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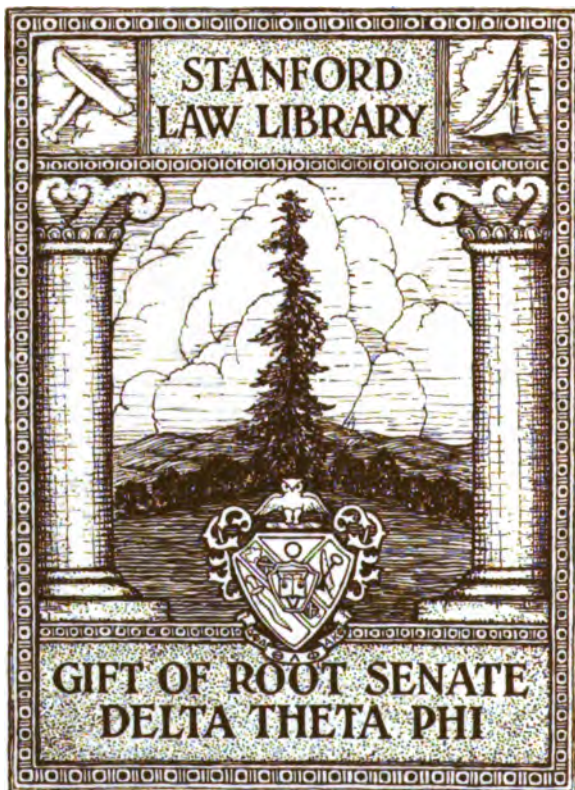
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Hornor & Benedict
Jan'y 26th 1867

THE
ADMIRALTY
JURISDICTION, LAW AND PRACTICE
OF THE
COURTS OF THE UNITED STATES:

WITH AN APPENDIX,
CONTAINING THE
NEW RULES OF ADMIRALTY PRACTICE PRESCRIBED BY THE SUPREME COURT OF THE
UNITED STATES, THOSE OF THE CIRCUIT AND DISTRICT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF NEW-YORK,
AND NUMEROUS
PRACTICAL FORMS
OF PROCESS, PLEADINGS, STIPULATIONS, ETC.,
COMPRISING THE ENTIRE PROGRESS OF A SUIT IN ADMIRALTY; ACCOMPANIED BY
EXPLANATORY NOTES.

BY ALFRED CONKLING.

SECOND EDITION, REVISED AND CORRECTED.

IN TWO VOLUMES.

VOL. II.

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ADMIRALTY JURISDICTION AND PRACTICE.

VOLUME II.

PRACTICE.

CHAPTER I.

ORIGIN OF THE AMERICAN COURTS OF ADMIRALTY, THEIR STRUCTURE, AND GENERAL PRINCIPLES OF PROCEDURE.

THE revival of commerce after the subversion of the Western Empire of the Romans, soon led to the institution by the enterprising commercial states bordering on the shores of the Mediterranean, of maritime judicatories under the name of consular courts, and to the compilation of maritime codes combining the wisdom of the civil law with the customs and usages of the sea.

Maritime courts of continental Europe.

The great utility of these tribunals commended them to other powers, and soon led to the establishment of similar courts by all the maritime nations of Europe. These courts were invested with a comprehensive jurisdiction relative to matters, whether of contract or tort, pertaining to navigation and

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commerce. Their forms of process and modes of proceeding were borrowed from the civil law(*a*). They remain substantially unchanged to the present day, and their functions and powers are usually designated under the denomination of Admiralty Jurisdiction(*b*).

English
Court of
Admiralty

The English Court of Admiralty is of very high antiquity, and its origin is probably nearly cotemporary with that of the maritime courts of the continent. The nature and extent of its ancient jurisdiction are involved in some obscurity, but it seems to have had cognizance of all questions of prize; of torts and offences committed not only upon the high seas, but in ports within the ebb and flow of tide; of maritime contracts and navigation; and also the peculiar custody of the rights, prerogatives and authorities of the crown in the British seas. Its forms of procedure were derived from the civil law, and the rules by which it was governed were the ancient laws, customs and usages of the seas. In fact, the admiralty of England, and the maritime courts of the other powers of Europe, appear to have been formed upon the same model, and their jurisdiction to have included the same subjects as the consular courts of the Mediterranean(*c*).

Colonial
vice-
admiralty
courts.

As the British colonies in the West Indies and on this continent grew into commercial importance,

(*a*) The recovery of the original copy of the Pandects (supposed to have been found at Amalphi), not long before the period here referred to, gave a new impulse to the study of the Roman law on the continent of Europe and in England. 1 Kent's Comm., 475.

(*b*) *De Lovio v. Boit*, 2 Gallison's R., 472.

(*c*) *Id.*, 399.

vice-admiralty courts were established here, with extensive powers derived from royal commissions and acts of Parliament. They also proceeded according to the course of the civil law. After the Declaration of American Independence, these courts, in the colonies which were parties to it, became state courts of admiralty, and continued to exercise their powers as such until the organization of the national government. The same cogent motives of expediency which impelled the people of the United States to confide the power to regulate commerce with foreign nations and among the several states exclusively to Congress, constrained them also to invest the national judiciary with exclusive cognizance of all cases of admiralty and maritime jurisdiction(*a*).

Admiralty jurisdiction vested exclusively in the courts of the United States.

Congress, at its first session, in the exercise of its power conferred by the Constitution to ordain and establish other courts, inferior to the Supreme Court, instituted the district courts, and invested them with "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as on the high seas(*b*)."

The district courts of the United States are, therefore, courts of admiralty, and constitute the

(*a*) Constitution of the United States, Art. II, § 1.

(*b*) Act of Sept. 24, 1789, ch. 20, § 9; 1 Stat. at Large, 73.

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only American tribunals of this character for the exercise of original jurisdiction. The extent of this jurisdiction, the leading principles and rules of law applicable to it, and the sources whence they are derived, have been treated of in the first part of this work. It remains now to point out the forms and modes of procedure which constitute the PRACTICE of the American courts of admiralty, in civil cases, other than those of seizure, under the laws of impost, navigation and trade(a).

Legislative provisions regulating the admiralty practice.

Test and seal of process. Process to be signed by the clerk.

By the act of September 29, 1789(b), (passed, it will be observed, a few days after the Judiciary Act, above referred to), entitled "An act to regulate processes in the courts of the United States," it is enacted "That all writs and processes, issuing from the Supreme or Circuit Court, shall bear test of the chief justice of the Supreme Court; and if, from a district court, shall bear test of the judge of such court, and shall be under the seal of the court from whence they issue, and signed by the clerk thereof." This act was, by its terms, limited in duration to the end of the then next session of Congress: it was, however, continued for one year longer; and then the permanent act of May 8, 1792(c), usually denominated the *Process Act*, was passed. The first section of this act is like that (above cited) of

(a) The practice in cases of seizure is, to a considerable extent, regulated by acts of Congress, and has been treated of by the author in another work, to which the present may be regarded as a supplement. See Conkling's *Treatise on the Organization, Jurisdiction and Practice of the Courts of the United States*.

(b) Ch. 21; 1 Stat. at Large, 93.

(c) Ch. 56; 1 Stat. at Large, 275.

the antecedent temporary act, except that it makes provision for the test of process, from the Supreme and Circuit Courts, in the name of the senior associate justice of the Supreme Court, when the office of chief justice may happen to be vacant; and of process from the district court, in the name of the clerk of that court, when the office of judge is vacant. The act of 1789 directed "that the forms and modes of proceeding in causes of equity and of admiralty and maritime jurisdiction, shall be according to the course of the civil law." But the language of this provision was modified by the act of 1792, by the second section of which it is enacted that the forms of writs, executions and other process, and the forms and modes of proceeding in suits of equity, and in those of admiralty and maritime jurisdiction, shall be "according to the principles, rules and usages which belong to courts of equity, and to courts of admiralty respectively, as contradistinguished from courts of common law, except so far as may have been provided for by the act to establish the judicial courts of the United States, subject, however, to such alterations and additions as the said courts, respectively, shall, in their discretion, deem expedient, or such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court, concerning the same."

Proceedings in admiralty causes to be according to the principles, etc., of courts of admiralty.

Practice may be altered by rule.

These are the only legislative provisions which Congress saw fit to enact, except with respect to cases of seizure, to regulate the practice in admiralty. They may, it is supposed, justly be regarded as little

Construction of the process act.

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At the date of the passage of the permanent process act, we had been sixteen years an independent people, during thirteen years of which the admiralty jurisdiction had been administered in the state courts of admiralty, and during the residue of the time in the national courts; and it is to the "principles, rules and usages" of these tribunals that the act may be supposed to refer. Such is the construction given to it by the Supreme Court in the case of *Manro v. Almeida*. "In giving a construction to the act of 1792," say the court, "it is unavoidable that we should consider the admiralty practice there alluded to, as the admiralty practice of our own country, as grafted on the British practice; and if, in fact, a change had taken place in the practice of the two countries, that of our own certainly must claim precedence(a)."

The important power conferred by the process act upon the Supreme Court to prescribe rules of practice in admiralty, has never, until very recently, been exercised; and, as in the absence of any common standard was unavoidable, the practice has continued uncertain, variant and perplexing. This was a serious evil, and had long been a subject of regret and of just complaint.

By an act of Congress, passed August 23, 1842(b), the power of the Supreme Court to prescribe rules of practice in admiralty cases was reiterated in very

(a) 10 Wheaton's R., 473 (8 Curtis's Decis. S. C., 427).

(b) Ch. 188, § 6; 5 Stat. at Large, 516.

ample terms; and at the January term, 1845, a well digested body of rules was framed and promulgated, entitled "RULES OF PRACTICE OF THE COURTS OF THE UNITED STATES, IN CAUSES OF ADMIRALTY AND MARITIME JURISDICTION, ON THE INSTANCE SIDE OF THE COURT(a)." A copy of these rules will be found in the APPENDIX. They are by no means to be regarded as mere arbitrary regulations originally devised by the Supreme Court, and having no higher claim to its sanction than their supposed adaptation to their object. On the contrary, they embody, substantially, the most authoritative and approved of the customary usages and forms of admiralty practice, with such modifications as were deemed necessary to adapt them to the structure of our courts, and as seemed to be demanded by the injunction contained in the act of 1842, above cited, so to regulate the practice of the courts "as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses." The high value of these rules consists in the greater degree of certainty, uniformity and stability which they have imparted to admiralty proceedings, and which it was their chief design to secure. As they are of the highest authority, I shall consider it unnecessary, in general, to cite other authorities relative to points concerning which they contain explicit directions. It is hardly necessary to remark, however, that they constitute little more than a skeleton, the

CHAP. 1.

Rules prescribed by the Supreme Court.

(a) 3 Howard's R., 3.

VOL. 2. integuments of which are to be drawn from the principles and general usages of admiralty procedure, or supplied by additional rules of court. It should be understood, moreover, that they are not to be considered as abolishing or superseding prior authorized rules of practice, except in cases of inconsistency. In some instances, therefore, there may be a choice of means to effect the end in view.

The district courts, their officers, etc.

The United States, collectively, are divided into forty-six judicial districts, besides the District of Columbia, in each of which there is a district court, possessing common law as well as admiralty jurisdiction.

As courts of admiralty, the district courts are PRIZE and INSTANCE(a) courts. The present work relates exclusively to their jurisdiction and practice in this latter character.

All actions in the admiralty are either *in rem*, against the thing; or *in personam*, against the person.

The party instituting the suit is called the *libellant*. Suits *in rem* are entitled in the name of the libellant against the thing libelled, most commonly a ship; and he who appears and is admitted to defend is called the *claimant*, *respondent*, or *defendant*(b).

(a) As Instance Courts, they afford redress on the application, prayer or solicitation, i. e., at the *instance* of the suitor. Thus, there was anciently in England a court of equity, called the *Court of Requests*. Or this may originally have been the French word *instance*, one of the definitions of which is demand, suit, or cause pending at law.

(b) In the English admiralty, suits *in rem* against a ship are entitled in the name of the ship, with the name of the master subjoined,

When the suit is *in personam*, the person against whom it is brought is called the *respondent*, *defendant*, or *libellee(a)*. CHAP. 1.

The practitioners, on the admiralty side of the court, are denominated PROCTORS and ADVOCATES; names corresponding respectively with those of *attorney* and *counsellor* in courts of common law jurisdiction, and *solicitor* and *counsellor* in chancery. But those by whom the cause is conducted in court, are usually spoken of under the general denomination of *counsel*.

The court consists of a single JUDGE. Its records, relating to both branches of its jurisdiction, are kept by one and the same officer, denominated the CLERK.

thus: *FLORA, Findlay*. In this country, the usage has most commonly been, as stated in the text, to name the libellant, and when a claimant appears, to subjoin *his* name, instead of that of the master, to the name of the ship, thus: *JOHN DOE, v. THE SHIP (or BRIG, &c.) MARY*; and, subsequently, if there is a claimant, *JOHN DOE v. THE SHIP MARY; RICHARD ROE Claimant*. In the *Reports* of cases decided in the High Court of Admiralty of England, the name of the vessel and of the master, only, appear at the head of the report; and this form is adhered to, even when the suit is *in personam* against the master of the vessel. (See *The Jack Park, Little*, master, 4 Rob. R., 308.) Latterly, in this country also, the name of the libellant is omitted, but that of the claimant is generally subjoined to the name of the vessel. In a few instances in Ware's Reports, the English form is adopted. This innovation upon the English practice is in bad taste, inconvenient and much to be regretted. It is the result, not of design founded in the supposition of its utility, but of ignorance.

(a) In a late case before Mr. Justice STORY, in which this appellation had been applied to the defendant by counsel at the argument, he commended it as very proper. Whether it is in use out of Massachusetts, I am not apprised.

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Commissioners to take acknowledgments of bail and affidavits, etc., etc.

The executive officers of the court are the MARSHAL of the district and his deputies.

The COMMISSIONERS of the circuit and district courts of the United States are highly important officers; and as the nature and extent of their powers and duties seem not to be generally well understood, it may be useful to enumerate them here, although some of them have no relation to the particular subject of this work.

The office of commissioner was created by the act of February 20, 1812(a); by which the circuit courts are authorized, whenever the extent of their districts renders it necessary, to appoint such and so many discreet persons within the district, as may be necessary, to take acknowledgments of bail and affidavits, to have the like force and effect as if taken before a judge of the court; and for the performance of these services, the same fees were to be paid as were allowed by the laws of the state where they were performed, for the like services. The powers of these officers being by this act limited to suits or proceedings in the circuit courts, an additional act was passed in 1817(b), authorizing them to take affidavits and bail in civil causes, to be used in the district courts. They thus became commissioners as well of the district as of the circuit courts. But, by this act, another, and highly important additional power is also conferred upon them, viz, that of taking depositions, *de bene esse*,

(a) Ch. 25; 2 Stat. at Large, 679.

(b) Ch. 30; 3 Stat. at Large, 350.

in civil cases, under the thirtieth section of the Judiciary Act of 1789. CHAP. 1.

The power conferred by these two acts, to take affidavits and depositions, extends as well to suits in the admiralty as to those at law and in equity; and, as we shall see, these officers are now, by the rules of practice in the admiralty and maritime causes, empowered to take admiralty stipulations. By a late act(*a*), commissioners are further invested with "all the powers that a judge or justice of the peace may exercise," under and in virtue of the sixth section of the act of 20th July, 1790, for the government and regulation of seamen in the merchant service. The power here referred to will be the subject of comment in the sequel. It is that of granting a summons in behalf of seamen to whom wages are due, calling on the master to show cause why admiralty process should not issue against the vessel; and if no sufficient cause be shown, granting a certificate authorizing the issue of such process(*b*).

(*a*) Act of August 23, 1842, ch. 188, § 1; 5 Stat. at Large, 516.

(*b*) By the act last above cited, these officers are empowered "to exercise all the power that any justice of the peace, or other magistrate of any of the United States, may now exercise in respect to offenders, for any crime or offence, by arresting, imprisoning, or bailing the same," under and by virtue of the thirty-third section of the Judiciary Act of 1789. And by the second section of the same act, it is further enacted "That in all hearings before any justice or judge of the United States, or any *commissioner* appointed as aforesaid, under and in virtue of the said thirty-third section of the act entitled 'An act to establish the judicial courts of the United States,' it shall be lawful for such justice, judge or commissioner, where the crime or offence is charged to have been committed on the high seas or else-

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**Commissioners in
 admiralty.**

By Rule XLIV of the Rules of Practice in Causes of Admiralty and Maritime Jurisdiction, it is ordained that "In all cases where the court shall

where within the admiralty and maritime jurisdiction of the United States, in his discretion to require a recognizance of any witness produced in behalf of the accused, with such surety or sureties as he may judge necessary, as well as in behalf of the United States, for their appearing and giving testimony at the trial of the cause, whose testimony, in his opinion, is important for the purposes of justice at the trial of the cause, and is in danger of being otherwise lost."

By the act of August 8, 1846, ch. 98, § 6, it is enacted "That upon the necessary proof being made to any judge of the United States, or other magistrate having authority to commit on criminal charges against the law of the United States, that a person previously admitted to bail on any such criminal charge is about to abscond, and that his bail is insufficient, it shall and may be lawful for any such judge or magistrate to require such person to give better security, or, for default thereof, to cause him to be committed to prison; and, to that end, an order for his arrest may be endorsed on the former commitment, or a new warrant therefor may be issued by such judge or magistrate, setting forth the cause thereof." The terms "other magistrates having authority to commit," etc., have been understood to embrace commissioners. The policy of the act, and the relation it bears to the other enactments referring to the same general subject, and in which commissioners are expressly named, favor this construction.

And by another act, passed August 8, 1846, ch. 105, entitled "An act more effectually to provide for the enforcement of certain provisions in the treaties of the United States," these officers, as well as the district and circuit courts of the United States, are empowered, upon the application of the consuls, vice-consuls or commercial agents of foreign powers with which the United States have entered into treaty stipulations to the effect mentioned in the preamble of the act, to issue process for the purpose of enforcing the awards and decisions of such consuls, etc., relative to controversies which may arise in our ports, between the masters and crews of vessels belonging to their respective countries.

There is still another power of great delicacy and high responsibility, which, as I have seen it stated in a newspaper, has, in one instance at least, been exercised by one of these officers, viz., that conferred by the Treaty of Washington, on "the judges and other *magistrates* of

deem it expedient or necessary for the purposes of justice, the court may refer any matters arising in the progress of the suit to one or more commissioners, to be appointed by the court, to hear the parties and make report therein; and such commissioner or commissioners shall have and possess all the powers

CHAP. 1.

the two governments" of the United States and Great Britain, of issuing warrants for the apprehension of certain fugitives from justice, upon the requisition of the two governments respectively. The question is, whether these officers are "magistrates," according to the true interpretation of the term as used in the treaty. It is true that some of the powers specifically confided to them by law are the same as some of those exercised by public functionaries usually denominated magistrates: it is true, also, that these common powers are analogous to those conferred by the treaty. The title of magistrate, in its general sense, is very comprehensive. In the Treaty of Washington, however, it obviously imports a *judicial* officer. But a commissioner has no general authority. He can exercise only certain specific powers, expressly conferred upon him by special laws. He is not, by any of these laws, denominated a magistrate, unless the sixth section of the act of 1846, ch. 98, where the term "magistrate" is coupled with the words "having authority to commit," etc., forms an exception; nor is he designated by law, or by usage, under any of the names by which judicial officers are known. He is uniformly called a commissioner, with some addition descriptive of his functions. He is merely an adjunct and auxiliary to the judicial tribunals of the United States. He is appointed by the circuit court, as the clerk of the court is appointed, and who is also authorized, by special laws, to exercise, in cases of emergency, several powers belonging primarily to the court. Upon the whole, therefore, it would seem that there is at least ample ground for doubt whether these officers can lawfully execute the power conferred by the treaty upon magistrates.

The foregoing part of this note was printed in the first edition of this work, and the doubt mentioned at the conclusion of it has been corroborated, if not established by the act of August 12, 1848, ch. 167, passed about the same time, providing for the better execution of the treaty stipulation above referred to. The act, among other things, directs the appointment by the courts of the United States, of special commissioners, to execute the duties in question.

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in the premises which are usually given to or exercised by masters in chancery in references to them, including the power to administer oaths and examine parties and witnesses touching the premises."

This rule sanctions the appointment of one or more commissioners to act in a particular case, *pro hac vice*; and a person so appointed would be, to the extent of his special powers, an officer of the court. But the rule doubtless also authorizes the designation of persons, at places where these services are likely to be often required, to act as commissioners generally, in cases as they arise. In the District Court of the United States for the Southern District of New-York, it has long been the practice, under one of the general rules of the court, and also in some if not all of the other districts, to refer matters of detail to the clerk of the court, *eo nomine*. This practice, it is supposed, may still be adhered to consistently with this rule; and even if it be doubtful, the difficulty may be easily removed by appointing the clerk a commissioner for that purpose. In the English admiralty, references are made to the registrar, or, in cases requiring mercantile skill, to the registrar "and merchants;" and such is also the practice in the American courts.

To what extent the district courts, as courts of admiralty, are to be considered as *always* open.

The question, to what extent, or for what purposes the district courts of the United States, as courts of admiralty, are to be deemed at all times open, is one of primary importance, upon which some diversity of opinion has prevailed. The only reported case I have met with, in which the question has been brought under judicial discussion, is that

of *The United States v. The Schooner Little Charles*, before the late Chief Justice MARSHALL, on appeal from the District Court of the Eastern District of Virginia. The schooner had been seized and libelled for a violation of the embargo laws; and during the pendency of the suit in the district court, she was released from arrest and delivered to the claimant on bond, in pursuance of an order of the judge *made at chambers*; and the question was, whether the order was valid, not having been made in open court. Chief Justice MARSHALL held that it was. "This objection," he said, "seems rather technical than substantial. By law, the district judge alone composes the court. He is a court wherever and whenever he pleases. No notice to parties is required; no previous order is necessary. The various *ex parte* proceedings which admiralty proceedings require, render this informal mode of acting essential to justice and expedition. The judge will take care that neither party be injured by the orders which he makes *ex parte*; and where they are of course, it is convenient that they should be made without the formality of summoning the parties to attend. It does not seem to be a violent construction of such an act(a), to consider the judge as constituting a court whenever he proceeds on judicial business. Such seems to have been the practice in this and in other districts of the United States. Had the judge prefixed to his order such words as these: 'At a special court, held at on this day

(a) The Judiciary Act, giving to the judge authority to hold special courts, previously referred to by the Chief Justice.

VOL. 2. of it is ordered, etc., the proceeding would have been regular; for the law does not, in terms at least, require that the order for a special court should be made in court, or made any given time previous to its session. To every purpose of justice the order of the judge, made in his character as judge, is made by him as a court, whether he declares himself, in words, to be a court, or not. This order is, in its nature, judicial. It is such an order as may be made *ex parte*; it is signed by the judge in his official character, and is directed to the officer of the court. Under such circumstances, I cannot overturn a practice which is convenient, which is not liable to abuse, on a mere technical objection(a)."

This opinion was given in 1819. Few will doubt that there must be force in reasoning which was satisfactory to the mind of Chief Justice MARSHALL. But the view he took of the subject seems either not to have occurred, or not to have carried conviction to the minds of all others; for, in 1832, an act of Congress was passed for the express purpose of conferring on the district judges the same power—that of ordering the delivery of property to the claimant, "in vacation"—which he held to exist before the passage of the act(b). And there is a later act containing many important provisions relative to the judiciary, which defines, and may possibly be regarded as also *limiting* the powers of the district judges, in admiralty suits, when not

(a) 1 Brockenbrough's R., 380.

(b) Act of April 5, 1832; 4 Stat. at Large, 503.

actually sitting in court at a stated or formally appointed special session thereof. The enactment referred to is as follows: "That the district courts, as courts of admiralty, and the circuit courts, as courts of equity, shall be deemed always open for the purpose of filing libels, bills, petitions, answers, pleas, and other pleadings; for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings whatever, preparatory to the hearing of causes pending therein upon their merits. And it shall be competent for any judge of the court, upon reasonable notice to the parties, in the clerk's office or at chambers, and in vacation as well as in term, to make and direct, and award all such process, commissions, and interlocutory orders, rules, and other proceedings, whenever the same are not grantable of course according to the rules and practice of the court(a)."

The particular objects of the second branch of this section of the act appear to have been to empower *each* of the judges of the circuit courts, separately, to exercise the powers conferred by the first branch of the section on the court, and to prescribe the simplest manner in which these powers might be executed by the judges of the two courts. The enumerated powers seem to have been intended to embrace every act which may be required of the court in causes prior "to the hearing upon their merits;" and to that extent, the statute places the

(a) Act of August 23, 1842, ch. 188; 5 Stat. at Large, 516.

VOL. 2. subject on the footing upon which C. J. MARSHALL supposed it to rest before. But though the case above cited did not require him to express an opinion upon the authority of the judge to hear a cause on its merits at any time, his course of reasoning would seem to lead to this result. In this respect, therefore, the statute may possibly be thought to abridge the power ascribed by him to the Chief Justice.

But even under this construction of the act, where a cause is not heard on the return day of the process, as — in cases of minor importance, especially in suits for seamen's wages — frequently happens, as I understand, in the Southern District of New-York, and, as I am well informed, in the District of Massachusetts; and where no day of hearing is fixed on the return day, which, however, it always ought to be, unless there be some special and sufficient reason to the contrary, it is supposed that the judge might, at any time after a cause was ready for a final hearing, on the application of the parties, or of either of them, appoint a special session for the purpose of such hearing. The act giving the power to appoint special sessions of the district court does not prescribe the mode of doing it. In this respect it differs from the act authorizing the appointment of special sessions of the circuit court, for which purpose a previous notice in a newspaper is required. Should a judge consider it to be his duty to exercise this power at the instance of one of the parties, he ought, doubtless, to take care to require reasonable notice to be given of his order to the opposite

party ; for although the parties to an admiralty suit are presumed to be always present in court, to take note of its proceedings, this presumption would not embrace an extraordinary act done at chambers. It is supposed, also, that special courts, for the purpose of admiralty proceedings, might, by an order made and published for that purpose, be lawfully appointed prospectively, to be held at stated periods, as on a certain day of each week, or month, for example ; and that at such sessions causes might be heard on their merits, as at a stated session.

But the possible constructions above mentioned, of the act of 1832 and of 1842, do not by any means appear to be necessary. On the contrary, the former may have been intended only to remove doubts or scruples, supposed or known to exist in some of the districts, as to the authority of a judge of the district court, in vacation, to direct the delivery of property seized under the revenue laws(*a*) ; and the latter act may not unreasonably be supposed to have been designed for a similar purpose, and also for that of inculcating as a duty, what it may have been thought might otherwise be regarded only as a power to be exercised, or to lie dormant, according to the inclination or convenience of the judge.

(*a*) I remember to have somewhere met with the expression of a doubt to this effect, by Mr. Justice STOKER ; and indeed there seems to be ground for it, in the language of the collection act in virtue of which such seizures are made.

OF THE TIME WITHIN WHICH SUITS IN THE ADMIRALTY MAY
BE PROSECUTED.

There is no statute of the United States limiting the period within which suits in the admiralty, of any description, are to be brought. The omission, in regard to suits for seamen's wages, at least, is remarkable; since, with respect to these, it has been thought necessary to prescribe minute regulations in other respects.

In common law actions, the laws of the states, respectively, furnish the rule of limitation, to the national courts, under that provision of the Judiciary Act by which it is declared that "the laws of the several states, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States where they apply." But this provision, it will be seen, does not embrace suits in the admiralty. In a suit *in personam*, brought by a mariner for the recovery of wages, in the District of Massachusetts, it was, nevertheless, insisted that the action was barred by the statute of limitations of that state, as a part of the *lex loci*, upon general principles. The district court overruled the plea, and the decision was affirmed by Mr. Justice STORY, on appeal. His opinion was that the terms of the act did not, in fact, embrace a proceeding in the admiralty; a libel *in rem* or *personam* not being, in the language of the act, "an action of account or upon the case." But he also strongly intimated the

opinion, that inasmuch as the admiralty and maritime jurisdiction is confined exclusively to the courts of the United States, a statute of limitation, of a state, could not, *proprio vigore*, apply to suits on the admiralty side of these courts(*a*). In another case, also, a suit for wages, it was, by the same learned judge, further held, that the statute of Anne, limiting suits in the admiralty for seamen's wages to six years, is not operative in the courts of the United States; the colonial vice-admiralty courts not being named in the act, and there being no evidence that this limitation had, in fact, ever been adopted by them. He was of opinion, moreover, if it were shown that the statute of Anne had been adopted in practice by the colonial courts, before the revolution, it would not follow that it was obligatory upon the admiralty courts organized under the government of the Union; these courts deriving their powers and authority from the constitution and laws of the United States, and having no connection or dependence upon the colonial vice-admiralty courts(*b*).

It follows, then, from these decisions, assuming them to be sound, that suits in the admiralty are subject to no definite limitation in point of time; but it is by no means to be supposed that they are exempt from restriction in this respect. On the contrary, it is a settled doctrine in the admiralty, that *stale* demands will not be entertained. "There is surely," said Lord Stowell, "a principle of limi-

(*a*) *Bown v. Jones*, 2 Gallison's R., 477.

(*b*) *Willard v. Dorr*, 3 Mason's R., 91.

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tation, in the administration of every system of jurisprudence, to be derived out of the nature of things, which entitles the court to avail itself of the universal maxim, '*vigilantibus non dormientibus subserviunt leges(a)*.'" This was said in the case of a bottomry bond; and the succeeding remarks of this eminent judge illustrate an important principle, viz., that the application of the maxim quoted by him, to a given case, ought to depend upon all the considerations and circumstances belonging to it, which, in point of general expediency, as well as private justice, affect the propriety of such application. But the discretion to be exercised by the courts, in this respect, is by no means an unlimited and arbitrary power. On the contrary, it has been justly said by Mr. Justice STORY, that "courts of admiralty, like courts of equity, govern themselves in the maintenance of suits by the analogies of the common law limitations(b)."

JOINDER OF PARTIES.

In suits *in personam*.

The principles relative to the joinder of parties in personal actions are essentially the same in courts of admiralty as in courts of common law. In actions *ex contractu*, all the persons with whom the contract was made, if living, ought to join as libellants in the action. Thus, if several persons have jointly furnished materials, labor, or other necessities for the repair or outfit of a vessel, and choose to sue the

(a) *The Rebecca*, 5 Robinson's R., 102.(b) *The Brig Sara Anne*, 2 Sumner's R., 207, 212.

owner or master, instead of having recourse to a suit *in rem* against the vessel, they should sue jointly; and, on the other hand, where the contract has been jointly made by several persons, they are to be jointly sued. If, for example, in the case of material-men, there are several part-owners of the vessel, the suit ought to be against them all. So, also, with respect to actions *ex delicto*: where two or more persons have received a joint injury, as by being jointly interested in the thing which was the subject of the injury, they should all join in the action. Thus, if there be several part-owners of a ship or goods injured by collision, they ought all to join in an action against the master or owner of the vessel by which the injury has been done; but, on the other hand, joint tort-feasors, being severally as well as jointly liable, may be sued separately. These rules are necessary for the purpose of preventing unnecessary litigation, and, in matters of contract, to insure impartiality in the enforcement of legal responsibilities. As such they ought to be observed, under all ordinary circumstances; but courts of admiralty administer justice *ex bono et equo*, and are therefore bound to take care that it shall not be obstructed in its course by a rigid adherence to technical rules. The foregoing rules forbid the *non-joinder* of proper parties. The rules prevailing in the common law courts, touching the *mis-joinder* of improper parties, are also applicable to suits *in personam* in the admiralty, and are in their nature imperative. Persons between whom there is no privity, can neither join as libellants, nor be joined as respondents, in the same libel. Thus, it was held

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by Mr. Justice STORY, that a libel against two persons, charging them severally with separate and distinct acts of assault and battery, could not be sustained (a). The same rule would apply, *a fortiori* to an action *ex contractu*, and would in both cases extend to libellants as well as respondents.

In suits
in rem.

With the exception of mariners, suing for wages who have always been, in some respects, a favored class of suitors in the admiralty, and who have long been permitted to sue jointly, the same principles are supposed to be applicable to the joinder or non-joinder of libellants suing *in rem*; and though several persons who have a proprietary interest in the thing proceeded against, may appear as claimants in the suit, and thus, in a general sense, become defendants, although their interests are distinct, yet where there is no privity of interest among them, each is bound to interpose his claim separately for his own interest, specifying it (b). Thus in salvage cases the proper course is to make all the co-salvors parties including the owners of the salvor ship, who, if such, are entitled to share in the salvage; or the underwriters, when there has been an abandonment of the property to them, and it has been accepted by them; and if any of the salvors are omitted in the original libel, and the property has already been arrested, and is in the custody of the court, under process, they may bring forward their claims with suitable allegations, connecting themselves with the salvage service, and thus make themselves parties

(a) *Thomas v. Lane*, 2 Sumner's R., 1.

(b) *Stratton v. Jarvis and Brown*, 8 Peters's R., 4 (11 Curt. Decis. S. C., 3).

Such allegations being admitted by the court, and filed, are necessarily brought to the notice of all the other parties, and the formality of notice by process is not required; and it may be said, in general, that where separate libels or claims are unnecessarily filed, it is at the peril of paying costs(a). CHAP. 1.

JOINDER OF ACTIONS.

With respect to the joinder allowable in the American courts of admiralty, of several demands, more or less distinct, in the same suit, it would be No settled rule.

(a) *The Henry Ewebank*, 1 Sumner's R., 400. Where a flat boat had been sunk by collision, whereby the boat and her cargo were lost, the cargo but not the boat being insured, the insurance had been paid under an agreement between the underwriters and the owners of the boat and part of the cargo, that the latter should institute a suit for the benefit of the former, to recover damages sustained by the collision, and an action was accordingly brought in the name of such owners, in which they claimed to recover the value, as well of their boat as of the cargo. The two-fold character assumed by the libellants was held to be no objection to the action, the rule being that "all persons entitled, on the same state of facts, to participate in the same relief, may join as libellants, whether the suit be *in personam* or *in rem*." *Fretz et al. v. Bull et al.*, 12 Howard's R., 466 (19 Curtis's Decis. S. C., 249).

And in a suit for salvage against the vessel and cargo saved, the cargo having been delivered to the consignees who resided near the place where the suit was brought, and the master being the owner of one-fourth of the vessel, it was held to be irregular and inadmissible for him to appear as claimant of the cargo as well as of the vessel. Had the suit been instituted at a great distance from the residence of the owners and consignees of the cargo it would have been otherwise.

The several owners of different parts of the same cargo shipped for conveyance may join in a suit *in rem* for damage or loss of the goods in transportation. *Rich v. Lambert*, 12 Howard's R., 347 (19 Curtis's Decis. S. C., 171).

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unsafe to attempt to lay down any very exact rule. Such of the rules upon this subject, prevailing in courts of common law, as result from diversity in the forms of pleas and of judgments, having a similar foundation to rest upon in the admiralty are, of course, inapplicable. And, on the other hand, although an admiralty suit bears a much closer analogy to a suit in equity than to a common law action, it cannot be asserted that exceptions to a libel on the ground of multifariousness, dependent in all respects, upon the same principles that are applicable to the like objections to a bill in chancery. Indeed, there seems to have been a great diversity of opinion and practice, in this particular among the several courts.

Rule as
stated by
Judge
Barnes.

The learned and experienced judge of the United States for the Southern District of New-York, in his summary of the practice in his own court observes, that "causes of action, however unconnected and dissimilar, may be prosecuted in the same suit in admiralty; such as claims resting upon hypothecation or privilege, or arising *ex contractu* or *ex delicto*; but this practice does not permit parties being joined as libellants, whose interests do not rest upon a cause of action common to all, to be made co-respondents, unless they are subjected to a common responsibility in the matter(a)."

Rule as
laid down
in Dunlap's
Practice.

It is laid down in Dunlap's Admiralty Practice that "In admiralty suits, *in personam*, all causes of action of admiralty cognizance, existing between the same parties, whether founded on contract

(a) Betts's Admiralty Practice, 20.

tort, may be joined in the libel and stated in different articles, as in several counts in a declaration at common law (a)." And he cites two manuscript cases, decided in the District Court for the District of Massachusetts, in support of this unlimited proposition. He adds, however, that causes of action, *ex contractu* and *ex delicto*, are not, in that court, *required* to be joined. Whether, in either of the cases referred to by Mr. DUNLAP, the doctrine stated by him was distinctly adjudicated on exception taken to the libel for multifariousness, does not appear; but the learned judge of the District Court for the District of Maine, in an elaborate and forcible judgment, has not hesitated to repudiate this doctrine, in its broad extent, as unsound in principle and unsupported by authority. In the case before him, which was a suit *in personam*, in behalf of a seaman against the master, the libel comprised, in one article, a demand of wages, technically denominated a cause of subtraction of wages; and, in another article, a demand of damages for personal injuries, technically called a cause of damage.

Opinion of
WARE, in
Pratt v.
Thomas.

Judge WARE admitted that it was a common practice in the admiralty to proceed in the same libel, for wages earned in a particular voyage, and for damages for a tortious discharge of the seaman in the course of the same voyage (b); and that a

(a) *Dunlap's Admiralty Practice*, 88, 89.

(b) *Emerson v. Howland*, 1 *Mason*, 45; *The Exeter*, 2 *Rob.*, 261; *The Beaver*, 3 *Rob.*, 92; *The Gloucester*, 4 *Peters's Ad. R.*, 403, *note*, 406.

VOL. 2 seaman might recover, in the same suit, wages, and the statute allowance made to a mariner, who discharged from a vessel in a foreign country with his own consent(a). But the superadded claims in these cases had been admitted, he said, rather being in the nature of additional wages, or as claims legally connected with and growing out of the principal claim, than as distinct and independent causes of action. It was true, also, that the extent to which different actions may be united in a single suit, and prosecuted together in the admiralty, not very clearly defined by any settled rule of jurisprudence. In the practice of the common law courts, several independent causes of action may be comprised in one suit, provided they are of the same nature, and the course of proceeding is in the same; and this, though contrary to the rule in chancery, is according to the modern practice, at least, in the civil law courts, which allows an indefinite number of distinct and unconnected actions to be united in one suit, provided they are all of the same general nature, and they do not occasion a confusion in the course of proceeding. If that effect is produced, the libel is liable to the dilatory exception, *ineptæ cumulationis*, in the nature of demurrer for want of form.

But the danger of confusion is not the reason for limiting the indefinite liberty of uniting different actions in one suit; and the objection to the admission of multifarious matters in this form of action applies with nearly the same force in the admiralty.

(a) *Orne v. Townsend*, 4 Mason, 541.

as in equity. And there is one objection to the allowance of this practice as a matter of right, which applies with peculiar force to suits in the admiralty; and that is, its tendency to delay. In maritime causes, and particularly in those to which mariners are parties, it is of primary importance that justice should be promptly administered. The modes of proceeding in the admiralty are adapted to this end. They are plain, simple and direct, and everything tending to prolixity is studiously excluded. But it is obvious that nothing could tend more directly to draw suits out to an inconvenient length, than to allow, as a general practice, independent actions, each depending on its own proper evidence, to be consolidated into one suit, whereby each must necessarily be subjected to the delays incident to all the rest. Such a practice, recognized as a matter of absolute right, would enable a mariner to join, in the same libel, a claim for wages earned in one voyage, and a cause of damage accruing in another. Oppressive uses might thus be made of the process of the court; and masters of vessels, in particular, might be subjected to the most inconvenient embarrassments in their business, or be unjustly compelled to buy their peace. The learned judge was of opinion, moreover, that there was a further objection to allowing the joinder of the particular causes of action in the case then before him, founded in the nature of two several liabilities which the libellant was seeking to enforce; for though the master is personally responsible to the mariner for his wages, it is not as for his own proper

VOL. 2. debt; and if he is compelled to pay the wages the first instance, he has his remedy over again the owner for reimbursement; while for personal injuries inflicted by himself, he alone is responsible. There was a manifest impropriety in thus attempting to blend such conflicting liabilities, and it was not allowable in suits at common law. Under the views of the question, Judge WARE allowed the exception to the libel. He would not, however, take it upon himself to pronounce that, even in such a case, if no objection be taken to the libel on account of its multifariousness, a court may adjudicate on both actions in one suit, making separate decrees in respect to each(a).

If this learned and well reasoned judgment were open to criticism at all, the learned reader will probably suppose it to be in respect to the importance it attaches to the twofold character in which the respondent was charged; while the admission that the court might and ought, in its decree to discriminate between the responsibilities attached to each, would seem to furnish a sufficient answer to the objection. I am very far, however, from intending to intimate a doubt of the soundness of the learned judge's conclusion. This is probably the only reported case to be met with, in which the subject of the joinder of actions in courts of admiralty has been discussed. The opinion is valuable as an illustration of the unsettled state of the question, and as clearly indicating the general

(a) *Pratt v. Thomas*, Ware's R., 427.

principles and considerations upon which it rests. CHAP. 1.
 In the specific application of general principles, courts are not required to go beyond the exigencies of the case before them; and if this opinion leaves the doctrine of joinder of actions still unsettled, except as to cases in all essential respects similar, or strictly analogous to that in which the opinion was pronounced, it is no fault of its author. It may be added, also, that his reasoning and conclusions are in accordance with what seem to have been the impressions of the Supreme Court of the United States, in a case where it was said to be irregular and contrary to the known principles of courts of admiralty to allow, in a libel *in rem*, and *quasi* for possession, the introduction of matters of an entirely different character, as the claim of a part-owner for his wages and advances as master(a).

The decision was in conformity, moreover, with what appears to be the established practice of the High Court of Admiralty of England; for in the case of *The Jack Park*(b), referred to by Judge WARE, which was a suit by a mariner against the master, for subtraction of wages, on exception taken to an allegation in the libel, of ill usage, for which however, no damages were claimed, but which was inserted for the purpose of rebutting matters of defence which it was expected would be set up; Sir WILLIAM SCOTT, referring to this allegation, said it was "certainly a charge proper for an allegation of

Practice in
England.

(a) *The Steamboat Orleans v. Phœbus*, 11 Peters's R., 175 (12 Curtis's Decis. S. C., 391).

(b) 4 Robinson's R., 308.

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damage; but it might, nevertheless, be not improper in a suit of this kind, as historically accounting a fact afterwards relied on; and on that ground might not be unfit to be admitted *here*, though court is not insensible of the danger of mixing so very different in their substance, as well as in manner of conducting them(*a*)."

(*a*) This allusion to a difference between the manner of conducting suits for wages and suits for damage, is understood by Judge W to refer to the distinctions between *plenary* and *summary* causes which exist in the practice of the English ecclesiastical courts; it is true that the advocate for the respondent did speak of an action of damage as a plenary action. The distinctions between these modes of procedure are stated and explained by BROWNE, as follows: "The distinctions between plenary and summary causes are well known. It is familiar, also, to the common, or at least the maritime law. *Plenary* are those causes in which the order and solemnity of the law are exactly observed. There is a formal contestation of a regular *term to propound*, and solemn *conclusion* of the acts; and there is the least omission or infringement of the regular order; the whole proceedings are annulled. *Summary* are those in which order and solemnity are dispensed with; the suit is, *as it were* tested, by the next contradictory act after the libel put in, that concerns the merits of the cause. Such as the dissent of the proctor at the *second assignation* to hear sentence, supplies the place of *conclusion*; there is no assignation to propound, nor express conclusion; in *summary* *omnia substantia sunt sublata*. Sometimes, even the libel and proceedings may be *viva voce*." 2 Bro. Civ. and Adm. Law (N. 1840), 413, note. See, also, 1 *idem*, 492.

But it is stated, without qualification, both by BROWNE (vol. 1, 413) and by CLERKE (Clerke's Praxis, tit. 19), that all causes in admiralty are summary. There is, however, in the English admiralty a form of proceeding which (though probably with such occasional variations as the exigencies of particular cases may be supposed to require) seems, from the reports of adjudged cases, to be almost formally pursued in suits *in rem* for seamen's wages, and frequently not generally, in others also (bottomry and collision, for example) and which is of a highly summary nature, compared with the formally conducted admiralty suit. By an advocate of the Co

Upon the whole, it may not be very unsafe to affirm, that the libellant has the privilege of uniting

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Causes of like nature may be united, subject to the discretionary power of the court.

Admiralty, speaking in that court, the latter might therefore, perhaps, naturally be denominated a plenary suit, in contradistinction to the very summary and informal proceeding to which I have alluded. This form of proceeding has been denominated *an act on petition* [a formal suit being usually called, in contradistinction, a proceeding or cause "by plea and proof." See 2 Hagg. R., 151, n., and 3 Hagg. R., 343]. I am not aware that it has been mentioned by any elementary writer; and though the reports of cases adjudged in the English admiralty show that it is in familiar use, as already mentioned, the only description of it which I have met with, is that incidentally given by Sir WILLIAM SCOTT, in the case of *Ville de Varsovie and others*, 2 Dodson's R., 174, 184, where he describes it as "*a summary proceeding, in which the parties state their respective cases briefly, and support their statements by affidavit*;" and, in reference to the case before him, he proceeded to characterize it as "a form convenient enough in matters of slight interest and not of very delicate investigation, but certainly not adapted to a case where the important facts are themselves minute, and therefore unfit to be left to the laxity of affidavits, in which the examination of unwilling witnesses cannot be enforced by the authority of the court."

See, also, *The Tartar*, 1 Haggard's Adm. R., 1, where the reporter, in giving the substance of the "act on petition," takes occasion, in a note, to repeat the above mentioned definition of Lord STOWELL, referring to the case of *The Ville de Varsovie*.

The mode of *commencing* suits in this form does not appear to be different from that of instituting formal suits. The "action is entered against the ship, and a warrant of arrest extracted" (*The Lord Hobart*, 2 Dodson's R., 100), in the usual mode; and, on the return of the process, the cause of action is stated and brought before the court by a "summary petition," instead of a formal libel.

Of this suit by summary petition, it may be said, in general, that, compared with a formal suit by libel, it is like a special motion compared with a formal suit at law, or bill in chancery. The petition is supported by the affidavit of the party, and the voluntary affidavits of other persons; and the allegations of the petition are contested, or defensive allegations are given and supported, in like manner.

What is said above of the frequency of this form of proceeding in the High Court of Admiralty, the learned reader will find fully verified on

VOL. 2 in one suit, as many actions of a like nature as pleases; subject, however, to the discretion

examining the reports. In a case of collision, Sir CHRISTOPHER ROBINSON, in discussing the competency of the crew of the vessel charged with committing the damage, to testify in the case, said the case had come before me *on petition supported by affidavits according to the usual form in such cases*, each party would have their own story." (*The Catharine of Dover*, 2 Hagg. R., 145.) But in a subsequent case of collision, Sir JOHN NICHOLL said "in collision suits, the most regular course of proceeding is by affidavit and proof, which enables the defendant to cross-examine the witness." (*The Gladiator*, 3 Hagg. R., 340, 342.)

Whether suits in this form can be entertained in the American courts of admiralty, consistently with the rules of practice prescribed by the Supreme Court, is a question upon which it would be indiscreet to express an opinion. These rules require a "libel" to be filed before process issues; but the mere form of the written statement of the cause of action is a matter of little importance, since it must be substantially the same, whether in the form of a libel or a petition. The subsequent proceedings are, however, widely different. In a suit by summary petition, there is no examination of witnesses; but the case is promptly and informally heard and decided, upon the affidavits as the parties are able to produce. Such, at least, is the nature of the proceeding in the English High Court of Admiralty. It would doubtless be admissible in the American courts, if mutually assented to by the parties; and in cases involving trivial amounts, especially in suits for wages, while it would be highly conducive to economy and dispatch, it would suffice for all the purposes of substantial justice.

Since the preceding part of this note was written, I have met with the report of a case in a late volume of Reports of Decisions in the English Admiralty, which sheds additional light upon the proceeding by act on petition, and shows it to be still more predominant in the High Court of Admiralty than I had ventured to represent it as being. I refer to the case of *The Minerva*, 1 W. Robinson's R., 169; and since the case is short, I shall make no apology for inserting it entire.

"THE MINERVA. CRAWFORD.

"This was a question as to the admissibility of a libel in a case of bottomry.

power of the court to order one or more of several actions, so joined, to be stricken out of the libel, CHAP. 1.

"The suit had been commenced by plea and proof; and a preliminary objection was taken to the form of the proceeding by *Adams and Harding*, on behalf of the owners, upon the ground that it was objectionable in principle, and a departure from the established practice of the court in cases of this kind. That the usual form of proceeding was by act on petition and affidavit; and the admission of the libel would entail a hardship upon the owners of the vessel proceeded against, and would also establish an inconvenient precedent in future cases. That bonds of bottomry, it was well known, were most frequently granted by the masters of ships in the ports of countries far distant from the residence of the owners. If, therefore, suits for their recovery might hereafter be brought at the option of the asserted bondholder, in the mode now attempted to be introduced, the consequence would be, that in a majority of cases of this description, the evidence must be taken by commission abroad, and a great increase of delay and expense must, of necessity, be occasioned. Such would be the result in the present case, if the court should admit the libel; and, at all events, the owners of the *Minerva* were entitled to demand security for the costs of proceeding.

"In support of the libel, *Queen's Advocate contra* :

"That in point of principle, it was obvious that a proceeding by plea and proof was a convenient form of proceeding, and in many cases indispensable to elucidate the truth of the facts set up on the one side and the other, by compelling the evidence of reluctant witnesses and the answers of the parties in the cause, which could not be done by the more summary form of an act on petition. That the ancient mode of conducting all suits in the Court of Admiralty was by libel and proof; and although in the modern practice of the court the more summary form of an act on petition and affidavit had undoubtedly prevailed, it was still open to the suitors to elect their own mode of proceeding; and that their right to such election had been recognized by the court in the cases of the *Westmoreland* and the *Sidney Cove*, and other decided cases.

"*Per Curiam* :

"It is, I think, essential to the furtherance of justice in these causes, that the parties in the suit should be at liberty to choose their own mode of proceeding, whether by act on petition or in the more solemn form of plea and proof; and for this reason, that many cases might

VOL. 2. when this privilege appears to have been oppressively or very unreasonably used.

occur, in which, without the exercise of this liberty, they would wholly deprived of the means of proof necessary for the establishment of their case. For instance, as it has been observed by the Queen's Advocate, where the evidence of reluctant witnesses or the answer of the adverse parties is important to elucidate the case, it is clear that these could not be obtained if the proceedings were confined to an affidavit on petition; because it is notorious that in an act on petition the testimony is altogether voluntary, and the court has no power to compel a man to make an affidavit. Again, similar difficulties might arise in cases of fraud, where, in order to detect the real truth and foundation of the transaction, it may be necessary to have an opportunity of cross-examining the witnesses that are produced. If, therefore, the objection that has been taken to the admission of the libel rested simply with the discretion of the court, I should be disposed to reject it; but I apprehend that it is not a matter of option on my part. Cases have been cited by the learned counsel, in which the suitor's right to proceed by plea and proof has been recognized by my predecessor in the chair; and I myself recollect a case which came under the consideration of Lord STOWELL, in which it was expressly stated by that learned judge, that the proceeding by plea and proof was the ancient law of the Court of Admiralty; that the more summary proceeding by act on petition and affidavit, was introduced for the sake of convenience alone; and that it was a matter of right in any suitor, subject to the liability for costs, to choose his own mode of proceeding.

"The case to which I refer was a case of collision; but I well recollect that the observations of Lord STOWELL were general, and not confined to cases of collision only. Upon principle, therefore, and upon the precedent of former decisions, I am clearly of opinion that the bondholder in this suit is at liberty to proceed in the mode he has adopted, namely, by libel and the examination of witnesses. If, in doing, any unnecessary expense or hardship shall be entailed upon the owners of the *Minerva*, I shall feel it my duty to protect them from any such burthen, by holding the bondholder responsible for the costs thereof, even although I should ultimately pronounce for the validity of the bond.

"As I am bound to presume that the bond was duly executed, I cannot make an order of security for the costs, until I see some special reason for so doing."

JOINDER OF SUITS IN REM AND IN PERSONAM.

In a suit for pilotage, prosecuted *in rem* against the vessel, and *in personam* against the master, Mr. Justice STORY, in pronouncing his judgment on the merits of the case, observed that it was, under the circumstances, unnecessary to decide "whether a proceeding *in personam* and *in rem* can be regularly combined, so as to entitle the libellant to a decree *in personam*, if he fails to establish his claim *in rem*(a).

The same question again presented itself for consideration in another more recent case of a suit on a contract of affreightment, and was fully discussed by the same learned judge. "In the course of the argument," he observed, "it was intimated, that in libels of this sort, the proceedings might be properly instituted both *in rem* against the steamboat, and *in personam* against the owners and master thereof. I ventured at the time to say, that I knew of no principle or authority, in the general jurisprudence of courts of admiralty, which would justify such a joinder of proceedings, so very different in their nature and character, and decretal effect. On the contrary, in this court, every practice of this sort has been constantly discountenanced, as irregular and improper(b)."

(a) *The Ann*, 1 Mason's R., 508, 512.

(b) *The Nantucket Citizens' Bank v. The Nantucket Steamboat Company*, 2 Story's R., 16.

Mr. Justice STORY proceeded to comment upon a case in the High Court of Admiralty of England, which had been cited at the bar; and

VOL. 2. In another case, decided at the same term, in which the libel, or a charter-party executed by the

the following extract, in addition to any light it may shed upon the question under consideration, will serve the further purpose of exemplifying the great and often insuperable difficulty which the ablest and best instructed American lawyer has to encounter, in attempting to ascertain the actual practice of the English Court of Admiralty. Indeed, it may reasonably be inferred, from the confused, obscure, and, in some respects, nonsensical statements rather ostentatiously introduced by Mr. CHITTY on the subject, in the second volume of his General Practice, that this knowledge is but little less inaccessible to an English lawyer habituated only to the practice of the common law courts. Strange as it may seem, it appears, moreover, by the very latest reports which have reached us, of the decisions of the High Court of Admiralty, that its practice, in many particulars, is still uncertain and fluctuating.

"The case of *The Friend* [*Triune*] (3 Haggard's Adm. R., 114)," the learned judge added, "was cited at the bar, in support of the right to join the proceedings. The case is very imperfectly reported; but it appears that the original proceeding was *in rem* against the ship, for collision; and that Wardell, who was the master and also the principal owner, and to whose negligence the libel attributed the collision, alone appeared in the suit. By the statute, 53 George III., ch. 159, the owners, when the loss has been without their fault or privity, are not liable beyond the value of their ship and freight; but the owners who are in fault, and the master also, are liable to full damages to the extent of the injury done to the other party. No bail was given. The freight was brought into court; the ship was sold; and the proceeds falling short of the damages by £400, a monition issued against Wardell to pay that sum, which failing to do, he was imprisoned on an attachment, moved for and granted by the court. Now it is apparent that there was a great peculiarity in this case; Wardell being the sole party who intervened, and being by the statute liable for the full damages. A monition issued before the attachment was granted; and if that monition was preceded by a supplementary libel, or act on petition, stating the facts of the sale of the ship, and the deficiency to pay the damages, the proceeding was clearly regular and right. But if no preliminary proceeding was had, I confess that I do not well see how a proceeding, originally *in rem*, could be prosecuted *in personam* against a party, who in such proceeding intervened only

master, was *in rem*, and also against the master *in personam*, Judge STORY, at the conclusion of his

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for and to the extent of his interest. Probably there were other circumstances which varied the general rule. At all events, I am not prepared to accede to the authority of this case, if it is to stand nakedly and only upon the circumstances above stated. In cases of collision, the injured party may proceed *in rem*, or *in personam*, or successively in each way, until he has full satisfaction; but I do not understand how the proceedings can be blended in the libel."

It is proper to add, that the dissent of this eminent American judge from the decision of Sir JOHN NICHOLL, in the case of *The Triune*, has since been fully sustained by his successor in the High Court of Admiralty: In the case of *The Hope* (1 W. Robinson's R., 155), the value of the vessel being insufficient to answer the damages decreed in an action of damage by collision, an application was made to the court to charge the excess of damage beyond the proceeds of the ship, upon the master of the damaging vessel, he being a part-owner, and as such, being personally responsible therefor. This application was opposed, as "unsustainable in principle, and wholly unprecedented in the practice of the court;" and the motion was denied by Dr. LUSHINGTON, the present distinguished occupant of the chair of the High Court of Admiralty. The supposed "hardship upon the owners will not," he observed, "entitle me to exercise a jurisdiction in their behalf, which, according to my own impression, I clearly do not possess. I am not aware of any case in which this court, in a proceeding of this kind, has ever engrafted upon it a further proceeding against the owners, upon the ground that the proceeds of the vessel proceeded against have been insufficient to answer the full amount of the damage, pronounced for."

In a subsequent case of collision (*The Volant*, 1 W. Robinson's R., 383), a like application was made; the counsel for the plaintiffs moving the court "to have the decree taken down, not only against the vessel, the value of which was wholly insufficient to cover the amount of damage in question, but also against the master, who was a part-owner of the *Volant* [the damaging vessel]; and in support of his motion, he cited the case of *The Triune*." This case, it appears, was now, for the first time, brought to the notice of Dr. LUSHINGTON; and he postponed his decision for the purpose of further consideration. On a subsequent day, adverting to the conflict between his own former decision and that of his immediate predecessor, he said he thought it

VOL. 2. opinion, again observed: "As the master has died pending the proceedings, and no revivor of the suit, as to him, has been moved for, it is unnecessary to consider whether a proceeding *in rem* and *in personam* can be instituted in the admiralty, in a case of this sort(a)."

It appears, however, that this form of proceeding was resorted to in a late case of collision, before the District Court of the United States for the Eastern District of Louisiana; and though the cause was carried by appeal to the Supreme Court, it does not appear by the report of it that any exception was taken to the form of the action, and the decree of the district court, in favor of the libellant, was affirmed. The suit was commenced in 1844, before the promulgation of the new rules of practice, and came before the Supreme Court in 1847(b).

I have deemed it proper to show the footing on which the question rested in point of general prin-

his duty to consider the question as an open question; and, as such, he proceeded elaborately to discuss it. His conclusion was that his former decision in the case of *The Hope* was unquestionably sound.

These decisions, although they are perfectly conclusive against any power in the court to enforce a personal liability beyond the value of the thing proceeded against in a simple suit *in rem*, are not, it will be seen, necessarily so against the regularity of formally joining a suit *in personam* in the same action with a suit *in rem*; but the absence in the English reports, as far as I remember, of any such practice, unless perhaps in suits for mariners' wages, furnishes ground for the supposition that it is deemed to be inadmissible.

(a) *Arthur et al. v. The Cassius*, 2 Story's R., 81, 99.

(b) *Waring v. Clark*, 5 Howard's R., 441 (16 Curtis's Decis. S. C., 456).

ciple, prior to the promulgation of the rules of admiralty practice, already so often referred to; but the joinder of the two forms of action seems to have engaged the serious attention of the Supreme Court, in framing these rules; and they expressly authorize the joinder in the same libel, of a suit *in rem* and of a suit *in personam*, for mariners' wages, for pilotage, and for damage by collision(*a*); while they seem to discountenance it in suits by material-men, suits for assault and beating, suits founded on a simple hypothecation by the master or on bottomry bonds, and in suits for salvage(*b*). But these provisions, and some others contained in the rules here referred to, require particular attention; and although those other provisions are not strictly pertinent to the particular subject under consideration, it is convenient, nevertheless, briefly to notice them in this place.

CHAP. 1.

In what cases permitted by the new rules of admiralty practice.

This code of rules was prescribed in pursuance of ample authority for that purpose, conferred by an act of Congress. They have the force, therefore, of legislative enactments, and they require the application of similar rules of interpretation.

The twelfth rule authorizes the libellant, in suits by material-men, to proceed against "the ship and freight *in rem*, or against the master and the owner alone *in personam*:" the thirteenth, in suits for mariners' wages, to proceed against "the ship, freight and master, or against the ship and freight, or against

Suits against the ship, and the master.

(*a*) See Appendix, Rules XII., XIV., XV.

(*b*) Appendix, Rules, XII., XIV., XVII., XVIII., XIX.

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the owner or the master alone *in personam*:" the fourteenth, in suits for pilotage, to proceed against "the ship and master, or against the ship, or against the owner alone or the master alone *in personam*:" the fifteenth, in suits for damage by collision, to proceed against the "ship and master, or against the ship alone, or against the master or owner alone *in personam*:" the sixteenth, in suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, directs that "the suit shall be *in personam* only:" the seventeenth, in suits founded on mere maritime hypothecation, express or implied, without marine interest, authorizes the libellant to proceed "either *in rem*, or against the master or owner alone *in personam*:" the eighteenth, in suits on bottomry bonds, to proceed "*in rem* only against the property hypothecated," except in certain specified cases of misconduct on the part of the master or owner, in which cases "the suit may be *in personam* against the wrong-doer:" the nineteenth declares that suits for salvage "may be *in rem* against the property saved, or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service has been performed."

First, then, as to the joinder in the same libel of a suit *in personam* with a suit *in rem*. It having been generally understood, previous to the adoption of the new rules, that wherever there is a personal liability arising from a contract in its nature maritime, or from a tort committed on the high seas or

tide waters, such liability might, in this country, be enforced by an admiralty suit *in personam*, the provisions contained in the rules above cited for the prosecution of suits in this form may be regarded as but a recognition of an existing principle. But while they expressly authorize the joinder of a suit against the *master* in a suit against the ship, they are silent with respect to the right of proceeding in like manner against the *owner*.

CHAP. 1.

No provision for suits against the ship, and the owner.

If it had previously been an established principle, that wherever a party was entitled to a remedy *in rem*, and also *in personam*, he might lawfully pursue those remedies, whether against the master or the owner, conjointly in the same suit, the question would then be, whether it was by these rules intended to abrogate this right with respect to the owner; a question by no means devoid of difficulty. But the right, independently of the rules, to join the two forms of action in one suit, at all, we have seen to be at least extremely questionable; and conceding that the rules would not, by implication, have impaired a previous right to proceed against the ship and owner, the question now, therefore, is whether, as the right to proceed in this form had never before been recognized, the rules are not nevertheless to be considered as having been intended to define and limit it. Such would seem to be the reasonable and sound view of the subject.

I propose, in the second place, briefly to notice the other provisions already alluded to, of two of the above mentioned rules. The twelfth rule, as we have seen, authorizes a suit by material-men against

Suits against the ship and freight.

VOL. 2 the *ship and freight*; and the thirteenth, a suit by mariners against the *ship, freight and master*. Now, in each of these cases the party had an unquestionable right, prior to the rules, to proceed against the ship alone; and as it was rarely necessary to resort to the less simple, and generally far more troublesome remedy against the freight, this was rarely done. Was it intended to compel the libellant, when he proceeded against the ship, to proceed against the freight? The objections to such a construction are so obvious and weighty as to render it wholly inadmissible, if it can be avoided; and it seems incredible, therefore, that such could have been the design of these rules: and yet, it may be pertinently asked, if this was not their object, what was it? Perhaps a sufficient answer to this question may be found in the obvious desire of the Supreme Court, in prescribing the forms of remedies in the admiralty, to avail itself of the occasion, as far as could conveniently be done, incidentally, also to declare and make known what it deemed to be sound principles, which might otherwise be doubted, affecting the rights to be enforced by these remedies. And the learned reader will recollect, that while the right of the material-man and mariner to proceed against the ship has never been questioned, it is otherwise with his right to resort to the freight.

CHAPTER II.

PROCEEDINGS PRELIMINARY TO THE COMMENCEMENT OF SUITS
FOR SEAMEN'S WAGES.

THIS seems to be the proper place to notice certain statutable regulations which Congress thought proper at an early period to prescribe, materially affecting the mariner's remedy for the recovery of his wages in one, at least, and that the most usual and efficacious, of its forms.

Suits in the admiralty, like suits at common law or in equity, may in general be instituted at the pleasure of the party claiming a right to remuneration or redress, as soon as this right accrues; but to this general rule suits for the recovery of seamen's wages form, to some extent, an exception. In regard to these, the interests of commerce, and a just regard to the welfare of a class of men proverbial for their rashness and proneness to error when on shore, have been supposed to require certain restrictions as a security against vexatious or unnecessary litigation. These restrictions are imposed by the sixth section of the "Act for the government and regulation of seamen," passed July 20, 1790(a), by which it is enacted, "That every

Act of 1790,
ch. 20, § 6.

(a) Ch. 29; 1 Stat. at Large, 131.

VOL. 2. or vessel to which he belongs, one-third part of the wages which shall be due to him, at every port where such ship or vessel shall unlade and deliver her cargo, before the voyage be ended, unless the contrary be expressly stipulated in the contract; and as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall be then due according to his contract; and if such wages shall not be paid within ten days after such discharge, or if any dispute shall arise between the master and seamen or mariners, touching the said wages, it shall be lawful for the judge of the district where the said ship or vessel shall be, or in case his residence be more than three miles from the place, or of his absence from the place of his residence, then for any judge or justice of the peace to summon the master of such ship or vessel to appear before him, to show cause why process should not issue against such ship or vessel, her tackle, furniture and apparel, according to the course of admiralty courts, to answer for said wages; and if the master shall neglect to appear, or, appearing, shall not show that the wages are paid or otherwise satisfied or forfeited, and if the matter in dispute shall not be forthwith settled, in such case the judge or justice shall certify to the clerk of the court of the district that there is sufficient cause of complaint whereon to found admiralty process; and thereupon the clerk of such court shall issue process against the ship or vessel, and the suit shall

be proceeded on in the said court, and final judgment be given according to the course of admiralty courts in such cases used; and in such suit, all the seamen or mariners (having cause of complaint of the like kind against the same ship or vessel) shall be joined as complainants; and it shall be incumbent on the master or commander to produce the contract and log-book, if required, to ascertain any matters in dispute; otherwise the complainants shall be permitted to state the contents thereof, and the proof of the contrary shall lie on the master or commander: but nothing herein contained shall prevent any seaman or mariner from having or maintaining any action at common law for the recovery of his wages, or from immediate process out of any court having admiralty jurisdiction, wherever any ship or vessel may be found, in case she shall have left the port of delivery where her voyage ended, before payment of the wages, or in case she shall be about to proceed to sea before the end of the ten days next after the delivery of her cargo or ballast."

With regard to the part of the seaman's wages which the act declares him entitled to at the intermediate ports, if any, where the vessel's cargo may be unladen, the act, it will be seen, imposes no restraint upon the right of immediate resort to the admiralty process; but with respect to the balance of his wages which remain unpaid at the termination of the voyage for which he shipped, his right of action (with the exceptions mentioned in the act) is deferred ten days, and until the cargo or ballast is fully discharged; and he is, moreover, then

Ten days' grace allowed.

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*Ten days
begin to run
from the day
on which the
wages be-
come due.*

required to obtain the certificate of the judge of the district court, or, by a late act(*a*), of a commissioner of the court, or of a state judge or justice of the peace, that there is sufficient cause of complaint whereon to found admiralty process. The voyage is "ended" when the vessel is returned to her last port of delivery, and is there safely moored(*b*). But some difficulty has been felt, and some diversity of opinion has been entertained by the courts, with respect to the true construction of the clause "and the cargo or ballast be fully discharged." The just conclusion from all that has been judicially said upon the subject seems to be, that this clause is to be considered as in effect confined to those cases in which, either by the express terms of the shipping contract, or by the established custom of the port, the crew are bound to stay by and unload the ship, and are actually retained in service for that purpose; in which case their wages continue until she is unladen: and not, therefore, to those cases where there is no such contract or usage, and where, according to what seems to be the uniform practice in our principal Atlantic ports, the crew are discharged on the arrival of the vessel in port, and other persons (stevedores) are employed to unlade her cargo. In such cases the wages become due on the day of the seaman's discharge, and, on the eleventh day thereafter, he is entitled to a summons, and, if a certificate be granted, to admiralty process against the vessel; the

(*a*) Act of August 23, 1842, chap. 188, § 1.

(*b*) *The Happy Return*, 1 Peters's Adm. Decis., 253; *The Mary*, Ware's R., 454.

principal being that the ten days are to be computed from the day on which the wages are due(a). And, as the discharge of the cargo may be indefinitely delayed by the owner or master, awaiting a market, or convenient storage, or for the express purpose of deferring the payment of the wages, no more than a reasonable time (usually fifteen working days), for the delivery of the cargo, ought to be allowed to the prejudice of the seaman, in cases where, by the terms of the contract or custom of the port, he is bound and required to assist in unlading the ship(b). The result of this analysis may, therefore, be summarily stated as follows: The wages of seamen may become due, according to circumstances, either, 1, by the termination of the voyage, when they are not to assist in the discharge of the cargo or ballast; or, 2, by their actual discharge from further service, when they would otherwise be under obligation to render such assistance; or, 3, by the actual discharge of the cargo or ballast, when performed by them; or, lastly, when retained in service for this purpose, by the lapse of a sufficient period, with reasonable exertion, to complete the unlading. In each of these

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When
wages are
due.

(a) *The Mary*, Ware's R., 454; *The Happy Return*, 1 Peters's Adm. Decis., 255; Betts's Adm. Prac., 61; Dunlap's Adm. Prac., 99. And this rule, it is presumed, would be applicable to the case of a single seaman who should be discharged either by the mutual consent of the master and himself, or arbitrarily by the master, while the rest of the crew were retained in service for the purpose of unlading the ship. Betts's Adm. Prac., 61.

(b) Betts's Adm. Prac., 61; *The Sussex*, 1 Peters's Adm. Decis., 165; *The Philadelphia*, ib., 210.

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cases, the wages are *due*, and, at the expiration of ten days, become *payable*.

The ten days not abridged by the occurrence of a dispute.

There is also another clause of this act, which, on account of its ambiguity, has led, as it is not at all surprising it should have done, to discordant judicial opinions. It is the clause, "or if any dispute shall arise between the master and the seamen or mariners, touching the said wages." In the District Court of the United States for the Southern District of New-York, the occurrence of such a dispute at any time after the wages became due, is held to be a distinct and independent alternative, upon the happening of which a right of action accrues. The learned judge of that district has expressed the opinion that by no other construction of the act can the clause in question be rendered effective, and that this construction was therefore obligatory upon the courts(*a*). There is great weight in the view which he has taken of the subject; but it is difficult to resist the conclusion, so forcibly inferred by the terms of the preceding clause, "and if such wages shall not be paid within ten days after such discharge," that it was the intention of Congress to allow ten days' grace in all cases, other than those especially excepted by a subsequent part of the section. The object of this allowance seems to have been to afford time to obtain payment of the freight, and to ascertain whether any embezzlement, chargeable on wages, has occurred(*b*); and the formidable objection to the construction above mentioned, is,

(*a*) Betts's Adm. Practice, 62.

(*b*) *The Susan*, 1 Peters's Adm. Decis., 165

that it would put it into the power of the mariner, at pleasure, to defeat the policy of the act, by originating a dispute. It is the duty of the courts, therefore, to reject this construction, if it can be done without unwarrantable violence to the words of the act.

In the District Court of the United States for the District of Massachusetts, this objection has been deemed to be insurmountable; and it has accordingly been held by that court, that notwithstanding the existence of a dispute, the mariner was bound to await the expiration of the ten days. The clause in question, it was said, must either be considered a dead letter, which cannot be carried into effect without violating the spirit of the law, or as merely providing for a dispute respecting wages, as well as for a neglect of payment, after the expiration of ten days(a). If this construction of the act necessarily and unequivocally involved the disregard of the clause in question, it would be the safer course to adopt the opposite interpretation; but this does not appear to be the case. It may be conceded, upon the hypothesis that the ten days were to be allowed notwithstanding a dispute, that the addition of the clause under consideration was unnecessary; but it may nevertheless be supposed to have been used from abundant caution, as being more exactly descriptive of cases very likely to arise, of an actual payment by the master of all that he believed to be due, though not of all that the seaman demanded,

(a) *Holmes's case*, cited in *Dunlap's Adm. Practice*, 106.

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when a disputed balance would remain. Here then would be a payment, and yet there would be a dispute; and it does not seem to be very highly improbable that such a case may have been contemplated by the Legislature, and suggested this clause.

Whether a previous summons and certificate are necessary to obtain admiralty process, on the ground that the vessel is about to sail before the expiration of ten days.

I have met with no judicial decision of the question, whether, when the seaman supposes himself entitled to "immediate process," on the ground that the vessel is about to sail before the expiration of ten days, he is bound to resort to the preliminary step of obtaining a summons and certificate, as in other cases.

All the considerations of justice and expediency which dictated this precaution, are applicable, in their full force, to such a case: and it ought not to be treated as an exception, unless there are cogent reasons for so considering it. The terms of the act seem to admit of either construction indifferently, and there does not appear to be any objection to requiring a previous summons and certificate, except that the delay thereby occasioned may possibly sometimes defeat the remedy, by the abrupt departure of the vessel before the admiralty process can be obtained; but this is not likely to occur often, and the objection seems hardly to be of sufficient importance to counterbalance the advantages of disregarding it. Indeed, there are peculiar reasons in this case for requiring a previous citation of the master. Whether the ship is likely to proceed to sea within the ten days, or not, will probably in a majority of instances be matter of uncertainty to the discharged mariner, and all that he can do is

to swear to his belief. Should he swear falsely, he would incur little danger of a conviction for perjury, and would be likely on this account to act with less caution: but he may also happen to be wholly mistaken in the opinion that the vessel is about to sail; and on this account, also, it is desirable that the master should have an opportunity to disprove the allegation. Such a construction of the act, it is supposed, moreover, would be beneficial to the mariner; because, even upon the opposite construction, he would at least be obliged to allege in his libel the fact on which his right to immediate process depends; and being so alleged, it would of course be open to contestation by a dilatory plea^(a); and in the event of his failure to establish it, he would fail in his action, and might be amerced in costs for having commenced it prematurely. Under these views of the question, it has, in the District Court for the Northern District of New-York, been deemed to be, upon the whole, the safer course to require the summons and certificate.

Applications for immediate process, on the ground that the vessel has left the port of delivery, are likely to be of less frequent occurrence; and the question whether in this case a previous summons and certificate are necessary, is therefore of less practical importance. So far as it depends upon the particular terms of the exception, the question stands on the same footing as that which has just been considered; but it is to be considered that the

Whether such summons and certificate are necessary, when the vessel has left the port of delivery.

(a) See *The William Harris*, Ware's R., 367, 368.

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terms of the enactment, requiring a preliminary inquiry, all have reference to the port of delivery, and that this requirement is restrictive of the antecedent right to immediate process conferred by the general maritime law. It may be at least questionable, therefore, whether the like construction ought to be given to this clause of the act.

Duty of the
officer
before
whom the
mariner's
complaint
is made.

The duty to be discharged by a commissioner or magistrate to whom an application is made by a mariner for a certificate, is one of great responsibility. He is bound not only to adhere strictly to the express terms of the act, but to effectuate, as far as possible, its beneficent design of preventing unnecessary litigation. It is his duty, in the first place, to ascertain when the wages claimed became due; and if the ten days' grace allowed by the act has not expired, he must be satisfied, before he can lawfully issue his summons to the master, either that the vessel has left the port of delivery where her voyage ended, or is about to proceed to sea. Having satisfied himself that the case of the applicant is within the conditions of the act in these respects, he ought next, by carefully interrogating him, to endeavor to ascertain with reasonable certainty that the wages claimed are probably really owing, and are unjustifiably withheld. This being done, he is bound to issue the summons, which ought to be served by some person qualified to make the service properly, and to attest to the service. If the master wilfully omits to appear, the same *prima facie* evidence which justified the issuing of the summons, will justify the granting of

the certificate. If the master appears, the magistrate is bound to hear his statements in opposition to the mariner's demand, and to allow him to verify them by his oath; and also to receive and give due weight to any other evidence that may be offered. He ought not, however, to grant an adjournment, unless for sufficient cause shown; nor, except under extraordinary circumstances, for more than an hour or two. It is not his duty to enter into an elaborate or protracted examination of the merits of the case, nor to take upon himself the decision of nice and difficult questions.

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If the answer of the master to the seaman's demand is unsatisfactory, the complaint ought not to be dismissed, although it may appear to be somewhat doubtful. But there is a further duty incumbent on the commissioner or magistrate, before granting his certificate; and that is, by proper representations touching the expenses and inconveniences of adverse litigation, and by judicious advice to the parties relative to their rights and obligations, to endeavor to bring them to an amicable settlement. To a conscientious magistrate, the success which there is reason to believe would almost always follow such an effort, will be an ample reward for any pains it may have cost him; and if it is unsuccessful, he will not be likely to regret it.

It is stated by Judge BERRIS to be usual, in his district, for seamen to employ a proctor to draw a libel in their behalf, to be laid before the judge, commissioner or magistrate, for the purpose of

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obtaining the required certificate. The act unquestionably contemplates a "complaint" by the mariner *in person*; and it requires no great sagacity to discern the strong tendency of the opposite practice to defeat the salutary design of the act. No intelligent and upright commissioner or magistrate, however, will allow himself to be diverted from the strict performance of his duty by any such devices, which in no degree diminish his obligations to examine for himself, and to decide according to his own independent convictions. *He* must be convinced that there is "*sufficient cause*" for resorting to a suit in the admiralty, before he can justifiably grant his certificate to that effect.

Whether suits *in personam* are within the equitable purview of the act.

The language of this section, it will be observed, is directly applicable only to suits *in rem* against the ship. But, as we have seen, the mariner may also maintain a suit for his wages, *in personam*, against the owner or master; and it has been a question whether actions in this form are not to be considered as within "the equity of the statute," and subject therefore to the regulations therein prescribed touching suits *in rem*, with respect to the time of their commencement, and the necessity of a previous summons and certificate. It is stated by Mr. DUNLAP(a), that in the District Court of the United States for the District of Massachusetts, such is held to be the sound construction of the act: but he refers to no adjudication upon the point; and in the *index* to a late Boston edition of Abbot on

(a) Dunlap's Admiralty Practice, 100.

Shipping, it is stated to have been very recently decided by the present learned judge of that district, in the case of *Collins v. Nicholson*, that the ten days' grace applies only to suits *in rem*. If so, I presume the previous summons and certificate were also deemed unnecessary, preparatory to the institution of a suit *in personam*. This is the construction given to the act in the District Court for the Southern District of New-York — where the mariner is permitted to sue *in personam* as soon as his wages are due, and without a previous summons and certificate(*a*).

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Seamen's wages being a fruitful source of litigation, attended by even more than its ordinary concomitant evils to the parties, this is a question of considerable practical importance. The design of the act, in requiring a previous summons to the master, obviously was to mitigate these evils; and this restriction may reasonably be supposed to have been prompted not less by a desire to guard the seamen against the consequences of their own rashness and credulity, than by that of shielding the adverse parties against vexatious or unnecessary prosecutions. That the provision is well adapted to these valuable ends, is unquestionable; and its salutary influence upon the interests of the seaman is as great, and upon those of the owner and master little less so, in regard to the one form of action as in regard to the other. So far then as this provision is concerned, the two forms of action stand substantially upon the

(*a*) Betts's Admiralty Practice, 66.

VOL. 2. same footing; and with respect also to the other branch of the enactment, by which the right of action is postponed until after the expiration of ten days from the day on which the wages became due, it is equally true that the two forms of action are alike embraced by its policy. If, therefore, these regulations are wise and just, as they have been deemed by the Legislature to be, in the one case, they are not less so in the other. But it is to be borne in mind, that the right of the mariner to sue, *in personam*, in the admiralty, for his wages, is conferred by the maritime law, independently of the statute; and though the courts of the United States are invested by law with comprehensive powers to regulate their own *forms* of proceedings in the admiralty, it may well be doubted whether they have authority to extend these statutable restrictions to another and distinct remedy, not embraced by the terms of the act. If Congress had deemed it expedient so to extend them, it may be supposed that it would have been done; and if the act requires amendment, it is the exclusive province of the legislative branch of the government to amend it.

Under this view of the subject, the judge of the District Court for the Northern District of New-York has not felt himself at liberty to apply the provisions of the act to suits *in personam*. What is the rule of procedure, in this respect, in the district courts for the other districts of the Union I am not apprised; nor do I deem it discreet to express any opinion as to the right of the mariner

to enforce his lien by a proceeding against the *freight* CHAP. 2. alone, without regard to the legislative restriction in question.

There is still another clause of the sixth section of the act, which may seem to require particular notice, viz., that which directs that "all the seamen or mariners (having cause of complaint of the like kind against the same ship or vessel) shall be joined as complainants" in the suit. For the purpose of affording a clear view of the policy, scope and design of this enactment, I avail myself of the language of Mr. Justice STORY in delivering the opinion of the Supreme Court, in a case^(a) in which the question was whether an appeal would lie to the Supreme Court, where, in a suit prosecuted jointly by several seamen for wages, the Circuit Court had decreed sums to the libellants respectively, which, in the aggregate, exceeded the sum of two thousand dollars, but which severally fell short of that sum. The extract I propose to give, will be found, in other respects, instructive and valuable. After describing the contract of seamen, notwithstanding they may all sign the same shipping paper, as to all intents and purposes several and distinct—no one being understood to contract jointly with, or to incur responsibility for any of the others, the court say: "It is well known that every seaman has a right to sue severally for his own wages in the courts of common law; and that a joint action cannot be maintained in such courts by any number of seamen,

Seamen
suing at the
same time,
to be joined
in one suit.

(a) *Oliver v. Alexander*, 6 Peters's R., 143 (10 Curtis's Decis., S. C., 69).

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for wages accruing under the same shipping articles for the same voyage. The reason is that the common law will not tolerate a joint action, except by persons who have a joint interest, and upon a joint contract. If the cause of action is several, the suit must be several also. But a different course of practice has prevailed for ages in the Court of Admiralty, in regard to suits for seamen's wages. It is a special favor, and a peculiar privilege allowed to them, and to them only; and is confined strictly to demands for wages. The reason upon which this privilege is founded, is equally wise and humane: it is to save the parties from oppressive costs and expenses, and to enable speedy justice to be administered to all who stand in a similar predicament; in the expressive language of the maritime law, *velis levatis*. And the benefit is equally as great to the ship-owner as to the seamen; though the burden would otherwise fall upon the latter, from their general improvidence and poverty, with a far heavier weight. A joint libel may, therefore, always be filed in the admiralty by all seamen who claim wages for services rendered in the same voyage, under the same shipping articles. But although the libel is thus in form joint, the contract is always treated in the admiralty according to the truth of the case, as a several and distinct contract with each seaman. Each is to stand or fall by the merits of his own claim, and is unaffected by those of his co-libellants. The defence which is good against one seaman, may be wholly inapplicable to another. One may have been paid; another may not have

performed the service ; and another may have forfeited, in whole or in part, his claim to wages. But no decree whatever, which is made in regard to such claims, can possibly avail to the prejudice of the merits of others, which do not fall within the same predicament ; and whenever, from the nature of the defence, it is inapplicable to the whole crew, the answer invariably contains separate averments, and is applied to each claim according to its own peculiar circumstances. The decree follows the same rule, and assigns to each seaman, severally, the amount to which he is entitled ; and dismisses the libel as to those, and those only, who have maintained no right to the interposition of the court in their favor. The whole proceeding, therefore, from the beginning to the end of the suit, though it assumes the form of a joint suit, is in reality a mere joinder of distinct causes of action by distinct parties, growing out of the same contract, and bears some analogy to the known practice at the common law, of consolidating actions against different underwriters, founded upon the same policy of insurance. Be this as it may, it is the established practice of the admiralty. The act of Congress already referred to, adopts and sanctions the practice ; and it enacts that in proceedings *in rem* against the ship for mariners' wages, 'all seamen or mariners,' etc. [as above recited]. *It thus converts what by the admiralty law is a privilege, into a positive obligation, where the seamen commence a suit at the same time in the same court, by a proceeding in rem for wages.* And it further directs, that 'the suit shall be proceeded on

VOL. 2. in the said court, and final judgment be given, according to the course of admiralty courts in such cases used.' ”

The design of this clause, then, was to render obligatory a form of procedure which would otherwise have been only allowable; and according to the construction given to it by the Supreme Court, it embraces only those cases in which several seamen sue “at the same time in the same court.” The act is not merely directory to suitors; it is mandatory to the courts.

Duty of
courts to
enforce
the act.

Its language is, “and in such suit, all the seamen or mariners shall *be joined*.” The courts are bound, therefore, by all proper means to see that they are so joined. Should several libels for wages earned on the same voyage be filed, it would doubtless be the duty of the court to direct a consolidation, and the issue of no more than one warrant of arrest. Much may be done also to secure the observance of the act, by a judicious exercise of the large discretionary power of the courts relative to costs. This power may be exercised *in pœnam*, not only against suitors but against their professional representatives(a).

(a) The remarks so frequently met with in the works of elementary writers, and in the reports of judicial decisions in the admiralty, concerning the moral responsibilities of practitioners in courts of admiralty, and the high character for integrity and honor which they are bound to maintain, are especially applicable to their dealings with mariners. In the case of *The Frederick*, 1 Haggard's Adm. R., 211, which was a suit for wages, in which the proctor for the mariners had wantonly, and by unfair means, greatly increased the costs, Sir WILLIAM SCOTT took occasion to speak of “the public as well as pri-

In the Southern District of New-York, there is a rule of the district court, providing that "in suits for seamen's wages, any mariner in the same voyage, not made a party, may, by short petition to the court, in any stage of the cause previous to the final distribution of the fund in court, or discharge of the defendant and his sureties, be joined as libellant in the cause; but no costs shall be allowed for the proceedings taken to make him a party." By another rule, it is further provided, that "the proctor in the original cause shall not, however, be compelled to proceed in behalf of such petitioning mariner, unless a reasonable indemnity is offered for such costs as may be incurred in consequence of his being joined in the cause(a)." Seamen admitted to prosecute under this rule are not obliged previously to sue out

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Rules and
practice of
the District
Court for the
Southern
District of
New-York.

vate character" which the proctor has "thrown upon him" in such cases; and after narrating the objectionable acts of the proctor in the case before him, he said: "All this savors of sharp and hungry practice, tending to defeat justice by the pressure of useless inconvenience and vexation; contributing not so much to the protection of the mariner's interest, as to the practitioner's own profit:" and thinking, as he said, that he could not justly throw the costs which had been thus incurred upon either party, he condemned the proctor to pay them, saying that he might "perhaps be thought to deal too temperately in not going further." But the duty of the courts of the United States to repress this species of rapacity by the imposition of costs, is expressly enjoined by an act of Congress; for by the act of July 22, 1813 (4 Bioren's ed. L. U. S., 545, § 3), it is enacted that "if any attorney, proctor, or other person permitted to manage and conduct causes in a court of the United States, or of the territories thereof, shall appear to have multiplied the proceedings in any cause before the court, so as to increase costs unreasonably and vexatiously, such person may be required, by order of the court, to satisfy any excess of costs so incurred."

(a) Rules 8 and 9 of the District Court for the S. Dist. of N. York.

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a summons, and obtain the certificate required by the act(*a*); and they seem not to be backward in availing themselves of this exemption. "Most commonly," says Judge BETTS, "one or two seamen present the petition, without being joined by the rest of the crew. It is not necessary, in order to give the others the benefit of the suit, that any summons or preliminary examination should be taken in their behalf afterwards. The vessel being under arrest, they can come in and be made parties, and have the benefit of the attachment," etc(*b*).

The design of the rule and practice under it doubtless was indirectly to promote the policy of that provision of the act which directs that all the seamen having claims against the ship shall be joined as original parties in the suit; but the practice is obnoxious to the objection that it tends strongly to encourage a disregard of the literal requirements of this provision. This in itself would be of less practical importance, if it did not involve also a disregard of that other provision of the act which, as already explained, enjoins a preliminary inquiry, and authorizes the issue of admiralty process only in pursuance of a certificate of sufficient cause of complaint. The objects designed to be secured by this enactment are of great importance. It is true, one of them was to prevent the interruption of commerce and navigation by the vexatious arrest and detention of vessels; and, in the cases to which the practice in question applies, an arrest having already

(a) Betts's Adm. Practice, 65, 66.

(b) Ibid.

taken place on process issued in conformity with the act, its policy, so far as it relates to this object alone, may not be essentially impeded. But another of its objects was to guard generally against groundless litigation, and the expenses and other evils incident to it, by requiring, beforehand, *prima facie* evidence of the necessity of resorting to it; and especially by affording an opportunity for the voluntary settlement of disputes between seamen and their employers. As it regards this object of the act, the practice in question must be conceded to be entirely at war with it, rendering it in fact measurably a dead letter. The whole crew of a ship, however numerous, and whatever may be the weakness or validity of their respective claims, having the privilege of becoming parties under cover of a certificate granted to any one of their number, it is not at all surprising that in the Southern District of New-York only "one or two seamen most commonly present the petition, without being joined by the rest of the crew." I do not find, moreover, that any provision is made by the rules or practice of the court for notice in any form to the master or owners of the vessel, of the motion to be permitted to join in the suit as co-libellant, or even of the order or decree for that purpose, when granted: so that for aught that appears, there may be a final decree for wages, without the previous knowledge of any one interested in resisting the claim(a).

(a) Perhaps, however, in a district where all or nearly all suits of this nature arise at a single port where all the business of the court is transacted, such results are not likely often actually to occur.

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District of
New-York.

In several suits *in rem* for wages, instituted in the District Court for the Northern District of New-York, soon after the passage of the late act investing the district courts with a *quasi* admiralty jurisdiction in certain descriptions of cases arising out of the commerce and navigation of the lakes, applications were made and granted for the admission of co-libellants according to the above mentioned rules and practice of the District Court of the Southern District. But this is now no longer done; and seamen are left to their general right, sufficiently secured to them, in common with all others, by the established principles of admiralty procedure, and expressly recognized by the late rules of practice prescribed by the Supreme Court(a), of intervening for their interest, by the independent assertion of their claims against the vessel, or its proceeds in court, in suitable allegations to be admitted by the court and filed for that purpose. Unless the owner has interposed a claim, and thus already has a professional representative in court to protect his rights, a monition would of course be directed to issue, to show cause why the party should not be admitted to intervene for his interest, and have his demand allowed. Should the new allegation be given at a stage of the original suit, and under circumstances, requiring a consolidation; or should several mariners separately intervene, and a consolidation of their suits appear to be beneficial for the purpose of saving expense, it would be the duty of the court to direct

(a) See Appendix, Rules xxxiv., xliii.

a consolidation(a). If, in any case, it should be shown that any of the parties had improperly refused or omitted to join in the original suit, and especially if it should appear that the omission had been prompted by a desire to subject the owners to unnecessary expense, or by advice given with a view to the increase of costs, it would be the duty of the court to withhold, or even to impose costs on this account.

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The learned judge of the District Court of the United States for the Southern District of New-York, has intimated an opinion that the provisions of the sixth section of the act for the government and regulation of seamen, commented on in the text, are to be considered as referring exclusively to those voyages, preparatory to which the master of the vessel is required, by the first section of the act, to make an agreement in writing with the seaman(b).

Whether the sixth section of the act of 1790 is applicable to cases arising under the act of Feb. 26, 1845, when the vessel is of less than fifty tons burthen.

(a) I infer that the practice in the Southern District is attended with embarrassment, and sometimes leads to unsatisfactory results. Judge BERRIS, in speaking of it, remarks, that "should the demands of those upon whose petition the arrest was made be satisfied, pending the suit, and a suggestion be made against the validity of the claims of the other libellants, the court would not detain the ship in custody in their behalf, without strong *prima facie* evidence of the justness of their demands. The owner or master might move the court for the immediate discharge of the vessel [without security, I presume], unless the libellants brought their cause to a hearing at once, or gave the court satisfactory proofs of a just balance due them." There would seem to be difficulties, therefore, in the way of treating these co-libellants as regular suitors in court, invested by law with certain defined rights as such; for they appear to be regarded rather as tenants at will, who may be turned out of court as unceremoniously as they got in.

(b) Betts's Admiralty Practice, 67.

VOL. 2. The effect of this construction is to limit those provisions to vessels "bound from a port in the United States to any foreign port;" and vessels "of the burthen of fifty tons or upwards bound from a port in one state to a port in any other than an adjoining state." The act of February 26, 1845, ch. 20, extending the jurisdiction of the district courts to certain cases arising on the lakes, embraces all enrolled and licensed vessels of the burthen of *twenty* tons and upwards, employed in the business of commerce and navigation between ports and places in different states and territories, upon the lakes, etc. It comprises vessels, it will be seen, therefore, which, by this construction of the sixth section of the act for the government and regulation of seamen, would be excluded from its operation, viz., those between twenty and fifty tons burthen, and those employed in the business of commerce and navigation between ports and places in adjoining states. There is nothing in the language of the section which requires it to be thus restricted; and if this interpretation of it can be maintained, it must therefore be upon the ground that it is the only one in accordance with the general design and scope of the act; and upon this point, I cannot but think there is room for doubt. Be this, however, as it may, Judge BERRIS appears not to have considered it to be incumbent on him to limit the preliminary inquiry required by the act exclusively to those cases which he supposes to be necessarily embraced by it; for he states that he "has been in the practice of allowing a summons to crews of coasting vessels, or those sailing on tide waters in this state, not coming within

the statute, with a view to secure their prompt payment, or to avoid the heavy expenses attending an arrest of the vessel, when it satisfactorily appeared that the mariner could have no convenient remedy *in personam*." He adds, however, that when the preliminary hearing did not result (as it generally did) in a settlement of the controversy satisfactory to both parties, it was not his practice to grant a certificate, but to leave the petitioners to pursue the remedy afforded, independently of the statute, by the maritime law; and that recently applications of this description had become so frequent, particularly by mariners navigating vessels on the Hudson river and on Long Island Sound, that he generally declined to take cognizance of them by way of summons at all.

In the exercise of the admiralty jurisdiction conferred by the act of 1845, an attempt to discriminate in this respect between vessels of fifty or more tons burthen, and those of less burthen; and between vessels employed in the business of commerce and navigation between ports or places in adjoining states, would inevitably lead to great embarrassment. For this reason, and on account of what was supposed to be the doubtful construction of the act of 1790, the provisions of the sixth section have been applied, in the Northern District of New-York, indiscriminately to all vessels embraced by the act of 1845(a).

(a) For certain provisions of the act of 1813, "for the government of persons in certain fisheries," requiring agreements with seamen to be employed in the cod fisheries to be in writing and defining and regulating the remedy of such seamen for the recovery of their earnings in certain cases, *vide supra*, p. 123, note.

CHAPTER III.

COMMENCEMENT OF THE SUIT—LIBEL.

IN the High Court of Admiralty of England, suits *in personam* and *in rem* are commenced, as the Roman action was, by the issue of process; and it is not until after the return of the process executed, that the plaintiff (or *promovent*, as he is denominated) is called upon to exhibit his libel(*a*). But in the admiralty courts of the United States, the process, in both forms of action, is preceded by a written statement of the cause of action, called a *libel*, corresponding to the *bill* in a suit in chancery. Such seems to have been the practice of the Colonial Courts of Admiralty(*b*); and it is now not only sanctioned, but expressly enjoined, by the Rules of Practice lately prescribed by the Supreme Court of the United States. The first rule ordains that "no mesne process shall issue from the district court, in any civil cause of admiralty and maritime jurisdiction, until the libel or ~~libel~~ of information(*c*) shall

No process
to issue,
until a libel
has been
filed.

(*a*) 2 Bro. Civ. and Ad. Law, N. Y. ed., 349, 357-396,

(*b*) Betts's Adm. Practice, 23.

(*c*) *Libel of information* is the same given to a libel filed by the district attorney of the United States, who "gives the court to understand and be *informed*" of the breach of laws on which the suit is founded.

be filed in the clerk's office from which the process is to issue^(a)."

It is stated by Judge BERRIS to have been the practice in the Vice-Admiralty Court of New-York (as he has ascertained, it is presumed, by an examination of the records of its proceedings), to read the libel in open court, and thereupon to obtain an order for process. And he adds, that though this usage did not survive the revolution, the principle upon which it was founded "still enters into and influences the practice" of his court. "In some cases the judge still considers and determines preliminarily the right of the party to coercive process, and in others subrogates the clerk to that office. When no order of the judge is filed, the clerk examines carefully the case made by the libel and the prayer of process, and gives the party such process as his libel will justify^(b)."

Such is the course of proceeding supposed to have been contemplated by the above recited rule. Except in those cases which require the previous order of the court directing the issue of process, the mere delivery or transmission of the libel to the clerk is all that the rule requires. But the duty thus imposed upon this officer demands vigilance and intelligence on his part; for he cannot lawfully issue any process, until, by an examination of the libel, he has ascertained that the matter of complaint is in its nature cognizable in a court of admiralty;

(a) See Appendix ; Rules of Admiralty Practice, Rule 1.

(b) Betts's Adm. Practice, 23, 24.

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Structure of
the libel.

It has always been the policy of courts of admiralty to discountenance prolixity and all unnecessary technicalities in pleading, and, disregarding, as far as could safely be done, mere matters of form, to look only at the substantial merits of the controversies before them. Their professed object has been (and it is no idle boast), to administer justice *velo levato*. The general principles of pleading which they inculcate are nevertheless excellent, and really embrace all that is desirable, and all, therefore, that ought to be required in any court. In imitation of the Roman courts, they exact *brevity, clearness, aptness and certainty*. Thus, of the libel, it is said that it "ought to contain a *narration and conclusion*; to be *short*, and contain nothing superfluous; *clear*, so as to avoid all ambiguity; *apt*, i. e., that the prayer for relief should accord with the nature of the grievance; and sufficiently *certain* as to the quantity, quality and nature of its subject matter(a)." But from the occasional judicial expressions of dissatisfaction and regret to be met with in our reports, I infer that the known disinclination of the courts to listen to technical objections, and the want of exact knowledge, skill or care on the part of practitioners, have led to a degree of slovenliness in pleading that is at once discreditable and mischievous. The Supreme Court, in framing the Rules

(a) 2 Bro. Civ. and Ad. Law, N. Y. ed., 361.

of Admiralty Practice, have accordingly aimed to correct this evil. By the 28d rule, it is ordained that the libel "shall state the nature of the cause, as, for example, that it is a cause civil and maritime, *of contract*, or *of tort or damage*, or *of salvage*, or *of possession*, or otherwise, as the case may be; and if the libel be *in rem*, that the property is within the district; and if *in personam*, the names and occupations and places of residence of the parties. The libel shall also propound and articulate in distinct articles the various allegations of facts, upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer of the process to enforce his rights *in rem* or *in personam* (as the case may require), and for such relief and redress as the court is competent to give in the premises(a)." This rule cannot properly be con-

(a) The 22d rule relates exclusively to cases of seizure for a breach of the revenue or navigation laws of the United States. It is as follows: "All informations and libels of information for a breach of the revenue or navigation laws of the United States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought, and where it then is. The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States, in such case made and provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause at the return day of the process, why the forfeiture should not be decreed." Its requirements, it will be seen, are the same in substance and effect as those

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sidered as enjoining anything not already demanded by the recognized principles of admiralty pleading, unless it be the division and proper distribution and arrangement of the contents of the libel under separate and distinct ARTICLES; and even this was to some extent in use in this country, as it has always been in England, and is strongly recommended by Mr. Justice STORY in several reported cases decided by him(*a*). This important requirement,

of the 23d rule, relative to other cases. Municipal seizures constitute a distinct class of cases, and are, moreover, sometimes of common law as well as sometimes of admiralty jurisdiction, according to the place of seizure. (See Conkling's Treatise, 3d ed., 236, 505 *et seq.*) The pleading filed by the district attorney, by which the suit is commenced, when the suit is on the common law side of the court, is called simply an *information*; and when on the admiralty side, a *libel of information*.

The reason why seizures are not treated of in this work, has already been stated. The above rule relative to them is here given, on account of its express requirement of distinct articles. In this respect, it will be seen, the rule makes no distinction between informations and libels of information. In all other respects, the directions relative to libels given in the treatise above mentioned, it is hoped, will be found correct.

(*a*) See *Thomas v. Lane*, 2 Sumner's R., 1, 4. This was a cause of damage for assault and battery. The suit in the district court was against the master and mate of the vessel, on board of which the injuries were alleged to have been committed. The case came before the circuit court, on appeal by one of the defendants. Mr Justice STORY, in delivering his opinion, speaks of the pleadings in the following terms: "There is a good deal of embarrassment thrown over the cause by the state of the pleadings; and I exceedingly regret that neither the libel nor the answer have that regularity and certainty of averments, which in strictness they ought to possess. The libel is not drawn in the regular form of articles, articulating (if I may so say) the grievances in a distinct order, and charging each as a joint act of the master and mate. On the contrary, it seems to be a narrative of the events in the order in which the libellant asserts them to have occurred; and the acts of each of the respondents are charged severally

especially in conjunction with the corresponding one in another rule relative to the answer of the defendant, cannot fail to be highly conducive to clearness and precision.

Judge BERRS, speaking of the libel, observes that "in practice it is too commonly drawn up in a vague and incoherent manner—filled with useless verbiage, or exaggerations of the libellant's claims or merits, or of the conduct or motives of the defendant;" and he very pertinently adds, that "pompos diction and strong epithets are out of place in a legal paper designed to obtain the admission of the opposite party to its averments, or to lay before the court the facts which the actor will prove." The libellant may be

against him, without any joint charge whatsoever attributing each act to both, and only by inference leading to the conclusion of any joint co-operation. The answer is equally embarrassing. It begins by asserting that the respondents jointly deny the assault and bruising of the libellant; and it then proceeds to deny that Thomas struck or kicked the libellant, or that he did the other acts charged against him personally, except the imprisonment, which he justifies, in a very general manner, on account of his disobedience of orders. It then proceeds to deny that Jordan [the other defendant] struck the libellant, or did the other acts charged against him; and concludes with a justification of the imprisonment, for the same cause as is asserted by Thomas: so that here are joint and several defences mixed up in the same general answer, in regard to the matters variously charged in the libel, some of them in form several, and some of them joint." The question which led to these remarks, was, whether one of the defendants, alone, could appeal from the decree of the district court; and the learned judge proceeded to say, "Upon this state of pleadings, I know not how to treat the case as either a libel exclusively upon a joint charge, or as a joint answer to such a charge. It seems to me to be a mixture of joint and several charges, with threads of connection which I am unable to disentangle or to unite together." See also *Orne v. Townsend*, 4 Mason's R., 541; *The Boston and Cargo*, 1 Sumner's R., 328; *Treadwell v. Joseph*, *id.*, 390.

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presumed, in general, to know beforehand what he is likely to be able to prove, and he can derive no possible advantage from exaggeration. And, to say nothing of the moral necessity which rests upon him, when the libel is to be sworn to, of a strict observance of the truth, the defendant, being required to make a distinct response, under oath, to the several articles and allegations of the libel, is likely to find himself obliged, in framing his answer to overcharged statements, so to qualify his admissions by partial denials, as to lead to unnecessary embarrassment and controversy. By one of the new rules of practice, exception may be taken to any libel as well as to other pleadings, "for surplussage, impertinence or scandal;" and if the exception be allowed, the matter will be expunged with costs(a).

Interrogatories.

It is also declared by the 23d rule above mentioned, that "the libellant may further require the defendant to answer on oath all interrogatories propounded to him, touching all and singular the allegations in the libel, at the conclusion thereof." The interrogatories which the defendant may thus be called upon to answer, can, of course, as indeed will be seen by the terms of the rule, be such only as relate to the allegations of the libel; but it is not to be understood that they are to be mere repetitions of these allegations, in an interrogative form. In that form they would be wholly useless; for the defendant is obliged, by another rule, to give a full,

(a) See Appendix, Rule xxxvi.

distinct, and explicit answer to each separate article of the libel, on oath or solemn affirmation(a). The object of the interrogatories, therefore, is, to obtain the defendant's admission of particular facts, not necessary to be specifically alleged, but which, if admitted, will serve or help to establish the truth of the more general allegations of the libel, and thus to relieve the libellant, wholly or in part, from the necessity of resorting to other evidence.

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Whether, without any rule or established usage of the particular court in which the question may arise, it is necessary that the libel should be verified by oath, is a question touching which a diversity of opinion seems to have prevailed, and which may be regarded as not fully settled. Mr. DUNLAP, in his Admiralty Practice, states, that "in the admiralty courts of the United States, although it is usual, it is not generally understood to be necessary that the libel should in the first instance be supported by the oath of the libellant. This, however," he adds, "depends on the rules of the different courts. In the District of Massachusetts, libels are usually signed by the proctor, without being sworn to, unless process of arrest of persons or property is prayed for(b)." The learned judge of the District Court of the United States for the District of Maine, after citing the above passage from DUNLAP, in the case of *Stutson v. Jordan*(c), says: "There may be little inconvenience in issuing a citation merely, where no

Whether the libel must be sworn to.

(a) Appendix, Rules XXIII., XXVII., XXVIII., XXX.

(b) Dunlap's Adm. Prac., 126.

(c) 18 American Jurist, 295.

