DIARY FOR APRIL.

1. Wed..Collectors of last yr. to ret. rolls and pay over money (32 V. c. 36, s. 103). Master and Reg. in Chy. and Clks. and Dep. Clks. Crown to make quarterly return of fees.
2. Fri...*Good Friday.*
4. Sat...Last day for notices of primary examination.
5. SUN..*Easter Sunday.*
6. Mon..County Court Term begins.
7. Tue..Last day for return by Local Treas. to County Treas.
10. Fri...Last day for Master and Reg. in Chy. and Clks. and Dep. Clks. Crown to pay over fees to Prov. Treas. under 32 V. c. 36, s. 115.
11. Sat...County Court Term ends.
12. SUN..*Low Sunday.*
13. Mon..Storming of Magdala, 1868.
15. Wed..Pres. Lincoln assassinated, 1865. Assessors in Tps. and Vills. to complete rolls by this date (32 V. c. 36, s. 4).
19. SUN..*2nd Sunday after Easter.*
23. Thu...*St. George.*
25. Sat...Parliament Houses burnt, 1849.
26. SUN..*3rd Sunday after Easter.*

CONTENTS.

THE

Canada Law Journal:

Toronto, April, 1874.

Several important changes have taken place in the Judiciary in England and Ireland. Baron Cairns has become Lord High Chancellor of England, in place of Lord Selborne, who went out with the Gladstone Government, and Sir John Karslake becomes Attorney-General. In Ireland, Lord O'Hagan, the late Lord Chancellor, bade adieu to the Bar on the 21st February last. He enjoyed a high reputation. Complimentary addresses were presented to him by the Bar and the Incorporated Society of Attorneys and Solicitors. His successor is the Right Hon. Abraham Brewster. Mr. Palles has been sworn in as Chief Baron of the Exchequer.

We are glad to learn that Mr. Walkem, whose treatise on the law relating to the execution of wills and to testamentary capacity has proved such a success, has ready for publication a small work on the Married Women's Property Acts of 1859, 1872 and 1873. It will consist of these Acts, with copious notes. The subject is not an easy one to tackle, and all we can say is, if he understands the law, it is more than any one else does. At least we are sure of this, that his book will be of great practical use, and doubtless throw much light upon many difficult points.

The United States Supreme Court, in *Stitt* v. *Hindekoper*, reported in the *Legal Gazette* of Philadelphia of Jan. 23rd, 1874, lays it down that it is a rule of presumption that ordinarily a witness who testifies to an affirmative, is to be preferred to one who testifies to a negative, because he who

testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed. The like rule was acted upon by the Court of Chancery of this Province in *Wright* v. *Rankin*, 18 Gr. 625.

One of the results of the English Judicature Act is seen in the appointment of an Equity Counsel, in the person of Richard Paul Amphlett, Q. C., to the vacancy in the Court of Exchequer occasioned by the resignation of Baron Martin. Nothing of the kind has happened since the appointment of Baron Rolph to that Court, but we may expect that the English Common Law Bench will henceforth be leavened with a continuing chancery element, in order that law and equity may be efficiently administered by the same Court. No doubt, a similar result may be looked for in this Province in consequence of the Administration of Justice Act.

The following judicial statistics are worth noting. During the year 1873, the English and Irish Judges who have died are Lord Westbury, Sir Wm. Bovill, Sir Wm. Channel, Sir John Wickens, Dr. Lushington, Chief Baron Pigott, and Mr. Justice Lynch. In the United States, Chief Justice Chase and Mr. Justice Nelson, of the Supreme Court. At present, the oldest Judge in England is Sir Fitzroy Kelly, Lord Chief Baron of the Exchequer, aged 78; the youngest is Sir George Jewel, Master of the Rolls, aged 49. The oldest Judge in Ireland is Chief Justice Monaghan, of the Court of Common Pleas, aged 70; the youngest is Mr. Justice Morris, in the same Court, aged 47.

Chief Justice Thompson, of the Supreme Court of Pennsylvania, lately returned to the practice of his profession, and while engaged in arguing a case, suddenly paused, and sinking back in his seat, in a few moments breathed his last. He commenced life as a printer, and from that position achieved the highest offices in his State. It is a singular circumstance that the case he was arguing, when arrested by the hand of death, was one on which, as Chief Justice of the Court, he had delivered judgment upon a former writ of error, and he was, in his last utterances, engaged in vindicating the opinion he had himself delivered. Among impressive scenes of a like solemn nature in Courts of justice, may be mentioned the death of Mr. Justice Talford, when in the middle of his charge to the jury.

It has been decided by a Court in one of the United States "on the wrong side of the Rocky Mountains," that shaving by a barber was not a work of necessity within the meaning of the usual exceptions to that effect in Sunday laws, and consequently that the tonsorial professor could not recover for services which were unlawful. A *dictum* to the same effect may be found in *Reg.* v. *Cleworth*, 9 L. T. N. S. 682, where the question incidentally arose on the argument as to the validity of a conviction against a farmer for work done on Sunday. Crompton, J., remarked, "I take the case of a man shaving another; the one who shaved would be liable, whilst the one who was shaved would not." To that, Mellish, Q.C., replied "that might come under the exception of a case of necessity." Whereupon Cockburn, C. J., observed, "judging from what we see all around, it can hardly be said that shaving is an act of necessity!"

ELECTION PETITIONS.

Either the last elections for the House of Commons of Canada were conducted, in Ontario, in a most grossly corrupt manner, or else there is a wild striving after purity on the part of the defeated

candidates and their friends, hitherto unknown, for we find that, so far, out of eighty odd elections more than thirty are protested on the ground of bribery, corruption and "undue influence,"—(whatever that may mean). Some few of the petitioners claim the seat on a scrutiny, but the frightful expense attending such a course prevents many attempts of that kind. The practical working of the statutes shows clearly that a complete revision is absolutely necessary. For example, the present system of giving particulars is simply a provision for notifying the briber and the bribee to take a trip across the border for a few weeks, either for the sake of their health or at the call of urgent private business. Summary powers of preliminary and interlocutory examinations both of candidates and witnesses, so as to catch and cage the evidence, from day to day, must be given before the Act will be worth the paper it is written on. The name of the other amendments necessary is legion, but these we have not now space to discuss. We are inclined to think that many of these petitions will not come to a hearing. If they do, the prospects of the Bench and Bar for long vacation are somewhat lugubrious.

Omissions in the Administration of Justice Act.

All statutes involving extensive or even considerable alterations of the law are tentative in character. There has been a demand for reform, and the reformer sometimes overshoots the mark, sometimes falls short of it. Statutes for the "amendment of the law" as a rule require amendment themselves, in order to approximate the ideal and the actual benefits to be derived therefrom. It is but rarely, if ever, that such acts issue from the brain of the legislator in practical perfection: time and use develope the necessity for many applications of the amending hand. Sheridan ridiculed the process by which the full measure of ultimate benefit is evolved from statute law, by a parody on "The house that Jack built." First, he says, there comes in a bill imposing a tax; and then comes in a bill to amend the bill that imposed the tax; and then comes in a bill to explain the bill that amended the bill to impose the tax; next a bill to remedy the defects of the bill that explained the bill, that amended the bill, that imposed the tax; and so on *ad infinitum*. But underlying this *persiflage* are the substantial truths that advantageous changes in the law are arrived at only by degrees, and that frequent short-comings almost necessarily precede satisfactory legislation.

It is in no spirit of fault-finding or captiousness that we proceed to point out some omissions and defects in the Administration of Justice Act of 1873. We have hitherto spoken of that Act as we think it deserves, in the language of eulogy, as being a substantial advance in so adjusting the machinery of the several courts that the relief any suitor is entitled to claim can be meted out to him without unnecessary delay or expense. But in some respects we are inclined to think that the Act might have gone further, with benefit both to the courts and the suitors.

In particular, the state of the law in regard to actions of ejectment, is at present very unsatisfactory. This form of action is full of anomalies which it would be well to remove. Until the recent Act 36 Vict. cap. 14, (which should have been incorporated with the Act for the Administration of Justice) no costs could be taxed in undefended actions of ejectment, unless by the circuitous process of proceeding to recover them in an action for mesne profits: *Steen* v. *Steen*, 21 U. C. Q. B. 454. To counterbalance this peculiarity, we find that the courts

have jurisdiction to award costs to be paid to the successful party by one not a party to the record, where it is established that the stranger has instigated or is fostering the litigation and is the party really interested: *Thornton* v. *Wilkinson*, 9 Jur. N. S. 606; *Mobbs* v. *Vanderbrand*, 4 B. & C. 904; *Lutz* v. *Beadle*, 5 P. R. 418.

Again, the recovery in ejectment is by no means final, as is the recovery of a judgment in other less-favoured actions. The law is now as it was in ancient times. If John Doe was nonsuit, or if Richard Roe obtained a verdict against him, the effect was either that John Doe did not prosecute his then action, or that Richard Roe had not been guilty of the particular trespass alleged to have been committed on John Doe. By consequence whereof the irrepressible claimant could bring another action of trespass and ejectment, complaining to all appearance of another assault and ejectment, but in reality to try the very same title. And so, as a counterpoise to this anomaly, two expedients were devised, one by the Legislature, and the other by the Court of Chancery. By the Con. Stats. of U. C. cap. 27, sect. 76, the claimant in a subsequent action, who has failed in a former ejectment, may be ordered to give security for the costs of the then pending action. But even this salutary provision has been limited by the courts, as may be seen in *Armstrong* v. *Montgomery*, 5 P. R. 461, and *Bell* v. *Cuff*, 4 R. P. 155. If ejectments are brought repeatedly for the same thing, equity is wont to interfere and award an injunction, when the litigation appears to be carried on for the purposes of vexation and oppression: *Barefoot* v. *Fry*, Bunb. 158; *Irwin* v. *Sager*, 21 U. C. Q. B. 375.

The Administration of Justice Act has removed one limitation with regard to discovery in actions of ejectment. According to the latest exposition of Judge-made law before that Act, it was held that in such an action the defendant was not allowed, in the absence of special circumstances, to interrogate the plaintiff as to the character or right by virtue of which he claimed title to the premises: *Provincial Insurance Co.*, v. *Merhery*, 18 W. R. 583. The provisions of the Act in question, with regard to the examination of parties (sect. 24) do in effect bring back the law to the full measure of discovery that was held proper in *Flitcroft* v. *Fletcher*, 11 Exch. 543:—a case which the Barons of the Exchequer, aghast at their own boldness, took pains speedily to overrule in *Horton* v. *Bott*, 2 H. & N. 249. We see no reason, however, why the Common Law Courts should not have such power as exists in Equity procedure to permit the examination of parties after the defence is filed, instead of waiting till the cause is at issue. In this respect we venture to think the Chancery practice is preferable, in the interests of suitors, to the practice at law, under the provisions of this Statute.

We suggest, also, that in actions of ejectment, the plaintiff should be enabled to apply for an injunction against the defendant's committing waste or spoliation upon the premises in question. This has been entirely overlooked in the Administration of Justice Act. The law now is the same as when determined by *Baylis* v. *Legros*, 2 C. B. N. S. 316, in which it was held that the English Common Law Procedure Act of 1854 did not authorize the issuing of a writ of injunction in an action of *ejectment*. The provisions of the English Act are found in our Con. Stat. U. C. cap. 23, sects, 9–13. Under these sections it was at first held in this Province that injunctions could be obtained in ejectment, as in *Frazer* v. *Robins*, 2 P. R. 162. But it was held in *Lauder* v. *Gilkinson*, 7 U. C. L. J. 150, that after the English case referred to, the earlier Provincial decisions were no longer to be regarded.

We think that the law should be altered, and that a plaintiff, in ejectment, should be able to prevent, for instance, the cutting and removal of timber from the premises he seeks to recover without the necessity of filing a bill in Chancery therefor, which is now his only mode of getting complete relief against a wrong-doing defendant.

LAW SOCIETY.

Hilary Term—37 Victoria.

The following is the *resumé* of the proceedings of the Benchers during this Term, published by authority:

Monday, 2nd February, 1874.

The several gentlemen whose names are published in the usual lists were called to the Bar, and received Certificates of Fitness.

The petition of Mr. A. G. M. Spragge, to be allowed an Examination passed by him for call to the Bar, in Easter Term, 1873, his time on the Books as a Student not having then expired, was refused.

The Treasurer announced the result of the Intermediate Examinations.

Tuesday, 3rd February, 1874.

The abstract of balance sheet for the year 1873, with the report of the Auditors thereon, was laid on the table.

The Report of the Examining Committee was received and adopted.

The petitions of Messrs. McPherson, Milligan and Kennin for admission to the Society, under the special circumstances stated in their petitions, were allowed.

The letter of Mr. David Lennox was considered.

The petition of Mr. Gormally, a member of the English Bar, for the consent of the Society to a special Act being passed for his admission as an Attorney, was refused.

Mr. Edward Martin was elected a Bencher in the place of Mr. Freeman, and Mr. Clarke Gamble in the place of Mr. E. B. Wood.

Saturday, 7th February, 1874.

Mr. George M. Evans was appointed Examiner for the next Term, and his fee for this Term was directed to be paid.

The sum of fifty dollars each was ordered to be paid to Messrs. Osler and Rae, the auditors for 1873, for auditing the accounts of that year.

The sum of one hundred dollars was ordered to be paid to Mr. Æmilius Irving for auditing the accounts of 1871 and 1872.

Mr. John S. Ewart was appointed auditor for 1874, in the place of Mr. Osler, who retires, having served two years.

The usual examinations for Call, Certificate of Fitness, and admission of Students and Articled Clerks, were ordered to take place as usual before Trinity Term.

Friday, 13th February, 1874.

The statement of Revenue and Expenditure for the last year, in accordance with 35 Victoria, chapter 6, was laid on the table.

The draft of the deed of surrender to the Crown was perused and accepted, and the Treasurer and Messrs. Patterson and Mackenzie were appointed a Committee to confer with the Government on the subject of the agreement for lighting and heating Osgoode Hall, and the grant of $2,000 promised to the Society in 1873.

