RECENT CASES.

ADVERSE POSSESSION—SUCCESSIVE GRANTS—POSSESSION BY LAST GRANTEE. —EARNEST V. LITTLE RIVER LUMBER CO., 75 S. W. 1122 (TENN.).—Where the State made three successive grants of the same land, and after those claiming under the third grant had been in adverse possession for seven years, the grantees in the second grant brought suit, claiming that such adverse possession had vitalized their intermediate grant. *Held,* that by the Statute of Limitations the effect of the adverse holding by defendants was to draw to and vest in them the absolute and indefeasible title which the first grantees received from the State under their grant. Wilkes, J., *dissenting.*

Consider the grants as made to A, B and C. The ruling that A's title passes to C is contrary to the weight of authority. That the estate in the disseisee is divested and vested in the party holding adversely is well supported by the authorities. 1 *Am. & Eng. Enclc.* (2d ed.), 833. It cannot be said that disseisin works a transfer of title. 2 *Prest. Abst.* 284; *Parker v. Prop. of Locks,* 3 Metc. 98; *Bradstreet v. Huntington,* 5 Pet. 402; *Smith Ld. Cas.* 529. Since a separate and distinct title is created in C the principles of adverse possession would seem to make C's title good as against A, but not good as against B. C's title is indefeasible by any one as to whom his holding has been adverse. It has not been adverse to B. As long as the paramount title remained in A, B, possessing a colorable title equal with C, cannot be disseised. The statute cannot apply unless there has been adverse possession. This decision overrules *Coal Creek Co. v. East Tennessee,* 105 Tenn. 563.

BANKRUPTCY — INVOLUNTARY PROCEEDINGS — PETITIONERS — PROVABLE CLAIMS.—IN MATTER OF HORNSTEIN, 10 AM. B. R. 308., 122 FED. 266.—Sec. 59b of the Bankruptcy Act provides that three or more creditors having provable claims of a proper amount against any person may file a petition to have him adjudged a bankrupt. Sec. 57g provides that claims of creditors holding a preference shall not be allowed unless the preference be surrendered. *Held,* that there is a distinction between provable and allowable claims and that the petitioners, though holding a preference in the form of an attachment, had provable claims and might file a petition.

The existence of the distinction is admitted in *Collier, Bankr.* (4th ed.), 442, but elsewhere it is declared that creditors holding attachments may not file petitions. *Id.* 408. The distinction is ignored and the words used interchangeably in *Re Conhain,* 97 Fed. 923. In *Re Rogers Milling Co.,* 102 Fed. 687, it is said that one who has received a preference has not a provable claim and may not file a petition. This rule has been expressly sustained in other cases. *In re Schenkein,* 113 Fed. 421; *In re Burlington Malting Co.,* 109 Fed. 777. In the principal case is a clear and logical argument based on the terms of the Bankruptcy Act, which seems to establish the existence of the distinction in the face of the weight of authority opposing it.

BANKRUPTCY—JURISDICTION—ENFORCING WAIVER OF EXEMPTIONS.—LOCKWOOD V. EXCHANGE BANK OF FORT VALLEY ET AL., 10 AM. B. R. 107; 190 U. S. 294.—A bankrupt's promissory notes contained a written waiver, as authorized by the laws of the State, of all right of homestead exemption. *Held,* that the bankruptcy court has no jurisdiction to enforce the rights of holders of the notes having no lien.

Under the Act of 1867 it was held that the court of bankruptcy had no jurisdiction over exempt property other than to hear and determine the claims of the bankrupt, if disputed. The decision of all questions as to property which had been adjudged exempt, including the results of a waiver, was to be left to the State courts. *In re Bass,* 3 Woods 382. Under the Act of 1898 it has been held in the district court that the bankruptcy court would take jurisdiction to enforce a waiver, even in the absence of a lien. *In re Woodruff,* 96 Fed. 317. But it has also been held that the jurisdiction of the bankruptcy court over exempt property concerns only its being set aside. *In re Jackson,* 116 Fed. 46; *In re Hatch,* 102 Fed. 280; *In re Seydel,* 118 Fed. 207. In the principal case it is decided by the United States Supreme Court that under the act of 1898 that rule holds which was laid down with regard to the earlier act. For the remedy of the creditor, see *In re Ogilvie,* 5 Am. B. R. 374.

