RECENT CASES.

BANKRUPTCY—CHATTEL MORTGAGE—UNRECORDED—DISTRIBUTION OF PROCEEDS OF SALE.—IN RE CANNON. 10 AM. B. R. 64.—*Held,* where the State law provides that all mortgages shall be valid so as to affect, from the time of delivery or execution, the rights of subsequent creditors only when recorded, and the fund arising from the sale of the bankrupts' property covered by an unrecorded chattel mortgage, is insufficient to pay in full the claims of subsequent creditors, they are entitled to the whole fund.

The decision in this case, as the learned judge says: "Seems to be in contravention of the fundamental principles of the Bankruptcy Law, which is designed to secure an equal distribution of the bankrupt's estate among all the creditors." There seems to be no direct authority upon the question. The court argues that the mortgage being valid as to antecedent creditors, the only claimants to the fund are the mortgagee and the subsequent creditors, and the mortgage being invalid as to the latter, they should take the whole fund. The purpose of such recording laws is to prevent the rights of creditors from being injured by their lack of notice of prior liens. *McKnight v. Gordon,* 94 Am. Dec. 164; *Bayley v. Greenleaf,* 7 Wheat. 46; *Williams v. Beard,* 1 S. C. 313. It would seem that the decision in the present case departed from this principle, in that the subsequent creditors are not only protected from loss through lack of record, but are even left in a better position than they would have been but for the existence of the mortgage. The holding of the referee that: "The entire fund should be divided *pro rata* among all creditors having allowed claims, the dividend set apart to antecedent creditors being applied to the mortgage debt," would seem not only to be more in consonance with the objects of the Bankruptcy act, but also to fulfil the spirit and intention of the recording laws, if not their strict letter. But the opinion holds that: This could only be by virtue of some right of subrogation, and there can be no subrogation to rights which do not exist; and all claims of antecedent creditors are extinguished by the mortgage."

BANKRUPTCY—CLAIMS—SERVICES RENDERED ASSIGNEE PRIOR TO ADJUDICTATION.—RANDOLPH *v.* SCRUGG, TRUSTEE, 10 AM. B. R. 1 (S. C.).—*Held,* where a general assignment for creditors made within the four months period provides that the costs and expenses of administering the trust shall be first paid, a claim for legal services rendered to the assignee prior to the adjudication of bankruptcy against the assignor, and which were beneficial to the estate, may be preferred, in the right of the assignee, as far as he would be allowed for its payment.

In reversing the opinion of the district court Justice Holmes concludes that whether the assignment be considered void as constructively fraudulent, under section 67e of the Bankruptcy Act, or whether its void character

be considered a necessarily implied effect of section 3 (4) which makes such assignments acts of bankruptcy, that it must be considered void is beyond question, for "It could not have been intended that the very conveyance which warranted putting the grantor into bankruptcy should withdraw all his property from distribution there." But the assignment was not *illegal.* Being permitted by the State law it was not prohibited by the Bankruptcy act unless and until proceedings in bankruptcy were instituted. *In re Sievers,* 91 Fed. 366. Being lawful when rendered the services raise a valid debt. *Re Lanis,* Fed. Cas. No. 7989. However, as these services were rendered to the assignee, the claim therefor must be worked out through him. *Central R. and Bkg. Co. v. Pettus,* 113 U. S. 116. The assignee, acting lawfully in what he does before proceedings are begun, in so far as his services are beneficial to the estate is entitled to an allowance for them, which should not be denied through the mere fiction of a void relationship. *Platt v. Archer,* Fed. Cas. No. 11,214. *McDonald v. Moore,* Fed. Cas. No. 8,763. Such allowance is to be regarded as a deduction from the property which the assignee is required to surrender, and in that way it gains a preference. *Platt v. Archer, supra; Re Scholtz,* 106 Fed. 834. *White v. Hill,* 148 Mass. 396.

BANKRUPTCY—SUBROGATION OF SURETY—SECTION 57i.—LIVINGSTON *v.* HEINEMAN, 10 AM. B. R. 39 (C. C. A.).—*Held,* that a surety upon notes of the bankrupt, upon paying the same, is, under section 57i of the Bankruptcy Act, subrogated to the rights of the creditor, *cum onere,* and can only participate in the distribution of the estate when he restores preferential payments received by the creditor.

