RECENT CASES

CORPORATIONS—FOREIGN CORPORATIONS—"DOING BUSINESS IN THE STATE".—BROOKFORD MILLS INC. V. BALDWIN ET AL., 139 N. Y. SUPP., 195.—*Held,* that a foreign corporation, which sends its product into another State for sale through a commission merchant, who transacts the business, makes the sales, and receives the consideration, is not "doing business" in the State.

The words "doing business" under most State statutes should be construed to mean the doing of any substantial part of the business for which the corporation was organized. *People v. Horn Silver Mining Co.,* 105 N. Y., 76. The maintenance of an office by a foreign corporation and the carrying on of any of its usual business within a State, is generally held to be "doing business"; and by weight of authority, the carrying on of any of its ordinary business alone is enough. *Ginn v. N. E. Mfg. Co.,* 92 Ala., 135; *Lamb v. Lamb,* Fed. Cas., 8018; *International Text Book Co. v. Connelly,* 124 N. Y. Supp., 257. Continuance of business is generally necessary; a single act not being enough to bring it within the meaning of the statute. *National Carbon Co. v. Bredel Co.,* 193 Fed., 897; *Del. & Hudson Canal Co. v. Mahlenbrock,* 63 N. J. Eq., 281; *Penn. Collieries Co. v. McKeever,* 183 N. Y., 76; *Cooper Mfg. Co. v. Ferguson,* 113 U. S., 727. Some cases hold that the doing of a single act, if within the usual course of ordinary business for which the corporation was organized, is "doing business". *Muller Mfg. Co. v. First National Bank of Dotham,* 57 Sou., 762; *Lamb v. Lamb, supra.* A foreign corporation is not "doing business" if it sells and delivers goods through drummers and common carriers. *Lehigh Portland Cement Co. v. McLean,* 149 Ill. App., 360; *Droege & Ahrens v. Ott Mfg. Co.,* 163 N. Y., 466; *Wolf-Dwyer Co. v. Bigler,* 192 Pa. St., 466; *Green v. Chicago, Burlington & Quincy R. R. Co.,* 205 U. S., 530. Nor is it "doing business" when it consigns goods to factors or merchants to sell on commission. *Havens & Geddes Co. v. Diamond,* 93 Ill. App., 557; *Crocker v. Muller,* 83 N. Y. Supp., 189; *Wolf-Dwyer Co. v. Bigler, supra.* But it is "doing business" if it maintains an agent who has the power to make binding contracts. *Irons v. S. L. & G. H. Rodgers,* 166 Fed., 781 The general rule in interpreting State statutes which impose conditions on the doing of business by foreign corporations would seem from the above to demand that the business be permanent in character, continuous in its nature, general in its scope, and carried on directly by the corporation itself, before it will be deemed to be "doing business".

CRIMINAL LAW—ACCESSORY BEFORE THE FACT—ACTS CONSTITUTING.—PEOPLE V. POLLAK, 139 N. Y., SUPP., 831.—*Held,* that one inciting boys under sixteen years of age to a vicious course of general conduct, and holding himself out to them as willing to purchase any silk which they may procure in any manner, is not a principal in a specific larceny by the

boys of silk, so as to destroy the character of his act as a receiver of stolen goods.

The *New York Penal Code,* Sec. 29, abolishes the common law distinction between a principal and an accessory before the fact, and makes the accessory a principal in the crime. The question, therefore, was whether the conduct of the defendant was such as to make him an accessory before the fact at common law. An accessory before the fact is one who, being absent at the time the crime is committed, yet procures, counsels, or commands another to commit it. 1 *Hale Pleas of the Crown,* 615; *Trial of Aaron Burr,* 8 U. S. (4 Cranch), 470; *U. S. v. Hartwell,* 26 Fed. Cas., 196. And one is responsible for the wrong which directly flows from his corrupt intentions. *Spies v. People,* 122 Ill., 1. If he gives directions vaguely and incautiously, and the person receiving them acts according to what he might have foreseen would be the understanding, he is responsible. *Spies v. People, supra.* It is not necessary that the acts or words of the accessory should directly incite or expressly command the principal to commit the crime; it is enough if it appears that they were intended to secure the crime, and that they effected that result. *Sage v. State,* 127 Ind., 15. Under these last rulings it would seem as if the conduct of the defendant in the principal case might be construed so as to convict him of being an accessory to the larceny. The case of *Vincent v. State,* 9 Tex. App., 46, is similar, but brings out a distinction which undoubtedly affected the ruling in the principal case. In the Texas case the defendant encouraged two boys to procure certain hogs, promising to pay a stated price for them. Subsequently the boys, without the defendant's presence or coöperation, stole the hogs designated by him, and delivered them to him. The defendant was held to be an accessory before the fact. Here the specific property was designated; in the principal case, no specific property was pointed out. This distinction is more apparent than real. The conduct of the defendant in each case is equally perversive of the welfare of society, and incites and produces criminal acts in each instance. It would seem as if public policy should require the punishment of the defendant in each case.

