PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ADMIRALTY.

It is well known that extraordinary services on the part of a tug are necessary to bring its work under the head of salvage, and the case of *The Sir Robert Fernie*, 96 Fed. 348, is interesting as furnishing a set of facts which were held to constitute a salvage service. In that case a steel bark, with a valuable cargo, was moored to a buoy in Tacoma Harbor when, on a stormy night, the buoy's anchor chain parted and the vessel drifted broadside towards the shore. A tug, though shorthanded, came to her rescue and succeeded in saving her after five hours of incessant labor and peril. The tug and her crew were exposed to danger, and the tug's boiler and engines were considerably strained by her efforts.

Salvage, What Services by a Tug will Constitute

An interesting opinion discussing the liability of ship owners for injuries to seamen caused by the negligence of the master is to be found in the case of *Olson* v. *Oregon Coal and Navigation Company*, 96 Fed. 109 (D. C., N. D. Cal.). In this case a seaman was injured by falling through a hatchway negligently left open by the master. The hatchway in itself was a proper one and no claim of negligence in the selection of the officers of the ship was made. It was held that the seaman and the master of the ship are fellow servants in all matters pertaining to the navigation of the ship, and a recovery was denied. The question is not free from doubt, but the authorities are carefully reviewed in the opinion and the better view seems to have been expressed.

Seamen, Liability of Owner for Injuries

In the case of *The Ethelred*, 96 Fed. 446 (D. C., E. D. Pa.), a libel *in rem* was filed for injuries sustained by a seaman who had been directed by the officer in charge to make use of a certain rope for his support while washing down the mast. The rope proved weak and broke under the libellant's weight, letting him fall to the deck. McPherson, J., sustained the libel, holding that there

Seamen, Liability of Vessel for Injury to

ADMIRALTY (Continued).

had been negligence in failing to examine the rope which, being just aft of the funnel, was exposed to smoke and heat, and occasionally to sparks or flames.

The court evidently regarded this failure of the officers to inspect, and the consequent providing for the seaman of unsafe appliances, as the act or the owner of the vessel. How does this case square with the general rule laid down in *Olson* v. *Navigation Co., supra?* Is the rule which is to be extracted from these cases, as follows: When the master and the seamen are working together in the ordinary navigation of the ship, they are fellow servants; but when the master orders a seaman to perform a distinct duty, he is to be regarded as a vice-principal?

The power of a captain of a ship has always been of necessity quite arbitrary, and it is held in a recent case that where there is no proof of malice or excessive punishment he will not be held liable for assault and battery when he uses physical force to compel prompt obedience to his orders: *Stout* v. *Weedin*, 95 Fed. 1001 (D. C., Wash.).

Seamen, Obedience

In *The Escanaba*, 96 Fed. 252 (D. C., N. D. Ill.), Judge Kohlsaat has applied the rule giving priority to the lien which is later in time, to a case where the conflict was between the claims of shippers for goods lost by the tort of the master and liens for supplies furnished prior to the tort.

Liens, Priority

BANKRUPTCY.

The application of the bankrupt in question for his discharge was opposed on the ground that he had made a false oath in swearing that he had no assets, when in fact he had, four months previous to the commencement of the proceedings, transferred a large stock of goods to his wife. Toulmin, Dist. Judge, held that while the transfer was void as to creditors and might be set aside by the trustee in bankruptcy, yet it was valid in regard to the bankrupt himself and did not amount to such an intentional fraud as would deprive the bankrupt of his discharge. The same was held of an omission, probably through oversight, of a certain debt in the bankrupt's schedule of liabilities: *In re Crenshaw*, 95 Fed. 632.

Discharge, False Oath, Concealment of Assets

BANKRUPTCY (Continued).

What is the status of a debt which the bankrupt includes in his schedule, but which has been barred by the statute of limitations? Such was the question certified to the District Court (D. Minn.) by the referee in bankruptcy in *In Re Resler*, 95 Fed. 804. Counsel for the proving creditor strongly urged that even if the barred debt was not provable,—on which point the authorities cited seemed to be in great conflict,—yet the inclusion of the debt in the bankrupt's schedule was a clear waiver of the objection that the statute had run, and from such waiver and the written acknowledgment a promise was implied to pay the creditor. However, Judge Lochren disallowed the claim, but some expressions in his short opinion seem rather to confine its effect to cases arising in Minnesota.

