PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ADVERSE POSSESSION.

The frequent use of the phrase "color of title" renders welcome an attempted definition of just what it means.

Color of Title

In *Street* v. *Collier*, 45 S. E. 294, the Supreme Court of Georgia defines it by holding that color of title is anything in writing connected with the title which serves to define the extent of the claim. It matters not how imperfect or defective the writing may be, considered as a conveyance, if there is a writing which defines the extent of the claim. Applying this principle, the court holds that a deed executed by one purporting to act as attorney in fact for another is good as color of title, though the one signing the paper as attorney had no authority, in writing or otherwise, to represent the owner in the transaction. See also *Beverly* v. *Burke*, 9 Ga. 440.

AGENCY.

The Supreme Court of Georgia, laying down in *Exchange Bank* v. *Thrower*, 45 S. E. 316, the general principle that authority to borrow money is among the most dangerous powers which a principal can confer upon an agent, and must be created by express terms, or be necessarily implied from the very nature of the agency actually created, holds that the fact that an agent is authorized to indorse checks with a stamp reading, "Pay to the order of X. Bank for deposit. M. N., Manager, by ———, Cashier," and to fill the blank therein with his own name, does not empower such cashier to indorse checks and drafts in blank, so as to collect the money thereon. See *Jackson Co.* v. *Com. Nat. Bank*, 65 N. E. 136, 59 L. R. A. 657.

Powers: Borrowing Money

ALTERATIONS.

In *Bashaw's Adm'r* v. *Wallace's Adm'r*, 45 S. E. 290, the Supreme Court of Appeals of Virginia holds that where, notwithstanding an alleged alteration in the date of a bond attempted to be enforced against the estate of the deceased maker, an action on the bond, if treated as having been executed at the time the consideration therefor arose, would not be barred by limitations, the alleged alteration was immaterial.

Materiality

BANKS.

In *Ober & Sons Co.* v. *Cochran*, 45 S. E. 382, the Supreme Court of Georgia holds that the mere fact that a bank, to which a note was sent for collection with instructions to remit immediately the proceeds of the collection to the owner, collected the money due on the note, and, instead of obeying instructions, used the same in its own business, is not sufficient, upon its insolvency, to impress a fund realized by its receiver, converting its assets into cash, with a trust for the payment of the money so collected and used. The case presents a good review of the authorities in point. See *McLeod* v. *Evans*, 66 Wis. 401.

Collections: Trust Fund

BANKRUPTCY.

It is decided by the Supreme Court of New Hampshire in *Roberts* v. *Fernald*, 55 Atl. 942, that where the records of a bankruptcy proceeding in the United States District Court show certain persons "were duly adjudged" bankrupts, the defendants, in assumpsit by the trustee to recover money collected in fraud of the bankruptcy act, cannot show by evidence independently of the records that the claims of creditors were insufficient in amount to give the bankruptcy court jurisdiction, the general principle being that the adjudication cannot be collaterally attacked. The case is interesting since in general one of the usual grounds for attacking a judgment is lack of jurisdiction, and the judgment itself is, in most cases, not conclusive in its recital of the facts giving jurisdiction. See *State* v. *Kennedy*, 65 N. H. 247.

Adjudication: Collateral Attack

BIGAMY.

Validity of Second Marriage

The Supreme Court of Illinois, referring in *Barber* v. *People*, 68 N. E. 93, to the usual rule that any intoxication at the time of entering into the marriage contract will not render the marriage void, but only voidable, holds that such voidable marriage will support an indictment for bigamy; that in such prosecution the lawful wife of the defendant is not a competent witness against him, and that such incompetency cannot be waived on the trial. See *Creed* v. *People*, 81 Ill. 565.

BREACH OF MARRIAGE PROMISE.

