THE

PRACTICE AND JURISDICTION

OF THE

COURT OF ADMIRALTY;

IN THREE PARTS.

I. AN HISTORICAL EXAMINATION OF THE CIVIL JURISDICTION OF THE COURT OF ADMIRALTY.

II. A TRANSLATION OF CLERKE'S PRAXIS, WITH NOTES ON THE JURISDICTION AND PRACTICE OF THE DISTRICT COURTS.

III. A COLLECTION OF PRECEDENTS.

PARET RATIONE MODOQUE.—HOR.

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two MS. copies in the hand writing of Dr. Wyseman and Dr. Lloyd. To this edition, which has been used in the present translation, large additions have been made in the volume now offered to the Bar, and the translator has endeavoured to incorporate the jurisdiction and practice of the District Courts of the United States.

In the third part, the practitioner will find a collection of precedents which may be useful to those whose experience is not extensive. The practice of our admiralty is yet in a crude state, and all that can be done, at present, is to select such precedents as have been approved. The admiralty jurisdiction of the United States, in the first instance, is committed to a variety of persons, and though appeals are allowed in certain cases, yet in many the poverty of the parties or the small value of the sum in dispute prevents a resort to the superiour tribunal. Hence the difficulty of obtaining uniformity of decision. To exhibit and reconcile the decisions of the different districts is a task which is not attempted in this work. The author does not attempt the discussion of the principles of maritime law, but he has confined himself to the manner in which those principles are applied.

His attempt is about to be arraigned at the bar of publick opinion, and the trial cannot be anticipated without a degree of solicitude which he neither wishes nor affects to conceal. From the liberality of his profession he may confidently expect every indulgence that is due to a desire of being useful to himself and to others.

Baltimore, 20th Sept. 1809.

PART I.

HISTORICAL ESSAY

ON THE

CIVIL JURISDICTION

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THE origin and antiquity of the title, Admiral, have exercised the research and divided the opinions of many profound writers upon this subject. Such an officer is to be found in most kingdoms that border upon the sea; and it is said that Philip of France was the first who conferred that title in civilized Europe. This was in 1284 or 1286, but the same writer finds the name of this officer occurring once in the history of France, so early as the year 558. 1 And. Com. 29.—By *Du-Cange* we are informed that the Sicilians were the first, and the Genoese the next, who gave the denomination of admiral to the commanders of their naval armaments; and that it was derived from the Saracen or Arabic word *amir* or *emir*, a general name for any commanding officer. According to some writers the first admiral who is recorded in English history, was in the reign of Edward I. in 1297, and the first title of Admiral of England which was expressly conferred upon a subject, was given by patent from Richard II. in 1387, to the Earl of Arundel and Surry. But *Spelman* is of opinion that the title was first used in the reign of Henry III. because it does not occur in the laws of Oleron enacted in 1266, nor is mentioned by Bracton, who wrote about that time: and in a charter, 8 Henry, which granted the office to Richard de

Lacy, the title is not used. But in the 56th year of the same reign, the historians used the appellation, and it is likewise found in charters.

The title *Admiralis Angliæ* was not frequent until the reign of Henry IV. when the title was given to the king's brother. *Cycl. verb. Adm.*

These particulars are not without interest to many readers: but as it is neither within our purpose nor ability to investigate them fully, we leave the subject to the antiquarian and the lexicographer, and hasten to another which is more important and less enveloped in mystery.

The jurisdiction of the civil or instance court of admiralty, as it is at present understood, appears to be of a strangely anomalous kind. Mariners' wages, except where the contract is under seal or is made in an unusual manner; bottomry, in certain cases only and under many restrictions; and salvage, when the property shipwrecked is not cast ashore; appear to be the only subjects within what is now considered to be its legitimate cognizance.

By the publication of Dr. *Robinson's Reports*, we have been, however, for the first time informed, for in the common law books there is no trace of it to be found, that the court of admiralty of *England*, entertains suits for the *mere possession* of vessels though it never interferes where the *title* is in controversy. We ought also to have mentioned that the admiralty has an ancient and long recognized jurisdiction, to decide between the part owners of a ship or vessel, who differ among themselves about the policy or advantage of sending her on a particular voyage.

On considering the present state of the civil jurisdiction of the court of admiralty and tracing back its history to ancient times, we were induced to believe that those different subjects of which it now has the acknowledged cognizance, were the venerable remains of a much more extensive jurisdiction which it was long permitted to exercise, notwithstanding the restrictive statutes of 13 and 15 *Rich.* II. This opinion was confirmed by a perusal of the present work.

As the court of admiralty is constituted at present the greatest part of its proceedings in civil cases is *in rem*. Indeed it was not long ago held that it had no jurisdiction *in personam*, and that question was agitated so late as the year 1781 in the great case of *Le Caux* v. *Eden*. If, then, in the reign of *Elizabeth*, when our authour wrote, the jurisdiction of the court of admiralty had been limited as it is at present, his rules of practice would have been particularly directed to the special cases of which it had cognizance, and particularly to proceedings *in rem*. Whereas the modern subjects of admiralty jurisdiction, bottomry, salvage and mariners' wages, are not even mentioned, and only a single chapter or title (the 41st) relates to those proceedings which may properly be said to be *in rem*: for we cannot call by that name an attachment of property for the mere purpose of compelling the appearance of the defendant, on which the plaintiff does not claim any right of ownership or lien, as is the case in a suit on a bottomry bond or for seamens' wages. But it seems from the context of Mr. *Clerke's* book, that the admiralty, in his time, had cognizance of a great variety of matters and contracts which required the same modes of proceeding that are used by courts of general jurisdiction. Indeed it evidently appears that the greatest number of suits which the admiralty then entertained, were actions of debt founded upon

contract, which were enforced in the first instance by the arrest of the debtor, if he was present, and by attachment of his property, in order to compel his appearance if he was absent. They entertained petitory suits, in which they decided on the title to property; as well as possessory suits, for the mere possession. No traces whatever appear of such a limited jurisdiction as the admiralty possesses at the present day. And it is remarkable that during the long reign of Queen *Elizabeth* (forty-four years) no prohibition appears to have been issued against the admiralty court, except two or three which are mentioned by Lord *Coke* in 4th *Inst.* but which we do not find elsewhere reported, and which, if his report be correct, were in violation of the agreement that will hereafter be mentioned. The admiralty jurisdiction then, as far as we are now able to trace it, extended to all cases of freight, charter parties, bottomry, mariners' wages, debts due to material men for the building and repairing of ships, and generally, to what was then considered as *maritime contracts.* It extended also to contracts made abroad, because those were to be decided according to the civil law, which was and is still the law of the admiralty. This jurisdiction was secured to that court by an agreement which was signed, in the 17th year of *Elizabeth*, by all the common law judges, in order to put an end to the disputes which their jealousy had excited and perpetually kept alive *Vide* 4 *Inst.* 136.

But those articles, in the subsequent reigns, were not executed with good faith, any more than similar ones which were as solemnly agreed to in the eighth year of *Charles* I. *Vid. Ray.* 3. *Sea Laws* 235. The judges evaded them by subterfuges which were unworthy of the dignity of the bench, and did not observe them longer than they were constrained by the

weight of royal authority. So useful, however, were they considered to be to trade and commerce, that the republican Parliament enacted them in substance by an ordinance of the 12th of *April*, 1648. *Scobell* 147. But at the Restoration, that ordinance ceased to be in force; and the common law judges began again to annoy the admiralty court with prohibitions, as they had formerly done. They did not, indeed, venture to deprive them of all their jurisdiction; they left them the cognizance of those cases of bottomry and mariners' wages which they entertain at present, but declared that they allowed it from mere indulgence and from the necessity of the thing. On the same ground a prohibition was denied in a case of mariners' wages, so early as the 8th of *James* I. *Winch.* 8. *Anonymous.*

It is certain that the court of admiralty, in its origin, had and entertained a jurisdiction co-extensive with that of the maritime courts throughout Europe. Those courts were established for the protection of maritime commerce, to which the feudal judicatures of those times were entirely inadequate. We find them in the middle ages established in all the maritime countries of christendom; in some under the name of admiralty, in others under that of consular courts. In the south of *Europe* the judges who had cognizance of commercial and maritime causes, were denominated consuls; and the celebrated code by which they were directed was thence called the consulate of the sea. *(Il Consolato del Mare.)* Those consuls were mere civil judges, unconnected with the military or feudal system; but in the north, where feudality most flourished, and where the judiciary power was considered as a necessary appendage to military grandeur, the constable, who was at the head of the land armies, and the admiral who commanded the naval forces, could not, consistently with the dignity of their

stations, be without a portion of the judicial authority, while every petty baron had a court of his own. The constable therefore invested his lieutenants, as the barons did their stewards, with the power of deciding on all matters and differences which arose out of the wars; and the jurisdiction over maritime affairs naturally fell to the share of the admiral. His court was established on the model of the consular courts; and those maritime contracts which are regulated by the *Consolato del Mare* and the laws of *Oleron*, were the subject matters of their civil jurisdiction.