Debt Barred by Statute of Limitations

It would seem unnecessary to decide that a person's oath before a referee in bankruptcy will not have the effect of depriving him of a right guaranteed him by the constitution. Yet in *In Re Scott*, 95 Fed. 815, the bankrupt possessed such a tender conscience that he refused to take the oath required by § 7 before the referee, unless there was added the proviso, "Reserving, however, the right to claim any lawful privilege as against or in relation to any question upon any examination." It seemed that the bankrupt was afraid that he would bind himself to give an answer to a question liable to incriminate himself, contrary to the fifth amendment. Judge Buffington properly decided that the bankrupt should have taken the oath in the original form; that the constitution of the United States was sufficiently strong to make implied exceptions of matters which it prohibited; and it would be time enough for the bankrupt to raise the objection when he was asked a question infringing upon his constitutional privilege.

Refusal to Take Oath, Self-Incrimination

The District Court (N. D. Mass.) has decided that where a husband, who is entitled to curtesy in the land of his wife, is placed in bankruptcy during the life of his wife, his curtesy does not pass to the trustee, since it is not property which he can convey or assign. Nor is it a "power" within § 70 (3) of the act which provides for the vesting in the trustee of all "powers" which the bankrupt might have exercised for his own benefit: *Hesseltine* v. *Prince*, 95 Fed. 802.

Assets, Curtesy in Land

BANKS AND BANKING.

Quin v. *Earle*, 95 Fed. 728, one of the many cases growing out of the failure of the Chestnut Street National Bank of Philadelphia, will be of interest to the many depositors in that institution. A bill was filed against the receiver of the bank, averring that the bank closed its doors at 3 P. M. on December 22, 1897, that within an hour prior to that time the complainant had made a deposit, and that, when the deposit was received, the bank's officers knew that it was hopelessly insolvent. The complainant, therefore, prayed to have his deposit declared a trust fund. The Circuit Court (E. D. Penna.), in an opinion by Judge Gray, while admitting that the above result would follow if complainant's premises were correct, yet, after a thorough examination of the evidence, decided that even up to 10 P. M. on December 22, 1897, there was no proof that the bank's officers considered it hopelessly insolvent, since they had hopes that it would receive outside assistance on December 23d, and the mere fact that the bank was in embarrassed circumstances at the time of the deposit was insufficient to warrant the creation of a trust. This decision, unless it is reversed, will probably block off a number of suits by depositors of December 22, 1897, who hope in this way to gain an advantage over their fellow-sufferers.

Deposit in Insolvent Bank, Knowledge of Officers

The president of the defendant bank had disappeared with funds of the bank, supposedly, in his possession. The cashier of the bank promised the plaintiff that if the latter would find the president, the bank would honor plaintiff's check for a certain amount. In an action against the bank for failure to honor the check, it was held, that under the circumstances the cashier had sufficient authority to bind the bank in this matter, and that there was a consideration for the check in the advantage which the bank would gain by the discovery of its president: *Valdetero* v. *Citizens' Bank*, 26 So. (La.) 425.

Promise by Cashier to Honor Check

CONSTITUTIONAL LAW.

Encouraged, perhaps, by the frequency with which federal courts grant injunctions, the complainant in *Kiernan* v. *Multnomah County*, 95 Fed. 849, actually went into the federal court to obtain an injunction against the sheriff of his own county, on the ground that the sheriff had levied upon his property under

Due Process of Law, Illegal Levy of Property

CONSTITUTIONAL LAW (Continued).

unauthorized proceedings, and that, therefore, the act of the sheriff was a deprivation of complainant's property without due process of law, contrary to the fourteenth amendment! Judge Bellinger, of the Circuit Court (N. D. Oregon), disappointed the complainant, by informing him, in a short opinion, that the fourteenth amendment was levelled at the states and not at individuals, "otherwise every invasion of the rights of one person by another would be cognizable in the federal courts under this amendment."

CORPORATIONS.

