RECENT CASES.

ATTORNEYS.

Extent of Attorney's Lien

The plaintiff's counsel in an action for a personal tort, claiming an assignment of the cause of action and charging that the settlement of the case and release of defendant before judgment, but after verdict, was collusive and for the purpose of depriving them of their fees, sought to establish a lien against defendant for their services. It was held that execution could not issue against the defendant in the action because the assignment before judgment was void, and the so-called charging lien did not attach until after judgment. *Tyler* v. *Superior Court,* 73 Atl. Rep. 467 (R. I.) The Common Law, on grounds of public policy, has sought to discourage litigation and leave the door wide open to a peaceable settlement outside of court at any stage of the proceedings. Hence the rule that all assignments of unliquidated claims for damages for personal injuries, prior to entry of judgment, are void. To be assignable the claims must be the subject of a definite judgment. *Stone* v. *Boston & Me. Ry,* 7 Gray (Mass.) 539.

Since the cause of action is not assignable, no lien or interest therein, legal or equitable, can be received by counsel prior to judgment. *Hanna* v. *Island Coal Co.,* 5 Ind. App. 163. *Boogren* v. *St. Paul City Ry. Co.,* 97 Minn. 51. And as costs are incident to recovery, it follows logically that the costs cannot survive settlement of cause of action so as to charge defendant, or place upon him the onerous duty of seeing that the collateral agreement of the plaintiff with his attorney is kept. In such cases, counsel must be left to their Common Law remedy on contract. *Lamont* v. *R. R. Co.,* 2 Mackey (D. C.), 502. The nature and extent of rights of counsel after judgment varies in different States. In many, as New York and Georgia, the whole matter is settled by statute. In the absence of statutory enactment, the prevailing and better view seems to be the one followed here, that the charging lien of an attorney extends only to his taxable fees and disbursements, and not to his general claim for compensation for his services. *Ocean Ins. Co.* v. *Rider,* 22 Pick. (Mass.) 210. *Swanston* v. *Morning Star Min.*

ATTORNEYS (Continued).

Co., 13 Fed. 215. *Quakertown & E. R. Co.* v. *Guarantors L. T. Co.*, 206 Pa. 350 (1903). See, also, *University of Pennsylvania Law Review*, Vol. 57, p. 642.

COMMON CARRIERS.

The Safety Appliance Act of 1893 construed. *United States* v. *Illinois Central R. Co.*, 170 Fed. Rep. 542 (1909).

(See note p. 87 of this issue.)

CONFLICT OF LAWS.

Damages for delayed telegram. *Western Union Telegraph Co.* v. *Hill*, 50 Southern, 248 (1909).

(See note p. of this issue.)

CONSTITUTIONAL LAW.

Invasion of the Right of Privacy

In *Dowds* v. *Swann et al*, 73 Atl. Rep. (Maryland) 653, where the question was raised as to whether photographing and measuring under the Bertillon system a person arrested on a felony charge, but before conviction, violated the personal liberty secured him by the Constitution of the United States or of the State, it was held that this method of identification was a necessary adjunct to the police power for the preservation of the public peace, and not a violation of the right of privacy under the Constitution. The decision follows *State* v. *Clausmeier*, 154 Ind. 599. The question presented is by no means a settled one. The New York rule is flatly contradictory. In *People* v. *Bingham*, 107 N. Y. Supp. 1011, it was held that to subject a citizen to such indignities is entirely unnecessary, because the "public peace" cannot readily be disturbed by a man already in the custody of the law. From a practical viewpoint it would seem that at the present time, when escapes are so frequent and recapture so difficult, the police ought to be afforded the most efficient means of identifying the fugitive, if recaptured. However, this power of the police should be strictly limited, as was done in the present case, where placing the photograph in the "rogues' gallery" or publishing the statistics in any manner, was forbidden, as a wanton injury to the person arrested, unless convicted or a fugitive from justice.

CONTRACTS.

A and B entered into a secret agreement by which they bid on separate portions of a public contract, with the understanding that if A's bid was accepted, they were to share as partners in such contract. It was held that such an agreement was illegal in its tendency and condemned by public policy, and that an accounting of the profits of such partnership would not be awarded. *Citizens' National Bank* v. *Mitchell,* 103 Pacific 720 (Oklahoma).