Section 57i of the Banruptcy Act provides that the surety of the bankrupt, discharging the obligation shall be subrogated to the rights of the creditor. Section 57q provides that creditors who have received preferences shall not have their claims allowed unless they surrender such preferences. This decision of the Circuit Court of Appeals in the Sixth Circuit reversing that of the district court, and a similar decision, *In re Amasa Lyon,* 10 Am. B. R. 25, just handed down in the second circuit confirm the weight of authority as to the construction of these sections. Notwithstanding ingenious efforts of district judges in this and other cases, see *In re Siegel-Hillman Co.,* 11 Fed. 980, to relieve the surety of the burden of returning the preference, by the plain weight of authority, the surety, under these sections, stands exactly in shoes of the creditor taking his claims, "subject to all the limitations and disqualifications attached to them in the hands of his predecessor." *Houston v. Bank,* 25 Ala. 250; *Swarts v. Seigel,* 117 Fed. 13. The conclusion reached in the Seventh Circuit, *Doyle v. Milwaukee Bank,* 116 Fed. 295, that the surety need not return the preference because he was not "in the same class" (Section 60a, Preferred Creditors) with ordinary creditors is deprived of all weight by the recent amendments to the Bankruptcy Act by which the preferences which must be returned are carefully defined as those void or voidable under sections 60b and 67e, i. e., those into which some element of fraud enters; in substance a return to the rule adopted in the former act of 1867.

CARRIERS—FAILURE TO PURCHASE TICKETS—EXCESS FARE.—FULMER V. SOUTHERN RY. CO., 45 S. E. 196 (S. C.).—*Held,* that a railroad company cannot charge passengers boarding trains without tickets an excess fare over the maximum rate fixed by statute, although a rebate for said excess is given. Jones, Woods, Townsend, and Gage, JJ., *dissenting.*

The ruling of the main opinion is based on the argument that the issuance of a rebate check allows the railroad company the use of the money until the check is cashed in. This brings the rate above the maximum fixed by statute. The reports show but two cases directly in point. *Baltimore & Y. Turnpike Road v. Boone,* 45 Md. 344, supports the view of the majority. *Fetter, Carriers,* Vol. I, p. 7004, remarks that on principle the passenger ought not to be put to the trouble of having refunded an excess charge which the company had no right to make in the first place. *Reese v. Railroad Co.,* 131 Pa. St. 422, is in direct conflict with *Turnpike Road v. Boone, supra.* Such excess charge and rebate check is held to be not in contravention of the statute. The "reasonableness of the regulation" is the ground for this decision. The necessity of the system overbalances the fine line of overcharging as drawn in the Maryland case. Justice to the railroads and convenience to the public will require courts to follow the rule laid down in *Reese v. Ry. Co., supra.*

CONSTITUTIONAL LAW—POLICE POWER—USE OF TRADING STAMPS.—YOUNG V. COMMONWEALTH, 45 S. E. 327 (VA.).—*Held,* that a statute prohibiting the use of trading stamps is in contravention of the Constitution of the United States, 14 Amd., sec. 1, as an infringement on personal liberty.

State v. Dalton, 46 Atl. 234 (R. I.), on which the opinion relies, presents the first decision bearing directly on the rights of the State, by police power, to abolish the so-called "trading stamp evil." Police power is the only source of authority by which a State may enact legislation of this character. *Barbier v. Connolly,* 113 U. S. 27; *Lawton v. Steele,* 152 U. S. 133. The constitution of the United States so limits the exercise of this power that property rights shall not be arbitrarily or unreasonably infringed by State legislatures. *Rubstrat v. People,* 185 Ill. 133; *Perry v. Comm.,* 155 Mass. 117; *Goodcharles v. Wigeman,* 133 Pa. St. 431. The ruling is well taken. The above decision supported by *State v. Dalton, supra,* seems to have established the fact that the trading stamp system cannot be disturbed by State action.

CORPORATIONS CREATED BY CONGRESS—GRANT OF POWER TO SUE AND BE SUED—LIABILITY FOR TORTS.—OVERHOLSER V. NATIONAL HOME, 67 N. E. 487 (OHIO).—Through the negligence of the defendant a large quantity of oil and water was discharged upon the land of the plaintiff in such a manner as to destroy his crops. *Held,* that the "home" is a corporation for the purpose of performing an appropriate and constitutional function of Congress and although the power to sue and be sued is conferred, yet it cannot be sued for a tort.

