RECENT CASES.

APPEAL AND ERROR—RIGHT TO APPEAL—A statutory requirement that the reporter's shorthand notes of the evidence be certified within thirty days of rendition of judgment in cases where an appeal was to be taken was not complied with, through no fault of the party desiring an appeal. *Held:* Refusal to grant a new trial because the right to appeal was thus lost is not a denial of any constitutional right. Bingham v. Clark, 159 N. E. (Iowa) 172.

The right to appeal did not exist at common law and so can only be exercised when given by the constitution or a statute, Hawkins v. Burwell, 191 Ill. 389 (1901). Where the right is given by the constitution, there is a split in the decisions as to whether it is absolute, or can only be exercised in accordance with conditions prescribed by the legislature. One line of cases holds that there is an absolute right to an appeal, and if through misfortune an appeal is not perfected a new trial must be granted as a matter of right, Zweibel v. Caldwell, 72 Neb. 47 (1904); 3 Okl. Cr. 175 (1909). The other cases, of which the principal case is one, hold that an appeal must be prosecuted according to the reasonable rules and regulations imposed by the legislature, and though failure to comply therewith may be caused by accident or misfortune, a refusal to grant a new trial under such circumstances is not a denial of a constitutional right, Sullivan v. Haug, 82 Mich. 548 (1890); Realty Co. v. Erickson, 143 Iowa 677 (1909). *A fortiori,* where the right to appeal to a particular court is purely statutory, it can only be exercised by a strict compliance with the requirements of the enabling statute, Railway Co. v. O'Neal, 10 App. D. C. 205, 244 (1897); Stenographer Cases, 100 Me. 271 (1905); Drainage District v. Railroad, 216 Mo. 709 (1908). These requirements cannot be waived by consent of the parties, for, if not complied with, the appellate court does not acquire jurisdiction. Caudle v. Morris, 158 N. C. 594 (1912). When the statutory requirements have been met, the right to be heard in the appellate court is absolute, and will be enforced by mandamus, McCreary v. Rogers, 35 Ark. 298 (1880).

BREACH OF MARRIAGE PROMISE—INSUFFICIENCY OF EVIDENCE—JUSTIFICATION FOR BREACH—In an action for breach of a promise to marry, the evidence of the promise consisted merely of the girl's testimony, uncorroborated by the other evidence or facts, and it was also brought out that in a previous case evidence given by her was untrue. The defendant denied the promise and gave proof of improper relations between the girl and another man before and during the alleged engagement. *Held:* The whole evidence in the case is against the finding of a contract to marry and the alleged improper relations if unknown to the defendant at the time of the alleged promise, are a complete defense. Carmony v. Henderson, 99 Atl. (Me.) 177.

An express promise of marriage in such an action need not be proved, but the promise may be inferred from the circumstances which usually attend an engagement, Connolly v. Bollinger, 67 S. E. 71 (W. Va. 1910). So it has been held that it may be implied from intimate and frequent asso-

ciation at the time of and prior to the engagement, Anderson v. Kirby, 125 Ga. 62 (1906), from admissions of defendant, whether oral or in letters, Stone v. Sanborn, 104 Mass. 319 (1870). It was recently held that intercourse between the parties was evidence of the promise of marriage, Fletcher v. Ketcham, 144 N. W. 916 (Iowa 1913). However, it is wholly a question of fact for the jury, Fisher v. Kenyon, 56 Wash. 8 (1909); Connolly v. Bollinger, *supra*.

The holding in the principal case that the fact of illicit relations with another man during the engagement is a complete defense is in line with the authorities, McKane v. Howard, 95 N. E. 642 (N. Y. 1911).

CIVIL PROCEDURE—MOOT CASE—A school girl's father sought to enjoin the enforcement of an ordinance compelling school children to be vaccinated. When the appeal was taken, the ordinance, by its own terms, had ceased to be of effect. *Held:* The question of the validity of the ordinance was a moot question which the court would not determine. Wendell v. Peoria, 113 N. E. 918 (Ill. 1916).

It is fundamental that a real controversy must be presented to the court. Abstract questions or fictitious proceedings will not be decided. Lincoln v. Aldrich, 5 N. E. 517 (Mass. 1886). Even if the case is an amicable one, there must be a real dispute between the parties. Berks County v. Jones, 21 Pa. 413 (1853). In general, if the matter is future, contingent or uncertain, the court will not determine the rights of the parties until the facts actually arise. *In re* Spingarn's Estate, 159 N. Y. S. 605 (1916). Accordingly, courts will not inquire into the question of the constitutionality of statutes until concrete cases, depending on the settlement of the question, are presented. Hanrahan v. Terminal Commission, 100 N. E. 414 (N. Y. 1912). It is immaterial that both parties unite in desiring to have the moot question settled. Southern Pac. Co. v. Eshelman, 227 Fed. 928 (1914).

If change of circumstances has removed the element of controversy from the case, it becomes a moot case and will not be decided; whether by act of the parties, Lesher v. Lesher, 95 N. E. 483 (Ill. 1911); or act of law, N. Y. Electric Lines Co. v. Gaynor, 153 N. Y. S. 244 (1915); or mere lapse of time, Faust v. Cairns, 242 Pa. 15 (1913). Obviously, it is not error for the trial court to refuse to charge on a moot question. Johnson v. Foster, 108 N. E. 928 (Mass. 1915).

