PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ATTORNEY AND CLIENT.

Eakin v. *People's Hotel Co.*, 54 S. W. 87, is one of the many cases showing that the reasonableness of an attorney's fee depends as much upon the importance of the controversy as upon the amount and character of the services rendered. In that case the attorney was one of four who conducted a case through the Circuit Court and Circuit Court of Appeals, resulting in a verdict of $16,000 for his client. The attorney did not actually argue the case, but he watched it all through and gave advice concerning its management. Under these circumstances the Court of Chancery Appeals of Tennessee decided that his claim for a fee of $800 was not excessive.

Attorney's Fee, Amount

An attorney cannot set off an unliquidated claim against his client for services performed in an action against him by the client for money collected for the client: *McCracken* v. *Harned*, 44 Atl. (N. J.) 959.

Set Off

BANKRUPTCY.

Is a debt owing by a commission merchant to his principal for goods consigned to be sold on commission, a debt created by "fraud, misappropriation or defalcation, or while acting in a fiduciary capacity," within § 17 of the Bankruptcy Act? Under the acts of 1841 and 1867 several state and lower federal courts decided that commission merchants were fiduciaries, but in *In Re Basch*, 97 Fed. 761, which was the first case on that point under the new act, the District Court (S. D. N. Y.) follows several late decisions of the Supreme Court of the United States in holding that they do not come within the section.

Fiduciary Capacity

Where, under a state law, a lien is given upon a fund in the hands of any assignee for the payment of debts, such a lien takes precedence in the distribution in bankruptcy without any necessity on the part of the holder of the lien to assert it previously in the state court: *In Re Byrne*, 97 Fed. 762.

Landlord's Lien

BANKRUPTCY (Continued).

The practice of sending attorneys and their clerks to vote at creditors' meetings receives a rebuke from Judge Brown in *In Re Blankfein*, 97 Fed. 191, where he holds that even an attorney at-law is not authorized to vote on behalf of the creditor, but the latter must send his duly constituted attorney-in-fact.

Attorneys

Where the creditors show their inability to elect a trustee by wasting the time of two meetings without coming to any result, the referee may appoint a trustee, and if no objection appears against the person appointed such appointment will be sustained by the court: *In Re Kuffler*, 97 Fed. 187.

Trustee

BANKS AND BANKING.

Aldrich v. *Campbell*, 97 Fed. (Circ. Ct. of App., 9th Circ.) 663, is important as throwing some additional light on the vexed question of the conclusiveness of an assessment by the comptroller of the currency upon the stockholders of an insolvent national bank. In this case the receiver of the bank, acting under the instructions of the comptroller, and by virtue of assessments made by him, had brought two actions at law against the stockholder, the total of the two assessments being less than the par value of the stock. The stockholder wished to set up the fact that the sum of the two assessments exceeded the total indebtedness of the bank, but knowing that it would be useless to plead that defence to the action by the receiver, he attempted to make use of a dictum by the Supreme Court of the United States in *U. S.* v. *Knox*, 102 U. S. 422, which was as follows: "Although assessments made by the comptroller under the circumstances of the first assessment, in this case, and all other assessments, successive or otherwise, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders, yet if he were to attempt to enforce one made, clearly and palpably, contrary to the views we have expressed, it cannot be doubted that a court of equity, if its aid were invoked, would promptly restrain him by injunction."

National Bank, Assessment Against Stockholders by Comptroller

Acting upon this suggestion, the stockholder in *Aldrich* v. *Campbell* filed a bill in equity against the receiver to enjoin the prosecution of the action at law on the ground above stated, and also upon the ground that the comptroller had exhausted his jurisdiction by the levy of the first assessment. His attempt, however, failed, the court holding (1) that the

BANKS AND BANKING (Continued).

assessments by the comptroller were conclusive upon the stockholder as to the bank's indebtedness, whether the question were raised in law or equity, and that the dictum in *U. S.* v. *Knox* was to be restricted to the facts of that case, viz., where the comptroller was attempting to make the solvent stockholders liable for the shares of the insolvent stockholders, and (2) that the comptroller could levy as many assessments as he might think necessary, up to the limits of the stockholder's liability. On this last point the court probably overruled *De Weese* v. *Smith*, 97 Fed. 309, noticed in 39 AMERICAN LAW REGISTER (N. S.) 104, although the case was not mentioned. The decision in the latter case was strongly criticized in 39 AMERICAN LAW REGISTER (N. S.) 185.