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arrest is asked for, without the affidavit of the party; because, on the appearance, the omission may be cured, on motion of the adverse party, upon pain of the libel being dismissed with costs. Though it may not be necessary, in all cases, that the libel should be formally sworn to, it is necessary, I apprehend, in correct practice, that the debt or cause of action, on which the libel is filed, should be verified by affidavit, as a good and subsisting cause of action. At least, such has always been the practice in this district, since I have been acquainted with it. Cases may have occurred, which have passed without notice, where it has been omitted; but whenever it has been asked for, the rule has invariably been enforced. It has been considered as a positive rule, which the court, in ordinary cases, was not authorized to dispense with. Cases have happened, in which, in the absence of the party, the oath of his agent, or attorney, has been admitted from necessity; but the verification of the debt by oath has always been held to be indispensable, when it was insisted upon." The Rules of Admiralty Practice prescribed by the Supreme Court, are not explicit upon the point. They do ordain, however, that "In suits *in personam*, no warrant of arrest, either of person or property of the defendant, shall issue for a sum exceeding five hundred dollars, unless by the special order of the court upon affidavit or other proper proof showing the propriety thereof(a)." These rules, and the omission of the Supreme Court to prescribe any

(a) See Appendix, Rule VII.

other regulation upon the subject, would seem to infer that the verification of the libel by oath was probably deemed by the court to be in general unnecessary. In the District Court of the United States for the Southern District of New-York, there is a rule requiring all libels in behalf of private suitors praying process of arrest *in personam*, or *in rem*, and all libels demanding the answer of any party on oath, to be verified by oath or affirmation; and by another rule of the same court, it is expressly declared that "Libels, informations, or petitions, praying a monition or citation only, without attachment, need not be sworn to(a)." A rule to the like effect has recently been made by the District Court for the Northern District of New-York(b). As this rule embraces the cases specified in the above mentioned rule prescribed by the Supreme Court, it supersedes the necessity, in any other form, of an affidavit or other proper proof," for the purpose of obtaining the order for process.

The libel must in all cases be signed by the proctor of the libellant, as all other pleadings must be by the proctor of the party in whose behalf they are filed.

Libel and other pleadings to be signed by the proctor.

(a) Betts's Adm. Practice, App., p. 1.

(b) Appendix, Rule 7. It was not until after the text was written, that the third volume of Story's Reports came to the hands of the author. In the case of *Coffin v. Jenkins*, at page 121, Mr. Justice STORY is reported to have said: "I observe, too, that there are some irregularities in the present case. The libel is sworn to, but not the answer. The reverse is the usual and proper practice; although there is no objection to the libel being sworn to, if the libellant chooses."

CHAPTER IV.

THE ADMIRALTY STIPULATION.

BEFORE proceeding to treat of the process to be issued on the filing of the libel, it is necessary to enter into a brief consideration of the *admiralty stipulation*(a); the name usually given to those securities which the parties are required to furnish or enter into, as a means of enabling the court to enforce justice.

Its general
nature and
uses.

Some general notion of their nature and importance may be conveyed by observing that, in addition to other important uses, they subserve all the purposes of bonds for the security of costs, of bail to the sheriff, and of special bail, in an ordinary action at common law, and of a bond for the return of property in the action of replevin.

The admiralty stipulation is of the nature of a recognizance. It is drawn up in writing, signed and acknowledged, but not sealed. It is the *cautio* of the civil law. The Roman word signifying a surety being *fidejussori*, and the correspondent adjective being *fidejussorius*, the security, when entered into by sureties, was denominated *cautio fidejussoria*. The sureties bound themselves separately from the

(a) *Stipulatio*, from *stipula* (as it has been supposed), the straw of old delivered as a token of consent. 2 Bro. Civ. and Ad. Law, 398, note.

principal ; but the latter was required, at the same time, to enter into a stipulation to the same effect as that entered into by the sureties, and containing an additional clause, in which he engaged to indemnify them against the responsibilities they incurred on his account. When the party made it to appear that he was unable to find sureties, he might, at the discretion of the court, be excused from doing so, and be admitted to the *cautio juratoria*, a personal security so denominated from the circumstance of its being entered into on oath. Another mode of security was, by deposit, *pignori* ; but the *cautio fidejussoria* was most generally used, and was, by way of eminence, also called *satisfactio*, full or sufficient security.

Until the reign of Justinian, no security in any form appears to have been required of the actor or plaintiff. By the ancient Roman law, vexatious litigation was restrained by other means. The principal of these was the action of calumny, by which the defendant, in a groundless and vexatious suit, was allowed to recover damages as an indemnity for his costs and expenses incurred in defending it. This action was abolished by Justinian ; and the oath of calumny, by which the actor was required to swear to his belief of the goodness of his cause, was substituted in its place. At a later period of his reign, he made a further provision against vexatious litigation, by requiring the actor, on filing the libel, to enter into a stipulation with sureties to bring the action to issue within two months ; to

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Roman stipulation in personal actions.

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prosecute the suit to final judgment and to pay the defendant one-tenth part of the sum demanded by the actor, if it should be adjudged *eum injuste litem movisse*, that he had commenced the action without probable cause(*a*). The defendant, in a *personal* action, was required to give a caution(*b*) or stipulation, by which he became bound, and his sureties or fidejussors for him, that he should appear at the time named in the stipulation, submit himself to the jurisdiction of the court, and abide its sentence(*c*). This was called the stipulation *in judicio sistendi*, and was the only one required of the defendant in a personal action, when he appeared and defended in his own person. Its object was satisfied by his personal subjection to the process of the court. He was not required to find sureties to pay the debt;

(*a*) See the learned opinion of Judge WARE in the case of *Lane v. Townsend et al.*, Ware's R., 286, 306, n, and the authorities there cited. This able opinion is the more valuable on account of its exposure of the errors committed by BROWNE (whose treatise on the civil and admiralty law is in general use in this country), in treating of the Roman stipulation. I shall have occasion to refer to it again, and shall not scruple to avail myself freely of its contents; and I beg leave to recommend it to the study of the learned reader, as the most intelligible and satisfactory summary of the Roman law upon this subject, within my knowledge. Indeed, the opinions throughout this volume are marked by extraordinary mental vigor, acuteness and learning.

(*b*) This is the word in common use as the English version of the Latin *cautio*. It is, however, a vicious translation, having nothing to recommend it but the similarity of sound. One of the ordinary significations of *cautio* is *security*; a sense in which the English word *caution* is never, except in this instance, used.

(*c*) And not also "to pay a tenth part of the sum in dispute, if defeated," as stated by BROWNE, and on his authority by Mr. HALL. [Vide 2 Bro. Civ. and Ad. Law, N. Y. ed., 410, 411; and Hall's Adm. Practice, 12.]

and though the stipulation *in judicio sistere* was forfeited, according to its terms, by his non-appearance, the forfeiture was never exacted when there was a reasonable excuse for his non-attendance. Thus, if he was detained by sickness, tempestuous weather, or flood—*valetudine, tempestate, vel vi fluminis*, the proctor was relieved against the penalty, and the fidejussores were discharged. But when a third person came in and took upon himself the defence of the suit, as any one was allowed to do even as a volunteer, whereby, according to the Roman law, he became substituted in place of the defendant as the debtor and *dominus litis*, he was obliged to enter into a stipulation, with sureties to pay whatever should be adjudged to be due, *judicatum solvere*, and by which he and his sureties for him also bound themselves that his acts should be ratified by his principal; whence it derived the name given to it, of the *stipulatio de rato*, or *ratam rem habiturum dominum*. This latter form of security was also required of the *procurators*, or proctors, of each party, in actions *in rem*, called vindications. These actions involved the right of property in the subject in controversy, and were brought to recover the thing *in specie* against the person in possession. It seems not unreasonable, therefore, that the defendant should have been obliged to give security to surrender the thing or pay its value (*judicatum solvere*), if the decision was against him; and a stipulation to this effect was, in fact, required of him, until the distinction in this respect, between personal actions and vindications, was abolished by

In actions
in rem.

VOL. 2 Justinian, and the defendant was only required to give the stipulation *in judicio sustendi*, to abide the judgment in personal actions.

Such, in brief, appear to have been the forms and legal effects of the securities exacted of litigants in the Roman forum. The practice of the Court of Admiralty, a civil law court, is derived from that of the Roman tribunals; and these securities have been adopted, with some modifications, as one of its essential elements.

Practice of
the English
High Court
of Admiralty,
in suits *in personam*;

According to the practice of the English High Court of Admiralty, when it exercised a comprehensive and undisputed jurisdiction of actions *in personam* as well as *in rem*, the defendant in a personal action was required, on his arrest, as the condition of his liberation, to give bail, by entering, with sureties, into a caution or stipulation for his appearance, on the day and at the place named in the warrant of arrest, to answer the libellant in a cause civil and maritime. This stipulation is equivalent to the bail bond to the sheriff, for the appearance of the defendant in an action at law; and being only for his legal appearance, he was required, on the return day, to give a new fidejussory caution to abide the sentence of the court (*in judicio sisti*), to pay the costs, and to ratify the acts of his proctor(a). This being done, the first stipulation was satisfied; and the new one bound him to await and abide the decision of the cause, and to submit as well to all interlocutory orders as to the final decree and pro-

(a) Clarke's Praxis, titles 4, 5, 12.

cess of execution. This stipulation, it will be perceived, corresponds with the recognizance of bail in a common law action, except that it superadds the condition to pay costs and expenses at all events.

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In suits *in rem* in the English admiralty, the fidejussory caution exacted of the claimant, or person appearing to defend the thing proceeded against, according to BROWNE, is threefold, embracing each of the several obligations comprised in the Roman fidejussory cautions above mentioned, viz., to ratify the acts of his proctor — *de rato*; to appear from time to time, and at the hearing, and to abide the sentence — *in judicio sistendi*; and, thirdly, to pay the condemnation or sum decreed, and also the costs which shall be decreed — *judicatum solvere*. In this stipulation, the sureties, and the party by his sureties, expressly submit to the jurisdiction of the court, and consent, in case of default in the performance of the conditions, that the admiralty process shall issue against them(a).

in suits
de rem.

(a) 2 Browne's Civ. and Adm. Law, N. Y. ed. of 1840, p. 408. See, also, *Lane v. Townsend et al.*, Ware's R., 286, 296, where BROWNE's statement of the English practice is adopted by the learned judge of the District Court of the United States for the District of Maine. But the forms of stipulations given in Marriott's Formulary, which is regarded as high authority, contain no engagement to ratify the acts of the proctor; and I do not recollect to have met, in the reports of modern cases in the English admiralty, with any allusion to this form of stipulation. I infer, therefore, that it has not latterly been in use. Indeed, I imagine that the proctor in the High Court of Admiralty has long since ceased to stand, as such, in any other than the ordinary professional relation towards his client or the subject in controversy.

Dr. BROWNE's account would lead us also to suppose that notwithstanding the stipulation of the claimant's sureties to pay the amount

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Having, by the foregoing brief outline of the nature and uses of the fidejussory caution or stipulation in the Roman tribunals and in the English High Court of Admiralty, endeavored to pave the way for the purpose, I proceed now to the consideration of the admiralty stipulations in use in the American courts of admiralty.

Admiralty stipulations in the American courts of admiralty.

Considering the indefinite footing on which the forms of procedure in our courts were left by the Constitution and laws upon the subject, the difficulty of obtaining exact information relative to the modes of proceeding in the courts of other countries, and the want, until very recently, of any authoritative common standard, it is not surprising that a con-

to be adjudged to the plaintiff, the ship still remains under arrest. But this would be unnecessary and oppressive; and it clearly appears from the forms above mentioned, that the court, on taking bail, releases the ship at once from arrest; and where the bail is taken by a commissioner appointed at a remote port for that purpose, he is expressly authorized by his commission to direct the release of the ship.

It may not be amiss here, also, to give the actual form of the engagement entered into by the claimant's sureties. They bind "themselves, their heirs, executors and administrators, for G. H. of _____, owner of the said ship _____ (or for the said master of the said ship _____), in the sum of (here insert the amount of the action on the face of the warrant), of lawful money of Great Britain, unto the said A. B., late mariner of the said ship, to answer the action commenced in this behalf, and to bring forth the said G. H. into judgment, to abide the summary hearing of this cause whenever it shall be assigned, and likewise to pay what shall be adjudged, with expenses; and unless they shall so do, they hereby severally consent that execution shall issue forth against them, their heirs, executors and administrators, goods and chattels, wheresoever the same may be found, to the value of the sum above mentioned." See *Marriott's Formulary*, 267, 269, 270, 271, 272, 273, 348, 350.

siderable diversity should have arisen in the practice of the American courts of admiralty. But happily this want has at length, to a considerable extent, been supplied by the promulgation of the Rules of Admiralty Practice prescribed by the Supreme Court; and though, as will be seen in the sequel, some of these rules, *as published*, and especially those relating to stipulations, are, unfortunately, in some respects defective, ambiguous and obscure, owing undoubtedly either to great haste or inadvertance in the preparation, or more probably to gross carelessness in the transcription or printing of them, still they were obviously maturely considered, and are in general highly judicious. They bear upon their face incontestible evidence of a thorough acquaintance with the subject, and, as a well devised, uniform and authoritative system of admiralty practice for our numerous courts, are of vast importance and value.

The question then is, not what has been the practice of our courts heretofore, with respect to the forms and uses of the admiralty stipulation (except where the rules are silent, or admit of an alternative), but in what manner the subject is now regulated by these rules.

I. IN ACTIONS IN PERSONAM.

The *third* rule is in these words: "In all suits *in personam*, where a simple warrant of arrest issues and is executed, the marshal may take bail with sufficient sureties from the party arrested, by bond

Stipulation
to be taken
on the arrest
of the defend-
ant.

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or stipulation, upon condition that he will appear in the suit and abide all the orders of the court, interlocutory or final in the cause, and pay the money awarded by the final decree there [therein] in the court to which the process is returnable, or in the appellate court; and upon such bond or stipulation, summary process of execution may and shall be issued against the principal and sureties by the court to which such process is returnable, to enforce the final decree so rendered, or upon appeal, to the appellate court(a).

It will at once be seen that the bail which the marshal is permitted by this rule to take from the defendant, embraces the conditions of the two principal Roman fidejussory cautions, viz. that *in judicio sistere*, to abide the orders and final decree of the court; and that *judicatum solvere*, to pay the sum awarded by the final decree. It will be seen, also, that it comprises the conditions of the stipulation, which, in the English admiralty, the defendant in a personal action was required to give on his arrest, and of that required of him on his appearance on

(a) The concluding part of this rule prescribing the mode of enforcing the stipulation, and the like provision in other rules, will be treated of in the sequel. The stipulations required by these rules extend in all cases to the appellate court, thus superseding the necessity of new security on appeal. In England, the opposite practice prevails. Clerke's Praxis, title 59; 2 Bro. Civ. and Ad. Law, 437.

It is necessary, also, here to advertise the reader that since the first edition of this work a rule has been made by the Supreme Court limiting the right to exact bail in admiralty actions, in the several judicial districts, to those cases in which bail is demandable by the laws of the state, in actions at common law. This rule will be more particularly noticed in the next chapter.

the return of the warrant of arrest, with the important addition, moreover, of the absolute obligation assumed by it to pay not only the costs and expenses, but the whole amount awarded against the defendant by the final judgment of the court. In authorizing the union in one security to be given on the arrest, of bail for appearance, and bail to the action, this rule is supposed, likewise, to be an entire innovation upon the antecedent practice of our courts. In another respect, also, it is in opposition to the antecedent practice of one, at least, of the courts, viz., that of the Southern District of New-York; by one of the rules of which it was ordained that the condition of the stipulation to be exacted of the defendant upon his appearance in an action *in personam*, should be that he "will perform and abide all orders and decrees in the cause interlocutory or final, *or deliver himself personally for commitment, in execution of such orders, to the proper officer(a).*"

But by a rule of the district courts for the districts composing the First Circuit, this condition prescribed by the new rule was already required in the bail to the action(*b*). I am informed, however, by the highest authority, that in actual

(a) Betts's Adm. Practice, Rule 38.

(b) Rule 3. This rule also requires the stipulation to the action to contain the condition that the defendant shall ratify the acts of his proctor, *de rato*; but no such condition appears in the forms of the stipulations I have seen in actual use in the District of Massachusetts, and it is not supposed to have recently been exacted in any of the American courts. The rule prescribed by the Supreme Court, it will be observed, does not require it. See *supra*, p. 85, note a.

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practice, the rule has not, in this respect, been strictly enforced when the defendant was unable to obtain sureties willing to bind themselves to this extent; but that in such cases, the defendant was liberated on giving a stipulation with sureties to pay *the costs and expenses of the suit* which might be awarded against him.

To imprison a defendant and to keep him in close confinement during the pendency of the suit, for want of sureties to pay the debt or damages which may or may not be decreed against him, when at the same time he is able and willing to find sureties for his appearance in court from time to time as often as his presence may be required, and his submission to its orders and decrees, would certainly be oppressive.

We shall presently see, however, assuming the new rule to be imperative, so as in all cases to require the marshal to exact the specified bail as the only condition on which he is permitted to liberate the defendant, that the hardships which might otherwise result from it would probably be in a great degree mitigated by another rule; but it becomes a question, nevertheless, of considerable interest, whether the third rule ought to receive so rigid a construction. The phraseology of the rule, as we have said, is potential: "the marshal *may* take bail," etc. The word *may*, occurring in statutes, is sometimes construed to be equivalent to *shall*; but this is only when the obvious design of the act requires such an interpretation. If this rule formed a part of a new code of procedure for a court newly

created, there would be strong ground for holding it to be absolutely imperative. The presumption would in such case be irresistible, of an intention that the defendant should not be liberated without some security; and this form of security being the only one designated, it would be the only one which the marshal would have any authority to exact. But these rules pertain to tribunals, and to a system of procedure therein, already in existence; and according to an established usage of these courts, the defendant, on his arrest, was required to give bail only for his appearance on the return of the process. The question, therefore, is, whether it was intended, by the new rule, absolutely to abolish this usage. It might not unreasonably have been supposed that defendants who, on being arrested, should have it in their power, without difficulty, to find sureties to the effect specified in the rule, might prefer to give it at once, instead of being obliged to give new security on the return of the process; and it does not seem extravagant to presume that it was the design of this rule, not to compel, but to put it in the power of defendants to do so. But if the courts adopt this construction, they will it is presumed, still consider the rule obligatory on them with respect to the form of the security to be exacted on the return of the process, unless it should clearly appear that the defendant is unable to find sureties willing to bind themselves to the extent specified in the rule. In such a case, having, as it is presumed, the power to take the mere personal security of the defendant, by admitting him to his

VOL. 2. juratory caution, when his imprisonment would otherwise be inevitable, the courts would probably be authorized, independently of the other rule alluded to above, and which will presently be more particularly noticed, to exercise the lesser power of relieving him from finding sureties for the payment of the principal sum that might be awarded against him by the decree, upon his offering to secure the payment of costs; according to the practice above mentioned, of the District Court for the District of Massachusetts.

But admitting the third rule to be imperative, there is, as already observed, another rule which seems to furnish, to a considerable extent, an antidote to the inconveniences and hardships which, without it, might be apprehended. The *twenty-fifth* rule prescribes that "In all cases of libels *in personam*, the court may, *in its discretion*, upon the appearance of the defendant, where no bail has been taken and no attachment of property has been made to answer the exigency of the suit, require the defendant to give a stipulation with sureties in such sum as the court shall direct, to *pay all costs and expenses* which shall be awarded against him in the suit upon the final adjudication thereof, or by any interlocutory order in the process [progress] of the suit."

Stipulation
to be taken
on the ap-
pearance of
the defend-
ant in cer-
tain cases.

The direct object of this rule may have been to provide for the case of a voluntary appearance of the defendant, in pursuance of a "simple monition in the nature of a summons," issued instead of a warrant of arrest, in pursuance of the second rule. But there is nothing in the language of it which

requires its limitation to such cases, nor is it by any means clear that such limitation was contemplated; and as the case of a defendant, who has been arrested on a warrant of arrest, and who, for want of bail, has been held in custody and brought into court on the return of the process, is equally within its terms, no reason is perceived why the courts should not apply it to such a case; and such, it is apprehended, will be their duty. It is true that the effect of the third rule, if it is to be deemed mandatory and absolute, will still be to deprive defendants of their former privilege of being discharged from arrest before the return day of the warrant, on giving bail simply for their appearance, unless, indeed, the courts should feel warranted, as possibly they may do, under special circumstances, to permit the defendant to be brought in before that day; and, assuming this to be an "appearance" within the requirement of the twenty-fifth rule, allow him *then* to give the stipulation therein designated. Be this, however, as it may, as only a few days generally intervene between the test and return day of the warrant, the defendant can, at most, under this construction of the twenty-fifth rule, be subjected to but a very brief imprisonment.

With regard to the prescribed condition of the stipulation to be exacted in pursuance of the twenty-fifth rule, "to pay all costs and expenses." etc., it would probably have been better, had the rule in terms required the further condition of abiding all interlocutory orders and the final judgment of the court, in conformity to the stipulation *in judicio*

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sistendi; but it is supposed, notwithstanding the omission, that the courts may, in their discretion, still require this condition to be superadded.

Stipulation required on the dissolution of an attachment of goods or credits.

The *fourth* rule prescribes that "In all suits *in personam*, where goods and chattels, or credits and effects are attached under such warrant^(a) authorizing the same, the attachment may be dissolved by order of the court to which the same warrant is returnable, upon the defendant, whose property is so attached, giving a bond or stipulation with sufficient sureties to abide by all orders, interlocutory or final, of the court, and pay the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court."

This stipulation, it will be observed, like that required on the arrest of the person, combines the Roman stipulation *in judicio sistere*, and that *judicatum solvere*.

II. IN ACTIONS IN REM.

The foregoing are all the forms of stipulation required by the Rules of Admiralty Practice, in suits *in personam*; and I proceed to notice those pertaining to suits *in rem*.

Stipulation on putting in claim.

By the *twenty-sixth* rule, it is ordained that the claimant upon putting in his claim, "shall file a stipulation with sureties in such sum as the court shall direct, for the payment of all costs and ex-

(a) A warrant to arrest the defendant, with a clause therein, if he cannot be found, directing his goods and chattels, or, for want thereof, his credits and effects to be attached. See Rule II., Appendix.

penses which shall be awarded against him by the final decree of the court, or, upon appeal, by the appellate court." This rule is merely declaratory of what is understood to have been the uniform antecedent practice of the American courts. The specified amount in which the security is to be taken, is regulated by the usage or rules of the courts respectively. In the District Court for the Southern District of New-York, the sum of \$250 is prescribed by express rule(a); and a correspondent usage exists in the District Court for the Northern District. The sum usually required in the New England districts is understood to be \$200. Under extraordinary circumstances requiring a larger sum, a special order would doubtless be made for that purpose. It is a simple security for costs, in the most stringent form, however, to pay absolutely.

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The *thirty-fourth* rule ordains that any third person, who in a suit *in rem* shall intervene for his own interest, shall, in like manner, upon filing his allegations, "give a stipulation with sureties to abide by the final decree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded by the court upon the final decree, whether it is rendered in the original or appellate court."

By a third person intervening for his interest.

The *tenth* rule, after providing for the sale, pending the suit, on the application of either party, of perishable "goods or other things" under arrest, proceeds as follows: "Or the court may,

On the delivery of goods or other things, to the claimant.

VOL. 2. upon the application of the claimant, order a delivery thereof to him upon a due appraisement to be had under its direction, either upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation with sureties in such sum as the court shall direct, to abide by and pay the money awarded by the final decree rendered by the court or the appellate court, if any appeal intervenes, as the one or the other course shall be ordered by the court(a)."

On the delivery of a ship.

The *eleventh* rule further directs, that "In like manner, where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him upon a due appraisement to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon giving a stipulation with sureties as aforesaid."

These rules, in providing the alternative of a deposit of money in pledge, *pignori*, for the property, adopt another form of security in use in the Roman tribunals.

In all these rules, it will be seen, the word "sureties," in the plural, is used, as it also is by the elementary writers who treat of the admiralty stipulation; but it is not supposed to be indispensably necessary, in all cases, to exact more than one surety. The only object in view is to secure the rights of the opposite party; and when a single

(a) Whether this part of the tenth rule extends to any other than perishable property, seems doubtful. On this subject, see *post*, chap. 5, § 2.

surety is sufficient for this purpose, doubtless one only may be taken. CHAP. 4

These rules relative to suits *in rem*, were not intended to change or modify the correct antecedent practice, but to declare and establish it. They require of the owner of the property proceeded against, as the condition on which he is to be permitted to appear in court as claimant, and in that character to contest the demand of the libellant, that he shall give security for any costs that may be adjudged against him in the suit; and they exact the like condition of any third person who comes into court for the purpose of enforcing any claim which he pretends to have against the same property, and who in such case is said to intervene for his interest: and, lastly, if the owner desires to have the thing under arrest re-delivered to him, for the purpose of enjoying the use of it during the continuance of the suit, or of saving the heavy expense of having it remain in the custody of the law, he is required to give security to the libellant for its appraised value, or to deposit an equivalent sum of money in court, subject to be applied to the satisfaction of the libellant's demand should it prove to be valid. It is of course optional with the owner to appear in the character of claimant and defendant, or not; and if he does so, it is equally at his option to apply for a re-delivery of his property, or not.

It is matter of surprise that, so far at least as I am informed, owners of vessels so frequently omit, in this country, to avail themselves of their right

VOL. 2. to have their property released from arrest, but leave it subject to the marshal's charges for custody fees, sometimes for months, when, at very little inconvenience and expense, they could regain the possession and use of it. There are cases, it is true, where there may be no adequate motive for desiring its release, and where it may even be for the interest of the owner to suffer it to remain and be sold, either by an interlocutory order, or under the final decree of the court; as in a suit for salvage, where the vessel is so much damaged as to be unfit for use, without expensive repairs; or when the claims upon the property amount to the whole or a large proportion of its value: but where the sum in dispute is inconsiderable, as is frequently the case in suits by material-men, and especially in suits for mariners' wages, the interest of the owner would in general be essentially promoted by re-possessing himself of his property at once. Such, I infer, is the practice in England; where the owner, upon his first appearance, gives security by a single stipulation for costs, and also for the payment of the sum which shall be awarded against him by the final decree. If the stipulation is taken and acknowledged before a commissioner at a distant port, he at once orders the vessel to be discharged; and if it is given in court, a supersedeas is immediately issued to the marshal.

The above recited rules, it has been seen, speak of an *appraisement* of the property, and seem to imply that the caution must be for its full value. There are cases, undoubtedly, which require an appraisement, unless the parties can agree upon the

value of the property; as in a suit for salvage, where the amount to be decreed depends on the value of the property saved; or, when the libellant's claim equals or exceeds in amount the whole value of the property, as is not unfrequently the case in suits to enforce an express or implied hypothecation for supplies and repairs, and as may be the case in a suit for damage by collision, or other tort. In cases of these latter descriptions, it is not only necessary that the value of the thing should be determined, but it is proper also that the security given should extend to that amount. In the High Court of Admiralty of England, however, security is taken for a less amount, even in cases of salvage; and in ordinary cases, where a specific sum is claimed, the security is for that sum, without regard to the value of the ship(*a*). It was doubtless very suitable, in a general declaratory rule, to recognize the propriety of an appraisement, preparatory to the delivery of the property to the claimant; but it is supposed that what has been described as the practice in England, may, with perfect propriety as well as great utility, be followed here..

It is necessary now to notice an act of Congress, passed when this work was nearly ready for the press, the design of which appears to have been to facilitate, and as far as practicable to insure, substantially, the course of practice above recommended, and at the same time to extend it. The act, it will be seen, also, has the further useful design of dis-

Act of
March 2,
1847.

(*a*) See Marriott's Formulary, 270-274, 355, *et passim*; Robinson's Dodson's and Haggard's Reports, *passim*.

VOL. 2. couraging the prosecution in the admiralty of suits for trivial amounts. Whether its provisions for this purpose are wise and just, is a question upon which it might be deemed unbecoming in me to express an opinion. It is entitled "An act for the reduction of costs and expenses of proceedings in admiralty, against ship and vessels;" and it enacts, "that in any case brought in the courts of the United States exercising jurisdiction in admiralty, where a warrant of arrest, or other process *in rem*, shall be issued, it shall be the duty of the marshal to stay the execution of such process, or to discharge the property arrested if the same has been levied on, receiving from the claimant of the same a bond or stipulation in double the amount claimed by the libellant, with sufficient surety, to be approved by the judge of the said court, or in his absence by the collector of the port, conditioned to abide and answer the decree of the court in such cause; and such bond or stipulation shall be returned to the said court, and judgment on the same, both against the principal and sureties, may be recovered at the time of rendering the decree in the original cause: provided that the entire costs in any such case, in which the amount recovered by the libellant shall not exceed one hundred dollars, shall not be more than fifty per centum of the amount recovered in the same; which costs shall be applied first to payment of the usual fees for witnesses, and the commissioner, where a commissioner shall act on the case, and the residue be divided *pro rata* between the clerk and marshal, under the direction of the judge of the court where

the case may be tried: provided, further, that no attorney's or proctor's fees shall be allowed or paid out of the said costs(a). CHAP. 4

Under this act, as I understand it, the required security may be offered to the marshal at any time after the receipt by him of the warrant of arrest; and he is thereupon bound, if before the execution of the warrant, to abstain from executing it, and if afterwards, to release the property from arrest. The security is to be given by "the claimant." A claimant, in the language of the admiralty, is one who has appeared in the suit, claiming to be the owner, or agent of the owner of the property, and who, upon satisfactory evidence of proprietary interest, *is admitted by the court as such*; but to put this interpretation upon the term *claimant*, as it stands in this act, would be, to a great extent, to defeat its policy, and would moreover be inconsistent with the right conferred by it to give security before an actual arrest. Interpretation of the act.

The reasons for requiring evidence of proprietary interest in the person who appears before the court, demanding to be admitted as claimant, are, 1, that by being so admitted, he acquires the right to contest the claim of the libellant, which it would be unjust to allow a stranger to do; and, 2, that he thereby also becomes entitled of course to the *restitution* of the property, in case the libellant fails in his suit, or to the balance that may remain in court after satisfying the libellant's demand, where

(a) Act of March 3, 1847, ch. 55.

VOL. 2. the property has been sold for that purpose under a decree of the court. But as the omission of the marshal to execute his process, when the security is offered beforehand; or his mere release of it, upon the tender of security, after arrest, can confer no such rights, no injustice or inconvenience seems likely to result from construing the word "claimant," in the act, as importing any person who chooses to assume that character, and offers the required security; unless, indeed, the marshal should have good reason to suspect some fraudulent or unlawful design. If a person has already appeared in court, and been admitted as claimant, he will of course be the proper person to give the security; and should one who has already given security, appear and demand admission in court as claimant, it will doubtless still be the duty of the court, nevertheless, to require the usual evidence of his ownership before admitting him as such.

It is not supposed that the giving of security under this act has the effect of subjecting the *person* of the party by whom it is given, to the jurisdiction of the court, except for the single purpose of ultimately enforcing the security should it become necessary. He is to bind himself, and his surety or sureties are to be bound for him, that he will "abide and answer the *decree* of the court in such cause;" the meaning of which is supposed to be, simply, that he will pay the amount awarded to the libellant, including costs, by the final decree of the court. If this view of the intention of the act is correct, it will follow that unless the claimant under the act

also appears and is admitted as claimant in court, he cannot be permitted to contest the demand of the libellant, nor be compelled to answer interrogatories; not being, in fact, a party to the suit. It is presumed, also, that the right secured by the act to the release of the property on giving security, is unaffected by the previous appearance and admission of the party as claimant. The result, therefore, appears to be, that the owner of the property proceeded against may obtain its release without appearing in the suit at all; and even when he has so appeared, he may still do so without any application to the court for that purpose. In these respects, the act is an innovation upon the antecedent practice of the American courts. The security required by the act, it will be observed, is equivalent to the stipulation for costs to be given on putting in a claim, and also that antecedently required, properly denominated bail to the action, on a delivery of the thing; but it is still left to the choice of the owner who desires to contest the suits, either to give security under the act, and thereby obtain the release of the property, or merely to give a stipulation for costs, leaving the property in the custody of the law.

CHAP. 4.

Security
may be
given in
either form.

In the High Court of Admiralty of England, when the suit is *in personam* against the master, as well as *in rem* against the ship, and bail to the action is given by the owner, the master, as well as the ship, is released from arrest. I presume such would be the practice of our courts; for the rights of the libellant having been thus made secure,

Discharge
of master
from arrest.

VOL. 2. there would be no propriety in detaining the master in custody until he should give additional security. It may be supposed that by the equity of this statute, the same consequence would follow in an action against the ship and master, from the giving of security by the claimant under the act.

It is necessary now to revert to the rules which have been the subject of comment in this chapter, and to consider them in connection with some of the others, for the purpose of endeavoring in some degree to dissipate the unfortunate obscurity in which, in some respects, they have left the subject involved.

Whether the terms "bond" and "stipulation," as used in the Rules, are to be considered as synonymous.

By the *third* rule, as we have seen, the marshal is authorized, upon the arrest of the defendant, to "take bail"—"*by bond or stipulation*;" and the same phraseology occurs also in the *fourth* and *sixth* rules. The question therefore necessarily arises, whether the words *bond* and *stipulation* are in these rules used synonymously; or, whether by the term *bond* it was intended to designate the instrument under seal and *executed*, known under this appellation in the common law courts. This is a question of considerable practical importance; because if the former construction be the true one, serious doubts might be entertained concerning the validity of common law bonds, should they be taken instead of a stipulation. One reason which may be supposed to favor this construction, is, that the admiralty securities are, in the English High Court of Admiralty, denominated *bonds* as well as *cautions* and *stipulations*. Thus, the caption to a

form for a stipulation given in Marriott's Formulary, to be "taken and acknowledged," is, "Form of the Bail Bond;" and at the end of it, there is this direction: "Note—The Bond is not to be sealed(*a*)."
Indeed, it seems to be called by either name indifferently(*b*).

CHAP. 4

But a stronger reason for supposing the term "bond" to have been used as but another name for stipulation, is to be found in the language of the *fifth* rule. It is as follows: "Bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before a commissioner of the court who is authorized by the court to take affidavits of bail [acknowledgments of bail and affidavits], and depositions in cases pending before the court." It can hardly be supposed to have been intended to require the party and his sureties to go before the court, the judge, or a commissioner, to execute a bond, or to acknowledge it.

It has long been customary in the District of Massachusetts, and, as it is supposed, also in the other districts composing the First Circuit, for the marshal, on the arrest of a defendant in an action *in personam*, to take bail for his appearance, in the form of a common bond; but the bond is simply executed in the presence of witnesses, by whom its execution is attested as in ordinary cases. If there were no grounds for distrust as to the genuineness of this rule, therefore, it would seem to be nearly

(*a*) Marriott's Formulary, 272.

(*b*) See, for example, 1 Haggard's R., 312.

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conclusive as evidence that the terms in question were used in the same sense. But the force of this evidence is greatly weakened, if not neutralized, by the *thirty-fifth* rule, which is as follows: "Stipulations in admiralty and maritime suits may be taken in open court, or by the proper judge at chambers, or, under his order, by any commissioner of the court, who is a standing commissioner of the court, and is now by law authorized to take affidavits of bail [acknowledgments of bail and affidavits], and also depositions in civil causes pending in the courts of the United States." In this rule, it will be observed, the word *bond* is not used. It is scarcely to be imagined that it was really intended to promulgate both of these rules. Undoubtedly the reports of the proceedings of the Supreme Court, sent forth by its reporter, are in general to be regarded as authoritative, and under ordinary circumstances it would be presumptuous to question their genuineness: but these rules are, upon their face, marked by defects too gross to be imputed to the court, and furnish evidence therefore of very great and reprehensible carelessness on the part of some one or more of the intermediate agents through whose hands they passed after leaving those of the court. Both of them, as we have seen, contain the senseless words "affidavits of bail," instead of the words *acknowledgments of bail and affidavits*. Neither these senseless words, nor the scarcely less unhappy jargon "or under his order, by a commissioner of the court, who is a standing commissioner of the court, and is now authorized," etc., which forms

a part of the thirty-fifth rule, could have been written by any member of the court, or received its assent. According to the literal construction of the rule, as printed, a special authority from the judge to a standing commissioner would be necessary before he could act; a restriction inconsistent with one of the main objects of the rule, and, *pro tanto*, destructive of its utility. Happily, however, there is no great difficulty in discerning what must really have been intended by this rule. It is an established practice in the High Court of Admiralty in England, to appoint commissioners to take stipulations at particular ports where their presence is most likely to be needed; and, also, when occasion requires, to issue a special commission to act in a particular case(*a*). The design of the rule probably was to provide for the taking of these securities, not only by the court and the judge, but also both by the standing commissioners of the court, and by commissioners specially appointed for the purpose. It may be difficult to find, in the language of the rule as printed, sufficient authority for the appointment of special commissioners; but this authority is supposed to be inherent in the courts as courts of admiralty and maritime jurisdiction, and no objection is perceived to its exercise independently of the rule. The thirty-fifth rule is, therefore, in substance, sufficient for all the exigencies of the case; and if it may be assumed, first, that only one of these rules is to be regarded as operative, and, secondly, that

(*a*) Forms of these commissions are given in Marriott's Formulary, 267, 309.

VOL. 2. the thirty-fifth is the one which is to be so regarded, the question under consideration will be relieved of so much of its difficulty as arises from the apparent anomaly of providing for the acknowledgment of bonds. In favor of these assumptions, there is the great improbability of any intention to promulgate both rules; the ambiguity of the fifth rule; the substantial fitness and sufficiency of the thirty-fifth; the fact of its being placed last in the order of arrangement, and its more natural and suitable relative position with respect to the other rules. Leaving the fifth rule out of the question, as it seems upon these grounds reasonable to do, I proceed to state some considerations, which appear to favor, if not warrant, the conclusion that the term *bond*, in the third, fourth and sixth rules, was intended to be used in its ordinary acceptation.

These rules all relate to actions *in personam*; and they are the only ones relating to this form of action, in which either of the two words in question occurs, except the twenty-fourth, in which the term *stipulation* alone is used to designate the security which the *court* is authorized to exact of the defendant on his appearance, when no bail has previously been given, or attachment of property made; but the tenth, eleventh, twenty-sixth and thirty-fourth rules, on the contrary, all relate to suits *in rem*; and, in all these, with only the exception just mentioned, the term *stipulation* alone is employed: and this exact discrimination is supposed to furnish very strong ground for the inference that it was designed and intended to be significant. This in-

ference is, moreover, strengthened by the fact, that in the districts composing the First Circuit, the practice of allowing the marshal to take bail for appearance on the arrest of the defendant in actions *in personam*, by bond executed in the usual form, had long prevailed, and was supposed to be sanctioned by the third rule of admiralty practice in those districts(a).

The rules of admiralty practice were framed and adopted before the death of the late Mr. Justice STORY; and from the lively interest he was known to feel in whatever pertained to the admiralty branch of the jurisdiction of the courts of the United States, it is morally certain that his attention was earnestly directed to an act of the court, so deeply affecting the subject. He was, of course, familiar with the practice of the courts within his own circuit; and on comparing the rules of admiralty practice prescribed by the Supreme Court, with those of his circuit above referred to, I find a coincidence not only in point of substance, but also of arrangement and language, so extensive and striking, as to lead the mind irresistably to the conclusion that the one code was taken as a general model for the other. If, therefore, it had been the intention of the Supreme Court to change the practice in this respect of so large a number of the courts, by

(a) The first branch of this rule directs that "On warrants to arrest the person in admiralty and maritime causes, if the bail be taken by the marshal or his deputy, or other person serving the same, it shall be on condition for the appearance of the defendant on the return day," etc.

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abolishing the use of the bond altogether, care would naturally have been taken to use expressions plainly significant of such intention, instead of employing language, to say the least, equivocal, not to say strongly indicative of the opposite intent. Besides, if nothing more than the admiralty stipulation was meant, why was the term *bond* coupled with it? It is difficult to conceive any reasonable answer to this question.

Either form
of security
probably
admissible
in suits *in
personam*.

Marshal's
right of
election.

Upon the whole, therefore, the just conclusion appears to be, that in personal actions, with the exception above mentioned of cases arising under the twenty-fourth rule, either of these forms of security is admissible(*a*). It is supposed, however, that the choice between them, on the arrest of the defendant, rests with the marshal, who, in cases

(*a*) It may seem to the reader that the author ought to have made some effort to ascertain the exact truth relative to these rules, for the purpose of enabling him more effectually to clear up the obscurity in which they are involved. He deems it due to himself, therefore, to state, that he long since addressed a full and carefully framed letter of inquiry upon the subject, to the Clerk of the Supreme Court, who, he doubted not, would be able, by reference to his original entries of the Rules, or, if not, by inquiries of the court, then in session, to furnish the necessary explanations. To this letter, Mr. CARROLL did not see fit to return any answer. The author, after waiting vainly until the adjournment of the court, took the liberty of addressing the Chief Justice on the subject. He replied promptly, and with that courtesy which so well befits high station, and which always accompanies it when worthily filled; but he was unable from recollection to furnish any light upon the subject, and deemed it indiscreet to hazard any opinion concerning it. The late Mr. Justice STORY—*clarum et venerabile nomen*—had gone to his final rest. Had he lived, he might, not improbably, for the reason mentioned in the text, have been able, from certain recollections, to give the information I desired; and I should not have failed to consult him on the subject.

involving large amounts, may not choose to assume the responsibility of accepting or refusing the sureties offered, and may prefer to throw it upon the judge or commissioner, and detain the defendant until a stipulation is given.

CHAP. 4.

With respect to the securities to be given in suits *in rem*, it seems very clear that the form exclusively contemplated by the Rules is that of an admiralty stipulation; but we have seen that these rules have been virtually superseded by a very recent act of Congress^(a). By the terms of this act, the bail to be given is to be "a bond or stipulation." There may be ground for doubt whether the term "bond" in the act was intended to be used in its common law acceptation, or only as synonymous with "stipulation," as it is often used in admiralty; but the design of the act being to simplify and facilitate the proceedings necessary to effect the object in view, the more reasonable presumption would seem to be that Congress intended to make it optional with the claimant to give the required security either in the form of a common bond, or in that of an admiralty caution.

Import of the term "bond," in the act of March 3, 1847.

The court, or other officer, on taking the stipulation, is bound to look to the sufficiency of the proposed sureties; and when it is doubted or questioned, the sureties may be sworn^(b). It is the practice in the High Court of Admiralty of England, also, to act upon information derived from merchants or others entitled to confidence;

Court or commissioner bound to look to the sufficiency of sureties.

(a) *Vide supra*, p. 100.

(b) *Marriott's Formulary*, 271.

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certificates of the collectors of revenue; and especially on the reports of the marshal, certifying to the sufficiency of the sureties(a). It should appear that each of the sureties is worth the sum for which they are bound; or that both together are worth double the sum, after payment of their just debts.

Commissioner to certify and return stipulation.

The stipulation, when not taken before the court, is to be certified and transmitted to the court. Forms of the various stipulations are given in the appendix. They may be taken and acknowledged, as we have seen, in court, before the judge at chambers, before one of the commissioners appointed by the circuit court to take acknowledgments of bail, affidavits, etc., or before a special commissioner appointed for the purpose.

Amount of stipulation may be reduced, and new sureties may be required.

As the sole object of the security is the attainment of justice between the parties, the court is bound so to regulate the exercise of the right to exact it, as to prevent its abuse as well as its abridgment; and, as in actions *in personam* for the recovery of unliquidated damages, it is in the power of the libellant, by making an exorbitant demand, to compel the defendant to give excessive bail, or submit to imprisonment for want of it, it is the duty and the practice of courts of admiralty to listen to applications for the reduction of the amount of the bail. So, too, the sureties, after having been accepted, may, upon inquiry, turn out to have been insufficient, or they may afterwards become so; and in such case the party may, in like manner, be called upon to give new

(a) Marriott's Formulary, 301; Clerke's Praxis, tit. 16, 17.

sureties(a). This practice is accordingly sanctioned CHAP. 4 and expressly affirmed by rule *sixth* of the Rules of Admiralty Practice, which is as follows: "In all suits *in personam*, where bail is taken, the court may, upon motion for due cause shown, reduce the amount of the sum contained in the bond or stipulation therefor; and in cases where a bond or stipulation is taken as bail, or upon dissolving an attachment of property as aforesaid, if either of the sureties shall become insolvent pending the suit, new sureties may be required by the order of the court, to be given upon motion and due proof thereof(b)." It will be seen, however, that the rule provides in terms for the mitigation of bail only where it has already been taken, and for new securities only in the case of subsequently occurring insolvency; but the rule ought not to be construed as restrictive, and extends in spirit, at least, to the case of a defendant maliciously imprisoned or held in custody for want of exorbitant bail demanded, and to the case of imposition or mistake leading to the taking of insufficient security originally.

The obligation entered into by the sureties to pay the amount awarded against the party for whom they have become bound, *judicium solvere*, is absolute, and cannot be discharged by the surrender of their principal(c); nor is it dissolved by the death of the party(d). Sureties not exonerated by surrender of the principal; nor by his death.

(a) Clarke's Praxis, tit. 15, 16.

(b) See Appendix; Rules of Admiralty Practice, Rule vi.

(c) 2 Bro. Civ. and Ad. Law, 412.

(d) Ibid; Hall's Ad. Pr., 25, n.

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How, and
against
whom en-
forced.

Stipulations are enforced in our courts by summary process of execution^(a). Such is the civil law practice, and an express assent to this effect is inserted in the stipulation. It appears to be the uniform practice in the High Court of Admiralty of England, however, before issuing an attachment or execution against the parties to the stipulation, to issue a monition citing them to pay the amount for which they have become liable within a certain number of days—usually, as I infer, fifteen. But by rules of long standing in the courts for the districts composing the First Circuit, it is expressly declared, that unless the sum decreed against the principal shall be paid within ten days after the decree, in case no appeal intervene, the court will direct execution immediately to issue of course against all the parties to the stipulation; and in the case of *The Virgin*^(b), the ship having been delivered to the claimant on stipulation, the Supreme Court, proceeding to render such decree as the circuit court ought to have rendered, decreed that the claimant pay into the circuit court the sum at which the ship had been valued, with interest and costs; and unless he should do so within ten days after the circuit court should require the same to be done, that execution should issue upon the stipulation against all the parties thereto. The words “after the said circuit court shall require the same to be done,” are understood to mean only after the

(a) See Appendix; Rules of Admiralty Practice, Rules III., IV.

(b) 8 Peters's R., 538 (11 Curtis's Decis. S. C., 208).

decree of the Supreme Court should be duly entered CHAP. 4
in the circuit court; it being by the process of that court that the decree was to be enforced. The new rules expressly prescribe with respect to bonds or stipulations given in suits *in personam* (being silent as to stipulations in suits *in rem*), that to enforce the final decree against the principal, "summary process of execution may and shall be issued upon such bond or stipulation(a);" and the recent act of March 3, 1847, declares that upon any bond or stipulation taken in pursuance of it, "judgment both against the principal and sureties may be recovered at the time of rendering the decree in the original cause." The particular form in which this enactment is to be carried into effect by the courts, is of course to be determined by judicial interpretation and discretion. Perhaps it may not unreasonably be assumed to have been the intention of the legislature simply so stamp upon these securities the character of admiralty cautions, to be summarily enforced, as such, in the accustomed modes. If so, the enactment may be regarded as equivalent to a direction that execution might be awarded at once, without the formality of a previous suit or notice(b). In directing, in general terms, the summary process of execution to enforce

(a) Appendix; Rules III., IV.

(b) Congress saw fit, in authorizing the *recovery of a judgment*, to use the language of the common law; and had the act related to common law proceedings, it might have been supposed to contemplate the filing of a declaration, and the formal entering up of a judgment; but relating, as it does, exclusively to suits in the admiralty, it does not require, and is not supposed to admit of such a construction.

VOL. 2 bonds and stipulations taken in pursuance of the rules, they are of course obligatory ; but it is left to the courts, nevertheless, by general rules, or by special order, in particular cases, to prescribe the time when the execution shall issue: and the like discretion is supposed to exist with respect to the securities to be taken under the recent act. The practice which has long prevailed in the First Circuit, and which was adopted by the Supreme Court in *The Virgin*, of withholding the execution for the term of ten days, to afford time to the principal to comply with the decree, or, if he shall see fit, to interpose an appeal, seems to be reasonable and just ; and when the decree is rendered in the absence of the party to be affected by it, and, as it may be according to the practice of our courts, and in fact often is, without notice, it would seem to be proper that the court should require it to be served, and that the time allowed for obedience to its requirements should be computed from the date of the service.

The admiralty stipulation in England, as given in Marriott's Formulary(*a*), extends in terms to the heirs and personal representatives of the stipulator, and is said to bind executors and administrators without mention, but not the heir ; and it is held not to affect lands(*b*). But by a rule of the courts for the First Circuit, the stipulators are required to consent in terms, that in case of delinquency, execution shall issue as well against their lands as against their goods and chattels ; and in the consent inserted

(*a*) Marriott's Formulary, 273, *et passim*.

(*b*) 1 Bro. Civ. and Ad. Law, 361, n.

in the stipulations in use in the District Court of the Southern District of New-York, also, *lands* are named. But the *twenty-first* rule of the Rules of Admiralty Practice, which prescribes the form of final process, directs that the writ of execution in the nature of *fiery facias*, shall command the marshal or his deputy to levy the amount thereof of the goods and chattels of the defendant, and is silent as to lands. The omission was doubtless intentional, and should be interpreted as an implied prohibition of an admiralty execution against lands, and consequently of the practice just mentioned of exacting the concert of the stipulator to the issuing of such process.

The English Court of Admiralty is not a court of record, and has, on this account, been held by the courts of common law to be incompetent to take recognizances, which are debts of record entitled to priority of payment, and binding the lands of the cognitor. These incidents were therefore denied to stipulations; but the decisions of the English common law courts, relative to the powers of the court of admiralty, it may now be safely asserted, are not binding on the admiralty courts of this country; and the American courts are undoubtedly left at liberty, in the exercise of a wise discretion, to depart in this instance, as they have done in many others, from the principles and usages which govern the English Court of Admiralty, and to require the stipulator to bind his land, or his heir, or both, as they may deem expedient. Whether they have power to give to the stipulation the remaining

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attribute of a recognizance—that of priority of payment—is a question which, since the power is not likely to be claimed, it is not necessary to discuss.

Stipulation
to indemnify
sureties.

The party being required by the rules of admiralty practice to enter into the stipulation jointly with his sureties, his separate stipulation to indemnify them, becomes of less consequence here than it is in England. Its chief value to the sureties consists in their right to have it enforced at their instance in the admiralty court, by summary execution, instead of being obliged to resort to an action for money paid, in the event of their having been obliged to advance their own money to satisfy the order or decree of the court against their principal. But under our practice, the sureties, by withholding payment, might always oblige the libellant to resort to his execution against the party jointly with themselves; and, if they were able to point out to the marshal any property belonging to their principal, might reasonably expect it to be taken in preference to their own. The rules are silent with regard to this form of stipulation; but as a familiar and well established part of the civil law and general admiralty practice, no American court of admiralty, it is believed, would hesitate, upon the application of the sureties, to direct it to be given.

Juratory
caution or
stipulation.

The last remark relative to stipulations for indemnity, is equally true of the juratory caution or stipulation. To deny the process of the court absolutely to a libellant apparently possessing a just and valid right of action, because he is unable to

find sureties, would be a denial of justice; and to keep a defendant in prison during the pendency of the suit, for a like reason, whatever might be the circumstances of the case in other respects, would be oppressive.

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Preparatory to entering, in the next chapter, upon the consideration of the several forms of process to which the libellant may be entitled, it is necessary briefly to advert to a question which presents itself at the threshold.

Whether the libellant is bound of course to find sureties for costs and expenses.

It has already been stated, that in the English Court of Admiralty, suits are commenced by the issue of process, and that no libel is filed until after the appearance of the adverse party. But it is stated by both CLERKE and BROWNE, that when the defendant or a claimant has appeared and given the bail required of him to abide the decree of the court, etc., his proctor is entitled, in the English Admiralty, to call upon the plaintiff to "libel with sureties," on pain of dismissal with costs; and thereupon the latter is obliged to find sureties (unless he shows himself entitled to be admitted to the juratory caution); the sureties being bound to the prosecution of the suit, to pay costs if the party should be defeated in the cause, and to produce the plaintiff personally as often as he may be called (a). The chief object of this security was to insure the payment, on the part of the libellant, of such costs as might be awarded against him in the event of his failure to maintain his suit. Another object was

(a) Brown's Civ. and Adm. Law, 410, 411; Clarke's Praxis, tit. 11,

VOL. 2. to secure to the party defendant his privilege of requiring the libellant to answer interrogatories from time to time during the progress of the suit(a).

The right to exact this security seems, however, to have been even formerly by no means rigorously enforced in the English admiralty; for CLERKE, who wrote in the reign of Elizabeth, states that "although the laws require that the plaintiff shall put in security by proper fidejussors before he porrects his libel, yet it is little attended to in the courts(b)." And the latest reported cases decided in the High Court of Admiralty, which have reached this country, show that the practice of requiring such security has become entirely obsolete, except in the case of non-resident plaintiffs; and one of these late cases seems moreover to infer, that it was not until 1842 that the practice was revived even with respect to foreign snitors. In the case alluded to, an action had been commenced by the master of a Danish vessel, in behalf of the owners, for damage alleged to have been done to the vessel by a steam tug belonging to the port of Liverpool; and the counsel for the owners of the steam tug moved the court to decree security for the costs of the suit by the master of the Danish vessel, she "being a foreign vessel, and the owners being resident abroad, out of the jurisdiction of the court." The judge, in deciding upon the motion, said, "It is undoubtedly a great hardship upon parties who are resident in this country, to be sued, where there

(a) Clarke's Praxis, tit., 14.

(b) Ibid., tit. 11, n.

is no chance of obtaining an indemnity for the costs, if they should be successful in the result of the suit. Upon this principle I am disposed, unless under particular exceptions, to require that security for the costs should be given in all cases in which the owners are resident out of the jurisdiction of the court. Looking to the practice of other courts, I find this rule to prevail, both in the courts of common law and equity." And he accordingly directed security to be given, in the sum of £100(a). A like application was made in a subsequent case, which was granted, under the circumstances of the case, notwithstanding the objection that it ought to have been made earlier; the court saying, however, that such applications ought to be made at the earliest stage of the proceedings, and that in ordinary cases the court would enforce the rule(b).

The new Rules of Practice are silent with respect to any obligation on the part of the libellant to give this security. It is important, therefore, to ascertain the just claims of the ancient usage, if it ever really existed, of the High Court of Admiralty of England, in this particular, to future respect and observance in our courts; and this is the question alluded to above, as one requiring immediate consideration.

The common law courts have always exercised the power of exacting security for costs from the

(a) *The Sophie*, 1 W. Robinson's R., 326.

(b) *The Volant*, 1 W. Robinson's R., 383. See also *The Minerva*, 1 Robinson's R., 169, 172, where an application for security was refused; Dr. LUSHINGTON saying that he could not make an order of security for costs, until he saw some special reason for so doing.

VOL. 2. plaintiff when justice required it, and especially in the case of non-resident plaintiffs. To this extent a like power ought certainly to be exercised by our courts of admiralty; but beyond this, aside from the authority of precedent, it would be wrong for them to go. The injunctions of the process acts of 1789 and 1792, requiring them to proceed according to the course of the civil law, and according to the principles, rules and usages which belong to the courts of admiralty as contradistinguished from courts of common law, are qualified, as we have seen, by the authority given to them to make, by rule, such "*alterations* and additions" as they "shall deem expedient." This authority was undoubtedly given for the express purpose of enabling the courts to dispense with useless antiquated forms, and, if necessary to substitute others in their stead, better adapted to our social condition and the genius and policy of our institutions, or more conducive to the ends of justice. This has long since been advantageously done to some extent, and the tendency has constantly been to assimilate admiralty proceedings to the more familiar forms of practice in the courts of common law and chancery. The Rules of Admiralty Practice contain, as we have seen, very ample and exact regulations concerning the stipulations required of the defendant or claimant; and if the Supreme Court considered it indispensable in any description of cases that the plaintiff should give security in order to entitle him to the process of the court, or to proceed on his libel, it seems a little extraordinary that the rules contain no decla-

ration to this effect. Not that these rules were designed to determine every point of practice, or to supersede all existing usages; but the omission of any provision relative to a point of so much importance, certainly affords strong presumptive evidence that the security in question was not deemed by the Supreme Court to be indispensable, and that it was intentionally left to the discretion of the district courts.

CHAP. 4

The only instance in which the subject appears to have been brought directly under judicial notice in an American court, is in a case in the District Court of the United States for the District of Maine. It was a libel *in personam*, against the master of a vessel for assault and battery, brought by a young slave who had been sent from Guadaloupe to this country, as a servant to the son of his master. On the return of the process, the counsel for the respondent moved the court for an order requiring the libellant to give the usual stipulation for costs. This motion was denied, on the ground that to grant it would, under the circumstances of the case, be equivalent to a denial of justice. At the hearing, it was again objected to the libellant's right to maintain the action, that he had not acquired a standing in court, on account of the want of such stipulation; and the learned judge, in deciding upon the objection, expressed himself as follows: "By the rules of this court, the respondent may always call for this stipulation, which the libellant is required to give, under the pain of having his libel dismissed; and this rule is in conformity with the ancient practice

VOL. 2. of the admiralty (*Clerke's Praxis*, tit. 11 and 14; 2 *Browne's Civ. and Adm. Law*, 410). The stipulation ordinarily required is that with sureties or fidejussores; but this stipulation is never required of seamen, as it would seldom be in their power to obtain sureties, on account of their poverty; and to exact it of them would be equivalent to a denial of justice. It is said that the ground on which this rule of court is waived in favor of seamen is, that they are a favored class in the admiralty; but the true reason why this rule is not enforced against them, is not because they have a claim to any special favor in this respect, but because they are usually unable to comply with it; and wherever the same reason exists, the same indulgence is, by the ordinary practice of admiralty, shown to others. In all courts proceeding according to the course of the civil law, when a party is poor, and unable to find fidejussores, the court will receive the jussory caution instead of a stipulation with sureties (*Clerke's Praxis*, title 5). The libellant in this case is a servant, a slave in his own country, with no other friend or acquaintance here, than a minor whom he attends in the quality of a servant. To require him to enter into a stipulation for costs with sureties, would be the same thing in effect as saying that he had no right to ask redress in this court. It was on this ground that the motion of the respondent's counsel for a stipulation with sureties was overruled by the court. It is there said, that it was necessary to tender the jussatory caution in order to place himself *rectus in curia*. There is some misunderstanding

between the opposing counsel, whether this tender was made or not. In the view which I take of the case, it is immaterial. The rule requiring a stipulation for costs, is a rule established for the benefit of the opposite party, which he may waive as he may any other right; and the principle applies to this as to other cases *quisque potest renuntiare jure pro se introducto*. It is for the party to move for the security, if he wishes for it; and if he is silent, it is considered as waived (a)."

CHAP. 4

The rule of practice supposed to be referred to by the court in the foregoing extract, declares that "on motion of the defendant, the court will direct the plaintiff (except where the suit is for the United States), on pain of dismissing his libel, to give a stipulation with sureties, to appear from time to time, and abide all interlocutory orders and decrees, as well as the final judgment which may be rendered in the cause, in the district court, or on appeal in the appellate court; and likewise to pay the costs which

Rules of the
dist. courts
in the First
Circuit.

(a) *Polydore v. Prince*, Ware's R., 402. This case involved another very interesting question, which was discussed by the learned judge with his wonted learning and ability. The libellant, as stated in the text, was a *slave* in the island of Guadeloupe; and, as such, was incapable of appearing as a party in a French court of justice. This disability, it was insisted by the counsel for the respondent, according to the acknowledged principles of the *jus gentium*, or at least of national comity followed him into whatever country he might voluntarily go or be carried by his master. But Judge WARE decided, that although the civil incapacities and disqualifications by which a person is affected by the law of his domicile are to be regarded by the courts of other countries as to acts done or rights acquired in the place of his domicile, it is otherwise as to acts done or rights acquired within another jurisdiction, where no such disqualifications exist; and he accordingly held that the libellant was competent to maintain his suit.

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shall be adjudged therein against him, if he fails to support the same(a)."

In the
Southern
District of
New-York.

The rules of the District Court for the Southern District of New-York require the libellant, except in suits for seamen's wages for services on board of American vessels, and in suits by salvors coming into port in possession of the property libelled, to enter into a stipulation with sureties "for costs," in suits *in personam*, in the sum of one hundred dollars, and in suits *in rem*, in the sum of two hundred and fifty dollars(b).

In the
Northern
District of
New-York.

The rules of the District Court for the Northern District of New-York require security to be given in all cases where the libellant is not a resident of the district, except in suits for seamen's wages, and suits for salvage where the salvors have come into port in possession of the property libelled; and the rules of this court also provide that even in the excepted cases, and in all cases where the libellant is a resident of the district, the court will, in its discretion, direct security to be given on motion of the defendant or claimant, on pain of dismissing the libel. And it is by these rules further declared that if, in any case, a libel shall be filed in behalf of a non-resident libellant before the required security for

(a) This is Rule 7 of a body of rules printed in the appendix to Dunlap's Admiralty Practice, entitled "Rules of the Circuit Court of the United States for the First Circuit, in civil causes of admiralty and maritime jurisdiction." They relate, however, not to proceedings on appeal to the circuit court, as their title infers, but to original suits in the district court, and are, in fact, rules of the district courts for the districts composing the First Circuit.

(b) Rules 17, 44, 45.

costs and expenses shall have been given, the pactor shall be liable therefor until such security shall be furnished(a). CHAP. 4

In what light the subject is viewed, and what regulations, if any, have been prescribed in regard to it in the other districts, I am not apprised.

(a) Appendix ; Rules 13, 14, 15, 16.

CHAPTER V.

MESNE PROCESS.

SECTION I.

MESNE PROCESS IN SUITS IN PERSONAM.

SUPPOSING the libel, and, if the rules of the court require it, a stipulation in the proper form, to have been filed, the next subject for consideration is the process which the libellant has thus entitled himself to sue out(a).

By the second of the Rules of Admiralty Practice, it is declared that, "In suits *in personam*, the mesne process may be by a simple warrant of arrest of the person of the defendant, in the nature

(a) At the first session of the Supreme Court of the United States, it was ordered that (unless and until it should be otherwise provided by law) all process of that court should be in the name of the President of the United States; and such has ever since been the style of the process of all the national courts. And by the first section of the process act of 1792 (ch. 36; 1 Stat. at Large, p. 275), it is enacted that "All writs and process issuing from the Supreme or a circuit court, shall bear test of the Chief Justice of the Supreme Court, or (if that office should be vacant) of the associate justice next in precedence; and that all writs and processes issuing from a district court, shall bear test of the judge of such court, or (if that office shall be vacant) of the clerk thereof; which said writs and processes shall be under the seal of the court from whence they issue, and signed by the clerk thereof." This act remains unchanged.

of a *capias*; or by a warrant of arrest of the person of the defendant, with a clause therein, that if he cannot be found, to attach his goods and chattels to the amount sued for, or if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of the garnishees named therein; or, by a simple monition in the nature of a summons to appear and answer to the suit, as the libellant shall, in his libel or information, pray for or elect(*a*).” In determining what form of process he will apply for, the libellant will of course be governed by the supposed exigencies of his case; but he must make his election beforehand, and frame his prayer for process in his libel accordingly. But before proceeding further it is proper to state that in accordance with the policy originally adopted by Congress, and ever since adhered to, with respect to common law proceedings, the first clause of the foregoing rule has; since the first edition of this work, been modified by a subsequent rule so far as to render it conformable to the laws of the several states in which imprisonment for debt had been or should be abolished. The new rule is as follows: “In all suits *in personam* where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the state where an arrest is made upon similar or analogous process issuing from the state courts. And imprisonment for debt, on process issuing out of the

Laws of
the several
states adopt-
ed by rule.

(*a*) Appendix; Rules of Admiralty Practice, Rule 11.

VOL. 2. admiralty court, is abolished in all cases where, by the laws of the state in which the court is held, imprisonment for debt has been or shall be hereafter abolished, upon similar or analogous process issuing from a state court(a)."

To be drawn
and signed
by the clerk.

All process is to be drawn and signed, as well as sealed, by the clerk; and he is bound to see that it is in accordance with the libellant's prayer, provided the prayer be a proper one; and if not, process is to be withheld until the libel is amended.

Test and
return.

Unless the rules of the court from which the process issues otherwise direct, it may be tested of the day on which it is issued, and made returnable on any future day.

Premising that, by the first of the rules prescribed by the Supreme Court, it is directed that "All process shall be served by the marshal or his deputy, or, where he or they are interested, by some discreet and disinterested person appointed by the court," I propose to offer a few observations upon each of the three several forms of process here prescribed, without regard, for the present, to the modifying influence of the new rule above recited.

1. WARRANT TO ARREST THE PERSON OF THE DEFENDANT ALONE.

It may, in general, be said that it is at the option of the libellant to choose either of these forms, as he may see fit; but his right to sue out a warrant of arrest is, by the seventh rule, subject to this

(a) Appendix, Rule 48.

limitation, that "In suits *in personam* no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding five hundred dollars, unless by the special order of the court, upon affidavit or other proper proof, showing the propriety thereof."

CHAP. 5.
Affidavit
and order,
when neces-
sary.

A general order was made by Sir WILLIAM SCOTT, soon after he took his seat in the High Court of Admiralty, "That no warrant of arrest, either of persons or ships, shall issue out of the instance court, without an affidavit of debt being previously made by the person on whose behalf such warrant is prayed, or his lawful attorney(a)." The term "debt" was doubtless used in its general sense of demand, or right of recovery, and includes actions for the recovery of damages, as well as suits for the recovery of specific pecuniary claims; and the term "lawful attorney" is supposed to designate an attorney in fact, under whose direction, in the absence of his principal, the suit is instituted. The rule of the Supreme Court, above recited, though expressed in very different language, probably was not intended, aside from its more limited scope, to bear a construction essentially different. In our courts, no process can issue until after the libel has been filed; and as the libel must necessarily contain a statement of the supposed cause of action, if it is verified by oath(b), that ought, it is presumed, generally to be deemed a sufficient compliance with the rule of the Supreme Court, to entitle the libellant to the order required. When the application

(a) Marriott's Formulary, 30.

(b) *Vide supra*, p. 77 *et seq.*

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Service of
the warrant.

Bail to be
taken.

The defendant is to be arrested in virtue of the warrant, in the usual mode of making arrests of the person; and it is the duty of the marshal to inform him of the cause of the arrest, and to exhibit to him the warrant. The marshal, on making the arrest, as we have seen in the last preceding chapter, is authorized to take bail, with sufficient sureties, from the party arrested, by bond or stipulation, upon condition that he will appear in the suit, and abide by all orders of the court, interlocutory or final in the cause, and pay the money awarded by the final decree rendered therein, in the court to which the process is returnable, or in any appellate court.

The important changes in the antecedent practice introduced by this rule, have already been noticed and explained in treating generally of the admiralty stipulation(a). Notwithstanding the potential form of its direction to the marshal — “*may take bail,*” etc. — this rule is doubtless so far imperative as to impose on him the duty of detaining the defendant in safe custody, or committing him to prison until he procures bail or is liberated by order

(a) *Vide supra*, p. 88.

of the court(a). If the marshal takes bail in the form of a bond (assuming that he has a right to do so), it is his duty to satisfy himself of the sufficiency of the sureties; and for wilful or gross negligence in this respect, he would doubtless be responsible to the libellant(b). If a stipulation is to be taken, the marshal is to go with the defendant, for that purpose, to the court if in session, to the judge at chambers, or to a standing commissioner of the court to take acknowledgments of bail, affidavits and depositions, etc., or to a special commissioner appointed by the court to act in the particular case.

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When a bond is taken, it may properly, it is supposed, as is usual in actions in law, be taken in double the sum for which the action is brought. In the stipulation, it is usual to insert the sum claimed by the libellant, with the addition thereto of a sum (commonly one hundred dollars) sufficient to answer the costs. The security, whether in the one or in the other form, is to the libellant by name. The bond is to be delivered to the marshal, and by him transmitted to the clerk of the court, together with the warrant with his return thereon endorsed.

Amount in which bail is to be taken.

To be in the name of the libellant.

To be transmitted to clerk of the court.

When a stipulation is taken by a commissioner, he is bound to transmit it; but, it is supposed, he may without impropriety deliver it to the marshal

(a) As to the authority of the court in virtue of the twenty-fifth rule, when no bail has been given and no property attached, to liberate the defendant on his giving a stipulation for costs and expenses only, *vide supra*, p. 92 *et seq.*

(b) Clerke's Praxis, tit. 4, where it is said that the officer is liable if the defendant does not appear.

VOL. 2. as a suitable agent for this purpose. In the English admiralty, the commissioner, in addition to his certificate at the foot of the stipulation, that it was "taken and acknowledged" before him, annexes to it a formal and full certificate of the proceeding before him, addressed to the judge of the Court of Admiralty.

Power and duty of the commissioner to take the oath of the sureties to their sufficiency.

The commissioner has authority, and, if there be ground for doubt, it is his duty to require the oath of the sureties to their sufficiency. In the English admiralty one surety is sometimes taken, provided he is worth double the amount of the required sum. When two or more sureties are offered, each of them must be able to justify in the sum for which the stipulation is to be given, or all of them collectively in double the amount. The Rules of Admiralty Practice speak uniformly of *sureties*; but this will probably not be regarded as an implied inhibition, under all circumstances, of the acceptance of one(a).

Whether one surety may be taken.

Marshal's return.

The return of the marshal or his deputy to this form of process, must, of course, be according to the fact: as that the defendant is not found within his district, or that he has arrested him, and has his body here present in custody, or that he has arrested him and taken bail from him with sufficient sureties by bond (or by stipulation, as the fact may be), in due

(a) See Marriott's Formulary, *passim*. In England, the commissioner is expressly authorized by his commission, on taking the stipulation for the defendant or claimant, to release the person or property from arrest; and, in his certificate, he states that he has done so. It is probably done by a formal order, to that effect, to the marshal.

form of law, which bond (or stipulation) is herewith CHAP. 5.
returned.

But it is necessary now to revert, momentarily, to the rule of December Term, 1850, mentioned at the beginning of this chapter.

This rule, it will be observed, extends as well to final as to mesne process. In the districts comprised within the states where imprisonment for debt has been abolished by law, the change introduced by it is highly important. To ascertain the precise extent of this change in any particular district, recourse must be had to the state law. Thus, for example, in the districts of New-York, in which the state statute, after forbidding the arrest of any person in civil action, except as therein prescribed, proceeds to specify the cases in which the defendant may be arrested, the question in any given case in admiralty will be whether it is one of those designated in the act.

It was not, however, I imagine, intended by the new rule to require the courts of admiralty to follow the direction of the state laws regulating the exercise of the right of the plaintiff to hold the defendant to bail. For example: the statute of New-York enjoins it upon the judge, to whom application is made for the required order for the arrest of the defendant, to exact a written promise on the part of the plaintiff, with or without sureties, to pay all costs that may be awarded to the defendant, together with all damages he may sustain by reason of the arrest. Now, although it may be proper for the courts of admiralty to exact the like security of the libellant in the form of an admiralty stipulation—a practice,

VOL. 2. as we have seen in the last chapter, by no means new in a court of admiralty—yet the state law is not supposed to be, by the new rule, rendered obligatory in this respect. The rule simply adopts the principle of partial exemption from arrest, as defined by the laws of the several states where it prevails, leaving the national courts to follow the dictates of their own judgments as to the most suitable modes of carrying it into effect. In the districts where the rule is operative, to warrant the arrest of the defendant, in any case, whether of contract or of tort, there must, of course, be a judge's order, founded on an oath, showing the case to be within the purview of the state law. But, as we have seen, an affidavit and order were previously required as a pre-requisite to the issue of a warrant of arrest for a sum exceeding five hundred dollars, and the effect of the new rule will be to extend this pre-requisite to all cases, without regard to amount, in which, by the state law, the right of arrest exists.

2. WARRANT TO ARREST THE PERSON OF THE DEFENDANT, WITH A CLAUSE, IF HE CANNOT BE FOUND, TO ATTACH HIS GOODS AND CHATTELS; OR, IF NONE CAN BE FOUND, TO ATTACH HIS CREDITS AND EFFECTS IN THE HANDS OF THIRD PERSONS(a).

This, it will be perceived, is a threefold and highly effective form of process. The admissibility of the attachment as an authorized form of civil law and admiralty procedure for the purpose of compelling

(a) This latter clause is denominated a *foreign attachment*; that against the goods and chattels of the defendant, simply an *attachment*.

an appearance by the defendant, or rather, virtually, as a mode of instituting an admiralty suit, when the defendant could not be found, was first established by the Supreme Court of the United States in the case of *Manro v. Almeida*(a), in which its regularity and propriety were vindicated in an elaborate opinion delivered by Mr. Justice JOHNSON(b). It was conceded, however, that according to the civil law

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Authorized
before the
promulga-
tion of the
rule.

(a) 10 Wheaton's R., 473 (6 Curtis's Decis. S. C., 485).

(b) Mr. Justice JOHNSON mentions the remark of an English writer, whom he does not name, that this form of process is no longer in use in England. He doubtless refers to the following passage in Browne's Civ. and Adm. Law (vol. 2, pp. 434, 435), relative to the action *in personam* in the English Court of Admiralty: "Let us, lastly, suppose that the person against whom a warrant has issued cannot be found, or that he lives in a foreign country; here the ancient proceedings of the admiralty court provided an easy and salutary remedy, though, according to HUBERUS, not authorized by the example of the civil law. They were analogous to the proceedings by foreign attachment, under the charters of the cities of London and Dublin. The goods of the party were attached, to compel his appearance. By this means, if a foreigner owed money in England, and any ship of his came into a British harbor, or any goods of his were found in these realms, they were seized by his creditors; and by this means the English creditor had an easy remedy for his debt, and the foreign merchant acquired more credit in England, when it was so easy to find a remedy against him: for this process of attachment of goods went not only against those in the actual possession of himself, his factors or agents, but also against those in the hands of his debtors; since the maxim, taken from Justinian's Code, was *debitor creditoris est debitor creditori creditoris*. This salutary proceeding has in latter times gone into disuse in England, and great is the mischief accruing to commerce from the want of it. It still prevails in many parts of Europe, and gives to foreigners an evident advantage."

It was probably under these views of the great utility of the process of attachment, that the Supreme Court thought proper not only to adopt it, but to increase its efficiency by directing its incorporation, in the first instance, with the warrant of arrest.

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practice, it did not issue as of course, nor in the first instance, but only by order of the court for contumacy after monition and the failure of the defendant to appear; but the Supreme Court, referring to the practice known to have prevailed to some extent at least, in this country, was of opinion that the attachment might be issued simultaneously with the monition, an express order for that purpose having first been obtained. And, although the primary object of the attachment was considered to be to compel the defendant to appear, it was nevertheless held that the District Court might lawfully proceed, without such appearance, to adjudicate upon the rights of the libellant; and having, for sufficient cause shown, made a decree in his favor, might subject the property attached to condemnation and sale, in satisfaction of the decree.

Quere, as to
the effect of
the rule of
December
Term, 1862.

Such is the form of procedure by attachment as indicated by the second rule, and as correctly described, according thereto, in the first edition of this work. Being in itself convenient and adapted to all cases, there was no necessity for inquiring whether the prescribed mode of resort to this remedy was designed, according to the maxim *expressio unius exclusio est alterius*, to forbid the use of other modes sanctioned by previous usage. But the new rule mentioned under the last preceding head may render this a question of considerable importance, though it may not be one of much difficulty; for if the mode prescribed by the second rule is to be taken as exclusive, and if, according to the true interpretation of the new rule, it is to be considered

as forbidding by implication, as the seventh rule does in terms, the issue of the warrant of arrest except in cases where it may be lawfully executed as such, the result will be that the right to resort to an attachment has also become limited to the like extent. But such a consequence can hardly be supposed to have been actually intended, and it may reasonably be expected that the rules in question will, if possible, be so interpreted by the courts as to avoid it. To permit the warrant of arrest still to issue as a mere vehicle for the attachment clause, in a case where the right to arrest the person of the defendant no longer exists, might savor of evasion; but no valid objection is perceived to considering the right to issue an attachment, in connection with a monition(a) which unquestionably existed prior to the promulgation of the rules of admiralty procedure, as still subsisting unimpaired by the second rule.

This decision was pronounced in 1825, and has since furnished the only authoritative rule upon the

(a) Or even alone, when the owner of the property is shown to have absconded or not to be within the district. *Manro v. Almeida*, 10 Wheaton's R., 473; *Clark v. The N. J. Steam Navigation Co.*, 1 Story's R., 513. But in *Wilson v. Pierce* (5 M. Law Rep., 137), decided in the District Court of California, it was held by Judge HOFFMAN, after a full and able review of the authorities on the subject, that the provision contained in the 11th section of the Judiciary Act of 1789, ordaining that no civil suit shall be brought before a circuit or district court of the United States against an inhabitant of the United States by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, embraces suits in admiralty as well as at common law, and forbids the institution of a suit by libel and process of attachment against the property of a person who is a citizen of another state, and at the time domiciled therein.

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How modified by the rules of admiralty practice.

Order for attachment, how obtained.

Process, how executed.

Duty of the marshal as to the goods and chattels of defendant.

subject until the promulgation of the Rules of Admiralty Practice. According to the second rule, already recited, the attachment is not to be issued as a separate writ necessarily preceded or accompanied by a monition, but is to be incorporated, in an alternative form, with a warrant of arrest against the person of the defendant; and it now issues as of course, for sums not exceeding five hundred dollars, a previous order being still necessary when the suit is for a larger sum. This order is to be founded, as we have seen, "upon affidavit or other proper proof showing the propriety thereof;" but as the attachment clause is to be executed only when the defendant cannot be found, and as the seizure of his property is then only substituted in place of a personal arrest, it is presumed, if the libellant shows himself entitled to a warrant of arrest, that he will also be entitled to the attachment clause, if it be his wish to have it inserted. The marshal, in executing the writ, is bound to observe the order therein prescribed, and has no right to arrest the goods and chattels of the defendant when he has it in his power to arrest his person; nor to attach his credits or effects in the hands of granishees, when he can find sufficient goods and chattels in the defendant's own actual or constructive possession.

The rule is supposed to contemplate a general command to the marshal to take the goods and chattels of the defendant without specifying them. The duty of the marshal, under this mandate, is therefore analogous to that of a sheriff under a writ of *fiery facias*, to search out and levy upon the

goods and chattels of the defendant; but the property, in this case, is taken in lieu of the person, for the purpose of compelling the defendant to appear and give bail, or in the event of his failure to do so, to be held as a pledge for the satisfaction of the libellant's debt or damages. It is therefore to be kept safely by the marshal, pending the suit, or until the defendant shall give the required security, and obtain an order for the dissolution of the attachment.

CHAP. 5.

In the case of *Manro v. Almeida*, above cited, it was held, though apparently with some hesitation, not to be indispensably necessary to specify in the writ the particular credits and effects of the defendant to be attached, but that a command, in general terms, to attach his credits and effects in whosoever hands, within the jurisdiction of the court, they might be found, was sufficient. But the second rule, as we have seen, very properly requires the garnishees to be named. It is upon such persons as are named in the process as garnishees only, therefore, that the service is to be made. The term "credits" embraces all debts owing to the defendant. The term "effects" is ordinarily one of comprehensive import, but being here used in contradistinction to "goods and chattels," may be supposed to refer more especially to kinds of property not strictly falling within the scope of the other terms employed, and not properly susceptible of manual seizure; such, for example, as shares in the stock of corporate companies, money in the hands of a sheriff or of an agent, or the like. The

Garnishees
to be named
in the pro-
cess.

What are to
be deemed
credits and
effects.

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Foreign attachment,
how served.

Garnishee
to answer
on oath.

foreign attachment clause, which should contain a monition to the person therein named to show cause on oath why he should not be held to pay over the amount for which he is supposed to be chargeable, to answer the exigencies of the suit, may be properly served by the exhibition of the warrant, and the delivery of a copy of it to the garnishee; or, in case of his absence, by leaving a copy, to be delivered to him, with some suitable person at his usual place of residence or of business. This is the only form in which, in general, the service could well be made, and seems to be the mode contemplated by the *thirty-seventh* rule, by which it is ordained that "In cases of foreign attachment, the garnishee shall be required to answer on oath or solemn affirmation, as to the debts, credits or effects of the defendant in his hands, and to such interrogatories touching the same as may be propounded by the libellant; and if he shall refuse or neglect so to do, the court may award compulsory process *in personam* against him. If he admit any debts, credits or effects, the same shall be held in his hands liable to answer the exigency of the suit." The proper time for the garnishee to answer, is on the return day of the process. The rule, it will be observed, makes no provision for the delivery over to the marshal, or to the court, of any moneys or other property, by the garnishee; nor for any further proceedings against him in case he denies that he owes the defendant, or has any effects belonging to him, in his hands. The foreign attachment was formerly in use in the English

admiralty; and it is stated by CLERKE, that if the garnishee "make oath upon the Holy Evangelists of the truth of his allegations [that he had not any goods or debts belonging to the defendant], he is to be dismissed, and all the acts of the plaintiff are to no purpose. But with this proviso, that if the plaintiff, before the oath is administered, be willing to allege and take upon himself the burthen of proving that the person has goods, or debts, etc., he is admitted to do so; and if he make out his proof, he should recover them with costs(*a*)."

This writer states, also, that the garnishee is required in such case to give security to abide the sentence and pay costs(*b*). Whether the thirty-seventh rule, above recited, leaves to the libellant the privilege of contesting the truth of the garnishee's answer, is a question, like many others, which is not difficult to foresee may arise out of a resort to this form of process, and upon which it would be indiscreet to hazard an opinion.

CHAP. 5.

The marshal is to return, according to the fact, that he has arrested the defendant and has him in custody, or has taken bail, as in the case of a simple warrant of arrest; or that the defendant is not found within his district, and that he has therefore arrested his goods and chattels, to wit [specifying them], and has them in safe custody; or that the defendant is not found, and has no goods and chattels within the district; and that he has therefore attached his credits and effects in the hands of the garnishee

Form of
marshal's
return.

(*a*) *Clerke's Praxis*, tit. 34; *Hall's Adm. Practice*, 71. (*b*) *Ibid.*

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named in the warrant, by showing the warrant and delivering a copy of it to him, or by leaving a copy thereof for him at his usual place of abode with some person of suitable age, he being absent. If there are several garnishees, not partners, the mode of service on each should be stated.

Attachment
to be dis-
solved, on
giving se-
curity.

It may well happen that the defendant, after the arrest of his property, may desire to repossess himself of it, and, for this purpose, may be willing to give the security which would have been required of him, had he been personally arrested. This contingency is provided for by the *fourth* rule, as follows: "In all suits *in personam*, where goods and chattels, or credits and effects are attached under such warrant authorizing the same, the attachment may be dissolved by the order of the court to which the same warrant is returnable, upon the defendant, whose property is so attached, giving a bond or stipulation with sufficient sureties to abide all orders, interlocutory or final, of the court, and pay the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court." An "order of the court" being necessary for the dissolution of the attachment, an application to the court is, of course, necessary for this purpose. It may, however, be made at any time, and should be made by petition, briefly stating the fact of the arrest of the property, either describing it, or referring to the marshal's certificate of the execution of the process, and showing the compliance of the applicant, or his readiness to comply with the conditions prescribed in the rule as to security, and

Application
for this pur-
pose, to be
made by
petition.

naming his sureties. The rule is silent as to the necessity of notice to the plaintiff of the application to dissolve the attachment; and unless the rules of the court to which it is to be made require a notice, the application may, it is supposed, be made *ex parte*; the party producing his sureties before the court, ready to enter into the required bond or stipulation, or offering a bond duly executed, or a stipulation already entered into before a commissioner, and satisfying the court beyond all reasonable doubt of the sufficiency of his sureties. According to the phraseology of the rule, "the attachment may be *dissolved* by order of the court." Probably, under this rule, it is sufficient for the defendant, having obtained the order, to serve a certified copy of it on the marshal; but the more formal and regular practice would be to sue out a writ of supersedeas. Such is the practice of the English Court of Admiralty in analogous cases^(a). The marshal having previously returned the attachment with his certificate of the arrest of the property, and having thus made himself responsible for it, ought strictly to have the like authority to release it, and the like opportunity to make an official return of the manner in which he had disposed of it.

The *tenth* rule contains a provision relative to the sale of perishable property, the terms of which are supposed to be sufficiently comprehensive to embrace property under arrest in virtue of this form of process. It is as follows: "In all cases where any goods or other things are arrested, if the same are

CHAP. 5.

Whether notice of the application is necessary.

Order of the court, how executed.

Supersedeas.

Sale of perishable property.

(a) Marriott's Formulary, 355.

VOL. 2. perishable, or are liable to deterioration, decay or injury, by being detained in custody pending the suit, the court may, upon the application of either party, in its discretion order the same, or so much thereof to be sold, as shall be perishable or liable to depreciation, decay or injury, and the proceeds, or so much thereof as shall be a full security to satisfy the decree, to be brought into court, to abide the event of the suit(a)." The application, it will be seen, may be made by either party; and unless the opposite party is present in court when the petition is presented, a copy of it, with reasonable notice of the application, ought to be served(b).

3. MONITION.

The remaining form of mesne process prescribed by the second rule above recited, is the "simple monition in the nature of a summons to appear and answer to the suit."

The object of the first process in a suit being to bring the defendant under the actual cognizance and power of the court for the purpose of enabling it to dispense justice to the plaintiff, the process, in order to render it effective for this object, must be

(a) The remaining part of this rule relates exclusively to suits *in rem*, and will be noticed in the next section.

(b) The 87th rule of the District Court for the Northern District of New-York contains minute and exact provisions relative to the sale of perishable property in cases of municipal seizure; and by a late rule of that court, these provisions are extended to cases of admiralty jurisdiction arising under the act of February 26, 1845, chap. 20. See Appendix; Rules of Practice of the District Court for the Northern District of New-York, in cases of admiralty jurisdiction.

served. In regard to the forms of process above treated of, there is little room for controversy or doubt as to what constitutes a sufficient service; but with respect to the monition, the question is not so clear. It is a summons, citation or notice(*a*). Its name and its object both imply the necessity of its being brought to the knowledge of the defendant; but the only certain mode of doing this is by a personal service; and the question is whether any, and, if any, what other mode of service is sufficient. Judge BETTS, in his summary of the admiralty practice of the District Court of the Southern District of New-York, lays down the law upon the point as follows: The "citation is served by reading or stating its contents to the defendant and showing it him, when requested. A copy of the citation should also be left with him. A citation may also be served, by leaving a copy at the defendant's usual residence or place of business. It should be delivered to some person, if any is found there, with instructions to give it the party; but when no person competent to receive it is found, the copy should be left so as to afford the greatest probability of its reaching the party, and the return should state the mode of service(*b*).” No authority or rule of court upon the subject is cited by the learned author, and the reader is therefore left to infer that nothing more is intended than to state his own

CHAP. 5.
How served.

(*a*) In form, however, it is a command to the marshal to cite and admonish the defendant to appear and answer, and not a summons addressed to the party.

(*b*) Betts's Adm. Practice, 33.

VOL. 2. apprehension of the law, or, at most, to lay down the actual practice of his own court. In Dunlap's Admiralty Practice, it is said of the special monition which, in addition to the general one, is sometimes used in suits *in rem*, that it is to be served by the delivery of a copy of it, attested by the officer, to the party, or by leaving an attested copy at his usual place of residence, but that personal service should be made if possible(*a*); and he cites as his authority Clerke's Praxis, tit. 21. The passage to which he refers, in fact, sheds little light upon the subject; but it tends rather to show that no simple form of service is sufficient except a personal service. It directs that the officer "shall go to the residence of the party who is sued, and shall cite him personally, if possible; and it proceeds to prescribe as applicable to all cases where a personal service cannot be effected, the mode of service denominated the *citatio viis et modis*; a long and tedious process little in accordance with our notions, and not likely ever to be resorted to in this country. It is virtually a substitute for a personal service in the first instance. If the defendant actually appear during its progress, the object in view is attained; and if he does not, the plaintiff is allowed at the termination of it to proceed in his suit notwithstanding(*b*), and to obtain such decree as he is able to show himself justly

(*a*) Dunlap's Adm. Practice, 135.

(*b*) 2 Bro. Civ. and Ad. Law, 455 - 459. The *citatio viis et modis* is a common law proceeding, and, in the ecclesiastical courts, involves excommunication. It is described by BROWNE in the pages above cited, and by CLERKE, tit. 21, and additions to tit. 21. Hall's Adm. Practice, 44, 45.

entitled to; the reasonable presumption probably being supposed to be that the defendant must by that time have become apprised of the suit, and that his non-appearance is intentional and contumacious. But the mere leaving of a copy at the dwelling-house or usual place of business of the party, in his absence—perhaps from home—is far from being equivalent to the protracted proceedings in which *all ways and means* are publicly resorted to for his notification. The reasonable and proper rule would perhaps be to require a personal service when it could be made, and to admit no light excuse for its omission; and when it cannot be effected, to permit a service by copy; but in the latter case, to require the marshal to state the mode of service, and to hold it valid or otherwise, according to the degree of probability there shall appear to be of its actual receipt by the defendant.

The return of the marshal to the monition must, of course, be according to the fact: as that he has monished and cited the within named C. D. to appear at the time and place, within, for that purpose, mentioned, by exhibiting to him the monition, and delivering to him a copy thereof; or by leaving a copy thereof for him, at his usual place of abode, with a person of suitable age, the within named C. D. being absent.

Form of a
marshal's
return.

SECTION II.

MESNE PROCESS IN SUITS IN REM.

Form of
process and
mode of
service in
the English
admiralty.

The following summary account given by Dr. BROWNE, of the mode of commencing suits *in rem*, in the High Court of Admiralty of England, will serve the purpose of an appropriate introduction to the subject of this section. "When the proceeding is against the ship, the action being entered, and an affidavit of the debt made by the person on whose behalf the warrant is prayed, or by his lawful attorney, process commences by a warrant directed to the marshal of the court, commissioning him to arrest the ship and goods, or both; which warrant contains also a citation to the master of the ship in particular, and all others in general, having, or pretending to have, an interest in the said ship, her tackle, apparel and furniture, or (as the case may be) in the goods, to appear personally on the day, and at a place therein named, to answer and defend in a certain cause, civil and maritime. This warrant is executed by producing the original before the master and crew, and affixing a copy to the mast of the ship: after which, an affidavit must be made of the following tenor, to wit, that the deponent did arrest the ship mentioned in the warrant thereunto annexed, her tackle, apparel and furniture; and that he did cite all persons in general, and those requisite in special, to appear as above; and if the arrest be made abroad, it must be certified under some authentic seal. This warrant and affidavit or certificate are then to be returned; and

if there be any apprehension of the ship's being carried to sea, the sails may be taken on shore, or a custodee put on board(a).”

CHAP. 5.

The practice of the American courts of admiralty, though differing in some respects from that here described, has always been substantially in accordance with it. In some of the courts it has been customary to issue the citation or monition in the form of a separate writ, simultaneously with the warrant of arrest, instead of being incorporated with it. The practice in this country has been, also, not to post up a copy of the process, but a notice containing a fuller statement of the cause of action, framed from the libel, which with us, as we have seen, contrary to the English practice, must be filed before the process can be issued. Our practice, also, is to publish the notice in a newspaper. This form of notice, and this mode of publication in cases of seizure under the collection act of 1799, are expressly enjoined by that act. The enactment referred to is as follows: “All ships or vessels, goods, wares or merchandise, which shall become forfeited in virtue of this act, shall be seized, libelled and prosecuted as aforesaid in the proper court having cognizance thereof; which court shall cause fourteen days’ notice to be given of such seizure and libel, by causing the substance of such libel, with the order of the court thereon, setting forth the time and place appointed for the trial, to be inserted in some newspaper printed near the place of seizure,

Process of
the courts of
the United
States.

(a) 2 Browne's Civ. and Ad. Law, 397, 398.

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and also by posting up the same in the most public manner, for the space of fourteen days, at or near the place of trial(a)."

The posting of the notice, "near the place of trial" (in actual practice, on or near the court-house door), required by this act, has not, as far as I am informed, been followed by our courts, in private suits; but in such cases the English practice has been pursued, of posting the notice on the mast of the ship.

Form of
process and
mode of
service pre-
scribed by
rule.

Having given these explanations, I proceed to notice the ninth rule of the Rules of Admiralty Practice, which is as follows: "In all cases of seizure, and in other suits and proceedings *in rem*, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or other things to be arrested, and the marshal shall thereupon arrest and take the ship, goods or other things into his possession for safe custody; and shall cause public notice thereof, and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the district court shall order, and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.

The exception in the rule, of cases "otherwise provided for by statute," though it is doubtless also

(a) Act of March 2, 1799, ch. 22, § 89; 1 Stat. at Large, 627. In England, forfeitures for the infraction of the revenue and navigation acts are prosecuted in the Court of Exchequer, and are not cognizable in the Court of Admiralty.

prospective, may probably be considered as having a particular reference to the provisions of the act of April 2, 1844, ch. 8, prescribing a summary course of proceeding by the collector, without the aid of judicial process, not exceeding in value the sum of one hundred dollars, seized under the revenue laws. CHAP. 5.

The newspaper in which the publication is to be made, is by the terms of the rule to be designated by the court; and this, it is supposed, may be done either prospectively by a general order having reference to the several localities where arrests of property are likely to be made, or by special order in each case."

The rule is silent, it will be observed, with respect to the length of the notice. The period of fourteen days, prescribed by the statute in cases of municipal seizure, is supposed to have been generally adopted by the courts in private suits; subject, however, to be altered, when justice requires it, by a special order; and it is not unusual to prescribe a shorter time, when it appears that the convenience of one or both of the parties will be promoted, and no hardship be imposed thereby. Period of the notice.

The number of days necessary between the test and return of the process, will of course be determined by the length of the notice required. The time must be sufficient to enable the marshal to complete the publication of the notice, and to bring or transmit to the court his certificate that this has been done. Test and return of process.

The duty of the marshal in executing a warrant of arrest *in rem*, is simple and direct. He is to Mode of execution.

VOL. 2. take the thing—most usually a vessel and her appurtenances—into his custody, and keep it securely, employing an agent for this purpose if necessary, until the further order of the court, or until security be given under the late act of Congress(a). In this latter case, the act does not seem to contemplate any interference on the part of the court, nor any specific act of restoration or delivery of possession by the marshal. The acceptance of the security simply terminates his right to the further custody of the thing.

**Marshal's
return**

The return of the marshal to the warrant will be, that he has arrested the within mentioned _____, and cited all persons having or pretending to have any right, title or interest therein, as he is by the warrant commanded to do. If security should be given under the late act, just above cited, before any arrest has been made, the return of the marshal ought to state that after the warrant came to his hands, and before the same was executed, a bond duly executed, or a stipulation duly taken and acknowledged by A. B. as claimant of the within mentioned _____, and by C. D. as his surety [or C. D. and E. F. as his sureties], for double the amount claimed by the libellant, conditioned to abide and answer the decree of the court in the cause, and duly approved, was delivered to and received by him, as will appear by the said bond or stipulation with the warrant returned. If the like security is given after the arrest, and before the return of the warrant, it may not be necessary,

(a) Act of March 3, 1847. *Vide supra*, p. 99.

but is certainly proper, in addition to the fact of the arrest as above directed, to state also that afterwards, and before the return, such security was given as above directed. The bond or stipulation is, in all cases, to be immediately returned to the court; and if it is not given until after the return of the process, the marshal should endorse his certificate upon it, that it was delivered to and received by him, and is now returned to the court in pursuance of the act in such case made and provided.

If the process be against the ship and her *freight* in the hands of the owners or consignees of the cargo, or against the ship and the proceeds of the cargo, it is to be executed, in respect to the freight or proceeds, in like manner as the attachment clause against the credits and effects of the defendant in a warrant *in personam*(a).

There is another of the rules prescribed by the Supreme Court, which it is proper also to notice in this place. It is the *eighth* rule, and is in the following words: "In all suits *in rem* against a ship, her tackle, sails, apparel, furniture, boats or other appurtenances, if such tackle, sails, apparel, furniture, boats or other appurtenances are in the possession or custody of any third person, the court may, after a due monition to such third person, and a hearing of the cause, if any, why the same should not be delivered over, award and decree that the same be delivered into the custody

CHAP. 5.

Warrant
against
freight, how
executed.Arrest, how
made of
appurte-
nances to
ship, when
in the hands
of third
persons.

(a) *Vide supra*, p. 481.

VOL. 2. of the marshal or other proper officer, if upon the hearing the same is required by law and justice."

Although the process to be first issued under this rule is auxiliary to a suit *in rem*, it is in fact a mere personal monition or citation to him who has the property in his possession or custody, and is to be served in like manner as a monition in a suit *in personam*. If no sufficient cause to the contrary be shown, he will be decreed to deliver it over to the marshal; and if he refuses to do so after the service of the decree, obedience to the decree will be enforced by attachment against his person.

The rule, it will be observed, relates to things appurtenant to the ship, which, being susceptible of easy removal to other places, it was supposed might sometimes be taken, or find their way into the possession of those who, under some mistaken view of their own rights or obligations, or from some other motive, might refuse to allow the marshal peaceably to execute his process; and the design of the rule seems to have been to relieve the marshal from unnecessary responsibility, and especially to guard against any unnecessary resort to force, by pointing out and recommending an easy and peaceful alternative. In such cases the marshal might doubtless lawfully abstain from a forcible arrest, and state the facts of the case in his return; when upon the application of the libellant, founded on such return, the court would direct the monition to issue; or, if he chose not to wait the return day, he might invoke the aid of the court at once on petition.

One of the emergencies which the rule may

possibly have had in view, is that of the marshal finding the property, named in the warrant, in the custody of the law under process from a state court. Cases of this description are not likely to occur often; but as they involve, apparently at least, considerations of some delicacy, it is proper therefore that they should receive a somewhat more particular notice. I shall content myself, however, with little more than a summary reference to the few reported decisions I have met with, in which the possession of a sheriff in virtue of process has been superseded by the arrest of the same property by the marshal in virtue of process *in rem* from a court of admiralty.

CHAP. 5.
Arrest of
property
already in
custody, on
legal pro-
cess.

In the case of *The Flora*(*a*), the ship had been levied upon and taken into custody by the sheriff, in virtue of a writ of *feri facias* issued out of the Court of King's Bench, on a judgment against the owner, in an action of assumpsit for money paid. On the next day the ship was arrested by the deputy marshal of the High Court of Admiralty, acting under a warrant issued from that court, in a suit for mariner's wages, against the ship. In this suit the ship was condemned and sold; and though there was a protracted contest between the owner and the judgment creditor concerning the balance of the proceeds of the sale remaining in the registry after deducting the wages and costs, in the course of which an unsuccessful application was made to the Court of King's Bench, and after a decision on appeal from the judgment of the High Court of

(*a*) 1 Haggard's Adm. R., 208.

VOL. 2. Admiralty to the Court of Delegates, another application was made to the Lord Chancellor for a commission of review, no objection was made to the arrest of the ship by the marshal, and no doubt seems to have been entertained of its regularity and propriety. It is stated in the report, however, that "upon the execution of the admiralty process, there seemed to be an understanding that the vessel should remain in the actual custody and personal possession of the sheriff's officer, and she continued warped and moored alongside a wharf at Deptford," etc.; and the controversy between the owner and his judgment creditor, relative to the surplus, ultimately turned upon the question whether there had been an abandonment of possession by the sheriff, the ship having been at one time temporarily removed across the Thames to another county. The Court of Delegates were clearly of opinion that there had, under the circumstances, been no abandonment by the sheriff. "The sheriff," say the court, "may have yielded to a *prior claim*; but he continued his right as against the *owner*, whatever might have been the effect of an abandonment in favor of another judgment creditor." And the opinion of the court was, that "although the Court of Admiralty cannot enter into the contracts of general creditors, yet it may be bound to take a judgment on record as a debt;" and the balance remaining in the registry was decreed to be paid to the sheriff. In this case, the suit in the admiralty was brought to enforce a maritime lien or privilege, having a clear and incontestible priority over any rights acquired

by the judgment creditor in virtue of his judgment and execution. The admiralty process was the only means by which the lien could be rendered effective; and it seems to have been conceded on all hands that the possession of the sheriff was no impediment to the execution of that process, or to the sale of the ship in pursuance of the decree of the Court of Admiralty, although his right to the surplus proceeds of the sale was recognized as against the owner. Had the suit in the admiralty been brought to enforce any other privileged lien, as that, for example, of a bottomry bond-holder, it would doubtless have drawn after it the same consequences; or if such a creditor had intervened for his interest, or petitioned against the proceeds in the registry, his claims would unquestionably have been allowed in preference to those of the execution creditor.

In the case of *Certain Logs of Mahogany(a)*, in consideration of advances made and responsibilities incurred by the respondent on account of the outward cargo, it was agreed, between the shipper and him, that he should have the control of the cargo, and that the homeward cargo should be shipped and consigned to him for his security and indemnity, which was done. On the arrival of the vessel, the owners gave notice to the respondent that they were ready to deliver the cargo to him, on condition that he would pay or secure the freight due to them on account of it. The respondent declining to do this, the owners landed the cargo and put it into

(a) 2 Sumner's R., 589.

VOL. 2 the possession of a wharfinger as their bailee. The respondent thereupon immediately brought an action of replevin in the state court against the wharfinger; and a few days afterwards, the cargo having, in the meantime, been replevied, the ship-owners filed a libel against it in the district court, to enforce their maritime lien for freight; and the warrant of arrest was executed by the marshal, and the cargo was afterwards delivered to the respondents on bail, according to the course of the admiralty. The right of the libellants thus, by means of admiralty process, to supersede the process of the state court, does not seem to have been questioned, except that the prior pendency of the replevin suit was set up in the answer of the respondent as a defence to the libel, on the ground, as was contended, that the former suit involved the same questions, and was therefore substantially for the same cause of action. In reference to this objection, Mr. Justice STORY, among other things, showing that a plea of a prior *lis pendens* was inapplicable to the case, said: "A suit in a state court by replevin, or by an attachment under process, of the property, can never be admitted to supersede the right of a court of admiralty to proceed by a suit *in rem* to enforce a right against that property, to whomsoever it may belong. The admiralty court does not attempt to enter into any conflict with the state court, as to the just operation of its own process; but it merely asserts a paramount right against all persons whatever, whether claiming above or under that process. No doubt can exist that a ship may be seized under

admiralty process for a forfeiture, notwithstanding a prior replevin or attachment of the ship then pending. The same thing is true as to the lien for seamen's wages or a bottomry bond."

In this case the plaintiff in the writ of replevin, being the consignee of the cargo, and having claims upon it as against the owner, to its full value, may be regarded as its owner, having the general right pertaining to that character to the possession of the property. But, as in the case of *The Flora*, the libellants had a maritime lien upon the property *in specie*, existing independently of any question of title; and this lien they were allowed to assert, by process from the only court competent to enforce it, notwithstanding the prior seizure of the property under process from another court.

In the case of *Poland et al. v. The freight and cargo of the Spartan(a)*, a portion of the cargo was attached by process from the state court, at the suit of certain creditors of the shipper, immediately after the arrival of the vessel in her home port; and, as I understand the report, while the goods were in the custody of the sheriff, admiralty process was sued out against them to enforce a supposed maritime lien. The attaching creditors, without, as far as appears, questioning the regularity or propriety of this proceeding, insisted that, when several creditors were pursuing their right, in different courts, against property, the proper rule, in order to prevent collision, was, to give precedence to those who first laid their hands on the fund. In answer to this

(a) Ware's R., 134, 147.

VOL. 2. objection, Judge WARE said: "This priority might be decisive, if both creditors stood in the same relation to this specific property; but the reason no longer holds when the claim of one of the parties is, in its nature, a privileged claim. The very essence of a privilege is to give the creditor a preference over the general creditors of the debtor; and if such be the claim of the seamen, the attachment only created a lien on the property subject to such prior incumbrance. It can only extend to the whole right of the owner, and that was to hold the property after discharging the lien."

The only remaining case I have met with, tending directly to reflect light upon the point under consideration, is that of *The Robert Fulton*(a). In that case, numerous material-men had claims to a large amount against the ship for labor and materials furnished in the port of New-York. Two of them had caused the ship to be arrested by the sheriff, on a warrant of attachment issued by the first judge of the Court of Common Pleas of the city and county of New-York, in pursuance of the statute of the state giving a lien in favor of material-men, and authorizing this mode of proceeding.

The next day after the arrest two other persons, having like claims, filed a libel against the ship in the District Court of the United States, on which a warrant of arrest was issued to the marshal, and returned executed. The admiralty suit proceeded in the district court, and a final decree was made therein. It was then brought by appeal before the

(a) Paine's R., 620.

circuit court, and Mr. Justice THOMPSON, in delivering his opinion, expressed himself as follows: "The case, as it now appears, is certainly involved in some difficulty; and I am unable to account for the returns which have been made by the sheriff and the marshal, upon the process issued to them respectively. If the sheriff, by virtue of his warrant, had attached and taken into his possession the ship, on the tenth of May, as he has returned, it is no way explained how the marshal could the day after seize and take into his possession the same vessel, and proceed to sell the same under the order of the district court. The right and authority of the sheriff, under the process directed to him, to attach the vessel, cannot be questioned; and if he had so done, the ship was in the custody of the law, and the marshal could certainly have had no authority to take it out of the possession of the sheriff. If he found the vessel held by the sheriff under his attachment, he should have so returned to the district court upon his process; and all further proceedings of the district court would have been arrested, and no conflict of jurisdiction could have arisen."