CONTRACT OF SERVICE—QUANTUM MERUIT—RECOVERY.—WAGNER V. EDISON ELECTRIC ILLUMINATING CO., 75 S. W. 966 (Mo.).—In complying with an ordinance requiring all electric wires to be placed underground, several companies acted jointly through a committee. This committee elected one of its members as engineer for the work. *Held,* that, although the engineer was a member of the committee, he could recover on the *quantum meruit* for services rendered as supervising engineer. Robinson, C. V., Gault, V., *dissenting.*

No decision is found directly in point. Bank directors, acting outside of their usual official duties, have been granted compensation where the evidence raised a fair presumption that such was the intention of the parties. *Plu v. First Nat. Bank,* 130 Mass. 391; *Ward v. Polk,* 70 Ind. 309. The rule was applied to railroad directors and trustees in *Cheeney v. Ry. Co.,* 68 Ill. 570, and to corporation presidents in *Santa Clara Mining Ass'n. v. Meredith,* 49 Md. 389. We see no reason why the doctrine should not control the case in question. *Fitzgerald, etc., Co. v. Fitzgerald,* 137 U. S. 98.

FRAUDULENT DEBTOR—NECESSARY PARTIES.—SCHNEIDER V. PATTON ET AL., 75 S. W. 155 (Mo.).—*Held,* that in an action by a judgment creditor against a fraudulent grantee to set aside a conveyance of real estate made by the judgment debtor, the judgment debtor is not a necessary party.

The law is unsettled on the point, although there are but few decisions in direct conflict. On the ground that the conduct of the judgment debtor is to be investigated, *Bump, Fraud. Con.* (1st ed.), 522, has considered him a "necessary party" to the suit. The rule is not well supported and is modified in the 3d ed. of the same work, 548, to read "proper party." See also *Story, Eq. Pl.* (4th ed.), 196. The debtor was held a necessary party in *Lawrence v. Bank,* 35 N. Y. 320; *Lovejoy v. Ireland,* 17 Md. 535; a proper party in *Gaylord v. Kelshaw,* 1 Wall. 82; *Birdwell v. Butler,* 13 Tex. 338; and not a necessary party defendant in *Leach v. Shelby,* 58 Miss. 681; *Potter*

v. Phillips, 44 Iowa 353. The tendency of the law is towards the ruling of this court. *Taylor v. Webb,* 54 Miss. 42; *Laughton v. Harden,* 68 Me. 208.

INSOLVENCY—PREFERENCES—RIGHTS OF CREDITORS.—POWERS-TAYLOR DRUG CO. V. FAULCONER ET AL., 44 S. E. 204 (W. VA.).—An insolvent debtor, with intent to prefer certain of his creditors, sold his property to a third party who was cognizant of the facts. The proceeds of the sale were paid to the preferred creditors. *Held,* that such sale was not fraudulent in fact. An intent to prefer is insufficient to establish a fraudulent intent. McWhorter, P., and Dent, J., *dissenting.*

There is a distinction between the effect of a transfer by a debtor in failing circumstances and an intent to hinder, delay or defraud his creditors. If the intent is to defraud, a valuable consideration will not save the transfer. *Gans v. Renshaw,* 2 Barr (Pa.) 36. The statute of 13 Eliz. is aimed only at intended fraud. *Bank v. Carter,* 38 Pa. 453. Without clear proof of fraud the sale is valid. *Meade v. Smith,* 16 Conn. 346; *Kirkland v. Snow,* 20 Conn. 23. The burden of proof rests upon the creditor impeaching the preference. *Glen v. Grover,* 3 Md. 212; *Johnson v. McGrew,* 11 Iowa 151. The fact that the debtor was about to abscond was held in *Garr v. Hill,* 9 N. J. Eq. 210, not to invalidate the sale. A secret motive for preference is immaterial, *Bun v. Ahl,* 21 Pa. 387, but the law will not tolerate any form of trust to the benefit of the debtor. *Johnson v. Whitwell,* 24 Mass. 71; *Dalton v. Currier,* 40 N. H. 237. If the debtor contrives that other creditors shall never be paid this is not a *bona fide* preference and the transfer may be set aside. *Drury v. Cross,* 7 Wall. 299; *James v. Ry. Co.,* 6 Wall. 752; *Gorden v. Clapp,* 113 Mass. 335; *Smith v. Schwed,* 9 Fed. 483.

JUDGMENT—WANT OF JURISDICTION—SERVICE OBTAINED BY TRICK.—FRAWLEY, BUNDY & WILCOX V. CASUALTY CO., 124 FED. 259.—*Held,* that a service of summons obtained by fraud is invalid and the defendant is not bound by a judgment rendered thereon.