Illegality: Partnership: Agreement to Stifle Competition

That such an agreement is against public policy and therefore void cannot be doubted. *McMullen* v. *Hoffman,* 174 U. S. 639. And it is not necessary to inquire into the particular effect of such contract; it is sufficient if the general tendency is illegal. *Atcheson* v. *Mallon,* 43 N. Y. 149.

CRIMINAL LAW.

Former jeopardy. *State* v. *Barnes,* 103 Pacif. Rep. 792 (1909).

(See note p. of this issue.)

In the case of *Lowe* v. *State,* 73 Atlantic Rep. 637 (Md.), the appellant, having testified against his criminal confederate, pleaded an implied promise of immunity, though he had already plead guilty to the charge against him. It was held error for the Court to receive the plea of Guilty without being satisfied that the accused fully understood its nature and effect. It did not appear that the accused understood that the plea would be taken as a waiver of the promised immunity from prosecution, or that he intended thereby to make such waiver.

Rights of Accomplice Who Has Confessed

This decision is in accord with the weight of authority. See *U. S.* v. *Lee,* 4 McLean, 103, where on identical facts, the Court was of the opinion that the promise of immunity by the prosecuting officer was a pledge of public faith, which the Court was bound to keep if the accused had acted in good faith and had testified truthfully to the matters within his knowledge. The rule is stated by Mr. Bishop, New Criminal Procedure, Vol. I, as follows: "A defendant cannot be a witness for or against another defendant, even though on separate trial, until the case as to himself is disposed of by a plea of guilty, or a verdict of conviction, by acquittal, discharge on a plea in abatement, or a *nolle prosequi;* then he may be, whether sentence is

CRIMINAL LAW (Continued).

rendered against him or not. (Section 1020.) Thereupon the accomplice pleads guilty and then testifies. If his testimony is satisfactory, a *nolle prosequi,* or other form of discharge follows. (Section 1166.)

If the prosecuting officer does not enter a *nolle prosequi,* which is the better course, the Court will continue the case until a pardon is procured. *U. S.* v. *Lee, supra; State* v. *Graham,* 41 N. J. L. 15.

Under the general practice of American courts, the receiving or rejecting of the testimony of an accomplice and his immunity from prosecution is left largely to the discretion of the Attorney-General. *Com* v. *Knapp,* 10 Pick. 493. But in some jurisdictions this question lies within the discretion of the Court. *Nichelson* v. *Wilson,* 60 N. Y. 362; *Bowden* v. *State,* 1 Texas App. 137.

EXTRADITION.

In re opinion of the Justices to the Governor and Council, 89 N. E. (Mass.) 174. The Supreme Court of Massachusetts, at the request of the Governor and Council, delivered an opinion on the duty of the Governor to deliver up on lawful demand by the Governor of New York, an alleged fugitive from justice, charged in that State with murder in the first degree, but at the time of the demand confined in a State prison on a conviction of burglary. The opinion of the Justices authorizes a refusal on the Governor's part to surrender the criminal until he has served his term, holding that the duty to deliver up a fugitive from justice, as imposed by Article 4, Section 2, of the Constitution of the United States, does not create a preference in the enforcement of the laws of the demanding State.

Conflict of Jurisdiction: Governor's Duty

This is in accord with previous decisions. *Taylor* v. *Taintor,* 16 Wall. 366; *In Matter of Troutman,* 24 N. J. L. 634; *State* v. *Allen,* 2 Humph. (Tenn.) 258. The general rule may be stated that where jurisdiction has attached to a person or thing, such jurisdiction is exclusive until it has wrought its function.

The Justices decide further that the Governor has no power to surrender this convict, even if he should desire to do so. This raises the much mooted question as to whether the executive's duty under the above Constitutional provision is a discretionary one or not. The general trend of authority since 1793 is that it is the Governor's absolute duty to surrender a fugitive from justice, but with no means of enforcing this.

