

submitted to their investigation is, by its nature, one of those works of art which the law of 1793 protects; in particular, the decision by which the judges of the fact decide that a photographic portrait is a production of the mind coming under the terms of the law, is not under the control of the Cour de Cassation. *Rej. 28 Nov. 1862, aff. Meyer et Pierson, Pataille, 62, 419.* (3) That if, in general, the reproduction of a picture or of a portrait by photographic process may not constitute a work of art in the spirit of the law, it is otherwise when there is joined to the ordinary labor of the photographer that of the designer, or any other artistic combination; in particular, the fact of a photographic negative having been touched up by a draughtsman and having undergone important modifications, gives to it, unquestionably, the character of a work of art. *Paris, 29 Avr. 1864, aff. Duroni et Muller, Pataille, 64, 235.* (4) That if the photographic products are not necessarily works which should be classed in the category of fine arts, they can be considered as such, and be protected by the law of 1793, when they are invested with the characteristics exacted by that law; particularly, in a portrait, the pose, the arrangement of the clothing, and the accessories, may give to the work the imprint of the personality of the photographer, and place him under the protection of the law. *Paris, 6 Mai, 1864, aff. Masson, Pataille, 64, 232.*

Our Opinion. Of these three theories we do not hesitate, so far as we are concerned, to adopt the second; but the last, especially, seems to us altogether inadmissible. It may be argued that the work of the photographer is or is not protected by the law, and, without agreeing with those who maintain the negative, we, at least, understand their view. As to the intermediate opinion, it is evidently contrary to the letter as well as to the spirit of the law. It cannot, indeed, have come into the mind of the legislator to transform our tribunals into academies, and to confide to our judges the duty of deciding that this is art and that that is not. Are such powers granted to our judges in the matters of drawing, of painting, and of sculpture; that is, in those departments which are certainly regulated by the law of 1793? Can they say of one painting that it is a work of art, and of another that it has in it nothing artistic? Can they grant protection to the one and refuse it to the other? No; the law is wiser; good or bad, whether it conform or not to the laws of aesthetics, every painting, drawing, and piece of sculpture is a work of art. Thus it was rightly said by M. l'avocat imperial Thomas, in the conclusions which we gave above, that it is impossible to avoid this alternative; either refuse the title of artistic works to all photographs, or grant it to all; outside of that there is only room for arbitrariness, and, consequently, for danger, as well for the judge as for the litigant.

“Let us now come to the reasons which, in our estimation, justify the second theory. The law of 1793 is a general law; we think we have shown that: it protects, as we have seen, every production of the mind, provided it be connected with the fine arts; and we have admitted, in common with all authors, that a casting, even of a natural object, comes under the provisions of the law. How, after that, could we exclude photography? What impresses the adversaries of our theory is that, in photography, the apparatus plays so important a role,—even the preponderant role. What does that show? If the painter, after having conceived his picture, should find the means of reproducing it on the canvas with one stroke, just as he conceived it, would it be denied that his work was a production of the mind? What matters the greater or less rapidity and ease of the execution? Is it not the conception, however expressed, which constitutes the artistic work? The photographer conceives his work; he arranges the accessories and play of light; he arranges the distance of his instrument according as he wants, in the reproduction, either distinctness or size; thus, also, he obtains this or that effect of perspect-

ive. After that, what matters the rapidity, the perfection, the fidelity of the instrument with which he executes what he has conceived, arranged, created? We have said many times already that the author's right was derived from the creation which gives to the work its character of individuality. Is this individuality lacking here? Is it not certain that two photographers, reproducing, each for himself, the same scene or the same model, will obtain two pictures capable of being distinguished? There is, therefore, a creation in the juridical sense of the word. The argument which we have used in an analogous question may be used here: Suppose the discovery of the photograph to have remained secret; its inventor presents the copies obtained by its process, without disclosing the mystery; he allows it to be believed that this copy is obtained by some improvement in the ordinary process of printing and engraving. Would any one think of denying his right? Would not this copy be put in the same category as other copies, and would the protection of the law be unhesitatingly granted to it? Why change opinions because the process of photography is known? Has its work not remained the same? Has it lost anything of its personal character?