Mr. J. B. Clarke's letter was read, and he is allowed to compete for the second year Scholarship in November, 1874.

The Report of the Committee on Reporting was received, read and adopted.

The Report of the Library Committee was received, read and adopted, and the Treasurer was authorized to pay for the valuation of the Library on the certificate of the Chairman of the Committee.

It was resolved that it be a rule of the Society, that in the computation of time

entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favorable to the student or clerk, and all students entered on the Books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

On motion made, resolved, that the third clause of the Report of the Committee on Reporting be communicated by the Secretary to the Reporter of the Court of Chancery.

On motion made, resolved, that the Attorney-General be requested to introduce a Bill during the present Session of Parliament, amending the section substituted for the 57th section of chap. 35 of the consolidated statutes of Upper Canada, so as to make the penalty therein mentioned apply to attorneys practising in the County Court.

J. Hillyard Cameron,
Treasurer.

CRITICISMS ON TEXT-WRITERS, REPORTERS, AND OTHER LEGAL AUTHORITIES.

Dr. Allibore, of Philadelphia, (famous for his elaborate "Dictionary of Authors") wrote a pamphlet some few years ago on the subject of "Bibliography," in which he maintained that a critical manual of legal bibliography is a great desideratum in the literature of the law. Such a book, containing a list of all law-works in the English language, or applicable to the English system of law, with references to the reports where they are cited, and with critical estimates of their value and correctness, would be of great value to bench and bar. Such a treatise is a thing well-nigh to be despaired of by any single author in this fast-living and fast-writing age. We do not say entirely to be despaired of, because we remember the wonderful monument of patience and research which Mr. Bigelow, of Boston, has reared in his "Index of Over-ruled Cases;" but still few (if any) lawyers would be willing to devote the requisite time and labour demanded for such an undertaking. Yet much may be done by the gradual accretion of materials for such a work by contributors to legal journals, and it is with this view that we are desirous to add our little collection of criticisms to others which we have from time to time published. Some few reporters, omitted from our former papers, are now inserted; and as before, we have endeavoured not to repeat notices that have been heretofore printed.

Beawes' Lex Mercatoria "is frequently referred to by all text-writers, and treated as a book of eminent authority:" per Mallin, V.C. in *Re Overend*, L.R. 6 Eq. 364.

Bell's Commentary on the Law of Scotland. "A work of which it is difficult to speak in terms of adequate commendation," 18 Law Mag. 17.

Benjamin's Treatise on the Sales of Personal Property: "appears to be very ably written": Lord Chelmsford in *Shepherd* v. *Harrison*, 20 W. R. 3.

Best on Evidence "One of the best works on our laws": Wills, J. in *Briggs'* case, 1 D. and B. Cro. Ca. 102.—"A very valuable text-book": Stuart, V.C., in *Sidebottom* v. *Adkins*, 3 Jur. N.S. 632. "a very remarkable book": Stuart, V. C., in *Mariett* v. *Anchor Ins. Co.*,—8 Jur. N. S. 52.—"A very valuable treatise": Wills, J. in *Hollighan* v. *Head*, 4 C. B. N. S. 391.

Blackstone's Commentaries. "I am always sorry to hear Mr. Justice Blackstone's Commentaries cited as an authority; he would have been very sorry himself to hear the book so cited; he did not consider it such: Lord Chan. Redesdale in *Shannon* v. *Shannon*, 1 Sch. and Ref. 327. Blackstone's positions have been frequently overruled; as for example in *Liddard* v. *Kain*, 2 Bing. 183; *Richardson* v. *Gray* 29 U. C. Q. B. 364.

Brown's Parliamentary Cases. Mr. Brown only made abstracts from the appeal cases lying on the table of the House, and therefore the grounds of the decision can not be known from the abstract of the case in Brown: Per Lyndhurst, Lord Chan. when referring to *Bouchier* v. *Taylor*, 4 Bro. P. C. 708 in *Barrs* v. *Jackson*, 5 Law Times, R. 365.

Buller's Nisi Prius. The author procured his materials from Mr. Justice Bathurst: 17 Law Mag. 27.

Crompton's Practice. "Many of the cases were partly collected by myself before I was at the bar; they were never intended by me for publication, and were too loose to be relied upon: Per Buller, J, in 5 T. R. 372.

Darby and Bosanquet on the Statute of Limitations. "A very useful book:" Per Willes, J., in *Wilkinson* v. *Verity*.

Espinasse's Reports. "It used to be said that Mr. Espinasse heard *one* half of the cases and reported the *other* half": Pollock, C.B., in *Whyman* v. *Gath*, 22 L. J. N. S. Exch. 317. The observations of Denman, C. J., in *Small* v. *Nairne*, 13 Q. B. 840, as to the want of acurracy in this reporter, so that his reports were wont to be quoted with doubt and hesitation and even apology, were adopted by Coleridge, J., in *Wenman* v. *Mackenzie*, 1 Jur. N. S. 1016.

Fonblanque's Notes to the "Treatise on Equity" attributed to Mr. Barlow are executed with consummate ability: 22 Law Mag. 61.

Foster's Crown Law. "Sir Michael Foster was a judge eminently versed in criminal law: *Queen* v. *Charleton*, 2 Irish L.R. 65.

Gale on Easements. "A very excellent book:" Per Campbell, C. J., in *Renshaw* v. *Bean*: 18 Q. B. 124; "An excellent treatise": Per L. Wensleydale in *Rowbotham* v. *Wilson*, 8 H. L. C. 359.

Gilbert on Replevin. "Is a book of the very highest authority:" Per Burton, J., in *Kenny* v. *Simpson*. 4 I. R. L. R. 44.

Gilbert on Uses. "It is known that the book was a posthumous work, and not presented in the form in which the Chief Baron intended it to be made public, and it is possible he might have made considerable alterations, if published in his lifetime; and it bears marks, particularly in the latter part of it, of being incomplete:" Romilly, M. R., in *Barron* v. *Wadkin*, 27 L. J. Ch. 134.

Hale's History of the Common Law. This book was published from a posthumous manuscript of the learned Judge, and is exceedingly cursory and defective:" *Barton, Convey.* cited in Greenleaf's Over-ruled cases, p. 204.

Hargrave. Mansfield's case cited by Mr. Hargrave, although by an unknown hand, yet the adoption of it by Mr. Hargrave makes it an authority: Per Hart, L. C., in *Power* v. *Sheil*: 1 Moll. Ch. R. 312.

Jarman on Wills. Mr Jarman's work is one of great value. It has followed what was begun by Mr. Roper, begun by Mr. Powell, improved by Mr. White, and by Mr. Jarman himself brought to a surprising degree of perfection. Mr. Jarman has, upon a deliberate consideration of cases in his chambers, endeavoured to extract certain rules of construction to guide in considering the language of testators; but it is quite possible to attempt to do a great deal more than it is in the power of any human being to accomplish in that respect: per Stuart, V. C., in *Conduitt v. Soane*, 4 Jur. N. S. 502.

SELECTIONS.

CONCERNING REGULATIONS REQUIRING TELEGRAMS TO BE REPEATED.

It is an established principle of law that telegraph companies, like railroad companies, have the right to make reasonable regulations for the conduct of their affairs, but there is some diversity of opinions as to what regulations are "reasonable," and as to whether, and, if so, how far, they relieve the company from liability for negligence. Most companies have adopted regulations to the effect that they will not be responsible for mistakes in transmitting, or delay in delivering a message unless such message is repeated, and these regulations are usually printed on the blanks on which messages are written. How far such regulations, so notified, are binding upon the sender, has been considered in the following cases:—

McAndrew v. *The Electric Telegraph Company*, 17 C. B. 3 (1855), presents the earliest discussion of this subject. In that case the plaintiff sent a message to

defendant's office to be transmitted to Exmouth, directing the master to proceed to Hull. In transmitting the message "Southampton" was, by mistake, substituted for "Hull," in consequence of which the vessel went to the former place, and the plaintiff sustained loss in the sale of her cargo. The blank on which the message was written contained a provision that "the company will not be responsible for mistakes in the transmission of unrepeated messages, from whatever cause they may arise." The plaintiff's message was not repeated. The court held the regulation reasonable. The declaration was on the contract to send the message as delivered, and the question of how far such a regulation would relieve the company from its own negligence was not presented.

Camp v. *The Western Union Telegraph Company*, 1 Metc. (Ky.) 164 (1858), was likewise an action on the contract, and it was therein held that a regulation requiring a message to be repeated was reasonable, and if brought home to the knowledge of the sender would preclude him from recovering damages occasioned by a mistake.

In *N. York and Washington Telegraph Company* v. *Dryburgh*, 35 Penn. St. 298 (1860), the action was on the case, and the court was called upon to decide how far the ordinary notice as to repeating messages relieved the company from liability for their own negligence. There a person wrote a message on a blank containing such notice, requesting plaintiff, a florist, to send him "two hand boquets." The transmitting operator, in mistaking "hand" for "hund," changed the message so as to read "two hundred boquets," and it was sent to the plaintiff. The jury found for the plaintiff, and the judgment on the verdict was affirmed by the District Court in *banc*—Sharswood, P. J., delivering the opinion—and by the Supreme Court. The mistake did not occur from the "infirmities of telegraphing," but from the carelessness of defendants' agent.

Sharswood, P. J., in his opinion said: "As to the private notice of the defendants, that they only insured the correct transmission of messages where they are repeated back and paid for as such, we do not think it applies here, for many reasons. It was not brought to the knowledge of the plaintiff (the plaintiff, it will be remembered, was the *receiver* of the message), and, if it had been, could not have exempted the defendants from liability for actual negligence . . . What the company, the defendants, insure against, when they do insure, is not the negligence of their officers, but those delays and mistake in the transmission which are unavoidable."

Seilers v. *Western Union Telegraph Company*, a brief note of which was given in 3 Am. Law Rev. 777, is similar, in facts, to the above case. The plaintiffs sent by telegraph an offer of 55 cents per bushel for salt delivered "at *our* city wharf." When received at the office of destination it read "at *rour* city wharf," and the operator, supposing *rour* to mean *your*, changed the despatch accordingly. The plaintiff lost in consequence, and brought an action. The District Court of New Orleans held the company liable for the error, notwithstanding the message was written on a blank containing a provision against liability except for a repeated message. In both these cases it should be observed that the damage occurred through unauthorized changes made in the messages by defendants' operators, and that, at least in Dryburgh's case, the mistake would not have been obviated by repeating.

In *Birney* v. *The New York & Washington Telegraph Company*, 18 Maryland, 341 (1862), plaintiff delivered to defendant, at Baltimore, a message to be sent to New York, directing plaintiff's agent to sell certain stocks. Through the negligence of the operator at Baltimore the message was never sent nor attempted to be sent. There was a notice posted conspicuously in the defendants' office that the company would "not be liable for any loss or damage that might ensue by reason of any delay or mistake in the transmission or delivery, or from non-delivery, of unrepeated messages." The message in question was not to be repeated. The court held that the terms of the notice did not cover the case; that the company had contracted to put the message upon its transit, and having made no effort to do this was liable for the damages occasioned. This decision covered the entire case, but the court went on to lay it down broadly that one employing a telegraph company to trans-

a message is bound by the regulations of the company, whether brought home to his knowledge or not. This part of the decision is clearly *obiter*.

In the *United States Telegraph Co.* v. *Gildersleve*, 29 Maryland, 232 (1868), the above dictum is re-asserted, although quite unnecessarily. There Gildersleve left a message at defendants' office, in Baltimore, to be sent to New York. It was written upon the blank of another company having upon its face this:—"The following message, without repeating, subject to the conditions indorsed on the back." What these conditions were does not appear in the report, except that they were intended to relieve the company from liability in case of non-repeated messages; but whether for delay or mistakes in transmission, or for non-delivery, also, is not apparent. The party to whom the message was directed failed to get it; but from what cause the case does not clearly inform us; but we gather from the argument of plaintiff's counsel that it was from a failure to deliver it after it had reached the New York office. It appeared that the defendant had regulations as to repeating similar to those on the message sent. The court held that neither the conditions on the message nor their own regulations would relieve the company from their own wilful misconduct or negligence; that such negligence must be established before there could be a recovery, and that, as the court below had refused defendants' prayers for instructions based upon this assumption, a new trial should be had. There was nothing calling for a decision as to whether the plaintiff would have been bound by the defendants' regulations without being made aware of them, since the plaintiff, in having written his message upon the blank of another company, very clearly made the conditions thereon his own, and proffered them with his message—and, as must be presumed, with a knowledge of them.

In the case of *Ellis* v. *The American Telegraph Co.*, 13 Allen, 226 (1866), the sole question was, as stated by Chief Justice Bigelow, "whether that portion of the terms and conditions prescribed by the defendants is reasonable and valid which provides that the defendants will not hold themselves responsible for errors and delays in the transmission and delivery of messages, unless they are repeated." The mistake in this case consisted in making the message read $175, instead of $125, as it was written. There was "no evidence of carelessness or negligence except the error in the sum, which was made by some agent of the company in transmission." The court held the regulation as to repeating the message reasonable; and that one injured by a mistake in an unrepeated message could not recover, beyond the amount paid for sending the same, without some further proof of carelessness or negligence on the part of the company than that resulting simply from error; that is, that there must be proof of negligence distinct from the "natural infirmities of telegraphing;" and the judgment, which was for the plaintiff, was reversed, on the ground that, under the circumstances, the plaintiff ought to have shown carelessness on the part of the company, and that, as the message was not repeated, negligence could not be inferred (as the court below had instructed) from the mere fact that a mistake in the sum had been made.

In *Wann* v. *Western Union Telegraph Company*, 37 Mo. 472 (1866), the plaintiff delivered to defendants a message directing salt to be sent by "sail;" the message when delivered, read "rail." The blank on which the message was written provided that the company would not be responsible "for mistakes or delays in the transmission of unrepeated messages from whatever cause they may arise." Of this condition the plaintiff had actual knowledge when he delivered his message, and the court held the condition reasonable and the plaintiff bound by it. The report informs us that the only evidence introduced on the trial to sustain the charge of carelessness was the mistake above stated. So that the case is "on all fours" with the Ellis case, but, as in that case, the court stated that the company would not be protected by their regulations from the consequences of their own gross negligence.