CRIMINAL LAW—REASONABLE DOUBT.—AYER V. TERRITORY OF NEW MEXICO, 201 FED., 498.—*Held,* that a charge that "a reasonable doubt is one for which a reason could be given based on the evidence or want of evidence in the case" destroys the rule of reasonable doubt, substitutes for a reasonable doubt a demonstrable doubt, logically and conclusively sustained by the evidence or the want of it, and places too heavy a burden upon the defendant.

The definition of a reasonable doubt as one for which a reason could be given based on the evidence or want of evidence in the case, has been laid down in several States, *Hodge v. State,* 97 Ala., 37; *Vann v. State,* 83 Ga., 44; *State v. Jefferson,* 43 La. Ann., 995; upon the ground that it guards against capriciousness, conjecture, indulgence of speculation upon possibili-

ties and the invasion of the realm of the imagination. In *Rhodes v. State,* 128 Ind., 189, it is stated that it is very doubtful if such a charge is correct. In *People v. Stubenvoil,* 62 Mich., 329, such a charge was held to be inaccurate, but not of sufficient consequence in a trial for manslaughter to be error. Many decisions, however, hold such a charge to be fatal error. *Childs v. State,* 34 Neb., 236; *State v. Morey,* 25 Ore., 242; *State v. Sauer,* 133 Ind., 677; *Abbott v. Oklahoma,* 94 Pac., 179. These decisions are based upon the grounds that a juror may feel a reasonable doubt which he may be unable to give a reason for in words, and that such a charge would in effect shift the burden of proof upon the defendant, requiring him to prove his innocence beyond a reasonable doubt. The holding in the principal case, in accord with the last cases cited, seems to lay down the better rule, for the reason given, that too heavy a burden would be placed upon the defendant if such a charge were allowed. The most widely approved definition of a reasonable doubt is that laid down by Chief-Justice Shaw in *Commonwealth v. Webster,* 5 Cush. (Mass.), 295, that a reasonable doubt is such a doubt as would cause a prudent and rational man to act or to pause or hesitate to act in the determination of any of the affairs of life of the highest importance to himself.

DAMAGES—BREACH OF THE MARRIAGE PROMISE—AGGRAVATION—SEDUCTION.—DALRYMPLE V. GREEN, (KAN.), 129 PAC., 1145.—Defendant promised to marry the plaintiff and, by means of this promise, induced her to permit sexual intercourse. This was followed by other acts of such intercourse from which pregnancy, miscarriage, and sickness resulted. This is an action for damages for the breach of the promise to marry. *Held,* that in assessing damages, the jury might take into consideration the first act of intercourse, but not those subsequent acts from which pregnancy, miscarriage and sickness resulted, as such could not be the proximate result of the promise of marriage, nor the breach of it. Mason, Burch, and Benson, JJ., *dissenting.*

At common law a woman had no right of action solely on the ground of seduction. *Hamilton v. Lomax,* 26 Barb., 615; *Cline v. Templeton,* 78 Ky., 550; *Conlon v. Cassidy,* 17 R. I., 518. But in a few American States this right has been conferred by statute. *Marshall v. Taylor,* 98 Cal., 55; *Watson v. Watson,* 49 Mich., 540; *Hood v. Sudderth,* 111 N. C., 215; *Revised Code of Iowa,* 1907, Sec. 3470. In most States evidence that the woman was seduced under a promise of marriage is admissible in aggravation of damages in an action for the breach of promise to marry. *Sramek v. Sklenar,* 73 Kan., 450; *Hattin v. Chapman,* 46 Conn., 607; *Paul v. Frazier,* 3 Mass., 71; *Wells v. Padgett,* 8 Barb., 323; *Osmun v. Winters,* 25 Ore., 260. In Tennessee, it was held that in such an action evidence of an unsuccessful attempt to seduce may be shown in aggravation of damages. *Kaufman v. Fye,* 99 Tenn., 145. This evidence, however, is admissible only where the seduction follows the promise and is effected by means of it. *Espy v. Jones,* 37 Ala., 379. In a great number of States it

