

THE
AMERICAN LAW REGISTER.

JANUARY, 1869.

THE LEGAL RELATIONS OF PHOTOGRAPHS.

PHOTOGRAPHY is not only an interesting art, esthetically considered, but it is capable of important scientific applications. The public are familiar with its employment in the delineation of anatomical specimens and of all natural historical objects. It has also long been used for the purpose of identifying criminals. These, however, are but a few of the many applications of the art, which either have been suggested or, as civilization progresses, will be made, for purposes analogous to those indicated above, that is, either to transcribe and fix for the information of scholars or of strangers the features and other physical peculiarities of objects or persons that are absent, but about whose identity there is no question; or to aid in the identification of things or persons present, with others that are absent, but whose photographs are at hand. Thus—for the purpose of identification—an English law magazine has lately proposed that there should be appointed a public photographer, whose duty it should be to take and register the likenesses of all persons leaving England, and, once in every five years, of all persons residing in England—each person, with his photograph thus taken, to deposit also his autograph: *Solic. Jour. and Reporter*, for June 27th 1868. In the United States, it is said, the directors of the Park Bank of New York, establishing regulations for their new safe-deposit vaults, have adopted the idea of identifying each holder or lessee of a safe by his own *carte-de-visite* previously taken and attached to his own folio or safe num-

ber. It has also been suggested that to the "paper" of every person who becomes naturalized, there should be attached his photograph, either fastened there by the official seal of the judge or commissioner, or taken by an official photographer on the paper itself. So, for the other purpose indicated, photography has lately been employed in England in a manner equally novel and interesting. Candidates for election to Parliament have, in some instances, it is said, instead of resorting to personal solicitation of votes, issued addresses containing, besides a declaration of principles, photographic likenesses of themselves. These all seem to be practical uses of the art; but others may be imagined of both kinds which would result in material advantage in the administration of justice and at the same time have an important bearing on the spread of civilization.

Thus—to aid in the identification of persons—the endorsees of drafts or letters of credit might be required, in important cases, to exhibit with the paper they hold their photographic likenesses with the endorsements under which they claim written upon their margins. So, a party seeking a divorce from an absent husband or wife, might be required to produce their marriage certificate containing the photographic likenesses of both, taken at the time of the marriage, by an official photographer; or to present the photograph of the person from whom a divorce is sought, and prove the identity *abundè*. So, all persons enlisting in the army or navy might advantageously be photographed by an official photographer; all persons travelling as agents for commercial houses or acting otherwise in such a capacity as to make an identification desirable to those with whom they act. So, for the purpose of accurate delineation, many new uses may be imagined. Thus—not to mention that large class of cases in which the art might be employed with great advantage in describing goods and chattels, and even real estate, to persons at a distance with whom the owners were in treaty for the sale of them—in all cases in our courts where, as in chancery causes, the depositions of witnesses not present are read, it would aid much in weighing their testimony, if their photographs were appended to their depositions. An official photographer might, on the suggestion of counsel, be present and take the likenesses of each witness, if desired, not only in his tranquil moods, but in moments of excitement or of embarrassment under cross-examination—the artist and his appa-

ratus being so placed, perhaps, as not themselves to be a cause of trepidation. The same advantage would follow from the accurate presentment of the moral, as determinable from the physical, qualities of witnesses, by photography, in many cases tried on appeal, where the result depends on the testimony of witnesses not present. So, where questions arise at *Nisi Prius* as to the genuineness of the alleged handwriting of a party, and the case is appealed, the difficulty of presenting the supposed spurious paper to the appellate court would be obviated by using a photographic copy. So, where an issue is made up as to the validity of a will—the will being contested on the ground of want of testamentary capacity, from imbecility, insanity, &c., it cannot be doubted that material aid in arriving at a just result might be derived from a photograph of the testator, taken by an official artist, in the act of signing the will, in the presence of the attesting witnesses. So, where a homicide has been committed, it is always important to ascertain as well the condition of the body when discovered as its position or relation to surrounding objects. In trials for murder or manslaughter, much time is very properly occupied in determining these circumstances from the imperfect and conflicting statements of witnesses, or from the rude plans and drawings of such artists as may be in the vicinity. It is obvious that were there an official photographer charged by law with the duty of taking views of the body and its surroundings in every case of homicide, and were it made the duty of the police or other executive authorities, before any change in the condition or relations of the body has taken place, to cause the official photographer to be present for the purpose indicated, the ascertainment of the facts relating to the killing would be much facilitated. And particularly would this be the case were the same precaution taken whenever any person is arrested charged with the crime, and the accused is to undergo the ordeal of a public interrogation before a magistrate or by the officers in charge. The official artist would preserve the lineaments of guilt or innocence as presented when the nature of the charge was communicated to the prisoner, and his protestations of innocence were uttered. I shall mention but a single other case in which the art might be similarly employed, and that is, where affrays or riots occur in large cities. The Emperor Napoleon is said to have so reconstructed the city of Paris, that there is no street or avenue, which could be barri-