EXTRADITION (Continued).

against him except through his own sense of duty. *Kentucky* v. *Denman*, 24 How. 66. Consequently, a case like the present arising, the Governor should immediately surrender the criminal, it not being permitted him to decide the legal effect of the fugitive being in prison on his duty to deliver him up. It has been suggested that the proper course in such a case as this is for the Governor to issue a warrant of rendition, and let the courts detain the prisoner. 13 Am. Law Rev. 238. This difficulty does not arise in Massachusetts, where the Governor is permitted by statute to get the opinion of the Supreme Court as to his legal duties.

FALSE PRETENSE.

Elements of Offense: Parting with Title

The Supreme Court of Oregon, in affirming the conviction in *State* v. *Germain*, 103 Pac. Rep. 521, holds that a recital in a receipt for money, "we promise to refund the above amount paid," meaning to repay the employment agency fee in case of failure to secure a position, did not indicate that the defendant received the money as bailee. His promise to refund indicated an intent not to return the identical money received, but to treat the money as payment for services. To "refund" means to repay, and the Court was of opinion that the title passed upon the payment of the money to the defendant.

The disputable point was whether or not the circumstances showed an intention on the part of the prosecutor to invest the defendant with the title to the money, or merely to give him the possession until he should have sought the position. If the former, the conviction was right; if the latter, it cannot be supported.

It is generally held that obtaining a loan of money is a sufficient obtaining to support a conviction for false pretences, for since the prosecutor does not expect to receive back the identical money lent, he parts with the title therein. In *Rex* v. *Crossley*, 2 Lewin C. C. 164, the acceptor of a bill loaned £250 to the maker, upon a false representation of the latter that he had sufficient to pay the balance, and upon his promise to so apply the money obtained, though he fraudulently intended to use the money otherwise. He was held liable to conviction, since the prosecutor had parted with the property in the money. In *State* v. *Ashe*, 44 Kans. 84, the lending of the money was good evidence of the intention to pass the title. In *People* v. *Oscar*, 105 Mich. 704, a conviction was affirmed for obtaining

FALSE PRETENSE (Continued).

money by false pretences, when the transaction was a mortgage negotiation, the defendant being the mortgagor.

An allegation in the indictment that the defendant "obtained money as a loan with the intent, etc.," was held sufficient. *Com.* v. *Coe,* 115 Mass. 481.

The decision is well supported by the comparatively few cases in the books. It is a payment with a provision for repayment only in case of a failure to obtain the situation offered, while in the instance of a loan, there is the certain intention that the money shall be repaid eventually. But that title passes to the borrower and in the principal case, to the payee, there seems to be no difference of opinion.

LANDLORD AND TENANT.

Legislative enactment limiting the use of demised premises. *O'Byrne* v. *Henley,* 50 Southern Rep. (1909).

(See note p. of this issue.)

MASTER AND SERVANT.

In the case of *Cleveland, C. & St. L. Ry. Co.* v. *Powers,* 88 N. E. Rep. 1073 (Ind.), the plaintiff, an employee, in passing through the switch yard of the defendant railroad was injured by his failure to see and avoid a fast train operated in violation of a speed ordinance, and without signals or warnings. He was required to pass at this point and was not negligent. It was held that the plaintiff did not assume the risk of injury under such circumstances. The decision of the Court in this case, following other cases in the same State, agrees with the doctrine of the majority of American jurisdictions. Where the statute imposing the restriction expressly deprives the employer of the defense of assumption of risk, of course such defense is not available to him. And the conclusion seems to be the same where there is no such prohibition. In *Inland Steel Co.* v. *Kachwinski,* 151 Fed. 219, the plaintiff was injured because of the failure of the company to guard machinery as provided under the Factory Act. The Court held that the employer could not set up the defense of assumption of risk. In *Spring Valley Coal Co.* v. *Patling,* 210 Ill. 342, it was held that a miner did not assume the risk resulting from the mine owner's violation of an Act

Assumption of Risk: Ordinance

MASTER AND SERVANT (Continued).

