## WILLEY et al. v. FIDELITY & CASUALTY CO.

(Circuit Court, W. D. Pennsylvania. January 16, 1897.)

INSURANCE—RENEWALS—PAYMENT OF PREMIUM—AGENTS GIVING CREDIT.

When an insurance company has forwarded to its agent a renewal receipt, and has charged him with the premium represented thereby,—such being their usual course of dealing,—and the agent has countersigned the receipt, and delivered it to the policy holder, the policy is continued in force, according to the terms of the receipt, though the premium is not in fact paid to the agent.

Sur Question of Law Reserved.

Knox & Reed, for plaintiffs.
Stone & Potter, for defendant.

ACHESON, Circuit Judge. The verdict of the jury, which is supported, I think, by ample evidence, establishes that it was the usual course of dealing between the defendant company and its general agent, Mr. Scott, for the company to charge Mr. Scott as its debtor with the premiums on policies of insurance, and on renewal receipts transmitted to him for delivery, and that in this particular instance the company, when it transmitted the renewal receipt of June 7, 1895, charged Mr. Scott as its debtor with the premium of $50 named in the receipt. The question of law reserved is whether, under these circumstances, the fact that the renewal premium was not actually paid by Mr. Getty constitutes a defense to this action.

In the case of Miller v. Insurance Co., 12 Wall. 285, 303, Mr. Justice Clifford, speaking for the supreme court of the United States, said:

"Where the policy is delivered without requiring payment, the presumption is, especially if it is a stock company, that a credit was intended; and the rule is well settled, where a credit is intended, that the policy is valid, though the premium was not paid at the time the policy was delivered; as where credit is given by the general agent, and the amount is charged to him by the company, the transaction is equivalent to payment."

The decisions of the supreme court of Pennsylvania are in harmony with this statement of the law. Thus, in Elkins v. Insurance Co., 113 Pa. St. 386, 394, 6 Atl. 224, after reciting that it appeared from the testimony of Crane, the agent of the insurance company, that he "had power, on receipt of a policy, to deliver it to the assured, or to his agent, and to collect the premiums," that "the company looked to Crane either for the return of the policy or for the premium"; that "upon delivery of the policy he was obligated to pay the premium as for his own debt"; and that he "kept an account with the company, in which he charged himself with the premiums as the policies were delivered, and took credit with any remittances he might make,"—the court said:

"In view of the course of business pursued by this company with Crane, and by this agent in the consummation of their contracts, we think the implication might fairly arise that any absolute requirement of the policy as to the actual prepayment of the premiums had been dispensed with, and that the obligation of the agent to pay the premium was, in effect, the payment of it by the assured."

To the like effect was the ruling in Insurance Co. v. Hoover, 113 Pa. St. 591, 595, 599, 8 Atl. 163. In Insurance Co. v. Carter (Pa. Sup.)

11 Atl. 102, 106, where the course of business between the company and its agent was similar to that pursued here, the trial judge charged the jury that the actual payment of the premium to the company before a loss was dispensed with, and the obligation of the agent to pay the premium was, in effect, the payment of it by the insured, and this instruction was approved by the supreme court of Pennsylvania.

I am of the opinion that the renewal premium in this instance must be regarded as having, in effect, been paid, or that cash payment thereof was dispensed with by the defendant company. The case, I think, does not turn upon the question of the agent's power to waive any stipulation of the written contract. We have here the conjoint action of the defendant company and its general agent. The case falls exactly within the rule laid down in Miller v. Insurance Co., supra, and is covered by the decisions of the supreme court of Pennsylvania.

Upon the undisputed facts, the defendant company cannot justly refuse to pay this policy merely because the renewal premium was not actually paid by Mr. Getty to Mr. Scott. The company transmitted for delivery, from its office in the city of New York, to its duly-commissioned general agent, resident in the city of Pittsburgh, a renewal receipt, signed by its treasurer and secretary, "continuing in force" the accident policy it had issued to Mr. Getty for another year. The only conditions on the face of the receipt were that the statements and warranties in the original application were still true, and that nothing had occurred or existed to affect the risk, with an appended notice that the receipt was "not valid unless countersigned by the duly-commissioned agent of the company." The company, when it transmitted this receipt to its agent, Mr. Scott, charged him as its debtor with the premium, as it was accustomed, with the knowledge of Mr. Scott, to do. Mr. Scott, having countersigned the renewal receipt, brought it in a completed form to Mr. Getty's place of business in the city of Pittsburgh and delivered it to him before the original policy had expired. Unquestionably, under the evidence, by that delivery Mr. Scott became absolutely bound to the company for the payment of the premium. The understanding between Mr. Scott and Mr. Getty without doubt was that the latter should have a short credit. Mr. Scott, occasionally at least, had thus delivered policies and renewal receipts upon credit to persons in good financial standing. The sudden death of Mr. Getty by a casualty within the policy prevented the payment of the renewal premium to Mr. Scott. From the conduct of the company and its general agent, Mr. Getty had reasonable and just ground to infer that his policy was continued in force, and fair dealing forbids the company to assert the contrary.