Service obtained by fraud is invalid. *Williams v. Reed,* 29 N. J. L. 385. And the one upon whom it is made may have an action therefor. *Wanger v. Bright,* 52 Ill. 35. But it would seem that, if the service is in behalf of one not a party to a fraud, it will be good. *Nichols & Co. v. Goodheart,* 5 Ill. Ap. 574; *Adriance v. La Grave,* 59 N. Y. 110; though the principle of this ruling is doubted. *Alderson, Jud. Writs,* 272. But if the one upon whom the fraudulent service is made enters a plea, the irregularity is waived, *Manhard v. Schott,* 37 Mich. 234; *Gilson v. Powers,* 16 Ill. 355; even though a motion to dismiss the suit has been made and overruled. *Peters v. R. Co.,* 59 Mo. 406; *Gorner v. Slate,* 8 Blackf. 567. If judgment goes against the plaintiff by default, some cases hold that it cannot be collaterally attacked. *Shee v. La Grange,* 78 Iowa 101; *McMullen v. State,* 105 Ind. 334. Other courts, when suit is brought on the judgment, treat it as void. *Wood v. Wood,* 78 Ky. 624; *Dunlap & Co. v. Cody,* 31 Iowa 260. And this better accords with the rule that the judgment of a court which has no jurisdiction is void. 1 *Black, Jud.,* 218.

MASTER AND SERVANT—BLACKLIST—BOYER V. WESTERN UNION TEL. CO., 124 FED. 246.—*Held,* that an employer, having discharged employes for belonging to a labor union, has the right to enter the reason of their discharge

in a book and invite other employers to examine it, even though the latter then refuse to hire the discharged employes.

It is well established that the jurisdiction of equity does not extend to granting an injunction in cases of libel or slander or false representation, AL. V. BLOW ET AL., 75 S. W. (Mo.).—*Held*, that in a suit to foreclose a 114 Mass. 69; *Mayer v. Stonecutters' Ass'n.*, 47 N. J. Eq. 519. A boycott does not fall within this rule; *Casey v. Union No. 3*, 45 Fed. 135; and an injunction may issue in such a case. *Oxley Co. v. Coopers' Union*, 72 Fed. 695. But it is held to apply so as to prevent an injunction being obtained against the continuing of a blacklisting agreement. *Worthington v. Waring*, 157 Mass. 421. Nor, it would seem, is such an agreement actionable at law. *R. R. Co. v. Schaffer*, 65 O. St. 414; *Bohn Co. v. Hollis*, 54 Minn. 223, 234. Though, if the employe suffers an injury by reason of a false entry in the blacklist an action would be. *Hundley v. R. Co.*, 105 Ky. 162.

MORTGAGES—PROPRIETARY MEDICINE—RECEIVERSHIP—NOTICE.—TUTTLE ET AL. V. BLOW ET AL., 75 S. W. 617 (*Mo.*).—*Held*, that in a suit to foreclose a mortgage upon the right to manufacture and sell a patent salve, where the mortgagor had threatened to disclose the secret formula, it was proper to appoint a receiver without notice to the mortgagor.

It is an established principle that courts will not appoint receivers on *R. R. Co.*, 15 Fla. 201, until defendant has filed an answer or taken *pro* motion of plaintiff, *Trilbert v. Burgess*, 9 Md. 452; *State v. J. P. & M. confesso. Whitehead v. Wooten*, 43 Miss. 523. To this rule there is the well-defined exception that a receiver will be appointed without notice to defendant on clear proof that irreparable injury will result from delay. *Olmstead v. Distilling Co.*, 67 Fed. 24; *Sims v. Adams*, 78 Ala. 395; *Cleveland, C. C. & I. Ry. Co. v. Jewett*, 37 Ohio St. 649. The court refused to appoint a receiver on an *ex parte* application in *Devoe v. Ithaca & Oswego Ry. Co.*, 5 Paige (N. Y.) 521, but granted an injunction pending the motion. Fraud on the part of defendant will aid plaintiff in obtaining appointment. *Voshell v. Hynson*, 26 Md. 83. Defendant's remedy is immediate, and on cause shown the order will be superseded. *Gowan v. Jeffries*, 2 Ashm. (Pa.) 296.