relating to mines. See also note to *Shatto* v. *Erie R. Co.*, 59 C. C. A. 5. This question was fully considered by Taft, J., in *Narramore* v. *C., C. & St. L. R. Co.*, 96 Fed. 298, 48 L. R. A. 68, and after a thorough review of the cases, a similar conclusion was reached. The New York Court of Appeals in *Kinsley* v. *Pratt*, 148 N. Y. 372, came to a contrary decision, relying largely upon *O'Malley* v. *South Boston Gas Light Co.*, 158 Mass. 135. It is submitted that the Court in resting upon the O'Malley case failed to give full weight to the fact that that case was brought, not under a statute imposing a positive duty of care on the employer in relation to the servant, but under an Employers' Liability Act, which was designed to deprive the master of certain defenses in suits for injuries sustained by servants while in the master's employ. The Court in the principal case reached its conclusion, though the authority imposing the restriction was a municipal ordinance and not a public statute; and in this it was undoubtedly correct, for a valid city ordinance has the force of a legislative act upon those upon whom it operates. *Dillon: Municipal Corporations*, Section 308.

NEGLIGENCE.

Lowery v. *Walker*, L. R. (1909) 2 K. B. D. 433, holds that the owner of a horse, which to his knowledge had previously bitten other persons, is not liable to a trespasser in the defendant's close, who is there attacked and bitten by the horse, not kept there for the purpose of inflicting the injury. Nor was the rule affected by the fact that the defendant knew the public habitually trespassed in the field.

Scienter: Owner's Liability to Trespassers

The case is to be distinguished from *Bird* v. *Holbrook*, 4 Bing. 628, where the defendant was held liable on the ground that even a wilful trespasser was not deprived of his right to freedom from intentional injury.

It is said that the question to be determined in cases like the principal case, is whether the man or animal which suffered, had or had not a right to be where he was when he received the hurt. *Deane* v. *Clayton*, 7 Taunt. 489. A wilful trespasser has no right of action in respect to unintentional injury caused by the owner's acts in the ordinary conduct of his business. *Union Stock Yards & Transit Co.* v. *Rourke*, 10 Ill. App. 474; *Mergenthaler* v. *Kirby*, 79 Md. 182. Placing horses or cattle in the owner's pasture in the absence of an

NEGLIGENCE (Continued).

intent to injure, is treated as an act in the ordinary conduct of the owner's business. *Brock* v. *Copeland*, 1 Esp. 203.

However, this is not the position of the Massachusetts Court in *Martle* v. *Ross*, 124 Mass. 44, where to keep an animal (stag) known to be dangerous, in the owner's pasture was said to be negligence, for which, in the absence of contributory negligence of the plaintiff, the owner was liable. That the plaintiff was a trespasser, is not such contributory negligence, if he did not know of the dangerous character of the animal. This view seems to be unsupported. It places on the owner a greater liability than the strong case of *Rylands* v. *Fletcher*, L. R. 3 H. L. 330. At best, the owner is only bound to keep the animal secure at his peril. *Muller* v. *McKesson*, 73 N. Y. 195. And he is permitted to show that the damage was owing to the plaintiff's default. *Idem*. *Nichols* v. *Marsland*, L. R. 2 Ex. 1; *Deane* v. *Clayton*, 7 Taunt. 489.

The second point of the principal case, that although one has knowledge from which he should anticipate the presence of trespassers, he is not bound in the ordinary conduct of his business, *to take care* that they shall not be injured, seems to be the consistent attitude of the English courts. The knowledge of a R. R. Company that trespassing was of common occurrence at a certain point imposes no duty on it to take care. *Harrison* v. *North Eastern Ry. Co.*, 1874, 29 L. T. 844. A reply that before the excavation on the defendant's land, he knew the public constantly made use of a road over the land, and that he made the excavations without taking reasonable precautions to protect the public, was held bad on demurrer, there being no duty to do so. *Murley* v. *Grove*, 1882, 46 J. P. 360.

The American courts are not so consistent. The Massachusetts view is in accord with the English doctrine, holding that a railroad company owes no duty of care toward trespassers whose presence, from past experience, might have been reasonably anticipated, though such trespasses on the part of the public are habitual at the certain point: *Chenery* v. *R. R.*, 160 Mass. 211. Accord: *Cannon* v. *R. R.*, 157 Ind. 682; *Ill. Cent. R. R.* v. *Godfrey*, 71 Ill. 500. In Pennsylvania and New York the doctrine is otherwise, and it is held that under such circumstances the railroad company, not having objected to known habitual trespasses, is in the position of a licensor and therefore bound to take care. *Taylor* v. *R. R.*, 113 Pa. 162; *Barry* v. *R. R.*, 92 N. Y. 289.