is held that the seduction must be alleged in the complaint to be admissible in evidence. *Leavitt v. Cutler,* 37 Wis., 46; *Cates v. McKinney,* 48 Ind., 562; *Tyler v. Salley,* 82 Me., 128; *Dent v. Pickens,* 34 W. Va., 240. A very small minority of States will not admit evidence of seduction in an action for breach of promise. *Baldy v. Stratton,* 11 Pa. St., 316; *Wrynn v. Downey,* 27 R. I., 454. In a few cases evidence that seduction was followed by pregnancy was held inadmissible. *Tyler v. Salley, supra; Giese v. Schultz,* 65 Wis., 487. The opposite view, however, prevails in a far greater number of jurisdictions. *Tubbs v. Van Kleek,* 12 Ill., 446; *Wilds v. Bogan,* 57 Ind., 453; *Musselman v. Barker,* 26 Neb., 737; *Hotchkins v. Hodge,* 38 Barb., 117; *Johnson v. Levy,* 122 La., 118. In *Musselman v. Barker, supra,* the Court places emphasis on the fact that the child was begotten while the agreement for marriage existed and on the faith thereof on the part of the plaintiff. The same facts were emphasized in *Johnson v. Jarvis,* 2 Ohio Dec., 312. In Illinois, it was held that in an action for breach of promise evidence of a venereal disease contracted from the defendant was incompetent in aggravation of damages because too remote, although evidence of pregnancy resulting from intercourse had with the defendant in faith of his promise is competent. *Churan v. Sebesta,* 131 Ill. App., 330. In civil actions for seduction, the defendant's acts of sexual intercourse are regarded as being one transaction, and evidence of continuous acts, including subsequent conception and the birth of a child, may be shown as bearing on the question of damage. *Breiner v. Nugent,* 136 Iowa, 322; *Thompson v. Glendening,* 1 Head (Tenn.), 287; *Davis v. Young,* 90 Tenn., 303. The most favorable criticism that can be made of the decision in the principal case is that it is extremely technical. It is contrary to reason and human observation to concede that a promise of marriage may induce one act of sexual intercourse and then to hold that it will so far cease to operate as not to make it the prime inducement of subsequent acts and their natural results.

HABEAS CORPUS—APPEAL—DENIAL OF WRIT.—EX PARTE COPLEY, 153 S. W. (TEX.), 325.—*Held,* that no appeal can be taken from a refusal to issue a writ of *habeas corpus.*

The writ of *habeas corpus,* though a writ of right, is not one of course, except where it is so provided by statute. *Broomhead v. Chisolm,* 47 Ga., 390; *Conn. Gen. Stat.* (Rev. 1902), Sec. 997. The general rule is that probable cause for its issuance must be shown. *In re Heather,* 50 Mich., 261; *O'Malia v. Wentworth,* 65 Me., 129. There is a conflict in the cases dealing with the question raised in the principal case, as to whether an appeal can be taken from a refusal to issue a writ of *habeas corpus.* The rule that an appeal can be taken is laid down in *Costello v. Palmer,* 20 App. Cas. (D. C.), 210; *Ex parte Edwards,* 11 Fla., 174; *Wood on Habeas Corpus,* 142. The contrary rule, that an appeal cannot be taken is held in *Gill on Petition,* 92 Ky., 118; *Ex parte Ainsworth,* 27 Tex., 731. Before an appeal can be taken in any litigated matter there must be final adjudica-

tion of the question in the Court below. *Wingo v. State,* 99 Ind., 343; *Long v. Long,* Morr. (Iowa), 381. In *Costello v. Palmer, supra,* a refusal to issue a writ of *habeas corpus* was held to be final. The Kentucky and Texas cases hold that such a refusal is not final and conclusive, since the prisoner may apply to any or every judge in the State in turn for a writ. A strict sense of justice would seem to require that if the writ was refused by all the judges to whom application could be made, the prisoner should be permitted to take an appeal. He should be given every opportunity to prove the illegality of his commitment, even though in such case it is obvious that such manifest facts as would justify all the judges in refusing to issue the writ, would inevitably prevent an Appellate Court from reversing the ruling.

INCEST—ELEMENTS OF OFFENSE—RELATION OF PARTIES.—HAMILTON V. STATE, (TEX.), 153 S. W., 331. The defendant was married in Texas to the mother of the girl with whom incest was charged. He had been previously married in Utah and had never been divorced, but had not heard of his first wife in eight or ten years and did not know whether she was living or dead. *Held,* that defendant could not be guilty of incest because it did not affirmatively appear that the former wife was dead or that the marriage had been legally terminated.

