

larceny. I think the effect of the evidence is that the prisoner was there to sell the mare, and receive the money for the prosecutor if he were present, and, if not present, then to sell and hold the money for him or his agent until he should come. I hold that the prisoner was a bailee of the money for the wife, who attended as agent of the prosecutor. She demanded the money, the prisoner refused, and thereupon the case falls directly within the words of the statute.

GROVE, J.—I am not free from doubt as to whether the prisoner was in the position of bailee. Although the evidence is ample that he took the money, yet it is clear that the money was not given to him on behalf of the prosecutor. But I think he is none the less a bailee by reason of his not having received the money directly from the hand of the prosecutor.

FIELD, J.—I agree, but not without some hesitation, that this conviction ought to be affirmed. The question is whether there was reasonable evidence that the prisoner was a bailee. It is important to note that the sale was for cash, that there had been no previous dealings between the parties, and that the prisoner was not a horse-dealer or agent who might probably be justified in mixing the money received with his own, as has been held in the case of a stock-broker charged with a similar offence.

STEPHEN, J.—I am sorry to be obliged to differ from the rest of the court, but this difference is due to the interpretation I place upon the facts rather than upon the application to them of any principle of law. I think the present case is governed by the case of *Regina v. Hassall*, 1 W. R. 708, L. & C. 58, where it was held that one who receives money, with no obligation to return the identical coins, is not a bailee of such coins within the 24 and 25 Vic. c. 96, sec. 3, under which the present prisoner has been convicted. Here there is nothing to show that the prisoner was bound to return the coins received for the horse, it was not so understood by the parties, and, in fact, the evidence negatives this view. The prisoner was authorized to sell the horse in the ordinary manner, and, if the check was part of the price paid, the wife raised no objection to his cash-

ing it. If he had got it cashed at the bank no objection would have been raised, and the prosecutor would have been satisfied whether he got the check or the proceeds. If so, it cannot be said that there was any obligation on the prisoner to hand over the specific coins received.

I may mention also that under section 72 of the same statute, which permits a conviction for larceny under an indictment for embezzlement, as was done in the present case, there is no power to convict of larceny as a bailee; but I do not in any way base my judgment upon this, because I think simple larceny includes larceny by a bailee.

A. L. SMITH, J.—The difference of opinion between the members of the court arises more upon a question of fact than of law. Upon the evidence before us I agree with the majority of the court that the prisoner was rightly convicted as a bailee of the money demanded of him by the wife of the prosecutor.

Conviction affirmed.

NEW YORK SUPREME COURT,  
GENERAL TERM, OCTOBER 1884.

HAYES v. NEW YORK CENTRAL R. Co.

*Railroad—Passenger's ticket.*

*If a passenger on a railroad train mislays his ticket, and acting in good faith fails to find it, until after the conductor rings the bell for the purpose of stopping the train and ejecting him; in an action against the carrier to recover damages for an unlawful ejection under such circumstances,*

*Held, that the omission to find and surrender the ticket or pay his fare before the bell rang is not equivalent to a refusal to do so.*

*Held, further, that the passenger is entitled to a reasonable opportunity to find his ticket if he can, and in default to pay his fare, and it is a question of fact for the jury to determine whether or not such reasonable opportunity was allowed.*

Appeal from judgment entered upon a non-suit directed at Oneida Circuit, May, 1884, and from an order denying a motion for a new trial on the minutes. The action is brought to recover damages for ejecting plaintiff from the train on its passage from