However, the mere fact that a decree of court has been executed does not make the case moot. Walker v. Sarven, 25 So. 885 (Fla. 1899). Nor does it become moot if lapse of time has simply altered the position of the parties, and has left an essential question undetermined. Postal Teleg. Co. v. City of Montgomery, 69 So. 428 (Ala. 1915). The motive of the parties is immaterial in determining whether the question is moot; if there is an actual dispute, the question is not moot simply because the settlement of the question was the motive of the suit. Adams v. Union R. R., 44 L. R. A. 273 (R. I. 1899).

Some courts have held that if the question is of great public importance, it will be decided, although between the parties any judgment the

court might render will be ineffectual. *In re* Cuddeback, 39 N. Y. S. 388 (1896); Southern Pac. Terminal Co. v. Interstate Commerce Comm., *supra*. But see, *contra*, Chicago R. R. v. Dey, 41 N. W. 17 (Ia. 1888), and *cf.* Milk v. Green, *supra*.

CIVIL PROCEDURE—WITNESS—"INTERESTED"—In an action to cancel an insurance policy the defendant objected to admission of testimony of a doctor on the ground that he was a policyholder in the plaintiff Mutual Company. *Held:* The interest is too infinitesimally small to disqualify the witness, Mutual Life Ins. Co. v. Woolen Mills Co., 90 S. E. (N. C.), 574.

Up to about the middle of the nineteenth century practically any interest in the dispute disqualified a witness. This rule has been universally modified by statutes so that today, with a few exceptions, interest merely impugns credibility and does not affect competency, Wigmore on Evidence, Secs. 575-577. (Ed. 1904). Even at common law the interest necessary to disqualify was required to be more than contingent or uncertain, Bean v. Bean, 12 Mass. 20 (1815).

The chief exception to the competency of "interested" witnesses is where the adverse party in interest is dead. In this case the interest must be legal or pecuniary, Jones v. Emory, 115 N. C. 158 (1894); Bailey v. Beall, 251 Ill. 577 (1911); and generally certain and vested. Southern Inst. v. Avery, 157 Ill. App. 568 (1910). Hence, a wife of a party is competent under this exception, Helsabeck v. Dow, 167 N. C. 205 (1914). The interest must be in the event of the action not merely in the subject of the controversy, Bunn v. Todd, 107 N. C. 266 (1890). In some jurisdictions this exception only includes "parties in interest" in which the witness is competent unless a technical party to the action, Hess v. Hartwig, 83 Kan. 592 (1910). Generally a paid agent or officer of a corporation is competent, Casey v. Biscuit Co., 163 Ill. App. 145 (1911). A stockholder is incompetent, Brown v. Bank, 113 Pac. 483 (Col. 1911); but he must be a stockholder at the time of testifying, *In re* Sloan's Estate, 50 Wash. 86 (1908).

In civil actions against a living defendant in general any witness is competent, as pecuniary interest only discredits and does not disqualify, R. R. Co. v. Chichester, 68 S. E. 404 (Va. 1910); Iron Co. v. Graham, 147 Ky. 161 (1912).

CONTRACTS—IS A TAX CLAIM A DEBT?—A city brought debt for unpaid taxes in a municipal court which had jurisdiction of contract actions above $1000. *Held:* A tax claim is not a debt and a statutory permission to sue in assumpsit as on a debt does not change the character of the action but merely the form. Hence, municipal court had no jurisdiction, People v. Dommer, 113 N. E. (Ill.), 934.

This case is good exposition of the best modern opinion that a tax claim is not a debt, Crabtree v. Madden, 54 Fed. 426 (U. S. C. C. 1893). When the statute authorizing the tax provides no remedy for collection the implication of the authority to institute a civil suit arises, State v. Dix, 159 Mo. App. 573 (1911). In some states where the statutory rem-

edy is deemed inadequate assumpsit is held to lie, Ryan v. Gallatin Co., 14 Ill. 78 (1852).

A few decisions have followed the principle laid down in the case of the City of Dubuque v. Ill. Central Railroad, 39 Ia. 56 (1874), where it was said that a duly authorized tax is a debt, as a "contract in its more extensive sense includes every agreement, obligation, or legal tie whereby one party becomes bound to do or not to do an act or to pay a sum of money." The better opinion seems to be that a tax is merely a pecuniary burden imposed for the support of the government. *In re* Farrell, 211 Fed. 212 (U. S. C. C. 1914).

CONTRACT—OFFER AND ACCEPTANCE—VOTE—A Grand Army post, by vote, directed its president to have the title to certain property examined and, if found good, to purchase it. This vote was rescinded at a subsequent meeting. *Held:* The vote was merely an initiatory step and it was not an offer nor an acceptance from which a contract could arise. Salvation Army v. Wilcox Post, 114 N. E. (Mass.), 60.

