RECENT CASES

ACCRETION—RESTORATION OF FORMER BOUNDARIES—RIPARIAN RIGHTS—A river gradually washed away lots belonging to the defendant, with the result that the plaintiff, who owned land immediately in back of that of defendant, became the riparian owner. Some years later the river shifted its position and the surface of the land washed away was gradually restored, so that the boundary lines could be re-established. Plaintiff claimed the land as accretion, while defendant claimed it under chain of title. *Held:* Defendant is owner of the land. *Erickson v. Horlyk,* 205 N. W. 613 (S. D., 1925).

In reaching this conclusion, the court followed the rule adopted in a previous decision to the effect that the land when restored belonged to the owner of the original front estate, as the boundary line could be re-established without difficulty. *Allard v. Curran,* 41 S. D. 73, 168 N. W. 761 (1918). Other jurisdictions have also taken this view. *Stockley v. Cissna,* 119 Fed. 812 (C. C. A., 1902); *Ocean City Assn. v. Shriver,* 64 N. J. L. 550, 46 Atl. 690 (1900).

In the majority of jurisdictions, however, the view prevails that if lands become riparian by the washing away of adjoining lands, the owner is entitled to the right of a riparian owner to accretions, even though they extend beyond the orginal boundary line of his land. *Welles v. Bailey,* 55 Conn. 292, 10 Atl. 565 (1887); *Widdecombe v. Chiles,* 173 Mo. 195, 73 S. W. 444 (1903); *Yearsley v. Gipple,* 104 Neb. 88, 175 N. W. 641 (1919). The court in the principal case and in *Allard v. Curran, supra,* attempts to justify its opposition to the majority of decisions on the ground that the original boundary line between the front and back estate has not been obliterated, but the cases following the majority rule do not recognize the suggestion that the possibility of ascertaining the original boundary prevents the owner of the back estate from acquiring title to the accreted land.

The lack of agreement among the decisions appears to be due, at least in part, to the confusion of the rule as to the right of a riparian owner to accretions with the common law rule that the original owner of submerged land has title to such land on its reappearance. *Randolph v. Hinck, 277* Ill. 11, 115 N. E. 182 (1917); *Hughes v. Birney,* 107 La. 664, 32 So. 30 (1902); *Mulry v. Norton,* 100 N. Y. 424, 3 N. E. 581 (1885).

As a practical solution of the question, it has been suggested that the legislature provide that if the whole or any usable portion of the front estate is restored within a period which may be called reasonable, as, for instance, the period prescribed by the local statute of limitations for recovery of land by a possessory action, it shall be deemed to remain the property of its former owner. Glassie, *Restoration of the Former Front Estate by Alluvion,* 10 VA. L. REV. 106, 123 (1923). It is submitted that an adoption of this suggestion would do much to avoid the hardship resulting in many cases where the majority view is followed.

CONSTITUTIONAL LAW—ANTI-TRUST ACT—EXCEPTION IN FAVOR OF "AGRICULTURAL PRODUCTS"—Under the Colorado *Anti-Trust Act* of 1910, combinations to fix prices were forbidden. By an Act of 1923, combinations of residents to market "agricultural products" were permitted. As construed by the

Colorado courts, the later Act controls and exempts such organizations from the operation of the Act of 1910. Thereafter, the plaintiffs, corporations engaged in the marketing of dairy products, were charged with conspiracy under the Act of 1910. They seek to enjoin these prosecutions as a denial of the equal protection of the laws. *Held:* Injunction granted. *Beatrice Creamery Co. v. Cline,* 9 Fed. (2d) 176 (D. C., 1926).

An anti-trust act exempting agricultural combinations is unconstitutional. *Connolly v. Union Sewer Pipe Co.,* 184 U. S. 540 (1902). An interesting question arises as to the effect of an amendment, permitting such combinations, upon an originally valid statute. Does it render the whole act unconstitutional, or is the amendment alone void? Under the construction placed upon the two statutes by the Colorado court, in *Growers Co-op. Assn. v. Smith,* 240 Pac. 937. (Colo., 1925), the federal court seems justified in holding the whole act unconstitutional. *International Harvester Co. v. Kentucky,* 234 U. S. 216 (1914).