NEGLIGENCE (Continued).

Automobile a Dangerous Instrument: Owner's Liability

The plaintiff in a recent case in New York was run into by an automobile owned by the defendant and operated by defendant's chaffeur, who at the time of the accident was taking a pleasure trip with the owner's consent. The court charged that "The owner of an automobile should be responsible for injuries caused by it by the negligence of any one whom he permits to run it in the public street," and this charge was sustained. *Ingraham* v. *Stockamore,* 118 N. Y. Supp. 399. The basis of the decision is that an automobile is a dangerous machine, and as a safeguard to the public the owner should in all cases be held responsible except where it is taken and used without his consent. This is a novel and very broad doctrine, apparently the only authority for it being in the dissenting opinion in *Cunningham* v. *Castle,* 127 N. Y. App. Div. 580. The opinion of the majority of the Court in that case represents the prevalent rule in New York and throughout the country, that the only basis of the owner's liability in such a case is the relationship of master and servant, and consequently the owner is only liable for the negligence of the operator, where the latter is an employee, and acting within the scope of his employment. *Doran* v. *Thomsen,* 66 Atl. (N. J.) 897; *Slater* v. *Thresher Co.,* 97 Minn. 305. There is some conflict of opinion as to whether an automobile is within the dangerous article class. It would seem that this fact is essential only in proving the actual negligence, either of the operator in the running of the machine or of the owner in providing a competent operator, under the rule "the greater the danger the greater the care required." The rule above goes further. It would hold the owner liable on the score of the dangerous character of his machine, where he has done everything in his power to safeguard it and injury is admittedly due solely to the negligence of a competent operator. However, the present tendency of the courts is undoubtedly to increase the liability of automobile owners.

Notice to Police of Defects in Highway

In an action to recover for personal injury received by reason of a defective sidewalk in a city, proof that notice of the defect had been given to a police officer, who although it was no part of his official duty, was nevertheless in the habit of reporting defects to the highway commissioners, was held insufficient. *Abbott* v. *City of Rockland,* 73 Atlantic, 865 (Me.). In accord is the case of *City of Columbus* v. *Ogletree,* 96 Ga. 177.

NEGLIGENCE (Continued).

Where policemen have been charged with the duty of reporting defects in sidewalks, it has been held that notice to such policemen was notice to the city. *City of Joliet* v. *Looney*, 159 Ill. 471. In *Shinnick* v. *City of Marshalltown*, 114 N. W. 542, it was held that notice to the mayor of an obstruction in the street was notice to the city.

NEGOTIABLE INSTRUMENTS.

In an action to recover on two negotiable bonds payable to bearer, defendant introduced evidence, undisputed, that plaintiff got the bonds from her husband, who procured them fraudulently from their true owner, a then extinct corporation.

Fraud of Intermediate Holder: Burden of Proof

Held, while possession of such an instrument is *prima facie* evidence of lawful ownership, possession alone cannot support recovery, after it once appears that the title of an intermediate party is defective. Proof that the negotiable instrument was once in the hands of a fraudulent owner raises the presumption that it continues in the hands of a holder of that character, until the contrary be proved. Therefore, in such a case, whether the fraudulent practices were connected with the original inception of the paper, or, as in the present instance, occurred subsequently, to the prejudice of an intermediate holder, the onus rests upon plaintiff to show that he is a *bona fide* holder for value. *Parsons* v. *Utica Cement Co.*, 73 Atl. Rep. 785 (Conn.).

While the case of *Kinney* v. *Kruse*, 28 Wis. 183, asserting that "the fraud in putting the note into circulation which will operate as a defense, or change the burden of proof in such an action, must be a fraud against the defendant," takes a contrary view, the present decision is supported by the great weight of authority; it is not only expressly covered by Section 59 of the Negotiable Instruments Act, but is also in conformity with well-established Common Law principles. *Collins* v. *Gilbert*, 94 U. S. 753; *Fulton Bank* v. *Phoenix Bank*, 1 Hall (N. Y.) 562.