It is well settled that if the transaction amounts simply to preliminary negotiations, no contract results until it assumes a formal character. Edge Moor Bridge Works v. Bristol County, 49 N. E. 918 (Mass. 1898); State *ex rel.* v. Board of Public Service, 90 N. E. 389 (Ohio 1909). Unless a vote is specifically a vote to sell or purchase, it is not an offer nor an acceptance, and cannot give rise to a binding contract. McManus v. Boston, 50 N. E. 607 (Mass. 1898).

If there is an understanding or a stipulation that the contract is to be reduced to writing, this becomes one of the conditions of the contract, and a vote to accept the offer is not sufficient; there is no contract which can be specifically enforced until the terms are reduced to writing. Weitz v. Independent District, 79 Ia. 423 (1890); McCormick v. Oklahoma City, 203 Fed. 921 (1913). Some courts hold, however, that if the offer is accepted and the contract is acted on, although there was a stipulation that it should be reduced to writing, failure to so reduce it does not invalidate the contract. Argenti v. San Francisco, 16 Cal. 255 (1860); Fort Madison v. Moore, 80 N. W. 527 (Ia. 1899). Once the offer is accepted by vote, one party cannot refuse to reduce the contract to writing, if that is a stipulation. McFarlane v. Mosier, 143 N. Y. S. 221 (1913).

The question of whether a vote is an offer, or an acceptance, often arises in the case of municipalities asking for bids. In Pennsylvania it has been held that the statute requiring that such contracts be reduced to writing is mandatory, and there is no valid contract even if the bid is accepted and work commenced. Hepburn v. Phila., 149 Pa. 335 (1892). It seems that the difficulty cannot be overcome by suing for refusing to enter into the written contract, after voting to accept the bid. Smart v. Phila., 54 Atl. 1025 (Pa. 1903), *cf.* Beckwith v. New York, 1066 N. Y. S. 175 (1907), and McFarlane v. Mosier, *supra*. If it developes after the bid has been accepted that the parties did not understand each other, all deposits which have been made must be returned and the parties put in *statu quo*. Dawson Springs v. Miller Contract Co., 160 S. W. 495 (Ky. 1913).

CORPORATIONS—DIRECTOR AS STOCKHOLDER—EFFECT OF ASSIGNMENT WHERE OWNERSHIP OF STOCK IS ESSENTIAL—A director in a corporation signed a blank transfer of his shares of stock, but did not intend thereby to terminate his interest in them. *Held:* The general rule that when ownership of shares is necessary to qualify as a director, one who sells his shares to another disqualifies himself, does not apply here, for under the law, the director did not cease to be a stockholder: Lippman v. Kehoe Stenograph Co., 98 Atl. (Del.) 943.

Though statutes usually require a director to be a holder of one or more shares of the stock of the corporation, in the absence of such a statute, or a rule of the corporation, a director need not be a shareholder; Wright v. S. & N. W. R. R., 117 Mass. 226 (1875). Where such requirement exists, the fact that he secured his stock by gift, or holds it in trust, does not disqualify him; Pulbrook v. Richmond Mining Co., L. R. 9 Ch. D. 610 (1878); Kardo v. Adams, 231 Fed. 950 (1916). And this is so even though the stock was transferred to him solely for the purpose of qualifying him; People v. Lihme, 269 Ill. 351 (1915). But it must be a *bona fide* transfer; *In re* Ringler & Co., 204 N. Y. 30 (1912).

Generally, a person elected a director is not disqualified because he was not a stockholder when elected, if he later qualifies by purchasing stock; Greenough v. Ala. G. S. R. Co., 64 Fed. 22 (1894). But where directors served from the date of their election, it was held they must be stockholders on that day; Waterbury v. Temescal Water Co., 11 Cal. App. 632 (1909).

There is some difference of opinion as to the effect of an assignment by a director of his qualifying shares. In some jurisdictions it is held that he ceases, *ipso facto*, to be a director; Orr Ditch Co. v. Reno Water Co., 17 Nev. 166 (1882); Oudin Co. v. Conlan, 34 Wash. 216 (1904). In others such assignment is merely cause for removal, and until such proceedings are taken, the office of director is not vacated; Savings Bank v. Lumber Co., 63 Cal. 179 (1883); Howle v. Scarbrough, 138 Ala. 148 (1903). The former result is accomplished by statute in many jurisdictions; Chemical Nat. Bank v. Colwell, 132 N. Y. 250 (1892).

CRIMINAL LAW—EVIDENCE—CORROBORATION OF ACCOMPLICE—Where evidence is given by an accomplice, it must be corroborated, and by independent testimony which implicates, or tends to connect the accused with the crime. Rex v. Baskerville, 115 L. T. (Eng.), 453.

At common law, the testimony of an accomplice, although entirely without corroboration, was sufficient to support a conviction of one accused of crime. State v. Holland, 83 N. C. 624 (1880). Yet it seems well settled, that a jury was always instructed to act upon such testimony with extreme care and caution, and should not bring in a conviction on such testimony, unless they were satisfied beyond a reasonable doubt of its truth. Hoyt v. People, 140 Ill. 588 (1892). The common-law rule has been changed in many jurisdictions by statutes, which expressly declare that uncorroborated testimony of an accomplice cannot sustain a conviction. People v. Bright, 203 N. Y. 73 (1912).