The situation in Kentucky was a very interesting one. Kentucky had a valid anti-trust act. Thereafter, in 1906, an act permitting the pooling of farm products to obtain a better price was passed. The Kentucky court, with the case of *Connolly v. Union Sewer Pipe Co., supra,* in mind, construed the statutes as making lawful combinations which did not decrease or enhance prices above or below the real value of the goods, but making all other combinations unlawful. *Commonwealth v. International Harvester Co.,* 131 Ky. 551, 115 S. W. 703 (1909). The statutes, under this construction, were held unconstitutional as giving no ascertainable standard of value, in a criminal proceeding. *International Harvester Co. v. Kentucky, supra.* Later the validity of the anti-trust legislation arose again in the state court, which then held the original act still in effect and the Act of 1906 unconstitutional and void, expressly overruling *Commonwealth v. International Harvester Co., supra. Gay v. Brent,* 166 Ky. 833, 179 S. W. 1051 (1915). This was done to carry out the legislative intent to keep anti-trust legislation in effect. Whether the Colorado court will place the same construction on the Act of 1923 will probably depend on the Colorado policy with regard to combinations in restraint of trade, which may conceivably have changed since the passage of the Act of 1910.

CORPORATIONS—DIVERSITY OF CITIZENSHIP—FEDERAL JURISDICTION—Three claimants to land sued to enjoin trespasses thereon in a state court, which granted their bill. It was alleged that, due to ulterior reasons, state officers would not enforce the decree, whereupon the complainants formed a corporation in another state, and transferred title to it of the lands, in order to invoke the jurisdiction of the federal courts. *Held:* Jurisdiction denied. *Venice Hunting Co. v. Salinovich,* United States District Court for Louisiana, January 4, 1926.

It is now well settled, after a gradual evolution of judicial decisions, that, for the purposes of diverse citizenship under Art. III, sec. 2 of the Constitution, corporations are conclusively presumed to be citizens of the state of their creation. *Muller v. Dows,* 94 U. S. 444 (1876); *Great Southern Hotel Co. v. Jones,* 177 U. S. 449, 456 (1900). They are not, however, citizens of any other state which permits them to do business. *St. Louis & S. F.*

Ry. Co. v. James, 161 U. S. 545 (1896). And in order to invoke federal jurisdiction because of diversity of citizenship, such circumstance must affirmatively appear. *Thomas v. Board of Trustees*, 195 U. S. 207 (1904). One of the basic reasons for the insertion of the diverse citizenship clause in the Constitution was to secure to suitors a fair hearing, which, it was feared, might not be had in state courts, who might favor their own citizens as against those who were not, and this thought seems to pervade federal decisions involving questions similar to the one presented in the instant case. Thus, it has been held that one changing his residence to another state merely for the purpose of invoking federal jurisdiction under the diverse citizenship clause, and where there existed the intention of immediately returning to his native state, was to be denied the right to such jurisdiction. *Morris v. Gilmer*, 129 U. S. 315 (1889). This case would seem to harmonize with the spirit if not the letter of the Constitution. The same rule has been applied to the transfer of choses in action to citizens of other states, where the avowed purpose was to obtain federal jurisdiction. *Williams v. Nottawa*, 104 U. S. 209 (1881). A distinction, however, has been drawn between real and colorable transfers, and if the transfer is real, the motive behind it will be disregarded. See *Barney v. Baltimore City*, 6 Wall. 280, 288 (U. S., 1867). The rule and the distinction likewise apply where a corporation is created in another state and the transfer made to it. *Lehigh Mining Co. v. Kelly*, 160 U. S. 327 (1895); *Miller & Lux v. East Side Co.*, 211 U. S. 293 (1908). Both of these cases seemed to turn upon the assumption that the transferor could at anytime require a re-transfer to it from the transferee, and it was recognized that, had the transaction been real, federal jurisdiction would have been assumed.