Of this fact there is a sufficient evidence to be found in the ancient records that are preserved in *England* in the *Black Book* of the admiralty. Among these, is an ancient statute of king *Edward* I. by which he ordained, with the consent of his barons, "that the stewards of their courts should not hold plea of any thing concerning *merchants* or *mariners*, whether it be on *charter-parties* of *vessels*, obligations or other *deeds*, even though it should be under forty shillings. Otherwise they should be proceeded against by indictment; and if found guilty by a jury of twelve men, they should be imprisoned at the discretion of the lord high admiral."*

In the reign of *Edward* III. was made the celebrated inquisition of *Queensborough*, which is to be found in *Zouch's Jurisd. of Adm. Ass. p.* 34. It contains a list of offences which the court of admiralty had then from time immemorial been authorised to inquire of and punish; and among those is that "of judges entertaining pleas of causes belonging to the admiral, and of such as in admiralty causes, sue in the courts of common law." *Zouch* 36.

* See the text of this statute in Master *Roughton's* articles, printed with Clerke's Praxis. p. 152, 3, 4. Edit. 1798.

This was not, we presume, directed against the king's courts, over whom we do not think that the lord high admiral ever claimed any jurisdiction or controul; but against the multitude of inferior courts with which *England* was filled at that period. The court of admiralty, indeed, claimed to be, and was then considered as one of the king's superior courts, and as such exercised the power of checking and controuling inferior jurisdictions, and particularly the baron's courts, which at that time ruled almost omnipotent within their respective precincts.

The sturdy barons could not submit to be checked in the midst of a judicial career, which was so profitable to them. For it must not be imagined that they were very ambitious of the empty honour of administering justice to their inferiors; and that, for that alone, they would have been anxious to obtain or preserve a share of the judicial authority. But a war of confiscations was then waged by the lords against their vassals. The church, on the one hand, and the nobles, on the other, by means of their judicial establishments, vied with each other in rapacity. Even down to the days of Lord *Coke*, it was a current saying, that "*Quod non capit Christus, capit fiscus.*" 3 Bulstr. 147. To secure, therefore, forfeitures, waifs, strays, heriots, deodands, and a variety of other feudal perquisites, was the real reason which induced them to keep that power in their hands. The obsequious stewards, appointed by the lords, and removable at their will, seldom failed to decide similar causes in favour of their imperious masters. Among those perquisites, not the least important to them, was that of *wrecks;* and they seldom failed to appropriate to themselves the vessels and goods which were unfortunately cast upon the *English* coast. As *wreck* was within the proper maritime jurisdiction of the lord high admiral, he interfer-

ed with them, not with a view of rescuing the shipwrecked property for the benefit of the owners, but in order to obtain it himself as a *droit* of his office. At that time several of the maritime towns enjoyed *franchises* of their own, and were exempted from the jurisdiction of feudal lords and their stewards. There the municipal authority, whose manners were softened and refined by the plastick influence of commerce and the fine arts, preserved such shipwrecked property as came within their bounds, and restored it to the lawful owner. To them the exercise of that and other parts of the admiral's jurisdiction became intolerable; and in the reign of *Richard* II. they laid their complaints before parliament.* The barons, as may be supposed, lent them a ready ear, and their remonstrances speedily procured the famous statutes of 13 *Richard* II. *cap.* 5. *and* 15 *Richard* II. *cap.* 3. by which *wreck* was, among other things, expressly excluded from the jurisdiction of the court of admiralty.

By the first of these statutes it was enacted that the admiralty should only meddle with things *done upon the sea*, as had been used in the reign of *Edward* III. and by the second that he should not have cognizance of *contracts, pleas and quarrels, and other things rising within the bodies of counties, nor of wreck.* It seems, however, that notwithstanding these statutes the court of admiralty continued to exercise its ancient jurisdiction with but little interruption from the courts of common law until the reign of *James* I. —that even in that reign and while Lord *Coke* sat on the bench, prohibitions were not frequent; that in the reign of *Charles* I. the agreement which had been made under *Elizabeth* between the courts of admiralty and common law, for the settlement of their respective jurisdictions was renewed; and it was not until the reign of *Charles* II. that a serious struggle took place between the two authorities; which finally terminated in the triumph of the common law.

* 3 *Reeves' Eng. Law.* 197.

The contest was maintained with great ability, on the part of the civilians, by *Exton*, *Zouch* and *Godolphin*, all of them eminent jurists. In support of the doctrines which they defended, they displayed all the ingenuity and force of reason; but although the weight of argument was manifestly and decidedly on their side, yet the superior power and influence of the king's court of common law prevailed.

But the works of these civilians may be consulted with great advantage by those who are desirous of becoming intimately acquainted with the nature and extent of the ancient jurisdiction of the *English* court of admiralty, and the usurpations, for so they must now be called, of the courts of common law. They interpreted the statutes of *Richard* in such a manner as not to leave the court of admiralty *any civil jurisdiction* whatever. This was an interpretation which could not have been the intention of the framers of the law, who undoubtedly meant to leave them, except as to *wreck*, the same jurisdiction which they had exercised in the reign of *Edward* III. and we have seen above what that was. But the courts of common law determined that if a contract was made at sea, but to be executed on land, or made on land to be executed at sea, in either case, the common law had jurisdiction exclusive of the admiralty. What contracts then were those which remained within the jurisdiction of the latter court? Who can conceive an idea of a contract *made at sea to be performed at sea?* an instrument, for instance, made in one latitude to be executed in another? The civilians more rationally interpreted the statutes to mean, by *things and contracts done at sea,*

those things and contracts, which, although the instrument by which they were proved may be made on land, yet are of a maritime nature, and are usually *performed at sea*: such as contracts of affreightment and the like; of the cognizance of which the admiralty was clearly possessed in the reign of *Edward* III.

The question, however, is now at rest in *England*; and the high court of admiralty has submitted to the restrictions which the courts of common law have imposed upon its jurisdiction. Yet in modern times, the latter have appeared to regret that those encroachments had been carried so far; and their decisions, since the time of Lord *Mansfield*, breath a spirit of much greater moderation than those of his predecessors. On several points, where it was doubtful the admiralty jurisdiction has been secured and fortified by clear and explicit adjudications; in other cases, it has been evidently enlarged; as in that of suits on bottomry contracts *under seal*. *Menetone* v. *Gibbons*, 3 *Term Rep.* 267. There it was determined that the jurisdiction of the court of admiralty does not depend on the *locality* of the contract but on the *subject matter*. This is the very principle for which the civilians have so long contended; and it only now remains to apply it with proper liberality in order to restore to the courts of admiralty, a part, at least, of that jurisdiction of which they have been deprived by the unreasonable jealousy of the courts of common law.

We should not have entered so fully into this subject, but that we think there arises out of it an important question under the constitution of the United States. By that instrument, the United States are invested with the judiciary power in all cases of *admiralty and maritime jurisdiction*. Is that jurisdiction the same which the high court of admiralty formerly

possessed; or is it restricted by the statutes of *Richard* II. and the adjudication of the *English* courts founded upon them?

In the case of the *Sandwich*, *Pet. Adm.* 233, Judge *Winchester*, of the Maryland District, said that the statutes of 13 and 15 *Richard* II. have received in *England* a construction which must at all times prohibit their extension to this country, and he goes on to mention some instances of irreconcileable decisions under those statutes by different judges.

It was difficult for an inconsistency or a false conclusion to escape the penetrating mind of this profound lawyer, who will long be remembered among the brightest luminaries of American jurisprudence.

We are inclined to the opinion that the words *admiralty and maritime jurisdiction*, in our constitution, should be so construed as to vest in the District Courts those powers which were formerly exercised by the High Court of Admiralty. The importance of maritime commerce, the necessity of certainty and stability in its operations and the diversity of those operations require an extensive admiralty jurisdiction.

It becomes us, however, barely to suggest this interesting question, and leave the investigation of it to those who are the proper judges and who are eminently better qualified for the task than we can pretend to be.

For particular information on the subject of the *present* jurisdiction of the civil or instance court of admiralty in *England* and of the laws and forms by which its proceedings are governed, the reader is referred to *Brown's Civil and Admiralty Law*, in which

the subject is treated in a luminous, methodical, and comprehensive manner.

There are but a few decisions of our own courts which make any change on the subject of jurisdiction. The most important are, 1 Dall. 49. 3 Dall. 297. 4 Cranch 24, 443, 447, 452.

Our admiralty is yet in its infancy, and we must wait for the slow hand of time to unfold the extent of its powers. The forms of proceeding are equally unsettled and various. We shall therefore, by the advice of a judicious friend, subjoin a collection of approved precedents.

