CURRENT DECISIONS

CONSTITUTIONAL LAW—CONSTRUCTION—INITIATIVE AND REFERENDUM.—The petitioner was nominated by a state senatorial district as delegate to a state constitutional convention. The state constitution provided for the re-districting of the state by the General Assembly, or, on its failure to act, by the Governor, the Secretary of State, and the Attorney-General. Mo. Const. art. 4, sec. 7. Subsequent to the petitioner's nomination, the State was re-districted by the executive officers, and thereafter the Secretary of State refused to file the petitioner's nomination. *Held,* (three judges *dissenting*) that the constitutional provision for re-districting the State by the executive officers was repealed by the Initiative and Referendum Amendment (Mo. Const. art. 4, sec. 57), and that the petitioner could compel by mandamus the filing of his nomination. *State, ex rel. Lashly, v. Becker, Secretary of State* (1921, Mo.) 235 S. W. 1017.

In holding that the initiative and referendum placed all grants of legislative power in a single forum, and thereby repealed the grant to the executive department, the majority opinion seems to violate some of the basic canons of constitutional construction. All parts of a law should be read together and harmonized if possible. *Wheeler v. Herbert* (1907) 152 Calif. 224, 92 Pac. 353. To effect an amendment of an existing constitutional provision the language must be clear and unmistakable, the presumption being against a repeal by implication. *People, ex rel. Murphy, v. Field* (1919) 66 Colo. 367, 181 Pac. 526. When a constitutional provision will bear two constructions, one of which is consistent with, and the other inconsistent with, an intention clearly expressed in a previous section, the former should be adopted, so that both provisions may stand. *Chance v. Marion County* (1872) 64 Ill. 66.

CONSTITUTIONAL LAW—EXERCISE OF POLICE POWER FOR PURELY AESTHETIC PURPOSES.—In a mandamus proceeding the plaintiff sought to compel the Commissioner of Buildings to issue a building permit for store houses. The defendant pleaded an ordinance which prohibited the construction of any business house in a zone having more residences than business houses within a radius of 300 ft. unless three-fourths of the owners of such dwellings agreed to the erection and the building inspector approved of the design of the proposed structure. *Held,* that the ordinance was unconstitutional and that mandamus should issue. *Spann v. City of Dallas* (1921, Tex.) 235 S. W. 513.

Purely aesthetic purposes have not been considered a sufficient basis for an exercise of the police power. See COMMENTS (1920) 30 YALE LAW JOURNAL, 171. While the distressing effects of obnoxious odors and annoying noises are recognized by the courts as injurious to public health, the significance of the reaction of ugly surroundings upon the nervous system apparently is not appreciated in the realm of law. See NOTES (1921) 34 HARV. L. REV. 419. With the development of modern community interest, as manifested by desires for "civic centers," "zoning" ordinances, etc., it is to be hoped that the courts may recognize that attempts to effect such a public purpose are certainly for the public welfare. The European example is worthy of emulation even if state constitutional amendment is necessary.

CRIMINAL LAW—BURGLARY—BREAKING BY ONE HAVING AUTHORITY TO ENTER.—The defendant was an intimate associate and friend of the owner of a dwelling-house. Her privilege of entering the house was altogether free and unlimited. She entered the house and stole a certain sum of money. In the trial court she

was convicted and adjudged guilty of burglary. *Held,* that one who is privileged to enter premises cannot be guilty of breaking into them, and so may not be convicted of burglary. *Davis v. Commonwealth* (1922, Va.) 110 S. E. 356.

When, by the use of force, however slight—e. g. the turning of a key—one enters a house at a time in the night when he is authorized to enter, and in an outward manner which is authorized, but with an intent to steal, there is conflict in authority as to whether he is guilty of breaking into the house, and consequently whether he is guilty of burglary. The books sometimes make a nice, but unjust, distinction, that though it is burglary if a servant enter with intent to steal, at a time and in a manner authorized, yet if a joint occupier enters with like intent it is not burglary. See L. R. A. 1915 D, 1015, note; 9 C. J. 1016. In at least one case where the culprit was both servant and joint occupier, his state of servanthood weighed more in the balance against him than his joint occupancy for him. *State v. Howard* (1902) 64 S. C. 344, 42 S. E. 173; *contra,* 2 Bishop, *Criminal Law* (8th ed. 1892) sec. 97, note 12. The instant case apparently extends the immunities of a joint occupier to an intimate family friend.