PATENTS.

In the recent case of *In re Hatschek's Patents,* C. R. (1909), II Ch. Div. 68, it appeared that while the invention, for which letters patent in England had been granted, was in commercial operation in Germany, France and Belgium, it had never been worked in the United Kingdom. Instead of attempting to establish a new home industry the patentee had devoted himself to the establishment of industries abroad, and had exercised his monopoly privileges to secure to a foreign licensee the exclusive right of selling in the United Kingdom articles manufactured abroad. Upon the failure of the patentee to show that the patented process was carried on to an adequate extent within the United Kingdom, or give satisfactory reasons therefor, the Court summarily revoked the patents. The decision turns upon the interpretation of Section 27 of the Patents and Designs Act of 1907, passed to prevent foreign traders being given a preference over British traders, and will be read with interest by those lawyers who make patents their specialty.

Revocation for Failure to Establish Industry

REAL PROPERTY.

Re-entry and forfeiture of estates on condition. *Moore* v. *Sharpe,* 121 S. W. 341 (1909).

(See note p. 89 of this issue.)

STATUTES.

In *State* v. *Wheeler,* 89 N. E. (Indiana) 1 (1909), an action was brought by the claimant to a public office against the incumbent to test the validity of the statute under which the defendant held the office. The unusual feature of the case was that the certificate of the Secretary of State in the published laws of the State showed that the statute as printed had been compared with the engrossed bill, since the enrolled bill was missing. The Court said that where the enrolled bill was missing, they must inform themselves from the best possible sources, in this case the laws published by authority of the State and the Journals of the legislature. Oral evidence, which the defendant attempted to introduce to show the bill had been vetoed, was held inadmissible. This decision is in accord with the early cases. *Prince's Case,* 8 Coke, 28. The same principle is applied to a somewhat different state of facts

Enrolled Bill Missing: Admissibility of Oral Testimony to Prove Bill was Vetoed by the Governor

STATUTES (Continued).

in *Gardner* v. *The Collector*, 73 U. S. 499. It is not an exception to the rule announced in *Field* v. *Clark*, 143 U. S. 649. "When an enrolled act is signed by the presiding officers of the two houses of Congress, approved by the President and deposited with the Secretary of State, according to law, its authentication is complete, and it cannot be impeached by the Journals of Congress." For the attitude of the various States on this question see the note to *Field* v. *Clark*, *supra*, at page 661.

TRADE MARKS.

Where two parties have used the same trade mark in the same business, though in different localities, but have now overlapped sales territories, the exclusive use in the territory in question is awarded to him who first devised and used the trade mark. *Thos. G. Carroll & Son Co.* v. *McIlvaine & Baldwin*, 171 Fed. Rep. 125.

Contemporaneous Use in Different Localities

This seems to be in accord with well-established principles of the law of trade marks. The exclusive right to the use of a mark or device claimed as a trade mark is founded on priority of appropriation. *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460. The question is, which party first made use of the trade mark or name in this particular business. *Stachelberg* v. *Ponce*, 128 U. S. 686; *Walton* v. *Crawley*, 3 Blatchf. 440.

Having decided this point upon the evidence, with a conclusion in favor of the defendant, Hough, J., proceeds to a discussion of the merits of the case upon any view of the evidence, therein giving recognition to a principle which may be stated thus: The right to a trade mark adopted and used by its originator in territory "A" is not such a vested right as to give him the exclusive use thereof in a second territory, "B," unless he is also the first to invade that territory and there to associate the trade mark with the business in question.