Let judgment be entered in favor of the plaintiffs upon the verdict and reserved question of law.

## UNITED STATES v. THREE BARRELS OF WHISKY.

(Circuit Court, E. D. North Carolina. December 9, 1896.)

INTERNAL REVENUE LAWS—STAMPS ON SPIRITS—FORFEITURES.

Merely tacking a piece of newspaper over the stamped end of a barrel of distilled spirits is no ground of forfeiture under the internal revenue laws (Rev. St. §§ 3289, 3322, 3445, 3456) and the regulations of the internal revenue department.

This was a libel of information to procure the forfeiture of three barrels of distilled spirits.

Charles B. Aycock, U. S. Dist. Atty.
Shepherd, Manning & Foushee, for claimant.

SEYMOUR, District Judge. The United States, by its district attorney, Mr. Charles B. Aycock, files a libel of information against three barrels of corn whisky which have been seized by a deputy collector for the Fourth collection district of North Carolina, and by said libel claims that such whisky has, for the causes alleged therein, become forfeited to the United States. One John S. Fowler, by his attorneys, Messrs. Shepherd, Manning & Foushee, intervenes, and files sworn answer to the information. It is alleged by the United States that the barrels of whisky in controversy did not have upon them the stamps required by law (Rev. St. § 3289), for that under the laws of the United States, and the regulations of the internal revenue department made in pursuance thereof, the stamps required by law to be placed upon barrels containing distilled spirits must be covered "only with transparent varnish, so that the stamps may be easily and readily seen by the officers whose duty it is to examine them, and nothing whatsoever is permitted on the stamp head of such barrels which will in any manner cover, obscure, or interfere with the stamps;" whereas the distiller who manufactured and shipped the whisky in question covered the stamp heads of the three barrels with a newspaper in such a manner as to cover and obscure the stamps and stamp heads, and they were so covered at the time of the seizure of said barrels. The claimant admits that the barrels in controversy were, at the time of seizure, "covered with a loose newspaper tacked upon each of them," which pieces of paper he says were placed upon them by the distiller to protect the stamps from being rubbed during transportation. So the controversy is as to whether the tacking of a piece of newspaper over the stamp head of a cask of whisky is, under the internal revenue laws, ground for its forfeiture. It is important, the revenue officers claim, that the stamps and numbers shall at all times be open to easy inspection, and in such condition that the marks and numbers may be copied by such officers with a view to the detection of the offense of reusing stamped casks. The question must, however, be determined by the internal revenue law, and a forfeiture cannot be enforced unless expressly authorized by law.

The statutes referred to by the attorney for the United States are sections 3289, 3322, 3445, and 3456 of the Revised Statutes. Sec-

tion 3289 provides that "all distilled spirits found in any cask * * * without having thereon each mark and stamp required therefor by law shall be forfeited to the United States." Section 3322 requires that the stamps upon barrels of distilled liquor shall "be affixed to a smooth surface of the" barrel, etc., and canceled, and shall then be immediately covered with a coating of transparent varnish or other substance, so as to protect them from removal or damage by exposure; "and such affixing, concellation, and covering shall be done in such manner as the commissioner of internal revenue may by regulation prescribe." It does not appear that the proper stamps have not been properly affixed, canceled, and covered with the required transparent coating. The libel states that under the laws of the United States and the regulations of the internal revenue department the stamps must be covered only with transparent varnish, and that nothing whatever is permitted on the stamp head which will cover the stamps. No requirement of the kind appears in section 3289 or section 3322, above cited. The allegation in the libel that the barrels did not have on them the stamps required by law is qualified by the negative pregnant immediately following, which admits that the stamps were upon the barrels, but advances the proposition that they were not the stamps required by law, because covered as described. Section 3445 of the Revised Statutes provides that the commissioner of internal revenue "may prescribe such instruments or other means for attaching, protecting, and canceling stamps" as he and the secretary of the treasury shall approve; and section 3456 provides that if any distiller or wholesale liquor dealer "shall knowingly or willfully omit, neglect, or refuse to do * * * any of the things required by law in the carrying on or conducting of his business, * * * all distilled spirits or liquors owned by him * * * shall be forfeited to the United States." I have been unable to find any provisions of law, other than the sections of the Revised Statutes above cited, which are material to the matter in controversy. None of them make the covering of barrel heads by pieces of paper, so as to obscure the marks and stamps, illegal. Certainly, the tacking of a piece of paper on the stamp heads of the barrels, so as to have the effect of concealing the stamps, is not an "omission," "neglect," or "refusal." But to work a forfeiture under section 3456 it must be made to appear that there has been a willful neglect to do something, or omission to do something, or a refusal to do something, required by law in the process of carrying on or conducting the business referred to. It is true, one of the things required to be done is covering the stamps with a coating of some transparent substance, and that in this case they have also been covered with a substance not transparent. The contention that covering the transparent substance with something not transparent renders nugatory the purpose of the statute, and is equivalent to the omission of the covering with a coat of transparent varnish required in section 3322, cannot prevail in the interpretation of a statute imposing a forfeiture, and which substantially creates a criminal offense. U. S. v Eaton, 144 U. S. 687, 12 Sup. Ct. 764. The libel of information avers that the covering the

