for a debt which Kendall owed them, after a demand by the plaintiffs for the same, then they are guilty of a conversion of the lathe, if the same belonged to the plaintiffs.

3. That if Prouty was simply the salesman and bookkeeper of Kendall, and that Kendall was not a warehouseman, this gave him no authority to give a warehouse receipt for the lathe, and such receipt so given would have no effect in this suit without special authority to do so or a ratification of the act.

4. That if the defendants had a lien upon the lathe for any freight and charges that they had paid upon it, but took Kendall's due bill for such freight and charges and delivered the lathe to him, then they lost their lien and could not afterwards and by a new contract with Kendall take the lathe and hold it as security for such freight and charges, without the consent of the plaintiffs, if they believed from the evidence that they owned the lathe.

5. That the freight and charges upon other goods belonging to other persons, were never any lien upon the lathe if it belonged to the plaintiffs.

6. That if the plaintiffs owned the lathe and sent it to Kendall as a commission merchant in the ordinary course of business to sell, then Kendall had no authority to pledge the lathe to the defendants either by a warehouse receipt or in any other way for any debt he on his own account may have owed the defendants.

7. That if the lathe belonged to the plaintiffs and they by their agent demanded the lathe of the defendants, and offered to pay all proper charges for the freight, storage, and other charges upon the lathe, but the defendants refused to deliver it unless charges upon other goods were also paid, then the plaintiffs are entitled to recover.

8. That if the jury find for the plaintiffs their verdict, they may find the value of the lathe at the time of the demand, with interest since that time at the rate of six per centum per annum as damages, less by way of recoupment whatever amount for freight and charges or either, the jury shall believe from the evidence the defendants had advanced on said property—if they shall further believe from the evidence that the defendants had never voluntarily parted with the possession of said property.

9. If the jury believe from the evidence that the defendants refused to deliver up the goods unless an amount larger than what they were entitled to should be paid them, and so told the plaintiff or his agent, then, no tender was necessary if the plaintiffs were ready and offered to pay the amount actually due, as the law does not require a party to do a useless thing.

To the giving of each of which said instructions the defendants by their counsel then and there duly excepted at the time they were respectively given.

The defendants by their counsel thereupon requested the Court to instruct the jury as follows :

DEFENDANT'S INSTRUCTIONS.

Record p. 36.

1. A warehouseman on receiving goods in the regular course of his business has a lien upon the goods for any advances which he may have made to the carrier, which may have accrued for the carriage of the goods, and also for his reasonable charges for storage of the goods if he shall have kept them in store, and has a right to retain the possession of the property until such advances and charges are repaid to him. And if the jury shall believe from the evidence in this case, that the defendants or one of them, in the summer of 1857 received the property in question as warehouseman, and paid to the carrier the sum of sixty-one dollars and fourteen cents which had accrued for the carriage of the goods, and afterwards kept the goods in store, they had a right to retain the possession of the property until the sum advanced by them and charges for storage was paid to them. Which was given to the jury.

The defendants by their counsel asked the Court to instruct the jury as follows :

Record p. 37.

2. If the jury shall believe from the evidence that the defendants or any one of them received the property as stated in the above instruction, and that they had a lien upon said property as stated in said instruction, and that the same was consigned to James Kendall, and that the defendants or one of them made an agreement with James Kendall that the said James Kendall should receive the said goods, temporarily to hold the same as bailee for said Hale & Co., and that for that purpose and in pursuance of said agreement, said Kendall or his authorized agent executed the warehouse receipt given in evidence in this cause, and that said goods were delivered to and received by said Kendall under and in pursuance of said agreement, this is not such a delivery of the property as will deprive Hale & Co. of their lien upon the property.

But the Court refused to give such instruction as asked, but modified the same by adding thereto the following words :

"This is so if the said agreement was made at the time the goods were first committed to the possession of said Kendall."

And the Court read to the jury said instruction thus modified, to which modification and alteration of said instruction the defendants by their counsel then and there excepted.

The defendants by their counsel then asked the Court to instruct the jury as follows :

3. If the jury believe from the evidence that the defendants or one of them received the goods in question as stated in the first instruction, and that they had a lien upon said goods for advances and storage as stated in said instruction, and that they had possession of said goods and continued in such possession to the summer and fall and year 1859, then they had a right to retain the possession of the property until the amount of the charges and advances were paid or tendered.

Which instruction was given to the jury as asked.

And thereupon the defendants by their counsel asked the Court to instruct the jury as follows :

4. To constitute a legal tender the money must be actually produced to the party who is entitled to recover it, and if the jury shall believe from the evidence under the above instructions that the defendants or one of them had a lien upon the property in question, then before they can be charged with having converted it, the jury should be satisfied from the evidence that the amount of this lien was *tendered the defendants or one of them*, and that upon such tender they or one of them refused to deliver the property. A mere tender to the bookkeeper of one of them is not sufficient.

But the Court refused to give such instruction to the jury as asked, but modified the same by adding thereto the following words :

"Of itself. But if the jury shall further believe from the evidence, that the plaintiffs or their agent offered to pay the actual amount due for such charges and advances, and the defendants claimed a larger sum and refused to deliver the lathe unless such larger sum was paid, then an actual tender was not necessary."

And read said instruction to the jury as thus modified ; to which modification and alteration of said instruction by the Court, the defendants, by their counsel, then and there duly excepted. And thereupon said cause was given to the jury upon the evidence and instructions aforesaid.

ASSIGNMENT OF ERRORS.

1st. The Court erred in sustaining the objection and refusing to allow the witness, Wm. Howe, to answer the question as to the custom among warehousemen in Chicago to charge interest upon advances, &c.

2d. The Court erred in refusing to allow the defendants to prove such custom by the witness Wm. McClary.

3d. The Court erred in giving the plaintiffs' first instruction.

4th. The Court erred in giving the plaintiffs' second instruction.

5th. The Court erred in giving the plaintiffs' third instruction.

6th. The Court erred in giving the plaintiffs' fourth instruction.

7th. The Court erred in giving the plaintiffs' fifth instruction.

8th. The Court erred in giving the plaintiffs' sixth instruction.

9th. The Court erred in giving the plaintiffs' seventh instruction.

10th. The Court erred in giving the plaintiffs' eighth instruction.

11th. The Court erred in giving the plaintiffs' ninth instruction.

12th. The Court erred in refusing to give the second instruction for the defendants, as asked, and in modifying and giving the same as modified by the Court.

13th. The Court erred in refusing to give the fourth instructions for the defendants, as asked, and in modifying and altering the same, and giving the same as modified and altered by the Court.

14th. The verdict of the jury was against the law and the evidence.

15th. The Court erred in overruling the defendants' motion for a new trial and giving judgment on the verdict.

HOYNE, MILLER & LEWIS,

For Appellants.

253
Supreme Court

Franklin W Hale et al
Appellants

vs
Joseph Parrott et al
Appellees

Abstract of Record.

Filed Apr. 24-1

L. Leland
Clerk

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1861.

FRANKLIN M. HALE, THOMAS HALE
AND MARTIN C. HALE,

Appellants.

vs.

JOSEPH BARRETT & CALEB CUTTING,

Appellees.

APPEAL FROM THE
SUPERIOR COURT OF CHICAGO.

This was an action of Trover brought to the January Term 1860, by the Appellees *vs.* the Appellants, to recover the value of a ten-foot Engine Lathe with counter shaft and hangers, consigned to James Kendall, and received by Hale & Co. in the regular course of their business as receiving and forwarding merchants at Chicago, June 29th, 1857, from one of a line of propellers for which they were agents, and held by them for charges, &c.

Record page 8.

Record p. p. 5, 6 & 7.

Record p. 12.

Record p. 13.

Record p. 14.

The declaration was in the usual form in trover to which the appellants pleaded, severally, the general issue. The cause was tried at the February Term, 1861, before Grant Goodrich, Judge, and a Jury. Verdict for the plaintiffs below for \$425, against all the defendants who entered a motion for a new trial, which was overruled and judgment entered on the verdict at the March Term, March 15th, 1861. Appeal prayed and allowed on filing bond in \$600, to be approved by a Judge of the Court in thirty days, and bill of exceptions by the 29th of March, which was done.

The first witness introduced by the plaintiff in the trial below was James Randall, who testified as follows:

I resided in Chicago in the year 1857; I was selling machinery on my own account and as Commission Merchant; my place of business was at the north end of Wells street, just over the bridge; it was in the building occupied by the Hales; I rented a store in that building; I know the defendants Franklin M. Hale and Martin C. Hale; they were, in the summer of 1857, doing business under the name of Hale & Co.; I can't say of my own knowledge that they were partners; they were doing business in the same office; Franklin generally did the business; Martin was there; I supposed they were doing business under that name; I know the lathe and counter shaft in controversy; I think it was about twelve feet long; the counter shaft and weights came with this lathe; the lathe was consigned to me by the plaintiffs Barrett & Cutting, for sale on commission; when it arrived, it came with some other machinery in boxes; Ball & Ballard consigned the machinery to me; when the bill for the charges was presented I told Prouty, my clerk, to pay the charges and money coming; told him to apply it for charges and supposed he had done so until some time

afterwards; I had occasion to go into the country about that time, and I was surprised on my return to find he had not done so; in my absence, Prouty got the lathe and counter shaft into my store, and it remained there until the next February, in 1858; the lathe and machinery came early in the summer in the previous year, in 1857; in February, 1858, I removed from that store to 86 Lake street; all the machinery in that store was taken to 86 Lake street, in February, 1858, except this lathe; that was left in the store on Wells street; I rented the store on Wells street of one of the Hales; my lease was with the young man, Franklin M. Hale; the store was in the same building occupied by the Hales; I saw the lathes there several times; not long after I left, Mr. Manny went into the store; I have not seen the lathe since; I was there afterwards; it had been removed; I don't know who removed it.

Being cross-examined he testified as follows:

Ball & Ballard and Barrett & Cutting lived in Worcester, Massachusetts; the lathe and boxes of machinery came in bill of lading under one charge; my impression is that the charge upon the lathe was \$42, though I am not positive; I executed the due bill now shown to me, (here was shown to the witness the exhibit marked "Exhibit A," attached to the deposition of Judson M. Bemis, and afterwards read in evidence); that was for the amount of freight and charges paid by Hale on the lathe and boxes of machinery and the dockage in Chicago; I have no recollection of signing it, but it is in my hand-writing; the warehouse receipt now shown to me is signed by Mr. Prouty, who was my clerk at that time, (here was shown to the witness the exhibit marked "Exhibit B," attached to the deposition of Judson M. Bemis, and afterwards read in evidence); Prouty had the money with which to pay the charges on the lathe and machinery, but he paid it on one of the notes I was owing at that time; the lathe and machinery were consigned to me at Chicago; they came by the same boat and at the same time; I did not have any sign up as Commission Merchant; the warehouse receipt was given without my knowledge; I did not know of it till months afterwards.