Incest is the carnal copulation of man and woman related to each other in any of the degrees within which marriage is prohibited by law. *State v. Herges,* 55 Minn., 464. It was not indictable at common law. *State v. Keesler,* 78 N. C., 469; *Tuberville v. State,* 4 Tex., 128. There could be no conviction for incest under the laws of Louisiana in 1878, it being denounced but not defined. *State v. Smith,* 30 La. Ann., 846. But there have since been convictions under a statute passed in 1884. *State v. Guiton,* 51 La. Ann., 155. According to the weight of authority assent of both parties is not necessary to constitute the crime of incest. *David v. People,* 204 Ill., 479; *State v. Freddy,* 117 La., 121; *Smith v. State,* 108 Ala., 1; *State v. Nugent,* 20 Wash., 522. But a few States hold that assent of both parties is necessary. *People v. Jenness,* 5 Mich., 305; *State v. Eding,* 141 Mo., 281; *Commonwealth v. Goodhue,* 43 Mass., 193. A common knowledge of the relationship has been held necessary to create the crime of incest. *Baumer v. State,* 49 Ind., 544. But the opposite view was held in Alabama. *Morgan v. State,* 11 Ala., 289. It is not necessary to the commission of the crime that the relationship of the parties be legitimate. *Baker v. State,* 30 Ala., 521; *People v. Lake,* 110 N. Y., 61. This doctrine has been requently applied where the daughter was illegitimate. *State v. Laurence,* 95 N. C., 659; *Brown v. State,* 42 Fla., 184; *Clark v. State,* 39 Tex. Cr. R., 179. In Mississippi cohabitation by a man with his stepdaughter is not incestuous. *Chancellor v. State,* 47 Miss., 278. The principal case arose under a Texas statute which made such cohabitation incestuous. It was held in that State that on a trial for incest with a stepdaughter, it must be shown that the girl's mother and her stepfather were

legally husband and wife. *McGrew v. State,* 13 Tex. App., 34. This was followed in a later case where it was held that it must affirmatively appear that the first marriage relation had been terminated by death or divorce before the defendant could be guilty of incest with the daughter of the second wife, *Harville v. State,* 113 S. W., 283. The facts adjudicated in the principal case are very unusual and the only cases directly in point arose in Texas, where the decisions were in harmony with the decision in the principal case. Since the crime of incest could have been committed by the defendant only in the event the female was legally his stepdaughter, the conclusion in the principal case is logically irresistible.

JURY—RIGHT OF TRIAL BY JURY—IMPAIRMENT—MISCONDUCT OF JUROR. —PEOPLE V. ROSELLE, (CAL.), 129 P., 477. The defendant's attorney made affidavit that he saw a juror asleep during the taking of testimony but did not know how long he had been asleep and that before he could inform the Court a recess was ordered. *Held,* that this was not sufficient ground for a new trial, the juror's condition not being shown to be such that he failed to hear any question or answer.

A new trial is the proper remedy for the misconduct of the jury. *Morgan v. Bell,* (La.) 4 Mart. (O. S.), 615. But the misconduct of a juror must be gross, to afford ground for a new trial. *Harrison v. Price,* 22 Ind., 165. It must also have probably injured the complaining party. *Flatter v. McDermitt,* 25 Ind., 326. It has also been held that the misconduct must be caused by the prevailing party, or some one on his behalf. *Koehler v. Cleary,* 23 Minn., 325. A juror may not talk to the plaintiff concerning the case during recess. (Ky.) *Ironton Lumber Co. v. Wagner,* 119 S. W., 197. Nor express an opinion to outsiders on the merits of the case. *Norcross v. Willard,* 82 Vt., 185. A remark by a juror after verdict, however, is held not to be ground for a new trial. *Goldberg v. Berman,* 33 R. I., 448. But it was not prejudicial error for one or more jurors to play in a card game with others in which the plaintiff and his attorney were playing. *Feary v. Metropolitan St. Ry. Co.,* 162 Mo., 75; *Ayrhart v. Wilhelmy,* (Iowa) 112 N. W., 782. The furnishing of intoxicating liquor, during trial or deliberation on verdict, is ground for a new trial. *Bernier v. Anderson,* 8 Idaho, 675. It has been held that cider, but not intoxicating liquors, may be furnished to a jury. *Tripp v. Bristol County Com'rs.,* 84 Mass., (12 Allen), 556. And the mere fact that jurors had intoxicating liquor in their possession while deliberating was not of itself sufficient to make a new trial necessary. *Richardson v. Jones,* 1 Nev., 405. Where the use of liquor is moderate, and no injury resulted therefrom to the losing party, it is not ground for a new trial. *Gamble v. State,* 44 Fla., 429; *State v. Corcoran,* 7 Idaho, 220. But where the juror is so intoxicated that his faculties are affected, the verdict should be set aside. *Underwood v. Old Colony St. Ry. Co.,* (R. I.) 76 A., 766. The sleeping of jurors was held to be misconduct affording ground for a new trial in Indiana. *Alderman v. Cobb,* 94 Ind., 602. But it was held in Arkansas