BROKERS.

Saule v. *Ryan*, 53 S. W. 977, will be of interest to business men who are required to take out a license to transact business. A statute of Tennessee rendered it unlawful for real estate brokers to transact business without a license. In an action by a broker for his commission, it appeared that the sale by the broker had been made on January 1, 1898, and that on February 5, 1898, the broker applied for and obtained a license to transact business for one year from January 1, 1898. The Court of Chancery Appeals of Tennessee held that the broker could not recover, on the ground that the subsequent issue of the license could not validate the unlawful transaction, even though the license purported to take effect from January 1, 1898. A decision to the contrary is *Mach. Co.* v. *Caldwell*, 16 AMERICAN LAW REGISTER (Ind.), 554.

License to Do Business, Retroactive Effect

CONSTITUTIONAL LAW.

Upon the ground that it is within the police powers of the state, the Supreme Court of Tennessee has upheld the constitutionality of the so-called "Scrip Act," or act requiring employers to redeem scrip orders for wages in cash: *Harbison* v. *Knoxville Iron Co.* 53 S. W. 955. The courts of the various states are almost equally divided upon this question, Pennsylvania being one of those in which such an act is unconstitutional. The question does not seem to have been decided by the Supreme Court of the United States, but since *Holden* v. *Hardy*, 169 U. S. 386, there is a strong probability that this court would recognize the existence of the police power to protect workmen to this extent.

"Scrip Act" Constitutionality.

CONTRACTS.

The doctrine that a mistake of a foreign law is to be regarded as a mistake of fact led to an interesting result in *Rosenbaum* v. *U. S. Credit System Co.* 44 Atl. 967. The defendant engaged the plaintiff in New Jersey to transact credit-insurance for it in Massachusetts, where it was forbidden by law. In an action for breach of the contract, it appeared that the defendant was aware of the Massachusetts law, but that the plaintiff was not. The Supreme Court of New Jersey held that there could be no recovery upon the illegal contract, but that the action of the defendant in concealing from the plaintiff the existence of a material fact, viz., the law of Massachusetts, amounted to a fraud upon the plaintiff, who could recover damages for injury resulting from such fraud.

Mistake of Foreign Law, Fraud

The Supreme Court of Maine has decided that a contract of employment for a certain time at a stipulated sum per week is an entire contract, for breach of which only one action may be brought. Thus in *Alie* v. *Nadeau*, 44 Atl. 891, the defendant employed the plaintiff for six months from November 9, 1897, at $10 per week. On May 12, 1898, the plaintiff, having been discharged, brought an action and recovered a judgment for wages due to May 12, which judgment was satisfied. Subsequently the plaintiff brought an action for the wages accruing from May 12 to the end of the six months. *Held*, that since the contract was indivisible, there was an irrebutable presumption that the plaintiff had recovered in the first action all that he was entitled to under the contract.

Separate Actions for Breach of Entire Contract

CORPORATIONS.

Of late years the courts have greatly relaxed the rule which held it *ultra vires* of a private corporation to become the accommodation endorser of negotiable paper. In *Murphy* v. *Improvement Co.*, 97 Fed. (C. Ct., U. D. Ark.), 722, it was held that where the assent of all the stockholders is obtained, such an accommodation endorsement is valid even in the absence of a charter power to that effect, provided the rights of creditors are not impaired thereby.

