

While we are not called upon to express an opinion upon the question whether the mere proof of a conspiracy to defraud the defendant by the procurement of an insurance upon Hillmon's life with the view of ultimately collecting the amount of the policies by a false pretense of his death would be sufficient to avoid the policies as having been obtained by fraud, without proof that such conspiracy had been consummated by compassing the death of another party and passing off the body of the deceased as that of Hillmon, the fact still remains that there was evidence of a conspiracy to procure a large amount of insurance upon the life of Hillmon and to procure in some way the body of another man to pass off as that of Hillmon, and thereby to obtain the amount of these policies, nominally, at least, for the benefit of Hillmon's wife. It is true the plaintiff is not alleged to have been a party to such conspiracy, although she was named as beneficiary in the policies, but her husband is alleged to have been a party, and any fraud perpetrated by him at the time the policies were taken out was available as a defense by the company in an action by her.

These questions and declarations of Baldwin to the four witnesses above stated were made either just before or just after the policy was taken out. They were not so much narratives of what had taken place as of the purpose Baldwin had in view, and we know of no substantial reason why they do not fall within the general rule stated by Greenleaf (1 Greenl. Ev. § 111), that every act and declaration of each member of the conspiracy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all, and is therefore original evidence against each of them. The conspiracy then existed and was still pending. *Smith v. National Ben. Soc.* 123 N. Y. 85, 9 L. R. A. 616, 25 N. E. 197.

These declarations, taken together, tend to show that Baldwin, who seems to have taken the most active part in the transactions connected with this policy, was heavily indebted, and being pressed by his creditors; that he expected in some way to obtain a large part of Hillmon's insurance, and that he was also desirous of going into a sheep ranch with Hillmon, with whom he declared he had a scheme under consideration by which they could raise the necessary funds; that such scheme consisted in obtaining insurance upon Hillmon's life, and then going south and getting the body of some other person and pass it off as the body of the insured, and thus recover the amount of the policy. This testimony was certainly corroborative of other testimony in the case, which both courts below agreed as establishing prima facie evidence of a conspiracy, and which was to the effect that Baldwin and Hillmon had been intimate acquaintances for eight or ten years prior to 1879; that Baldwin, who appears to have been a man of considerable means, had em-

ployed Hillmon in various capacities connected with his farm, and that during his visits at Lawrence, Hillmon generally stayed at his house. Hillmon there first met his wife, who was a cousin of Baldwin's, and worked at his house. Hillmon was a man of no property, and after his marriage he and his wife occupied a single room in the house of one Mary Judson, and did their cooking upon her stove. Baldwin and Hillmon became interested in life insurance, and consulted various agents as to their companies and about methods of collection in case of loss. In a conversation with one Wiseman in February, 1879, Hillmon stated that he was going west on business and might get killed; asked about proofs of death; what the widow must do to get her insurance money and what evidence she would have to furnish if he were killed. Under these circumstances he took out insurance for \$25,000, the annual premium for which amounted to \$600. There were various other items of testimony of the same character, which the courts below regarded as sufficient prima facie evidence of a conspiracy.

Under the circumstances we think the evidence of the four witnesses in question should have been submitted to the jury, and that such testimony was admissible as against the plaintiff, though she was not alleged to be a party to the conspiracy, upon the theory that any fraudulent conduct on the part of the insured in procuring the policy, or in procuring the dead body of another to impersonate himself, was binding upon her. It is well settled that the fraud of the insurer's agent in the procurement of the policy is binding upon the principal. *Millville Mut. M. & F. Ins. Co. v. Collierd*, 38 N. J. L. 480; *National L. Ins. Co. v. Minch*, 53 N. Y. 144; *Oliver v. Mutual Commercial Marine Ins. Co.* 2 Curt. C. C. 277, Fed. Cas. No. 10,498; *Burruss v. National Life Asso.* 96 Va. 543, 32 S. E. 49.