In the instant case, the transfer of title to the corporation was not regarded as being real, since the incorporators could require a reconveyance to them at any time, and hence the decision is in consonance with the rule of the cases already cited. This rule would seem to be a sound interpretation of the diverse citizenship clause, since it is obvious that a state court should not be biased where all the parties before it are citizens of its own state. Nor does it seem that this rule attacks the theory of corporate entity, since it is the conveyance to the corporation and not the corporation itself which is being attacked.

EMINENT DOMAIN—RIVERS AND HARBORS—POWER OF FEDERAL GOVERNMENT—The United States, in widening the River Rouge, condemned certain land along the banks, to obtain compensation for which this suit was brought. The *Rivers and Harbors Act* of 1918, 40 STAT. 911, U. S. Comp. Stat. (1925) § 9878b, contains a provision that in all condemnation proceedings by the United States, to acquire lands for the public use in connection with any improvement of rivers, when a part only of any parcel of land is taken, the jury "shall take into consideration by way of reducing the amount of compensation or damages any special and direct benefit to the remainder arising from the improvement." The trial court charged the jury that the benefit of the improved river to the riparian owner, in computing the deductions for benefits, would merely be such uncertain and contingent privileges of access to

the navigable stream and of constructing docks, as the Government, in the exercise of an absolute control over the navigation of the river, might see fit to allow him. *Held:* Charge erroneous, and judgments reversed. *United States v. River Rouge Imp. Co.*, 46 Sup. Ct. 144 (U. S., 1926).

It is well settled that, in the absence of a controlling local law otherwise limiting the rights of a riparian owner upon a navigable river, he has, in addition to the rights common to the public, a property right, incident to his ownership of the bank, of access from the front of his land to the navigable part of the stream, and when not forbidden by public law he may construct landings, wharves or piers for this purpose. *Railroad Co. v. Schurmeir*, 7 Wall. 272 (U. S., 1868); *Transportation Co. v. Parkersburg*, 107 U. S. 691 (1882).

This right of a riparian owner, it is true, is subject to the public right of navigation, and it is of no avail against the exercise of the absolute power of Congress over the improvement of navigable rivers. *United States v. Chandler-Dunbar Co.*, 229 U. S. 53 (1912). But Congress, in the exercise of this power, may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation. See *Yates v. Milwaukee*, 10 Wall. 497, 504 (U. S., 1870).

In the light of these general principles, then, it is clear that the trial judge not only unduly stressed the contingent character of the rights of the riparian owner, but in substance, charged that they had no rights in this respect, and could only obtain uncertain privileges as a matter of grace. Instead, such a riparian owner has the rights enumerated above, until they are taken away by the Government in the due exercise of its power of control over navigation. There is an essential difference between a property right which may be enjoyed until taken away in the appropriate exercise of a paramount authority, and an uncertain privilege which may not be allowed at all, and the failure to point out this distinction would naturally lead the jury to a lower estimate of the benefits.

EVIDENCE—FAILURE TO CALL WITNESSES—PROPRIETY OF COMMENT—The plaintiff was injured when an auto in which she was riding was struck in the rear by a trolley car. The conductor took the names of the passengers in the car, but none was called at the trial. Plaintiff's counsel was permitted to argue to the jury that they might draw an inference unfavorable to the defendant from this failure. *Held:* Reversible error. *Myer v. Wells*, 277 S. W. 585 (Mo., 1925).

"The non-production of evidence that would naturally be produced by an honest claimant permits the inference that its tenor is unfavorable to the party's cause." 1 WIGMORE, EVIDENCE, 585 (2d ed., 1923). See also 22 C. J. 111. This inference, however, arises only under certain conditions. The witness must be within the power of the party to produce. *Tetreault v. Conn. Co.*, 81 Conn. 556, 71 Atl. 786 (1909). See *People v. Sharp*, 107 N. Y. 427, 465, 14 N. E. 319, 342 (1887); WIGMORE, *supra*, p. 587. The defendant is not bound to produce rebutting evidence until the plaintiff has established a *prima facie* case. He may, if he so desires, rely on plaintiff's failure to establish a cause of action. *McDuffee's Administratrix v. B. & M. R. R.*, 81 Vt. 52, 69 Atl. 124 (1908).