To gratify the curiosity of those who wish to pursue the investigation of the subject of which we have taken a cursory view in this introduction, we shall add the following documents:

1. The ordinance of *Hastings*, made by King *Edward* I. on the subject of admiralty jurisdiction: extracted from the Black Book of the Admiralty:

2. The heads of the articles of the Inquisition of *Queensborough*, taken in the 49th year of *Edward* III. by eighteen expert seamen;* before the Admirals of the North and West and the Lord Warden of the Cinque Ports.

3. The *Articuli Admiralitatis*, or remonstrance of the Court of Admiralty to King *James* I. complaining of the violation of the articles agreed upon and signed by all the common law judges in the 17th year of *Elizabeth*, with Lord *Coke's* evasive answer.

* Probably a Grand Jury of Mariners.

4. The Resolution signed by all the common law judges in the 8th year of King *Charles* I. on the subject of admiralty jurisdiction and afterwards disavowed.

5. The Ordinance made by the Republican Parliament of *England*, in 1648, on the subject of admiralty jurisdiction.

A.

Ordinance of Hastings on the subject of Admiralty Jurisdiction.

Extract from the Black Book of the Admiralty, C.—Art. 20.

(TRANSLATION.)

It was ordained at *Hastings* by King *Edward* I. and his Lords, that whereas divers Lords had various franchises of trying pleas in sea-ports; their Stewards or Bailiffs should not hold any plea, if it concerned merchants or mariners, whether by *Deed, Charter-party* of vessels, *Obligations* or other *Deeds;* even though the sum should not exceed 20*s.* or 40*s.* and that if any one act to the contrary, and should thereon be indicted, and be thereof convicted, judgment should be given against him as is said above.

Vide *Clerke's Praxis, Lond. Edit.* 1743. *page* 153.

B.

Heads of the Articles of the Inquisition taken at Quinborow in the year 1376, *in the* 49*th of King Edward the Third, by eighteen expert seamen, before William Nevil, Admiral of the North, Philip Courtency, Ad-*

miral of the West, and the Lord Latimer, Warden of the Cinque Ports.

I. OFFENCES AGAINST THE KING AND KINGDOM.

1. Of such as did furnish the enemy with victuals and ammunition, and of such as did traffic with the enemies without special licence.

2. Of Traytors goods detained in ships and concealed from the King.

3. Of Pirates, their receivers, maintainers and consorters.

4. Of murthers, manslaughters, maimes and petty felonies committed in ships.

5. Of ships arrested for king's service; breaking the arrest; and of sergeants of the admiralty, who for money discharge ships arrested for the king's service; and of mariners who having taken pay, run away from the king's service.

II. OFFENCES AGAINST THE PUBLIC GOOD OF THE KINGDOM.

1. Of ships transporting gold and silver.

2. Of carrying corn over sea without special licence.

3. Of such as turn away merchandizes or victuals from the king's ports.

4. Of forestallers, regrators, and of such as use false measures, balances, weights, within the jurisdiction of the admiralty.

5. Of such as make spoil of wrecks, so that the owners, coming within a year and a day cannot have their goods.

6. Of such as claim wrecks, having neither charter nor prescription.

7. Of wears riddles, blindstakes, water mills, &c. whereby ships and men have been lost or endangered.

8. Of removing anchors, and cutting of buoy-ropes.

9. Of such as take salmons at unreasonable times.

10. Of such as spoil the breed of oisters or drag for oisters and muscles at unreasonable times.

11. Of such as fish with unlawful nets.

12. Of taking royal fishes, viz. whales, sturgeons, purpoises, &c. and detaining one half from the king.

III. OFFENCES AGAINST THE ADMIRAL, THE NAVY, AND DISCIPLINE OF THE SEA.

1. Of judges entertaining pleas of causes belonging to the admiral, and of such as in admiralty causes sue in the courts of common law, and of such as hinder the execution of the admiral's process.

2. Of masters and mariners contemptuous to the admiral.

3. Of the admiral's shares of waifs or dereliets, and of deodands belonging to the admiral.

4. Of *Flotson*, *Jetson*, and *Lagon*, belonging to the admiral.

5. Of such as freight strangers' bottoms, where ships of the land may be had at reasonable rates.

6. Of ship-wrights taking excessive wages.

7. Of masters and mariners taking excessive wages.

8. Of pilots, by whose ignorance ships have miscarried.

9. Of mariners forsaking their ships.

10. Of mariners rebellious and disobedient to their masters.

Vide Zouch's *Jurisd. of the Adm. asserted, page* 34.

C.

Articuli Admiralitatis.

The complaint of the Lord Admiral of England to the King's Most Excellent Majesty, against the Judges of the Realm, concerning prohibitions granted to the Court of the Admiralty 11 *die Febr. ultimo die Termini Hilarii, Anno* 8. *Jac Regis.* The effect of which complaint was after, by his Majesty's commandment, set down in Articles by Doctor Dun, Judge of the Admiralty, which are as followeth.

Certain grievances whereof the Lord Admiral and his officers of the Admiralty do especially complain, and desire redress.

1. That whereas the conusance of all contracts and other things done upon the sea belongeth to the Admiral jurisdiction, the same are made triable at the Common Law, by supposing the same to have been done in Cheapsides, and such places.

2. When actions are brought in the Admiralty upon bargains and contracts made beyond the seas, wherein the Common Law cannot administer justice, yet in these cases prohibitions are awarded against the Admiral Court.

2. Whereas time out of mind the Admiral Court hath used to take stipulations for appearance and performance of the acts and judgments of the same court: It is now affirmed by the judges of the Common Law the Admiral Court is no court of record, and therefore not able to take such stipulations: And hereupon prohibitions are granted to the utter overthrow of that jurisdiction.

4. That charter-parties, made only to be performed upon the seas are daily withdrawn from that court by prohibitions.

5. That the clause of *non obstante statuto,* which hath foundation in his Majesty's prerogative, and is current in all other grants, yet in the Lord Admiral's Patent is said to be of no force to warrant the determination of the causes committed to him in his Lordship's patent, and so rejected by the Judges of the Common Law.

5. To the end that the Admiral jurisdiction may receive all manner of impeachment and interruption, the rivers beneath the first bridge where it ebbeth and floweth, and the ports and creeks, are by the judges of the Common Law affirmed to be no part of the seas, nor within the Admiral jurisdiction: And whereupon prohibitions are usually awarded upon actions depending in that court, for contracts and other things done in those places; notwithstanding that by use and practice, time out of mind, the admiral court have had jurisdiction within such ports, creeks, and rivers.

7. That the agreement made Anno Domini 1575, between the Judges of the King's Bench and the Court of Admiralty for the more quiet and certain execution of Admiral Jurisdiction, is not observed as it ought to be.

8. Many other grievances there are, which by discussing of these former will easily appear worthy also of reformation.

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The following is the answer of the Common Law Judges, drawn up by Sir Edward Coke, to the 7th of the above articles of complaint.

ANSWER: The supposed agreement mentioned in this article hath not as yet been delivered unto us, but having heard the same read over before his Majesty, (out of a paper not subscribed with the hand of any Judge) we answer, that for so much thereof as differ-

eth from these answers, it is against the laws and statutes of the realm: and *therefore* the Judges of the King's Bench never assented thereunto, as is pretended, neither doth the phrase thereof agree with the terms of the law of the realm.

Vide 4th Inst. 134.

D.

Resolution upon the Cases of Admiral Jurisdiction.

Whitehall, 18th February. Present, the King's Most Excellent Majesty.

Lord Keeper,	Earl of Morton,
Lord Abp. of York,	Lord V. Wimbleton,
Lord Treasurer,	Lord V. Wentworth,
Lord Privy Seal,	Lord V. Falkland,
Earl Marshal,	Lord Bishop of London.
Lord Chamberlain,	Lord Cottington.
Earl of Dorset,	Lord Newburgh.
Carlisle,	Mr. Treasurer,
Holland,	Mr. Comptroller,
Denbigh,	Mr. Vice Chamberlain.
Lord Chancellor of Scotland.	Mr. Secretary *Coke*,
	Mr Secretary Windebank

This day the King being present in Council, the Articles and propositions following for the accommodating and settling the difference concerning Prohibitions, arising between his Majesty's Courts at Westminster, and his Court of Admiralty, were fully debated and resolved by the Board: and were then likewise upon reading the same, as well before the Judges of his Majesty's said Courts at Westminster, as before the Judge of his said Court of Admiralty, and his Attorney General, agreed unto, and subscribed by them all in his Majesty's presence, *viz*:

1. If suit should be commenced in the Court of Admiralty upon contracts made or other things personal done beyond the seas or upon the sea, no prohibition is to be awarded.