In *Bryant* v. *The American Telegraph Co.*, 1 Daly, 575 (1866), the loss occurred through a delay in delivering the message after it was received at the office of destination. The company was fully informed of the importance of the message and of its prompt transmission. There were the usual regulations as to repeating, to guard

against "mistakes or delays in *transmission*." The company was held liable.

In *De Sutte's Case*, 1 Daly, 547; 30 How. Pr. 403 (1866), the injury occurred through an alteration in transmission of "twenty-*two*" to "twenty-*five*." The company had regulations relieving them from liability for unrepeated messages, but this despatch was not written on a blank of the company containing the ordinary conditions, and the court held that the plaintiff was not bound by such conditions unless they were brought home to his knowledge.

In *Western Union Telegraph Company* v. *Carew*, 15 Mich. 525 (1867), regulations as to repeating were held to be reasonable, and binding upon one who writes his message upon a blank containing such regulations, whether he reads them or not. In that case there was no evidence of negligence upon the part of the company.

In *Sweetland* v. *The Illinois, etc., Telegraph Company*, 27 Iowa, 432; 1 Amer. Rep. 285 (1869), rules requiring messages to be repeated were held to be reasonable, but it was also held that such rules would not be so construed as to exempt the company from liability for a loss occasioned by its own fault or negligence, or for want of proper skill or ordinary care on the part of its operators in transmitting an unrepeated message. In such case, however, the burden of proving negligence is put upon the plaintiff.

In *Graham* v. *Western Union Telegraph Company*, 1 Colorado, 730 (1871), the damage occurred through a failure to deliver the message after it had been received at the office of destination. There were the usual regulations as to repeating, but the court held these regulations not applicable to the case, and that the company was liable. This is in accordance with the ruling in Gildersleve's case, and in Bryant's case, and, by analogy, with the doctrine in Birney's case.

In *True* v. *The International Telegraph Company*, to appear in 60 Maine (1870), it was held that a regulation that the company will "not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any message beyond the amount received by said company for sending the same," would not protect the company from liability for its own misfeasance or negligence.

In *Breese* v. *The United States Telegraph Company*, 48 N. Y. 132; 8 Am. Rep. 526 (1871), the commission of appeals decided that regulations of a telegraph company as to repeating are reasonable, and that where a person writes a message upon a blank containing such regulations, he will be presumed to know and consent to them. The error, in that case, was in making "700" read "7,000," the precise cause of which error was unknown—as the case states. There was no evidence of negligence beyond the fact of the mistake, and the court was not called upon to decide, nor did it attempt to decide, whether the company might relieve itself by such conditions from liability for injuries occasioned by its own negligence.

From this review of the case it appears that a majority of the authorities hold that regulations of a telegraph company relieving them from liability, unless the message is repeated, are reasonable, but will not be construed so as to relieve them from liability for injuries occasioned by their own wilful misconduct or negligence.—*Albany Law Journal.*

The Supreme Court of Illinois, in the recent case (February 7th, 1873,) of *Tyler* v. *The Western Union Telegraph Co.*, 5 *Chic. Leg. News* 550, Breese, J. have decided that a Telegraph Company cannot restrict its liability by the printed writing as to repetition, &c.,—but our own courts have rather followed the majority of the authorities as stated in the above article. For two recent decisions in our District Court upon the subject, see *Harris* v. *Western Union Telegraph Co.*, *Legal Intelligencer*, January 3rd 1873, Mitchell, J., and *Passmore* v. *Id. Legal Int.*, January 31st, 1873, Hare, P. J.—*The Legal Intelligencer.*

TRADING PARTNERSHIPS WITH MARRIED WOMEN.

In France, "where nothing but the Monarchy is *salique*," writes Parson Yorick, "the legislative and executive powers of the shop not resting in the husband, he seldom comes there—in some dark and dismal room behind, he sits commerceless in his thrum night-cap, the same rough son of nature that nature left him." This department, with sundry

others, having been ceded totally to the women, Monsieur *le Mari* is little better than the stone under your foot—"a figure of 9 with the tail cut off," to use the polite periphrasis for a cypher applied to one of the Tichborne witnesses, at the recent notorious Newcastle meeting—a mere tolerated negation, like poor Mr. Tibbs, whose relative significance in Mrs. Tibbs' boarding house has been formulated by Boz:—"He was to his wife what the 0 is in 90—he was of some importance *with* her—he was nothing without her." Do they, then, order these matters better in France? Would it be a desirable consummation to cultivate a similar state of things by Act of Parliament? Does Mrs. Mantalini really need to be elevated to a vantage of yet greater ascendancy, upon a collection of sympathetic statutes of the realm? Whither, indeed, will not Mr. Hinde Palmer's powers of amendment ultimately lead us? May the result stop short of realising a pretty general concurrence in the paradox of Hugo de Bohun, in "Lothair," that all women—but no man—ought to marry. Indeed, of a bill very similar to that which was introduced by Mr. Palmer, Lord Penzance observed that, if it passed, it might be dubious how far there would remain any inducement to the male moiety of the community to enter into so perilous a contract as matrimony would then become. Yet, what may not the next session bring forth?—for, saith the old legend, the nineteenth century is to be the "century of women." Already, the Married Women's Property Act (1870), has placed its protégés in the position equivalent to that which Madame enjoys in France, under what the French code calls the *régime* of *biens separés*; and doubtless, many advantageous suggestions towards extending that Act might be derived by sending a judicious traveller into other regions, as remote from us in customs as in latitude, where the Amazons prevail and the tornado is rampant. At all events, it is obvious that the progressive spirit of modern innovation will not stop short at such halting improvements as those contemplated in the Married Women's Property Act (1870) Amendment Bill, to which we have adverted, a measure, indeed, though it was, as has been observed, only needing a clause for the purpose of having married couples registered under the Limited Liability Act. Admitted ills the Act of 1870 unquestionably did redress, and we are very far from quarrelling with it in detail; but, exceptional ills are ill-cured by remedies that convulse the constitution at large; and, before impetuously medicating ourselves with experimental Amendments, it is interesting, to say the least of it, to contemplate what would be the probable operation of the proposed panacea. On this point, however, we need not here recapitulate in full what may be found by referring back to a paper on "Man and Wife (Limited)," at p. 106 of this volume; and, for our present purpose, it will suffice to re-transcribe one passage from the *Saturday Review*—"The wife may either go into business with her husband, or, if she likes, she may start a rival shop and carry off his customers. If she provides the greater part of the capital, she will, no doubt, claim priority in the firm, and 'Smith and Husband' may possibly become a familiar sign. A lady who finds the dull routine of domestic duties wearisome, will be at liberty to seek excitement on the Stock Exchange, or go shares with cousin Charley in a racing stable. If the family accounts get into confusion, husband and wife will have the opportunity of bringing actions against each other. Each will, of course, have a separate banker and solicitor," &c. There is, indeed, nothing, apparently, to prevent a baron and femme from living together if they choose, and without wrangling—if they can; but may they, as here suggested, enter into a contract with one another for mutual participation in trading profits and losses—can Mrs. Doe, despite the protestations of her John, enter into partnership with Peter Stiles? What are the legal bearings of coverture in relation to trading co-partnership in particular?

By the common law, married women were disabled from entering into binding contracts, or from engaging in trade. They were, accordingly, incapable of entering into contracts of partnership, whether for trading or other purposes; holding themselves out as partners would not subject them to the responsibilities attaching to other persons so acting; and, if *de facto* partners, nevertheless, it was their husbands, and not themselves, who

should be considered as sustaining that character in point of law. When it happened that, under positive covenants, they were entitled to shares in banking houses, &c., their husbands were entitled and became partners in their stead. "The right of a married woman or of her husband," it is observed, "to vote in respect of shares held by her has not been judicially considered. Speaking generally, however, and without reference to the regulations of any particular company, it would seem that, if the shares belong to her as part of her separate estate, her husband has no right to vote in respect of them, and her vote is valid, notwithstanding his disapproval thereof. But, if the shares do not form part of her separate estate, she alone cannot in point of law be a member in respect of them, and cannot, therefore, vote; nor is her husband entitled to vote in respect of such shares, until he has become a member of the company in respect of them. Nor does it follow, from the fact that he is subject to liabilities in respect of his wife's shares, that he is entitled to the privilege of voting in respect of them." (1 Lind. Part. 575, 3rd ed.) The principle that marriage operated as an assignment to the husband of the wife's share in a partnership is forcibly exemplified by the decision of *Nerot* v. *Burnand*, 4 Russ. 260, 2 Bli. N. S. 215; and see *Wrexham* v. *Hudlestone*, 1 Swanst. 517 n., holding that the marriage of a feme sole partner operated as a dissolution of the partnership. This doctrine proceeds upon the ground that, in the absence of express agreement to the contrary, the marriage operated against the principle of *delectus personæ*, or the consent of the parties, by the introduction of a stranger into the partnership. It has, indeed, been treated by Collyer, and by other text-writers of authority, as only taking effect as a dissolution at will, but we rather incline to hold with Dixon that, in this case, the partnership (apart from the statute law, of which more hereafter) would be dissolved *ipse facto*. And it would seem to follow that, if the business were continued by the other co-partner and the husband, an entirely new partnership would be constituted between them. We are not aware that the question has ever arisen as to what would be the effect, as regards a partnership, of the marriage of a feme sole partner with a man who is *civiliter mortuus*. But, it will be borne in mind that a married woman, in such case, is competent to contract, and would be bound by the contracts of a partner. It may also be noticed here that, by the custom of London, a feme covert, trading without the interference of her husband, was considered in the city courts as a sole trader. Collyer infers thence that she might also trade in partnership. We would rather incline to hold, however, that an authority to involve herself in the complex transactions, responsibilities and duties of partnership, would not necessarily be imported, from her husband's consent that she should carry on trade as sole, unless, indeed, the trade could not otherwise be carried on either necessarily, conveniently or beneficially. We find similar laws, with respect to trading by married women, in France, Holland, Spain, Louisiana, &c. And, by-the-bye, it is said by Collyer that, when a husband and wife are partners in a foreign country where it is competent for them to contract in partnership, it would still be incompetent for them to sue in this country as partners. We should certainly think that this doctrine is not maintainable as a doctrine of public law; neither is it by any means borne out in its full latitude by the case of *Cosio* v. *De Bernales*, 1 C. & P. 266, n., Ry. & M. 102. In this country it followed, *a fortiori*, from the principles to which we have adverted, that, at common law, a husband and wife could not enter into a contract of trading partnership with one another. Could they do so in equity? There, if the wife have separate estate, she is regarded as a feme sole. And since debts and obligations incurred by her either expressly or impliedly on the credit of that estate could be enforced against it, although not against her personally, there seems no reason why it should not be liable for the debts of a partnership, or why, in a limited sense, she should not be considered as a partner. Then, as between husband and wife themselves, the doctrines of equity have also gone very far, as in *Woodward* v. *Woodward* 8 L. T. N. S. 749, where it was held that a married woman was entitled to sue her husband for money lent to him out of her *separate estate*, the Lord Chancellor observing that, "The old

common law has been entirely abrogated, and the power of the wife to contract with the husband has been fully established." So that we should think that the separate estate of a married woman would be liable for the debts of a partnership *in respect of it* between her and her husband, and that, in a limited sense and in a Court of Equity, she should be considered as a partner in such a partnership. "Whether at law, the husband of a married woman entitled to a share in a partnership for her separate use is liable as a partner, is a question," it has been observed, which, so far as the writer was aware, "has not been judicially determined; but, if the wife holds her share herself and not in the names of trustees, the husband will, it is conceived, be a partner in respect of such share. There are, indeed, cases in which it was decided that when a married woman was a shareholder in a company, and was herself registered as such, her husband was not liable either to be made a contributory, on the winding up of the company, or to be sued by *scire facias* by a creditor thereof. But these cases turned on particular statutory enactments, and do not by any means determine the general question above suggested:" 1 Lind. Part. 3rd ed. 86.

On many of the points we have mentioned, the Married Women's Property Act (1870), we need hardly say, has now an important bearing, as, indeed, will be sufficiently obvious by a mere statement of the terms of the first section alone; but our space will only permit us to advert to one or two matters in connection with it. That section provides, in effect, that, in respect of the wages and earnings of any married woman acquired or gained by her after August 9, 1870, "in any employment, occupation or trade in which she is engaged or which she carries on separately from her husband," and also as to any property acquired through the exercise of any "literary, artistic, or scientific skill," such married woman is to be placed in the position of a feme sole in respect of the beneficial enjoyment of such property. And by this Act as to such property, a married woman has acquired a personal legal status, with power to contract and to pursue legal remedies, free from the incapacities consequent on coverture. It appears to us that since this statute as to any partnership respecting industries, &c., within the terms quoted, there would no longer be any reason why the marriage (before or after the passing of the Act) of a feme sole partner should dissolve the partnership. This statute is a remedial one, and, although in derogation of the common law, should be construed so as to suppress the mischief contemplated and to advance the remedy. We hold, then, that, in respect of property as specified, a married woman may now be a partner; but as to whether she may be a partner with her husband, we were at first view inclined to hesitate, notwithstanding the terms of the section quoted. We think, however, that this statute does not enable her to engage in or carry on a partnership with her husband. And although, as we have seen, a different impression appears to prevail, neither do we think that an Amendment Act, only so wide in terms as that which was contemplated by Mr. Palmer, would achieve this object. So, under a statute of Massachusetts, which provides that a married woman may sell her separate property, enter into any contracts in reference to the same, and carry on any trade or business on her sole and separate account, in the same manner as if she were sole, it has been held that a woman may belong to a trading partnership if her husband is not a member thereof, but not if he is a member: *Plummer* v. *Lord*, 5 All. 460, ib. 481, 9 ib. 455; *Lord* v. *Parker*, ; 127: *Lord* v. *Davison*, ib, 1313; *Edwards* v. *Stevens*, ib. 315. We confess that, for our part, we should not desire it otherwise; even though the law in this respect may not be finely calculated to promote hymeneal commerce between money-bags, and although it may ruffle the current of true love between those of whom it is written that, "if their goods and chattels can be brought to unite, their sympathetic souls are ever ready to guarantee the treaty."—*Irish Law Times.*

PRODUCTION OF TELEGRAMS FROM THE POST OFFICE.