* A number of other alleged errors are embraced in the assignments, but we see none to which we find it desirable to call attention. For the error in the instruction regarding Brown's affidavit and in ruling out the declarations of the four witnesses named, *the judgment of the Court of Appeals is reversed*, and the case remanded to the Circuit Court for the District of Kansas, with instructions to grant a new trial.

Mr. Justice Brewer and Mr. Justice White dissented.

(188 U. S. 239)

GEORGE BLEISTEIN, John W. Bridgman, John A. Rudolph, Ansley Wilcox, Gerritt B. Lansing, and Edwin Fleming, Doing Business under the Name of The Courier Company and the Courier Lithographing Company, Plffs. in Err.,

v.

DONALDSON LITHOGRAPHING COMPANY.

Copyright — printing and engraving — pictorial illustrations—circus posters.

1. Printing and engraving, though not for a mechanical end, are not excluded from the useful arts, which Congress is empowered by the Constitution to promote by copyright laws.
2. Pictorial illustrations are none the less within the protection of the copyright law (U. S. Rev. Stat. § 4952; U. S. Comp. Stat. 1901, p. 3406), because they are drawn from real life.
3. Chromolithographic advertisements of a circus, portraying a ballet, a number of persons performing on bicycles, and groups of men and women whitened to represent statues, are proper subjects of copyright, under U. S. Rev. Stat. § 4952 (U. S. Comp. Stat. 1901, p. 3406), as amended by the act of 1874, § 3 (18 Stat. at L. 78, 79, chap. 301, U. S. Comp. Stat. 1901, p. 3412), as "pictorial illustrations," even assuming that only such illustrations as are "connected with the fine arts" are within the protection of such laws.

[No. 117.]

Argued January 13, 14, 1903. Decided February 2, 1903.

IN ERROR to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Kentucky in favor of defendant in a suit to recover the penalties prescribed for infringements of copyrights. *Reversed* and remanded, with directions to set aside the verdict and grant a new trial.

See same case below, 44 C. C. A. 296, 104 Fed. 993.

The facts are stated in the opinion.

Messrs. Ansley Wilcox and Arthur Von Briesen, and Messrs. Wilcox & Miner for plaintiffs in error.

Messrs. Edmund W. Kittredge and Joseph Wilby for defendant in error.

* Mr. Justice Holmes delivered the opinion of the court:

This case comes here from the United States circuit court of appeals for the sixth circuit by writ of error. Act of March 3, 1891 (26 Stat. at L. 828, chap. 517, § 6, U. S. Comp. Stat. 1901, pp. 549, 550). It is an action brought by the plaintiffs in error to recover the penalties prescribed for infringements of copyrights. Rev. Stat. §§ 4952, 4956, 4965 (U. S. Comp. Stat. 1901, pp. 3406, 3407, 3414), amended by act of March 3, 1891 (26 Stat. at L. 1109, chap. 565), and act of March 2, 1895 (28 Stat. at L. 965, chap. 194). The alleged infringements consisted in the copying in reduced form of three chromolithographs prepared by employees of the plaintiffs for advertisements of a circus owned by one Wallace. Each of the three contained a portrait of Wallace in the corner, and lettering bearing some slight relation to the scheme of decoration, indicating the subject of the design and the fact that the reality was to be seen at the circus. One of the designs was of an ordinary ballet, one of a number of men and women, described as the Stirk family, performing on bicycles, and one of

groups of men and women whitened to represent statues. The circuit court directed a verdict for the defendant on the ground that the chromolithographs were not within the protection of the copyright law, and this ruling was sustained by the circuit court of appeals. *Courier Lithographing Co. v. Donaldson Lithographing Co.* 44 C. C. A. 296, 104 Fed. 993.