2. If suit be before the admiral for freight or mariner wages, or for breach of charter-parties, for wages to be made beyond the seas; though the charter-party happen to be made within the realm; so as the penalty be not demanded, a prohibition is not to be granted. But if the suit be for the penalty, or if the question be made, whether the charter-party be made or not; or whether the plaintiff did release, or otherwise discharge the same within the realm; this is to be tried in the King's Courts, and not in the Admiralty.

3. If suit be in the Court of Admiralty, for building, amending, saving or necessary victualling of a ship, against the ship itself, and not against any party by name, but such as for his interest makes himself a party; no prohibition is to be granted, though this be done within the realm.

4. Altho' of some causes arising upon the Thames beneath the Bridge, and divers other rivers beneath the first Bridge, the King's Courts have cognizance; yet the Admiralty hath also jurisdiction there, in the point specially mentioned in the statute of *Decimo quinto Richardi Secundi*, and also by exposition and equity thereof, he may enquire of and redress all annoyances, and obstructions in those rivers, that are any impediment to navigation or passage to or from the sea; and no prohibition is to be granted in such cases.

5. If any be imprisoned, and, upon habeas corpus brought, it be certified, that any of these be the cause of his imprisonment, the party shall be remanded.

Subscribed 4th February, 1632, by all the Judges of both benches.—Vide *Cro. Car.* 296. *Ed. Lond.* 1657. By Sir Harbottle Grimstone.

Sir George Cooke was one of the judges who subscribed these resolutions, and he inserted them in his reports, no doubt considering them as law, yet they were afterwards disavowed and said to have been renounced by several of the Judges. Raym. 3.

"These resolutions," says *Brown*, 2 Civ. and Adm. L. 79, "are inserted in the *early* editions of Coke's "Reports; but left out in the later, seemingly *ex in-*"*dustriâ*." And page 78 he says, "To these resolu-"tions the objection cannot be made, which is urged "by my Lord Coke (4 Inst. 136) to the agreement of "1575, that though it was read over in his Majesty's "presence, and in the hearing of the Judges, yet it "was never assented to."

E.

Extract from Scobell's Collection of the Acts and Ordinances of the Republican Government of England. Anno 1648—*page* 147.

CHAPTER 112.

The Jurisdiction of the Court of Admiralty settled.

The Lords and Commons assembled in Parliament, finding many inconveniences daily to arise, in relation both to the trade of this Kingdom, and the Commerce with foreign parts, through the uncertainty of jurisdiction in the trial of maritime causes, do ordain and be it ordained by the authority of Parliament, That the Court of Admiralty shall have cognizance and jurisdiction against the ship or vessel, with the tackle, apparel and furniture thereof; in all causes which concern the repairing, victualling and furnishing provisions for the setting of such ships or vessels to sea; and in all cases of bottomry, and likewise in

contracts made beyond the seas concerning shipping or navigation or damages happening thereon, or arising at sea in any voyage; and likewise in all cases of charter parties or contracts for freight, bills of lading, mariners' wages, or damages in goods laden on board ships, or other damages done by one ship or vessel to another, or by anchors, or want of laying of buoys, except always that the said Court of Admiralty shall not hold pleas or admit actions upon any bills of exchange or accounts betwixt merchant and merchant or their factors.

And be it ordained, That in all and every the matters aforesaid, the said Admiralty Court shall and may proceed and take recognizances in due form, and hear, examine, and finally end, decree, sentence and determine the same according to the laws and customs of the sea, and put the same decrees and sentences in execution without any let, trouble or impeachment whatsoever, any law, statute or usage to the contrary heretofore made in any wise notwithstanding; saving always and reserving to all and every person and persons, that shall find or think themselves aggrieved by any sentence definitive, or decree having the force of a definitive sentence, or importing a damage not to be repaired by the definitive sentence given or interposed in the Court of Admiralty, in all or any of the cases aforesaid, their right of appeal in such form as hath heretofore been used from such decrees or sentences in the said Court of Admiralty.

Provided always, and be it further ordained by the authority aforesaid, that from henceforth there shall be three judges always appointed of the said court, to be nominated from time to time by both houses of Parliament or such as they shall appoint; and that every of the judges of the said court for the time being, that shall be present at the giving of any definitive sen-

tence in the said Court, shall at the same time, or before such sentence given openly in Court, deliver his reasons in law of such his sentence, or of his opinion concerning the same; and shall also openly in Court give answers and solutions (as far as he may) to such laws, customs or other matter as shall have been brought or alleged in Court, on that part against whom such sentence or opinion shall be given or declared respectively.

Provided also, That this Ordinance shall continue for three years and no longer.

Passed, the 12th April 1648.

Made perpetual by Ordinances of 2nd April, 1641. C. 3.—1654. C. 21. and 1645. C. 10.

Expired at the Restoration, anno 1660.

PART II.

THE PRACTICE

OF THE

HIGH COURT OF ADMIRALTY.

BY FRANCIS CLERKE.

TRANSLATED FROM THE LAST EDITION,

WITH NOTES AND ADDITIONS

TRANSLATION

Of the Preface to the Fifth Edition

COURTEOUS READER,

ACCEPT a brief account of this new edition of the Praxis, with which I wish thee to be acquainted.—FRANCIS CLERKE was a man of great skill and industry, who, not without credit, held the office of a Proctor in the Court of Arches, during the reign of Elizabeth. Besides this Book on the Practice of the Court of Admiralty, he composed another on that of the Ecclesiastical Court, which he originally intended for his own use. And having no view of exposing them to the public eye, he hath paid less attention to the digesting and explanation of the principles, upon which these rules are founded.

After his decease, these manuscripts were anxiously sought, and eagerly copied by divers Advocates and Proctors: because, as yet there were no books extant on the subjects whereof they treat. And thus, at length, by a certain evil fate, they chanced to fall into the hands of mercenary men and *half scholars*, who, being exceedingly covetous of a dishonest gain, and having, moreover, no regard to the name or reputation of the author, now dead, did not blush to publish these books, which were only intended for private use, disgraced by manifold omissions and typographical errours.

The work in which the Practice of the Ecclesiastical Court is treated of, hath indeed, lately been diligently corrected and happily reduced to method, by Master *Oughton*, a man well skilled in such matters. But this, its father being no more, hath hitherto lain so neglected and exposed, and withal so transformed throughout, that it could scarcely be recognized by the authour himself, if he were to rise from his grave. And it is likewise so mutilated and imperfect, that not a single chapter, verily, scarce a paragraph in the former editions, can be consulted with safety, much less understood. But before it was published we know, certainly,

that it was held in such high estimation by learned men and all professors of the Law, that they copied it with their own hands.

And this is the reason that the edition which we now present to thee, friendly reader, is produced thus correct. For it hath been collated with two manuscripts, one of which is in the hand-writing of Dr. Law, and the other of Robert Wiseman, L. L. D. and Knight,* both of whom were distinguished ornaments of their Country and the Civil Law. The former was not long since, a Fellow of the Holy Trinity College, Cambridge, and the latter was Keeper of the same, and a liberal benefactor to it. These copies became the property of the College, by the donation of that most accomplished man Nathaniel Lloyd, L. L. D. and Knight, who not long since, was the most worthy Keeper of the College, and lived and died its distinguished benefactor.

The Notes distinguished by this mark ["] were communicated to me by a most learned friend from a manuscript in his possession, which he supposeth to have been written by a certain *Tobias Swinburne*, a not unworthy relative of the writer on Wills of the same name.

[* Sir Robert Wiseman, a Civilian and Dean of the Arches, married the sister of Francis North, Baron of Guilford, Lord Keeper of the Great Seal in the reigns of Charles II. and James II. With this eminent Judge he "observed a more than brotherly correspondence until his death." Life of Lord Guilford, p. 306. Of Dr. Eden, I have not found any mention.]

PRACTICE

OF THE

HIGH COURT OF ADMIRALTY.

.....

Tit. 1. *Of the manner of instituting or commencing an action in the High Court of Admiralty of England; and of the form of the original warrant or mandate which is to be impetrated in Maritime Causes.*

IF any person have cause to maintain an action of a civil or maritime nature, it is necessary for him in the first place to procure a warrant or mandate from the Judge,[1] to these effects respectively, to wit: to arrest and hold the defendant, and to detain him in sufficient custody until he has legally appeared,* or that he shall have produced his body on a certain day, viz. on the third, fourth, fifth, sixth, seventh, eighth or tenth day next ensuing that of his arrest, according to the distance of the defendant's place of residence, provided it be a return day; otherwise on the next return-day following, at the Court

[1 In this country it is to be procured from the Clerk of the Court.—*Tr.*]

* What shall be deemed a legal appearance. Vid Tit. 5. *seq.*

House where justice is administered, or where it is usually administered, in the borough of Southwark, near the London bridge, before the honourable the Lord High Admiral of England, or his Lieutenant,[2] the President or Judge of the Supreme Court of Admiralty, to answer unto N. merchant of London, in a certain civil or maritime cause, as to justice shall seem meet and proper.

