CURRENT DECISIONS

AGENCY—ESTOPPEL—ACTIONS EX DELICTO.—The plaintiff was injured by an automobile owned and driven by A. The plaintiff sued B as employer of A. The evidence showed that B had sold out to C, who retained the seller's name and location. The lower court allowed the plaintiff to recover on the ground of estoppel. *Held,* that such recovery was error. *Jung v. New Orleans Ry. & Light Co.* (1919, La.) 82 So. 870.

As pointed out by the court, estoppel is applied where persons have acted in good faith in reliance upon representations and have changed their position so that a denial of the facts as represented would cause them loss. In an action *ex delicto* this doctrine cannot be applied to hold one "liable" for the acts of another who appears to be his agent, because the plaintiff cannot say he would have acted differently had he known otherwise. To do so would be to admit contributory negligence. The authorities are not uniform; the well-reasoned doctrine of the instant case is obviously the sounder one.

AGENCY—EXCLUSIVE PRIVILEGE TO SELL.—The plaintiff and the defendant executed a contract by which the plaintiff was to aid in making sales of land bought by the defendant from the plaintiff for $1 per acre commission. The plaintiff had shown such land to prospects furnished by the defendant, but the sale was made not to them, but to other parties with whom the plaintiff had not negotiated. The plaintiff sued for the commission of $1 per acre. *Held,* that he could not recover. *Alley v. Griffin* (1919, Tex. Civ. App.) 215 S. W. 479.

The court denied recovery on the theory that an "exclusive agency" does not prohibit the owner himself from selling without incurring the duty to pay the agent commissions on such sales. This doctrine is reviewed in COMMENT (1919) 28 YALE LAW JOURNAL, 575. As to the sufficiency of the consideration in exclusive agency contracts, see (1919) 29 *ibid.,* 115.

CARRIERS—GOVERNMENT ADMINISTRATION—FUEL ORDERS.—The plaintiff was the consignee of a shipment of horses transported by the defendant. During the transmission the horses were so handled that several died after delivery and the remainder were emaciated. In a suit for damages the defendant claimed that it was under government control and hence not liable. *Held,* that this was no defence. *Clapp v. American Express Co.* (1919, Mass.) 125 N. E. 162.

This holding is in harmony with what seems to be the weight of authority. *Cf. Witherspoon & Sons v. Postal Telegraph Co.* (1919, E. D. La.) 257 Fed. 758; (1918) 28 YALE LAW JOURNAL, 199; (1919) *ibid.,* 714, 830.

CONSTITUTIONAL LAW—DUE PROCESS—DAMAGES UPON TERMINATION OF A FRANCHISE.—A canal company in 1839 obtained the power of eminent domain to condemn land for canal purposes provided that it should, at all times when safe to open the locks, permit all boats, etc., of proprietors of abutting lands to pass through the canal. Such proprietors had previously had access to deep water through creeks and streams destroyed by the canal. In 1916 the canal company obtained permission from the legislature to abandon its franchise so far as necessary to permit a railroad to bridge the canal; it then granted the railroad the privilege of building a bridge shutting off passage through the canal at that point. The plaintiffs, proprietors of adjoining land, sued for an injunction against the canal company and the railroad. *Held,* that the petition disclosed no cause of action since the privilege of passing terminated

with the abandonment of the franchise by the consent of the legislature. *Johnson v. Lake Drummond Canal & Water Co.* (1919, Va.) 99 S. E. 771.

See COMMENTS, *supra*, p. 431.

CONSTITUTIONAL LAW—WAR POWERS—PROHIBITION.—The plaintiff sued for an injunction against the United States Attorney and the Collector of Internal Revenue enforcing against him the penalties provided in the War Time Prohibition Act as amended by the Volstead Act. The plaintiff was manufacturing beer containing more than 0.5 and less than 2.75 *per cent.* of alcohol. The plaintiff contended that the question of this beverage being intoxicating was issuable, that Congress could not probihit the making of non-intoxicating liquors, and that the prohibition could not without compensation be extended to liquor acquired before the passage of the act. *Held,* that a dismissal of the petition was correct; the vital point being that "there was no appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use." *Ruppert v. Caffey* (Jan. 5, 1920) U. S. Sup. Ct. Oct. Term 1919, No. 603.