that a new trial should not be granted upon affiidavit "that during the trial, or at least a portion of it, one of the jurors was to all appearances asleep." *Pelham v. Page,* 6 Ark. (1 Eng.), 535. Nor is it ground for a new trial where the juror made affidavit that he had a habit of listening with his eyes closed and that he heard what was said by witnesses and counsel. *Continental Casualty Co. v. Semple,* (Ky.) 112 S. W., 1122. It was also held that an appellant cannot complain that a juror slept during argument of counsel, when he did not request the Court to awaken him. *Slaughter v .Coke County,* 34 Tex. Civ. App., 598. Mere conjecture or surmise that the jury acted improperly never requires the granting of a new trial. *McWhorter v. Haigler Mercantile Co.,* (Ala.) 58 So., 790. In case of misconduct of the jury the complainant must call it to the attention of the Court immediately; he may not speculate upon the verdict. *Shepherdson v. Clopine,* 83 Neb., 764; *Ulmer v. Seelman,* 159 Mich., 253; *Woods v. Klein,* 223 Pa., 257. The decision of the principal case is sound in the doctrine it announces that one cannot complain of the misconduct of the jury, unless he does so at the time it happens and shows that he has probably been injured thereby.

MASTER AND SERVANT—"FELLOW SERVANTS"—EMPLOYEES ON DIFFERENT TRAINS.—CHESAPEAKE & O. RY. CO. v. BROWN ET AL., 153 S. W. (KY.), 753.—*Held,* that a brakeman on one train was not a fellow servant of the operatives of another train on the same railroad, by whose negligence he was injured.

The rule most generally followed is that all are fellow servants who are in the same service, and subject to the same general control, even though in different grades and departments. *Farwell v. Boston R. Co.,* 4 Met. (Mass.), 49; *Brown v. Winona, etc., R. Co.,* 27 Minn., 338. Under this rule trainmen working on different trains for the same railway company must be considered fellow servants. *Vermillion v. Balt. & O. R. Co.,* 38 App. D. C., 434; *Mellish v. Pere Marquette R. Co.,* 167 Mich., 86; *Ham v. St. Louis & S. F. R. Co.,* 136 Mo. App., 17. It has even been held that train crews of one railroad company running over the track of another, under the complete control of an employee of the latter, are fellow servants of the train crews of the latter company. *Johnson v. Wheeling Terminal Ry. Co.,* 65 W. Va., 415. Some States, however, hold that for persons to be fellow servants they must work in the same grade or department so as to afford them the power and opportunity of exercising a mutual influence over each other promotive of proper caution. *Thompson v. Northern Hotel Co.,* 99 N. E. (Ill.), 878; *Missouri Pac. R. Co. v. Dwyer,* 36 Kan., 58; *Pittsburg R. Co. v. Devinney,* 17 Ohio St., 197. Under this rule the train crews of different trains have been held not fellow servants. *Chicago, etc., R. Co. v. House,* 172 Ill., 601; *Cincinnati, etc., R. Co. v. Roberts,* 110 Ky., 856. Motormen of different cars operated by a street railway company have been held not fellow servants. *Louisville Ry. Co. v. Haynes,* 128 S. W. (Ky), 1055. But *contra, Birmingham Ry., etc., Co. v.*

Moseley, 164 Ala., 111. These last cases are in accord with the modern tendency of legislation to increase the employers' liability. It is becoming universally recognized that the welfare of society is best promoted by the most liberal policy towards workingmen, and therefore wherever practicable the definition of fellow servants should be restricted. In the case of train crews on different trains, however, it would seem better to regard them still as fellow servants. "Being engaged in the same kind of service, they must naturally be often thrown into contact, and have ample opportunities for mutual supervision." Justice Brewer in *Howard v. Denver, etc., R. Co.,* 26 Fed., 837. To make the employer liable and responsible for the negligence of fellow servants would unavoidably lead to carelessness and negligence which would not otherwise result; and in the case of railroad employees, who have charge over the safety of all who ride over the road, it is essential that they preserve the highest degree of care and caution in their work. To hold the train crews of different trains fellow servants would tend to prevent negligence, where it is most essential that it be prevented.