Ultra Vires, Power of National Bank to Hold Stock of Another Bank

The Supreme Court of the United States has given another instance of the extreme rigor with which it applies the doctrine of *ultra vires* in corporation cases without regard to the equities of each particular case. In *Nat. Bank* v. *Hawkins*, 19 Sup. Ct. 739, it appeared that the A. national bank held stock of the B. national bank and collected the dividends regularly, as the registered owner. On the failure of the B. bank, its receiver brought an action against the A. bank to recover the statutory assessment on the stock. He obtained a judgment in the Circuit Court, which was affirmed by the Circuit Court of Appeals (33 U. S. App. 747, 24 C. C. A. 444), from which a writ of error was taken to the Supreme Court.

The opinion, by Justice Shiras, consistently follows the extreme view which the Supreme Court has always taken on the subject of corporate power, or rather, lack of corporate power. After citing *Bank* v. *Kennedy*, 167 U. S. 362, to show that a national bank does not possess the power to hold stock of another national bank, he explains that the Circuit Court of Appeals was in error by reason of its failure to observe the distinction between the power of a national bank to purchase stock for an investment and its power to hold it merely as collateral security; the power exists in the latter instance, but is absent in the former. A determined effort was made by counsel to persuade the court that the A. bank, by receiving the dividends and partaking of the advantages of the transaction, was estopped from setting up its own lack of power when a legitimate burden was about to be cast upon it. But the court said that it had never recognized any such doctrine in regard to cases involving corporate power, quoting

CORPORATIONS (Continued).

the decisive words of Justice Gray on this subject in *Cent. Trans. Co.* v. *Pull. Pal. Car Co.*, 139 U. S. 24.

Irregular Acts of Officers of Corporation, Estoppel

The doctrine of immunity from estoppel, just mentioned, is applied by the Supreme Court of the United States only to acts *ultra vires* of the corporation itself and not to acts of officers of the corporation which are irregular in that they have not received the actual consent of the corporation. Thus in *Louisville, etc., Rwy. Co.* v. *Louisville Trust Co.*, 10 Sup. Ct. 817, a corporation had guaranteed certain negotiable bonds of another corporation. In a suit on the guarantee by a *bona fide* holder of the bonds, the defence set up was that the guarantee was void for want of the assent of a majority of the defendant's stockholders. In holding that defendant was estopped from setting up the defence, Justice Gray clearly marks the distinction between irregular acts wholly within the corporate power and acts *ultra vires*, relying principally on *Zabriskie* v. *R. R. Co.*, 23 How. 381, and *St. Louis, etc., Rwy. Co.* v. *Terre Haute, etc., Rwy. Co.*, 145 U. S. 393.

DAMAGES.

Death from Blood Poisoning

The Supreme Court of Alabama, following *Ginna* v *R. R.*, 8 Hun, 494, has decided that where a person receives an injury to his hand through the negligence of another, by reason of which blood poisoning sets in, resulting in death, the death may be considered the proximate result of the injury, even though the blood poisoning has not made its appearance until some time after the injury. It is not of importance that such a result does not generally follow wounds of this character, nor is it incumbent upon the person injured to show that he received the germs of the blood poison in the accident: *Armstrong* v. *Montgomery St. Rwy. Co.*, 26 So. 349.

EVIDENCE.

Failure to Produce Witness, Presumption

A., who was indicted for adultery committed with B., failed to call B. as a witness at the trial. In his closing argument, the prosecuting attorney commented on this fact, relying upon the rule that if a party has a witness possessing peculiar knowledge of the transaction and supposed to be favorable to him, and he fails to produce such witness when he has the means of doing so,

EVIDENCE (Continued).

this, in the absence of all explanation, is ground for suspicion against the defendant that such better informed testimony would make against him. On appeal, the Supreme Court of Alabama (Tyson, J., dissenting), held that the above rule did not apply to this case, since, even if B. had been called, he could not have been forced to divulge facts tending to incriminate himself. The action of the district attorney was therefore held error: *State* v. *Brock*, 26 So. 329.

"Honesty," Certificate of Birth

In an indictment for rape, in order to prove that the prosecutrix was under the age of sixteen, the prosecution offered, and the court admitted in evidence, a written certificate of baptism in which the clergyman had given the date of the prosecutrix. This was held, error, by the Supreme Court of New Jersey: *State* v. *Snover*, 43 Atl. 1059.