The decision of Mr. Justice Grove, with reference to the production in evidence of copy telegrams in the custody of Her Majesty's Post Office, will be received with unmixed satisfaction. The applica-

tion made to the learned judge was of a very peculiar character. Mr. Charles Russell, as counsel for the petitioners at the pending trial of the Taunton Election Petition, asked the interference of the judge for the purpose of obtaining from the Post Office not any specific telegraphic message, but the telegrams *en masse*, which passed through the office at Taunton during a stated period of time. Mr. Justice Grove, though not doubting in his own mind what answer he ought to make to this request, consulted his brother election judges, and, having been fortified by their opinion, refused either to interfere to compel the production of these telegrams, or even to say anything to the officials at the Post Office to procure their production. Upon this application and the judgment thus given we must first observe that, apart altogether from the question of public policy involved, no judge and no Court of Law or Equity could, in the face of the recent case of *Crowther* v. *Appelby*, 43 Law J. Rep. N. S. C. P. 7, on which we commented last week, venture to compel by threat of fine or imprisonment any servant of the Crown to produce any document contrary to the orders of the Crown as expressed through the proper officer. If the secretary of a railway company can refuse with impunity to produce a document because his masters have prohibited him from doing so, *a fortiori* would a servant of the Crown be protected. Probably, also, it would be held that copy telegrams in the custody of the State stand upon the same footing as secrets of State, State papers, and communications between Government and its officers. But it might be that the Post Office authorities would declare themselves ready to act exactly as the judge might in the exercise of his discretion direct, thus throwing the responsibility of production or non-production on the judge. Evidently this probability was in the mind of Mr. Justice Grove, when he expressed his opinion that he ought not even to say anything to the Post Office officials to procure the production of the copy telegrams. Assuming this to be the position taken up by the Post Office officials, we come to the question whether it is expedient or proper that copy telegrams *en masse* should be produced from the custody of the Post Office in a Court of Justice. We are not speaking of messages identified by the names of the parties by and to whom they have been sent, but of the whole lot of messages transmitted through a particular office in a given space of time. Telegraphy has opened up many new questions of law and policy, but such a question as this can be resolved on principles trite and familiar. Where the Government provides public means of communication open to all persons, and prohibits private enterprise directed to a similar object, the Government by implication pledges itself to the duty of keeping secret that which is entrusted to it for the purpose of communication. We need not recall the debates which arose on the conduct of Sir James Graham as Home Secretary in disregarding this rule, and disclosing the contents of the Mazzini letters seized during transmission through the Post Office. But between the interception and disclosure of a letter and the revelation of a telegram there is no sort of distinction. The Legislature also has expressed its opinion very clearly on the subject. By 26 & 27 Vict. c. 112, s. 45, a penalty not exceeding 20*l.* was imposed on any person in the employ of a telegraphic company improperly divulging the purport of a message; and by 31 & 32 Vict. c. 110, s. 20, any person in the Post Office disclosing the contents of a telegraphic message, contrary to his duty, is declared to be guilty of a misdemeanour punishable with twelve months' imprisonment. In reliance on the general principle already stated, and on the recognition of it by the Legislature, thousands of persons send telegraphic messages which could not be revealed to the public without damage to the feelings, the reputation, and the property of the senders, the receivers, or third parties; and it is manifestly better that election petitions should break down, actions at law fail, and honest defences collapse, than that such public mischiefs as these should be encountered. The proposition made at Taunton that the mass of telegraphic messages should be examined by one counsel on either side, betrays a very clear appreciation of the objectionable nature of the proposal made to the Court.

It is further to be observed that the application for the production of telegrams *en masse* is really an application not for evidence, but for discovery of evi-

dence; and discovery from utter strangers to the matter *sub judice* is altogether unknown to the law. A *subpœna duces tecum* presupposes knowledge of the existence of a particular document, and ability to specify and define the document. Here it was not known or proved that there were any telegrams which could or would ultimately be made evidence in the cause. There was no more than an expectation that something might turn up. But in a suit between A and B no Court has jurisdiction to call upon C, a mere stranger to the parties, to discover all papers in his possession, for the purpose of seeing whether by chance he has some document relating to the matter in issue.

Clear as we take the case to be against applications of this sort, and much as we welcome the decision of the judge refusing this particular one, we believe that in the trial of at least one election petition—that at Coventry—some use of telegrams not altogether unlike to that desired by counsel for the petitioners at Taunton was allowed. We have not the material for an exact account of what was done on that occasion, but probably the cases are distinguishable. At any rate we may take it that for the future the judges will follow the precedent established by Mr. Justice Grove.—*Law Journal.*

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

(Reported by Mr. H. J. Scott, B.A., Student-at-Law.)

McMaster v. Beattie.

Defence for time—Striking out false plea—34 Vict. cap. 12, sec. 8.

Held, that a plea pleaded merely for time, and admitted in a proceeding in the cause to be false in fact, will be struck out under 34 Vict. cap. 12, sec. 8, and leave given to sign final judgment.

This was an action on a promissory note, plea—payment. After issue joined, plaintiff examined defendant, under sec. 29 of Administration of Justice Act, 1873, when defendant admitted that he had not paid the note, and that the defence was put in only to gain time. An application to strike out the plea and all subsequent proceedings, under sec. 8 of 34 Vict. cap. 12, and enter final judgment, was granted.

[March 7, 1874.—Mr. Dalton.]

This suit was on a promissory note, and the plea payment. The plaintiff joined issue on this plea, and then, under the Administration of Justice Act, obtained an order to examine one of the defendants. At the examination this defendant swore that the note had not been paid—that the defence was merely put in for time—and that he had given instructions to his attorney to put in this same defence for the other two defendants.

Under these circumstances the plaintiff obtained a summons to strike out the plea, and set aside all subsequent proceedings, with costs against the defendants, on the ground that the plea was for the purpose of delay.

D. B. Read, Q. C., showed cause. The Courts had no jurisdiction before the Administration of Justice Act to entertain an application of this sort, and that Act does not give them jurisdiction. There is no rule of law requiring pleadings to be verified by affidavit, except in cases of abatement, and allowing this application would be equivalent to introducing such a rule. The Courts have continually held that they will not try the truth of pleadings by affidavits on chamber applications: *Smith* v *Blackwell*, 4 Bing., 512; *Nutt* v *Rush*, 4 Exch., 490; *Levy* v *Railton*, 14 Q. B. N. S., 418; *Rawstorm* v *Gandell*, 15 M. & W., 304; *Phillips* v *Clagett*, 11 M. & W., 84; also Archbold's Q. B. Practice, pp. 292—297, and *Gibson* v *Winter*, 2 N. & M., 737. Section 8 of 34 Vict. cap. 12, under which this application is made, was intended only for the case provided for in the former part of the section; that, namely, of several pleas being pleaded; and the whole section should be read and construed together. Even if meant to apply to the case of a single plea, in this case the plaintiff having joined issue, and thus having admitted the plea to be a good one, cannot now come in and try to set it aside. As to the intention of the Administration of Justice Act in giving power to examine, the 24th, 25th, and 29th sections must be read together, and from them it is very evident that the examination is to have reference only to matters to come into question at the tral of the cause. If the Legislature did not mean this, why did it give the power to examine only after issue joined? It will be a fraud on the statute, if it is turned to this use. The effect will be to do away with defences for time; and although it may be a question whether this would not be a good thing, still the Court ought not to do so without the express direction of the Legislature, as it will create a very great change in the practice of the Court.

J. K. Kerr, contra.—The plea is a fraud upon the Court, and ought not to be allowed to stand. Under the Common Law Procedure Act, sec

119, there might perhaps be some doubt as to the propriety of striking out the plea, as that only gave power to strike out pleas "so framed" as to embarrass or delay. But the Common Law Procedure Amendment Act, 34 Vict. cap. 12, goes further, and gives power to strike out any plea upon the ground of embarrassment or delay, and thus extends to the whole plea, and not merely to its form. As to the rule before the Administration of Justice Act, that the Court would not decide as to the truth of pleadings regular in form previous to the trial, the reason was, that it might not be put to the trouble of deciding between conflicting affidavits, and also that there might be no temptation to a defendant to put in affidavits on which he would have no cross-examination. This does not now apply, as there are no conflicting affidavits, and the evidence is taken in the same way as at a trial. There always was at Common Law, irrespective of statutory enactments, a rule that the Court would strike out sham pleas, the only difficulty being the proving them to be sham: Ch. Arch. Prac., pp. 292–297, and the cases there cited; *Gordon* v. *Hassard*, 9 Ir. C. L. Rep., appendix, 21; *Stokes* v *Hartnett*, 10 Ir. C. L. Rep., appendix, 20 *Bank* v. *Jordan*, 7 Ir. Jur. N. S., 28; *Leathly* v. *Carey*, 8 Ir. C. L. Rep., appendix, 1; *Nutt* v. *Rush*, 4 Exchequer, 490. As to their having pleaded over this is a case of the discovery of new facts, and we have availed ourselves at the very earliest possible moment of the power of obtaining the information. The Legislature has not given this power until issue is joined, in order to prevent its being used as a means of discovering some defence, and also that it might not come to be used as a matter of course, and thus greatly exhance the expenses of a suit.

Mr. Dalton.—This is an application to strike out the plea of the defendants, on the ground that it is false and merely for delay.

The action is against the maker and two endorsers of a promissory note. The plea by all the defendants is payment before action. Issue was joined by the plaintiff on the plea. Since then the plaintiff has caused the defendant, Beattie, the maker of the note, to be examined under the Administration of Justice Act of 1873, and this is his examination.—"I am one of the Defendants. I made the promissory note sued on in this action for $420. I made it in favor of Mr. Robbs, I think. I know that he and O'Dwyer are endorsers on the note. I know that the plaintiffs are the holders of his note. I did not pay this note, nor did the other defendants. I gave instructions to defend this suit for all three defendants. The object of the defence is to gain time to pay the amount. The whole amount, $420, and interest, is still due from the Defendants to the plaintiffs."

Upon this the plaintiff has moved to strike out the defendants' plea as false and pleaded for delay, upon the admission of the defendant himself made in the suit.

I think I ought to make the summons absolute.

At one time, undoubtedly, it was considered that the Court had a jurisdiction to strike out the plea of a defendant, and allow the plaintiff to sign judgment where it manifestly appeared that the plea was false. *Rickly* v *Proone*, 1 B. & C., 286, was a case of this kind. There, to a declaration for use and occupation, the defendant pleaded that he had delivered certain named goods to the plaintiff, as "satisfaction." The plea was struck out, upon an affidavit that it was false—the defendant not filing any counter affidavit. I believe that this is not the law now, and that the Court at this day does not feel that it has jurisdiction to force the defendant to verify his plea by affidavit, or to try on affidavits the truth of the plea—the law having assigned a different tribunal for such trial. This was settled by *Mornington* v. *Becket*, 2 B. & C. 81, and *Smith* v. *Backwell* 4 Bing., 512. These cases have been followed ever since, and no doubt the result from the cases of the present law is correctly stated in Arch. Prac. 11 ed, 291, that "the Judge will not interfere and strike out a plea upon the mere ground of its being false, although *the plaintiff swear* that it is in every respect so." Thus in *La Forest* v. *Langa*, 4 D. P. C. 642, a defendant pleaded that the bill sued on was outstanding in the hands of a third person, and upon affidavit that the plea was wholly false, and a production of a letter of the defendant in proof of it, in which the defendant requested from the plaintiff time for payment, it was said by Tindal, C. J., on a motion to strike out the plea,—"It is a plea upon which issue may be taken, and if we were to allow this rule, we should in effect be trying the case upon affidavit."

All this relates to pleas on which a single issue may be taken, and the reason which runs through the cases is this alone, that to strike out such a plea is an assumption by the Court of the power to try on affidavit that which, by the law, is to be tried by jury.

But there is another class of cases, viz., those where, from the form or substance of the plea,

a distinct and single issue cannot be taken, and in such cases it has always been the practice to strike out pleas manifestly false. 4 Ex. 490, and 14 Q. B. 418 are cases of this kind. The cases are numerous. A single instance will show how far the Courts have gone, and how much the falsity of the plea has influenced the mind of the Court beyond all other considerations. In *Smith* v. *Hardy*, 8 Bing. 435, to debt on a judgment, the defendant pleaded a release under seal, which had been destroyed by accident. The Court allowed the plaintiff to sign judgment on an affidavit that the plea was false; but it will be observed that here the plea was good in form and substance.

The present case, as it seems to me, stands clear from all these. I am not asked to try the truth of the plea upon affidavit, and it is not necessary to say that I could act upon the most conclusive and indisputable evidence, out of the cause itself, of its falsity. As to two of the defendants, they are not active in the defence. The defendant, Beattie, alone instructed the defence; and in his examination in this suit he says, in effect, the defendants owe the plaintiff all he claims, that the plea is false to his knowledge, and was pleaded for delay. Then, if I can look at this examination (and why should I not), what is there to try? And when we read of sham pleas, false in fact, what are such if this be not? All the difficulties which occur in such cases as I have cited seem to be removed by the fact that there is nothing left to try; and to allow the defendant to force the plaintiff to the expense and delay of proving at a trial that which the defendant himself asserts, in this cause, to be the truth, is to be passive where action is required, to allow the forms of law to be abused in the face of the court, and that which was meant solely for a defendant's protection to be perverted to inflict the merest injustice upon the plaintiff.

The Irish cases I have been referred to show that the Courts there are much more ready to act in striking out a false plea than the Courts in England; indeed, they treat a plea that is plainly false as necessarily a sham plea.