In those jurisdictions where the uncorroborated testimony of an accomplice is insufficient to sustain a conviction, it would seem to be clearly essential, that the jury be properly instructed as to the accomplice's testimony, the necessity for its corroboration, and the nature, weight, sufficiency, and effect of such evidence as required by the statute of the particular jurisdiction. Wadkins v. State, 58 Tex. Cr. 110 (1910); People v. Coffey, 161 Cal. 433 (1911). While the corroboration may be slight, it must tend to inculpate the defendant with the crime, and it is not sufficient if it merely shows the commission of the offense, or the circumstances thereof. Comm. v. Holmes, 127 Mass. 424 (1879).

CRIMINAL LAW—OBSTRUCTING JUSTICE—PROCURING ABSENCE OF WITNESS—An indictment charged the prisoner with conspiracy to obstruct the course of justice by agreeing for $500—that defendant, a material witness in a cause then pending, should absent himself from the jurisdiction. *Held:* The indictment sets out an indictable offense and is good. Commonwealth v. Perkins, *et al.*, 113 N. E. 780.

While the cases are not numerous, it seems well settled that it is a crime to prevent a witness from attending or testifying upon the trial of any cause. Com. v. Reynolds, 14 Gray 87 (Mass. 1859). An attempt, whether successful or not, to dissuade a witness is also indictable. State v. Carpenter, 20 Vt. 9 (1847). It is not necessary that the person be under process to attend at the time his absence is procured in order that it be an offense. State v. Brebusch, 32 Mo. 276 (1862); Com. v. Berry, 141 Ky. 477 (1911). It seems that the nature of the proceedings in which the witness was to testify is immaterial as it has been held a crime to bribe a person not to attend as a witness before a grand jury, State v. Hughes, 43 Tex. 518 (1875), and to induce one not to appear before a justice of the peace, State v. Hodge, 142 N. C. 665 (1906). It was held in State v. Bringold, 40 Wash. 12 (1905), that no physical act of intervention is necessary but that the offense may be committed by persuasion, advice or threats. The Louisiana court held that though the proceedings had not been commenced but were only being considered when the witness was spirited away the offense was nevertheless complete. State v. Desforges, 47 La. Ann. 1167 (1895).

In Com. v. Reynolds, *supra*, it was pointed out that if the one spirited away had been subpœnaed to appear it was not necessary that his testimony be material or even admissible, and indeed it has been held that the materiality of the evidence is never essential to the offense. Tedford v. People, 219 Ill. 23 (1905).

Intentionally and designedly getting a witness drunk for the express purpose of preventing his appearance before a grand jury was held to be indictable in State v. Holt, 84 Me. 509 (1892).

CRIMINAL LAW—TREASON—Adherence to the sovereign's enemies by a subject who is without the realm is treason within the meaning of the English Statute of Treason (25 Edw. III, c. 2), making it treason to "levy war against our Lord the King in his realm, or to be adherent to the

King's enemies in his realm, giving to them aid and comfort, in the realm or elsewhere." Rex v. Casement, 115 Law Times 277.

According to Article 3, Section 3, of the Constitution, "treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort." This definition was taken from the English Statute of Treasons. Charge to the Grand Jury, 5 Blatchf. 549 (1861). These terms are therefore to be understood in the same sense in which they are used in that statute. Burr's Trial, 4 Cranch. 469 (1807). Congress has no power to change in any way the crime of treason as defined by the Constitution. U. S. v. Greathouse, 4 Sawyer 457 (1863).

Treason cannot be committed by one who does not owe allegiance, and so, though an alien may have been domiciled in the country, if he leaves it and joins the enemy, he is not guilty of treason, U. S. v. Villato, 2 Dallas 370 (1797), but as long as he stays in the country, he owes a temporary allegiance, and may be guilty of treason equally with citizens. Com. v. O'Donnell, 12 Pa. C. C. 97 (1892). Rebels are not "enemies" within the meaning of the definition. It is confined to subjects of a foreign power in a state of open hostility. U. S. v. Greathouse, *supra*.

Treason against a state is a distinct offense, and unless otherwise provided by the state constitution or its laws, adhering to and giving aid to the enemies of the United States is not treason against a state. People v. Lynch, 11 Johnson 549 (N. Y. 1814). Nor is it treason against the United States to levy war exclusively against the sovereignty of a state. Charge to the Grand Jury, 1 Story 614 (1842).

The principal case is the first in which the question of whether the words of the statute include one who, being without the realm, adhered to the sovereign's enemies, has been squarely raised. It has, however, been held that the act of becoming naturalized in an enemy state in time of war is an adherence to the enemy. Rex v. Lynch (1903), 1 K. B. 444. The decision in the principal case is in accord with the general opinion of text-writers. 1 Hale P. C. 165; Stephen's Digest of Criminal Law (6th Ed.), 44.

EQUITY—SPECIFIC PERFORMANCE—CONVERSION—At a testator's death certain lands were subject to a building agreement with a provision for re-entry, and an option of purchase. Notice of exercising the option was given but before the purchase was completed the lessee died insolvent and later the trustees of the will re-entered. *Held:* Giving notice of exercising the option converted the premises, the property being personalty from then on. The fact that the sale was not completed and re-entry made, did not operate as a reconversion. *In re* Blake, 115 Law Times 663.