ceded in case of a revolt of his subjects, that cannot now be swept by his batteries. So, it is not unreasonable to suppose, that when the art of photography is perfected, the streets and alleys of our great cities will be swept by photographic batteries, so located as to take, from many points of view at once, the likenesses of persons engaged in disturbing the peace, for use in subsequent legal examinations. The details of the process, including the collateral incidents which science may devise to render it effective, such as lights thrown upon the mob to bring into relief in the night or in cloudy weather the individuals composing it, I shall not attempt to give. That is the business of those charged with the improvement of photography. All I affirm is, that the art is capable of such an extension; and I need not add that to apply it thus successfully would be of advantage in the administration of justice equal to that which resulted from the employment of street-lamps in cities—one of the most efficient causes, as historians admit, of the diminution of crime and of the consequent advance of civilization, that have ever existed.

The principal object of this paper, however, is, to determine the evidentiary rank of the products of the photographic art. Is a photograph, considered as a narration or delineation of facts, a piece of hearsay, or of original and direct evidence? Let us look at it as employed for each of the two purposes indicated, that is, first, for that of identification, and, secondly, for that of mere delineation of features or qualities. Before proceeding to do this, with respect to the former, we must determine what is involved in the process of identification of a person or thing as ordinarily effected in a court of justice. In identifying a person a witness is produced and required to compare the person presented for identification with him with whom he is sought to be identified, as the latter remains pictured in the witness's mind; that is, with the conception or image of him existing in his "mind's eye." So, if the identification be of one physical object or place with another; the same act of comparison of the thing presented with a mere mental image or idea of it, is required of the witness.

Now, let us suppose a photograph to be employed for the same purpose: a witness—he may be an expert—would be asked to compare the person proposed with a likeness or image of him formed, not by the mysterious operation of vital laws and forces

but by the subtle actions of chemical agencies; formed, too, not in the brain or upon the retina of the eye of the witness, but upon the equally faithful and far more durable tablet used by the photographer. The question is, are these processes so far identical as to entitle the corresponding steps in both to the same rank as evidence.

The process is, doubtless, in one respect, more complex, when conducted with than without the use of the photograph. Without it the image which forms the standard of comparison is one created in the brain of a person who stands at once as photographer and identifying witness; with it, the photographer or other person vouching for the genuineness of the photograph, and the witness making the comparison, would commonly be different persons, and the image a *tertium quid*, extraneous to both.

This disadvantage, however, is compensated for by the greater certainty, when the photograph is employed, that the image forming the standard of comparison is neither a compliment nor a caricature. The photographic apparatus never intentionally falsifies nor do its products ever so fade as to distort the image they present, as do the figures of things committed to the treacherous memory of men. The comparative certainty of the two processes may be inferred from a single example. The heir to an estate has been a long time missing. A photographic likeness of him, as he was about the time of his disappearance, is preserved. A person presenting himself and claiming the inheritance, an issue is made up to determine whether he is the true heir or not. Witnesses speaking to his identity must rely wholly upon their recollections of what he was when they last saw, or used to see, him—a method involving every kind and degree of error to which the human mind is subject. Let witnesses, now, be shown a photographic likeness of him, proved to be genuine, and be required with it to compare the person proposing himself for identification, and the sources of error would be sensibly diminished. Others, it is true, might exist, peculiar to this mode of identification, by which the balance might, in a measure, be restored. Thus, the fact that the comparison would be of a living person, whose face might present many different phases in as many seconds, with a lifeless image, in which there may have been fixed by the imperfect methods of the art, a fleeting or unusual expression of its

original, or a sheer vacuity of features without expression, would certainly tend to restore it.

Without stopping to insist, on the other hand again, on what is very evident, that the memory of features and of delicate shades of expression is never perfect, and is often very defective, and that, during the lapse of years, such changes of feature, complexion, or expression may have occurred as to put at fault those whose memory of faces is best, I will observe that it is not so much my purpose to strike a balance of advantages between the two methods of identification, as to ascertain their relative rank as evidence, leaving the weight of each to be determined as in other cases.

The testimony of a witness comparing a person present with the remembered image of a person absent, is, in all its parts, original evidence. Ought we to rank as secondary evidence either of the three elements of the process of identifying a person by his photograph, which follow, namely, 1. The establishment by proof of the genuineness of the photograph; 2. The statement or narration of facts made, if I may so say, by the picture itself; and, 3. The comparison, by witnesses, or by a jury directly, of the person offering himself, with that picture?