EMPLOYERS' LIABILITY ACT—NO ASSUMPTION OF RISK OF INJURY FROM UNFORESEEABLE NEGLIGENCE OF FELLOW SERVANT.—While assisting in the movement of an interstate train in the yards of the defendant railway company, the plaintiff's intestate was killed through the negligence of a fellow servant. The plaintiff sued under the Federal Employers' Liability Act. Act of April 22, 1908 (35 Stat. at L. 65). The lower court held that the deceased had assumed the risk of injury from such negligence and that the defendant was not liable. The plaintiff appealed. *Held,* that the ruling was erroneous, since under the federal act an employee does not assume the risk of unforeseeable negligence of a fellow servant. *Reed v. Director-General of Rys.* (1922) 42 Sup. Ct. 191.

The Federal Employers' Liability Act abrogated the common-law fellow-servant doctrine. *Illinois Cent. Ry. v .Skaggs* (1916) 240 U. S. 66, 36 Sup. Ct. 249; Boyd, *Workmen's Compensation Acts* (1916) 25 YALE LAW JOURNAL, 556. Although the earlier decisions of some federal and state courts held that under the federal act an employee never assumed the risk of injury from the negligence of a co-employee, the more recent cases have applied the rule of the instant case. See *Chicago. R. I. & P. Ry. v. Ward* (1920) 252 U. S. 18, 40 Sup. Ct. 275; *Ewig v. Chicago, M. & St. P. Ry.* (1918) 167 Wis. 597, 167 N. W. 442; 1 Roberts, *Federal Liabilities of Carriers* (1918) sec. 560.

EVIDENCE—ADMISSIBILITY OF PRICE OF ADJACENT LAND IN EMINENT DOMAIN PROCEEDINGS.—In an eminent domain proceeding, the defendant was allowed to introduce evidence of the sales of other land of similar character in the vicinity for the purpose of showing the value of his own land. *Held,* that the evidence was admissible. *Virginian Power Co. v. Brotherton* (1922, W. Va.) 110 S. E. 546.

Practically all jurisdictions admit evidence of this nature in the discretion of the court when from the similarity of circumstances it is relevant and the tendency to raise collateral issues is not too great. *Forest Preserve Dist. v. Kean* (1921) 298 Ill. 37, 131 N. E. 117; *Lewisburg Ry. v. Hinds* (1916) 134 Tenn. 293, 183 S. W. 985; 1 Wigmore, *Evidence* (1904) sec. 463. Such evidence is not admissible in Pennsylvania and New York. *Pennsylvania Co. v. Philadelphia* (1920) 268 Pa. 559, 112 Atl. 76; *Robinson v. New York Elevated Ry.* (1903) 175 N. Y. 219, 67 N. E. 431 (discussing New York's peculiar rule); see also *State v. Wright* (1921) 105 Neb. 617, 181 N. W. 539. Where the other sales were not voluntary as under prior condemnation proceedings, such evidence is uniformly rejected. *State v. Wright, supra; Bonaparte v. City of Baltimore* (1917) 131 Md. 80, 101 Atl. 594. Likewise evidence of previous offers to sell is regularly rejected because of its slight probative value. *Sharp v. United States* (1903) 191 U. S. 341, 24 Sup. Ct. 114. See (1915) 25 YALE LAW JOURNAL, 83.

INSURANCE—CLAUSE AGAINST SANE OR INSANE SUICIDE—RECOVERY BY BENEFICIARY WHERE INSURED WAS TOO INSANE TO REALIZE THE CONSEQUENCES OF HIS ACT.—An insurance policy contained a clause exempting the insurance company from liability for death by sane or insane suicide. The insured committed suicide while so insane that he did not know he was taking his life. *Held,* that the beneficiary could recover. *Columbian Nat. Life Ins. Co. v. Wood* (1921, Ky.) 236 S. W. 562.

The generally accepted rule is that a clause exempting the insurer from liability in case the insured dies by suicide, either sane or insane, is a valid limitation of the liability of the insurer and renders the policy voidable if the insured takes his own life. 7 Ann. Cas. 659, note. The majority of courts apply this rule regardless of the degree or character of the insanity. *De Gogorza v. Knickerbocker Life Ins. Co.* (1875) 65 N. Y. 232; *Clarke v. Equitable Life Assur. Soc.* (1902, C. C. A. 4th) 118 Fed. 374.

INTOXICATING LIQUORS—REVENUE PENALTY FOR FAILURE TO DECLARE.—A revenue statute imposed a penalty to the value of the merchandise imported on any "goods, wares, or chattels" not declared in the manifest. Act of March 2, 1799 (1 Stat. at L. 646). The defendant brought in some intoxicating liquors in his ship, and failed to declare it in his manifest. *Held,* that he was not liable for the penalty, since liquor is no longer "merchandise" in a legal sense. *United States v. Hana* (1921, C. C. A. 9th) 276 Fed. 817.