Accommodation Endorsement

The name of Mr. George H. Earle, Jr., Receiver of the Chestnut Street National Bank of Philadelphia, has been associated with a number of interesting cases on the liability of stockholders in insolvent corporations. The latest of these is *Earle* v. *Coyle*, 97 Fed. 410, where it appeared that in 1894 Coyle, a stock-

Liability of Stockholder After Sale of Stock

CORPORATIONS (Continued).

holder in the bank, sold his stock at auction to William Steele, the cashier of the bank; that the auctioneer delivered the certificate to Steele; that no transfer was made on the books to Steele, but the bank paid the dividends to Steele until 1897, when it failed. In an action by the receiver against Coyle to hold him liable on his stock, the plaintiff insisted that there had been no valid transfer from Coyle, by reason of a by-law of the bank providing that "no officer of the bank, except the president and vice-president, shall, without the permission of the directors, hold stock in the bank," so that the transfer to Steele, the cashier, was void. The Circuit Court of Appeals (Third Circuit) decided that the defendant and the auctioneer had performed their duty as "careful, prudent business men," that they had the right to assume that the directors had specially empowered Steele to hold the stock, and this inference was further justified by the fact that the dividends had been paid to Steele for three years. Judgment for the defendant was therefore affirmed.

COURTS.

Jurisdiction In Suit Against United States Marshal

A state court has jurisdiction to enforce the common law liability of a United States officer for acts growing out of his obedience to writs of the Federal Court. Thus, in *Park* v. *Hayden*, 61 N. Y. Suppl. 265, the marshal had seized a tug of plaintiff by virtue of a writ of execution issuing out of the District Court of the United States. In an action against the marshal, in the state court of New York, for negligently allowing the tug to deteriorate in value while in his possession, the Supreme Court of New York assumed jurisdiction and allowed a recovery.

CRIMINAL LAW.

Rape, Conviction on Testimony of Prosecutrix

In *State* v. *Anderson*, 59 Pac. 180, on the trial of an indictment for rape, the prosecution offered no testimony except that of the prosecutrix, a child of thirteen years. The trial judge charged the jury as follows: "You are hereby instructed that you should not convict the defendant on the uncorroborated testimony of the prosecutrix alone, but such corroboration may be by facts and circumstances connected with or surrounding the case; in other words, corroboration is not the testimony of other witnesses." On appeal from a conviction, the Supreme Court of Idaho decided that the above charge was improper, since the only corroboration which could properly be considered was corroboration obtained without the evidence of the prosecutrix.

CRIMINAL LAW (Continued).

As the court remarked, "It (the charge) was virtually saying to the jury that the prosecution might be corroborated by her own statements." It was then contended, on behalf of the state, that the question had been properly submitted to the jury, even upon the uncorroborated testimony of the prosecutrix, citing *Tway* v. *State*, 50 Pac. (Wy.) 188; *People* v. *Wessel*, 98 Cal. 352. However, the court held that the above quoted rule applies only where the testimony of the prosecutrix is unimpeached; and in this case, since it had been shown that the prosecutrix was of loose character and uncertain reputation, the question should not have been submitted to the jury at all, but binding instructions given in favor of the defendant. The discharge of the latter was therefore ordered.

DAMAGES.

Excessive Damages for Loss of Child

Considerable comment was caused by a late New Jersey decision to the effect that a parent could not recover anything for the death of his one-year old infant, on the ground that the latter would probably cost the parent more than it would gain for him. Following in the line of this case, the Supreme Court of New Jersey has decided that a verdict for $5,000 for the loss of a four-year old child should be set aside as excessive: *Graham* v. *Cons. Traction Co.*, 44 Atl. 965. A peculiar feature of this case was that there had been two trials previous to the one from which the appeal was taken, at each of which a verdict for $5,000 had been rendered.

EQUITY.

Conclusiveness of Answer by Corporation

There is great diversity among the cases upon the question whether or not the answer by a corporation to a bill in equity is as conclusive as the answer of a natural person, and requires the complainant to produce more than the testimony of one witness. Some authorities hold that where the corporation's answer is verified by an officer, with full knowledge of the facts, it is conclusive, but all agree in holding that, unless it is so verified, it amounts to nothing more than mere pleading. Such was the case in *Savings Soc.* v. *Davidson*, 97 Fed. (Circ. Ct. of App. 9th Circ.) 696, where the answer of a bank was verified by the cashier, who showed by his testimony that he was not personally acquainted with the facts.