The plaintiffs then introduced as a witness William H. Doan, who proved the signatures to a Power of Attorney, given on pages 16 and 17 of the Record, and which was read to the jury, and the witness proceeded as follows: I know the Hales by sight; the two Hales that are present—Martin C. Hale, and Franklin M. Hale; I know Thomas Hale; I have had repeated conversations with the Hales about the lathe; it was a long time before I could find the lathe; I finally found it in an old building on the North Side; it was in the warehouse of Sanford & Hall; I first saw Franklin, and then Martin, and all together; Franklin at first seemed to think I had no business with it; I showed them my Power of Attorney; their business was all done together; I applied to the Hales to get the charges on the lathe, and told them I would pay all proper charges upon it; they finally gave me a bill for about \$140; for advanced charges in gross; I told them there was some mistake, and wanted them to give me the items; they afterwards gave me another bill for about \$110, including the boxes; I objected to paying charges on another man's property; my talk was with all of them; I then proposed to give them seventy-five dollars, and close it up; they said they would write to Buffalo; they finally said if I would pay the whole bill they would deduct nine dollars; I made them a tender of from \$100 to \$105, in bank bills; they refused to let me have the lathe unless I paid them the whole amount of their bill; I have been in the machinery business five years, and know the value of this lathe; I could have sold the lathe repeatedly for \$475; I had already sold it for \$475; when the lathe was shipped the usual price for freight from Worcester to Chicago was from sixty cents to one dollar; there would have been no difficulty in ascertaining the freight on the lake by weighing it.

And being cross-examined said witness testified as follows: I have been acting as salesman for myself and others for nearly ten years; am acting as salesman for Fay & Co. and for myself; my brother, James T. Doan, went with me to the Hales when I made the tender of which I have spoken; I saw Hales' book-keeper, or the person I took to be the book-keeper; I can't say that I saw any one else; I don't think any of the Hales were in; I did not see either of them; I tendered the money to the book-keeper; it was in bank bills; I laid it on the counter; he said he had no instructions to take anything less than the amount of the bill, and that I had better see Mr. Hale; I did not see Mr. Hale; I know it was over one hundred dollars that I tendered, but how much over I can't say; I know it because we went

right from Mr. Van Buren's office to the Hales to make the tender; I had \$100 when I was in Mr. Van Buren's office, and he said I had better be sure and tender a little more, and I borrowed some more on the way, from my brother, who went with me; I can't say how much more—four or five dollars perhaps; this was a short time before this suit was commenced; a week or two perhaps before it was commenced; I first saw the Hales about this lathe in the summer or fall of 1858; I can't say which of them I first saw, it is so long ago; I saw them a good many times; I can't state the substance of any particular conversation I had with either of them before I went to Mr. Van Buren's office with Martin C. Hale, it is so long ago; I can't state what I said or what they said in any particular conversation; I had learned where the lathe was before I went to the Hales; I had learned this from Kendall; I wanted to know of the Hales what their charges were on the lathe; I have the bills they rendered to me from time to time of the amount of their charges; the following was the first bill they rendered to me in the fall of 1858.

Here was presented the bill referred to by him, in the words and figures following:

HALE'S DOCKS,

CHICAGO, NOVEMBER 19TH, 1858.

MR. JAMES KENDALL, or whom it may concern,

To THOMAS HALE, DR. *North Water St., between Wells and La Salle Sts.*

Storage on Lathe	-	-	-	-	-	-	-	-	-	-	\$17 10
Bill rendered June 29	-	-	-	-	-	-	-	-	-	-	106 01
Advances for	-	-	-	-	-	-	-	-	-	-	2 60
Interest	-	-	-	-	-	-	-	-	-	-	8 61
Cart account	-	-	-	-	-	-	-	-	-	-	3 50
											\$137 82

When they handed me this bill I told them the charges ought not to be so high; that I wanted a bill of the items; that there was one charge of \$106.01 all in one lump, and I wanted the items. I think it was Martin C. Hale that handed me the bill, and afterwards they made out and handed me this bill.

Here the witness produced the bill referred to by him, in the words and figures following:

HALE'S DOCKS,

CHICAGO, NOVEMBER 19TH, 1858.

MR. JAMES KENDALL,

To THOMAS HALE, for F. M. HALE, DR.

North Water Street, between Wells and La Salle Streets.

[For Freight and Charges on Goods per Propeller Galena, June 29th, 1857.]

Seven boxes Machinery	-	-	-	-	-	-	-	-	-	3,216
One Engine Lathe, Counter Shaft attached										
One Box, one Weight,	-	-	-	-	-	-	-	-	-	3,800
Advances,	-	-	-	-	-	-	-	-	-	\$24 90
Freight to Chicago	-	-	-	-	-	-	-	-	-	77 01
Dockage	-	-	-	-	-	-	-	-	-	3 50—\$100 01

(Duplicate Bill.)

Record p. 22.

The above bills were read to the jury, and the witness further testified as follows: I thought the charges were too high; they insisted that they had a right to hold the lathe and counter shaft, &c., until the charges on the seven boxes of machinery were paid; I insisted that they had no such right, and told them I was willing to pay the charges on the lathe, but that they had put it all in one bill; I recollect Martin C. Hale saying something about their having to write to Buffalo to see how much the charges were on the lathe; that they could not separate it from the charges on the machinery; Martin C. Hale said if my lawyer would satisfy them that they had no right to keep the lathe for the charges on the boxes of machinery, then he would not insist upon it, and I went with him to Mr. Van Buren's office;

we saw Mr. Van Buren there, and he said to Mr. Hale that they had no right to keep one man's goods for the charges on another man's goods; Mr. Hale, after talking some time, said he wanted to see his lawyer, and went out; Mr. Hale then rendered to me this bill.

Here the witness produced the bill referred to by him, in the words and figures following:

HALE'S DOCKS,

CHICAGO, SEPTEMBER 3RD, 1859.

MR. THOMAS, KENDALL, CHICAGO,

TO THOMAS HALE, ASSIGNEE OF F. M. HALE, DR.

North Water Street, between Wells and La Salle Streets.

June 29th. For freight charges, &c.

"	"	Lathe, &c.	-	-	-	3,800	
"	"	Freight advanced N. Y. C. R. R.	-	-	-		\$61 14
"	"	2½ per cent. for adve'g	-	-	-		1 52
"	"	Interest 10 per cent. to date (2 years 2 2-12 months)	-	-	-		13 42
"	"	Paid 3 Cartages	-	-	-		6 00
		Storage	-	-	-		27 00

———— \$109 08

Record p. 23.

Which last mentioned bill was read to the jury, and the witness further testified as follows: This bill was rendered after Martin C. Hale and I went to Mr. Van Buren's office; I told Mr. Hale that I thought the bill was large; that when the lathe and counter shaft weighed only 3,800 pounds, and the machinery weighed 3,216 pounds, I could not see how the charges on the lathe were \$109.08, when the charges on the whole were only \$137.82; he insisted that the bill was right and said that they had advanced the \$61.14 for freight as stated in last bill, and that the other charges were correct; I think he said he had written to Buffalo and found out, though I don't recollect that he showed me the letter; I don't know but that the building of Sanford & Hall was good enough to keep the lathe in.

Thereupon the plaintiffs called as a witness T. Rogers, who testified as follows:

I am selling machinery; have been engaged continually for two years; I have seen the lathe; I have not examined it particularly; think a ten foot lathe is worth from \$450 to \$500.

On his re-examination in chief, he said: When each of these bills were presented, I offered to pay them all charges on the lathe if they would let me have it, and at each time they refused, unless I would pay for the charges on the other goods.

The plaintiffs here rested.

Record p. 24.

And, thereupon, the defendants read in evidence the deposition of Judson M. Bemis, taken in said cause, whose testimony, as read to the Jury, was as follows:

I am 27 years old in May next, and live in St. Louis; occupation, manufacturing bags; in 1857, I was clerk for Hale & Co; they (Hale & Co.) received seven boxes of machinery; one engine-lathe, counter shaft attached, one box and one weight, June 29, 1857; Hale & Co. were at that time Receiving and Forwarding Merchants; the said property was received in the ordinary course of their business; the property was all consigned to James Kendall; the charges which Hale & Co. paid on it were \$102.51, the amount of the dock charges was \$3.50,—total \$106.01; these were the charges upon the whole property in that consignment; Mr. Kendall gave us a warehouse receipt for the property, subject to the order of Hale & Co., for the purpose of holding the property to secure the above charges, \$106.01; the paper now shown me and marked "Exhibit 1," is the warehouse receipt above referred to; the receipt is signed by Mr. Prouty who was at that time clerk for Mr. Kendall; I saw him sign it; the arrangement that this property was to be held as security for the charges was made by Mr. Kendall; there was a due bill given by Kendall for the same amount of charges at the same time; the paper now shown to me and marked "Exhibit 2," is the due bill referred to above; the property remained in Mr. Kendall's store for how long a time I don't know; the lathe and weight and box were afterwards sent to Sanford & Hall for storage by Thomas Hale; I saw it there afterwards; Franklin M. Hale composed the firm of Hale & Co.; no

Record p. 25.

one else to my knowledge; I remained in their employment until the 1st of January, 1858, and was there with Thomas Hale until the 1st of January, 1859; I suppose the property came into the hands of Thomas Hale as the assignee of Hale & Co.; I don't know what became of the seven boxes of machinery; there was no division of the charges to Hale & Co. on the bills of lading on the several pieces of property; it was one gross charge on the whole property; there were no minutes by which we could apportion the charges on the different lots; we might have done so by weighing each piece, if we had known the rates; the property was shipped from Buffalo on the New York Central line of Propellers, of which Hale & Co. were agents; Mr. Kendall had several other lots of freight sent that year; his freight was usually shipped by said line of Propellers and came into Hale and Co.'s hands, as the agents; the goods were marked *James Kendall, Chicago*; he came frequently with duplicate bills of lading to inquire after his goods; some time in the fall of 1858, Mr. Doan came in and inquired if we had a lathe; Mr. Doan claimed to have some letters regarding the disposition of the property, or something to that effect. (Any conversation with Doan objected to.) The goods were not claimed by anybody but Kendall before the fall of 1858 to my knowledge; Mr. Kendall never paid these charges to my knowledge.