The reasoning in this case rests on the principle that the "home" is an instrument of government. *Bigelow v. Inhabitants of Randolph,* 14 Gray 541. A suit against a corporation performing only governmental functions is a suit against the government and hence can only be maintained when

consent is given by the sovereign. *U. S. v. Gleeson,* 124, U. S. 225. In as much as the United States has not given jurisdiction for claims against it for torts its instrumentalities cannot be held liable therefor. *Barnes v. Dist. of Columbia,* 91 U. S. 540, 552; *Schillinger v. U. S.,* 155 U. S. 163. The government is not liable for the negligence or misfeasance of its officers. *Robertson v. Sibel,* 127 U. S. 507. Nevertheless Congress has power to pay claims or debts which rest upon mere equitable or honorary obligation. *U. S. v. Realty Co.,* 163 U. S. 427.

CORPORATIONS—EXAMINATION OF BOOKS—REFUSAL—PENALTY.—COX V. PAUL, 67 N. E. 580 (N. Y.).—The Stock Corporation Law imposes a penalty on each officer of the corporation who refuses to exhibit the stock book to a member, and also a like penalty upon the corporation. Plaintiff applied to the secretary for permission to inspect the book but was refused. The next day a like demand was refused. The day following a demand was made upon the president, which was refused but subsequently complied with. *Held,* that these interviews amounted to but one demand and one refusal on one occasion and not on several occasions. Parker, C. J., Martin and Werner, JJ., *dissenting.*

This seems to be a very strict construction of the statute. It was said that the statute being penal in its nature should not be extended, and that ordinarily one penalty would secure the end as effectually as many. But it would seem that had the president thought there would be but one liability the plaintiff would have been obliged to seek legal aid to inspect the books. The court next proceeds to rest its decision upon the arbitrary rule that a party suing for penalties can recover but for one violation prior to the commencement of the action and relies on *Jones v. Rochester Gas & El. Co.,* 168 N. Y. 65, as sanctioning that doctrine, but in that case the penalty was continuing and it was held that after an action was brought another request was necessary to start the running of the penalty anew. In the principle case it would seem that each refusal to permit the plaintiff to examine the books constituted a separate wrong as no injury need be shown. *Kelsey v. Pfandler Process Fermentation Co.,* 3 N. Y. Supp. 723.

CRIMINAL LAW—MARRIAGE OF WITNESS BEFORE TRIAL—TESTIMONY—PREJUDICIAL ERROR.—MOORE V. STATE, 75 S. W. 497 (TEX.).—Accused married an eye witness to the crime the day before the trial. The State merely proved by the wife the date of the marriage. *Held,* that such proceeding was prejudicial error, in that it aided the theory of the prosecution that defendant married the witness to suppress her testimony. Henderson, J., *dissenting.*

The bare right of the State to call a witness under the circumstances above was, at common law, a mooted question of evidence. In *Redley v. Wellesley,* 3 C. & P. 558, the wife was considered incompetent; also the husband in *Rex v. Sergeant,* 1 Ry. & M. 352. These cases formed an exception to the rule that a witness cannot, by his own acts, deprive the other party of a right to the testimony. *Greenl., Ev.,* secs. 167, 418 (15th ed.), and cases cited. The principle, rendering a wife an incompetent witness against her husband in criminal actions, except in an offense, one against the other, does not rest on the discretion of the parties. *Stein v. Bowman,* 13 Pet. 209. This rule of exclusion is binding upon the court. 3 *Jones, Ev.,*

sec. 757; *Greenl., Ev.,* sec. 340 (15th ed.). The testimony of a polygamous wife was held cause for reversal in *Bassett v. United States,* 137 U. S. 496. To test competency, either the man or the woman may be examined on the *voir dire* as to marriage, *Seeley v. Engell,* vc *N. Y.* 542, but to establish the marriage, proof *aliunde* must be adduced. By admitting that which the witness is used to prove she is *a fortiori* incompetent.