Here was the case of different creditors, having liens in all respects alike, seeking almost simultaneously to enforce them by means of process *in rem* from different tribunals, each having jurisdiction for this purpose over the subject to which the liens attached, and (aside from the difficulty which the state court might have to encounter on account of the want of any explicit provision in the state law, for the execution of its judgment) each being com-

VOL. 2. . petent to afford redress to its own particular suitors. But in other respects there was a wide disparity between the powers possessed by the two courts respectively; for while those of the state court were limited to the claims of the parties by whom the proceeding had been instituted, those of the district court, as a court of admiralty, embraced all other persons having similar claims who might choose to intervene for their interest at any stage of the suit, before the final distribution of the proceeds of the ship in the event of its being sold. If, therefore, as Mr. Justice THOMPSON supposed, it was the duty of the marshal, instead of executing the warrant of arrest which has been directed to him, simply to return it with his certificate of the fact that he found the ship in the custody of the sheriff; if, by such a return, "all further proceedings of the district court would have been arrested;" and if, as the learned judge also seemed to suppose, the two suitors in the state court, by electing to resort to it for redress, had thereby acquired a prior right to satisfaction over the numerous other material-men having equal claims to redress, justice would seem to require, either that the state courts should be empowered to proceed according to the principles and usages which govern courts of admiralty in like cases, or that they should be relieved altogether from the duty of enforcing the lien given by the state law. It will be seen, however, that there is no necessary conflict between the opinion expressed by Mr. Justice THOMPSON, and the principles which were applied in *The Flora*, and in the case before Mr.

Justice Story. In these cases the powers of the admiralty had been put in requisition for the enforcement of rights unquestionably paramount to those asserted in the common law courts, and in no other respect inconsistent with them. The admiralty process had been resorted to, not for the purpose of controverting these rights of the adverse parties, which it was the province of the courts of law to protect, but for the purpose of enforcing specific claims against the property concerned, which adhered to it wherever it might be found, and to whomsoever it might belong. But it is only by obtaining the possession and control of the thing to which the lien attaches, that a court of admiralty can give effect to such claims, and this it is their peculiar province to do. The duty implies the power requisite to its performance.

There is still another of the rules prescribed by the Supreme Court, to which it seems proper here to advert. The thirty-eighth of these rules provides that "In cases of mariner's wages, or bottomry, or salvage, or other proceedings *in rem*, where the freight or other proceeds of property are attached to, or are bound by the suit, which are in the hands or possession of any person, the court may, upon due application by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit, and, if no sufficient cause be shown, the court may order the same to be brought into court to answer the exigency of the suit, and,

Freight or the proceeds of property bound by or attached to the suit, may be brought into court.

VOL. 2. upon failure of the party to comply with the order, may award an attachment or other compulsory process to compel obedience thereto."

To those not familiar with admiralty jurisprudence, this rule may not be altogether intelligible; but it is not supposed to have been intended to introduce any new, or essentially to modify any existing form of procedure. Maritime privileges or liens are not restricted to the particular thing to which they originally attached, but adhere to and may be enforced against its proceeds. There may be ground to apprehend that these will become dissipated, or that the person in whose hands they may happen to be may become insolvent. It may on this account be the interest both of the libellant and of the claimant to have such proceeds brought into court; and this is equally true of freight in the hands of the shipper or consignee, when that is the fund out of which payment is sought. There are instances in which the freight or proceeds "are bound by the suit." It often happens, moreover, that the same thing is subject to several coexistent liens; and where an admiralty suit is resorted to for the enforcement of any one of them, all other persons having similar liens are entitled to intervene for the purpose of obtaining satisfaction; but the property originally arrested may be insufficient for this purpose, and it may be necessary to bring under the power of the court "freight, or other proceeds of property, *attached* to the suit." Justice to the libellant, as well as, at other times, to those who intervene for their interest, may require this to be

done; for it may happen that their claims are of a nature entitling them to priority over his. CHAP. 5.

It is proper to add, that the form of proceeding specified in this rule is resorted to for the enforcement of a final decree, when it is to be satisfied out of freight or proceeds. Thus in a case in the English admiralty, where three bottomry bonds had been given, one on the ship and freight, and two on the ship, freight and cargo, the court, in pronouncing judgment in favor of the bondholders, decreed "a monition against the several owners of the cargo, to bring in their proportions of the freight and accounts of the value of their goods(a)." Rule applicable also to final process.

The proper mode of "requiring the party charged to appear and show cause," in all cases, is by decreeing a monition to that effect(b). How enforced.

One of the powers exercised by courts of admiralty, in proceedings *in rem*, is that of decreeing a sale, *pendente lite*, of the thing proceeded against, when from its nature or condition it is likely to become worthless or of greatly diminished value, if kept under arrest until the termination of the suit; and vessels have always been considered to be subject to this power. The process in virtue of which such sales are made, is a warrant of sale; and as it is issued in pursuance of an interlocutory order of the court, it properly falls under the denomination of mesne process. This power in regard to perishable goods, is declared by the *tenth* rule as follows: "In Sale, pendent lite, of perishable goods, and of vessels.

(a) *The Radamanthe*, 1 Dodson's R., 201, 209.

(b) See *Sheppard v. Taylor*, 5 Peters's R., 675 (9 Curtis's Decis. S. C., 531).

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all cases where any goods or other things are arrested, if the same are perishable, or are liable to deterioration, decay or injury, by being detained in custody pending the suit, the court may, upon the application of either party, in its discretion order the same, or so much thereof to be sold, as shall be perishable or liable to depreciation, decay or injury, and the proceeds, or so much thereof as shall be a full security to satisfy the decree, to be brought into court, to abide the event of the suit."

The sale, *pendente lite*, of property seized and prosecuted in behalf of the United States for infractions of the revenue laws is expressly provided for by an act of Congress passed April 5, 1832(a). The rule was unnecessary, therefore, for this purpose. The cases most likely to call for its application, in this form of action, are those of salvage.

The tenth rule does not appear to have been intended to embrace *vessels*; but this species of property is separately provided for by the next succeeding rule, as follows: "In like manner, where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him upon a due appraisement to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation with sureties as aforesaid; and if the claimant shall decline any such application; then the court may in its discretion, upon the application of either party, upon due

Sale of
ships, *pendente lite*.

(a) 4 Stat. at Large, ch. 66.

cause shown, order a sale of such ship, and the proceeds thereof to be brought into court, or otherwise disposed of as it may deem most for the benefit of all concerned.” CHAP. 5.

It will be seen that ships are subject to the power of sale without reference to their particular condition. This distinction is in accordance with long established usage, although the proceeding for the purpose of obtaining the order or decree of sale is commenced in the English admiralty by what is denominated a perishable monition. All vessels are in fact subject to constant deterioration by time, and it is moreover for the interests of commerce that they should be actively employed. “Ships,” it is said, “are made to plough the ocean, and not to rot at the dock.”

SECTION III.

PROCESS IN REM AND IN PERSONAM.

When the right of action is against the master as well as against the ship, a suit in the admiralty may, in some cases, be maintained jointly against both. It seems to be a familiar practice in the High Court of Admiralty of England, to proceed in this form for the recovery of seamen's wages; and by the Rules of Practice in cases of admiralty and maritime jurisdiction, it is declared that for mariners' wages, for pilotage, and for damage by collision, the libellant may proceed against the ship and master(a).

(a) See Appendix; Rules XIII., XIV., XV.

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In one of the precedents given in Marriott's Formulary, the warrant of arrest against the ship contains a further command to arrest also the master(a).

To be by
warrant
of arrest *in*
personam.

The usual practice in the English High Court of Admiralty, as described by BROWNE, is, as we have seen(b), to insert in the monition which accompanies the warrant of arrest, the name of the master, and to direct the marshal to summon him in particular; although the precedent given in Marriott's Formulary of a warrant against the ship, when the suit is against that alone, contains no command to cite the master specially, but only the general one to cite "all persons in general(c)." The form mentioned by BROWNE is, however, in use in this country, especially in suits for seamen's wages; and sometimes there is a special citation to the owners also. But in speaking of this practice, the learned judge of the United States for the District of Maine justly observes: "Yet the master does not become technically a party in the cause, but by appearing, answering, and taking upon himself the defence. It is sometimes said, in a loose sense, that all the world are parties to a libel *in rem*; but by this general language, nothing more is meant than that all who have an interest in the thing may make themselves parties by filing their claims, and are therefore bound by the decree so far as they have an interest in the thing. None, however, are parties,

(a) Marriott's Formulary, 328.

(b) *Vide supra*, p. 150.

(c) Marriott's Formulary, 326.

in the proper sense of the word, but those who make themselves such(a).”

CHAP. 5.

It is not to be inferred, however, from what is here said, that a suit *in rem* and *in personam* cannot be instituted without process of arrest against the person. A suit against the person alone may be prosecuted, as we have seen, by a simple monition; and no reason is perceived why this form of process may not also be used in conjunction with process *in rem*; but the intention of the libellant to proceed *in personam*, as well as *in rem*, should be unequivocally evinced by a prayer in the libel, of process, and of a decree against the party to be made a defendant, and by the issue and service of a separate monition citing him to appear and answer the libellant. Such, indeed, seems to have been the form of proceeding in a late case in the District Court of the United States for the Eastern District of Louisiana, which was finally decided in the Supreme Court(b).

Warrant of arrest *in rem*, united with a monition.

I have ventured, in the last preceding chapter(c), incidentally to suggest, that when, in a suit commenced in this form, security is given, pursuant to the act of March 3, 1847, the process, by an equitable construction of the act, might properly be held to be superseded, as well with respect to the master as the vessel.

In accordance with established practice, and, indeed, with what the nature of the case obviously

Process in petitory and possessory suits, etc.,

(a) *The William Harris*, Ware's R., 367, 370. See also *The Hope*, 1 W. Robinson's R., 154; *The Volant*, id., 383.

(b) *Waring et al. v. Clarke*, 5 Howard's R., 411 (1 Curtis's Decis. S. C., 456).

(c) *Supra*, p. 104.

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to be by
warrant of
arrest and
monition.

requires, it is by the *twentieth* rule also declared, that "In all petitory or possessory suits between part-owners or adverse proprietors, or by the owners of a ship, or a majority thereof, against the master of a ship, for the ascertainment of the title and [for the] delivery of the possession, or for the possession only, or by one or more part-owners against the others, to obtain security for the return of the ship from any voyage undertaken without their consent; or by one or more part-owners, to obtain possession of the ship for any voyage, upon giving security for the safe return thereof, the process shall be by an arrest of the ship, and by monition to the adverse party or parties to appear and make answer to the suit." The process, in these cases, it will be seen, is a warrant of arrest, united with a special monition or citation to the adverse parties.

Precedents for the various forms of process treated of in this chapter, are given in the appendix.

CHAPTER. VI.

NON-APPEARANCE—TAKING LIBEL PRO CONFESSO.

SECTION I.

OF THE NON-APPEARANCE OF THE LIBELLANT.

THE practice of our courts, especially in suits *in rem*, as regulated by established usage and by the rules recently promulgated by the Supreme Court, at this stage of a suit in admiralty, differs widely from that of the English High Court of Admiralty. Minutely to point out all these differences, would not only lead to unnecessary prolixity, but would tend rather to perplex than to edify. It is not proposed, therefore, to make any other than such occasional references to the English forms of procedure, as seem necessary to the more ready and exact comprehension of the technical phraseology pertaining to the subject, not unfrequently met with in the reports of English decisions, and which might otherwise prove an impediment or stumbling-block in the path of the uninitiated reader.

Upon the return day of the process, supposing it to have been duly executed and returned, it is incumbent on the parties, for the purpose of main-

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Rule pre-
scribed by
the Supreme
Court in
case of
default.

Libellant to
be called.

taining their respective rights, in person(a), or by their advocates, to appear in court. It may happen that the libellant fails to appear; and the provision made by the rules prescribed by the Supreme Court of the United States for such a contingency, as well as for any subsequent delinquency of a like nature on the part of the libellant, is as follows: "If, in any admiralty suit, the libellant shall not appear and prosecute his suit according to the course and orders of the court, he shall be deemed in default and contumacy; and the court may, upon the application of the defendant, pronounce the suit to be deserted, and the same may be dismissed with costs." It is the uniform usage of the English High Court of Admiralty, in all "proceedings for defaults," to require the delinquent party to be publicly called, before taking any step "*in pœnam*" against him; and such, it is presumed, is the practice of all the American courts of admiralty. The libellant is therefore to be first called(b); and then, upon his

(a) By the thirty-fifth section of the Judiciary Act of September 26, 1789, ch. 20, § 35 (1 Statutes at Large, 92), it is enacted that "In all the courts of the United States, the parties may plead and manage their own causes personally, or by the assistance of such counsel and attorneys-at-law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein."

(b) The formula for this purpose, in the District Court for the Northern District of New-York, is as follows: "A. B., come forth and prosecute your suit against C. D. [or against the ship, brig, schooner, sloop, steamboat, propeller, etc., as the case may be], wherein the process is returnable here this day, or the same will be pronounced deserted, and be dismissed with costs."

It may not be amiss for the author, in order to guard against the possible imputation of arrogance in referring specifically to the usages of the district court for this district, to seize this occasion to remind

making default, the provisions of the rule are to be enforced against him, unless the court shall think proper to afford him a further opportunity, by assigning a future day for his appearance.

CLERKE, after giving the form of the petition (a) of the defendant "to be dismissed with costs, and that his bail-bond be decreed to be returned to him," by reason of the non-appearance of the plaintiff,

the learned reader that the forms of procedure treated of in this work are of recent introduction in this court, and that the practitioners therein have not, therefore, until very lately, had any sufficient motive for acquainting themselves with these forms; and to add, also, that the author's strongest impulse to undertake and prosecute this task, arose from his desire in some degree to assist the legal gentlemen of his own particular district in acquiring the requisite information to enable them to conduct suits in the admiralty with safety to their clients and satisfactorily to themselves.

(a) *Clerke's Praxis*, tit. 10. CLERKE was a proctor, and also registrar of the Court of Arches during the reign of Elizabeth; and at the time he wrote his *Praxis Suprema Curie Admiralitatis*, it appears that there were certain established forms for all oral motions or "petitions" addressed to the Court of Admiralty; and, although some of them sound quaintly, especially to an American ear, at the present day, one cannot fail to be struck with their aptitude and terseness. The petition of the defendant's proctor referred to in the text (as translated by Mr. HALL), is as follows: "I allege that M. here present in court, was and is arrested according to the warrant or mandate which was issued from this court, and that he has given bail for his appearance here this day, to answer the complaint of N. in a certain civil and maritime cause. But that the said N., the plaintiff, neither appears in person nor by his proctor, and neglects to prosecute his cause; and, moreover, that my client is ready to produce proper and sufficient securities to respond to the plaintiff in the said action by him commenced, according to the provisions of the law and the rules of court. Wherefore, I pray that my client may be hence dismissed with costs, and that his bail-bond may be decreed to be returned to him or be canceled." Hall's Adm. Practice, 26.

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Further
time for
appearance
not allowed,
unless, etc.

describes the proceeding thereon, as follows: "Then the judge shall cause the plaintiff to be publicly called by the marshal of the court; and in default of his personal appearance, or by his proctor, and on account of his utter negligence to prosecute his suit, the judge, in his discretion, may pass such a decree as has been prayed on the part of the defendant, and condemn the plaintiff in costs, or that he shall not be heard at any future day, unless the defendant's costs are discharged, or he may grant a continuance of the cause until some future court day, and then decree as above; or he may decree that the plaintiff be called at a future day, under the penalty of being finally dismissed with costs, which is the more usual course." But it is not supposed to be the practice of any of our courts to grant such indulgences, except under special circumstances furnishing ground for the conclusion that the libellant intended to appear, but was prevented by misapprehension or casualty; and if further time is allowed, it may be supposed that it will always be until some particular day designated for that purpose, so that the defendant may know when he is again required to appear, and only on payment of costs. CLERKE very properly advises the defendant, if he has his bail in court, and believes that the plaintiff will appear and prosecute his suit on the future day assigned, "to enter his security at once, lest he might not have them ready on the day appointed for the plaintiff's appearance, and his bail-bond should be decreed to be forfeited."

SECTION II.

OF THE NON-APPEARANCE OF THE DEFENDANT IN AN ACTION IN PERSONAM, ON THE RETURN DAY OF THE MESNE PROCESS.

Having in the last section stated the legal effect of the non-appearance of the libellant on the return day of the mesne process, which, in general, is the simple dismissal of his suit with costs — leaving him, however, at liberty to institute a new suit — it is proposed in this and the following section to point out the more important and decisive consequences of a similar default on the part of the defendant in an action *in personam*, or of any claimant in a suit *in rem*: premising only the general applicability in this case, also, of what was said in the last section, of the allowance of further time to the libellant, upon his failure to appear, under circumstances coming to the knowledge of the court, which warrant the presumption that an appearance was intended.

Allowance
of further
time to
answer.

Whether the process was a simple warrant of arrest, or a warrant of arrest with a clause of attachment therein against the goods and chattels of the defendant, and for want thereof, his credits and effects in the hands of garnishees; or a simple monition to appear and answer to the libel; if the process be returned duly executed, the proceedings thereon are the same. The advocate of the libellant, after reading or stating the substance of the libel, moves that the defendant be called(*a*);

Defendant
in suit *in
personam*,
to be called.

(*a*) Clerke's Praxis, tit. 9. The form of this call in use in the District Court of the United States for the Northern District of New-

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scribed by
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and the rights and liabilities of the parties, arising from his failure to appear and answer, are declared and regulated by the following rule: "If the defendant shall omit or refuse to make due answer to the libel upon the return day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default, and thereupon the libel shall be adjudged to be taken *pro confesso* against him, and the court shall proceed to hear the same *ex parte*, and shall adjudge therein as to law and justice shall appertain; but the court may in its discretion set aside the default, and, upon the application of the defendant, admit him to make answer to the libel at any time before the final hearing and decree, upon his payment of all the costs of the suit up to the time of granting leave therefor."

One order
only re-
quired to be
entered.

This rule is not supposed to contemplate the necessary intervention of any period of time between the entry of the defendant's default, and that of the order to take the libel *pro confesso*; nor, indeed, is it supposed to be necessary to enter more than one order for these purposes. No objection is perceived, moreover, to incorporating in this order, the further order, when the case is such as to require one, directing a reference to the clerk,

York, in a suit *in personam*, is as follows: "C. D., come forth and answer the libel of A. B., which has just been read (or, indifferently, the process whereon is returnable here this day), on pain of being pronounced in contumacy and default, and of having the libel adjudged to be taken *pro confesso* against you."

or a commissioner(a). The provision of the rule CHAP. 4.
relative to the setting aside of the "default" may, Order may
be set aside.

(a) The order may be in the following form :

At a Special Session of the District Court of the United
States of America, for the District of ,
held at in the said District, on the
day of in the year of our Lord .

PRESENT : Esquire, Judge.

A. B. }
v. }
C. D. }

The mesne process returnable this day, in this cause, having been returned duly executed; and this defendant, although publicly called, having omitted and altogether failed to appear and make due answer to the libel filed in this cause, the court, on motion of Mr. , advocate for the libellant, doth pronounce him, the said defendant, to be in contumacy and default, and doth order and adjudge that the libel filed in this cause be, and the same hereby is, taken *pro confesso* against him.

The like where further time has been allowed, to the defendant to answer : see next chapter.

This day having been assigned by an order of the court made in this cause, on the day of , for the defendant to answer the libel filed therein; and the said defendant, although publicly called, having omitted and altogether failed to make due answer to the same, the court, on motion, etc., *as in the last form.*

If there is an order of reference to the clerk or a commissioner, which, according to the suggestion in the text, is to be embodied in either of the foregoing orders, then add :

And it is further ordered that it be referred to the clerk (or to G. H. residing at , who is hereby appointed a commissioner for that purpose), to compute the amount due to the libellant on account of his services as a mariner on board the ship (or for materials or supplies furnished, or for labor performed in repairing or building, or in fitting out the ship , or due on the charter-party, or the bottomry bond, etc., as the case may be), mentioned in the libel, and report thereon with all convenient speed.

It may not be amiss here, also, to subjoin a form for the report, which may be as follows :

practice in chancery to treat the order to take a bill *pro confesso* as a mere order, subject to be opened or vacated at the instance of the defendant, upon any grounds sufficient to excuse his default; the DECREE *pro confesso* being however, in this respect, precisely like any other final decree. The rule moreover authorizes the setting aside of the default, "at any time before the final hearing and decree."

But in strictness the court is not bound to defer the final hearing and decree, out of any indulgence to the defendant; and it sometimes happens, as we shall presently see, that it is unnecessary to do so for any purpose of substantial justice. But to proceed, at once, to the actual entry of the final decree, and thus to preclude the defendant from availing himself of this provision in his favor, would be rigorous, and might subject him to hardship. Few cases, however, properly admit of such summary dispatch; and it is presumed to be the practice of all our courts, in general, to withhold the final decree for a few days, even in such cases(a).

Court may proceed without delay to final hearing;

but this is not usual.

Or,

One bottomry bond, dated [etc., describing it], - - - - \$
Interest thereon from to , being year
month and days, at per centum per annum, is \$
Amount due libellant, Dec. 18, 1847 [or as the case may be], \$

These forms, it will be seen, are adapted to cases of liquidated damages. Where witnesses or the parties are to be examined, and the evidence or the commissioner's opinion, or both, are to be reported, or where there is a special reference of some particular subject of inquiry, the order of reference and the report are, of course, to be varied accordingly.

(a) Another rule [the 40th] authorizes the court to rescind a decree by default, and to grant a rehearing, within ten days after the

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vacate order
to take libel
pro confesso.

Not to be
granted of
course.

Final hear-
ing neces-
sary.

It may be necessary for the defendant, in order to avail himself of the relief provided by the above mentioned rule, to make an *ex parte* application for this purpose. If this should be done, the court would, of course, take care to guard against surprise, by requiring actual notice to the proctor for the libellant, and, if necessary, abstaining from further action against the defendant in the mean time. The application is addressed to the sound discretion of the court, and is by no means to be granted of course. It was said by Lord ELDON, in a case in equity before him, that "After an order to take the bill *pro confesso* has been obtained, the court will at least see the answer you propose to put in (a)." No court will deprive a plaintiff of an advantage which he has fairly obtained, for the purpose of indulging the defendant in the gratification of a litigious spirit, or to enable him to avail himself of an unconscientious defence; and it would be especially inconsistent with the principles by which courts of admiralty profess to be governed, to do so. It may be supposed, therefore, that our courts would require some evidence of a meritorious defence, either by enforcing the rule laid down by Lord ELDON, or by exacting, at least, an affidavit of merits.

The rule, it will be remarked, makes no distinction between the case of the defendant's non-appearance and that of his appearing and omitting

entry of the decree, on terms. This rule will be the subject of comment in the sequel.

(a) *Herne v. Ogilvie*, 11 Vesey, 77.

or refusing to make due answer to the libel. In CHAP. 6. neither case, therefore, is the libellant allowed, in the language of the Court of Chancery, to take "such decree as he can abide by;" but the court is to "proceed to hear the cause *ex parte*, and judge therein as to law and justice shall appertain."

If it appears on the face of the libel that the Libel may be dismissed. case is not within the jurisdiction of the court; or if it appears in like manner or from the evidence adduced by the libellant, that there is no just ground for a decree against the defendant, the libel will be dismissed notwithstanding the defendant's default. And so where there are two defendants having a joint interest, against one of whom the libel is taken *pro confesso*, and the other appears and answers, and disproves the libellant's case, the libel will be dismissed as to both(a).

It will be recollected that the libellant has a right Right of libellant to propound interrogatories. to propound interrogatories to the defendant, and that the latter is bound to answer them. It is not likely to be often necessary for the libellant, where the defendant offers no resistance to his claim, to insist upon this right; but if a case should occur where justice to the libellant should demand it, the court would doubtless require the defendant to answer, and, if necessary, enforce its order by the summary process of attachment.

The forms of procedure in the admiralty bear, in most respects, a much stronger resemblance to those of the Court of Chancery than to those pursued by

(a) See *Clason v. Morris* in error, 10 Johnson's R., 534.

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the courts of common law ; although the reverse of this is true of the nature of the demands cognizable in the admiralty, of which, indeed, the common law courts possess a concurrent jurisdiction.

Amount,
how ascer-
tained.

The accustomed and well known modes by which common law courts ascertain the sum which the plaintiff is entitled to recover under an interlocutory judgment by default, is by the report of an officer of the court (a master, in the King's Bench ; the clerk, in New-York), on a reference to him for that purpose, in cases where little or nothing more than mere arithmetical computation is required ; and by the verdict of a jury on a writ of inquiry, in other cases. But the reference or inquest being merely for the purpose of informing the conscience of the court, the court itself, it is said, may, in all cases, if it pleases, assess the damages, and thereupon give final judgment^(a). In courts of admiralty, there being no jury, it is often the indispensable duty of the court to do this. When the amount to be awarded to the libellant is altogether unliquidated, and the circumstances of the transaction out of which the suit arose require to be ascertained by the testimony of witnesses, the task of first carefully weighing the evidence for the purpose of ascertaining the facts, and, when ascertained, of applying to them sound principles of law and justice, ought in general to be performed exclusively by the judge in person. Of this description are suits for salvage, all suits for marine tort, whether to person or property (except

In what
cases by the
court.

(a) See 2 Archbold's Practice, 20.

in very glaring and palpable cases, where the only question to be determined is the value of the property destroyed), and, generally speaking, petitory and possessory suits. What is here said of the duty of the judge, must, however, be taken with one important qualification, specified in one of the new rules. It ordains that "In cases where the court shall deem it expedient or necessary for the purposes of justice, the court may refer any matters arising in the progress of the suit to one or more commissioners to be appointed by the court to hear the parties, and make report therein; and such commissioner or commissioners shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery, in references to them, including the power to administer oaths to and examine the parties and witnesses touching the premises(a)." This rule may be supposed to have been intended to subserve two purposes: the one, the more speedy dispatch of business, by preventing delays in court, for want of time; the other, the saving of expense to parties when the witnesses reside at a distance remote from the court.

CHAP. 6.

What matters may be referred to a commissioner.

The power of reference given by the rule, it will be seen, is very comprehensive. All questions of fact, even those embracing the whole merits of the case, may, in a suit in chancery, it is supposed, be referred to a master; and he may be required, according to the exigencies of the case, to report the evidence *in extenso* with his opinion thereon, or

(a) See Appendix; Rule XLIV.

VOL. 2. simply his opinion, or his opinion with his reasons therefor; or, in cases depending on mere computation, only the result. It has long been a familiar practice in the High Court of Admiralty of England, to refer matters of fact depending on commercial usage, or requiring mercantile knowledge or skill, to the "registrar and merchants," and to require their report and opinion thereon; and such also has been the practice of our own courts(a). But to whatever extent beyond this the new rule confers the power of reference, it is supposed to be an innovation upon the antecedent practice as generally understood.

(a) Analogous to this practice is that most convenient and useful one prevailing in the English High Court of Admiralty, of calling two "masters of the Trinity House" into court, as is almost uniformly done in cases of collision, to hear the evidence, and, at its close, to give their opinion thereon. (See the Reports of Cases in the English Admiralty, *passim*.) These masters or "Elder Brethren," of the Trinity House are sometimes called *assessors*, as referees also sometimes are in our courts. It is only upon the question, which vessel, if either, was in fault, that their opinion is required; and although I have met with no case in which their opinion was disregarded, yet it is not, like the verdict of a jury, binding on the court. (*The Speed*, 2 Wm. Robinson's R., 225.) The question of damages in cases of collision seems to be invariably referred to the registrar and merchants. In this country, nautical men are called as witnesses for this purpose. But in references under the rule, experts may be selected as commissioners; and in cases not only of collision, but of suits on contracts of affreightment depending on questions of seaworthiness or of nautical usage or skill, such references may be found conducive to justice. Instead of the conflicting opinions of witnesses selected by the parties, and testifying under the influence of prejudice or of impressions derived from partial representations, the court might thus expect to obtain the deliberate and impartial judgments of men acting under a sense of responsibility analogous to that which pertains to the judicial office.

When after an order to take the libel *pro confesso*, a cause requiring proofs is brought before the court on its final hearing, the right of the libellant to a decree in his favor being uncontested, and the object being to enable the court satisfactorily to determine the amount to be awarded, it is for the judge to decide when, in his opinion, the evidence is sufficient for this purpose; and he may require further proofs, or may arrest the further introduction of those offered. In the English admiralty, voluntary affidavits are often received. I have not learned that this practice has been adopted in any of the American courts; but though this species of evidence ought in general to be regarded with distrust, and acted upon with great caution, it is doubtless within the discretion of our courts to receive it, where the libellant has it not in his power to obtain other evidence, or cannot do it without great expense or delay.

CHAP. 6.
Further
proofs may
be required.

Affidavits.

Unless the libellant is prepared to give the requisite evidence on the return-day of the process, which in our courts he is permitted to do, a future day, generally near at hand, is appointed for the hearing, as in contested cases; and it is the practice at least of some of the courts, not only to permit the libellant's witnesses to be cross-examined, but also to hear direct evidence in behalf of the defendant, in mitigation of damages. "Witnesses are summoned," says Judge BERTS, speaking of his own court, "and the same proceedings had as on contested trials, the advocate of the defendant being allowed to cross-examine them, or offer testimony on his part miti-

Day to be
appointed
for final
hearing.

Rights of
defendant
to cross-ex-
amine wit-
nesses, and
to give evi-
dence in
mitigation.

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gating the recovery(a)." And in a case in the District Court of the United States for the District of Maine, what the learned judge of that court understood to be the law on the subject is thus summed up in the marginal abstract of the case: "Before the defendant can be heard in his defence or introduce new evidence in the cause, he must appear and contest the suit either by exceptions to the libel, or by answering it. If he does neither, the court will hear and adjudge the cause *ex parte* upon the evidence offered by the libellant; but when it appears that the defendant has neglected to put in his answer through ignorance of the practice of the court, and is at the time of the hearing absent, the court is not precluded from receiving any evidence which his counsel may offer as *amicus curiæ*(b)."

Decree,
when pro-
nounced.

At the close of the hearing, the court either pronounces its decision on the spot, or, when necessary, holds the case under advisement, for the purpose of more mature consideration.

Cases not
requiring
proof.

In cases arising *ex contractu*, little or no evidence in addition to the oath of the libellant, and the implied admission of the defendant, is usually required. In most instances a definite sum is claimed and shown by the libel to be due. In suits by material-men, and for mariners' wages, it is customary and proper also, though not necessary(c), to subjoin, at the end of the libel, a schedule or account, stating the items

(a) Betts's Adm. Practice, 38.

(b) *The David Pratt*, Ware's R., 495.

(c) *Pratt v. Thomas*, Ware's R., 427, 431.

and prices of supplies furnished, or the quantum of labor or services performed, and the payments, if any, which have been made, and exhibiting the exact balance claimed. In suits on bottomry bonds, and on charter-parties by the ship-owner against the charterer, the amount of the demand must necessarily appear, also, on the face of the libel; to which, moreover, a copy of the instrument on which the suit is founded, usually is, and ought to be annexed. In such cases, therefore, no proofs are necessary. The judge may himself determine the amount to be decreed, or, which is the usual practice, he may refer the matter to the clerk, or to a commissioner, to make the requisite examination and computations, and to state the account between the parties.

Reference to
the clerk or
a commis-
sioner.

But there are cases arising from contract, where it would be unsafe to rely on the libellant's representation of his own case. His statements, though substantially true, may be exaggerated, and the damages claimed may be excessive. Suits for the non-performance of contracts for the conveyance of goods, especially when instituted for the recovery of damages arising from injury to the goods, and not from the absolute loss of them, are generally of this nature; and suits founded upon any other maritime contract, not excepting those above mentioned, may happen to be so circumstanced as to bring them within the same category.

In such cases the court will, in its discretion, either refer the matters requiring proofs to the clerk or a commissioner; or, if the case presents one or more questions depending on mercantile usage,

VOL. 2 or requiring mercantile or other professional knowledge or skill, to such merchants or other experts (to be associated with the clerk or a commissioner, or not, as seems fit) as the court shall appoint for that purpose; or, the judge will hear and decide upon the evidence directly, in person.

Libellant bound reasonably to move for confirmation of report.

It is an established and pervading principle of admiralty procedure, that parties are bound at their peril to take notice of the proceedings of the court, without formal notification. When, therefore, the report of the clerk or commissioner is filed, the libellant is bound on pain, as in other cases of delinquency, of having his suit dismissed, at the instance of the defendant, for want of prosecution, to bring the report before the court, and, unless he excepts to it, to move for its confirmation and for a final decree thereon; and upon such motion the defendant is entitled to be heard, and to except to the report, but is not entitled to any notice of the motion(a).

The custom of dispensing with formal notices might in our courts sometimes be made productive of injustice and hardship by a practitioner disposed to abuse it; but there are happily few such men among the legal profession, and the prevalent practice of abstaining from all unfair advantages, and of apprising the proctor of the opposite party of any adversary step about to be taken, and enter-

(a) Betts's Adm. Practice, 38, 39. By an express rule of the District Court of the United States for the Southern District of New-York, the libellant is limited to four days to move for the confirmation of his report. *Ib.*, and Rule 35.

ing into arrangements dictated by a spirit of courtesy and of mutual accommodation, is found to be a sufficient antidote to any evils which might otherwise result from the usage in question. CHAP. 4

SECTION III.

OF THE NON-APPEARANCE OF ANY CLAIMANT IN AN ACTION IN REM, ON THE RETURN DAY OF THE MESSE PROCESS.

It seemed to be advisable, for the sake of simplicity and perspicuity, not to blend the subjects of the last and present sections; and it was found to be more convenient to notice suits *in personam* first in order, although the action *in rem* is the favorite remedy of suitors in the admiralty, and is consequently much more frequently resorted to than the action *in personam*; but in reality, nearly all that has been said in the last section respecting suits of the latter description is equally applicable to those of the former. The 29th rule above recited makes no distinction in this respect, but it was unquestionably intended to embrace both forms of action; although the appellation "defendant" is not strictly applicable to a suit *in rem* before the appearance of a claimant. But in this form of action, all persons who have or pretend to have any interest in the thing proceeded against are cited to appear and answer the libellant; and all such persons are accordingly entitled to appear as claimants, and, on showing that they have in fact such interest, to make themselves parties defendant in the suit.

Proceedings essentially the same as in suits *in personam*.

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The nature of the interest, and the evidence to establish it, requisite to confer this right, will be considered in the next chapter; the design of the present section being only to point out the proceedings immediately consequent on the non-appearance of any person to contest the libellant's demand.

All persons
having any
interest, etc.,
to be called.

As in the action *in personam*, proclamation is made by the crier of the court, calling upon all persons, having a right to do so, to appear and answer the libel(a). If no claimant appears, the libel

(a) The formula in use for this purpose in the District Court of the United States for the Northern District of New-York is as follows: "All persons having or pretending to have any right, title or interest in the ship _____, her tackle, apparel and furniture, arrested at the suit of A. B. on process returnable here this day, come forth, assert your claims and answer the libel of the said A. B., on pain of being pronounced in contumacy and default, and of having the libel adjudged to be taken *pro confesso* against you."

The form of the proclamation used in the same court, and in substance, I presume, also, in the other courts, in cases of municipal seizure, is as follows: "If any person can aught say why the articles mentioned in the libel [or information] which has just been read should not be *condemned* as forfeited to the United States, let him come forth and he shall be heard." In the District Court of the United States for the Southern District of New-York, it seems that in private suits the proclamation is also for "all persons having anything to say why the property arrested should not be *condemned* and sold for the benefit of the libellant, to come in and make their allegations in that behalf." (Betts's Adm. Practice, §6.) I perceive, also, that it is customary in this country to insert, at the close of the libel, a prayer that the ship or other property be *condemned* and sold, etc. I am not able, however, to discern any propriety in this form of expression thus applied; and I infer that it must have been inadvertently borrowed from cases of municipal seizure and of prize, where the decree against the thing is properly enough, and for obvious reasons, denominated a decree of *condemnation*. But the arrest of property in virtue of a maritime lien, at the suit of a private suitor, differs very widely from the seizure of property at the suit of the government to enforce a forfeiture or a capture *jure belli*. The object of the arrest is merely to obtain secu-

is adjudged to be taken *pro confesso* against all persons whatever; and if a claimant appears, and is admitted as such, then against all other persons(a). CHAP. 6.

ity for a debt or other demand, for which the owner is also personally responsible, precisely as in a suit in a state court commenced by attachment; and in point of fact, the property arrested is rarely sold, being usually returned to the owner, on the substitution of personal security *pendente lite*, or on the payment of the sum awarded to the libellant by the final decree. In the English admiralty, neither the term *condemnation* nor any one of like import occurs either in the *primum decretum*, awarding the possession of the property to the libellant, or in the subsequent decree of sale on a perishable monition, to satisfy the decree; and I repeat that it appears to me to be wholly misapplied in our own practice.

(a) The form of the order given, *supra*, p. 179, note, in an action *in personam*, must, of course, be varied, so as to adapt it to the form of action now under consideration, and may be as follows:

A. B.

v.

The Ship, her tackle, etc. [or as the case may be].

The mesne process returnable this day, in this cause, having been returned duly executed; and, upon proclamation duly made for all persons having or pretending to have any right, title or interest in the said ship, her tackle, etc. [or as the case may be], to appear and make due answer to the libel filed in this cause, no person having appeared to answer the same, the court, on motion of Mr. , advocate for the libellant, doth pronounce all persons whatsoever to be in contumacy and default, and doth order and adjudge that the libel filed in this cause be, and the same hereby is, taken *pro confesso* against all persons whatsoever.

If a claimant appears and puts in an answer, or is allowed further time to do so, the foregoing form will require to be varied as follows: After the words "make due answer to the libel filed in this cause," insert: O. D. [or C. D. and E. F., etc., as the case may be], appeared as claimant [or claimants] of the said ship, her tackle, etc. [or as the case may be; and if the claim extends only to a part of the property arrested, specify the part claimed], and made due answer to

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In all other respects, the proceedings in an action *in rem*, at this stage of the suit, are the same as those in an action *in personam*, as already described.

The form of the decree when the libel is taken as confessed, and the mode of enforcing it, are essentially the same as when the suit is contested. These and other matters more or less intimately related to the subject of the present chapter, will be more fully considered hereafter.

Decree, how
enforced.

In suits *in personam*, where, as is usually the case, bail has been given to pay the sum awarded by the decree, the decree is enforced against the defendant and his sureties.

In suits *in rem*, when the property has been delivered to the owner on a bond or stipulation, the decree is enforced in like manner; and where it remains in custody, by a sale of the property.

Practice of
the English
High Court
of Admir-
alty.

In England, no decree for contumacy in an action *in rem* is pronounced until after four successive defaults. On the return day of the process, as in our courts, all persons having a right to appear are publicly called in court. No one appearing, the

the said libel [or prayed further time until the day of to make due answer to the said libel, which was allowed by the court]; and no other person having appeared to answer the same, the court, on motion of Mr. , advocate for the libellant, doth pronounce all other persons, except the said C. D. [or C. D. and E. F., etc.], to be in contumacy and default, and doth order and adjudge that the libel filed in this cause be, and the same hereby is, taken *pro confesso* against all other persons whatsoever, except the said C. D. [or C. D. and E. F., etc].

The order of reference and the report thereon, with the exception of one or two slight and obvious verbal differences, are the same in this form of action as in an action *in personam*.

action is said to proceed in *pœnam contumaciæ*; and in pain of their contumacy, the ship, etc., or rather they are said to incur the first default. Time is then given to them to appear at the next court-day, which is technically called continuing the certificate of the execution of the warrant to that day, when they are again called; and this is repeated until the fourth default has been incurred^(a). The proctor for the plaintiff thereupon exhibits a petition stating the cause of action, reciting the defaults incurred, and praying that the plaintiff may be put in possession of the ship, etc., to the extent of his demand, to the end that the property may be preserved. A schedule of expenses to be taxed is at the same time exhibited, together with the instrument, if any, as a bottomry bond, for example, on which the suit is founded. The court then decrees that the plaintiff shall be put in possession of the ship, etc., he first giving security to answer for the same to any person claiming right, or intervening for his interest within a year. This is called the first decree—*primum decretum*. But as the plaintiff is not permitted to use the property or appropriate its proceeds, this decree in his favor would prove but a barren remedy

(a) They are, on each day, "thrice called." (2 Bro. Civ. and Adm. Law, 399.) Whether, in any of our courts, the call is thus repeated, I am not apprised. In the courts of the New-York districts there is but one call. It seems to be understood, however, when a party is to be called, in the Supreme Court, preparatory to any order or proceeding founded on his default, that three calls are to be made. See the case of *Walsh v. The United States*, 1 Howard's R., 28, where the plaintiff in error was "three times solemnly called by the marshal to come into court and prosecute his writ of error."

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were it not usually a matter of course for the court, at the instance of the plaintiff, to decree a sale of the property and the application of its proceeds to the satisfaction of his claims. For this purpose, an allegation is made of the perishable condition of the property, and of its actual or probable deterioration by time, concluding with a prayer that it may be appraised and decreed to be sold, and that the moneys arising from the sale be brought into the registry of the court. Upon this the court decrees what is called a perishable monition, which is a citation to be served by affixing it on the Royal Exchange, to all persons in general, having any interest adverse to that of the plaintiff, to appear in court on a certain day, and show cause why the petition of the plaintiff should not be granted. After a summary hearing, the court decrees a commission of sale.

In Ireland, as Doctor BROWNE informs us, the commission of appraisement and sale, at the time when he wrote, usually followed the defaults directly, without the intermediate *primum decretum*; a practice, however, which he admits to have been irregular(*a*); and even in England, vague notions seem to have prevailed upon the subject(*b*). It is somewhat

(*a*) 2 Browne's Civ. and Adm. Law, 399-404.

(*b*) The case of *The Exeter*, 1 Robinson's R., 173, which occurred soon after the accession of Sir WILLIAM SCOTT, will serve to illustrate this remark. An application was made to the court for the allowance of interest from the date of the *primum decretum*, in a suit on a bottomry bond. "Let me ascertain the correct practice of the court," said Sir WILLIAM SCOTT: "This *primum decretum*, I perceive, gives not only possession of the ship, but of the proceeds also. Is not this going a step too far?" The advocate for the petitioner replied that he feared that was irregular. Sir WILLIAM SCOTT then proceeded, in

remarkable that the antiquated, dilatory and oppressive formalities, very summarily and imperfectly above detailed, should have escaped the enlightened and searching spirit of reform manifested within the last few years in that country, in regard to its entire system of jurisprudence, not excepting that of the admiralty. CHAP. 2.

pronouncing his judgment, to state the correct practice as follows: "It appears that a *primum decretum* was obtained so long ago as last June; but, in obtaining it, the party seems to have gone farther than the forms of the court would allow. The effect of that decree should be only, in the first instance, to put the party into the possession of the thing. All further proceedings of the sale, and power over the proceeds, should be by subsequent application to the court. In this case the ship was sold without application to the court. When the court signed the decree, it could not have been aware that the tenor of the decree was not in the usual form; and that it went farther than such a decree should go, in concluding with a power over the ship and proceeds." See the form of the first decree in a suit for wages; Marriott's Formulary, 295; *et infra*, ch. 11, note.

CHAPTER VII.

OF THE PROCEEDINGS UPON THE APPEARANCE OF THE PARTIES
ON THE RETURN-DAY OF THE PROCESS.

UPON the appearance of the adverse parties in court, it behooves them, not in a captious and litigious spirit, which a court of admiralty never indulges, but with a prudent regard to their substantial interests, to look to their respective rights.

Security
to be given
by libellant.

If, by the rules of the court, the libellant is required, on filing his libel, to give security for costs, and to appear from time to time and abide the orders of the court(*a*), the defendant or claimant has a right, if this security has not already been given, to call upon the court to direct it to be now given, before the libellant shall be permitted further to prosecute his suit.

By the de-
fendant in
an action *in*
personam.

The libellant also possesses a correspondent right. The defendant, in an action *in personam*, may not, on his arrest in virtue of a warrant of arrest, have given bail to the action in pursuance of rule *third* of the rules prescribed by the Supreme Court. He may, on the contrary, have given bail only for his

(*a*) As by a rule of the District Court for the Northern District of New-York, he is, in imitation of a law of the state courts, required to do, when he is a non-resident of the district, except in suits for mariners' wages, and in suits by salvors in possession of the salvaged property. See Appendix, Rule XII.

appearance, according to the antecedent practice(a); or he may have been brought into court under arrest for want of bail. The process against him may also have been a simple monition. In each of these cases, the libellant has a right now to call upon him either to give bail to the action, according to the general rule of admiralty procedure; or, if it appears that he is unable to obtain sureties for the payment of the debt or damages which may be awarded against him, he may, in the discretion of the court, be required only to give a stipulation with sureties in such sum as the court shall direct, to pay all costs and expenses which shall be awarded against him according to the twenty-fifth rule(b).

I have ventured, also, in a former chapter, to refer to the practice observed in the civil law courts, and in the English admiralty, of taking what is called a juratory caution, when the defendant was unable to find sureties, as a practice prevailing, or at least admissible in our own courts. One of the rules of the district courts composing the First Circuit expressly declares that "In proper cases, the court will permit the defendant to give a juratory caution or stipulation." The new rules are silent with respect to this form of security; but it is not supposed to have been intended by them to abrogate any existing rules of procedure not inconsistent with them, and they ex-

Juratory
caution.

(a) As to his right still to do which, *vide supra*, p. 100, *et seq.*

(b) *Vide supra*, pp. 92, 93. As to the right, at this or any subsequent stage of the suit, of the libellant to exact new sureties, and of the defendant to ask to have the amount of his bail-bond reduced, *vide supra*, p. 112.

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pressly recognize the power of the courts to regulate their own practice "in such manner as they shall deem most expedient for the due administration of justice, in all cases not provided for by the" new rules(a). I presume, therefore, when the learned judge of the District Court of the United States for the Southern District of New-York, speaking of the juratory caution, remarks that "modern practice has not employed this oath(b)," he must be understood to refer to the practice of his own court in particular. He adds, however, of the "modern practice," that it "acts in relief of the indigent suitor by mitigating his bail, or exonerating him wholly from giving it;" so that, even as understood by him, it differs from the general civil law and admiralty practice only in the omission of the promissory oath of the party that he will fulfil his engagements(c). It is doubtless within the discretion of the courts to modify the practice in this respect, by dispensing with the oath; and this may have been actually done in other districts, besides that of the Southern District of New-York.

Dissolution
of attach-
ment.

It may happen, also, that upon a warrant of arrest with an attachment clause therein, the defendant could not be found, and that his goods and chattels, or, for want thereof, his credits and effects, may have been attached. In such case the defendant may, if he think proper (as he also may at any other stage of the

(a) See Appendix, Rule XLVI. As to the general scope and design of these rules, *vide supra*, p. 7.

(b) Betts's Adm. Practice, 27.

(c) The form of this stipulation is given in the Appendix.

suit), apply to the court, in pursuance of the fourth rule, for an order to dissolve the attachment, on the substitution of security. CHAP. 7.

The security to be exacted of the claimant in a suit *in rem* is prescribed by the twenty-sixth rule; which ordains that the claimant, upon putting in his claim, "shall file a stipulation with sureties in such sum as the court shall direct, for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or, upon an appeal, by the appellate court(a)." Security to be given by claimant.

But the question now presents itself for consideration, who may lawfully be admitted as claimant, and, in that character, to contest the libellant's demand; and the inquiry is not altogether unattended, in point of authority, with difficulty. In the few reported cases in which it has been discussed, vague notions on the subject seem to have been entertained at the bar, and there is a want of entire precision and consistency respecting it in the language of the courts. Who may become a claimant.

The obscurity which, upon a cursory examination, apparently rests upon the subject, arises, however, in some degree, from the indiscriminate and almost unavoidable use of the word *claim*, as well in its ordinary popular acceptation, to signify any asserted right relating to the thing proceeded against in an admiralty suit, and of the word *claimant* to designate the person asserting or claiming such rights, as in the technical and more limited sense in which these Inaccurate use of the word claimant to designate a third person intervening for his interest.

(a) See Appendix, Rule xxvi., and *supra*, p. 440.

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terms are now to be considered. Thus, for example, in a case of seizure for an infraction of the laws prohibiting the African slave trade, one of "the claims filed" is said by the court to be that "of certain seamen who demand compensation for their wages, from the proceeds of the vessel(*a*)."

But the seamen, in this case, were not, strictly speaking, claimants; they were third persons intervening for their interest. They did not claim the ship, but only insisted on a maritime lien or privilege, in virtue of which they claimed compensation for their services. So in a suit on a bottomry bond, and in two cases of salvage, a "claim" is said to have been offered in behalf of the underwriters of the ship, to whom an abandonment, had been made, but who had not accepted the abandonment, and who could not therefore have supposed themselves to be the owners of the property(*b*).

What the insurers desired to do in these cases, therefore, was, not to assert and defend a proprietary interest in the ship, but merely to acquire a standing in court for the protection of such interests, if any, as they might have in respect to it(*c*).

So also in a case of municipal seizure, the vessel at the time of the seizure being under attachment at the suit of certain creditors of the owner, it is said that "the owner interposed no claim," but that "a claim was filed" by the attaching creditors.

(*a*) *The St. Jago de Cuba*, 9 Wheaton's R., 409 (6 Curtis's Decis. S. C., 110).

(*b*) *The Ship Packet*, 3 Mason's R., 255; *The Boston and Cargo*, 1 Sumner's R., 328; *The Henry Evebank*, ib., 400.

(*c*) *The Mary Ann*, Ware's R., 104.

But in a strict sense, a *claimant* is one who not only has a right to intervene for his interest, and to contest the suit, but who, *prima facie*, has also a right to have the thing delivered to him on bail, pending the suit; or, if he does not choose to exercise this right, to have it unconditionally surrendered to him, in case the suit proves to be groundless; or, to receive the balance of its proceeds after satisfying the decree, in the event of the libellant's success. These rights imply an exclusive proprietary interest, or at least, an exclusive right of possession in the *res*; the *jus in re*, and not merely *jus ad rem*: and such I understand to be the relation in which the party who appears to take upon himself the defence of a suit in the character of claimant, is bound to show himself to stand towards the property.

CHAP. I.

Right of property necessary to support a claim.

In one of the cases above cited, Mr. Justice STORY observes: "The first point which I am called upon to consider, is, whether an underwriter, who has refused to accept an abandonment can be permitted to claim property in the ship in this court? In my opinion, it is perfectly clear that he cannot. He has not, and pretends not to have, any *jus ad rem* or *jus in re*. All that can be said is, that he may ultimately have an interest in the questions here litigated; but an interest in the question forms no title to claim property in the admiralty. This court looks only to rights in the thing itself, to ownership general or special, and to such claims as are direct, as a lien, or *jus ad rem*. The claim of the New England Insurance Company must therefore be rejected. Underwriters, as such, cannot litigate

VOL. 2. here, as to the rights of the libellants or the claimants: they are mere strangers, and no more entitled to be heard than any contingent debtor or creditor of either party(a)." In admitting the sufficiency of a direct lien to constitute a valid ground of claim, the learned judge must be understood to have had in view the general right of intervention, without regard to the particular form in which the right may be asserted. This is true also of what he says in the other two cases above cited, though in these his expressions are more guarded. But the language used by the same learned judge in delivering the opinion of the Supreme Court in a case of municipal seizure, is very explicit. "The claimant," he observes, "is an actor, and is entitled to come before the court in that character, only in virtue of his proprietary interest in the thing in controversy: this alone gives him a *persona standi in judicio*. It is necessary that he should establish his right to that character, as a preliminary to his admission as a party *ad litem*, capable of sustaining the litigation. He is, therefore, in the regular and proper course of practice, required in the first instance to put in his claim, upon oath, averring in positive terms his proprietary interest. If he refuses so to do, it is a sufficient reason for the rejection of his claim(b)."

What was here said, seems also to be clearly implied by the terms of the oath which is required of the party offering a claim, by the twenty-sixth rule.

(a) 3 Mason's R., 255, 257.

(b) *The United States v. 422 Casks of Wine*, 1 Peters's R., 547, 549 (7 Curtis's Decis. S. C., 691).

He is to "verify his claim on oath or solemn affirmation, stating that the claimant, by whom or on whose behalf the claim is made, is the true and *bona fide* owner, and that no other person is the owner thereof."

This oath, in substance, it is presumed is to be deemed an indispensable pre-requisite, in all cases, to admission into court as a claimant; and while it prescribes the form of the oath to be made by a person claiming on the ground of his exclusive proprietary interest, it would seem also to have been intended to limit and define the right, by restricting it to such an interest.

It is not to be understood, however, that the verification of a claim in the form prescribed by the rule, or even its admission by the court, is conclusive upon the question of property. The libellant has a right, by a suitable exceptive allegation, to contest the proprietary interest of the claimant, and to have it formally decided. If the claim be admitted without objection at this stage of the proceedings, and allegations or pleadings to the merits are subsequently put in, it is a waiver of the preliminary inquiry, and an admission that the party is rightly in court, and capable of contesting the merits. But should it afterwards appear, upon the trial, or even after the merits had been disposed of in favor of the claimant, that he had in reality no title to the property, but that it was the property of a third person, who was not represented by the claimant, or had an adverse interest, or whose rights had been defrauded, it might still be the duty of the court to retain the property in its custody, to afford the true owner an opportunity to interpose a claim to it, and receive

CHAP. 7.

Form of the oath required of the claimant.

Asserted proprietary interest of the claimant open to contestation.

VOL. 2. it from the court(*a*). This was done in a case of municipal seizure, where certain articles of property found on board the offending vessel were adjudged not to be subject to forfeiture, but which, though formally claimed as the property of the claimant, turned out to have been purchased with the funds of a person unknown, and to have probably belonged to, or to have been destined for the use of, the public enemy(*b*).

Owner to claim in person, if present; otherwise by his agent.

When a claim is to be interposed, it is the duty of the owner, if practicable, to do it in person; but where he is out of the country, or resides at a great distance, it may be done by his authorized agent(*c*); and the master of a vessel has always been considered a competent agent, as such, for this purpose, upon the arrest of his vessel or cargo. The consignee of a cargo is also entitled, as such, to appear as claimant, and this right extends as well to other parts of the cargo consigned to him, as to those parts which belonged to him and were shipped on his account(*d*). In the case just cited, it was also said by the court that an agent of absent owners may appear either in his own name, as agent, or in the name of his principals, as he thinks best.

Consignee entitled to claim.

(*a*) *The United States v. 422 Casks of Wine*, 1 Peters's R., 547, 550 (7 Curtis's Decis. S. C., 691).

(*b*) *The Boat Eliza and Cargo*, 2 Gallison's R., 4, 11.

(*c*) *The Adeline and Cargo*, 9 Oranch's R., 244 (3 Curtis's Decis. S. C., 350); *The Sally and Cargo*, 1 Gallison's R., 401; *The Lively and Cargo*, id., 315, 337.

(*d*) *Houseman v. The Cargo of the North Carolina*, 15 Peters's R., 40 (14 Curtis's Decis. S. C., 15).

The right of the absent owner to be thus represented by another is recognized, and the form of the oath to be required in such cases in addition to the oath of ownership, is prescribed in the twenty-sixth rule, above mentioned, as follows: "And where the claim is put in by an agent or consignee, he shall also make oath that he is duly authorized thereto by the owner, or if the property be, at the time of the arrest, in the possession of the master of a ship, that he is the lawful bailee thereof for the owner."

CHAP. 7.
Oath of the
agent.

The latter part of this extract from the rule, as the attentive reader will not fail to notice, is unhappily expressed. In terms, it requires the agent or consignee to swear to the lawfulness of the master's possession. But in order to convey distinctly what is supposed to be its intended meaning, its language requires to be modified as follows: "or if the property be, at the time of the arrest, in the possession of the master of a ship, [and the claim is put in by him, he shall make oath] that he is the lawful bailee thereof for the owner."

It was held in an early case in the Circuit Court for the First Circuit, but was not until long afterwards definitively settled by a decision of the Supreme Court of the United States, that a foreign consul or vice-consul, duly recognized by our government, is competent, as such, to assert or defend the rights of his countrymen in causes within the admiralty jurisdiction. "To watch over the rights and interests of their fellow subjects," said Mr. Justice JOHNSON, in pronouncing the judgment of the court, "wherever the pursuits of commerce

A foreign
consul or
vice-consul
is a competent
agent
for his fellow
subjects.

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may draw them, or the vicissitudes of human affairs may force them, is the great object for which consuls are deputed by their sovereigns; and, in a country where laws govern, and justice is sought for in courts only, it would be a mockery to preclude them from the only avenue through which their course lies to the end of their mission. The long and universal usage of the courts of the United States has sanctioned the exercise of this right, and it is impossible that any evil or inconvenience can flow from it. Whether the powers of the vice-consul shall, in any instance, extend to the right to receive, in his national character, the proceeds of property libelled and transferred into the registry of the court, is a question resting on other principles. In the absence of specific powers given him by competent authority, such a right would certainly not be recognized; much, in this respect, must ever depend upon the laws of the country from which and to which he is deputed. And this view of the subject will be found to reconcile the difficulties supposed to have been presented by the authorities quoted upon this point(a)."

Claims founded upon distinct interests, to be separately interposed.

When the property arrested is owned jointly or in common by several persons, there would probably be no valid objection to the interposition of a claim by one of the co-proprietors in behalf of his associates as well as of himself; but where there are distinct proprietary interests, separate

(a) *The Bello Corrunes*, 6 Wheaton's R., 152 (5 Curtis's Decis. S. C., 44).

claims are to be interposed by the several owners, or by their agents, each intervening in his own name for his proprietary interest, and specifying it. One co-shipper, therefore, has no authority, as such, to interpose any claim for other shippers with whom he has no privity of interest, in a proceeding against the cargo of a ship. Where separate claims are interposed, although the libel is joint against the whole property, as in a case of salvage, each claim is treated as a distinct and independent proceeding, in the nature of a several suit, upon which there may be a several independent hearing and appeal.

If any owner should not appear to claim any particular part of the property, the habit of courts of admiralty is, to retain such property or its proceeds, after satisfaction of the libellant's claim upon it, until a claim is made, or a year and a day has elapsed from the time of the institution of the proceedings^(a).

It behooves the defendant upon his arrest or citation, and those who are entitled to appear as claimants in the action, on the arrest of the vessel or other property proceeded against, if they intend to resist the libellant's demand, to obtain at once a copy of the libel on file, and to prepare the proper response thereto in season to give it in on the return-day of the process, and to have it ready in court for that purpose; and in case of their

Of the allowance of further time to answer.

(a) *Stratton v. Jarvis & Brown*, 8 Peters's R., 1 (9 Curtis's Decis. S. C., 3).

VOL. 2. delinquency in this respect, they are liable to have the libel adjudged to be taken *pro confesso* against them.

But although expedition is a leading object of admiralty jurisprudence, insomuch that for those who are not familiar with its remedies, and who have long been conversant with the delays which usually attend proceedings in the higher courts of law, and especially in equity, it is not easy fully to apprehend the force of this principle, or to become at once reconciled to its practical results; yet justice is not to be sacrificed to celerity, and *festina lente* is a maxim as applicable to the pursuit of justice by its ministers, as it is to the common concerns of life.

For reasonable cause shown, therefore, it is usual to allow a short specified time to the party defendant to prepare his response to the libel; and the rule, in directing the libel to be taken *pro confesso*, on the omission or refusal of the defendant to make due answer thereto on the return-day of the process, "or other day assigned by the court," contemplates the contingency of such an indulgence.

Claimant permitted to combine his claim and answer.

When, in an action *in rem*, the claimant puts in his response to the libel on the return-day of the process, his claim, or assertion of proprietary interest in the property, is, in this country, generally combined with his answer; in which case the pleading is denominated his "claim and answer." It is, however, in all cases more proper to put in the claim separately; and as it is only in virtue of his right of property, or that of his principal, that a claimant obtains a standing in court which entitles him to

answer at all, if he is not, on the return-day, ready to CHAP. 7.
 answer, and desires further time for that purpose,
 he ought nevertheless to be required then to inter-
 pose his claim.

CHAPTER. VIII.

OF THE ALLEGATIONS OR PLEADINGS SUBSEQUENT TO THE LIBEL.

Less strict-
ness requir-
ed than in
other courts.

IN the common law courts, pleading has long been a science; and it has at length, to a considerable extent, become so in courts of equity. This is true; also, of the courts from which the English and American courts of admiralty originally derived their forms of procedure. But, in these courts, where substantial and speedy justice in each particular case is the paramount object; where, to this end, all mere technicalities are disregarded; where pleadings are always upheld when they can be, and the parties are allowed upon easy terms to amend and alter them when they cannot be; and where, though the courts are frequently impelled to complain of the negligence of practitioners in this respect, a suitor is scarcely ever turned out of court for bad pleading—it could hardly be expected that pleading would attain even the dignity of an art, much less of a science; for laxity and delinquency are the natural consequences of license and impunity.

Questions of
pleading of
recent origin
in English
admiralty.

What is here said undoubtedly is, as indeed it would, for obvious reasons, be strange if it were not, more applicable to the American courts than to the English High Court of Admiralty; but until the recent accession of Dr. LUSHINGTON to the chair of that

court, scarcely a single question of pleading appears to have been there discussed. All pleading subsequent to the libel, or rather the summary petition, which, latterly, has nearly superseded the libel(*a*), are spoken of in the reports under the general name of allegations; a discrimination sometimes, though rarely, being made between defensive allegations, corresponding to pleas to the action, and exceptive allegations, corresponding to pleas in abatement, and demurrers, in the courts of common law. Little or no attention seems to have been paid, in litigated cases, to the rule prevalent in other courts, that

CHAP. 8.

Laxity of
pleading in
the English
admiralty.

(*a*) What, if any, is the substantial characteristic difference between a libel and a summary petition, nowhere, as I can discover, satisfactorily appears. Marriott's Formulary (p. 148) contains a precedent for a "Libel in a Cause of Damage," and for a "Summary Petition for Wages" (p. 274). They differ in their formal parts, at the commencement, and to some extent also, at their conclusion; but in substance they are alike. In both of them the cause of action is with great fulness and precision, "articulately propounded."

These forms appear antiquated to an American reader; but the precedent above mentioned, of a libel, copied, I presume, from one on file, bears the name of "W. SCOTT," afterwards Sir WILLIAM SCOTT, and subsequently Lord STOWELL, the immediate successor of Sir JAMES MARRIOTT, by whom, or under whose supervision, after his retirement from the court, the Formulary was compiled.

I had supposed, until very lately, that the summary petition was used only when the proceeding was by act on petition. (See *supra*, p. 32, n.) But in one of the recent cases, it is said "A summary petition, consisting of ten articles, was brought in on behalf of the plaintiff;" and it is also stated that "the proceedings were *by plea and proof*," the form thus characterized in the English admiralty standing opposed to that by act on petition. (*The Two Sisters*, 2 W. Robinson's R., 125.) And in another case, Dr. LUSHINGTON, almost in the same breath, denominates the plaintiff's original pleading, first a libel, and next a summary petition. (*The City of London*, 1 W. Robinson's R., 88, 90.)

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what is alleged on the one side and not controverted by pleading on the other, is for that reason to be taken as true, on the ground that a party may justly be considered as virtually admitting what he does not choose to deny; and consequently little attention appears to have been paid to the formation of precise issues between the parties. Generally speaking, each party has been allowed to tell his own story in his own way, and to prove what he could; and the judge has then, upon a review of the whole case, decided between them. Causes in the English High Court of Admiralty have thus been made to assume the character rather of arbitrations, than of suits either at law or in equity.

Protracted
pleadings
rare, but
allowed.

Pleadings have rarely been extended beyond the first responsive allegation, on behalf of the defendant, to the libel or summary petition. There is, however, no restriction in this respect — the parties being at liberty to protract their pleadings as in suits at common law, the pleadings in that case taking the names which they bear in the common law courts. In one very late case they were extended to a sur-rejoinder and rebutter(a).

Certain fundamental rules relative to this plenary course of proceeding have been laid down by the present learned and vigorous minded judge of the High Court of Admiralty; and it appears that the practice of the court in this respect is modeled rather after that of the courts of law, than that of the English chancery.

(a) *The Lord Cochrane*, 2 W. Robinson's R., 320.

The term "answer" is rarely applied to any form of responsive pleading, on the part of the defendant, to the libel or summary petition of the plaintiff. It occurs, in connection with the term "reply," applied to the next succeeding pleading, in two or three instances in the very latest volumes of reports, as we shall presently see; but, even in these instances, it was probably intended to be used only in its generic sense, as equivalent to "response"(a). The term "answers," or rather the phrase "personal answers" often occurs; but it means the responses given by the party to matters charged against him, upon his examination under oath, in pursuance of a "decree for answers," made by the court at the instance of the opposite party, when he chooses to try the experiment of appealing to the conscience of his adversary, for the purpose of obtaining admissions to be used as evidence. These are denominated *personal* answers, because all allegations or pleadings are "given" in the name of the proctor, who, upon his appearance, "makes himself a party for" his client. Formerly he was obliged to exhibit a power of attorney or proxy, in virtue of which he became *dominus litis*, and was obliged to give security for the ratification of his acts by his principal; but though these formalities have been dispensed with, as it is said in a late case(b), for the last 200 years, the pleadings are still, as already observed, in his name. His clients are called "his parties;" and in

CHAP. 2.

"Answer" used only in a general sense.

Personal answers.

Pleadings put in by proctor in his own name.

Parties not named, unless, etc.

(a) See *The Canadian*, 1 W. Robinson's R., 343, 344, where the answer to the petition is called a "reply."

(b) *The Wilhelmine*, 2 W. Robinson's R., 335, 337.

VOL. 2. suits *in rem* they are not even named, unless, in the progress of the suit, it becomes necessary to ascertain their names for the purpose of enforcing some personal responsibility against them. In the case just cited, for example, which "was a cause of salvage promoted by the master, the owner and crew of the steam vessel Robert Burns against The Wilhelmine, a Hanovarian galliot," the court, being of opinion that no salvage service had been rendered, dismissed the owner of the galliot, and condemned the asserted salvors in the costs of the suit. Upon a subsequent day, the costs not being paid, the court, upon motion of the proctor for the owners, assigned the proctor for the asserted owners to set forth his clients' names. But the proctor stated that "he did not know who his parties were—the action being entered for the master, owner and crew generally, as a matter of course, in the usual form in cases of this kind(a)." The case above alluded to, in which Dr. LUSHINGTON has stated what he deems to be sound general principles of pleading in his court, is interesting and instructive, and serves to illustrate, at once, the disposition and habit of the court to discountenance

(a) In the end, the proctor for the unknown parties was himself compelled to pay the costs; Dr. LUSHINGTON, in pronouncing his judgment, among other things, observing: "I apprehend, further, that at any period of the cause, and at any time before the case is dismissed out of the court, the court has a right to call upon the proctor to state, not generally, but specifically by name, the whole of the parties for whom he is authorized to appear. The authority of the court to make this demand upon the proctor is, I conceive, inherent in the jurisdiction of this court, in common with all other courts, and is absolutely essential to the due administration of justice, for the purpose of preventing unauthorized litigation."

all mere technical objections, and the limits beyond which its liberality will not be extended. CHAP. 2.

Pleadings in the English admiralty, instead of being simply filed, *ad libitum*, by the proctor, are offered in open court, where objections, if made to them at all, are to be then made orally to their "admission," and they are then either "admitted" or "rejected," wholly or in part, by the court. It is in this convenient and expeditious form that objections to the jurisdiction of the court, or to the substantial validity of the alleged causes of action or grounds of defence, are disposed of. With this explanation, I proceed to notice the two cases above mentioned. Pleadings offered in open court.

In *The Ann and Jane*(a), "which was a cause of collision, an act on petition and an answer had been admitted in the cause. A reply was now brought in, and the admission of this reply was opposed." In support of the objection it was "submitted, that it was incumbent upon the party proceeding in a cause to state his case in the first instance; as it was not competent for him to lie by and plead, in subsequent pleas, facts that must have been within his knowledge when the original plea was given in. That some portion of the plea now offered was open to objection upon this ground," and "that other parts of the plea were a mere repetition of matters pleaded in the original act." General principles of pleadings in the High Court of Admiralty.

To these objections it was, on the other side, answered, "That as regarded the practice of the court, the objections which had been taken were

(a) 2 W. Robinson's R., 98.

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somewhat unusual and irregular, and were calculated to produce great inconvenience, by causing an increase of delay and expense to the suitors."

Technical
objections
discounte-
nanced;

The court, in pronouncing its decision, said: "It has been observed by the counsel who have supported the admission of this plea, that the course which has been adopted in taking these objections is a novel mode of proceeding, and one that is irregular and inconvenient as regards the general practice of the court. This observation is perfectly true, so far as respects the usual mode of conducting proceedings in this court: at the same time, it is equally true that it is competent to the parties in a suit to take such objections. The question, then, which I have to determine, is, whether, upon a consideration of its contents, this plea is so perfectly objectionable, either in substance or in form, that it must be altogether rejected; or whether certain portions of it are so exceptionable, that the court must direct them to be either amended or expunged. Now, in all these cases, it is most desirable that the whole case of the parties proceeding should be fully stated in the first instance. It may occasionally happen that difficulty will arise in attempting to decide what is strictly in the nature of a reply, and what ought to have been stated in the first instance. It may, however, be laid down as a general rule for the guidance of practitioners, that whatever is pleaded in the nature of a reply must be either in contradiction of what is alleged in the answer, or explanatory of averments in the defence, or else is necessary to corroborate the original statements in

but the parties have a right to raise them.

Party to state his whole case in the first instance.

Proper office of a reply.

the cause." Upon a critical analysis of all the pleadings before him, and applying to them the principles he had thus stated, the learned judge declined either to reject the reply, or to make any order for its reformation; adding, however, that "of course it must be understood that if more expense is incurred, and it shall turn out that the foreigner(a) has made a complaint which he is not able to substantiate, the increased costs will fall upon him."

CHAP. 2.

In the case of *The Hebe*(b), the question was "as to the admissibility of a rejoinder in a cause of bottomry," in which "an act on petition," "an answer, and a reply, had been given in and admitted." To the admission of the rejoinder, it was objected, first, that it did not contain matter proper to be put in issue originally in the cause; and secondly, that if the matter might rightfully have been pleaded in the first instance, it was now offered at too late a period of the proceedings; and these objections were supported by the argument, that great inconvenience and delay must be caused by the necessity to which the objecting party must be subjected, of sending to Sidney for fresh information, to meet and answer what was alleged to be new matter in the cause.

Dr. LUSHINGTON, in proceeding to consider the objections, observed that, although it is clearly com-

(a) The promovent being a foreigner, it was on this account insisted by his counsel, and conceded by the court, that he was entitled to indulgence upon a question addressed, to some extent, to the discretion of the court.

(b) 2 W. Robinson's R., 146.

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petent to the parties in a suit to take objections of this kind, yet these objections should not be raised without grave and substantial reasons in support of them. Cases, he said, might unquestionably occur, in which it may be right and proper to bring them before the court, especially where the preliminary discussion might prevent the introduction of irrelevant matter, which, if admitted, would lead to the accumulation of unnecessary evidence. Where, however, no such consequence was likely to result from the admission of the plea, the court would be disposed to discountenance the discussion, as tending to defeat the objects for which the summary form of proceeding was introduced into the practice of the court viz: expedition, and the avoidance of expense to the suitors; and in accordance with the principles enunciated by him, in the antecedent case above cited, he observed: "I apprehend that no absolutely new matter, that is, matter of a separate and distinct character from that which is alleged in the answer, ought to be pleaded in a rejoinder, unless, indeed, such new matter has come to the knowledge of the party pleading for the first time since the original answer was given in. Subsidiary matter, in support of the original defence, may be alleged under a great variety of circumstances; for instance, when issue is taken on the original defence, and averments are made in support of that issue, which require to be contradicted or explained; in such a case, there is no other mode in which they can be answered, save in a rejoinder." After an elaborate examination of the allegations on both sides, Dr. LUSHINGTON said,

No new matter to be pleaded in a rejoinder, unless it first came to the knowledge of the respondent after his answer was given in.

Subsidiary matters admissible, and when.

that, upon the whole, he thought the rejoinder was entitled to be admitted. He was aware, he said, that an increase of expense and delay might ensue from this further investigation; but it was abundantly clear that the party had a right to make good his defence by the averments contained in the rejoinder, and that they were necessary, and called for by the reply. Upon the announcement of this decision, Haggard, counsel for the promovent, observed: "My party must have time to answer these matters." To which Dr. Lushington answered, "If I am furnished with an affidavit, that, for the purposes of justice, it is necessary to answer them, I will allow time."

In addition to the above mentioned rules, inculcated by the present judge of the High Court of Admiralty, other highly salutary rules, designed to repress unnecessary prolixity in pleading, were laid down and enforced by his immediate predecessor. A brief reference to the case here more especially alluded to will serve, at once, to explain and to illustrate them. In a suit by a mariner, for wages, a defensive allegation was brought in, consisting of five articles. The first set forth the mariner's contract. The second described the voyage outward and homeward, specifying the ports visited, and the landing and shipment of goods, etc. The third charged the mariner with misconduct and disobedience during the voyage, and a refusal to perform duty on certain specified days. The fourth alleged that the mate of the vessel had, during the voyage, been in the practice of pilfering the spirituous liquors

VOL. 2. and wine on board, and charged the mariner with encouraging him to commit these offences, by partaking of the stolen liquors: this article also alleged that the mariner, having obtained leave to go on shore, after the return of the vessel to the London docks, left the ship and never afterwards returned; and in conclusion, recapitulating his alleged offences, the article alleged and propounded that the mariner had thereby forfeited all legal right or claim to the wages that otherwise would have been due to him. The fifth article, "in part supply of proof, referred to the mariner's contract, and to the log-book in the registry; and alleged that Clint [the mariner] executed the contract by signing by his mark; and that the contract was read, or the purport and effect fully explained to him, and that he understood the same."

The admission of the allegation being opposed, Sir JOHN NICHOLL, in deciding the question, observed: "The present allegation is defensive. In substance, the owners have a right to set up the defence it offers; but the question is, whether it is in proper form? It is the duty of the court to watch that no unnecessary matter be introduced. Every page, every sentence, increases expense; such an allegation, therefore, should be limited to matter contradictory and responsive to the summary petition, and not be a replender of it. Now, the first and second articles repeat the facts that are in the summary petition, and I accordingly reject them as unnecessary. The allegation may, however, commence thus: 'Whereas, it is alleged, in the summary petition, that during the voyages therein set forth,

the said Peter Clint did well and truly perform his duty as carpenter on board the said ship, and was obedient to all lawful commands ;' and then allege, as in the third counterpleading, in the usual form, with a reference, perhaps, to the log, recording his absence from duty. The fourth charges embezzlement, and may stand thus: 'That, during the voyage, there were spirituous liquors on board, belonging to the owner, and also wine, taken in at the Cape on the return voyage; that certain of the crew frequently embezzled parts of such spirituous liquors and wine, knowing the same to have been so stolen; and having been seen to take the same, he acknowledged he had so done.' The remainder, except the latter part, which pleads the legal consequences of misconduct, may then stand as a new article. The fifth I reject as unnecessary: the mariner's contract is brought in; it is not contradicted, and it is alleged in the petition to have been executed by the mariner. This allegation, as thus compressed, is admissible; but what will be its legal effect, can only be properly ascertained when the whole case is before the court."

CHAP. 8.

Before taking leave of the system of pleading in the High Court of Admiralty, it is proper to advert to what is there denominated an "Appearance under protest;" a step shown by the reported cases to have been very frequently resorted to, though, from the almost indiscriminate manner in which, during the long presidency of Lord STOWELL, it was applied, its appropriate use does not appear to have been distinctly marked; or if it was so origi-

APPEAR-
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PROTEST.

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 only for the
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 the jurisdic-
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 court.

nally, or in theory, it seems not to have been well understood by the practitioners in the court. But, at length, by the direct authoritative interposition of the court, it has been restricted to the purpose of questioning the jurisdiction of the court; as will appear by the following cases.

In a cause of damage by collision, the owner of the *Girolamo* [the damaging ship], appeared under protest on the ground, that under the 6 George IV., he was not liable for the damage. The statute provisions relied on, exempt the owner of the vessel from liability for loss or damage, occasioned by the negligence or incompetency of a licensed pilot on board. An answer had been given to the grounds of the protest, averring that the *Girolamo* was a foreign vessel, and insisting that, for this reason, the case was not within the act. The answer also alleged that the *Girolamo* had been imprudently towed down the river at a rapid rate, in a dense fog. To this part of the answer a reply had been given in, denying the alleged imprudence.

Sir JOHN NICHOLL, in pronouncing his decision, said: "This protest does not deny the jurisdiction of the court nor the regularity of the proceedings; the statement, if anything, is matter of defence; and to preserve the regularity of the proceedings, the protest must therefore be overruled(a).

In a still more recent case, Dr. LUSHINGTON said that he wished "it to be understood that, for the future, there must be no appearance under protest

(a) *The Girolamo*, 3 Haggard's R., 169, 173.

in any of these cases, except where there is a real question as to the jurisdiction(a). CHAP. 8.

The references to this form of appearance, in the reports of cases decided in our own courts, are equivocal and very rare; and, in the few instances where it occurs, the phrase was probably employed in a general sense, as descriptive of an exception taken to the jurisdiction of the court, rather than of any particular verbal formula adapted to that purpose, and in most cases was probably used without any very definite notion of its import in the English admiralty, whence it was borrowed. Thus, in the report of an early case decided on appeal in the Supreme Court, in which William Maley, commander of a public armed vessel of the United States, was sued in the admiralty for an asserted unlawful seizure of the schooner *Mercator*, it is stated that he appeared to the libel "and protested against the proceedings, setting forth in his protest the capture of the *Mercator*, on the ground of her having violated the laws of the United States, etc., and claiming that the libel should be dismissed with costs." In the district court, the libel was dismissed; but "the circuit court reversed the decree of the district court, overruled and rejected the protest of Maley, and ordered him to appear absolutely without protest before the district court(b)." In another case, it is stated that "the respondent appeared by a proctor of the court, and demurred to the libel;" and Mr.

Rare in the American courts.

(a) *The Protector*, 1 W. Robinson's R., 45, 62.

(b) *Maley v. Shattuck*, 3 Cranch's R., 458 (1 Curtis's Decis. S. C., 643).

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Justice JOHNSON, in pronouncing the decision of the Supreme Court, observes that the defendant had "demurred under protest(a)." And in an early case before Mr. Justice STORY, the claimant is stated to have "appeared under protest, denying the jurisdiction of the court, and setting forth the alienage of the parties;" and the learned judge, at the conclusion of his judgment asserting the jurisdiction of the court, using the language uniformly employed on the like occasions, with slight variations, in the High Court of Admiralty of England, said: "I overrule the protest of the claimant to the jurisdiction of the court, and assign him to answer peremptorily to the libel of the plaintiff."

There may be, and probably are, other instances in which similar expressions occur in the American reports, but these are the only ones I remember to have met with. Nothing is said of this form of proceeding, either by Judge BERRIS, or by Mr. DUNLAP; nor is there any precedent for it in the collection of precedents appended by Mr. SUMNER to the work of the latter author. Neither is there any trace of it in Marriott's Formulary. I find, however, among the precedents subjoined to Mr. HALL's translation of Clerke's Praxis, what is called a "Protest to Evidence," taken, as I infer, from the proceedings in a case in the District Court for the Eastern District of Pennsylvania(b).

(a) *Manro v. Almeida*, 10 Wheaton's R., 473 (6 Curtis's Decis. S. C., 485).

(b) This precedent is as follows:

"The respondent, Stephen Dutilh, objects to the commission issued out of this honorable court, directed to W. H. D., &c.; and the de-

Unsatisfactory as the foregoing account of an appearance under protest in a suit in the admiralty will probably be to the inquisitive reader, I have now imparted all the information which I have been able to collect upon the subject from the sources within my reach, except the statements of Dr. BROWNE, which, though they may have been, and indeed seem to have been, warranted by the actual practice in the High Court of Admiralty even so late as the date of the publication of his work, are entirely irreconcilable with what was said by Sir J. NICHOLL in the case of *The Girolamo* above cited (a), and with the impressions, as far as they are discernable, which have prevailed in our own courts upon the subject. "Let us now suppose," observes the writer, "that some person cited or interested, as the master or owner or occupier, claiming right

Browne's definition of an appearance under protest.

positions of F. C. M., taken by the said commissioners and returned to this court, being read in evidence so far as affects the right and interest of the said Stephen Dutilh, and the issue joined between the said J. B. and J. S., and the said S. D. doth protest against the same being read in evidence so far as it may in any way affect him in the defence he hath made, and the right and interest he hath in the matter in controversy. M. RAWLE, for S. DUTILH, *Respondent*.

"The above objection having been offered to the court, and a motion having been made for leave to enter the same on the minutes of the court, and his honor the judge having refused permission to enter the same, the advocates for the said Stephen Dutilh, respondent, do protest against the conduct of the said judge in this particular.

LEWIS, }
RAWLE, } *Advocates for S. Dutilh.*

29th July, 1800."

[Hall's Adm. Practice, 164.]

On what ground this proceeding may have been supposed to be necessary, proper or useful, I must leave it to the learned reader to divine.

(a) *Supra*, p. 224.

VOL. 2 of possession therein, appears and defends the ship, he will either appear under a *protest*, or absolutely. In the former mode, the party appears protesting that he doth so only to save his contumacy; and that for reasons set forth in his protest, he is not bound to answer; as, for instance, that he is sued as owner, although he never was owner, but only a broker; or that he is sued for wages by a mariner who never was on board his ship, or that he is sued for ransom money exceeding the value of a ship and cargo, which he has offered to abandon: which assertions he supports by affidavits and exhibits, and desires to be dismissed. To this the promovent replies by allegations, contradicting those of the protester, and further alleging that his appearance under protest is in no respect agreeable to law and the known practice of the court, the matter by him set forth being to be introduced in no other way than by plea and proof; wherefore he prays the judge to reject his petition to be dismissed, and to assign him to appear absolutely(a).”

This reply seems, indeed, very reasonable to the enumerated grounds of protest, which, it will be seen, are strikingly obnoxious to the observation of Sir JOHN NICHOLL concerning the ground of protest in the case of *The Girolamo*, that it was, “if anything, matter of defence.” It may be supposed, however, that Dr. BROWNE has correctly stated the form of the protest, in saying that “the party appears protesting that he doth so, only to save his

(a) 2 Browne's Civ. and Adm. Law, 406.

contumacy; and that, for reasons set forth in his protest, he is not bound to answer." CHAP. 2.

But assuming the legitimate use of an appearance under protest to be, to contest the jurisdiction of the court; and conceding it to be the most proper mode of doing so, there is no authority for asserting that, in the American courts, it is necessary even for this purpose. When the want of jurisdiction is apparent on the face of the libel, there can be no doubt of the admissibility and substantial propriety of a simple demurrer(*a*); and indeed it matters not in what mode, however informal, in such cases, the fact of a defect of jurisdiction is brought to the notice of the court; for, in whatever manner it may be done, the court will, of course, thenceforth desist from all further cognizance of the cause, or, in the language of the English High Court of Admiralty, will "prohibit itself(*b*)."
Appearance under protest not necessary in this country.
Objections to the jurisdiction of the court, how taken.
 And where the want of jurisdiction results from facts not appearing on the

(*a*) *Manro v. Almeida*, 16 Wheaton's R., 473 (6 Curtis's Decis. S. C., 485); *Wilson v. Graham*, 4 Washington's R., 59.

(*b*) *The Bee*, Ware's R., 332. This was a suit for salvage, in which both the libellants and respondents were British subjects. After a claim and answer had been given in, and testimony had been taken on commission, a *motion* was made to dismiss the suit for want of jurisdiction. The learned judge held, that, considering the objection under one of the aspects which it had been made to assume, viz., that of an asserted incapacity of the court to take cognizance of the case, he was bound to entertain the motion; but that considered as a mere declinatory plea, founded upon the idea that the respondents, being foreigners, ought not to be subjected to the jurisdiction of the court against their consent, the motion came too late.

Where the want of jurisdiction does not appear on the face of the libel, if the defendant omits to put in a declinatory exception or plea to the jurisdiction, but answers the libel, he thereby waives the objection. 2 Browne's Civ. and Adm. Law, 442.

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face of the libel, such facts may, without doubt, be set forth in a plea to the jurisdiction of the court, in the ordinary form. There is in the appendix of HALL's translation of Clerke's Praxis, a precedent for such a plea, bearing the signature, as proctor, of an eminent jurist, deeply learned, especially in the civil law(*a*); and in several of the early cases decided

(*a*) Hall's Adm. Practice, 151. The precedent is as follows:

"To the Honorable, &c.,

"The Plea of PIERRE ARCADE JOANENE, a citizen of the French Republic, in behalf of himself and all concerned in the capture of the British Ship *William* and her cargo, to the Libel and petition exhibited to this Honorable Court, by, etc.

"The said Pierre Arcade Joanene, by protestation, not confessing or acknowledging any of the matters and things in the libellant's said petition and libel contained, to be true in such manner and form as the same are therein and thereby alleged, for plea to the said libel and petition, says: That he was, at the time of his attacking in a hostile manner and making prize of the said ship *William*, her cargo and people, and now is, duly commissioned by the French Republic as captain on board the armed schooner *Citizen Genet*, fitted out by and belonging to citizens of the said Republic, to attack all the enemies of the said Republic wherever he might find them, and take them prisoners with their ships, arms and property that might be found in their possession; which commission he is ready to show unto your Honor.

"That he, the said Pierre Arcade Joanene, with his officers, seamen and mariners on board the said armed schooner *Citizen Genet*, took as prize the British ship *William* as aforesaid, with the property that was found on board of her, the said ship and property belonging to some subject or subjects of the King of Great Britain, and took the people on board of her prisoners, they being subjects of the said King, and the said King and his subjects then being in open hostility and actual war with the French Republic and her citizens, and brought the said ship and property as prize, and the people on board of her as prisoners, into the port of Philadelphia, and there detains [them] on board the said schooner *Citizen Genet*.

"That by the law of nations, and the treaty subsisting between the United States of America and the French Republic, it doth not pertain to this Honorable Court, nor is it within the cognizance of this court

in the District Court of the United States for the District of South Carolina, there was a "plea to the jurisdiction(a)." In some of the reported cases, also, a plea to the jurisdiction has been combined with an answer. Thus, in a case in the Massachusetts district, the owner of the cargo proceeded against, it is said, "filed a claim and answer denying the jurisdiction of the court(b) ;" and in a very late case which arose in the Eastern District of Louisiana, a like form of pleading was adopted. It was a suit for damage by collision, occurring on the River Mississippi. The libel, in five articles, sets forth the circumstances attending the alleged injury, showing it to have been occasioned by negligence and mismanagement on the part of the vessel proceeded against. The answer, in several distinct articles, alleges that

at all, to interfere or hold plea respecting the said ship or property so taken as prize, or the British subjects taken on board of her as prisoners.

"Wherefore he prays that he may be hence dismissed, and the said ship and cargo discharged from arrest, etc.

"Du PONTAULT, Proctor for Respondents.

"11th June, 1793."

In a case in the District Court of the United States for the District of South Carolina, a plea of the same nature and general import was offered by a third person, who claimed a right to interpose in virtue of a certificate from the French consul, representing him as an agent, for certain purposes relative to prizes, of the French Republic. His plea was "repelled with costs, as being brought forward by a person incompetent thereto;" and the court seems to have been of opinion that a plea to the jurisdiction of the court could properly be offered only by the defendant *in propria persona*, and on oath, and not therefore by the proctor of the party. But it is believed that no such technical distinction is now recognized by our courts.

(a) *Dean v. Angus*, Bee's R., 369; *Clinton v. The Hannah and General Knox*, id., 419.

(b) *The Volunteer and Cargo*, 1 Sumner's R., 551, 552. See also *The Rebecca*, Ware's R., 188.

VOL. 2. the collision took place within the body of a county of the State of Louisiana; that at the place where it occurred, there was no ebb and flow of the tide; that the collision did not, therefore, happen on the high seas; that neither of the vessels concerned was at the time employed in maritime navigation, and that neither of them was built or designed for that purpose. For these reasons, the answer insists that "the court has not jurisdiction, and ought not to proceed to enforce the claim" of the libellants. The answer then proceeds as follows: "And the said respondents, in case their said plea to the jurisdiction of the court, so above propounded, articulated and pleaded, should be overruled, then they, for further defensive answer, articulately propound and say," etc.; setting forth, in five additional articles, the grounds of defence upon the merits. It would seem, moreover, from the report of this case, that it was not until after "a great body of evidence was taken," and the whole case came before the district court for final decision, that the question of jurisdiction was argued and decided(a). But as the question of jurisdiction is in its nature a preliminary inquiry, it is certainly more proper to present it in a separate and distinct plea; and in whatever form it may be presented, it should be brought to the consideration of the court at the first opportunity, and be decided before incurring expenses which would be rendered fruitless by the dismissal of the cause for want of jurisdiction.

Objections to jurisdiction not to be deferred.

(a) *Waring et al. v. Clark*, 5 Howard's R., 441 (16 Curtis's Decis. S. C., 456).

It is necessary to proceed now to a somewhat more direct consideration of the modes of defence in the American courts of admiralty; premising, only, that whatever differences there may be between the practice of our courts and that of the High Court of Admiralty, in this respect, there are none which affect the applicability of the general principles above mentioned, lately declared in the latter court. The nice division and exact distribution of the several matters of defence, in the civil law and ecclesiastical courts, as described in treatises on the practice of these tribunals, are rarely mentioned in our courts, and it is unnecessary to enumerate them; although, arising as they do out of the nature of the subject, and being therefore in themselves accurate, they are theoretically applicable to admiralty pleadings.

CHAP.-8.
General course of pleading in the American courts.

In our courts we hear little of any other pleadings, except the libel and answer. Whether the libel be "contested negatively," by a denial of its truth; or whether it is opposed by matter "defensive" or "exceptive;" and whether the matter be "dilatory" or "peremptory; in other words, whether the matter insisted on by the defendant, would, in a court of common law, be available under plea of the general issue, or constitute the proper subject of a special plea in bar, of a plea of abatement, or of a demurrer; such matter usually finds its place in the ANSWER of the defendant. We have already seen that exceptions to the jurisdiction of the court have been repeatedly taken in this mode, and I am not aware of any authority denying the right to

The defendant may avail himself of all matters of defence by way of answer, general and special.

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propound any other matter, exceptive or defensive, in like manner. On the contrary, it seems to be conceded. Thus, in a suit by a mariner for wages, where one of the objections taken at hearing was, that the suit had been prematurely commenced, ten days not having then elapsed after the discharge of the vessel's cargo; and where, although, in anticipation of this objection, it was alleged in the libel that the vessel was about to proceed to sea within the ten days, there was in the answer no denial of this allegation, the court observed that the objection did not go to the merits, but was "merely a dilatory exception; and if the respondent had intended to rely upon it, he should have put the question of fact in issue by a dilatory plea in abatement, *or*, by a distinct denial of the averment in the libel, *by a counter allegation in his answer(a).*"

(a) *The William Harris*, Ware's R., 367. I would, however, by no means be understood as intending to represent the practice described in the text as universal in our courts, much less to recommend it. The case of *The David Pratt* [entitled, by mistake I presume, *Pratt v. Thomas*], Ware's R., 427, is an instance of the opposite, and certainly the more correct mode of defensive pleading. The master of the vessel appeared, and for the purpose of availing himself of the objections enumerated below, "put in a dilatory exception to the libel in the nature of a demurrer;" insisting "that he is under no obligation or necessity by law to answer the same in this court, and that this court has no proper authority to hear and try the same, and that process in this cause issued improvidently, and in particular he excepts thereto:

1. That the said libel endeavors to unite and mix up distinct, heterogeneous and multifarious matters, which cannot be joined in the same complaint; namely, matter in alleged subtraction of wages, and matter of damage, assault and battery, and wrongful imprisonment.

2. That there is no proper account or exhibit of the pretended demand or claim for wages. And,

However inartificial such a system of pleading may appear to the learned reader, whose attention in this respect has previously been directed, chiefly or exclusively, to the diversified forms of pleading in courts of equity, and especially in courts of common law, no great practical inconvenience may result from this simplicity. It is certainly desirable, however, that there should be some appellate distinction between the direct answer to the libel and interrogatories, if any, appended thereto, which the defendant is obliged to give, and a pleading in the nature, wholly or in part, of a demurrer or a special plea; and the appellations of GENERAL and SPECIAL answer, seem to be appropriate for this purpose; the denomination of *general and special* being also applied, when, as often happens, the answer, according to this mode of designation, is both general and special. But it matters little what names are given

3. That there is no proper oath or attestation, in due form of law, to the truth of the facts undertaken to be set forth in the said libel."

The superior fitness of the practice of bringing before the court all objections in their nature preliminary, by a separate pleading for that specific purpose, is pointedly asserted by Mr. Justice SUMNER, in the case of *Certain Logs of Mahogany*, 2 Sumner's R., 589, 592. In that case, one of the grounds of defence insisted on by the respondent in his general answer, was the pendency of a replevin suit, substantially, as it was contended, for the same cause of action. "The objection," observed the learned judge, "is in its own nature a mere declinatory or dilatory objection in the nature of a plea in abatement, and not peremptory as a bar on the merits. It being preliminary in its character, it should have been taken, if at all, by a special plea in the nature of a plea in abatement, known in the practice of the ecclesiastical and admiralty courts by the appellation of a dilatory or declinatory exception, which is always brought forward before the *contestatio litis*, or general defence in bar, or general answer upon the merits."

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Libel ought
to consist of
distinct
articles.

to pleadings, provided they are framed with the requisite degree of fullness, precision and certainty. Some general principles upon this subject have, from time to time, been laid down in our courts, and especially by Mr. Justice STORY; but their enunciation is not unfrequently accompanied with expressions of regret on account of their non-observance, and a hope that they would be heeded in future. Thus, in the case of *Treadwell v. Joseph*(a), which was a suit by a seaman for gross maltreatment, and wrongful assault and imprisonment of the libellant, Mr. Justice STORY observed: "The matter in the libel resolves itself into two distinct charges, each of which ought to have been propounded in a distinct article, with reasonable certainty of time and place, instead of being mixed together in one general statement; for they were not cotemporaneous, nor in any exact sense a continuation of the same injurious proceeding. I cannot but express my regret at finding this anomalous and loose course of practice so long pursued, and I trust it will soon be reformed by more exact pleadings. The first charge is, that the respondent did, with force and violence, without rightful cause or justification, order the libellant to scrape down the masts of the ship for a long space of time, to wit, fourteen hours, the wind blowing heavily. The answer of the respondent to this charge is, "that the scraping of the masts of a ship is a necessary duty, and proper to be performed by the mariners thereof; and, that if

(a) Sumner's R., 390.

the libellant was employed in that manner, it was a part of the ship's duty, which the libellant was bound, by his enlistment on board the vessel, to perform." Now, this answer is insufficient, both in matter and form. It neither admits nor denies the act complained of, but states, conditionally, that 'if the libellant was employed, etc., it was part of the ship's duty,' etc. It is clear, upon the first principles of all responsive pleadings, that the party who sets up a justification or excuse for any act, must admit the existence of that act; and if he denies it, his denial must be in positive terms. A defensive allegation in the admiralty equally as much requires this certainty, as a plea at the common law. A party cannot put forth a sort of middle and speculative answer, neither admitting nor denying anything. He should meet the charge of the libel with direct allegations; besides, the answer does not reach the gravamen of the charge. Admitting it to be a part of the duty of the crew to scrape the masts, it is to be done at proper times and seasons, and in a reasonable manner(a)."

CHAP. 2.

Answer to be direct and explicit.

If a justification or excuse is pleaded in the answer, it must admit the act complained of.

These principles are now expressly enjoined by the new Rules. Thus, the twenty-third rule directs that the libel shall "propound and articulate, in distinct articles, the various allegations of facts upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer, distinctly and separately, the several matters contained in each article;" and the twenty-seventh rule

Regulations prescribed by the new rules.

(a) See, also, to the like effect, *Orne v. Townsend*, 4 Mason's R., 431.

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requires, that the "answer shall be full and explicit, and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel; and shall also answer, in like manner, each interrogatory propounded at the close of the libel."

Each party
entitled to
except to
the pleading
of his ad-
versary

These rules, it will be seen, are peremptory and mandatory, and the parties respectively have it in their power to enforce their observance by exceptions. The right of the defendant to except to the libel for any defects, as well of form as of substance, is expressly recognized by the twenty-fourth rule, which defines and regulates the power of the courts to allow amendments of the libel(a). On the other hand, the twenty-eighth rule provides that "The libellant may except to the sufficiency, or fullness, or distinctness, or relevancy of the answer to the articles and interrogatories in the libel; and if the court shall adjudge the same exceptions, or any of them, to be good and valid, the court shall order the defendant forthwith, [or] within such reasonable time as the court shall direct, to answer the same, and shall further order the defendant to pay such costs as the court shall adjudge reasonable." And the thirty-sixth rule, referring to defects of a different nature, provides generally, that "Exception may be taken to any libel, allegation or answer for surplusage, irrelevancy, impertinence or scandal; and if, upon reference to a master(b), the exception

(a) Appendix, Rule xxiv.

(b) The appellation "master" was probably here used inadvertently instead of *commissioner*. The 44th rule provides for the appointment of "one or more commissioners," to hear and report upon any

shall be reported to be so objectionable, and [shall be] allowed by the court, the matter shall be expunged at the cost and expense of the party in whose libel or answer the same is found." CHAP. 2.

Mr. Justice STORY has repeatedly taken occasion to inculcate the propriety of applying to admiralty causes, another rule lately adopted by courts of equity, namely, that of presenting additional facts when necessary in the form of amendment to the bill or answer, instead of resorting, according to what we have seen to be the English practice, to a replication or rejoinder. "I regret," he observes, in the case of the brig *Sarah Ann*(a), "that the pleadings in this case do not present all the points made in argument, in a clear and definite form. The old course of practice, indeed, was to introduce additional matters by way of replication and rejoinder; but the modern, and certainly the better practice, is to present new facts, when rendered necessary, in an amendment of the libel and answer, as is the ordinary course in chancery." Amended libel or answer, instead of special replication or rejoinder.

This was said in 1835, but though the language of the learned judge implies the existence of the practice recommended by him, at that time, it seems not to have been uniformly followed even in the District of Massachusetts, so lately as 1844; for

matters arising in the progress of a suit, which the court may deem it expedient and necessary to refer; and declares that "such commissioner or commissioners shall have and possess all the powers in the premises, which are usually given to or exercised by masters in chancery in references to them."

(a) 2 Sumner's R., 206, 208.

VOL. 2. in a case decided by him in that year, he again referred to the subject, and observed: "Then, again, the libellant has put in, and sworn to, a special replication, without being called upon by the respondent to answer the allegations in the answer. This is irregular: according to the modern and correct practice, no special replication is admissible, unless the respondent requires the libellant to give an answer on oath to the matters propounded in his own answer, and then it is in the nature of a cross bill, or *revocatio* of the civil law. It is, therefore, the privilege of the respondent to require such a reply; but not the right of the libellant to put it in, without its being demanded by the respondent, or specially ordered by the court(*a*). Indeed, I do not remember to have met with but one reported case, where this mode of pleading has been adopted. I refer to a very recent case which arose in the Eastern District of Louisiana, in which there was what is called an amended and supplemental libel," and "an amended and supplemental answer(*b*). These phrases were borrowed from the court of chancery. But there is a broad and well known distinction in that court between an amended and supplemental bill, or answer; and if these terms are to be employed in our courts of admiralty, this distinction should be preserved(*c*).

The pleading in the abovementioned case, de-

(*a*) *Coffin v. Jenkins*, 3 Story's R., 108, 121.

(*b*) *Waring et al. v. Clarke*, 5 Howard's R., 441 (16 Curtis's Decis. S. C., 456).

(*c*) See Story's Eq. Pleadings, 678-691, 268, 474.

nominated an "amended and supplemental libel," CHAP. 2. was a response to the exceptive and defensive matter propounded in the answer, and was therefore what in a suit at law, and formerly also in a suit in equity, would have been a special replication, and what in the modern practice in equity constitutes an amended bill; while the pleading called "an amended and supplemental answer" is what in chancery has usually been termed a *further* answer, it being responsive to the matter of the amended libel(a).

It is obvious from what has already been said in this chapter, that Mr. Justice STORY regarded the system of pleading in chancery as the proper model for pleadings in the admiralty; and it is evident, also, that the new Rules of Practice in admiralty and maritime causes were framed under the same impression; but the modern form of pleading above mentioned is not enjoined by these rules, as it is, expressly, by the new Rules of Equity Practice(b). The alteration consists substantially in the restriction of the parties to two pleadings on a side, and the substitution of new for old names(c).

Substitution of amended libel for special replication, not required by the new rules, etc.

(a) Story's Eq. Pleadings, § 878. In the new Rules in Equity, however, such a pleading is denominated a "new or supplemental answer." See Rule XLVI.

(b) The 45th Rule declares that "no special replication to any answer shall be filed."

(c) "Formerly, replications were either general or special, as they still are at law. A general replication, which alone is now used in equity, is a general denial of the truth of the defendant's plea or answer, and of the sufficiency of the matter alleged in it to bar the plaintiff's suit, and an assertion of the truth and sufficiency of the bill. A special replication was occasioned by the defendant's introducing

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Whether even a second pleading will be required on either side, may depend in the admiralty upon the frame of the libel, as in chancery it may upon the frame of the bill. If the libellant states and avoids, by counter allegations, the matter to be insisted on by the defendant by way of defence or excuse, no further pleading may be necessary after the original answer of the defendant. The right to do this is expressly declared by the 21st of the new Rules of Equity Practice; but the plaintiff may not be apprised of the nature of the defence,

new matter into his plea or answer, which made it necessary for the plaintiff to put in issue some additional fact on his part, in avoidance of such new matter introduced by the defendant. This, it seems, was in use in Lord NOTTINGHAM's time. The consequence of a special replication was a rejoinder, by which the defendant asserted the truth and sufficiency of his answer, and traversed every material part of the replication; and, if the parties were not then at issue, by reason of some new matter disclosed in the rejoinder, which required an answer, the plaintiff might file a surrejoinder, to which the defendant in his turn might put in a rebutter. The pleadings in ancient times, in this manner, frequently proceeded to a surrejoinder and rebutter; but the inconvenience, expense, and delay of these proceedings occasioned an alteration of the practice. Special replications have gone quite out of use; so that, if any material charge is omitted in the bill, although it is alleged by way of replication, it is not pertinent, nor will it affect the defendant. In the room of special replications, amendments of the bill have been substituted; and the plaintiff must now always be relieved according to the form and matter, either originally or by amendment, contained in his bill. To the matter thus introduced by the plaintiff, the defendant may put in a further answer, whether required by the plaintiff so to do, or not; and thus has the advantage and effect of a special rejoinder." *Cooper's Eq. Pleadings*, 329, 330; *Story's Eq. Pleadings*, 674, 675.

It is stated by OLIVER, in a note to tit. 19 of his *Praxis*, that in the Dutch admiralty no replication is permitted. "*In Admiraltate Hollandiæ, duplica non est litigantibus permissa.*"

and is not obliged thus to anticipate it, if he is. It would seem, therefore, that when by reason of any matter alleged in the answer, an amendment of the bill in chancery, or of the libel in a suit in the admiralty, becomes necessary, the plaintiff ought to be allowed to amend, as a matter, not of favor, but of strict right, without costs, and without application to the court for leave; but the 45th of the new Rules of Practice declares that, in such cases, "he may have leave to amend with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct." The new code of Rules of Admiralty Practice contains but a single rule on the subject of amendments, and this rule is not supposed to have been framed with any view to the interposition of an amended libel instead of a special replication(a). The right of the libellant to reply, when necessary, in some form, to any defensive matter put forth by the answer, and of the defendant to do the like in regard to the matter of the amended libel or special replication of the libellant, rests, therefore, upon the general principles of pleading, and is supposed not to be subject to any such restrictions as are implied by the rule in equity above recited.

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The principle adopted in the courts of chancery and of common law, that what is alleged on the one side and not denied on the other is to be taken as true, makes it necessary for the plaintiff in a suit in equity, even when no further special pleadings are required (unless the statements of the bill

General replication not required.

(a) See Appendix, Rule 24.

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are admitted by the answer), to file a general replication denying the truth of the defendant's plea or answer, and asserting the truth and sufficiency of his bill; but it rarely happens in the High Court of Admiralty of England, or in our own courts, as far as can be ascertained by reported decisions, in cases contested on the merits, that there is, and for any purpose of substantial justice it is not often necessary that there should be, any pleading subsequent to the immediate response of the defendant to the libel. It is not supposed to be necessary, therefore, unless it is required by some express rule or special usage of the particular court in which the suit is prosecuted, for the libellant to file a general replication in any case, even though the owner should set up a new matter in defence. If the new matter appears to the libellant to be sufficient in law to defeat his claim, and he is of opinion that the defendant will be able to establish its truth by evidence, he ought to abandon his suit; but if he persist in prosecuting it, his determination to contest whatever tends to predjudice his interests is thereby sufficiently evinced, and the defendant, as well as himself, is required to support his allegations by proof(a).

(a) In the District Court of the United States for the Southern District of New-York, the practice with respect to replications is regulated by express rules, the operation of which is thus stated by the learned judge of that court in his summary of its practice: "Replications need not be filed to answers without oath, taking issues in fact to the allegations of the libel. The respondent will be required, and the libellant will be permitted, each to give testimony in support of their respective allegations, the issue being complete without any

It is, however, an inflexible principle in courts of admiralty, no less than in all other courts, that no evidence is admissible in a cause, except such as relates to the express allegations, on the one side or the other therein. The parties are respectively bound, in some form, to apprise each other of their respective pretensions; and the proofs, to be available, must accord with the allegations. If, therefore, the answer sets up a justification which the libellant is able, by new matter, to repel, but which he has omitted in his libel to state, and by proper counter allegations to avoid, it behooves him to bring forward such matter by an amended libel or a special replication; because if he omit this precaution, he may not only debar himself of the right to introduce independent evidence necessary to the maintenance of his suit, but forego any advantage which he might otherwise derive from evidence actually given; for it is not sufficient that facts are proved which show that a party has a good cause of action, or a valid defence, unless there are allegations suited to bring such facts as matters of plea and controversy before the court(a).