Record p. 26.

On his cross-examination his testimony, as read to the Jury, was as follows: I know the lathe I have been testifying about is the one which is in controversy in this suit; I know it, because it was first received in store and sent to Sanford & Hall's; I saw it afterwards at Sanford & Hall's, and when Mr. Doan came to inquire after it, I told him it was there; I think I went with Mr. Doan to Sanford & Hall's to see it; when the propeller Galena discharged this freight, she was lying at Hale & Co.'s dock on the North side of the river, next East of Wells street bridge; the lathe was first discharged at Hale & Co.'s dock; it was first moved from the dock to James Kendall's store, next adjoining Wells street bridge; his store was a separate room from any warehouse of Hale & Co.'s; he rented of Hale & Co.; the lathe was put into his store before the said warehouse receipt (Exhibit 1) was given; the vessel had a bill of lading; there was no other bill; the charges on the book were made up from that bill of lading; the book is a copy of the bill of lading, so far as relates to the marks of the goods, the articles, weight and charges; the bill of lading was delivered to the vessel by Hale & Co., after they had receipted it; the amount of the due bill (Exhibit 2) was taken from Hale & Co.'s book; I did not keep the book; Mr. Holliday did; the warehouse receipt is in my hand writing, with the exception of the signature; the due bill is not; I have such a recollection of amounts, dates and weights that I could have sworn to about the amount of the charges, without referring to the books; I do not know what became of the other things mentioned in exhibit "1" besides this lathe.

Record p. 27.

On his re-examination his testimony, as read to the Jury, was as follows: My recollection is that the warehouse receipt was given the same day Kendall took the lathe; the arrangement to give the warehouse receipt was made between the time of delivery of the goods on the dock and the delivery to Kendall. [SIGNED.] JUDSON M. BEMIS.

The defendants, by their counsel, thereupon read to the Jury the receipt and the due bill referred to by said witness in his deposition, and marked respectively Exhibits 1 and 2, which are in the words and figures following:

EXHIBIT 1.

CHICAGO, July 1, 1857.

Record p. 28.

Received in store from Prop. Galena, subject to the order of Hale & Co.:

7 Boxes Machinery; 1 Engine Lathe, Counter Shaft attached; 1 Box; 1 Weight.

JAMES KENDALL, BY B. T. PROUTY.

EXHIBIT 2.

Due Hale & Co. for freight received per Propeller Galena One Hundred and Six Dollars, June 29, 1857.

JAMES KENDALL.

\$106.01.

The defendants thereupon introduced as a witness Wm. Howe, who testified as follows:

I am in the Forwarding and Commission business in Chicago; have been so engaged for the last seven years; in 1857, the customary charge in Chicago by warehousemen as commissions for advancing and paying charges for freights upon goods which came subject to such charges, was $2\frac{1}{2}$ per cent.

Thereupon the counsel for the defendants asked the witness the following question: "State whether it was then customary for warehousemen in Chicago to make any further charges as interest upon the advances so made by them, when such advances were not repaid to them within a short time after they were made." Counsel stated his object was to prove a custom to charge ten per cent. interest. To which question, the plaintiffs, by their counsel, then and there objected, and the Court sustained said objection and refused to allow the witness to answer said question; to which ruling and decision of the Court, the defendants, by their counsel, then and there excepted.

Record p. 29.

Said witness further testified as follows: The established rate for storage then was one dollar per ton for the first month and fifty cents per ton after that time, until taken away; I think the cartage would be worth one dollar for each removal; I am acquainted with Sandford & Hall's warehouse, which has been referred to; I consider it a good building, better, if anything, than that of Mr. Hale's, and a suitable place for storing:

Thereupon the defendants introduced as a witness Mr. Wm. Clary, who testified as follows:

I am engaged in the Forwarding and Commission business in Chicago; have been so engaged for nine years; in 1857, a proper charge by warehousemen, by way of commission for advancing freight and charges was $2\frac{1}{2}$ per cent.; there was then, and now is, a custom among warehousemen in Chicago, regarding the rate of interest to be charged upon advances thus made.

Record p. 30.

The counsel for the defendants thereupon asked the witness the following question: "What was the custom?" and stated that his object was to prove a custom to charge ten per cent. interest; to which question, the plaintiffs, by their counsel, then and there objected, and the Court sustained said objection and refused to permit said question to be answered; to which ruling and decision the defendants then and there excepted.

Said witness further testified as follows: The customary charge for storage in 1857 was one dollar per ton for the first month and then fifty cents per ton per month afterwards until the goods were taken away; this I consider a fair and reasonable charge.

Thereupon the defendants introduced as a witness B. T. Pronty, who testified as follows:

Record p. 31.

I was clerk for James Kendall in the summer of 1857, and had been for about a year; I had charge of his business during his absence; the seven boxes of machinery, the lathe and counter shaft attached, and one box and weight all came together, and subject to one entire charge for freight, as appeared by the bill of charges as presented to us; the freight was not apportioned. Here was shown to witness the warehouse receipt above referred to, and he further testified: I cannot recollect giving this receipt, though the signature to it is in my hand writing, and I must have given it; I do not recollect about giving it, it is so long ago; I think Mr. Kendall had orders for the seven boxes of machinery at the time or soon after it was received, and it was shipped away; the machinery was shipped to Kendall by Ball & Co.; the charges on the lathe and machinery for freight was about \$106; that was the charge on both. The lathe was an old-fashioned lathe and out of order. I think it was worth about \$200. The lathe had been manufactured for other parties and they would not take it, and then it was sent out here. It was a good deal out of order. We had it in the store to see if we could not get an offer for it. But we did not get any offer for it.

On his cross-examination he testified as follows:

I was clerk for Kendall for about a year. I did not know anything about lathes before I came there. I know it was out of order, for I tried to fix it up and get it into shape several times, and could not. It was first entered on our books for sale at \$400; it was so entered because the plaintiffs told us to sell it for that price. Afterwards when we couldn't sell it, they told us to sell it for any price. The gross amount of the charges, about \$100, included the goods shipped by Ball & Ballard and by Barrett & Cutting. The lathe was shipped by Barrett & Cutting, and the rest of the goods by Ball & Ballard.

The defendants thereupon introduced as witness John Simmons, who testified as follows:

Record p. 22. I have been selling machinery for five years; I am acquainted with the kind of machinery in question; I have seen the lathe in question; I have seen it within a week; it is an old-fashioned lathe and out of date; I do not consider it a saleable lathe; I consider it worth about \$250. Thereupon the defendants introduced as a witness,

John Onahan, who testified as follows: I am book-keeper of Thomas Hale; I entered his employment as book-keeper in the summer of 1858; Thomas Hale was the assignee of Hale & Co.; there has been no other book-keeper in the office from that time down to the present time; I have had the sole charge of the books; Martin C. Hale has attended to the business in the office as has also Franklin M. Hale; I know Wm. H. Doan, who has testified in this case; I have seen him in the office conversing with Mr. Hale about the lathe in question. He never tendered any money to me or offered to tender any money to me on account of this lathe; nor do I know of his ever tendering or of his offering to tender any in the office to any one; Mr. Hale had no other office than the one in which I was book-keeper.

Here the defendants rested. The plaintiffs thereupon recalled William Kendall, who testified as follows: This was not a second hand lathe; there was another lathe in the store that Prouty worked on several times trying to repair it. In his cross-examination he testified as follows: I will not swear that this lathe had not been used any before it was sent out to Chicago. It was sent from the dock to my warehouse.

Record p. 33. Here the plaintiffs rested, and the above being all the evidence that was given in the case, the Court at the instance and request of the counsel for the plaintiffs, instructed the jury as follows:

PLAINTIFF'S INSTRUCTIONS.

1. That if the jury believe from the evidence that the lathe in controversy was the property of the plaintiffs, and that the defendants had the possession of it, and that the plaintiffs by their duly authorized agent demanded the lathe of the defendants, and that the defendants refused wrongfully (that is without right) to deliver the same, this is evidence of a conversion by the defendants of the lathe to their own use.

2. That if they believe from the evidence that the defendants took the lathe from the store formerly occupied by Kendall, without any authority from the plaintiffs or from Kendall so to do, and then undertook to keep the same from the plaintiffs as security for a debt which Kendall owed them, after a demand by the plaintiffs for the same, then they are guilty of a conversion of the lathe, if the same belonged to the plaintiffs.

Record p. 34. 3. That if Prouty was simply the salesman and bookkeeper of Kendall, and that Kendall was not a warehouseman, this gave him no authority to give a warehouse receipt for the lathe, and such receipt so given would have no effect in this suit without special authority to do so or a ratification of the act.

4. That if the defendants had a lien upon the lathe for any freight and charges that they had paid upon it, but took Kendall's due bill for such freight and charges and delivered the lathe to him, then they lost their lien and could not afterwards and by a new contract with Kendall take the lathe and hold it as security for such freight and charges, without the consent of the plaintiffs, if they believed from the evidence that they owned the lathe.

5. That the freight and charges upon other goods belonging to other persons, were never any lien upon the lathe if it belonged to the plaintiffs.

6. That if the plaintiffs owned the lathe and sent it to Kendall as a commission merchant in the ordinary course of business to sell, then Kendall had no authority to pledge the lathe to the defendants either by a warehouse receipt or in any other way for any debt he on his own account may have owed the defendants.

Record p. 35. 7. That if the lathe belonged to the plaintiffs and they by their agent demanded the lathe of the defendants, and offered to pay all proper charges for the freight, storage, and other charges upon the lathe, but the defendants refused to deliver it unless charges upon other goods were also paid, then the plaintiffs are entitled to recover.

8. That if the jury find for the plaintiffs their verdict, they may find the value of the lathe at the time of the demand, with interest since that time at the rate of six per centum per annum as damages, less by way of recoupment whatever amount for freight and charges or either, the jury shall believe from the evidence the defendants had advanced on said property—if they shall further believe from the evidence that the defendants had never voluntarily parted with the possession of said property.