When the plaintiff has established a *prima facie* case, failure on the part of the defendant company to call witnesses in its employ may be commented upon. *Schwier v. N. Y. C. & H. R. R.*, 90 N. Y. 558 (1882); *Oldham v. U. S. Express Co.*, 25 Pa. Super. 549 (1904). But if there is no evidence that an employe, even though present, could testify as a witness to the accident, there is no inference to be drawn from a failure to call him. *Kaplan v. I. R. T. Co.*, 165 N. Y. Supp. 276 (1917). In the instant case the defendant called the conductor and motorman of the car which caused the accident.

The court ruled, in the instant case, that there was no such relation existing between the railroad company and its passengers as to warrant the jury in drawing any unfavorable inference from a failure to produce them as witnesses. This ruling was based on two *dicta*. *Foster v. Atlanta Rapid Transit Co.*, 119 Ga. 675, 678, 46 S. E. 840, 841 (1903); *Fleishman v. Polar Wave Ice Co.*, 163 Mo. App. 416, 425, 143 S. W. 881, 884 (1915). When such inference is permitted, "the plaintiff gets the benefit of the favorable testimony of the witnesses, as was said in the principal case, without having them subjected to cross-examination or impeachment." The justice of the ruling is particularly apparent in the instant case, where the plaintiff would have almost no chance for recovery if she were not permitted to infer what the testimony would be, and where under the peculiar facts of the case, it was quite possible for her to have discovered the names of the passengers by the use of a little diligence.

EVIDENCE—PAROL EVIDENCE RULE IN PENNSYLVANIA—In a suit on a note payable on demand, the defendant offered parol evidence that it was given for goods sold on consignment, and that when the note was executed it was agreed that it was to be liquidated by partial payments only as the goods were sold. *Held:* The evidence is admissible. *Ward & Sherk v. Zeigler,* Supreme Court of Pennsylvania, February 3, 1926.

Action for goods sold and delivered. The defendant had a claim against the plaintiff for extra work. The defendant's letter was admitted in evidence, showing that he agreed to withdraw all claims and accept a stated sum in full settlement. The defendant offered parol evidence that prior to the writing of the letter, he and the plaintiff agreed that the amount due for the goods should be cancelled and that the plaintiff would pay the amount stated in the letter *Held:* The evidence is admissible. *Garrison v. Salkind,* 285 Pa. 265, 132 Atl. 125 (1926).

For a thorough and exhaustive treatment of this subject see Harrison, *Pennsylvania Rule as to Admissibility of Evidence to Establish Contemporaneous Inducing Promises to Affect Written Instruments,* 74 U. OF P. L. REV. 235 (1926). These two cases are the most recent applications of the rule in Pennsylvania. In both cases the parol evidence was admitted because the written instrument "did not express the entire understanding and agreement" between the parties. But to determine whether the written contract is a complete instrument, the writing itself is to be examined. *Gianni v. Russell & Co.*, 281 Pa. 320, 126 Atl. 791 (1924).

It is therefore submitted that while the decision in *Garrison v. Salkind* is justifiable on this ground, the decision in *Ward & Sherk v. Zeigler* is questionable, because the note itself represented a complete contract.

RECEIVERS—CLAIMS AGAINST CORPORATION—FOREIGN JUDGMENT—While an action, begun by the plaintiff in New York against the defendant, an Illinois corporation, was pending, the defendant was put into the hands of a receiver by an Illinois court. The receiver notified the plaintiff that he had no power to defend the action, but that the claim could be presented on its merits to a master in chancery of the Illinois court. The plaintiff, however, took judgment by default, and presented his judgment to the master as his claim. The receiver contended that the plaintiff's judgment was not binding on the property in his hands and that the proper remedy was to present the claim anew to the master on its merits. The plaintiff relied on the "full faith and credit" clause of the Constitution (Art. IV, sec. 1). *Held:* The plaintiff's judgment is not binding on the receiver and cannot be satisfied from assets in his hands. *Evans v. Illinois Surety Co.* (*McKegney v. Hopkins, Receiver*), Supreme Court of Illinois, December 16, 1925.