"It is almost useless to add—so evident is it—that our theory has the advantage of respecting the rights of each person; for if the photographer has the property in his proof, his property does not go beyond that, and everybody is none the less free to reproduce the same subject. Why not leave to him the property in the work which he has conceived and executed? Why encourage the piracy of his rivals? What good does society derive?"

DESCRIPTIVE ADVERTISEMENTS. It was adjudged in England in 1872 that there could be no copyright in a descriptive advertisement, illustrated or otherwise, of articles which any one might sell.¹ In that case an upholsterer had published an illustrated furnishing guide, with engravings of the articles of furniture which he sold, and descriptive remarks thereon. A bill was filed to restrain another upholsterer from publishing, for the purpose of his own trade, a similar work, in which many of the said engravings were alleged to be copied. And it was held that he could not be restrained from copying illustrations which were merely descriptive of his stock, or of common articles of furniture. Lord ROMILLY, M. R., declared: "At the last it always comes round to this: that, in fact, there is no copyright in an advertisement. If you copy the advertisement of another, you do him no wrong, unless in so doing you lead the public to believe that you sell the articles of the person whose advertisement you copy." In a case decided two years afterwards,² it appeared that a cemetery stone-mason employed and remunerated a person to collect monumental designs, and published a book containing sketches of such designs, with scarcely any letterpress. It was held that a tradesman who employed another, for remuneration, to compile a book of designs for him, was himself entitled to copyright in the book, and that a book in the nature of an advertising catalogue might be the subject of copyright. The distinction between the two cases seems to be that in the latter case the subject-matter was a book, which had a value as a book of reference, while in the former case it was a simple catalogue of articles offered for sale.

In this country it was held³ that an advertising card, devised for the purpose of displaying paints of various colors, "consisting of a sheet of paper having attached thereto square bits of paper painted in various colors, each square having a different color, with some lithographic work surrounding the squares advertising the sale of the colors," was not the subject of copy-

¹ *Cobbett v. Woodward*, L. R. 14 Eq. 407.

² *Grace v. Newman*, L. R. 19 Eq. 623.

³ *Ehret v. Pierce*, 10 Fed. Rep. 553; S. C. 13
Blatchf. 302.

right. "True, it has lithographic work upon it," said BENEDICT, J., "and also words and sentences; but it has none of the characteristics of a work of art, or of a literary production. It is an advertisement, and nothing more. Aside from its functions as an advertisement of the Morris paints, it has no value."

In a subsequent case it was decided, in the circuit court for the southern district of New York, that a chromo, which was a meritorious work of art, might be copyrighted, though designed and used for gratuitous distribution as an advertisement for the purpose of attracting business.¹ It was designed, said the court, as a symbolic glorification of lager-beer drinking. In the center was a conspicuous figure of King Gambrinus, his left arm resting upon a keg of lager, the right holding up a foaming glass of beer. On either side of him were a dozen figures of persons representing various classes in life, into whose eager hands his page was distributing the beer. "This chromo, by its subject, its brilliant coloring, its excellent finish, and the artistic grouping of its figures, forms a striking picture, suitable for hanging in saloons, and well calculated to draw attention to the plaintiff, whose name is printed in large type beneath the figures as a person engaged in the lager-beer business, and constituting, therefore, a valuable mode of advertising." The distinction between this case and that of *Ehret v. Pierce, supra*, and *Cobbett v. Woodward, supra*, lies in the fact that it was not a mere print or engraving of an article offered for sale. It was in itself a work of the imagination, possessing artistic qualities. And the court laid down the proposition that when the work in question was clearly one of artistic merit, it was not material whether the person claiming the copyright expected to obtain his reward directly through a sale of the copies, or indirectly through an increase of profits in his business, to be obtained through their gratuitous distribution.