There was evidence warranting the inference that the designs belonged to the plaintiffs, they having been produced by persons employed and paid by the plaintiffs in their establishment to make those very things. *Gill v. United States*, 160 U. S. 426, 435, 40 L. ed. 480, 483, 16 Sup. Ct. Rep. 322; *Colliery Engineer Co. v. United Correspondence Schools Co.* 94 Fed. 152; *Carte v. Evans*, 27 Fed. 861. It fairly might be found, also, that the copyrights were taken out in the proper names. One of them was taken out in the name of the Courier Company and the other two in the name of the Courier Lithographing Company. The former was the name of an unincorporated joint-stock association formed under the laws of New York (Laws of 1894, chap. 235), and made up of the plaintiffs, the other a trade variant on that name. *Scribner v. Clark*, 50 Fed. 473, 474, 475, S. C., *sub nom. Belford, C. & Co. v. Scribner*, 144 U. S. 488, 36 L. ed. 514, 12 Sup. Ct. Rep. 734.

Finally, there was evidence that the pictures were copyrighted before publication. There may be a question whether the use by the defendant for Wallace was not lawful within the terms of the contract with Wallace, or a more general one as to what rights the plaintiff reserved. But we cannot pass upon these questions as matter of law; they will be for the jury when the case is tried again, and therefore we come at once to the ground of decision in the courts below. That ground was not found in any variance between pleading and proof, such as was put forward in argument, but in the nature and purpose of the designs.

We shall do no more than mention the suggestion that painting and engraving, unless for a mechanical end, are not among the useful arts, the progress of which Congress is empowered by the Constitution to promote. The Constitution does not limit the useful to that which satisfies immediate bodily needs. *Burrow-Giles Lithographing Co. v. Sarony*, 111 U. S. 53, 28 L. ed. 349, 4 Sup. Ct. Rep. 279. It is obvious also that the plaintiff's case is not affected by the fact, if it be one, that the pictures represent actual groups,—visible things. They seem from the testimony to have been composed from hints or description, not from sight of a performance. But even if they had been drawn from the life, that fact would not deprive them of protection. The opposite proposition would mean that a portrait by Velasquez or Whistler was common property because others might try their hand on the same face. Others are free to copy the original. They are not free to copy the copy. *Blunt v. Patten*, 2 Paine,

† 2. See Copyrights, vol. 11, Cent. Dig. § 7.

397, 400, Fed. Cas. No. 1,580.* See *Kelly v. Morris*, L. R. 1 Eq. 697; *Morris v. Wright*, L. R. 5 Ch. 279. The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.

If there is a restriction it is not to be found in the limited pretensions of these particular works. The least pretentious picture has more originality in it than directories and the like, which may be copyrighted. *Drone, Copyright*, 153. See *Henderson v. Tompkins*, 60 Fed. 758, 765. The amount of training required for humbler efforts than those before us is well indicated by Ruskin. "If any young person, after being taught what is, in polite circles, called 'drawing,' will try to copy the commonest piece of real work,—suppose a lithograph on the title page of a new opera air, or a woodcut in the cheapest illustrated newspaper of the day,—they will find themselves entirely beaten." *Elements of Drawing*, first ed. 3. There is no reason to doubt that these prints in their *ensemble* and in all their details, in their design and particular combinations of figures, lines, and colors, are the original work of the plaintiffs' designer. If it be necessary, there is express testimony to that effect. It would be pressing the defendant's right to the verge, if not beyond, to leave the question of originality to the jury upon the evidence in this case, as was done in *Hegeman v. Springer*, 49 C. C. A. 86, 110 Fed. 374.

We assume that the construction of Rev. Stat. § 4952 (U. S. Comp. Stat. 1901, p. 3406), allowing a copyright to the "author, designer, or proprietor . . . of any engraving, cut, print . . . [or] chromo" is affected by the act of 1874 (18 Stat. at L. 78, 79, chap. 301, § 3, U. S. Comp. Stat. 1901, p. 3412). That section provides that, "in the construction of this act, the words 'engraving,' 'cut,' and 'print' shall be applied only to pictorial illustrations or works connected with the fine arts." We see no reason for taking the words "connected with the fine arts" as qualifying anything except the word "works," but it would not change our decision if we should assume further that they also qualified "pictorial illustrations," as the defendant contends.