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But all substantial grounds of action and defence must be distinctly propounded.

Otherwise no evidence can be admitted or can be regarded in support thereof.

special replication being filed; but the allegations of a sworn answer responsive to the charges of the libel will be deemed admitted, unless, within four days from the time the answer is perfected, or from the time allowed to except thereto, he files a replication, or serves on the respondent's proctor a written notice, that, on the trial, proofs will be offered in opposition to the allegations of the answer." Betts's Adm. Practice, 50.

(a) *The Schooner Hoppel and Cargo v. The United States*, 7 Cranch's R., 389 (2 Curtis's Decis. S. C., 585); *The Schooner Boston and Cargo*, 1 Sumner's R., 328, 331. When a defence is given by a

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This principle, it is needless to say, is equally applicable to the pleadings on both sides; and

public statute, it has, however, been recently decided in the High Court of Admiralty of England, not to be indispensably necessary specifically to plead the statute. The Act 6 George IV., c. 125, s. 55, exempts the owner and master of any vessel from liability for any loss or damage arising from neglect, default, incompetency, or incapacity of any licensed pilot acting in charge of such vessel. The case of *The Canadian*, above alluded to, was a suit for collision, in which the claimants, by way of defence, alleged, in general terms, that their vessel, at the time of the accident, was in charge of a duly licensed pilot, whose orders were duly obeyed by the crew, and that the collision was not occasioned, in any degree, by the wilfulness or carelessness of those on board, but was solely attributable to the persons on board the other vessel. "The Trinity masters, by whom the court was assisted, were of opinion that the accident was occasioned solely by the neglect and want of skill of the *Canadian*, and that the pilot who was in charge of the vessel was exclusively to blame." In this opinion the court acquiesced; but "an argument was subsequently raised with respect to the claim of the owners of the *Canadian* to be exonerated under the provisions of the statute." The counsel for the owners of the injured vessel objected to the application of the statute, on the ground that if the respondents had intended to rely on the act, they ought to have pleaded it; whereas, not only had they not done this, but their counsel had not in any manner suggested, in opening the case, that the act would be relied on, but had simply rested the defence on the denial of the fact that the accident was caused by the default of the *Canadian*. "This defence," it was argued, "had been overruled by the Trinity masters, and the owners of the *Canadian* were consequently concluded by the sentence already pronounced." On the other side, it was submitted that the question of fact having been determined against the *Canadian*, it was perfectly competent for the owners of that vessel to fall back upon their legal defence; that such defence, being founded upon the provisions of a general act of Parliament, it was not necessary to plead the act specifically; and that it had, moreover, been sufficiently averred in the pleadings, as one ground of defence, that the vessel was in charge of a pilot. The judgment of Dr. LUSHINGTON was as follows: "I certainly feel, in this case, that the mode of pleading is not altogether satisfactory to my mind, but doubt whether I should be enabled (certainly not in

while it forbids the omission of all reference to facts, which it may be necessary or useful to prove, it requires caution also in framing the allegations of such facts, in order to render them correspondent to the evidence to be adduced in their support; for lightly as mere technical objections are regarded in the admiralty, and liberal as the court is in granting amendments to relieve the parties from the consequences of mistakes and inadvertencies, it by no means follows that the rights of a party may

this case) to lay down any rule on the subject which would be generally approved of. When a collision has taken place, and proceedings have been instituted, the first plea almost uniformly is, 'Not to blame at all;' then follows a second defence: 'If our vessel is in fault, apply to the pilot, not to us.' If I were to lay down a rule, it would be, that the party intending to take the benefit of the statute 6 George IV. should state his intention of so doing in the pleadings. The whole course of the proceedings in these causes, long before and since the passing of the act, has been exceedingly loose. As the act of parliament is, however, a public act, the court is bound to take notice of it without its being specially pleaded. I must therefore follow, in this case, the course adopted in the case of *The Vernon*, by holding the owners of the Canadian not responsible for the damage." (1 W. Robinson's R., 343.) The case of *The Vernon*, referred to by the learned judge, is reported in the same volume, p. 316. The only words in the plea, in that case, which bore any reference to the statute, were "That the vessel proceeded on her voyage, under the charge of Grice, an experienced and duly licensed pilot." In that case, also, the question of exemption, under the circumstances of the case, "was subsequently raised;" but no objection to the form of pleading appears to have been made. There is nothing, however, in these cases, that necessarily militates against the general doctrine stated in the text, because, in both of them, the fact on which the applicability of the act depended, was substantially alleged. Had there been no allegation of the presence of a licensed pilot on board, having charge of the vessel, it is presumed the respondents would have been held liable, even though the fact had appeared in evidence.

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not be jeopardized, and even lost, by want of skill and care in bringing them by suitable allegations before the court. The decree of the court must be *secundum allegata et probata*.

Cases illustrative of the foregoing principles.

A case decided in the District Court of the United States for the District of Maine affords a good illustration of the practical operation of this principle. It was a suit by the cook of a vessel, against the master and mate, for combining to oppress and ill-treat the libellant; and various instances of assaults and other ill-usages, both by the master and mate, were specified in the libel. But the evidence showed that every one of the acts complained of was committed either by the master alone, or by the mate alone; and there was no direct or other sufficient evidence of any concert, agreement, or understanding between the respondents, to harass or ill-treat the libellant. On this ground, it was held that the libel, considered as an action for a combination in the nature of a conspiracy, was not sustained by the proof. It was, however, argued by the counsel for the libellant, that the action might be supported as an action for a joint assault. The objection to this, the learned judge observed, was, that the libel, in its original structure, was not framed as for a joint assault, and could not be sustained as such, except by evidence of concert between the respondents, whereby they would be rendered mutually responsible for the acts of each other. The allegation of a combination, therefore, became a substantive allegation, the proof of which was indispensable to the admission of testimony in

support of the charges of personal injury ; and the libel was accordingly dismissed without costs(a). So, too, in a suit for seamen's wages, where one of the grounds of defence, assumed at the hearing, was, that the misconduct of the libellant with the rest of the crew amounted to a mutiny, and worked a forfeiture of wages ; no such defence having been alleged in the answer, it was held that no evidence of mutinous conduct was admissible, or could avail the defendant(b). So, also, in an action for mariner's wages, where one of the grounds of defence set up in the answer was, that the libellant "did not, and would not, though often thereto requested and ordered by the master and other lawful officers of the ship, obey the said master and officers having command and charge of the ship, but wholly neglected and refused so to do;

(a) *Jenks v. Lewis et al.*, Ware's R., 51. "The rules of pleading in the admiralty," added Judge WARE, "do not require all the technical precision and accuracy which is required in the practice of our courts of common law ; but they require that the cause of action should be plainly and explicitly set forth, not in any particular and sacramental formula, but in clear and intelligible language, so that the adverse party may understand what is the precise charge which he is required to answer, and make up an issue directly upon the charge. The evidence must be confined to the matters put in issue by the parties, and the decree must follow the allegations and the proofs."

(b) *The William Harris*, Ware's R., 367. "The court," observed the learned judge, "cannot travel out of record to decide questions which the parties have not submitted to it ; and nothing is submitted to its determination, but what is distinctly alleged on one side and contradicted on the other. Each party must set forth, by plain and precise allegations, the grounds on which he asks for the judgment of the court in his favor, as well to disclose to the adverse party the points to which he must direct his proof, as to enable the court to see what is in controversy between them."

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and disobeyed their lawful commands, and violated his contract and agreement, and became mutinous, and attempted to excite a mutiny on board said ship, while at sea, at divers times." "Whatever," observed Mr. Justice STOKY, "may be the sufficiency of such an allegation, in a declaration at common law, founded on the shipping articles, as it has no specification of time, place, occasion, or other circumstances, it is far too loose and general in its texture to found any defensive allegation in proceedings in the admiralty. Every charge of such a nature is there expected to be propounded, or, as it is technically phrased, articulated in distinct articles in the answer, with due certainty of time, place and other circumstances, so that the court may distinctly see to what charges in particular the evidence applies. If, therefore, a preliminary exception had been taken to the admission of the charge thus generally and loosely framed, I should not have doubted that the charge ought to have been expunged from the answer. As it is, I am clearly of opinion that it is wholly insufficient in point of law to be acted upon by the court; and, therefore, I should, if I did not deem it unsupported by the evidence (as I certainly do), deliver myself from all consideration of it. Where a general charge of general and habitual misconduct is to be made out, it should be propounded in exact terms for the purpose: where specific acts of misconduct are to be relied on, they should be specifically put in issue, with due certainty and exactness of statement." It is not to be inferred, however, that the rigid rules

prevailing in courts of common law, relative to CHAP. 2.
 variances, are enforced with equal strictness in
 admiralty proceedings. If the allegations of a Slight
variances
not material.
 party be such as fairly to apprise his adversary of
 the nature and import of the evidence adduced
 in support of them, slight variances will be disre-
 garded^(a).

I will conclude this very desultory review of the
 subject of the admiralty pleadings, by a reference
 to the provisions of such others of the new rules of
 practice as pertain to the subject.

The thirty-first rule ordains that the defendant
 may object, by his answer, to answer any allegation
 or interrogatory contained in the libel, which will
 expose him to any prosecution or punishment for a
 crime, or to any penalty, or any forfeiture of his
 property for any penal offence. Defendant
not bound
by his an-
swer to ac-
cuse himself.

The thirty-second rule declares that the defen-
 dant shall have a right to require the personal
 answer of the libellant, on oath or solemn affirma-
 tion, to any interrogatories which he may, at the
 close of his answer, propound to the libellant,
 touching any matter charged in the libel, or touch-
 ing any matter of defence set up in the answer,
 subject to the like exception as to matters which
 shall expose the libellant to any prosecution or
 punishment or forfeiture as is provided in the 31st
 rule. In default of due answer by the libellant to such
 interrogatories, the court may adjudge the libellant
 to be in default, and dismiss the libel, or may compel
Libellant
bound to
answer
interroga-
tories.

(a) *Crawford et al., v. The William Penn*, 3 Washington's O. C. R.,
 484.

VOL. 2. his answer in the premises by attachment, or take the subject matter of the interrogatory *pro confesso* in favor of the defendant, as the court in its discretion shall deem most fit to promote public justice.

Court may dispense with answers to interrogatories, or direct the answer to be taken on commission.

Answer to be verified by oath or solemn affirmation.

The thirty-third rule provides, that where either the libellant or the defendant is out of the country, or unable, from sickness or other casualty, to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may in its discretion, in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the defendant, when and as soon as it may be practicable.

The twenty-seventh rule expressly requires that in all cases, "whether *in rem* or *in personam*, the answer of the defendant to the allegations in the libel shall be on oath or solemn affirmation(a)."

(a) It may be worth while to inquire whether this rule is not an innovation. The right of the libellant to require the defendant to answer on oath the allegations of the libel, and such interrogatories pertinent thereto as he may choose to propound, has never been doubted; but whether, when no such demand has been expressly made upon him, the defendant was bound to swear to the truth of his answer, I should have supposed to be at least doubtful, but for the remark of Mr. Justice STORY in the early case of *Gammel v. Skinner* (2 Gallison's R., 45), that "in causes on the instance side of the court, the answer of the claimant should be verified by his oath;" adding that "this is the general practice both of courts of equity and of courts of admiralty, and indeed of all courts proceeding according to the course of the civil law;" and the unhesitating re-assertion of this rule of practice by the learned judge of the District of Maine, in the case of *Sutson v. Jordan* (18 American Jurist, 294).

Mr. DUNLAP, who may be supposed to have been familiar with the practice of the District Court of the United States for the District of

But by a subsequent rule this form of verification CHAP. 2.
has been dispensed with, when the sum or value in

Massachusetts, states that, in that court, "answers are not required to be on oath, unless at the instance of the plaintiff." It is obvious also that he considered this to be the general rule of practice, because he repeatedly cautions the libellant against the inconsiderate exercise of his right to require an answer under oath, lest he should thereby prejudice his cause by making an unfavorable answer evidence against him; and in this opinion, the learned editor of his work, who had for several years been Reporter of the Circuit Court for the First Circuit, seems to have intended to be understood as concurring, by his repetition of the like caution; for it is hardly to be supposed that either of these writers believed that a formal demand on the defendant to verify his answer on oath, would give to it any additional weight, if he would by law have been equally obliged to swear to its truth without any such demand.

In the Southern District of New-York, the practice in this respect has long been deemed a fit subject of regulation by express rule. Formerly all answers were there required to be sworn to; but by a subsequent rule, it is declared that "an answer need not be put in under oath, unless so required by a sworn libel, or one filed by the United States." By the phrase "so required," it is presumed an express prayer for this purpose is meant. The effect, and indeed the only object of the rule, therefore, appears to have been to dispense with the oath required by the former rule, in all cases, unless it was expressly required by the libellant. In support of the assertion of Mr. Justice STORY, above quoted from the case of *Gammel v. Skinner*, he cites 2 BROWN'S Civ. and Adm. Law, 416, and MARRIOTT'S Formulary, 363. The remark of BROWN is, that "Each party is entitled, at any time, even down to the hearing of the cause, to demand the answer of his adversary upon oath to every one of his pleadings." And at the page referred to in MARRIOTT, there is given a precedent for a "*Decree for Answers*," which is in fact a monition, citation, or summons to the defendant to answer personally on oath; reciting that the monition had been "*decreed*," on the petition of the proctor of the libellant, "alleging that the said ——— [the claimant] is a more legal person, from whom the truth in this behalf may be better found out and inquired, than from his proctor exercising for him." And at page 350 of the same work, a precedent is given of an attachment against the claimant, founded on his disregard of the monition to answer on oath.

VOL. 2. dispute does not exceed fifty dollars, exclusive of costs, unless the court shall otherwise specially direct(a).

Form of the answer.

With regard to the form of the answer contemplated by the new rules, the only safe direction which can be given, probably, is, that it should be in accordance with the principles enforced by courts of equity in this respect. The following brief summary, extracted from STORY's excellent work on Equity Pleadings, comprises the most essential of these principles

To be full, certain and direct.

"An answer must be full and perfect to all the material allegations in the bill. It must state facts and not arguments. It is not sufficient that it contains a general denial of the matters charged; but there must be an answer to the sifting inquiries upon the general subject. It should also be certain in its allegations, as far as practicable. To so much of the bill as it is necessary and material for the defendant to answer, he must speak directly and

The true explanation of the matter is supposed to be this: According to the civil law practice, the proctor is formally appointed, and expressly recognized as the *proxy* of his client, to appear for him, and to do all things for him which he might possibly do if he were personally present himself. In this representative character he takes upon himself the entire management of the suit, and gives his allegations in his own name. Such is the practice in the English admiralty. Hence the answer of the *party* is always denominated his *personal* answer; which, as I understand, is only given when demanded by the adverse party, and in pursuance of a decree of the court. The sole object being to obtain admissions or discoveries beneficial to the adverse party, the respondent is of course required to answer on oath. In our practice, all answers to the libel are personal answers, and are, by the abovementioned rule, required to be given on oath.

(a) Appendix: Rules of Admiralty Practice, Rule XLIX.

without evasion; and he must not merely answer the several charges literally, but he must confess or traverse the substance of each charge; and wherever there are particular, precise charges, they must be answered particularly and precisely, and not in a general manner, though the general answer may amount to a full denial of the charges. The answer should, in general, also, be full to all the interrogatories founded on the matters charged in the bill, unless, indeed, they are clearly immaterial; and one test of materiality is to ascertain whether, if the defendant should answer in the affirmative, the admission would be of any use to the plaintiff in the cause; either to assist his equity or to advance his claim to relief. If it would, it must be answered, for it is material; if not, it is immaterial, and need not be answered.

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“In general, if a fact is charged which is in the defendant's own knowledge, as if done by himself, he must answer positively, and not to his remembrance or belief, if it is stated to have happened within six years before; but as to the facts which have not happened within his own knowledge, he must answer positively, and not on belief, though not so as to the result of a conversation. There is great practical difficulty on this head; for, though the answer must meet, in some way or other, every statement in the bill, and the defendant is required ‘to speak to the best of his knowledge, remembrance, information and belief,’ yet there will be partial omissions and denials of every shade and character; some delivered in terms of uncertainty; some mixed

Answer to be positive

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up with explanatory or qualifying circumstances, and some very general and loose, and general in their language and import. It was with a view to meet this difficulty that Lord CLARENDON's order was made, declaring that an answer to a matter, charged as the defendant's own act, must regularly be without saying 'To his remembrance,' or, 'as he believeth,' if it be laid to be done within seven years before, unless the court, upon exception taken, shall find special cause to dispense with so positive an answer. And if the defendant deny the fact, he must traverse or deny it (as the case requires), directly, and not by way of negative pregnant. As if he be charged with a receipt of a sum of money, he must deny or traverse that he hath received that sum or any part thereof, or else set forth what he hath received. And if a fact be laid to be done with divers circumstances, the defendant must not deny or traverse it literally, as it is laid in the bill, but he must answer the point of substance positively and certainly. However, it is plain that no positive rule can fully provide for all the various difficulties of this sort; and each must therefore be decided upon its own circumstances(a)."

Must not be evasive.

Hearing upon the libel and answer, demurrer, or plea to the jurisdiction.

If the answer of the defendant contains admissions of the allegations of the libel to an extent sufficient, in the opinion of the libellant, to supersede the necessity of proof, he may at once have the cause set down for hearing upon the libel and answer alone; and so, if a demurrer or a plea to the juris-

(a) Story's Eq. Pleadings, §§ 252, 253, 254, 255.

diction be interposed, the question of law thus presented may, at the instance of either party, be brought to argument immediately, or on such early day as shall for that purpose be assigned by the court.

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CHAPTER IX.

AMENDMENTS.

General principles affecting the right of amendment.

THE subject of the present, like that of the last chapter, does not admit of being treated with much minuteness or precision. It may be said, in general, however, that our courts are invested with a large discretionary power, which they are bound to exercise with the utmost liberality, of permitting parties in admiralty suits to correct mistakes, to rectify errors and supply omissions or deficiencies in pleadings. The object of this authority being the furtherance of justice, amendments are allowed, on either side, in matters of substance as well as of form, at every stage of the suit, when necessary to the attainment of this end. The propriety of granting this privilege, in any particular case, will depend on the circumstances by which it is attended. The application is addressed to the sound discretion of the court, and this discretion is to be exercised with a just regard to the rights and interests of both parties—care being taken that, for the sake of relieving one party, injustice shall not be done to the other.

Rule regulating the amendment of the libel.

The Supreme Court has thought proper, by one of the new rules of admiralty practice, to some extent, to define this power and to regulate its

exercise. The twenty-fourth of these rules is as follows: "In all informations and libels, in cases of admiralty and maritime jurisdiction, amendments in matters of form may be made at any time, on motion to the court, as of course; and new counts may be filed, and amendments in matters of substance may be made upon motion at any time before the final decree, upon such terms as the court shall impose; and where any defect in form is set down by the defendant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms upon the libellant." It is not supposed to have been the design of this rule to introduce any innovations in conflict with authoritative antecedent decisions. These decisions are few in number, and directly relate chiefly to amendments in an appellate court—the authority to grant relief in this form being held not to be limited to the district court, but to appertain also to the circuit and Supreme Court on appeal. It is held, moreover, not to be restricted, even in the appellate court, to the reformation of the original allegations, but that the court may also allow new allegations to be filed for the purpose of enabling it to take effective cognizance of merits which appear upon the record, but are not embraced by the pleadings as framed. Thus, in a prize proceeding for the condemnation as a prize of an American vessel, having a cargo on board, consisting partly of French and partly of American property, captured by a British squadron, and afterwards recaptured by an American privateer; the property belonging to American citizens, having,

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Amend-
ments al-
lowed after
appeal.

New allega-
tions admis-
sible in ap-
pellate
courts.

VOL. 2 by a decree of the district court, which was affirmed in the circuit court, been restored to the owners on the payment of salvage, and it being objected, on appeal to the Supreme Court, that, as the whole cargo had been libelled as enemy's property, the salvage had been irregularly and improperly awarded — the court observed, that "if there were anything in the objection, it could not, in any beneficial manner, avail the defendants; for the most that could result, would be that the cause would be remanded to the circuit court, with directions to allow an amendment of the libel. Where merits clearly appear on the record, it is the settled practice in admiralty proceedings, not to dismiss the libel, but allow the party to assert his rights in a new allegation." This practice, so consonant with equity and sound principle, the court added, had been deliberately adopted by the court on former occasions^(a). So, where, in a libel of information, the offence charged was, that the ship proceeded against, departed on the 12th of February, 1810, from the port of Savannah, with a cargo, *bound to a foreign port*, with which commercial intercourse was not permitted, etc., the ship having been condemned by the decree of the district court, and an appeal having been taken to the circuit court, the district

(a) *The Adeline and Cargo*, 9 Cranch's R., 244 (3 Curtis's Decis. S. C., 350). The objection was held, moreover, to be altogether inapplicable to a prize proceeding; because "whether the salvage be held a portion of the thing itself, or a mere lien upon it, or a condition annexed to its restitution, it is an incident to the principal question of prize, and within the scope of the regular prize allegation."

attorney was permitted to amend the libel of information by filing a new allegation, that Liverpool, in Great Britain, was the foreign port to which the ship was bound when she departed from Savannah, and that she did so depart, etc(a). So, also, where the ship proceeded against, being a Portuguese ship, was charged in the original libel with a piratical aggression upon an American armed vessel, against the act of Congress, entitled "An act to protect the commerce of the United States, and punish the crime of piracy;" pending the proceedings in the circuit court, on appeal, leave was granted to the libellants to file a new count or allegation, alleging the aggression to have been hostile, and with intent to sink and destroy the American ship(b). In both of these cases an objection was taken in the Supreme Court, against the admissibility of the amendment allowed in the circuit court, on the ground that the subject matter was exclusively cognizable, originally, in the district court; and that to allow the amendment, was virtually to permit a new suit to be instituted in the circuit court. But the amendments were held to have been properly allowed. "The objection," said the court, "is founded on a mistaken view of the rights and authorities of appellate courts of admiralty. It is the common usage, and admitted doctrine of such courts, to permit the parties, upon appeal, to introduce new allegations and new proofs."

(a) *The Edward*, 1 Wheaton's R., 261 (3 Curtis's Decis. S. C., 540).

(b) *The Marianna Flora*, 11 Wheaton's R., 1 (6 Curtis's Decis. S. C., 497).

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In cases of
municipal
seizure.

In cases of municipal seizure, in accordance with the principles of these decisions, it has repeatedly been held that when the evidence turns out to be insufficient to establish a forfeiture on the particular ground alleged in the libel, but shows that a forfeiture has nevertheless been incurred by reason of a different offence, the libel may be amended by the introduction of a new allegation setting forth such offence(a). In the case of *The Harmony*, the libel of information claimed a forfeiture, under the fiftieth section of the collection act of 1799, for unlading goods without a permit; and the attorney for the United States moved for leave to amend the libel, by inserting a new count founded on the twenty-eighth section of the same act, for unlawfully receiving on board certain foreign goods from another vessel. But it appearing that the statute of limitations had already run against the forfeiture, so that to allow the amendment would in effect be to revive a right of action which in an original suit would be barred, the application was denied on this ground alone; the court, at the same time, expressing its concurrence in the doctrine prevailing in the common law courts, which favors the allowance of amendments in relation to a cause of action already before the court, for the express purpose of avoiding the statute bar.

In private
suits.

The principle of allowing the libel to be reformed, so as to render it conformable to the truth of the case as disclosed by the evidence, is equally appli-

(a) *The Caroline*, 7 Cranch's R., 496 (2 Curtis's Decis. S. C., 641); *The Schooner Harmony*, 1 Gallison's R., 123.

cable to suits between private suitors. In a suit by CHAS. S. a mariner against the master and mate of a vessel on board of which the libellant had served, the main allegation in the libel, and that which gave it unity, being a combination by the respondents to oppress and ill-treat the libellant, the libel at the same time containing charges of specific assaults by them — the libellant having failed to establish the charge of combination, the court said the libel might be amended so as to assume the form of a libel for a joint assault, if it had appeared that the evidence would support such a libel(a).

But although the parties are entitled, in the appellate court, to make any amendments which are necessary fully to present the merits of the case, this right has been held not to extend to new or additional subjects of controversy not embraced within the scope of the original proceeding. This was adjudged in a case which originated in the Superior Court of the Territory of Florida, whence it was by appeal carried to the territorial Court of Appeals, and thence to the Supreme Court. In pursuance of an award of arbitrators fraudulently appointed, one hundred and twenty-two bales of cotton had been landed and put into a warehouse at the Indian Key, a small island on the coast of Florida, in payment of a claim for salvage. The owners of the cotton, on discovering the fraud, instituted a suit *in rem* in admiralty to obtain the restoration of this cotton, claiming in their libel an indefinite number of bales. Some of the bales had

Amend-
ments re-
stricted to
the original
subjects of
controversy.

(a) *Jenke v. Lewis et al.*, Ware's R., 51.

VOL. 2. in the mean time been sold, and only seventy-two bales were arrested. A claim was interposed in behalf of the salvors, and the Superior Court decreed a restoration of these seventy-two bales. From this decree the claimant appealed; and in the Court of Appeals a new or amended libel was filed, in which the libellant claimed one hundred and twenty bales of cotton, and obtained a decree against the claimant for the value of that number of bales.

On appeal to the Supreme Court, one question was, whether the Court of Appeals was authorized to allow the abovementioned amendment.

"The parties," say the court, "have a right in the appellate court to make any amendments that were required to bring forward the merits of the case: and the question is, whether the amendments allowed exceed these limits; and whether a new case was not presented there, different from that which was carried up by appeal." The decision of the court was that the amendment was not justifiable. "The case carried up was the controversy about the seventy-two bales: this was the *res* in controversy; and in so far as these seventy-two bales were concerned, either party was entitled to make amendments, or introduce new evidence, in support of his title in the appellate court. But the libellant could not introduce a new subject of controversy; and the amendments which brought into the case the additional fifty bales, was the introduction of a new *res*, which did not go up by appeal, and could not be originally instituted in an appellate court."

The libel in the Court of Appeals also claimed damages against the claimant for a marine tort, in addition to the value of the property withheld. This new demand was held by the Supreme Court to be obnoxious to the same objection as that for the additional fifty bales of cotton. "There was," say the court, "no such charge made by the libellant in the Superior Court, nor any decree made there in relation to such damages; and no such question could therefore be carried up by the appeal of the claimant. It was a new claim, and originated in the Court of Appeals." The decree of the Court of Appeals was held to be erroneous also in another respect. On the arrest of the seventy-two bales, they were, upon the application of the claimant, delivered to him on giving a stipulation for the agreed value thereof. The Court of Appeals, impelled probably by its sense of the turpitude of the whole transaction, fixed a higher value upon the property than that for which the stipulation was taken, and decreed the claimant to pay it; but the Supreme Court very truly observed that the stipulation "was a substitute for the cotton delivered to the claimant, and, upon appeal, stood in the place of it, and represented it in the appellate court. It could not, therefore, be put aside, and a new valuation substituted in its place(a)." The decree seems, moreover, to have been obnoxious to still another objection, viz., that a court of admiralty, even of original jurisdiction, has no right to engraft a pros-

CHAP. 9.

Decree in rem cannot exceed the sum specified in the stipulation.

(a) *The Cargo of the Schooner North Carolina*, 15 Peters's R., 40 (14 Curtis's Decis. S. C., 15).

VOL. 2. ecution *in personam* upon a suit *in rem*, and thereby subject the claimant to damages beyond the amount of his stipulation.

It will be observed that all the foregoing cases relate to amendments of the libel; and this, as we have seen, is true also of the only rule which the Supreme Court has thought proper to promulgate upon this subject.

Amend-
ments of
answer
cautiously
admitted.

The same liberal principles in this respect which are applied in the admiralty to the libel, prevail also in chancery in relation to amendments of the bill. But in the case of answers and pleas put in upon oath, courts of equity, for reasons applicable also to admiralty causes, proceed with greater caution and reserve in regard to the allowance of amendments. In a material matter the defendant will not be allowed to amend, unless upon evidence of surprise; but where a defendant, after putting in his answer, discovered a ground of defence of which he was not before informed, the court allowed the new matter to be added to the answer, and the answer to be re-sworn(a). In accordance with this principle,

(a) The following is the rule lately promulgated by the Supreme Court, concerning the amendment of answers to a bill in equity. It is the 60th of the new Rules of Equity Practice.

"After an answer is put in, it may be amended, as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document or other small matter, and be re-sworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer; but after replication, or such setting down for a hearing, it shall not be amended in any material matter, as by adding new facts or defences, or qualifying or altering the original statements, except by special leave of the court, or of a judge thereof, upon motion and cause shown after due notice to the opposite party,

in a suit for salvage, where, after a decree in the district court in favor of the libellants, and an appeal to the circuit court, the claimants having there, as it was clearly shown, for the first time discovered that some of the salvors had been guilty of deliberate embezzlement of the salvage property, whereby their claim to salvage had become justly forfeited, the claimants were permitted to file a supplementary answer setting up this ground of defence(*a*). And in a suit by a seaman for wages, in the District Court of the United States for the District of Maine, where one of the grounds of defence supposed to be countenanced by the evidence, and insisted upon at the hearing, was, that the libellant had been guilty of misconduct which amounted to mutiny, and worked a forfeiture of his wages, but there was no allegation to this effect in the answer, the learned judge said that as the charge was of a very grave character and went to the merits, he should feel it to be his duty, if it were in fact sustained by the evidence, to allow an amendment, in order to bring the matter fairly before the court.

The language of the twenty-fourth rule seems to contemplate an application "to the court" for leave to amend the libel, in all cases, even though the amendment be "of course," or without notice or

Application
to the court,
when neces-
sary.

supported, if required, by affidavit. And in every case where leave is so granted, the court or the judge granting the same may, in his discretion, require that the same be separately engrossed and added as a distinct amendment to the original answer, so as to be distinguishable therefrom."

(*a*) *The Schooner Boston and Cargo*, 1 Sumner's R., 328.

VOL. 2. special cause shown. The rule is not supposed, however, to form an impediment in the way of permitting amendments *before answer or exception*, without a formal motion for that purpose(*a*).

Amend-
ments in the
District
Court for the
Southern
District of
New-York.

The antecedent practice in this respect, of the District Court of the United States for the Southern District of New-York, is thus stated by Judge BERRS:

"When a libellant finds any irregularity or mistake in his *process* or libel, he may amend them of course before contestation of suit, in which case he should serve on the opposite party the proceeding amended, where a proctor has appeared and taken a copy of the libel." Such a practice is convenient, and seems to be unobjectionable; and it is not supposed to be in conflict with the twenty-fourth rule. One of the rules of that court also prescribes that "amendments or supplementary matters must be connected with the libel or other pleading by appropriate references,

(*a*) No such formality is required by the correspondent rule of equity practice; and as no reason is perceived why its provisions should not be substantially applied to suits in admiralty, it is sub-joined, and is as follows:

"The plaintiff shall be at liberty as a matter of course, and without payment of costs, to amend his libel in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do, of course) after a copy has been so taken, before any answer or plea or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall without delay furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted; and if the amendments are numerous, he shall furnish in like manner to the defendant a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby."

without a recapitulation or restatement of the pleading amended or added to.” CHAP. 9.

This is certainly a highly proper practice, and ought to be observed without any express rule requiring it. But the rule seems to have been deemed necessary for the purpose of correcting an evil which had crept into the practice of the court; for it is said by Judge BERRS to have been “not unfrequently the case with practitioners to recapitulate or rehearse all preceding processes, as inducements to the amendatory charges;” but he adds, that “costs are never allowed for such proceedings.”

With respect to the mode of obtaining the allowance of amendments when an application to the court for that purpose is necessary — in the absence of any express rule or established usage of the court to the contrary, a copy of the proposed amendments should be served on the proctor of the opposite party, with a notice of the time of applying to the court to grant an order for their allowance(*a*).

(*a*) Betts's Adm. Practice, 58, and rule 95. As to amendments in an appellate court, see further, *infra*, chapter on Appeals.

CHAPTER X.

EVIDENCE.

THE next subject for consideration, is the means to be resorted to, when, as generally happens in contested cases, there are questions of fact in controversy between the parties, for the purpose of enabling the court to determine such questions.

I. THE PLEADINGS.

One of the sources of information to which the court will be required to direct its attention, is the pleadings in the cause; and as the extent to which it will be necessary for the parties in a suit to provide themselves with extrinsic evidence in support of their respective allegations will depend upon the degree of weight to be allowed by the court to these allegations in the formation of its judgment, it is proper, at the outset, to ascertain the principles by which courts of admiralty are governed in this respect.

Admissions
supersede
the necessity
of proof.

The defendant is required, as we have seen, to give an explicit answer to each article and material allegation of the libel. To whatever extent the statements of the libel are expressly admitted by the answer, no further evidence of their truth is required. It must be borne in mind, however, that where there are several defendants, each is entitled, if he chooses (subject to an ultimate question as to

One defend-
ant not
bound by
the admis-
sions of his
co-defen-
dant.

costs if the proceeding is oppressive), to put in a separate answer, although they have a common defence; and that the answer of one defendant is not evidence against his co-defendant(a).

CHAP. 10.

Where the defendant has no knowledge of the facts alleged by the libellant, except what he derives from the libel itself—as may happen in a case of salvage of property found derelict, for example—he may, it is supposed, decline either to admit or deny their truth, but may assert his ignorance thereof, and thus oblige the libellant to establish them by proof(b).

Facts neither admitted nor denied, to be proved.

Where the answer sets up new matter, by way of discharge or avoidance of the matter of the libel, it must be established by proof *aliunde*, as in chancery.

New matter in defence, to be established by evidence.

But suppose that the answer, in direct response to the libel, expressly denies some material allegation therein. The familiar and well established rule in chancery, in such cases, is, that no decree can be made against such denial, until it is contradicted by the oaths of two witnesses, or by evidence equivalent thereto. This rule rests upon the plausible ground, that, as the plaintiff, by appealing to the conscience of the defendant, has made him a witness in the cause, something more than the testimony of one opposing witness is necessary to turn the scale in favor of the plaintiff. Whether this is also the rule in courts of admiralty, is a highly important

Force and effect of denials in the answer.

Conflicting judicial opinions.

(a) Story's Eq. Pleadings, § 348.

(b) *Clarke et al. v. The Brig Dodge Healy and Cargo*, 4 Washington's C. C. R., 651.

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question, concerning which a contrariety of opinion has prevailed in our courts, and one which it is necessary here to notice.

In a case in admiralty, decided in the District Court of the United States for the District of South Carolina, in 1794, this rule was referred to and asserted by Judge BEE, as the rule of all courts proceeding according to the course of the civil law(*a*). And in an early case before Chief Justice MARSHALL, he is reported to have used language indirectly indicative of an impression that this rule was obligatory on courts of admiralty, no less than on courts of equity(*b*). But neither of these cases turned upon this point, and in neither of them is any authority relating to it referred to. They were nevertheless considered by Mr. DUNLAP to be of sufficient weight to warrant him in laying down the rule in question as a principle of admiralty procedure(*c*).

Rule in
chancery re-
quiring two
witnesses to
controvert
answer, not
applicable
in the admi-
ralty.

Under this unsatisfactory state of American authority upon this question, a case arose a few years since, in the District Court for the District of Maine, in which it became necessary to consider and decide it. The suit was instituted by a seaman against the master and mate of the vessel, for assault and beating on the high seas. Against the mate, by whom the assault was alleged in the libel to have been actually committed, the charge was clearly established. The charge against the master was, that he had not only omitted to interpose for the protection of the libel-

(*a*) *The Rambler*, Bee's R., 10.

(*b*) *The Matilda*, 4 Hall's Law Journal, 428.

(*c*) Dunlap's Adm. Practice, 122.

lant, as it was his duty to do, but that he had ordered the mate to commit the violence complained of. The master, in his answer, distinctly denied all knowledge of the assault until it was consummated. This part of the answer was contradicted by one witness; and the question was thus presented, whether the rule which prevails in chancery, that a sworn answer responsive to the bill is to be received as true, unless it is contradicted by two witnesses, or by one witness with strong corroborative circumstances, was also the rule in the admiralty. Judge WARE, upon a luminous review of the subject, came to a satisfactory conclusion that the rule in chancery was *not* the rule in the admiralty. If, in fact, there was any such established rule in the admiralty jurisprudence, he thought it was, to say the least, surprising, that it should be nowhere met with, or explicitly declared and laid down, as a known rule of decision, as it is found in almost every volume of equity reports; that no instance in point should have occurred in all our admiralty cases, where it was the very turning point of the cases, as it frequently is in equity; that the only evidence that can be found existing, of so important a rule of jurisprudence, and one of which the application must be of such frequent occurrence, should be two *obiter dicta*, where it is just mentioned, and that in connection with the familiar rule in chancery. Nor did he consider it a legitimate inference, that, because a certain effect is given to an answer in chancery, the same must be allowed to an answer in admiralty. The course of proceeding in the two courts is in many respects

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different, and, what is more material to be remarked, their rules and principles of practice were derived from different sources, those in equity being derived from the canon law, through the English ecclesiastical courts, modified, it is true, from time to time, by the court itself; while the general rules of practice in admiralty come to us directly from the Roman law. By the Roman law, both parties were obliged to verify their causes by oath; that is, the actor was obliged to swear to his demand, and the defendant that his defence was made in good faith, was in his belief true, and a good defence to the action. In the brief and comprehensive form of pleading in the Roman forum, the oaths of the parties amounted, in substance, to the actor's swearing to the libel, and the defendant to his answer; and such, notwithstanding the doubts expressed upon the subject, he had supposed to have been always the practice of the admiralty. The oath required of the libellant to the debt or claim on which the action is brought, corresponds to the oath of calumny required of the actor by the Roman law: *quod non calumniandi animo litem se movisse, sed existimando bonam causam habere*. And the oath required of the defendant in the admiralty, in like manner, corresponds with that exacted of the defendant by the Roman law: *quod putans se bona instantia uti, ad reluctandum pervenerit*.

The doctrine thus laid down by Judge WARE, has since been recognized by the Supreme Court. "The answer," it was added, "may be evidence, but

it is not conclusive(a)." To what degree of weight, then, is it entitled? The learned judge having satisfied himself that the rule of the court of chancery is inapplicable to suits in admiralty, it became necessary to consider and decide this question. His conclusion was, that in the strict and proper sense of the word, neither the libel nor the answer were to be regarded as *testimony*; but, on the other hand, they were not to be considered in the light of ordinary pleadings at common law, drawn up according to a fixed and established formula — a declaration and plea of the general issue, in the action of trover, for example. They contain a particular statement by the parties of the cause of action and of the grounds of defence, deliberately made under the solemnities of an oath, and as such they are to be regarded. And in order to determine the just influence which the answer ought to have upon the decision of the controversy, it is to be carefully compared with the allegations of the libel, and with the proofs and testimony in the case; and the degree of credit to be given to it depends upon the result of such comparison. If it appears to have been carefully drawn, and the result of this comparison is favorable to the candor of the respondent; if it exhibits no more than that degree of bias which every one naturally feels towards his own cause, and no more coloring than an upright man may insensibly give to facts in which his interest and feelings are involved — it may justly have a material influence

CHAP. 10

Answer to
libel not
testimony
in a strict
sense.

(a) *Andrews v. Wall*, 3 Howard's R., 568, 572.

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Force and effect of the answer to be determined by the particular circumstances of the case.

upon the final conclusion of the judge. But whether the answer is to be treated as the statement of the party, or received as the testimony of an interested witness, and treated as a part of the proofs in the case, there is no technical rule in the admiralty which binds the conscience of the court, by determining beforehand the degree of credit to be ascribed to it. It is to have that weight, to which, in the judgment of the court, under all circumstances of the case, it is fairly entitled. If it be objected that this is giving no rule, the answer is that the nature of the case does not admit of any precise rule. By what rule of law is it that we are authorized to believe one disinterested witness in preference to another? In both cases, the matter is referable to the sound discretion and conscience of the tribunal whose province it is to decide(a).

(a) *Stutson v. Jordan et al.*, 18 Amer. Jurist, 294. The opinion of Judge WARE is followed by a dissertation, written, as I infer from the initials subjoined to it, also by him, which is characterized by so much learning and research, and is so replete with interest and instruction, that I cannot refrain from inserting it entire.

"As the forms and modes of proceeding in the admiralty are derived principally from the Roman law, some light may be thrown on the question discussed in the above case, by a more extended account of the practice of the civil law courts in relation to the same matters.

"In all countries, and under all systems of jurisprudence, it has been found necessary to establish some checks to causeless and vexatious litigation. In the jurisprudence of the common law, the principal check is the liability to costs; but in the jurisprudence of ancient Rome, it appears that a party was not liable for the costs of the adverse party, merely because judgment was rendered against him. He was liable only when he instituted an action without probable cause; that is, when the suit was vexatious, or, in the language of the Roman law, calumnious; and then costs were not given against him as part of the judgment, but could be recovered only by a new action called an action of

The doctrine of this case is distinctly reiterated by Judge WARE, in the case of *The Crusader*(a). CHAP. 16.

calumny, corresponding to an action for a malicious suit at common law. By this action, the party could recover ordinarily a tenth, but in some cases a fifth and even a fourth, of the sum in controversy in the former action. This was given as an indemnity for his expenses, in being obliged to defend himself against a vexatious suit.

"In the time of Justinian, and perhaps at an earlier period, the action of calumny had fallen into desuetude, and he, as a substitute, required the oath of calumny. The oath required was in substance an affidavit on the part of the actor, that the debt or cause of action on which the suit was brought, was in his opinion well founded; and on the part of the defendant, that the defence was made in good faith, and in the belief that it was a good defence: *Actor quidem juret, non calumniandi animo litem se movisse, sed existimando bonam causam habere; reus autem non aliter suis allegationibus utatur, nisi prius et ipse juraverit, quod putans se bona instantia uti, ad reluctandum pervenerit.*

"But these affidavits were not evidence in the cause: they were required solely and professedly as a check to vexatious litigation; but the oath of calumny, though not evidence, was an essential part of the proceedings in the cause. It was ordered by Justinian to be officially required by the judge, although not insisted upon by the parties; and if omitted, it vitiated the whole proceedings. The practice of requiring the oath of calumny appears to be preserved generally in the civil law courts of the continent of Europe. It is not, however, observed in France; and DUPIN condemns it as conducing more to perjury than the prevention of litigation, which he says is more effectually checked by a liability for costs.

"Another part of the Roman jurisprudence, from which our admiralty practice has been in part derived, is the interrogatory actions of the Roman law. These were derived from the edict of the prætor, and constituted a part of that very portion of the law of Rome called the *jus prætorium*. The reason of the introduction of these actions was this: If the actor demanded in his action more than was his due, he failed in his whole demand: judgment was rendered against him; and if he failed for this cause, it was with difficulty that he could be restored to his rights *in integrum*. As he could not in all cases know the precise extent of his rights, or rather of the defendant's liability,

(a) Ware's R., 438, 443.

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Force and effect of answers to interrogatories.

The concluding paragraph of the extended extract from the American Jurist, just given in a note, as the learned reader will not have failed to remark,

that is, whether he was liable for his whole demand, in *solido*, or for a part; as, if the action was against him in his quality of heir, whether he succeeded to the whole inheritance or to a part, this action was allowed by the prætor, in the nature of a bill of discovery to compel a disclosure, for the purpose of enabling the actor to make his claim to correspond precisely with his right and with the defendant's liability.

"BROWN says that these actions 'were confined to a few cases, and were introduced to discover to what part of the *as*, or inheritance, the defendant was entitled.' Though this seems to have been the principal object of their introduction, and there might be more frequent occasion for their use in these cases than in others, it is clear, from the whole title of the Digest, where they are treated, that they were not confined to them, but might be resorted to in all cases where the actor required a discovery: *Ubique judicem equitas moverit, æque oportere fieri interrogationem, dubium non est.*

"By a construction of the Emperor Nero, the law *de pluris petitione*, by which the actor failed if he demanded too much, was abolished; and by the time of Justinian, if not at an earlier period, these interrogatory actions had fallen into disuse, as we learn from a fragment of Callistratus preserved in the Digest. A new practice arose of putting the interrogatories after contestation of suit; and the answers thus obtained, instead of furnishing the grounds for the commencement of an action, became evidence in the case for the adverse party. This appears from the law referred to above: *Ad probationes sufficient ea, quæ ab adversa parte expressa fuerint.* The general practice of courts which have adopted the forms and modes of proceeding of the Roman law, of requiring the parties to answer interrogatories under oath, called positions and articles, or facts and articles, seems to be derived, through this law of the Digest and the later practice of the Roman forum, from the ancient interrogatory action; although HEINECCIUS has expressed a contrary opinion.

"The clause of the law in question is generally supposed to be an interpolation of Tribonian in the text of Callistratus, and considered as the introduction of a new practice. It is so viewed by POTHIER; and in his edition of the Pandects, it is called *fus novum*. VOLT, however, seems to think that there is evidence of a change in the practice as early as the age of Ulpian, who was contemporary with

intimates a distinction in the American courts of admiralty, between the force allowed to responses to interrogatories propounded, and that ascribed to

CHAP. 10.

Callistratus. But at whatever period the change took place, whether in the age of Ulpian or Tribonian, it has passed with various modifications into the practice of the courts of all nations which have adopted the Roman law as the basis of their jurisprudence. Either party may interrogate the other as to any matters of fact which may be necessary to support the action or maintain the defence; and the party interrogated is bound to answer, unless his answer will implicate him in a crime. The answer is evidence against himself, but not to affect the rights of third persons.

"This appears to be the usual mode in which parties extract evidence from each other; but modern practice has introduced another innovation, and has authorized, for the purpose of expediting causes, the introduction substantially of the positions and articles into the libel itself, although regularly they cannot, in the form of positions and articles, be propounded until after contestation of suit, and of course not until after the answer is in. A libel in this form is said to be an articulated libel, or a libel in articles. The evidence sought for is then obtained in the answer. It is a special answer to each article in the libel; and the *litis contestatio*, when the pleadings are in this form, is said to be special and particular, in contradistinction to a simple libel, and a general answer amounting to the general issue. An issue is formed on each article.

"From this account, it is apparent that the practice of the admiralty, so far as relates to the libel and answer, is in its forms identical with that of the Roman law. As in the Roman law, so in the admiralty, the parties are required to verify the cause of action and the defence by oath. The libel may either be simple or articulated, and the answer must correspond with it. Either party also may require the other to answer interrogatories on oath, touching any matters which may be necessary to support the libel or the answer.

"We have seen that the oath of calumny, or the general verification of the cause of action and ground of defence, was not evidence for either party. How far are the answers to interrogatories, or positions and articles, held to be evidence by the courts of the civil law? It has been before stated that this practice of interrogating a party after contestation of suit was derived from the interrogatory actions, and took their place when they fell into disuse. The answers of the defendant

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the answer to the allegations of the libel; and such a distinction is expressly asserted by the same eminent judge in the case of *The David Pratt*(a).

in these actions were evidence against him, but not in his favor. The object of the action was to extract from the party facts, the knowledge of which was confined to himself, or which was difficult to be proved except by his own admission, and without which the actor could not safely commence his action. If he answered truly, he was responsible according to his actual legal liability; but if he answered falsely, by denying his liability altogether, or by alleging it to be less than it was in fact, unless he could show that it was by an honest mistake, he was held liable for the whole demand: *Ut vel confitendo vel mentiendo sese oneret*.

"The late period in the progress of Roman jurisprudence at which this innovation on the ancient practice took place, is the reason why we find so little relating to it in the *Corpus Juris*. The natural presumption would be, that the answers would be held to be evidence to the same extent that the answers to interrogatory actions were, for which they were a substitute; and this seems to be a clear inference from the words of the law, whether they are to be considered as the words of CALLISTRATUS OF TRIBONIAN: *Ad probationes litigationibus sufficient ea, quæ ab adversa parte expressa fuerint apud iudices, vel in hereditatibus vel in aliis rebus quæ in causis vertuntur*.

"The civilians teach us accordingly that the interrogatories or positions and articles are subject to the same rules, and are governed by the same principles, as the interrogatory actions. POTHIER states the doctrine, and explains the reasons of it with his customary clearness. 'When a party,' says he, 'proposes facts and articles, upon which he obtains an order that the opposite party shall be interrogated by the judge, the oath which is taken on such occasions is very different from the decisory oath. While the decisory oath is proof for him who makes it, this, on the contrary, is no proof in favor of the party who makes it: the answers which the party interrogated makes, are proof only against him; they prove nothing in his favor. The reason of the difference is, that he who causes the party to be interrogated does it not with the intention of having the decision depend on his answers, but he puts him to answer in order to draw from the avowals of the party, or from the contradictions into which he may fall, some proofs or presumptions in his favor: *Ut vel confitendo vel mentiendo sese oneret*.

(a) Ware's R., 495, 504.

Referring to interrogatories subjoined to the libel, to which the answer of the master was demanded, but which had not been answered, he says, "The master, by answering these interrogatories, would make his answers evidence; for though the general answer of the respondent is not properly evidence any further than the charges in the libel, which are equally verified by oath, yet the answer to special interrogatories, which are subjoined to the libel, and sometimes put at the hearing, are evidence." But admitting the distinction to be sound, the question still remains, what is the force of this evidence? For it by no means follows from the language of the learned judge, that he supposed the rule which prevails in chancery to be applicable even to answers to special interrogatories. Indeed, the course of reasoning which led him so irresistably to the repudiation of that rule with respect to the answer to the allegations of the libel, seems to be hardly less conclusive against its admission with respect to answers to interrogatories. The objection to the rule is that it trammels the judgment of the court, and thus obstructs the free course of justice; and this is as true in the one case as in the other. To what extent this distinction may have been recog-

The answer cannot be divided: the whole must be taken together, or the whole rejected. It seems, however, that when a series of articles is propounded, the answer to each article is distinct and independent, and may be taken by itself; and the party making use of one, is not bound to admit the rest.'

"In the admiralty practice of this country, it is believed that when a party is required to answer interrogatories, the answers are evidence as well for the party who is interrogated, as for the other party."

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nized in the American courts of admiralty, I am not apprised. No ground is stated by the learned judge, on which it is supposed to rest; and it would, I think, be difficult to assign any, which would be altogether satisfactory. It is true that in calling upon the defendant to answer interrogatories touching the allegations of the libel, the libellant makes a voluntary appeal to the conscience of the defendant; and it may be said that, in doing so, he may justly be considered as acting at his peril, and ought to be bound by the answer, whatever it may be. But in citing the defendant to appear and answer the allegations of the libel, which he must do on oath, the libellant makes the like appeal. Besides, as the interrogatories can be such only as pertain to the allegations of the libel, the subject matter of them might generally be embraced in the libel without subjecting it to just exception for surplusage. Still, however, it must be conceded that the two cases are not identical, and that there are many distinctions in the law resting upon still narrower bases. It is only by means of his libel that the libellant can bring his case under judicial cognizance at all, and it is the law which compels the defendant to swear to his answer, whether the libellant desires it or not. But in propounding interrogatories to the defendant, the libellant avails himself of a privilege which he was at perfect liberty to forego.

II. TESTIMONY OF WITNESSES.

Having premised thus much concerning the influence which the allegations of the parties to the

suit are to have upon the judgment of the court, it is necessary to proceed, now, to the consideration of evidence in its more strict and usual sense; and, first, of the testimony of witnesses. CHAP. 10.

In courts proceeding according to the course of the civil law, testimony is taken upon written interrogatories by examiners, or on commission. It was in this manner only (except by voluntary affidavit in an act on petition), until the passage of the act of 3 and 4 Victoria, ch. 65, authorizing the examination of witnesses *viva voce* in open court, that evidence could be taken in causes in the English High Court of Admiralty. How obtained

The process act of 1792(a) ordains that "the forms and modes of proceeding in suits of equity and of admiralty jurisdiction shall be according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law, except so far as may have been provided for by the act to establish the judicial courts of the United States; subject, however, to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the Supreme Court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same." Under this enactment, therefore, if the judiciary act to which it refers had contained no provision upon the subject, our courts

(a) 1 Stat. at Large, 275, ch. 36, § 2.

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Witnesses to
be examined
viva voce in
court.

would probably have had no authority to summon witnesses to appear before them, and testify orally in equity and admiralty causes; but this act peremptorily directs "that the mode of proof by oral testimony and examination of witnesses in open court shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law(a)."

With respect to suits in equity, this provision has been so far altered by the act of April 29, 1802(b), as to empower a circuit court, upon the application of a party, to order the testimony of witnesses to be taken by deposition, except in states where testimony in chancery is not allowed to be taken in this form.

And the act of March 3, 1803(c), has been supposed to have wrought, by implication, the actual repeal of the above recited provision of the judiciary act, in regard to suits in equity, and to have so far modified it with respect to suits in admiralty, as to require all such additional evidence as the parties may be entitled to offer in the circuit court, on appeal, to be taken on commission(d); but neither of these acts is supposed to affect the positive injunctions of the judiciary act in relation to admiralty causes in the district court. It seems, nevertheless,

(a) 1 Stat. at Large, 73, ch. 20, § 30.

(b) 2 Stat. at Large, 156, ch. 31, § 25.

(c) 2 Stat. at Large, 244, ch. 40, § 2.

(d) *The Boston and Cargo*, 1 Sumner's R., 328, 332. But *vide infra* APPEALS.

to have been supposed by Mr. DUNLAP, that depositions may lawfully be taken on commission, in that court, in any case, without regard to the residence of the witnesses(*a*); and I am assured that such is the practice, to a considerable extent, in the district of Massachusetts. But I am bound to suppose that it is only by the mutual consent of parties, express or implied, that testimony is taken in this form(*b*). It may be said, therefore, in general, that in the district court, the manner in which the evidence of witnesses is to be brought before the court in admiralty causes, is the same as in suits at common law. The like process of subpoena is used for the purpose of securing the attendance of the witnesses, including the subpoena *duces tecum*, and they are examined in like manner. Generally, the process of a court is operative only within the territorial limits of its jurisdiction. By the act of March 2, 1793(*c*), however, a subpoena in a civil cause(*d*) may run to any place out of the district where the process is issued, provided such place be not more than one hundred miles distant from the place of holding the court at which the presence of the witness is required.

CHAP. 10.

Process of subpoena.

But the 30th section of the Judiciary Act provides a new mode of obtaining evidence in civil causes,

(*a*) Dunlap's Adm. Practice, 251.

(*b*) The legislative provisions referred to in the text, relating to this subject, will be more particularly noticed in the sequel, under the head of APPEALS.

(*c*) 1 Stat. at Large, 333, ch. 22, § 6.

(*d*) In criminal cases, a subpoena runs throughout the United States. *Ib.*

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under certain circumstances therein specified, which is very frequently resorted to in the courts of the United States, and which requires particular notice.

Depositions
de bene esse.

I refer to the taking of depositions *de bene esse*.

The importance of these provisions renders it proper here to insert them entire. They are as follows :

“ And when the testimony of any person shall be necessary in any civil cause depending in any district in any court of the United States, who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance than as aforesaid before the time of trial, or is ancient or very infirm, the deposition of such person may be taken *de bene esse* before any justice or judge of any of the courts of the United States, or before any chancellor, justice or judge of a supreme or superior court, mayor or chief magistrate of a city, or judge of a county court or court of common pleas of any of the United States, not being of counsel or attorney to either of the parties, or interested in the event of the cause ; provided that a notification from the magistrate before whom the deposition is to be taken, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party or his attorney, as either may be nearest, if either is within one hundred miles of the place of caption, allowing time for their attendance after being notified, not less than at the rate of one day, Sundays exclusive, for every twenty miles travel. And in causes of admiralty and maritime jurisdiction, or other causes of seizure when a libel shall be filed, in which an adverse party is not named, and depositions of persons circumstanced as aforesaid shall be taken before a claim be put in, the like notification as aforesaid shall be given to the person having the agency or possession of the property libelled at the time of the capture or seizure of the same, if known to the libellant. And every person deposing as aforesaid shall be carefully examined and cautioned, and sworn or affirmed to testify the whole truth,

and shall subscribe the testimony by him or her given, after the same shall be reduced to writing, which shall be done by the person taking the deposition, or by the deponent in his presence. And the depositions so taken shall be retained by such magistrate, until he deliver the same with his own hand into the court for which they are taken ; or shall, together with a certificate of the reason as aforesaid of their being taken, and of the notice, if any, given to the adverse party, be by him the said magistrate sealed up and directed to such court, and remain under his seal until opened in court. And any person may be compelled to appear and depose as aforesaid, in the same manner as to appear and testify in court. And in the trial of any cause of admiralty or maritime jurisdiction in a district court, the decree in which may be appealed from, if either party shall suggest to and satisfy the court that probably it will not be in his power to produce the witnesses there testifying before the circuit court, should an appeal be had, and shall move that their testimony be taken down in writing, it shall be so done by the clerk of the court. And if an appeal be had, such testimony may be used on the trial of the same, if it shall appear to the satisfaction of the court which shall try the appeal, that the witnesses are then dead or gone out of the United States, or to a greater distance than as aforesaid from the place where the court is sitting ; or that by reason of age, sickness, bodily infirmity or imprisonment, they are unable to travel and appear at court. And unless the same shall be made to appear on the trial of any cause, with respect to witnesses whose depositions may have been taken therein, such depositions shall not be admitted or used in the cause."

CHAP. 10.

The residue of the section consists of a proviso recognizing the power of the courts of the United States to issue a commission to take depositions, and to authorize the taking of depositions to perpetuate testimony ; and is as follows :

"Provided, That nothing herein shall be construed to prevent any court of the United States from granting a *dedimus potestatem* to take depositions according to common usage, when it may be

VOL. 2. necessary to prevent a failure or delay of justice, which power they shall severally possess; nor to extend to depositions taken in *perpetuam rei memoriam*, which, if they relate to matters which may be cognizable in any court of the United States, a circuit court, on application thereto made as a court of equity, may, according to the usages in chancery, direct to be taken(a)."

In addition to the officers named in the act, commissioners are, by a subsequent statute, also empowered to take depositions *de bene esse*(b).

The act must be strictly pursued, and a compliance with its requirements affirmatively shown.

Certificate *prima facie* evidence of the proceedings.

The authority conferred by the above recited enactment is to be strictly construed; and it must therefore appear that all the requisites of the law have been complied with, before the testimony taken is admissible. The reasons for taking the deposition and the fact of a notice, if any, to the adverse party, it will be remarked, are expressly required to be stated in the certificate of the officer before whom the deposition is taken. The certificate ought also to show a compliance with the act in regard to the manner in which the deposition was taken; viz, that the deponent was carefully examined, and cautioned, and sworn, or, having conscientious scruples, was affirmed, to testify the whole truth; and that his testimony was reduced to writing, either by the officer by whom it was taken, or by the deponent in his presence, and that it was subscribed by the deponent. Of all these facts, when explicitly stated, the certificate is sufficient *prima facie* evidence. But no mere presumptions in favor of the regularity of the proceedings are to be indulged; and therefore where the certificate showed an exact compliance

(a) Act of September 24, 1789, ch. 20; 1 Stat. at Large, 73, § 30.

(b) Act of March, 1817, ch. 30; 3 Stat. at Large, 350.

with the act in all other respects, except that the deposition was stated to have been subscribed by the deponent, after having been by him reduced to writing in his own proper hand, but did not state that this had been done in the presence of the officer, it was held by the supreme court to be inadmissible in evidence(a).

CHAP. 16.

It has also been held that the requisite official character of the person by whom the deposition was taken, is sufficiently established, *prima facie*, if it appears upon the face of the certificate(b). If no notice was given to the adverse party, because neither of them resided within one hundred miles of the place of examination, it will of course so appear from the certificate; and in accordance with the above mentioned decisions, this, it is presumed, would be deemed sufficient *prima facie* evidence that no notice was necessary.

Certificate *prima facie* evidence of the requisite official character, etc.

The authority conferred by the act, it will be observed, is limited to the officers therein named, "not being of counsel or attorney to either of the parties, or interested in the event of the cause." For greater caution, at least, it is certainly advisable that the officer should certify his exemption from these disqualifications; and such certificate, as in regard to the other requirements of the act, would undoubtedly be sufficient evidence of the fact, until the contrary should be shown: but whether such a certificate is necessary, has not, so far as I am

Whether the certificate ought to state that the officer is not counsel, etc.

(a) *Bell v. Morrison*, 1 Peters's R., 351 (7 Curtis's Decis. S. O., 612); *The Petapasco Insurance Company v. Southgate et al.*, 5 Peters's R., 604 (9 Curtis's Decis. S. O., 490).

(b) *Ruggles v. Bucknor*, Paine's O. C. R., 358.

VOL. 2. ~~the contrary should be shown: but whether such a certificate is necessary, has not, so far as I am~~ apprised, been judicially determined. The fact is negative in its character; and the presumption that an officer, standing in either of the specified relations to the suit, would not be guilty of the gross impropriety of assuming to take depositions therein, is very strong. The principle laid down in the case of *Bell v. Morrison*, above cited, that no presumptions are to be indulged in favor of the regularity of proceedings under this statute, was asserted in regard to one of the positive acts enjoined thereby, in itself unimportant, except as a precaution, and the omission of which would not necessarily imply any fraudulent or unlawful intent. Perhaps, therefore, there may be ground for holding that the competency of the officer in this respect should be presumed, until it is disproved.

Continuation of remote residence of witness need not be shown;

but the adverse party may show a change of residence.

When a deposition is taken, on the ground that the residence of the witness was more than one hundred miles distant from the place of trial, it is so far absolute that it is entitled to be read without proof that the witness still continues to reside at that distance; but if it be satisfactorily shown by the party against whom the deposition is offered, that the witness removed to a place within one hundred miles of the place of trial, after the deposition was taken, and that the party offering it knew the fact, the deposition cannot be read; and it makes no difference in this respect whether the deposition was taken at a place within or without the district(a).

(a) *The Petapaco Insurance Company v. Southgate et al.*, 5 Peters's R., 604 (9 Curtis's Decis. S. C., 490).

With respect to the other descriptions of persons mentioned in the act, the party offering the deposition is bound to show, at the trial, that the reason of taking it is still subsisting. This condition is imposed, in terms, by the act, which declares that unless it shall be made to appear, on the trial of any cause, that the witnesses whose depositions have been taken therein are dead, or gone out of the United States, or to a greater distance than as aforesaid from the place where the court is sitting; or that by reason of age, sickness, bodily infirmity or imprisonment, they are unable to travel and appear at court, such depositions shall not be admitted or used in the cause; and so it was held in the case last cited.

CHAP. 10.

In other cases, the party offering the deposition is bound to show the reason of taking it to be still subsisting.

It was decided by the late Mr. Justice THOMPSON, in a learned and elaborate judgment, that although objections to the competency of a witness examined *de bene esse* ought, in general, to be made at the time of taking the deposition, and should, if not then interposed, be considered as waived, provided the party against whom the witness is called to testify is present at the examination, and is at the time aware of the objection, yet that if the ground of objection was unknown to him, he is entitled to insist upon it at the trial(a).

The provision contained in the above recited section, which requires notice to be given to the person having the agency or possession of property libelled, when depositions are to be taken in behalf

Notice to agent or possessor of property arrested.

(a). *The United States v. One Case of Hair Pencils*, Paine's C. C. R., 400.

VOL. 2. of the libellant in a suit before a claimant has appeared, is supposed to embrace all suits *in rem* in the admiralty; although the terms of it seem to imply that it was framed with special reference to cases of municipal seizure, and of capture.

Witnesses
examined
viva voce.

Witnesses whose depositions are taken in this form, are examined and cross-examined *viva voce*, as in open court.

Depositions
may be
transmitted
by mail.

The injunction of the act that the deposition and certificate, when not delivered into the proper court by the magistrate in person, shall be "sealed up and directed to such court," has always been supposed to warrant their transmission by mail, directed to the clerk of the court; and this is the usual practice: but when this mode of conveyance is adopted, care must be taken, by a suitable endorsement on the package, to apprise the clerk of the nature of its contents, so as to prevent it from being opened out of court; for if so opened, without the consent of the parties, it cannot be received as evidence^(a).

If opened
out of court,
cannot be
read.

Depositions
may be
taken on
commission.

For the purpose of excluding any inference which might otherwise be drawn from the provisions of the act relative to the taking of depositions *de bene esse*, against the authority of the courts to issue commissions for the purpose of taking depositions absolutely, this authority, as we have seen, is expressly recognized by the act; and each party has a right to resort to this mode of obtaining evidence, when the witness resides beyond the reach of a

(a) *Beale v. Thompson et al.*, 8 Cranch's R., 70 (3 Curtis's Decis. S. C., 29).

subpoena. And it has been adjudged that depositions may be taken in this form, by agreement between the parties, wherever the witness may be (a).

The circumstances and conditions under which a commission will be issued, and the mode of obtaining, executing and returning it, in the several districts, depend, in the absence of any special rules of court upon the subject, on the laws and practice of the state in which the commission is issued (b). The practice of the Circuit and District Courts of the United States for the Southern District of New-York, relative to commissions, is regulated in detail by rules of court. By the rules of the courts for the Northern District of New-York, the regulations on the subject prescribed by the Revised Statutes of the state are expressly adopted; and those rules further provide that commissions may be issued by consent of parties, but the agreement for that purpose must be in writing and filed in the clerk's office, and the commission must be endorsed by the clerk, under his signature, "allowed by consent of parties (c)." .

There is another and more certain and effectual mode by which, in courts of admiralty, the testi-

Letters.
regatory.

(a) *Sergeant's Lessee v. Biddle et al.*, 4 Wheaton's R., 508 (4 Curtis's Decis. S. C., 456).

(b) *Buddicum v. Kirk*, 3 Cranch's R., 293 (1 Curtis's Decis. S. C., 584).

(c) See, relative to evidence in the courts of the United States, Conkling's Treatise on the organization, jurisdiction and practice of these courts, 3d ed., 389-423, where the subject is more fully treated; and the appendix of the same work, where practical forms adapted to the taking of depositions *de bene esse*, and by *dedimus potestatem*, are given.

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mony of witnesses resident in foreign countries may be obtained, viz., through the instrumentality of a foreign court within whose jurisdiction the witnesses reside. Courts of admiralty, in which the laws of nations and the general maritime law are administered, hold themselves bound mutually to aid each other for the furtherance of justice; and hence, when in a cause pending in a court of one country, the evidence of witnesses resident in another country is required, a court of the latter country will, upon request, cause such witnesses to be examined upon interrogatories furnished for that purpose, and transmit the evidence so taken to the court where it is to be used. Requests for assistance in this form are denominated Letters Rogatory, or commissions *sub mutua vicissitudinis obtentu*. By these letters the foreign court is informed that a suit is pending in the court from which they are sent, in which the testimony of certain witnesses resident within the jurisdiction of such foreign court is required, whom it is requested to examine or cause to be examined in due course and form of law, for the furtherance of justice; with an offer from the court making the request, to render the like service for the other. "If these letters rogatory are received by an inferior judge, he proceeds to call the witnesses before him by the process commonly employed within his jurisdiction, examines them on interrogatories, or takes their depositions, as the case may be; and the proceedings being filed in the registry of his court, authentic copies thereof, duly certified, are transmitted to the court *a quo*,

and are legal evidence in the cause. If the letters are directed to a court of superior jurisdiction, they appoint an examiner or commissioners for the purpose of executing them, and the proceedings are filed and returned in the same manner(a)."

CHAP. 10.

In general, courts of admiralty, in deciding upon the competency of witnesses, are governed by the same principles that are enforced in courts of com-

(a) Hall's Adm. Practice, 37. "It is to be regretted," adds Mr. HALL, "that the principle of the civil law with respect to letters rogatory, has not been introduced into our practice. Commissions of *dedimus potestatem* are liable to great objections. It is sometimes difficult to procure the names of commissioners; and when they are obtained, it is often impossible to prevail upon them to act. They have no power to compel the attendance of witnesses; and as they rarely receive a compensation for their services, they do not care much about attending themselves. Thus the return of the commission is protracted, the attorney is unable to account for the delay, his opponent is ordered to press for a trial, and an honest creditor is frequently deprived of a just claim. This is far from being an exaggerated picture. We may add that the witnesses cannot be prosecuted for perjury before the tribunals of their own country; nor, while they remain there, can they be prosecuted in that in which the cause is tried. It often happens, too, that the constituted authorities of the place consider these commissions as an encroachment upon their jurisdiction, and refuse to permit them to be executed. Instances of this kind have sometimes happened in cases of commissions which have been issued by the courts of the United States, the commissioners having been threatened with punishment if they proceeded to act under them. These and other inconveniences have been sensibly felt by practitioners, who have long wished that something more effectual for the advancement of justice were introduced into our practice."

But in one reported case, at least, that of *Nelson et al. v. The United States* (1 Peters's O. O. R., 235), this method of obtaining testimony has been resorted to. A commission, in the usual form, had been issued to Havana, but the authorities prevented its execution; deeming the attempt to take testimony under it, an interference with the local judicial tribunals. Letters rogatory were thereupon issued, and the desired

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mon law. The most important of these principles is that which pronounces an interest in the event of the suit a disqualification to testify therein. But this rule is subject to some exceptions; and even a party has been allowed, in courts of law, to testify to facts which from their nature could not be pre-

testimony was thus obtained. The following is a copy of these letters, as given in a note to the above recited report of the case.

UNITED STATES, }
DISTRICT OF PENNSYLVANIA, } *Sct.*

The President of the United States, to any Judge or Tribunal, having jurisdiction of civil causes at Havana, GREETING :

Whereas, a certain suit is pending before us, in which John D. Nelson, Henry Abbot and Joseph E. Tatem are claimants of the schooner *Perseverance* and cargo, and the United States are defendants; and it has been suggested to us that there are witnesses residing within your jurisdiction, without whose testimony justice cannot be completely done between the said parties. We therefore request you that, in furtherance of justice, you will, by the proper and usual process of your court, cause such witness or witnesses as shall be named or pointed out to you by the said parties, or either of them, to appear before you, or some competent person by you for that purpose to be appointed and authorized, at a precise time by you to be fixed, and there to answer on their oaths or affirmations to the several interrogatories hereunto annexed; and that you will cause their depositions to be committed to writing, and returned to us under cover, duly closed and sealed up, together with these presents. And we shall be ready and willing to do the same for you in a similar case, when required. Witness, etc.

When, in compliance with letters rogatory addressed by a court of a foreign country to a circuit court of the United States, a commissioner is designated to examine the witness named, such commissioner is empowered to compel them to appear and testify as in court. Act of March 2, 1855, ch. 140. The act seems to have been passed under the expectation that in any letters rogatory addressed to our courts, the witnesses would be *named*. In the above form, it will be observed, they are not named. Doubtless it would be suitable, and a foreign court might perhaps deem it indispensable to name them.

sumed to be within the knowledge of any indifferent person (a). CHAP. 10.

This exception rests upon the ground of necessity; and upon this ground it is that in cases of collision (b) and of salvage (c), the master and crew of a vessel, although interested, are nevertheless permitted to testify to facts which could not otherwise be proved. But it often happens in other cases, also, in suits for wages and on contracts of affreightment, for example, that the rights of the ship-owners would be in danger of being seriously prejudiced by the absolute exclusion of the master as a witness in their behalf. His evidence may be important also to the adverse party; as in cases of hypothecation, express or implied, by the master, where his authority is disputed by the owner.

Shipmaster and crew competent witnesses in cases of collision and salvage.

With respect to the competency of the master in suits *in personam*, the decisions at common law furnish, in general, a safe and easy guide; but the question of the master's competency in suits *in rem*, notwithstanding its great practical importance, still rests in this country, at least so far as it depends on the reported decisions of the American courts of admiralty, upon an unsatisfactory footing; and I have met with but two reported cases in the English admiralty, tending to shed any light upon it.

Competency of the master as a witness in suits *in rem*, in other cases.

The first is the case of *The Exeter*. The case was this: The libellant had been hired as mate in the service of the ship at Bombay, by the master; and

(a) *Roscoe's Ev. in Civil Cases*, 87.

(b) *The Catharine of Dover*, 2 Haggard's R., 145; *The Celt*, 3 Haggard's R., 321, 323.

(c) *The Boston and Cargo*, 1 Sumner's R., 328; *The Henry Ewebank and Cargo*, *id.*, 400; *The Pitt*, 2 Haggard's R., 149, *nota*.

VOL. 2. was afterwards, in the prosecution of the voyage to Europe, forcibly discharged from the service of the ship, at the island of Columbo, on a charge of incapacity, drunkenness, neglect, and disobedience of orders. The suit was for the balance of wages, and expenses incurred in returning to Europe; the libellant insisting that the charges against him were unfounded, and that he was wrongfully discharged. To prove the truth of the charges, the master had been examined; and at the hearing, an objection being taken to his competency, Sir WILLIAM SCOTT permitted his evidence to be read *de bens esse*, reserving the objection, not, he said, from any doubt entertained, but because he wished to give it further consideration. His conclusion was that the master was clearly incompetent(*a*).

This case has, however, been supposed, by the learned judge of the United States for the District of Maine, to assert the doctrine that the master "is an incompetent witness to support any matters of defence set up, which originate in his own acts, because, for these acts he may be held personally responsible(*b*)."

If the case had presented no other features than those above mentioned, it would, when considered conjointly with another case, decided by Sir WILLIAM SCOTT, have warranted the inference drawn from it by Judge WARE; but, in reality, the decision in the case of *The Exeter* turned upon a point quite independent of the question of the competency of a master, as such, to testify in

(*a*) *Robinet v. The Ship Exeter*, 2 Robinson's R., 261.

(*b*) *The William Harris*, Ware's R., 367.

behalf of his owners; for, in the report of the case, the master is expressly described as "late commander and *two-thirds owner* of the said ship *Exeter*(a)." As owner of the ship, he would of course have been incompetent; and the ground on which his evidence was supposed to be admissible, was, that subsequent to the arrival of the ship in the port of London, he had been duly declared a bankrupt, and obtained his certificate as such; and that the ship had, moreover, already been sold by a decree of the court to discharge the claims of the officers and mariners; after payment of which, there would remain a balance of the proceeds of but about the sum of £4000, against which there were privileged claims of bottomry, and other bondholders, to the amount of £6000, on whose behalf such proceeds had been arrested. These facts were set forth in the 13th and 14th articles of the defensive allegation; the conclusion of the latter article being, "That by reason of the premises, he, the said Richard Whitford, was and is a legal and competent witness, to be produced, sworn, and examined in this cause."

Sir WILLIAM SCOTT, in proceeding to the consideration of the objection, describes it as an "objection taken to the conclusion drawn from the 13th and 14th articles of the allegation on the part of the defence;" and after reciting these articles at large, he announces his decision in the following terms: "Personally exonerated he certainly is; but not exonerated as to the estate, about which he is still

(a) This fact seems also to have escaped the observation of Mr. Justice STONY in the case of *The Ship Fortitude*, 3 Sumner's R., 228.

VOL. 2. liable to be examined. He has an interest still remaining as to the surplus of the estate, and also as to the allowance, which will depend on the payment that is made: till he does more, therefore, than he has yet done; till he has released all interests under the estate, and also the allowance; I have no doubt, upon the consideration which I have been able to give the matter, and also on conversation with eminent persons at the common law, that he is not a competent witness(a)." But though the question really decided in the case of *The Exeter* was quite distinct from that now under consideration, there is much in the language of other parts of the judgment of Sir WILLIAM SCOTT, which seems to me to infer a decided impression on his part, that but for the proprietary interest of the master in the ship, he would have been a competent witness. Thus, after giving a summary statement of the case, and before adverting to the objection to the master's competency, he says: "In the first place, I observe there is no general incapacity set up: such a charge is introduced into the deposition of Captain Whitford, indeed, but it makes no part of the plea. If a general incapacity had been specially pleaded, and properly supported by the depositions of the master, this court would find a difficulty in opposing the presumption, arising from the opinion of a superior officer. If that had been pleaded in the allegation, it must have been strong evidence that would have

(a) This case is also cited, in a well known elementary work, in a manner calculated to convey an erroneous impression relative to the point decided. See Dunlap's Adm. Practice, 244.

induced the court to determine against such testimony." CHAP. 10.

It appears improbable that this language would have fallen from the eminent judge by whom it was used, unless he supposed that in a case like that before him, the master, notwithstanding his relation as such to the vessel, would be a competent witness. Indeed, it may be inferred, that such was the opinion of all parties concerned; for the effort on the one side to establish the admissibility of the evidence, and on the other to exclude it, seems to have been prompted and directed by the relation of joint owner, and not by that of master, in which the witness stood to the ship.

This interpretation of the case is fortified by a decision of the same judge, pronounced several years afterwards in the other case above alluded to. It was a suit for wages, and the matter of defence set up was the alleged desertion of the mariner. An objection being taken that the master was not a competent witness, Sir WILLIAM SCOTT said: "I am not aware of any general objection to the competency of the master of a vessel as a witness in a suit for wages. The mariner has his election whether he will proceed against the owners, the master, or the ship; and in this case the proceedings being instituted against the owners, the master has no immediate interest in the suit, and therefore is not an incompetent witness by any rule with which I am acquainted, though it may certainly be necessary to watch his testimony with jealousy, as his conduct may constitute a material part of the adverse case(a)."

(a) *The Lady Ann*, Edwards's R., 235.

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In the District Court of the United States for the District of Pennsylvania, it was uniformly held, during the time of Judge PETERS, that the master was not a competent witness in disputes with mariners. The first of the reported cases in which the question arose in that district, was a suit in behalf of a mariner, for wages, in which the demand of the libellant was resisted on the ground of his alleged desertion; and the master, in the absence of the mate, was produced as a witness to prove the entry in the log-book, and other facts to establish the defence. Touching the question of his admissibility, Judge PETERS expressed himself as follows: "I have generally been averse, as I am in this case, to admitting masters of ships as witnesses in disputes with mariners. I do not believe, or suspect, that masters of ships are liable to any more or peculiar objections, than any other class of citizens; but it so happens, from their situation, that differences and disputes, and consequently strong prejudices, most commonly originate between the master and mariners; and the merchant is governed by the master's representation. The master is personally liable for wages, though the seamen may proceed *in rem* against the ship, or *in personam* against the owner. It is his interest to throw the responsibility off himself. If the vessel is not valuable enough to discharge the lien, or the owner is in bad circumstances, and the master solvent, he must pay the debt. Instances have not been wanting in this court, where unjustifiable endeavors have been made by masters to charge the ship with seamen's wages:

in some cases, where funds had been furnished and misapplied; in others, to secure themselves. But suppose the master's testimony given in a proceeding *in rem*, and a decree on the merits against the demand; the success of the seamen in a prosecution *in personam* thereafter, if their circumstances permitted further proceeding, would be hopeless. I would not be understood so to apply particular instances as to affect general character or principles; but a practice liable to great abuses ought to be avoided, and other testimony may be procured. The law removes from testimony, persons even remotely interested, especially where their testimony is not the only proof which can be obtained. Having, on the admiralty side of this court, to judge of both competency and credit, I wish to avoid exposing myself to the painful task of rejecting testimony for want of credit. Although I might not be often placed in this predicament, yet such a situation might occur. The line between competency and credit is often imperceptible, and difficult to draw (a)."

In a case of the same nature which occurred a few years later, the captain being offered as a witness to prove the libellant's absence from duty, the judge said that in these cases he had constantly refused to admit the captain. He was liable to a suit for the wages, at the will of the mariner, who has several remedies, though he can have but one satisfaction. Protests had been entered against this opinion, but they had never been prosecuted. It

(a) *Jones v. The Brig Phoenix*, 1 Peters's Adm. Decisions, 201.

VOL. 2. was his wish that the point should be put in a shape to be determined by the circuit court. The master, he conceived, was interested in the result, though not immediately. If a decree passes against the seaman in a suit *in rem*, or against [for] the owner, it may be given in evidence to repel a suit against the master. The master was therefore adjudged to be incompetent(a).

With unfeigned respect for the opinions of the learned judge by whom these decisions were pronounced, I am constrained to doubt the soundness of the grounds on which he has placed them. At common law, a plea of judgment recovered is available only in a suit between the same parties; for where several persons are separately liable, they may be successively sued until satisfaction can be obtained; and an unsuccessful suit, which may have failed for want of evidence, and by which no fact may have been certainly ascertained, is no impediment to another suit against another person who may also be liable for the same demand. It is said, indeed, that to a suit *in rem*, all the world are parties, and that a judgment therein is conclusive. The real import of this maxim is that all who have an interest in the thing have a right to make themselves parties, by appearing as claimants, or otherwise intervening for their interest, and that all persons are therefore bound by the decree. It is in regard to cases of municipal seizure that this doctrine has been most frequently asserted; and in relation to these, it is true that a judicial sentence or decree, whether

(a) *Malone v. The Brig Mary*, 1 Peters's Adm. Decisions, 139.

of condemnation or of acquittal, is conclusive, not only with respect to the thing seized, but also with respect to the incidental rights and responsibilities of the parties concerned. If the thing is condemned as forfeited, and is sold, the change of property is absolute, and the title of the purchaser is incontrovertible; if it is acquitted and restored, it cannot, I presume, be again seized and proceeded against for the same offence. An acquittal is conclusive against the seizing officer, in an action of trespass (unless, under our laws, he obtains a certificate of probable cause); and a sentence of condemnation is equally conclusive in his favor(a). In other words, the judgment is conclusive upon the point of forfeiture, and consequently with respect to the facts from which it results. This follows, indeed, from the nature of the proceeding, which is strongly analogous to a criminal prosecution. The seizure is made in consequence of a supposed violation of a penal law; and the suit is

(a) *Vide, inter al.*, *Rose v. Himely*, 4 Cranch's R., 241; *Hudson v. Guestier*, 4 Cranch, 293; S. C., 6 Cranch, 281; *Williams v. Armroyd*, 7 Cranch, 423; *Slocum v. Mayberry*, 2 Wheaton's R., 1; *Gelaton v. Hoyt*, 3 Wheaton, 246; *Roscoe on Evidence in Ac. at N. P.*, 104. The same principles are applied in cases of capture. The doctrine of the conclusiveness of a sentence of a prize court, as well foreign as domestic, not only with respect to the subject matter on which it is pronounced, but also with respect to the facts which it asserts as the grounds on which it proceeds, was first firmly established in the English courts by the decision of the House of Lords, in the case of *Lothian v. Henderson* (3 Bos. & Pull., 299). The doctrine has been maintained in the courts of England, particularly as applying to cases of insurance; and was adopted and enforced by the Supreme Court of the United States in the early case of *Croudson v. Leonard*, 4 Cranch's R., 434. The case of *Bolton v. Gladstone*, 5 East's R., 155, furnishes an instructive illustration of its practical operation.

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against the thing seized, as the culpable instrument of the offence. The government is the prosecutor, and asserts a title to the entire thing, in virtue of a forfeiture accruing from the alleged offence; and the question to be determined is, whether the charge is true. As in a criminal trial, it is a question of guilty or not guilty; and the decision of it ought, upon general principles, to be equally conclusive. Seizures *jure belli* rest substantially upon the same footing(a): but an action *in rem*, prosecuted by a private suitor, is of a nature in some respects essentially different; for though, in point of form, it is against the thing, it is, in effect, against the owner; the thing being arrested, and, unless bail be given, detained in the custody of the law, merely for the purpose of affording the means of satisfying the libellant's demand, in case it shall turn out to be well founded. It is equally true, however, in the one case as in the other, that all persons claiming an interest in the property have a right to become parties in the suit; and it follows, therefore, that if a decree pass in favor of the libellant, and the thing be sold in pursuance of the decree, to satisfy his demand, the purchaser obtains an indefeasible title:

(a) "The decree," say the Supreme Court, in the case of *Gelston v. Hoyt* (3 Wheaton's R., 246), "acts upon the thing in controversy, and settles the title of the property itself, the right of seizure, and the question of forfeiture. If its decree were not binding upon all the world, upon the points which it professes to decide, the consequences would be most mischievous to the public. In cases of condemnation, no good title to the property could be conveyed, and no justification of the seizure could be asserted under its protection. In case of acquittal, a new seizure might be made by any person *toties quoties* for the same offence, and the claimant be loaded with ruinous costs and expenses."

and on the other hand, a decree, upon the merits, in favor of the claimant, would unquestionably be a bar to another suit for the same cause of action, against the same property, in whosoever hands it might be; and probably also to an action *in personam* against the owner: but beyond this, I can discern no sufficient reason for ascribing any greater efficacy to a decree in a suit *in rem* than *in personam*.

But the familiar maxim, that the whole world are parties to a suit *in rem*, and that all persons are therefore bound by the decision, has been solemnly adjudged by the Supreme Court of the United States to be subject to this most important and just limitation: that the phrase, "the whole world," means only all those persons who have an interest in the thing proceeded against, and as such are entitled to appear in court and contest the suit. And it was accordingly adjudged that a sentence of condemnation against the vessel as enemy's property, and therefore lawful prize, was not binding on the owner of the cargo; but that he was entitled, notwithstanding the decree, to contest the validity of the capture, by asserting the American character of the vessel^(a). In the masterly judgment of the court, delivered by Chief Justice MARSHALL, he observes, "The reason on which this dictum stands will determine its extent. Every person may make himself a party, and appeal from the sentence; but notice of the controversy is necessary in order to become a party, and it is a principle of natural

(a) *The Mary*, 9 Oranoh's R., 126 (3 Curtiss's Decis. S. C., 292).

VOL. 2. justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally, or by publication; where they are *in rem*, notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable, because it is necessary, and because it is the part of common prudence for all those who have any interest in it to guard that interest by persons who are in a situation to protect it. Every person, therefore, who could assert any title to the *Mary* has constructive notice of her seizure, and may fairly be considered as a party to the libel; but those who have no interest in the vessel, which could be asserted in a court of admiralty, have no notice of her seizure, and can, on no principle of justice or reason, be considered as parties in the cause, so far as respects the vessel. When such person is brought before a court in which the fact is examinable, no sufficient reason is perceived for precluding him from reëxaming it. The judgment of a court of common law, or the decree of a court of equity, would under such circumstances be reëxaminable in a court of law, or a court of equity; and no reason is discerned why the sentence of a court of admiralty, under the same circumstances, should not be reëxaminable in a court of admiralty. This reasoning is not at variance with the decision that the sentence of a foreign court of admiralty, condemning a vessel or cargo as enemy property, is

conclusive against the underwriters, on a policy in which the property is warranted to be neutral. It is not at variance with that decision, because the question of prize is one of which courts of law have no direct cognizance, and because the owners of the vessel and cargo were parties to the libel against them."

CHAP. 18.

It is stated by Mr. DUNLAP, that in suits by seamen for wages, whether against the ship or the owners, the master is not generally admitted as a competent witness for the defence, in the District Court of the United States for the District of Massachusetts. He informs us, however, that on the authority of *The Lady Ann*, above cited, a master was, in that court, allowed to testify in a peculiar case, to establish the fact, in a suit for wages, that the libellant had been guilty of smuggling in a foreign port, and that the master had paid a gratification to a custom-house officer, in order to prevent a prosecution; the owners claiming to have the sum so paid deducted from the wages demanded, and offering security for any sum that might be recovered(a).

In another case, in the District Court for the Pennsylvania District, in which the master was offered and rejected as a witness, the validity of the defence depended on the legality of the acts of the master. It was a suit *in rem* for wages, in behalf of the mate of the ship, whom the master had taken it upon himself, during the voyage, to displace

(a) Dunlap's Adm. Practice, 244.

VOL. 2. and send before the mast, for alleged negligence and disobedience of orders. The libellant claimed the amount stipulated to be paid to him as mate, and his demand was resisted on the ground of his alleged misconduct and degradation. The master having been offered as a witness to maintain this defence, the judge, in refusing to permit him to be sworn, referred to his practice of rejecting such testimony, and added, as a further reason for adhering to this rule, that, "the master is answerable to the owners for damages accruing to them by his improper and illegal discharge of mariners(a)."

On this ground, as already intimated, a master was held to be incompetent by Judge WARE. It was a suit *in rem* for wages, in which the owners set forth in their answer, and claimed to have deducted, several charges against the libellant. The libellant, while at Matanzas, was, by the procurement of the master, for some alleged misconduct, put in prison and detained several days; and among the deductions claimed, one was the expenses of this imprisonment, and another the expense of hiring another hand to supply the place of the libellant while in prison. "These are expenses," said the learned judge, "which the master pays, and charges to the owner among the expenses of the voyage. It is very certain that the master cannot charge the owner with this expense, unless he can show by satisfactory proof that the imprison-

(a) *The Huntress*, 1 Peters's Adm. Decisions, 244. As to the competency of a mate who, by the death of the captain during the voyage, became master, see *ibid.*, p. 247, note.

ment was required by the urgency of the case, and called for by the interest of the owners. If it were unnecessary and unjustifiable, the master would be liable himself for the expenses and all the damages which his own wrongful act had occasioned, besides being liable to the seaman for his personal wrong. The master is introduced as a witness to justify this imprisonment and throw the expenses on the seaman, and thus exonerate himself from his liability. For this purpose, the master is clearly an inadmissible witness(a)."

Upon the general question of the competency of the master, where the defence set up does not originate in his own acts, Judge WARE, referring to the doctrines uniformly acted upon in the District Court of the Pennsylvania District during the presidency of Judge PETERS, deemed it unnecessary to express any opinion. His language, however, appears to infer very serious doubts of the soundness of these doctrines.

The principle laid open and applied by Judge WARE was acted on in a recent highly important and instructive case, decided on appeal in the Circuit Court of the United States for the District of Massachusetts(b). It was an action *in personam* on a contract of affreightment, against the owners of a steamboat, to recover the value of a package of bank notes delivered to the master at Nantucket, to be carried for reasonable freight to New Bedford,

(a) *The William Harris*, Ware's R., 367, 371.

(b) *The Citizens' Bank v. The Nantucket Steamboat Company*, 2 Story's R., 16.

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and which were lost, as it was alleged, through want of proper care. In order to establish the competency of the master as a witness for the respondents, they executed a release to him of all liability to them on account of the subject matter of the suit. The release was subjected to very severe scrutiny(a); but no doubt seems to have been entertained of its necessity, nor, admitting it to have been sufficiently proved, and to be valid, of its sufficiency to render the master competent.

These cases, it will be seen, turn upon a principle altogether distinct from that of the conclusiveness of a decree *in rem*, asserted by Judge PETERS as the ground on which he held the master to be an incompetent witness for the owner in a suit for wages. The same principle is enforced in the courts of common law. Thus in an action against an insurer, to recover a loss on a policy of insurance on a ship and goods, it appearing that the loss was occasioned by barratry, the captain of the vessel was called by the defendant to prove that the barratrous acts were

(a) The deposition of the master had been taken; and he was asked, upon his direct examination in behalf of the respondents, if he had received from them a release. He answered that he had, and produced the paper and annexed it to his answer. It being objected that it ought nevertheless to have been proved by a subscribing witness, the objection was held to be untenable. It was further objected that the release could not operate to discharge the master from the damages which might be recovered by the libellants, because it was not a release of a present but of a future interest, not yet vested in the releasors. But it was held that however valid such an objection might be to a release of future damages for future acts, it was untenable against a release of future damages for past acts; and the objection was overruled.

committed with the knowledge and by the consent of the owners; and not having a release, he was held to be incompetent, on the ground that if the plaintiff recovered a verdict, the defendant might maintain an action against the master, the loss having arisen from his act(a).

I must not omit, however, here to notice a case in which Mr. Justice STORY seems, though with great hesitation, to have adopted the views of the subject entertained by Judge PETERS. It was a suit on a bottomry bond given by the master of the ship, for moneys taken up at Calcutta for repairs. The defence was that the repairs were unnecessary; and, at the hearing, the deposition of the master being offered in evidence by the libellant, to prove the necessity of the repairs in question, it was objected to by the counsel for the respondents, on the ground of the incompetency of the master.

In this case, it will be perceived, the master was called to testify against the owners, and for the purpose of disproving the defence set up by them, where, in the event of their success, he would himself be personally responsible to the libellant. He had, therefore, a direct interest in the event of the suit, under this aspect, inasmuch as his evidence would tend to his own exoneration; but on the other hand,

(a) *Bird v. Thompson*, 1 Espinasse's N. P. R., 339. Lord KENYON, before whom the cause was tried, said, that "though he knew of no action of that sort ever having been brought, yet he conceived that wherever a man acted contrary to his duty, whereby another received a damage, or was rendered responsible or liable to damages, he might maintain an action *ex delicto* against the person who had so subjected him."

VOL. 2. if he had abused his trust as the agent of his owner, and thereby subjected him to loss, he would, upon general principles, be responsible therefor to the owner.

The question then was, Mr. Justice STORY said, whether he stood indifferent from an opposing interest; and this depended on the question, whether a decree affirming the validity of the bond would be conclusive in his favor, as to the necessity of the repairs, in a suit brought against him by the owner. The learned judge was of opinion that it would, upon the grounds: 1, that a decree *in rem*, as to the point directly decided in it (as that of the necessity of repairs must be in the case before him), is conclusive in all other cases; and, 2, that in order to found his claim against the master for loss and damage, the owner would be obliged to produce the proceedings and decree in admiralty, which, when produced, would be evidence not merely of the fact of the decree of sale, but also of the validity of the bottomry bond, and of course of the necessity of the repairs.

In support of these propositions, he cited two of the cases (a) above referred to of forfeiture, and the cases decided by Judge PETERS. He also cited and relied upon the case of *The Elceter*, decided in the English admiralty, under (as already shown) an entire misapprehension of its real import, and contrary to what appears to have been the impression

(a) *Rose v. Himely*, 4 Oranch's R., 241 (2 Curtis's Decis. S. C., 87); *Gelston v. Hoyt*, 3 Wheaton's R., 246 (4 Curtis's Decis. S. C., 211).

of Lord STOWELL, and the counsel by whom it was argued. But after thus asserting the conclusiveness of the decree as to the necessity of the repairs, as evidence for the master in a suit brought against him by the owners, he subsequently observes: "I do not say that it is conclusive; that is not necessary to say in the point of view in which I am now looking to the case. It is sufficient if it be *prima facie* evidence in the case, in favor of the master. If it be the latter only, can he be a witness, thus to create evidence in his own favor in such a suit? I think not. But if it be evidence at all in such a suit (and that it is, cannot be doubted), then it seems to me that it must be conclusive as to the very hinge of the controversy." After adverting to certain cases at common law(*a*), cited at the bar by the counsel for the respondent, to which he concede the difficulty of giving a satisfactory answer, he concludes as follows: "If these cases are not reconcilable with the principles which I have already stated, I shall still adhere (at present) to the doctrine that, in proceedings *in rem*, turning upon the very point of the necessity of the repairs, the master is not a competent witness. At the same time, I am ready to confess that I am not confident that this opinion rests upon grounds so clear, that it ought not to yield to a settled course of practice; and I greatly fear that there is no authority which directly sustains it."

An examination of the positions of this decision,

(*a*) *Evans v. Williams*, 7 Term R., 481, note; *Milward v. Hallet*, 2 Caines's R., 77; *Rocher v. Busher*, 1 Starkie's R., 27.

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sufficiently full to be satisfactory or useful, would require an extent of space which cannot with propriety be here devoted to the purpose, and they must be left therefore to the consideration and judgment of the reader. For having already dwelt at so much length upon the question of the master's competency as a witness in suits *in rem* to which his owners are parties, I trust the practical importance of the subject, and the uncertainty in which it is to some extent involved, will be deemed a sufficient apology. Perhaps it would be safe to conclude, that when the case involves the legality or propriety of the master's conduct, so that in the event of a recovery the master would consequently be responsible to the owner, a release from the owner is necessary; and that in other cases, unless the master is to be excluded upon some ground of supposed expediency peculiar to the American courts of admiralty, his evidence is admissible, subject to the jealous scrutiny of the court.

Whether
and in
what cases
seamen may
be witnesses
for each
other.

The question has been agitated in the American courts of admiralty, whether mariners who have engaged in the same voyage out of which the suit arises, and who have a common interest in the point in contest, are competent witnesses for each other. It was held by Judge PETERS that they were not. In a case which came before him in 1805, he said that, on the point of admitting seamen to be witnesses for each other; it was settled in that court that one seaman cannot be witness for another, if the witness and the party have a common interest

in the point in contest(a). But in an early case before Mr. Justice STOKY, he decided, upon a full examination and discussion of this question, that there was no sufficient reason, founded either in authority or justice, for departing from the common law rule, which excludes a witness on the ground of interest only when he has a direct interest in the event of the suit, and regards an interest in the question as an objection going to the credit only, and not to the competency of the witness(b). The doctrine laid down by Mr. Justice STOKY is believed to be now generally acquiesced in.

It has been stated in an antecedent chapter, that seamen suing for wages earned on the same voyage, are required, by the act of Congress for the government and regulation of seamen in the merchant service, to join in one and the same action. The contracts entered into by the several persons respectively, composing the crew of a ship, and evidenced by the shipping articles, are nevertheless wholly distinct, insomuch that at common law they cannot maintain a joint action for wages, and are competent witnesses for each other; and even in the admiralty, the joint suit is treated throughout

CHAP. 10.

Whether they can be witnesses for each other, when joined as co-libellants in a suit for wages.

(a) *Thompson v. The Philadelphia*, 1 Peters's Adm. Decisions, 210. Nevertheless the defence in that case, which was a suit for wages, being that the libellant had failed to render himself on board at the appointed hour, another seaman who stood charged on the log-book with some delinquency, and who also had a like controversy with the owners, was admitted as a witness to prove a special indulgence given by the master to the libellant individually, beyond the hour named in the shipping articles.

(b) *Spurr v. Pearson*, 1 Mason's R., 104.

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as but the joinder of distinct causes of action, prosecuted by distinct parties, and to be severally adjudicated according to their respective merits. It has been supposed, therefore, by a learned writer, and, it must be conceded, with no slight appearance of reason and justice, that the competency of mariners to be witnesses for each other ought not to be affected by their joinder as co-libellants; and it is stated by the same writer to have been the practice in the District Court of the United States for the District of Massachusetts to obtain permission of the court, in suits for wages, to strike out from the libel, or to omit in instituting the suit, those parties whose testimony may be required(a). This, of course, can only be done for the purpose of avoiding the apparant anomaly of permitting a party to the record to become a witness in the suit; and as the practice affords no security against falsehood, and is moreover at variance with the act, it may be worthy of consideration whether it would not be preferable to omit it, and receive the testimony notwithstanding.

Suppletory
oath of the
party.

By the ancient civil law, proof was distinguished into full and half proof — *plena probatio*, and *probatio semiplena*. "Full proof," says BROWNE, "consisted in confessions, testimony of witnesses, public written instruments and deeds, oaths and presumptions. The *probatio semiplena* was made by one witness, by private books of account, by common fame, and by comparison of handwriting. The

(a) See Dunlap's Adm. Practice, 239.

conjunction of two half proofs, of course, produced a *plena probatio*. Oaths were *voluntary*, *necessary*, and *judicial*: the first requires no explanation; the second was imposed by the judge upon one party at the request of the other, the latter agreeing to be determined by it, i. e., the plaintiff or defendant said, I will give up the point if my opponent will swear to his cause of action: but this, as I have observed, is totally unlike a special personal answer. Judicial oaths were imposed by the judge, of his own mere motion. The last comprehended the *suppletory*, administered to him who had made but half proof; and the *purgatory*, to him against whom presumptions and circumstances militated. Though a single witness made but an half proof yet there were exceptions to this general rule; as if, in cases of great difficulty, no other evidence could possibly be had, or in unimportant causes, or where the witness was of very extraordinary rank or character: and, on the other hand, sometimes a private writing was no evidence at all, as, for instance, on behalf of the writer or party himself, unless produced by his adversary; though now, says HEINECCIUS, in Germany, a merchant's books of accounts rightly and duly kept, authenticated and produced, shall entitle him to have the suppletory oath administered to him: and in general, where half proof has been made, the suppletory oath, or oath of the party, is to be superadded to make full proof(a)."

(a) 2 Browne's Civ. and Adm. Law, 370, 383, 384, 385, 386. See also Clerke's Adm. Praxis, tit. 47, and additions thereto by Hall, p. 93.

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A practice similar to that here described, of admitting the party to his suppletory oath, for the purpose of supplying a deficiency of his evidence *aliunde*, was introduced many years ago, in regard to one description of suits, into the courts of the State of New-York, by a decision of the Supreme Court of the State, asserting the right of the plaintiff in an action for the recovery of a book account, under certain limitations, to swear to the truth of his charges against the defendant. A similar practice is understood also to prevail in several of the other states; and it is stated by Mr. DUNLAP to be the constant practice in the District Court of the United States for the District of Massachusetts, to receive the oath of a party in support of his book charges(*a*). This rule was recognized also in a case in the District Court of the United States for the District of Maine; and it was held that charges made by the master against a seaman, for advances in the course of the voyage, might accordingly be verified by the suppletory oath of the master(*b*).

Release to
be given
before ex-
amination
de bene esse.

It not unfrequently happens that, from abundant caution, witnesses are examined *de bene esse*, whom it is intended nevertheless to produce, and who are in fact produced at the hearing, to testify orally; and it may not, on this account, be a useless precaution to suggest the expediency, whenever in such cases it is apprehended that a release may be necessary,

(*a*) Dunlap's Adm. Practice, 287.

(*b*) *The David Pratt*, Ware's R., 495, 505.

of having it given before the examination of the witness *de bene esse*, although no objection to his competency should then be made; for when a witness has testified in the cause without a release, it may at least be questionable whether a subsequent release ought to be deemed sufficient to render him competent to testify anew. Depositions, moreover, are often taken in the absence of the adverse party; and though he be present, he may not be apprised of the interest of the witness: in which cases, he will be entitled at the hearing to object to the reading of the deposition; and for this reason, also, it may be advisable to release the witness beforehand.

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III. DOCUMENTARY EVIDENCE.

The principles which regulate and determine the competency, the authentication and the effect of written evidence in courts of admiralty, being essentially the same as those which prevail in other courts, any general disquisition upon the subject would be unsuitable in this place—a summary notice of a few particulars being all that the occasion requires.

The several states of the American Union being, as such, independent and foreign with respect to each other, it was deemed necessary by the framers of the Constitution of the United States to guard against the inconveniences likely to result from this relation, in judicial proceedings, by ordaining that “Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state;” and empowering Congress,

Legislative
acts, judicial
and other
records of
the several
states.

VOL. 2 "by general laws," to "prescribe the manner in which such acts, records and judicial proceedings shall be proved, and the effect thereof^(a)."

In pursuance of this authority, it was, at the second session of Congress, enacted, "That the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto: That the records and judicial proceedings of the courts of any state shall be proved or admitted, in any other court within the United States, by attestation of the clerk and the seal of the court annexed, if there be a seal; together with a certificate of the judge, chief justice or presiding magistrate, as the case may be, that the said attestation is in due form. And the said record and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken^(b)."

And, by a supplemental act, it is further enacted, "That all records and exemplifications of office books, which are or may be kept in any public office of any state, not appertaining to a court, shall be proved or admitted in any court or office in any other state, by the attestation of the keeper of the said records or books, and the seal of his office thereto annexed, if there be a seal; together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may

(a) Constitution, art. 4, § 1.

(b) Act of May 26, 1790, ch. 11; 1 Stat. at Large, 122.

be kept; or of the governor, the secretary of state, the chancellor or keeper of the great seal of the state, that the said attestation is in due form, and by the proper officer; and the said certificate, if given by the presiding justice of the court, shall be farther authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or if the said certificate be given by the governor, the secretary of state, the chancellor or keeper of the great seal, it shall be under the seal of the state in which such certificate is made. And the said records and exemplifications, authenticated as aforesaid, shall have such faith and credit given to them, in every court and office within the United States, as they have by law or usage in the courts or offices of the state from whence the same shall be taken." And it is, by the same act, further declared "That all the provisions of this act, and the act to which this is a supplement, shall apply as well to the public acts, records, office books, judicial proceedings, courts and offices of the respective territories of the United States, as to the public acts, records, office books, judicial proceedings, courts and offices of the several states(a)."

Legislative acts are sufficiently authenticated by having the seal of the state affixed to the copies thereof, no other formality being required by the statute; and in the absence of any proof to the con-

Legislative
acts.

(a) Act of March 27, 1804, ch. 56; 2 Stat. at Large, 298.

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trary, the seal will be presumed to have been affixed by an officer having the custody thereof, and having competent authority to do the act(a).

Records of courts.

In authenticating the records and judicial proceedings of a state court, the directions of the act are to be strictly pursued; and a certificate from the presiding judge, that the person whose name is signed to the attestation is clerk of the court, and that the signature is his proper handwriting, without stating that the attestation is *in due form*, has accordingly been held insufficient(b); but whatever may be the form of the attestation, the required certificate, that it is in due form, is conclusive evidence that it is so(c).

Force and effect of judgments in the courts of other states.

With respect to the force and effect of a judgment rendered in one state, in the courts of other states, it has been a vexed question whether the judgment is to be regarded as a foreign judgment, and so inconclusive; or as a domestic judgment, and, as such, conclusive upon the rights of the parties: but after much controversy, this question has long been settled. The Constitution, in conformity with a principle of the common law, founded in comity, secures the admissibility of such records as evidence, but leaves it to Congress to prescribe, first, the tests of their genuineness; and, secondly, their legal effect.

(a) *The United States v. Amedy*, 11 Wheaton's R., 392 (6 Curtis's Decis. S. C., 638).