9. If the jury believe from the evidence that the defendants refused to deliver up the goods unless an amount larger than what they were entitled to should be paid them, and so told the plaintiff or his agent, then, no tender was necessary if the plaintiffs were ready and offered to pay the amount actually due, as the law does not require a party to do a useless thing.

To the giving of each of which said instructions the defendants by their counsel then and there duly excepted at the time they were respectively given.

The defendants by their counsel thereupon requested the Court to instruct the jury follows :

DEFENDANTS' INSTRUCTIONS.

Record p. 86.

1. A warehouseman on receiving goods in the regular course of his business has a lien upon the goods for any advances which he may have made to the carrier, which may have accrued for the carriage of the goods, and also for his reasonable charges for storage of the goods if he shall have kept them in store, and has a right to retain the possession of the property until such advances and charges are repaid to him. And if the jury shall believe from the evidence in this case, that the defendants or one of them, in the summer of 1857 received the property in question as warehouseman, and paid to the carrier the sum of sixty-one dollars and fourteen cents which had accrued for the carriage of the goods, and afterwards kept the goods in store, they had a right to retain the possession of the property until the sum advanced by them and charges for storage was paid to them. Which was given to the jury.

The defendants by their counsel asked the Court to instruct the jury as follows :

Record p. 87.

2. If the jury shall believe from the evidence that the defendants or any one of them received the property as stated in the above instruction, and that they had a lien upon said property as stated in said instruction, and that the same was consigned to James Kendall, and that the defendants or one of them made an agreement with James Kendall that the said James Kendall should receive the said goods, temporarily to hold the same as bailee for said Hale & Co., and that for that purpose and in pursuance of said agreement, said Kendall or his authorized agent executed the warehouse receipt given in evidence in this cause, and that said goods were delivered to and received by said Kendall under and in pursuance of said agreement, this is not such a delivery of the property as will deprive Hale & Co. of their lien upon the property.

But the Court refused to give such instruction as asked, but modified the same by adding thereto the following words :

"This is so if the said agreement was made at the time the goods were first committed to the possession of said Kendall."

And the Court read to the jury said instruction thus modified, to which modification and alteration of said instruction the defendants by their counsel then and there excepted.

The defendants by their counsel then asked the Court to instruct the jury as follows :

3. If the jury believe from the evidence that the defendants or one of them received the goods in question as stated in the first instruction, and that they had a lien upon said goods for advances and storage as stated in said instruction, and that they had possession of said goods and continued in such possession to the summer and fall and year 1859, then they had a right to retain the possession of the property until the amount of the charges and advances were paid or tendered.

Which instruction was given to the jury as asked.

And thereupon the defendants by their counsel asked the Court to instruct the jury as follows :

Record p. 83.

4. To constitute a legal tender the money must be actually produced to the party who is entitled to recover it, and if the jury shall believe from the evidence under the above instructions that the defendants or one of them had a lien upon the property in question, then before they can be charged with having converted it, the jury should be satisfied from the evidence that the amount of this lien was *tendered the defendants or one of them*, and that upon such tender they or one of them refused to deliver the property. A mere tender to the bookkeeper of one of the defendants is not sufficient.

But the Court refused to give such instruction to the jury as asked, but modified the same by adding thereto the following words:

"Of itself. But if the jury shall further believe from the evidence that the plaintiffs or their agent offered to pay the actual amount due for such charges and expenses, and that the defendants claimed a larger sum and refused to deliver the lathe unless such sum was paid, then an actual tender was not necessary."

And read said instruction to the jury as thus modified; to which modification and alteration of said instruction by the Court, the defendants, by their counsel, the jury duly excepted. And thereupon said cause was given to the jury upon the evidence and instructions aforesaid.

ASSIGNMENT OF ERRORS.

1st. The Court erred in sustaining the objection and refusing to allow the witness Wm. Howe, to answer the question as to the custom among warehousemen in Chicago to charge interest upon advances, &c.

2d. The Court erred in refusing to allow the defendants to prove such custom by the witness Wm. McClary.

3d. The Court erred in giving the plaintiffs' first instruction.

4th. The Court erred in giving the plaintiffs' second instruction.

5th. The Court erred in giving the plaintiffs' third instruction.

6th. The Court erred in giving the plaintiffs' fourth instruction.

7th. The Court erred in giving the plaintiffs' fifth instruction.

8th. The Court erred in giving the plaintiffs' sixth instruction.

9th. The Court erred in giving the plaintiffs' seventh instruction.

10th. The Court erred in giving the plaintiffs' eighth instruction.

11th. The Court erred in giving the plaintiffs' ninth instruction.

12th. The Court erred in refusing to give the second instruction for the defendants, as asked, and in modifying and giving the same as modified by the Court.

13th. The Court erred in refusing to give the fourth instructions for the defendants, as asked, and in modifying and altering the same, and giving the same as modified and altered by the Court.

14th. The verdict of the jury was against the law and the evidence.

15th. The Court erred in overruling the defendants' motion for a new trial and giving judgment on the verdict.

HOYNE, MILLER & LEWIS,

For Appellants.

253

Hale

vs

Barrett

Abstract

Filed Apr. 29. 1861

L. Leland
Clerk

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable, the Judges of the Superior Court of Chicago, within and for the County of Cook and State of Illinois, at a regular Term of said Superior Court of Chicago, begun and holden at the Court House, in the City of Chicago, in said County and State, on the first Monday, being the fourth day of March in the year of our Lord One Thousand Eight Hundred and Sixty One and of the Independence of the United States of America the Eighty fifth.

Present, The Honorable John M. Nelson Chief Justice of the }
Superior Court of Chicago. }

Sam H. Higgins }
Grant. Gordich. } Judges.

Charles Hearn Prosecuting Attorney.

Anthony C. Hering Sheriff of Cook County.

Attest, Walter Kinsball Clerk.

Be it remembered that heretofore to wit on the thirtieth day of December in year of our Lord one thousand eight hundred and fifty nine there issued out of the office of the Clerk of the Superior Court of Chicago the people's writ of summonses which summonses with the sheriffs return thereon endorsed is in words and figures following to wit

State of Illinois }
County of Cook SS

The people of the State of Illinois to the Sheriff of said County Greeting. We command

That you summon Franklin M. Hale
 Thomas Hale and Martin C. Hale
 If they shall be found in your County
 personally to be and appear before the Superior
 Court of Chicago of said Cook County on
 the first day of the next Term thereof to
 be holden at the Court House in the City
 of Chicago in said Cook County on the
 first Monday of January next to answer
 unto Joseph Barrett and Leabel Cutting
 in a plea of trespass on the case to the damage
 of said plaintiffs as they say in the sum of
 Five Hundred Dollars



And have you then and there this
 writ with an endorsement thereon
 in what manner you have executed
 the same

Witness Walter Kimball Clerk of
 our said Court and the seal thereof
 at the City of Chicago in said
 County this thirteenth day of
 December AD 1859

Served by reading to the within named
 defendants this thirteenth day of December
 AD 1859.

John Gray Sheriff
 By Ab Rufing Deputy -

And afterwards to wit on ^{the} twenty third day of December in the year aforesaid Joseph Barrett and Caleb Cutting plaintiffs filed in the office of the clerk of said court a certain declaration in words and figures following to wit

State of Illinois
County of Cook

In the Superior Court of Chicago of the January Term AD 1860

Joseph Barrett and Caleb Cutting plaintiffs in this suit by Van Buren and Gony their attorneys complain of Franklin M Hale Thomas Hale and Martin C Hale defendants of a plea of trespass in the case

For that whereas the said plaintiffs heretofore to wit on the first day of January AD 1859 at said County were lawfully possessed as of their own property of certain goods and chattels to wit one ten foot Engine Lath with counter shaft and hangers of great value to wit of the value of Five hundred Dollars and being so possessed the said plaintiff afterwards to wit on the day and year aforesaid at said County casually lost the same out of their possession and the same

Afterwards to wit on the day and year aforesaid
 at said County came to the possession of said
 defendants by finding - Yet the said defend-
 ants well knowing the said goods and
 chattels to be the property of ^{the} said plaintiff
 and of right to belong and appertain ~~to them~~
 but contriving and fraudulently intending craftily
 and subtly to deceive and defraud the said
 plaintiff in their behalf have not ^{as yet}
 delivered the said goods and chattels ^{or any part of them} to
 the said plaintiff although often
 requested ^{and have further refused to do} so to do, and afterwards to wit
 on the day and year aforesaid at said
 County converted and disposed of the said
 goods and chattels to their own use to the
 damage of the said plaintiffs of Five
 Hundred Dollars and they therefore sue vs
 Van Buren & Gray
 Plff & Attorneys

And afterwards to wit on the tenth day of
 January in the year Eighteen Hundred and
 sixty Franklin M. Hale Martui C. Hale and
 Thomas Hale by Hyman Miller and Lewis their
 attorneys filed in the office of said Court
 their pleas in words and figures following

5

to wit

Superior Court of Chicago
January Term AD 1860

Franklin M. Hale
impeached with
Martin C. Hale
and Thomas Hale
ad
Joseph Barrett
and Caleb Cutting

And ~~the said Franklin M. Hale and the said~~
^{The said Joseph M. Hale} defendant, by Hynes Miller and Lewis his
attorneys come and defends the wrong and injury
where ~~do~~ and says that he together with the
said Martin C. Hale and ~~the said~~ Thomas Hale
is not guilty of the said supposed grievances
above said to his charge or any or either of them
in manner and form as the said plaintiffs have above thereof
or any part thereof complained against him
And of this he the said defendant Franklin M.
Hale puts himself upon the country so

Hynes Miller and Lewis
Attorneys for defendant Franklin M. Hale

And the said plaintiffs do the like so

Nas Burr and Gray
Pliffs Attys

Thomas Hale } Superior Court of Chicago
 impleaded with } January Term AD 1860
 Franklin M. Hale
 and Mortimer L. Hale
 vs
 Joseph Barrett
 and Charles Cutting

And the said ~~Thomas Hale~~ and the said
^{the said Thomas Hale} defendant, by Horne Miller and Lewis his
 attorney comes and defends the wrong and claims
 where so and says that he together with the
 said Franklin M. Hale and Mortimer L. Hale
 is not guilty of the said supposed grievances
 above laid to his charge or any or either of them
 or any part thereof in manner and form as
 the said plaintiffs have above thereof complained
 against him And of this the said defendant
 Thomas Hale puts himself upon the country so
 Horne Miller & Lewis
 attorneys for defendant Thomas Hale

