And so the supreme court of Iowa, in a case yet unreported, *Johnson* v. *Brown*, Oct. 1873,) has also held. In the case just cited, wheat was left in an elevator with the understanding that when the depositor should be ready to sell it, the proprietor of the elevator would give the highest market price or the same amount as wheat of like grade and quality—the custom being to ship off grain, but to keep on hand sufficient to fill outstanding storage receipts, but not the identical wheat received—and it was adjudged that the transaction was a sale and not a bailment.

I regard the case at bar distinguishable from *Young* v. *Miles*, 20 Wis. 615, 23 Wis. 643; and *Kimberly* v. *Patchin*, 19 N. Y. 330; and like cases where the bulk from which the mingled articles were to be taken was specific and not subject to constant fluctuations.

I am of opinion, therefore, that the court erred in holding that the receipt owners had the right to the wheat in the warehouse as against the assignee, and its decree in this respect is reversed, and a decree will be entered here dismissing the bill.

I may add, that I am entirely satisfied, in view of the mode of conducting business at the grain elevators, as shown in the testimony, that the foregoing is a sound view of the relation between the grain depositor and the proprietor of the elevator, and that legislation to protect the former against the insolvency of the latter, would appear to be called for.

In respect to the claim of the bank upon the two wheat receipts for 12,000 bushels, made by the bankrupts after their failure to secure $10,000 to their local bankers, I concur so fully in the views of Judge Nelson that I do not deem it essential to do more than refer to his opinion. The decree of the district court, dismissing the cross-bill of the bank is affirmed. The cause will be remanded to the district court with directions to tax the costs in that court equitably as between the receipt holders and the bank. The costs on this appeal will be borne equally between the same parties.

Ordered accordingly.

(Note by the Editor of *Central Law Journal.*)

In *Chase* v. *Washburn*, 1 Ohio St. 244, the receipt of the warehouseman, was: "Milan, O., Nov. 5, 1847. Rec'd *in store* from J. C. W. thirty bushels of wheat. H. Chase & Co." The evidence *aliunde* showing that the wheat was received with an understanding that the warehouseman might dispose of it, and that, upon demand, he would return other grain, *or* pay for that deposited, the transaction was ajudged a sale and not a bailment, and therefore it was no defence to the warehouseman that his warehouse was destroyed by fire at a time when it contained wheat enough to answer all the outstanding receipts.

So, in the case of the *South Australian Ins. Co.* v. *Randall*, Law Rep. 3 Priv. Council App. 101, 6 Moore P. C. N. S. 341, as in the case to which this note is subjoined, the receipts issued to the farmers by the miller were "to store," and under the circumstances stated in the foregoing opinion, the transaction was considered to be a sale.

In 6 Am. Law Review, 450, the reader will find a valuable article entitled "*Grain Elevators: the title to Grain in Public Warehouses.*" The case of *Chase* v. *Washburn* is there printed in full, and is selected "as presenting the ablest exposition of the opposite opinion" to that which the annotator there maintains to be the true doctrine. In that note is cited, perhaps, every reported case on the subject of the title to grain in elevators which had been decided down to April 1872. The substance of that note will be found condensed in Holmes's edition of Kent's Commentaries. 2 Kent Com. 12th ed. 590.

The case of Rahilly, *supra*, is one where there was an understanding implied from the known and invariable course of business, that the warehouseman might mingle the specific wheat deposited with other wheat of like quality, and dispose of it at his pleasure, with the further understanding that on demand, he would pay the depositor the highest market price, or deliver the same amount of grain of a like quality, but not the identical grain deposited, nor grain from any specific mass. We have found no adjudged case which holds such a transaction to be a bailment, but there are several directly to the point that it is a sale. Such a case is obviously distinguishable from that of a specific deposit which is not to be changed by the warehouseman, but retained by him until called for by the depositor. This is a bailment. And the case is distinguishable, also, from those where specified amounts of grain of different owners is mixed by consent in specific mass, without any understanding that the warehouseman might dispose of the grain so deposited and mingled. And it may be different from the case where the proprietor of the elevator is a mere warehouseman and where his course of business is, and his duty is, always to keep on hand in the elevator sufficient grain to meet all outstanding receipts, though not the particular grain received. We say it *may* be different from such a case, but it is doubtful whether it is so. See *Johnson* v. *Brown*, Iowa Sup. Ct., 1873. But where it is known by the depositor that the warehouseman is himself buying and selling grain on his own account, and also receiving grain "in store," and that he intermingles all that is so obtained, and is constantly buying, receiving and selling, so that the mass is constantly fluctuating, and there is no fixed time when the receipts are to be presented, it seems impossible to consider the holders of the outstanding receipts as tenants in common of the whole mass of wheat in the elevator in proportion to the amount of their receipts. And such a case seems to be the same in principle as an ordinary general deposit of money in bank; it creates simply the relation of debtor and creditor; and so the Privy Council in the case of the Australian Ins. Co., above cited, considered it.

The very recent case of *Butterfield* v. *Lathrop*, 71 Pa. St. 225, goes upon the same principle. Here, Baxter and numerous other farmers delivered milk to a cheese factory; each was credited with the amount of his milk, and all was manufactured together; the company sold all the cheese; each farmer was charged with the expense, and received his share of the proceeds in propor-