PRINTS. In *Rosenbach v. Dreyfuss*,² the question was whether "prints of small balloons, with printing for embroidery and cutting lines," and "prints of hanging baskets, with printing for embroidery and cutting lines," were subject to copyright. The form of the different parts of the balloon was marked out with lines showing how the paper was to be cut to make the different parts fit together, so as to construct of them a balloon, and with marks showing how and where they might be embroidered. It was held not subject to copyright as being a "print," within the meaning of the statute. "It (the word 'print') means, apparently, a picture; something complete in itself, similar in kind to an engraving, cut, or photograph. It clearly does not mean something printed on paper, that is not intended for use as a picture, but is itself to be cut up and embroidered, and thus made into an entirely different article, as a balloon or hanging basket." It was also held that they did not come within the clause, "models or designs intended to be perfected as works of the fine arts."

PROTECTION LIMITED TO NATIVE ART. The claim has been recently advanced that the act of 1870 (Rev. St. § 4952) authorizes a citizen or resident of this country, if he be "proprietor" of any book, map, print, etc., to obtain a copyright therefor, although the author, inventor, or designer was an alien. The literal reading of the section of the act does not require that both the "author" and the "proprietor" shall be citizens or residents of the United States. Owing to the peculiar phraseology of the statute, it was claimed that as to "paintings, drawings, chromos, statues, statuary, and models," a "proprietor" might obtain a copyright, though the artist or author was an alien. But the court held that such a holding would involve a reversal of the policy of the government from its foundation, to protect American artists and

¹ *Yuengling v. Schile*, 12 Fed. Rep. 97.

² 2 Fed. Rep. 217.

authors only; and that the word "proprietor," as used in the copyright laws, meant the representative of an artist or author who might himself obtain a copyright.¹

HENRY WADE ROGERS.

¹ *Yeungling v. Schlic*, 12 Fed. Rep. 97.

SCHREIBER and others, who sue as well for the United States as for themselves, v. THORNTON.²

(District Court, E. D. Pennsylvania. April 24, 1883.)

1. COPYRIGHT—COPYING AND PUBLISHING COPYRIGHTED PHOTOGRAPH—CONSTITUTIONALITY OF REV. ST. §§ 4952 AND 4965—POWER OF CONGRESS TO SECURE COPYRIGHT TO PROPRIETOR OF A PHOTOGRAPH.

The act of congress (Rev. St. §§ 4952 and 4965) securing a copyright to the proprietor of a photograph, and imposing a penalty for the infringement of such copyright, is constitutional.

2. QUI TAM ACTION—PENALTY FOR THE INFRINGEMENT OF COPYRIGHT TO THE PROPRIETORS OF A PHOTOGRAPH.

In an action by several persons, being the proprietors of a duly copyrighted photograph, to recover, as well for the United States as for themselves, the penalty for infringement provided by section 4965, it appeared that the defendant had caused lithographic copies of the photograph to be made, of which 14,800 were found in his possession or control. *Held*, that the defendant was liable to a penalty of one dollar for each copy so found in his possession or control.

Motion for a New Trial.

This was a *qui tam* action, pursuant to section 4965, Rev. St., brought by Francis Schreiber and others, suing as well for the United States as for themselves, against Edward B. Thornton, to recover a statutory penalty for the copying, printing, publishing, selling, and exposing to sale by the defendant of a photograph, copyrighted by plaintiffs. The defendant pleaded "not guilty." The facts appearing upon the trial were similar to those disclosed by the evidence in a former trial for the same matter, and fully reported in *Schreiber v. Sharpless*, 6 FED. REP. 175. The plaintiffs, being photographers, had made and copyrighted, as proprietors, a certain photograph, the title thereof being "The Mother Elephant 'Hebe' and her baby 'Americus,' the first known to have been born in captivity in the world. Born at Philadelphia, United States, March 10, 1880. The property of Cooper and Bailey." Notice of the copyright was printed on each copy of the photograph. The defendant had charge of the dry goods department of the business house of Sharpless & Sons, dealing in general merchandise, and desired a new label for certain goods. He purchased one of plaintiff's photographs, took it to a lithographer, and caused a lithographic copy thereof to be made, and 15,200 copies

² Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.