The defendant's counsel offered to ask a witness, "Do you know what is his [defendant's] reputation for morality, virtue and honesty in living?" The prosecution objected on the ground that, while evidence of defendant's general character was relevant, yet no evidence of defendant's specific character on any subject was admissible except upon the subject referred to in the indictment; that evidence of defendant's "honesty" could refer only to his financial probity and was therefore irrelevant, for the only subject upon which specific evidence of character could be given was that of defendant's sexual laxity. The court held that the question should have permitted, since, under the circumstances, the word, "honesty," imported chastity and was equivalent to "sexual morality;" citing authorities including Chaucer and Shakespeare.

HUSBAND AND WIFE.

Divorce, Effect on Dower Right, Remarriage

Brown's Appeal, 44 Atl. 22, presented a remarkable state of facts. The husband, A., was divorced from his wife, B., the latter being the innocent party. A. subsequently married C., from whom he was also divorced, C. being the innocent party. A. then married D., who survived him as his lawful wife. Both B. and C. had remarried after their divorces from A. On A.'s death, B. and C. claimed dower in his land under Conn. Gen. St. (1877), § 618, which provide that a divorced wife, who is the innocent party and shall survive her husband, shall have one-third of his real estate for life.

HUSBAND AND WIFE (Continued).

The Supreme Court of Connecticut, in a rambling opinion, decided that, under the circumstances, the true intent of the statute did not give B. and C. rights of dower, since A. had left a lawful wife surviving him. In reaching this conclusion the court relied largely on the Act of 1849 (p. 274), which allowed a divorced person to marry again. The argument of the court seems to be that since, under the Act of 1849, a man may leave a lawful wife surviving him, as he did in this case, the Act of 1877 could not have been intended to apply here, since, if B. and C. could have claimed dower, they could not have interfered with D.'s undoubted right of dower, and the result would be that three persons would be allowed dower on the ground that each was A.'s wife at the time of his death. Moreover, the court construes the Act of 1877 as admitting a woman to dower "only because she represents, and no other is, the wife living with her husband, or separate through his fault." Of course, with D. surviving, neither B. nor C. could be said to be in such a position.

The question naturally asserts itself: Was it the fact of A.'s remarriage that cut off B. and C., or was it the fact that D. survived A.? In other words, if D. had died before A., would B.'s and C.'s rights have been any different? The court refuses to commit itself on this point, but would seem not indisposed to lay down the rule that the mere fact of remarriage after divorce is of itself sufficient to oust the divorcee's rights: "If, upon marriage after divorce, the link between the wife and her divorced husband which supports her claim to dower is finally severed, no troublesome questions will arise, no matter how many times a man is divorced; otherwise such questions as have been discussed in this case may arise whenever a man dies, leaving more than one divorced widow and no genuine widow. . . . But they [these questions] are not likely to become practical. Such a case as this has never been presented to this court, and it is to be hoped that it may never arise again."

INSURANCE.

The Supreme Court of Massachusetts has decided that an insurance company waived its rights to demand proofs of loss, according to the policy, under the following circumstances: After the fire plaintiff notified the general agent of the company, who said that D., an adjuster, would attend to the matter. D., having been sent from the office of the company, viewed the premises with the plaintiff

Waiver of Proofs of Loss

INSURANCE (Continued).

and suggested that the amount of the loss should be determined by one F. The latter, a few days afterwards, handed his figures to D., but nothing more was done by any of the parties. The court, in holding that the above facts constituted a waiver of the proofs of loss, mentioned *Everett* v. *Ins. Co.*, 142 Pa. 332, as a case *contra* to the above decision. It would not seem that *Everett* v. *Ins. Co.* decided anything different, for in that case the decision was expressly based upon the fact that, as Justice Mitchell said in his opinion, no evidence of authority appeared whereby the adjusters could waive any provisions in the policy, while in the case at bar the court said that the fact that D. was sent by the company itself in reply to a letter to the general office was sufficient evidence of his authority to act on behalf of the company: *Wholly* v. *Western Assurance Co.*, 54 N. E. 548.

JUSTICES OF THE PEACE.