MASTER AND SERVANT—INJURIES TO SERVANT—DISOBEDIENCE OF RULES.—SOUTHERN BELL TELEPHONE AND TELEGRAPH CO. v. SHAMOS, (GA.), 76 S. E., 1083.—A telephone company waived a rule requiring its employes to wear rubber gloves and rubber coats by knowingly permitting work to be done without them.

The general rule is that where an employe disobeys a reasonable rule of his employer and suffers injury thereby, he cannot recover. *Nordquist v. Great Northern Ry Co.,* 89 Minn., 485; *St. Louis, I. M. & S. Ry. Co. v. Caraway,* 77 Ark., 405; *Smith v. Foster,* 93 Ill. App., 138; *Western Mattress Co. v. Ostergaard,* 71 Neb., 572. But such rules are binding only on employes who have knowledge of them. *Little v. Southern Ry. Co.,* 120 Ga., 347; *Humphreys v. Raritan Copper Works,* 60 A. (N. J.), 62. It is not necessary that the disobedience be willful or intentional; it is enough if there is a failure to use ordinary care. *Chicago & A. R. Co. v. Stevens,* 80 Ill. App., 671. It was held in Texas that breach of a rule was not negligence *per se* unless the act was one so opposed to the dictates of common prudence that no careful person would commit it. *Galevston, H. & S. A. Ry. Co. v. Cherry,* 98 S. W., 898. Nor is a servant excused where his disobedience is obviously dangerous, though the rule is habitually disobeyed by employes. *Eldorado & B. R. Co. v. Whatley,* 114 S. W., (Ark.), 234. Neither can the disobedience of a rule by one servant excuse another for disobeying a rule. *Mo., K. & T. Ry. Co. v. Collier,* 157 Fed., 347. Disobedience of a master's rule is still negligence *per se* though a superior servant of the master is present. *N. Y. C. & St. L. R. Co. v. Rapp,* 81 N. E. (Ohio), 748. But it is otherwise if he acts under a foreman. *Wiley v. St. Joseph Gas Co.,* 132 Mo. App., 380. A servant cannot justify disobedience on the grounds that the rule was unnecessary or that he adopted another equally safe. *Gilbourne v. Oregon Short Line R. R. Co.,* 114 P. (Utah), 532. But it was held in Georgia that he could show that

the rule was not made in good faith. *Seaboard Air Line R. R. Co. v. Hunt,* 73 S. E., 588. In New Jersey it was held that the employe could recover for injuries resulting from violation of a rule where it was given him only for his guidance and he did not know the danger involved in its violation. *Horandt v. Rosenthal,* 79 Ala., 321. An employe is not responsible for willful or intentional disobedience when the reason for it is sickness or emergency. *Junction Mining Co. v. Ecnh,* 111 Ill. App., 346; *Brown v. Southern Ry.,* 82 S. C., 528. Where the master with knowledge allows a rule to be habitually disregarded, no blame attaches to servant. *Tullis v. Lake Erie & W. R. Co.,* 105 Fed., 554; *Knickerbocker Ice Co. v. Finn,* 80 Fed., 483; *A. G. S. R. R. Co. v. Bonner,* 39 So. (Ala.), 619; *Fluhrer v. Lake Shore & M. S. Ry. Co.,* 121 Mich., 212. Customary violation without master's knowledge is not sufficient. *King v. Woodward Iron Co.,* 59 So. (Ala.), 264. Even though a master has waived a rule by not exacting obedience, a servant is not excused where he has been personally warned not to disobey it. *Crawford v. So. Ry.,* 150 N. C., 619. Where a rule that employes must wear goggles in a department of a plant where caustic soda was made was habitually disregarded by employes with master's knowledge, it was held not contributory negligence to disobey it. *Haley v. Solway Process Co.,* 112 N. Y. S., 25. The holding of the principal case is in harmony with the weight of authority and is sound.

MASTER AND SERVANT—INJURIES TO THIRD PERSON—SON AS AGENT OF FATHER.—MARSHALL v. TAYLOR, 153 S. W. (Mo.), 527.—*Held,* that where an automobile was provided by a father for the use of members of his family, and an adult son was chauffeur for them, and was permitted to use the car for his own pleasure, the son was an agent of the father, though using the car for his own pleasure, so as to make the father liable for his negligence.