I therefore make the summons absolute, to set aside the plea, and for leave to the plaintiff to sign final judgment.

Order accordingly.

NOTES OF RECENT DECISIONS.

Abernethy v. Beddome.

Satisfaction piece—Signing before Attorney in the United States.

[February 25, 1874—Mr. Dalton.]

In this case a satisfaction piece was executed before a practising attorney in the United States, and the attorney's affidavit made before a notary public. Order applied for to enter same on roll.

Held, that signing before a practising attorney in the United States is a sufficient compliance with Rule 64, and order accordingly.

Elmsley v. Cosgrave.

Examination under A. J. Act Sec. 24—Clerk's affidavit for order.

[March 10, 1874—Mr. Dalton.]

In this case, the affidavit for order to examine under A. J. Act was made by managing clerk of attorney, and stated, "I am familiar with all the proceedings in this suit."

Held, that although a managing clerk's affidavit is sufficient under the statute, still it must state that he has some particular charge of the suit.

McCrum v. Foley.

Amendment under A. J. Act—Penal action.

[March 11, 1874—Mr. Dalton.]

This was a penal action against a magistrate. The notice required by section 10, Con. Stat. U. C. cap. 126, stated that the plaintiff intended bringing his action in one of the Superior Courts, while the writ was issued in the other. On an application to amend under the A. J. Act:

Held, that under the statute these forms could not be departed from, and that it could not be amended as if merely formal.

Queen ex rel. O'Reilly v. Charlton.

Amendment under the A. J. Act—Quo Warranto proceeding.

[February 24, 1874—Mr. Dalton.]

In this case, the fact of the relator being a candidate or a voter, who had voted or tendered his vote as required by sec. 131, 36 Vict. cap. 48, was omitted in the relation, but was contained in one of the affidavits filed.

Held, that the fact being already before the court, the relation could be amended under the A. J. Act.

CHANCERY CHAMBERS.

(Reported by T. Langton, Esq. M.A., Barrister-at-law.)

Wilson v. Black.

Computation of time—Con. Order 273, 406.

[The Referee, Dec. 6.—The Chancellor, Dec. 17.]

Replication was filed on the 9th of October. The sittings of the court were on the 30th.

Held, that replication was filed three weeks before the sittings.

If the time when the plaintiff should join issue is not three weeks before the next hearing term at the place where the venue was laid, the defendant cannot succeed on a motion to dismiss.

Paxton v. Jones.

Cross-examination—Affidavit on production—Con. Order 268.

[Jan. 28, 1874.—The Referee.]

An affidavit on production is not within the provisions of Order 268, and therefore the party making it does not thereby become liable to cross-examination upon it, except so far as this can be had by examination for discovery under Order 138.

Only one examination of a party under Order 138 can be had.

Long v. Long.

Sequestration—Con. Order.

[Jan. 30, 1874.—The Referee.]

To entitle a party to the issue of a writ of sequestration for non-payment of money, it is not now necessary to show that the order for payment and a demand thereunder have been personally served on the party ordered to pay.

Murcheson v. Donohoe.

Contempt—Married woman—Liability to attachment—35 Vict. c. 16, Ont.

[February 17, 1874.—The Referee.]

A married woman, a defendant, living with her husband, was ordered, as administratrix of a former husband, to bring certain accounts into the Master's office, in a suit in which her husband was joined as a co-defendant. On an application to commit her for disobedience of the order, it was contended that the rule laid down in *Maughan* v. *Wilkes*, 1 Chy. Ch. 91, that the husband must answer for his wife's default unless he showed some ground of exemption, was in effect abrogated by 35 Vict. c. 16 (Ont.), which renders married women liable for their separate engagements in certain cases.

Held, that sec. 8 of this Act was not applicable in the present case, where the marriage took place before the passing of the Act, and that the other sections did not affect the rule.

It was also contended that the reason for the rule in this instance was wanting, as it was shown that the married woman was a woman of great force of character, and not, *in fact*, under the control of her husband.

Held, that the husband must satisfy the court that he has used his best endeavours to get his wife to obey the order before he will be discharged from his liability to attachment.

Bennetto v. Bennetto.

Partition Act—32 Vict. c. 33 (Ont.)

[March 16, 1874.—Blake, V. C.]

The Partition Act of 1869 only applies to cases in which some common title in the petitioner and respondents to the land in question is admitted.

Where it appeared, from the statements in the petition, that two of several respondents claimed to be entitled absolutely to part of the lands sought to be partitioned, and that the petitioners contested such claim,

Held, the proper mode of proceeding as against these respondents was by bill in the ordinary way.

Hamelyn v. White.

Production—Communications between solicitor and client—Documents in use in business.

[March 9, 1874.—Strong, V. C.]

Communications between solicitor and client are privileged, no matter at what time made, so long as they are professional and made in a professional character. (*McDonald* v. *Putnam*, 11 Gr. 258 not followed.)

The following clause in an affidavit on production was *held* a sufficient statement of the nature of the document produced:—"I object to produce the documents set forth in the second part of the first schedule, on the ground that, being communications between solicitor and client, they are privileged.

A defendant was ordered to permit the inspection by the plaintiff of books in daily use in the defendant's business, which he objected to produce on that account, but which he was willing to produce at the hearing.

Documents formerly in the possession of the defendant, and filed by him in a Master's office in another suit, were directed to be produced by defendant upon his being indemnified by the plaintiff against the expense of obtaining them out of court.

Leonard v. Clydesdale.

Representative to a deceased party—Con. Order 56.

[March 2, 1874.—The Referee.]

A bill was filed against an executrix *de son tort*, charging that she had sold the personal estate of the deceased and applied the proceeds in the purchase of certain lands, and praying that she be declared a trustee thereof for the next of kin, and, if necessary, that the estate of deceased be administered.

An application was made under Con. Order 56 for the appointment of some person to represent the estate in the suit, on the ground that there was no personal estate outstanding, and the appointment in this way would save expense.

The motion was dismissed, it being *held* that the deceased was not "interested in the matters in question in this suit," and therefore the case was not within the provisions of Con. Order 56; and no account having been taken of the personal estate it could not be said that the personal representative of the deceased would be a merely formal party, for a balance might be found due from the defendant to the estate, which it would be the duty of the personal representative to administer.

ENGLISH REPORTS.

---

*Reg. v. Coote.

Desposition on oath of a prisoner—Admissibility in evidence—Criminating questions—Ignorantia juris—Caution to witness—11 *&* 12 *Vict. c.* 42, *s.* 18.

By an Act of the Quebec Legislature, certain officers called "Fire Marshals" are appointed with power to inquire into the origin of fires in Quebec and Montreal, and for that purpose to examine persons on oath. Upon an inquiry, held in pursuance of this statute, as to the origin of a fire in a warehouse occupied by the prisoner, he was examined on oath as a witness. No caution was given to him that his evidence might be used against him. At the time of such examination there was no charge against the prisoner or any other person. Subsequently the prisoner was tried for arson of the said warehouse, and the depositions made at the inquiry before the Fire Marshals were admitted as evidence against him.

* Present: The Right Hons. Sir James W. Colville, Sir Barnes Peacock, Lord Justice Mellish, Sir Montague E. Smith, and Sir Robert P. Collier.

Held (reversing the judgment of the Court of Queen's Bench for the Province of Quebec, Canada), that the depositions were properly admitted.

The depositions on oath of a witness legally taken are evidence against him, should he be subsequently tried on a criminal charge, excepting so much of them as consists of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer. The exception depends upon the principle "*Nemo tenetur seipsum accusare*," but does not apply to answers given without objection, which are to be deemed voluntary.

The witness's knowledge of the law enabling him to decline to answer criminating questions must be presumed—*Ignorantia juris non excusat.*

The statute (11 *&* 12 *Vict. c.* 42, *s.* 18), requiring magistrates to caution the accused with respect to statements he may make in answer to the charge, is not applicable to witnesses asked questions tending to criminate them.

[29 T. Rep. 111—March 18, 1873.]

By the Consolidated Statutes of Lower Canada, c. 77 s. 57, it is provided that when any person has been convicted of any felony at any criminal term of the Court of Queen's Bench, the court before which the case has been tried may, in its discretion, reserve any question of law which has arisen on the trial for the consideration of the Court of Queen's Bench on the appeal side thereof, and may thereupon postpone the judgment until such question has been considered and decided by the said Court of Queen's Bench. By s. 58, the said court shall thereupon state in a case, to be signed by the presiding judge, the question or questions of law, with the special circumstances upon which the same have arisen.

The said Court of Queen's Bench shall have full power and authority at any sitting thereof on the appeal side, after the receipt of such case, to hear and finally determine any question therein; and thereupon to reverse, amend, or affirm any judgment which has been given on the indictment on the trial of which such question arose, or to avoid such judgment and order an entry to be made on the record, that in the judgment of the said Court of Queen's Bench the party convicted ought not to have been convicted, or to arrest the judgment, or to order the judgment to be given thereon at some other criminal term of the said court, if no judgment has before that term been given, as the said Court of Queen's Bench is advised, or make such other order as justice requires.

The present appeal was from a judgment of the appeal side of the Court of Queen's Bench for the Province of Quebec, Canada, on a case reserved for that court by Badgley, J., under the powers of the above statute, on the trial of the respondent for arson.

The case so reserved was as follows :—

"The prisoner, Edward Coote, was indicted or arson of a warehouse in his occupation, and belonging to Alexander Roy.

"The indictment contained four counts,—The first with intent to defraud the Scottish Provincial Insurance Company ; second, to defraud the Royal Insurance Company ; the third to defraud generally ; and the fourth to injure generally ; upon his plea of not guilty, he was tried before the Court of Queen's Bench, at the criminal term of the said court, holden by me at Montreal, in this present month, before a competent jury empannelled in the usual manner, and, after evidence adduced by the Crown and by the prisoner, was found guilty, the jury returning a general verdict of guilty.

"In the course of the adduction of the evidence for the Crown, two depositions made and sworn to by the prisoner, with his signature subscribed to each, taken by the Fire Commissioners at their investigation into the cause and origin of the fire at his warehouse, before any charge or accusation against him or any other person had been made, were produced in evidence against him, and which, after having been duly proved, were submitted to the jury as evidence against him, after the objection previously made by the prisoner to their production in evidence, and after his said objection had been overruled by me—after the conviction of the prisoner, and before sentence was pronounced by me thereon, he moved the court by two motions filed in court in terms following :"

The case then set out the two motions, of which the first is immaterial, as Badgley, J., rejected it, and reserved no question respecting it ; the second was in the following terms : -

"Motion on behalf of the said Edward Coote, that judgment upon the said indictment, and upon a verdict of guilty thereon, rendered against him, be arrested, and that the said verdict be quashed and set aside, and the said defendant, to wit the said Edward Coote, be relieved therefrom, for, among others, the following reasons :"

Twenty-one reasons were then set out, the only ones material to the present appeal being in effect that the two depositions were inadmissible in evidence, because the said Fire Commissioners, before whom they were taken, had no authority to administer an oath, or take such depositions, and such depositions were not admissible as statements made by the prisoner, because they were not made freely and voluntarily and without compulsion or fear, and without the obligation of an oath.

The case then stated the rejection of the first motion, and that he, the said judge, though himself considering the reasons given insufficient to support the second motion, yet, as doubts might be held by the Court of Queen's Bench as to the legal production of the said depositions, reserved it, and held it over for decision with reference to the admission of the said despositions by the Court of Queen's Bench, appeal side.

The Fire Commissioners, before whom the depositions were taken, are appointed under the provisions of two statutes of the Provincial Legislature of Quebec (31 Vict. c. 32, and 32 Vict. c. 29), under which Acts they are empowered to investigate the origin of any fires occurring in the cities of Quebec and Montreal, to compel the attendance of witnesses and examine them on oath, and to commit to prison any witnesses refusing to answer without just cause.

The criminal law of England was introduced into Lower Canada at the time of the cession to the English, A. D. 1763, and the criminal law of England of that date still continues in force in the province of Quebec, Canada, except as it has been altered by Canadian statutes or imperial statutes applicable to Canada.

Previous to the year 1869 a statutable provision (Consolidated Statutes of Lower Canada, c. 77 s. 63) was in force, by which a power was vested in the Court of Queen's Bench, appeal side, if at the hearing of a case reserved they were of opinion that the conviction was bad, for some cause not depending on the merits of the case, to declare the same by its judgment, and direct that the party convicted should be tried again as if no trial had been had in such case ; but by a subsequent statute (32 & 33 Vict. c. 29 s. 80), passed by the Legislature of the Dominion of Canada shortly after the establishment of that confederation, for the purpose of assimilating the criminal procedure throughout the various provinces of the Dominion, that section was expressly repealed, and there were at the time of the respondent's trial statutable provisions giving right to a new trial in criminal matters, or regulating motions in arrest of judgment in criminal proceedings in force in the Province of Quebec, Canada.

On the 15th Dec. 1871, the reserved case came on for argument in ths Court of Queen's Bench, appeal side, before Duval, C. J., and Caron, Drummond, Badgley, and Monk, JJ., and on the 15th March, 1872, the court gave judgment in the following terms : "After hearing counsel as well on behalf of the prisoner as for the

Crown, and due deliberation had, on the case transmitted to this court from the Court of Queen's Bench, sitting on the Crown side at Montreal, it is considered, adjudged, and finally determined by the court now here, pursuant to the statute in that behalf, that an entry be made on the record to the effect that in the opinion of this court the production of the depositions made by the prisoner before the Fire Commissioners at Montreal was illegal, and, therefore that the evidence adduced on the part of our Sovereign Lady the Queen does not justify the verdict, which is hereby quashed and set side.

"But this court, considering that the conviction is declared to be bad from a cause not depending upon the merits of the case, does hereby order that the said prisoner, Edward Coote, be tried anew on the indictment found and now pending against him, as if no trial had been had in the case, and that for the purpose of standing such new trial, he be bound over in sufficient recognizance to appear on the first day of the next ensuing term of the Court of Queen's Bench, sitting on the Crown side, at Montreal, and thereafter from day to day until duly discharged."