[[2] The title of *locum tenens Regis super mare*, the king's lieutenant general of the sea, mentioned in the reign of Rich. II. was superior to that of *admiral* of England. Before the appellation of *admiral* was introduced, the title of *custos maris* was in use.

In some ancient records the Lord High Admiral is called *capitanus maritimarum*. There has been no such office for some years, but his duties have been exercised by *Lords* commissioners of the Admiralty, who possess the same jurisdiction.—2. W. & M.—c. 2.

The modern style of the Judge of the High Court of Admiralty in England, is, 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.* Formal. Instrument. by Sir James Marriott, 245.

He may delegate his powers to an inferior Judge called Surrogate (*Judex subrogatus*, substituted Judge) and that deputy may hear causes and even to proceed to final judgment: *ib.* 246. There are similar Surrogates or deputy Judges in the Ecclesiastical Courts. Hence in some of the United States, in New-York, particularly, the name of *Surrogate* has been given to the officer who has cognizance of the probate of wills and granting letters of administration, although that officer does not exercise his functions by deputation. In other States as in Pennsylvania and Maryland, he is called Register, from the denomination which is given in England to the Clerks of Ecclesiastical Courts. Both these appellations appear to me to be incorrect. That of *Judge* of *Probate*, which is used in Massachusetts, is much more applicable and conveys a more just idea of the office, which it is meant to designate.—*Tr.*]

ADDITIONS TO TITLE 1.

A CITATION or *in jus vocatio*, is a judicial act whereby the defendant by authority of the Judge, (the plaintiff requesting it) is commanded to appear in order to enter into suit at a certain day, in a place where justice is administered.

The citation ought to contain,

1. The name of the Judge and his commission, if he be delegated; if an ordinary Judge, with the style of the Court of which he is Judge.
2. The name of him who is to be cited.
3. An appointed day and place where he must appear; which day ought either to be expressed particularly to be such a day of the week or month, &c. or else only the next Court day (or longer) from the date of the citation, in which the Judge sits to administer justice: the time of appearance ought to be more or less, according to the distance of the place where they live.
4. The cause for which the suit is to be commenced.
5. The name of the party at whose instance the citation is obtained.

These words may also be added, viz. If the said day be a court-day, or otherwise, the next court-day following, in which the Judge happens to sit to administer justice. The reason of this is, lest that day of the month so particularized in the citation should happen to be a holy-day, which is no day for administering justice.

The days called in the law, *dies juridici* are such as are only proper and suitable, and set

apart in the law for judicial acts; in which respect they are termed opposites to holy-days; these being exempt from all judicial acts, and rendering them null and void, if attempted to be executed on such days. *Consetio's Practice of Spiritual and Ecclesiastical Courts, London* 1708. p. 3.

It is also usual for citations to be issued forth against the defendant to appear the third, fourth, sixth, or other day next following the citation, wherein the Judge happens to sit judicially to try causes (no day of the month being named) and this is called *dies incertus*, only in respect of the time when he must appear; the other necessaries and constitutive parts of the citations (*scil.*) *de quo et an et cui extiturus sit*, being complete. In which case, it is necessary that the defendant repair immediately to the place where the Court is to be kept, and inform himself certainly what day of the week or month is the day intended for his appearance, lest his adversary get the advantage by his not appearing. *ib.*

By the act of Congress, July 20, 1789, sec. 2. Mariners are entitled to demand one third part of the wages which shall be due at every port where the vessel shall unlade and deliver her cargo before the voyage be ended, unless the contrary be expressly stipulated in the contract. If the wages be not paid within ten days after the termination of the voyage and the discharge of the cargo or ballast, or if there be any dispute between the seamen and the master respecting the wages, the Judge of the district where the vessel may be, may summon the master before him to show cause why process should not issue against the vessel, according to the course of Admiralty Courts, to answer for the wages. If his residence be more than three miles from the place or if he be absent from his place of residence a summons may be obtained from any Judge or Justice of the peace. Upon the master's neglect to appear, or if he appear and do not show that the wages are paid, or otherwise satisfied or forfeited, the Judge or Justice certifies to the clerk of the District Court that there is sufficient cause of complaint whereon to found Admiralty-process. The clerk then issues process against the ship and the suit is proceeded on and final judgment given according to the usual course of Admiralty Courts.

In such suits, all the seamen, having cause of complaint of the like kind against the same ship are joined as complainants; but it has been decided by Judge Houston, of Maryland District, that such consolidation of claims does not prevent the seamen from being sworn as witnesses. The act further protects them, by making it incumbent on the master to produce the contract and log-book if required, to ascertain any matter in dispute, or the complainants are permitted to state the contents thereof, and the *onus probandi* the contrary lies upon the master. The District Courts have not exclusive cognizance of disputes concerning wages, but seamen may maintain any action at common law for the recovery of them. Seamen are entitled to immediate process without the previous summons, out of any Court possessing Admiralty jurisdiction, wherever the ship

may be found, in case she shall have left the port of delivery where her voyage ended, or in case she shall be about to proceed to sea before the expiration of the ten days, ensuing the delivery of her cargo or ballast. 1. Laws U. S. 140.

Such are the statutory provisions respecting suits for mariners' wages. In the case of Edwards *vs.* the ship Susan, *Pennsylvania District*, the question arose, at what time a mariner, at the last port of delivery, is entitled to receive or sue for his wages? Judge Peters, in his decision, said, that it had always appeared to him unwarrantable to contend that the ten days should run from the time of the discharge of the cargo. He thought that the end of the voyage was, clearly the period when the wages, according to the contract were due. The discharge of the cargo or ballast, is coupled with the end of the voyage in the law, not as part of the contract, or to fix the time, from which the ten days are to be computed; but because it is a necessary step to enable the merchant to demand his freight: and the wages ought not to be paid, until this is recoverable; it being the fund out of which the wages are payable. He considered himself authorised to inquire into the circumstances peculiar to each case, and in the exercise of this discretion, he had allowed at the least, ten days from the end of the voyage, and at the most, fifteen working days to unlade. By the *end of the voyage*, he understood, the day on which the vessel was made fast to the wharf and ready to discharge. Pet. Adm. Dec. 165.

I will barely add, that in all other cases where the District Court exercises an Admiralty jurisdiction, the course of proceeding is, to file a libel, in which the causes of complaint are alleged. Upon the receipt of the libel a monition and attachment are issued of course, by the Clerk and served by the Marshal.]

Tit. 2. *Of the direction of the Warrant.*

The Warrant is issued in the name of the Lord High Admiral of England,[3] and it must be directed to all and singular the Justices, Constables, Mayors, Bailiffs, and other officers of our Lord the King, particularly to D. Marshal of the High Court of Admiralty of England. It is usual for the Registrar[4] of the Court to issue this Warrant without a special decree for the purpose, in the same manner that primary or common citations are issued in the Ecclesiastical Courts.

[3 Such was the practice in England at the time when our authour wrote, but at present it appears to be different. All processes and even forms of decrees that are recorded in Sir James Marriott's Formulary of authentick writs, run in the name of the King. *Vid. Form. Inst. passim.*

In the United States Courts, every process in the District, as well as in the Circuit Courts, is in the name of The United States.—*Tr.*]

[4 In *Dyer* 152 *b.* there is a prescription, for the Lord High Admiral to grant the Office of Registrar of the Admiralty for life. In this country the Clerks of the District Courts of the United States are appointed by the Courts respectively in which they act, and hold their Offices at will.—*Tr.*]

Tit. 3. *Of the manner of executing the Warrant.*

When you have obtained such a Warrant as has been described, it is to be delivered to the Marshal of the Court* (*i. e.* to a certain officer who is specially appointed for this particular purpose) if the person who is to be arrested resides or is to be found within the City of London, the suburbs or adjacent places. Otherwise to some Mayor, Bailiff, Constable, or any Officer or Assistant, in whatever City, Village or Town, where the person lives, who is to be arrested. And the person to whom it is delivered, by virtue of the Warrant shall arrest the defendant, and shall notify to him the cause of the arrest, at the same time exhibiting the Warrant to him. He shall then lodge him in gaol or detain him in safe custody, unless he shall give sufficient security for his legal appearance on the day and at the place mentioned in the Warrant, and shall answer the plaintiff in the action which has been instituted. Which being done he shall be released from the arrest.

Additions to Title 3.