All the authorities are in accord in holding that a principal, or a master, is not liable for the torts of his agent, unless they are committed while the agent is acting for him. *Bigelow on Torts,* p. 55; *Jones v. Hoge,* 47 Wash., 663; *Lotz v. Hanson,* 217 Pa., 339. The cases are not in harmony, however, on the question whether a son, driving for his own pleasure an automobile provided by his father for the use of the family, is such an agent or servant of his father, as to render his father liable for his negligence. The son is regarded as such an agent in *Stowe v. Morris,* 147 Ky., 387, and in *Daily v. Maxwell,* 152 Mo. App., 415, on the ground that since the automobile was provided for the use of the family, the son was carrying out what, within the spirit of the matter, was the business of the father. An early case, *Lashbrook v. Patten,* 1 Duv. (Ky.), 316, held that a son driving the horses and carriage of his father, with the father's approbation, was the servant of his father. On the other hand, *Doran v. Thomsen,* 76 N. J. L., 754, and *Maher v. Benedict,* 108 N. Y. Supp., 228, hold that in such cases the son is not acting as the agent of his father. Where the son uses the machine as a means of recreation and pleasure to himself, it would seem impossible to draw the conclusion that he could

be regarded as the agent or servant of his father upon that occasion. *Doran v. Tohmsen, supra.* The holding in the New Jersey and New York cases seems to be more in accord with the rule laid down above, that the principal is only liable for the torts of his servant, when the servant is acting for him. It seems to be a strained conclusion to consider the son in this case, as acting for his father.

TRADE-MARKS AND TRADE-NAMES—CONVEYANCE APART FROM BUSINESS —RIGHTS OF ASSIGNEE.—IN RE JAYSEE CORSET CO., 201 FED., 779.—*Held,* that conveyance of a trade-mark, unaccompanied by any business to which it had been previously attached, conferred no title on the assignee.

The rule laid down above is in harmony with all the American and English decisions. It is universally held that a trade-mark or name cannot be assigned except in connection with an assignment of the particular business in which it has been used. *Falk v. American West Indies Trad. Co.,* 180 N. Y., 445; *Viano v. Baccigalupo,* 133 Mass., 160; *Brown Chemical Co. v. Meyer,* 139 U. S., 540; *Croft v. Day,* 49 Eng. Reprint, 994. The office of a trade-mark is to point out distinctly the origin or ownership of the article to which it is affixed, or in other words, to give notice as to who was the producer. *Deering Harvester Co. v. Whitman & Barnes Mfg. Co.,* 91 Fed., 376, 378. As an abstract right, apart from the business in which it is used, a trade-mark has no existence, and to permit a trade-mark to be transferred apart from the business in which it is used would be productive of fraud upon the public. *Paul: Trade-marks,* Sec. 116. The public relies upon a trade-mark as designating the firm which produces the goods, and as a guarantee that the reputation and methods of the producer are behind the goods sent out. To permit the assignment of the trade-mark alone would be to do away with all the advantages to be gained by the use of a trade-mark, since the public, finding that the trade-mark could be assigned at will, and that a new firm, whose methods might be entirely different, might be producing the goods, would soon distrust all trade-marks as meaningless and misleading devices.

WEAPONS—UNLAWFUL CARRYING.—CRAIN V. STATE, 153 S. W. (TEX.), 155.—Defendant loaned money for a short time and a pistol was pledged to him, the cylinder of which he removed and put into his coat pocket and the frame of which he put into his pantaloons pocket. *Held,* that this was an unlawful carrying of a concealed weapon.

It is no defense to a charge of carrying a concealed pistol that it was unloaded. *Caldwell v. State,* 106 S. W. (Tex.), 343. Where one carries concealed all the pieces of pistol, which may be readily put together, it is indictable. *Hutchinson v. State,* 62 Ala., 3. It was held to be indictable to carry a concealed pistol though it was so battered that it could not be discharged by the trigger. *Atwood v. State,* 53 Ala., 508; *Redus v. State,* 82 Ala., 53. It was similarly held where the mainspring was broken and