From this judgment Badgley and Monk, JJ., dissented.

On the 15th March, 1872, an application was made by the Attorney-General for the Province of Quebec, Canada, on behalf of the Crown, to the said Court of Queen's Bench, for leave to appeal to Her Majesty in Her Privy Council, and such leave was refused.

On the 10th May, 1872, special leave was granted by Her Majesty in Council to appeal from the said judgment of the said Court of Queen's Bench, of the 15th March, 1872.

Sir *John B. Karslake*, Q. C. and *Bompas* for the appellant.—The depositions were properly received in evidence by the judge before whom the indictment was tried. They were admissible although made on oath, and although made by the prisoner as a witness whose attendance might have been compelled. At the time the depositions were taken, no charge had been made against the prisoner, and he had the right of refusing to answer questions tending to criminate him. The prisoner answered voluntarily, and Badgley, J., states that he "frequently exercised his privilege of refusing to answer certain questions." It was not necessary that the Fire Commissioners should caution the prisoner that statements made by him on the inquiry might be used in evidence against him. The statute (11 & 12 Vict. c. 42 s. 19) relates only to proceedings before magistrates, and caution given to accused persons. There was no ground for moving in arrest of judgment; nor had the court power to grant a new trial, for the statute empowering the court to grant a new trial (Consolidated Statutes of Lower Canada, c. 77 s. 57) was repealed by 32 & 33 Vict. c. 29, s. 80, which gives no such power. They cited the authorities given in the judgment *post*, and urther, 1 Taylor on Evidence, 743; Rosc. Crim. Evidence, 62; Joy on Confessions, 62, 68; *Reg.* v. *Gillis*, 17 Ir. C. L. Rep. 512.

Judgment was delivered by

Sir ROBERT P. COLLIER.—Edward Coote, the respondent, was convicted of arson, subject to a question of law reserved by Badgley, J., (the judge who presided at the trial), for the consideration of the appeal side of the Court of Queen's Bench, in pursuance of c. 87, sect. 57 of the Consolidated Statutes of Lower Canada. The question reserved was, whether or not the prosecutor was entitled to read as evidence against the prisoner depositions made by him under the following circumstances:—An Act of the Quebec Legislature appointed officers named "Fire Marshals" for Quebec and Montreal respectively, with power to inquire into the cause and origin of fires occurring in those cities, and conferred upon each of them "all the powers of any judge of session, recorder or coroner, to summon before him and examine upon oath all persons whom he deems capable of giving information or evidence touching or concerning such fire." These officers had also power, if the evidence adduced afforded reasonable ground for believing that the fire was kindled by design, to arrest any suspected person, and to proceed to an examination of the case and committal of the accused for trial in the same manner as a justice of the peace. Upon an enquiry held in pursuance of this statute as to the origin of a fire in a warehouse, of which Coote was the occupier, he was examined on oath as a witness. No copy of his depositions accompanies the records, but their lordships accept the following statement of Badgley, J., as to the circumstances under which they were taken: "Among the several persons examined respecting that fire was Coote himself, upon two occasions at an interval of three or four days between his two appearances, on each of which he signed his deposition taken in the usual manner of such proceedings, and which was attested by the commissioners. Upon both occasions he acted voluntarily and without constraint; there was no charge or accu-

sation against him or any other person; he was free to answer or not the questions put to him, and frequently exercised his privilege of refusing to answer such questions. Some days after the date of the latter deposition, and after the final close of the inquiry, Coote was arrested upon the charge of arson of his premises and duly committed for trial." At his trial the above-mentioned depositions were duly proved, and admitted in evidence after being objected to by the counsel for the prisoner. The objection taken at the trial appears to have been that to constitute such a court as that of the Fire Marshal was beyond the power of the provincial legislature, and that consequently the depositions were illegally taken. Subsequently other objections were taken in arrest of judgment, and the question of the admissibility of the depositions was reserved. It was held by the whole court (in their Lordship's opinion rightly), that the constitution of the court of the Fire Marshal, with the powers given to it, was within the competency of the provincial legislature; but it was further held by a majority of the court that the depositions of the prisoner were not admissible against him, because they were taken upon oath, and because he was not cautioned that whatever he said might be given in evidence against him, after the manner in which justices of the peace are required to caution accused persons, by an Act of the British Parliament adopted in this respect by the Colonial Legislature. The Court held the conviction to be bad, but inasmuch as the objection to it was not founded on the merits of the case, made an order directing a new trial. Their Lordships are unable to concur in what appears to be the view of one of the judges of the Court of Queen's Bench, that the law on the subject of the reception in evidence against a prisoner of statements made by him upon oath is so unsettled that every judge is at liberty in every case to act upon his own individual opinion. It is true that doubts have from time to time arisen on this subject, and that conflicting dicta, and indeed decisions, may be found upon it; but, in their Lordships' opinion, all such doubts have been set at rest by a series of recent decisions, not indeed promulgating any new law, but declaring what the law has always been if properly understood. In the case of *Rex* v. *Haworth*, 4 C. & P. 254, a deposition on oath made by the prisoner as a witness against a person named Sheard, on a charge of forgery, was received in evidence by Park, J., against the prisoner, on an indictment of forgery. In *Reg.* v. *Goldshede and another*, 1 C. & K. 657, Denman, J., admitted against the defendants, on a charge of conspiracy, answers which they had made on oath in a suit in Chancery. In *Reg.* v. *Sloggett*, Dearsl. C. C. 656, the prisoner was examined in the Court of Bankruptcy, under an adjudication against him, and answered questions tending to criminate himself without objection. At a certain stage of his examination he was told by the commissioner to consider himself in custody. On a case reserved, it was held by the Court of Criminal Appeal that so much of his examination as was taken before his committal to custody was evidence against him. In that case Jervis, C. J., observes: "The test is whether he may object to answer. If he may, and does not do so, he voluntarily submits to the examination to which he is subjected, and such examination is admissible as evidence against him." In *Reg.* v. *Chidley and Cummins*, 8 Cox C. C. 365, Cockburn, C. J., admitted a deposition made by Cummins, when Chidley alone was accused of the offence for which they were afterwards both tried. The learned editor of the 4th edition of Russell on Crimes (vol. 3, p. 418), thus reports a case of *Reg.* v. *Sarah Chesham*: "Where the prisoner was indicted for administering poison with intent to murder her husband, the coroner stated that he had held an inquest on his body, which was adjourned, and that the prisoner was present as a witness on the second occasion. No charge had at that time been made against her. She made a statement on oath, which the coroner took down in writing. Campbell, C. J., after consulting Parke, B., admitted the statement, and the prisoner was convicted and executed." The case of *Reg.* v. *Garbett*, Den. C. C. 236, accords with the foregoing. There the prisoner objected to answer certain questions on the ground that his answers might criminate him. His objections, which were based on reasonable grounds, were overruled, and he was compelled to answer. It was held by a majority of the judges on a Crown case reserved that the particular answers so given were inadmissible against him, but it does not appear to have been suggested that the rest of his deposition was not admissible. The case of *Reg.* v. *Scott*, D. & B. C. C. 47, seems to go somewhat further. It was there held by the Court of Criminal Appeal (Coleridge, J., dissenting), that although, under the Bankruptcy Act then in force (12 and 13 Vict. c. 106), the bankrupt was bound to answer certain questions, notwithstanding that they might tend to criminate him, nevertheless such answers were admissible against him, the compulsion under which he acted being one of law, and not the

improper exercise of judicial authority. From these cases, to which others might be added, it results, in their Lordships' opinion, that the depositions on oath of a witness legally taken are evidence against him should he be subsequently tried on a criminal charge, except so much of them as consists of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer. The exception depends upon the principle *Nemo tenetur seipsum accusare*, but does not apply to answers given without objection, which are to be deemed voluntary. The Chief Justice indeed suggests that Coote may have been ignorant of the law enabling him to decline to answer criminating questions, and that if he had been acquainted with it he might have withheld some of the answers which he gave. As a matter of fact, it would appear that Coote was acquainted with so much of the law; but be this as it may, it is obvious that to institute an inquiry in each case as to the extent of the prisoner's knowledge of law, and to speculate whether, if he had known more, he would or would not have refused to answer certain questions, would be to involve a plain rule in endless confusion. Their Lordships see no reason to introduce, with reference to this subject, an exception to the rule recognised as essential to the administration of the criminal law, *Ignorantia juris non excusat.* With respect to the objection that Coote when a witness should have been cautioned in the manner in which it is directed by statute that persons accused before magistrates are to be cautioned (a question said by Badgley, J., not to have been reserved, but which is treated as reserved by the court), it is enough to say that the caution is by the terms of the statutes applicable to accused persons only, and has no application whatever to witnesses. If, indeed, the Fire Marshal had exercised the power which he possessed of arresting Coote on a criminal charge (but which he did not exercise), then it would have been proper to caution him before any further statement from him had been received. A question has been raised on the part of the Crown whether or not the Court had the power of ordering a new trial, inasmuch as c. 77, s. 63, of the Consolidated Statutes of Canada, giving the Court power to direct a new trial, has been repealed by the subsequent statute 32 and 33 Vict. c. 29, s. 80, which does not itself in terms confer any such power, but in the view which their Lordships take of the cas it becomes unnecessary to determine this question. For the reasons above given their Lordships will humbly advise Her Majesty that the order made by the Court of Queen's Bench be reversed, that the conviction be affirmed, and that the said Court of Queen's Bench be directed to cause the proper sentence to be passed thereon.

EXCHEQUER CHAMBER.*

ROWLEY, (EXECUTRIX, &C.) v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Action under Lord Campbell's Act (9 & 10 Vict. c. 93) —Death by negligent accident — Compensation in damages for value of deceased's life—Value of an annuity for a person's life—Mode of calculating— "Carlisle Tables"—Evidence—Skilled witness—Misdirection—Proper mode of directing the jury—Exceptions.

[May 14 and June 26, 1873.]

The plaintiff, as executrix of R., deceased, brought an action under Lord Campbell's Act (9 & 10 Vict. c. 93), against the defendant company, to recover damages from them on behalf of the mother, widow, and children of the deceased, whose death was caused by the defendants' negligence. It appeared at the trial that the deceased's mother was entitled to an annuity of 200*l.* a year during the joint lives of herself and the deceased, and which was secured by his personal covenant. The deceased was an attorney in practice, and at the time of his death was forty years old, his mother's age being then sixty-one. On the part of the plaintiff, a witness was called who stated that he was an accountant, and was "acquainted with the business of life insurance," and having referred to the "Carlisle Tables," which he stated were used by insurance offices for obtaining information as to the average and probable duration of human lives of all ages, he gave evidence as to the average and probable duration of the lives of two persons of the respective ages of the deceased and his mother; and also as to the sum of money for which an annuity of 200*l.* a year for the life of a person of the mother's age could be purchased.

Objection being taken by the defendants' counsel to the admissibility of this evidence, it was ruled by the Lord Chief Baron to be admissible.

In summing up the learned judge told the jury that "they might, if they thought proper, calculate the damages to the deceased's mother by ascertaining what sum of money would purchase an annuity of 200*l.* a year for a person sixty-one years of age, according to the average duration of human life;" and that "they might

* Before Blackburn, Keating, Brett, Grove, Archibald, and Honyman, JJ.

also, if they thought proper, take as a guide in calculating the damages to the deceased's wife and children, that the probable duration of the life of a man forty years old, in the deceased's circumstances, was twenty-seven years and a fraction according to the Carlisle Tables."

Upon error, on a bill of exceptions to the ruling of the Lord Chief Baron in admitting the above evidence, and to his directions to the jury, it was.

Held, first (by Blackburn, Keating, Grove, and Archibald, J.J., Brett, J., dissenting, and Honyman, J., expressing no opinion on the point), that the average and probable duration of a life of the age in question was material and revelant to the question at issue, and could not be better shown than by proving the practice of a life insurance company, who learn it by experience, and that, therefore, the evidence objected to was admissible; and also (Brett, J., doubting) that the witness, though not an actuary, was competent to give the evidence, subject to remarks on its weight.

Secondly (per totam curiam), that the direction to the jury with reference to the calculation of the damages to the mother, was wrong for the following reasons respectively:—

By Blackburn, Keating, Grove, and Archibald, JJ. The direction was wrong, first, because it did not notice the fact that the annuity lost by the deceased's death was for the joint lives of the mother and her son, and was therefore of less value than one for her own life only; and, secondly, because the annuity was secured only by the deceased's personal covenant, and was, therefore, of less value than an annuity on Government or other very good security, to which latter the evidence given had reference.

By Honyman, J.—The direction was wrong on two grounds. First, as authorising the jury to fix the term for which an annuity is to be purchased, solely by reference to the average duration of human life, without taking into account the state of health and condition of the annuitant. Secondly, in allowing the jury to disregard the fact that the annuity lost by the defendants' negligence was secured only by the personal covenant of a professional man, and would therefore become practically valueless by his inability, through ill health or loss of business, to keep up the annual payments.

By Brett, J.—The proper and only legal direction to the jury would have been to tell them that "they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, under all the circumstances, a fair compensation," and therefore the direction complained of was wrong in leaving it open to the jury to give the utmost amount which they might think to be an equivalent for the pecuniary mischief done. *Bristow* v. *Sequeville* (5 Ex. 275; 19 L. J. 289 Ex. 3 Car. & Kir. 64); *Blake* v. *The Midland Railway Company* (18 Q. B. 93; 21 L. J. 233 Q. B.); *Armsworth* v. *The South-Eastern Railway Company* (11 Jur. 758), referred to, discussed and approved.

Thirdly (by Blackburn, Keating, Grove and Archibald, J.J., Brett, J., dissenting, and Honyman, J., expressing no opinion on the point), that the direction to the jury as to the mode of calculating the damages to the deceased's wife and children could not be construed as meaning more than that the probable duration of the life of a man of forty, in the deceased's circumstances, according to the "Carlisle Tables," was an element to be taken by the jury into consideration with the rest of the evidence, and, if that were so, it was unexceptionable.