This section was originally designed to prevent the fraudulent diminution of the revenue income of the government from property which is the *lawful* subject of import and export. See *United States v. Sischo* (1921, C. C. A. 9th) 270 Fed. 958, 960. The court very properly effectuated this purpose by its interpretation in the instant case. In so doing it also very logically refused to permit the government to treat intoxicating liquor as property as against any "owner" or dealer, who no longer himself has any property rights in the liquor as against the government. COMMENTS (1921) 31 YALE LAW JOURNAL, 305, note 12. Apparently the law is refusing to consider liquor as "property" for any purpose except to punish crime,—and sometimes not even then. *People v. Spencer* (1921, Calif. App.) 201 Pac. 130; (1921) 31 YALE LAW JOURNAL, 309.

LIMITATION OF ACTION—EFFECT OF STATUTES OF LIMITATION UPON EXISTING RIGHTS OF ACTION.—The legislature of Louisiana enacted a statute which provided that any action to annul a land patent must be brought within six years of the issuance of such patent, or within six years from the date of the act. La. Gen. Sts. 1912, ch. 62. The plaintiff sued after the six-year period had elapsed, claiming that the statute could have no effect upon an existing right. *Held,* that the statute was valid. *Atchafalaya Land Co. Ltd. v. Williams Cypress Co. Ltd.* (March 13, 1922) U. S. Sup. Ct. Oct. Term, 1921, No. 106.

It is well settled that a statute of limitations applies to rights of action at the time it is passed. The situation is the same whether the statute creates a limitation where none existed before, or whether it changes one already established. *Terry v. Anderson* (1877) 95 U. S. 628. A reasonable period must be allowed, however, for the prosecution of existing causes of action. 21 L. R. A. (N. S.) 157, note.

MASTER AND SERVANT—LIABILITY OF OWNER OF AUTOMOBILE FOR SON'S NEGLIGENT DRIVING.— The defendant's son, the only licensed driver in the family, while on business of his own, negligently drove his father's automobile against the plaintiff's buggy, injuring the plaintiff's wife. The plaintiff sued the father. *Held,* that the defendant was not liable as a matter of law. *Whitelock v. Dennis* (1921, Md.) 116 Atl. 68.

There is considerable conflict in the cases dealing with the question of whether an owner of an automobile, kept for family use, is liable for the negligent driving of the car by a member of the family. According to the familiar doctrine of the "family automobile," the owner is liable for the negligent management and operation of the car by any member of the family for pleasure and convenience. The rule may be based either upon the principle of *respondeat superior* or upon the "dangerous instrumentality" doctrine. The first basis is of course fictitious, and the second has been generally repudiated, though it was adopted in a recent Florida decision. *Southern Cotton Oil Co. v. Anderson* (1920, Fla.) 86 So. 629. See (1920) 5 MINN. L. REV. 322. As a general rule the owner should perhaps be liable, but it seems more satisfactory to base his liability upon his having entrusted a dangerous instrumentality to a negligent person than upon the fiction of master and servant. For a discussion, see (1920) 29 YALE LAW JOURNAL, 467; (1917) 26 *ibid.* 327, 621; NOTES (1920) 19 MICH. L. REV. 543; NOTES (1915) 28 HARV. L. REV. 91; see also *Baldwin v. Parsons* (1922, Iowa) 186 N. W. 665.

PROXIMATE CAUSE—DAMAGES RECOVERABLE FOR AGGRAVATION OF INJURY.—The plaintiff, whose leg was fractured as a result of the defendant's negligence, was directed by his physician to use a crutch during the period of convalescence. The crutch accidentally slipped, causing the plaintiff to fall and injure his leg again at the same place. In an action for damages, the trial court admitted evidence of the second fracture. *Held,* that the evidence was properly admitted. *Wagner v. Mittendorf* (1922) 232 N. Y. 481.

The basis of the decision was that the second injury was a proximate consequence of the defendant's negligence, since the plaintiff was obeying his doctor's instructions. Likewise, the negligence of a competent physician employed by the plaintiff to treat his injuries does not constitute an intervening cause. *Smith v. Kansas City Ry.* (1921, Mo. App.) 232 S. W. 261. It is well settled that a person who has been injured as a result of another's negligence has no right to recover additional damages for an aggravation of the original injury unless he makes a reasonable effort to prevent such an aggravation. *Hartnett v. Tripp* (1918) 231 Mass. 382, 121 N. E. 17; *Hoseth v. Preston Mill Co.* (1908) 49 Wash. 682, 96 Pac. 423. See also (1921) 31 YALE LAW JOURNAL, 102. For the application of the doctrine of proximate cause to workmen's compensation acts, where the question is whether an aggravated injury arises "out of and in the course of" the employment, see (1920) 6 VA. L. REG. 712; (1918) 3 MINN. L. REV. 123; see also COMMENTS, *supra* p. 768.