The case presents an interesting problem in the law of receiverships, and one that seems to have arisen very infrequently. On first thought, it might seem to be wrongly decided, as a denial of the effect of a judgment of a court of a sister state. But it is to be noted that the judgment is against the corporation only. The receiver was never made a party to the action, and even if he had been, it is settled law that apart from statute no suit can be brought against a receiver without the permission of the court which appointed him. HIGH, RECEIVERS, § 254 (4th ed., 1910). The appointment of a receiver does not, however, abate pending actions, and the plaintiff may prosecute his action to a judgment if he sees fit. But the judgment would not bind the receiver or the property in his hands, for the receivership court holds such property, through the receiver as its officer, to administer in such manner as it shall decide. Clearly, another court cannot dictate to it the manner in which it shall determine who are the creditors and the amount due them; that, it would seem, is for the receivership court, and it only, to decide. *Attorney-General v. Supreme Council A. L. H.*, 196 Mass. 151, 81 N. E. 966 (1907). This case seems to be the only authority presenting the question on the same set of facts. *Cf.*, however, *Pendleton v. Russell*, 144 U. S. 640 (1892), affirming *People v. Knickerbocker L. Ins. Co.*, 106 N. Y. 619, 13 N. E. 447 (1887), where it was held that a court appointing a receiver of a corporation, which it dissolved at the same time, is not bound as to the assets in its possession by a judgment recovered in another state against the corporation after the receivership and dissolution took effect, though the action was brought prior to the receivership proceedings. The decision really turns on the point that the corporation having expired, there was no judgment to bind anybody [*accord: Insurance Commissioner v. United F. Ins. Co.*, 22 R. I. 377, 48 Atl. 202 (1901)], but there is a dictum that were it otherwise, still it would not be binding on the receivership court.

The plaintiff, of course, may satisfy his judgment out of any assets the corporation may have on its discharge from the receivership. As the corporation in this case was insolvent and would probably be dissolved, that right was entirely technical and unsubstantial. But the plaintiff still has the privilege, graciously accorded him by the court of equity of Illinois, of presenting to the master his claim on its merits.

SALES—CONDITIONAL SALES—CONFLICT OF LAWS—The vendee of an automobile under a conditional sale contract, valid in Indiana, drove the car into Illinois, where it was taken in execution on a judgment in an action for damages caused by its operation. The vendor brought replevin against the constable and the custodian. *Held:* Reservation of title in the vendor was valid as against the judgment creditors of the vendee. *Grover-Bartlett Nash Co. v. Krans & Nelson,* Appellate Court of Illinois, December 28, 1925.

Generally, if the state in which a contract of conditional sale is made enforces the title of the conditional vendor as against third persons, the vendor's title will prevail even though the rights of third persons are considered superior in the state in which the action is brought. *Overland Texarkana Co. v. Bickley,* 152 La. 622, 94 So. 138 (1922); *Barrett v. Kelley,* 66 Vt. 515, 29 Atl. 809 (1894); *Studebaker Bros. v. Mau,* 13 Wyo. 358, 80 Pac. 151 (1904). See WILLISTON, SALES, § 339 (2d ed., 1924). At least two jurisdictions, however, have held that it is contrary to public policy to enforce such reservation of title in the vendor, and refuse to recognize such a reservation as against their own citizens, even on the ground of comity. *Turnbull v. Cole,* 70 Colo. 364, 201 Pac. 887 (1921); *Judy v. Evans,* 109 Ill. App. 154 (1903).

The court in the principal case overrules *Judy v. Evans, supra,* and earlier cases, and holds that the *Uniform Sales Act,* § 20, changes the rule in Illinois as to conditional sales, making them valid and recognizing the reservation of title in the seller, thus bringing Illinois into line with the generally accepted view. Ill. Laws 1915, 604, Ill. Rev. Stat. 1925, ch. 121a, p. 2129. The Colorado case, *supra,* overruled *Harper v. People,* 2 Colo. App. 177, 29 Pac. 1040 (1892), which was a strong case in accord with the principal case. *The Uniform Sales Act* does not appear to have been adopted in Colorado.