Fourthly (by Blackburn, Keating, Grove, and Archibald. J. J.), that the jury might properly be directed to consider the lives in question as average lives, unless there was some evidence to the contrary; and, if there were such evidence, the party excepting ought to have placed it on the bill of exceptions.

[This case will be found reported at length in 29 Law Times Rep. N. S., 180.]

UNITED STATES REPORTS.

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY.

CHRISTMAN v. BAURICHTER.

Partnership—Shares.

The assets of a partnership were distributed by a master, in proportion to the capital advanced by each partner. Exceptions were filed, upon the ground that the assets should be divided equally, but were overruled by the court, and the master's report confirmed.

Exceptions to master's report.

Opinion of the court by Finletter, J.

The capital invested was $2,900, of which the plaintiff furnished $2,000, and the defendant $900. The business was unprofitable, and the assets are about $1,400. The master distributed this sum in proportion to the capital advanced by each, and charged the costs equally.

The defendant excepts, 1st. Because the assets should have been shared equally; and 2nd.

Because all the costs should have been imposed upon the plaintiff.

Articles of partnership are not intended to define all the rights and duties of partners *inter se*. Much is left to be understood and determined by general principles, which are always applicable when not clearly excluded.

They are to be construed so as to defeat fraud, and the taking of unfair advantages. Lindley on Part., pp. 841 and 843.

In the case before us, the articles of agreement provide that "the profits shall be divided equally." And in case of the dissolution of this copartnership, from whatever cause, the parties hereto agree to and with each other that they will make a true, just and final account of all things relating to their said business, and in all things truly adjust the same. And after all the affairs of the copartnership are adjusted, and its debts paid off and discharged, then all the stock and stocks, as well as the gains and increase thereof, which shall appear to be remaining either in money, goods, wares, fixtures, debts or otherwise, shall be divided between them."

It is clear there can be no division of assets until they shall have made "a true, just and final account of all things relating to their said business, and in all things truly adjust the same." Not the least of the things relating to their said business, are the accounts of the individual partners with the firm. They are some of the affairs of the copartnership, the adjustment of which they have made necessary to a division of the assets.

There is no allegation that "equally" was omitted from the clause by fraud or mistake. We cannot interpolate it; for that would be adding to the written contract of the parties.

There is no ambiguity in the language used; and as it stands, we must apply the principles of instruction. "Divided," means divided according to law.

Partnership arises from a contract to join in lawful business, and to divide the profits and the losses. The controlling idea is a division of the profits. The courts have always held that a partnership existed whenever the profits were divided; even though the parties may have agreed otherwise.

It nowhere appears that a division of assets enters into the definition of partnership. That, indeed, could only work a dissolution. This should be kept in view when we consider the language of judges and text writers in reference to the "shares" of partners. That term in an active partnership could mean only a division of profits or losses. In the settlement of the affairs after dissolution, its meaning could not be enlarged. It could not therefore include the capital. That must be distributed upon othe principles, or by special agreement.

Capital is the conjoined means of each partner, to be used for a specific purpose. Its component parts should be none the less the property of the individual members when dissolution has occurred, because of the combination.

It may be considered well settled that "when there is no evidence from which any satisfactory conclusion as to what was agreed can be drawn, the shares of the partners will be adjudged equal."

What follows from this? Equality in the thing created, in its objects, in authority, and in the profit and loss. It does not imply equality in the component parts of that by which the agreement of the parties was made effective. When the fabric is useless for the purposes of its creation, natural equity would suggest that to each should belong whatever he had contributed thereto. Any other rule would be a continuing temptation to him who had furnished the smaller part, to violate his duty as a partner, and thereby compel a dissolution.

Accordingly we find in Lindley on Part., p. 696, "when it is said that the shares of partners are *prima facie* equal, although their capitals are unequal, what is meant is, that losses of capital, like other losses, must be shared equally; but it is not meant that on final settlement of accounts, capitals contributed unequally are to be treated as an aggregate fund, which ought to be divided between the parties in equal shares."

When a partnership is created there are two distinct parties interested therein. 1st. The individual members. 2nd. The conjoined members or firm. The firm represents the capital. It is therefore debited with the amount paid in by each partner.

But there must be also an account for each of the members, in which he is credited with what he brings into the business, and debited with what he takes out of it.

These accounts show how they stand in relation to the firm, and to each other. Upon a final settlement they must be balanced just as any other. This would effectually preclude the possibility of an unjust distribution of the assets of the partnership.

In stating an account between partners, each should be credited with what he has brought into the enterprise, and debited with what he has taken out. If there is no evidence as to the

amount contributed by them, the shares of the whole assets should be considered equal.

Upon dissolution after the debts are paid, the advances should be first paid, and then each partner should be paid ratably what is due to him in respect of capital upon the settlement of the accounts of all the partners. If there be a residue, it should be divided as profit in equal shares, unless otherwise agreed upon. The losses of capital, if not specially provided for, must be borne equally. Watson on Part., 285; Lindley on Part., pp. 623 and 827; *West* v. *Skip*, 1 Ves. Sr. 242.

The master has been governed in his distribution substantially by these principles. The costs of the proceedings have arisen from a difference of opinion upon the articles in reference to a division of the assets. In this no blame can be ascribed to either party; and therefore the costs were properly charged in equal portions.

The exceptions are dismissed.

U. S. CIRCUIT COURT—MINNESOTA.

Rahilly v. Wilson.

Warehouse Grain Receipts—Sale—Bailment.

1. Where grain is stored in an elevator warehouse with the understanding implied from the known and invariable course of business, that it may be sold by the warehouseman, and that when the depositor shall be ready to surrender the receipt of the warehouseman therefor, the latter will give the highest market price, or the same amount of grain of the like quality, but not the identical grain deposited nor grain from any specific mass, the transaction is a sale and not a bailment.
2. Sales and bailments stated.

[Minnesota, U. S., December, 1873.]

This was an appeal in bankruptcy from the decree of the district court, granting the relief prayed in the original bill of Rahilly, filed for himself and the other warehouse grain receipt holders, and dismissing the cross bill of the First National Bank of St. Paul.

The suit was brought in the district court to settle the title to twenty-one thousand five hundred bushels of wheat, or its representative in money, now lying in that court.

Geo. Atkinson & Co., and their successors, Atkinson & Kellogg, were engaged at Lake City as warehousemen and commission and forwarding merchants, during the fall of 1868, and up to December 8th, 1870, when they filed their petition in bankruptcy, and were adjudicated bankrupts.

The firm of George Atkinson & Co. was composed of George Atkinson alone until April 1st, 1870, when Kellogg became a partner. The old name was used until September, and was then changed to Atkinson & Kellogg, and so continued until their failure, at which time they had in their warehouse the wheat in controversy, which was taken possession of by the assignee in bankruptcy.

At the date of their bankruptcy, they had outstanding warehouse receipts issued to farmers to the amount of about thirty-five thousand bushels, representing Nos. 1 and 2 grades of wheat, and two receipts dated November 23, 1870, to the amount of twelve thousand bushels, issued as collateral security for the payment of three drafts given to pay an overdrawn bank account with their bankers, to the amount of ten thousand dollars. These two receipts were issued to the drawee named in the drafts, and they had been endorsed over to their bankers. They represented twelve thousand bushels of wheat, and are now held by the First National Bank of St. Paul, having come into its possession in the course of a transaction hereafter mentioned.

The complainant, a farmer to whom some of these receipts had been issued in behalf of himself, and the others holding receipts to the amount of thirty-five thousand bushels, filed this bill against the assignee, and seeks to appropriate the fund exclusively to the payment of their receipts. The bank, by stipulation, is made a party defendant, has answered the bill, and also filed a cross bill, alleging that it has, to the extent of its claim, a prior right to payment out of the fund in court.

Both suits were heard together in the district court upon proofs taken.

The complainant, Rahilly, and other owners, on whose behalf he sues, held receipts in the following form:

Not good unless Countersigned by Warehouseman.

Lake City, Minn. . . . 1869

Warehouse of George Atkinson & Co.
Rec'd *in store*, of P. H. Rahilly..bush No...Wheat

(Signed) Geo. Atkinson & Co.
. . . Per Atkinson.

The receipts issued by Atkinson & Kellogg were similar, with the addition of the words "subject to warehouse charges and advances," and an omission of the words "in store."

The proofs show that Atkinson & Kellogg were the owners of an elevator in Lake City, constructed in the usual manner, for the purpose of receiving, storing and discharging grain—the elevating machinery being propelled by steam. There are several similar buildings in the same city, and the proofs show that business

in them is conducted in the same general manner. The wheat is brought in by the farmers and is either purchased and paid for at the time by the preprietors of the elevators, or received by them and receipts issued therefor, like the one above copied.

Wheat is classified or graded into what is termed No. 1. No. 2, and rejected. Wheat when received in either mode, is tested, graded, and put into a common bin, each grade being kept distinct, but all of the same grade is mingled together, and this is the invariable practice and known to be so. The warehousemen do not keep the identical wheat on hand for which receipts are issued, but sell and ship at their pleasure : at least, the evidence shows that this is the general practice. The receipts specify *no time for the delivery* of the wheat to the depositor, but the usage or custom is that the holder may select his own time for presenting them, and demand either the market price of the grain on that day, *or* the quantity and quality of the grain called for in the receipt. It is expected that the ticket-holder will give the warehousemen who issued it the first privilege of buying, if he will pay as much as the holder can obtain elsewhere. In the event of the holder selling to the warehouseman, the latter receives no storage, unless the grain has been carried over the winter ; but if he demands grain, or if he sells the receipt to others, who demand grain instead of the market price or value, then the practice is to charge storage. The evidence shows that it seldom happens that the depositor demands grain, but almost invariably elects to take the money, that is the highest market rate of the grade of grain mentioned in the receipt on the day when he closes the transaction and surrenders the instrument. The warehouseman often makes advances on these receipts, charging interest.

The bankrupts, in addition to receiving wheat of farmers and issuing storage tickets as above, also purchased wheat for themselves under an arrangement with Eames and Co., of St. Paul, whereby the latter were to allow them a commission or compensation for their services, of two cents per bushel. Wheat thus purchased was paid for by the bankrupts' own checks on local banks, and the bankrupts reimbursed themselves by drafts drawn from time to time on Eames & Co., on account of wheat shipped to them. All wheat thus purchased was graded and put into its proper bin, mingled with wheat for which receipts or tickets were issued ; and when shipments were made, the grain was taken from the amount in the elevator building. As wheat was being constantly received and constantly shipped, the amount in the elevator fluctuated from week to week. In the summer of 1870, before the new crop of that year came in, the bankrupts' elevator was entirely cleared of grain, although many of their receipts, issued in 1869, were then outstanding.

The storage capacity of the bankrupts' warehouse was about 60,000 bushels, although the amount of wheat which was received, handled and discharged therefrom in a year largely exceeded this amount.

When they failed they had on hand 21,500 bushels of wheat, of which about 18,000 had been purchased within a week previous to the failure and mixed with grain then in the building. To pay for this 18,000 bushels, the bankrupts drew cheques on their local bankers, Williamson and Co., and between the 15th and 17th of November, 1870, drew in favor of these bankers three drafts on Eames & Co. for $10,000, which were dishonored and returned to Williamson & Co., who demanded warehouse receipts as security, and on the 23rd day of November, when it was known that the bankrupts had stopped business, and were in failing circumstances, the bankrupts issued two warehouse receipts for $12,000, which afterwards came into the hands of the First National Bank at St. Paul, as collateral security, with full notice of all circumstances.

The district court held that this transaction was an attempt on the part of Williamson & Co. to obtain from the bankrupts an illegal preference, contrary to the bankrupt act, and that the St. Paul bank was affected with notice thereof, and it accordingly dismissed the cross-bill of the last named bank, but decided that the ordinary receipt holders were entitled to the grain on hand at the time the petition in bankruptcy was filed. From the decree dismissing the cross-bill, the St. Paul bank appeals, and from the decree on the original bill, the assignee in bankruptcy appeals.

E. C. Palmer & James Gilfillan for the assignee ; *George L. Otis*, for the First National Bank of St. Paul ; *Bigelow, Flandrau & Clark*, for the complainant, Rahilly.

DILLON, Circuit Judge.—The proofs satisfy me that the invariable and known course of business at the elevator warehouse in Lake City, was to mingle together all grain of the same grade, whether purchased outright and paid for at the time, or received on tickets specifying the grade and quantity, and which contemplate the future delivery of the like amount of the same grade of wheat to the holders of such receipts

when they should call for it, or the payment in money of the value of that amount and quality of grain. Those who deposited wheat must be taken to know, and in fact did know, that it would be thus mingled with other grain ; that is would be shipped and sold by the warehousemen, when the latter should deem it to be for their interest (for such was the uniform practice), and consequently if the depositor should demand wheat instead of the value of the wheat, he would not receive, unless by accident, any of the identical wheat deposited, nor any of the immediate mass into which it went. As wheat was being daily received and constantly shipped, the amount on hand fluctuated from time to time. In July, 1870, there was not a bushel of wheat in the elevator building, although many receipts for the crop of the previous year, or years, were outstanding. The proofs show that it was very unusual to deliver wheat to the depositor, as he almost always chose to take the value of the amount and quality called for in the receipt at the date when he desired to surrender it and close the transaction.