(b) *Drummond's Administrators v. Magruder & Co.'s Trustees*, 9 Cranch's R., 222 (3 Curtis's Decis. S. C., 290).

(c) *Ferguson v. Harwood*, 7 Cranch's R., 408 (2 Curtis's Decis. S. C., 596).

as evidence. Congress has exercised this power; and, in regard to the latter branch of it, have made a duly authenticated record, out of its proper state, equivalent to the record, in its proper state. It is therefore evidence of the highest nature, viz., record evidence, and not to be contradicted but by a plea of *nul tiel record*. Not that a record thus authenticated is held to be absolutely, and under all circumstances, conclusive, so as in all cases necessarily to preclude every other plea; for this would be to give it an efficacy superior to what the original would possess in the state where the judgment was pronounced; but the principle established is, that the record of a judgment of a state court, duly authenticated, shall have the same credit, validity and effect—and that the same pleas in a suit on it, and none others, would be good—in the courts of every other state, as in the courts of the state where it is rendered. The proper inquiry, therefore, in every case, is, what would be the effect of the record in that state(a).

The constitutional and legislative provisions in question are not, however, to be understood as imposing any restriction upon the power of the states to legislate upon the remedy in suits on the judgments of other states, except so far as the merits of the original suit are concerned. The judgment is to be regarded as a debt of record, not examinable

(a) *Mills v. Duryee*, 7 Cranch's R., 481 (2 Curtis's Decis. S. C., 631); *Hampton v. M'Connel*, 3 Wheaton's R., 234 (4 Curtis's Decis. S. C., 207); *Mayhew v. Thatcher*, 6 Wheaton's R., 129 (5 Curtis's Decis. S. C., 3); *Hopkins v. Lee*, 6 Wheaton's R., 109 (Curtis's Decis. S. C., 26).

VOL. 2. on the merits; but in other respects, it is subject to the *lex fori*. And therefore in an action instituted in one state on a judgment obtained in another, a statute of limitations to suits on judgments of the former state may be pleaded(*a*).

Records and papers in the office of the secretary of state.

Copies of records and papers in the office of the secretary of state, authenticated under the seal of office for that department, are "evidence equally as the original record or paper(*b*)."

Consular certificates.

For the purpose of guarding and protecting the rights and interests of that numerous class of our citizens who are employed in the prosecution of foreign commerce, this country has adopted the practice pursued by all commercial nations, of appointing consuls, vice-consuls, or other commercial agents, at the principal seaports of those countries to which our maritime trade extends. The powers, duties and responsibilities of these functionaries are defined by statute, and in some instances by reciprocal treaty stipulations. From the nature of their functions, they not unfrequently become officially concerned in transactions which give rise to litigation in our courts of admiralty; and hence the propriety of noticing them in this place, for the purpose of ascertaining in what cases their certificates, under their seal of office, are to be received as evidence of the facts therein stated.

By an act passed soon after the organization of the government, the consuls and vice-consuls of the

(*a*) *M'Elmoyle v. Cohen*, 13 Peters's R., 312 (13 Curtis's Decis. S. C., 169).

(*b*) Act of September 15, 1789, ch. 14, § 5; 1 Stat. at Large, 68.

United States are empowered, in the ports or places to which they are severally appointed, to receive any protests or declarations which such captains, masters, passengers and merchants, as are citizens of the United States, may choose to make, and those also of foreigners relative to the personal interest of any citizens of the United States; and the act declares that the copies of such protests and declarations, duly authenticated under the consular seal, shall receive faith in law equally as their originals would in all courts of the United States^(a).

CHAP. 10.

Evidence of protests.

By a supplemental act, the master of every vessel, bound on a foreign voyage, is required to deliver to the collector of the port of departure a descriptive list of the persons composing the ship's company, and to give a bond obligating himself to exhibit a certified copy thereof to the first boarding officer on the return of the vessel to this country, and at the same time to produce the persons described in such list; and the act provides that the bond shall not be forfeited on account of the non-production of any seaman who may have been discharged in a foreign country, with the consent of the resident consul signified under his hand and official seal.

Evidence of consul's consent to the discharge of seamen.

This act also makes it the duty of the consuls, or other commercial agents of the United States, to send home, and it enjoins it on the masters of American vessels, under a penalty for refusal, to receive on board, American seamen found destitute in foreign ports; and the certificate of the consul,

And of master's refusal to receive on board destitute seamen.

(a) Act of April 14, 1792, ch. 24, § 2; 1 Stat. at Large, 254.

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given under his hand and official seal, is by the act declared to be *prima facie* evidence of such refusal, in any court of law, for the recovery of the penalty (a).

In the above mentioned cases, therefore, the certificate of a consul, under his seal of office, is made evidence by statute; but the question remains, whether in any, and, if so, in what cases, such certificate is to be received as evidence, unless expressly declared to be so by law; and this question, both in our own and in the English courts, has proved an embarrassing one.

Not evidence of sale of vessel and amount of proceeds.

In an action in the English Common Pleas, on a policy of insurance on goods at and from London to Rio Janeiro, it appeared that the goods in question, having been damaged apparently by sea water, were sold, on their arrival at the place of destination, by the British vice-consul there, in pursuance of the law of the country authorizing and requiring their sale by him as damaged goods belonging to absentees; and upon the trial, his certificate of the amount for which the goods were sold, was offered and admitted in evidence to prove the amount of the loss. But on a motion for a new trial, the certificate was held to have been improperly admitted; Sir JAMES MANSFIELD, Ch. J., before whom the cause had been tried, observing, that he thought at the trial it was very difficult to bring the certificate within any head of evidence. It was somewhat analogous to the proceedings of courts and other public functionaries; but he knew of no instance of

(a) Act of February 28, 1803, ch. 9, §§ 1, 4; 2 Stat. at Large, 203.

such a certificate being received. It came nearest to foreign judgments, but these were received under the seals of the courts, and a vice-consul was not a judicial officer(a). CHAP. 10.

In an early case in our own courts, of a suit on two policies of insurance on the cargo of the brigantine *Aurora*, at and from New-York to Portuguese ports on the coast of Brazil; it having been stipulated, by a memorandum at the foot of the policies, that the underwriters should not be liable for any loss resulting from illicit trade with the Portuguese, the defendants offered in evidence two several certificates of the American consul at the city of Lisbon, the one to prove the existence of certain laws of Portugal prohibiting foreign vessels from entering the ports of Portuguese provinces; and the other to verify a translation of a sentence of condemnation, by the governor of the capital of Para, against the *Aurora* and her cargo, certified to the Portuguese secretary of state. These certificates were admitted as evidence at the trial in the Circuit Court of the United States; but on a writ of error to the Supreme Court, this evidence was held to be inadmissible, and the judgment of the circuit court was reversed upon that ground(b).

Consular
certificates
not evidence
of foreign
laws, or to
verify a
translation.

(a) *Waldron v. Coombe*, 3 Taunton's R., 162.

(b) *Church v. Hubbert*, 2 Oranch's R., 186 (1 Curtis's Decis. S. C., 470). The judgment of the Supreme Court upon this point, delivered by Ch. J. MARSHALL, comprising as it does an authoritative exposition of the law relative to the mode of authenticating both foreign laws and foreign judgments, no apology will, I trust, be thought necessary for subjoining the following extended extract from it:

"To prove that the *Aurora* and her cargo were sequestered at Para, in conformity with the laws of Portugal, two edicts and the judgment

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Not evi-
dence of
judicial pro-
ceedings.

In a case, also of insurance, in the Circuit Court of the United States for the Southern District of New-York, agreeably to the principles laid down by the Supreme Court in the case last cited (of

of sequestration have been produced by the defendants in the circuit court. These documents were objected to, on the ground that they were not properly authenticated; but the objection was overruled, and the judges permitted them to go to the jury. The edicts of the Crown are certified by the American consul at Lisbon to be copies from the original law of the realm, and this certificate is granted under his official seal. Foreign laws are well understood to be facts which must, like other facts, be proved to exist before they can be received in a court of justice. The principle that the best evidence shall be required which the nature of the case admits of, or, in other words, that no testimony shall be received which presupposes better testimony attainable by the party who offers it, applies to foreign laws as it does to all other facts. The sanction of an oath is required for their establishment, unless they can be verified by some other such high authority that the law respects it not less than the oath of an individual. In this case, the edicts produced are not verified by an oath. The consul has not sworn; he has only certified that they are truly copied from the originals. To give to this certificate the force of testimony, it will be necessary to show that this is one of those consular functions, to which, to use his own language, the laws of this country attach full credit. Consuls, it is said, are officers known to the laws of nations, and are entrusted with high powers. This is very true; but they do not appear to be entrusted with the power of authenticating the laws of foreign nations. They are not keepers of those laws: they can grant no official copies of them. There appears no reason for assigning to their certificate, respecting a foreign law, any higher or different degree of credit than would be assigned to their certificates of any other fact. It is very truly stated, that to require, respecting laws or other transactions in foreign countries, that species of testimony which their institutions and usages do not admit of, would be unjust and unreasonable. The court will never require such testimony. In this, as in other cases, no testimony will be required which is shown to be unattainable; but no civilized nation will be presumed to refuse those acts for authenticating instruments which are usual, and which are deemed necessary for the purposes of justice. It cannot be presumed

which, however, neither the court nor the counsel seem to have been aware), a consular certificate was held to be incompetent evidence of the survey and sale of the vessel as unworthy of repair, under the order

that an application to authenticate an edict by the seal of the nation would be rejected, unless the fact should appear to the court: nor can it be presumed that any difficulty exists in obtaining a copy. Indeed, in this very case the testimony offered would contradict such a presumption. The paper offered to the court is certified to be a copy compared with the original. It is impossible to suppose that this copy might not have been authenticated by the oath of the consul, as well as by his certificate. It is asked in what manner this oath should itself have been authenticated; and it is supposed that the consular seal must ultimately have been resorted to for this purpose. But no such necessity exists. Commissions are always granted for taking testimony abroad; and the commissioners have authority to administer oaths, and to certify the depositions by them taken. The edicts of Portugal, then, not having been proved, ought not to have been laid before the jury.

"The paper offered as a true copy from the original proceedings against the *Aurora*, is certified under the seal of his arms by D. JONO DE ALMEIDA DE MELLO DE CASTRO, who states himself to be the secretary of state for foreign affairs; and the consul certifies the English copy which accompanies it to be a true translation of the Portuguese original.

"Foreign judgments are authenticated,

1. By an exemplification under the great seal;
2. By a copy proved to be a true copy;
3. By the certificate of an officer authorized by law, which certificate must itself be properly authenticated.

These are the usual, and appear to be the most proper, if not the only modes of verifying foreign judgments. If they be all beyond the reach of the party, other testimony, inferior in its nature, might be received; but it does not appear that there was any insuperable impediment to the use of either of these modes, and the court cannot presume such impediment to have existed. Nor is the certificate which has been obtained an admissible substitute for either of them.

"If it be true that the decrees of the colonies are transmitted to the seat of government, and registered in the department of state, a certifi-

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of the Vice-admiralty Court of the Isle of France. "I attach," observed Mr. Justice THOMPSON, "no credit to the consular certificate. It has been said

cate of that fact under the great seal, with a copy of the decree authenticated in the same manner, would be sufficient *prima facie* evidence of the verity of what was so certified; but the certificate offered to the court is under the private seal of the person giving it, which cannot be known to this court, and of consequence can authenticate nothing. The paper, therefore, purporting to be a sequestration of the Aurora and her cargo at Para, ought not to have been laid before the jury.

"Admitting the originals in the Portuguese language to have been authenticated properly, yet there was error in admitting the translation to be read on the certificate of the consul. Interpreters are always sworn; and the translation of a consul, not on oath, can have no greater validity than that of any other respectable man."

In the case of *Ennis v. Smith* (14 Coward's R., 400; 20 Curtis's Decis. S. C., 251), the proper mode of authenticating foreign laws again became the subject of inquiry, and was examined by the court upon authority as well British as American. With respect to the written laws of foreign nations, the conclusion of the court was that "a foreign written law may be received when it is found in a statute book, with proof that the book has been officially published by the government which made the law." The particular question was whether a book purporting to be a volume of the Civil Code of France was admissible to prove the law of that country regulating the distribution of the personal estate of an intestate. It purported to have been printed at the royal printing press in Paris, and had been sent to the Supreme Court in the course of our national exchanges with France, and bore an endorsement in the following words: "Le Garde des Sceaux de France à la Court Supreme des Etats Unis." Congress had acknowledged the donation in an act appropriating a sum of money to enable the Supreme Court to reciprocate the civility which had been done. Under these circumstances, the evidence was held to be admissible as falling within the above mentioned rule.

The English cases cited and commented on by Mr. Justice WAYNE, in delivering the opinion of the court, evince a great diversity of opinion and practice among the English judges on this subject; and the prevalent impression among them latterly seems to be that even in the case of written as well as of unwritten law, "an expert, acquainted with the text and the interpretation of it, must be called."

that he is an officer recognized by the law of ^{CHAP. 10.} nations, and entitled to credit. The law of nations recognizes him only in commercial transactions, but not as clothed with any authority to authenticate judicial proceedings(a)."

The act of 1803, above cited, makes it the duty of every master or commander of a ship or vessel belonging to citizens of the United States, on his arrival in a foreign port, to deposit his register, sea letter, or mediterranean passport, with the consul, vice-consul or other commercial agent, if any there be at such port; and subjects the master to a penalty of five hundred dollars for his refusal or neglect to comply with this requirement, to be recovered by the consul, vice-consul or other commercial agent, in his own name, for the benefit of the United States(b). But the act contains no provision making the certificate of the consul, etc., evidence of the deposit of the register, etc., or of such refusal or neglect.

In a case before the Circuit Court of the United States for the District of Pennsylvania, the certificate of the American consul at St. Thomas was admitted to prove the deposit of the ship's register, agreeably to the act, but was held to be inadmissible as evidence of the other facts stated therein(c).

Certificate of consul held to be evidence of the deposit of ship's register.

Under this state of judicial authority upon the subject, on a writ of error before Mr. Justice STORY,

(a) *Catlett et al. v. The Pacific Insurance Company*, Paine's R., 594, 614.

(b) Act of February 26, 1803, ch. 8, § 2; 2 Stat. at Large, 203.

(c) *The United States v. Mitchell*, 2 Washington's R., 478.

VOL. 2. in a suit against the master to recover the penalty of \$500 under the act last above cited, for not depositing his ship's register with the consul at St. Thomas, the question arose whether the certificate of the consul of the arrival and departure of the vessel, and of the neglect of the master to deposit the register, was admissible evidence of these facts. The district court had admitted it as evidence of the latter fact, but rejected it as evidence of the arrival and departure of the vessel; and it was to this latter part of the opinion of the court that the exception on which the writ of error was founded, was taken by the plaintiff.

On a review of the decisions above cited, Mr. Justice STORY affirmed the judgment of the district court. Adverting to the omission in the act of 1803, of any provision making a consular certificate evidence of the facts, which, in the case before him, it was relied on to establish, while on the other hand it was by the same act expressly provided, in regard to another penalty denounced by it for refusing to receive destitute seamen on board, that such certificate should be evidence, he thought the maxim *expressio unius est exclusio alterius*, might, without impropriety, and with some force, be applied to the case. It was undoubtedly true, however, he observed, as a general principle, that certificates and other documents, made by a public officer entrusted by law with authority for that purpose, are to be treated as public documents, and as such are evidence; but in the case before him, neither the particular statute on which the action was founded,

nor any other, made it the duty of the consul to certify the facts which his certificate was offered to establish. The general rule of the law was that all evidence must be given under oath, and in the very case in controversy; and the difficulty was to bring the case within the scope of any of the exceptions to this rule. He was not aware, moreover, of any act of Congress, requiring consuls to take an oath for the faithful performance of the duties of their office; although, in common with all other officers, they were required to take an oath to support the Constitution of the United States. So that the certificate offered was not only not provided for by any statute, and not verified by oath, but was open to the grave objection that it was not even made by an officer sworn to discharge his duty. In addition to this, it was not shown to be any part of the official duty of a consul to keep a memorandum of the arrival and departure of American vessels at and from the port for which he is appointed. If it were so, it would, however, by no means follow that his certificate of the fact would be evidence in a court of justice; because his own deposition, giving to the opposite party a right of cross-examination, would be better evidence.

With respect to the decision of Mr. Justice WASHINGTON (above cited), holding a consular certificate to be evidence that a ship's register had been deposited with him, Mr. Justice STORY said he would not meddle with the point; because it was not necessary to the decision of the case before the court, and there might be good reason to hold a

VOL. 2. consular certificate to be admissible in relation to an official fact, of which the consul may have exclusive knowledge, when, as to all other facts, it would be inadmissible, because they might admit of proof *aliunde*. If, however, it had been rightly held by Mr. Justice WASHINGTON that a certificate of the actual deposit of a ship's register was evidence of that fact, he should not doubt that it was also evidence of the arrival of the vessel; for it would be a natural presumption that it was deposited by the master in the regular discharge of his duty. But a certificate of the non-deposit of a register could, at most, establish that single fact; for instead of affording any presumption of the arrival of the vessel, the presumption would rather be that she never did arrive at the port, since the law will not presume a violation of duty by the master.

It was true, the consul had certified, also, to the fact of the arrival and departure of the vessel; but of these facts, the certificate could not be considered as evidence. It was not under oath. It was not authorized by any statute. It was not made any part of the consul's official duty to keep a memorandum or record of such facts. They were not facts peculiarly within his official knowledge, but were susceptible of proof from other sources. For these reasons, the judgment of the district court was affirmed. The suit had been instituted, agreeably, as we have seen, to the act, in the name of the consul; and this was urged at the bar, as a further objection to the admission of the certificate: 1, on the ground that the plaintiff, in the event of

the failure of the suit, would be liable for costs; and, 2, on the more comprehensive ground that the consul was a party to the record. Mr. Justice STORY said it was unnecessary to decide this point; but he observed that it had never, to his knowledge, been decided that a party so circumstanced was not liable to costs: and although he was aware that his late brother, Mr. Justice WASHINGTON, in the case of *Willing v. Consequa* (1 Peters's C. C. R., 307), had held that a party plaintiff of record, who, in fact, had no interest in the suit, was a competent witness to testify therein, yet he also knew that the decision had not been thought entirely satisfactory(a).

From the foregoing analysis of the judicial decisions upon the subject, it would seem to be questionable whether the certificate of a consul is admissible in evidence in any case, except where it is expressly made so, or, at most, where authority to grant it is expressly given by statute. For although a consular certificate of the deposit of a ship's register was admitted by Mr. Justice WASHINGTON, its admissibility was doubted by Mr. Justice STORY, and is hardly consistent with Judge WASHINGTON's own course of reasoning, or with that of the Supreme Court in the case of *Church v. Hubbard*, above cited. What is rather apologetically said by Mr. Justice STORY, of the deposit of the register being in its nature a fact peculiarly within the knowledge of the consul, appears to be but a questionable answer to the objection to which the

Quere, whether a consular certificate is evidence in any case, except where made so by statute.

(a) *Levy v. Burley*, 2 Sumner's R., 355.

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evidence would still be obnoxious, that the fact certified might, and ought, nevertheless, to have been verified by his oath.

PROTESTS.

The act of 1792, ch. 24, it will be recollected, empowers consuls to receive protests made by masters of American vessels and others; and declares that copies thereof, duly certified, shall be equivalent to their originals in all courts of the United States.

No inference is to be drawn from this enactment with respect to the force and effect of these documents as evidence, its object being merely to invest consuls with a power which would otherwise have belonged exclusively to public notaries, and to prescribe a convenient mode of authentication.

The following account of these instruments, given by Mr. SHERR among his additions to Abbot on Shipping, will serve to explain their nature and uses:

“On the arrival of the vessel at her homeward port, and when compelled by accidents to put back, or into a port other than that of her destination, it is usual for the master to present himself before a notary, and cause a protest to be noted, and afterwards to be drawn up or extended. British consuls at foreign ports are empowered by statute to perform notarial acts; but inasmuch as their attestation would probably not be deemed abroad of equal authenticity with that of a regular public notary, the master would do well to address himself to that functionary. He should remember, however, that our courts do not adopt the rules of evidence which prevail in foreign courts; and although copies of public documents, attested by a public notary, may be evidence

of the originals abroad, they will not be received as such in England. CHAP. 10.

"The protest is a declaration or narrative by the master of the particulars of the voyage; of the storms or bad weather which the vessel may have encountered, the accidents which may have occurred, and the conduct which, in cases of emergency, he had thought proper to pursue. With whatever formalities drawn up, it cannot be received in our courts as evidence for the master or his owners, but it may be evidence against him and them; and he should take care to supply from the log-book, his own recollection and that of his mate, or trustworthy mariners, true and faithful instructions for its preparation. Protests are often of great utility in matters connected with the adjustment of losses in marine insurance, and in the calculation of averages: they are received as evidence in foreign courts; and with us, credit is often given to their contents by merchants and underwriters, when free from circumstances of suspicion.

"Protests are also made by the master against the charterers of the ship, or the consignees of goods, for not loading or unloading the vessel pursuant to contract, or within reasonable or stipulated delays; and by the merchant against the master, for misconduct, drunkenness, etc.; for not proceeding to sea with due dispatch; for not signing bills of lading in the customary form, and other irregularities(a)."

(a) Abbot on Shipping, Boston ed. of 1846, p. 465. It may not be unacceptable to the reader here to subjoin the form of a Note of Pro-

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This statement seems to imply that it is customary with English shipmasters to make protests on the termination of a voyage, whether it has been

test, and one of the several forms of a Protest drawn up or "extended," given by Mr. SHEE in the appendix of the work above cited.

Entry or Note of the Protest of a Ship.

On this day of , in the year of our Lord one thousand eight hundred and , personally appeared and presented himself at the office of R. B., notary public, O. D., master of the ship or vessel the Mary, which sailed on a voyage from , on the day of last, and arrived at on the day of instant, laden with a cargo of . And the said master hereby gives notice of his intention of protesting, and causes this note or minute of all and singular the premises to be entered in this register.
C. D.

Ship Protest in consequence of a loss by collision.

By the public instrument of protest hereinafter contained or annexed hereto,

Be it known and made manifest unto all people, That on the day of , in the year of our Lord one thousand eight hundred and , personally came and appeared before me, R. B., notary public, duly authorized, admitted and sworn, residing and practicing in , in the county of , in the United Kingdom of Great Britain and Ireland, and also a master extraordinary in the High Court of Chancery in England, A. B., master of the sloop or vessel the Ann Mary, belonging to Liverpool, O. D., mate, and E. F., seaman of the said vessel, who did severally duly and solemnly declare and state as follows, that is to say: That on the first of February instant, about half-past three p. m., these appearers and the rest of the crew of the said vessel set sail in her from Liverpool, bound on a voyage to Hatchett near Bridgewater, laden with a cargo of hides; the said vessel being then tight, staunch and strong, well manned, victualed and sound, and in every respect fit to perform her intended voyage. And these appearers, the said A. B. and E. F., for themselves, declare and say, That about half-past two a. m., on the second of February, whilst the vessel was proceeding on her intended voyage, the other appearer C. D. being below in bed, and the said vessel being between the Great Ormehead and Point Linus, the wind being about east-southeast, with

attended with any unusual incidents or not. I CHAP. 10. imagine, however, that in this country, at least, this step is, in general, resorted to only in extraor-

moderate weather and smooth water; the vessel running before the wind, and steering about west-northwest, under sail, with square-sail and half topsail set; and this appearer A. B. being then at the helm, and this appearer E. F. being forward, called out that he saw a light on the starboard bow; and they at first thought that it was Point Linus light, but it afterwards turned out to be the light of the steamer Vesuvius. That the appearer the said E. F. immediately went below for a light, and brought a lantern on deck and showed the light over the starboard bow; and this appearer the said A. B. put the helm of the Ann Mary to the starboard, until her course was altered from west-northwest to southwest, in order to avoid the steamer. That after so altering their course, this appearer the said E. F. shifted the light from the bow to abaft the rigging on the starboard side, to make it better seen by the crew on board the steamer; and both these appearers, the said A. B. and E. F. called out to the steamer to starboard her helm; and about five minutes after the light was shown, the steamer struck the Ann Mary, and she went down in a minute afterwards. And this appearer the said C. D., for himself, declares and says, that he was below in bed, and was awoke by the said A. B. calling out "Steamer ahoy!" and he immediately ran upon deck in his shirt and drawers, and saw the appearer the said E. F. holding a lantern on the starboard quarter; and this appearer the said C. D. had not been a minute on deck, before the steamer struck the Ann Mary. And these appearers, the said A. B., C. D. and E. F., for themselves, declare and say, that immediately after the said C. D. came on deck, the steamer struck the Ann Mary nearly amidships; and, for the preservation of their lives, these appearers, and another of the crew of the Ann Mary, jumped on board the steamer, and arrived back at Liverpool in her on the second day of February; and on the same day, this appearer the said A. B. appeared at the office of me the said notary, and caused his protest to be duly noted. And these appearers do protest, and I the said notary do also protest against the said steamer, and the said collision, striking, facts and occurrences, and all loss and damage occasioned thereby.

We, A. B., C. D. and E. F., do solemnly and sincerely declare that the foregoing statement is correct, and contains a true account of the facts and circumstances; and we make this solemn declaration,

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dinary cases involving loss or damage; or which are likely to arouse suspicion, or to become the subject of litigation.

How far a
protest is
evidence.

To what extent, and under what circumstances, if any, the protest of a shipmaster would, in our courts, be evidence for his owners, is a question of considerable importance, upon which, unfortunately, little or no light has hitherto been shed by the decisions of our courts. The remark of Mr. SHEE, that it is inadmissible for this purpose in the English courts, is certainly not in accordance with the practice of the High Court of Admiralty; and what is remarkable, the only case decided in that court, to which he refers in support of his assertion, was obviously decided exclusively upon its own peculiar circumstances, constituting it an exception to the general practice of the court. It was a suit for collision, brought by the owners of a smack run down while engaged in towing a foreign ship into port,

conscientiously believing the same to be true; and by virtue of the provisions of an act made and passed in the sixth year of the reign of his late Majesty, entitled "An act for the more effectual abolition of oaths and affirmations taken and made in various departments of the state, and to substitute declarations in lieu thereof, and for the entire suppression of voluntary and extrajudicial oaths and affidavits, and to make other provisions for the abolition of unnecessary oaths."

A. B.

C. D.

E. F.

Thus declared and protested in due form of law, at the office of me, the said notary, at L , on the day and year first above written.

[SEAL.]

R. B., *Notary Public, Liverpool.*

In this country, there being no statute like the English act above mentioned, I presume protests are always verified by oath.

and the protest offered was made by the master of the foreign ship. The only objection made to its admission, was that it was "*res inter alios acta*;" and Lord STOWELL, in deciding the point, observed: "If the effect of that collision had been to destroy the persons on board the smack, it would be a reason for admitting evidence not strictly and technically legal; but none of the crew were lost: all survived, all are capable of being witnesses. A case of necessity, then, does not exist, such as might induce the court to open a door for the admission of any other evidence; and since it does not, I should be unwilling to allow a protest to be introduced that has been properly described as *res inter alios acta(a)*." It is clear, therefore, that this decision, so far from warranting the remark of Mr. SHEP, implies the reverse of it; and in point of fact, the reports of cases decided in the High Court of Admiralty show it to be its constant practice to receive the protest of the master of the vessel immediately concerned in the acts or incidents which gave rise to the suit. The protest seems to be admitted, of course, as adapted to shed light upon the controversy, *valere quantum valere potest*; such degree of credit being given to it by the court, as, under all circumstances, it appears to merit. Thus, in a case of salvage, the protest of the master of the salvaged vessel, giving a narrative of the disaster which befel her, and of the salvage services rendered, was thus noticed by Sir JOHN NICHOLL in pronouncing his judgment.

(a) *The Betsey Cairnes*, 2 Haggard's R., 28.

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After stating certain general principles relating to the amount of compensation to be awarded for services of this nature, he observed: "The facts of most cases have peculiarities of more or less weight, which furnish criteria for their adjudication; and that observation renders it proper to refer, in the first place, to the facts of the present case. The master states them in his protest, which was noted and extended in the usual way for the satisfaction and benefit of his owners." After reading the protest (as the report states)—resuming his observations upon the protest, he added: "There are some omissions of details in this statement; but giving credit to the master for the truth of it—it was made on the 2d of October, before the salvage cause commenced—some observations arise upon it," etc(*a*). So, in another case, of the same nature, where the claim of salvage compensation was founded on the asserted recapture by a British ship of war, of a Swedish vessel, from a Danish privateer, the protest of the Swedish master was relied on in behalf of his owners to defeat the claim of salvage; and not having been made until long after the transaction to which it relates, this delay was dwelt upon by Lord Stowell, as a circumstance "much to the disadvantage of the protest;" but nothing was said against its admissibility(*b*). And so, again, in a case of collision, the protest of the master of the damaged vessel, confirmed by three of his crew, was the evidence

(*a*) *The Exell Grove*, 3 Haggard's R., 209.

(*b*) *The Charlotte Caroline*, 1 Dodson's R., 192.

which appears to have been exclusively relied on in support of the action(a). CHAP. 10.

In these cases, however, the proceedings appear to have been by summary petition, where, as we have seen, the case is wholly heard and decided on affidavits, including those of the parties themselves; and it may be that all the numerous cases in which the protest of the master has been admitted as evidence in behalf of his owners, were of this description, and that it would be deemed inadmissible as such in a proceeding by plea and proof(b).

But whether they are regarded as evidence in a strict sense, or not, it is unquestionable, not only that when produced, as they usually are, especially in cases of salvage, they are resorted to by the court without scruple as a means of arriving at just conclusions, but that their non-production in cases where they are usually made is regarded with suspicion. This remark is fully verified by the observations of Dr. LUSHINGTON in a late case of salvage, in which he is reported to have expressed himself to the following effect:

Protest uniformly looked into in the English admiralty, and its non-production deemed suspicious.

“In proceeding to the consideration of this case, I cannot but notice with some degree of suspicion that no protest has been produced on the part of the vessel proceeded against. Looking to the facts and circumstances of the case itself, it is certainly a case in which, according to ordinary experience, a protest would have been made; and if made, it should undoubtedly have been brought in. The non-production of such protest in the present instance becomes the more extraordinary, when I look at the

(a) *The Celt*, 3 Haggard's R., 321.

(b) *Vide supra*, p. 32, note.

VOL. 2. affidavits which have been sworn to by the master and mate; the affidavit of the latter being infinitely fuller and more comprehensive than that of the former. I will here avail myself of the opportunity to express my opinion with respect to the production of protests in general in this class of cases. According to my own experience in this court, I have always understood the rule and practice of the court to be, and I am now applying it to cases of salvage, that the protests in all cases ought to be brought in, and for the following reasons: In the first place, because every protest is presumed to be made *recenti facto*, and to contain a statement of the transaction when the facts are fresh in the memories of the parties deposing to it; whereas the discussion and legal investigation of those facts, and of the evidence taken upon them, cannot be had until a much later period, when even those who are most inclined to speak with the most perfect accuracy as to the nature and extent of the salvage service may find their memory fail them with respect to certain important points. This is one reason why the production of the protest is required, and ought to be observed. Another, and in my view of it, a most important reason why the protest should be produced, is this, viz., that it is made and sworn *alio intentu*. In the argument which was addressed to the court by one of the learned counsel, Dr. ADDAMS, this circumstance has been adverted to, and ingeniously applied as a justification for keeping back the protest on the present occasion. I cannot, I confess, accede to the argument which was so urged upon the court. The first and primary object for which all protests are made, is to found a claim upon the underwriters for damage done. It is clear, therefore, that it is the object of the parties to state all the facts and everything which has happened to the ship, so as to lay the foundation for the most extensive indemnification. When they come before this court, on the other hand, for the purpose of adjusting the amount of the award, then the state of things is reversed; the extent of the danger is decried; the nature and extent of the damage is depreciated. Upon these considerations, therefore, it is most desirable, and much more so in cases of salvage than in cases of collision, that the protest should always be produced(a)."

(a) *The Emma*, 2 W. Robinson's R., 315.

SHIPPING ARTICLES, in controversies respecting mariners' wages, often constitute an essential and necessary part of the evidence. Like other written contracts, they are binding, and, with certain exceptions in favor of mariners, as an uninformed and improvident class of men, are conclusive upon the rights of the parties concerned. Parol evidence is therefore inadmissible to vary the contract. But where the rate or amount of wages has been omitted by mistake or accident, it has been held to be competent to either party to show by parol what the contract in this respect really was, notwithstanding the provision contained in the act of 1790, ch. 29, requiring the master to make an agreement in writing, or in print, with every seaman before proceeding on his voyage, and in default thereof, entitling the seaman to the highest rate of wages paid at the port during the last preceding three months(a).

CHAP. 10.

Unintentional omission in shipping articles of the rate of wages may be supplied by parol evidence.

It appears to be an established and uniform practice in suits for mariners' wages, in the English admiralty, to bring into court the shipping articles and log-book; and by our act for the government and regulation of seamen in the merchants' service, it is expressly enacted that in all such suits, "it shall be incumbent on the master or commander to produce the contract and log-book, if required, to ascertain any matter in dispute; otherwise the complainants shall be permitted to state the contents thereof, and

In suits for wages, master required to produce agreement and log-book.

(a) *Wickham v. Blight*, Gilpin's R., 452. Concerning the effect, if any, of the words "or elsewhere," subjoined to the description of the voyage in the shipping articles, see *supra*, vol. I, p. 150.

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proof to the contrary shall lie on the master or commander(a)."

Whether the word "state" here means the giving of parol evidence, or simply an assertion, of the contents of the contract and log-book, which assertion is to be taken as true until disproved by the production of these writings, may perhaps be questionable. If the intention was to confer the right of giving secondary proof, as in the case of lost instruments, it seems difficult to account for the use of the word chosen.

(a) Act of July 20, ch. 29; 1 Stat. at Large, 131, § 6.

CHAPTER. XI.

THE HEARING AND DECREE.

ALL unnecessary delays, at any stage of the suit, are inconsistent with the principles by which courts of admiralty are governed, and which it is their duty to enforce, not only when specially applied to for that purpose, but, if necessary, by spontaneous interposition. Such delays nevertheless frequently occur in this country, especially in bringing causes to a hearing, after the parties are, or ought to be, ready for that purpose. This generally arises, it may be charitably supposed, from conflicting professional engagements in the numerous state courts of law and equity, in all of which the members of the legal profession are accustomed to practice. To a certain extent, therefore, these delays are, perhaps, unavoidable. But, unless the parties are ready to proceed to a hearing on the return-day of the process—as they should do when the cause on account of its simplicity requires little or no time for preparation, and when the witnesses are few and reside on the spot—the more convenient and proper practice is, if the circumstances admit of it, for the court on the return-day to assign some early day for the hearing. When from the absence of witnesses, the necessity of obtaining a commission, or other cause, this cannot

THE
HEARING.

Causes to
be speedily
heard.

If not heard
on the re-
turn-day of
the process,
day to be
assigned.

VOL. 2. with propriety be done, the parties may at any subsequent time agree upon a day, or either of them apply to the court to appoint a day for hearing. When an application is made to the court for this purpose by one of the parties, it is advisable to give notice of the application to the adverse party, designating some day which the applicant would prefer. If no such notice is given, the existing predicament of the cause ought to be truly and clearly stated for the information of the court. The judge may, nevertheless, deem it proper to require a previous notice, or to grant only an order to show cause; and if he assigns a day, upon an *ex parte* application, he will, of course, take care to direct that the opposite party shall be seasonably notified of the day assigned. When special sessions of the court are appointed prospectively to be regularly held on certain specified days, as on a certain day of each week, such day of the next or other week will of course be assigned for the hearing of a cause, unless there shall be special reasons for designating some other day. The order assigning a day for hearing ought to be entered by the clerk.

Hearing,
how con-
ducted.

The hearing or trial of an admiralty cause upon the merits, is conducted, substantially, in the same manner as a trial at common law. The counsel for the libellant opens the cause by reading the pleadings or allegations of the parties, or by an exact statement of their more material parts, and a summary statement of the evidence which he expects to adduce. The witnesses in behalf of the libellant are then called, and, being sworn, are examined and

cross-examined in the usual form. If depositions on the part of the libellant have been taken on commission, or *de bene esse*, according to the 30th section of the Judiciary Act of 1789, they are read.

CHAP. 11.

The libellant having thus completed his proofs, the defence is opened by the counsel for the respondent, and the evidence in his behalf is in like manner adduced.

The libellant then has a right to call other witnesses for the purpose of repelling the effect of the respondent's evidence.

If either party intends, in the event of an adverse decision, to exercise the right of appeal, he may, under certain conditions, demand that the evidence of any witness shall be taken in writing, to be used in the appellate court. This right is secured and defined by the 30th section of the Judiciary Act, as follows:

Right of the parties to have the evidence of a witness taken down by the clerk.

"And in the trial of any cause of admiralty or maritime jurisdiction in a district court, the decree in which may be appealed from, if either party shall suggest to and satisfy the court that probably it will not be in his power to produce the witnesses there testifying before the circuit court, should an appeal be had, and shall move that their testimony be taken down in writing, it shall be so done by the clerk of the court. And if an appeal be had, such testimony may be used on the trial of the same, if it shall appear to the satisfaction of the court which shall try the appeal, that the witnesses are then dead or gone out of the United States, or to a greater distance than as aforesaid from the place where the court is sitting; or that by reason of age, sickness, bodily infirmity or imprisonment, they are unable to travel or appear at court, but not otherwise."

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The evidence being concluded, the cause is argued; and unless it has already been fully opened on the part of the libellant, both as to the law and the facts on which he relies, this ought now to be done, to the end that the respondent may be informed of the points to which it behooves him particularly to direct his argument. The argument is closed by the counsel for the libellant. When two counsel argue on each side, the practice in the Southern District of New-York (and it seems worthy of imitation) is, for them to address the court alternately^(a).

Issues of law are rare in admiralty causes; but when presented by the pleadings for decision, they should be argued at once; or if that is not done, a day is assigned for that purpose in the manner above stated.

THE
DECREE.

The decree is pronounced either at the close of the argument, the clerk noting in his minutes the substance of the decree; or, when the judge deems it necessary to hold the case under advisement, at some future day, when the decree is either drawn up by him, or the proper instructions are given to the clerk for that purpose. Decrees in the admiralty are almost always very simple in their directions and requirements—being usually either for the dismissal of the libel, or for the payment of a specific sum to the libellant, and the issue, if necessary, of the proper process to enforce such payment.

(a) Betts's Adm. Practice, 94.

All matters of computation are usually referred to the clerk; and matters of fact pertaining to commercial usage, and requiring mercantile skill for their proper decision, are referred to the clerk together with one or more (generally two) merchants; or, when the necessary investigation can be more conveniently made at some place remote from the residence of the clerk, the reference may be to one or more commissioners specially appointed for the purpose, in pursuance of one of the new rules(a). The first decree in favor of the libellant, therefore, in cases involving matters of the nature above described, is interlocutory; settling only the general principles and main questions affecting the rights of the parties, and comprising or accompanied by an order of reference. When the report comes in, the parties are entitled, if they desire it, to be heard upon the question of its confirmation.

CHAP. 11.

Reference
to the clerk,
etc.

There seems to have been considerable diversity in the structure and phraseology of decrees in the several admiralty courts in this country, and there has probably been no very strict adherence to particular forms even in the same court; but in avoiding all unnecessary prolixity, the practice of our courts, it is believed, has been uniform. In the High Court of Admiralty of England, the established usage appears to be to incorporate in the decree a full recital of the substance of the pleading and allegations, and of all the antecedent proceedings, as is done in the High Court of Chan-

Form of the
decree.

(a) See Appendix, Rule XLIV.; and *supra*, p. 185.

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cery(a). This practice is not known to have been followed in this country; nor does it appear to be necessary for any purpose of justice. Indeed, the

(a) The following is given in Marriott's Formulary, as a precedent for a First Decree for wages. Like all the precedents in this book, it is drawn, as will be seen, with great neatness and perspicuity. Sir JAMES MARRIOTT, the learned reader will remember, was the immediate predecessor of Sir WILLIAM SCOTT, afterwards Lord STOWELL, as Judge of the High Court of Admiralty; and these forms are stated, in the title page, to have been "perused and approved as correct," by him. It is believed to be the only collection of admiralty precedents ever published in England, and it has never been reprinted in this country. The forms are given with scarcely a word of explanation, and with little regard to order in their arrangement.

"First Decree for Wages."

In the name of God, Amen. Before you, the right worshipful Sir JAMES MARRIOTT, knight, doctor of laws, lieutenant, judge, or president of the High Court of Admiralty of England, lawfully constituted, the proctor for late mariners of, and belonging to the ship or vessel called the (whereof now is or lately was master), doth say, allege, and by this writing propound in law against the said ship, her tackle, apparel and furniture, and against all persons in general having or pretending to have any right, title or interest in the same, that the said mentioned in the schedule or affidavit hereunto annexed, were, in the year and months mentioned in the said affidavit and schedule hereunto annexed, or in some or one of them, within the flux and reflux of the sea, and within the jurisdiction of the said High Court of Admiralty of England, shipped and hired to serve on board the said ship, in the voyage and voyages to be performed and afterwards performed by the said ship, at the rate of wages and for the sum of money in the said schedule and affidavit mentioned; and the said did perform their duty in the said ship for the time mentioned in the said schedule and affidavit, and did well and truly deserve the sum of money mentioned in the said schedule and affidavit, for their services performed and necessary expenses on board the said ship; and that the said money mentioned in the said schedule is due and ought to be paid to the said for their wages, for their service performed and necessary expenses on board the said ship:

prolixity of decrees in chancery has called forth expressions of regret from more than one of the English chancellors. Lord HARDWICK said he

also that the wages mentioned in the said schedule and affidavit (which affidavit and schedule, the proctor, propounding them, prayed may be admitted as if here read and inserted) amounts, after deducting what is due for Greenwich and the merchants' hospitals, to the sum following, to wit: the wages due to the said

	to the sum of
those due to	to the sum of
and those due to	to the sum of

of lawful money of Great Britain. Whereupon

the said

having no other hopes of recovering

their aforesaid wages, but by arresting the said ship and her tackle, apparel and furniture, have procured the same to be arrested, by virtue of a warrant under the seal of the said court; and have caused all persons in general, having or pretending to have any right, title or interest in the premises, to be cited to appear before you the aforesaid judge, or your surrogate, at a certain time and place mentioned in the said warrant, to answer to the said

in a

certain cause of subtraction of wages, civil and maritime: all which persons in general, cited as aforesaid, being called and not appearing, but contumaciously absenting themselves, stand in contempt, by having incurred four defaults; all which premises were and are true, public and notorious, and thereof there was and is a public voice and fame. Whereupon the oath required by law being made, and the proctor for the said

praying right and justice to be done,

and the said

to be put in possession of the

said ship, her tackle, apparel and furniture, with effect according to the extent of their debts, that their property may be preserved, and for the expenses in this behalf, by this your first decree, according to the style, manner and practice of proceeding in the said court in the like cases; which premises he doth propound jointly and severally, not restraining himself to prove all and singular the premises; but as far as he shall prove therein, he humbly prays he may obtain in his demands, the right and benefit of the law being always preserved, humbly praying your aid and assistance herein.

All which premises, we, Sir JAMES MARRIOTT, knight, doctor of laws, the judge aforesaid, having maturely weighed and considered the same, do admit, and do pronounce, decree and declare that the same ought to be admitted, and that the defaults aforesaid have been made

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wished that orders in that court were drawn with the same brevity as those in courts of law; and this wish has been accomplished with respect to the courts of the United States, as courts of equity, by one of the new rules of equity practice prescribed by the Supreme Court of the United States, by which it is ordained, that "in drawing up decrees and orders, neither the bill nor answer, nor other pleadings nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin in substance as follows: 'This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:'

The present learned judge of the District Court for the Southern District of New-York, states, in his summary of the practice of that court, that in the minutes of the Vice-admiralty Court of New-

as is above alleged; and do pronounce, decree and declare that the said
 said schedule, ought to be put in possession of the said ship, her tackle, apparel and furniture (sufficient security being first given to the said effect, as is usual in like cases); and by this our first decree do adjudge and declare the possession of the said ship, her tackle, apparel and furniture to the said

JAMES MARRIOTT.

WILLIAM BATTINE.

This first decree was signed and promulgated by the right worshipful Sir JAMES MARRIOTT, knight, the judge, in the dining room adjoining to the common hall of DOCTORS COMMONS, on the day of
 in the year of our Lord
 in the presence of R. J., one of the Deputy Registrars."

York, the opinion of the judge is often found entered at large(a). And in many of the cases reported in Peters's Admiralty Decisions, what is called the "Decree," consists of the opinion of the court, terminating in a formal decree commencing like the *ordering or decretal part* of a decree in chancery; and this, I infer, was the only decree drawn up. In one case, the opinion commences with the remark that "The state of the case will appear in the libel, and the testimony and exhibits in this cause;" and, after discussing and determining the questions of law on which the case turned, concludes with a formal decree, awarding and apportioning salvage, and commencing thus: "I do therefore adjudge, order and decree," etc.(b). The first volume of these reports contains full reports of two cases conducted by very able lawyers, decided in the District Court for the District of New-York—the one in 1797, by Judge TROUP(c); and the other a few years later, by Judge HOBART(d). In both of these cases, the decree is given *in extenso*. In the first it commences thus: "The court, having taken time to advise in this cause until this day, doth now order, sentence and decree, and it is hereby ordered, sentenced and decreed by the court, that," etc. In the second, the decree commences thus: "The court, having taken time to advise as to its decree, and as to the proportion and distribution of salvage in this cause, doth now order and decree that," etc.

(a) Betts's Adm. Practice, 97.

(b) *La Belle Creole*, 1 Adm. Decisions, 31.

(c) *The Harmony*, ib., 34, note.

(d) *The Jefferson*, ib., 46, note.

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In the report of the important salvage case of *The Blaireau*, finally decided on appeal to the Supreme Court, the decree, both of the district and circuit court, is given at large(*a*). It arose in the District of Maryland, during the time of Judge WINCHESTER, a learned and accurate admiralty lawyer. It commences as follows: "The counsel for the parties respectively intervening in this cause, were heard by the court; and their argument, together with all and singular the proceedings and testimony in this cause, were by the court maturely considered. And it appearing to the court that the circumstances of extreme danger under which the salvage of the ship *Blaireau* and cargo was effected, require a salvage compensation as liberal as is consistent with precedents and legal principles; that the danger, labor," etc. It then proceeds to state the conclusions of the judge as to the particular merits and claims of the several salvors, and closes with an award of salvage to each, commencing thus: "It is, this 14th day of July, 1803, by me, JAMES WINCHESTER, Judge of the District Court of the United States for Maryland District, and by the power and authority of this court, ordered, adjudged and decreed, that," etc. The decree of Judge CHASE, made on appeal to the circuit court, commences as follows: "This court having heard the parties on the appeal in this cause, by their counsel, and fully examined the evidence, exhibits and proofs, and maturely considered the same, do order, adjudge and

(*a*) 2 Cranch's R., 240 (1 Curtis's Decis. S. C., 479).

decree, and it is hereby ordered, adjudged and decreed by the said court, that," etc. CHAP. 11.

In one of the above cited cases decided in the New-York district, the decretal words, as we have seen, are "order and decree;" and in the other, "order, sentence and decree;" and this latter form is understood to be usually employed in the Southern District of New-York. The correspondent words used in the Pennsylvania district, in the time of Judge PETERS, were *adjudge, order and decree*. In the case of *The Blaireau*, above cited, the terms employed, both in the district and in the circuit court, are *order, adjudge and decree*, being those in familiar use in courts of chancery; and this same phraseology was used by the Supreme Court of the United States, in proceeding to render such decree as the circuit court ought to have rendered, in another more recent case(a).

The uniform language of the High Court of Admiralty of England appears to be "*pronounce, decree and declare*." The term "pronounce" seems to be peculiarly distinctive of the admiralty jurisdiction. It is almost invariably found, as the learned reader will not have failed to remark, at the conclusion of the reported judgments of the court, to express the result, as, for example, in cases of bottomry: "I therefore *pronounce* for the validity of the bond." To indulge in the expression of some regret that the language, in this instance, of the English court has not been adopted in this

(a) *The Virgin*, 8 Peters's R., 538 (11 Curtis's Decis. S. C., 208).

VOL. 2. country, or to cherish a hope that it may yet find favor in our courts, as a type, if not a *droit* of the admiralty, might seem to be puerile; and to recommend its adoption, might appear to savor of arrogance.

Decrees usually drawn up by the clerk.

Decrees are usually drawn up by the clerk, according to the forms in use in the particular court in which they are rendered. Decrees in the English High Court of Admiralty, it is believed, are always signed by the judge; and a certificate is thereunto subjoined by the registrar, stating the fact, time and place of signature. In the Southern District of New-York, and, as I learn, also in the District of Massachusetts, the signature of the judge to the separate decree is not deemed necessary; but in the former district, and it is presumed also in the other districts where the decree itself is not signed by the judge, the enrolment, or record of the judgment of the court, is signed by him(*a*). It is not supposed to be necessary, or that it is in any of the districts deemed to be indispensable, that the decree should be enrolled preparatory to its execution. Its entry *apud acta*, it is believed, is considered to be sufficient for this purpose(*b*).

Decree may be executed before enrolment.

Power of the court to modify its own decree.

The liberal provision made by our laws for the rehearing of causes on appeal to the circuit court from the decrees of the district court, renders the question of the power of the latter court to vary its own decrees of far less importance than it would

(*a*) Betts's Adm. Practice, 98.

(*b*) Its contents are prescribed by a late act of Congress. *Vide infra*, ch. XIII.

otherwise be; but inconsiderable as the sum in controversy is which is requisite to sustain the right of appeal, there are occasionally suits, especially for seamen's wages, in which the amount in controversy is less than this sum. It is to be considered, moreover, that the delay and expense incident to an appeal may sometimes render this form of relief of little or no value to the party concerned, even where from misapprehension or inadvertence on the part of the court, or deception on the part of the successful litigant, or other cause, the district court may have been led into palpable error, which it would gladly correct at once, upon motion, if it had the power.

In addition, therefore, to the authority conferred, or rather recognized by one of the new rules, to set aside defaults for contumacy on the return-day or the mesne process(*a*), another of these rules provides that "The court may, in its discretion, upon motion of the defendant and the payment of costs, rescind the decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof, at any time within ten days after the decree has been entered, the defendant submitting to such further orders and terms in the premises as the court may direct(*b*)."

But these rules are silent as to any power in the district courts to vary a decree in a contested suit, and I have met with no authoritative judicial decision on this point. The question is briefly discussed, under the head of "Rehearing

(*a*) *Vide supra*, chapter vi.

(*b*) See Appendix, Rule xl.

VOL. 2. and Review," by the learned judge of the District Court of the United States for the Southern District of New-York, in his summary of the practice of that court(*a*), in which it has also been deemed to be a fit subject for regulation by general rules(*b*).

It is not a little remarkable that a question of so much practical importance should have remained undetermined in the High Court of Admiralty of England, until since the accession of Dr. LUSHINGTON, the present distinguished judge of that court. An application was made to him, in the case here alluded to, to modify a decree pronounced a few months before by Sir JOHN NICHOLL, his immediate predecessor; and the question of his power to do so was treated both by the counsel and the court as an original one, substantially new, and unaffected by any antecedent decision or usage of the court.

The suit was a cause of collision promoted by the owners of a fishing smack named the Success, against a steam vessel, the Monarch, for damage sustained at sea, whereby the smack was totally lost.

At the hearing of the cause, Sir JOHN NICHOLL

(*a*) Betts's Adm. Practice, 100 *et seq.*

(*b*) The rules referred to in the text are as follows:

"RULE 156,

"A rehearing will not be granted in any matter in which a decree has been rendered, unless application is made at the term when the decree is pronounced, or there is a stay of proceedings by order of the judge.

"RULE 157.

"No libel of review will be entertained in causes subject to appeal, nor unless filed before the enrolment of the decree or return of final process issued in the cause."

pronounced both parties in the cause to have been in fault, and decreed the loss to be borne equally between them; "and an interlocutory decree was taken down by the registrar in the assignation book, in the following words: 'The judge being assisted by Captains Timbrell and Hayman, two of the elder brethren of the Trinity Corporation, and having read the act and the evidence, by interlocutory decree pronounced the collision in question in this cause to have been equally the fault of the masters and crews of the said ship Monarch and the said smack Success; and for a moiety only of the damage proceeded for, and condemned the owners of the said ship Monarch, Pulley's parties, and the bail given in their behalf, in a moiety of the amount of such damage, and of the costs incurred on behalf of Pitcher's parties in this cause. And the judge, at the further petition of Pitcher, referred to the registrar and merchants the amount of the damage pronounced for, together with all accounts and vouchers brought in or hereafter to be brought in relative thereto, to report thereon.' "

By this decree, it will be seen, the owners of the vessel proceeded against, in addition to being left to pay their own costs, were subjected also to the payment of one-half the costs of the promovent; whereas, according to a judgment of the House of Lords, pronounced several years before, in which the question of costs was fully discussed and considered, each party ought to have been required to pay their own costs. The application was made in behalf of the owners of the Monarch, "to vary the

VOL. 2. decree in question as regarded costs, on the ground that it was inequitable, and that the late judge could not have intended to burthen them with three-fourths of the expenses: on the contrary, that he had actually directed the parties to pay their respective costs, as was set forth in the affidavits of persons of respectability who had taken notes of the judgment at the time." It appeared, however, "that previous to the entry of the decree in the assignation book, a draft thereof was submitted by the registrar to the judge in chambers, who confirmed its accuracy and approved of its contents."

Dr. LUSHINGTON said he could not allow the registrar's entry to be questioned, upon the averments of another person as to what took place at the time, especially after the registrar's statement that he subsequently took the opinion of the late learned judge as to the accuracy of the decree. And in reply to the remark of the counsel for the owners of the *Monarch*, that this opinion was taken in the absence of the parties interested and their advisers; and that if the late judge had heard counsel on the subject, he would never have sanctioned the decree as it stood recorded — Dr. LUSHINGTON observed: "It may be so, but I cannot help that; the court must uphold the statement of its registrar. With respect to the present application, I should be disposed so far to alter the decree, as to meet what I conceive to be the equity of the case; but I am not aware that the court possesses the power to do so in the present instance." The counsel admitted his inability to furnish any precedents in support of the applica-

tion, and it was directed to stand over, that cases might be looked into. On a subsequent day some cases were cited, having, however, but a remote relation to the question before the court; and in opposition to the motion, it was contended that, as in the present instance there was no omission to be supplied, and no ambiguity to be explained, these cases were inapplicable; that the decree in question was clear and perfect upon the face of it, and that the application was, in point of fact, an appeal from the judgment of the late judge; that its admission would be a departure from the ordinary practice of the court, and be attended with great inconvenience; and that a similar application had been held inadmissible by the Privy Council, in the case of *The Elizabeth*.

Dr. LUSHINGTON, in pronouncing his judgment, assumed that the decree, as it had been taken down, was in fact the decree of the late judge; and after commenting upon the case above mentioned decided in the House of Lords, and after stating his conviction that if, at the time the decree in question was pronounced by Sir JOHN NICHOLL, he had been aware of that decision, he would have decreed in conformity with it; and that if afterwards, during his continuance in office, it had been made known to him, he would have desired to alter his decree, and would have done so if he supposed he had the power—the learned judge proceeded to observe as follows:

“ Being of this opinion, I have now to consider whether I have authority, according to the rules and practice of this court, to

VOL. 2. vary this decree; so far, at least, as the learned judge himself would have varied it, if the case of *Hay v. Le Nerve* had been brought to his notice.

"It has been argued, that great inconvenience will ensue, if decrees of this court, after they have once been made, can be altered, varied or rescinded. If it was a frequent practice to alter the decisions of this court, much evil and inconvenience would undoubtedly ensue in consequence. At the same time it is to be observed that great injustice may be occasioned, if this court has not such a discretionary power of varying its decrees, as is possessed by other courts of this country. The Court of Chancery, before enrollment of a decree, may, and often does alter, vary, and amend it; and I am at a loss to conceive upon what grounds this court, in its equitable jurisdiction, is to be precluded from a similar discretionary authority.

"In the exercise of this authority, I should, I trust, use the greatest caution; and the limit which I would propose to myself in future cases is this, merely to make such an alteration of an error arising from defect of knowledge or information upon a particular point, as the justice of the case requires. At the same time, let it be understood, that it must be an error instantly noticed, and brought to the attention of the court with the utmost possible diligence.

"With respect to the case before the court, if I could satisfy my conscience that, in varying this decree, I was departing from what would have been the real judgment of Sir JOHN NICHOLL, I would abstain from making any alteration in the terms of the minute, as it has been taken down by the registrar in the present instance. But believing that I am about to effect, not only what I have authority to do, but what the late learned judge himself would have done, if he were sitting in this chair, I think that I am bound to vary this decree to the extent of making it accord with the judgment of the House of Lords; namely, that each party should pay their own costs.

"With regard to the costs which have been incurred subsequently to the decree, I shall adopt the same course. I shall not give Mr. Pulley his costs, because I think that Mr. Pitcher was right

in standing by the decree which was the decree of the court. It CHAP. II. is an unfortunate case, but I cannot do otherwise(a)."

I have not hesitated to cite this case so much at large, because it contains, so far as I have discovered, the only exposition of the views entertained by the English High Court of Admiralty, touching its powers to reform its own decrees(b).

It seems very clear that the learned judge entertained no notion of any power in the court analogous to that exercised by courts of equity on a bill of review, or of any power to grant a rehearing upon questions of fact. The only power which he felt himself warranted in asserting, was that of making "such an alteration of an error, arising from defect of knowledge or information upon a particular point, as the justice of the case requires." The error to be corrected in the case before him was an error of law; and it was unnecessary for him to decide whether the principle he adopted was, in his judgment, applicable also to an erroneous conclusion or mistake of the court respecting a question of fact.

(a) *The Monarch*, 1 W. Robinson's R., 21.

(b) This case possesses, however, an additional interest on account of the light it sheds upon the forms of procedure in the High Court of Admiralty.

CHAPTER XII.

APPEALS.

GENERAL PRINCIPLES REGULATING THE RIGHT OF APPEAL.

THE legislation of Congress on the subject of appeals, is, in some respects, obscure, and has given rise to several perplexing questions; but the laws being of early date, the questions here more particularly alluded to have long since been settled, and it is unnecessary to bring them under review.

The right of appeal is conferred, defined and regulated by the second section of the act of March 2, 1803, ch. 20(*a*); which, however, adopts and applies the regulations prescribed by the 22d, 23d and 24th sections of the Judiciary Act of 24th September, 1789, ch. 20(*b*), respecting writs of error.

The Judiciary Act gave an appeal from final decrees in a district court, in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeded the sum or value of three hundred dollars, exclusive of costs, to the next circuit court(*c*). This is the only remedy by appeal provided for by that act; but it gave a writ of error, which might be brought at any time within five

(*a*) 1 Stat. at Large, 244. (*b*) Ibid., 73. (*c*) Ibid., § 21.

years, for the reëxamination of final judgments in all other civil cases, involving the sum or value of fifty dollars, from the district court to the circuit court; and from the circuit court to the Supreme Court, in all civil actions originally brought in a circuit court, or removed to it from a state court, or having come by appeal from the district court, when the matter in dispute exceeded the sum or value of two thousand dollars(a).

This act also directs that the testimony of witnesses, in all cases, in suits in equity, and in those of admiralty jurisdiction, as well as in suits at common law, shall be taken, not on commission, or by examiners out of court, as is usual in courts proceeding according to the course of the civil law, but by *viva voce* examination in open court(b).

The proper and well known office of a writ of error, is, to bring under the revision of the appellate court, merely the questions of law in the decision of which the inferior court is supposed to have erred; and when restricted to common law actions in which questions of fact are decided by a jury, and where relief against an erroneous verdict may be obtained by a new trial, a writ of error is sufficient for all the purposes of justice. But to limit the parties to this form of redress in equity and admiralty causes, in which the court, proceeding according to the course of the civil law, decides the questions of fact as well as of law, was an innovation upon all antecedent precedent of which the

(a) 1 Stat. at Large, 73, § 22.

(b) Ibid., § 30.

VOL. 2. suitor had a right to complain. The act, it is true, made it the duty of circuit courts, in causes in equity and of admiralty and maritime jurisdiction, to cause the "facts," on which they founded their sentence or decree, fully to appear upon the record, either from the pleadings and decree itself, or a state of the case agreed by the parties or their counsel; or, if they disagreed, by a stating of the case by the court(a). But this provision did not supply the deficiency suggested; for it still left the appellate court without any adequate means of determining whether the court below might not have erred in drawing conclusions from the evidence.

The limitation of the right of appeal from the district courts to the circuit courts in admiralty causes, to those in which the sum or value in controversy exceeded three hundred dollars, while at the same time a writ of error was given in common law suits involving no more than the amount of fifty dollars, was also deemed to be inconsistent and objectionable.

To remedy these defects, the amendatory act of 1803 above cited was passed, the second section of which (the first and only other section relating to a different subject) is as follows:

"SEC. 2. *And be it further enacted*, That from all final judgments or decrees in any of the district courts of the United States, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of fifty dollars, shall be allowed to the circuit court next to be holden in the district where such judgment or judgments, decree or decrees, may be rendered; and the circuit

(a) 1 Stat. at Large, § 19.

court or courts are hereby authorized and required to receive, hear and determine such appeal: And that from all final judgments or decrees rendered in any circuit court, or in any district court acting as a circuit court, in cases of equity, of admiralty and maritime jurisdiction, and of prize or no prize, an appeal where the matter in dispute, exclusive of costs, shall exceed the sum or value of two thousand dollars, shall be allowed to the Supreme Court of the United States; and upon such appeal, a transcript of the libel, bill, answer, depositions, and all other proceedings of what kind soever in the cause, shall be transmitted to the said Supreme Court; and that no new evidence shall be received in the said court, on the hearing of such appeal, except in admiralty and prize causes; and that such appeals shall be subject to the same rules, regulations and restrictions as are prescribed in law in case of writs of error; and the said Supreme Court shall be, and hereby is authorized and required to receive, hear and determine such appeals. And that so much of the nineteenth and twenty-second sections of the act of Congress, entitled 'An act to establish the judicial courts of the United States,' passed on the twenty-fourth day of September, 1789, as comes within the purview of this act, shall be, and the same is hereby repealed^(a)."

By this act, appeals from the district to the circuit courts in admiralty causes are placed upon the same footing, with respect to the amount in controversy, as writs of error in suits at common law; and the remedy by writ of error from the circuit courts to the Supreme Court, in admiralty and equity causes, is abolished, an appeal being given in its stead; the nineteenth section of the Judiciary Act, requiring the circuit courts to cause the facts on which their sentence or decree was founded to appear on the record, is repealed, and instead of the statement

(a) Act of March 3, 1803, ch. 40; 1 Stat. at Large, 244, § 2.

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of facts, the evidence itself is required to be returned(a).

In what cases, and within what times an appeal lies.

According to the construction which these acts have received, they authorize an appeal, in the technical sense of the term, as contradistinguished from a writ of error, from all final decrees of the district courts, in causes of admiralty and maritime jurisdiction, and cases of prize, where the matter in dispute exceeds the sum or value of \$50, exclusive of costs, to the *next circuit court* to be holden in the district where the decree is pronounced; and from all final decrees of any circuit court, in cases of equity, of admiralty and maritime jurisdiction, and of prize, where the matter in dispute, exclusive of costs, exceeds the sum or value of \$2000, at any time within five years after the decree is rendered, or, in case of coverture, infancy, insanity or imprisonment, after such disability shall have ceased, to the Supreme Court(b).

Decree appealed from must be final.

It is, then, only from *final* decrees that an appeal can be taken. It rarely happens that there is any serious difficulty in determining whether a decree is in its nature final or not. It is not necessary that the decree, unless appealed from, should be conclusive upon the rights asserted by the parties in the suit; it is sufficient if it determines the

(a) *The San Pedro*, 2 Wheaton's R., 132 (4 Curtis's Decis. S. C., 57).

(b) The right of appeal from the decisions of the territorial courts is regulated by the several acts organizing the territorial governments. An exposition of the laws upon the subject would lead to undue details, and is therefore omitted. See Conkling's Treatise on the National Courts, 3d edition, 294-297.

particular cause(*a*); and a decree is final, as contradistinguished from an interlocutory decree, when it has this effect. But no appeal lies from a decision upon any matter addressed to the sound discretion of the court, as, for example, upon a petition to open a decree(*b*); or upon a motion for leave to amend(*c*); or to reinstate a cause that has been dismissed(*d*); or to dissolve an injunction where the bill is not finally disposed of(*e*). Controversies have arisen relative to those provisions of the acts above cited, by which the right of appeal is made to depend on the amount in dispute between the parties; and the course of decision with respect to this test of jurisdiction has not been altogether consistent. A principle has been established, however, sufficiently comprehensive and exact to embrace most cases likely to arise, and it is this: that when a specific amount is claimed by the plaintiff, if the decision is adverse to his claim, whether wholly or in part, and an appeal is interposed by him, such amount will be deemed to be the sum or value in dispute, because he may ultimately recover that sum; and consequently the appeal will lie: but

Appeal will not lie for error in matters resting in discretion.

Amount in dispute.

(*a*) *Weston v. The City Council of Charleston*, 2 Peters's R., 449 (8 Curtis's Decis. S. C., 171).

(*b*) *Brockett et al. v. Brockett*, 2 Howard's R., 238 (15 Curtis's Decis. S. C., 107).

(*c*) *Marine Insurance Co. of Alexandria v. Hodgson*, 6 Cranch's R., 206 (2 Curtis's Decis. S. C., 373); *Watson v. Craig*, 9 Wheaton's R., 576 (6 Curtis's Decis. S. C., 192); *Chirac v. Reinicker*, 11 Wheaton's R., 280 (6 Curtis's Decis. S. C., 595).

(*d*) *Welsh v. Mandeville*, 7 Cranch's R., 152 (2 Curtis's Decis. S. C., 493).

(*e*) *Verden v. Coleman*, 18 Howard's R., 86.

VOL. 2. whatever may have been the amount claimed, the *defendant's* right of appeal depends upon the amount decreed(*a*).

**Distinct
interests.**

In a suit prosecuted by or against several persons jointly, each having a separate interest; as in the case of seamen suing jointly for wages, or of several claimants in a suit *in rem*, claiming different portions of the property proceeded against, by distinct and independent titles; no appeal can be maintained on either side, except with respect to those interests, if any, which are of the required value; and if no one of them are of this value, no appeal will lie, although, in the aggregate, they may exceed such value(*b*).

Decree *pro forma*. An appeal will be entertained by the Supreme Court from a decree in admiralty rendered on appeal *pro forma* by a circuit court, because the presiding judge had been counsel for one of the parties(*c*).

MODE OF INSTITUTING AN APPEAL FROM A CIRCUIT COURT TO THE SUPREME COURT, AND THE PROCEEDINGS THEREON.

The act of 1803, it will be recollected, contains the following important provision. After giving an

(*a*) *Cooke v. Woodrow*, 5 Cranch's R., 13 (3 Curtis's Decis. S. C., 177); *Wise & Lyn v. The Columbian Turnpike Company*, 7 Cranch's R., 276 (2 Curtis's Decis. S. C., 526); *Gordon et al. v. Ogden*, 3 Peters's R., 33 (8 Curtis's Decis. S. C., 272); *Smith v. Honey*, id., 469; 8 id., 491).

(*b*) *Oliver et al. v. Alexander et al.*, 6 Peters's R., 143 (10 Curtis's Decis. S. C., 69); *Spear v. Place*, 11 Howard's R., 522 (18 Curtis's Decis. S. C. 699); *Rich et al. v. Lambert et al.*, 12 id., 347 (10 id., 171).

(*c*) *The Steamer Oregon v. Rocca*, 18 Howard's R., 570.

appeal from the district courts to the circuit courts, and from the circuit courts to the Supreme Court, as already stated, it enacts "*that such appeals shall be subject to the same rules, regulations and restrictions as are prescribed in law in cases of writs of error.*" In giving a construction to this clause of the act, the question presented itself, what "law" it was that the courts were required to look to, for the "rules, regulations and restrictions" by which appeals were to be governed; or, in other words, whether this enactment was to be considered as referring to the laws and usages of other courts, or to the rules, regulations and restrictions prescribed by the Judiciary Act, respecting writs of error. The decision of the Supreme Court was, that it referred to the latter. "These rules, regulations and restrictions," say the court, "are contained in the 22d and 23d sections of the act of 1789, and respect the time within which a writ of error may be brought, and in what instances it shall operate as a supersedeas; the citation to the adverse party; the security to be given by the plaintiff in error for prosecuting his suit; the restrictions upon the appellate court as to reversals in certain enumerated cases. All these are, in the opinion of a majority of the court, applicable to appeals under the act of 1803, and are to be substantially observed(a)." The sections thus referred to by the court are as follows:

"Sec. 22. *And be it further enacted*, That final decrees and judgments in civil actions in a district court, where the matter in

(a) *The San Pedro*, 2 Wheaton's R., 132 (4 Curtis's Decis. S. C., 57).

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dispute exceeds the sum of fifty dollars, exclusive of costs, may be reexamined, and reversed or affirmed in a circuit court holden in the same district, upon a writ of error; whereto shall be annexed, and returned therewith at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by the judge of the district court, or a justice of the Supreme Court, the adverse party having at least twenty days' notice. And upon a like process, may judgments and decrees in civil actions, and suits in equity in a circuit court, brought there by original process, or removed there from courts of the several states, or removed there by appeal from a district court, where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be reexamined, and reversed or affirmed in the Supreme Court; the citation being in such case signed by a judge of such circuit court or justice of the Supreme Court, and the adverse party having at least thirty days' notice. But there shall be no reversal in either court on such writ of error, for errors in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or such plea to a petition or bill in equity as is in the nature of a demurrer, or for any error in fact. And writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of; or in case the person entitled to such writ of error be an infant, *feme covert*, *non compos mentis*, or imprisoned, then within five years as aforesaid, exclusive of the time of such disability. And every justice or judge, signing a citation on any writ of error as aforesaid, shall take good and sufficient security that the plaintiff in error shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good.

"SEC. 23. *And be it further enacted*, That a writ of error as aforesaid shall be a supersedeas and stay of execution, in cases only where the writ of error is served, by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of. Until the expiration of which term of ten days, executions shall not issue in any case where a writ of error may be a supersedeas; and where, upon

such writ of error the Supreme Court or a circuit court shall affirm a judgment or decree, they shall adjudge or decree to the respondent in error just damages for his delay, and single or double costs at their discretion."

CHAP. 12.

In making a practical application of these statutable regulations to appeals in the several districts, it is highly probable that there has been a considerable diversity in point of form. The aim ought, however, to be, to adhere to them as closely as circumstances will allow. In place of the writ of error, there may, and strictly should be, a written appeal. As to its form, there being neither precedents nor judicial decisions to guide the practitioner, he must follow the dictates of his own judgment. A form is proposed in the Appendix(a).

Appeal should be in writing.

Its form.

According to the twenty-third section of the Judiciary Act, as we have just seen, no execution can lawfully issue in any case, where a writ of error would lie, until the expiration of ten days, Sundays exclusive, after rendering the judgment or passing

Copy of the appeal to be lodged in the clerk's office, for appelles.

(a) According, however, to a late decision of the Supreme Court, an appeal need not be in writing. If made in open court it may be done orally, and the clerk takes official notice of the fact and certifies it in his return. If not so taken, a subsequent application to a judge, in vacation, for his approval of the appeal bond and his signature to a citation, is in itself the exercise by the appellant of his right of appeal. It seems impossible, from the language of the court in the case alluded to, that these acts on the part of the judge would constitute such an allowance of the appeal as to make it the duty of the clerk to send up a return, which is the only purpose and effect of an order allowing the appeal. *Hudkins v. Kemp*, 18 Howard's R., 530. For the purpose of avoiding controversy, however, it is certainly advisable that the clerk should note the fact in his minutes, of an appeal being taken, when it is done in open court, and that the judge or court should make an order allowing the appeal, on the presentation of the appeal bond for approval.

VOL. 2. the decree complained of; and a writ of error, served within that period, supersedes the execution until after the decision of the appellate court. The mode of service prescribed by the act in the case of a writ of error is, by lodging a copy thereof, for the adverse party, in the clerk's office where the record remains; and this direction, it is presumed, is to be followed in the case of an appeal. A copy of the appeal, with an appropriate endorsement expressive of its object, ought therefore to be in like manner lodged in the clerk's office, unless, perhaps, when the appeal is entered during the session of the court at which the decree appealed from is pronounced; in which case, as we shall see, even the personal citation required by the act has been held not to be indispensable.

The language of the twenty-third section of the Judiciary Act may seem to warrant the inference, that the clause designating this mode of serving a writ of error had no object in view, other than that of simply prescribing the condition, by a compliance with which the writ might be made to operate as a supersedeas; and that except for this purpose, the lodging of a copy of the writ of error or appeal in the clerk's office might therefore be safely omitted. But in an early case decided in the Supreme Court, the observance of this form seems to have been regarded by the court as essential to the due service of a writ of error, for the purpose of rendering it effective at all. According to the report of the case, the writ was "dated" on the 23d of December, 1805, on which day it was filed in the clerk's office:

the citation also bore date on the same day; and CHAP. 12.
 the writ was returnable at the February term, 1806,
 but was not returned and filed in the office of the
 clerk of the Supreme Court until the 18th of March,
 after the adjournment of the court. Under these
 circumstances, it was moved to dismiss the writ of
 error; and Ch. J. MARSHALL, in pronouncing the
 decision of the court, observed: "If the writ of
 error had been served when it was not in force (that
 is, after its return-day), such service would have
 been void; but if served while in force, a return
 afterwards will be good. The service of a writ of
 error is by lodging a copy thereof, for the adverse
 party, in the office of the clerk of the court where
 the judgment was rendered. If so served before
 the return-day, the service is good(a)."

The twenty-second section of the Judiciary Act Petition of
 appeal.
 further requires that there shall be annexed to the
 writ of error, and returned therewith, "an assign-
 ment of errors and prayer for reversal."

In order to obtain the interposition of a court of
 justice in his behalf, a party who deems himself
 aggrieved is always required to set forth his supposed
 grievance in some form of pleading. If he seeks
 redress from an appellate court by means of a writ
 of error, this pleading is called an assignment of
 errors; which commonly consists of a mere general
 allegation that the judgment complained of is erro-
 neous, and a prayer for its reversal. When the
 assistance of an appellate court is invoked by means

(a) *Wood v. Lide*, 4 Cranch's R., 180 (2 Curtis's Decis. S. C., 64).

VOL. 2. of an appeal, the pleading by which the appellant brings his case under the cognizance of the court is usually called a petition of appeal; which contains the like allegation and prayer, and is therefore in substance the same as an assignment of errors.

Contents of
the petition
of appeal.

On an appeal from a decree of the High Court of Chancery, in England, to the House of Lords, the petition of appeal, addressed to the latter, after setting forth the pleading and decree, alleges in general terms that the decree is erroneous, and concludes with a prayer that the defendant be summoned to put in his answer, and for a reversal of the decree.

By one of the rules of the late Court for the Correction of Errors in the State of New-York, it was declared to be sufficient, in a petition of appeal from the Court of Chancery, to set forth the decree, decretal or other order appealed from, without reciting the pleadings in the cause; and stating that the decree appealed from, or some part thereof (specifying what part or parts), is erroneous, and that the same ought to be reversed or modified, as the case may be.

As full copies of the pleadings are to be transmitted to the appellate court, any statement of their substance is unnecessary; and as its omission is more in accordance with the brevity observed in our courts, it is believed that the practice in this respect, authorized by the rule above mentioned, has prevailed generally, if not universally, in the national courts. Nor have I met with any judicial intimation that any special statement of the grounds of appeal, or any specific designation of the particu-

lar parts of the decree complained of, is in any case necessary. The objections to the decree will, of course, be sufficiently indicated by the points relied on at the argument. CHAP. 12.

In England, the petition of appeal is entitled in the original cause. Such has also been the practice in this state; and such is doubtless the proper form in the courts of the United States.

As the petition of appeal is to constitute a part of the return, it ought, at some time previous to the commencement of the next term of the Supreme Court, to be filed with the clerk of the circuit court. But it has at all times been the policy of the national courts, and especially of the Supreme Court, to overlook, as far as possible, all errors of mere form; and, in accordance with this policy, when a plaintiff in error has omitted to assign errors in the court below, he has been permitted to do it in the Supreme Court. This privilege is recognized and regulated by a rule of that court, by which it is ordained, that "it shall be the duty of the plaintiff in error, if errors shall not have been assigned in the court below, to assign them in this court at the commencement of the term, or so soon thereafter as the record shall be filed with the clerk, and the cause placed on the docket; and if he shall fail so to do, and shall also fail to assign them when the cause shall be called for trial, the writ of error may be dismissed at his cost; and if the defendant shall refuse to plead to issue, and the cause shall be called for trial, the court may proceed to hear the argument on the part of the plaintiff, and to give

Place of
filing the
petition of
appeal.

VOL. 2 judgment according to the right of the cause; and where there is no appearance for the plaintiff in error, the defendant may have the plaintiff called, and dismiss the writ of error, or may open the record and pray for an affirmance(a)."

Answer to
the appeal.

The response of the defendant in error to the assignment of errors is usually the common joinder *in nullo est erratum*; and the correspondent pleading on the part of the respondent in an appeal is called an answer, and is the same in substance as a joinder in error. When the petition of appeal is filed in the court below, as we have seen it ought regularly to be, the answer, it is presumed, may, at the option of the appellee, be filed either in that court, in which case it will be sent to the Supreme Court along with the petition of appeal; or in the latter court. Forms for the petition of appeal and answer are given in the Appendix.

• Answer,
where filed.

Citation.

Not neces-
sary when
appeal
taken
sedente
curia.

In the next place, there must be a citation signed by the district judge or a justice of the Supreme Court. But it was decided in an early case by the Supreme Court, that when the appeal is interposed during the session of the court below, no citation is necessary(b). This decision rests upon the presumption that the parties will be present, in person or by their professional representatives, when the decree is pronounced, and will thus have notice of whatever it concerns them to know: for the act,

(a) Rule xix.

(b) *Reily v. Lamar et al.*, 2 Cranch's R., 344 (1 Curtis's Decis. S. C., 495). See also *The San Pedro*, 2 Wheaton's R., 132 (4 Curtis's Decis. S. C., 57).

as we have seen, requires that the adverse party shall have notice of an appeal from a decree of the district court to the circuit court, of twenty days; and of an appeal from a decree of the circuit court to the Supreme Court, of thirty days; and the citation prescribed by the act is the notice contemplated. The reasons on which this decision is founded appear to be equally applicable also to that other requirement of the act last above mentioned, viz., the lodging of a copy of the appeal in the clerk's office; and it may not unreasonably be supposed that this would, under like circumstances, be held to be unnecessary.

The citation is, in substance, a notice to appear at the next session of the appellate court, and answer the appeal; and the meaning of the act is, that it shall be served the specified number of days before the argument or hearing. A form for a citation is given in the Appendix.

Form of
the citation.

To be
served 30
days before
the argu-
ment.

It may, and sometimes does happen, however, that the decree appealed from is rendered within a less number of days before the sitting of the appellate court. In such cases, the appeal must nevertheless be made returnable on the first day of the court, notwithstanding the apparent inconsistency of citing the appellee to appear and contest the appeal before the expiration of the time allowed by the act for that purpose. In one of the early cases of this description which arose in the Supreme Court, Chief Justice MARSHALL observed: "The law respecting the thirty days' notice on a writ of error, and the ten days allowed for filing it, was

Appellee to
be cited to
appear on
the first
day of the
next term,
although
less than
30 days
remain.

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predicated upon the existing state of things at the time of passing the act; at which time there was no circuit court, whose term would not be finished more than forty days before the sitting of the Supreme Court. The times of the session of the courts have been altered; but no alteration has been made in the law respecting the thirty days' notice, which makes it difficult to form a rule in the case. At present, if the citation has not been served thirty days, the court will not take up the cause until the thirty days have expired, unless the defendant in error shall appear(a). And in a subsequent case, it was determined not to hear a cause thus situated, at any time during the same term(b). This decision was made in 1803; and during the same term a general rule was adopted, declaring "That where the writ of error issues within thirty days before the meeting of the court, the defendant is at liberty to enter his appearance, and proceed to trial; otherwise the cause must be continued(c)." It is by this rule that the rights of the parties, in cases of appeal as well as of writs of error, are understood to be regulated.

When the appeal is taken less than thirty days before the next term, optional with the appellee to have cause heard or continued.

Citation, how served.

The citation, it is supposed, must be served on the adverse party personally; but where a female defendant in the court below marries after judgment therein, a service on the husband has been held to be sufficient(d). It is required to be returned to

(a) *Lloyd v. Alexander*, 1 Cranch's R., 365 (1 Curtis's Decis. S. C., 426).

(b) *Welsh v. Mandeville*, 5 Cranch's R., 329 (2 Curtis's Decis. S. C., 281).

(c) See Appendix, Rule xvi.

(d) *Fairfax v. Fairfax*, 5 Cranch's R., 19, 21, note.

the appellate court; and, to this end, after it has been served by showing it to the appellee and delivering a copy thereof to him, is to be filed with the clerk of the court below, together with an affidavit of its due service.

CHAP. 12.

To be filed in the court below, and returned to appellate court.

At the time of signing the citation, the justice or judge is required to "take good and sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good." Doubts having arisen concerning the amount of the security to be exacted when the writ of error had not been served in season to stay execution, an explanatory act was passed, declaring that in such cases the security should be to such amount only as, in the opinion of the justice or judge taking the same, should be sufficient to answer all such costs as might in the appellate court be adjudged to the respondent(a). This provision, so far as it is in its nature applicable to appeals, must also be regarded as one of those regulations "prescribed in law in case of writs of error," which are adopted by the act of 1803. Its propriety with respect to writs of error, is obvious; a writ of error *per se*, constituting no impediment to the enforcement of the judgment in the court below, and the appellate court having no authority to interfere with an execution issued for that purpose(b). But it is otherwise with appeals; the effect in this respect of an appeal being to remove the cause itself, and to

Security.

(a) Act of December 12, 1794, ch. 3; 1 Stat. at Large, 404.

(b) *Wallen v. Williams*, 7 Cranch's R., 278 (2 Curtis's Decis. S. C., 528).

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suspend the sentence or decree appealed from altogether(a). If at the time of its interposition no execution has been issued, none can lawfully issue; if an execution be already in the hands of the marshal, all proceedings under it would be arrested, unless, for special reasons, it should be deemed expedient to allow it to be executed—care being taken, in such cases, to retain its fruits in court, to be disposed of according to the final decision of the cause. Inasmuch, therefore, as an appeal operates in all cases as a supersedeas, it would seem to follow, at least, that upon an appeal from a decree *in personam*, there should be security to answer the damages as well as the costs which may be decreed in the appellate court. If, however, no appeal is interposed until after the sum awarded against the respondent has been paid, whether the money has been paid over to the libellant, or is still in court, and an appeal be then taken, the case would fall within the spirit of the act of 1794. No such case is likely to arise with respect to a decree of the district court—from which, if at all, an appeal must be taken, at latest, before the next circuit court—but it is not unlikely to happen with respect to decrees of the circuit court, from which appeals may be brought at any time within five years. The same is generally true also of suits *in rem*, where the property arrested furnishes the means of satisfying the decree.

(a) *Yeaton et al. v. The United States*, 5 Cranch's R., 281 (2 Curtis's Decis. S. C., 263); *The Grotius*, 1 Gallison's R., 503; *The Collector*, 6 Wheaton's R., 194 (5 Curtis's Decis. S. C., 58).

In short, the obvious design of the law is that the security should be co-extensive, and no more than co-extensive, with the interests of the appellee which are put at hazard by the appeal; and this, doubtless, is the principle by which particular cases are to be governed. But the necessity for this security, in admiralty causes, is in a great measure superseded by the practice enjoined by the new Rules of Admiralty Practice, requiring the defendant, on his arrest in a suit *in personam*, and the claimant on his appearance in a suit *in rem*, to give security for the payment, in the first case, of the damages and costs, and in the second case, of the costs and expenses which may be awarded against him, on appeal, by the appellate court. This form of security was undoubtedly designed by the Supreme Court to be a substitute for the "appeal bond" previously in use. By one of those rules, however, as we have seen, the court may in its discretion, under some circumstances, dispense with the security in suits *in personam*; and when this has been done, the defendant would be obliged, upon the interposition of an appeal, to give the security prescribed by the act.

In a case where an appeal to the Supreme Court had been interposed and allowed within the five years allowed by the statute, but security had not been given until after the expiration of the time, the Supreme Court held the appeal to be valid nevertheless; for although the court below might have disallowed the appeal, and rejected the security when subsequently offered, the mode of taking the

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security and the time of perfecting it are matters of discretion,* to be regulated by the court granting the appeal, and the acceptance of the security had relation back to the time of the allowance of the appeal(a).

Of the transcript.

It behooves the appellant, in the next place, to see that a duly authenticated transcript of the record of the proceedings in the circuit court is seasonably made and transmitted to the Supreme Court.

How authenticated.

To avoid the inconvenience of any direct agency on the part of the presiding judge of a circuit court (which, according to the practice of the English courts, would otherwise have been necessary), in making the return to a writ of error, a general rule was made by the Supreme Court, in 1797, by which it was ordained "that the clerk of the court to which any writ of error shall be directed may make return to the same, by transmitting a true copy of the record, and all proceedings in the cause, under his hand and the seal of the court." This rule having been made while the revisory power of the Supreme Court could be invoked only by means of a writ of error, the rule of course does not, in terms, embrace appeals. But it being declared by the act of 1803 that appeals should be subject to the same regulations as writs of error, the rule above mentioned, and all other rules and usages of the court concerning writs of error, were doubtless considered to be operative with respect to appeals, so far as they were in their nature applicable; and I understand that in point of fact, transcripts in cases of

(a) *The Dos Hermanos*, 10 Wheaton's R., 306 (6 Curtis's Decis. S. C., 402).

appeal are sent to the Supreme Court in the manner prescribed by the rule. The certificate of the clerk imports that the writings annexed thereto are true copies of their respective originals, on file and remaining of record in his office. In testimony whereof, etc., according to the usual mode of certifying under the seal of the court.

CHAP. 12.

The first six days in term are allowed to the appellant in all cases, "to docket the cause and file the record thereof with the clerk," of the court. "If he shall fail so to do, the defendant in error, or appellee, as the case may be, may docket the cause and file a copy of the record with the clerk, in which case it shall stand for argument at the term; or at his option he may have the cause docketed and dismissed, upon producing a certificate from the clerk of the court, wherein the judgment or decree was rendered, stating the cause, and certifying that such writ of error, or appeal, had been duly sued out and allowed." And the rule proceeds further to ordain, that no writ of error shall be docketed, or the record of the cause filed by the plaintiff in error, or appellant, after the first six days of the term, except upon the terms that the cause shall stand for argument during the term or be continued, at the option of the defendant in error, or appellee. But in no case shall the plaintiff in error, or appellant, be entitled to docket the cause and file the record, after the same shall have been docketed and dismissed in the manner provided for in the preceding part of the rule, unless by order of the court, or with the consent of the opposite party. And in

Transcript
to be filed
within six
days in
term.

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all cases where the cause shall not be docketed and the record filed with the clerk by either party until thirty days from the commencement of the term, the cause shall stand continued until the next term(a).

Transcript
must be
complete.

By another rule of the Supreme Court it is declared that no cause will be heard until a complete record, containing in itself, without references *aliunde*, all the papers, exhibits, depositions and other proceedings which are necessary to the hearing, shall be

its contents.

filed(b). But by a late act of Congress, "only the process, pleading and decree, and such orders and memorandums as may be necessary to show the jurisdiction of the court and the regularity of the proceedings," are to be entered on the record; "and in case of an appeal, copies of the proofs and of such entries and papers on file as may be necessary on hearing of the appeal," are to be certified to the appellate court(c). When the transmiss, upon inspection, turns out to be deficient, according to the requirements of this rule, a certiorari for diminution must be resorted to, for the purpose of having the deficiency supplied; but it is, by one of the rules of the court, expressly provided, that no certiorari will be awarded, except upon motion in writing, nor unless the facts on which it is founded, unless admitted by the adverse party, shall be verified by affidavit. The motion must also be made "at the first term of the entry of the cause;" otherwise, it will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay(d).

Certiorari
for diminution.

(a) Rule of 1835.

(b) Rule of 1823.

(c) Act of February 26, 1853, ch. 80, § 1; 10 Stat. at Large, 161.

(d) Rule of 1824.

On appeal to the Supreme Court, no objection is allowed to be taken to the admissibility of any deposition or exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; and such evidence will otherwise be deemed to have been admitted by consent(a). The entry of record, mentioned in the rule, must of course be taken to mean a note in the minutes of the clerk; and the proper mode of certifying the objection to the Supreme Court is to annex a copy of the note of the objection, or to state it in the general certificate. A note by the clerk, of the fact of the objection having been made, endorsed on the back of the deposition or exhibit, would also probably be deemed sufficient(b).

CHAP. 12.

Objections to evidence to be made in the court below, and certified to S. C.

It may happen that the inspection by the appellate court, of original papers produced in the court below, is necessary to a proper understanding of the controversy between the parties; and for the purpose of providing for such a contingency, it is, by one of the rules of the Supreme Court, ordained, that whenever, in the opinion of the court below, it shall be necessary or proper that original papers of any kind should be inspected in the Supreme Court, upon appeal, such papers may be sent to that court under a suitable order for their safe keeping, transportation and return; and the papers will be received and considered by the appellate court, in connection with the transcript of the proceedings(c). The rule,

Original papers may be sent to the S. C.

(a) Rule of 1825.

(b) *The Samuel*, 1 Wheaton's R., 9 (3 Curtis's Decis. S. C., 447).

(c) Rule of 1817.

VOL. 2. indeed, seems to be but a recognition and formal declaration of an existing practice; for in an antecedent case before Mr. Justice STORRY, at the close of his judgment, he observed: "In case of appeal I shall direct all the original papers to be delivered to the captors, upon their undertaking to deliver them to the Supreme Court, and leaving attested copies in the circuit court. It is impossible, without an inspection, to feel the full force of some portion of the difficulties of this case."

Mode of
taking new
evidence in
S. C.

On an appeal to the Supreme Court in causes of admiralty and prize jurisdiction (though not, as we have seen by the act of 1803, in equity causes), additional evidence will be admitted. But the 30th section of the Judiciary Act, authorizing depositions to be taken *de bene esse*, refers only to the circuit and district courts; and it has accordingly been held that the right to take depositions in this form is limited to these courts, and that for the purpose of obtaining depositions to be read in the Supreme Court, a commission must be resorted to^(a). In the last of the cases just cited, a deposition had been taken *de bene esse* in the court below, but not having been received in season to be used at the hearing, it was by the court ordered to be filed, and was sent to the Supreme Court with the transcript, with an explanatory endorsement by the clerk: but, it appearing upon inspection to have been irregularly

(a) *The Brig James Wells v. The United States*, 7 Cranch's R., 22 (2 Curtis's Decis. S. C., 440); *The Clarissa Claiborn*, 7 Cranch's R., 107 (2 Curtis's Decis. S. C., 471); *The Samuel*, 1 Wheaton's R., 9 (3 Curtis's Decis. S. C., 447).

taken, it was on this ground rejected ; and as, without it, and on account of the contradictory state of the evidence, the court found it difficult to arrive at any satisfactory conclusion upon the merits of the case, the cause was continued to the next term, with leave to each party to produce further evidence. It is clear from this case that if the evidence had been taken on a commission, though issuing from the court below, it would have been received. In a case which came before the court at the next term, depositions appear to have been taken *de bene esse* in the Supreme Court, pending the appeal ; but they were, upon the ground above mentioned, held to be inadmissible, and the cause was continued until the next term, for the purpose of enabling the parties to take testimony upon commission(a). At the same term a general rule was made (superseding a rule on the same subject, but of more limited scope, made at the term last preceding), for the purpose of defining and regulating the rights of the parties in this respect. This rule is as follows : " In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken, under a commission to be issued from this court, or from any circuit court of the United States, under the direction of any judge thereof ; and no such commission shall issue but upon interrogatories to be filed by the party applying for the commission, and notice to the opposite party, or his agent or attorney, accompanied with a copy of the interrogatories so

(a) *The Argo*, 2 Wheaton's R., 287 (4 Curtis's Decis. S. C., 62).

VOL. 2. filed, to file cross-interrogatories, in twenty days from the service of such notice: *Provided, however, that nothing in this rule shall prevent any party from giving oral testimony in open court, in cases where, by law, it is admissible.*"

The precise scope of this proviso is not obvious. It doubtless refers, however, to the 30th section of the Judiciary Act requiring the oral examination of witnesses, in open court, on trials in all the courts of the United States, and may be supposed to have regard especially to trials before the Supreme Court, in the exercise of its original jurisdiction. In one reported case of appeal from the Circuit Court for the District of Columbia, witnesses were examined *viva voce*, before the Supreme Court(a). But in a subsequent case, where a witness was offered for examination, the court ordered him to be examined out of court, "for the sake of convenience(b)."

Effect of
an appeal.

By an appeal from a decree of a district court, the cause and all its incidents are removed into the appellate court, where such decree is to be pronounced as ought to have been passed by the district court, and where the decree is to be executed. But upon a further appeal to the Supreme Court, the property, or its proceeds, in a suit *in rem*, and all securities given by the parties as a substitute for the property, or to abide the final decree to be made in the cause, remain in the circuit court, because the Supreme Court does not execute its own

(a) *The United States v. The Betsey and Charlotte*, 4 Oranch's R., 443 (2 Curtis's Decis. S. C., 171).

(b) *The Samuel*, 3 Wheaton's R., 77 (4 Curtis's Decis. S. C., 174).

decrees, but sends a special mandate to the circuit court to award execution thereon(a). The circuit court, pending an appeal to the Supreme Court, may, therefore, make any order respecting the safe custody, delivery or security, or sale of the property proceeded against(b). The appeal, nevertheless, suspends the sentence altogether. The cause is, to be heard in the Supreme Court *de novo*, as if no decree had been pronounced, and it is not *res adjudicata* until the final decree of the appellate court: and therefore if, pending an appeal, the law on which the sentence of the court below was founded be repealed, the sentence must be reversed(c).

By one of the rules of the Supreme Court, it is provided as follows: "Whenever, pending a writ of error, or appeal, in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the cause shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order, that unless such representatives shall become parties within the first ten days

Death of parties.

(a) *The Collector*, 6 Wheaton's R., 194 (5 Curtis's Decis. S. C., 58).

(b) *Id.* and *The Grotius*, 1 Gallison's R., 503; *The Woodbridge*, 1 Haggard's Adm. R., 63, 76.

(c) *Yeaton v. The United States*, 5 Cranch's R., 281 (2 Curtis's Decis. S. C., 263).

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of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error, or appeal, dismissed ; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the same reversed, if it be erroneous. *Provided*, however, that a copy of every such order shall be printed in some newspaper, at the seat of government, in which the laws of the United States shall be printed by authority, three successive weeks, at least sixty days before the beginning of the term of the Supreme Court next ensuing(a)."

Printed
argument
allowed in
S. C.

A rule of the Supreme Court, reciting that it had been represented to the court that it would, in many cases, accommodate counsel, and save expense to parties, to submit causes upon printed arguments, provides that this may be done in all cases at the option of counsel on either or both sides(b) ; and by a subsequent rule it is declared, that " When a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel(c)."

Printed
brief or
abstract
required in
S. C.

No cause is allowed to be brought to argument in the Supreme Court, until the parties shall have furnished the court with a printed brief, or abstract of the cause, containing the substance of all the material pleadings, facts and documents on which the parties rely, and the points of law and fact intended to be presented at the argument(d) : and

(a) Rule of 1821.

(c) Rule of 1837.

(b) Rule of 1833.

(d) Rule of 1821.

only two counsel for each party is permitted to argue.

CHAP. 12.

Only two counsel for each party allowed to argue.

APPEALS FROM A DISTRICT COURT TO A CIRCUIT COURT.

In entering upon the consideration of appeals to the circuit courts from the district courts, we are met at the threshold by an important question, which it is necessary briefly to examine.

Whether the provisions of the Judiciary Act relative to writs of error are applicable to appeals from district court.

According to the construction which has been given to the act of March 2, 1803, ch. 20, as we have seen, appeals to the Supreme Court are in all respects placed upon substantially the same footing as writs of error; Congress, in giving the remedy by appeal, having seen fit to subject it to the same "rules, regulations and restrictions" as had previously been prescribed with respect to writs of error. And the question is, whether this is not also equally the case with respect to appeals from the district courts to the circuit courts? Judging from the language of the act of 1803, and that of the Supreme Court in the case of *The Don Pedro*, I should have felt little hesitation in giving an affirmative answer to this question. I can discern in the act no evidence of any intention to make a distinction between the two cases in this respect: there is no intimation in the opinion of the Supreme Court, delivered by Mr. Justice WASHINGTON, that any such distinction was supposed to exist; and I know of no reason why it should have been deemed expedient to make such a distinction. The language of the act, on the contrary, appears to me to indicate the opposite intention.

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The section in question, with the exception of the repealing clause with which it concludes, consists of a single sentence. It gives an *appeal* from the district courts to the circuit courts, and an *appeal* from the latter to the Supreme Court; and then, dropping the singular form of expression, it adds, that "such *appeals* shall be subject to the same rules," etc. But in a case before Mr. Justice STORRY, he seems to have considered this provision as applicable only to appeals from the circuit courts to the Supreme Court. The case was this: A decree had been made by the District Court for the District of Massachusetts, in favor of a mariner, for wages. No appeal was taken before the adjournment of the court; "but three days afterwards, the respondent claimed an appeal in the clerk's office," which "the district judge refused to allow, upon the ground that the party was bound to appeal before the final adjournment of the court, or within such other period as the court should upon his application prescribe." The respondent thereupon addressed a petition to the circuit court for relief. Mr. Justice STORRY dismissed the petition, on the grounds, 1, that "the Judiciary Act of 1789, ch. 20, has provided no mode as to appeals from the decrees of the district courts to the circuit courts, confining the appeal only to the next circuit court;" and, 2, that in the District Court for the Massachusetts district, "the uniform course, from the earliest period, has been to make the appeal in open court, *apud acta*, before the adjournment of the court;" which course of practice, he observed, was equivalent to a rule of the court, and must be considered as

directory to all parties, unless, upon application to the court, further time was granted(a). CHAP. 12.

It is true, as observed by Mr. Justice STORY, that the Judiciary Act prescribes no forms of procedure as to appeals. The part of the act to which he must be understood as alluding, is the twenty-first section, by which an appeal is given to the next circuit court, in admiralty causes involving an amount exceeding three hundred dollars, and which is silent with respect to the mode of instituting the appeal; but this section, although not repealed in express terms, is wholly superseded by the act of 1803, which takes up the subject of appeals *de novo*, and gives an appeal when the value of the matter in dispute exceeds fifty dollars, instead of three hundred dollars. According to the construction which this act has received, its language was ill-chosen; for, instead of limiting the right of appeal to admiralty causes, it declares that an appeal shall lie "from *all* final judgments or decrees in any of the district courts of the United States, where the matter in dispute," etc. But no doubt has ever been entertained that it was intended to embrace suits in admiralty; and, in a very elaborate and able judgment pronounced by Mr. Justice STORY, at an early date, and which has ever since been acquiesced in, it was held to be *limited* to this description of causes. If, in the case of *Norton v. Rich*, the attention of the learned judge had been directed to the act of 1803; and if, by any course of reasoning upon it satisfactory to his own mind,

(a) *Norton v. Rich*, 3 Mason's R., 443.

VOL. 2. he had arrived at the conclusion to which he came, I should hesitate to question its soundness. But the act does not appear, by the report, to have been present to his thoughts at all; or, if it was, he seems to have assumed that it had no relevancy to the question before him. This assumption may perhaps be accounted for from the fact stated by him, that from the earliest period, it had been the uniform practice in the District Court for the Massachusetts district to interpose appeals *apud acta*, before the adjournment of the court, and that this had continued to be the practice in that court, to the time of his decision (in 1812), notwithstanding the act of 1803. In the English admiralty, as he shows by references to CLERKE and BROWNE, appeals are made either *sedente curia*, in open court, *viva voce*, when they are said to be *apud acta*—among the acts of the court—or within ten days after the decree, before a notary. The latter mode, he observed, had never been in use in America, and had, moreover, at an early period, been expressly declared to be inadmissible by the Supreme Court. Under these circumstances it was nearly a matter of course that the former mode should be adopted before the passage of the act of 1803, while the right of appeal depended wholly upon the 21st section of the act of 1789, which, as we have seen, merely gave an appeal, without prescribing any mode of procedure. The practice thus naturally adopted from the English court of admiralty continued of course to prevail, and became firmly established, during the fourteen years which intervened between the dates of the

two acts: and if it be necessary to account for the fact of its continuance in the District Court for the District of Massachusetts, after the passage of the act of 1803, it may, perhaps, not unreasonably be suggested—inasmuch as one of the objects of that part of the act of 1803 which relates to appeals from the district courts was to substitute \$50, instead of \$300, as the amount requisite to sustain an appeal, and as this object was clearly defined on the face of the act—that its other less plainly expressed purpose might, on these accounts, the more naturally have escaped attention.

If the construction of the act which I suppose to be the true one, would lead to mischievous or highly inconvenient consequences, so as to furnish a motive for discarding it, provided this could be done without doing gross violence to its language, it may be conceded that the opposite construction would be admissible. But, on the contrary, it seems highly proper that the mode of proceeding for the purpose of instituting appeals from the district courts, and from the circuit courts, should be substantially the same; and it appears reasonable, therefore, to conclude that in substituting appeals from the circuit courts to the Supreme Court, instead of writs of error, for the reëxamination of equity and admiralty causes, and in devising rules and regulations to govern such appeals, Congress, legislating at the same time upon the subject of appeals from the district courts, would not fail to extend those rules and regulations also to the latter class of appeals. Instead of framing new regulations, Congress thought proper

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But supposing Mr. Justice STORY to have been mistaken in considering these regulations inapplicable to appeals from the district to the circuit courts, it may not necessarily follow that he erred in his decision upon the particular question before him. This related merely to the time of interposing the appeal. The act, in giving an appeal to the next circuit court, and in prescribing the conditions under which it should operate as a supersedeas, would probably be so construed, in the absence of any rule of court upon the subject, as to allow of the interposition of an appeal at any time before the next circuit court: but no such right is, in terms, conferred, and there may have been ground for holding that the court might lawfully so far regulate the right of appeal as to restrict its exercise to the session of the court during which the decree was pronounced. The material error into which, according to my apprehension of the subject, Mr. Justice STORY fell, arose from his overlooking the

act of 1803; and consists, not so much in merely upholding the usage of the district court whereby the right of appeal was limited in its exercise to the time of passing the decree, as in assuming that because "no mode as to appeals from decrees of the district courts to the circuit courts" had been originally provided, the case was, therefore, "untouched by statute, and must be decided upon general principles."

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But, however it may have been with the district courts, there can be no doubt that, under the plenary power conferred by the act of August 3, 1842, ch. 188(a), the Supreme Court had authority thus to limit the right of appeal; and this it has done with respect to cases not otherwise provided for by any general rule or special order of the district court. The *forty-fifth* of the Rules of Admiralty Practice ordains, "that all appeals from the district to the circuit court must be made while the court is sitting, or within such other period as shall be designated by the district court, by its general rules, or by an order specially made in the particular suit."

Appeals from the district courts to be made *audientibus curia*, unless, etc.

This rule speaks for itself, and, with respect to the time when appeals are to be interposed, is obligatory upon the courts; but with respect to the manner in which the appeal is to be "made" and prosecuted, neither this nor any other of the new rules furnishes any direction. If, as I cannot but believe was intended, the provisions of the Judiciary Act are adopted by the act of 1803, as well in

Mode of making and prosecuting an appeal, according to construction of the act of 1803, above insisted on.

VOL. 2 regard to appeals to the circuit courts as with respect to appeals to the Supreme Court; then, what has already been said relative to the latter, is applicable also to the former — “the adverse party having at least twenty days’ notice” instead of thirty.

For the purpose of removing all doubt as to the rights of the parties in the contingency of the issue of a writ of error within thirty days before the commencement of the next session of the Supreme Court, a rule, as we have seen, was, at an early date, made by that court, which has been applied also to appeals, declaring that in such cases it shall be optional with the defendant either to “proceed to trial,” or to have the cause continued to the next term. This rule, while it recognizes the right of the defendant to the prescribed notice as absolute, treats it at the same time as a privilege which he may waive, and thereby avoid the delay which would otherwise occur. A correspondent practice may be supposed to prevail in the circuit courts. It may be presumed, also, that when an appeal is interposed *sedente curia*, the decision of the Supreme Court above mentioned, dispensing with the necessity of a citation, would be applied by the circuit courts to appeals from the district courts.

Rights of the appellee on appeal entered less than 30 days before next circuit court.

Citation supposed to be unnecessary on appeal *sedente curia*.

Mode of interposing and prosecuting appeals according to the practice of the English admiralty.

But if, on the other hand, the provisions of the Judiciary Act are to be deemed inapplicable to appeals to the circuit courts, we must look elsewhere for direction; and the reference made by Mr. Justice STORY, in the case above mentioned, to English authorities for the purpose of ascertaining the “general principles” on which he supposed the

cause to depend, is sufficiently indicative of his apprehension that resort may properly be had to the usages of the High Court of Admiralty of England for guidance. CHAP. 12.

