"I allege that N. and M. fidejussores produced on the part of R. in this cause, were not nor are sufficient, according to the matter in dispute; and that the said fidejussores, or such a particular one, is commonly held and reputed among his neighbours and acquaintance to be a poor man, especially as not worth such a sum, or even a much less sum than that for which he is bound. Therefore I pray that better and more substantial security be given by the adverse party, or that he be taken into custody until such security be given by him."

Then the Proctor for the opposite side shall say:

"I dissent and protest the nullity of this petition, and I deny the truth of the allegations contained in it: and I allege that the fidejussores in behalf of my client in this cause, are good and sufficient, and that they are able to pay the amount of the sum for which this cause has been instituted, and as such they are commonly accounted and esteemed. Therefore I pray that may client be not required to put in additional security in this cause."*

* And note, that although the fidejussores put in by the defendant were sufficient at the time when they were received as such, yet, if they afterwards become *lapsi facultatibus*, as it is said above, the defendant is bound to give other and better security. Likewise if the fidejussores who were introduced at the commencement of the cause, cease, during its pendency, to be sufficient, the party, in whose behalf they were introduced, ought to give others.

Tit. 16. *The decree of the Judge on the petition for further security.*

This matter or question, viz. whether the fidejussores are proper and sufficient or not, the Judge ought and he usually does decide upon summary proof, in order to prevent any delay of the principal cause and further expense to the parties, and if he be able to ascertain immediately by any persons present in Court, (for on Court days merchants are usually there, who are generally acquainted with the circumstances of the citizens, and often they are known to the Judge himself) he shall order the party to produce further and more sufficient security by some future day. But if the premises be not proved, the Judge shall assign a time for hearing his determination.

Tit. 17. *The form of proving the sufficiency or insufficiency of the fidejussores.*

Summary and not full or exact proof is required in such a case: Thus, if the party alleging the insufficiency of the fidejussores, produce to the Judge, a certificate under the hand of the King's Collector of the Revenue in those parts in which the fidejussores dwell, that they do not pay their taxes, or, at least, not as much as they are rated at, or if from the certificate of honest men of the neighbourhood who are known to the Judge, it appear that these men are publickly held and reputed to be poor, or, at least, not worth as much as the amount for which they are

security, or a sum much less than that for which the action was instituted, the Judge should decree as above in Title 16. But, on the contrary, if the party which produced the fidejussores, shall prove in the manner abovementioned, or by any other kind of proof, that his fidejussory caution is good and sufficient, then the aforesaid petition for the introduction of new security is to be refused, either in express terms, or tacitly by proceeding in a manner contrary to it.

Tit. 18. *The security to be interposed by the principal party to indemnify his fidejussores.*

At the same time and in the same record in which the stipulation or recognizance of the fidejussores was taken, as in Title 12. the principal party enters into an obligation to a similar effect with that for which the fidejussores are bound, and also to indemnify them against the consequence of their security. And this caution of the principal party ought to be taken in double the amount of the fidejussory caution, or, at least, in a greater sum than that in which they are bound, at the discretion of the Judge.

Tit. 19. *The giving or tendering a libel.*

After the exhibiting and introduction of the fidejussory caution, *hinc inde*, to the effect specified in Title 12. the Proctor for the plaintiff shall say:

"I give you a libel and pray decree for proceeding in a plain and summary manner."

As all civil and maritime causes are summary,* the mode of proceeding is the same as in Ecclesiastical cases,† viz. there is to be a decree for the appearance of the principal party; a probatory term is to be limited or assigned: the principal is to be produced: the witnesses are to be brought into Court: a commission for the examination of witnesses is to be issued, if they are within the Kingdom, or, if they are not, a commission *sub mutuæ vicissitudinis*, from the mutual aid granted by different jurisdictions for the furtherance of justice: that commission is to be proceeded in and duly certified: the publication of the testimony is to be prayed and decreed: and finally, the course of proceedings until pronouncing the final sentence is to be the same as in the Ecclesiastical Courts with the exceptions which shall hereafter be shown.

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* Summatim, brevitèr ac de plane citrà strepitum forensem, levato velo, i. e. aperto ostio, cui velum solebat prætendi Locc. Lib. 3. c. 11. §. 2. Welwood Tit. 5. f. 53.

Causa maturanda ob navigandi necessitatem, cujus periculum est in morâ. Locc. Lib. 3. c. 11. §. 2.

Maximè in causis de submersis navibus aut naufragiis. Cod. 11. 55. Locc. Lib. 3. c. 11. 2. Of wreck or Spoil. Welw. Tit. 5. f. 53.

Insomuch that they need not put up their petitions in writing. Welm. Tit. 5. f. 54.