For discussion of this and the companion cases, see COMMENTS, *supra*, p. 437.

CONSTITUTIONAL LAW—WAR POWERS—WAR TIME PROHIBITION AND NON-INTOXICATING LIQUORS.—The defendant was indicted for using food products in the manufacture for beverage purposes of beer containing one-half of one *per cent.* of alcohol, in violation of the War Time Prohibition Act and the President's Proclamations thereunder. The Act was directed against "beer, wine *or other intoxicating malt or vinous liquors.*" *Held,* that a demurrer to the indictment was properly sustained. *United States v. Standard Brewery* (Jan. 5, 1920) U. S. Sup. Ct. Oct. Term 1919, No. 458.

The court stressed the words *or other intoxicating;* declared its inability to rule as matter of law that beverages containing not more than one-half of one *per cent.* of alcohol were intoxicating; declined to pass on the power of Congress to prohibit non-intoxicating liquors; and distinguished Internal Revenue Department rulings as classifications for purposes of taxation which could not enlarge criminal liability under Acts of Congress. See further COMMENTS, *supra*, p. 437.

CONTRACTS—OFFER AND ACCEPTANCE—SILENCE OF OFFEREE AS ACCEPTANCE.—On March 26, 1917, the defendant's traveling salesman solicited and received at the plaintiff's country store a written order for 50 barrels of meal, the order expressly stating that the salesman had no power to make a contract and that the order should not be binding until accepted by the defendant at its own office. The meal was to be ordered out by the plaintiff by July 31, or storage was to be charged thereafter. The salesman continued to make weekly calls upon the plaintiff, but nothing was said by either party as to this order, until May 26, when the plaintiff ordered the meal to be shipped. The defendant at once said that it had not accepted the order. In the meantime war had been declared and prices had risen. *Held,* that the defendant's silence for two months was unreasonable and that it operated as an acceptance of the order. *Cole-McIntyre-Norfleet Co. v. Holloway* (1919, Tenn.) 214 S. W. 817.

See COMMENTS, *supra*, p. 441.

COURTS—JURISDICTION—ORIGINAL JURISDICTION OF UNITED STATES SUPREME COURT.—The complainant, a citizen of New Jersey, asked leave to file an original bill against certain United States officers and against the State of New Jersey for an injunction against the enforcement of the Eighteenth Amendment or legislation under it, on the ground that the amendment was void. *Held,*

that the Supreme Court had no jurisdiction, as section 2, Article 3, of the Constitution conferring original jurisdiction upon the court "in all cases affecting ambassadors . . . and those in which a State shall be a party . . ." merely *distributes,* and does not *confer* jurisdiction; and since a citizen may not sue his sovereign state without its consent. *Duhne v. New Jersey* (Jan. 12, 1920) U. S. Sup. Ct. Oct. Term 1919.

The decision accords wholly with previous authority. The result desired by the complainant is, however, being achieved by another road. The daily press carries reports, under date of January 19, of leave granted Rhode Island, through its Attorney General, to contest the validity of the amendment and the enforcement act.

DAMAGES—INTEREST—UNLIQUIDATED AMOUNT—WRONGFUL DEATH.—In an action under the federal Employers' Liability Act to recover for the death of her husband, the plaintiff claimed interest on the amount of the verdict from the date of the death to the time the verdict was returned. *Held,* that such interest should not be allowed. *Bennett v. Atchison, etc., Ry.* (1919, Iowa) 174 N. W. 805.

The court reasoned that the damages must be measured by the amount of support the widow would have received from the decedent, if he had lived his expectancy and that the greater part of this would not have been received until long in the future; and that as it was impossible to calculate the amount she would have received between the time of death and the verdict, interest on that amount must also be denied. The decision is in accord with cases collected in *22 Cyc.* 1512, note 1.

DAMAGES—WRONGFUL DEATH—FUNERAL EXPENSES.—In an action for wrongful death the jury was instructed that the funeral expenses should be considered an element of the damages. *Held,* that such instruction was error. *Brady v. Haw* (1919, Iowa) 174 N. W. 331.