Jurisdiction, Amount of Claim, Judgment

The Vermont statute on the subject of justices of the peace (V. S. § 1040) provides that the justices shall have jurisdiction "where the debt or other matter in demand does not exceed $200." An action was brought before a justice on a judgment of $249.15, on which a certain amount had been collected, so that the balance remaining due was $145.52. It was urged on behalf of the defendant that the test of the jurisdiction was the amount of the judgment, but the Supreme Court of Vermont properly held that the amount really involved was $145.52, and allowed jurisdiction: *Page* v. *Warner*, 44 Atl. 67.

NEGLIGENCE.

Storing Dynamite on Land, Proof of Negligence

The Supreme Court of Ohio has lately had occasion to apply and extend the doctrine of *Fletcher* v. *Rylands*, L. R. 3, H. L. 330. In the case before it, *Bradford Glycerine Co.* v. *St. Mary's Mfg. Co.*, 54 N. E. 528, the facts showed that the defendant was the owner of a magazine and contents, containing about fifty quarts of nitroglycerine, situated about a mile from plaintiff's property and separated from it by the lands of several persons. While one of the defendant's servants was placing some nitroglycerine in the magazine it exploded with great force, causing vibrations in the atmosphere sufficient in power and violence to shatter the glass

NEGLIGENCE (Continued).

windows of plaintiff's buildings. Plaintiff was unable to show that the defendant's servant was in any way negligent in handling the nitroglycerine, but he claimed the application of the doctrine of *res ipsa loquitur*.

In support of his contention, plaintiff cited the cases of *Tiffin* v. *McCormack*, 34 Ohio St. 638, and *Hay* v. *Cohoes Co.*, 2 N. Y. 159, which illustrate the well-recognized doctrine that, where one, in blasting rocks on his own land, casts fragments on the land of another, causing injury, it is no defense to show that ordinary care has been taken in the working of the blast. Counsel for defendant contended that these cases were not in point, since in the one case the damage was caused by fragments of rock being hurled upon or against the property injured, while in the other case nothing was thrown upon the property, but the injury occurred through the medium of the atmosphere—something that was not to be naturally expected. However, the court very sensibly decided that the manner of the injury was immaterial to fix the liability, which latter was established in respect to plaintiff's property by the mere fact of the explosion.

It was then strongly contended on behalf of the defendant that, since no presumption of negligence arises from the mere fact that a steam boiler explodes, to the injury of an adjoining property—see *Marshall* v. *Welwood*, 38 N. J. L. 339; *Losee* v. *Buchanan*, 51 N. Y. 476—there was no reason for applying the doctrine of *Fletcher* v. *Rylands* to the case of carefully-stored nitroglycerine. The court said that the reason for making the distinction was that steam engines and boilers are, at the present day, in so common use and attended with so little danger to the neighboring properties that they cannot be said to constitute nuisances *per se*. Not so, however, with a magazine of nitroglycerine. The existence of a manufacturing plant is often attended with the rise in value of neighboring properties, while the presence of nitroglycerine can have no other than a disastrous effect with such values. The one is an ordinary, the other is an extraordinary, use of property.

Finally, the court disposes of the argument that the liability for the explosion was confined to the adjacent properties by stating that the rule of *Fletcher* v. *Rylands* includes all injuries "within the lines of the danger," and the lines of the danger in this case were fixed only by the limits of the atmospheric vibrations' ability to injury property. The opinion in this case, by Bradbury, C. J., well repays a reading, since the question, now a comparatively new one, will probably arise often in the

NEGLIGENCE (Continued).

future, and the law on the subject is collated in a remarkably able manner. Shauck, J., dissented, but delivered no opinion.

PARTNERSHIP.

It is provided by the Special Partnership Act of Michigan (How. Ann. Stat. § 2348) that, at the time of the formation of the special partnership, one or more of the general partners shall file an affidavit stating that the special partner has paid in his requisite amount "in money or other property at cash value." In *Chick* v. *Robinson*, 95 Fed. 619, a creditor of the partnership attempted to hold the special partner to the liability of a general partner on the ground that the contribution of the special partner had been made, not in money, but by a check, which check, however, had been honored on presentation.