MUNICIPAL CORPORATIONS—EQUITABLE ESTOPPEL—REPEAL OF ORDINANCE. —CITY OF ASHLAND V. NORTHERN PACIFIC RY., 96 N. W. 688 (WIS.).—A city passed an ordinance vacating certain streets under an agreement with a railroad company, but the ordinance was soon afterwards repealed before the company had acted thereon. No personal notice of the repeal was given to the company, and it thereafter went on to expend large sums relying on the ordinance. The city itself erected buildings on the land formerly occupied by the streets, and took no steps to enforce the repealing ordinance. *Held*, in an action commenced 13 years after the repeal, that the city was not estopped from claiming the streets as a highway. Cassoday, C. J., and Marshall, J., *dissenting*.

In support of the proposition upon which the decision seems to rest, that no acts done after the repeal of an ordinance in reliance on the ordinance will raise an estoppel against the city, because the other party is bound by law to know that the ordinance has been repealed, no authority

has been found. The dissenting justices contended that the general attitude of the city and public for 13 years upon the faith of which the company had put itself in a position from which it could not recede without great pecuniary loss, rendered it extremely inequitable in the city to now interfere; and that, therefore, the doctrine of equitable estoppel should be applied. That doctrine has, in certain cases somewhat similar to the present, been applied. *Paine Lumber Co. v. Oshkosh,* 89 Wis. 449; *Chicago, etc., R. R. Co. v. Joliet,* 79 Ill. 25. But the circumstances of the particular case must be exceptional to warrant its application. 2 *Dillon, Mun. Corp., sec.* 675. And there seems to be great conflict in the authorities both as to the existence and the extent of the doctrine. See 2 *Dillon, Mun. Corp.,* secs. 667-675.

MUTUAL BENEFIT ASSOCIATION—AMENDMENT OF BY-LAWS—CONTRACT OF INSURANCE.—MILLER V. TUTTLE, 73 PAC. 88 (KANS.).—Plaintiff's application for insurance contained a stipulation that he would be bound by the by-laws of the order. The by-laws in force at the time gave power to amend. *Held,* that this stipulation does not give authority to a mutual benefit association to adopt by-laws which will modify the insurance contract. Johnston, C. J., Cunningham, Mason, JJ., *dissenting.*

Unless power to amend is reserved to the association, it does not exist. *Chadwick v. Alliance,* 56 Mo. App. 463. It would seem that in the principal case, authority to amend was reserved. The by-laws of a mutual benefit society form a part of its contract with its members. *Grand Lodge, etc., v. Elsner,* 26 Mo. App. 108. And they are not less elements of the contract. of membership, because not specifically referred to in the nominal contract. 3 *Am. & Eng. Enc. L.* (2d ed.), 1081. Where by-laws in force at the time a person becomes a member provide for amendment, the members are bound by the amendments. *May v. Reserve Fund Soc.,* 14 Daley (N. Y.) 89.

NEGLIGENCE—PLACE ATTRACTIVE TO CHILDREN.—MCCABE V. AMERICAN WOOLEN CO., 124 FED. 283.—*Held,* that the maintenance of an unguarded canal, with precipitous banks, through a thickly-settled portion of a town, is not such negligence as will sustain a recovery for the death of a child five years of age who fell in and was drowned.

There are many reported cases which maintain that one who has upon his land anything in its nature attractive to children is liable for an injury suffered by a child by reason of being attracted thereto. Some of these cases blindly follow the lead of *Stout v. R. Co.,* 17 Wall. 657; but this is not a well considered case. *Daniels v. R. Co.,* 154 Mass. 149. The others are based upon the doctrine announced in *Keffe v. R. Co.,* 21 Minn. 207. But this doctrine is untenable. Children attracted on the premises are there, not as invitees, but as licensees. *Indermans v. Dames,* L. R. 1 c. p. 288. *Wharton, Neg.,* sec. 349. And the owner of lands owes no duty to a licensee, except not to injure him through wilfulness, fraud or gross negligence. *Gautret v. Egerton,* L. R. 2 C. P. 371, 375; *Pollock, Torts,* 425; *Cooley, Torts,* 304.

ORAL LICENSE—REVOCATION.—KASTNER V. BENZ, 73 PAC. 67 (KAN.).—*Held,* that an oral license given for a valuable consideration, and in reliance upon which the licensee has expended money or labor, is irrevocable.