CARRIERS OF PASSENGERS—DEFECTIVE TICKET—EJECTION—REMEDY.—WESTERN MARYLAND R. Co. *v.* SCHAUN, 55 Atl. 701 (Md.).—Because of a defect in her return ticket, due to the negligence of the conductor on the outgoing trip, plaintiff was ejected from the defendant's train. *Held,* that plaintiff could recover in an action ex contractu only, and not in one ex delecto.

There are decisions which hold that, in such circumstances, the passenger must either pay his fare or leave the train, and sue ex contractu *Hall v. M. & C. R. Co.,* 15 Fed. 57; *Townsend v. R. Co.,* 56 N. Y. 295. But the weight of authority is that he may resist ejection, and recover damages therefor. *New York etc., R. Co. v. Winters.* 143 W. S. 60; *Lake Erie, etc., R. Co. v. Fix,* 88 Md. 381; *Wood, R. R's.,* sec. 349. In Massachusetts a distinction is drawn between those cases where the passenger could have perceived the defect in the ticket upon receiving it and where he could not. *Murdock v. R. Co.,* 137 Mass. 293. The form of action usually adopted is one in tort. *Laird v. Traction Co.,* 166 Pa. St. 4; *Gorman v. R. Co.,* 97 Cal. 1. But it would seem that the same result could be reached in one ex contractu. *Johnson v. R. Co.,* 46 Fed. 347.

EMINENT DOMAIN—RAILROADS—ERECTION OF VIADUCT—STATIONS.—DOLAN ET AL. v. NEW YORK & HARLEM R. Co., 67 N. E. 612 (N. Y.).—The legislature ordered the erection of a steel viaduct through Park avenue. Upon completion the defendant was required to run its trains over it instead of through a depressed cut and over the highway. It was also required that stations which occupied more of the road than the viaduct, be erected. *Held,* that no damages could be recovered by reason of the construction of the viaduct or operation of trains thereon, but damages may be awarded as a consequence of the erection of the stations.

In most of the cases concerning the Park avenue viaduct in New York City there has been a dissenting opinion and no little difficulty has confronted the courts to ascertain precisely the rule to be followed. *Dolan v. N. Y. & H. R. Co.,* 77 N. Y. Supp. 815. The decision reached in the case under discussion and which seems to define the law is that the building of the viaduct in place of the cut is a public improvement effected through a governmental agency, and hence the defendant is not liable to abutting property owners for damages resulting from the operation of its trains thereon, but the stations are ordered to be erected to afford suitable facilities for the public, and where they interfere with the easements of light, air and access the company is liable. It seems quite impossible, however, to reconcile the first proposition with the decision in *Lewis v. N. Y. & H. R. Co.,* 162 N. Y. 202.

EX POST FACTO LAW—STATUTORY CHANGE OF PUNISHMENT BETWEEN CONVICTION AND SENTENCE.—STATE v. ROONEY, 95 N. W. 513 (N. D.).—After

the conviction of the defendant for murder, and before sentence, a new statute went into effect extending the time after sentence within which the judgment of death should be carried into effect. *Held,* that the statute was not *ex post facto* as to the defendant for the reason that the extension of time was a mitigation and not an increase of punishment.

The argument of the court is (1) that death is the extreme penalty that can be inflicted; (2) any change of penalty short of that is a mitigation; and (3) postponement of the time of its infliction is also a mitigation. The only authority directly in point on the third proposition is *People v. McNulty,* 93 Cal. 427, which is directly opposed to the present decision. (Three justices dissented.) In *In re Petty,* 22 Kan. 477, the subsequent statute extended the time within which the execution must take place from eight weeks to not less than one year, and provided further, that it should take place there only upon the issuance of the governor's warrant; held, *ex post facto* and void. And the decision was the same in respect to a similar statute in *Hartung v. People,* 22 N. Y. 95; although the doctrine there laid down that any alteration in the manner of punishment is necessarily *ex post facto* as to one convicted before the going into effect of the alteration has been repudiated. *People v. Hayes,* 140 N. Y. 484.