And the said plaintiffs do the like so
 Van Buren and Gray
 Pltffs Atty's -

7
Martin C Hale
impleaded with
Thomas Hale &
Franklin M Hale
Ads

Joseph Barrett &
Leah Cutting

Superior Court of Chicago
January Term AD 1860

And the said defendant the said Martin C Hale by
Hoyne Miller & Lewis his attorneys comes and defends the wrong
and injury when so and says that he together with
the said Thomas Hale & Franklin M Hale is not guilty of
the said supposed grievances above laid to his charge or
any or either of them or any part thereof in manner and
form as the said plaintiffs have above thereof complained
against him and of this the said defendant Martin
C Hale puts himself upon the country &c

Hoyne Miller & Lewis
Attorneys for defendant Martin C Hale

And the said plaintiffs do the like &c

Van Buren Hays
Plffs Atlys

and afterwards to sit on the ~~trial~~ day of February
in the year Eighteen Hundred and sixty one said
day being one of the days of the February Term
of said court the following among other proceedings
was had in said court and entered of Record to wit

Joseph Barrett ^{and}
Caleb Cutting

vs Treppapond case

Mortui Le Hale

Franklin M. Hale and Thomas Hale

And now comes the pleaid plaintiffs by ~~the~~ Bureau
and Parry their attorneys and the said defendants by
Hoyne Miller and Lewis their attorneys also comes the
issue being joined herein it is ordered ^{that} a Jury come and
hereupon comes the Jury of good and lawful ^{men} to wit
J. McKnight, Geo. Sawson, Miller Jackson, Mortui Quincy
J. O. Miller, Mr. Metcher, Oliver Mitchell, C. D. Miller,
Geo. Fiddings, A. E. Hicks, N. W. McKnight ^{and} C. Ludden,
who being duly elected tried and sworn to try the
issue joined as aforesaid after hearing part of the
testimony and the hour of adjournment having
arrived it is ordered upon the agreement of the parties
that the Jury separate and meet the court tomorrow
morning

9

and afterwards to wit on the thirteenth day of February
in the year aforesaid said day still being of the
February Term of said Court the following among
other proceedings was had in said court and entered
of Record to wit

Joseph Barrett
Caleb Cutting

vs Prespap in case

Franklin M. Hale

Thomas Hale and

Montui C. Hale

And now again comes the parties to this cause by their
respective attorneys as aforesaid and the Jury empanelled
herein on yesterday for the trial of this cause also
comes and having heard all the testimony arguments
of the counsel and instructions of the court retire to
consider of their verdict and the hour of adjournment
having arrived it is ordered upon agreement of the
parties that when the Jury shall have agreed
upon a verdict they shall reduce the same to writing
sign and seal the same and afterwards separate
and meet the court tomorrow morning on opening
thereof

10.

And afterwards to wit on the fourteenth day of February in the year aforesaid said day being still of the February Term of said court the following among other proceedings was had in said court and entered of Record to wit

Joseph Bonnett
vs
Leah Cutting
Trespass on case

Franklin M Hale

Thomas Hale & Martin C Hale

And ^{now} again comes again comes the parties to this cause by their respective attorneys as on yesterday and the Jury empanelled herein for the trial of this cause as on yesterday also come and submit their verdict and say We the Jury find the said defendants guilty and we assess plaintiffs damages against all ^{of the said} defendants to the sum of four hundred twenty five dollars and therefore the said defendants submit their motions herein for a new trial in said cause,

And afterwards to wit on the twenty third day of February in the year aforesaid said day being still of the February Term of said court the following among other proceedings were had in said court and entered of Record

11.

To wit

Joseph Borrett^{and}
Caleb Cutting

vs Presaps on case

Francis M. Hale

Thomas Hale & Montai Hale

And now again comes the said plaintiffs by Van Buren
& Gray their attorneys and the said defendants by Hays
& Miller & Lewis their attorneys also come and the
motion heretofore submitted by the said defendants
for a new trial in said cause being heard and argued
by counsel is taken under advisement by the Court

And afterward to wit on the fifteenth day of March
in the year aforesaid said day being one of the days
of the March Term ^{of said Court} the following among others
proceedings were ~~had in said court~~ and entered of
Record to wit

Joseph Borrett^{and}
Caleb Cutting

vs Presaps on the case

Francis M. Hale

Thomas Hale & Montai Hale

And now again comes the said plaintiffs by Van Buren
& Gray their attorneys and the said defendants by

Hynes Miller & Lewis their attorneys also come
 and the cause coming on now to be heard on the motion
 heretofore submitted herein by defendants for a new
 trial in said cause and counsel being heard and the
 Court being fully advised in the premises are of the
 opinion that the motion for a new trial be and hereby
 is overruled to which ruling and decision of the Court
 the said defendants except ~~enter~~ their exceptions therefore
 plaintiffs ought to have Judgment entered on the verdict
 of guilty heretofore rendered herein against the said
 defendants and for their damages as ^{afforded} thereon
 therefore it is considered by the ^{County} that the said plaintiffs
 do have and recover of and from the said defendants
 their damages of Four Hundred and twenty five Dollars
 in form aforesaid found and ascertained by the Jury together
 with their costs and ~~charges~~ in this behalf expended and
 thereof have execution. And therefore the said defendants
 having entered their exceptions pray an appeal be ~~carried~~
 to the supreme Court of this State which is allowed
 to them upon filing their appeal bond in the sum of
 Six Hundred Dollars with security to be approved by a
 Judge of this Court. And to be filed within twenty days
 from this date and bill of exceptions to be filed by the
 twenty ninth day of March instant.

13.

And afterwards to wit on the twenty eighth day
day of March in the year aforesaid there came
said defendants Franklin M. Hale Thomas Hale
and Martin Hale and filed in the office of the Clerk
of said Court a certain bill of exceptions in words
and figures following to wit

Superior Court of Chicago

Joseph Barrett
vs
Isabel Cutting

Thomas Hale, Franklin M. Hale
and Martin L. Hale

Be it remembered that on this 12th day of February AD 1864
the above cause came on to be tried before the Honorable
Grant Goodrich one of the Justices of said Court And the
parties being represented by their respective Counsel a
Jury was duly empanelled and sworn to try said Cause

And thereupon the plaintiffs introduced as a
witness James Kendall who being duly sworn testified
as follows

I resided in Chicago in the year 1857 I was
selling machinery on my own account and as
Commission Merchant. My place of business was

14.

at the north end of Wells Street just over the bridge, it was in the building occupied by the Hales I rented a store in that building.

I know the defendants Franklin M. Hale and Martin Hale, they were in the summer of 1857 ^{business under the name of Hale & Co.} ^{I kept some of my own machinery} ~~doing business in the same office~~ ^{that they were partners they were doing business in the same office} Franklin generally did the business. Martin was there

I supposed they were doing business under that name. I know the Lathe and Counter ~~and~~ shaft in controversy I think it was about 12 feet long. The counter shaft and weights came with ^{this} Lathe. The Lathe was consigned to me by the plaintiffs Barrett & Co. cutting for sale on commission. When it arrived it came with some other machinery in boxes. Ball & Ballard consigned the machinery to me when the bill for the charges was presented.

I told Prouty my clerk to pay the charges and money coming, told him to apply it for charges and supposed he had done so until some time afterwards I had occasion to go into the country about that time and I was surprised on my return to find he had not done so. In my absence Prouty got the Lathe and Countershaft into my store and it remained there until the next February in 1858. The Lathe and machinery came early in the summer of the previous year ⁱⁿ 1857. In February 1858 I removed from that store to 86 Lake Street. All the machinery in that store was taken to 86 Lake St in February 1858.

15.

Except this Lathe, that was left in the store on ^{Wells St} ~~Wells St~~
I rented the store on Wells St of one of the Hals
My lease was with the young man Francis M. Hale
The store was in the same building occupied by
the Hals. I saw the Lathe there several times.

Not long after I left Mr. Manning went into the
store. I have not seen the Lathe since. I was there
afterwards, it had been removed. I don't know who
removed it. Being cross examined he testified
as follows

Ball and Ballard and Barrett and Cutting
lived in Worcester, Massachusetts. The Lathe and
boxes of machinery came in bill of lading under
one charge. My impression is that the charge upon
the Lathe was \$42 (dollars) though I am not positive.
I executed the due bill now shown to me (there was
shown to the witness the exhibit marked exhibit "A"
attached to the deposition of Judson M. Bennie
and afterwards read in evidence) that was for the amount
of freight and charges paid ^{by Hale} on the Lathe ^{by Hale}
and boxes of machinery and the Dr. charge in Chicago.
I have no recollection of signing it but it is in my
hand writing. The warehouse receipt now shown to me
is signed by Mr. Prouty who was my Clerk at that
time (there was shown to the witness the exhibit marked
exhibit "B" attached to the deposition of Judson M. Bennie
and afterwards read in evidence) Prouty had the money with
which to pay the charges on the Lathe and machinery

15.

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time (there was shown to the witness the exhibit marked
exhibit "B" attached to the deposition of Judson M. Bennie
and afterwards read in evidence) Prouty had the money with
which to pay the charges on the Lathe and machinery

But he paid it on one of the notes I was owing at that time. The Lathe and machinery were consigned to me at Chicago; they came by the same boat and at the same time -

I did not ~~have~~ have any sign up as commission Merchant the warehouse receipt was given without my knowledge I did not know it till months afterwards

And thereupon the plaintiffs introduced as a witness William H. Coan who testified as follows

I am acquainted with the plaintiffs; they are partners under the firm name of Barrett & Cutting I know the signatures to the paper now shown to me they are in the hand writing of the plaintiffs Here the plaintiffs ^{by their counsel} introduced and read to the jury the paper referred to by the witness as follows

Know all men by these presents that we Joseph Barrett and Caleb Cutting both of Worcester in the county of Worcester and State of Massachusetts copartners under the firm of J Barrett & Co have constituted ordained and made and in our stead and place set and by these presents do constitute ordain and make and in our own stead and place set William H Coan of Chicago in the state of Illinois to be our true sufficient and lawful attorney for us and in our name and stead to take possession of all the machinery tools and other ~~personal~~ property of any description now held or in the possession of James Kendall or other persons in Chicago aforesaid and the same to dispose of for cash or if this cannot be done to our advantage then for

But he paid it on one of the notes I was owing at that time. The Lathe and machinery were consigned to me at Chicago; they came by the same boat and at the same time -

I did not ~~have~~ have any sign up as commission Merchant the warehouse receipt was given without my knowledge I did not know it till months afterwards

And thereupon the plaintiffs introduced as a witness William H. Coan who testified as follows

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17.