The reason of the decision was that death was inevitable, and that a burial would be given at death in a Christian country. Hence, the estate lost, as a proximate result of the defendant's wrong, only the use of the money during the expectancy. The theory advanced by the court seems satisfactory. See Demogue, *Validity of the Theory of Compensatory Damages* (1918) 27 YALE LAW JOURNAL, 585.

EQUITY—BILL OF DISCOVERY.—The plaintiff, after the expiration of his patent, brought an action to recover damages for infringement by the defendant. He also filed a bill of discovery praying that the defendant be ordered to state and produce the records of all the profits made from the sale of the article during the existence of the patent. *Held,* that the bill be denied. *Munger v. Firestone Tire & Rubber Co.* (Nov. 12, 1919) C. C. A. 2d, Oct. Term, 1919, No. 18.

A bill of discovery is allowed only to obtain the disclosure of facts in the possession of the defendant which are necessary to the existence of the cause of action relied on by the plaintiff. See 1 Pomeroy, *Equity Jurisprudence* (4th ed. 1918) sec. 201. Since the *amount* of damages was not essential, the bill in the instant case was properly refused. The court cited a quotation which suggested that a *subpoena duces tecum* would have been the proper remedy.

JUDGMENTS—RES JUDICATA—LATER EXISTING RIGHTS—WIDOW'S AWARD.—Just prior to their marriage, the plaintiff's husband conveyed his property to the defendant without consideration. Upon the death of the husband, the plaintiff probated his will and was granted a widow's award. The estate

being without funds, she brought an action to have the conveyance to the defendant set aside or the property charged with the award. *Held,* that the defendant should hold the property subject to the award. *Deke v. Huenkemeier* (1919, Ill.) 124 N. E. 381.

In a former action, brought by the plaintiff during the marriage, it was held that the defendant's deed was subject to the plaintiff's inchoate right of dower. *Deke v. Huenkemeier* (1913) 260 Ill. 131, 102 N. E. 1059. This decision is in accord with the general rule. See (1919) 28 YALE LAW JOURNAL, 701. The court properly overruled the defendant's contention that the earlier decision rendered the plaintiff's claim *res judicata,* no award having been made at that time.

SALES—BULK SALES ACT—STOCK OF MERCHANDISE—RESTAURANT SUPPLIES.—The plaintiff supplied goods to the defendant's restaurant. While the bill was still unpaid, the defendant sold the restaurant, including fixtures and canned goods on hand, to the co-defendants. The provisions of the Bulk Sales Act were not complied with and the plaintiff claimed that the sale was, therefore, void as to creditors. The Bulk Sales Act applied to "the sale in bulk . . . of a stock of merchandise." *Held,* that this was not a sale within the terms of the Act. *Swift & Co. v. Tempelos* (1919, N. C.) 101 S. E. 8.

The case raised the question whether a restaurant proprietor *sells* the food which he sets before his patrons; the court answered in the negative. Although the decisions are not entirely harmonious, it is believed the instant case is with the majority. The cases may be found discussed in COMMENTS (1914) 24 YALE LAW JOURNAL, 73; and (1918) 27 *ibid.,* 1069, note 3.

TAXATION—DOMICIL—INTENT TO CHANGE.—The petitioner claimed to have an immunity from paying Virginia taxes. The evidence showed that after leaving Ohio in 1900 with no intent to return, he traveled abroad. Upon his return he rented for a year and occupied an apartment in Washington, D. C. In 1905 he purchased a farm in Virginia and prior to 1915 spent the greater portion of each year there, although he continued to frequent health haunts at regular intervals and to enjoy repeated sojourns in Washington. While absent from his farm he resided at hotels and apartment houses. He paid a capitation tax in the county in which his farm was located and reported there his income for taxation. While away from Virginia he made out the federal income tax as a resident of Virginia. But when summoned to pay Virginia taxes, he claimed to be a resident of and domiciled in Washington. *Held,* that the petitioner was a resident of Virginia. *Bowen v. Commonwealth* (1919, Va.) 101 S. E. 232.

The court stated correctly that the case "involves fundamentally the problems of an accurate analysis of that complex aggregate of fact and intention, i. e., physical facts and mental facts which go to make up the legal concept of domicile." Such an analysis will be found in (1917) 26 YALE LAW JOURNAL, 796, a considerable portion of the language of which note was apparently embodied in the opinion of the principal case.