The question is a new one in Kansas, and the court follows the authorities which hold that a revocation of an executed license would work a fraud

upon the licensee, and that the licensor has estopped himself from revoking the license. *Thompson v. McElaney*, 82 Pa. St. 174; *Sancer v. Keller*, 129 Ind. 475; *Vannest v. Fleming*, 79 Ia. 638. The prevailing view in England and in many of our States, however, is that neither the execution of the license nor the incurring of expense affect the right of the licensor. *Adams v. Andrews*, 15 Q. B. 284; *Cobb v. Fisher*, 121 Mass. 169; *Crosdale v. Lanigan*, 129 N. Y. 604; *Lambe v. Manning*, 171 Ill. 612. The better view seems to be that the Statute of Frauds prevents any act, other than the giving of a deed, from vesting an irrevocable interest in land. *Lumber Co. v. Wilson*, 119 Mich. 406. And that so far as the question of future enjoyment is concerned, the license may be revoked. *Pitzman v. Boyce*, 111 Mo. 387.

PRINCIPAL AND AGENT—PURCHASE OF ADVERSE INTEREST BY AGENT—CONSTRUCTIVE TRUST.—CALUMET, ETC., Co. v. PHILLIPS, 72 PAC. 1064 (CAL.). —An agent of a mining corporation, while sinking a shaft on their property, discovered a vein uponw hich another claim was located, which claim conflicted with two claims belonging to the corporation. During his agency he obtained title to that claim. *Held*, that he did not acquire the property as agent of the corporation, so as to give rise to a constructive trust.

Where the principal had no present interest in the property purchased by the fiduciary, the agent cannot be adjudged a trustee, though the purchase would have been beneficial to the principal. *Rogers v. Simmons*, 55 Ill. 76; *Loring v. Palmer*, 118 U. S. 321. Under certain circumstances, however, the ownership of the property purchased by the fiduciary may be so essential to the principal that a court of equity would consider a purchase by the fiduciary in his own name a breach of trust, and hold him as a trustee. *Dickinson v. Codwise*, 1 Sandf. Ch. (N. Y.) 214; 15 *Am. & Eng. Enc. L.* (2d ed.), 1198. In *Spalding v. Mattingly*, 89 Ky. 83, a distinction is noted in the nature of the service, as to whether it is a trust, or merely the performance of an appointed service.

TAXATION—EXEMPTIONS—PENSION MONEY.—MANNING v. SPRY, 96 N. W. 873 (IOWA).—*Held*, that pension money paid to the guardian of an insane pensioner, and by him loaned, is "in process of transmission to the pensioner," and still under control of the federal government, and so is exempt from taxation.

There is considerable diversity in the decisions as to when pension money ceases to be "in process of transmission to the pensioner." It has been held that although the pensioner has received the government check and has deposited it in a bank, it does not cease to be exempt. *Reiff v. Mack*, 160 Pa. 265. *Contra, Martin v. Bank*, 60 Vt. 364; *State v. Building Association*, 44 N. J. Law 376. And that land paid for with pension money and conveyed to the pensioner's wife is exempt. *Marquardt v. Mason*, 87 Iowa 136; *Hissem v. Johnson*, 27 W. Va. 644. *Contra, Johnson v. Elkins*, 90 Ky. 163. But the decided weight of authority favors a less liberal construction of the federal statute than that of Iowa and Pennsylvania. See note to *McIntosh v. Aubrey, U. S. Sup. Ct.*, 46 Law Ed. 834, 185 U. S. 122, where it was held (three justices dissenting) that land purchased with pension money the title to which is taken in the pensioner's name, is not exempt.

WITNESSES—IMPEACHMENT.—BRINK V. STRATTON, 68 N. E. 148 (N. Y.).—*Held*, that a witness may not be interrogated as to his belief in the existence of a Supreme Being who would punish him for false swearing, thus affecting his credibility.

In *People v. Most*, 128 N. Y. 108. this question was disposed of by the court without discussion with the remark that "the exception to the question put to the witness on cross-examination as to his belief in a Supreme Being is frivolous." And the decision was the same in *Stanbro v. Hopkins*, 28 Barb. 265, although there the discussion of the question was obiter. But reason and authority appear to justify the court in overruling those decisions. *Perry's Case*, 3 Grat. 632; *Bush v. Com.*, 80 Ky. 244. The only cases apparently *contra* may be distinguished, since they were based on a constitutional provision that "facts which have heretofore caused the exclusion of testimony may still be shown for the purpose of lessening its credibility." *State v. Elliott*, 45 Ia. 486; *Leary v. Miller*, 57 Ia. 613.