[If the party cited request a copy of this citation, the officer ought to give him a copy, and

* If the process is to be served within twenty miles from the City of London, it is to be given to the Marshal, but if at a greater distance, it is committed to the party who applies for it.

receive only six pence for that copy, if it be an ordinary or usual citation.—*Cons.*]

Tit. 4. *Of the* caution or bail to be given by the person who is arrested, for his legal appearance.*

In the margin or at the foot of the Warrant to which the seal of the Lord High Admiral is affixed, the sum for which the action was brought is marked in these words: *action for* £500. The security which is taken ought therefore to be to the amount of the sum thus specified † for the legal appearance of the party, for the purposes before mentioned, to wit: to answer the plaintiff in the civil and maritime cause. The Officer who executes the Warrant should therefore be cautious that his security be good and sufficient before he release the defendant, as he himself is liable to an action, if the defendant should not appear.‡ The security being taken, the War-

* It is not proper to accept as bail to abide the sentence, (fidejussor judicio sisto) a person who has no property within the territory. *Scaccia de appell. quæs.* 15. nu. 139.

† This security should be taken in the name of the Lord High Admiral. [In the District Courts of the United States it is taken in the name of the Marshal. *Tr.*]

‡ Vid. l. 1. Digest. Si quis in jus vocat. et Bald. et Castr. et Dd. ibid. vid. Joseph. Ludov. Decis. Lucens. 33. who says that a Notary receiving improper security becomes liable, except in three cases:

1st. When he does it by order of the Judge.

2nd. When the principal is solvent, *i. e.* possesses as much property as the amount of the bond.

rant and the bond are to be transmitted before the day of appearance, to the Judge, Registrar, Plaintiff, or to his Proctor, together with the name and surname of the person who executed the process, and the time and place of executing it, in order that an authentick certificate of the execution may be made out and exhibited.

Additions to Title 4.

[*Securities, or cautions, as they are termed by Civilians, are of three sorts:*

1. *Judicatum Solvi;* by which the party is bound absolutely to pay such sum as may be adjudged by the Court.
2. *De Judicio Sisti;* by which he was bound to appear from time to time during the pendency of the cause, to abide the sentence and also to pay a tenth part of the sum in dispute if he should be defeated.
3. *De Ratio;*[5] by which he engaged to ratify and confirm the acts of his Proctor.

With respect to the manner in which these cautions were taken, they were,

1. *Cautio fidejussoria;* by sureties.

3d. When he receives it in the presence of the party, who does not protest against it.

The Judges are not liable, see §. last Inst. de Satisdat. tuto. vid. Vincen. de Franch. decis. 480. n. 3. Farinac. part 1st. prax. crimin. quest. 33.

[5 De *Ratio* is not Latin. I find that Brown 2 Civ. & Adm. Law 356. has it *ratio;* but it is clearly a mistake. The true word is *Rato;* it is so in all the best texts.—*Tr.*]

2. *Pignoratitia;* by deposit.
3. *Juratoria;* by oath.[7]
4. *Nudi Promissoria;* by bare promise.—*Cons.*

The securities in the Admiralty, though in the nature of recognizance, do not authorize the Courtto proceed against lands.—*Tr.*]

Tit. 5. *What shall constitute a legal appearance.*

If the party arrested, or his lawful Proctor shall personally appear, at the return-day by virtue of the Warrant, together with new security (for that which was taken at the time of his arrest, was only bound for the appearance of the person arrested, as in the preceding title) bound to the effects respectively enumerated in Tit. 12, *(of the security given by the defendant)* he has completed a legal security, otherwise not. But if the party himself appear in person, with security to the effect of the aforesaid obligation, he is to be committed to prison by the Judge, until the termination of the suit, unless in the interim he put in bail.* Nevertheless the Judge may, upon proper causes, admit the party to his juratory caution,† viz: the oath of the party to the same effects for which bail should have been

[7 This security is given when the party is too poor to find actual bail. It is in the discretion of the Judge *Tr.*]

* In patriâ seu territorio vocato in judicium succurritur, obcausas sonticas absentia; (non solum morbum, sed tempestatem, quæ impedit navigationem et iter quæ probanda. Locc. 3. c. II. §. 4. 5.

† Vid. Capell. Tholoss. quæs. 138. n. 2

given; particularly if it should appear to him that the party is so poor that he is unable to find security. And if the party shall bring the aforesaid new security, or shall be committed for want of them, or if the Judge shall admit the juratory caution, the former security for his appearance shall be discharged, the bail-bond is to be delivered up, and the party arrested is to be released.

Tit. 6. *The execution of the Warrant.*

If the Warrant have been executed by the Marshal, or by any of the Deputy Marshals of the Court, then the same Officer is accustomed to make his corporal oath, that at such a day and in such a place, he arrested the defendant according to the tenor of the Warrant. But if the Warrant was executed without the City of London, or the suburbs, by a Mayor or any of the Officers specified above in Tit. 2. the Proctor of the plaintiff shall procure a certificate of the execution of the Warrant at length, specifying the day and place of its execution: and he should have it sealed with an authentick seal, in order that full credit may be given to it.

Tit. 7. *Of the Warrant of Attorney or Proxy.*[*]

The Warrant of Attorney or Proxy in civil and maritime causes, is made in the same form

[* The Civil Law distinguishes, as we do, between a Letter and a Warrant of Attorney. The former is called a procuration, proxy, procuracy, or procuratory, *ad negotia*, and the former *ad lites*; that is to say, the one is an authority given to an Attorney in fact, and is a matter extra-judicial, or, *in pays*, and the latter is an authority given to an Attorney at Law, to manage or prosecute one or more suits, or all suits, and is a matter of record, because it is always filed among the exhibits of the cause, and sometimes is executed before and attested by the Clerk or Register of the Court. In the last case, it is said to be made *apud acta*, in the acts of Court.—*Tr.*]

with the Proxy or Procuratory *ad lites*, in Ecclesiastical causes; and it contains all those clauses and powers general and particular which are usually contained in them, with these exceptions: that in the commencement of the proxy to conduct an Ecclesiastical suit, power is given to the Proctor *in omnibus causis* negotiis, litibus et *querelis*; but in civil causes, after the words *litibus et querelis*, the words *civilibus et maritimis* are added. Proxies of this kind, in order to be authentick should be sealed with an authentick seal, in the same manner that such papers are in the Ecclesiastical Courts.* In the Proxies which are filed in Ecclesiastical causes, power is likewise given to petition for the benefit of absolution or liberation from whatever decrees of excommunication, or of interdiction, suffered or to be suffered by law or man, whether simply or by bond. But in Proxies in civil causes, that clause is to be omitted and another is to be inserted, by which power is given to the Proctor to give and introduce, *Ligios, cautiones et Fidejussores*, and also to demand and receive them from the opposite party.

* Cler. Praxis per Oughtonum, Tit. 48.

Additions to Title 5.

[A Proctor is constituted either by proxy or *apud acta curiæ*, or before a Notary Publick and witnesses.

A Proxy, (which *Wesembecy* ranks in the number of extra-judicial constitutions, as also the other before a Notary Publick) is a power or mandate given to the Proctor by his client to appear for him, and to do all things for him, which he might possibly do, if he were personally there himself; with power to substitute another in his stead, so often as he shall be absent upon urgent occasions. And that it may be valid and authentick it ought to contain the name of the party constituting and the name of the Proctor constituted; also against whom, in what cause, before what Judge, and to what acts he is constituted, (viz.) to act, offer, or receive a libel; to except, contest suit, produce witnesses, hear sentence, &c. in which respect these mandates or proxies may be said to be either general (giving full power to prosecute the whole cause while it is in controversy) or special (which gives power only to do or perform some particular act, &c.) and this mandate, that it may be authentick, must be sealed in the same form as authentick certificates (before mentioned) are sealed; of which, see *Lindwood*, Constitutioni *Othoboni, C. d. officio procuratorum.* These mandates ought likewise to make mention, that they are ready to confirm whatsoever their said Proctor shall do in the premises.

Another sort of extra-judicial Constitution is that which is made before a Notary Publick, who draws up a publick instrument thereupon, and exhibits it in Court; and likewise a Proctor is constituted before two or more witnesses, who give their testimony concerning this Constitution of the Proctor. A Proctor is only then said to be constituted judicially, when the party constituting is present in Court, and makes choice of his Proctor before the Judge, and confirms his person, and promises to ratify whatsoever his said Proctor shall act or do (which election he desires may be put into the Court act) or when he, or some one in his name, offers to the Judge a letter, or other writing, which makes appear whom he makes choice of for a Proctor; the contents of which is to be inserted in the acts of the Court. Mr. *Clerke* seems to reckon a constitution before a Notary Publick to be a judicial constituting of a Proctor, but the mistake will easily appear by Wesembecy ff. T. *de Procuratore.*[a] Cons. Prac. 30.]