TAXATION—INHERITANCE TAXES—DEDUCTION OF FEDERAL ESTATE TAX BEFORE COMPUTING STATE INHERITANCE TAX.—In assessing the tax imposed by the Indiana Inheritance Tax Law, the circuit court allowed a deduction from the value of the decedent's property of the federal estate tax paid by the executor. The State appealed. *Held,* that the deduction was proper. *State v. First Calument T. & S. Bank* (1919, Ind. App.) 125 N. E. 200.

This decision accords with the view adopted by the majority of the jurisdictions which have passed upon the problem. *Contra,* see *In re Week's Estate*

(1919, Wis.) 172 N. W. 732. The subject is discussed and earlier authorities are collected in (1918) 27 YALE LAW JOURNAL, 1055; (1919) 28 *ibid.*, 194, 517.

TAXATION—INHERITANCE TAXES—FEDERAL ESTATE TAX CHARGE ON RESIDUE.—Executors brought suit for instructions to determine whether the federal estate tax paid by them should be charged entirely against the residue or apportioned *pro rata* among all the devisees and legatees. *Held,* that the tax was chargeable against the residue. *Plunkett v. Old Colony Trust Co.* (1919, Mass.) 124 N. E. 265.

This case accords with the recent New York decision commented upon with approval in (1919) 29 YALE LAW JOURNAL, 124. The apportionment rule was declared, but without discussion, in *Fuller v. Gale* (1918) 78 N. H. 544, 103 Atl. 308.

TAXATION—STOCK TRANSFER TAX—WHAT IS TRANSFER OF TITLE—POWER AS AN ELEMENT OF TITLE.—A statute imposed a stamp tax upon transfers of shares of stock. By a voting trust agreement made in 1908 certain shares were vested in three trustees. In 1913, by an agreement made by all parties in interest, the stock was deposited in escrow, and three banks were empowered to procure the transfer of the stock to themselves by merely filing a copy of a resolution to that effect with the depository; they were further empowered to cause the formation of a new voting trust and to cause the stock to be transferred to the new trustees. Later the banks created new trustees and ordered the stock to be delivered to them. The state argued that this constituted one transfer from the old trustees to the banks and a second transfer from the banks to the new trustees, requiring the payment of two stamp taxes. *Held,* that only one tax was payable. *Hudson & M. R. R. v. State* (1919, N. Y.) 125 N. E. 202.

See COMMENTS, *supra,* p. 429.

TORTS—MALICIOUS PROSECUTION—ABANDONMENT OF SUIT.—The Ad Club of Birmingham, at the instigation of the defendant, had the plaintiff arrested for false advertising. Before the trial, the Ad Club instructed the attorney to drop the case, but he continued prosecution under the orders of the defendant. The plaintiff was convicted in the recorder's court, but the case was dismissed on appeal, the prosecutor not appearing. The plaintiff then sued the defendant for malicious prosecution. The abandonment of the suit by the Ad Club was admitted as evidence of lack of probable cause for believing the plaintiff was guilty of the offense charged. *Held,* that such admission was proper. *Parisian Co. v. Williams* (1919, Ala.) 83 So. 122.

It seems that the abandonment by the Ad Club would not be admissible to show the termination of the original suit, although abandonment of the suit altogether, by all parties to the prosecution, is admissible on that ground. See note, 2 L. R. A. (N. S.) 927, 941, 951. But that should not prevent its admission as evidence of lack of probable cause in a jurisdiction where abandonment is allowed as such evidence. See 26 *Cyc.* 95, notes 3 and 4. For the effect of a reversed judgment as such evidence, see COMMENT (1920) 29 YALE LAW JOURNAL, 325.

TREATY-MAKING POWER—LEGISLATION UNDER IT CONSTITUTIONAL—MIGRATORY BIRD TREATY AND ACT.—The Migratory Bird Act of 1913 was held unconstitutional as beyond the scope of federal legislative power. A treaty with Canada was, therefore, concluded in 1916 for the protection of migratory birds and an Act passed in 1918 to carry the treaty into effect. *Held,* that the Act of 1918 was constitutional. Cases mentioned in COMMENT, note 5.

See COMMENTS, *supra,* p. 445.