Real Estate the conveyance thereof to be taken in our name by good and sufficient deeds of Warranty free from all incumbrances said deeds or money to be transmitted to us at once upon the receipt thereof. We said Board to receive the usual commission for transacting said business giving and ~~hereto~~ granting unto our said attorney full power and authority in and about the premises and to use all due means course and process in the law for the full effectual and complete execution of the business ~~afordescribed~~ and in our names to make and execute due acquittance and discharge And generally to say do act transact determine accomplish and finish all matters and things whatsoever relating to the premises as fully amply and effectually to all intents and purposes as we the said constituents if present ought or might personally do

In witness whereof, We have hereunto set our hand ^{and} seals this second day of December in the year of our Lord One Thousand Eight Hundred and Fifty Eight

Joseph Barrett
Caleb Cutting

Seal
Seal

I know the Hales by sight the two Hales that are present Martin Hale and Francis W Hale. I know Thomas Hale I have had repeated

conversation with the Hales about the lathe. It was a long time before I could find the lathe. I finally found it in an old building on the North side; it was in the warehouse of Sanford & Hall. I first saw Hausch and then Martin and all together. Hausch at first seemed to think I had no business with it. I showed them my power of attorney. Their business was all done together. I applied to the Hales to get the charges on the Lathe and told them I would pay all proper charges upon it. They finally gave me a bill for about \$140. for advanced charges in gross. I told them there was some mistake and wanted them to give me the items. They afterwards gave me another bill for about \$110. including the taxes. I objected to paying charges on another man's property my talk was with all of them. I then proposed to give them seventy five Dollars and close it up they said they would write to Buffalo. They finally said if I would pay the whole bill they would deduct nine dollars. I made them a tender of from \$100. to \$105. in bank bills. They refused to let me have the lathe unless I paid them the whole amount of their bill. I have been in the machinery business for five years and know the value of this Lathe. I could have sold the Lathe repeatedly for \$475. I had already sold it for \$475. When the Lathe was shipped the usual price for

19.

Freight from Worcester to Chicago was from sixty cents to one dollar. there would have been no difficulty in ascertaining the freight on the Lath by weighing it. And being cross examined said witness testified as follows. I have been acting as salesman for myself and others for nearly ten years, and acting as salesman for Fay & Co. and for myself - My Brother James J. Doane went with me to the Hales where I made the tender of which I have spoken. I saw Hales Bookkeeper or the person I took to be the Bookkeeper. I cant say that I saw any one else. I don't think any of the Hales were in. I did not see either of them. I tendered the money to the Bookkeeper. It was in bank bills. I laid it on the counter. He said he had no instructions to take anything less than the amount of the bill and that I had better see Mr Hale. I did not see Mr Hale. I know it was over One Hundred Dollars that I tendered but how much over I cant pay. I know ^{it} because we went right from Mr Van Burens office to the Hales to make the tender. I had \$100. dollars when I was in Mr Van Burens office and he said I had better be sure and tender a little more and I borrowed some more on the way from my Brother who went with me. I cant say how much more \$4. or \$5. perhaps, This was a short time before this suit was commenced a week or two perhaps before it was commenced.

20.

I first saw the Hales about this Lath in the summer or fall of 1858. I cant say which of them I first saw it is so long ago. I saw them a good many times I cant state the substance of any particular conversation I had with either of them before I went to Mr Davis Bureau office with Martin Hale. It is so long ago. ~~that~~ I cant state what I said or what they said in any particular conversation. I had learned where the Lath was before I went to the Hales. I had learned this from Kendall I wanted to know of the Hales what their charges were on the Lath. I have the bills they rendered to me from time to time of the amount of their charges. the following was the first bill they rendered to ^{me} in the ^{Fall of} ~~year~~ 1858

Here was presented by the witness the bill referred to by him in the words and figures following

Hales Docks

Chicago Nov 19 1858

Mr James Kendall or whom
it may concern

To Thomas Hale 100
North Water Street between Wells and La Salle Sts

Storage on Lath	17.10
Bill rendered June 29 th	106.01
Advances for	2.60
Interest	8.61
Cost of	3.50
	<u>\$ 137.82</u>

21.

When they handed me this bill I told them the charges ought not to be so high. that I wanted a bill of the items that there was one charge of \$106.01 all in one lump and I wanted the items. I think it was Martin Hale that handed me the bill and afterwards they made out and handed to me this bill. Here the witness produced the bill referred to by him in the words and figures following

Hales Docks

Mr James Kendall, Chicago Nov 19, 1858

To Thomas Hale Dr for

North Water Street between Wells & La Salle sts J. M. Hale.

For Freight and Charges on Tools for for Palena June 29th 1858

1/ Boxes Machinery 3.216

1 Engine Lathe

Counter Shaft attached

1 Box 1 Weight 3.800

Admunes

24.90

ht to Chicago

77.61

Dockage

3.50 106.01

Duplicate Bill

The above bills were read to the Jury and the witness further testified as follows. I thought the charges were so high they insisted that they had a right to hold the Lathe and Counter Shaft & until the charges on the seven boxes of machinery were paid. I insisted that that they had no such right and told them I

was willing to pay the charges on the Lathe but that they had put it all in one bill. I recollect Martin Hale saying something about ^{their} having to write to Buffalo to see how much the charges were on the Lathe. that they could not separate it from the Charges on the machinery. Martin Hale said if my lawyer would satisfy them that they had no right to keep the Lathe for the charges on the taxes of machinery then he would not insist upon it and I went with him to Mr Van Buren's office, we saw Mr Van Buren there and he said to Mr Hale that they had no right to keep our man's goods for the charges on another man's goods Mr Hale after talking some time said he wanted to see his lawyer and went out. Mr Hale then rendered to me this bill here the witness produced the bill referred to by him in ^{the} words and figures following

Hales Docks

Chicago Sept 3rd 1859

Mr James Kendall

Chicago to New York Dr

North Water Street between Wells & La Salle ^{Assignee of M Hale}

June 29	For Freight Charges &c	
" "	Lathe &c	3.800
" "	Freight adved N.Y. & R.R.	61.14
" "	2 1/2 % For adveg	1.52
" "	Interest 10% to date (2 yrs 1/2 mo)	13.42
" "	Pd 3 Centages	6.00
" "	Storage	27.00
		<u>\$109.08</u>

23.

which last mentioned bill was read to the Jury and the witness further testified as follows,

This bill was rendered after Martin C. Hale and I went to Mr Van Burens office. I told Mr. Hale that I thought the bill ^{was} large that when the Lathe and counter shaft weighed only 3800 pounds and the machinery weighed 3216 pounds I could not see how the charges on the Lathe were \$109.08 when the charges on the whole were only \$137.82. he insisted that the bill was right and said that they had advanced the \$61.14 for freight as stated in last bill and that the other charges were correct.

I think he said he had written to Buffalo and found out though I dont recollect that he showed me the letter. I dont know but ^{that} the building of Sanford & Hall was good enough to keep the Lathe in. thereupon plaintiffs called as a witness J Rogers who being duly sworn testified as follows

I am selling machinery, have been engaged continually for two years. I have seen the Lathe I have not examined it particularly, think a ten foot Lathe is worth from \$450. to 500. Dollars

On his reexamination in chief he said when each of these bills were presented I offered to pay them all charges on the Lathe if they would let me have it and each time they refused unless I would pay the ^{for} charges on the other goods

The plaintiffs here rest and thereupon the

Note. This

means Dismiss
to examine

EWB
to. must to show

defendants read in evidence the deposition of
 Suddon M. Benis taken in said cause whose
 testimony as read to the Jury was as follows

I am 27 years old in May next and live
 in St Louis occupation manufacturing bags in 1857
 I was Clerk for Hale & Co They (Hale & Co) received
 seven boxes of machinery One Engine Lathe Counter
 shaft attached one box and one weight June 29, 1857
 Hale & Co were at that time receiving and forwarding
 merchants. The said property was received in the
 ordinary course of ^{their} business. the property was all
 consigned to James Kendall. the charges which
 Hale & Co paid on it were \$102.51 the amount of the
 Dock charges was \$3.50 Total \$106.01 Those were
 the charges upon the whole property in that
 consignment. Mr Kendall gave us a warehouse
 receipt for the property subject to the order of
 Hale & Co for the purpose of holding the property
 to secure the above charges \$106.01 The paper
 now shown me and marked Exhibit "1" is the
 warehouse receipt above referred to. The receipt
 is signed by Mr Proutty who was at that time
 Clerk for Mr Kendall I saw him sign it

The arrangement that this property was to be held
 as security for the charges was made by
 Mr Kendall There was a due bill given by Kendall
 for the same amount of charges at the same time

The paper now shown to me and marked Exhibit

25.

is the due bill referred to above. the property remained in Mr Kendall's store for how long a time I don't know. The Lath and weight and Box was afterwards sent to Sanford & Hall and ~~was~~ for storage by Thomas Hale. I saw it there afterwards. Franklin M. Hale composed the firm of Hale & Co. no one else to my knowledge. I remained in this employment until the first of January 1858 and was then with Thomas Hale until the 1st January 1859. I suppose the property came into the hands of Thomas Hale as the assignee of Hale & Co. I don't know what became of the seven boxes of machinery there was no division of the charges to Hale & Co on the bills of lading on the several pieces of property. It was one gross charge on the whole property. there was no minutes by which we could apportion the charges on the different lots. we might have done so by weighing each piece if we had known the rates. The property was shipped from Buffalo on the N.Y. Central line of Propellers of which Hale & Co were agents. Mr Kendall had several other lots of freight sent that year. his freight was usually shipped by said line of propellers and came into Hale & Co's hands as the agents. The goods were marked James Kendall Chicago he came frequently with duplicate bills of lading to inquire after his goods. some time in the fall of 1858

Mr Doan came in and inquired if we had a Latho
Mr Doan claimed to have some letters regarding
the disposition of the property or something to that
effect (any conversation with Doan objected to)