Contribution of "Money" by Special Partner, Check

The Circuit Court of Appeals for the Sixth Circuit, while admitting that many courts hold a special partner to the very strictest compliance with the words of the statute in order to shield him from general liability—see *Haggerty* v. *Foster*, 103 Mass. 17—nevertheless held that a check, filed in good faith, and which has been subsequently honored, comes within the intendment of the above section. "Doubtless the weight of authority in the construction of limited partnership statutes is to the contrary; but, as already said, the trend of modern cases is towards a more liberal and sensible view of such statutory requirements. Their purpose is to secure the actual payment of the money into the capital of the firm, and, failing that, to hold the partner to a general liability. It seems to us that our construction of the statute secures this end, and it does not entrap the honest and unwary into unexpected liabilities by enforcing a stricter rule as to what are cash payments than obtains in the commercial community." Per Taft, J.

SALES.

The Supreme Court of New Hampshire has enforced strictly the rule of law which requires a sale of personal property to be accompanied by an open and notorious change of possession, in order to be effective against the creditors of the vendor. Thus, in *Janelli* v. *Denoncour*, 44 Atl. 62, which was an action against a sheriff for levying on a kiln of bricks as the property of B., which A., the plaintiff, claimed to have been previously sold to him by B., it appeared that A. had recorded

Change of Possession, Notice to Creditors

SALES (Continued).

the bill of sale in the office of the town clerk on the day of the sale; that B.'s wife had given A. permission to allow the bricks to remain in B.'s yard; and that A. had sent his servant at night to cover the bricks with a cloth. None of these facts were held to afford A. any claim against the creditor of B. making the levy, since (1) the recording of the bill of sale, not being required by law, was no notice to creditors, (2) the permission given by B.'s wife was of no avail, since B.'s wife did not own the yard, and (3) the covering of the bricks by A.'s servant at night was not an open and visible assertion of property in them by A.

STATUTES.

Time at which Statutes goes into Effect

The Bankruptcy Act of July 1, 1898 (30 Stat. 544), provides that "this act shall go into full force and effect upon its passage, . . . and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof." In *Carriage Co.* v. *Stengel*, 95 Fed. 641, where a petition for involuntary bankruptcy had been filed November 1. 1898, the court was asked to take judicial notice of the exact hour and minute on July 1, 1898, when the act went into effect. This the Circuit Court of Appeals for the Sixth Circuit declined to do, Judge Taft saying that they would follow the ordinary presumption that a statute takes effect from the first minute of the day on which it is passed; that a court should abandon the presumption and receive evidence of the exact time at which a statute is passed only when the application of the presumption would impart a harsh and retroactive effect to the statute. The proceedings before the court were therefore upheld.

SURVIVAL OF ACTIONS.

Action by Widow for Death of Husband, Act of Husband as Bar

The exact nature of a widow's right of action for the death of her husband, caused by negligence, has been the subject of much discussion. It seems that in the state of Washington a carrier may lawfully contract for freedom from liability for negligence resulting in injury to a person carried on a free pass. In *Adams* v. *Northern Pac. Rwy. Co.*, 95 Fed. 939, the question was whether or not such a contract barred the right of the widow of the person carried, given under a statute based on Lord Campbell's Act. Following the rule adopted

SURVIVAL OF ACTIONS (Continued).

by the Supreme Court of the United States and many jurisdictions, the Circuit Court (E. D. Wash.) held that the right of the widow was entirely separate from the right which the husband might have, and therefore his contract with the railroad did not constitute a bar to his action. The contrary view has been adopted in Pennsylvania.

WILLS.

In Alabama there is the usual statute providing that every devise of land shall be construed as a devise in fee, unless a contrary intention appears. In *Johnson* v. *Land Co.*, 26 So. 360, the devise was "to A. for life, and after her death to her children. Should she, however, die without children, I give at her death to B." It was urged that B. was to take only upon the event of surviving A., but the Supreme Court of Mississippi held that there was not sufficient evidence to take it without the statute, and that the devise should be read to B. and his heirs.

Intention to Create Fee Simple Estate

The testator in this will left his son, J., "one dollar, and no more." There was no residuary clause in the will, and the testator left a piece of land undisposed of by the will. In an action to determine whether or not J. should have a share in the undevised land, it was argued that the evident intention of the testator was that J. should have nothing more than his dollar from the whole estate, and so the intention probably was, but the Supreme Court of New Hampshire restricted the effect of the words, "and no more," to the property left by the will, and allowed J. to share in the undevised land: *Wells* v. *Anderson*, 44 Atl. 103.

Reference to Property not Devised