*These chromolithographs are "pictorial illustrations." The word "illustrations" does not mean that they must illustrate the text of a book, and that the etchings of Rembrandt or Müller's engraving of the Madonna di San Sisto could not be protected today if any man were able to produce them. Again, the act, however construed, does not mean that ordinary posters are not good enough to be considered within its scope. The antithesis to "illustrations or works connected with the fine arts" is not works of little merit or of humble degree, or illustrations addressed to the less educated

classes; it is "prints or labels designed to be used for any other articles of manufacture." Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd, and therefore gives them a real use,—if use means to increase trade and to help to make money. A picture is none the less a picture, and none the less a subject of copyright, that it is used for an advertisement. And if pictures may be used to advertise soap, or the theatre, or monthly magazines, as they are, they may be used to advertise a circus. Of course, the ballet is as legitimate a subject for illustration as any other. A rule cannot be laid down that would excommunicate the paintings of Degas.

Finally, the special adaptation of these pictures to the advertisement of the Wallace shows does not prevent a copyright. That may be a circumstance for the jury to consider in determining the extent of Mr. Wallace's rights, but it is not a bar. Moreover, on the evidence, such prints are used by less pretentious exhibitions when those for whom they were prepared have given them up.

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value,—it would be bold to say that they have not an aesthetic and educational value,—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights. See *Henderson v. Tompkins*, 60 Fed. 758, 765. We are of opinion that there was evidence that the plaintiffs have rights entitled to the protection of the law.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is also reversed and the cause remanded to that court with directions to set aside the verdict and grant a new trial.

Mr. Justice Harlan, dissenting:

Judges Lurton, Day, and Severens, of the circuit court of appeals, concurred in affirming the judgment of the district court. Their views were thus expressed in an opinion delivered by Judge Lurton: "What we hold is this: That if a chromo, lithograph, or other print, engraving, or picture has no

other use than that of a mere advertisement, and no value aside from this function, it would not be promotive of the useful arts, within the meaning of the constitutional provision, to protect the 'author' in the exclusive use thereof, and the copyright statute should not be construed as including such a publication, if any other construction is admissible. If a mere label simply designating or describing an article to which it is attached, and which has no value separated from the article, does not come within the constitutional clause upon the subject of copyright, it must follow that a pictorial illustration designed and useful only as an advertisement, and having no intrinsic value other than its function as an advertisement, must be equally without the obvious meaning of the Constitution.* It must have some connection with the fine arts to give it intrinsic value, and that it shall have is the meaning which we attach to the act of June 18, 1874 (18 Stat. at L. 78, chap. 301, U. S. Comp. Stat. 1901, p. 3411), amending the provisions of the copyright law. We are unable to discover anything useful or meritorious in the design copyrighted by the plaintiffs in error other than as an advertisement of acts to be done or exhibited to the public in Wallace's show.

No evidence, aside from the deductions which are to be drawn from the prints themselves, was offered to show that these designs had any original artistic qualities. The jury could not reasonably have found merit or value aside from the purely business object of advertising a show, and the instruction to find for the defendant was not error. Many other points have been urged as justifying the result reached in the court below. We find it unnecessary to express any opinion upon them, in view of the conclusion already announced. The judgment must be affirmed." *Courier Lithographing Co. v. Donaldson Lithographing Co.* 44 C. C. A. 296, 104 Fed. 993, 996.

I entirely concur in these views, and therefore dissent from the opinion and judgment of this court. The clause of the Constitution giving Congress power to promote the progress of science and useful arts, by securing for limited terms to authors and inventors the exclusive right to their respective works and discoveries, does not, as I think, embrace a mere advertisement of a circus.

Mr. Justice McKenna authorizes me to say that he also dissents.