The goods were not claimed by any ^{body} ~~one~~ but
Kendall ^{before} ~~until~~ the fall of 1858 to my knowledge
Mr Kendall never paid these charges to my
knowledge. On his cross examination his testimony
as read to the Jury was as follows

I know the Latho ~~which~~ I have been testifying
about is the one which is in controversy in this suit
I know ^{it} because it was first received in store and
sent to Sanford & Hull; I saw it afterwards at
Sanford & Hulls and when Mr Doan came to inquire
after it I told him it was there. I think I went
with Mr Doan to Sanford & Hull to see it. When
the Propeller ^{Galeus} discharged this freight she was
lying at Hale & Co's Dock on the North side of
the river next east of Wells St Bridge the
Latho was first discharged onto Hale & Co's Dock
It was just ~~received~~ from the Dock to James Kendalls
store next adjoining Wells St Bridge his store was
a separate room from any warehouse of Hale & Co's
He rented of Hale & Co's The latho was put into his
store before the said warehouse receipt (Exhibit 1)
was given The vessel had a bill of lading There
was no other bill The charges on the goods were
^{This book is a copy of the bill of lading}
made up from that bill of lading, so far as relates

27

to the marks of the goods. The articles weight and charges. The bill of lading was delivered to the vessel by Hale & Co after they had receipted it. The amount of the due bill (Exhibit 2) was taken from Hale & Co's Books. I did not keep the book. Mr Holliday did the warehouse receipt in my hand writing with the exception of the signature the due Bill is not. I have such a recollection of amounts dates and weights that I could have sworn to about the amount of the charges without referring to the books. I do not know what became of the other things mentioned in Exhibit 1) Besides this Lathe

On his reexamination his testimony as read to the Jury was as follows

Direct examination resumed

My recollection is that the warehouse receipt was given the same day. Kendall took the Lathe the arrangement to give the warehouse receipt was made between the time of delivery of the goods on the dock and the delivery to Kendall.

(Signed) Hudson M. Bemis

the defendants by their counsel thereupon read to the Jury the receipt and the due bill referred to by said witness in his deposition and marked respectively Exhibits (1) & (2) which are in the words and figures following

Chicago July 1-1857

Received in store from Prop Galena subject
to the order of Halway & Co

of Bores Machinery

1 Engine Sather counter shaft attached

1 Box 1 freight

James Kendall

by B. J. Prouty

Due Halway & Co for freight received for Propeller Galena

One Hundred & six ²¹/₁₀₀ Dollars June 29-1857

\$106.01

James Kendall

The defendants thereupon introduced as a witness
Wm. H. H. who being duly sworn testified as follows

I am in the forwarding and commission business in
Chicago Have been so engaged for the last seven
years. in 1857 the customary charge ^{in Chicago} by warehousemen
as commissions for advancing and paying charges for
freights upon goods which come subject to such
charges was 2 1/2 per cent Thereupon the counsel for
the defendant asked the witness the following question:

State whether it was the customary for warehousemen
in Chicago to make any further charges as interest
upon the advances so made by them when such advances
were not repaid to them within a short time after they
were made Counsel stated his object was to ^{prove} a custom

29.

To charge 10 per cent interest to which question the plaintiffs by their counsel then and there objected and the Court sustained said objection and refused to allow ^{the} witness to answer said question to which ruling ~~and~~ decision of the court the defendants by their counsel then and there objected)

Said witness further testified as follows
The established rate for storage then was one dollar per ton for the first month and 50 cents per ton after that time until taken away.

I think the charge would be worth one dollar for each removal. I am acquainted with Sanford and Hulls warehouse which has been referred to

I consider it a good building better if anything than that of Mr Hales and a suitable place for storing

Whereupon defendants introduced as a witness Mr Wm L. Carey who testified as follows. I am engaged in the forwarding and commission business in

Chicago have been so engaged for 9 years. in 1857 a proper charge by warehousemen by way of commission for advancing freight and charges was $2\frac{1}{2}$ per cent

There was then and now is a custom among warehousemen in Chicago regarding the rate of interest to be charged upon advances thus made the counsel for the defendants thereupon asked the witness the following question What was that custom and ^{that} stated his object was to move a custom to charge 10 per cent. To which question the plaintiffs by their counsel then and

and there objected and the court sustained said objection and refused to permit said question to be answered to which ruling and decision ^{the} defendants then and there ~~objected~~ ^{excepted} said witness further testified as follows The customary charge for storage in 1857 was \$1. per ton for the first month and then 50 cents per ton per month afterwards until the goods were taken away This I consider a fair and reasonable charge Thereupon the defendants by their counsel introduced as a witness

B. P. Frouty who being sworn testified as follows

I was clerk for James Kendall in the summer of 1857 and had been for about a year I had charge of his business during his absence The seven boxes of machinery the Lathe and counter shaft attached and one box and weight all came together and subject to one entire charge for Freight as appears by the bill of charges ^{as} presented to us the freight was not apportioned Here was shown to the witness the warehouse receipt above referred to and he further testified I cannot recollect giving this receipt ~~though the signature to it was~~ ^{my} hand writing and I must have given it I do not recollect about giving it it is so long ago I think Mr Kennedy had orders for the seven boxes of machinery at the time or soon after it ^{was} received and it was shipped away

The machinery was shipped to Kendall by Ballou & Co The charges on the lathe and machinery

31.

For Freight was about \$106. that was the charge on both. The Lathe was an old fashioned Lathe and out of order I think it was worth about \$200.

The Lathe had been manufactured for other parties and they would not take it and then it was sent out here. It was a good deal out of order. We had it in the store to see if we could not get an offer for it. but we did not get any offer for it.

On his cross examination he testified as follows
I was Clerk for Kennedy for about a year
I did not know anything about Lathes before I came there. I know it was out of order for I tried to fix it up and get it into shape several times and could not. It was first entered on our Books for sale at \$400. it was so entered because ^{the} plaintiffs told us to sell it for that price. afterwards when we could not sell it they told us to sell it ^{for} any price. The gross amount of the charges about \$100 included the goods shipped by Ball ^{and} Ballard and ^{by} Barrett and Cutting. The Lathe was shipped by Barrett and Cutting and the rest of the goods by Ball ^{and} Ballard.

The defendants thereupon introduced as a witness John Simmons who being duly sworn testified as follows I have been selling machinery for 5 years I am acquainted with the kind of machinery in question I have seen the Lathe in question I have seen it within a week It is an old fashioned Lathe and out of date I do not

consider it a saleable Lathe I consider it worth about \$250. Thereupon the defendants introduced as a witness John Mahan who being sworn testified as follows

I am Book Keeper of Thomas Hale I entered his employment as Book Keeper in the summer of 1858 Thomas Hale was the assignee of Hale & there has been no other Book Keeper in the office from that time down to the present time I have had the sole charge of the Books Martin C Hale has attended to the business in the office as has also Franklin M Hale I know Wm H. Doan who has testified in this case I have seen him in the office conversing with Mr Hale about the Lathe in question he never tendered any money to me or ~~ever~~ offered to tender any money to me on account of this Lathe nor do I know of his ever tendering or of his offering to tender any in the office to any one

Mr Hale had no other office than the one in which I was Book Keeper Here the defendants rest and the plaintiffs ^{thereupon} recall Wm Kendall who testifies as follows. This was not a second hand Lathe there was another Lathe in the store that Prouty worked on several times trying to repair it

In his cross examination he testified as follows I will not swear that this Lathe had not been used any before it was sent out ~~to~~ Chicago it was sent from the Dock to my Warehouse Here the plaintiffs rest and the above being all the evidence

33.
1

That was given in the case the Court at the instance and request of the counsel for the Plaintiffs instructed the Jury as follows That if the Jury believe from the evidence that the Sathu in controversy was the property of the Plaintiffs and that the defendants had the possession of it and that the plaintiffs by their duly authorized agent demanded the Sathu of the defendants And that the defendants refused wrongfully (that is without right) to deliver the same this is evidence of a conversion by the defendants of the Sathu to their own use

2

That if they believe from the evidence that the defendants took the Sathu from the store formerly occupied by Kendall without any authority from the Plaintiffs or from Kendall so to do And then undertook to keep the same from the Plaintiffs as security for a debt which Kendall owed them after a demand by the Plaintiffs for the same Then they are guilty of a conversion of the Sathu if the same belonged to the Plaintiffs

3

That if Routy was simply the salesman and Book keeper of Kendall and that Kendall was not a warehouseman. this gave him no authority to give a warehouse receipt for the Sathu And such receipt

34.

So given would have no effect in this suit without special authority to do so or a ratification of the act

4

That if the defendants had a lien upon the Sather for any freight and charges that they ^{had} paid upon it but took Kendall's due bill for such freight and charges and delivered the Sather to him then they lost their lien and could not afterwards and by a new contract with Kendall take the Sather and hold it as security for such freight and charges without the consent of the plaintiffs if they believe from the evidence that they owned the Sather

5

That the freight and charges upon other goods belonging to other persons were more any lien upon the Sather if it belonged to the plaintiffs

6

That if the plaintiffs owned the Sather and sent it to Kendall as a commission merchant in the ordinary course of business to sell then Kendall had no authority to pledge the Sather to the defendants either by a warehouse receipt or in any other way for any debt he on his own account may have owed the defendants

7

That if the Sather belonged to the plaintiffs and they by their agent demanded the Sather of the defendants and offered to pay all proper charges for the freight

and

Storage and other charges upon the Laths but the defendants refused to deliver it unless charges upon other goods were also paid then the plaintiffs are entitled to recover.

8

That if the Jury find for the plaintiffs their verdict they may find the value of the Laths at the time of the demand with interest since that time at the rate of six per centum per annum as damages less by way of recoupment whatever amount for freight and charges or either. The Jury shall believe from the evidence the defendants had advanced on said property if they shall further believe from the evidence that the defendants had never voluntarily parted with the possession of said property,

9

If the Jury believe from the evidence that the defendants refused to deliver up the goods unless an amount larger than what they were entitled to should be paid them and so told the plaintiffs or his agent then no tender was necessary if the plaintiffs was ready and offered to pay the amount actually due as the law does not require a party to do a useless thing.

To the giving of each of which said instructions the defendants by their counsel then and there duly excepted at the time ^{they} were respectively given.