We have seen that the only mode of interposing an appeal in that court, which is deemed admissible in this country, is by the simple annunciation to the court of the desire and intention of the party to appeal from its decree; accompanied, I presume, by a prayer that the appeal be allowed, and followed by an order for its allowance. According to Mr. Justice STORY's view of the subject, this, therefore, is the first step to be taken by the party for the purpose of appealing from a decree of the district court; but unless he has already given security for the costs which may be awarded against him in the appellate court (as, by the new rules, the parties are, in general, required to do), he is bound, at the time of making his appeal, to give such security(*a*). Appeal to be entered *apud acta*.
Security to be given.

With regard to the succeeding steps to be resorted to in the prosecution of the appeal, when there are no express rules or established usages of the particular court to the contrary, the appeal, having thus been instituted according to the practice of the English High Court of Admiralty, ought doubtless to be pursued according to the same standard, so far as the nature of the case will permit.

BROWNE, after speaking of the interposition of the appeal *apud acta*, and the giving of security, describes the succeeding proceedings as follows:

(*a*) Clerke's Praxis, tit. 59; 2 Browne's Civ. and Adm. Law, 438.

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The trans-
mission, etc.

"The party after he has appealed, prays apostles from the judge *a quo*, i. e., short letters dismissory, signed by the judge, stating shortly the case and sentence; and in the room of further apostles, declaring he will transmit all proceedings. At the time when the apostles are prayed and granted, a time is appointed within which the party is to retrocertify to the judge *a quo* what steps he has taken, who otherwise will proceed to execute his sentence. The apostles, when granted, are carried to the Lord Chancellor's secretary, and upon the back of them the chancellor names commissioners or judges delegates; and the commission being made out, two of them at least must accept it; which being done, they issue an *inhibition* to the judge below to stop all further proceedings, and a monition to transmit all the past proceedings in the cause to them; and this *transmiss* serves in the room of further apostles(a)."

The ends to be obtained by what is here described, it will be observed, are, 1, the designation of an appellate tribunal; 2, to bring the cause under the cognizance of such tribunal; and 3, to prevent the court of admiralty from proceeding to execute its decree.

In this country the appellate court is a permanent tribunal, established by law: the prompt transmission of a transcript of the record and proceedings of the district court, at the instance of the appellant, is a matter of course; and it is no less a matter of course for that court, after an appeal, to abstain from proceeding further in the cause. None of the steps recounted by Doctor BROWNE, therefore, are necessary in our courts for the purpose of accomplishing the above mentioned objects. Should the appellant fail to prosecute his appeal with proper

(a) 2 Browne's Civ. and Adm. Law, 438.

diligence, the appellate court, upon the petition of the appellee, would pronounce the appeal deserted, and remit the cause for final proceedings to the district court; or retain the cause, and, upon a hearing *ex parte*, affirm the original decree, with costs(a): and should the district court, in fact, improperly attempt to enforce its decree, notwithstanding the appeal, the appellate court would, in such case, doubtless have the power, and consider it to be its duty, upon an application for that purpose, to issue an inhibition to restrain the proceeding.

We have seen that by a general rule of the Supreme Court, made before the passage of the act of 1803, it was ordered that the return to a writ of error, returnable in that court, might be made by the clerk of the court to which the writ was directed, by transmitting a true copy of the record and all proceedings in the cause, under his hand and seal of the court; and that since the passage of the act, this rule has been considered to be applicable to appeals. It may be presumed that this mode of authentication has been deemed sufficient, and actually adopted in all the districts; but unless there be a rule or established usage to this effect of the circuit court, to which an appeal is taken, the transcript ought, according to general precedent, to be certified by the district judge.

The proceedings on the appeal, before the appellate court, are thus described by BROWNE:

Proceedings
in appellate
court.

"The appeal proceeding, an appellatory libel is exhibited. This is contested or answered by the opposite party; the deposi-

(a) *The Privateer Montgomery v. The Betsey*, 1 Gallison's R., 416.

VOL. 2. tions are read from the *transmissa*, in which all the proceedings below are made up in the form of a book; advocates are heard, and the delegates proceed to pronounce sentence, and according to their judgment decree *bene* or *male appellatum*; and in the latter case, approving of the sentence of the judge below, send back the whole cause to him, with all its incidents, to be by him carried into execution; or they may, if they please, though they remit the cause, retain the taxation and enforcement of the costs; and it must be remembered that all proceedings before the delegates are summary(a)."

The appellatory libel and answer correspond with the petition of appeal and the answer thereto. But, however it may be with respect to the other regulations prescribed by the Judiciary Act, there can be no question concerning the applicability of the direction contained in the 24th section, "That when a judgment or decree shall be reversed in a circuit court, such court shall proceed to render such judgment or pass such decree as the district court should have rendered or passed." The manner of hearing will be the same, whichever of the two modes of antecedent proceeding be adopted, and will be treated of in the sequel.

It is necessary now to bring under review two important subjects pertaining to appeals from the district courts to the circuit courts, concerning which practitioners in general seem not to be thoroughly informed, and relative to which, if I mistake not, some misapprehensions have hitherto prevailed. I refer, 1, to the familiar dictum, that in admiralty causes the parties are entitled in the appellate court

(a) 2 Browne's Civ. and Adm. Law, 441.

to allege what has not been alleged, and to prove what has not been proved in the court below — or, as it is commonly expressed — *non allegata allegare, et non probata probare*; and, 2, to the mode of proof on appeal. CHAP. 12.

OF THE RULE NON ALLEGATA ALLEGANDI, ET NON PROBATA
PROBANDI, IN AN APPELLATE COURT.

The first branch of the above mentioned dictum seems to have been understood by some to imply not merely the continuance, *notwithstanding* an appeal, of the right which the parties had in the district court, in proper cases, to amend their pleadings; but a new and superior right accruing *in consequence* of the appeal, to introduce new matter of controversy almost *ad libitum*.

The difficulty of reconciling such a doctrine with that provision of the Judiciary Act which declares that the district courts shall “have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction,” would seem of itself to constitute a very serious objection to such a doctrine; but in reality it has no foundation in authority.

The earliest reported case I have met with in which the rule in question became the subject of judicial comment, was an appeal from the district court to the Circuit Court of the United States for the District of South Carolina.

Origin and
application
of this rule
in our
courts.

The question in that case, however, concerned, not the right to make new allegations in the appellate court, but, the right to adduce new proofs in support of the original allegations on the part of the

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claimant in a suit *in rem*. But Mr. Justice JOHNSON, quoting the Latin maxim above mentioned, and referring generally to CLERKE and BROWNE, observes: "An appeal, therefore, in the admiralty, is rather in the nature of a new trial, in which the court does not enter into the mere consideration of the propriety of the decision of the court below, upon the evidence before it, but affords an opportunity to the appellant to present his case with the best possible aspect that new allegations or new evidence can afford it(a)." It was not necessary for the learned judge, in the case before him, to define the scope of the first branch of the rule, and his language is too general to enable the reader to infer his views concerning it. His observation is important only as an early and deliberate recognition, by an able and learned judge, of the right, to some extent, to give new allegations in the appellate court, and as showing the authority on which he supposed the right to rest. With respect to the second branch of the rule he is more explicit, and his observations upon it will be noticed in the sequel.

This case was decided in 1805; and in a case which arose four years later in the Supreme Court, indirectly involving the doctrine now in question, Ch. J. MARSHALL, in pronouncing the judgment of the court, also quotes the statement of BROWNE, that "in cases of appeal it is lawful to allege what has not before been alleged, and to prove what has not before been proved(b);" but the case did not

(a) *Rose v. Himely et al.*, Bee's R., 313.

(b) *Yeaton v. The United States*, 5 Cranch's R., 281 (2 Curtis's Decis. S. C., 263).

require any direct application of the principle, and sheds no light upon it. CHAP. 12.

The next instance in which the doctrine is brought under judicial review, is an anonymous case before Mr. Justice STORY, in which the question was "as to the right of the circuit court to grant amendments, in libels or informations *in rem*, for violations of municipal laws, brought by appeal from the district court;" a question, he observed, which had been argued several times, as a question of general importance, and on which the court would then deliver its opinion. After referring to the authority conferred on the courts of the United States by the thirty-second section of the Judiciary Act, to permit the parties "to amend any defect in the process or pleadings, upon such conditions as the said courts respectively shall, in their discretion, and by their rules, prescribe;" and after reviewing the authorities concerning the common law power of granting amendments, the learned judge proceeds to show that according to the established constructions which had been given to the Constitution and laws of the United States, municipal seizures were of admiralty and maritime jurisdiction, and observes: "If, then, these are admiralty and maritime causes, the appeal must let in all the general principles which govern such cases. Now no principle is more exactly settled, than that upon an appeal in an admiralty cause, it is allowable, under certain restrictions, to allege what has not been before alleged, and to prove what has not been proved; and this right to allow new allegations seems the natural result from the

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introduction of new evidence on the appeal. The same practice is familiar in our state courts on appeals; and though it derives countenance from our statutes, yet I apprehend that the true ground why the practice has obtained is, that on the appeal the proceedings are considered as *de novo* in the appellate jurisdiction. On the whole, we are well satisfied of our right to grant amendments, which seem necessary, in the various causes before us, on appeal; but it is an exercise of sound discretion, in which the court will take care that no unfair advantage shall be taken by one party, and no oppression practiced by the other. Considering the nature of informations *in rem*, the countenance which has heretofore been allowed to amendments in the appellate courts, and the mischiefs which would arise from a sudden change of practice, we shall now allow the amendments asked for: but we do not mean to lay it down as a general rule, that such amendments will be hereafter allowed, as of course, in this court; on the contrary, having the authority, we shall probably limit the exercise of the discretion by general regulations(a)."

It is probable, from the language here used by the learned judge, that at that time he entertained no idea of the existence of any right in the parties to introduce new allegations before the appellate court, independently of the doctrine of amendment. The question which he considered it necessary to discuss was, not whether the parties were entitled to add or substitute new pleadings at pleasure, but

(a) *Anonymous*, 1 Gallison's R., 22.

whether an appellate court had authority to allow the original pleadings to be altered or amended at all. In asserting this power as derived from the usages of courts of admiralty, he cites for authority, as usual, CLERKE and BROWNE(a); and considering how slight and questionable these authorities appear, upon close examination, in reality to be, he very properly takes care to speak of the asserted power as resting in the sound discretion of the court, and to inculcate caution in its exercise.

In another case decided at the same term, a libel, founded on the fiftieth section of the collection act of 1799, for unloading goods without a permit, the attorney for the United States moved in the circuit court for leave to amend his libel, and to insert a new count, founded on the twenty-eighth section of the same act, for receiving on board, from another vessel, certain foreign goods and merchandise in the the Bay of Passamaquoddy, an offence alleged to have been unknown to the district attorney when the libel was framed. The proposed amendment being opposed on the ground that it would be introductory of a new cause of action, Mr. Justice STORY observed that such amendments in admiralty and maritime causes were "within the scope of the general rule that you may allege new allegations in the appellate court;" and leave to amend was denied only on the ground that the statute of limitations had run against the cause of action which it was proposed thus to introduce(b).

(a) *Clerke's Praxis*, tit. 54; 1 *Browne's Civ. and Adm. Law*, 500; 2 *id.*, 436.

(b) *The Schooner Harmony*, 1 *Gallison's R.*, 123.

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In the case, decided a few years later in the Supreme Court, of a prize proceeding in behalf of American re-captors, in which it was insisted that the property libelled was not enemy's property, and that the libellants were therefore only entitled to salvage, which, it was argued, could not be awarded in a suit claiming the property as prize of war, the same learned judge, in pronouncing the judgment of the court, observed, that the most that could result from the allowance of the objection against the form of the libel would be that the cause would be remanded to the circuit court, with direction to allow an amendment of the libel; for that "where merits clearly appear on the record, it is the settled practice, in admiralty proceedings, not to dismiss the libel, but to allow the party to assert his rights in a new allegation."

The rule, non allegat, comprises only the ordinary power of amendment.

The just conclusion from this brief review appears to be, that the first branch of the rule in question, notwithstanding the generality of its terms, really imports nothing more than that a discretionary power of allowing amendments to the pleadings passes by force of the appeal to the appellate court, and may there be exercised, upon a proper application for that purpose, to the like extent, and subject to the like restrictions, as the like power may be exercised in the court below; and it is only necessary, for the purpose of more fully defining the scope and limitations of this power, to refer the learned reader to the ninth chapter of this volume, which treats of the subject of amendments in general. It will there be found that in one or two of the

cases of intermediate date, the rule has been reiterated in terms somewhat too comprehensive ; and that the latest of the decisions of the Supreme Court to which I have referred, evinces a disposition to restrain the power within limits less extended than those terms seem to imply.

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The principle established appears to be this: that not only is the party entitled to amend a defective statement of his cause of action or defence, but if, in the progress of a suit *in rem*, he discovers, or first becomes aware of, even a new cause of action, or ground of defence, which the evidence adduced, or which he has it in his power to give, is adapted to support, he may, in the discretion of the court, original or appellate, be permitted, by an amended or supplemental libel, or answer, to avail himself of such new cause of action or defence. Such, indeed, is the clear import of the twenty-fourth of the new Rules of Admiralty Practice, recited in the antecedent chapter above referred to. But the appellate court is bound, nevertheless, to take care that this privilege shall not be abused. The parties are bound, as far as they are able, by the exercise of all proper diligence, fully and fairly to bring forward their respective pretensions and claims, in the first instance ; and it is only upon this condition that new allegations can be admitted^(a). The spirit of this rule seems also to require, that if the necessity for amendment is discovered at any time before the actual decision of the cause in the district court, the

General principle regulating the application of the rule.

Restrictions to which the rule is subject.

(a) *The Schooner Boston and Cargo*, 1 Sumner's R., 328, 331.

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to give new
evidence in
the appel-
late court.

party should be required to address his application for leave to amend, to that court, instead of seeking to obtain it by resorting to an appeal(a).

It remains now briefly to notice the second branch of the rule under consideration, asserting the right of the parties to prove, in the appellate court, what has not before been proved. Respecting the practical import of this maxim, under our system of admiralty jurisprudence, I should not have entertained a doubt, but for what has in one case been said by the eminent jurist to whose decisions it has been necessary, in the course of this work, so frequently and so constantly to refer, and of whom it has, by another learned and distinguished admiralty judge, been justly observed, that "if it shall hereafter appear, on more profound and critical examination, that error has, in some cases, crept into his judicial opinions, it will also be found that he has left as great a number of judgments behind him, which will remain to future ages, permanent landmarks of the law, as any other judge that ever sat upon the bench in this country, or in Eng-

(a) The learned reader who is familiar with the rules of the courts of the United States for the Southern District of New-York, will not fail to perceive, that so far as they recognize the right of the libellant to file a new libel and virtually to institute a new suit in the circuit court, at his own option, they are irreconcilable with what the author has found himself compelled to adopt as the true import of the rule that the parties are entitled in the appellate court to allege what has not before been alleged. He trusts, it is hardly necessary to add, that he is induced to notice this conflict by no arrogant or censorious spirit, but only for the purpose of excluding any inference either that he was not aware of the existence of the particular rules to which he has above alluded, or that he had misunderstood them.

land(a)." The observation to which I refer is this : After adverting to what he denominates "the well known usage of admiralty courts, even after appeal, in fit cases, in their discretion, to allow either party to file new allegations and proofs, '*non allegata allegare, et non probata probare*'"—he adds: "There is a restriction, too often forgotten in practice, *modo non obstat publicatio testium*, the effect of which is to exclude new testimony to the old articles, or to those of which no proof was formerly given. In the actual frame of our laws, the restriction is in many cases overlooked, or abandoned; but it is still retained in prize causes, where further proof stands upon the direct order of the court itself." The authority cited by Mr. Justice STORY in support of the restriction mention, is 1 Browne's Civil and Admiralty Law, 500, 501; 2 *id.*, 436, 437(b). This

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Whether
this right
extends to
original al-
legations,
unless, etc.

(a) Remarks of Judge WARE in the District Court of the United States for the District of Maine, responsive to Resolutions adopted by the Bar on the occasion of the death of the late Mr. Justice STORY.

I cannot forbear to quote the following additional observations of Judge WARE, scarcely less honorable to the illustrious subject of his eulogy: "But there is one quality in the judicial opinions of Judge STORY, in which, if they are not altogether preëminent, they are not surpassed by those of any other judge in the annals of jurisprudence. If there be latent error in them, they usually themselves furnish the means by which it may be detected. For such was his conscientious diligence, the extent and profoundness of his learning, and the fertility of his mind, that the subject was seldom dismissed until it had been analyzed with the most thorough exactness—until all its analogies and distinctions had been critically examined—the whole dissected by a most subtle and accurate logic, and over all had been thrown the light of all the learning that pertained to the matter."

(b) *The Schooner Boston and Cargo*, 1 Sumner's R., 328, 331. In the report, 2 Browne, 500, 501, is erroneously printed for 1 Browne, 500, 501.

VOL. 2. restriction was designed to guard against perjury and abuse. But under our system they cannot be enforced; and no effort appears to have been, or is likely to be made to do it. The hearing in the circuit court must, from the nature of the case, be virtually a new trial as in a suit at common law. The parties cannot be restricted to the same course of inquiry in the examination of their witnesses in the appellate court, that was adopted in the district court; nor can a witness be precluded from correcting any error into which, on his first examination, he may have fallen; nor, being sworn to speak the whole truth, can he be restrained from supplying any deficiencies in his original recollections. Neither can the party be restricted to the same witnesses; for those produced in the court below may have gone to parts unknown, or died in the mean time. Besides, the matter introduced by the new articles will generally be so closely related to that contained in the old, and so intimately blended with it, as to render it impracticable to confine the witnesses exclusively to the former.

Further time to obtain new proof not allowed in cases of laches.

The appellate court ought undoubtedly to guard itself, by rigid scrutiny, against imposition by means of new evidence; and in case further time is demanded for the purpose of obtaining such evidence in support of the original allegations of the party, unless it shall appear that the evidence could not have been produced in the court below, the indulgence will not be granted: and in no case will further time be allowed for this purpose, unless it be shown that the new evidence is material. Thus

in a case before Mr. Justice JOHNSON, already cited, in which the question was, first, whether, in any case, new evidence could be adduced in the appellate court; and, secondly, whether, in the case before him, time ought to be allowed for the purpose, the learned judge said his "decision on the second point must depend upon the nature of the evidence proposed to be adduced, and the sufficiency of the grounds set forth in the affidavit to show that the inability of the claimant to produce such evidence at the time was not attributable to his own laches;" and he proceeded to narrate the facts, and confirmed his decision to the rule he had laid down.

MODE OF PROOF ON APPEAL.

I proceed now to consider the second of the two subjects above indicated as especially requiring notice, viz., the mode of proof on appeal in the circuit court. The necessity of this discussion, also, arises from a dictum of the late Mr. Justice STORY—whose opinions concerning everything pertaining to admiralty jurisprudence are so highly and so justly influential—and from certain vague, and, as they appear to me, erroneous impressions upon the subject, entertained by others. I have already, in a former chapter(a), adverted to the legislative enactments on which this question chiefly depends; the most important of which is that contained in the 30th section of the Judiciary Act, enjoining the examination of witnesses, *viva voce*, in open court,

(a) *Supra*, chapter x.

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When the evidence of a witness may be ordered to be taken down by the clerk.

in equity and admiralty causes as well as in suits at law. The injunction is absolute and unqualified; and if a doubt could otherwise have been entertained whether this provision was intended to embrace proceedings in an appellate as well as in the original court, the same section contains another provision which precludes the possibility of such a doubt; and it is this: That "in the trial of any cause of admiralty or maritime jurisdiction in a district court, the decree in which may be appealed from, if either party shall suggest to and satisfy the court that probably it will not be in his power to produce the witnesses there testifying before the circuit court, should an appeal be had, and shall move that their testimony be taken down in writing, it shall be so done by the clerk of the court; and if an appeal be had, such testimony may be used on the trial of the same, if it shall appear to the satisfaction of the court which shall try the appeal, that the witnesses are dead or gone out of the United States to a greater distance than as aforesaid [one hundred miles] from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity or imprisonment, they are unable to travel and appear at court, but not otherwise." It is true this important section recognizes, by way of proviso, the power of the courts to grant commissions "to take depositions according to common usage;" but it is expressly restricted to cases "where it may be necessary to prevent a failure or delay of justice."

Whether it is wise to allow the evidence of witnesses to be taken in writing, out of court, in any

description of suits, when their attendance in court may be obtained, has long been considered, in England as well as in this country, an important and at least questionable problem. Whatever advantages may have been supposed to attend this mode of examination, it has never been doubted that it was obnoxious to weighty objections, or that the opposite mode was better adapted to elicit the truth; and the tide of enlightened public opinion, both in this country and in England, has been constantly gaining strength in favor of oral examinations in open court.

The practice unquestionably had its origin in a desire to diminish the labor and save the time of judges, and it is certainly true that it requires less time to read the written deposition of a witness than to examine him; but I am convinced by experience that even this advantage has been overrated, and that it is much more than counterbalanced by the superior means afforded by seeing the witness and hearing him testify, of forming a correct judgment of the credibility and weight of his evidence. But it is unnecessary to discuss this question. Its importance could not have escaped the earnest attention of the enlightened and sagacious men by whom the Judiciary Act was framed and passed; and it is enough that they thought proper peremptorily to prescribe the *viva voce* examination of witnesses in open court.

Thirteen years afterwards, at whose instance or with what degree of deliberation we have not the means of determining, Congress, it is true, so far

VOL. 2 relaxed this injunction, as to confer upon the courts a discretionary power, on the application of either party, in suits in equity—not in admiralty—to order the testimony of witnesses to be taken by deposition; expressly limiting this power, however, to the circuit courts holden in those states in which testimony in chancery was so taken^(a). Then came the act of 1803, substituting an appeal instead of a writ of error from the circuit courts to the Supreme Court, in equity and admiralty causes; and requiring the transmission to the latter court, “upon such appeal, of a transcript of the libel, bill, answer, depositions, and all other proceedings of what kind soever in the cause;” and repealing so much of the 19th and 22d sections of the Judiciary Act, as came within its purview.

Whether
evidence in
the circuit
court can be
taken on
commission.

Under this state of the laws it was, that in a case of salvage on appeal before Mr. Justice STORY, in which the claimant had been permitted to file a supplemental answer in the circuit court, to which the libellants had filed a defensive allegation, repelling charges of embezzlement contained in the answer, the learned judge is reported to have used the following language: “Upon the issue thus framed, new testimony was taken; and by the direction of the court, it was taken under commission, and reduced to writing. And I beg here to repeat what was stated at the bar at the time, but seems not to be understood in practice, that since the act of 3d March, 1803, ch. 93, in admiralty causes as well as

(a) Act of April 29, 1802, ch. 31, § 25; 2 Stat. at Large.

in equity causes, all the evidence originally taken in the circuit court, in cases capable of appeal, must be transmitted to the Supreme Court, which cannot be unless the same is reduced to writing; and no supplemental evidence can be required in the Supreme Court, except in admiralty and prize causes; which rule presupposes that all the old evidence is already in the record(a).”

CHAP. 12.

Now I am constrained, with great deference, to say that the conclusion of the learned judge, if such it was, that the act of 1803 requires, or even warrants, a disregard of the above mentioned injunction of the Judiciary Act, appears to me altogether inadmissible. Undoubtedly this very loosely framed act requires the transmission to the Supreme Court, on appeal from a circuit court, of the evidence itself, instead of a statement of the “facts” proved as required by the 19th section of the Judiciary Act, which, by the act of 1803, is expressly repealed. It must be conceded, also, that the act of 1803, according to this construction, imposes upon the circuit courts the necessity of devising some suitable mode by which its design in this respect may be accomplished. But it seems to me that to construe it as an absolute repeal of the abovementioned important provision of the organic Judiciary Act, and to substitute a mode of proof so pointedly forbidden by it, would be as unsound in point of law, as a resort to robbery for the purpose of enabling the perpetrator to give alms, would be in

(a) *The Schooner Boston and Cargo*, 1 Sumner's R., 328, 332.

VOL. 2. point of ethics. Nothing short of the most irreconcilable repugnancy between the two acts, could justify such a construction : but no such repugnancy exists ; and it is moreover highly improbable, if it had really been the intention of the legislature to make so great a change in the law, that such intention, instead of being left to remote and uncertain implication, would not have been explicitly declared.

There are other less objectionable modes of complying with the act of 1803. Thus, by a late act of the British Parliament, giving authority to the High Court of Admiralty to "summon before it, and examine or cause to be examined, witnesses by word of mouth, either before or after examination by deposition," it is enacted that "notes of such evidence shall be taken down in writing by the judge or registrar, or by such other person or persons, and in such manner, as the judge of the said court shall direct:" and it is by this act further provided, that in case of appeal, the notes of evidence so taken by or under the direction of the judge of the High Court of Admiralty, shall be certified by him to the appellate tribunal, and shall be admitted to prove the oral evidence originally given ; and that no evidence shall be admitted on such appeal to contradict the notes of evidence so taken and certified, but that the appellate court may nevertheless direct witnesses to be examined and re-examined upon such facts as it shall see fit(*a*).

(*a*) 3 and 4 Vict., ch. 65, §§ 7, 17. In England, the responsibility of making innovations so important is not cast upon judicial tribunals: still less would any English court dream of spontaneously assuming it.

A somewhat different mode of proceeding has been devised in the Circuit Court for the Southern District of New-York, by the 135th of the general rules of which it is ordained, that in cases "when appeal shall be made from the decree of this court, the appellant shall, within four days from the pronouncing or filing of such decision, unless further time shall be allowed by the judge, make and serve on the adverse party a statement of the testimony on the trial, excepting such evidence as was in writing, which shall properly be referred to therein: the party on whom the same is served shall, in four days after such service, propose amendments thereto, or the statement shall be deemed acquiesced in; and the statement and amendments, unless acquiesced in, shall be submitted by the appellant to the judge in four days afterwards, for settlement; and the same, when settled, shall be engrossed with the clerk, and with the written evidence shall be deemed the proofs on which the decree is made, and shall operate as a stay of further proceedings in this court."

If this rule, like the English act, had extended to all cases in which an appeal would lie, instead of being limited to cases in which an appeal is actually

The provision of the British act, it will be seen, is in accordance with that contained in our act of 1789, with respect to witnesses whose attendance in the circuit court the party is apprehensive he may not be able to procure. A general rule, in substantial conformity with the abovementioned provision of the British act, has very recently been adopted by the Circuit Court for the Northern District of New-York. See Appendix, Rule 6.

VOL. 2. interposed; or if it required the statement of the evidence to be drawn up and served within four days after the interposition of an appeal, instead of four days after the passing of the decree appealed from, it would be unobjectionable(a).

By some such means as those above indicated the circuit courts are undoubtedly authorized, and even required, to provide for the exigencies of the case: but I humbly conceive that they have no authority to substitute a new mode of proof. The mention of "depositions," in the act of 1803, in the enumeration of the documents to be transmitted to the Supreme Court, in no degree affects the question. Depositions taken *de bene esse* under the 30th section of the Judiciary Act, or, when the witnesses reside abroad, under a commission, to prevent the failure or delay of justice, often form a part of the evidence in the circuit court, and it is doubtless these that Congress had in view.

It is very desirable that some suitable and uniform practice in this respect should be introduced in the several circuits; and it is to be regretted that the Supreme Court did not think proper to supply this deficiency in prescribing the new Rules

(a) Appeals from the decrees of the circuit courts, it will be remembered, may be interposed at any time within five years; while this rule is well adapted only to appeals required to be taken instantane, or at longest within four days. It would seem to be more suitable, also, that the rule on this subject, whatever it may be, should be prescribed by the Supreme Court; not only because it belongs to that court to determine what shall be deemed a sufficient compliance with the law requiring the evidence to be returned on appeal, but for the sake also of uniformity.

of Practice in admiralty causes, under the very CHAP. 12. plenary authority conferred upon that court by the act of 1842(a). With respect to suits in equity, this has been done by the new Rules of Equity Practice, and it is not too late to provide by a supplemental rule for cases in admiralty.

THE DECREE.

When a decree in favor of the libellant is simply Form of the decree. affirmed, the decree of the court below stands as the decree of the appellate court; when it is reversed *in toto*, the decree of the appellate court is that the libel be dismissed; and when it is neither wholly affirmed nor reversed, but modified, a new decree is made in conformity with the judgment of the court: when a decree in favor of the respondent

(a) Act of August 23, 1842, ch. 188, § 6; 5 Stat. at Large, 516. The extraordinary powers conferred by this section, furnish a striking illustration of the public confidence that had been reposed in the Supreme Court of the United States, and is on this account sufficiently interesting to justify its quotation. It is as follows:

"*And be it further enacted*, That the Supreme Court shall have full power and authority, from time to time, to prescribe and regulate, and alter the forms of writs and other process to be used and issued in the district and circuit courts of the United States, and the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings in suits at common law or in admiralty, and in equity, pending in the said courts; and also the forms and modes of taking and obtaining evidence, and of obtaining discovery, and generally the forms and modes of proceeding to obtain relief, and the forms and modes of drawing up, entering and enrolling decrees, and the forms and modes of proceeding before trustees appointed by the court; and generally to regulate the whole practice of the said courts, so as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein."

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or libellee is affirmed, the decree of the court below stands as the decree of the appellate court; and where it is reversed, a new decree in favor of the libellant is made.

Decree to be conformable to the opinion of judge of S. C.

It is expressly declared by statute, that "in all cases which, by appeal or writ of error, are or shall be removed from a district to a circuit court, judgment shall be rendered in conformity to the opinion of the judge of the Supreme Court presiding in such circuit court(a)."

Decrees, how enforced.

The decree of the circuit court on appeal, whatever it may be, is enforced in that court; but the decrees of the Supreme Court are carried into effect by the court below, in pursuance of a special mandate directing it to conform its decree to that of the Supreme Court(b).

Whether there can be a trial by jury on appeal, in cases arising under the act of Feb. 26, 1845.

A question of some importance may arise, with respect to appeals in suits depending upon the act extending the admiralty remedies to certain cases upon the lakes and navigable waters connecting the

(a) Act of April 29, 1802, ch. 31, § 5; 2 Stat. at Large, 156. It would follow from this provision, if, indeed, it did not, as it doubtless would, from the nature of the case, that an appeal to the circuit court cannot be heard in the absence of the judge of the Supreme Court; although the court may be lawfully held, for the exercise of all its original jurisdiction, by the judge of the district court alone. Since the passage of the act (rendered necessary, as it must have been supposed, by the increase of litigation) relieving the judges of the Supreme Court from the duty of being present at more than one of the terms of the circuit court annually held in their respective districts, the remedy by appeal is, therefore, unhappily, often attended with serious delay.

(b) Act of September 24, 1789, ch. 20, § 24; 1 Stat. at Large, 73; Reports of the Decisions of the Supreme Court and Circuit Courts *passim*.

same(*a*), to which it may not be amiss briefly to advert, though it may not be discreet to express any decided opinion upon it. This act, as we have seen, gives "to the parties the right of trial by jury, of all facts put in issue in such suits, where either party shall require it;" and the question above alluded to is, whether this provision is applicable to trials in the circuit court on appeals from the district court. The terms of the act being indefinite with respect to this point, the question must be decided upon general principles. The right of appeal might have been withheld altogether, and might, therefore, have been given subject to such conditions as Congress might have seen fit to prescribe. The course actually adopted was, to leave the whole subject to legal intendment. The right of appeal itself rests upon inference; and there seems, therefore, to be ground for holding that it can be exercised, in the instances under consideration, only in conformity with the conditions which pertain to it in ordinary cases. It may possibly be supposed that the right of trial by jury in the appellate court depends upon the form of trial in the court below. No sound reason is preceived, however, for any such distinction.

CHAP. 12.

(*a*) Act of February 20, 1845, ch. 20; 5 Stat. at Large, 726.

CHAPTER XIII.

FINAL PROCESS.

I. IN SUITS IN REM.

1. When the vessel remains in custody.

By far the larger proportion of suits in the admiralty are suits *in rem*, in which, as the reader is well aware, the vessel or other property is arrested in virtue of an asserted lien, and held as a security for the demand of the libellant. It is to this property, therefore, that he looks for satisfaction; and if it remains in the custody of the law until he obtains a decree in his favor, unless the sum awarded by the decree is paid immediately, or, in appealable cases, within ten days, or within such other short period as may be allowed by the decree, he is entitled to have the property sold, and the proceeds thereof applied to the payment of the amount decreed. The process for this purpose, in the English admiralty, is denominated a Decree of Sale. In this country it is, I imagine, commonly called a *Venditioni Exponas*. It contains a simple command to the marshal absolutely to sell the specific property arrested, and to pay the proceeds of the sale into court(a).

(a) To one familiar only with the forms of procedure in courts of common law, it may seem oppressive to direct the sale of a valuable

Generally, however, especially when the suit is contested, the vessel, soon after the arrest, is delivered to the claimant on bail. When this is done, the security thus taken is a substitute for the property itself; and it is to this security that the libellant is then obliged to resort for satisfaction. The liability of the securities is enforced by summary process of execution against them and their principal, in pursuance of a direction to that effect in the decree.

CHAP. 12.

2. When the vessel has been delivered to the claimant on bail.

Thus, in a case decided on appeal in the Supreme Court, that court, proceeding to render such decree as the circuit court ought to have rendered—having decreed that the claimant (to whom the ship had been delivered on bail) should pay into court the appraised value of the ship—further directed, that unless he should do so within ten days after the circuit court should require the same to be done, execution should issue in due form of law, upon the stipulation, against all the parties thereto(a).

The words “in due form of law,” may be sup-

ship, to satisfy a comparatively inconsiderable claim. It is to be recollected, however, that the property is not, in its nature, partible for the purpose of sale, and that the owner may always prevent a sale by paying the sum decreed. It often happens, moreover, that there are other demands against the vessel, in favor of third persons, who are entitled to intervene for the purpose of obtaining satisfaction out of the proceeds. Sometimes, indeed, the amount decreed to the libellant may be so inconsiderable that the sale of the boats, or other appurtenances of the vessel alone, would be sufficient to satisfy the decree; but, in general, if the claimant does not voluntarily pay the sum awarded against him, it may fairly be presumed that he prefers, on his own account, that the property should be sold.

(a) *The Virgin*, 8 Peters's R., 538 (11 Curtis's Decis. S. C., 208).

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posed to have been intended to refer to the form of process in actual use in the District of Maryland, in which the decree was to be executed; and it is not to be doubted that different forms of execution (adopted, probably, from the state courts) have been in use in the several districts of the Union. Thus, we have seen that in the districts composing the First Circuit, and in the Southern District of New-York, the sureties in a stipulation were formerly required to consent that execution should issue against their *lands*, as well as goods and chattels; and the forms of execution in these districts were in accordance with this requirement. I infer that this practice was peculiar, or nearly so, to these districts. In these districts the stipulation also contained an engagement on the part as well of the sureties, as of the principal, that execution should issue against *them*; and the execution accordingly comprised both the common law *capias ad satisfaciendum*, and the *feri facias*: and it is understood that this continued to be the practice in the Southern District of New-York, after the abolition of imprisonment for debt therein, and the adoption by Congress of all state laws passed for this purpose. What the practice, in this respect, has been in the other districts, I am not apprised.

It is desirable, however, for several reasons, that the admiralty practice throughout the United States should in this, as well as in all other respects, be uniform. The Supreme Court had ample authority, in framing the new rules, to make it so; and it is to be regretted that these rules are not more explicit

upon the subject. It did not, however, escape the attention of the court, and there is good reason to infer that they in reality intended to provide for it. The true interpretation of such of the rules as relate to it, becomes, therefore, an important subject of inquiry. The most material of these rules is the *twenty-first*, which is as follows:

"In all cases where the decree is for the payment of money, the libellant may, at his election, have an attachment to compel the defendant to perform the decree; or a writ of execution in the nature of a *capias* and of a *fieri facias*, commanding the marshal or his deputy to levy the amount thereof of the goods and chattels of the defendant, and, for the want thereof, to arrest the body to answer the exigency of the execution. In all other cases, the decree may be enforced by an attachment to compel the defendant to perform the decree; and upon such attachment the defendant may be arrested and committed to prison, until he performs the decree, or is otherwise discharged by law or by the order of the court."

21st rule.

One of the questions to which this rule seems likely to give rise, is, whether it embraces suits *in rem* as well as *in personam*. It is clear that brevity was constantly aimed at in the framing of these rules; and with this view, general terms and forms of expression were used in their most comprehensive legal sense. Thus the appellation "defendant" is constantly used to designate the party contesting the libellant's right, in whichever form of action; and this, I imagine, is the sense in which it is to be considered as having been employed in the rule in question. It is supposed, therefore, to embrace as well a claimant who has appeared, and availed himself of his right to have the property proceeded

Whether the rule extends to suits *in rem*.

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Whether
the rule
embraces
sureties.

against, restored to his possession, on giving bail, as a defendant in a suit *in personam*.

Another question is, whether the rule applies to the *sureties* of the defendant. Are *they*, as well as the defendant himself, liable to imprisonment on a simple attachment, or an execution in the nature of a *capias* and a *fieri facias*? By the terms of the stipulation, as we have seen above, they, in common with their principal, consent to the issue of an execution against *them*, as well as against their property(*a*); and it has repeatedly been decided in our courts, that when a bond is substituted instead of a stipulation, it is to be regarded as a stipulation, and enforced in like manner. There is nothing in the rules indicative of an apprehension, on the part of the Supreme Court, that there ought to be any distinction in the practical construction to be given to this engagement, between the principal and his sureties; while the *third* and *fourth* rules, in providing that upon the "bond or stipulation" to be

(*a*) The stipulations taken in the English High Court of Admiralty contain also a like engagement. In that court, I infer, the first process to enforce a decree is always a simple monition, by which the marshal is commanded that he "monish or cause to be monished, peremptorily and personally," the principal and his sureties, "that they pay or cause to be paid" the sum decreed, "within fifteen days after service, under pain of the law, and the peril which would fall thereon." (Marriott's Formulary, 834.) What is the exact nature of the pain and peril that await the parties, in case of their disobedience, I have nowhere seen distinctly stated. There does not appear, however, to be any distinction in this respect between the principal party and his sureties; and inasmuch as, where the former is alone concerned, the monition is followed by process of attachment [*id.*, p. 350], it seems reasonable to suppose that such is also the form of coercive process against both sureties and principal.

taken in pursuance of them, "summary process of execution may and shall be issued against the principal and sureties," seem to warrant the conclusion that no such distinction could have been contemplated. CHAP. 12.

The foregoing observations relative to final process, with the exception of one or two verbal changes, are reprinted from the first edition of this work; and with respect to those districts severally consisting, or forming a part of a state in which imprisonment for debt is still permitted, the *twenty-first* rule remains in full force. But, as we have already seen (*a*), a rule has since been promulgated by the Supreme Court, in virtue of the power conferred by statute, whereby imprisonment for debt on admiralty process is abolished in all cases where, by the laws of the state in which the court is held, imprisonment for debt on similar or analogous process issuing from a state court, is or shall hereafter be abolished.

In the districts embraced by this rule, therefore, the right of a successful party in a suit in admiralty to the attachment or *capias ad satisfaciendum* mentioned in the rule will depend on the law of the state (*b*).

II. IN SUITS IN PERSONAM.

In the foregoing review of the subject, with respect to suits *in rem*, all the rules relating to final process in suits *in personam* having been brought under consideration, it is unnecessary to pursue the

21st rule modified. State law abolishing imprisonment for debt adopted.

(*a*) *Supra*, p. 129.

(*b*) See the brief commentary upon the new rule, *supra*, p. 135.

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subject with respect to them. Whatever ground for doubt there may be whether these rules are applicable to suits *in rem*, there can be none concerning their applicability to suits *in personam*. The forms of process are prescribed by the 21st rule; and, for the reasons above stated, this rule is supposed to embrace sureties as well as the principal defendant. The language of the 3d and 4th rules, in directing the issue of summary process of execution against the principal and his sureties, implies, contrary to the English practice, but in accordance with what is understood to have been the antecedent practice of the American courts, that both the principal and his sureties are to be jointly embraced in the same writ.

Lands not
subject to
execution.

The question has already been adverted to, in treating of the admiralty stipulation(a), whether the practice which seems to have formerly been deemed admissible in some of the districts, of awarding an execution against the lands of the defendant, is compatible with the language of the *twenty-first* rule prescribing a writ of execution in the nature of a *fiery facias* commanding a levy for the amount thereof of the goods and chattels of the defendant, and being silent as to lands. The reasonable conclusion from this omission would seem to be, that the lands were not to be considered subject to the admiralty process of execution, except so far as they may be indirectly reached through the coercive power of personal restraint in the districts where this is still admissible.

(a) *Supra*, p. 116.

By an act which is presumed to be applicable to CHAP. 12. cases of admiralty as well as common law jurisdiction, Congress has seen fit to ordain

"That on all judgments in civil cases, hereafter recovered in the circuit or district courts of the United States, interest shall be allowed, and may be levied by the marshal, under process of execution issued thereon, in all cases where, by the law of the state in which such circuit or district court shall be held, interest may be levied under process of execution on judgments recovered in the courts of such state, to be calculated from the date of the judgment, and at such rate per annum as is allowed by law on judgments recovered in the courts of such state(a)."

Interest allowable according to state law.

(a) Act of August 23, 1842, ch. 188, § 8; 5 Stat. at Large, 518.

CHAPTER XIV.

COSTS — CONSOLIDATION — TENDER.

Prevailing party in general entitled to costs; subject, however, to the discretion of the court.

In the admiralty, as in other courts, costs are in general awarded to the successful party; but a court of admiralty, like a court of chancery, nevertheless, possesses a discretionary power to withhold costs, wholly or in part, from such party, where, in the opinion of the court, it would be inequitable to award them. This power is frequently exercised in the High Court of Admiralty of England; and in some instances, where the costs of the unsuccessful party have been unnecessarily and materially increased by the prevailing party, he, or his proctor, is condemned to pay them.

The taxable costs in a suit in the admiralty consist of certain specific fees for services performed by the professional representatives of the parties, the clerk, and the marshal; the compensation allowed by law to witnesses; the fees allowed to commissioners and other officers, for taking depositions, whether on commission or *de bene esse*, etc. These fees are prescribed by an act of Congress, passed February 26, 1853, ch. 80(a).

(a) 10 Stat. at Large, p. 161. This act may also be found in the appendix of Conkling's Treatise, 3d ed.

In a cause of damage, involving questions of great importance, affecting the rights and sovereignty of foreign nations, five hundred dollars were allowed by the district court to the libellant as necessary counsel fees. On appeal to the Supreme Court, this allowance was objected to by the counsel for the defendant, as inadmissible; but that court held it to be "unexceptionable"—observing that it was "the common course of the admiralty to allow expenses of this nature, either in the shape of damages, or as part of the costs. The practice," it was added, "is very familiar on the prize side of the court. It is not less the law of the court in instance causes, it resting in sound discretion to allow or refuse the claim." In the Southern District of New-York, extra counsel fees are not allowed, except in extraordinary cases(a), and no instance has yet occurred of such allowance in the Northern District. The recognition of a right to demand it under circumstances other than such as are likely only very rarely to occur, would introduce a new element of controversy, and impose on the judge a disagreeable and embarrassing duty.

With respect to costs on appeal to the Supreme Court, that court saw fit, a few years since, to put an end to all doubt and controversy, by the promulgation of a general rule, by which it is declared, that

"In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed for the defendant in error, or appellee, as the case may be, unless otherwise agreed by the parties.

(a) Betts's Adm. Pr., 124.

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Counsel
fees.

Cost on
appeal to
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"In cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, as the case may be, unless otherwise ordered by the court.

"In all cases of reversal of any judgment or decree in this court, except where the reversal shall be for want of jurisdiction, costs shall be allowed in this court for the plaintiff in error or appellant, as the case may be, unless otherwise ordered by the court.

"Neither of the foregoing rules shall apply to cases where the United States are a party; but in such cases, no costs shall be allowed in this court for or against the United States.

• • • • •

"When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail(a)."

Consolidation.

For the purpose of preventing unnecessary costs, courts of admiralty, in common with courts of law, are empowered to direct the consolidation of causes. The reports of the decisions of the English High Court of Admiralty show that this power is exercised by that court; and if its existence would otherwise have been doubtful in the American courts, it is expressly recognized, if not extended, by an act of Congress. The enactment referred to is as follows:

"That whenever causes of the like nature, or relative to the same question, shall be pending before a court of the United States or of the territories thereof, it shall be lawful for the court to make such orders and rules concerning proceedings therein as shall be conformable to the principles and usages belonging to courts, for avoiding unnecessary costs or delay in the administration of justice; and, accordingly, causes may be consolidated as to the court shall appear reasonable. And if any attorney, proctor, or other person admitted to manage and conduct causes in a court of the United States or of the territories thereof, shall appear to

have multiplied the proceedings in any cause before the court, so CHAP. 14
as to increase costs unreasonably and vexatiously, such person
may be required, by order of the court, to satisfy any excess of
costs so incurred(a)."

In the admiralty, as in courts of law, the defend- Tender.
ant is permitted, for the purpose of shielding him-
self against the imposition of costs, to tender payment
or amends. This practice is very common in Eng-
land, particularly in cases of salvage.

I infer that it is not held to be necessary, in the
English admiralty, to produce the money tendered,
or to offer to pay in coin, unless the tender is refused
for want of a compliance with these conditions, and
provided it distinctly appears that the offer was
sincere, and that the party making it possessed the
present ability to pay the sum tendered; but the
offer must be distinct, definite and unequivocal. In
a case of salvage, where there had been a mere ver-
bal offer to pay £50, not followed by any formal
tender *in acts of court*, and where it was left doubt-
ful whether the tender was intended to embrace the
expenses as well as the services of the salvors, Lord
Stowell decided, upon argument and full considera-
tion, that the tender was not "formally and legally
made," and that the salvors were therefore entitled
to their costs, although he held the sum offered to be
sufficient. "I see," he observed, "enough of the
inconvenience of proceeding in this loose manner, to
make it necessary for me to require, in future, as an
universal rule of court, that a tender should be made,

(a) Act of July 22, 1813, ch. 14, § 3; 3 Stat. at Large, p. 19.

VOL. 2. in the first stage of the proceeding, in a regular form. The court will then consider its sufficiency; and if it shall be pronounced sufficient, the court will make the party who refuses such an offer liable not only to his own costs, but also to those of the other party, if it shall appear that proceedings have been vexatiously pursued(a)."

What is said above of the minor degree of strictness, with respect to a tender, required in a suit in the admiralty, compared with that which is exacted in a suit at common law, is in accordance with the practice of the District Court for the District of Massachusetts, as stated by Mr. DUNLAP. And he adds, that "It has often been held in that court, that where a tender has been made in current bank bills, or a check on a bank, drawn by a merchant of established credit, it was a good tender unless specially objected to; and where this kind of tender is specially objected to, the party tendering is considered to be entitled to a reasonable time to procure coin, where coin is specially required(b)."

What is a
sufficient
tender.

A tender, to be effectual, must be sufficient to satisfy the entire claim of the libellant, for which he is entitled to seek remuneration or redress. When, therefore, the salvors' vessel had been damaged in performing the salvage services, a tender of £20 for the services alone, although it was deemed sufficient for that purpose, was overruled by the court, because it did not cover the

(a) *The Vrouw Margaretha*, 4 Robinson's Adm. R., 103.

(b) Dunlap's Adm. Practice, 103, 104.

damages also; and £45 with costs was awarded to the salvors(*a*). CHAP. 14.

But it may be safely stated that when a tender is made and rejected before suit brought, the sum tendered ought to be paid into court without unnecessary loss of time after the commencement of the suit, and the tender insisted upon by the defendant in his answer, in discharge of his further liability. The deposit of the money ought to be noted by the clerk in his register, among the proceedings in the cause, and a receipt for it given by him to the party by whom it is made. If made after suit brought, it must be accompanied by a distinct offer to pay the costs of the libellant which have already accrued, and the money must be deposited in court as above directed. In the District Court for the Southern District of New-York, the practice in this respect is regulated by express rules as follows :

Tender,
when to be
paid into
court.

“ A tender *inter partes* shall be of no avail on defence or in discharge of costs, unless on suit brought, and before answer, plea or claim filed, the same tender is deposited in court to abide the order or decree to be made in the matter.

“ When tender is first made after suit brought, it must include taxable costs then accrued(*b*).”

(*a*) *The Ocean*, 1 W. Robinson's R., 334.

(*b*) Rules 72, 73. See Betts's Adm. Practice.

he cannot be found, to attach his goods and chattels to the amount sued for, or, if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of the garnishees named therein; or, by a simple monition in the nature of a summons to appear and answer to the suit, as the libellant shall, in his libel or information, pray for or elect.

III.

Bail may be taken on the arrest of the defendant.

In all suits *in personam*, where a simple warrant of arrest issues and is executed, the marshal may take bail, with sufficient sureties, from the party arrested, by bond or stipulation, upon condition that he will appear in the suit, and abide by all orders of the court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered *there* [therein](a) in the court to which the process is returnable, or in any appellate court; and upon such bond or stipulation, summary process of execution may and shall be issued against the principal and sureties, by the court to which such process is returnable, to enforce the final decree so rendered, or upon appeal, by the appellate court.

Bond or stipulation to be enforced by summary process of execution.

IV.

Attachment may be dissolved, on giving bond or stipulation with sureties.

In all suits *in personam*, where goods and chattels, or credits and effects, are attached under such warrant authorizing the same, the attachment may be dissolved by order of the court to which the same warrant is returnable, upon the defendant, whose property is so attached, giving a bond or stipulation, with sufficient sureties, to abide by all orders, interlocutory or final, of the court, and pay the amount awarded by the final decree rendered in the court

(a) The publication of these rules in 3 Howard's R., being by authority, I have deemed it necessary to print them as they are there printed, but have nevertheless taken the liberty, in cases of palpable mistake, to indicate the error by words in brackets.

to which the process is returnable, or in any appellate court; and upon such bond or stipulation, summary process of execution shall and may be issued against the principal and sureties, by the court to which such warrant is returnable, to enforce the final decree so rendered, or, upon appeal, by the appellate court.

Summary process to issue on such bond or stipulation.

V.

Bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before any commissioner of the court who is authorized by the court to take *affidavits of bail* [acknowledgments of bail, affidavits] and depositions, in cases pending before the court.

Stipulations, before whom taken.

VI.

In all suits *in personam*, where bail is taken, the court may, upon motion, for due cause shown, reduce the amount of the sum contained in the bond or stipulation therefor; and in all cases where a bond or stipulation is taken as bail, or upon dissolving an attachment of property as aforesaid, if either of the sureties shall become insolvent pending the suit, new sureties may be required by the order of the court to be given, upon motion and due proof thereof.

Amount of bail may be reduced.

New sureties to be given in case of insolvency.

VII.

In suits *in personam*, no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding five hundred dollars, unless by the special order of the court, upon affidavit, or other proper proof showing the propriety thereof.

Special order for process of arrest *in personam*, when necessary.

VIII.

In all suits *in rem*, against a ship, her tackle, sails, apparel, furniture, boats or other appurtenances, if such tackle, sails, apparel, furniture, boats or other appurte-

Third persons in possession of the appurtenances of

a ship,
may be
required to
deliver
them to the
marshal.

nances are in the possession or custody of any third person, the court may, after a due monition to such third person, and a hearing of the cause, if any, why the same should not be delivered over, award and decree that the same be delivered into the custody of the marshal or other proper officer, if, upon the hearing, the same is required by law and justice.

IX.

Process in
rem to be
by warrant
of arrest.

Duty of the
marshal
thereon.

In all cases of seizure, and in other suits and proceedings *in rem*, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods or other things to be arrested; and the marshal shall thereupon arrest and take the ship, goods or other things into his possession for safe custody; and shall cause public notice thereof, and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the district court shall order; and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.

X.

Perishable
goods, etc.,
may be
ordered to
be sold;

or to be
delivered to
the claimant
upon his
making a
deposit of
money or
giving a
stipulation
with sure-
ties.

In all cases where any goods or other things are arrested, if the same are perishable, or are liable to deterioration, decay or injury, by being detained in custody pending the suit, the court may, upon the application of either party, in its discretion, order the same or so much thereof to be sold as shall be perishable, or liable to depreciation, decay or injury, and the proceeds, or so much thereof as shall be a full security to satisfy in [the] decree, to be brought into court, to abide the event of the suit; or the court may, upon the application of the claimant, order a delivery thereof to him upon a due appraisement to be had under its direction, either upon the claimant's depositing in court so much money as the court shall order, or upon

his giving a stipulation with sureties in such sum as the court shall direct, to abide by and pay the money awarded by the general decree rendered by the court or the appellate court, if any appeal intervenes, as the one or the other course shall be ordered by the court.

XI.

In like manner, where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him upon a due appraisement to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation with sureties as aforesaid; and if the claimant shall decline any such application, then the court may, in its discretion, upon the application of either party upon due cause shown, order a sale of such ship, and the proceeds thereof to be brought into court, or otherwise disposed of as it may deem most for the benefit of all concerned.

Ships under arrest may be delivered to claimant, upon the like condition;

or may be sold.

XII.

In all suits by material-men, for supplies or repairs or other necessities for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight(a) *in rem*, or against the master or the owner alone *in personam*; and the like proceedings *in rem* shall apply to cases of domestic ships, where, by the local law, a lien is given to material-men for supplies, repairs, or other necessities.

Suits by material-men, how prosecuted.

XIII.

In all suits for mariners' wages, the libellant may proceed against the ship, freight and master, or against the ship and freight, or against the owner or master alone *in personam*.

Suits for mariners' wages, how prosecuted.

(a) *Vide* Vol. I., p. 76.

XIV.

Suits for collision, how prosecuted.

In all suits for damage by collision, the libellant may proceed against the ship and master, or against the ship, or against the owner alone, or the master alone *in personam*.

XV.

Suits for pilotage, how prosecuted.

In all suits for pilotage, the libellant may proceed against the ship and master, or against the ship, or against the owner alone, or the master alone *in personam*.

XVI.

Suits for assaults to be *in personam*.

In all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* alone.

XVII.

Suits founded on hypothecation by the master without marine interest, how prosecuted.

In all suits against the ship or freight, founded upon a mere maritime hypothecation, either express or implied, of the master, for moneys taken up in a foreign port for supplies or repairs, or other necessities for the voyage, without any claim of marine interest, the libellant may proceed either *in rem*, or against the master or the owner alone *in personam*.

XVIII.

Suits on bottomry bonds, how prosecuted.

In all suits on bottomry bonds, properly so called, the suit shall be *in rem* only against the property hypothecated, or the proceeds of the property in whosoever hands the same may be found, unless the master has without authority given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property; or unless the owner has, by his own misconduct or wrong, lost or subtracted the property; in which latter cases, the suit may be *in personam* against the wrong-doer.

XIX.

In all suits for salvage, the suit may be *in rem* against the property saved, or the proceeds thereof; or *in personam* against the party at whose request, and for whose benefit, the salvage service has been performed.

Suits for salvage, how prosecuted.

XX.

In all petitory or possessory suits between part-owners or adverse proprietors, or by the owners of a ship or the majority thereof against the master of a ship, for the ascertainment of the title and delivery of the possession, or for the possession only; or by one or more part-owners against the others, to obtain security for the return of the ship from any voyage undertaken without their consent; or by one or more of the part-owners against the others, to obtain possession of the ship for any voyage, upon giving security for the safe return thereof, the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit.

Form of process in petitory or possessory suits, etc.

XXI.

In all cases where the decree is for the payment of money, the libellant may, at his election, have an attachment to compel the defendant to perform the decree, or a writ of execution in the nature of a *capias* and of a *fieri facias*, commanding the marshal, or his deputy, to levy the amount thereof of the goods and chattels of the defendant; and for want thereof, to arrest his body to answer the exigency of the execution. In all other cases, the decree may be enforced by an attachment to compel the defendant to perform the decree; and upon such attachment the defendant may be arrested and committed to prison until he performs the decree, or is otherwise discharged by law or by the order of the court.

Forms of final process.

XXII.

Form of
libels or
libels of in-
formation
upon
seizures.

All informations and libels of information upon seizures for any breach of the revenue or navigation or other laws of the United States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States; and the district within which the property is brought, and where it then is. The information or libel of information shall also propound, in distinct articles, the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require; and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause, at the return-day of the process, why the forfeiture should not be decreed.

XXIII.

Form of a
libel in other
causes.

All libels in instance causes, civil and maritime, shall state the nature of the cause, as, for example, that it is a cause civil and maritime, of contract, or of tort or damage, or of salvage, or of possession, or otherwise, as the case may be; and if the libel be *in rem*, that the property is within the district; and if *in personam*, the names and occupations and places of residence of the parties. The libel shall propound and articulate, in distinct articles, the various allegations of facts upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer of the process to enforce his rights *in rem*, or *in personam* (as the case may require), and for such relief and redress as the court is competent to give in the premises. And the libellant may further require the defendant to

answer, on oath, all interrogatories propounded by him, touching all and singular the allegations in the libel, at the close or conclusion thereof.

XXIV.

In all informations and libels in causes of admiralty and maritime jurisdiction, amendments in matters of form may be made at any time, on motion to the court as of course; and new counts may be filed, and amendments in matters of substance may be made, upon motion, at any time before the final decree, upon such terms as the court shall impose; and where any defect of form is set down by the defendant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms upon the libellant.

Amendments of libel in matters of form, to be allowed of course on motion. In matters of substance, when and on what terms. In matters of form, after special exception, on terms.

XXV.

In all cases of libels *in personam*, the court may, in its discretion, upon the appearance of the defendant, where no bail has been taken and no attachment of property has been made to answer the exigency of the suit, require the defendant to give a stipulation with sureties in such sum as the court shall direct, to pay all costs and expenses which shall be awarded against him in the suit upon the final adjudication thereof, or by any interlocutory order in the progress of the suit.

Stipulation required of defendant on appearance, when.

XXVI.

In suits *in rem*, the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant, by whom or on whose behalf the claim is made, is the true and *bona fide* owner, and that no other person is the owner thereof. And where the claim is put in by an agent or consignee, he shall make oath that he is duly authorized thereto by the owner; or if the property be, at the time of the arrest, in the possession of the master of a ship, that he is the lawful bailee thereof for the

Claim in suits *in rem*, to be verified on oath or solemn affirmation.

Form of the oath of agent on putting in a claim.

Of master.

Claimant
required to
file a stipu-
lation with
sureties.

owner(a); and upon putting in such claim, the claimant shall file a stipulation with sureties in such sum as the court shall direct, for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or, upon appeal, by the appellate court.

XXVII.

Answer to
libel to be
on oath or
solemn affir-
mation; to
be explicit,
and to an-
swer each
intergato-
ry.

In all libels in causes of civil and maritime jurisdiction, whether *in rem* or *in personam*, the answer of the defendant to the allegations in the libel shall be on oath or solemn affirmation; and the answer shall be full and explicit, and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel, and shall also answer in like manner each interrogatory propounded at the close of the libel.

XXVIII.

Libellant
may except
to answer,
for want of
sufficiency,
etc.

The libellant may except to the sufficiency or fullness or distinctness or relevancy of the answer to the articles and interrogatories in the libel; and if the court shall adjudge the same exceptions or any of them to be good and valid, the court shall order the defendant forthwith, or within such time as the court shall direct, to answer the same, and may further order the defendant to pay such costs as the court shall adjudge reasonable.

XXIX.

Libel may
be taken *pro*
confesso, for
want of an-
swer.

If the defendant shall omit or refuse to make due answer to the libel upon the return day of the process or other day assigned by the court, the court shall pronounce him to be in contumacy and default; and thereupon the libel shall be adjudged to be taken *pro confesso* against him, and the court shall proceed to hear the cause *ex parte*, and adjudge therein as to law and justice shall appertain. But

Cause to be
heard *ex*
parte.

the court may in its discretion set aside the default, and, upon the application of the defendant, admit him to make answer to the libel at any time before the final hearing and decree, and upon his payment of all the costs of the suit up to the time of granting leave therefor.

Default may be set aside, before final decree, on payment of costs.

XXX.

In cases where the defendant answers, but does not answer fully and explicitly and distinctly to all the matters in any article of the libel, and exception is taken thereto by the libellant, and the exception is allowed, the court may, by attachment, compel the defendant to make further answer thereto, or may direct the matter of the exception to be taken *pro confesso* against the defendant to the full purport and effect of the article which it purports to answer, and as if no answer had been put in thereto.

Proceedings on allowance of exception to an answer.

XXXI.

The defendant may object, by his answer, to answer any allegation or interrogatory contained in the libel, which will expose him to any prosecution or punishment for a crime, or for any penalty or any forfeiture of his property for any penal offence.

Defendant not obliged to criminate himself.

XXXII.

The defendant shall have a right to require the personal answer of the libellant, upon oath or solemn affirmation, to any interrogatories which he may at the close of his answer propound to the libellant, touching any matters charged in the libel, or touching any matter of defence set up in the answer, subject to the like exception as to matters which shall expose the libellant to any prosecution or punishment or forfeiture as is provided in the 31st rule. In default of due answer by the libellant to such interrogatories, the court may adjudge the libellant to be in default, and dismiss the libel, or may compel his answer in the

Libellant required to answer interrogatories, unless, etc.

Proceeding in case of his refusal.

premises by attachment, or take the subject matter of the interrogatory *pro confesso* in favor of the defendant, as the court in its discretion shall deem most fit to promote public justice.

XXXIII.

Proceedings
for want of
answer oc-
casioned by
the absence
of the party.

Where either the libellant or the defendant is out of the country, or unable from sickness or other casualty to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may, in its discretion, in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the defendant when and as soon as it may be practicable.

XXXIV.

Interven-
tion of third
persons *pro*
interesse
eius, in suits
de rem.

If any third person shall intervene in any cause of admiralty and maritime jurisdiction *in rem*, for his own interest, and he is entitled according to the course of admiralty proceedings to be heard for his own interest therein, he shall propound the matter in suitable allegations, to which, if admitted by the court, the other party or parties in the suit may be required by order of the court to make due answer; and such further proceedings shall be had, and decree rendered by the court therein, as to law and justice shall appertain. But every such intervenor shall be required, upon filing his allegations, to give a stipulation with sureties to abide by the final decree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded by the court upon the final decree, whether it is rendered in the original or appellate court.

Intervenor
to give stip-
ulation with
sureties.

XXXV.

Stipulations in admiralty and maritime suits may be taken in open court, or by the proper judge at chambers or under his order, or by any commissioner of the court,

who is a standing commissioner of the court, and is now by law authorized to take *affidavits of bail* [acknowledgments of bail and affidavits], and also depositions in civil causes pending in the courts of the United States.

XXXVI.

Exception may be taken to any libel or allegation or answer, for surplusage, irrelevancy, impertinence or scandal; and if, upon reference to a master, the exception shall be reported to be so objectionable, and allowed by the court, the matter shall be expunged at the cost and expense of the party in whose libel or answer the same is found.

Exception may be taken to any pleading for surplusage, etc.

XXXVII.

In cases of foreign attachment, the garnishee shall be required to answer on oath or solemn affirmation, as to the debts, credits or effects of the defendant in his hands, and to such interrogatories touching the same as may be propounded by the libellant; and if he shall refuse or neglect so to do, the court may award compulsory process *in personam* against him. If he admit any debts, credits or effects, the same shall be held in his hands, liable to answer to the exigency of the suit.

Garnishee may be required to answer on oath.

XXXVIII.

In cases of mariners' wages, or bottomry, or salvage, or other proceedings *in rem*, where freight or other proceeds of property are attached to, or are bound by the suit, which are in the hands or possession of any person, the court may, upon due application by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit; and if no sufficient cause be shown, the court may order the same to be brought into court to answer

Freight, etc., may be ordered to be brought into court.

the exigency of the suit, and, upon failure of the party to comply with the order, may award an attachment or other compulsive process to compel obedience thereto.

XXXIX.

Libel may be pronounced deserted, for want of prosecution.

If, in any admiralty suit, the libellant shall not appear and prosecute his suit according to the course and orders of the court, he shall be deemed in default and contumacy; and the court may, upon the application of the defendant, pronounce the suit to be deserted, and the same may be dismissed with costs.

XL.

Rehearing may be granted within ten days after decree by default.

The court may, in its discretion, upon the motion of the defendant and the payment of costs, rescind the decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof at any time within ten days after the decree has been entered, the defendant submitting to such further orders and terms in the premises as the court may direct.

XLI.

Sales of property to be made by the marshal.

All sales of property under any decree in admiralty, shall be made by the marshal or his deputy, or other proper officer assigned by the court where the marshal is a party in interest, in pursuance of the orders of the court; and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court, by the officer making the sale, to be disposed of by the court according to law.

XLII.

All moneys to be deposited in a bank.

All moneys paid into the registry of the court shall be deposited in some bank designated by the court, and shall be so deposited in the name of the court, and shall not be drawn out except by a check or checks signed by a

judge of the court and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit and out of what fund in particular it is paid. The clerk shall keep a regular book, containing a memorandum and copy of all the checks so drawn, and the date thereof.

How drawn out.

Accounts of clerk, how kept.

XLIII.

Any person having an interest in any proceeds in the registry of the court, shall have a right by petition and summary proceeding to intervene *pro interesse suo*, for a delivery thereof to him; and upon due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice; and if such petition or claim shall be deserted, or upon a hearing dismissed, the court may in its discretion award costs against the petitioner in favor of the adverse party.

Persons having an interest in proceeds, may intervene therefor.

XLIV.

In cases where the court shall deem it expedient or necessary for the purposes of justice, the court may refer any matters arising in the progress of the suit to one or more commissioners to be appointed by the court to hear the parties and make report thereon; and such commissioner or commissioners shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in references to them, including the power to administer oaths, and to examine the parties and witnesses touching the premises.

Reference may be made to commissioners, who shall have the powers of masters in chancery.

XLV.

All appeals from the district to the circuit court must be made while the court is sitting, or within such other period as shall be designated by the district court by its general rules, or by an order specially made in the particular suit.

Appeals from D. C. to C. C. to be interposed *ex parte curia*, or, etc. 24 Feb 1889 521 1889 8

XLVI.

D. and C.
courts au-
thorized to
make addi-
tional rules.

In all cases not provided for by the foregoing rules, the district and circuit courts are to regulate the practice of said courts respectively, in such manner as they shall deem most expedient for the due administration of justice in suits of admiralty.

XLVII.

Rules to
take effect
September,
9, 1845.

These rules shall be in force in all the circuit and district courts of the United States, from and after the first day of September next.

To be pro-
mulgated.

It is ordered by the court, that the foregoing rules be, and they are adopted and promulgated as rules for the regulation and government of the practice of the circuit courts and district courts of the United States, in suits in admiralty on the instance side of the courts; and that the Reporter of the court do cause the same to be published in the next volume of his reports, and that he do cause such additional copies thereof to be published as he may deem expedient for the due information of the bar and bench in the respective districts and circuits.

DECEMBER TERM, 1850.

Ordered, That the following supplemental rules be added to the rules heretofore adopted by this court for regulating proceedings in admiralty:

XLVIII.

Right to
exact bail
governed
by state
laws.

In all suits in personam where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the state, where an arrest is made upon similar or analogous process issuing from the state courts.

And imprisonment for debt, on process issuing out of the

admiralty court, is abolished in all cases where, by the laws of the state in which the court is held, imprisonment for debt has been or shall be hereafter abolished, upon similar or analogous process issuing from a state court.

XLIX.

The twenty-seventh rule shall not apply to cases where the sum or value in dispute does not exceed fifty dollars, exclusive of costs, unless the district court shall be of opinion that the proceedings prescribed by that rule are necessary for the purposes of justice in the case before the court.

27th rule restricted.

All rules and parts of rules heretofore adopted, inconsistent with this order, are hereby repealed and annulled.

DECEMBER TERM, 1851.

L.

Ordered, That further proof, taken in a circuit court upon an admiralty appeal, shall be by deposition taken before some commissioner appointed by a circuit court pursuant to the acts of Congress in that behalf, or before some officer authorized to take depositions by the thirteenth section of the act of Congress of the 24th of September, 1789, upon an oral examination and cross-examination, unless the court in which such appeal shall be pending, or one of the judges thereof shall, upon motion, allow a commission to issue to take such deposition upon written interrogatories. When such deposition shall be taken by oral examination, a notification from the magistrate before whom it is to be taken, or from the clerk of the court in which such appeal shall be pending, to the adverse party, to be present at the taking of the same and to put interrogatories if he shall think fit, shall be served on the adverse party or his attorney, allowing time for their attendance after being notified not less than twenty-four hours and in

Further proof on appeal to C. C., how taken.

addition thereto, one day, Sundays exclusive, for every twenty miles' travel: Provided, that the court in which such appeal may be pending, or either the judges thereof, may, upon motion, increase or diminish the length of notice above required.

LI.

Evidence taken down by clerk of D. C., may be read in C. C.

Ordered, That when oral evidence shall be taken down by the clerk of the district court pursuant to the above mentioned section of the act of Congress, and shall be transmitted to the circuit court, the same may be used in evidence on the appeal, saving to each party the right to take the depositions of the same witnesses or either of them, if he should so elect.

DECEMBER TERM, 1854.

Ordered, That the following supplemental rules be added to the rules heretofore adopted by this court for regulating proceedings in admiralty.

LII.

Replication to new facts alleged in answer forbidden: amendment of libel substituted.

When the defendant in his answer alleges new facts, these shall be considered as denied by the libellant; and no replication, general or special, shall be allowed. But within such time after the answer is filed as shall be fixed by the district court, either by general rule or by special order, the libellant may amend his libel so as to confess and avoid, or explain or add to the new matter set forth in the answer; and within such time as may be fixed, in like manner, the defendant shall answer such amendments.

LIII.

Contents of record transmitted from D. to C. court on appeal.

The clerk of the district court shall make up the records to be transmitted to the circuit court, on appeals, so that the same shall contain the following:

1. The style of the court.
2. The names of the parties, setting forth the original parties and those who have become parties before the appeal, if any change has taken place.
3. If bail was taken, or property was attached or arrested, the process of arrest and attachment, and the service thereof, and all bail and stipulations, and, if any sale has been made, the orders, warrants and reports relating thereto.
4. The libel, with exhibits annexed thereto.
5. The pleadings of the defendant, with the exhibits annexed thereto.
6. The testimony on the part of the libellant, and any exhibits not annexed to the libel.
7. The testimony on the part of the defendant, and exhibits not annexed to his pleadings.
8. Any order of the court to which exception was made.
9. Any report of the assessor or assessors, if excepted to, with the orders of the court respecting the same, and the exceptions to the report. If the report was not excepted to, only the fact that a reference was made, and so much of the report as shows what results are arrived at by the assessor, are to be stated.
10. The final decree.
11. The prayer for an appeal, and the action of the district court thereon; and no reasons of appeal shall be filed or inserted in the transcript.

The following shall be omitted :

1. The continuances.
2. All motions, rules and orders, not excepted to, which are merely preparatory for trial.
3. The commissions to take depositions, notices therefor, their captions, and certificates of their being sworn to, unless some exception to a deposition in the district court was founded on some one or more of these; in which case so much of either of them as may be involved in the

exception shall be set out. In all other cases it shall be sufficient to give the name of the witness and to copy the interrogatories and answers, and to state the name of the commissioner, and the place where, and the date when, the deposition was sworn to; and in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

The clerk of the district court shall page the copy of the record thus made up, and shall make an index thereto; and he shall certify the entire document, at the end thereof, under the seal of the court, to be a transcript of the record of the district court, in the cause named at the beginning of the copy, made up pursuant to this rule, and no other certificate of the record shall be needful or inserted.

It is further ordered, That these rules be published in the next volume of the reports of the decisions of this court, and that the clerk cause them to be forthwith printed and transmitted to the several district courts.

Test: WM. THOS. CARROLL.

II.

RULES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF NEW-YORK, REGULATING APPEALS FROM
THE DISTRICT COURT.—JUNE TERM, 1848..

I.

The transcript to be sent to this court, on appeal thereto <sup>Transcripts,
how certi-
fied.</sup> from a sentence or decree of the district court, may be certified by the clerk of the latter court, under his hand and the seal of the court.

II.

Eight days' notice of hearing on appeal shall in all cases <sup>Notice of
hearing.</sup> be given, by the service thereof on the adverse party, or on his proctor.

III.

When an appeal from a decree of the district court is <sup>When ap-
peal may be
noticed by
either party.</sup> interposed less than twenty days before the next stated session of this court, it may be noticed for hearing at such session by either party.

IV.

When an appeal from a decree of the district court is <sup>When by
appellee
alone.</sup> interposed less than twenty days before the next stated session of this court, the appellee may, at his option, notice the cause for hearing at such session, on the first or other day thereof; or have the cause continued until the next stated session.

V.

Depositions
taken in D.
C. to be read
on appeal.

Transcripts of the depositions taken in any cause, in the district court, according to law — whether *de bene esse* under the acts of Congress, or on commission — and read at the hearing of the cause in that court, may be transmitted to this court on appeal, and read by either party as evidence at the hearing of the cause in this court.

VI.

Notes of evi-
dence taken
in D. C.,
how used
on appeal.

A copy of the notes taken by the judge, or under his direction by the clerk, of the district court, of the evidence of witnesses examined orally therein, shall be certified and transmitted to this court on appeal, along with the transcript of the record and other proceedings in the cause, and shall be admitted to prove the evidence given by such witnesses; but nothing herein contained shall be construed to abridge the right of the parties to re-examine such witnesses in this court, if they shall see fit to do so.

III.

RULES OF PRACTICE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW-YORK, IN CASES OF ADMIRALTY AND MARITIME JURISDICTION ON THE INSTANCE SIDE OF THE COURT, AS AMENDED AND ESTABLISHED AT THE MAY TERM, 1856.

I.

The "Rules of Practice of the courts of the United States in causes of admiralty and maritime jurisdiction on the instance side of the court," prescribed by the Supreme Court of the United States, at the January term, 1845, and the rules of said court in addition to or in modification of the same, are rules of practice in this court in all cases of admiralty and maritime jurisdiction, including cases within the act entitled "An act extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same," passed February 26th, 1845.

Rules prescribed by S. C. to govern in all cases.

II.

A special session of the court is hereby appointed to be held at Buffalo, on Tuesday of every week, at ten o'clock in the forenoon: at which special session all process may be made returnable, and all proceedings may be had, except trials by jury, which will not be held without a special order by the judge for that purpose, except at a stated term; and except trials of issue of fact before the court, which will be had only on the first Tuesday of each month other than the months of July and August, without a like special order. Issues of fact may be brought to trial by either party after twenty days' notice to the other parties

Weekly and monthly sessions to be held at Buffalo; for what purposes; proceedings of regulated.

in interest or in pursuance of an order previously obtained for such purpose; and issues of law, and enumerated and non-enumerated motions may be brought to a hearing after eight days' notice as aforesaid, or in pursuance of a like order; but no notice shall be required in respect to any proceeding or motion which can be properly made or taken on the return-day of process, if such motion shall be made or proceeding taken on such return-day, or when the court shall not sit on such return-day, on the first court day thereafter. In case of the non-attendance of the judge at the time hereby appointed, or at any other time, which may, by special order, be appointed, for any special session of the court, all process and proceedings shall be continued, as of course and without prejudice to the next special sessions; or by special order, to some earlier day for that purpose appointed by the judge.

III.

Test and
return of
process.

All process shall bear test of the day on which it is sealed, and shall be made returnable before the judge at Buffalo on any Tuesday thereafter, sufficiently remote to admit of the prescribed notice. But final process upon bonds or stipulations may be made returnable at a stated term of the court, or at a special session as hereinbefore provided.

IV.

Designation
of newspa-
per in pur-
suance of
Rule ix.

The newspaper called the *Buffalo Commercial Advertiser*, printed at the city of Buffalo, is hereby designated, in pursuance of Rule ix. of the Rules of Practice in admiralty and maritime causes prescribed by the Supreme Court, as the newspaper in which all notices shall be printed which are by the said rule required to be published in a newspaper, in all suits *in rem* in which the arrest of the vessel, goods, or other thing proceeded against, has been made at or within the collection district of Buffalo creek, or the collection district of Niagara.

V.

The Hollister Bank, in the city of Buffalo, is hereby designated, in pursuance of Rule XLII. of the same Rules, as the place of deposit for moneys paid into court.

Bank of deposit.

VI.

Libels, answers, and all other pleadings and papers to be filed, shall be so plainly written as to be readily legible, and shall be free, to all reasonable extent, from interlineations and erasures; and it shall be the duty of the clerk to reject all papers delivered to him to be filed, which are not in conformity with this rule.

All pleadings, &c., to be plainly written.

VII.

All libels praying process of arrest, whether *in rem* or *in personam*, shall be verified by the oath or solemn affirmation of the libellant, unless, for sufficient cause shown, such oath or affirmation shall be dispensed with by the special order of the judge. And all libels, answers and other pleadings shall be signed by the party in his own proper handwriting, and in like manner by the proctor for the party in whose behalf they are filed, unless, for special cause shown, such signature shall be dispensed with by leave of the court.

Libels to be verified by oath.

Pleadings to be signed.

VIII.

In suits *in rem*, the mesne process shall be served, and the required notices given, at least fourteen days before the return-day of the process, unless a shorter time shall be prescribed by special order, founded upon the exigencies of the particular case.

Notice to appear and answer in suits *in rem* to be 14 days, unless, etc.

IX.

All process, and all notices for publication in a newspaper in pursuance of Rule IX. of the Rules of Practice in admiralty and maritime causes, prescribed by the Supreme

Process and notices of arrest to be drawn by clerk.

Court, shall be drawn up by the clerk; and no process, except subpoenas, shall be issued by him in blank.

X.

Contents of such notices.

The notice mentioned in the last preceding rule shall contain the title of the suit, a summary statement of the cause of action, the amount of the demand, and the day and place fixed for the return of the process; and shall have affixed at the close thereof, the name of the proctor of the libellant, and that of the marshal, or of his deputy, intrusted with the execution of the process.

XI.

Sum demanded to be stated in libel, &c.

The amount of the debt or damages for which the action is brought, shall be stated in the libel, and with the addition thereto for costs of \$250, in a suit *in rem*, and of \$100, in a suit *in personam*, shall be endorsed on the mesne process thus, "action for \$ _____," and in a suit *in rem* the requisite bond or stipulation upon the release of the property, shall be in the sum of \$250 in addition to twice the amount demanded in the libel, and in a suit *in personam* in the sum of \$100, with the addition of twice the amount of the demand.

Bond or stipulation for real sum to be given.

XII.

Non-resident libellants to give security, except, etc.

When the libellant is not a resident of the district, he shall, at the time of commencing his suit, give a bond or stipulation, with one or more sufficient sureties, in the sum of at least one hundred dollars, if the suit is *in personam*; and in the sum of at least two hundred and fifty dollars, if the suit be *in rem*—conditioned that he will appear from time to time, and abide by all orders, interlocutory and final, of the court, and pay the costs and expenses, if any, which shall be awarded against him by the final decree of this court, or of any appellate court: *Provided*, however, that this regulation shall not extend to suits for

seamen's wages, nor to suits for salvage when the salvors have come into port in possession of the property libelled.

XIII.

In all cases not embraced within the last preceding rule, on motion of the defendant or claimant, the court will, in its discretion, direct the libellant, on pain of dismissing his libel, to give the like security.

In cases excepted, security required by special order, on due cause shown.

XIV.

Instead of the security specified in the two last preceding rules, the party from whom it is required may, at his option, deposit in court a sum of money of the like amount.

Money may be deposited as security.

XV.

If in any case a libel shall be filed in behalf of a libellant who is not a resident within the district, before security for costs and expenses shall be filed as required by Rule XII., the proctor for such libellant shall be liable for costs and expenses to the amount specified in the said rule, until such security shall be filed; and the payment thereof may be enforced by summary process *in personam* against such proctor.

Proctor for non-resident libellant liable for costs, until security filed.

XVI.

When a proctor is retained to defend in any suit, before the return-day of the mesne process therein, who resides or has his place of business more than three miles from the clerk's office, and not more than three miles from the residence or place of business of the proctor for the libellant, such proctor for the defendant may, at any time before the return-day of the process, serve a notice of his retainer on the proctor for the libellant; and it shall thereupon be the duty of the proctor for the libellant, without delay, to serve on the proctor for the defendant a copy of the libel on file.

Libel to be served on proctor for defendant, when.

XVII.

Answer,
etc., not
given on re-
turn-day, to
be served.

When the defendant's answer, or any other pleading subsequent to the libel, is put in by being simply filed in the clerk's office, instead of being given in open court in presence of the proctor or advocate for the adverse party, a copy thereof, with notice of the time of filing the same, shall without delay be served on the proctor of such adverse party.

XVIII.

Copy of de-
cree to be
transmitted
to factor,
when.

When a decree is made in the absence of the proctor of either party to the suit, unless such proctor resides at the place where the clerk's office is kept, it shall be the duty of the clerk immediately to transmit to him by mail a copy of the decree; and such proctor and party shall be responsible to the clerk for the fees to which he may be entitled for such service, according to the usual rate of charge.

XIX.

Sales on
execution
regulated.

In all suits other than those founded upon municipal seizure, not less than six days' notice of the sale of property on final process shall be given. A longer notice may be given at the discretion of the marshal or his deputy by whom the sale is to be made, or by order of the court. It shall be the duty of the marshal in all cases in which it shall be practicable, to make the sale and pay the proceeds into court on or before the return day of the process, under which such sale is to be made. The clerk will in all cases make the process returnable at such time as may be necessary to enable the marshal to give the requisite notice, make the sale, and return such process on or before the return day thereof.

XX.

On order
that libel be
taken *pro*
confesso,

Whenever any libel shall be taken as confessed, for want of answer, there shall be an order of reference to the

clerk or a commissioner *pro hac vice* to take proof of the material facts and circumstances stated in the libel, and to examine the libellant on oath or affirmation, in respect to payments or offsets, and in the discretion of the referee in respect to any other matters pertaining to his demand, and the referee shall report accordingly.

evidence to be taken by clerk or commissioner.

Upon sufficient cause shown, the court will in the order of reference, or otherwise, direct that the oath or affirmation of the libellant may be received in support of the allegations of the libel, or will give such other special directions in respect to the proceedings upon the reference as the nature of the case may require.

Oath of libellant may be taken.

XXI.

In cases of reference under a decree *pro confesso*, the libellant shall, unless otherwise specially directed, proceed with the reference within four days from the date thereof; and upon a reference in cases in which an answer shall have been interposed, or in which, for other reasons, notice of hearing on the reference shall be required, the hearing may proceed on any day appointed by the referee, at the instance of either party; provided, that eight days' notice shall have been given of such hearing, to all adverse parties who have appeared in the cause.

Proceedings on such reference regulated.

Such reference may be continued from day to day or by adjournment, and when adverse parties appear, the proofs shall be closed at the end of thirty days from the date of the order of reference, unless the parties shall agree to the closing of the same at an earlier day, or unless the time shall be extended by the written order of the referee, or by the written stipulation of the parties, or by the order of the court for that purpose obtained; and the clerk or commissioner shall make and file his report within eight days after the testimony shall have been closed.

XXII.

Ten days
allowance
for excep-
tions to
report.

Exceptions to any report made by the clerk or a commissioner, must be filed or served on the adverse party within ten days after such report shall have been filed, unless the time shall be enlarged by the judge or by the written stipulation of the parties; and if exceptions are not so filed and served, the party in whose favor the report may be, may, on the first special session thereafter, and without notice, move for the confirmation of the report, and a final decree therefrom.

XXIII.

Libellant
allowed 12
days to an-
swer inter-
rogatories.

When interrogatories are propounded by the defendant at the close of his answer, touching any matters charged in the libel, or touching any matter of defence set up in the answer (according to Rule xxxii. of the Rules of Practice prescribed by the Supreme Court)(a), the libellant shall answer the same within twelve days, unless, for sufficient cause shown, he shall, by special order, be allowed a longer period; and the court may, in its discretion, require such interrogatories to be answered within a shorter time, or *instantly*.

XXIV.

Proceedings
against
garnishee
regulated.

When interrogatories are propounded to a garnishee (in pursuance of Rule xxxvii. of the Rules of Practice prescribed by the Supreme Court), a copy thereof shall be served upon the garnishee personally, or, in case of his absence from his dwelling-house or usual place of abode,

(a) "In default of due answer by the libellant to such interrogatories, the court may adjudge the libellant to be in default, and dismiss the libel, or may compel his answer in the premises by attachment, or take the subject matter of the interrogatory *pro confesso* in favor of defendant, as the court in its discretion shall deem most fit to promote public justice." Rule xxxii. of the Rules of Practice prescribed by the Supreme Court.

by leaving such copy with some person of suitable age who is a member or resident of the family; and the garnishee shall be required to answer the interrogatories within twelve days after such service, unless a longer period shall, for adequate cause shown, be by special order allowed for that purpose; and the court may also, in its discretion, prescribe a shorter period.

XXV.

Exceptions to the libel (taken in pursuance of Rule xxxvi. of the Rules of Practice prescribed by the Supreme Court), for surplusage, irrevelancy, impertinence or scandal, may be taken *ore tenus*, on the return-day of the mesne process; and exceptions to the answer or other allegation given by the defendant, taken for the like causes, in pursuance of the same rule, or in pursuance of Rule xxvii., for want of sufficiency, fullness or distinctness, may be taken in like manner, when the answer or other allegation is put in in open court; and the court will thereupon, in its discretion, either decide upon the sufficiency of the exceptions so taken, *instantly*, or direct the same to be drawn up in writing, and appoint a day to hear argument thereon, or refer the same to a commissioner.

Exceptions to libel or answer, how taken.

XXVI.

When, at the return of the mesne process, further time has been granted to answer the libel; and the answer, instead of being produced and offered in open court in the presence and hearing of the advocate of the libellant, is simply filed with the clerk, a copy thereof shall, without delay, be served on the proctor for the libellant personally, if he resides within three miles of the proctor for the defendant, otherwise either personally or by mail; and the proctor for the libellant may, within ten days after the service thereof, file and serve exceptions thereto. The defendant, within eight days after the service of such exceptions, may

When copy of answer to be served.

Ten days allowed for exception thereto.

Proceedings on exceptions regulated.

give a written notice of his submission to any or all of them; and if any of them are not submitted to within the time prescribed, the libellant may bring the same to a hearing before the court, by giving, at any time within six days, a notice of not less than six, nor more than ten days, of such hearing. Every exception not submitted to, and which is not notified for hearing within the time specified, shall be considered as abandoned.

XXVII.

Proceedings
on excep-
tion further
regulated.

When exceptions are referred to a commissioner, if the party who obtained the reference shall not procure and file the commissioner's report within fourteen days from the date of the order of reference, unless further time shall be allowed, for sufficient cause shown, by special order, the exceptions shall be considered abandoned. The party by whom the reference was obtained shall have eight days after filing the report of the commissioner, to except thereto. On filing the report, he shall give notice of filing the same to the adverse proctor, who shall have eight days after such notice to except to the report. Exceptions to a commissioner's report may be noticed for argument by either party, and the notice shall be served at least six days before the day designated for the hearing(a).

(a) When any exception to an answer for want of sufficiency, fullness or distinctness, is submitted to, or adjudged to be well founded, the court is to order the defendant to put in a further answer forthwith, or within such time as the court shall direct, and may further order the defendant to pay such costs as the court shall adjudge reasonable. (Rule XXVIII. of the Rules of Practice prescribed by the Supreme Court.)

And when any exception for surplusage, irrelevancy, impertinence or scandal, shall be submitted to or adjudged to have been well taken, the matter of such exception is to be expunged at the cost and expense of the party in whose libel or answer the same is found. (Rule XXXVI. of the Rules of Practice prescribed by the Supreme Court.)

XXVIII.

All appeals to the circuit court must be interposed within ten days from the date of the decree, or within such other period as shall be designated by special order made in the particular suit; and in cases where the right of appeal is allowed, no final process shall issue, before the expiration of the ten days or other period prescribed.

Ten days allowed for appeal, &c.

XXIX.

The regulations prescribed by law relative to the mode of serving notices and other papers in suits prosecuted in the courts of the State of New-York, are hereby adopted, *mutatis mutandis*, as rules of this court.

Practice of state courts relative to service of notices adopted.

XXX.

The provisions in the foregoing rules contained, shall be held applicable, as far as may be, to all proceedings by petition or otherwise, which may be instituted to enforce any lien or demand, upon or against any property in the custody of the court, or any proceeds in the registry.

Foregoing rules to govern in cases of intervention.

XXXI.

It is ordered, That where several suits are instituted against one and the same vessel, or the proceeds thereof, no more than one charge for mileage shall be allowed for the service and return of mesne process in such suits, unless for special cause shown it shall be otherwise specially ordered by the court.

Mileage in suits *en rem*, regulated.

XXXII.

It is hereby ordered, That the rule heretofore made and entered, requiring the office of the clerk of this court to be kept at the city of Auburn, be, and the same is hereby abrogated, and it is ordered that the said office be henceforth kept at the city of Buffalo.

Clerk's office to be kept at Buffalo.

PART II.—PRECEDENTS.

I.—LIBELS.

CLERKE, in his "Brief Discourse showing the order and structure of a Libel or Declaration," in the High Court of Admiralty of England, observes, that with respect to the form of the libel, "there is no special custom extant;" and it will occasion no surprise to the attentive reader to be told that this observation is not less true of the libel in the American courts of admiralty^(a).

It may be reasonably supposed, however, that the precedents prepared by Mr. SUMNER, and contained in the Appendix to DUNLAP'S Admiralty Practice, have already to some extent contributed "to remedy the looseness and inaccuracy which have so strongly marked the admiralty pleading of our country." The author ventures to cherish the hope, also, that with the aid of the new Rules, this desirable reform may be still further promoted by the following precedents:

The twenty-third of these Rules prescribes the substantial requisites of the libel. There are, however, certain matters rather of form than of substance, concerning which the new Rules furnish no

(a) CLERKE remarks that a libel ought to be so drawn as to contain the five things comprehended in the two following verses:

Quis, quid, coram quo, quo jure petatur et a quo,
Recte compositus quisque libellus habet.

This distich is also given by Lord Chief Baron COMYNS (Dig., tit. Chancery, E. 2), and quoted by COOPER (Eq. Pl., 17, note i.), and by Mr. Justice STORY (Eq. Pl., § 25), as descriptive of the essential parts of a bill in equity.

direction, and in respect to which some diversity of practice seems to have prevailed.

The precedents of libels given in the appendix to Dunlap's Practice are all *entitled* after the manner of declarations in suits at law, as of some stated term of the court, thus :

“ UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, ss.
— TERM, 18—.”

Such may be supposed, therefore, to be the established usage, at least in the District of Massachusetts ; but I have met with no evidence that this usage prevails in any other of the districts of the Union. Several precedents of libels are given by Mr. HALL in his edition of Clerke's Praxis, purporting to relate respectively to suits in different districts, and which I infer are copies of libels actually filed in such suits, which are not thus entitled. On the contrary, they commence with an address to the judge, like a bill in chancery ; and such is the form of the libel in a recent case originating in the District of Louisiana, and finally decided in the Supreme Court of the United States, in the report of which the voluminous pleadings are recited *in extenso*(a).

Whether libels in the English admiralty are entitled I have not been able certainly to ascertain. In Marriott's Formulary there is a precedent of a libel in a cause of damage, and another of a summary petition for wages, which are not entitled. But in Chitty's General Practice (vol. 2, p. 534), there is a precedent of what is denominated a “ Summary petition *or libel* for wages ” (an appellation not calculated to inspire confidence), which is entitled thus :

“ ADMIRALTY INSTANCE COURT.

On the — day of — term, to wit,
the — day of —, A. D. 1884, before
the Right Honorable the Judge.”

The American courts of admiralty being, as such, always open, and there being no necessity for the fiction of referring their acts to a stated term, any more than there is in a court of chancery, no rea-

(a) *Waring et al. v. Clarke*, 5 Howard's R., 441.

son is perceived for entitling libels—which may be, and in fact are, filed at any time—as of a general term; and as it is better to avoid fiction when there is no need of resorting to it, the libel may therefore properly commence with the direction or address.

The next point to be considered is the Introduction. With respect to this part of the libel, also, there seems to have been a want of uniformity of practice. The precedents given by Mr. HALL begin after the manner of a bill in chancery, thus:

“The Libel of A. B., mariner (or as the case may be), humbly sheweth.”

In the precedents prepared by Mr. SUMNER, the introduction is more formal; that of a libel *in rem* for wages, for example, is as follows:

“The libel and complaint of A. B. of —, late mariner of the ship —, whereof C. D. now is or late was master, against the said ship, her tackle, apparel and furniture, and against all persons lawfully intervening for their interest therein, in a cause of subtraction of wages, civil and maritime. And thereupon the said A. B. alleges and articulately propounds as follows.”

It may not be easy to devise a better form; but the first sentence of this, it will be noticed, is imperfect. It asserts nothing. To render it significant, it requires additional words, as “This is the libel,” etc.; or a more extensive modification, as thus: “A. B. of —, late mariner of the ship —, whereof C. D. now is or late was master, exhibits this his libel and complaint against the said ship,” etc. The word “thereupon,” in the second sentence, seems also, as the first sentence now stands, to be objectionable: it would be more exact to say *therein* or *thereby*.

In the form above mentioned of a libel in a cause of damages given in Marriott's Formulary, the address and introduction are blended, thus:

“In the name of God, Amen. Before you the Right Worshipful Sir JAMES MARRIOTT, knight, doctor of law, and lieutenant of the High Court of Admiralty of England, and in the same court official principal and commissary general and special, and president and judge thereof, lawfully con-

stituted, your surrogate or some other competent judge in this behalf, the proctor of Hugh Pickering, owner of the brigantine or vessel called the Venus, against the ship called the De Glieicklick Wilkonst, whereof Caul Paul Meesche now is or lately was master, her tackle, apparel and furniture, and against the said Caul Paul Meesche, intervening for his interest therein, and also against all and every other person or persons lawfully intervening or appearing for them, in judgment, before you by way of complaint, and hereby complaining unto you in this behalf, doth say, allege, and in law articulately propound as follows, to wit(a)."

The summary petition above mentioned, as given in Marriott's Formulary, in a suit *in personam* for wages, commences as follows:

"On — the — day of —, — —, late joiner, carpenter and mariner, on board the ship or vessel called the —, whereof — was master, against the said master, in a cause of subtraction of wages, civil and maritime. On which day, Slade exhibited as proctor for the said —, and made himself a party for him; and under that denomination, and by all better and more effectual ways and means, and to all intents and purposes whatsoever in law, that may be most beneficial for his said party, did say, allege, and in law articulately propound as follows, to wit(b)."

This form, it will be observed, is without any address, as is, also, that given by Mr. CHITTY, the title of which is above recited, The introduction is as follows:

"THE SUSANNA, A. B. master.

C. D. late mariner of the above named ship Susanna,)
whereof A. B. now is or lately was the owner of the)
said ship(c), in a cause of subtraction of wages, civil)
and maritime, against E. F. of —.) On which
day, G. H.(d), in the name and as the lawful proctor for the said C. D., and

(a) Marriott's Formulary, 148.

(b) *Ib.*, 274.

(c) The words "of the said ship," it will be seen, are tautological. The same letters are used also to designate first the master, and next the owner. In short, the thing is unintelligible.

(d) In the original, the letters E. F. are here used as the initials of the proctor's name, obviously by mistake, these being the letters already used as the initials of the defendant's name. I therefore substitute the letters G. H.

under that denomination, and by all better and more effectual ways, means and methods, and to all intents and purposes as [in] the law, that might be most beneficial to his said party, doth say and allege, and in law articulately propound as follows, to wit."

After this rather tedious review, without arrogating any right to dictate, and with no love of innovation, I suggest the following as a suitable form for the entire introductory part, or *address and introduction* of a libel in the American courts of admiralty.

IN ADMIRALTY.

*To the Judge of the District Court of the United States
for the District of——.*

A. B. of ——, —— (a), exhibits this his libel, against the ship or vessel ——, whereof C. D. now is or lately was master, her boats, tackle, apparel and furniture [or, if the suit be *in personam*, against C. D. of ——, now or lately master, or owner, as the case may be, of the ship ——; or, if the suit be *in rem* and *in personam*, against the ship ——, her boats, tackle, apparel and furniture, and also against C. D. of ——, etc., as above], in a cause of contract [or of subtraction of wages, or of collision, or of damage, or of salvage, or of possession, or, etc., as the case may be], civil and maritime. And thereupon the said libellant doth allege, and articulately propound as follows, to wit(b)."

THE NARRATIVE OR STATING-PART OF THE LIBEL.

The *third* part of the libel corresponds with what is usually denominated the premises or stating-part of a bill in chancery, and contains a narrative of the facts and circumstances of the libellant's case, so as clearly to show the wrong or grievance of which he complains, and his claim to redress in the court and in the form in which it is sought. It may be said in general, therefore, as of the

(a) The 23d of the new Rules requires that in suits *in personam*, the occupations as well as the places of residence of the parties shall be stated. The spirit of the rule extends also to the libellant in a suit *in rem*.

(b) This is substantially the form of the address and introduction of a bill in chancery, prescribed by the 20th of the new Rules of Practice for the courts of equity of the United States.

1st part of White
3rd part of White
t of a bill in equity, that in this part of the libel
it to which the libellant intends to offer evidence
is distinctly stated; for otherwise he will not be permitted
to offer or require any evidence of such fact. But in the one case
as in the other, a succinct general charge or statement of the mat-
ter of fact is sufficient, provided it be clear, accurate, and, to all
necessary and convenient extent, certain, as to the essential circum-
stances of time, place, manner, and other incidents; and it is not
necessary to charge minutely all the circumstances which may con-
duce to prove the general charge; for these circumstances are
properly matters of evidence, which need not be charged in order
to let them in as proofs(a).

The twenty-third of the new Rules contains a provision applicable
to this part of the libel, which it behooves the pleader to bear in
mind. In accordance with the practice of the English High Court
of Admiralty, it requires that "the libel shall propound and articu-
late in distinct articles the various allegation of facts, upon which
the libellant relies in support of his suit, so that the defendant may
be enabled to answer distinctly and separately the several matters
contained in each article."

MATTERS OF DEFENCE AND AVOIDANCE.

If the libellant is aware of any matter likely to be insisted upon
by the defendant, to justify or excuse his non-compliance with the
right or claim set forth in the libel, the libellant, in the narrative
part of the libel may properly, and, for the purpose of saving the
necessity of a special replication or amended libel, sometimes very
usefully, as in the charging part of a bill in equity(b), set forth
any other matter which he may have to allege, which may disprove
or avoid the supposed defence or excuse.

(a) Story's Eq. Pleadings, §§ 28, 241.

(b) By one of the new Rules of Practice for the courts of equity of the
United States, it is ordered that "the plaintiff may, in the narrative or *stating*
part of his bill, state and avoid, by counter-averments, at his option, any matter
or thing which he supposes will be insisted upon by the defendant, by way of
excuse to the case made by the plaintiff for relief."

PRAYER OF PROCESS.

The twenty-third Rule above mentioned, in addition to other requirements, directs that the libel shall conclude with a prayer of the proper process to enforce the rights of the libellant, and for such relief and redress as the court is competent to give in the premises. The *fourth* part of the libel, therefore, is the *prayer of process*; and as in an action *in personam*, there are several forms of process which the libellant is permitted at his option to sue out, he is bound, and indeed is by the second rule expressly required, in that form of action, to make and state his election by a specific prayer for that purpose.

PRAYER FOR REDRESS.

Lastly, the libel contains a prayer that the court will pronounce for the debt, damages or compensation claimed, with costs.

INTERROGATORIES.

The above mentioned rule also provides that "the libellant may further require the defendant to answer on oath all interrogatories propounded by him touching all and singular the allegations in the libel, at the close or conclusion thereof;" and the 27th Rule also directs that the defendant, in addition to answering explicitly all the several articles and allegations of the libel, "shall also answer in like manner each interrogatory propounded at the close of the libel." This rule applies, in terms, as well to suits *in rem* as to suits *in personam*; but in a suit *in rem*, no person can properly be called a "defendant" except one who has appeared and been admitted as claimant, and in that character undertaken to contest the suit. Unless, therefore, the master or owner of the ship chooses thus to appear, it is not supposed to have been the intention of this rule to authorize coercive proceedings against him for the purpose of compelling him to answer either the libel or interrogatories: nor, am I aware that it anywhere appears to be otherwise by the general principles of admiralty procedure (of which this rule is but declaratory) governing such cases. It is otherwise in suits *in perso-*

nam; and if, in a suit *in rem*, the libellant desires to obtain the personal answer of the master, but fears that he may not appear, he may in some cases attain this end by joining the master as defendant. The necessity of special interrogatories, however, is not likely very often to arise.

SCHEDULES AND WRITINGS ANNEXED TO THE LIBEL.

When the libellant's demand consists of matters of account, or is composed of several items, as generally happens in suits by materialmen, for example, it is usual, and highly expedient, to annex to the libel a schedule containing an exact statement of the several charges on which the action is founded, including credits for partial payments or advances, if any, and showing the exact balance claimed. This is always done in suits for mariners' wages. The schedule ought to be distinctly referred to, and its truth asserted in the libel; and when this is done, if the libel shall be allowed to be taken *pro confesso*, and the case is apparently free from just suspicion, the court may be warranted in pronouncing for the balance claimed, without proof *aliunde*. It is usual, also, if not indeed absolutely necessary, when the suit is founded upon a written instrument, as a charter-party, or a bottomry or respondentia bond, or other express hypothecation, to annex to the libel a true copy of such instrument.

Having completed this brief survey of the several parts of the libel, it remains, for the convenience of the inexperienced practitioner, to give a few precedents, in which they shall be exhibited in union.

I.

**LIBEL IN A SUIT IN REM, FOR LABOR, MATERIALS OR SUPPLIES
FURNISHED, IN REPAIRING, FITTING OUT, OR FURNISHING A
FOREIGN MARITIME VESSEL.**

DISTRICT COURT OF THE UNITED STATES OF AMERICA.

DISTRICT OF ——— :—

IN ADMIRALTY.

*To the Judge of the District Court of the United
States for the District of ———.*

A. B., of ———, ——— [Here state the libellant's place of residence, and also his occupation, as shipwright, ship-chandler, sail-maker, rope-maker, blacksmith, merchant, etc., as the case may be], exhibits this his libel against the ship Helen (whereof C. D. is or lately was master), now lying at the port of ———, in the district aforesaid, and within the admiralty and maritime jurisdiction of this honorable court, her, boats(a), tackle, apparel and furniture, and against all persons lawfully intervening for their interest therein, in a cause of contract, civil and maritime. And thereupon the said A. B. doth allege and articulately propound as follows, to wit:

First. That the said ship Helen was, at the time when the repairs [or supplies] hereinafter mentioned were made [or furnished], a foreign vessel, owned by some person or persons not residing in the State of [here insert the name of the state in which the services were rendered, or materials or necessities supplied], and who are to the libellant unknown [or, if the owner and his residence are known, state his name and residence], and is of the burthen of about ——— tons.

Second. That on or about the ——— day of ———, the said ship, then lying at the port of ———, in the State of [the state in which the services were rendered, or the materials or supplies furnished], and within the

(a) The 8th of the new Rules of Admiralty Practice contains the formula, "tackle," *sails*, apparel, furniture, *boats*, and *other appurtenances*. But I have met with no authority, and know of no reason for considering so prolix a description necessary. A judicial doubt has, however, been expressed, whether *boats* can properly be considered as comprised within the usual formula, "tackle, apparel and furniture;" and it appears that in the English vice-admiralty courts in the West Indies, at least, *boats* are expressly named. I have, therefore, deemed it expedient to imitate this example.

admiralty and maritime jurisdiction of the United States^(a), the said C. D., master of the said ship Helen, represented to the libellant that the said ship stood in need of the repairs [or supplies] hereinafter mentioned, in order to render her seaworthy and competent to proceed to sea on her intended voyage, and requested the libellant to make such repairs [or furnish such supplies]; and that the libellant, in pursuance of such representation and request, on the day and at the place last above mentioned, undertook to repair and did repair [or to furnish supplies for, and did supply] the said ship, by removing from her hull several courses of worn and decayed plank, and replacing them by new plank; making and hanging a new rudder; putting a new fluke on her sheet anchor; calking her upper seams; mending her sails and rigging [etc., as the case may be; or, by furnishing, for the use of the said ship, one new chain cable, one long boat, four spars, one topsail, a large quantity of provisions, consisting of ship bread, vegetables, pork and other ship stores, etc., as the case may be]; which repairs [or supplies] and the value thereof are truly and more particularly stated and described in the schedule or account hereunto annexed, and which amount in the whole to ——— dollars and ——— cents.

Third. That the said repairs [or supplies] were so made [or furnished] by the libellant, on the credit of the said ship, as well as of the owners and the said master thereof; and were suitable, proper and necessary for the purpose of enabling the said ship to proceed to sea with safety.

Fourth. That the aforesaid sum of ——— dollars and ——— cents still remains wholly unpaid and due to the libellant [or, if a part has been paid, add, except the sum of ———, mentioned in the schedule or account hereunto annexed], although the libellant has often requested the said C. D., the aforesaid master of the said ship, to pay the same.

Fifth. That all and singular the premises are true.

Wherefore the libellant prays that process in due form of law^(b) may issue against the said ship Helen, her boats, tackle, apparel and furniture;

(a) This allegation is usual, but in cases of contract, is not supposed to be necessary in the American courts, the jurisdiction depending, not upon the particular place where the vessel happened to be when the contract was entered into or performed, but upon the character and proper use of the vessel. Thus, if a vessel adapted to maritime navigation, and usually employed in that business, should obtain necessary repairs or supplies while lying in some inland cove or creek not within the admiralty jurisdiction, the case, it is presumed, would still be within the admiralty jurisdiction.