At first view, doubtless, a photograph seems a mere piece of hearsay evidence. It is what the witness vouching for its genuineness says, the photographic apparatus, acting in conjunction with sunlight and chemical reagents at the time of taking it, affirmed to be an accurate likeness of the person who sat for it. It differs from hearsay, however, in one essential particular; it is wholly free from the infirmity which causes the rejection of hearsay evidence, namely, the uncertainty whether or not it is an exact repetition of what was said by him whose testimony is repeated by the witness. In the picture we have before us, at the trial, precisely what the apparatus did say. Its language is repeated to us, syllable for syllable. Disclaiming any knowledge as to the name or identity of the original, the apparatus says:—"His features, size, shape, apparel, and surroundings were so and so." The vouching witness completes the narration thus left imperfect by locating and naming the person whose picture it is, and this latter, all will agree, is original evidence. Is not that of the picture equally original? Or, if a difference exist, should we not give the greater credence to the photograph, whose testimony, we

know, is perfectly truthful and generally commensurate with the fact, while that of the vouching witness, and also of the witness called to speak to the question of identity, may be mistaken or perjured?

If any one supposes that when a photograph is used to aid in the identification of persons, the evidence is less entitled to rank as original evidence, than that of a witness identifying a person by comparison with an image in the witness's mind, let him analyze the process in the latter case. To make such a comparison, the witness must first recall an image, formed, perhaps, years before, on the retina of his eye, by the natural processes involved in the act of vision; and then, with this image, compare the person proposed. Is the faculty of vision never at fault? May not the person seeing be mistaken in supposing it was A., rather than B., whom he saw, even when the image is recent; much more, when it is ancient and faded, from the imperfection of his memory? If, on the other hand, we feel such a degree of confidence in the accuracy of the representations made by the eye, notwithstanding the many sources of error to which vision is subject, that we accord to the evidence in question the rank of original evidence, why should we rely less confidently on the trustworthiness of photographic testimony, which is free not only from all moral bias, but from nearly every conceivable physical cause of error? We know that the photograph is not the work, in any respect affecting its truthfulness, of a human brain, but of natural forces, which, experience teaches, generally speak the truth without flattery or detraction. If I am correct in this, a photograph, proved to be that of a person absent, is that person himself, *precisely as he exists in the article of vision*—is, therefore, direct and original evidence of the kind of man he was. So, of the photographic likeness of any natural object or place. When shown to be the photograph of the place or object, it is original—that is, legally speaking, the best—evidence of its features and relations; as much so as the testimony of a witness speaking from memory of the same features and relations. And, in general, whenever the art of photography is employed to delineate for the information of others the features and expression of a person, or the condition and relations of an object, whose identity is not in question, its products are so veracious as to entitle them to rank, not as hearsay or secondary, but as original, evidence. How important this

is, practically, may be seen from the example given above of a photograph taken of a body and its surroundings after a homicide has been committed. If the picture is secondary evidence, it could not be offered, whilst there were, as there always would be, witnesses who could speak of those circumstances from their own knowledge, since their testimony would, in law, be the best evidence. On the contrary, the really best evidence, as every one must perceive, would be that given by a photograph. Its testimony in relation to the enumeration and grouping of details, would be perfectly exact; and, in relation to their perspective, and, often, to their coloring, it would be nearly so. This use of the art, however, having a less intimate connection than the other with the administration of justice, I shall not dwell further upon it in this relation. As furnishing a cause of action in suits for damages, but one or two cases occur to me. One would be, when a photograph clandestinely taken, and representing its original in a ridiculous light, or publishing his personal defects, should be uttered maliciously, to his damage. Such a picture would doubtless be a libel in all our states, and particularly in those in which the old maxim, "The greater the truth, the greater the libel," is still in force. So, if a likeness, once lawfully taken, were, without permission, to be multiplied for gain, the artist reckoning on the beauty or distinction of the original for an extensive sale, it might be considered whether there was not a violation of a sort of natural copyright, possessed by every person of his or her own features, for which the courts would be bound to furnish redress. If the newspapers are to be trusted, a case of the kind has lately occurred in Europe. An artist multiplied the likeness of a lady of high rank at the Austrian court, and sold the copies as the photograph of some notorious woman in another city. Suit was brought by the injured lady and a judgment recovered. What was the ground or the nature and extent of the recovery, we are not told. Special damage may have formed the basis of it; but it cannot be doubted, that had there been none, her right to control the market of her own beauty could not have been denied her by any court, and that she must have recovered on the ground that that right had been infringed, if on no other.

J. A. J.