Under these circumstances the question is, what is the relation which exists between the grain depositor and the warehouseman ? Is the depositor a bailor, simply, and the warehouseman a bailee, or is the former a seller, and the latter a purchaser, of the wheat ? The district court held the former theory, and that the holders of outstanding receipts were entitled to the grain in the warehouse at the time of the failure of the bankrupts, and that as the amount therein did not equal the amount called for in the outstanding receipts, they must share *pro rata*. This view proceeds upon the ground that the title in the grain deposited does not pass to the warehouseman, but remains in the depositor, and that the latter has the title at all times to an amount of wheat in the warehouse equal to that called for in his receipt ; and it is contended that if sales are made by the warehouseman, this is a conversion of the depositor's property, and if other like property is placed in the warehouse, the law will imply that it is placed there in substitution for that which was wrongfully removed, and hence the grain at any time on hand belongs to the depositors to the extent of their receipts or tickets. It seems to me that this view cannot be maintained, and that it would lead to difficulties and confusion, and that it is against the established legal principles by which sales and bailments are discriminated. If this view is sound and the warehouse should burn without the fault of the owner, this would be a defence to any demand on the part of the ticket holder either for the wheat or its value—a proposition which cannot, I think, be maintained, and which is against the precise point adjudged in several well-considered cases : *Chase* v. *Washburn*, 1 Ohio St. 244, 1853 ; *The South Australian Ins. Co.* v. *Randall*, Law Rep. 3 Privy Council Appeals, 101, 1869.

Viewed in the light of the uniform course of business, the contract is not one of bailment proper, but one (*mutuum*) where the property passes to the mutuary or receiver, and is delivered to him for his own use or consumption, and where he is not bound to return the identical article in its original or altered shape, but property of the same kind and value ; in which case it is a sale, and the title passes, and the receiver becomes a debtor for the stipulated return. (Jones on Bailments, 64, 102 ; Story on Bailments, sec. 439 ; 2 Kent's Com. 590.)

That this is a correct view of the relations between the wheat depositor and the bankrupts is expressly adjudged in the following cases, which, in their facts, are identical with the one under consideration : *South Australian Ins. Co.* v. *Randall*, *supra* ; *Chase* v. *Washburn*, *supra* ; *Lonergan* v. *Stewart*, 55 Ill., 44, 1870 ; *Johnson* v. *Brown*, *infra*. See *Myers* v. *Adams*, 8 Nat. Bankr. Reg. 214 ; Stearns & Raymond 26 Wis. 74.

Applying the principle above mentioned, the Privy Council in the case of the South Australian Insurance Co., in an elaborate judgment, decided, when corn was deposited by farmers with a miller to be "stored," and used as part of the current or consumable stock or capital of the miller's business, and was by him mixed with other corn deposited for a like purpose, subject to the right of the farmers to claim, at any time, an equal quantity of corn of the like quality, without reference to any specific bulk from which it is to be taken, or in lieu thereof, the market price on any equal quantity, on the day on which he made his demand, with a small charge for general purposes ; that the transaction was a *sale* by the farmer to the miller of the corn deposited, and not a bailment. In giving their lordships' judgment, Sir Joseph Napier says : "It appears to their lordships that there is no sound distinction, in principle, between this, and the case of money deposited with a banker on a deposit receipt ; * * * that it is not the case of a possession given (by the farmer) subject to a trust, but that it is the case of property transferred for value, *at the time of delivery*, upon special terms of settlement : Law Rep. 3 Privy Council Appeals 109, 113.

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-

tion to the milk furnished; Baxter's interest in the cheese, etc., was sold under an execution against him. *Held*, that the sale by the factory converted his interest into a money demand, and this interest was, therefore, not the subject of a levy. The arrangement at the factory did not constitute the farmers partners nor tenants in common in the cheese; nor was there an agency or bailment as to the particular milk delivered. It was a sale of milk to be paid for in a certain time and manner.

On the general subject see and compare *Cushing* v. *Breed*, 14 Allen, 370; *Warren* v. *Milliken*, 57 Maine, 97; *Dale* v. *Olmstead*, 36 Ill. 150; 2 Kent Com., 12th ed., 90, and cases cited in Mr. Holmes' note.

SUPREME COURT OF PENNSYLVANIA.

WOLFORD v. HERRINGTON.

Trust ex maleficio.

[*Pittsburgh Legal Journal*, Oct. 27, 1873.]

Error to Common Pleas of Crawford County.

SHARSWOOD, J.—Upon this writ of error we have nothing to do with the competency of the witness, Mrs. Wolford. Her testimony was admitted, and forms part of the evidence. Had it been rejected, *non constat* that the defendant would not have strengthened his case by other testimony, he might have proved *aliunde* that she had a deed for the property, or he might have produced and offered the deed itself. He had a perfect right, when the evidence was in, to rely upon it. Her testimony alone, if believed by the jury—and there was no contradiction of it—showed a clear case of fraud on the part of Herrington within our late decisions of *Beegle* v. *Wentz*, 5 P. F. Smith, 369, and *Boynton* v. *Housler*, 21 *Pittsburgh Legal Journal*, 17. She had a claim to the land in her own right by an unrecorded deed—whether good or bad—conveying a good title or not, is unimportant; and these cases settle that where one having any interest is induced to confide in the verbal promise of another that he will purchase for the benefit of the former at a sheriff's sale, and in pursuance of this allows him to become the holder of the legal title, a subsequent denial by the latter of the confidence is such a fraud as will convert the purchaser into a trustee *ex maleficio*.

But we are of opinion, also, that if the testimony of John Wightman—a clearly competent witness, admitted without objection—is believed, it was sufficient to make Herrington a trustee *ex maleficio*, independent of any interest in the land in Mrs. Wolford. He testified that at the time of the verbal contract Herrington distinctly agreed that he would execute a writing declaring the trust before he bid the property off. At the time of the sale he did not deny but evaded the performance of this promise, by saying he would get his lawyer to write it after the bidding. It was written, and then he refused until the deed was acknowledged. In one of the earliest cases on this subject in Pennsylvania, *Thomson's Lessee* v. *White*, 1 Dall. 447, decided in 1789, where a husband and wife, having no children, conveyed the estate of the wife to a stranger, who reconveyed to them as joint tenants in fee, under a parol agreement between the husband and wife that the husband should settle the fee upon the wife's heirs, and the husband died without making the settlement, it was held that the parol evidence was admissible to establish the agreement. Mr. Chief Justice McKean said: "Where a party is drawn in by assurances and promises to execute a deed, to enter into a marriage, or to do any other act, and it is stipulated that the treaty or agreement should be reduced to writing, although this should not be done, the court, if the agreement is executed in part, will give relief." When this case was cited before the same eminent judge soon after, in *Plankinham* v. *Carr*, 1 Yeates, 370, he said: "The case of *Thomson* v. *White* was that of a fraud and an exception to the general rule." So it has been classed in the numerous subsequent cases in which it has been cited with approbation in the opinions of this court. *Wallace* v. *Baker*, 1 Binn. 616; *Drum* v. *Les see of Simpson*, 6 Binn. 482; *Cozens* v. *Stephenson*, 5 S. & R. 426; *Overton* v. *Tracy*, 14 S. & R. 326; *Oliver* v. *Oliver*, 4 Rawle, 144; *Robertson* v. *Robertson*, 9 Watts, 34; *Pugh* v. *Good*, 3 W. & S. 58; *Miller* v. *Pearce*, 6 W. & S. 100; *Morey* v. *Herrick*, 6 Harris, 128. In short, the principle settled in *Thomson's Lessee* v. *White*, is a landmark of our law, and is well generalized by Mr. Justice Duncan in *Overton* v. *Tracy*, *supra*: "If one of the contracting parties insists on a certain stipulation and desires it to be made a part of the written agreement, and the other by his promise to conform to it, as if it was inserted in the written agreement, prevents its insertion, this is a fraud, and chancery will enforce the agreement as if the stipulation had been inserted. Having no court of chancery, our common law courts have constantly acted upon this principle from *Thomson* v. *White*, 1 Dall. 424, to *Christ* v. *Diffenbach*, 1 S. & R. 464, in a succession of decisions, varying in their circumstances, but all bottomed upon this principle." The case before us is much stronger than *Thomson* v. *White*, for there was no evidence to show then that wher

the party made the promise he did not mean to comply with it in good faith, but circumstances evinced the contrary. The fact was that he had procured a settlement to be drawn by a conveyancer, which his wife refused to sign, because it contained a remainder to the "issue of the bodies of her three half sisters," one of whom was unmarried, which she thought an indelicate expression; and on his death bed he expressed great uneasiness at not having made a will, and soon after the declaration lost his reason. In noticing the case in *Oliver* v. *Oliver*, *supra*, Mr. Justice Rogers said: "It has never been doubted that he entered into the contract in good faith." In the case before us, from Herrington's evasion of his promise at and after the bidding, and his final refusal, there was reason to infer that when he made the agreement he did not mean to perform it, and that the whole arrangement was sought by him for the very purpose of deceiving and defrauding the Wolfords, and becoming the owner of their property at a price below its true value. When, however, it is a part of the agreement that the trust shall be declared in writing, or it is shown that the trust was not inserted in the deed under a stipulation to that effect in consequence of the verbal promise to perform it, such fraudulent intent at the time of the agreement need not be shown in order to establish the trust. The fraud consists in the fraudulent use of the instrument, as was decided in *Oliver* v. *Oliver*. It is true that it has been since held in *Jackman* v. *Ringland*, 4 W. & S. 149, that where there is nothing more in the transaction than is implied from the violation of a parol agreement, equity will not decree the purchaser a trustee; which was affirmed in *Barnet* v. *Dougherty*, 8 Casey, 371, *Kellman* v. *Smith*, 9, Ibid, 158, in the latter of which Mr. Justice Strong said: "The fraud which will convert the purchaser at a sheriff's sale into a trustee, *ex maleficio* of the debtor, must have been fraud at the time of the sale." But in none of these cases did the element exist of a promise at the time to execute a declaration of trust in writing, upon the faith of which the purchase was made. In *Jackman* v. *Ringland* the opinion was by Mr. Justice Rogers, who does even refer to his own opinion in *Oliver* v. *Oliver*, and evidently did not suppose that there was any conflict. In *Kellman* v. *Smith*, Mr. Justice Strong cites *Robertson* v. *Robertson*, 9 Watts, 32, in the opinion in which, by Mr. Justice Rogers, *Thomson's Lessee* v. *White* is cited with approbation as a case of fraud. He would undoubtedly have noticed it if he had supposed the opinion he was then pronouncing overruled it. *Thomson's Lessee* v. *White*, and *Oliver* v. *Oliver*, have never been shaken or overruled. These decision are founded upon sound reason. Where it appears that the understanding at the time of the verbal promise was by a writing to comply with the provisions of the statute of frauds, it is something more than a mere verbal promise. The opposite party relies upon the special stipulation to reduce it to writing and thus make him secure. A chancellor would decree its specific performance. If in confidence that such writing will be executed the legal title is acquired, it is a fraud in the purchaser to refuse to do what was promised, and claim to hold discharged of it, which will constitute him a trustee *ex maleficio*. We are of opinion that the case below should have been submitted to the jury. Some difficulty may arise perhaps upon another trial, growing out of the fact that John Wolford, the defendant below, was the defendant in the execution. It may be well for the counsel to consider the propriety of applying to the court to permit Mrs. Wolford also to be made a defendant.

Judgment reversed, and *venire facias de novo* awarded.

Agnew and Williams, JJ., dissent.

CHANCERY SPRING CIRCUITS, 1874.

THE HON. THE CHANCELLOR.

TORONTO	Tuesday	March 24th.

THE HON. THE CHANCELLOR.

EASTERN CIRCUIT.

LINDSAY	Tuesday	April 7th.
PETERBORO'	Friday	" 10th.
BELLEVILLE	Thursday	" 16th.
BROCKVILLE	"	" 23rd.
CORNWALL	Tuesday	" 28th.
COBOURG	"	May 5th.
KINGSTON	"	" 12th.
OTTAWA	"	" 19th.

THE HON. VICE-CHANCELLOR STRONG.

WESTERN CIRCUIT.

LONDON	Wednesday	March 18th.
WOODSTOCK	"	" 25th.
STRATFORD	"	April 1st.
GODERICH	"	" 8th.
WALKERTON	"	" 15th.
SANDWICH	"	" 22nd.
SARNIA	"	" 29th.
CHATHAM	Tuesday	May 5th.

THE HON. VICE-CHANCELLOR BLAKE.

HOME CIRCUIT.

GUELPH	Tuesday	April 7th.
SIMCOE	"	" 14th.
WHITBY	"	" 21st.
BRANTFORD	"	" 28th.
BARRIE	Monday	May 11th.
OWEN SOUND	Tuesday	" 19th.
ST. CATHARINES	"	" 26th.
HAMILTON	Thursday	" 28th.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Hilary Term, 37th Victoria.

DURING this Term, the following gentlemen were called to the Degree of Barrister-at-Law:

No. 1276. Robert Hamilton Dennistoun.
" 1277. John Henry Metcalf.
" 1278. J. Howatt Bell.
" 1279. William Drummond Hogg.
" 1280. Kenneth McLean.
" 1281. Edward Meek.
" 1282. Edward Harry D. Hall.
" 1283. William McDonnell, Jr.
" 1284. E. Burritt Edwards.
" 1285. A. Elswood Richards.
" 1286. Henry Arthur Reesor.

The above named gentlemen were called in the order in which they entered the Society as Students, and not in the order of merit.

The following gentlemen received Certificates of Fitness:

William Drummond Hogg.
Henry Arthur Reesor.
William G. Murdoch.
J. Howatt Bell.
E. Burritt Edwards.
William McDonnell, Jr.
Albert Edward Richards.
Frank D. Moore.
Edward Meek.
Archibald McKinnon.
George M. Roger.
Mortimer A. Ball.
John MacGregor.

And on Tuesday, the 3rd February, 1874, the following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks:

Graduates.

Edward Poole.
Ancus Martius Peterson.
William Macbeth Sutherland.
Colin George Snider (as an Articled Clerk.)
Lafayette Alexander McPherson.
Henry Peter Milligan.
Frank Nicholls Kennin.

Junior Class.

William Beairsto.
William Leigh Walsh.
David Burke Simpson.
Chester Glass.
Thomas P. Galt.
William H. Best.
Alexander H. Leith.
Frederick Case.
John Kelley Dowsley.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes Book 3; Virgil, Æneid, Book 6; Cæsar, Commentaries Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Cæsar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students at law, shall be as follows:—

1. For Call.—Blackstone Vol. i., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding, —Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills. Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shal be as follows:—

1st year.—Stephen's Blackstone, Vol. i., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.