The rule that conversion dates from the exercise of the option to purchase and not from the execution of the contract is established in England by *In re* Marlay [1915], 2 Ch. Div. 264. For American cases, see the annotation to this case in 64 U. OF PA. L. REV. 528. Also Chas. J. Smith Co. v. Anderson, 84 N. J. Eq. 681 (1915).

As regards the doctrine of conversion, *In re* Blake is similar to Rose v. Jessup, 19 Pa. 280 (1852).

By a contract for sale, equity considers land converted into personalty and a reconversion will not be effected by a rescission of the contract after the testator's death. Longwell v. Bently, 23 Pa. 99 (1854); Leifer's Appeal, 35 Pa. 420 (1860): Maffet's Estate, 8 Kulp 184 (Pa. 1896). The extent of this rule is illustrated by Keep v. Miller, 42 N. J. Eq. 100 (1886), where the contract existed at testator's death but because of laches became unenforcible against the vendee yet the conversion was held to control the distribution of the estate. *Accord:* Curre v. Bowyer, 5 Beavan 6 (Eng. 1819). There is, however, no conversion if the testator would have been unable to convey the title contracted for, Lunsford v. Jarrett, 11 Lea 192 (Tenn. 1880); Thomas v. Howell, L. R. 34 Ch. Div. 166 (Eng. 1886). Or if the contract is rescinded by both parties before his death. *In re* Goetz, 13 Cal. App. 198 (1910).

Similarly where the vendor defaults, the purchase price in the vendee's hands remains realty for the purpose of distributing his assets. Whitaker v. Whitaker, 4 Bro. C. C. 31 (Eng. 1792). But there is no conversion if the vendor was unable to convey a good title. Green v. Smith, 1 Atk. 572 (1738). The executor of the vendor alone has the right to the purchase price. Krause's Appeal, 162 Pa. 18 (1894). The heir and vendee cannot agree to rescind the contract so as to defeat his right to specific performance. Bubb's Case, Freeman Ch. Cas. 38 (1678).

Evidence—Criminal Law—Previous Offenses—The prisoner shot a police officer, who was attempting to arrest him. *Held:* Evidence of previous crimes on the same day not admissible to prove motive. People v. King, 114 N. E. (Ill.), 601.

Evidence of the character of a prisoner, though formerly admissible, Hawkins' Trial, 6 How. St. R. 921 (1669), is now excluded on the grounds that the jury attaches too much weight thereto, and that the prisoner cannot be prepared to rebut. Boyd v. U. S., 450 (1891); 1 Wigmore, Evidence (2d Ed.), Sec. 194. But where the former crimes are introduced to prove motive, Com. v. Robinson, 146 Mass. 571 (1888); identity, Stock v. Mitchell, 252 Ill. 534 (1911); knowledge, People v. Hensler, 48 Mich. 49 (1882); or intent, Queen v. Francis, L. R. 2 C. C. R. 128 (Eng. 1874), the evidence has been admitted. This result has been reached by two lines of reasoning. One is that on the trial of a person accused of a crime, the general rule is that evidence of former crimes is inadmissible and that the rule has the above exceptions. See People v. Cunningham, 66 Cal. 668 (1885). The other view is that the general rule is that anything that is logically probative is admissible and that the character rule is an exception based on the common law's leniency towards prisoners, Wigmore, Evidence (2d Ed.), Sec. 194: public policy, Com. v. Jackson, 132 Mass. 20 (1882); and expediency, Attorney-General v. Hitchcock, 1 Ex. 93 (1847).

If the reason for the exclusion of the evidence, to prove the offense, is not its lack of probative value—see State v. Lapage, 57 N. H. 275, 299 (1876)—the reason of undue prejudice to the prisoner would seem to apply equally well to the production of such evidence to prove motive.

On this principle, it has been held that evidence of a former crime was inadmissible to show motive, if there was other and sufficient evidence to establish the motive, Farris v. People, 129 Ill. 532 (1889), and it is on this principle that the principal case proceeds.

See 62 U. of P. L. Rev. 225; 63 U. of P. L. Rev. 138, 910; 64 U. of P. L. Rev. 525.

Evidence—Former Testimony of Witness—Admissibility—A father, suing for damages for an injury to his infant son, offered evidence given by a witness, since deceased, in a former suit by plaintiff as son's next friend against defendant. *Held:* Evidence offered was admissible, the parties and issues being substantially identical, Palon v. Great Northern Ry. Co., 160 N. W. 670 (Minn. 1916).

It has been suggested as a true test: "Whether the former testimony was given upon such an issue that the party-opponent in that case had the same interest and motive in his cross-examination that the present opponent has." 2 Wigmore on Evidence, Sec. 1388. Few cases have adopted this rule in its entirety as yet, but it seems clear that former testimony is admissible if the difference consists merely in a difference of the nominal parties, or in an addition or subtraction, Wright v. Tatham, 1 A. & E. 3 (1834); or, if the property interest is the same, Morgan v. Nicholl, L. R. 2 C. P. 117 (1866). A few modern cases cling tenaciously to the old tests, Metropolitan Ry. Co. v. Gumby, N. Y. L. J. Feb. 6 (1900); Eesley Light and Power Co. v. Power Co., 137 N. W. 663 (Mich. 1912); but the tendency is to adopt Wigmore's rule, Szelwicki v. Lumber Co., 156 N. W. 622 (Wis. 1916); particularly where the parties are privy in interest, Cohen v. Long Island R. Co., 154 App. Div. 603 (N. Y. 1913).