it was necessary to strike the hammer to cause a discharge. *Fielding v. State,* 135 Ala., 56. But it was held in the same State that where one carried concealed a pistol which had no mainspring or other necessary parts of a lock, and could be fired only by the use of a match or other such means, it was not indictable. *Evins v. State,* 46 Ala., 88. This doctrine was rejected in Mississippi, and it was held that "an object, once a pistol, does not cease to be one by becoming temporarily inefficient." *Mitchell v. State,* 55 So., 354. Where one, for the owner, concealed a pistol while taking it to a shop to be repaired it was indictable, though it would not explode a cartridge. *State v. Tapit,* 52 W. V., 473; *Crawford v. State,* 94 Ga., 772. Where a statute makes it an offense to wear a pistol "concealed as a weapon" the offense is not committed except when the pistol is worn with intent to use it as a weapon and the presumption that it was to be so used is rebutted by proof that it was unloaded, or unfit for use. *Carr v. State,* 34 Ark., 448. Carrying a pistol with no cylinder is not an unlawful carrying of weapons. *Cook v. State,* 11 Tex. App., 19. But where the pistol was not proved to be so broken that it could not be fired, the fact that it was broken was held to be no defense in a prosecution for carrying weapons. *State v. Smith,* 96 S. W. (Tex.), 1086. It was held, however, in the same State, that where one's reason for having the pistol was that he intended to sell it, and, where he had removed the cylinder rod to render the pistol harmless, he could not be indicted, although it appeared that the pistol could, in fact, be made to shoot by placing the cylinder in position with the hands. *White v. State,* 66 S. W., 773. The holding in the principal case does not seem to be in harmony with the spirit of the last case, but is in harmony with practically all the cases where analagous facts have been adjudicated. When it is remembered, however, that the purpose of the law against carrying concealed weapons is to prevent sudden shooting, it would seem that the holding in some of these extreme cases very justly deserves criticism.

WITNESSES—PRIVILEGED COMMUNICATION—WAIVER—APPEAL—SUBSEQUENT TRIAL—IN RE WHITING, 85 ATL. (ME.), 791.—An attorney in a Probate Court testified to matters which could have been excluded on the ground that they were privileged. No objection was made. In a proceeding in the Appellate Court the same evidence was excluded on the ground that it was privileged.—*Held,* that this exclusion was error, and that a right of privilege once waived cannot be asserted on a subsequent trial.

An attorney cannot be required to state communications made to him by his client. *Brown v. Butler,* 71 Conn., 576. Such a privilege, being personal, can be waived by the client. *Sleeper v. Abbott,* 60 N. H., 162; *Blair v. Chicago & A. Ry. Co.,* 89 Mo., 383. But the waiver must be distinct and unconditional. *Tate v. Tate's Ex'r.,* 75 Va., 522. Where a privileged communication is made jointly it cannot be waived except by all the parties. *Chahoon v. Commonwealth,* 21 Grat., (Va.), 822; *Herman v. Schlesinger,* 114 Wis., 382. A client waives his privilege by

testifying himself to the privileged communications. *King v. Barrett*, 11 Ohio St., 261. He also waives it by examining his attorney as a witness. *Stockwell v. Boyce*, 53 Hun, (N. Y.), 630. Where a waiver is expressly made, it may be withdrawn any time before it is acted upon. *Herpolscheimer v. Citizens' Ins. Co.*, 113 N. W. (Neb.), 152. Where a waiver is made without advice of counsel it may be withdrawn. *Ross v. Great Northern Ry. Co.*, 101 Minn., 122. Hence, where the client has consented that one of his attorneys may testify, an objection to the admission of the evidence by his other attorney withdraws the consent. *Natlee Draft Horse Co. v. Marion Cripe & Co.*, 142 Ky., 810. An objection to testimony on the ground that it was privileged cannot be made for the first time on appeal. *Groves v. Groves*, 55 Hun, 612. Where a patient allowed his physician to testify it was held that he waived his privilege and could not recall it upon new trial or appeal. *Marquard v. Brooklyn Heights R. Co.*, 126 App. Div. (N. Y.), 272; *Pittsburg C., C. & St. L. Ry. Co. v. O'Conner*, 85 N. E. (Ind.), 969; *Elliott v. Kansas City*, 198 Mo., 593. The same decision is reached where the plaintiff waives the privilege in an action in which he is non-suited and begins a new action on the same ground *Schlotterer v. Brooklyn & N. Y. Ferry Co.*, 85 N. Y. S., 847. In Massachusetts where a privilege was waived in a Probate Court it was held that it could not be exercised upon a trial on appeal. *Green v. Crapo*, 181 Mass., 55. In Iowa, however, where the privilege was waived and a physician was allowed to testify, it was held that the evidence might be objected to on a subsequent trial on the ground of privilege. *Burgess v. Sims Drug Co.*, 114 Iowa, 275. In Michigan, it was held that though the party has waived the privilege upon one trial, he may claim it upon a new trial of the same cause. *Breisenmeister v. Supreme Lodge, K. P. of the World*, 81 Mich., 525. The holding in the principal case is in harmony with the majority of cases where the point has been decided and represents the sounder view.