Tit. 8. *Of constituting a Proctor* apud acta, *or extra-judicially before a Notary.*

The plaintiff or defendant if he is present in Court at the commencement of the suit, gene-

[a. As to the form and manner of constituting a Proctor, see further *Wesemb. ff. de procur. numb.* 5, 6. Myns. 46. 1. *Maranta. in Specul. par.* 4. *dist.* 1. *n.* 35. *in Prac.* and Spec. in *tit. de procur. Sect. rationæ form. numb.* 13. 19. and n. 4. *Cuja. obs.* l. 7. c. 26. in prac. 12. n. 2.—*Tr.*]

rally executes a proxy for the cause in a judicial manner, with all the clauses which are usually inserted in proxies and according to the style of the Court and the precedent written by the Register; by which he stipulates to ratify all the acts and things done by his Proctor. And the Register shall receive a Warrant of Attorney and stipulation of this kind, and shall take the person so constituting and stipulating by the right hand[10] in token thereof. And this sort of appointment may be done before the Register in his own house, in the presence of witnesses.— This Constitution is called a constituting *apud acta*, though it be only done in the absence of the Judge; also the parties and attornies interested when they are in different places, may constitute Proctors before a Notary Publick, and may stipulate as above, in his presence and before witnesses, and may demand of him to draw up a publick declaration and cause it to be recorded. In this last case the Proctors usually say "I exhibit my Proxy for A. B. taken under publick instrument," &c.

[10 The original is thus:—*et in signum ejusdem accipiet constituentem ac stipulantem per manum dextram, &c.* I at first thought, that this meant simply the signature of the party, but when we reflect upon the ignorance of the early ages, when few could write, we are led to conclude that taking by the hand or other symbols, supplied the place of signatures. As in some of the States, in taking a recognizance, our Prothonatories and Justices say, *are you content?—Tr.*]

Additions to Title 8.

[The next thing considerable in order, seems to be the Proctor, his office and power, &c.— Seeing no citation though executed, can be brought into Court but by the Proctor, nor any notice taken of it, unless exhibited by him.— Therefore, among the several divisions of Proctors (in respect of their offices) we shall only make use of that definition best fitting our purpose; and in this place it is *Procurator Judicialis*, a Judicial Proctor,[11] which is intended; (that is) he who manages any one's concern in a Court of Judicature, by the special mandate of his client. The division of Judicial Proctors, see in *Myn. Inst. de action.* F. 10.

How and when Proctors may be substituted.

1. What a substitution is and the several kinds of it.

2. When a Proctor may substitute another in his stead in any cause.

1. A substitution is the putting any one in his stead, giving power to act in his absence. There are several sorts of substitutions; some are testamentary[12] (which are likewise general or spe-

[11 Fide Procur. *l.* 1. l. 71. l. 72. Cod. Eodem Urum. disput. 3. th. 1. n. 2. Jac. Bouric. de officio Advocati, c. 1, 2. Specul. Noctit. in rub. Eodem n. 1. Wesemb. ff. de Procur. n. l. 2.—*Tr.*]

[12 A testamentary substitution in the Civil Law, is the limitation of an estate by will, to go from one person to another upon a certain contingency. The *pupil*

cial) others pupillary: others such as are made by the officers or assistants in Courts of controversy, which agrees properly with the definition here mentioned.

2. And though a Proctor has power given by his proxy to substitute any other in the cause, so often as he shall be absent from the Court; yet he cannot substitute any Proctor before the contesting of suit, called the *litis contestatio*,[13] because he is not, 'till then, lord of the suit, or controversy, nor can it properly be called a suit. But after this *litis contestatio* or contesting of suit, all things whatsoever acted or done by the substituted Proctor, are valid and good in law as if done by the original Proctor. *Wesemb. ubi. s.*

When a Proctor is said to cease to be a Proctor in a cause and when not.

The general rule is, *unumquodque dissolvi eodem modo quo colligatum est;* every thing

lary substitution is a devise to a minor and in case he dies under age, then to his father, guardian, or other person under whose care or custody he is. These are very little connected with the substitution by a letter or warrant of Attorney; but the Civilians are fond of reducing under one head all matters in which their ingenuity can discover the slightest degree of analogy. *Tr.*]

[13] This is analogous to our Common Law pleadings or joining issue. But no critical nicety is required in these Civil Law pleadings; it is sufficient that they are clear and perspicuous and free from impertinent or irrelevant matter. The parties are at liberty to make as many points or questions of fact or law as may be deemed necessary or proper, so that the cause may be heard and determined upon its real merits.—*Tr.*]

ought to be dissolved after the same manner, as it received its being; so that a Proctor (being constituted by mutual consent) may likewise be released after the same manner. But this general rule admits of several limitations, though before the suit is contested (in which state the Civilians term the business to be *uti res integra*) the Proctor may be revoked or changed: the several causes of revocation are at large enumerated by *Wesemb.*

Likewise the client dying before the suit is contested, though the Proctor has exhibited his proxy, and accepted the libel, &c. yet he needs not further defend the suit, but may let his adversary call the executor or administrators of his deceased client, and begin the suit anew, if any action be against them for that fact; but it is otherwise if the matter ceases to be *integra* or whole, that is, if the suit has been contested. And on the contrary, if the Proctor dies after the suit is contested, the mandate is absolutely revoked,[14] though the substitution made by that Proctor, after the suit so contested, is not absolutely revoked by the death of the party substituting. Also the proxy is said to be revoked when the instance is ended, (viz.) sentence being given in a cause, and a protestation of an appeal being interposed;[15] nor can the Proctors or either party, act or do any thing except they exhibit their proxy for their client anew, after the sentence is laid, which often happens when the

[14] Ranch. ad Guid. papam, p. 119.—*Tr.*]

[15] Wesemb. ubi. *S.* Berlachin. repert. verbo procuror appellans verbis qui eum item verbis. p. 234.—*Tr.*]

Proctor appealing comes before the Judge (from whom he appeals) and alleges, that he has so appealed, and desires dismission, &c. or where the party who got the cause comes and demands sentence to be put in execution. And though the appellate do obtain sentence of remission, and do present this letter of remission to the Judge from whom it was appealed ; yet he can do nothing in the presence of his adversary's Proctor, but must call the principal party by new process, in like manner whether it is appealed or not. After sentence is given, the party who got the sentence, must call the adverse party by way of process, to see the sentence put in execution and both of them must constitute their Proctors as at first. But if the principal party die after the suit has been contested by the Proctors, the Proctor of that party so dying (whether plaintiff or defendant) is (by the contestation of suit, *res nimirum desinens esse integra*, as the civil law calls it) made lord of the suit,[16] and may prosecute and defend the suit, and do all things which ought to have been done, if the principal party had been alive ; and likewise obtain a definitive sentence. But we must distinguish between real and personal actions, for all actions that are personal[17] do die with the person : such as are actions or causes for defamation or matrimonial, and such like ; but in

[16] Zouch Elem. Jur. p. 5. Sect. 8. Sect. et procuror. *Tr.*]

[17] Inst. Sect. ovum. de Succes. Myns. Grav. ad vest *Tr.*]

real actions, which may respect the goods, or the right any one pretends to a personal estate, &c. then what is above said takes place. Likewise, if any appeal from any pretended grievance which they suffer in the proceedings, before the definitive sentence, and the Judge, to whom it was appealed, pronounceth, that it was unjustly appealed, and thereupon remits the cause back to the Judge from whom it was appealed, and the party appellate exhibits the letters remissary before the Judge from whom, &c. and makes request that they may proceed according to the former acts,[18] and in the same state in which the cause was at the time of the appeal ; in this case, the Proctor of the party appellate, may, in the presence of the Proctor who appealed, act and do all things as if he had not been appealed at all. For the Proctor of the appealing party does not cease to be Proctor ; if the appeal be made from some grievances committed after the contesting of suit, but before the sentence, seeing the procuratory mandate is of force until the definitive sentence. And thence it happens, that the party appellate needs not (in this sort of remission) call the principal party who appealed, to see further proceedings, as above. Cons. Prac. 30.]

[18] Gail l. 1. obs. 109. n. 3, 4, 5. &c. Grav. ad vest. l. 4. c. 4. n. 39. verbo nisi forte.—*Tr.*]

TIT. 9. *The petition of the Plaintiff's Proctor at the time of the return of the Warrant before the Judge.*

The Proctor for the plaintiff appears before the Judge saying as follows :[19]

"I exhibit my proxy in writing, (or *apud acta*, if he was thus constituted) for N. (*i. e.* for the plaintiff) and make myself party to the same; and I exhibit the original mandate with the certificate indorsed thereon, (or, upon the execution of which the mandatory here present in Court attests by his oath.) And I accuse M. of contumacy because he was bound to make his legal appearance here this day, (as well by the tenour of the mandate, as by the stipulation or undertaking of his bail-bond which was executed in this behalf and remains in the hands of the Registrar, or, which is now ready to be exhibited by me) and is not now forthcoming."

"Wherefore I pray that he be declared in contumacy, and that, in pain of such contumacy, he be declared to have incurred the forfeit of his bond."