Under any rule the witness whose testimony is offered must be either dead, Cooper v. Southern R. Co., 87 S. E. 322 (N. C. 1915); or shown to be outside of the jurisdiction and unobtainable, Daniels v. Stock, 23 Col. App. 529 (1913); or has become incapacitated due to insanity, Atwood v. Atwood, 86 Conn. 579 (1913); or has become disqualified by reason of interest, Banks v. Bradwell, 140 Ga. 640 (1913); but not when there is a partial failure of memory, Donaldson v. Valley Coal Co., 175 Ill. App. 224 (1912).

If the witness testifies in the second trial in contradiction of his former testimony, the latter is admissible to impeach his testimony, but not to prove facts, Pitts Banking Co. v. Clayton, 217 Fed. 38 (U. S. C. C. A. 1914).

See also 13 Harv. L. Rev. 687, 28 Harv. L. Rev. 429, and 63 U. of P. L. Rev. 556.

Evidence—Value of Land—Competency of Witness—Upon the offer of a witness to testify to the value of land, who claimed familiarity with the property in the vicinity but "no exact knowledge in dollars and cents," his competency was questioned. *Held:* Any person who knows the property and has an opinion of its value may testify thereto irrespective of the probative value of such testimony. Great discretion is vested in the trial court in determining competency, Brown v. Aitken, 99 Atl. 265 (Vt. 1916).

The case seems thoroughly in accord with modern opinion on the subject. Whitman v. Boston & Maine R. Co., 89 Mass. 313 (1863); Jones v. R. R. Co., 151 Pa. 30 (1892); Farin v. Nelson, 31 N. D. 636 (1915). It has been held, however, that a non-expert witness was not competent to testify to the increase in value of land after purchase or the value of buildings, Conlin v. Osborn, 120 Pac. 775 (Cal. 1912).

The value of land is established by implied reference to a market value, actual or assumed. Berg v. Spink, 24 Minn. 138 (1877). The actual market value may be proved by opinion evidence, Alabama Coal and Iron Co. v. Turner, 145 Ala. 630 (1905). Where there is no actual market value the opinions of conversant witnesses generally are competent, Eckington & S. H. Ry. Co. v. McDevitt, 191 U. S. 103 (U. S. Sup. Ct. 1903). This opinion may be based on every consideration that would influence the general buyer such as availability for cutting up into building lots, *etc.*, Trust Co. v. P. R. R., 229 Pa. 484 (1911). The non-expert witness may give his opinion as to the value of land in gross or by unit value, such as price per acre, square or running foot, *etc.*, Schuster v. Chicago Sanitary Dist., 177 Ill. 626 (1899).

The question of competency is almost entirely a matter of discretion vested in the trial court. General knowledge is usually sufficient though there is no rule to determine the question, Monghan v. Estate of Burns, 64 Vt. 316 (1892).

See also 60 U. of P. L. Rev. 283.

Master and Servant—Workmen's Compensation Act—Loss of Will Power—An injured workman recovered from all objective symptoms of the injury but suffered from functional paraplegia; inability to walk being due to loss of will power. *Held:* Loss of will power is as much a result of the injury as any objective symptoms, and whether the cause of paralysis was physical or mental is unimportant in the administration of the compensation act, Southampton Gas Co. v. Stride, 115 L. T. (Eng.), 498.

In general, if the nervous condition following the injury is due to the injury, the employee is entitled to compensation. There may be complete recovery from the physical or muscular effects of the injury, but a condition known as traumatic neurasthenia may intervene, and although the employee is competent to work, he genuinely, though mistakenly, believes he is not. While this condition continues, he is entitled to compensation. Eaves v. Blaenclydack Colliery Co., 100 L. T. 751 (Eng. 1909). This neurasthenic condition must be genuine and must be clearly distinguished from malingering. The distinction is pointed out in a case decided by the California Industrial Commission, Sartini v. Mammouth Mining Co., 1 Cal. Ind. Comm. 161 (1913), cited in 11 N. C. C. A. 32 n.

If the nervousness is such as a reasonable man could throw off, then it is not compensable. Turner v. Brooks, 3 B. W. C. C. 22 (Eng. 1909). If it is due, not to the injury, but to brooding over the injury so that the employee lacks the courage to do the work, it has been held that the employee is not suffering from incapacity resulting from the accident, and that he is not within the act. Holt v. Yates, 3 B. W. C. C. 75 (Eng. 1909).

And if the sufferer erroneously believes that he is a chronic invalid, and his refusal to try to work is unreasonable, he is not entitled to compensation. Higgs v. Uricume, 108 L. T. 169 (Eng. 1913). Every case depends upon its own particular facts, and sometimes it is difficult to distinguish them. Wall v. Steel, 8 B. W. C. C. 136 (Eng. 1915).