Damages: Evidence in Mitigation

There seems to be no doubt under the authorities that if a party to the contract to marry refuses to perform his obligation he cannot cure such breach of contract by a subsequent offer to marry. The effect of such subsequent offer upon the damages which may be recovered is dealt with in *McCarty* v. *Heryford*, 125 Fed. 46, where the United States Circuit Court (D. Oregon) holds that an offer of marriage by a defendant in an action for breach of promise after the commencement of the suit is admissible in evidence in mitigation of damages, if made in good faith; the jury, however, being entitled to consider any change in the character, habits, or condition of defendant between the time of the breach of the contract and the renewal of the offer which would be to plaintiff's disadvantage, or justify her in rejecting the offer. See *Kelly* v. *Renfrow*, 9 Ala. 325.

CONSTITUTIONAL LAW.

Use of Trading Stamps

A statute in Virginia passed in 1897 prohibited the use of trading stamps and similar devices which might be used in payment and purchase of or exchange for articles of merchandise from any person or corporation other than the party using the same. In *Young* v. *Commonwealth*, 45 S. E. 327, the Supreme Court of Appeals of Virginia holds this act unconstitutional as violating Section 1 of the fourteenth amendment to the constitution of the United States, which forbids any persons being deprived of life, liberty or property without due process of law. The word "liberty," it is held, as used

CONSTITUTIONAL LAW (Continued).

in the constitution of the United States and of the several states, is deemed to embrace the right of a citizen to be free in the employment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling, and for these purposes to enter into all contracts which may be proper, necessary and essential to his carrying to a successful conclusion the purposes above mentioned. See, in connection with this case, the well-known decision of *Allgeyer* v. *Louisiana*, 165 U. S. 578.

CONSPIRACY.

Religious Societies

The Supreme Court of Pennsylvania holds in *Irvine* v. *Elliott*, 55 Atl. 859, that an action will not lie by a priest of the Protestant Episcopal Church against the bishop of his diocese and a member of his congregation for trespass for malicious conspiracy, on evidence that defendants united to charge the priest with violation of church law and forgery, and testified to sustain the same in an ecclesiastical court, which barred the plaintiff from the ministry; though the acts of the defendants might to some extent have been influenced by vindictiveness. The proceedings of ecclesiastical courts, it is held, on matters within their jurisdiction will not be reviewed by the civil court. See also *German Reformed Church* v. *Com.*, 3 Pa. 282.

CONTEMPT OF COURT.

What Constitutes Contempt

An excellent review of the general subject of contempt of court appears in the case of *State* v. *Shepherd*, 76 S. W. 79, in which the Supreme Court of Missouri discusses both civil contempts and criminal contempts and such as are direct in contradistinction to those which are merely constructive. These last constructive contempts are defined to be such as arise from matters not transpiring in court, but which tend to degrade or make impotent the authority of the court, or which tend to impede or embarrass the administration of justice. The case deals with the question of whether a publication in a newspaper is a contempt and holds that such publication having averred that the Supreme Court had reversed and stultified itself; that no sane man could

CONTEMPT OF COURT (Continued).

have any other opinion but that the judges . . . had been bought in the interest of the railroad and that the Supreme Court had, at the "whipcrack" of the railroad, sold its soul to the corporations; and having designated the court as a "venal court," constituted criminal contempt. The case presents an exhaustive consideration of the matters involved and traces the doctrine from its earliest source. Compare with this case *Respublica* v. *Oswald*, 1 Dallas 319.

CONTRACTS.

Against the dissent of two judges, the New York Supreme Court (Appellate Division, Third Department) holds in *Cook* v. *Casler*, 83 N. Y. Supp. 1045, that a contract by which defendant agreed with plaintiff that, if plaintiff would procure and give to defendant a surety company bond, he would then pay a certain conditional obligation to plaintiff, was not supported by any consideration, plaintiff not agreeing to procure the bond and plaintiff's act in procuring the bond and tendering it to defendant, who refused to accept it, did not constitute a consideration for defendant's agreement to pay the obligation. See also *Palmer* v. *Gould*, 144 N. Y. 671.

Consideration

CRIMINAL LAW.

In *United States* v. *Linnier*, 125 Fed. 83, the United States Circuit Court (D. Nebraska) holds that in a criminal case in which a verdict has been returned finding the defendant guilty of a higher offense than was warranted by the evidence, the court has power to pronounce judgment thereon for such lower offense included in the one charged as the evidence warrants.