INDEMNITY INSURANCE—CONSTRUCTION OF POLICY—LEGAL EXPENSES.—CORNELL V. TRAVELER'S INS. CO., 67 N. E. 578 (N. Y.).—An indemnity insurance policy provided for the liability of the insurers in case of accidental injury caused in the course of business of the insured to persons other than employes, and made it the duty of the insurer to negotiate settlement of such claims. Election was given to the company, in event of suit, to pay the full amount of its liability to the insured or defend the proceedings, consent in writing being necessary to bind it. *Held,* that the insurer was not liable for the successful defense by the insured of suits brought against him without legal basis. Cullen, Vann and Werner, JJ., *dissenting.*

The court decided that the obligation of the insurer to defend claims against the insured included only valid claims, since it is not unusual for business men to be sued on claims without just basis and, in such a case, the plaintiff must bear the loss as it was not insured against. The dissenting opinion is based on the proposition that the insurers should defend claims of such a character that if established, they would be liable. In the cases cited in support of this contention, the language seems to have been broader than in the case under discussion and did not restrict indemnity to "circumstances which shall impose on the insured a liability to the person injured" as above.

INJUNCTION—GROUNDS OF REMEDY—STRIKES.—MASTER HORSESHOERS, ETC., V. QUINLIVAN, 82 N. Y. SUPP. 288.—Defendants, a voluntary association of journeymen, demanded that plaintiff, an incorporated association of master mechanics, should permit them to affix their stamp, or trademark, to the work done by them in the shops of plaintiff's members. Upon refusal of the demand defendants declared a strike. *Held,* an injunction may be had restraining defendants from committing acts of violence against members of plaintiff association or their employes. Van Brunt, P. J., and Ingraham, J., *dissenting.*

The injunction is asked for on the ground that plaintiff's use of its own trademark is being injured. The right to a trademark is a property right, which will be protected. *United States v. Steffens,* 100 U. S. 82. The plaintiff is not an employer of labor itself, but its members employ labor, and the strike is against certain of the members. In a strong dissenting opinion, Ingraham, J., contends that the plaintiff association, not being the party against whom the strike is directed, is not entitled to relief, on the ground that a corporation cannot sue for damages to its individual members. *Bank v. McKenna,* 32 Minn. 468. This seems to be the sounder view, and no cases can be found to support the prevailing opinion.

INTOXICATING LIQUORS—SALE WITHOUT A LICENSE—SOCIAL CLUB.—PEOPLE V. LAW AND ORDER CLUB, 67 N. E. 855 (ILL.).—Defendant, a club formed for "social and literary" purposes, sold tickets to its members which they used to pay for liquors at the club bar. The price of the tickets was sufficient only to pay the cost of the liquors. *Held,* to be a "sale" without license, contrary to the statute.

On the question of the right of a social club to supply its members with intoxicating liquors without taking out a liquor license, there is an irreconcilable conflict of authority. Some courts uphold the right on the ground that the so-called "sale" is merely an equitable method of distributing the common property of the members. *Tennessee Club v. Dwyer,* 79 Tenn. 452; *People v. Adelphi Club,* 149 N. Y. 5. Other courts hold that where the club sells intoxicants in a private manner, only to members and guests, and not with a view to profit, it is not a "sale" within the statute. *State v. Austin Club,* 89 Tex. 20; *Piedmont Club v. Commonwealth,* 87 Va. 540. On the other hand, there are not a few courts which, as in the present case, deny absolutely the right of the club to supply liquors to its members, and regard all attempts to do so as mere attempts to evade the statute. *Kentucky Club v. Louisville,* 92 Ky. 309; *State v. Social Club,* 73 Md. 98; *State v. Essex Club,* 53 N. J. Law 99. The authorities seem to be about evenly divided.

LIBEL—ADVERTISEMENT—ASCRIPTION OF UNCHASTITY—INUENDO.—MORRISON V. SMITH, 82 N. Y. SUPP. 166.—Defendant's magazine contained an advertisement of a book. The advertisement was so worded as to give an impression that the book was immoral. Accompanying the advertisement and forming a part of it was plaintiff's picture. Plaintiff alleged that the meaning intended was that she was the subject of an "unchaste and indecent" experience. *Held,* that though perhaps libelous *per se,* the libel failed to support the inuendo, and no action could be maintained. Laughlin and Patterson, JJ., *dissenting.*

Where the language of an alleged libel is ambiguous, the court may properly refuse to strike from the complaint the inuendoes averring the meaning which plaintiff claimed should be attached to the words complained of. *Barnard v. Pub. Co.,* 17 N. Y. Supp. 573. If that which is alleged can be reasonably imputed to the words complained of, then the allegation of such meaning was proper. *Gault v. Babbitt,* 1 Ill. App. 130. It is a question for the jury which meaning would on the occasion in question have reasonably been given. *Smith v. Gafford,* 33 Ala. 168. *Newell on Defamation, Slander and Libel,* 280. Where the words are actionable *per se,* an inuendo may

be treated as surplusage. *Crosswell v. Weed*, 25 Wend. 621. *Schmisseur v. Kreilich*, 92 Ill. 347. But it does not render the complaint demurrable on the ground that the facts do not constitute a cause of action. *Kraus v. Sentinel Co.*, 60 Wis. 425.