It has been held, where the neurasthenia is not traumatic, the employee suffering merely from nervous shock and from no physical injury whatever, has nevertheless received an injury by accident, Yates v. South Kirby Collieries, 3 B. W. C. C. 418 (Eng. 1910). It seems that such a condition is not compensable within the terms of the Pennsylvania Act. Roller v. Drueding Bros. Co., 3 Pa. Dep. Rep. 202 (Phila. C. P. 1916).

The few American decisions on the question of traumatic neurasthenia follow the English to the extent of allowing compensation if the condition results from the accident and if the employee is unable to throw it off. *In re* Hunnewell, 107 N. E. 934 (Mass. 1915); Coslett v. Shoemaker, *supra*.

PLEADING—ABATEMENT—EFFECT OF SUBSEQUENT SUIT ON PENDING ACTION—To a declaration in assumpsit on a promissory note an affidavit of defense was filed setting out that a suit was "still pending and undetermined" in a neighboring county on the identical note. A rule by plaintiff for judgment was made absolute by the lower court. *Held:* The affidavit of defense is here substantially a plea in abatement and is insufficient because it failed to aver that the action pending was a "prior action." Judgment sustained, Feather v. Hustead, *et al.*, 98 Atl. Rep. 971 (Pa. 1916).

It is usually said that matter pleaded in abatement must be accurately stated and negative every conclusion against the pleader, Brown-Ketcham Iron Works v. Swift Co., 100 N. E. 584 (Ind. App. 1913). It has, however, been held that where the matter in abatement is meritorius this strict rule ought not to be applied and that in such a case a more liberal construction should be made. Campbell v. Hudson, 106 Mich. 523 (1895). It was held in Suckles v. Harlan, 54 Ill. 361 (1870), that the plea of a prior action pending on same cause of action should be considered in such a favorable light. It would seem that this view is in line with the present more liberal pleading.

That the mere bringing of a subsequent suit on same cause of action will not abate a former one is well settled. Boone v. Boone, 141 N. W. 938 (Iowa 1913). If then the strict rule of construction is to be applied it seems that the court was correct in holding that the failure to aver that there was "a prior action" pending is fatal to such a plea. For a discussion of the general requirements of a plea in abatement avering the pendency of a prior action, see Eastman v. Barker, 76 N. H. 277 (1912). It is well to note that the principal case does not have reference to an affidavit of defense under the Pennsylvania Practice Act of 1915 (P. L. 483).

PROPERTY—COVENANT OF SEIZIN—MEASURE OF DAMAGES—DEFENSE AND RELIEF IN EQUITY—If the title of a covenantee, who has been in undisturbed possession, is made good by the Statute of Limitations, after rendition of judgment for breach of covenant of seizin, but before satisfaction,

then a suit in equity may be maintained to enjoin enforcement of the judgment. Mather v. Stokely, 236 Fed. 124.

The better rule is, that a covenant of seizin is a personal covenant, not running with the land and is broken as soon as made, if the grantor at the time of the conveyance has no title. Pate v. Mitchell, 23 Ark. 590 (1861). In those jurisdictions where such covenants are regarded as in *praesenti*, the rule of damages for breach, is the actual damage sustained, which is generally the consideration paid and interest thereon. Miller v. Hartford Ore Co., 41 Conn. 112 (1874), but the damages are assessed upon the facts appearing at the time of assessment. Dickey v. Weston, 51 N. H. 23 (1881). So if the covenantee perfects his title by inurement, the recovery for breach will be limited to nominal damages only, Water Co. v. Fray, 96 Va. 559 (1899). The consideration money with interest, less any benefit the grantee has obtained from possession, is generally accepted everywhere as the proper measure of damages. Flint v. Steadman, 36 Vt. 210 (1863); Tone v. Wilson, 81 Ill. 529 (1876). Therefore, if the covenantee's title is made good by the Statute of Limitations, and there has been no actual disturbance or injury, the damages will be merely nominal, Hilliker v. Rueger, 165 App. Div. N. Y. 189 (1915).

To an action on a judgment, no defense should be entertained, which might have been interposed to defeat the original action, Barton v. Radclyffe, 149 Mass. 275 (1889). Equity will not interfere with judgments at law, unless the complainant has an equitable defense of which he could not have availed himself at law. Ashton v. Board of Commissioners, 158 Pac. 901 (Okla. 1916). And any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have brought up in defence at law, will justify an application to a court of chancery. Marshall v. Holmes, 141 U. S. 589 (1891). For a satisfactory way of dealing with the effect of the Statute of Limitations upon the vendee's right of recovery for a broken covenant of seizin, see Bolinger v. Brake, 57 Kan. 663 (1897).

SALES—VALIDITY—VIOLATION OF LICENSE STATUTE—When a statute requires all peddlers to have licenses and provides a penalty for any sale without a license, such sale is void, Albertson and Co. v. Sherton, 98 Atl. (N. H.) 516.

The fact that the vendor has violated the law in relation to a chattel sold does not avoid the sale, but if the act of contradicting is prohibited, the contract is void. Singer Co. v. Draper, 103 Tenn. 262 (1899).