Degree of Offense

EQUITY.

In *Wilson* v. *American Palace Car Co. of New Jersey*, 55 Atl. 997, the Court of Errors and Appeals of New Jersey holds that when the object of a bill in equity is to affect the claims of a defendant to property, which is not located within the state, and the defendant is not a resident or citizen of the state, or is a foreign corporation, which has not subjected itself to the

Jurisdiction

EQUITY (Continued).

jurisdiction of the state, the court can acquire jurisdiction over the defendant only by service of process or notice within the state, or by the voluntary appearance of the defendant. From this decision four judges dissent. See *Fitzgerald Co.* v. *Fitzgerald*, 137 U. S. 98.

FEDERAL COURTS.

In *Redfield* v. *Baltimore & Ohio R. Co.*, 124 Fed. 929, the United States Circuit Court (S. D. New York) holds that to a suit by a stockholder in a domestic corporation to charge a foreign corporation as trustee on the ground that as the owner of a majority of the stock of the domestic corporation it caused such corporation to do acts which were in fraud of its other stockholders, the domestic corporation is an indispensable party, and a Federal Court is without jurisdiction of such suit where complainant and such corporation are citizens of the same state. It is further decided that in such suit by a stockholder of a corporation of the same state against such corporation and a foreign corporation to charge the latter as trustee because of acts which as majority stockholder it caused the former to do in fraud of its other stockholders, the domestic corporation is not a party in the same interest as complainant, and cannot be aligned with him for the purpose of giving a Federal Court jurisdiction on the ground of diversity of citizenship.

Jurisdiction: Parties

The U. S. Circuit Court (D. Massachusetts) holds in *Goodwin* v. *New York, N. H. & H. R. Co.*, 124 Fed. 358, that a corporation, owning and maintaining a system of railroad in Massachusetts and Connecticut, and so incorporated in both states that the Circuit Court in Massachusetts has jurisdiction of a suit there brought against it by a citizen of Connecticut, and conversely, the Circuit Court in Connecticut has jurisdiction of a suit there brought against it by a citizen of Massachusetts, cannot be sued in the Circuit Court in Massachusetts by a citizen of Massachusetts, who alleges that the defendant is a citizen of Connecticut. The case contains a very satisfactory review of the cases in point and is a valuable addition to the authorities upon the jurisdiction of the Federal Courts in cases of diversity of citizenship. See in connection herewith *St. Louis, I. M. & S. Ry. Co.* v. *Newcom*, 6 C. C. A. 174.

Jurisdiction: Diversity of Citizenship

FOREIGN CORPORATIONS

Where a foreign corporation had not paid its license fee and received the receipt or certificate within the time prescribed by statute, another statute declaring that no action could be maintained by such corporation, which had not complied therewith, does not prevent such foreign corporation from suing, if it afterwards pays the required license and secures certificate, since the state, having issued the certificate after the time limited, a third party could not object. New York Supreme Court (Appellate Division, Third Department) in *Dubarton Flax Spinning Co.* v. *Greenwich & J. Ry. Co.*, 83 N. Y. Supp. 1054.

License

GIFTS.

The Supreme Court of Michigan in *Clay* v. *Layton*, 96 N. W. 458, deals at length with the perplexed question of what is sufficient to constitute a valid gift, holding upon the facts in the case that where a man in his lifetime executed checks, deeds and assignments to certain persons whom he desired to make beneficiaries of his estate after his death and deposited the same in separate envelopes in a tin box, with direction that they be given to such beneficiaries after his death, and he died with the papers still in his possession, the transfers could not be enforced as gifts for want of a delivery. The court further refuses to hold that a trust was thereby created. The cases bearing upon the question in issue are carefully examined and the decision is worthy of study. See also *Bigley* v. *Lowey*, 45 Mich. 370.

Delivery

INSURANCE.

