A QUESTION IN THE LAW OF COPYRIGHT.

In *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 53 (1884), the question was presented, to what extent Congress was within its constitutional powers in attempting to grant exclusive rights to the "author, inventor, designer or proprietor of any . . . photograph." Rev. St. § 4952.

The subject-matter of the case was a photograph of Oscar Wilde, who was specially posed for the occasion. The argument against the validity of the copyright was drawn from the enumeration of the powers of Congress in the Constitution (Art. 1, § 8), where we read: "To promote the progress of science and the useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries."

It was said that a photograph was not a writing.

The court in answer referred to the early enactments of Congress protecting charts and engravings, which were participated in by many of the framers of the Constitution; and to the long acquiescense in these statutes. This is one of the earliest uses of the now familiar argument from "contemporary interpretation." Miller, J., said: "By 'writings' in that clause is meant the literary productions of those authors, and Congress very properly has declared these to include all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression. The only reason why photographs were not included in the extended list of the Act of 1802 is probably that they did not exist. . . . We entertain no doubt that the Constitution is broad enough to cover an Act authorizing the copyright of photographs, so far as they are *representatives of original intellectual conceptions* of the author." A reference is then made to a finding of fact in the court below (a jury having been waived) with regard to the photograph, viz: "that the plaintiff made the same . . . entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, . . .

arranging the subject, . . . the light and shade, suggesting and evoking the desired expression," etc., and the conclusion is reached that it was "an original work of art, the product of the plaintiff's intellectual invention," and protected by the copyright.

The court expressly refused to consider the validity of copyright upon an ordinary mechanical photograph. But the words of the Constitution have been already extended so far beyond their natural meaning, that there can be little doubt that when the question is squarely presented for decision, a limit will be set at the point indicated in Sarony's case. The criterion of "original, intellectual conception," if established, is applicable not only to photographs, but to all "written" productions, such as engravings, paintings and the like, to which as works of art the imaginative effort gives their chief value. To maps, charts, statistical tables, etc., the merit of which consists in accurate compilation, the test of "original drudgery" may be applied.

By taking the words of the leading case apart from the facts there presented, viz., the photograph of the human model, an easy application may be made of its supposed principle to very different circumstances. This is daily attempted and leads to interesting questions. Can there be a valid copyright of a copy of an original picture or other work of art? In particular, following the lead of Sarony's case, can there be a valid copyright of a *photograph* of a picture, though such photograph be distinguished by skillful arrangement of the original in the light before the camera, or skillful manipulation of the negative and print, in order to simulate *chiaroscuro* and color values? Is the product an original mental conception, having definite, artistic value? Or is it mere mimicry achieved by technical skill dependent for success upon the fidelity with which the impression of the original is conveyed, rather than imagination; To be proper for copyright the photograph must, of course, be so original as not to be an infringement upon the painting. In asserting copyright in such productions it is forgotten that the subject of copyright—and the idea permeates the whole Sarony case—is the concept, and not the brushwork, or the strength of the acid used to bite the line. Sarony copy-

righted the disposition he made of his model and not the photographic method used to perpetuate it. The concept is the essential feature of the picture, to copy which is infringement, though it be done by a process which shows no color or stroke of the brush in the one case, and no line in the other. It is even decided that to copy an engraving of a painting is an infringement of copyright in the painting. *Beale's Case,* L. R. 3 Q. B. 387.

Whether or not a given production has the required characteristics is a question of fact to be determined in any litigation that may arise. *Lithographic Co.* v *Sarony, supra.* "It is therefore . . important that when the supposed author sues for a violation of his copyright, the existence of those facts of originality, of intellectual production, of thought and conception on the part of the author should be proved." The proof on this point will be the opinions of expert photographers or engravers, as the case may be, and if the court think there is fair room for a difference of opinion upon it, its decision will be entirely for the jury; if they credit the testimony, they will sustain the copyright. If a photograph so produced is proper subject for copyright, so is a steel engraving, a wood-cut, a lithograph, a photogravure, or a water-color of the original painting; and so on, as often as there can be found processes so different from one another as to give opportunity for the exercise of a different kind of pictorial skill. While one or another of these copyrights may fall because overborne by weight of evidence in the minds of the jury, they have not yet been declared invalid as a matter of law. An English case, *Graves' case,* L. R. 4 Q. B. 715, sustained a copyright upon a photograph of a painting, but it proceeded upon the words "authors of photographs" in a statute, upon the meaning of which there was no constitutional limitation. Congress has, to be sure, recognized their validity by providing (Act of March 2, 1895) a penalty for infringement of copyright on a photograph of a work of the fine arts different from that provided for photographs of objects not works of fine arts; but this cannot bind the court.

Aside from the possibility of such copyrights as matter of reason, an argument proceeds against them *ab inconve-*

nienti. The infringer of a copyright is subject not only to forfeiture and suits for actual damages, but to heavy penalties (Rev. St. § 4965, as amended by Act of March 2, 1895), recoverable by the owner of the copyright to his own use and that of the United States. Infringement may be accomplished by any process which reproduces the essential features of the original, plus the intent to copy: *Lawrence* v. *Dana,* 4 *Cliff,* 80; *Johnson* v. *Donaldson,* 3 Fed. R. 22; *Lith. Co.* v. *Falk,* 59 Fed. R. 707. Here again we have matter of fact to be determined by a jury. The usual evidence of this intent, sufficient to warrant a finding, is the similarity of the two productions, to be judged of by inspection: *Chapman* v. *Ferry,* 18 Fed. R. 539. It is possible, therefore, that one who has unlawfully reproduced a picture, should find himself the object of suits for penalties by each one of the owners of the various copyrights; and that each suit should be successful. One jury may find that defendant has copied the original picture; the next that he has copied the photograph of it. Who will say, comparing defendant's chromo with the photograph, that it is not a copy thereof, with such confidence, at least, as to deny the possibility of an affirmative verdict? To prevent such a result it is not possible to bring before court or jury, in a legitimate manner, the record in the previous cases against the same defendant. While the same articles produced by defendant are involved in each suit, yet the parties, and the act alleged as the basis of suit, viz., the copying of plaintiff's production, are different. This result is not predicated of perjury; each plaintiff may hold the most genuine belief in his own merits, and it may be shared by his brother artists; and, if the witnesses in the several cases are different, there will be no contradiction. Such a multiplication of penalties for what is in substance but one violation of the law is at utter variance with the salutary rule for the strict construction of penal statutes, and would work the ruin of an ordinary man. If it is a possible state of affairs, it shows a serious defect in our present law of copyright.

To remedy such a defect congressional action may be necessary. But there is a possible corrective ready at hand. Every court has the power to see to it, not only that the ver-

dict of the jury is based on pertinent evidence, but also that it corresponds with human reason. A jury would not be permitted, for example, to prefer the oath of a witness to the laws of nature. This power is exercised every day, when it is declared that upon such and such facts a question of negligence is to be determined as matter of law. The court which directs a copyright case could hold it contrary to reason that a copy of a picture should display original imaginative effort; and they could, therefore, declare as law to the jury that there can be no copyright in the copy of another man's ideas, however skillfully it may be made.

It is submitted that this must be their conclusion upon consideration of the purpose of the copy, and the qualities which gave it merit. If there be any doubt, the hardship of the case, as it has been pointed out, should turn the scale.

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