SHERIFFS—FALSE ARREST—LIABILITY OF SURETIES.—STATE EX REL. BREMAN V. DIERKER, 74 S. W. 153 (Mo.).—*Held*, that the sureties of a sheriff on his official bond, are not liable for an arrest by him, without a warrant, for a misdemeanor not committed in his view, although he believed he was acting officially. Reyburn, J., *dissenting*.

The sureties of a sheriff are liable for his acts done *virtute officii*, but whether or not they are liable for acts done *colore officii* is a matter concerning which there is a conflict of authority. Sureties were held not liable in *Gerber v. Achley*, 37 Wis. 43; *Huffman v. Koppelkon*, 8 Neb. 344; *People ex rel. Comstock v. Lucas*, 93 N. Y. 585. The distinction is well drawn in *Thomas v. Connelly*, 104 N. C. 342. The ruling above follows an opinion of the same court in *State v. McDonough*, 9 Mo. App. 63. The apparent weight of authority, however, is in favor of binding the sureties under the circumstances of this case. *Lammon et al. v. Fensier*, 111 U. S. 17, gives a very complete collection of the conflicting State decisions.

SUICIDE—CRIMINAL OFFENSE.—STATE V. CARNEY, 55 ATL. 44 (N. J.).—*Held*, an attempt at suicide is an indictable offense in New Jersey.

The principle is well founded that a criminal is not excused by having any one's permission. Suicide, therefore, like any other murder, is a common law felony. *Rex v. Russell*, 1 Moody 356; *Hales v. Petit*, 1 Plow. 253; 4 *Bl. Comm.*, 94, 95; and is still considered a criminal offense. *Comm. v. Mink*, 123 Mass. 422. The court of Hawaii in *Rex v. Absee*, 2 Am. Law Rev. 794, deeming the punishment for murder and the attempt to murder not to apply to self-murder, held as a consequence that an attempt at suicide could not be punished. Where the question is not covered by statute, as in this case, the attempt as a general rule will be punishable as a felony. *Comm. v. Dennis*, 105 Mass. 162; *Darrow v. Fund Society*, 116 N. Y. 537. *Contra*, *Dawes on Crimes*, 72.

WATERCOURSES—RIPARIAN AND NON-RIPARIAN OWNERS—RIGHTS.—DOREMUS V. PATERSON, 55 ATL. 304 (N. J.).—*Held*, that the rights of non-riparian lessees and grantees of the right to take water from a canal flowing out of a river above tidewater are subordinate to the right of a city located above the intake of the canal to vent its sewage into the stream. Hendrickson and Pitney, JJ., *dissenting*.

The right of a riparian proprietor in a watercourse is said to be an inseparable incident of his property right in the land bordering the stream. *Johnson v. Jordan*, 2 Met. 234, 239; *Corning v. Troy Factory*, 39 Barb. 311. Yet the owner can grant to another the right to use the stream; *Kensit v. R. Co.*, L. R. 27 Ch. D. 122; *Gould v. Stafford*, 91 Col. 146; though not as against the lower proprietor, if it causes them injury; *Higgins v. Flemington Water Co.*, 36 N. J. Eq. 538; *Heilborn v. Fowler Co.*, 75 Col. 426. The grant gives rights only against the grantor. *Ormerod v. Todmorden Co.*, L. R. 11 Q. B. D. 155. Yet from this it would seem to follow that, if an upland proprietor pollutes the river to the damage of the grantee, the grantor may indirectly recover; for his damage from the pollution is measured by the decrease in the rental value of his land. *Ferguson v. Mfg. Co.*, 77 Iowa 576; *Seely v. Alden*, 61 Pa. St. 302.