(b) There being but one form of process adapted to a suit *in rem*, viz., a warrant of arrest against the vessel, etc., which contains also a command to the

and that this honorable court will pronounce for his aforesaid demand, and decree the same to be paid with costs; and for such other and further relief and redress as to right and justice may appertain, and as the court is competent to give in the premises(a). [And if the libellant sees fit to put interrogatories, then add: And farther, that the said C. D., or other person or persons intervening for his or their interest, may be required to answer the interrogatories hereunto annexed.]

(Signed) A. B., *Libellant*.

G. H., *Proctor*.

On the ——— day of ———, appeared personally }
A. B., the above named libellant, and was sworn }
to the truth of the foregoing libel.

Before me J. K., *Clerk* [or *Commissioner*].

INTERROGATORIES REFERRED TO IN THE FOREGOING LIBEL.

1. ———.
2. ———, etc.

SCHEDULE OR ACCOUNT REFERRED TO IN THE FOREGOING LIBEL.

——— feet of ship plank - - - - - \$——
&c.

Of which there has been paid to the libellant the sum of \$——

II.

LIBEL BY A MATERIAL-MAN, IN A SUIT *IN PERSONAM* AGAINST THE MASTER OR OWNER. IN ADMIRALTY.

To the Judge of the District Court of the United States for the District of ———.

A. B. of ———, ———, exhibits this his Libel, against C. D., now or lately master of the ship Helen [or against L. M., owner of the ship Helen, whereof

marshal to cite and admonish all persons having the requisite interest to appear and answer the libellant, it is unnecessary, in the prayer of process, to specify its form.

(a) This general prayer, it is supposed, supersedes the necessity of a specific prayer for a decree that the vessel be sold, if necessary, to pay the sum awarded.

C. D. now is or lately was master], in a cause of contract, civil and maritime. And thereupon the said A. B. doth allege and articulately propound as followa, to wit:

First. That on or about the — day of —, the said ship Helen, then lying at the port of —, and being a maritime vessel, employed in navigating the high seas, and waters within the flux and reflux thereof, he the said libellant, at the request of the said C. D., he the said C. D. then being master of the said ship, then and there undertook to repair and did repair [or, to furnish supplies for, and did supply] the said ship by removing [etc., as in the second article of the last precedent, to the end thereof].

Second. That the aforesaid sum of — dollars and — centastill remains wholly unpaid and due to the libellant [or, if part has been paid, add, except the sum of —, mentioned in the schedule or account hereunto subjoined], although the libellant has often requested as well the said L. M., owner as aforesaid, as the said C. D., master as aforesaid of the said ship, to pay the same.

Third. That all and singular the premises are true.

Wherefore the libellant prays that a warrant in due form of law may issue to the marshal of the district aforesaid, commanding him to arrest the said C. D. [or L. M.], and to have him forthcoming before this honorable court on the — day of —, or on such other day, to be inserted in the said warrant, as the court shall direct, then and there to answer the libellant in the premises [or, if it is desired that the warrant shall contain a clause of attachment against the goods and chattels, credits and effects of the defendant, then add: and further commanding the aforesaid marshal, if the said C. D. (or L. M.) shall not be found within the district aforesaid, to attach the goods and chattels, and, for want thereof, the credits and effects of the said C. D. (or L. M.) in the hands of E. F. of —, merchant; or, if the libellant sees fit to sue out a simple monition, instead of a warrant of arrest, then the form of the prayer will be: Wherefore the libellant prays that process of monition may issue to the marshal of the district aforesaid, commanding him to cite and admonish the said C. D. (or L. M.) to appear before this honorable court on the — day of —, or on such other day, to be inserted in the said monition, as the court shall direct, then and there to answer the libellant in the premises], according to the course of courts of admiralty, and the rules and practice of this honorable court in civil causes of admiralty and maritime jurisdiction; and that this honorable court will pronounce for the libellant's aforesaid demand against the said C. D. (or L. M.), and decree the same to be paid with costs, and for such other and further relief and redress as to right and justice appertain, and as the court is com-

petent to give in the premises [and if a prayer to such effect is deemed expedient, then add: and further, that the said C. D. (or L. M.) may be required to answer the interrogatories hereto subjoined. See the last precedent].

(Signed) A. B., *Libellant*.

G. H., *Proctor*.

On the — day of —, appeared personally }
A. B., the above named libellant, and was }
sworn to the truth of the foregoing libel. }

Before me, J. K., *Clerk* [or *Commissioner*].

SCHEDULE OR ACCOUNT (*See the last Precedent*).

III.

LIBEL IN A SUIT *IN REM*, BY A MATERIAL-MAN, UNDER THE ACT OF FEB. 26, 1845, "EXTENDING THE JURISDICTION OF THE DISTRICT COURTS TO CERTAIN CASES UPON THE LAKES AND NAVIGABLE WATERS CONNECTING THE SAME."

IN ADMIRALTY.

To the Judge of the District Court of the United States for the District of —.

A. B. of —, —, exhibits this his libel against the steamboat (a) *Juno* (whereof C. D. is or lately was master), her engine and machinery (b), boats tackle, apparel and furniture, and against all persons lawfully intervening for their interest therein, in a cause of contract, civil and maritime. And thereupon the said A. B. doth allege and articulately propound as follows, to wit:

(a) This is the appellation by which vessels propelled by steam are usually designated in this country, and it is used in the acts of Congress relative to such vessels. In the English Court of Admiralty, the shorter and better appellation *Steamer* is used.

(b) The addition of the words "engine and machinery" to the usual formula, in a proceeding against a steamer, are not supposed to be necessary; but as the practice of using them prevails, to some extent, at least, in our courts, the author deems it expedient not to omit them.

First. That the said steamboat Juno, now lying at —, in the district aforesaid, is a vessel of about — tons burthen [or, indifferently, of more than twenty tons burthen], and, at the time when the cause of action hereinafter stated and set forth arose, was enrolled and licensed for the coasting trade, and was employed in the business of commerce and navigation between ports and places in different states and territories of the United States, upon the lakes and navigable waters connecting the said lakes(a).

Second. That on or about the — day of —, while the said steamboat Juno was lying at — in the district aforesaid, the said C. D., master as aforesaid, represented to the libellant that the said steamboat stood in need of the repairs [or supplies] hereinafter mentioned, in order to render her seaworthy and competent to proceed on her intended voyage, and requested the libellant to make such repairs [or furnish such supplies]; and that the libellant, in pursuance of such representation and request, on the day and at the place last above mentioned, undertook to repair, and did repair [or to furnish supplies for, and did supply] the said steamboat, by [here enumerate the repairs made or supplies furnished]; which repairs [or supplies], and the value thereof, are truly and more particularly stated and described in the schedule or account hereunto annexed, and which amount in the whole to — dollars and — cents.

Third. That the said repairs [or supplies] were so made [or furnished] by the libellant on the credit of the said steamboat, as well as of the owners and the said master thereof; and were suitable, proper and necessary for the purpose of enabling the said steamboat to depart with safety.

Fourth. That the aforesaid sum of — dollars and — cents still remains wholly unpaid and due to the libellant [or, if a part has been paid, then add, except the sum of —, mentioned in the schedule or account hereunto annexed], although the libellant has often requested the said C. D., the aforesaid master of the said steamboat, to pay the same.

Fifth. That all and singular the premises are true.

Wherefore [etc., as in the first precedent, substituting "steamboat Juno" for "ship Helen," to the end].

To frame a *libel in personam against the master or owner, under the act of February 26, 1845*, the pleader will find the last two precedents a sufficient guide.

(a) These allegations, it will be observed, are necessary to bring the case within the act.

IV.

LIBEL BY A MATERIAL-MAN OR SHIPWRIGHT, IN A SUIT *IN REM*, FOR MATERIALS FURNISHED OR LABOR BESTOWED IN THE BUILDING OF A SHIP IN A PORT OF THE STATE IN WHICH THE OWNER RESIDES, AND WHERE A LIEN IS CONFERRED BY THE LOCAL LAW.

IN ADMIRALTY.

To the Judge of the District Court of the United States for the District of —.

A. B. of —, —, exhibits this his libel in a cause of contract, civil and maritime, against the ship or vessel *Minerva*, whereof C. D. now is or lately was master [or, if the ship has not yet received a name and no master has been appointed, then describe her as a *new ship*, to which, to the knowledge or belief of the libellant, no name has yet been given], now lying at —, in the district aforesaid, and within the admiralty and maritime jurisdiction of this honorable court. And thereupon the libellant doth allege and articulately propound as follows, to wit:

First. That on or about the — day of —, at —, in the State of —, a contract was entered into between E. F., of —, and the libellant, whereby the libellant agreed to furnish materials for [or to build] a ship for him the said E. F., and the said E. F. agreed to pay to the libellant therefor the sum of —; that the libellant thereupon then and there entered upon the execution of the said contract on his part, and, in pursuance thereof, did furnish the materials for [or build] for the said E. F. the said ship *Minerva* [or the *New Ship*] in the introductory part of this libel mentioned, and completed the said agreement on his part [or finished the said ship] on or about the — day of —.

Second. That the said ship is a maritime vessel of about — tons burthen, employed [or designed to be employed] in the business of navigation and commerce on the high seas, and on waters within the admiralty and maritime jurisdiction of the United States(a).

(a) It is a rule of pleading, as the learned reader is aware, that in an action founded upon a statute, the plaintiff is bound to state every fact necessary to inform the court that his case is within the statute. In a suit in the admiralty, brought to enforce a lien conferred by a state law, therefore, it is not only necessary to assert all the conditions on which the attachment of the lien depends, but it may moreover be necessary, and certainly is advisable, also to negative the

Third. That in undertaking to furnish the materials for [or to build] the said ship, the libellant relied as well upon the credit of the said ship and the lien thereupon which would accrue to him for the materials and labor to be by him so furnished, in virtue of the laws of the said State of —, as upon the personal credit of the said E. F(a).

prescribed conditions on which it is to cease. Thus a statute of the State of New-York gives a lien for any debt of not less than fifty dollars, contracted on account of labor performed, or materials or supplies furnished for or towards the building, repair or outfit of vessels; but the act also declares that, in case the vessel departs from the port where the debt was contracted to some other port in the State, the lien shall cease at the expiration of twelve days thereafter; and in case of her departure from the state, shall cease immediately.

It is true that, according to another rule of pleading, matter which goes to defeat the action need not be stated by the plaintiff, but may be left to be brought forward, if the defendant sees fit, by way of defence; and there may be ground for contending that the restrictions, prescribed with respect to the lien given by this act, are of this nature. But the safer course, in an action to enforce a lien accruing in virtue of the New-York statute, undoubtedly would be to subjoin to the second article, as it now stands in the text, an allegation to the following effect: *And that the said ship has at no time departed from the aforesaid port of — [or, the said ship has at no time departed from the State of New-York, and that twelve days have not yet elapsed since she first departed from the aforesaid port of —].*

(a) When, as is likely to be generally the case, the action is brought in a district comprising the state, or a part of it, by the laws of which the lien to be enforced is given, a simple reference to such laws, in the form given in the text, is supposed to be sufficient. But if an action may, in any case, be maintained in virtue of a lien given by the laws of one state, in a district court sitting in another state, in such case it may be necessary expressly to aver that a lien is given by the local law, and to recite the act conferring it; the states, as political communities, being foreign with respect to each other, except so far as it is otherwise provided by the Constitution of the United States. The form of the allegation and recital may be as follows: That the libellant is advised and believes, and therefore alleges, that he has a lien upon the said ship, for the materials and labor so furnished by him as aforesaid, in virtue of an act of the legislature of the said state of —, entitled "An act," etc., passed on the — day of —, Anno Domini —; which said act, or so much thereof as is pertinent to this action, is in the words following, that is to say: Be it enacted, etc.

Whether in reality the admiralty jurisdiction extends to a lien created by the law of another state, provided it is not, by the express terms of the law, declared to be lost by the departure of the vessel from such state, is an undecided question. The exercise of such a jurisdiction would be highly inconvenient, and would be

Fourth. That the said sum of — still remains wholly unpaid and due to the libellant [or, if a part has been paid, then add: except the sum of —, which was paid on the — day of —, leaving a balance of — still due to the libellant], although he has often requested the said E. F. to pay the same. .

Fifth. That all and singular the premises are true.

[The prayer of process, relief and redress, etc., etc., the same as in the first precedent, except the schedule.]

When the suit is *for materials furnished or labor performed towards the building, or for the repair of a vessel; or for supplies furnished in fitting out a vessel*; the foregoing precedents, it is hoped, will afford the pleader a sufficient guide.

likely moreover to lead to mistakes and injustice, on account of the difficulty of ascertaining with certainty all the provisions of the local laws, and their constructions by the local tribunals. State laws of this description are mere municipal regulations, looking to the security of the citizens of the state through the instrumentality of its own tribunals, and (so far as I am acquainted with them) prescribing the mode in which the remedy is to be enforced. To hold that a shipwright or material-man, possessing a lien thus acquired, may, also, at his election, institute an admiralty suit in the same state, may not be very unreasonable or otherwise objectionable. But to whichever form of remedy he may resort, it is to the state law alone that recourse must be had to ascertain the nature of the lien; and it seems to me to be at least questionable whether such a lien can properly be considered as subsisting when the vessel is absent from the state, by the laws of which it is conferred, even though the law itself is silent with respect to its continuance.

These observations will readily be understood to relate especially to liens given by the *statute* law of the state. There may be ground for a distinction in this respect, between such a lien, and that given by the common law to the shipwright while in actual possession of the vessel on which his labor has been bestowed; as where a vessel, having been built in one state, is carried by the shipwright or his agent for delivery in another state, where he may see reason for desiring to enforce his lien. But statutes are to be interpreted and applied according to the intention of the legislature; and to give to a statute of the kind in question an extra-territorial application, would certainly be to transcend its real design.

V.

LIBEL BY A MATERIAL-MAN, IN A SUIT *IN REM* AGAINST THE SHIP AND FREIGHT.

[The remedy of the material-man against the ship, as likewise in general that of other lien-holders, extends also, as we have seen, to the freight which has been earned by the ship, but has not yet been paid by the owner or consignee of the cargo; or which, having been paid to the master, still remains in his hands. And in relation to such cases, the 38th Rule provides that "In cases of mariners' wages, or bottomry or salvage, or other proceedings *in rem*, where freight or other proceeds of property are attached to or are bound by the suit, which are in the hands or possession of any person, the court may, upon due application by petition of the party interested, require the party charged with possession thereof to appear, and show cause why the same should not be brought into court to answer the exigency of the suit," etc. This rule furnishes no guide for the structure of that part of the libel which relates to the freight, and I have not met with any precedent of such a libel. It is presumed, however, that the suit ought to be described in the introductory part of the libel to be against the ship and freight, and to name the person from whom the freight is due, or in whose hands it may be. The libel, it is supposed, also, ought to pray process of *attachment* against the freight, as well as of monition to the person named, to show cause why the freight should not be applied to the satisfaction of the libellant's demand.

The rule above cited, it will be seen, speaks of an order requiring the freight to be paid into court, to be granted "upon due application *by petition*." This language may seem to infer the necessity, in all cases, of a separate and distinct petition for this purpose. But the design of the rule doubtless was to confer, or rather to recognize this right as one which might be exercised at any time during the pendency of the suit; and if some reason for its exercise should appear in the progress of the suit, which did not exist, or was unknown, at its commencement, a petition would, of course, be

necessary. But where the reason exists, and is known in the beginning, it is presumed that the "petition" may properly be embodied in the prayer of the libel, and the necessary monition be prayed for and incorporated in the original process.

The following precedent is drawn according to these views.]

IN ADMIRALTY.

To the Judge of the District Court of the United States for the District of —.

A. B. of —, —, exhibits this his libel, against the ship or vessel *Venus*, whereof C. D. now is or lately was master, her boats, tackle, apparel and furniture, and also against the freight earned by the said ship and due from E. F. of — [here state the residence and occupation of the person from whom the freight is due. If the freight has been paid to the master, then the form will be, and also against the freight earned by the said ship, and now in the hands of the said C. D., master as aforesaid], and against all persons lawfully intervening for their interest therein, in a cause of contract, civil and maritime. And thereupon the said A. B. doth allege and articulately propound as follows, to wit:

First. [The same as in the first precedent.]

Second. [The same as in the first precedent.]

Third That the said repairs [or supplies] were so made [or furnished] by the libellant, on the credit of the said ship and her earnings, as well as of the owners and the said master thereof; and were suitable, proper and necessary for the purpose of enabling the said ship to proceed to sea with safety.

Fourth. [The same as in the first precedent.]

Fifth. That all and singular the premises are true.

Wherefore the libellant prays that process in due form of law may issue against the said ship *Venus*, her boats, tackle, apparel and furniture, and also against the said freight earned by the said ship; and that in and by the said process, the marshal or his deputy whosoever may be commanded to cite and admonish the aforesaid E. F. [or C. D. master as aforesaid] to appear before this honorable court, on the day and at the place in the said process for that purpose to be inserted, to show cause, if any he has, why the said freight should not be paid to the libellant to satisfy his aforesaid demand [and if it is desired to have the freight paid into court, then add: and also to show cause, if any he has, why the freight so due from him the said E. F., or in the hands of him the said C. D., should not be forthwith

paid into the registry of the court, there to remain subject to the further order of the court]; and that this honorable court will pronounce for the aforesaid demand of the libellant, and decree the same to be paid, with costs, and for such other and further relief and redress as to right and justice may appertain, and as this court is competent to give in the premises [and if the libellant sees fit to propound interrogatories, then add: And further that the said C. D., or *the said C. D. and E. F.*, or other person or persons intervening for his or their interest, may be required to answer the interrogatories hereunto subjoined]. (Signed) [*&c.* as in the first precedent].

VI.

LIBEL IN A SUIT *IN REM*, BY A MARINER, FOR WAGES^(a).

IN ADMIRALTY.

*To the Judge of the District Court of the United States
for the District of ———.*

A. B., of ———, late mariner on board the ship or vessel *Frances*, now lying at the port of ———, in the district aforesaid, and within the admiralty and maritime jurisdiction of this honorable court, exhibits this his libel against the said ship or vessel, whereof C. D. now is or lately was master, her boats, tackle, apparel and furniture, and against all persons lawfully intervening for their interest therein, in a cause of subtraction of wages, civil

(a) The preliminary Summons and Certificate may be as follows:

UNITED STATES OF AMERICA,

DISTRICT OF ———, ss.

*To C. D., Master of the Ship [or brig, or steamboat,
etc., as the case may be] called the ———.*

You are hereby summoned to appear before me, R. S., Judge of the United States for the District of ——— [or, justice of the peace in and for the county of ———; or, a commissioner to take acknowledgments of bail, affidavits and depositions, etc.], at my office, No. ———, ——— street, in the city of ——— [or as the case may be], on ——— the ——— day of ———, at — o'clock in the ——— noon, to show cause, if any you have, why admiralty process should not issue out of the District Court of the United States for the district aforesaid, against the above named ship [or etc. as the case may be], whereof you are master, her tackle, apparel and furniture, to answer the demand of A. B., late a mariner on board the said ship [or etc.], for his wages as such mariner, earned on her voyage from the

and maritime. And thereupon the said A. B. doth allege and articulately propound as follows, to wit:

First. That on or about the — day of —, A. D. —, the said ship or vessel Frances, whereof the said C. D. was master, being then in the port of —, and designed on a voyage upon waters within the admiralty and maritime jurisdiction of the United States, and of this honorable court, to wit, from the said port of — to —, and back to the said port of —(a), he the said C. D. did ship and hire the libellant to serve as a

port of — to the port of —, which voyage ended on the — day of —. [Or, if the vessel has been engaged in the coasting trade, and the engagement of the mariner was not for a single specific voyage, then say: for his wages for services rendered as such mariner on board the said ship [or, etc.], between the — day of —, and the — day of —.]

Given under my hand, this — day of —, A. D. 18—. (Signed) R. S.

I, R. S., Judge, etc. [or, a justice of the peace, etc., or, a commissioner, etc., as above], do hereby certify that there is, in my opinion, sufficient cause of complaint whereon to found admiralty process at the suit of A. B. for mariners' wages, against the ship [or, etc.] called the —, whereof C. D. is master, her tackle, apparel and furniture. Dated this — day of —, 18—. R. S.

(a) The voyage should, of course, be truly described. If it comprises several foreign ports, they should be named; as, for example, from the said port of — to Liverpool; thence to any other port in the Kingdom of Great Britain [or, thence to Rotterdam in the Kingdom of Holland, and thence back, etc.]. So if the voyage be a general trading voyage, or a coasting voyage, it should be so described; as, for example, from Boston to the Pacific, Indian and Chinese oceans or elsewhere, on a trading voyage, and from thence back to Boston; or, on a coasting voyage from Portland to Eastport in the State of Maine, thence to New-York, thence to Alexandria, thence to Norfolk in the State of Virginia, thence to St. Augustine in the State of Florida, thence to Charleston in South Carolina, etc., etc., and thence to Boston. (See *The Crusader*, Ware's R., 437.)

There are other descriptions of service, also, for which mariners are frequently hired. I refer especially to engagements to serve on board vessels employed in making regular trips between certain specified places, for the conveyance of passengers, or of passengers and merchandise, and occupying but a few days; as, for example, between Boston and New-York; and vessels employed in the domestic carrying trade, from the port to which they belong, to various other ports or places, according to the exigencies of commerce; as, for example, from the port of Buffalo, to Cleveland, Sandusky, Detroit, or other places on the great lakes. In such cases, seamen are usually shipped, not for a single trip or voyage, but for a certain period, as three months, or for the season of navigation; or, at the rate of so much a month, so long as they shall continue to serve; it being understood, in the latter case, that they may quit the service, or may be dis-

mariner on board the said ship for and during the said voyage, at the rate or wages of — dollars per month; and accordingly on or about the — day of —, the libellant entered on board and into the service of the said ship, in the capacity and at the monthly wages aforesaid, and signed the usual shipping articles or mariner's contract, which, for greater certainty, he prays may be produced by the said C. D. to this honorable court(a).

Second. That the said ship having taken in a cargo of divers goods and merchandise, proceeded on her said voyage with the libellant on board, and arrived at the said port of — on or about the — day of —, with the said cargo on board, which she delivered or otherwise disposed of, and then proceeded on her homeward bound voyage to the said port of —, where she arrived on or about the — day of —, with the libellant on board,

charged, at any reasonable time. In such cases the contract must, of course, be truly set forth. Thus, in the case first above mentioned, the proper form of the allegation would be that the said ship or vessel Frances, whereof, etc., being then at, etc., and designed to be employed [or being employed] in performing regular trips on the high seas, and within, etc., from the port of — to the port of —, and back again, for the conveyance of passengers and merchandise, he the said C. D. did ship and hire the libellant to serve as a mariner on board the said ship, for and during the period of —, at the rate or wages of — [or, did ship and hire, etc., at the rate or wages of —, for and during such period as the libellant should continue to serve as such mariner; and so of the other case above mentioned].

(a) Contracts with mariners to serve as such, are, as we have seen, under certain limitations, required by law to be in writing; and unless they are so, the mariner is entitled to recover the highest rate of wages paid to any seaman shipped for the voyage, without regard to any mere verbal agreement that may have been entered into. It sometimes happens, nevertheless, that seamen are shipped without the observance of this injunction. In such cases, the allegation that the libellant signed shipping articles, is, of course, to be omitted, and the contract may be stated as follows: He the said C. D. did ship and hire the libellant to serve as a mariner on board the said ship, for and during the said voyage; and, accordingly, on or about the — day of —, the libellant entered on board and into the service of the said ship, in the capacity aforesaid.

The second article will require no variation. The third article may be as follows: That during all the aforesaid voyage, the libellant well and truly performed his duty on board the said ship in the capacity aforesaid, and was obedient to all the lawful commands of the said master and other officers on board the said ship; and he thereby became entitled by law to demand and receive, and well and truly deserved, the wages of — dollars per month as schedulate, so much or greater wages having been paid to one or more other seamen shipped for the voyage aforesaid, and no shipping articles or mariners' contract having been signed by the libellant.

and was there safely moored; and the said C. D. discharged the libellant from the service of the said ship, without paying him the wages due to him for the said voyage [or, if a part has been paid, then say, except the sum of * —], though often applied to and requested to pay the same.

Third. That during all the aforesaid voyage, the libellant well and truly performed his duty on board the said ship in the capacity aforesaid, and was obedient to all the lawful commands of the said master and other officers on board the said ship, and well and truly deserved the wages of — dollars per month as schedule.

Fourth. That all and singular the premises are true.

Wherefore the libellant prays that process in due form of law may issue against the said ship Frances, her boats, tackle, apparel and furniture, and that this honorable court will pronounce for the wages aforesaid, and decree the same to be paid with costs, and for such other and further relief and redress as to right and justice may appertain and as the court is competent to give in the premises [and if the libellant sees fit to put interrogatories, then add: and further, etc., *as in the first precedent*].

(Signed) A. B., *Libellant.*

G. H., *Proctor.*

On the — day, etc., *as in the first precedent.*

INTERROGATORIES REFERRED TO IN THE FOREGOING LIBEL.

1. —.
2. —.

SCHEDULE TO WHICH THE FOREGOING LIBEL REFERS.

Wages from the — day of —, 18—, to —, 18—, —	
months and — days, at — dollars per month	- \$
Deduct	- \$
	\$
	==

VII.

**LIBEL IN A SUIT IN PERSONAM, BY A MARINER, FOR WAGES,
AGAINST THE MASTER OR OWNER.**

IN ADMIRALTY.

*To the Judge of the District Court of the United States
for the District of —.*

A. B. of —, late mariner on board the ship or vessel Frances, whereof
C. D. now is or lately was master [or if the suit be against the owner, then

add: and E. F. of —, —, now is or lately was owner], exhibits this his libel against the said C. D. [or E. F.], in a cause of subtraction of wages, civil and maritime. And thereupon the said A. B. doth allege and articulately propound as follows, to wit:

First. That on about the — day of —, the said ship or vessel Frances, whereof the said C. D. was then master [or if the suit be against the owner, then add: and the said E. F. was then owner], being then in the port of —, and designed on a voyage upon the high seas, and on waters within the admiralty and maritime jurisdiction of the United States and of this honorable court, to wit, from the said port of — to — and back to the said port of —, he the said C. D. master as aforesaid did ship and hire [or if the suit be against the owner: he the said E. F. owner as aforesaid, did, by himself or by his agent, ship and hire] the libellant [etc. *as in the last precedent to the end of the fourth article*, and then add]:

Wherefore the libellant prays [etc. as in the second precedent, to the end thereof].

If the suit be against the *ship and freight*, or if it be *in rem* and *in personam*, as it may be for wages, the pleader will find the foregoing precedents a sufficient guide in framing the libel.

If the suit whether *in rem* or *in personam*, be instituted under the act of February 26, 1845, "extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same," the pleader, it is presumed, will find little difficulty, with the aid of the two last, and of the second and third of the preceding precedents, in adapting the libel to the case.

VIII.

LIBEL IN A SUIT *IN REM*, FOR THE NON-FULFILMENT OF A CONTRACT OF AFFREIGHTMENT FOR THE CONVEYANCE OF GOODS IN A GENERAL SHIP.

IN ADMIRALTY.

*To the Judge of the District Court of the United States
for the District of —*

A. B. of —, —, exhibits this his libel in a cause of contract civil and maritime, against the ship or vessel Mary, now lying at the port of

—, in the district aforesaid, and within the admiralty and maritime jurisdiction of this honorable court, whereof C. D. now is or lately was master, her boats, tackle, apparel and furniture, and against all persons lawfully intervening for their interest therein. And thereupon the said A. B. doth allege and articulately propound as follows, to wit:

First, That on or about the — day of —, the said ship or vessel Mary, whereof the said C. D. was master, being then in the port of —, and designed on a voyage upon the high seas, and on waters within the admiralty and maritime jurisdiction of the United States and of this honorable court, to wit, from the said port of — to —, the libellant being the owner of [here describe the goods shipped, as, for example, five hundred barrels of wheaten flour], of the value of —, made a contract with the said C. D. as such master, whereby he agreed, in consideration of certain freight, to convey the said flour from the said port of — to — aforesaid, and there to deliver the same in good order and condition, to —, saving and excepting only such loss and damage as might happen by perils of the seas(a); and that the libellant, on the same day, delivered to the said master the said flour in good order, and received from him a bill of lading therefor(b).

Second. That the said ship shortly afterwards departed on her said voyage; but the said C. D. master as aforesaid, not regarding his duty in that respect, nor his promise and undertaking to convey and deliver the said flour as aforesaid, did not so convey and deliver the same (although no danger of the seas prevented him from so doing); but on the contrary thereof, so negligently and carelessly conducted himself with respect to the said flour, that by and through the mere carelessness, negligence and improper conduct of the said C. D. and his mariners and servants, the said flour became and was wholly lost to the libellant [or wetted and greatly damaged, as the case may be](c); by reason whereof the libellant has sustained damage to the amount of —, for which he claims reparation in this suit.

(a) When there is a bill of lading, this exception should, of course, be stated as it is expressed in the bill of lading.

(b) Sometimes, especially in coasting voyages, there is no bill of lading; and when this is the case, the last allegation is, of course, to be omitted.

(c) This very summary statement of the breach of the contract is believed to be sufficient; but it may, nevertheless, in some cases, be advisable to narrate the circumstances which attended the disaster by which the loss or damage was occasioned; as that the ship, soon after leaving port, sprung a leak, whereby the goods were wetted, and spoiled or damaged; or that she ran upon a sandbar or reef, or was stranded on a certain shore, and that the goods were consequently

Third. That all and singular the premises are true.

Wherefore the libellant prays [etc. as in the first precedent].

If the suit be *in personam* against the master or owner, the pleader, it is hoped, will find it an easy matter, with the last and preceding precedents before him, to frame the libel.

IX.

LIBEL IN A SUIT *IN REM*, ON A CHARTER-PARTY, BY THE OWNER, AGAINST THE CARGO, FOR THE STIPULATED FREIGHT OR HIRE OF THE SHIP.

[This suit can be maintained, it will be remembered, only when the absolute or general owner continues owner for the voyage. When, by the terms of the charter-party, the charter is constituted owner for the voyage, *he*, being thus, *pro hac vice*, substituted in place of the general owner, may, in like manner, maintain a suit *in rem*, for the freight of merchandise belonging to a sub-shipper.

In the case of *Certain Logs of Mahogany*, 2 Sumner's R., 600-602, Mr. Justice STORY assumes that the lien of the ship-owner on the cargo, for freight, continues only so long as he retains possession of the cargo; and consequently that a stipulation in a charter-party

thrown or were washed overboard; or that she came in collision with another vessel, whereby she was caused to leak, and the goods were lost or injured; or that the goods were stolen or embezzled by the crew at sea, or by others in port. But as all the disasters above mentioned (except the last) may fall under the denomination of perils of the seas, the statement of their occurrence ought to be accompanied with the charges of negligence or of misconduct on which the libellant relies to show that they are not, under the actual circumstances of the case, to be so regarded: as that the ship was unseaworthy, by reason of not being staunch and tight when she left port, or of not having been provided with necessary charts, or not properly manned or sufficiently tackled or appareled; or that she deviated from her course, or did not keep a good lookout, or was otherwise carelessly or unskilfully managed; or that the goods were, by the direction of the master, and without the consent or knowledge of the libellant, stowed on deck; and the like.

for the payment of the freight on, or, at any rate, within a specified number of days after, the delivery of the cargo to the shipper or his consignee, would operate as a waiver of the lien. He shows, however, at the same time, that although the shipper cannot ordinarily insist on a delivery of the goods to him until the freight or hire is paid or secured, according to the terms of the agreement, yet, that on the other hand, the ship-owner is not at liberty to insist that the goods *shall not be landed* before such payment is made or such security is given; but that on the contrary, the shipper has a right, as it would seem, by the maritime law, to insist upon examining the goods, after they are unlivered, in order to ascertain whether they are damaged or not, before he makes himself liable at all events for the freight. An unlivery of the cargo, is, therefore, in all cases, perfectly proper; but unless the lien thereon, for freight or hire, has been waived, the ship-owner has a right, notwithstanding, to detain the cargo in his custody, until the freight or hire shall have been paid or secured. The modern Code of Commerce of France (liv. 2, tit. 8, art. 306) contains a provision to this effect. It declares that the master cannot retain the merchandise on board his vessel, for default of payment of its freight; but he may, at the time of unlading, insist on the deposit of it in the hands of a third person, until such payment. Mr. Justice STORY quotes this provision as in substantial accordance with what he understands to be the general maritime law upon the subject. This libel is intended to be framed in conformity with this view of the law. The preservation of the lien, it will be seen, involves some practical inconveniences, which the Commercial Code of France aims to diminish, by the further provision that the lien for freight shall continue for the space of fifteen days after the delivery of the goods, provided they have not passed into the hands of third persons (liv. 2, tit. 8, art. 307). This provision supersedes the necessity of insisting on the right of retention, except under circumstances demanding extraordinary precaution.]

IN ADMIRALTY.

*To the Judge of the District Court of the United States
for the District of —.*

A. B. of —, —, exhibits this his libel against [here describe the goods proceeded against, as, for example, ten bales of blue broadcloths, ten

boxes of steel cutlery, etc.], lately laden on board the ship *Eliza*, whereof C. D. now is or lately was master, and which — [broadcloths or cutlery, or, as the case may be] are now in the hands of I. J. [or in the custody of the master, or of the libellant, as the case may be], at — in the district aforesaid, and within the admiralty and maritime jurisdiction of this honorable court, and against all persons lawfully intervening for their interest therein, in a cause of contract civil and maritime. And thereupon the said A. B. doth allege and articulately propound as follows, to wit:

First. That on the — day of —, at —, the libellant, being the owner of said ship *Eliza*, by a certain charter-party of the affreightment (a copy whereof is hereto annexed) then and there made and concluded between him, the libellant, of the one part, and G. H., of —, —, of the other part, did let to freight the aforesaid ship, whereof the said C. D. was then master, with the appurtenances to her belonging, for a voyage on the high seas, and on waters within the admiralty and maritime jurisdiction of the United States and of this honorable court, to wit, from the port of — to —, and back again to the aforesaid port of —.

Second. That the libellant, in and by the said charter-party, and for the consideration thereafter mentioned, covenanted and agreed with the said G. H., that the aforesaid ship, in and during the voyage aforesaid, should be tight, staunch and strong, and sufficiently tackled and apparelled with all things necessary for such a voyage; and that it should be lawful for the said G. H., his agents or factors, as well at the port of — aforesaid as at — aforesaid, to load and put on board the said ship loading of such goods and merchandise as they should think proper, contraband goods excepted.

Third. That in consideration of the premises in the said charter-party expressed and hereinbefore stated, the said G. H., thereby agreed to pay to the libellant for the freight and hire of the said ship and appurtenances, the sum of — dollars per month, and so in proportion for a less time, so long as the said ship should be continued in the aforesaid service, in — days after her return to the said port of —, or, in — days after the said voyage shall be otherwise in any manner whatsoever determined, and notice thereof to the libellant. And the said G. H., in and by the said charter-party, further agreed to pay the charge of victualing and manning the said ship, and all port charges and pilotage during the aforesaid voyage, and to deliver the said ship on her return to the libellant or his order. All which, by the said charter-party, a copy whereof is hereunto annexed, reference being thereunto had, will fully appear.

Fourth. That afterwards, to wit, on the — day of —, the said vessel being then and there tight, staunch and strong, and every way properly fitted and manned for the voyage, in the aforesaid charter-party mentioned, the said C. D., master as aforesaid, did then and there, at the instance of the said G. H., receive and take on board the said ship a full cargo of lawful goods, and immediately thereafter set sail and proceeded to — aforesaid, where, on his arrival, he duly delivered the whole of the said cargo to the agents or consignees of the said G. H.

Fifth. That afterwards, to wit, on the — day of —, at — aforesaid, the said C. D., master as aforesaid, at the instances of the said G. H., or his agent, took on board the said ship another full cargo of lawful goods consisting of — hereinbefore mentioned, and immediately thereafter set sail and proceeded thence to the aforesaid port of —, where he arrived on the — day of —, and immediately gave notice of the arrival of the said ship and cargo to the said G. H., and proceeded to unload the said cargo; and for the purpose of preserving and maintaining the lien or privilege of the libellant therefor, the said master deposited the same in the hands of the aforesaid L. J., to be by him retained until the aforesaid freight or hire should be paid or secured, and who still retains the same in his custody [or, if the fact be so, then say: and for the purpose, etc., the said master retained and still retains the custody of the same; or, for the purpose, etc., the libellant took the same into his custody, and still retains the same].

Sixth. That the libellant has always, since the making of the aforesaid charter-party, well and truly performed and kept all and singular the covenants and undertakings by the said charter-party required to be performed and kept on his part; and has, at all times since the arrival of the said ship at the port of — aforesaid, been ready, and still is ready, to deliver the said cargo, or cause the same to be delivered to the said G. H., on his paying or securing the aforesaid freight or hire of the said ship.

Seventh. That the said G. H. has not paid to the libellant the aforesaid freight or hire, nor any part thereof, although often requested to do so, but on the contrary utterly neglects and refuses to pay the same.

Eighth. That all and singular the premises are true.

Wherefore the libellant prays that process, in due form of law, may issue against the said cargo; and that this honorable court will pronounce for his aforesaid demand [etc., as in the first precedent].

[A copy of the charter-party is to be annexed to the libel. The form of the instrument on which the foregoing precedent is supposed to be framed, is as follows]:

This CHARTER-PARTY of affreightment, indented, made, and fully concluded upon this — day of — in the year of our Lord one thousand eight hundred and —, between A. B. of —, owner of the good ship *Eliza*, of the burthen of — tons or thereabouts, now lying in the harbor of —, whereof C. D. is at present master, on the one part, and G. H., of —, on the other part, WITNESSETH, that the said A. B. for the consideration hereinafter mentioned, hath letten to freight the aforesaid ship with the appurtenances to her belonging, for a voyage to be made by the said G. H. from the port of —, to — and back again to the said port of —, where she is to be discharged (the danger of the seas excepted): And the said A. B., doth by these presents covenant and agree with the said G. H., in manner following, that is to say, that the said G. H. in manner following, that is to say, that the said ship, in and during the voyage aforesaid, shall be tight, staunch and strong, and sufficiently tackled and apparelled with all things necessary for such a vessel and voyage; and that it shall and may be lawful for the said G. H., his agents or factors, as well at the said port of — as at — aforesaid, to load and put on board the said ship, loading of such goods and merchandise as he shall think proper, contraband goods excepted.

In consideration whereof, the said G. H. doth by these presents agree with the said A. B. well and truly to pay, or cause to be paid unto him, the said A. B., in full for the freight or hire of the said ship and appurtenances, the sum of — per month, and so in proportion for a less time, so long as the said ship shall be continued in the aforesaid service, in — days after her return to the said port of —, or in — days after the said voyage shall be otherwise in any manner whatsoever determined, and notice thereof to the said A. B. And the said G. H. doth agree to pay the charge of victualing and manning the said ship, and all port charges, pilotage during said voyage; and to deliver the said ship, on her return to the said port of —, to the said A. B. or his order.

And to the true and faithful performance of all and singular the covenants, payments and agreements aforementioned, each of the parties aforementioned binds and obligates himself, his executors and administrators, in the penal sum of — dollars, firmly by these presents.

In witness whereof, the parties aforesaid have hereunto interchangeably set their hand and seals, the day and year above written.

Signed, sealed and delivered, }
in presence of }

(Signed)

A. B.
G. H.:

X.

LIBEL IN A SUIT *IN REM*, BY A SHIP-OWNER, AGAINST THE CARGO
OR GOODS TRANSPORTED, FOR THE FREIGHT THEREOF.

IN ADMIRALTY.

*To the Judge of the District Court of the United States
for the District of —.*

A. B. of —, —, exhibits this his libel, against [here describe the goods proceeded against, as, for example, twenty tons of Liverpool coal, or bar iron; or five boxes of figured muslins, or of silks], lately laden on board the barque Margaret, whereof C. D. now is or lately was master; which said — [coal, iron, muslins, silks, or as the case may be] are now in the hands of I. J. [or in the custody of the said master, or of the libellant, as the case may be], at — in the district aforesaid, and within the admiralty and maritime jurisdiction of this honorable court; and against all persons lawfully intervening for their interest therein, in a cause of contract civil and maritime. And thereupon the said A. B. doth allege and articulately propound, as follows, to wit:

First. That on or about the — day of —, the said barque Margaret, whereof the said C. D. was master, and the libellant was and still is the owner [or charterer], being at the port of Liverpool, in the Kingdom of Great Britain, and bound to New-York, the said master, at the request of G. H., of the city of Liverpool, merchant, agreed to receive and take on board the said barque the aforesaid —, and to convey the same to New-York aforesaid, and there to deliver the same in the like good order in which the said — were received on board, to E. F., merchant, there residing; he the said E. F. paying the usual and customary freight thereon [or, if the sum to be paid was agreed upon at the time of the shipment: he the said E. F. paying as and for the freight thereon the sum of —], the dangers of the seas excepted; for which said —, the said master gave to the said G. H. a bill of lading.

Second. That afterwards, to wit, on or about the said — day of —, at the port of Liverpool aforesaid, the said C. D., master as aforesaid, in pursuance of the said agreement, did receive and take on board the said barque the — aforesaid, and immediately [or soon] thereafter set sail and proceeded to New-York aforesaid, where he arrived with the said — in good order, on board, on the — day of —, and immediately gave notice to the said I. J. of the arrival of the said barque, and of the — aforesaid so laden on board thereof, and offered to deliver the said — to the said

I. J. upon the payment of the freight due thereon according to the aforesaid agreement.

Third. That afterwards, to wit, on the — day of —, the said freight not having in the mean time been paid or secured [or, that afterwards, to wit, on, etc., the said I. J. having declined, or having refused to pay the said freight; or having declined or having refused to pay the said freight until the said — had been landed, and an opportunity thereby afforded to inspect the same, for the purpose of ascertaining whether any damage had been done thereto during the voyage], he the said C. D., master as aforesaid, proceeded to unload the said —; and to the end that the lien or privilege of the libellant thereupon might not be lost, the said master deposited the same in the hands of the aforesaid I. J., to be by him retained until the aforesaid freight should be paid or secured, and who still retains the same in his custody [or if the fact be so, then say: and, to the end, etc., the said master retained, and still retains the same in his custody; or to the end, etc., the libellant took the same into his custody, and still retains the same].

Fourth. That the usual and customary freight for the conveyance of — (here specify the goods on account of which freight is claimed) from Liverpool to New-York, at the time of the making of the aforesaid agreement, was](a).

Fifth. That the said E. F., the consignee as aforesaid of the said —, hath not paid to the libellant the said freight nor any part thereof, etc. [as in the last precedent, to the end thereof].

[Suits like those to which the two last precedents relate, may also be maintained by the master, as the agent of the ship-owner or charterer. Suits for the like purpose may also be prosecuted *in personam*, against the shipper. With the aid of the foregoing precedents, there will be little difficulty in framing the libels in such suits.]

(a) If the sum to be paid for freight was specifically agreed upon, this article ought to be omitted, and the stipulated sum stated.

XI.

LIBEL IN A SUIT *IN REM*, ON A BOTTOMRY BOND GIVEN BY THE MASTER, AGAINST THE SHIP; OR AGAINST THE SHIP AND FREIGHT; OR AGAINST THE SHIP, FREIGHT AND CARGO.

[The master has no authority, as we have seen, to bind his owner personally by a bottomry contract; and therefore no suit *in personam* against the owner can be maintained on such a bottomry bond given by the master.]

IN ADMIRALTY.

To the Judge of the District Court of the United States for the District of —.

A. B. of Marseilles, in the Republic of France, merchant, exhibits this his libel against the brig Juliet, now lying in the harbor of — in the said district, and within the admiralty and maritime jurisdiction of this honorable court (whereof C. D. now is or lately was master), her boats, tackle, apparel and furniture [if the freight, or the freight and cargo, as well as the bottom, are hypothecated, then add: and against the freight earned by the said brig in the voyage hereinafter mentioned; or, against the freight, etc., and the cargo hereinafter mentioned, now (or lately) laden on board the said brig], and against all persons lawfully intervening for their interest therein, in a cause of bottomry, civil and maritime. And thereupon the said A. B. doth allege and articulately propound as follows, to wit:

First. That on or about the — day of —, while the said brig Juliet was in the Gulf of Lyons, on her voyage from New-York to Marseilles aforesaid, the said C. D. then being master of the said brig, she encountered a severe gale, whereby she sustained serious damage in her hull, sails and rigging, and two days thereafter entered the harbor of Marseilles aforesaid in a disabled state: that the said C. D. being under orders to take in a cargo at that port without delay, and to return therewith to New-York aforesaid, it became and was his duty forthwith to repair and refit the said brig, so as to enable him safely to undertake the execution of his aforesaid orders; that being in want of the funds necessary for this purpose, amounting to the sum of three thousand dollars, and having no other means of procuring the same, he the said C. D., master as aforesaid, borrowed the aforesaid sum of the libellant on bottomry, at the rate of twelve per centum premium on the

voyage aforesaid, designed from Marseilles to New-York; which said sum was, by the libellant, accordingly advanced to the said C. D. for the purpose aforesaid.

Second. That in consideration of the said sum of money so advanced, he the aforesaid C. D. by a certain bond or instrument of bottomry, bearing date at Marseilles aforesaid, the — day of —, by him duly executed in the presence of two credible witnesses, who respectively subscribed their names thereto as witnesses to the due execution thereof, bound the said brig, her boats, tackle, apparel and furniture [and (if the fact be so) also the freight which should become due for the aforesaid voyage; or the freight, etc., and also the cargo on board the said brig], for the payment of the aforesaid sum of three thousand dollars, together with the aforesaid premium thereon, amounting in the whole to the sum of three thousand three hundred and sixty dollars, at or before the expiration of five days after the safe arrival of the said brig at her moorings in the harbor of New-York; a copy of which bond is hereunto annexed.

Third. That the said brig having, by means of the said loan, been fitted for sea, proceeded with a cargo on board [if the cargo is hypothecated, it would be proper here to describe it, as thus: consisting of —], to New-York aforesaid, where she arrived in safety on or about the — day of —.

Fourth. That the aforesaid sum of three thousand three hundred and sixty dollars has not, nor has any part thereof, been paid to the libellant, nor to any other person authorized to receive the same in his behalf, although the said C. D. has often been requested to pay the same.

Fifth. That all and singular the premises are true.

Wherefore the libellant prays [etc., as in the preceding precedents].

FORM OF THE BOTTOMRY BOND ON WHICH THE FOREGOING LIBEL IS SUPPOSED
TO BE FOUNDED.

KNOW ALL MEN BY THESE PRESENTS, That I, C. D., master of the brig Juliet of New-York, of the burthen of — tons, now at her moorings in the harbor of Marseilles, in the Republic of France, for myself, and G. H. of New York, merchant, owner of the said brig, am bound to A. B. of Marseilles aforesaid, merchant, in the sum of six thousand dollars; for the payment of which sum to the said A. B., his executors, administrators or assigns, I bind myself, my heirs, executors and administrators, firmly by these presents. In witness whereof, I have hereunto set my hand and seal, this — day of —.

Whereas the above bound C. D. hath taken up and received of the said

A. B. the full and just sum of three thousand dollars upon the bottomry of the said brig Juliet, whereof the said C. D. is now master, at the rate of twelve per centum premium for the voyage from the port of Marseilles aforesaid to New-York, for the purpose of enabling him the said C. D. to procure the necessary repairs for the said brig, to fit her for sea, and he being destitute of the funds necessary therefor, and unable by any other means to obtain the same; in consideration whereof the usual risks of the seas, rivers, fires, enemies and pirates, are to be on account of the said A. B. For the further security of the said A. B., the said C. D., as such master, doth by these presents mortgage, hypothecate and assign over to the said A. B., his executors, administrators and assigns, the said brig, her boats, tackle, apparel and furniture [her freight; or, her freight, and also her cargo on board]; and it is hereby declared that the said brig Juliet [and her freight; or, her freight and cargo] is [or are] thus assigned over for the security of the aforesaid moneys so advanced to the said C. D., and shall be delivered to no other use or purpose whatever, until payment of this bond is made, with the premium due thereon.

Now THE CONDITION of this obligation is such, that if the above bound C. D., his heirs, executors, or administrators, shall and do well and truly pay to the said A. B. or to his attorney in New-York legally authorized to receive the same, his executors, administrators or assigns, the full and just sum of three thousand dollars, being the principal of this bond, together with the premium which shall become due thereupon, at or before the expiration of five days after the safe arrival of the said brig at her moorings in the harbor of New-York; or in case of the loss of the said brig, such average as by custom shall become due on the salvage; then this obligation to be void, and of no effect: otherwise to remain in full force and virtue.

Signed, sealed, and delivered

(Signed) C. D. [SEAL]

in presence of

J. K.; L. M.

XII.

LIBEL IN A SUIT *IN REM*, FOR PILOTAGE.

[The subject of pilotage being regulated, as we have seen, by the laws of the several states, sanctioned and adopted by an act of

Congress, the libel must, of course, be so framed as to show that the libellant is entitled to the compensation he seeks, according to the particular laws, if any, under which the service was performed. If it was rendered on waters through which none but licensed pilots could in such a case be lawfully employed, the libel must allege that the libellant was duly licensed. If the right to compensation, or the rate of compensation depends, in the case of an inward bound vessel, on the place where the libellant came on board, or upon the tonnage or draft of the vessel, or other circumstances, the requisite facts should be stated. So, also, if the law under which the service was rendered provides for the allowance of extra compensation in certain cases requiring extraordinary exertions, and such compensation is claimed, the facts and circumstances on which the claim is founded should be briefly set forth in the libel.

If the service is performed on waters not embraced by the state law, or under circumstances which exempt the case from its operation, it will, of course, be governed by the general principles applicable to other services rendered. If the amount of compensation was fixed by previous voluntary contract, that will be the measure of the sum to be awarded; otherwise the libellant will be entitled to such reward as he reasonably deserves to have, and the libel must in either case be framed accordingly.

The following precedent of a libel in a suit for piloting a vessel into the port of New-York by way of Sandy Hook, it is hoped, will serve as a sufficient guide in cases of this nature; and, by the aid of the antecedent precedent, may be adapted to a suit against the ship and master, this being one of the three cases designated by the new Rules in which a joint proceeding *in rem* and *in personam* (suits for wages and collision being the other two) may be maintained. (See Rules XIII., XIV., XV.) The pleader will find it easy, also, to frame a libel *in personam* against the master; he being in this case, as in all others of contract entered into by him, personally liable, and being moreover expressly declared to be so by one of the above cited Rules.]

IN ADMIRALTY.

To the Judge of the District Court of the United States for the District of —.

A. B. of the city of New-York [or of South Amboy in the State of New Jersey], exhibits this his libel in a cause of pilotage, civil and maritime, against the ship *Miranda* (whereof C. D. now is or lately was master), now lying at the port of — in the district aforesaid, and within the admiralty and maritime jurisdiction of this honorable court, her boats, tackle, apparel and furniture, and against all persons lawfully intervening for their interest therein, in a cause of pilotage, civil and maritime. And thereupon the said A. B. doth allege and articulately propound as follows, to wit:

First. That on or about the — day of —, the libellant was a pilot duly licensed and qualified according to the laws of the State of New-York [or of the State of New Jersey] and of the statutes of the United States in such case made and provided, to pilot vessels to and from the port of New-York, by way of Sandy Hook; that being then on board the pilot boat *Vigilant*, upon the high seas, and on waters within the admiralty and maritime jurisdiction of the United States, and of this honorable court, to wit, about one mile southeasterly from the white buoy on the eastern edge of the outer middle, near the bar, seeing a signal for a pilot from a ship approaching from the south-east, which proved to be the said ship *Miranda*, drawing — feet water, and bound to the port of New-York, he immediately went on board the said ship, whereof the aforesaid C. D. was then master, took charge of her helm, and piloted her safely to her anchorage [or moorings, or to a wharf, *describing it*] in the port of New-York aforesaid, as directed by the said master.

[If, owing to the tempestuous state of the weather, the disabled condition of the ship, or other cause, the service was attended with extraordinary danger, or required extraordinary exertion or skill, justly entitling the libellant, in his opinion, to extra compensation, state the circumstances in a separate article.]

Second. That for the services mentioned in the first article, the libellant is entitled by law to demand and receive, of and from the said master or owner of the said ship *Miranda*, the sum of —.

[If extraordinary services are set forth, as above mentioned, then add, in a separate article: That by reason of the extraordinary peril, care, skill and exertions mentioned in the second article, the libellant reasonably deserves to have and receive of and from the said master or owner the further sum of —.]

Third. That neither the said master nor the said owner has paid to the libellant either of the said sums of money or any part thereof, although often requested so to do; and the same remain wholly unpaid and due.

Fourth. That all and singular the premises are true.

Wherefore [etc., as in the first precedent.]

XIII.

LIBEL IN A SUIT *IN REM*, FOR WHARFAGE.

IN ADMIRALTY.

To the Judge of the District Court of the United States for the District of —.

A. B. of —, —, exhibits this his libel against the schooner Dolphin (whereof C. D. now is or lately was master), now lying at the port of — in the said district, and within the admiralty and maritime jurisdiction of the United States and of this honorable court, her boats, tackle, apparel and furniture, and against all persons lawfully intervening for their interest therein, in a cause of wharfage, civil and maritime. And thereupon the said A. B. doth allege and articulately propound as follows, to wit:

First. That the libellant is and at the times hereinafter mentioned was, the owner of a certain wharf in the harbor of the said port of —.

Second. That the said schooner Dolphin, being of the burthen of — tons or thereabouts, was, at the time hereinafter mentioned, a maritime vessel, employed in the business of navigation and commerce on waters within the admiralty jurisdiction of the United States and of this court.

Third. That the said schooner, on or about the — day of —, at the instance and request of the said C. D., then master thereof, was received by the libellants as such wharfinger, and moored at the said wharf, where, through the care of the libellant, his agents and servants, she has lain in safety to the present time.

Fourth. That the libellant is informed, and verily believes that the said C. D., master as aforesaid, is preparing, and intends very shortly to remove the said schooner from the said wharf, and immediately to proceed with her to sea, without the consent of the libellant, and without paying wharfage therefor(a).

(a) In the case of *Johnson v. The M'Donough*, Gilpin's R., 101, it was assumed by the late Judge HOPKINSON that the removal of the vessel from the wharf, with

Fifth. That according to the customary rate of compensation paid for the wharfrage of such vessels at the port aforesaid, the libellant is well entitled, by reason of the premises, to demand and have [or that by reason of the premises the libellant reasonably deserves to have], for the wharfrage of the said schooner, of and from the said C. D., as aforesaid, or from the owner of the said schooner the sum of —(a); and that neither the said master nor the owner has paid the same, nor any part thereof, although often requested, and that the same remains wholly unpaid and due to the libellant.

Sixth. That all and singular the premises are true.

Wherefore [etc., as in the first precedent.]

XIV.

The subject next in the order in which the several subjects of admiralty and maritime jurisdiction are treated of in the first volume of this work, is that of **CONTRACTS OF CONSORTSHIP**. The case in which the admiralty jurisdiction over contracts of this nature was affirmed by the Supreme Court, as we have seen, was a proceeding by petition in behalf of the owners of a vessel between which and another vessel a contract of consortship was alleged to exist, in virtue of which the petitioners claimed a right to a certain share of the salvage which had been awarded in the same court to the latter vessel, and which had not been paid over to the salvors. It was therefore not an original suit, but an intervention by third persons for their interest, against funds in court. If the money had been actually paid to the salvors, and thus placed beyond the control of the court, it may

the knowledge and consent of the wharfinger, extinguishes his lien for wharfrage; but he held that if she is afterwards brought back without fraud or force, the lien is revived.

(a) In an early case before Mr. Justice STONY, that learned judge felt himself constrained by the force of authorities, the reasonableness of which, however, he professed his inability to understand, to decide that where the wharfinger and shipowner enter into a personal contract for the payment of a specific sum for wharfrage, such contract supersedes the implied lien, which would otherwise result to the wharfinger by operation of law. *Ex parte Lewis*, 2 Gallison's R., 483, 485.

be supposed that a suit in the admiralty, *in personam*, might still have been maintained by the owners of the consort for the share of the salvage to which they were entitled; for although it would have been but equivalent to a suit at common law for the recovery of money had and received to the use of the libellants, yet, inasmuch as it would have been founded upon a maritime contract, the admiralty jurisdiction, it may be presumed, would have been held to extend to the case. Should a case arise, requiring a resort to this form of remedy, there can be little difficulty in framing the libel.

There seem to be sufficient reasons for holding that no mutual liens arise from a contract of consortship, and therefore no suit *in rem* can be maintained for their enforcement.

XV.

PROCEEDINGS FOR THE SURVEY AND SALE OF A VESSEL, AS
UNFIT FOR SEA, AND UNWORTHY OF REPAIR.

In the chapter on this subject in the first volume of this work, the course of proceeding for the survey and sale of vessels is briefly indicated; and the case of *Dorr v. The Pacific Insurance Company*, 7 Wheaton's R., 581 (5 Curtis's Decis. S. C., 338), is referred to as the authority for what is there said. The report contains a copy, duly authenticated, of the decree of condemnation and sale of an American ship, pronounced in the Vice-admiralty Court of the Island of New Providence; and the decree, according to the English practice, recites the antecedent proceedings at large. This is the only account I have anywhere met with, of the forms of procedure adapted to such a case. The proceedings seem to have been very regularly and properly conducted; and I can in no manner more satisfactorily and succinctly convey the information I desire, than by giving a summary of these proceedings, and subjoining thereto forms for the process therein referred to, and a few other brief directions.

The petition of the master, John S. Thompson, was preferred on the 8th of October, 1819; and set forth in substance that the ship

Holofern had departed from Wiscasset in the State of Maine, on the 9th of September, 1819, bound on a voyage to Havana in the Island of Cuba. That during the voyage, she had encountered a violent gale, which caused her to leak so badly that the master was obliged, after the crew had become exhausted by labor at the pumps, to run into the harbor of Nassau in the Island of New Providence, where he arrived on the 26th of September, and where the ship then was. That after unlading a part of the cargo, and examining into the condition of the ship, he conceived her not only unfit to proceed to sea again in her present state, but altogether unworthy of being repaired. He therefore prayed that a warrant might forthwith issue out of the court, "according to law, and the usage and practice of the said court in such cases, to cause the said ship to be surveyed and examined by persons duly competent in that behalf, who might report as to the true state and condition of the said ship."

Upon this petition a warrant or commission was issued; directed to two shipwrights, and another person late a master mariner, who, on the 19th of October, certified, on oath, that on the 8th of October they repaired on board the ship; but finding her no more than half discharged, they could not then proceed to examine into her state and condition. And they further certified, "that on the 16th of October, the ship being then nearly discharged, they were enabled to inspect and examine into her state and condition; and having done so, minutely and diligently, they found her to be in a very leaky state; and having at the same time caused a part of her inside ceiling to be stripped off, they discovered the said ship to be in a very decayed condition." And they further certified, "that they were of opinion that the said ship was altogether unworthy of being repaired, and that she ought to be condemned as being unsafe and unfit ever to go to sea again."

On the 20th of October, a "libel or information" was exhibited in the name of the master against the ship, giving "the court to understand and be informed" of the facts above detailed, praying that justice might be duly administered to the libellant; that the ship might, by the decree of the court, be condemned as unfit for further service, and, together with her boats, tackle, apparel and

furniture, be ordered to be sold by the marshal of the court; and that the proceeds thereof might be paid to the master, or his agent, for the use of the owners and proprietors and insurers thereof; and such other proceedings might be had and done in the premises as should be agreeable to law, and the style and practice of the Admiralty.

Upon the exhibition of this libel, a monition was issued, returnable on the 26th of October; when, no person having appeared to show cause why the ship should not be condemned agreeably to the prayer of the libellant, the judge having considered the whole proceedings had and done before him in the cause, did adjudge, pronounce and declare the said ship unfit for further service, and as such did condemn the said ship, and direct that the same, together with her boats, tackle, apparel and furniture, be forthwith sold by the marshal, and the proceeds paid to the master or his agents, for the use of the owners, proprietors and insurers thereof.

The address and commencement of the Petition may be as follows :

IN ADMIRALTY.

*To the Judge of the District Court of the United States
for the District of ———.*

The petition of J. W., master of the ship *Desdemona*, now lying at the port of ——— [or riding at anchor in the harbor of ———, or lying aground or stranded at ———, as the case may be], in the said district, and within the admiralty and maritime jurisdiction of the aforesaid court, respectfully shows :

First. That, etc.

The Warrant of Survey may be in the form following (See Marriott's Formulary, *passim*) :

UNITED STATES OF AMERICA,

DISTRICT OF ———, ss.

The President of the United States of America: To A. B. and C. D., shipwrights, and E. F., master mariner [or as the case may be], of ———, Greeting :

Whereas, the judge of the District Court of the United States for the District of ———, at the petition of G. H., master of the ship *Desdemona*,

now lying at the port of — [or riding at anchor in the harbor of —], hath decreed the said ship to be surveyed and examined, to the end that he may be advised of the state and condition of the said ship, and especially whether she is now fit to proceed to sea; and if not, whether she is worthy of being repaired. You are therefore by these presents empowered and authorized, and strictly charged and commanded, that you forthwith survey, inspect and examine the said ship; and that you transmit, together with these presents, to the aforesaid judge of the said court, without delay, a true and perfect certificate in writing by you subscribed, and under your corporal oaths, of the state and condition in which you shall find the said ship; that you certify, in like manner, whether the said ship is fit to proceed to sea; and, if not, whether she is worthy of being repaired. Witness the Honorable —, judge of the aforesaid court, at —, the — day of —, in the year of our Lord —.

L. J., Clerk.

K. L., Proctor.

The address, commencement and general frame of the Libel will, of course, be the same as in the preceding precedents, except that instead of the words "*doth allege and articulately propound* as follows, to wit," the nature of the proceeding seems to render it proper (in accordance with the form observed in the case of *The Holofern*) to say: *gives the aforesaid judge of the said court to understand and be informed*, as follows, to wit:

The form of the Warrant of Sale may be as follows:

UNITED STATES OF AMERICA,

DISTRICT OF —, ss.

The President of the United States of America: To the Marshal of the District of —, and to his deputy whomsoever, Greeting:

Whereas, the judge of the District Court of the United States for the District of —, in a certain business civil and maritime moved and prosecuted before him in the said court, against the ship *Desdemona* (whereof G. H. is now master), now lying, etc. [or, etc., as in the petition], her boats, tackle, apparel and furniture, and against all persons lawfully intervening for their interest therein, hath decreed a warrant to issue for the sale of the said ship (justice so requiring): You are therefore by these presents authorized and empowered, jointly and severally, and you are strictly charged and commanded, that you expose or cause the aforesaid ship, the *Desdemona*, her boats, tackle, apparel, furniture and other appurtenances, to be exposed to public

sale, and that you sell or cause the same to be sold to the best bidder; and that you bring or cause to be brought the money arising from such sale, into the registry of the aforesaid court, on or before the — day of — next, for the use of the persons who shall be entitled thereto; and that at the same time you duly transmit the account of such sale, subscribed by you, to the aforesaid judge of the said court, together with these presents. Witness the Honorable — —, judge of the aforesaid court, at —, the — day of —, in the year of our Lord —.

(Signed) [etc., as in the first precedent.]

XVI.

LIBEL IN A SUIT BY A CO-TENANT OWNING A MOIETY OR LESS THAN A MOIETY OF A SHIP, TO COMPEL HIS CO-TENANT TO GIVE SECURITY FOR HER SAFE RETURN.

IN ADMIRALTY.

To the Judge of the District Court of the United States for the District of —.

A. B., —, of —, exhibits this his libel against the brig Proserpine (whereof C. D. is or lately was master), now lying in the port of — in the said district, and within the admiralty and maritime jurisdiction of this honorable court, her boats, tackle, apparel and furniture, and also against E. F. of —, —, and all other persons lawfully intervening for their interest therein, in a cause of possession, civil and maritime. And thereupon the said A. B. doth allege and articulately propound as follows, to wit:

First. That the said brig is a maritime vessel of the burthen of — tons or thereabouts; that the libellant is the true and lawful owner of one equal moiety [or of two-fifth parts, or, as the case may be] of the said brig Proserpine, and the said E. F. is the owner of the other moiety [or remaining — parts] thereof.

Second. That the aforesaid E. F. being in possession of the said brig, and assumming and exercising the power of employing her according to his own will and pleasure, declares it to be his intention, and is making preparations to send the said brig on a voyage to —, under the charge of the aforesaid C. D., who has been constituted master for the said voyage by the aforesaid E. F. without consultation with the libellant.

Third. That the libellant disapproves of the said contemplated voyage, and of the appointment of the said C. D. as such master, and he has repeatedly informed the said E. F. of his objections thereto. That the libellant is willing, and has repeatedly offered and proposed to the said E. F. to send the said brig at their joint expense and risk, on some other, shorter or less hazardous voyage [or, as the case may be], to be mutually agreed upon between the said E. F. and the libellant, and under the charge of some other more competent and trustworthy master, to be by them jointly appointed [or, if the libellant desires to send the vessel on some particular voyage, the fact should be so stated]; but that the said E. F. utterly refuses to accede to the wishes of the libellant in this behalf, and persists in his aforesaid design, against the will and expostulations of the libellant.

Fourth. That all and singular the premises are true.

Wherefore the libellant prays that a warrant of arrest may issue against the said Proserpine, her boats, tackle, apparel and furniture; and also process of monition, commanding the marshal to cite and admonish the aforesaid E. F., part owner of the said brig as aforesaid, and the aforesaid C. D., master as aforesaid, and all other persons in general who have or pretend to have any right, title or interest therein, to appear before this honorable court, on the — day of —, or on such other day to be inserted in the said process as the court shall for that purpose direct, then and there to answer the libellant in the premises, and especially to show cause, if any they have, why the said brig should not be detained in custody, and not allowed to depart from the aforesaid port of —, until good and sufficient security be given to the libellant to the extent of his aforesaid interest therein; and if no sufficient cause to the contrary be shown, that this honorable court will pronounce accordingly, and will decree the said brig to remain under arrest, until such security shall be given as aforesaid, and for such other and further relief and redress as to right and justice appertain, and the court is competent to give in the premises.

(Signed) [etc., as in the first precedent.]

XVII.

LIBEL IN A SUIT BY A CO-TENANT OF A SHIP, OWNING MORE THAN ONE-HALF THEREOF, TO OBTAIN POSSESSION THEREOF FROM HIS CO-TENANT.

IN ADMIRALTY.

*To the Judge of the District Court of the United States
for the District of —*

A. B. of —, —, exhibits this his libel against the schooner Experiment (whereof C. D. is or lately was master), now lying in the port of — in the said district, and within the admiralty and maritime jurisdiction of this honorable court, her boats, tackle, apparel and furniture, and against E. F. of —, —, and all other persons lawfully intervening for their interest therein, in a cause of possession, civil and maritime. And thereupon the said A. B. doth allege and articulately propound as follows, to wit:

First. That the said schooner is a maritime vessel of the burthen of — tons or thereabouts; that the libellant is the true and lawful owner of three-fifth parts of the said schooner [or as the case may be], and the said E. F. is the owner of the remaining two-fifth parts thereof.

Second. [Here state the facts and circumstances which obliged the libellant to institute the suit, as, that he is desirous of sending the vessel upon some particular voyage, but that his co-tenant having theretofore undertaken to act as ship's husband or managing owner, the vessel is consequently still in his possession or under his control, and that he refuses to agree to such voyage or to allow the vessel to proceed thereon; or, that he is employing the vessel in a manner, or threatens to send her on some voyage, which the libellant disapproves, and that he refuses to desist therefrom; or, that the libellant lacks confidence in the master, and desires to substitute another in his place, but that the master, acting under the orders or with the knowledge and consent of the minor owner, declares it to be his intention to resist the will of the libellant in this respect, and to continue in command of the vessel, or threatens immediately to proceed to sea with the vessel; or, that the vessel being now a registered vessel, the libellant wishes to surrender the certificate of registry, and to have the vessel enrolled and licensed for the coasting trade, or fisheries, or *vice versa*, but that the minor owner (or master) has possession of the certificate of registry (or of enrolment and license) and refuses to deliver up the same for this purpose, and threatens

immediately to send (or proceed with) the vessel to sea, or as the case may be.]

Third. That all and singular the premises are true.

Wherefore the libellant prays that a warrant of arrest may issue against the said schooner *Experiment*, her boats, tackle, apparel and furniture; and also process of monition, commanding the marshal to cite and admonish the said E. F., part owner of the said schooner as aforesaid, and the said C. D., master as aforesaid, and all other persons in general, who have or pretend to have any right, title or interest therein, to appear before this honorable court on the — day of —, or on such other day to be inserted in the said process as the court shall for that purpose direct, then and there to answer the libellant in the premises, and especially to show cause, if any they have, why the possession of the said schooner should not be delivered to the libellant; and if no sufficient cause to the contrary be shown, that this honorable court will pronounce accordingly, and will decree the possession of the said schooner to be forthwith delivered to the libellant, and for such other and further relief and redress as to right and justice may appertain, and as the court is competent to give in the premises.

(Signed) [etc., as in the first precedent.]

If the circumstances require it, the libel may, it is presumed, properly contain a prayer that the certificate of registry, or of enrolment and license, or the license of the vessel, be decreed to be delivered to the libellant.

In cases in which this form of remedy is resorted to, the minor owner is sometimes, perhaps generally, himself the master; and when this is so, he ought, of course, to be so described.

It would, it is presumed, be a matter of course, upon the demand of the respondent, to require the libellant to give security for the safe return of the vessel from any voyage on which the libellant was about to send her against the will of the respondent, as the condition on which the possession should be delivered. I have not, however, deemed it necessary to specify this as a condition on which the decree is to be prayed for.

XVIII.

LIBEL IN A SUIT BY THE OWNER OF A MOIETY OF A SHIP, TO OBTAIN POSSESSION THEREOF, FROM THE OWNER OF THE OTHER MOIETY, ON THE GROUND THAT THE LATTER REFUSES TO EMPLOY THE SHIP, OR TO ALLOW HER TO BE EMPLOYED AT ALL.

A precedent for a libel, in a suit of the nature above specified, is omitted, in the persuasion that the last precedent will be found a sufficient guide in such a suit, and for the sake of economy of space. It will readily be seen that it is only when the part-owner against whom the proceeding is directed is in the actual possession of the vessel, and stubbornly refuses to employ her, or to permit her to be employed, that this form of remedy can properly be resorted to.

XIX.

LIBEL IN A SUIT BY THE OWNER OF A MOIETY OF A SHIP, FOR A DECREE OF SALE THEREOF, ON THE GROUND OF IRRECONCILABLE DISAGREEMENT AS TO HER DISPOSITION OR EMPLOYMENT.

In the chapter on the subject of partnership, two cases are cited, in which the power has been exercised by an American court of admiralty, of decreeing a sale of a vessel on the application of an equal part-owner. In the first of these cases the power does not appear to have been questioned, and the report sheds no light upon its existence. The case was very peculiar. One of the owners had fraudulently procured a sale of the vessel by auction in another state; and the libellant, who was the other part-owner, "prayed the court to decree a sale thereof, in order to have a division of the property." The court being of opinion that the purchaser at the auction sale obtained a valid title to one-half of the interest in the vessel, but that the libellant's interest remained unaffected by it,

decreed a sale and an equal division of the proceeds^(a). The only contested question appears to have been one strictly of title; and conceding the power of the court to decide upon that question, and to decree possession accordingly, it is difficult to perceive on what ground the court was authorized to decree a sale.

In the other case, the question of jurisdiction was fully discussed by very able counsel, first in the district court, and next in the circuit court, and elaborate judgments were pronounced in each. The late Judge HOPKINSON declined to exercise the jurisdiction; but Mr. Justice WASHINGTON, on appeal, affirmed its existence, and the propriety of its exercise in a case like that before him, cautiously limiting the doctrines he asserted to such cases. The utility of this power in a court of admiralty seems to be admitted on all hands; and, to the extent in which it was insisted on by Mr. Justice WASHINGTON, there does not appear to be any sufficient ground for doubting that it will be upheld in the United States. The particular subject of disagreement between the owners in the case here referred to, was the appointment of a master; but this, Mr. Justice WASHINGTON was of opinion, was exactly equivalent to a disagreement with respect to the employment of the vessel alone, each party being desirous of employing her in some mode. It happened, moreover, that one of the part-owners (Capt. Levely) was also master of the vessel; but this circumstance does not appear to have been deemed material. The disagreement was considered to be irreconcilable; and this, it is presumed, would be regarded as an ingredient essential to the propriety of decreeing a sale in any case. Several circumstances were stated in the petition (that being the form in which the suit was instituted), tending to show the fairness of the petitioners' conduct, and the unreasonableness and obstinacy of that of the adverse party. It was alleged, that seeing their interests prejudiced and jeopardized by the conduct of Capt. Levely, who for several months had had sole possession and control of the vessel, and was then threatening to take her to sea again without their consent, the petitioners had repeatedly offered to sell their share to him at a reasonable price, or to purchase his share on the

(a) *Skinner v. The Sloop Hope*, Bee's R., 3.

like terms; or to sell the entire vessel at a public sale; or to send her to sea on a designated voyage, under the charge of a master to be agreed upon by both parties: all which offers, it was alleged, were rejected by Capt. Levely, who persisted in declaring that he would take the vessel to sea; or, as it was subsequently alleged in an amended petition in the appellate court, that he had himself, without their concurrence, recently appointed a master to command her, and threatened to send her on a voyage, under his charge, against their consent. The importance of these circumstances consisted in their tendency to demonstrate the irreconcilableness of the dispute between the parties, and the necessity of judicial interposition, provided the court had the power to interfere. They were denied by the answer of the respondent, who, in turn, charged the petitioners with having refused to expend a dollar upon the vessel when she stood in need of repairs, and with having, in reply to his proposal that she should be fitted out and repaired, declared that they would rather see her rot at the wharf; wherefore, as the respondent alleged, he had himself repaired her at great expense, and was ready to proceed to sea, when he was stopped by the process of the court. The evidence fell far short of fully establishing the allegations of the petitioners, and seems not to have shed much light upon the controversy. Mr. Justice WASHINGTON, in pronouncing his judgment, states his apprehension of the just inferences from the pleadings and evidence, in the following terms: "I find the case," he observed, "*to be that of joint owners of a vessel, having equal interests in her, each willing and desirous to employ her in navigation, but upon his own terms, and neither willing to do so upon any other.*" And in further explanation of this summary statement, he adds: "The terms on which the appellants desire it [the employment of the vessel] are, that she may be commanded by a master of their appointment, and, at all events, that Levely should not be her master. The appellee objects altogether to these terms, and claims to take her to sea under his sole command. It is manifest, therefore, that the differences between these owners is not whether the vessel shall be employed, but which of them shall be entitled to appoint the master; and that, upon this point, all prospect of

compromise is hopeless. They do not differ, it is true, as to the destination of the vessel, because until this preliminary matter of disagreement was adjusted, it was unnecessary for either to propose, or to discuss the expediency of any particular voyage. But I consider it to be entirely unimportant to the decision of this case, whether the subject of difference be the appointment of the master, or the particular destination of the vessel, if the consequence in either case, as to the employment of the vessel, must be the same(a).” The consequence here referred to, it will be readily seen, is that of the vessel’s remaining unemployed; contrary to the maxim of the maritime law, that “vessels are designed to plough the sea, and not to lie at the wall.”

Having given this exposition of the case just cited, the author deems it unnecessary to subjoin any precedent for a libel in similar cases; not doubting that, with the aid of this analysis and of the antecedent forms, the pleader will find it easy to frame a libel adapted to any case of a like nature in which his services may be required.

XX.

LIBEL IN A SUIT TO ENFORCE THE RIGHT OF POSSESSION OR
PROPERTY IN A SHIP, AGAINST AN ADVERSE HOLDER
IN ADMIRALTY.

*To the Judge of the District Court of the United States
for the District of —.*

A. B. of —, —, exhibits this his libel in a cause of possession, civil and maritime, against the brigantine Sylvia, her boats, tackle, apparel and furniture (whereof C. D. is or lately was master), and now lying at the port of — in the said district, and within the admiralty and maritime jurisdiction of this honorable court; and against E. F., of —, and the said C. D., master of the said brigantine as aforesaid, and also against all other persons

(a) *Davis & Brooks v. The Brig Seneca, and Lively part-owner*, 18 Amer. Jurist, 486.

lawfully intervening for their interest therein. And thereupon the said A. B. doth allege and articulately propound as follows, to wit:

[The particular circumstances under which it may be necessary to resort to this action, it will readily be perceived, are likely to be widely variant. It may happen, for example, that the possession was originally acquired by force or fraud, without pretence of right; or that a possession originally lawful is wrongfully withheld from the rightful possessor without color of title, as a possession taken under a charter-party, and unlawfully retained after the expiration of the time agreed upon for its restoration; or, where the master refuses, upon the appointment of a new master, or upon the demand of the owner, to surrender the possession of the ship, or threatens to sail away with her against the owner's will. In such cases, a simple allegation that the libellant is the true and lawful owner of the vessel, and entitled to the possession thereof; and that such possession is wrongfully withheld from him by the defendant, is all that the case requires or properly admits of.

But it may, for example, also happen that the title relied upon by the libellant has been recently acquired, and that the party in possession does not choose, on account of some supposed irregularity or other insufficiency attending the transfer, to admit its validity, and therefore refuses to recognize the libellant's right; or, that the party in possession has, by some fraudulent means, acquired a color of title; or has in good faith become a purchaser, from the master or other pretended agent of the libellant, acting fraudulently or without adequate authority. In such cases, if the libellant aware of the grounds of resistance to his claims, it is certainly advisable, though it may not be absolutely necessary, to set forth in the libel the matter of excuse or defence on which the possessor relies, and, by proper allegations, to repel or avoid such matter.

The usual allegation of the truth of the premises being subjoined to the statement of the case, the libel concludes with a prayer in the form of that at the close of Precedent No. 17.]

XXI.

LIBEL IN A SUIT *IN REM*, IN A CAUSE OF SALVAGE.

[In the broad field lying between the case of useful assistance, rendered in good weather, occupying but a few hours, and involving little or no danger—in contributing to the relief of a sloop aground upon a sandbar at the entrance of a harbor; and that of rescuing a disabled ship, in mid-ocean, from impending destruction, and conducting her safely into port, by long continued heroic exertions and consummate skill, and amid appalling dangers which poetic fancy could not heighten—there is ample room for an almost endless diversity of salvage causes. The features actually presented by the various cases that arise in the courts, are accordingly exceedingly diversified; and as in each case, the circumstances by which it is characterized are to be truly stated, it can be of little use to furnish the pleader with a single precedent adapted to a single imaginary case. It may nevertheless be expected of the author, considering the frequency and great relative importance of this description of causes, that he should do this; and the following precedent is accordingly given.]

IN ADMIRALTY.

*To the Judge of the District Court of the United States
for the District of —.*

A. B. of —, —, owner, and C. D. of —, master of the schooner Alert, hereinafter mentioned, as well also for the several persons composing the crew of the said schooner, as for themselves [or else insert the names of the crew, stating the capacity in which they severally served, as master, carpenter, seaman, cook, etc., which, though not the more usual, seems to be the better course; because, at some stage of the suit, the names of all who are entitled to share in the salvage must be brought before the court in some authentic form], exhibit this their libel against the brig Josephine (whereof K. L. now is or lately was master), now in the port of — in the aforesaid district, and within the admiralty and maritime jurisdiction of this honorable court, her boats, tackle, apparel and furniture, and also against the cargo laden on board the said brig at the time when the salvage services hereinafter mentioned were rendered, and against all persons lawfully inter-

vening for their interest therein. And thereupon the said A. B. and C. D., as well for, etc. [as above; or, etc. as above], allege and articulately propound as follows, to wit:

First. That on the — day of —, the aforesaid schooner the Alert, of — tons burthen (whereof the aforesaid A. B. was then owner and the aforesaid C. D. was master), and having a crew of — men besides the said master, sailed from the port of Norfolk, with a valuable cargo of flour, on a voyage to the Island of St. Thomas.

Second. That while proceeding on her said voyage, to wit, about — o'clock — of the — day of —, the said schooner, being at sea about — miles from Charleston in South Carolina, with the wind blowing hard and a heavy sea running, descried a brig to windward with a signal of distress flying: that orders were thereupon given on board the said schooner to bear down to the said brig, which was immediately done, and she was discovered to be the aforesaid brig Josephine, of — tons burthen, bound from New Orleans to New-York, with a valuable cargo of sugar, and navigated by the master, the mate, — seamen and — boys.

Third. That the said brig was in a leaky and almost sinking state, having four feet water in her hold, and the water fast gaining upon her, and her crew totally exhausted from their incessant exertions at the pumps.

Fourth. That the mate, and four of the crew of the said schooner, boarded the said brig at the risk of their lives: that a consultation was held between the aforesaid K. L., master of the said brig, and the aforesaid C. D., master of the said schooner; when it was determined, on account of the wind and other circumstances, to run for the said port of Charleston, distant about — miles as aforesaid; and that the mate and four of the crew of the said schooner should remain on board the said brig, to work at the pumps, and otherwise assist in the navigation of the said brig, which was accordingly done, and the two vessels proceeded in company for Charleston aforesaid; a light being hung in the rigging of the brig, for the guidance of the schooner during the night.

Fifth. That a pilot came on board the said brig, about — o'clock — of the — day of —; and about — o'clock — of the same [or other] day, the said brig was safely moored in the harbor of Charleston aforesaid.

Sixth. That but for the assistance so rendered by the said schooner, the brig, cargo and crew would most probably have been lost; inasmuch as her crew could not, from their exhausted state, have kept her much longer afloat, nor have brought her into port.

[If the salvor vessel has suffered damage in performing the salvage service, the nature and extent of the injury should here be stated in a distinct article, as a ground for additional compensation.]

Seventh. That the said A. B., owner, and the said C. D., master of the said schooner, and the crew thereof [or, if the crew are named, then say, the said libellants], by reason of the perils necessarily incurred, and the great importance and nature of the services rendered by them in saving the said brig and her cargo, reasonably deserve to have, and they therefore claim a commensurate reward by way of salvage therefor.

Eighth. That all and singular the premises are true.

Wherefore the libellants pray that process in due form of law may issue against the said brig Josephine, her boats, tackle, apparel and furniture, and against the aforesaid cargo thereof; and that this honorable court will pronounce for the demand of the libellants, and will decree to them such compensation and reward by reason of the premises as shall appear to be just and reasonable, together with their costs and expenses, and such other and further relief and redress as to right and justice may appertain, and as the court is competent to give in the premises.

(Signed) &c., [as in the first precedent.]

A suit *in personam*, by salvors, against the owner of the salvaged vessel, may also be maintained; and when by reason of the vessel having been permitted, after the performance of the salvage service, to proceed upon her voyage, or for any other reason, the salvors choose to resort to this form of remedy, there can be little difficulty in framing the libel for that purpose.

XXII.

LIBEL IN A SUIT *IN REM*, FOR DAMAGES BY COLLISION UNDER THE ACT OF FEB. 26, 1845, "EXTENDING THE JURISDICTION OF THE DISTRICT COURTS OF THE UNITED STATES TO CERTAIN CASES UPON THE LAKES AND NAVIGABLE WATERS CONNECTING THE SAME."

IN ADMIRALTY.

*To the Judge of the District Court of the United States
for the District of —.*

A. B. of —, —, owner of the schooner Sylph, hereinafter mentioned, exhibits this his libel against the steamboat Vixen (whereof C. D. is or lately

was master), now lying in the port of —, in the district of — aforesaid, and within the admiralty and maritime jurisdiction of this honorable court, her engine, machinery(a), boats, tackle, apparel and furniture, and against all persons lawfully intervening for their interest therein, in a cause of collision, civil and maritime. And thereupon the said A. B. doth allege and articulately propound as follows, to wit:

First. That the said schooner Sylph is a vessel of more than twenty tons burthen, to wit, of the burthen of — tons or thereabouts; and at the time when the cause of action, hereinafter mentioned and set forth, arose, was enrolled and licensed for the coasting trade, and was employed in the business of commerce and navigation between ports and places in different states and territories of the United States, upon the lakes and navigable waters connecting the said lakes.

Second. That on the — day of —, in the year —, the aforesaid schooner being tight, stanch, and well manned and provided, sailed from the port of Sandusky in the State of Ohio, with a valuable cargo of wheat, on a voyage to the port of Buffalo in the State of New-York.

Third. That during the said voyage, to wit, about eleven P. M. of the — day of —, the said schooner being then about eight miles westerly from Cleveland, with the wind blowing hard from the east-southeast, and the said schooner being close hauled on the starboard tack, her course lying east-northeast, R. T., the first mate of the said schooner, who then had the watch and was the commanding officer on deck, being on the lookout, descried lights ahead, and soon after discovered that they were borne by a steamboat approaching the said schooner in a southwesterly direction, apparently about one mile distant, and then bearing about one point on her lee bow. That as soon as the said R. T., mate as aforesaid, had discovered the approach of the said steamboat, he informed the helmsman of the said schooner thereof, and ordered him to keep her steady, believing that the said steamboat would pass her on the larboard hand. That about three minutes after the said order was given, it became apparent to the said mate that there was ground to apprehend a collision with the said steamboat; and within one or two minutes thereafter, he became satisfied that such collision was inevitable, unless proper means were immediately resorted to, by the persons having charge of the said steamboat, to prevent the threatened disaster. Whereupon, the said steamboat having in the meantime approached within speaking distance, the said R. T., mate as aforesaid, instantly shouted, "Port your helm! Stop your engine!" and several times repeated this request, and

(a) See note to the third precedent.

continued to do so, in a loud and audible voice, until, about a minute and a half after first hailing the said steamboat, she struck the said schooner, stem on, on her larboard bow, and so greatly injured the said schooner that she immediately began to fill with water, and, in spite of the most strenuous exertions on the part of all on board to keep her afloat, she soon thereafter sunk, and was, with her cargo, totally lost; her officers and crew having with difficulty saved their lives, by getting on board the said steamboat.

Fourth. That the said steamboat, by which the said damage had been done, proved to be the Vixen aforesaid, under the command of G. H., as master thereof, and being of about — tons burthen, bound on a voyage from Buffalo aforesaid to Detroit(a). That at the time when lights were first discovered from the Sylph, as hereinbefore mentioned, the Sylph carried a light suspended from the outer end of her bowsprit, which remained there until she was struck by the Vixen; and although there was considerable haze on the water, the said light could easily have been seen, and, if she kept a good lookout, must have been seen by her at the distance of half a mile, or at least of a quarter of a mile, and in season to have enabled her to give way for the said Sylph, as she was bound to do, and thereby to prevent a collision therewith.

Fifth. That if, at the time the said Vixen was first hailed from the Sylph, and thenceforth, she had had a proper watch on deck, the warning given by the mate of the Sylph, as hereinbefore mentioned, must have been distinctly heard on board the Vixen, in season to have enabled her, by putting her helm to port, to pass the Sylph in safety; or, by immediately stopping her engine, greatly to diminish the violence of the blow. But instead of so doing, the said steamboat Vixen kept on her previous course; and although she was running at the rate of twelve knots an hour, her speed was not slackened; and the aforesaid G. H., master of the said Vixen, admitted to the aforesaid R. T., mate of the Sylph, soon after the said R. T. got on board the Vixen, that her engine had not been stopped.

(a) This description of the tonnage and voyage of the colliding vessel is not given for the purpose of bringing the case within the jurisdiction of the court, which it is supposed has already been sufficiently done by the description given of the libellant's vessel. The act extends the new jurisdiction to all "matters of contract or tort, arising in, upon or concerning steamboats and other vessels," etc. This definition is supposed unquestionably to embrace, in cases of collision, the injured vessel; and, in the case of salvage, the salvaged vessel; and it seems not to be an unreasonable interpretation to consider it as embracing, also, the colliding and the saving vessel.

Sixth. That at the time when the danger of a collision between the said vessels was first perceived as aforesaid from the Sylph, it was impossible for her to get out of the way of the said Vixen; nor were there any means to which she could with propriety have resorted for that purpose.

Seventh. That at the time of the aforementioned loss of the said schooner Sylph and her cargo, the libellant was the true and lawful owner of the said schooner, and of her said cargo; and that the said schooner was of the value of — dollars, and the said cargo was of the value of — dollars or thereabouts; and that by reason of the careless, negligent, unskillful and improper management of the said steamboat Vixen, and of the collision thereby occasioned of the said steamboat with the said schooner Sylph, the libellant hath sustained damages to the amount of — dollars or thereabouts, for which he claims reparation in this suit.

Eighth. That all and singular the premises are true.

Wherefore the libellant prays that process in due form of law may issue against the said steamboat, her engine, machinery, boats, tackle, apparel and furniture; and that this honorable court will pronounce for the damages aforesaid, and decree the same to be paid with costs, and for such other and further relief and redress as to right and justice may appertain, and the court is competent to give in the premises.

(Signed) [etc., as in the first precedent.]

For damages by collision, a suit *in rem* and *in personam* against the offending ship and the master, or a suit *in personam* against the master or the owner, may also be maintained; and there can be little difficulty in adapting the foregoing precedent to either of these forms of remedy.

XXIII.

LIBEL IN A CAUSE OF DAMAGE, BY A SEAMAN, AGAINST A MASTER, FOR ASSAULT AND BEATING, OR IMPRISONMENT.

IN ADMIRALTY.

To the Judge of the District Court of the United States for the District of —.

A. B. of —, late a mariner on board the ship Charlotte (whereof C. D. of — is or lately was master), exhibits this his libel against the said C. D.

in a cause of damage, civil and maritime. And thereupon the said libellant doth allege and articulately propound as follows, to wit:

First. That on or about the — day of —, at the port of —, the said ship Charlotte, whereof the said C. D. was master, then being at the port of —, and destined on a voyage on waters within the admiralty and maritime jurisdiction of the United States and of this honorable court, to wit, from the said port of — to —, and thence back to the said port of —, the libellant shipped to serve as a mariner on board the said ship during the said voyage; that the said ship soon thereafter proceeded upon the said voyage, with the libellant on board, and in due time completed the same; and that during the whole of the said voyage, the libellant did well and truly perform his duty on board the said ship as such mariner, and was obedient to all the lawful commands of the said master and other officers on board the said ship.

Second. That during the said voyage, to wit, on or about the — day of —, the libellant having the day before been accidentally hit by the jib-sheet block on his right arm, which became thereby so severely hurt and lamed as almost wholly to deprive him of the use thereof, insomuch that he could not move his said arm at all without excruciating pain, the said C. D., well knowing that the libellant had received the aforesaid injury, and had thereby become disabled as aforesaid, ordered the libellant to go aloft and assist in shortening sail; when the libellant respectfully told the said C. D. that it was impossible for him to obey the said order; whereupon the said C. D. immediately knocked the libellant down by a violent blow, with his clenched fist, upon the head of the libellant, and, with great force and violence, kicked him several times, and once upon his arm, while he lay upon the deck, whereby he was greatly hurt and bruised.

Third. That afterwards, during the said voyage, to wit, on or about the — day of — [Here allege any other assault and beating, or any imprisonment, which may have been inflicted by the defendant upon the libellant, and of which he sees fit to complain; and if more than two injuries of this nature have been so inflicted, they may also, severally, be alleged in separate successive articles].

Fourth. That by reason of the wanton cruelty and unlawful violence to which the libellant has been subjected by the said C. D., as hereinbefore alleged and set forth, the libellant hath suffered great pain and distress [and if the fact be so, then add: and his health was thereby greatly impaired, or was and still is thereby greatly impaired], and he hath been damnified to the amount of — dollars.

Fifth. That all and singular the premises are true.

Wherefore the libellant prays that a warrant in due form of law may issue to the marshal of the said district, commanding him to arrest the said C. D., and have him forthcoming before this honorable court on the — day of —, or on such other day to be inserted in the said warrant as the court shall direct, then and there to answer the libellant in the premises(a), according to the course of courts of admiralty and the rules and practice of this honorable court in civil causes of admiralty and maritime jurisdiction; and that this honorable court will pronounce for the damages aforesaid, and decree the same to be paid by the said C. D. to the libellant, with costs, and for such other and further relief and redress as to right and justice may appertain, and as this court is competent to give in the premises.

(Signed) [etc., as in the first precedent.]

XXIV.

**LIBEL IN A SUIT BY THE OWNER, MASTER, SUPERCARGO, MATE,
AND ONE OF THE SEAMEN OF A SHIP, AGAINST THE OWNER
OF ANOTHER SHIP, IN A CAUSE OF SPOILIATION AND DAMAGE(b).
IN ADMIRALTY.**

*To the Judge of the District Court of the United States
for the District of —.*

A. B. of Matanzas in the Island of Cuba, merchant; C. D. of the same place, master mariner; E. F. of —, merchant; and G. H. and I J., mariners, exhibit this their libel against K. L. of —, shipbuilder, in a cause of spoliation and damage, civil and maritime. And thereupon the said libellants allege and articulately propound as follows, to wit:

First. That at and before the time of the several trespasses hereinafter mentioned, the above named libellant, A. B., was the true and lawful owner of the brig La Isabel, hereinafter mentioned; and that on or about the —

(a) As to the insertion of a clause of attachment; and as to the process of monition, *vide supra*, the prayer of process in the second precedent.

(b) It seems to have been assumed, and, as far as appears, without controversy, in our courts, that several persons, although claiming distinct damages, may lawfully sue jointly in this from of action. The defendant is to be held to bail for the aggregate amount claimed; and the sum decreed by the court is to be distributed by it among the several libellants, according to their respective rights.

day of —, as such owner as aforesaid, he dispatched the said brig, laden with a valuable cargo of sugar, coffee and cigars, on a voyage from Matanzas aforesaid to Portland in the State of Maine, under the command of the libellant C. D. as master of the said brig, the libellant E. F. being supercargo, the libellant G. H. being first mate, and the libellant I. J. being one of the crew thereof.

Second. That on the third day after the departure of the said brig, as aforesaid, to wit, on or about the — day of —, in latitude — degrees and — minutes north, and longitude — degrees and — minutes west, or thereabouts, while the said brig was prosecuting her aforesaid voyage on the high seas, the said brig was overtaken by the schooner Regan, owned by the defendant, the aforesaid K. L., and commanded by one T. A., and was boarded by a boat's crew armed with muskets, sent from the said schooner, and headed by a man who, by his companions, was called Sampson, and who, as the libellants understood and believe, was mate of the said schooner.

Third. That upon coming on board the said brig, the said Sampson told the libellant C. D., master as aforesaid, that the said schooner was in want of provisions, and in an insolent tone demanded a supply from the stores of the said brig; and upon being informed by the said C. D. that the said brig had no more than a sufficient supply of provisions for her own use during the residue of the voyage, the said Sampson replied that he should take what he wanted, and immediately stationed three of his followers on the after-part of the deck of the said brig, with orders to shoot the first man belonging to the said brig who should offer any resistance to his will.

Fourth. That the said Sampson, with the rest of his crew, armed as aforesaid, proceeded to plunder the said brig of a large quantity of her ship's stores, of the value of — dollars, and also of — bags of coffee, of the value of — dollars, and of — boxes of cigars, of the value of — dollars, composing a part of the cargo of the said brig; and not content with this, he entered the cabin of the said brig, and forcibly took therefrom — dollars in specie belonging to the aforesaid libellant C. D., — dollars belonging to the libellant E. F., and — dollars belonging to the libellant G. H.: all which provisions, coffee, cigars and money were, by the said Sampson and other persons composing the aforesaid armed boat's crew, carried on board the said schooner, and have never been restored to the libellants.

Fifth. That while the said Sampson and his men were engaged in plundering the said brig, as in the preceding articles is stated and set forth, the libellants C. D. and E. F. repeatedly remonstrated with the said Sampson

against his lawless conduct; but the said Sampson, instead of yielding to such remonstrances, at first took no notice thereof, and at length, becoming exasperated, he seized the libellant C. D. by his collar, and threatened to throw him overboard; whereupon the libellant I. J. took hold of the arm of the said Sampson, for the purpose of restraining him from further violence upon the person of the libellant C. D.: that the said Sampson thereupon ordered one of his men to knock the said I. J. down, which he immediately did with the butt-end of his musket.

Sixth. That during all the time, which was about one hour, that the said armed boat's crew continued on board the said brig, the said schooner Regan, which was armed with two small pieces of cannon, and had a considerable number of men remaining on board, kept within pistol shot of the said brig, while the said brig and her crew were entirely unarmed.

Seventh. That by reason of the acts of plunderage and violence committed by the persons in the service of the aforesaid defendant K. L., as herein before set forth, the libellants respectively have sustained damages as follows, that is to say: the said A. B., to the amount of — dollars; the said C. D., to the amount of — dollars; the said E. F., to the amount of — dollars; the said G. H., to the amount of — dollars; and the said I. J., to the amount of — dollars, in the whole amounting to the sum of — dollars.

Eighth. That all and singular the premises are true.

Wherefore the libellants pray that a warrant in due form of law may issue to the marshal of the said district, commanding him to arrest the said K. L., and to have him forthcoming before this honorable court on the — day of —, or on such other day to be inserted in the said warrant as the court shall direct, then and there to answer the libellant in the premises(a), according to the course of courts of admiralty, and the rules and practice of this honorable court in civil causes of admiralty and maritime jurisdiction; and that this honorable court will pronounce for the aforesaid damages, and decree the same to be paid to the libellants respectively, according to their respective claims thereto, as hereinbefore set forth, with costs; and for such other and further relief and redress as to right and justice may appertain, and as the court is competent to give in the premises.

(Signed) [etc., as in the first precedent.]

(a) As to the insertion of a clause of attachment, and as to the process of monition, *vide supra*, the prayer of process in the second precedent.

XXV.

LIBEL OR PETITION BY A THIRD PERSON INTERVENING FOR HIS OWN INTEREST IN A SUIT *IN REM*, *PENDENTE LITE*.

(See Rule XXXIV.)

An intervention by a third person *pro interesse suo*, in a case contemplated by the *thirty-fourth* of the new Rules, for the purpose of obtaining the payment or satisfaction of an independent demand, is virtually a new suit. The intervenor is to "propound the matter in suitable allegations;" and this, it is presumed, he may do by a pleading in the form either of a libel or of a petition, although the latter form is supposed to have been heretofore generally resorted to for this purpose. But whichever form may be adopted, the allegations on the part of the libellant or petitioner must be essentially the same as those of a libel in an independent suit.

The rule provides that "the other party or parties in the suit may be required by order of the court to make due answer;" that is to say, they may be cited in the usual form, and, if necessary, compelled to answer as in other cases; and in our courts, where pleadings are often merely filed in the clerk's office, without being previously exhibited and admitted in open court in the presence of all parties concerned, it may sometimes be proper to direct a special monition to the libellant in the principal suit, as well as a general one to all persons having an interest in the property proceeded against; as where the claim set up by the intervenor is such as, if valid, will entitle him to equality or priority of payment.

Since the passage of the act of March 3, 1847, ch. 55, directing the marshal, upon the receipt by him of security from the claimant for the libellant's demand, at any time after the arrest, at once to discharge the property arrested, it may be the duty of the court, upon the prayer of the intervenor to that effect, to award a new warrant of arrest, to be placed in the hands of the marshal, for the purpose of securing the further detention of the property, in case such security shall be given; or, in the event of the discharge of the property from arrest in the mean time, of having it again arrested, to

answer the new demand. When the property has already been discharged under this statute, before a third person having a claim originally cognizable in the admiralty has obtained a standing in court in the character of an intervenor, he may doubtless institute an original suit without regard to the prior suit.

The Introduction of the Libel (if that be the form of pleading resorted to) may be as follows :

R. S. of —, —, exhibits this his libel against the ship Sarah (whereof C. D. is or lately was master), now being in the custody of the marshal of the district aforesaid, under arrest in virtue of a warrant issued out of this honorable court, at the suit of A. B. of —, —, in a cause of —, civil and maritime, her boats, tackle, apparel and furniture, and against all other persons lawfully intervening for their interest therein, in a cause of —, civil and maritime. And thereupon the said R. S. doth allege and articulately propound as follows, to wit:

First. etc.,

The Prayer of the Libel may be in the form following :

Wherefore the libellant prays that process of monition may issue to the marshal of the district aforesaid, commanding him to cite and admonish all persons having or pretending to have any right, title or interest in the said ship Sarah, her boats, tackle, apparel or furniture, to appear before this honorable court on the — day of —, or on such other day to be inserted in the said monition as the court shall direct, then and there to answer the libellant in the premises, according to the course of courts of admiralty, and the rules and practice of this honorable court in civil causes of admiralty and maritime jurisdiction [and also that a warrant of arrest, in due form of law, may issue to the said marshal against the said ship, boats, tackle, apparel and furniture]; and that this honorable court will pronounce for the libellant's aforesaid demand, and decree the same to be paid with costs.

PETITION AGAINST PROCEEDS IN THE REGISTRY.

(See Rule XLIII.)

In cases contemplated by the *forty-third* of the new Rules, of intervention against proceeds in the registry of the court, the proceeding is by petition, which may commence as follows :

IN ADMIRALTY.

*To the Judge of the District Court of the United
States for the District of —.*

R. S. of —, —, exhibits this his petition, and therein doth allege and propound as follows, to wit :

Or,

The petition of R. S. respectfully shows.

But whichever form may be adopted, it will probably be found most convenient, and most conducive to perspicuity, to state the matter in distinct articles, as in a libel : and the claims of the petitioner should be propounded with the like degree of precision and fullness, and their statement should be followed by an allegation that the property in question has been sold in pursuance of a decree of the Court in behalf of A. B. in a cause of —, civil and maritime; that the proceeds of such sale have been brought into the registry of the court; and that there remains [or will remain] a surplus of such proceeds, amounting to the sum of —, after satisfying the said decree, as by the records and proceedings of the said court will more fully appear.

If a claimant has appeared (who, until the contrary be shown, would of course be entitled to the surplus proceeds after satisfying the libellant's demand), he ought to be cited to appear; and the petition may, in that case, properly contain a prayer to that effect.

The prayer of the petition may be as follows :

Wherefore the petitioner prays that this honorable court will pronounce for his aforesaid demand, and will direct the same to be paid out of the aforesaid proceeds so remaining in the registry of the court as aforesaid, with costs; and for such other and further relief and redress as to right and justice may appertain, and as the court is competent to give in the premises [or, if a claimant has appeared, the prayer may then be: that process of monition may issue to the marshal of the district aforesaid, commanding him to cite and admonish G. H. of —, —, who appeared and was duly admitted as claimant in the said cause, to appear before this honorable court on the — day of —, or on such other day to be inserted in the said process

as the court shall direct, to show cause, if any he may have, why the aforesaid demand of the petitioner should not be allowed and ordered to be paid out of the said proceeds so remaining in court as aforesaid ; and that this honorable court will pronounce for the petitioner's aforesaid demand, and direct the same to be paid with costs, and for such other and further relief, etc].

The petition must be verified by oath or solemn affirmation.

II. PLEADINGS SUBSEQUENT TO THE LIBEL — ANSWER.

In treating (in the 8th chapter of this volume) of the pleading in an admiralty suit, subsequent to the libel, the author has already endeavored to afford to the pleader all the assistance which he deemed it necessary or expedient to attempt to render, relative to those objections to which the defendant may sometimes, though very rarely, have occasion and see fit to resort, for the purpose of defeating the libellant's action, but which, he may suppose, do not form the proper subject of what in our courts is known under the comprehensive appellation of the ANSWER. To the above mentioned chapter, therefore, the author begs leave to refer the reader, with respect to such exceptive allegations. The general frame and requisites of the answer are likewise there treated, with nearly as much fullness as is compatible with the plan of this work.

The observations already made concerning the want of precise rules, and the prevalence of a great diversity of actual practice, with respect to the form of the libel, are true also of the answer.

In the precedents appended to DUNLAP'S Practice, the answers as well as the libels are *entitled* as of a stated term of the court ; but the reasons which the author has given for dispensing with this form, in the case of the libel, are equally applicable to that of the answer. The answers in this collection are also prefaced by an Address to the Judge. This, as far as I know, is peculiar to these precedents. It is discordant, moreover, with the usage of courts

of chancery, between the form of procedure in which, and those of the American courts of admiralty, there is a strong similitude; and though there may be no serious objection to such preface, it seems not easy to excogitate any sufficient reason for its adoption.

There is, however, another form observed in chancery, which, though I have met with no evidence of its having been hitherto adopted in the courts of admiralty, appears to be equally appropriate to these courts, and to be worthy of imitation; viz., the well known descriptive heading of the answer, as follows:

*The Answer of C. D., defendant, to the Bill of Complaint
[Libel] of A. B., complainant [libellant].*

The use or omission of this caption, however, would not in any respect vary the form of the commencement of the answer in any other respects, and its simple adoption or rejection is therefore purely optional with the pleader. The prefixion of the words *In Admiralty*, seems to be equally appropriate to the answer and the libel.

The answer is the defendant's response to the narrative given by the libellant, of his supposed cause of action; and the twenty-seventh of the new Rules requires that it "shall be full and explicit, and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel," and that it "shall also answer in like manner each interrogatory propounded at the close of the libel." This plain and indispensable direction it will not be difficult, with the aid of what is said in the above mentioned chapter, to follow. If it is necessary to insist in the answer upon some new matter of defence, not set forth and controverted or avoided in the libel, and which cannot be pertinently introduced as responsive to the particular allegations thereof, such matter is to be introduced in additional articles framed after the manner of the articles of a libel(a).