TRADE UNIONS—ANTI-TRUST LAWS—PICKETING THEATRE BECAUSE OWNER OPERATES MACHINE HIMSELF.—The plaintiff, owner of a motion picture theatre, desired to reduce expenses by operating his motion picture machine himself. The defendant union then published the theatre as "unfair" and placed a picket in front of the theatre. The plaintiff sought an injunction against the picketing and other acts of the defendant. *Held,* that the State Anti-Trust Act applied and that an injunction should be granted. *Campbell v. Motion Picture Machine Operators* (1922, Minn.) 186 N. W. 781.

Had the case been decided on common-law principles, the court would doubtless have followed its previous decision. *Roraback v. Motion Picture Machine Operators' Union* (1918) 140 Minn. 481, 168 N. W. 766. On the same facts, an injunction was granted. In the instant case, however, the court used a different means of reaching the same result. The court held that the Sherman Act and the State Anti-Trust Act were virtually the same and then accepted the United States Supreme Court's interpretation of the Sherman Act. *Duplex Printing Co. v. Deering* (1921) 254 U. S. 443, 41 Sup. Ct. 172; *Truax v. Corrigan* (1921) 42

Sup. Ct. 124; see also COMMENTS (1922) 31 YALE LAW JOURNAL, 408. Since most of the state anti-trust acts are modelled after the Sherman Act, it will be important to know whether the state courts will accept this interpretation of state statutes. See also COMMENTS (1922) 31 YALE LAW JOURNAL, 643.

TRESPASS—TREES SEVERED FROM FREEHOLD—NO RECOVERY AGAINST DEFENDANT IN ACTUAL ADVERSE POSSESSION.—In an action of trespass for cutting timber on a certain freehold, it appeared that the plaintiff claimed the premises under a land warrant, but that the defendant was in actual possession under *bona fide* claim of title adverse to that of the plaintiff. *Held,* that the plaintiff could not recover. *Kossell v. Rhoades* (1922, Pa.) 116 Atl. 56.

The constructive possession consequent upon holding paper title is a proper basis for an action of trespass. *First Nat. Bank v. Tome* (1917) 23 N. M. 255, 167 Pac. 733. But an action to recover damages for injury to the freehold or for severance and conversion of a portion of the freehold cannot be maintained by the "true owner" against one in possession, claiming title adversely. The appropriate method for trying title is by a suit in ejectment. *Johnson v. Sand & Gravel Co.* (1897, C. C. A. 7th) 86 Fed. 269. After the issue of title is thus determined, the owner is generally allowed to recover for things severed from the freehold, *fructus industriales* excepted. *Stockwell v. Phelps* (1866) 34 N. Y. 363; *contra, Powell v. Smith* (1833, Pa.) 2 Watts, 126. Although the courts usually decline to allow an action of trespass on the ground that title to realty can not be tried in a transitory action, the real reason appears to be historical. Until the real owner proved his superior title, the person in possession under claim of title was deemed owner. The rule may be also justified on practical grounds; it prevents a multiplicity of suits. See L. R. A. 1918 A, 550, 556, note; (1921) 5 MINN. L. REV. 155; COMMENTS (1920) 29 YALE LAW JOURNAL, 539.

TRUSTS—MASSACHUSETTS BUSINESS TRUST NOT "ASSOCIATION" UNDER REVENUE ACTS.—The plaintiff, a Massachusetts trust, sued to recover a tax paid under the Act of September 8, 1916 (39 Stat. at L. 789) providing for payment of a tax by "every corporation, joint-stock company, or association . . . . having a capital stock represented by shares," and the Act of February 24, 1919 (40 Stat. at L. 1126) providing for a special excise tax in lieu of the tax imposed by the Act of 1916. *Held,* that the plaintiff could recover. *Hecht v. Malley* (1921, D. Mass.) 276 Fed. 830.

In spite of the fact that the Act of 1916, unlike the other acts which have been construed in connection with this question, contains a comma between "joint-stock company" and "or association," the instant case affirms the previous decisions. *Eliot v. Freeman* (1911) 220 U. S. 178, 31 Sup. Ct. 360; *Crocker v. Malley* (1919) 249 U. S. 223, 39 Sup. Ct. 270. The court reasoned that since the other kinds of organizations mentioned in the act are characterized by powers derived from statutes, "association" was also intended to bring under the tax only such groups as invoked special statutory powers in their organization. This is not true of a Massachusetts trust. For a discussion of this problem, see COMMENTS (1918) 27 YALE LAW JOURNAL, 677; (1919) 28 *ibid.* 690.