The defendants by their counsel thereupon requested the Court to instruct the Jury as follows

A Warehouseman on receiving goods in the regular course of his business has a lien upon the goods for any advances which he may have made to the carrier or which may have accrued for the carriage of the goods and also for his reasonable charges for storage of the goods if he shall have kept them in store and has a right to retain the possession of the property until such advances and charges are repaid to him. And if the Jury shall believe from the evidence in this case that the defendants or one of them in the summer of 1857 received the property in question as Warehouseman and paid to the Carrier the sum of sixty one dollars and fourteen cents which had accrued for the carriage of the goods and afterwards kept the goods in store they had a right to retain the possession of the property until the sum advanced by them and charges for storage was paid to them which was given to the Jury. The defendants by their counsel asked the court to instruct the Jury as follows

- 2/ If the Jury shall believe from the evidence that the defendants or any one of them received the property as stated in the above instructions and that they had a lien upon said property as stated in said instructions and that the same was consigned to James Kendall. And that the defendants or one of them made an agreement with James Kendall that the said James Kendall should receive the said goods temporarily to hold the same as bailer for said Hales & Co and that for that purpose and in pursuance of said

37

2

agreement said Kendall or his authorized agent executed the warehouse receipt given in evidence in this cause and that said goods were delivered to and received by said Kendall under and in pursuance of said agreement this is not such a delivery of the property as will deprive Hale & Co of their lien upon the property.

But the court refused to give said instruction as asked but modified the same by adding thereto the following words "This is so if the said agreement was made at the time the goods were ~~first~~ committed to the possession of said Kendall"

And the court read to ^{the} jury said instruction thus modified to which modification and alteration of said instruction the defendants by their counsel then and then ~~excepted~~

The defendants by their counsel then asked the court to instruct the jury as follows

- 3 If the jury shall believe from the evidence that the defendants or one of them received the goods in question as stated in the first instruction and that they had a lien upon said goods for advances and storage as stated in said instruction and that they had possession of said goods continued in such possession to the summer and fall and year 1859 then they had a right to retain the possession of the property until the amount of the charges and advances were paid or tendered.

Which instruction was given to the jury as asked And thereupon the defendants by their counsel asked the court to instruct the jury as follows

38. H

To constitute a legal tender the money must ^{be} actually produced to the party who is entitled to recover it. And if the Jury shall believe from the evidence under the above instructions that the defendants or one of them had a lien upon the property in question. Then before they can be charged with having converted it, the Jury should be satisfied from the evidence that the amount of this lien was tendered the defendants or one of them and that upon such tender they or one of them refused to deliver the property. a mere tender to the Bookkeeper of one of them is not sufficient.

But the Court refused to give said instruction to the Jury as asked but modified the same by adding thereto the following words,

'of itself. But if the Jury shall further believe from the evidence that the plaintiffs or their agent offered to pay the actual amount due for such Charges and advances and the defendants claimed a larger sum and refused to deliver the same unless such larger sum was paid then an actual tender was not necessary

And read said instruction to the Jury as thus modified to which modification and alteration of said instruction by the court the defendants by their counsel then and there duly excepted and thereupon said cause was given to the Jury upon the evidence and instructions aforesaid and the Jury having retired to consider of their verdict returned a verdict in favor of the plaintiffs whereby they found the defendants guilty and assessed the damages at \$425.

The defendants by their counsel thereupon entered a motion

For a new trial of said cause upon the following grounds

- 1 The Court erred in overruling defendants motion to the Court that the Court direct the Jury to find the defendant Martin Hale not guilty in order that he might be examined as a witness for the said defendants Thomas Hale and Francis M. Hale
- 2 On the ground that ^{the} Court erred in giving to the Jury in behalf of the plaintiffs the several instructions marked respectively 1, 2, 3, 4, 5, 6, 7, & 8 together with the last instruction which was read to the Jury by the Court in behalf of the plaintiffs and the defendants by their counsel insist that there is error in said last mentioned instruction and that there is likewise error in each of the said instructions marked 1, 2, 3, 4, 5, 6, 7, & 8 as the same were given by the Court to the Jury.
- 3 On the ground that the Court erred in instructing the Jury in behalf of the plaintiffs as he did,
- 4 That the Court erred in modifying the first instruction presented in behalf of the defendants and in not instructing the Jury as desired by said defendants counsel and as first requested by said defendants counsel

40. 5

That the court erred in modifying the ~~second~~ instruction presented in behalf of said defendants and in ^{not} giving said instruction as originally requested by said defendants counsel.

6

That the court erred in modifying the third instruction presented in behalf of said defendants and in not giving said instruction as originally requested by said defendants counsel.

7

That the court erred in modifying the fourth instruction presented in behalf of said defendants and in not giving said instruction as originally requested by said defendants counsel.

8

The verdict of the Jury was against the law and the evidence.

The verdict of the Jury should have been for the defendants, but the court overruled said motion to which ruling and decisions of the Court in overruling said motion for new trial the defendants by their counsel then and there duly excepted and forasmuch as the matters aforesaid do not appear of record in said cause the defendants by their counsel pray that this bill of exceptions may be signed and sealed by the court and incorporated into the record of said cause which is done this
27th Day of March A.D. 1861 Grant Godrich (Seal)

And afterwards to wit on Second day of April 1861
in the year aforesaid Franklin M Hale Thomas Hale
and Martin Hale filed in the office of the Clerk of
said court their appeal bond in words and figures following
to wit

Know all men by these Presents that we Franklin M Hale
Thomas Hale and Martin Hale and Henry G Miller
are held and firmly bound unto Joseph Borrett
and Caleb Cutting in the full sum of Six Hundred Dollars
(\$600) lawful money of the United States of America for the
payment of which well and truly to be made to the said
Joseph Borrett and Caleb Cutting their executors administrators
or assigns We do bind ourselves our heirs executors and
administrators firmly by these Presents Sealed with our
own seals and dated this twenty fifth day of March
AD 1861

Whereas the above named Joseph Borrett & Caleb Cutting
did at the March Term of the Superior Court of Chicago
AD 1861 recover a Judgment against the above bounden
Franklin M Hale, Thomas Hale & Martin Hale, for the
sum of Four Hundred and Twenty Five Dollars (\$425) and
costs of suit from which Judgment an appeal to the
Supreme Court of the State of Illinois was duly prayed
by the said Franklin M Hale, Thomas Hale & Martin Hale,

Now therefore the conditions of the above Obligation is such
 that if the said Franklin M Hale, Thomas Hale, and Martin
 Hale shall duly prosecute their said appeal and shall
 well and truly pay the said Judgment and all costs interest
 and damages in case the Judgment appealed from shall be
 affirmed then this obligation to be null and void
 otherwise to remain in full force and virtue

Franklin M Hale (Seal) Martin Hale (Seal)
 Thos Hale (Seal) Henry G Miller (Seal)

Approved Grant Goodrich Judge C.

State of Illinois }
 County of Cook } S. S.

I Walter Kimball Clerk of the Superior Court
 of Chicago. in and for said County. do hereby certify
 that the foregoing is a full, true and complete Transcript
 of all the pleadings on file in my office and of the
 proceedings and Judgment entered of Record in said
 Court. together with the Bill of Exceptions and Appeal
 Bond in the case wherein Joseph Barnett & Caleb Cutting
 are plaintiffs and Franklin M Hale, Thomas Hale and
 Martin C Hale are defendants.

In testimony whereof I hereunto subscribe
 my name and affix the Seal of said Court
 at Chicago in said County this 15th
 day of April A.D. 1861

Walter Kimball Clerk



Supreme Court of Illinois.

April Term 1861.

Franklin M. Hale, Thomas Hale
& Martin C. Hale Appellants.

vs.

Joseph Barrett & Caleb Cutting.
Appellus.

} Appeal from the
Superior Court of Chicago

Afterwards to-wit: on the Eighteenth day of April A.D.
1861. at the April Term 1861. of said Supreme Court came
the said Franklin M. Hale, Thomas Hale, & Martin C.
Hale by Boyne Miller & Lewis their Attorneys and say that
in the record and proceedings aforesaid, and also in the rendi-
tion of the judgment aforesaid, there is manifest error in this
to-wit: -

1st. The Court erred in sustaining the objection and refusing
to allow the witness Abel Grove to answer the question as to the
custom among warehousemen in Chicago, to charge interest upon
advances made by them -

2nd. The Court erred in sustaining the objection and refusing
to allow the Defendants to prove such custom by the witness
Abel Cary -

3rd. The Court erred in giving the first Instructions for the
Plaintiffs below as asked -

4th. The Court erred in giving the Plaintiffs second Instruction.

3rd The Court erred in giving the Plaintiffs Third Instruction.

6th The Court erred in giving the Plaintiffs Fourth Instruction.

7th The Court erred in giving the Plaintiffs Fifth Instruction.

8th The Court erred in giving the Plaintiffs Sixth Instruction.

9th The Court erred in giving the Plaintiffs Seventh Instruction.

10th The Court erred in giving the Plaintiffs Eighth Instruction.

11th The Court erred in giving the Plaintiffs Ninth Instruction.

12th The Court erred in refusing to give the second Instruction for the Defendants as asked, and in modifying the same and giving the same to the Jury as modified by the Court.

13th The Court erred in refusing to give the Fourth Instruction for the Defendants as asked, and in modifying and altering the same and giving the same to the Jury as modified and altered by the Court.

14th The Verdict of the Jury was against the law and the evidence.

15th The Court erred in overruling the Defendants motion for a new trial and giving judgment on the Verdict.

And the said Franklin M. Hale, Thomas Hale, & Martin C. Hale pray that the judgment aforesaid, for the errors aforesaid, and for other errors apparent in the record and

proceedings aforesaid may be reversed and annulled. and
that they may be restored to all things which they have lost
by occasion of the said Judgment &c.

Hoyne, Miller & Lewis.
for Appellants -

Supreme

Joseph Barnett &
Calce Cutting Appellants

vs

Franklin M. Hale & al
Appellants

April Term
1861

founder
in error

And now comes the
said Appellants Paul James Gary
their Attorneys and they have no
error in the record & proceedings aforesaid
and now in giving the judgment
aforesaid pray that the said judgment
may in all things be affirmed
&c.

Paul James Gary
Attorneys

25-5

Supreme Court

Franklin M. Hale
et al Appellants

Joseph Barrett &
Leah Cutting
Appellees

Transcript of Record &c

Franklin M. Hale et al

vs

Joseph Barrett et al
Record

Filed Apr 18. 1861
A. Deland
Clerk

Hoyou Miller Lewis
for Appellants

Fees \$9.00.