In suits *in rem*, the answer is given by the claimant; and a claim may be put in either by the owner in person, or, as we have seen,

(a) As to the mode in which defensive allegations of this nature are to be contested, see the chapter above referred to in the text.

in his absence, by the master, consignee or other agent. The claim may be given separately; and as its validity may become the subject of controversy, this would seem to be the more convenient course, but the usual, if not uniform practice, is to incorporate the claim with the answer. When this is done, care must be taken to conform to the 27th of the new Rules, prescribing the forms of the oath by which the claim is to be verified.

In the High Court of Admiralty of England it seems to be the practice to recite in the answer, *verbatim*, all the substantive allegations in the libel or summary petition. Thus in a precedent given in MARRIOTT(a), of a defensive allegation to a summary petition in a cause of wages, the proctor for the respondent, who was the master of the ship, is represented to have appeared before the court, and “said, alleged, and in law articulately propounded, as follows, to wit: I. Whereas in the first pretended position or article of a certain pretended summary petition, bearing date the — day of —, given in and admitted in this cause, on the part of —, late joiner and mariner on board the said ship, and the other party in this cause, it is alleged and pleaded in the words, or to the effect following, to wit: That in or about the month of,” etc.; and then follows an exact transcript of the substantive allegations of the summary petition. The unnecessary prolixity of this form of answer renders it objectionable, and it is not supposed to have been adopted in any of the American courts. In another respect, also, this precedent seems to be unnecessarily prolix. After reciting the summary petition, it proceeds thus: “Now the same is therein in a great part falsely and untruly alleged and pleaded; for the truth and fact was and is, and the party proponent doth allege and propound, that in or about the month of,” etc.; and then follows a repetition in terms of that part of the summary petition in which the voyage about to be undertaken by the ship, the shipment of the plaintiff, etc., are set forth, instead of a mere summary reference to these allegations, and a simple admission of their truth, which it is supposed would be sufficient. Indeed, this summary form of admission is usual in suits in equity, even in the High Court of Chancery in

(a) Marriott's Formulary, p. 279.

England, where brevity is less consulted than in the American courts.

The inexperienced practitioner, in framing an answer in a suit in admiralty, may safely have recourse, if necessary, to the precedents in common use for answers in chancery. Indeed, the precedents of answers appended by Mr. HALL to Clerke's Praxis, and which seem to be copies of actual pleadings drawn in suits conducted by distinguished lawyers, are in exact conformity with the chancery forms—commencing with the usual formula—*saving and reserving all and all manner of advantage of exception*, etc., and proceeding with admissions, denials or other defensive matter introduced by the words: *And this respondent, further answering, saith*. But this introductory formula is not necessary, and is not supposed to be at this time in use; and in place of the words “further answering saith,” the more appropriate phraseology in admiralty is: *doth further allege and propound*. Care must of course be taken to comply with the twenty-seventh of the new Rules, requiring a distinct reference to the several articles of the libel, and a response to each in the order in which they are numbered. The form of an admission may be as follows: That it is true [or, That this respondent has heard and believes it to be true] that, etc., as in the first [or second, etc.] article of the said libel is alleged and pleaded. The form of a denial may be as follows: That it is not true [or, That this respondent has no knowledge, information or belief] that, etc., as in the first [or second, etc.] article of the said libel is untruly alleged and pleaded [and if, as will generally happen, the case requires it, then add: for the truth and fact was and is, and the respondent doth allege and propound, that, etc]. When matters partly true and partly erroneous are comprised in one and the same article of the libel, and are so blended as not to admit of convenient separation, as may frequently happen, in causes of collision or of salvage, for example, the response to such article may be framed thus: That as to the matters contained in the ——— article of the said libel, the same are therein in great part falsely and untruly alleged and pleaded; for the truth and fact was and is, and the respondent doth allege and propound, that, etc(a).

When there are writings upon which the respondent relies for defence, they should be distinctly referred to, and their due execution asserted in the answer. In the English High Court of Admiralty, copies of all such papers are annexed to the defensive allegation, and are called exhibits. Thus in the precedent above cited from MARRIOTT'S Formulary, in a cause of wages, a balance, after deducting certain specified advances made to the libellant during the voyage, is admitted to have remained unpaid at the termination of his service; and the defence as to this balance is, that soon after the arrival of the ship, the plaintiff being under the necessity of concealing himself, sent an order to the owner of the ship for the payment of the said balance to the person in the order named; that the same was paid accordingly, in the presence of two witnesses; and that a receipt, witnessed by them, was given therefor: copies of which order and receipt are annexed to the pleading, and are therein referred to as such(a).

(a) Marriott's Formulary, 188 *et seq.* This precedent furnishes a striking example of the extreme prolixity in pleading which prevails in the English Court of Admiralty; and it is worth while here to insert a portion of it as a matter of curiosity, and as an example to be avoided.

It was alleged in the summary petition that the petitioner had been shipped as a *joiner* and mariner, at a certain rate of wages; but that during the voyage (which was a long one) the *carpenter*, who was shipped at a higher rate of wages, died; and that the petitioner, at the request of the master, had agreed to serve, and did serve during the remainder of the voyage, as carpenter, and was to be paid at the rate that had been allowed to the deceased carpenter. The defence set up in behalf of the owners was, that there was no such request, agreement or service; but that the master had been obliged, at an intermediate port, to expend a large sum for carpenter's work; that the petitioner was therefore entitled to no more than the rate of wages at which he was originally shipped, and that he had been fully paid. After stating the advances made during the voyage, and the balance remaining due at the termination thereof, as mentioned in the text, the defensive allegation proceeds as follows:

— "And the party proponent doth further allege and propound, that soon after the arrival of the said ship — [name of the ship] at — aforesaid, the said — being under the necessity of concealing himself, to avoid being impressed into his Majesty's service, did, on or about the — day of —, and with his own hand, write, subscribe, superscribe, and send a letter addressed to the said — and —, desiring them to pay his wages to —, the bearer thereof; which

With these explanations, the following forms, it is believed, will be found sufficient :

letter was received by the said —, who told the said — that as he was a stranger to them, the said —, they must decline paying the said wages, until they received a draft from the said — on the proper stamp for that purpose ; and thereupon, on the —, being the — day of —, the said — did with his own hand write and subscribe a draft on a — stamp, addressed to the said — and company, thereby desiring them to pay the bearer — the wages due to him the said — from the ship —, and declaring the receipt of the said — should be their discharge ; and thereupon the said — and company, or one of them, did, on the said — day of —, pay the said — the aforesaid sum of —, for the wages due to him the said —, in the presence of — and — ; and the said — then gave a receipt for the said sum of —, endorsed on the said draft, and the said — and — witnessed the same ; and the said — immediately or very soon after paid the said sum of — to the said —, who hath several times acknowledged the receipt thereof. And the party proponent doth further allege and propound, that after such payment, the said — several times went to the accompting house of the said — and company, and conferred with — their clerk on other business, but never once expressed himself dissatisfied with the payment of the money which had come to his hands as his wages, or pretended that there was anything further or more due to him from the said — and company, for his service on board the said ship —, or any other account whatever ; and this was and is true, public and notorious : And the party proponent doth allege and propound, of any other times, and of everything in this and the subsequent articles of this allegation contained, jointly and severally.

“ II. That in supply of the premises mentioned in the next preceding article, and to all other intents and purposes in the law whatsoever, the party proponent doth exhibit and hereto annex, and prays to be heard read and inserted, and taken as part and parcel hereof, — paper writings, marked — and — ; and prays leave to refer to the parchment writing marked —, now remaining in the registry of this court, annexed to an affidavit of the said —, and doth allege and propound the said parchment writing marked — to be the articles of agreement or mariner's contract for the said ship —, mentioned in the former part of the said preceding article ; and the said paper writing marked — to be the letter written and sent by the said — to the said — and company, mentioned in the said preceding article ; and the said paper writing marked — to be the draft by the said —, on the said — and company, for his wages, payable to the aforesaid —, the bearer thereof, also mentioned in the said preceding article ; that the names ‘ — ’ and ‘ — ’, subscribed to the exhibit —, were and are the proper handwriting of the said —, the party in this cause ; and he did, on the day of the date thereof, duly sign the same, in the presence of the persons whose names appear to be subscribed as witnesses thereto ; that the whole series

I.

COMMENCEMENT OF AN ANSWER BY THE OWNER OF THE VESSEL
PROCEEDED AGAINST, IN A SUIT *IN REM*, WHERE THE CLAIM OF
PROPERTY IS INCORPORATED IN THE ANSWER.

DISTRICT COURT OF THE UNITED STATES OF AMERICA.

DISTRICT OF ———.—
IN ADMIRALTY.

*The Answer of G. H., owner and claimant of the ship
Helen, to the Libel of A. B. against the said ship.*

And now comes G. H. of ———, ———, owner of the ship Helen, and for
answer to the libel of A. B., against the said ship, doth allege and propound
as follows, to wit:

and contents of the said exhibit marked ——— were and are so well known and
believed to be, by several persons of good credit and reputation, who have fre-
quently seen him write and subscribe his name, and thereby came to know and
be well acquainted with the manner and character of his handwriting and sub-
scription; and that ——— who did so sign the said exhibit marked ———, and write
and subscribe both the said exhibits marked ——— and ———, and ——— the party
in this cause, was and is one and the same person, and not divers; and the said
ship mentioned in the said exhibit marked ———, and the ship ———, on board of
which the said ——— was joiner, and many times mentioned in the proceedings in
this cause, was one and the same ship, and not divers; and this was and is true,
public and notorious; and so much the said ——— doth know in his conscience,
and hath confessed to be true: And the party proponent doth allege and pro-
pound as before.

"III. That all and singular the premises were and are true, and so forth."

[The exhibits appended are as follows:]

(NO. —.)

SIR,

Please to pay the bearer ——— my wages due from the ship ———, and you
will oblige your servant; and this receipt will be your discharge. A. B.

To Mr.

(ENDORSED.)

Received ——— the sum of ———, in full of the within note.
Witness present, Per C. D.

A. B.

C. D.

First. That the said G. H. is the true and *bona fide* owner of [or of one-fourth (or otherwise as the case may be) of] the said ship Helen, and that no other person is the owner thereof (a).

Second. That, etc.

II.

THE LIKE WHEN THE CLAIM IS INTERPOSED BY AN AGENT OR
A CONSIGNEE.

IN ADMIRALTY.

The Answer of E. F., agent of G. H., the owner [or of E. F., the consignee] and claimant of the ship Helen, to the Libel of A. B. against the said ship.

And now comes E. F. of —, —, the agent of G. H. of —, —, the owner [or, E. F. of —, —, consignee] of the ship Helen, and for answer to the libel of A. B. against the said ship doth allege and propound as follows, to wit:

First. That the said G. H. is the true and *bona fide* owner of the said ship Helen, and that no other person is the owner thereof; and that he the said E. F. is duly authorized by the said G. H. to put in a claim, in his behalf, to the said ship, in this suit.

Second. That, etc.,

III.

THE LIKE WHERE THE CLAIM IS INTERPOSED BY THE MASTER
IN ADMIRALTY.

The Answer of C. D., master and claimant of the ship Helen, in behalf of G. H., the owner thereof, to the Libel of A. B. against the said ship.

And now comes C. D., master of the said ship Helen, and for answer to the libel of A. B. against the said ship doth allege and propound as follows, to wit:

(a) See Rule xxvi. of the new Rules of Admiralty Practice.

First. That G. H. of —, —, is the true and *bona fide* owner of the said ship Helen, and that no other person is the owner thereof; and that he the said C. D. is now the master of the said ship, and, as such master, has the possession and is the lawful bailee thereof for the said G. H.(a).

Second. That, etc.

IV.

COMMENCEMENT OF AN ANSWER IN A SUIT *IN PERSONAM*.

IN ADMIRALTY.

The Answer of C. D., the defendant, to the Libel of A. B., libellant.

And now comes C. D. of —, —, and for answer to the libel of A. B. against him the said C. D., doth allege and propound as follows, to wit:

First. That, etc.

V.

CONCLUSION OF THE ANSWER.

The last article of the answer, as of the libel, is—

That all and singular the premises are true.

In all the American precedents of answers I have met with, this allegation is also followed, as in the libel, by a *prayer*, which constitutes the conclusion of the answer; but in the form of this prayer there seems to have been the same diversity, as in almost everything else pertaining to admiralty pleadings. The converse of the prayer at the conclusion of the foregoing precedents of libels seems to be the more appropriate form, viz:

Wherefore the respondent prays that this honorable court will pronounce against the demand of the libellant in his aforesaid libel mentioned and set forth, with costs.

(a) See Rule xxvi.

The form used in the neatly expressed precedents appended to DUNLAP'S Practice, is, however, quite unobjectionable, and is as follows :

Wherefore the respondent prays that this honorable court would be pleased to pronounce against the libel aforesaid, and to condemn the libellant in costs, and otherwise right and justice to administer in the premises.

A simple prayer that the libel aforesaid be dismissed with costs, is doubtless sufficient, and is one of the forms in use.

The answer, like the libel, is to be signed by the respondent and proctor, and sworn to in like manner.

The right to append interrogatories, it will be remembered, pertains to the respondent as well as to the libellant, and the form for this purpose is the same in both cases. *Vide supra*, No. 1. of precedents for libels.

III. PROCESS.

I.

[See Rule II. See also *supra*, p. 128, and Marriott's Formulary, 330.]

WARRANT OF ARREST IN PERSONAM.

UNITED STATES OF AMERICA,

DISTRICT OF —, ss.

The President of the United States of America(*a*) to the Marshal of the District of —, and to his deputy whomsoever, GREETING :

(*a*) At the first session of the Supreme Court of the United States, in February, 1790 (at the city of New-York, then the seat of government), an order was made by the court, "That (unless and until it shall be otherwise provided by law) all process of this court shall be in the name of the President of the United States." No change having been made by law, this rule has continued in force to the present day ; and although in terms it is limited to the process of the Supreme Court, the form prescribed by it has been observed in other courts.

You are hereby jointly and severally empowered and strictly enjoined and commanded that you arrest A. B. of —(a), —(a), if he be found within your district; and him so arrested you keep under safe and secure arrest, so that his body may be had and forthcoming before the judge of the District Court of the United States of America for the District of —, at —, on the — day of —, if it be a court day, else on the court day next following, at — o'clock in the — noon, there to answer unto C. D. in a cause of —(b), civil and maritime, and further to do and receive in this behalf as to justice shall appertain; and that you duly certify the aforesaid judge what you shall do in the premises, together with these presents. Witness(c) the Honorable —, judge of the aforesaid court, at —, this — day of —, in the year of our Lord —.

E. F., *Clerk.*

ACTION FOR \$—(d).

G. H., *Proctor.*

(a) These blanks are designed to be filled with the place of residence and occupation of the defendant. Rule XXIII. requires the libel to state these particulars, and the spirit of the rule is supposed to extend to the process. It is not intended, however, to intimate that the process would be *vitiated* by their omission.

(b) The nature of the cause with which this blank is to be filled, will appear in the libel, in which it is, by the twenty-third Rule, required to be stated.

(c) The Process Act of 1792 directs that "all writs and process issuing from the Supreme or a circuit court, shall bear test of the chief justice of the Supreme Court (or, if that office shall be vacant), of the associate justice next in precedence; and all writs and process issuing from a district court shall bear test of the judge of such court (or, if that office shall be vacant), of the clerk thereof; which said writs and processes shall be under the seal of the court from whence they issue, and signed by the clerk thereof." The form of the test given in the above precedent is a convenient mode of complying with the act, which is supposed to embrace admiralty as well as other process; and no distinction is known to have been hitherto made in this respect in the actual practice of our courts; The conclusion of the process from the High Court of Admiralty of England is as follows:

"Given at London, in our aforesaid court, under the seal of the same for causes. the — day of —, in the year of our Lord —, and of our reign the —."

(See Marriott's Formulary, 330.)

(d) The sum sued for should be truly stated here, to the end that the marshal may know for what amount he is to take bail; which should be in the sum specified, together with such additional sum as is proper to cover costs, one hundred dollars for example; and by one of the rules of the District Court for the Northern District of New-York, this is expressly required to be done. (See Rule 11.) This form of process, it will be recollected, cannot be issued for a sum exceeding five hundred dollars, without an express order founded upon a sworn

II.

[See Rule II.]

**WARRANT OF ARREST IN PERSONAM, WITH A CLAUSE THEREIN
TO ATTACH THE GOODS AND CHATTELS, CREDITS AND EFFECTS
OF THE DEFENDANT.**

UNITED STATES OF AMERICA,

DISTRICT OF —, ss.

The President, etc.

You are hereby jointly and severally empowered and strictly enjoined and commanded that you arrest C. D. of —, —, if he be found within your district; and him so arrested you keep under safe and secure arrest, so that his body may be had and forthcoming before the judge of the District Court of the United States of America for the — District of —, at —, on the — day of —, if it be a court day, else on the court day following, at — o'clock, in the — noon, there to answer unto A. B. in a cause civil and maritime, and further to do and receive in this behalf as to justice shall appertain: And you are hereby further empowered and strictly enjoined and commanded, that if the said C. D. is not found within your district, you attach his goods and chattels to the amount of — dollars [the amount sued for]; or, if no goods and chattels of the said C. D. be found in your district, that you attach his credits and effects in the hands of [here insert the name or names of the garnishee or garnishees, and his or their place of residence and occupation] to the same amount, and that you monish and cite peremptorily and personally the said [here insert the name of the garnishee]

libel, or other evidence showing the propriety of such order; and in such case, the order will of course specify the sum for which the process is to issue. In other cases the amount claimed ought to be made known to the clerk by the libel, or in some other authentic form. In England, no warrant of arrest, either of person or ships, issues without an affidavit of debt; and as the process is "extracted" before the libel is "given" (or, "impetrated" before the libel is "corrected," as the more ancient phrase was), the action is first entered with the registrar thus:

"APRIL 10, 1847.

"Arrest A. B., now or late master [or owner] of the ship or vessel called the —, so that his body may be had or forthcoming on the — day after said arrest, to answer C. D. in a cause of —, civil and maritime.

"ACTION £—."

to appear before the aforesaid judge on the day and at the place aforesaid, then and there to answer on oath or solemn affirmation, as to the debts, credits or effects of the said A. B. in his hands, and to such interrogatories touching the same as shall be propounded on behalf of the said C. D., and further to do and receive in this behalf as to justice shall appertain; and that you duly certify the aforesaid judge what you shall do in the premises, together with these presents.

Witness, etc.

III.

[See Rule II.]

MONITION IN A SUIT *IN PERSONAM*.

UNITED STATES OF AMERICA,

DISTRICT OF —, ss.

The President, etc.

You are hereby strictly charged and commanded that you monish and cite peremptorily and personally C. D. of —, —, if he be found in your district, to appear before the judge of the District Court of the United States of America for the District of —, at —, on the — day of —, if it be a court day, else on the court day next following, at — o'clock in the — noon, to answer unto A. B. in a cause of — civil and maritime, and further to do and receive in this behalf as to justice shall appertain; and that you duly certify the aforesaid judge what you shall do in the premises, together with these presents.

Witness, etc.

IV.

[See Marriott's Formulary, p. 326.]

WARRANT OF ARREST *IN REM*.

UNITED STATES OF AMERICA,

DISTRICT OF —, ss.

The President, etc.

You are hereby jointly and severally empowered and strictly enjoined and commanded that you arrest the ship called the — (whereof C. D.

now is or lately was master), her boats, tackle, apparel and furniture(a), if she shall be found within your district; and the same so arrested you keep under safe and secure arrest until you shall receive further orders from the court, or the same shall be discharged by due course of law(b); and that you cite at the premises all persons in general who have or pretend to have any right, title or interest therein, to appear before the judge of the District Court of the United States of America for the District of —, at —, on the — day of —, if it be a court day, else on the court day next following, at — o'clock in the — noon, there to answer unto A. B. in a cause of —, civil and maritime, and further to do and receive in this behalf as to justice shall appertain; and that you duly certify the judge of the aforesaid court what you shall do in the premises, together with these presents. Witness, etc.

If the warrant is against the ship *and cargo*, it will of course be varied accordingly; and if it be against the ship *and freight* in the hands of the owners or consignees of the cargo, or against the ship and the proceeds of the cargo, it should contain an attachment and citation clause similar to that contained in a warrant *in personam* against credits and effects.

[For the form of the marshal's return, see p. 154].

V.

[See Marriott's Formulary, p. 328.]

WARRANT OF ARREST *IN REM* AND *IN PERSONAM*.

UNITED STATES OF AMERICA,

DISTRICT OF —, ss.

The President, etc.

You are hereby jointly and severally empowered and strictly enjoined and

(a) The suit may also be against the ship and *freight*; or against the ship and *cargo*; or against the proceeds of both or either. (See Rules XII.—XIX).

(b) I have deemed it proper to add this last clause, in consequence of the provisions of the act of March 3, 1847 (*vide supra*, 99), which entitle the claimant, on giving security, to an immediate release of the property, without an order of the court for that purpose.

commanded that you arrest the ship called the — (whereof C. D. now is or lately was master), her tackle, apparel and furniture, if she shall be found within your district [or, the ship, etc., etc., and her freight in the hands of G. H. of —, —]; and the same so arrested you keep under safe and secure arrest, until you shall receive further orders from the court, or the same shall be discharged from arrest by due course of law; and that you cite at the premises all persons in general who have or pretend to have any right, title or interest therein, to appear before the judge of the District Court of the United States of America for the — District of —, on the — day of —, if it be a court day, or else the next court day following, at — o'clock in the — noon, there to answer unto A. B. in a cause of —, civil and maritime, and further to do and receive in this behalf as to justice shall appertain; and you are hereby further empowered and strictly enjoined and commanded that you arrest, moreover, the said C. D., if he shall be found within your district; and him so arrested you keep under safe and secure arrest, so that his body may be had and forthcoming before the judge of the said court, the day, hour and place aforesaid, there to answer unto the said C. D. in a like cause, and further to do and receive in this behalf as to justice shall appertain; and that you duly certify the judge of the aforesaid court what you do in the premises, together with these presents.

Witness, etc.

VI.

[See Rule VIII.]

MONITION TO A THIRD PERSON, TO DELIVER OVER THE APPURTENANCES OF A SHIP.

UNITED STATES OF AMERICA,

DISTRICT OF —, ss.

The President, etc.

Whereas, in a certain cause of —, civil and maritime, moved and prosecuted in the District Court of the United States for the District of —, on behalf of A. B., against the ship called the —, her boats, tackle, apparel and furniture, at the petition of the said A. B., alleging that the said boats, tackle apparel and furniture [or some part of them, to be specified according to the fact] of the said ship, were in the possession or custody of

E. F. of —, —, the said court, on the — day of —, decreed the said E. F. to be monished, cited and called to judgment at the time and place underwritten, and to the effect hereinafter expressed: You are therefore hereby strictly charged and commanded, jointly and severally, that you monish and cite peremptorily the said E. F. to appear before the judge of the said court, at —, on the — day of —, at — o'clock in the — noon, then and there to show cause, if any he have, why the said boats, tackle, etc. [as above], should not be decreed to be delivered over to you the said marshal or deputy, and to do and receive as to justice shall appertain; and that you duly certify the aforesaid judge what you shall do in the premises, together with these presents.

Witness, etc.

VII.

[See Rule VIII. See also Marriott's Formulary, 352.]

ATTACHMENT FOR NOT DELIVERING OVER THE TACKLE, &c., OF
A SHIP.

UNITED STATES OF AMERICA,

DISTRICT OF —, ss.

The President, etc.

Whereas, in a certain cause of —, civil and maritime, moved and prosecuted in the District Court of the United States for the District of —, on behalf of A. B., against the ship called the —, her boats, tackle, apparel and furniture, the said court, on the — day of —, decreed a monition to issue to E. F. of —, —, having the said boats, tackle, etc., in his possession or custody, to appear before the said court, at —, on the — day of —, to show cause, if any he had, why the said boats, tackle, etc., should not be decreed to be delivered over to you the said marshal or deputy, and to do and receive as to justice should appertain. And whereas, a monition to the effect aforesaid issued accordingly, which was, on the — day of —, by you the said marshal [or by C. D., your deputy] returned, with a certificate thereon endorsed, that the same had been duly executed, on the — day of —, by showing the same under seal to him the said E. F., and by leaving with him a copy thereof. Whereupon, no sufficient cause to the contrary being shown, the aforesaid court, on the — day of —, decreed the said boats, tackle, etc., to be by the said E. F. forthwith [or, on or before the — day of —] delivered over as aforesaid. And

whereas, the said E. F. having neglected to comply with the said decree, the aforesaid court, on the — day of —, decreed him, the said E. F., to be attached for his contempt in not delivering over the said boats, tackle, etc., pursuant to the said decree (justice so requiring): You are therefore hereby strictly charged and commanded, jointly and severally, that you attach and arrest the said E. F., if he be found within your district; and him so attached and arrested you keep under safe and secure arrest until he shall have delivered over to you the said boats, tackle, etc., pursuant to the said decree; and that you duly certify the judge of the aforesaid court what you shall do in the premises, together with these presents.

Witness, etc.

VIII.

[See Marriott's Formulary, 366.]

WARRANT TO DELIVER A SHIP TO PART-OWNERS HAVING THE
MAJORITY OF INTEREST THEREIN, CALLED IN THE ENGLISH
PRACTICE A "DECREE OF POSSESSION."

UNITED STATES OF AMERICA,

DISTRICT OF —, ss.

The President, etc.

Whereas, in a certain cause or business, civil and maritime, moved and prosecuted before the District Court of the United States for the District of —, on behalf of A. B., owner of — parts of the ship or vessel called the —, against the said ship, her tackle, apparel and furniture, and against C. D. the master, and E. F. the owner of — parts of the said ship, and all others having or pretending to have any right, title or interest therein, on the — day of —, the aforesaid court decreed the possession of the said ship to be delivered to the said A. B., owner of — parts thereof, and having a majority of interest therein, or to his lawful attorney, for his use; and it being alleged that the said C. D. and E. F., or one of them, are in possession of the register belonging to the said ship or vessel, the said court further decreed a monition to issue against them, to deliver up the same unto the said A. B.(a): You are therefore by these presents

(a) As this process looks only to the delivery of the ship, this reference to the part of the decree relating to the register seems unnecessary. The delivery of the register is enforced by a separate process of monition (see the next prece-

authorized and empowered, jointly and severally, and strictly charged and commanded, to release the said ship, her tackle, apparel and furniture, from the arrest made in this behalf, and to deliver the possession thereof to the said A. B., owner of — parts thereof, and having a majority of interest therein, or to his lawful attorney, for his use ; and hereof fail not.

Witness, etc. [as in the last precedent.]

IX.

[See Marriott's Formulary, 337.]

MONITION TO DELIVER UP SHIP'S REGISTER, AT THE PETITION OF
THE OWNER OF A MAJORITY OF INTEREST.

UNITED STATES OF AMERICA,

DISTRICT OF —, ss.

The President, etc(a).

Whereas, in a certain cause or business, civil and maritime, moved and prosecuted before the District Court of the United States of America for the District of —, on behalf of A. B., owner of — parts of the ship called the —, against the said ship, her tackle, apparel and furniture, and against C. D. the master, and E. F. the owner of — parts of the

dent), to be followed, if necessary, by attachment. No objection, however, is perceived to a union of this warrant and the monition, in which case the recital concerning the register would of course be proper. I have deemed it expedient, therefore, to follow the precedents, as given in MARRIOTT. The direction of the monition in England (see note to the next precedent) being different from that of the warrant, that circumstance may furnish a reason for the separation of the two processes which does not exist here.

(a) For the purpose, as I presume, of rendering this process more effective, and upon the presumption also that the person or persons who are supposed to be in possession of the register are not, or may not be, in England, the process from the High Court of Admiralty of England is directed not only to the marshal of that court, but also to all justices of the peace, mayors, sheriffs, constables, etc., to the officers of the colonial vice-admiralty courts, and to all other officers, ministers, etc. ; and it is doubtless in fact sent to as many of them as the exigencies of the case are supposed to require. Disobedience to this process, without sufficient cause shown, would of course be followed by an attachment, as in the case of a refusal to deliver appurtenances. See Nos. 6 and 7.

said ship in special, and all others in general, the said court, on the — day of —, decreed the possession of the said ship to be delivered to the said A. B., owner of — parts thereof, and having the majority of interest therein, or to his lawful attorney for his use; and it being alleged that the said C. D. and E. F., or one of them, are in possession of the register belonging to the said ship, the said court further decreed a monition to issue against them, to deliver up the same unto the said A. B.: You are therefore by these presents authorized and empowered, jointly and severally, and strictly charged and commanded, that you monish and cite peremptorily and personally the said C. D. and E. F. to deliver up the register belonging to the said ship unto the said A. B., or his lawful attorney, immediately after the execution of these presents upon them the said C. D. and E. F., under pain of the law and the peril which may fall thereon; and that you duly certify the judge of the aforesaid court what you shall do in the premises, together with these presents.

Witness, etc.

X.

[See Rule xi.; and Marriott's Formulary, 340.]

MONITION TO SHOW CAUSE AGAINST THE SALE OF A SHIP
PENDENTE LITE, CALLED IN THE ENGLISH ADMIRALTY A
"PERISHABLE MONITION."

UNITED STATES OF AMERICA,

DISTRICT OF —, ss.

The President, etc.

Whereas, in a certain cause of —, civil and maritime, moved and prosecuted before the District Court of the United States of America for the district of —, on behalf of A. B. against the ship called the —, her boats, tackle, apparel and furniture, at the petition of the said A. B. [or, of the said C. D., the claimant of the said ship, etc.], alleging that the said ship, tackle, apparel and furniture are in a perishable condition, and cannot be preserved without damage and great expense, the aforesaid court, on the — day of —, decreed all persons in general who have or pretend to have any right, title or interest in the said ship, her tackle, apparel and furniture, to be monished, cited and called to judgment at the time and place underwritten, and to the effect hereafter expressed: You are therefore strictly

charged and commanded, jointly and severally, that you monish and cite peremptorily all persons in general who have or pretend to have any right, title or interest in the said ship, her tackle, apparel and furniture, to appear before the judge of the said court at —, on the — day of —, at — o'clock in the — noon; then and there to show cause why the said ship, her tackle, apparel and furniture, should not be exposed to public sale and sold to the best bidder, and the money proceeding from the sale thereof be brought into the registry of the aforesaid court, for the use of the persons interested therein; and further to do and receive in this behalf, as to justice shall appertain; and that you intimate moreover peremptorily unto all persons in general as aforesaid (to whom it is also by these presents intimated), that if they do not appear at the time and place above mentioned, or, appearing, do not show a reasonable and lawful cause to the contrary, the aforesaid court doth intend to decree and will decree the said ship, her tackle, apparel and furniture, to be exposed to public sale, and sold to the best bidder, and the money proceeding from the sale thereof to be brought into the registry of the aforesaid court, for the use of the persons interested therein; and further to do all other things in the aforesaid cause as the law requires in that behalf, the absence or rather contumacy of the persons so cited and intimated in any wise notwithstanding; and that you duly certify the judge of the aforesaid court what you shall do in the premises, together with these presents.

Witness, etc.

XI.

[See Rule XI.; Marriott's Formulary, 361.]

WARRANT TO SELL A SHIP *PENDENTE LITE*, CALLED IN THE
ENGLISH ADMIRALTY A "DECREE OF SALE."

UNITED STATES OF AMERICA,

DISTRICT OF —, ss.

The President, etc.

Whereas, in a certain cause of —, civil and maritime, moved and prosecuted before the District Court of the United States of America for the District of —, on behalf of A. B. against the ship called the —, her boats, tackle, apparel and furniture, and against all persons in general having or pretending to have any right, title or interest therein, on the —

day of —, at the petition of the said A. B. [or of C. D., the claimant of the said ship or vessel, her tackle, etc.], the aforesaid court decreed a warrant to issue for the sale of the said ship or vessel (justice so requiring): You are therefore by these presents authorized and empowered, jointly and severally, and strictly charged and commanded, that you expose the aforesaid ship, her boats, tackle, apparel and furniture, to public sale, and that you sell the same to the best bidder, and that you bring the proceeds arising from such sale into the registry of the aforesaid court, on or before the — day of —, to be there kept for the use of the persons who shall be entitled thereto; and that at the same time you duly transmit the account of such sale, subscribed by you, to the aforesaid court, together with these presents.

Witness, etc.

In a proceeding for the sale of “goods or other things,” in pursuance of Rule x., as, for example, the cargo of a ship in a cause of salvage, the monition and warrant will be varied accordingly.

XII.

MONITION IN CASE OF THE INTERVENTION OF A THIRD PERSON, *PENDENTE LITE.*

UNITED STATES OF AMERICA,

DISTRICT OF —, ss.

The President, etc.

Whereas, in a certain cause of —, civil and maritime, moved and prosecuted before the District Court of the United States of America for the District of —, and still pending before the said court, on behalf of A. B., of —, —, against the ship called the Grace, her boats, tackle, apparel and furniture, and against all persons in general having or pretending to have any right, title or interest therein; G. H. of —, —, hath been admitted by the aforesaid court to intervene for his interest therein, in a cause of —, civil and maritime: You are therefore hereby strictly charged, jointly and severally, that you cite at the premises all persons in general who have or pretend to have any right, title or interest in the said ship, her boats, tackle, apparel or furniture (and that you cite, also, in special, the above named A. B.) to appear before the aforesaid court, on the —

day of —, if it be a court day, or else on the next court day following, at — o'clock in the — noon, there to answer unto the said G. H. touching the allegations in his libel [or petition], now on file in the aforesaid court, contained, and further to do and receive in this behalf as to justice shall appertain; and that you duly certify the judge of the aforesaid court what you shall do in the premises, together with these presents.

Witness, etc.

If the case requires process of arrest, it will be easy to frame it with the aid of the above precedent, and of precedent No. 4 of the precedents of process.

In case of intervention against proceeds in the registry, there can be little difficulty in framing the proper monition, if any is required. The *forty-third* Rule relating to cases of this nature, provides for a "notice to the adverse parties, if any." The parties more particularly referred to, are probably other persons also preferring claims upon the fund in court, and actual personal notice is doubtless contemplated. In admiralty proceedings, notices of this nature are usually given by means of the process of monition; but when the parties to be notified are already in court, they are presumed to take notice of all proceedings relating to the subject of the controversy, or at least of all such as occur in their actual presence and hearing; and if a special notification to such parties is at any time required, a simple notice in writing, to be personally served on the party or his proctor by a private person, as in a suit at law, may be substituted in place of the more formal and expensive proceeding by monition.

With respect to the owner of the property, whose title of course extends to its proceeds, there is the same necessity for notice to him, as in the case of an original suit. If he has not appeared as a claimant, and is unknown, a publication of the ordinary notice in a newspaper is the only means by which the notice can be given. If he has appeared, or is known, the notice may be by personal monition in the usual form; or by the service, on him or his proctor, of a copy of the petition, with notice to appear and show cause against it, on a day designated for that purpose.

XIII.

WARRANT OF APPRAISEMENT.

[This process is not often required ; but it is sometimes necessary in controversies between part-owners of vessels, where security is to be given for the safe return of the vessel, and where the parties cannot agree upon the value of the shares of the party entitled to the security. It is sometimes necessary, also, in cases of salvage, for the purpose of enabling the court to determine the amount of compensation to be awarded. It is no longer, in general, necessary, since the passage of the act of March 3, 1847, on an application by the claimant for the delivery of the property arrested ; it being by this act made the duty of the marshal to discharge the property from arrest, on receiving security in double the amount claimed by the libellant. Still, however, this enactment, being designed to facilitate the repossession of the property, is not, I presume, to be considered as obligatory upon the claimant, so as to preclude him from applying to the court for an order of delivery, on his giving a stipulation for the value, in the mode heretofore in use. There may be cases where the amount claimed exceeds the value of the property, as, for example, in causes of collision or bottomry, and where the claimant might therefore prefer to give bail in the accustomed form.]

UNITED STATES OF AMERICA,

DISTRICT OF —, ss.

The President, etc.

Whereas [if it be a case of dispute between part-owners], in a certain cause of possession [or, if it be a cause of salvage, or the like, in a certain cause of salvage, etc.], civil and maritime, moved and prosecuted before the District Court of the United States, on behalf of A. B., owner of — parts of the ship called the —, against the said ship, her boats, tackle, apparel and furniture, and against C. D. the master, and E. F. the owner of — parts of the said ship [or on behalf of A. B. against the said ship, her boats, etc., and against all persons, etc.], the aforesaid court, on the — day of —, decreed a warrant to issue for the appraisement of the said ship, her boats, tackle, apparel and furniture [or of the said ship, etc., and of

the goods, wares and merchandises laden therein], (justice so requiring): You are therefore by these presents authorized and empowered, jointly and severally, and strictly charged and commanded, that you reduce into writing a full, true and perfect inventory of the said ship, her boats, tackle, apparel and furniture [and the goods, wares and merchandise laden therein]; and that you choose one good and lawful person, well experienced in such affairs, and swear him faithfully and justly to appraise the same according to their true values; and that you so appraise and value the same, or cause the same to be so appraised and valued; and that you duly transmit the said appraisement, subscribed by you and the said appraiser, to the aforesaid court, together with these presents, on or before the — day of —.

Witness, etc.

XIV.

ATTACHMENT OR WRIT OF EXECUTION IN THE NATURE OF A *CA. SA.* IN A SUIT *IN PERSONAM*, TO ENFORCE A DECREE FOR THE PAYMENT OF MONEY.

[See Rule xxi.]

UNITED STATES OF AMERICA,

DISTRICT OF —, ss.

The President, etc.

Whereas, in a certain cause of —, civil and maritime, moved and prosecuted before the District Court of the United States for the District of —, on behalf of A. B. against C. D., it was, on the — day of —, by a decree of the aforesaid court, pronounced, decreed and declared that the said A. B. was entitled to recover of and from the said C. D. the sum of —; and that the said C. D. ought to pay the same to the said A. B., together with his costs and expenses of suit, as by the said decree, remaining as of record in the aforesaid court, doth more fully appear: And whereas, the costs and expenses so decreed to be paid to the said A. B. amount to the sum of —, as taxed in the aforesaid court: Now, therefore, in order that full and speedy justice may be done in the premises, you are hereby strictly charged and commanded, jointly and severally, that you attach and arrest the said C. D. [and if, as will generally be the case, the defendant has given bail to the action, and execution has been awarded against his sureties also, then add: and also L. M. and N. O. the sureties of the said C. D.], if he [or they] be found within your district, and him [or

them] so attached and arrested you keep under safe and secure arrest until he [or they] shall pay the said sum of —, together with the said costs and expenses, and your fees on this execution, or until he [or they] shall be otherwise thence discharged by due course of law; and that you duly certify the judge of the aforesaid court what you shall do in the premises, together with these presents.

Witness, etc.

XV.

THE LIKE IN A SUIT *IN PERSONAM*, FOR COSTS ON DISMISSAL OF
THE LIBEL.

UNITED STATES OF AMERICA,

DISTRICT OF —, ss.

The President, etc.

Whereas, in a certain cause of —, civil and maritime, moved and prosecuted in the District Court of the United States for the District of —, on behalf of A. B. against C. D., it was, on the — day of —, by a decree of the aforesaid court, ordered and decreed that the libel in the said cause be dismissed with costs, to be paid by the aforesaid A. B., as by the said decree remaining as of record in the aforesaid court doth more fully appear. And whereas, the said costs amount to the sum of —, as taxed in the aforesaid court: Now, therefore, in order that full and speedy justice be done in the premises, you are hereby strictly charged and commanded, jointly and severally, that you attach and arrest the said A. B. [and if security for costs has been given by the libellant, and execution has been awarded against them also, then add:], and also L. M. and N. O., the sureties of the said A. B., if they be found within your district, and them so attached and arrested you keep under safe and secure arrest until they shall pay the said sum of —, together with your fees on this execution, or until they shall be otherwise thence discharged by due course of law; and that you duly certify the judge of the aforesaid court what you shall do in the premises, together with these presents.

Witness, etc.

XVI.

**THE LIKE TO COMPEL THE PERFORMANCE OF SOME ACT OTHER
THAN THE PAYMENT OF MONEY.**

See Precedent No. 7 of Process, which may be readily adapted to cases falling under this head.

XVII.

**EXECUTION IN A SUIT *IN PERSONAM*, IN THE NATURE OF A *CAPIAS*
AND OF A *FIERI FACIAS*, TO ENFORCE A DECREE FOR THE PAY-
MENT OF MONEY.**

[See Rule XXI.]

UNITED STATES OF AMERICA,

DISTRICT OF —, ss.

The President, etc.

Whereas, etc. [as in Precedent No. 14.]

Now, therefore, in order that full and speedy justice may be done in the premises, you are hereby strictly charged and commanded, jointly and severally, that of the goods and chattels of the said C. D., and of L. M. and N. O., his sureties, in your district, you cause to be made the said sum of —, which in the aforesaid court was decreed to the said A. B. as aforesaid, and also the sum of — for his costs and expenses, so decreed to him as aforesaid, amounting in the whole to the sum of —, together with your fees on this execution; and that you have those moneys before the aforesaid court on the — day of —, to render to the said A. B., according to the decree aforesaid. And you are hereby further strictly charged and commanded, if sufficient goods and chattels of the said C. D., L. M. and N. O. cannot be found in your district, that you then arrest the said C. D., L. M. and N. O., if they be found therein, and them so arrested you keep under safe and secure arrest until they shall pay the said last above mentioned sum of money, together with your fees on this execution, or until they shall be otherwise thence discharged by due course of law; and that you duly certify the aforesaid judge what you shall do in the premises, together with these presents.

Witness, etc.

[When the decree to be enforced by this form of execution is for costs on the dismissal of the libel, it will be easy to adapt the above precedent to the case.]

XVIII.

VENDITIONI EXPONAS TO SATISFY A DECREE IN FAVOR OF THE
LIBELLANT IN A SUIT *IN REM*.

UNITED STATES OF AMERICA,

District of —, ss.

The President, etc.

Whereas, in a certain cause of —, civil and maritime, moved and prosecuted before the District Court of the United States of America for the District of —, on behalf of A. B. against the ship called the —, her boats, tackle, apparel and furniture, and against all persons in general having or pretending to have any right, title or interest therein, it was, on the — day of —, by a decree of the aforesaid court, pronounced, decreed and declared that the demand of the said A. B., in the libel in the said cause set forth, was valid and effectual against the said ship to the amount of —; and that the same ought to be paid to the said A. B.(a), together with the costs and charges by him incurred in the prosecution of his said suit, as by the said decree, remaining as of record in the said court, doth more

(a) This recital in the process ought, of course, to be in substantial accordance with the decree itself; and in some cases, the language used in the text may not be the most appropriate for the decree. Thus, for example, in a cause of bottomry, the terms of the decree would be likely to require a recital in the process to the effect following, to wit: It was, on the — day of —, by a decree of the aforesaid court, pronounced, decreed and declared that the bottomry bond in the pleadings in the said cause mentioned was, and ought to be, held valid for the sum of — therein mentioned [or, if the bond was pronounced valid only in part: for the sum of —, being the amount due to the libellant for necessary expenditures and advances, and made in the usual employment of the said ship]; and also for the additional sum of — per centum, the maritime interest agreed on and payable by the terms of the said bond, amounting in the whole to the sum of —; and that the libellant was entitled to the said last mentioned sum, with interest thereon, at the rate of six per centum, from the commencement of the said suit to the time when the same shall be paid.

fully appear. And whereas, the costs and expenses so decreed to be paid to the said A. B. amount to the sum of —, as taxed in the aforesaid court: And whereas, it was by the aforesaid court accordingly further ordered that the said ship, her boats, tackle, apparel and furniture, should be sold to pay the said above mentioned sum of money, amounting in the whole to the sum of —: Now, therefore, in order that speedy justice may be done in the premises, you are hereby strictly charged and commanded, jointly and severally, that you expose the aforesaid ship, her boats, tackle, apparel and furniture, to public sale, and that you sell the same to the best bidder; and that you bring the proceeds arising from such sale into the registry of the aforesaid court, on or before the — day of —; and that at the same time you duly transmit the account of such sale, subscribed by you, to the judge of the aforesaid court(a), together with these presents.

Witness, etc.

XIX.

ATTACHMENT AGAINST THE CLAIMANT AND HIS SURETIES, TO
ENFORCE A DECREE FOR THE PAYMENT OF MONEY IN A SUIT
IN REM.

UNITED STATES OF AMERICA,

DISTRICT OF —, ss.

The President, etc.

Whereas, etc. [as in the last preceding form, to the end of the recital of

(a) The command to the marshal to transmit an account of the sale (see Marriott's Formulary, 363), I presume, is understood in England to require a formal report, specifying the time and place of sale, the person or persons to whom the property was struck off, the highest sum or sums bid therefor, etc., according to the practice in chancery; but in this country it is supposed always to have been deemed sufficient for the marshal to make a return by endorsements on the process, under his signature, stating that, in obedience to the command of the within writ, he had sold the ship and her appurtenances therein mentioned for the sum of —, that being the highest sum bid therefor; and that after deducting his fees from the said sum, he had paid over the balance thereof, amounting to —, to the clerk of the court. Instead of the above form, therefore, it would be sufficient, and is probably more usual, to substitute the form used in other cases, viz: and that you certify the judge of the aforesaid court what you shall do in the premises.

the decree, and then add:] And whereas, it was in and by the said decree further ordered, that E. F. of —, —, who had appeared and been admitted as claimant in the said cause, and to whom the said ship with her appurtenances aforesaid had in due form of law been delivered on stipulation [or bond], forthwith pay into court the last mentioned sum, together with interest thereon at the rate of six per centum from the date of the said decree [or, if the sum decreed equal or exceed the appraised or agreed value of the ship as specified in the stipulation, then say: the sum of —, being the appraised (or agreed) value of the said ship, together with interest thereon at the rate of six per centum from the — day of —, when the said ship was delivered to him on stipulation as aforesaid], unto the time when the same sum shall be paid; and unless he should do so within — days after the date of the said decree, that execution should issue in due form of law against him the said E. F., and also against G. H. of —, —, and I. J. of —, —, his sureties in the said stipulation [or bond]: Now, therefore, in order that speedy justice may be done in the premises, you are hereby strictly charged and commanded, jointly and severally, that you attach and arrest the said E. F., G. H. and I. J., if they shall be found in your district, and them so attached and arrested you keep under safe and secure arrest until they shall pay the aforesaid sum of —, with the interest thereon as aforesaid, and your fees on this execution, or until they shall be otherwise thence discharged by due course of law; and that you certify the judge of the aforesaid court what you shall do in the premises, together with these presents.

Witness, etc.

XX.

ATTACHMENT FOR COSTS, ON THE DISMISSAL OF THE LIBEL IN
A SUIT *IN REM*.

In framing this writ, the last precedent, and that numbered 14, will be found a sufficient guide.

XXI.

EXECUTION IN THE NATURE OF A *CAPIAS* AND OF A *FIERI FACIAS*, AGAINST THE CLAIMANT AND HIS SURETIES, IN A SUIT *IN REM*.

[See Nos. 19 and 16.]

When the decree to be enforced by this form of execution is against the libellant and his sureties, for costs on the dismissal of the libel, it will be easy to adapt the last form to the case.

The foregoing precedents of process, it will be seen, are all adapted to decrees in the district court. When the decree to be enforced is rendered on appeal in the circuit court, the process will require but slight and obvious modifications.

IV. STIPULATIONS AND BONDS.

I.

STIPULATION ON THE PART OF THE LIBELLANT IN AN ACTION *IN PERSONAM*, FOR COSTS.

On the — day of —, in the year of our Lord —, before A. B., a commissioner duly appointed and empowered to take acknowledgments of bail, affidavits and depositions, etc., within the District of —.

C. D. against E. F., in a cause of —(a), civil and maritime, moved and prosecuted in the District Court of the United States of America for the aforesaid district.

Which day appeared personally the above named C. D., and produced for sureties(b) G. H. of [here insert the place of residence and occupation of the

(a) The nature of the cause will appear in the process.

(b) The term "sureties" is used throughout the new Rules; but a single surety is sometimes taken in England (see *Marriott's Formulary*, 311), and it is not supposed necessary in all cases to exact more than one in our courts.

surety], and I. J. of —, — : And the said C. D., G. H. and I. J., submitting themselves to the jurisdiction of the aforesaid court, bound themselves, their heirs, executors and administrators, unto the said E. F., in the sum of [here insert the sum required by the rule or usage of the court, e. g., one hundred dollars], that the said C. D. shall prosecute his action in this behalf, and abide by all orders, interlocutory and final, of the aforesaid court, and pay the costs and expenses, if any, which shall be awarded against him by the final decree of the aforesaid court, or of any appellate court; and unless he shall so do, they do hereby severally consent that execution shall issue forth against them, their heirs, executors and administrators, goods and chattels, wheresoever the same may be found, to the value of the sum above mentioned.

(Signed) C. D.

G. H.

I. J.

Same day, taken and acknowledged }
before me,

A. B., *Commissioner(a)*.

In the English admiralty, the party to the suit does not join in the stipulation, and need not be present, when it is given. The sureties are said to “produce themselves.” This is a convenient practice, and no good reason is perceived for requiring the party to stipulate in person (except in the case of a juratory caution, where his oath is chiefly relied on), as he is required by the new Rules to do, jointly with the sureties. He is always subject to the orders, decrees and process of the court.

(a) It is the practice in the English admiralty, for the commissioner, when the sureties attest on oath to their sufficiency, to return the attestation with the stipulation; or, when the oath of the sureties is not taken, to append his own certificate to their sufficiency. This seems to be a very proper practice; and the following are the forms given in Marriott's Formulary, p. 271, 317, for these purposes. The attestation may be prefixed to the stipulation, and the certificate subjoined or annexed to it.

Attestation of sureties as to their sufficiency.

Appeared personally C. D. of —, in the county of —, merchant, and E. F., of the same place, gentleman, and made oath that they are respectively worth the sum of [here insert the sum in which they are to be bound] of lawful money of Great Britain, after payment of their just debts.

C. D.

E. F.

On the — day of —, the said C. D. }
and E. F. were sworn to the truth of }
the above attestation, before us,

Commissioners.

II.

BOND ON THE PART OF THE LIBELLANT IN AN ACTION *IN PERSONAM*, FOR COSTS.

Know all men by these presents, that we, C. D. of —, as principal, and G. H. of —, —, and I. J. of —, —, as sureties, are held and firmly bound unto E. F. in the sum of [as in the last preceding form], to be paid to the said E. F., his executors, administrators or assigns; to the payment whereof we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated at —, the — day of —, in the year of our Lord —.

Whereas, the above bounden C. D. is about to exhibit his libel [or, if the fact be so, *hath commenced an action*] in the District Court of the United States for the District of —, against E. F., in a cause of —, civil and maritime: Now, therefore, the condition of this obligation is such, that if

Certificate of the sufficiency of sureties.

And I, the said —, one of the commissioners named in the commission hereunto annexed, do certify the above sureties to be sufficient security for the sum in which they are bound.

It is customary, also, in England, for the marshal to certify to the sufficiency of the sureties offered; and when the stipulation is taken and acknowledged in court or before the judge, I infer that this is the usual if not the uniform practice.

The certificate or "report" of the marshal is in the form following:

I, A. B., marshal of the High Court of Admiralty of England, hereby certify, that having made inquiry after C. D. and E. F., proposed to be securities for G. H., master of the ship —, find they are sufficient security for the said G. H., in the sum of — pounds of lawful money of Great Britain, from the best information I can get, and, as such, report them accordingly.

Witness my hand, this — day of —.

A. B.

[See Marriott's Formulary, 301.]

And the fact of such report having been made and acted upon, is stated at the close of the stipulation as follows:

Which caution the said judge received on the report of A. B., marshal of this court, as to the sufficiency of the said security.

[See Marriott's Formulary, 347.]

This practice seems to be worthy of imitation.

the said C. D. shall prosecute his aforesaid action, and abide by all orders interlocutory and final of the aforesaid court, and pay the costs and expenses, if any, which shall be awarded against him by the final decree of the aforesaid court, or of any appellate court, then this obligation shall be void; otherwise it shall remain in full force and virtue. (Signed) C. D.

G. H.

I. J.

Signed, sealed and delivered }
in presence of }

[When a bond is given in a suit in the admiralty, instead of a stipulation, the attestation of the sureties, or the certificate of a commissioner of the court of the sufficiency of the sureties, should accompany it, as in the case of a stipulation. (See the note at the conclusion of the last precedent.) There is an exception, however, to this remark. The act of March 3, 1847, ch. 55, provides for the discharge of property arrested in a suit *in rem*, by the marshal, "on receiving from the claimant of the same a bond or stipulation in double the amount claimed by the libellant, with sufficient surety, to be approved by the judge of the court, or, in his absence, by the collector of the port, conditioned," etc. Another exception ought also probably to be made, viz., of the case of a bond taken by the marshal on the arrest of the defendant in an action *in personam*, in pursuance of Rule III. The acceptance of the bond by the marshal, acting in his official capacity, may well be considered equivalent to his certificate of the sufficiency of the sureties.]

III.

STIPULATION ON THE PART OF THE LIBELLANT IN A SUIT *IN REM*, FOR COSTS.

On the — day of —, in the year of our Lord —, before A. B., a commissioner duly appointed and empowered to take acknowledgments of bail, affidavits and depositions, etc., within and for the District of —.

C. D. against the ship called the Nancy, in a cause of —, civil and maritime, moved and prosecuted in the District Court of the United States of America for the aforesaid district.

Which day, appeared personally the above named C. D., and produced for sureties G. H. of —, and I. J. of —: And the said C. D., G. H. and I. J., submitting themselves to the jurisdiction of the court, bound themselves, their heirs, executors and administrators, in the sum of [here insert the sum required by the rule or usage of the court, e. g., two hundred and fifty dollars], for the benefit of whomsoever it may concern(a), that the said C. D. shall prosecute his action in this behalf, and abide by all orders interlocutory and final of the aforesaid court, and pay the costs and expenses, if any, which shall be awarded against him by the final decree of the aforesaid court, or of any appellate court; and unless he shall so do, they do hereby severally consent that execution shall issue forth against them, their heirs, executors and administrators, goods and chattels, wheresoever the same may be found, to the value of the sum above mentioned.

[Signed and acknowledged as in No. 1(b).]

(a) This stipulation, it will be observed, is for the benefit of the owner of the vessel who may chance to appear as claimant, and who at the commencement of the suit is unknown. In the High Court of Admiralty of England, the name of the master, who is always known, is inserted instead of the words used in the text (See Marriott's Formulary, 311f); but this practice is not known to have been adopted in this country. The words "for the benefit of whom it may concern" are employed in the District Court for the Southern District of New-York, and no objection is perceived to their use for this purpose. When the stipulation is not given until after a claimant has appeared, his name should be inserted, thus: unto E. F., the claimant of the aforesaid ship.

(b) Bonds instead of stipulations are unknown in the English High Court of Admiralty, and it is presumed also in the correspondent courts of the other maritime nations of Europe. The collection act of 1799 prescribes this form of security in cases of municipal seizure, as the condition on which the property seized may be delivered to the claimant; and this, or perhaps the antecedent prevalence of the same practice in the colonial or state courts of admiralty, in cases of seizure, probably led to the substitution of bonds in private causes. They have proved embarrassing in practice; and the courts, even in cases of seizure, have felt constrained to cut the gordian knot by holding such bonds to be stipulations in effect, and dealing with them accordingly. It is certainly desirable that they should be banished from the American courts of admiralty. They are understood to have been in use to some extent as security on the part of the libellant, for costs; and a precedent has accordingly been given (No. 2) of a bond for this purpose, in an action *in personam*; but the new Rules, indirectly at least (*vide supra*, p. 104 *et seq.*), discountenance this form of security in suits *in rem*, and a precedent for such security is therefore omitted. If resorted to preparatory to the commencement of the suit, the obligee may be described

IV.

STIPULATION TO BE GIVEN BY THE DEFENDANT, WITH SURETIES, ON HIS ARREST IN AN ACTION *IN PERSONAM*, IN PURSUANCE OF RULE III.

[See Marriott's Formulary, 311.]

On the — day of —, in the year of our Lord —, before A. B., a commissioner duly appointed and empowered to take acknowledgments of bail, affidavits and depositions, etc., within the District of —.

C. D. against E. F., in a cause of —, civil and maritime, moved and prosecuted in the District Court of the United States of America for the aforesaid district.

Which day, appeared personally the abovenamed E. F., and produced for sureties G. H. of —, —, and I. J. of —, —: And the said E. F., G. H. and I. J., submitting themselves to the jurisdiction of the aforesaid court, bound themselves, their heirs, executors and administrators, in the sum of [here insert the sum stated in the warrant], unto the said C. D., that the said E. F. shall appear in the said suit, and abide all orders of the said court, interlocutory and final, in the said cause, and pay the money awarded by the final decree rendered therein in the said court, or in any appellate court; and unless he shall so do, they do hereby severally consent that execution shall issue forth against them, their heirs, executors and administrators, goods and chattels, wheresoever the same may be found, to the value of the sum above mentioned.

(Signed) E. F.

G. H.

I. J.

Same day, taken and acknowledged }
before me. }

A. B., *Commissioner*.

as the claimant appearing and admitted as such, whosoever he may be, of the ship —, in the conditional part of this obligation mentioned. (See precedent No. 2.) If a claimant has already appeared, his name ought, of course, to be inserted.

V.

**BOND TO BE TAKEN BY THE MARSHAL ON THE ARREST OF THE
DEFENDANT IN A SUIT *IN PERSONAM*, IN PURSUANCE OF RULE
III(a).**

Know all men by these presents, That we, E. F. of —, —, as principal, and G. H. of —, —, and I. J. of —, —, as sureties, are held and firmly bound unto C. D. in the sum of [double the amount stated in the warrant], to be paid to the said C. D., his executors, administrators or assigns; to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated at —, the — day of —, in the year of our Lord —.

Whereas, the above bounden E. F. has been arrested by the marshal of the District of —, in virtue of a warrant issued on the — day of —, out of the District Court of the United States of America in and for the aforesaid district, at the suit of the above named C. D., in a cause of —, civil and maritime: Now, therefore, the condition of this obligation is such, that if the said E. F. shall appear in the said suit, and abide by all orders of the aforesaid court, interlocutory and final, in the cause, and pay the money awarded by the final decree rendered therein in the said court, or in

(a) In the District of Massachusetts it has been the practice for the marshal to take this bond to himself, his successors in office, and assigns. Probably this form was adopted in imitation of the correspondent one prevailing in the courts of common law; but the sheriff, in a suit at law, being personally responsible for the appearance of the defendant, it is highly proper that the bond given on the arrest, and conditioned for his appearance, should be executed to the sheriff as an indemnity against such responsibility. No responsibility of this nature, however, is understood to rest upon the marshal in an admiralty suit, provided he acts with good faith and due caution; and no reason, therefore, is perceived for his being made the obligee in the bond. It is in reality of no great consequence, probably, what form is adopted in this respect, since the bond as well as the stipulation is to be enforced by summary process of execution; but it seemed, upon the whole, to be more proper, in accordance with the form of the stipulation, to insert the name of the libellant as the obligee, and I have accordingly done so.

any appellate court, then this obligation shall be void; otherwise it shall remain in full force and virtue.

(Signed) E. F.
G. H.
I. J.

Signed, sealed and delivered }
in presence of }

VI.

STIPULATION ON THE APPEARANCE OF THE DEFENDANT IN AN ACTION *IN PERSONAM*, WHERE NO BAIL HAS BEEN TAKEN, AND NO ATTACHMENT OF PROPERTY HAS BEEN MADE TO ANSWER THE EXIGENCY OF THE SUIT.

[See Rule xxv.]

At a District Court of the United States of America, held at —, within the District of —, on the — day of —, in the year of our Lord —.

A. B. against C. D. in a cause of —, civil and maritime.

Which day, appeared personally the above named C. D., and produced for sureties E. F. of —, —, and G. H. of —, —: And the said C. D., E. F. and G. H., submitting themselves to the jurisdiction of this court, bound themselves, their heirs, executors and administrators, in the sum of — dollars, unto the said A. B., that the said C. D. shall pay all costs and expenses which shall be awarded against him in this suit, upon the final adjudication thereof, or by any interlocutory order in the progress thereof; and unless he shall do so, they do hereby consent that execution shall issue forth against them, their heirs, executors and administrators, goods and chattels, wheresoever the same shall be found, to the value of the sum above mentioned.

TESTE,

I. J., Clerk.

C. D.
E. F.
G. H.

[The twenty-fifth Rule authorizes the court, in its discretion, to require this form of stipulation “*upon the appearance* of the defendant, where no bail has been taken, and no attachment of property has been made to answer the exigency of the suit.” The foregoing

precedent supposes the defendant to appear in person; but when the suit has been commenced by a simple monition, he may choose to appear by his proctor alone; and it is supposed that the rule extends also to such an "appearance." If so, the court would probably, at the request of the proctor, permit the stipulation to be taken before a commissioner, and allow a reasonable time for that purpose. The stipulation, when so taken, will of course be varied accordingly as in No. 1.]

VII.

STIPULATION FOR THE PURPOSE OF OBTAINING A DISSOLUTION OF AN ATTACHMENT OF THE GOODS AND CHATTELS, OR CREDITS AND EFFECTS, OF THE DEFENDANT IN AN ACTION *IN PERSONAM*.

[See Rule iv.]

On the — day of —, in year of our Lord —, before A. B., a commissioner duly appointed and empowered to take acknowledgments of bail, affidavits and depositions, etc., within the District of —.

C. D. against E. F., in a cause of —, civil and maritime, moved and prosecuted in the District Court of the United States for the aforesaid district.

Which day, appeared personally the above named E. F., and produced for sureties G. H. of —, —, and I. J. of —, —: And the said E. F., G. H. and I. J., submitting themselves to the jurisdiction of the aforesaid court, bound themselves, their heirs, executors and administrators, in the sum of [here insert the amount sued for], unto the said C. D., that the said E. F. shall abide by all orders, interlocutory or final, of the said court, and pay the amount awarded by the final decree rendered in the said court, or in any appellate court; and unless he shall so do, they do hereby severally consent that execution shall issue forth against them, their heirs, executors and administrators, goods and chattels, wheresoever the same may be found, to the value of the sum above mentioned.

E. F.

G. H.

I. J.

Same day, taken and acknowledged }
before me. . . }

A. B., *Commissioner*.

VIII.

BOND FOR THE SAME PURPOSE.

Know all men by these presents, That we, E. F. of —, —, as principal, G. H. of —, —, and I. J. of —, —, as sureties, are held and firmly bound unto C. D. in the sum of — [double the sum for which the action is brought], to be paid unto the said C. D., his executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated at —, the — day of —, in the year of our Lord —.

Whereas, in virtue of a warrant issued on the — day of —, out of the District Court of the United States of America for the District of —, in a cause of —, civil and maritime, moved and prosecuted therein in behalf of the abovenamed C. D., against the abovenamed E. F., certain goods and chattels [or certain credits and effects] of the said E. F. have been attached, and are now in the custody of the marshal of the said district: And whereas, the said E. F. is desirous of obtaining a dissolution of the said attachment, on giving the security required by law for that purpose: Now, therefore, the condition of this obligation is such, that if the said E. F. shall abide by all orders, interlocutory and final, of the aforesaid court in the said cause, and pay the amount awarded by the final decree rendered therein, or in any appellate court, then this obligation shall be void; otherwise it shall remain in full force and virtue.

(Signed) E. F.

Signed, sealed and delivered }
in presence of }

G. H.

I. J.

IX.

STIPULATION IN A SUIT *IN REM*, GIVEN IN PURSUANCE OF THE
ACT OF MARCH 3, 1847, CH. 55, FOR THE PURPOSE OF PROCURING
THE DISCHARGE OF THE PROPERTY ARRESTED.

On the — day of —, in the year of our Lord —, before A. B., a commissioner duly appointed and empowered to take acknowledgments of bail, affidavits and depositions, etc., within the District of —.

C. D. against the ship called the Medora, in a cause of —, civil and maritime, moved and prosecuted in the District Court of the United States for the aforesaid district.

Which day, appeared personally E. F. of —, —, as claimant of the said ship, and produced for sureties G. H. of —, —, and I. J. of —, —; and the said E. F., G. H. and I. J., submitting themselves to the jurisdiction of the court, bound themselves, their heirs, executors and administrators, in the sum of — [double the amount sued for], unto the said C. D., that the said E. F. shall abide and answer the decree of the said court in the aforesaid cause; and unless he shall so do, they do hereby severally consent that execution shall issue forth against them, their heirs, executors and administrators, goods and chattels(a), wheresoever the same may be found, to the value of the sum above mentioned. (Signed) E. F.
G. H.

Same day, taken and acknowledged }
before me. }
A. B., *Commissioner*.

X.

BOND GIVEN IN PURSUANCE OF THE SAME ACT, FOR THE LIKE PURPOSE.

Know all men by these presents, That we, A. B. of —, —, as principal, and C. D. of —, —, and E. F. of —, —, sureties, are held and firmly bound unto G. H. of —, —, in the penal sum of — [double the amount claimed by the libellant], to be paid unto the said G. H.; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated at —, the — day of —, in the year of our Lord —.

(a) It is not supposed that this clause, expressing the consent of the stipulators, is necessary in this country, and especially in a stipulation taken under the late act, which declares that judgment on the bond or stipulation, "both against the principal and sureties, may be recovered at the time of rendering the decree in the original cause." The clause, however, can do no harm, and is sanctioned by usage.

Whereas, in a certain cause of —, civil and maritime, moved and prosecuted in the District Court of the United States of America for the District of —, on behalf of the above named G. H. against the ship or vessel called the —, her boats, tackle, apparel and furniture [or other thing, as the case may be], a warrant of arrest has been issued out of the said court, against the said ship or vessel, boats, tackle, apparel and furniture; which said warrant is now in the hands of I. J., marshal [or one of the deputies of the marshal] of the said district, *unexecuted* [or, in virtue of which said warrant, the said ship, her tackle, apparel and furniture have been arrested by I. J., the marshal (or one of the deputies of the marshal) of the said district, and are now in his custody—according to the fact]. Now therefore the condition of this obligation is such, that if the above bounden A. B., the claimant of the said ship or vessel, her tackle, apparel and furniture, shall well and truly abide and answer the decree of the said court in the aforesaid cause(a), then this obligation shall be void; otherwise it shall remain in full force and virtue.

(Signed) A. B.

C. D.

E. F.

In presence of }

The sureties are to be “approved” by the judge, or, in his absence, by the collector of the port where the arrest is made. (See note to Precedent No. 2.) The act requires a stipulation or bond with “sufficient *surety*,” and will doubtless authorize the acceptance of one surety. The approval may be in the form of a formal certificate (see note at the conclusion of Precedent No. 1), or by the more simple expression: I approve the surety [or sureties] named in the above [or within] bond [or stipulation].

(a) I have deemed it expedient, in stating the condition of the bond, to adhere to the words of the act.

XI.

STIPULATION FOR COSTS AND EXPENSES ON PUTTING IN CLAIM.

[See Rule xxvi.]

On the — day of —, in the year of our Lord —, before A. B., a commissioner duly appointed and empowered to take acknowledgments of bail, affidavits and depositions, etc., within the District of —.

C. D. against the ship called the Harriet, in a cause of —, civil and maritime, moved and prosecuted in the District Court of the United States of America for the aforesaid district.

Which day, appeared personally E. F. of —, —, as claimant of the said ship, and produced for sureties G. H. of —, —, and I. J. of —, —: And the said E. F., G. H. and I. J., submitting themselves to the jurisdiction of the said court, bound themselves, their heirs, executors and administrators, unto the said C. D. in the sum of — [the sum directed by the court, by general rule or by a special order], to pay all costs and expenses which shall be awarded against the said E. F., in the said cause, by the final decree of the said court, or, upon appeal, of the appellate court; and unless he shall do so, they do hereby severally consent that execution shall issue forth against them, their heirs, executors and administrators, goods and chattels, wheresoever the same may be found.

(Signed) E. F.

Same day, taken and acknowledged }
before me. }

G. H.

I. J.

A. B., *Commissioner*.

[A *stipulation*, or putting in a claim, is expressly required by the above mentioned rule.]

XII.

STIPULATION BY THIRD PERSON, INTERVENING FOR HIS OWN INTEREST.

[See Rule xxxiv.]

[As in the preceding precedent, to the words "District of —" inclusive.]

Which day, appeared personally I. J., intervening for his own interest in the said cause, and produced [etc., as in the last preceding precedent, adding the word *damages* after the words “costs and expenses”].

[In cases of intervention by third persons, a *stipulation* is expressly required by the above mentioned rule.]

XIII,

JURATORY CAUTION TO PROSECUTE.

At a District Court of the United States of America, held at —, within and for the District of —, on the — day of —, in the year of our Lord —.

A. B. against C. D. [or against the ship called the *Norna*], in a cause of —, civil and maritime.

Which day, appeared personally the abovenamed A. B., who, submitting himself to the jurisdiction of this court, bound himself, his heirs, executors and administrators, in the sum of [see Precedents Nos. 1 and 3], unto the said C. D. [or, for the benefit of whomsoever it may concern^(a)], to prosecute his aforesaid action, and to pay all costs and expenses which may be awarded against him therein by the final decree of this court, or of any appellate court, and to appear on the — day of — [the return-day of the process], and so often afterwards as he shall be ordered by the court; and unless he shall so do, he doth hereby consent that execution shall issue forth against him, his heirs, executors and administrators, goods and chattels, wheresoever the same shall be found, to the value of the sum above mentioned; and the said A. B. made oath that he would appear on the — day of —, and so often afterwards as he shall be ordered by the court.

(Signed) A. B.

TESTE,

E. F., *Clerk*.

[A petition to be admitted to the juratory caution being addressed to the equitable discretion of the court, stipulations in this form do

(a) See Precedent No. 3 and note. In England, the stipulator, in a juratory caution to prosecute, binds himself to the master. (See *Marriott's Form.*, 354.)

not appear to be ever taken before a commissioner in England; but in this country, upon a previous application and sufficient cause shown, the court would probably direct the stipulation to be taken before a commissioner; and in that case, the stipulation would be varied accordingly.]

XIV.

STIPULATION FOR THE SAFE RETURN OF A SHIP.

At a District Court of the United States of America, held at —, within and for the District of —, on the — day of —, in the year of our Lord —.

A. B., owner of three-eighth parts of the brig called the *Lara*, against the said brig, and against R. S., the master thereof, and C. D., the owner of the remaining five-eighth parts thereof.

Which day, appeared personally the abovenamed C. D., and produced for sureties E. F. of —, —, and G. H. of —, —: And the said C. D., E. F. and G. H., submitting themselves to the jurisdiction of this court, bound themselves, their heirs, executors and administrators, in the sum of —, being double the appraised value of three-eighth parts of the said brig, unto the abovenamed A. B., owner of the said three-eighth parts of the said brig, for the return of the said brig to the port of —, being the port to which the same belongs^(a), or else to pay to the said A. B. the value of his said shares; and unless they shall do so, they hereby severally consent that execution shall issue forth against them, their heirs, executors and administrators, goods and chattels, wheresoever the same shall be found, to the value of the sum aforesaid.

(Signed) C. D.

E. F.

G. H.

TESTE,

I. J., *Clerk*.

[This stipulation may also be taken before a commissioner according to the foregoing precedents. As to the regularity of substituting a bond in this case, see the note at the conclusion of Precedent No 3.]

(a) See *The Margaret*, 2 Haggard's R., 275, 278. Possibly a stipulation for the return of the vessel to a port, or to some port of the state where she belongs, may be admissible.

V. APPEALS.

I.

APPEAL FROM A DECREE OF THE DISTRICT COURT, TO THE
CIRCUIT COURT.*District Court of the United States for the District of —.*

<p>A. B. <i>Libellant</i>,</p> <p style="text-align: center;"><i>v.</i></p> <p>The Ship <i>Venus</i>, her tackle, etc.</p> <p>C. D., <i>Claimant and Respon-</i> <i>dent.</i></p>	}	<i>IN ADMIRALTY.</i>
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The above named libellant [or respondent] conceiving himself aggrieved by the final sentence or decree, entered on the — day of —, in the above entitled cause, doth hereby appeal therefrom to the next Circuit Court of the United States to be held in and for the said district; and he prays that this his appeal may be allowed, and that a transcript of the record and proceedings in the cause, duly authenticated, may be sent to the said circuit court.

II.

APPEAL FROM A DECREE OF THE CIRCUIT COURT, TO THE
SUPREME COURT.

Circuit Court of the United States for the —
District of —.

[Title as above.]

The above named libellant [or respondent] conceiving himself aggrieved [etc., as above], doth hereby appeal therefrom to the Supreme Court of the United States; and he prays that this his appeal may be allowed, and that a transcript of the record, proceedings and evidence in the cause, duly authenticated, may be sent to the said Supreme Court.

III.

CITATION ON APPEAL TO THE CIRCUIT COURT.

UNITED STATES OF AMERICA,

DISTRICT OF —, ss.

To —, Greeting: You are hereby cited and admonished to be and appear at a Circuit Court of the United States, to be held at —, in and for the District of —, on the — day of —, pursuant to an appeal from a decree of the District Court of the United States for the said district, wherein — is appellant and you are appellee, to show cause, if any there be, why the said decree should not be corrected, and speedy justice be done to the parties in that behalf.

Witness the Honorable —, Chief Justice [or one of the Justices] of the Supreme Court of the United States [or District Judge of the United States for the said district], this — day of —, in the year of our Lord 18—.

[Signed by the Chief Justice, one of the Justices, or the District Judge.]

IV.

CITATION ON APPEAL TO THE SUPREME COURT.

UNITED STATES OF AMERICA, ss.

To —, Greeting: You are hereby cited and admonished to be and appear before the Supreme Court of the United States, on the second Monday in January next, pursuant to an appeal from a decree of the Circuit Court of the United States for the District of —, wherein — is appellant and you are appellee, to show cause, if any there be, why the said decree should not be corrected, and speedy justice be done to the parties in that behalf.

Witness the Honorable —, Chief Justice [or one of the Justices] of the said Supreme Court of the United States, this — day of —, in the year of our Lord 18—.

[Signed by the Chief Justice, or one of the Justices.]

V.

SECURITY TO BE TAKEN ON SIGNING THE CITATION.

[One of the regulations prescribed by the Judiciary Act of 1789 relative to writs of error, and applied by the act of 1803 to appeals, requires, as we have seen, the justice or judge, on signing the citation, to "take good and sufficient security," etc. But the new Rules of Admiralty Practice (contrary to the English practice) require that the securities to be originally given by the respective parties shall extend as well to the appellate court, in case of appeal, as to the district court; whereby it was unquestionably intended to dispense with new security in the appellate court. But security may or may not have been required of the libellant in the court below; and it may, in a suit *in personam*, under some circumstances, be dispensed with in the case of the defendant, except for costs. In such cases, the appellant is to be required to give security. If the appeal be interposed by the libellant, the security is for costs only; if by the defendant in a suit *in personam*, it ought to be also for damages. In the English admiralty, the security given on appeal, as well as in the court below, is in the form of a stipulation. In this country, it is supposed to have been generally, if not uniformly, as well in admiralty causes as in suits in equity, in the form of a bond.

Supposing the libellant in the case to which the foregoing forms are adapted, to be the appellant, and that security has not already been given by him, the following will serve for the form of the bond to be exacted of him by the judge, on signing the citation.]

Know all men by these presents, that we, A. B., I. J. and L. M., of —, are held and firmly bound unto C. D. of —, in the sum of two hundred and fifty dollars, to be paid unto the said C. D., his executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Dated this — day of —, in the year —.

Whereas, the above bounden A. B. has appealed to the Circuit Court of the United States for the District of —, from a decree of the District

Court of the United States for the said district [or to the Supreme Court of the United States, from a decree of the Circuit Court of the United States for the District of —], bearing date the — day of —, in a cause in which the said A. B. was libellant, and the said C. D. was claimant of the ship Venus, her tackle, etc., and respondent: Now, therefore, the condition of this obligation is such, that if the abovenamed appellant A. B. shall prosecute his appeal with effect, and pay all such costs and expenses as shall be awarded against him as such appellant therein, then this obligation to be void; otherwise to remain in full force and effect.

Sealed and delivered }
in presence of }

A. B.
I. J.,
L. M.

[When the security is given in a suit *in personam*, whether by the libellant or defendant, it will be easy to adapt the foregoing form to the case.]

VI.

PETITION OF APPEAL FROM A DECREE OF THE DISTRICT COURT,
TO THE CIRCUIT COURT.

Circuit Court of the United States for the District of —.

C. D., claimant of the ship Venus,
her tackle, etc., *Appellant*,
v.
A. B., *Appellee*.

or,

A. B., *Appellant*,
v.
C. D., claimant of the ship Venus,
her tackle, etc., *Appellee*.

To the Circuit Court of the United States for the District of —:

The Petition of Appeal of the abovenamed C. D. [or A. B.] respectfully shows, that a decree was lately made in the District Court of the United States, in and for the said district, bearing date the — day of —, in a certain cause of admiralty and maritime jurisdiction pending in the said

court, wherein the abovenamed A. B. was libellant, and the abovenamed C. D. was claimant of the ship *Venus*, her tackle, etc., and respondent; in and by which said decree, it was [or was, among other things,] ordered, adjudged and decreed, that, etc. [here recite the substance of the decree, or of so much thereof as the appeal is intended to draw in question]; which said decree of the said district court [or so much of which said decree as is above stated and set forth] is, as this appellant is advised, erroneous, and ought to be reversed.

Wherefore this appellant respectfully prays that the said decree [or, that so much of the said decree as is hereinbefore stated and set forth] may be reversed; and that such other decree may be made by this court as shall be agreeable to equity and good conscience, and this appellant may be restored to all things which he has lost by said decree.

And this appellant, as in duty bound, will ever pray.

C. D. [or A. B.]

Dated this — day of —, 18—.

E. F., *Proctor*.

G. H., *Advocate*.

VII.

PETITION OF APPEAL FROM A DECREE OF THE CIRCUIT COURT,
TO THE SUPREME COURT.

[Title as above.]

To the Supreme Court of the United States:

The Petition of Appeal of the abovenamed C. D. [or A. B.] respectfully shows, that a decree was lately made in the Circuit Court of the United States for the District of —, bearing date the — day of —, in a certain cause of admiralty and maritime jurisdiction pending in the said court, wherein the abovenamed A. B. was libellant, and the abovenamed C. D. was defendant; in and by which [etc., as in the last precedent, to the end].

. VIII.

ANSWER TO PETITION ON APPEAL.

Circuit Court of the United States for the District of —.

or,

Supreme Court of the United States.

[Title as above.]

The answer of the above respondent, to the petition of appeal of the appellant.

This respondent, not confessing or acknowledging all or any of the matters or things to be true as in and by the said petition of appeal are contained and set forth, for answer thereunto, says, that he believes it to be true that such decree, as is complained of by the appellant, was made by the District [or Circuit] Court of the United States for the District of —, as in the said petition of appeal is set forth; but as to the date, substance and contents thereof, this respondent humbly craves leave to refer thereto, when the same shall be produced.

And this respondent is advised and believes that the said decree is agreeable to justice and equity; and he therefore prays that the same may be affirmed, and that the said petition of appeal may be dismissed by this honorable court, with costs to be adjudged to this respondent.

A. B. [or C. D.]

K. L., *Proctor.*

M. N., *Advocate.*

ADDENDA.

THE 19th volume of Howard's Reports of the Decisions of the Supreme Court of the United States not having made its appearance until the very last of the preceding sheets are passing through the press, the author avails himself of the only mode remaining to him briefly to notice such of these newly reported cases, pertaining to the subjects treated of in the present work, as seem to require it.

One of these decisions he deems it the more strongly incumbent on him to bring to the attention of the learned reader, because it asserts, and purports to rest upon, dogmas in marked conflict with what he has hitherto regarded as among the settled and indisputable principles of the maritime law, and which he has accordingly not hesitated to lay down as such in the antecedent pages of this work.

The case alluded to is that of *The Sultana(a)*.

(a) Reported, according to a practice much to be deplored, under the title of Samuel F. Pratt, Pascal P. Pratt and Edward P. Beals, claimants of the steamboat Sultana, appellants, v. Charles M. Reed, libellant, 19 Howard's R., 359. If the learned reporter sees fit to persevere in giving the names of all the parties concerned in admiralty suits, instead of simply giving the name of the ship, he will, I trust, excuse a gentle hint that he should be careful not to aggravate the offence by the incongruity of applying to the parties on one side the appellation belonging to them in the appellate court, and on the other that which pertains to them as suitors in the court below. The correlative of "Appellant" is *Respondent*, not "Libellants." But there

The Sultana was a steamer employed in the transportation of passengers and merchandise on Lake Erie and the upper lakes, and was owned at Buffalo, in the State of New-York. The action was brought to recover the value of coal from time to time supplied at Erie, in the State of Pennsylvania, for the use of the vessel in generating steam. The master, at whose instance the supplies were furnished, was also the sole owner, and was known to be such by the libellant. The defence (interposed by mortgagees of the vessel) was the asserted want of an implied lien on the Sultana in favor of the libellant, who, it was alleged, must be considered to have looked to the personal responsibility of the master alone for remuneration. In the district court this defence was overruled, and the amount claimed by the libellant was decreed to him. On appeal to the circuit court the decree was affirmed. On what ground it was contended by the able counsel for the defendants, either in the courts below or in the Supreme Court, that the plaintiff acquired no lien, does not appear from the report, the arguments of the counsel being wholly omitted. But the omission is unimportant to the object of

is another and graver error in the entitling of this cause, which, however, probably originated in the court below. The persons who appeared to contest the lien, asserted by the libellant, are denominated "Claimants." A claimant is one who asserts a proprietary right to the ship, and to entitle him to admission as such, he is required to make oath that he "is the true and *bona fide* owner, and that no other person is the owner" of the vessel. But the defendants here were mortgagees, and in that character intervened for their interest. They were therefore intervenors. The simple, proper and graceful antidote to these and other like incongruities, by which the records of our admiralty jurisprudence are so sadly marred, is to designate each case by the name of the vessel alone, according to the invariable English usage. The next succeeding case in this volume, p. 362 (the report of which, by the by, is scarcely intelligible), is obnoxious to the like criticisms.

this notice. The opinion of the court, though very brief, speaks for itself. It is proposed to dissect it, and to subject its general members to a summary examination^(a).

Afer stating the pleadings and narrating the essential facts, the learned justice who spoke for the court proceeds to observe :

“There is no great doubt in the case but that the article was necessary for the navigation of the vessel at the times when furnished, though the proof is very loose and indefinite. It seems to have been taken for granted that a supply of coal was essential to the propelling of a steamboat, and, in a general sense, this is doubtless true ; but then, to make out a necessity within the admiralty rule, the supply must be really or apparently necessary at the time when furnished.”

That is true, unquestionably, though the phrase, “within the admiralty rule,” had better have been omitted, as adapted only to mislead ; for when the question is whether the owner is bound by a contract made by the master for supplies or repairs, the rule is the same in a court of common law as in a court of admiralty. Let us pass on, however.

The learned judge continues :

“But the more serious difficulty in the case, on the part of the libellant, is the entire absence of any proof to show that there was a necessity, at the time of procuring the supplies, for a credit upon the vessel. This proof is as essential as that of the necessity of the article itself. The vessel is not subject to a lien for a common debt of the master or owner. It is only under very special circumstances, and in an unforeseen and unexpected emergency, that an implied maritime hypothecation can be created” !

(a) It will be seen that the important fact of the debt having been contracted by the sole owner in person, known to be so by the plaintiff, is passed over by Mr. Justice NELSON as entitled to little regard, and the reader will be pleased to leave this fact out of view for the present, and until it shall again be brought to his notice.

No authority is cited for these dogmas, nor, so far as the author is informed, is there the semblance of any such authority to be anywhere found. On the contrary, that all necessary supplies furnished in good faith, on credit, to the master of a vessel in a foreign port, are to be presumed, unless the reverse is proved, to have been furnished on the credit of the vessel as well as upon the personal responsibility of the owner and master, has long been regarded as an indisputable axiom.

As such it has been applied in the maritime courts of the continent of Europe, and hitherto, without scruple, in numberless instances in this country; and at length, since the restoration by act of Parliament to the High Court of Admiralty of its ancient jurisdiction of the claims of material-men, in England. Unless there be an express stipulation to the contrary, or some other act be done by the material-man amounting to a waiver, as the acceptance of some other independent security, the lien arises and silently attaches by operation of law (such being its policy, founded in the supposed necessities of commerce), from the nature of the contract. Nothing is more natural than that vessels in making long voyages, especially American vessels employed in lake commerce or in the coasting trade on the Atlantic coast, enterprises notoriously carried on, to a great extent, upon credit, should occasionally and even frequently happen to be in want of indispensable repairs or supplies while absent from a home port; nor can the want of sufficient funds in the hands of the master, to defray the expenses he may thus be obliged to incur, be justly denominated "an unforeseen and unexpected emergency." But we are now informed that those who venture to trust the master in such cases must look to his personal responsibility alone for reimbursement.

"It seems," continues the learned judge, "also, to be supposed that circumstances of less pressing necessity, for supplies or repairs,

and an implied hypothecation of the vessel to procure them, will satisfy the rule, than in a case of necessity, sufficient to justify a loan of money on bottomry, for the like purpose. We think this a misapprehension. The difference is, that before a bottomry bond can be given, an additional fact must appear, namely, that the master could not procure the money without giving the extraordinary interest incident to that species of security. This distinction was attempted in the case of *The Alexander* (1 Wm. Rob., 336), but was rejected by Dr. LUSHINGTON. A principle, also, excluding any such distinction, has been laid down, at this term, in the case of *William Thomas and others v. J. W. Osborn(a)*."

In what quarter it was that the supposition, mentioned at the begining of this extract, seemed to Mr. Justice NELSON to be entertained, he does not inform us, except by his reference to the case of *The Alexander*. It will be necessary to recur to this case in the sequel. Suffice it for the present to say that it contains no allusion whatever to bottomry bonds. Bottomry contracts have at all times been cognizable, and have often been subjects of litigation in the English Court of Admiralty; but it is only within the last few years that, in latter times, this court has exercised jurisdiction in behalf of material-men. While, therefore, prior to the late act of Parliament restoring this jurisdiction, the kind and degree of necessity requisite to give validity to a bottomry bond had been fully discussed in the English Admiralty, the reports of its decisions had shed no light upon the nature and urgency of the necessity required to render the ship-owner, and his ship by implication, responsible for debts contracted by the master. Although the authority of the master to bind the

(a) This is the case of *The Barque Laura*, or, as the reporter has it, of "William Thomas, Southworth Barnes, Nathaniel Russell and others, owners of the barque Laura, Appellants, v. James W. Osborn," 19 Howard's R., 22.

owner had been much discussed in the courts of common law both in this country and in England, Mr. Justice STORY, in an early case, as is shown in the antecedent pages of this work, deemed it necessary to institute this inquiry, and he addressed himself to the task with his accustomed ardor and success. His conclusion was precisely that which the present distinguished judge of the English Court of Admiralty arrived at and acted on in the first contested cases that came before the court under the act of Parliament, and, strange to say, in the very cases of *The Alexander*, already mentioned, and of *The Sophie*, also, as we shall presently see, cited by Mr. Justice NELSON, in support of doctrines utterly at war with the principles they clearly inculcate. Mr. Justice STORY's conclusion was, that the supplies must appear to have been fit and proper for the vessel, and such as it may reasonably be presumed a prudent owner of the vessel would have ordered had he been present(a). With regard to bottomry bonds, it having been the habit of English judges of admiralty to indulge in strong but indefinite language in describing the privileges that belong to them, and the necessities of commerce to which they owe their origin, Mr. Justice STORY also entered earnestly and elaborately into the inquiry, whether in reality any higher degree of necessity was necessary to authorize the master to give a bottomry bond than was required to subject the ship to an implied hypothecation. His decision was that there was no distinction between the cases in this respect, but that to uphold a loan on bottomry it must be shown that there was the "superadded necessity" of resorting to this extra-

(a) Dr. LUSHINGTON, in *The Alexander* (1 Wm. Rob. Adm. R., 288, 346), laid down the rule as follows: It must appear that the supplies were "fit and proper for the service in which the vessel was engaged, and what the owner of that vessel, as a prudent man, would have ordered if present."

ordinary and disadvantageous means of raising funds for the use of the ship, or that upon diligent inquiry the lender was led to entertain a reasonable belief of the existence of such necessity, and that he advanced his money in good faith(a).

There is nothing in the later decisions of the English Court of Admiralty at all at variance with Mr. Justice STORY's conclusion. Mr. Justice NELSON is very far, therefore, from deriving any support from his reference to bottomry bonds(b). The rule applicable to them, with respect to the degree of necessity for supplies requisite to give validity to a loan on bottomry, is the same as that already mentioned, required to confer an implied lien on the ship for supplies furnished directly; and the super-added necessity requisite to uphold a bottomry bond is uniformly spoken of and treated as peculiar to this form of security, while Mr. Justice NELSON, on the contrary, insists, without the slightest warrant, and with strange inconsistency, moreover, upon a like superadded necessity, to give a simple lien by implication.

The learned judge having thus laid down the principles on which he supposed the case ought to be decided, next proceeded to apply them as follows:

"Now, the supplies having been furnished at a fixed place, according to the account current, and apparently under some general understanding and arrangement, the presumption is that there could be no necessity for the implied hypothecation of the vessel—there could be no unexpected or unforeseen exigency to require it. For aught that appears, the supplies could have been procured on the personal credit of the master, and in this case, especially, as he was also the owner."

So, then, it seems a master, who in a foreign port finds himself under the necessity of obtaining supplies or repairs

(a) See Vol. I., ch. 5.

(b) *Ib.*

on credit, is under obligation, if possible, to procure them on his own personal responsibility, and is not permitted to obtain them on the credit of the ship, until his efforts have proved fruitless. But upon this medley of false principles, and bald, unwarrantable presumptions, it is unnecessary to dwell.

The learned judge proceeds to the effect following :

" We do not mean to say that the mere fact of the master being the owner, of itself excludes the possibility of a case of necessity that would justify an implied hypothecation ; but it is undoubtedly a circumstance that should be attended to, in ascertaining whether any such necessity existed in the particular case (1 Wm. Rob., 369, *The Sophie*)."

As nothing had thus far been said from which the inference the learned judge saw fit here to repel could possibly have been drawn, this salvo was entirely unnecessary. It may not be amiss, however, just to glance at the legal effect of a purchase of necessities on credit in a foreign port, by the sole owner in person, who navigates the vessel as master. That, as a general rule, no lien arises by implication from contracts entered into by the owner, has at all times been regarded as an established principle of the maritime law, and the author having met with no intimation of any exception to it, he did not hesitate to lay it down, in an antecedent chapter of this work, as universally true. In *The Sultana*, however, when before the district court, the able and learned judge of that court took occasion to enter into an elaborate examination of the question whether a distinction ought not to be made, in this respect, between ordinary cases and those in which the characters of owner and master were united in the same person. His not unreasonable conclusion was, that the rule did not extend to cases of the latter description ; and in *The Sophie*, cited above, the fact that the master was also *part-owner*, though adverted to by Dr. LUSHING-

TON, does not appear to have been supposed, either by him or by the counsel for the defendants, to be of the slightest importance in deciding on the existence of an implied lien. But it by no means follows that a sole ownership by the master, known to the material-man, would not have been deemed conclusive against the plaintiff. Be this as it may, however, in *The Laura*, above cited, it was assumed and distinctly asserted, without qualification, as the settled law of this country, both by Mr. Justice CURTIS, speaking for the majority, and by the chief justice, in his dissentient opinion, concurred in by the rest of the judges, that no lien results from a contract with the owner, albeit he is also master. The decision of that case having preceded that of the case under consideration, in which it distinctly appeared that the master was, and that to the knowledge of the plaintiff, also the sole owner of the *Sultana*, it seems difficult to account for Mr. Justice NELSON's unnecessary resort to the false ground of defence on which he chose to found his decision, or for his intimation, in direct conflict with the doctrine so explicitly laid down in *The Laura*, that there might be cases in which a contract for supplies, entered into with the owner, might confer an implied lien. His reference to it, however, for a purpose which, by no torture could it be made in the slightest degree to subserve, shows him to have had, at the time, but a very defective apprehension of its import.

We are now brought to the conclusion of this most dis-creditable performance :

"These maritime liens," continues the learned judge, "in the coasting business, and in the business upon the lakes and rivers, are greatly increasing; and, as they are tacit and secret, are not to be encouraged, but should be strictly limited to the necessities of commerce which created them. Any relaxation of the law, in this respect, will tend to perplex and embarrass business, rather than furnish facilities for carrying it forward. After the fullest

consideration, we think the decree below was erroneous, and should be reversed," etc.

Most certainly there ought to be no relaxation of the law in this or any other respect by a judicial tribunal; but it is equally true, on the other hand, that no judicial tribunal has a right, from any supposed considerations of policy, to restrict the law by arbitrarily withholding its remedies from those who are entitled to them. If the practice of resorting to admiralty process to enforce the claims of material-men has become an evil requiring the abolition of implied maritime liens in their favor (for such, to a very great extent, must be the effect of the alteration of the law inaugurated by this decision), it belongs to the legislative, not to the judicial branch of the government, to apply the remedy.

Before concluding this review, it may not be amiss to notice somewhat more particularly, yet very briefly, the three reported cases cited by Mr. Justice NELSON.

In *Thomas et al. v. Osborn*, the sound and explicit statements of the law by Mr. Justice CURTIS in pronouncing the opinion of the court, and by the chief justice in his masterly dissenting opinion, in exact accordance with the principles above laid down, might have sufficed, one would suppose, to remove from the mind of Mr. Justice NELSON the singular delusions under which he appears to have labored. It would be easy to show this by extracts from the report; but being accessible to every American lawyer, the author contents himself with this reference to it. So it is with the two English cases cited by Mr. Justice NELSON; and not the least remarkable feature of his opinion is, that the very cases, and the only ones to which he refers, not only afford no color for his heresies, but, on the contrary, effectually refute them.

In *The Alexander*, the supplies obtained in an English port, on credit, by the master of a foreign ship, consisted

chiefly in an anchor and a chain cable. The defence was twofold: 1. That these articles were purchased, not for the use of the ship, but for a private adventure of the master; and 2. That they were wholly unnecessary. The first ground Dr. LUSHINGTON did not consider quite sufficiently established. As to the second, it was argued in behalf of the material-men, that the supplies, being in their nature necessary to the safe navigation of the ship, it was fairly within the scope of the master's authority to order them. To this it was answered, in behalf of the owners, that it ought also to appear that the *Alexander* was, *at the time*, in want of them, the reverse of which it was alleged was true, as she already had two anchors, and had no use for more. Dr. LUSHINGTON, in pronouncing his judgment, referring to the total want of any evidence that the ship was in want of another anchor and cable, expressed himself to the following effect:

"I cannot divest myself of the conviction that *some* evidence is necessary—there would have been no difficulty to have proved, by evidence of persons acquainted with nautical affairs and engaged in voyages of this description, that a third anchor and cable were articles such as a prudent owner would have sanctioned. No such evidence is produced in the present case. The onus rests on the plaintiff, and such onus has been altogether deserted in the present instance. Upon the other side, it is distinctly sworn, in the affidavits of the master(*a*), the mate and the seamen on board the vessel, that she was supplied with the proper number of anchors and cables, and that the articles in question were of no service and were never used."

According to Dr. LUSHINGTON, then, the plaintiff ought to be required to give "some proof" (and it is very clear that he deemed slight proof to be *prima facie* sufficient) that there was a present necessity for the supplies for

(*a*) There had, in the meantime, been a change of masters.

which he had brought his action; but **not a word** about "very special circumstances," "unforeseen and unexpected emergencies," and "pressing necessity" to "justify an implied hypothecation;" and not a word about **any distinction** between express hypothecations by **bottomry bond** and implied hypothecations, although it is **most unaccountably asserted** by Mr. Justice NELSON that "**this distinction was attempted in the case of *The Alexander*, but was rejected by Dr. LUSHINGTON.**" There is **not in this case**, by judge or counsel, the remotest allusion to **bottomry bonds**, nor a single syllable to give color to **such a reference**.

The other English case, *The Sophie*, cited by Mr. Justice NELSON, so far as it bears on the point discussed by him, is precisely to the same effect. The question *there* was whether the owner, and of course the ship, were bound for the payment of money advanced to the **master to enable him to obtain supplies**, in like manner as for a direct supply of the articles needed. Dr. LUSHINGTON *held* that there was no difference in this respect between the two cases (though, in adverting incidentally to this question, in *The Alexander*, he had very properly intimated that, on account of the greater danger of fraud on the part of the master, and especially of collusion between him and *the* lender, it might be fit to require stronger proof that the ship really stood in need of the supplies), and, *upon the production of an affidavit "stating that the money was advanced for the necessary purposes of the ship,"* he signed the *primum decretum*.

It is really humiliating to see such a judgment as this emanating from the highest judicatory of the country. To one having but a moderate acquaintance with the law maritime it must be obvious that the writer, of what here appears as the unanimous opinion of the court, must have entertained very obscure and confused ideas of the settled and best defined principles of that branch of American jurisprudence.

Incredible as it may seem, the language of Mr. Justice NELSON seems to infer a conviction on his part that to subject a ship to an implied hypothecation in favor of a material-man, requires some positive act or stipulation, or at least some express consent, on the part of the master, for this specific purpose, contrary to the plain import of the very appellation by which this form of security is designated. He does not speak of the lien as *arising, resulting, accruing* or *springing* from the nature of the contract, but as a thing to be given or withheld by the master according to circumstances, and he accordingly undertakes the novel task of defining the "necessity that would justify an implied hypothecation." It can hardly be necessary, after what has been said, to enter into a formal refutation of so gross a misapprehension. The question of implied hypothecation, in any given case, depends on the question of the master's authority, under the circumstances of that case, to bind the owner. If he had this authority, the liability of the ship, in specie, follows as a legal consequence; if he had not this authority, he alone is responsible, though not, it is supposed, in a court of admiralty; for he simply contracts a common debt, for which he renders himself answerable in an action of assumpsit at common law(a).

(a) If, as this and the case of *St. John v. Patne*, noticed at page 417, *et seq.*, of the first volume, seem clearly to infer, it is the practice of the judges of the Supreme Court, as a general rule, to confide the examination and decision of the several cases argued before it to a single one of their number, I must be permitted, in behalf of the American public, to say, that it is not only highly desirable, but a clear dictate of imperative duty, henceforth, if possible, to avoid the grave error of entrusting this high function, in any case, to a judge not acquainted with the general principles of law pertaining to it, and who is not likely, before presuming to decide it, to take the trouble of learning them. A suitor for justice before a tribunal, for an American citizen, of last resort this side the bar of God, has a right to

In the chapter on contracts of affreightment^(a) these contracts, whether in the usual form evidenced by a bill of lading, or in that of a charter-party, are spoken of in general terms, without qualification, as conferring a lien, upon the one hand on the ship for the safe conveyance of the cargo, and upon the other on the cargo for the payment of the freight. Not being cognizable in the High Court of Admiralty of England, and the courts of common law being incompetent to entertain suits *in rem*, this lien has not been the subject of discussion in the English courts. In this country the admiralty jurisdiction of contracts of affreightment has from time to time been asserted, and has at length become definitively established, as the learned reader will have become apprised by what is said in the chapter just above cited; and the American courts of admiralty are now frequently resorted to for the purpose of enforcing the liens accruing from them by force of the maritime law. It is only lately, however, that these courts have been called upon to ascertain and determine the precise point of time at which the lien in favor of the freighter first attaches. But it seems now to be authoritatively settled, both upon principle and authority, that no such lien arises, at earliest, until the delivery and receipt of the goods on board. This rule was distinctly asserted by the Supreme Court in *The Freeman*^(b); and in *The Yankee Blade*^(c), it was explicitly re-affirmed, in a learned and satis-

expect that it will be meted out to him according to law; and it is matter of still graver concern that a venerable system of laws, which it has required centuries and the united wisdom of the most enlightened nations to perfect, should not be corrupted by innovations, the fruit of inadequate knowledge and indolent self-complacency.

(a) Vol. I., ch. 4.

(b) The schooner *Freeman* v. *Buckingham*, 18 Howard's R., 188.

(c) *Vanderwater* v. *Mills*, 19 Howard's R., 82.

factory opinion delivered by Mr. Justice GREEN, and was declared applicable to a contract by charter-party. Indeed, the foreign continental writers seem to defer it until the vessel shall have actually proceeded on her voyage. Under this predicament of the subject in point of authority, the question arose very recently in the District Court for the Northern District of New-York, whether the general rule established by these decisions was applicable to the case of a charter-party embracing an entire season of navigation on the lakes, the owner stipulating to victual, man and navigate the vessel, but where, after several voyages had been performed in pursuance of the contract, the owner unlawfully withdrew his vessel altogether from the service. The conclusion of the learned judge, upon an elaborate review of the authorities, foreign as well as American, was that the case could not properly be made an exception to the rule(a). I can discern no ground on which this conclusion could have been consistently avoided. The only circumstance attending the case which could afford any color for pronouncing it an exception, was, that the agreement had been partially executed before its infraction. This circumstance Judge HALL justly regarded as immaterial. Justice requires that, as a general principle, all creditors should have an equal right to satisfaction out of the property of their debtor; and the preferences conferred by the maritime law being but exceptions originating in the exigencies of commerce, are *stricti juris*, and are accordingly limited to these exigencies. A lien on the ship is given to the shipper, the more effectually to insure fidelity, skill and vigilance, where these safeguards are imperatively required, because the want of them would be ruinous; and a like priority is accorded, with respect to the cargo, to the ship-owner as an additional security for the payment of his freight, on

(a) *The Carrington*, Mss. case.

the ground of just reciprocity. But the policy on which these exceptions rest does not require their extension to cases of mere breach of contract for the conveyance of merchandise occurring before the goods have yet been subjected to the dangers of navigation, or, at least, been delivered on board the ship; for while the interests of commerce demand consummate diligence and integrity on the part of the ship master after a cargo has once been committed to his care, it matters not in whose ships the articles of foreign commerce are carried to their place of destination; and an occasional abandonment of a contemplated voyage, to the disappointment of the shipper, or a refusal to fulfill a contract by charter-party, to the inconvenience of the charterer, are but ordinary delinquencies, for which an action at law for the recovery of damages is the only remedy compatible with equal justice to others. It matters not, therefore, in the case of a charter-party for a series of projected voyages, whether the injury complained of be the total failure of the ship-owner to fulfill his engagement, or his refusal to proceed further in the observance of his contract after its partial performance. In neither instance, unless there be a stipulation in the charter-party to the contrary, is the charterer entitled to redress in a court of admiralty.

By an untoward accident, which it would be as useless to narrate as it is now vain to regret, a carefully prepared notice, in the proper places, of the four last of the additional rules prescribed by the Supreme Court for the regulation of admiralty procedure, combined with the requisite modifications of the text of the first edition of this work, having been omitted, the author avails himself of this opportunity to bring them briefly to the attention of the reader. Happily neither of them requires much explanation, and it is hoped that no serious inconvenience

will result, to any one who may resort to these pages for guidance, from the omission.

The first of the abovementioned rules relates to the mode of proof before the circuit court on appeal(a).

At the conclusion of the chapter on Appeals, the author took occasion, in the first edition, to combat the opinion that the circuit court had authority to dispense with the personal attendance and oral examination of witnesses, in trials upon appeal, and to require the evidence to be taken by deposition, such a practice appearing to him to be forbidden by the Judiciary Act, which enjoins the *viva voce* examination of witnesses; and he was accordingly of opinion that either a legislative act, or a rule prescribed by the Supreme Court, in virtue of its plenary authority conferred by law, was necessary to legalize it. The rule above cited has since been made for this purpose. The phrase "*further proof*" seems to have been inadvertently used. It would be pertinent in speaking of an appeal to the Supreme Court, but is not so in reference to appeals to the circuit court. Rejecting the word "further" as unmeaning, this rule, it will be seen, virtually forbids the examination of witnesses in court, by peremptorily directing their evidence to be taken by deposition before a commissioner, or some one of the officers designated in the 30th (misprinted the 13th) section of the Judiciary Act, or else upon commission.

Evidence,
on appeal
to circuit
court, how
taken.

By the next of the rules in question(b), evidence taken down by the clerk of the district court, at the hearing therein, pursuant to the 30th section of the Judiciary Act, and which the act makes admissible in the circuit court only when the personal attendance of the witnesses cannot be obtained(c), is declared to be absolutely admis-

Evidence
taken down
by clerk of
district
court admis-
sible in cir-
cuit court.

- (a) Rule L., *vide supra*, p. 461. (b) Rule LI., *vide supra*, p. 462.
(c) See this section, *supra*, p. 287.

sible, reserving to the parties the right to reexamine the witnesses out of court.

Contents of
transmission
from district
to circuit
court.

Another of these rules prescribes and specifically designates the contents of the record to be transmitted by the clerk of the district court, on appeal to the circuit court(a).

Amendment
of libel in-
stead of re-
plication,
etc.

The remaining rule abolishes the replication and rejoinder in pleading, substituting amendments of the libel and of the answer(b).

(a) Rule LIII., *vide supra*, p. 462.

(b) Rule LII., *supra*, p. 462. *Vide supra*, p. 241, where this rule ought to have been mentioned and the text modified.

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