[19] By this and other titles in Clerke we learn that in the early stage of jurisprudence, the pleadings were oral in the Civil, as well as in the Common Law Courts. But a different practice has since been introduced, and every thing in the course of a Civil Law suit, except incidental motions, is now exhibited in writing in the various forms of Libels, Petitions, Allegations, Answers, Replications, Duplications, &c. which are not required to be framed in any formal set of words. These formularies, however are curious, as contributing to show the ancient practice of the Courts of Civil Law in England, and through them, as though our ancient Common Law Courts, important principles may still be traced, which will be found useful to the modern practitioner.—*Tr.*]

Then the Judge shall order the defendant to be thrice called upon his stipulation by the Marshal of the Court, and in case he does not appear, he shall pronounce the bond to be forfeited, and order him to be taken into custody until the penalty be paid. When the defendant fails to appear, the Judge is accustomed to allow a reasonable proportion of the penalty thus forfeited, to the plaintiff, in consequence of the injury which he may sustain by the delay in his suit. He may dispose of the remainder according to his discretion;* for the aforesaid stipulation for the appearance of the defendant was said to be a prætorian stipulation,[20] and is, therefore, at the disposal of the Judge. But in case the defendant, notwithstanding the stipulation for his appearance, does not appear, but flies the Kingdom or dies, leaving no effects, then the whole amount of the stipulation entered into by the fidejussores for his appearance, is to be delivered to the plaintiff upon his making proof of the debt.

* Nam tota Summa foris facta, debetur Domino Admirallo, quia cautio, illi interponitur non parti.

[20] *Prætorian* stipulation is made to the Court, *contentual* to the party. The bail are not discharged by the surrender or death of the principal, as at Common Law. In proceedings *in personam*, the caution for the appearance of the party is prætorian.—*Tr.*]

TIT. 10. *The petition* of the defendant upon perfecting his legal appearance according to the stipulation, and the plaintiff not appearing or neglecting to prosecute his suit.*

IF the defendant appear according to the arrest and the bail which was put in by others for him, he, or his Proctor in exhibiting his proxy, in writing or *apud acta*, shall say:

"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 this Court. Wherefore, I pray that my client may be hence dismissed with costs, and that his bail-bond be decreed to be returned to him or be cancelled."

Then the Judge shall cause the Plaintiff to be publickly 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

* Vide Gail. lib. 1. obs. 59. per totum. Et vid. Clerke's Prax. in Caus. Eccl. Tit. 53. per Oughtonum.

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 this is to be observed here; if the defendant have his bail in Court, ready to answer to the plaintiff in the particular cause, and believes that the plaintiff will appear before the day which has been granted for his appearance, or on the very day on which he may be cited to appear, and prosecute the suit; then he, the defendant, may for fear of surprise, 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. And then a bill of costs is to be made out and taxed by the Judge, and the party is to swear to the disbursement of the said costs. But of the taxing of costs: the monition for the payment of them and other incidental expenses, is to be proceeded on as in Ecclesiastical Courts; with this difference, that in the Ecclesiastical Courts the party who is condemned in costs is admonished to pay them by a certain day, otherwise to appear on another day and show cause why he should not be excommunicated; whereas, in the Admiralty, in civil and maritime causes, the monition contains an injunction to the party to pay the costs by a certain

day mentioned therein, and there is moreover inserted in a *capias* clause, by which, if he does not pay them on or before that day, the officer is ordered to take his body and commit him to prison until he shall pay.*

Tit. 11. *The Petition of the Proctors* hinc indè, *if both parties appear.*

If the plaintiff appear at the day appointed either in person or by his Proctor, he shall say, "I accuse the defendant of contumacy, &c." (as in Tit. 9.) Then the defendant, if he appear in person or by his Proctor, shall pray that a libel and fidejussory security† be given by the opposite party, or that he be dismissed with costs.

‡The Proctor for the plaintiff shall reply, that, first he prays that proper fidejussory security be put in by the defendant according to the provisions of law and the forms of the Court, to the effect specified in Tit. 12.

Then the Judge shall say "We direct that both parties shall file their fidejussory security by to-morrow, and that the plaintiff file his libel on the same day.

* Vid. Cler. Prax. in Curiis Eccles. Tit. 27. 28. 29. per Oughtonum.

† Although the Laws require that the plaintiff shall put in security by proper fidejussores before he corrects his libel, yet it is little attended to in Courts. addit. ad Capel. Tholos. quæs. 138.

‡ For the plaintiff is not bound to libel, unless fidejussory security has been first put in by the defendant

Tit. 12. *Of the fidejussory security given by the defendant, and the stipulation which is entered into by him.*

*The defendant ought to find at least two fidejussores, who should be bound respectively to the plaintiff, in the sum for which the action was instituted, to these effects,† viz: to abide the sentence, *(judicio sisti)* to pay costs, and to ratify the acts of the Proctor by him constituted, or to be constituted. But if it be objected, on the part of the defendant, that the plaintiff has maliciously commenced his action for a greater sum than is really due to him, in order that the defendant might be cast into prison for want of fidejussores; the Judge, for the prevention of such fraud or rather malice, may compel the plaintiff to swear to the sum which he expects to prove is due to him, and the fidejussory caution shall be taken to that amount:[21] the other disbursements incurred by praying the decision of the Judge, and for expenses in supporting the cause, if the plaintiff succeeds, are to be added.

* Vid Digest. Lib. 46. Tit. 7. l. 9. But after decree pronounced, are the fidejussores held to that which may be pronounced in the Appeal cause? Vid. l. 20. *cum apud;* where it is said they are not unless there be another action. Vid. Bart. add. l. et etiam Castrens. ib.

† Ridley's View, pars 2. c. 1. §. 5. in fine.

[21 This seems now to be made unnecessary by the rule, 28th Jan. 1801, requiring an affidavit of the debt before the Warrant issues. 2 Bro. Civ. & Adm. 410 *Tr.*]

TIT. 13. *The Petition and Protest of the Proctor for the Plaintiff at the introduction of fidejussores of this kind.*

As it sometimes happens that the defendant introduces fidejussores who are unknown, or who are not able to pay the amount sued for, the Proctor for the plaintiff, at the production of them, may protest against the admission or reception of them and their insufficiency, and he may pray for more ample security. This protestation is particularly necessary, because, if it be neglected, the party is excluded from demanding more substantial security at any future period of the cause.

TIT. 14. *The production of fidejussores on the part of the plaintiff.*

*THE plaintiff is also obliged to find fidejussores to these effects, viz. for the prosecution of the suit; for the payment of the defendant's costs if the plaintiff fail in his cause,† and for the production of the plaintiff personally as often as he may be called. For take notice, that the plaintiff can use the personal answers of the

* Vid. Capell. Tholos. decis. 138. nu. 3. vid. auth. generaliter Cod. de Episc. et Cleric. vid. Fachsii differentias Juris Civilis et Saxonici, Lib. 1. Tit. 40. p. 154. Novell. 111. 2. Oldendorp. Class. 1. Act. 7. in fine.

† Cave. For unless you add, *in which the plaintiff shall be condemned*, the fidejussores will be bound to pay costs though the plaintiff may not be condemned in costs. Thus Salicet. l. in the conclusion of Cod. de fruct. et lit. Expens. nu. 2. versic: and therefore be careful.

defendant, to the allegations contained in the libel, or any other matter by him suggested and filed. So it is lawful for the defendant to make use of the personal answers of the plaintiff, to any matter of defence, whether by exceptions or by any other kind of allegations whatsoever, which are by him put in. And it is proper that the Proctor for the defendant should dissent and protest at the time of taking the fidejussores for the plaintiff, in the same manner as was done by the plaintiff in the preceding title.

TIT. 15. *The Petition of the Proctor for better or more substantial security.*

*ALTHOUGH fidejussory caution has been put in on both sides, yet if any of the fidejussores are not sufficient, the Proctor for the adverse party may object to them, either at the contestation of the claim or after the conclusion of the cause, in these words:

* When the security is prætorian or judicial, upon the death of one of the fidejussores, or upon the event of his becoming insolvent, the party may demand additional security—secus, when the security is conventional, vid. l. si ab arbitro. 10. §. ult. Dig. qui satisdare tenent. et Alber. et Angel. et Jas. ibidem in 8 Not. Vincent. de Franchis. decis. 480.

[In the Admiralty they do not take recognizances, because not being a court of record, a prohibition would lie. This seems to be the law at present, though there has been much dispute upon the subject. See Zouch, Godolphin, and Lord Rayne, 1285, 1. Bro. Civ. & Adm. 361, says that the securities or stipulations taken in the Court of Admiralty, in the nature of bail have no priority over specialty debts, nor do they affect laws. Nor is the heir bound by them unless expressly mentioned, but the executor is.—*Tr.*]

Admiralty - Not a court of record.