HUSBAND AND WIFE.

Johns v. *Johns*, 60 N. Y. Suppl. 865, shows that courts sometimes have as much trouble in construing their own judgments as they have in cases of instruments written by laymen. In this case a wife had obtained a divorce from her husband, the decree commanding the yearly payment of alimony, and also the payment by the respondent of the premiums upon policies of life insurance taken out by him upon his own life in favor of his wife. Subsequently the respondent died and the widow sued his estate for alimony accruing after his death, claiming that the estate was liable for alimony throughout her life. The Supreme Court of New York decided, partly in view of the provision for life insurance, that the effect of the judgment for alimony was to create a liability only during the lives of both parties, and that no intention appeared to continue the binding force of the judgment after the respondent's death.

Judgment for Alimony, Death of Respondent

INSURANCE.

In *North. Pac. Exp. Co.* v. *Traders' Ins. Co.*, 55 N. E. 702, the defendant insurance company insured the plaintiff express company "on express matter . . . only while contained in cars while in transit upon lines owned, leased or operated bythe Northern Pacific Railroad Company." The goods were destroyed while on a line operated by the Northern Pacific Railroad Company at the date of the policy, but not at the date of the fire. The Supreme Court of Illinois decided that the policy had reference to the operation of the line at the time of the execution of the policy only, therefore the subsequent abandonment by the railroad previous to the fire did not render the policy inoperative.

Construction of Policy to Express Company

LIMITATION OF ACTIONS.

In *Beeler* v. *Clarke*, 44 Atl. 1038, the defendant, who was the maker of a note, on being pressed for payment, replied: "I cannot do it now; I have two members of my family to support." The Court of Appeals of Maryland decided that these words constituted both an acknowledgment of the existence of the debt and an implied promise to pay, thus tolling the statute of limitations.

Implied Promise to Pay

The surety of a note wrote to the payee, requesting him to collect the money as soon as possible, and stating that, "I will no longer be held good on the note, if you let him [the debtor] have the money any longer." *Held*, that this was a sufficient acknowledgment

Debt, Acknowledgment

LIMITATION OF ACTIONS (Continued.)

of the debt to bring it within the exception to the Nebraska statute of limitations, which required merely an acknowledgment of the liability: *Harms* v. *Freytag*, 80 N. W. [Neb.] 1039.

MORTGAGES.

Mortgagee as Attesting Witness

The North Dakota Code (§ 4738) provides that mortgagors' signatures to chattel mortgages must be attested by two witnesses. Under this section the Supreme Court of North Dakota decided that the mortgagee was incompetent to act as one of the witnesses, and a mortgage attested only by him and a third party was void: *Donovan* v. *Elevator Co.*, 80 N. W. 772. In South Dakota and several other states the contrary view has been taken, on the ground that the modern rule rendering parties competent to testify in court has removed the basis for the objection to their acting as attesting witnesses: *Fisher* v. *Porter*, 77 N. W. (S. D.) 112.

NEGLIGENCE.

"Res Ipsa Loquitur," Fall of Wall

The Supreme Court of New Jersey has sensibly applied the rule of *res ipsa loquitur* to the fall of a brick wall, while in course of construction by the defendant, whereby the plaintiff was injured. "The wall was of brick, and it is a matter of common knowledge that when such cubes are laid upon one another, with care to keep the wall plumb, it will stand by virtue of the law of gravity; and a fall of a wall of brick would indicate either that it had been improperly laid, or that the fall had been caused by some force from without": *Dettmering* v. *English*, 44 Atl. 855.

Independent Contractor

Where, after a fire, the walls of the building, which had been left standing, were ordered torn down by the building inspectors, and the owner employed a contractor to perform the work, it was held by the Supreme Court of Ohio that the duty of removing the walls was one owing to the public and one which could not be delegated to an independent contractor, so as to relieve the owner from liability for the negligence of the workmen incident to the performance of the work: *Covington* v. *Cincinnati Bridge Co.*, 55 N. E. 618.

PLEADING AND PRACTICE.