In Pennsylvania, since the adoption of the *Sales Act* of 1915, P. L. 241, Pa. St. 1920, § 19649, *et seq.,* the conditional vendor may enforce the reservation of title in himself as against *bona fide* purchasers or creditors of vendee. See Mueller, *Conditional Sales in Pennsylvania Since the Adoption of the Sales Act,* 72 U. OF PA. L. REV. 123, 147 (1924). It would therefore seem to follow that Pennsylvania would reach a result in accord with the principal case. This state, however, has recently passed the *Uniform Conditional Sales Act,* which does not enforce a reservation of title as against a purchaser or creditor of the vendee, unless the contract or a copy is filed in a prescribed manner. Act of 1925, P. L. 325. Where a sale of personal property took place in another state, but the property was attached in Pennsylvania, it was held that the validity of the sale and transfer was to be tested by the law of the foreign state rather than that of Pennsylvania. *Born v. Shaw,* 29 Pa. 288 (1857). It is submitted that this would indicate an accord with the result reached in the principal case.

SALES—FRAUD—PASSAGE OF TITLE—RIGHTS OF BONA FIDE PURCHASER—One M, dealing face to face with the plaintiff, through false impersonation induced the latter to sell him a ring, giving in payment therefor a forged check. M then pledged the ring with the defendant, a *bona fide* pledgee, for $450. The plaintiff sought to recover the ring. *Held:* Plaintiff may recover. *Amols v. Bernstein,* 214 App. Div. 469, 212 N. Y. Supp. 518 (1925).

It is the general rule that in case of a sale where the vendor intended to pass title to the vendee, the vendee receives title even though he be guilty of fraud or false pretenses, the title being voidable until the vendee sells or pledges it to a *bona fide* purchaser or pledgee for value without notice. Here the court held that the transaction amounted to common law larceny and common law forgery, so that no title passed. But where A and B are dealing face to face, and B falsely represents himself to be C, and A, believing him, sells him the goods, the majority of courts hold that the vendor intended to pass title, there was a meeting of the minds and title passed, though subject to be avoided, so that there is no larceny. *Hickey v. McDonald,* 151 Ala. 497, 44 So. 201 (1907); *Edmunds v. Merchant's Dispatch Co.,* 135 Mass. 283 (1883); *Phelps v. McQuade,* 220 N. Y. 232, 115 N. E. 441 (1917). Contrary to the majority rule is Missouri, which has held, on similar facts, that not even a voidable title passed. *Loeffel v. Pohlman,* 47 Mo. App. 574 (1891).

The principal case, as stated above, proceeds on the theory that the false representations and the giving of the forged check vested a wrongful possession in the vendee which amounted to a larceny, and that no title passed. To substantiate this view, the court relies on the cases of *People v. Miller,* 169 N. Y. 339, 62 N. E. 418 (1902) and *Shipply v. People,* 86 N. Y. 375 (1881). These cases, however, are clearly distinguishable from the principal case, in that they were based on the express finding by the jury that the vendor did not intend to part with title. It is clearly the prevailing rule that if the transaction is such that the vendor intends to part with possession, but retain the title, no title passes, so that a party who through fraud or false pretenses obtains possession of the goods and converts them to his own use is guilty of larceny. *Commonwealth v. Flyn,* 167 Mass. 460, 45 N. E. 924 (1897); *People v. Martin,* 116 Mich. 446, 74 N. W. 653 (1898); *Commonwealth v. Perrine,* 46 Pa. Super. 637 (1911).

Under the general rule on the subject, the facts of the principal case establish merely a sale obtained through false impersonation and false pretenses, notwithstanding which a voidable title passes, and if the goods are transferred to a *bona fide* purchaser or pledgee for value, the latter's title or claim becomes absolute.

It is suggested that the decision in the principal case is not in accord with the accepted law, the variance being due largely to a failure of the court to differentiate between the case where the vendor intends to transfer possession only, and the case, which was the one before the court, where he intends a transfer of both title and possession.