stamps as described is prohibited by regulation of the internal revenue department. The regulation relied upon by the United States reads as follows: "The stamps, marks, and brands required by law and regulations to be applied to casks and packages of distilled spirits are designed to bear witness to the legality of the spirits which they cover, and they must not be obscured in any manner, or covered by encasing the vessel bearing the same in another, but must at all times be in such condition as to admit of ready examination by revenue officers." Regulations and Instructions Concerning the Tax on Distilled Spirits 1895, p. 116. This regulation does not seem to me to apply to the case of a package temporarily covered by a newspaper. If it could be so construed, I do not think it would be a regulation, the violation of which would work a forfeiture under section 3322 of the Revised Statutes. A regulation cannot have the effect of amending or changing the law. The province of the rules laid down by the treasury department in accordance with the statute authorizing them is to regulate the mode of proceeding to carry into effect what congress has enacted. U. S. v. 200 Barrels of Whisky, 95 U. S. 571; Morrill v. Jones, 106 U. S. 466, 1 Sup. Ct. 423; U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764. In U. S. v. Eaton, supra, the defendant a wholesale dealer in oleomargarine, had failed to keep a book showing his purchases and sales of oleomargarine. Dealers in that article were required to keep such a book, by the regulations made by the commissioner of internal revenue and approved by the secretary of the treasury. It is provided by section 41 of the act of October 1, 1890, "that wholesale dealers in oleomargarine shall keep such books and render such returns in relation thereto as the commissioner of internal revenue, with the approval of the secretary of the treasury, may by regulation require." By section 18 of the act of August 2, 1886, it is provided that if any dealer in oleomargarine, etc., shall neglect to do, etc., any of the things required by law in the carrying on or conducting his business, he shall, if a wholesale dealer, forfeit to the United States all the oleomargarine owned by him. The supreme court, by Blatchford, J., held that while "regulations prescribed by the president and by the heads of departments, under authority granted by congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus in a proper sense have the force of law," yet that "it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense." To avoid any misapprehension of the scope of this opinion, I will add that the record does not present the case of a failure to affix, cancel, and cover the stamps on the three barrels of whisky in such manner as the commissioner of internal revenue may have by regulation prescribed, but, instead,—what I consider as a different matter,—the case of an additional, temporary, and removable covering, subsequently placed on the stamp heads, which in my opinion is not forbidden by statute, and therefore could not be made penal by any departmental regulation.

## BOLLES v. OUTING CO., Limited.

(Circuit Court of Appeals, Second Circuit. January 13, 1897.)

1. COPYRIGHTS—PHOTOGRAPH—INFRINGEMENT—PENALTY.
The provision of Rev. St. U. S. § 4965, that any one who unlawfully copies, prints, publishes, or imports a copyrighted photograph shall forfeit to the proprietor one dollar for every sheet thereof "found in his possession," applies only to sheets shown to have been in fact discovered in the defendant's possession prior to the bringing of the suit.

2. SAME—NOTICE OF COPYRIGHT—SUFFICIENCY.
The words, "Copyright 93, by Bolles, Brooklyn," printed on the face of a photograph, are sufficient as the notice of copyright required by Rev. St. U. S. § 4962, especially where it is not shown that there is another photographer of the name of "Bolles."

3. SAME—QUESTION FOR JURY.
Whether the copyright notice on a photograph is sufficiently legible is a question for the jury.

4. SAME—ORIGINALITY.
Whether a photograph is an original work of art, or a mere manual reproduction of subject-matter, is a question of fact.

In Error to the Circuit Court of the United States for the Southern District of New York.

B. Lewinson and Wells, Waldo & Snedeker, for plaintiff in error.
John R. Abney, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. Upon this writ of error, brought by the plaintiff in the court below to review a judgment for the defendant, error is assigned of the rulings of the trial judge in excluding evidence offered by the plaintiff, and in instructing the jury to find a verdict for the defendant. The action was brought, under section 4965 of the United States Revised Statutes, to recover penalties for the violation of a copyrighted photograph. The defendant was the proprietor of "The Outing," a monthly magizine published at the city of New York. The complaint alleges that the defendant printed in said magazine, and sold, without the plaintiff's consent, 40,000 copies of the photograph, whereby there accrued to the plaintiff, pursuant to the statute, penalties in the sum of $40,000. Upon the trial it was shown that the defendant's magazine was printed by the Fless & Ridge Printing Company, a concern employed by the defendant to do its printing. The plaintiff offered to prove by a witness the number of copies of the issue containing the photograph which were printed by the Fless & Ridge Company and delivered into the possession of the defendant. The evidence was objected to upon the ground of its incompetency, the statute making the copies found in the possession of the defendant the measure of the penalty, and not the copies published by it. The objection was sustained, and the plaintiff duly excepted.

The statute declares that if "any person, after the recording of the title of any * * * photograph, * * * as provided in this chapter, shall, within the term limited, and without the consent of the proprietor of the copy-right first obtained in writing,