In re Opinion of Justices, 55 Atl. 828, the Supreme Judicial Court of Maine holds that the legislature is not prohibited by any provision in the constitution of the United States or of this state from exercising the power of limiting incorporated insurance companies to the issuance of one standard fire insurance policy, even though such standard form contain a clause that there shall be no right of action on the policy until the amount of the loss or damage be determined by three arbitrators, or there be a waiver of such clause by both parties. Compare *Head* v. *Providence Insurance Co.*, 2 Cranch 127.

Standard Policy

INTERSTATE EXTRADITION.

In *Bruce* v. *Rayner*, 124 Fed. 481, the U. S. Circuit Court of Appeals (Fourth Circuit) decides that the question whether a person arrested on a governor's warrant for return to another state on requisition from its governor is a fugitive from the justice of such state is one of fact, which may be inquired into by the courts on a writ of habeas corpus, the decision of the governor in issuing his warrant being *prima facie* evidence of the fact, but not conclusive, although, when such decision was made after a hearing and on conflicting evidence, it will not be reversed by a court. It is held, however, that in habeas corpus proceedings for the discharge of a person held under an extradition warrant issued by the governor of a state, the court will not receive evidence tending to show the guilt or innocence of the person whose surrender is sought, in determining the question whether or not he is a fugitive from justice. See *Ex parte Reggel*, 114 U. S. 653.

Conclusiveness of Governor's Warrant

JUDICIAL SALES.

The U. S. Circuit Court of Appeals (Eighth Circuit) holds in *Files* v. *Brown*, 124 Fed. 133, that in the absence of fiduciary relations or extraordinary circumstances, courts and their officers are as firmly bound by their executed sales, both in morals and in law, as private citizens, and they ordinarily have no right or privilege to rescind them upon any ground which is not equally available to a private party.

Rescission

MONOPOLIES.

The ineffective operation of the so-called Sherman anti-trust law appears again in the case of *Ellis* v. *Poulsen & Co.*, 124 Fed. 956, where the United States Circuit Court (D. Oregon) holds that a combination between all the lumber manufacturers of a city to raise and maintain the price of lumber to local consumers, and to refuse to sell lumber to consumers who purchase any part of their supply from outside mills, some of such mills supplying the local market being situated in another state, is not in violation of the Sherman anti-trust law, as in restraint of interstate commerce, its effect on such commerce being indirect and incidental only.

Anti-Trust Law

SPECIFIC PERFORMANCE.

The Supreme Court of Nebraska holds in *Best* v *Grolapp*, 96 N.W. 641, that an agreement to devise land upon sufficient consideration may be enforced specifically. And it is sufficient if the agreement is that the promisee shall receive the property or that it shall be left him at the decease of the promisor. There need not be an express promise to make a will. Equity, it is held, will impress a trust upon the property in such cases, which will follow it into the hands of personal representatives or devisees of the promisor, and an agreement to leave property by will is not ambulatory or recoverable after performance on the part of the promisee. The court decides in conclusion that in order to take such case out of the statute of frauds it is sufficient that part performance on the part of the promisee is of such a nature that it would be impossible to put him in the situation in which he was when the agreement was made or compensate him in damages. Compare with this case *Minnie* v. *Minnie*, 166 N. Y. 263.

Agreement to Make Will

WATER RIGHTS.

The Supreme Court of New Hampshire in *State* v. *Sunapee Dam Co.*, 55 Atl. 899, holds that where several shore owners were entitled to rights in a lake, but the rights of each had not been defined and limited, nor the proper mode of exercising and enjoying them ascertained and determined, but existed in common, a suit by several of them to restrain a corporation authorized to maintain a dam at the outlet of the lake from so conducting the dam as to seriously interfere with plaintiffs' use of the lake, was within the jurisdiction of equity on the ground that it was brought to determine the extent of the rights of the parties in admitted legal rights in a body of water. Two judges dissent.

Equitable Jurisdiction

WILLS.

The Supreme Court of Pennsylvania holds *In re Kane's Estate*, 55 Atl. 917, that the testimony of the attorney who drew the will of testator, and that of the physician who attended him at the time, when positive as to the testamentary capacity of the testator, is of far more weight than the opinion of medical experts based on hypothetical questions.

Testamentary Capacity