If a contract is prohibited, it is void, McNulta v. Corn Belt Bank, 164 Ill. 427 (1907), unless the legislature expressly provides otherwise; People v. Board of Supervisors, 122 Ill. App. 40 (1905). Where a penalty is provided, the act is impliedly prohibited, Brackett v. Hoylt, 29 N. H. 264 (1854), though such provision has been held merely *prima facie* a prohibition, Rahter v. First Nat'l Bank, 92 Pa. 393 (1880). So if an act is termed a misdemeanor, it is impliedly prohibited, Pinney v. First Nat'l Bank, 68 Kan. 223 (1904); *contra*, Sinnot v. Bank, 164 N. Y. 386 (1900).

If, however, the statutory penalty is for purposes of revenue only,

the act of contracting is not illegal and the contract may be enforced, Mandlebaum v. Gregovich, 17 Nev. 87 (1882). If the purpose of the statute is designed in any way to protect the public, though its primary purpose be for revenue, the act is prohibited, Levinson v. Boas, 150 Cal. 185 (1901). There is a split of opinion on whether a statute requiring peddlers to be licensed, is a revenue statute. Some courts so hold it, Mandlebaum v. Gregovich, *supra;* Banks v. McCorter, 82 Md. 518 (1896). Others hold with the principal case that as the intention of the legislature was to restrict the issuance of licenses to competent individuals, the statute is not for revenue alone, but for the protection of the public and that hence the contract is void, Singer Co. v. Draper, *supra*. Statutes requiring that pawnbrokers be licensed are protective, Levinson v. Boas, *supra*.

TORT—FRAUD—MISREPRESENTATIONS—LIABILITY—No liability in deceit attaches to misrepresentations as to intentions for the future, especially when not made with intent that they be relied on, Gleason v. Thaw, 234 Fed. 570.

To sustain an action for deceit, it must appear that the defendant made some representation, which must be material to the subject matter of the contract, to the plaintiff with intention that he should act thereon, that the representation was false, that defendant when he made it knew it to be false, and that plaintiff believed it to be true, and acted on it to his injury, Lenbeck v. Gerken, 90 Atl. 698 (N. J. 1914). One who makes a misrepresentation without fraudulent design, cannot be held liable for any damages resulting therefrom, Buford v. Edwards, 84 S. E. 654 (Va. 1915). Such representations must be made for the purpose of influencing, or of their being acted upon, Blake v. Thuring. 185 Ill. App. 187 (1914).

Concealment of a material fact which one is bound to disclose is an actionable fraud, but in the absence of a duty to speak, mere silence as to material facts is not of itself actionable, Boileau v. Breen, 144 N. W. 336 (Ia. 1913).

False representations in order to be fraudulent, must relate to a present or past state of facts, and no action will lie to recover for deceit, in the failure to perform a promise looking to the future, Farwell v. Colonial Trust Co., 147 Fed. 480 (1906). Representation as to a future condition is not actionable fraud, Everest v. Drake, 143 Pac. 811 (Col. 1914); Martin v. Daniel, 164 S. W. 17 (Tex. 1914).

There is no rule of law which places upon one who has made a truthful statement at the time of present existing facts, the affirmative duty of correcting such statement when conditions later change, Du Pont Co. v. Schuenger, 154 N. Y. S. 186 (1915).

TRIAL—COMPETENCY OF JURORS—HOLDERS OF CORPORATION STOCK OR BONDS HAVING AN INTEREST—HARMLESS ERROR—As a party has no right to the service of a particular juror, rejection of a juror because he owned a bond of the defendant company did no harm and was not a reversible error, Seehrman v. Wilkes-Barre Co., 99 Atl. (Pa.), 174.

The cases establish that one in the relation of stockholder is incompetent to serve as juror in a case in which the corporation has an interest,

Respublica v. Richards, 1 Yeates 480 (Pa. 1795). The rule applies to a stockholder's son, Irvine v. The M. & M. Bank, 1 Pitts. Rep. 422 (Pa. 1858), and to a stockholder's tenant who holds from year to year on shares, Harrisburg Bank v. Forster, 8 Watts 304 (Pa. 1839). But no other case has been found in which the question was raised concerning a bondholder. The mere fact of an indebtedness between a party and the juror is not enough, it seems, to disqualify him, Mumford Banking Co. v. Bank, 82 S. E. 112 (Va. 1914); Thompson v. Douglass, 35 W. Va. 337 (1891), annotated in Loyd's Cases on Civil Procedure at page 354. Where a statute makes the relation of debtor and creditor a disqualification, a deposit of notes to the defendant in escrow does not establish this relation, Hall v. Chattier, 17 Idaho 664 (1910). It is within the trial court's discretion to decide whether the juror has had such business relations with a party as would influence his verdict, Moffenbier v. Koeing, 108 N. E. 594 (Ind. 1915).

The different views as to whether an erroneous ruling on a challenge for cause is ground for reversal are shown in an annotation to Colbert v. Journal Publishing Co., 142 Pac. 146 (N. Mex. 1914), in 63 U. of P. L. Rev. 141. The general rule is that the appellant must show an injury, Curney v. Chapman, 158 Pac. 1125 (Okla. 1916). As was said in the principal case, a man has no right to a particular man or men on his jury nor to any particular men from whom to select, Commonwealth v. Payne, 205 Pa. 101 (1913).