

cious stones, still that they were known in trade and commerce in this country each by its specific trade name, as it appears upon the invoice; that they were of different colors and appearances, and varied much in price.

Stephen G. Clarke and Charles Curie, for plaintiff.

Stephen A. Walker, U. S. Atty., and Macgrane Coze, Asst. U. S. Atty., cited Schneider v. Barney, 6 Fed. Rep. 150.

LACOMBE, J., (*orally, after stating the facts as above.*) Whether or not the penalty provided for in section 2900, Rev. St., is to be exacted from an importer is to be determined by a comparison of the value declared in the entry with the value found upon appraisement. Although articles may be dissimilar, and known by different trade names, still, if they belong to the same class, and are grouped together in the tariff acts as dutiable under their class name at the same rate, and are valued in the entry only at a lump sum for the entire importation, the penalty is not incurred unless the appraisement of the importation as a whole exceeds by 10 per cent. or more the value so declared on the entry. The case decided by Judge SHIPMAN, and referred to on the argument (*Schneider v. Barney, 6 Fed. Rep. 150,*) does not apply to the case at bar, because in that case the different varieties were apparently separately valued upon the amended entry, so that comparison of the declared value of each variety with the appraiser's report was practicable. Verdict must be directed for the plaintiff.

UNITED STATES *v.* TAYLOR.

(*District Court, E. D. Michigan. December 31, 1888.*)

POST-OFFICE—EMBEZZLEMENT OF LETTER.

An employe of the post-office department can only be convicted of embezzling such letters as are, at the time, a proper subject of deposit in the mail; and where a postmaster received \$15 in paper money and \$3 in silver, which were handed to him in his office, with a request that he send it in a registered letter, and he took the money, put it in an envelope, which he addressed, wrote a letter to accompany the remittance, delivered to the sender the usual receipt for a registered letter, received the fee for registration, and said it would be all right; but there was no evidence that the silver money had been exchanged for paper, or that the letter was ever stamped or sealed, or put in the special envelope used for registered letters.—it was held that his conviction for embezzling a "letter" should be set aside.

(*Syllabus by the Court.*)

On Motion for New Trial. Indictment for embezzlement of a letter. Defendant, who was postmaster at Reese, a small office in Tuscola county, was convicted of the embezzlement of a letter, and the stealing of its contents, under the following circumstances: The sender of the letter brought the defendant \$15 in paper money and \$3 in silver, and

handed it to him in his office, with the request that he send it in a registered letter to one Williams in Rochester, N. Y. He took the \$18, put it in an envelope, which he addressed, wrote a letter to accompany the remittance, and delivered the sender the usual receipt for a registered letter, received the fee for registration, and told her it would be all right. The money disappeared. The testimony indicated that the letter was never sent, and the jury found that the defendant had embezzled it, and convicted him. His counsel moved for a new trial, upon the ground that he was guilty only of a breach of trust, and not of a violation of the federal statute.

Charles T. Wilkins, Asst. U. S. Dist. Atty.

Thomas Hislop, for defendant.

BROWN, J. The indictment charges the prisoner with taking and embezzling a certain letter which came into his possession as postmaster, was intended to be conveyed by mail, and which contained \$18 in money, with intent to steal and appropriate the same to his own use. The question raised by the motion is whether the admitted facts show that defendant was guilty under Rev. St. § 5467, of embezzling the letter, or simply of embezzling money intrusted to him as the agent of Mary Bauer, the witness, for the purpose of being sent in a letter; in other words, whether the federal jurisdiction had attached when the embezzlement took place. Upon the trial I held, *pro forma*, that the delivery of the receipt and payment of the registration fee were sufficient evidence that the thing embezzled was a registered letter.

Upon reflection, however, I am satisfied that the defendant ought not to have been convicted under this statute. It is true that the money was delivered to him and placed by him in an envelope, which he addressed to Williams, and that he gave a receipt, and was paid the usual fee, as for a registered letter. But a portion of the money was in silver coin, and it was evidently contemplated that he should exchange it for paper money, and there is no evidence that the letter was ever stamped or sealed, or put in the special envelope used for registered letters. So long as anything remained to be done to render the envelope mailable matter,—that is, a proper subject of deposit in the mail,—the postmaster was acting merely as the agent of the sender, and the envelope was not a letter within the meaning of the statute. In placing the money in the envelope, and in exchanging the silver for paper money, which would be necessary before the envelope could be mailed, the postmaster was clearly acting as the agent of the sender, and the package was not such a one as he could properly receive in the discharge of his official duty. The execution of the receipt, and the payment of the registry fee, were undoubtedly *prima facie* evidence of the delivery of a registered letter, but a receipt is never conclusive, and may be explained by parol evidence. I am satisfied the jurisdiction of the federal court had not attached when the money was embezzled, and that the conviction should be set aside, and defendant discharged.

FALK v. T. P. HOWELL & Co.

(Circuit Court, S. D. New York. December 20, 1888.)

COPYRIGHT—PHOTOGRAPHS—INFRINGEMENT.

A copyright of a photograph artistically designed to illustrate a musical composition is infringed by stamping an imitation in raised figure on leathern chair bottoms and backs.

In Equity.

Bill by Benjamin J. Falk against T. P. Howell & Co., a corporation, to restrain the infringement of a copyrighted photograph. The plaintiff is a photographer, and has copyrighted a picture of Geraldine Ulmer as "Yum Yum," in which she is represented as sitting upon the horn of the moon, while uttering the words, "We're very wide awake, the moon and I," it being intended thereby to illustrate a song sung by Miss Ulmer in the "Mikado." Defendant is engaged in the manufacture of chairs, and stamped a raised figure, like the picture, on the leather of which the bottoms and backs of chairs are made. The picture was illustrative of the song, not only by the combination of the figure of the girl with that of the moon, but also by the representation of the moon as a face, the features of both bearing an expression appropriate to the words of the song.

Isaac N. Falk, for complainant.

William C. Wallace, for defendants.

COXE, J. Since the decision of the supreme court in *Burrow-Giles Co. v. Sarony*, 111 U. S. 53, 4 Sup. Ct. Rep. 279, there can be no doubt that a photograph which has the artistic merits possessed by the complainant's photograph is the subject of a copyright. The only question is, do the defendants infringe? That their design is copied directly from the copyrighted photograph is not denied, but it is urged that infringement is avoided, because it is larger than the photograph, and is stamped on leather, and is intended for the bottom or back of a chair. It is thought that this proposition cannot be maintained. Differences which relate merely to size and material are not important. They may affect the question of damages, but not the question of infringement. The complainant is entitled to the usual decree.