In *Glendal Fruit Co.* v. *Hirst*, 59 Pac. (Ariz.) 103, it was held that where an action was commenced by attachment and the

PLEADING AND PRACTICE (Continued).

Judgment in Excess of Attachment

defendant was personally served, the defendant could not object to the entry of judgment against him in an amount greater than that set out in the writ of attachment; but of course the decision would be different if there had been no personal service, as in cases of foreign attachment, or if the rights of third persons had intervened.

PRINCIPAL AND AGENT.

It is well settled that where payment of a promissory note is made to a person not in possession of the note, the burden is on the debtor to show that the payment is made to an authorized agent of the creditor. In *Rhodes* v. *Belchee*, 59 Pac. 117, it appeared that A. appointed B. his agent to sell goods and to receive in payment promissory notes. B. sold goods of A. to C., receiving C.'s note; and after B. had parted with the note, C. made payment to him. In an action by A. against C., the Supreme Court of Oregon held that the above facts did not justify C. in presuming that B. had authority to receive payment after he had parted with the possession of the note.

Evidence of Authority to Receive Payment

REAL PROPERTY.

Campbell v. *Sidwell*, 55 N. E. 609, presents one of those sets of facts involving conflicting liens which a professor of real property law delights in laying before his class as a puzzle. The case arose from the distribution of the proceeds of a sheriff's sale of land, against which there were, successively, (1) a vendor's lien, (2) a judgment, and (3) a mortgage. The vendor's lien was superior to the judgment, but inferior to the mortgage, while the judgment was, of course, superior to the mortgage. Under circumstances such as these an astute lawyer could present a very plausible argument on behalf of the priority of any one of the three liens, and indeed any result would probably find support in some decision, although the case has not arisen a large number of times. The Supreme Court of Ohio solved the problem on the theory that the vendor's lien, being in the nature of a secret, unrecorded trust, was the weakest of the three liens and least entitled to consideration. They therefore held that the superiority of the vendor's lien over the judgment was of less weight than the superiority of the mortgage over the vendor's lien, and, since the judgment was admittedly superior to the mortgage, they awarded the fund to the judgment creditor, balance to the mortgagee.

Conflicting Liens, Priority

SALES.

In *Bank* v. *Anderson*, 44 Atl. 1066, the defendant held a note of A., with certain stock as collateral. Learning that the stock was worthless, since its issue was unauthorized, the defendant refused to renew the note, and A. arranged with the plaintiff bank for its discount. The defendant sent the note and stock to the bank, which paid the defendant the value of his interest in the stock and the balance was paid to A. No mention was made by the defendant of the worthlessness of the stock. In an action by the bank against the defendant, the Supreme Court of Pennsylvania held that, since there was no sale to the bank, the concealment by the defendant, did not amount to a fraud, Fell, J., saying: "There is no foundation whatever for the contention that the transaction was a sale by the defendants of their claim on the note and collateral. It was not, either in form or in substance, a sale, and none of the parties so regarded it at the time. It was merely the borrowing of one party to pay an overdue note held by another, and nothing more can be made of it." While the decision may be correct, yet, if the transaction did not amount to a sale of the defendant's interest in the stock to the bank, it certainly came very near to it.

Fraud in Transfer of Collateral

WILLS.

Hoysradt v. *Tionesta Gas Co.*, 45 Atl. 62, shows the distinction between a sale by virtue of an order of court and a sale where the court merely designates the vendor. A will had been probated in New York, and a copy filed in the county of Pennsylvania where land of the testator was situate, according to the act of March 15, 1832 (P. L. 135). Under the will the executor had power to convey the land. The executor died, and the New York court appointed a successor, by whom a conveyance was made, the validity of which was the subject of the present controversy.

Power to Convey Land, Foreign Probate

It was strongly urged against the conveyance that the executor could derive no power to convey land in Pennsylvania by virtue of his New York appointment, but the Supreme Court of Pennsylvania decided that the executor derived his power from the will and not from his appointment, which latter was merely a designation of the person entitled to act under the will, and which was made by the only court having power to make such designation.