In reaching such a conclusion the court proceeds upon two grounds. First, the owner of a trade mark has no estate in a trade mark as such; the adoption of words is useless without a business; the exclusive right to an ordinary trade mark grows out of its use and not from its mere adoption. *United States* v. *Steffens* (*Trade Mark Cases*), 100 U. S. 82; *Avery* v. *Merkle*, 81 Ky. 73; *Schneider* v. *Williams*, 44 N. J. Eq. 391. Second, the defendants have built up a large and profitable business in the territory "B" for the article sold under the

TRADE MARKS (Continued).

litigated trade mark. The injunction in trade mark cases is primarily designed to prevent the public from being misled and deceived. If the defendant be enjoined, complainant continuing to sell, the public will be deceived, thinking they are purchasing the goods of the defendant. Therefore to grant an injunction under such circumstances, would be to disregard the most important branch of the equitable rule invoked.

As to the first, there is no doubt that the right to the exclusive use of a trade mark is dependent not upon adoption, but upon adoption and application to the article in trade. *Browne on Trade Marks,* Section 52; *McAndrews* v. *Bassett,* 4 DeG., J. & S. 380.

The criticism of the position of the Court is that the complainant is shown by the evidence to have long used the trade mark in this business in the territory "A," that being by the hypothesis prior to its use in territory "B" by the defendant. The Court has added to the general rule the requirement that it must have been adopted and put into use in that territory where the exclusive right to it is now asked. As authority therefor the case of *Carwin* v. *Daly,* 7 Bosw. (N. Y.) 222, is cited. This case holds that a privilege of monopoly in a certain trade mark does not carry a similar exclusive right to it in other markets where it has been and is now being used by others. The sentence, "They have not monopolized all the markets of the world," indicates the trend of the argument. In *Tetlow* v. *Tappan,* 85 Fed. 774, it was held that the recognition of a prior right to the use of a trade mark in a locally confined business in a distant city, did not invalidate the complainant's title thereto as against a proven invader of territory wherein complainant operated. But it will be noted that this is a three-party case and not conclusive as to any attitude, had the owner of the prior right himself been the invader of the territory of complainant. To the same effect is *Sartar* v. *Schaden,* 125 Iowa, 696.

The weight of authority seems opposed to this addition, which it is indicated should be made to the requirements for the acquisition of a trade mark. The right of property in a trade mark is not limited in its enjoyment by territorial bounds, but, subject only to local statutory regulations, the proprietor may assert and maintain his right whenever the Common Law affords remedies for wrong. *Derringer* v. *Plate,* 29 Cal. 292. Trade marks are an entirety and are incapable of exclusive use at different places by more than one independent proprietor; for in seeking redress, in order to establish an exclusive right to

TRADE MARKS (Continued).

the mark, at any one place, the party must show an exclusive right to its use generally. *Manhattan Medic. Co.* v. *Wood*, 4 Cliff. (Fed. Cases) 461. Though having conceded the complainant's prior use, the Court denies his right to the trade mark in territory "B," yet his right in his original territory "A" would not be denied him, which gives rise to the condition here said to be impossible. Nor do the English cases support the dictum of the case. In *Collins Co.* v. *Brown*, 3 Jur. N. S., p. 1, 929, 1857, it was held that an American who had acquired a trade mark in this country, but had never used it in England, was entitled to restrain a British subject from using it there. In accord: *Collins Co.* v. *Reeves*, 28 L. J. Ch. 56, 1859. It is also of interest that the French books contain a direct authority against the addition to the law suggested by the principal case. Priority in the adoption and use of a trade mark, though in a different territory from that where the alleged infringement took place, will give one the exclusive right thereto whenever piracy occurs, even though the infringers have used the trade mark long before the conflict in sales territories took place. *Holtzen & Co.* v. *Lendenberg & Co.*, 14 Annales, 167.

As to the second ground, the primary object of the injunction in trade mark cases may be disputable. The office of a trade mark, and therefore, of its protection, is to point out distinctively the origin of the article to which it is affixed; to give notice who was the producer that he may secure to himself the ultimate benefit of good workmanship. *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U. S. 537; *Schmaltz* v. *Wooley*, 57 N. J. Eq. 303. It would therefore seem that the second branch of the court's argument must depend upon the validity of the first conclusion as to who shall have the right in the contested territory.

It may be remarked that the facts of the case, even conceding priority to complainant, would support the result attained by the Court on the ground of laches. Note to *Taylor* v. *Sawyer Spindle Co.*, 22 C. C. A. 211.