

may be taken as the preparation made and offered to the public by the appellee. We have not deemed it necessary to enter into any lengthy discussion of the law on the points raised on this hearing, as they are fully settled by other courts, and moreover, the cause is still pending for final trial; but we think the facts before the lower court clearly justified the conclusion it reached, and its order and judgment, so far made, are affirmed.

HEFEL v. WHITELEY LAND CO.

(Circuit Court, D. Indiana. February 2, 1893.)

No. 8,808.

1. **COPYRIGHT—FORM OF NOTICE.**

Act June 18, 1874, (18 St. at Large, p. 78,) prescribes the following alternative form of notice of claim of copyright: "Copyright, 18—, by A. B." *Held*, that the following notice on a map: "Copyright entered according to act of congress 1889, by T. C. Hefel, civil engineer,"—is sufficient, since it differs from the prescribed formula only by including words which are mere surplusage.

2. **SAME—STATUTES—CONFLICTING PROVISIONS.**

Act June 18, 1874, relating to copyright, (18 St. at Large, p. 78,) prevails over Rev. St. 1878, § 4962, with which it is in conflict, by virtue of Rev. St. § 5601, which provides that acts passed after December 1, 1873, are to be taken as passed subsequent to the revision.

At Law. Action by Toney C. Hefel against the Whitely Land Company to recover penalties for infringement of copyright. Heard on demurrer to the declaration. Overruled.

J. N. Templer & Son and Morris, Newberger & Curtis, for plaintiff.
Ryan & Thompson, for defendant.

BAKER, District Judge. Action to recover penalty for infringement of a copyright of a map. The declaration, which is in two counts, alleges in each that the plaintiff is the author and proprietor of a certain map entitled "Hefel's Natural Gas and City Map, Muncie, Indiana;" and that the same has been duly copyrighted by compliance with the acts of congress; and charges that the defendant, in violation of his rights as such author and proprietor, has infringed his copyright by the publication of 10,000 copies of the map in and on a paper called "The Whitely Bulletin," for which infringement the plaintiff seeks to recover as damages the penalty provided by statute. The defendant demurs to each count of the declaration, upon the ground that it fails to show that the plaintiff has obtained a valid copyright upon his map. The map in question is referred to in each count of the declaration, from which it appears that the only notice of the copyright given on the map itself is by printing upon each copy and issue thereof the following words: "Hefel's Natural Gas and City Map, Muncie, Indiana, made by T. C. Hefel, civil engineer. Copyright entered according to act of congress 1889, by T. C. Hefel, civil engineer,"—and the only question raised by the demurrer and argued by counsel is whether this shows a sufficient notice to entitle the plaintiff to maintain an action to recover the penalty

provided by statute for the infringement of a copyright. Counsel for defendant cite and rely on section 4962, p. 959, Rev. St. U. S. 1878, (2d Ed.,) as the one which governs in this case. This section, so far as material, is as follows:

"No person shall maintain an action for the infringement of his copyright unless he shall give notice thereof, * * * if a map, * * * by inscribing upon some portion of the face or front thereof * * * the following words: 'Entered according to act of congress in the year ———, by A. B., in the office of the librarian of congress, at Washington.'"

If this section were the one applicable to the case, the demurrer would be well taken. The plaintiff has not adopted the formula for his notice prescribed in the above-quoted section. He has used a portion of the formula, but has omitted the words "in the office of the librarian of congress, at Washington." It is not necessary to discuss the natural rights of authors in their literary productions, nor to determine whether in this country, aside from the rights secured by statutes, they can maintain an action to recover damages for the unauthorized appropriation of their writings. This action is brought to recover the penalty denounced by the statute against the infringer of a copyright. The statute is highly penal in its character, and must be strictly construed. Giving it such a construction, the omission of the above-quoted words would be fatal, if there was no other statute applicable to the case. *Jackson v. Walkie*, 29 Fed. Rep. 15.

Section 5601, Rev. St. U. S. 1878, provides that "the enactment of said revision is not to affect or repeal any act of congress passed since the 1st day of December, one thousand eight hundred and seventy-three, and all acts passed since that date are to have full effect as if passed after the enactment of this revision; and, so far as such acts vary from or conflict with any provision contained in said revision, they are to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith." Consequently the act of June 18, 1874, (18 St. at Large, p. 78,) is the one which must be looked to in determining the sufficiency of the declaration. Section 1 of that statute, so far as material to this case, provides "that no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof, * * * if a map, * * * by inscribing upon some visible portion thereof * * * the following words, viz.: 'Entered according to act of congress, in the year ———, by A. B., in the office of the librarian of congress, at Washington;' or, at his option, the word 'Copyright,' together with the year the copyright was entered, and the name of the party by whom it was taken out; thus, 'Copyright, 18—, by A. B.,'" The notice alleged to have been inscribed on each copy of the map is in the following words: "Copyright entered according to act of congress 1889, by T. C. Hefel, civil engineer." The notice embodies the exact words required by the last formula prescribed in the statute, with the additional words "entered according to act of congress," and the words "civil engineer" following the author's name. These additional words simply amplify the formula prescribed by the statute, without in any manner affecting its mean-

ing. They are to be regarded as surplusage. The maxim, "utile per inutile non vitiatur," is decisive. *Patterson v. U. S.*, 2 Wheat. 221. The declaration is sufficient, and the demurrer is overruled.

THE CITY OF NEW YORK.

STEVENS et al. v. THE CITY OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. February 7, 1893.)

1. ADMIRALTY—APPEAL.

Although the opinion of the trial judge in an admiralty case will not be disturbed on appeal as to questions of fact depending upon the credibility of witnesses examined in his presence unless there is a decided preponderance of evidence the other way, his decision rendered without an opinion cannot be reviewed conformably with that rule, and, on appeal therefrom, the appellate court will decide such questions of fact as best it may on reading the record.

2. COLLISION—TUG AND STEAMER AT PIER.

A tug had instructions from the officers of a steamship company to assist one of its steamers in getting into her slip, and, in so doing, take a position under her starboard quarter. After the steamer got part way into the slip, using her propellers from time to time for that purpose, the tug came alongside, signaled with her whistle, stopped her engines, and lay alongside, waiting for a line to be passed, with her stern close to the steamer's propeller, her approach not having been noticed by the steamer's crew. While in this position the tug was sucked under and sunk by the starting of the steamer's starboard propeller. *Held*, that the tug was negligent in assuming such a position, and that the steamer was not liable.

Appeal from the District Court of the United States for the Eastern District of New York.

In Admiralty. Libel by Stevens and others against the steamship City of New York for collision. Decree for libelants. Respondent appeals. Reversed.

H. G. Ward, for appellant.
 Jos. F. Mosher, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The learned district judge who heard this cause in the court below did not express any opinion in deciding it upon the facts or law of the cause, and we are wholly uninformed of the reasons which led him to conclude that the libelants were entitled to recover. In controversies involving questions of negligence there is usually less difficulty in applying the rules of law to the facts than in ascertaining what the facts really are. In the present case the findings of the trial judge, in whose presence the important witnesses for the parties were examined, would have been most persuasive with this court in determining the facts, and probably would have been controlling, because the testimony is conflicting, and its weight and force depends upon the credit to be given the witnesses. The demeanor of the witnesses is a material and important part of the evidence, which cannot be sent up with the record; and, because this is so, the rule prevails in appeals in