In Admiralitats Hollandiæ duplica non est litigantibus permissa. Locc. Lib. 3. c. 11. §. 2.

In liquidis delictis Nauticis summariè et executivè procedendum per jura Sueciæ Locc. Lib. 3. c. 11. §. 2.

† Vid. Clerk. Prac. in causis Ecc. Tit. 61. 58. 80. 76. 86. 65. 62. 97. 95. 96. 71. &c. 221. per Oughtonum.

Additions to Title 19.

[A **term probatory**, is said to be that time, or delay which was given to the plaintiff wherein he might prove what he pleads or sueth for; nor has the plaintiff the sole or absolute benefit of it: for the defendant may likewise make use of this term, if the plaintiff renounce it.

Now proofs are said to be twofold, in respect of the matter in controversy. One sort of proof has relation to the matters of fact, the other has relation to the matters of law which occur therein; and this latter sort ought to be made by the laws, customs, canons, &c. Sometimes directly, sometimes by argument. *Mascardus* de proba. vol. 1. 94. 3. Wesemb. in paratit. ff. de proba et pres. n. 2.

Proofs* which have relation to the fact are said to be either

- *Most evident*, which are such as are made by instruments of undoubted credit, &c.
- *Evident and clear*, or full proof which makes so much as serves to determine the suit; and this is done either by — witnesses, instruments, *i. e.* writings, confession, evidence of the fact, an oath, a just presumption, fame, or undoubted circumstances.

or

- *Less evident*,† which make some proof of the matter, but not so much as will ground a sentence upon; this is made by — one witness, a private book, or writing, a mean, reasonable, or indifferent presumption.

* De hisce prob. apud Liud. videas t. dejure jur. c. Presbyteri. Sect. quod Si verb. probationes.

† Mascard. de prob. vol 1. quest. 4. n. 16. Ummius disp. 15. th. 1. alc. ubi. s. et in tract. presumption. in prin. par. 3. n. 2. Wesemb. in f. f. de prob. & pres. n. 4. ubi plene de his probation. divisionibus reperias. Speculator tit. de prob. sect. videndum.

Commissions Submutuæ Vicissitudinis, or Letters Rogatory.

By the Law of Nations, the Courts of Justice of different countries are bound to be mutually aiding and assisting to each other for the furtherance of justice. Hence, when the testimony of witnesses who reside abroad is necessary in a cause, the Court or Tribunal where the action is pending, may send to the Court or Tribunal within whose jurisdiction the witnesses reside, a writ patent or close, as they may think proper. They are usually called *letters rogatory*, but our author here denominates them *sub mutuæ vicissitudinis*,* from a clause which they generally contain. By that instrument the Court abroad is informed that a certain claim is pending in which the testimony of certain witnesses who reside within its jurisdiction is required, and it is requested to take their depositions or cause them to be taken, in due course and form of law for the furtherance of justice and *sub mutuæ vicissitudinis obtentu*: that is with an offer on the part of the Court making the request to do the like for the other in a similar case. 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.

* Vid. the form of Letters Rogatory in Clerke's Ecc. Prac. Tit. 167. p. 236.

and the proceedings being filed in the Registry of his Court, authentick copies thereof, duly certified, are transmitted to the Court *à 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.

Such is the manner in which the Courts of those countries of Europe which are governed by the Civil Law, proceed with regard to each other. In former times, even the Courts of Common Law in England availed themselves of this privilege of calling upon the Courts of other countries for their assistance. Thus, in the reign of Edward I. in an action of trespass for a ship and cargo, *Letters Rogatory* issued from the Court where the action was pending directed to the Count of Holland, requesting him to cause an inquest to be taken by good and lawful men of his own country, to ascertain what goods, wares, and merchandizes had been shipped on board the vessel in question. 1. Ro. Ab. 530. pl. 13.

By the Judiciary Act, (Laws U. S. vol. 1. p. 47) the mode of proof by oral testimony and examination of witnesses in open Court, is 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. When the testimony of any person is necessary in a civil cause depending in one of these Courts, who lives 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 the District in which the Court is held, and to a greater distance than one hundred miles, before the time of trial, or if he be ancient and infirm, his deposition may be taken *de bene esse* before any Judge or Justice 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. But the person before whom the deposition is taken, must not be of counsel or attorney to either of the parties, nor interested in the event of the cause. In such cases it is necessary that there be a notification from the Magistrate before whom the deposition is to be taken to the adverse party to attend and put interrogatories if he think fit. This must be served on the party or his attorney, as either may be nearer, if either be within one hundred miles of the place of such 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.

In causes of Admiralty and maritime jurisdistion, or other cases of seizure, when a libel is filed, in which an adverse party is not named, and the depositions of persons in the circumstances above described, are taken before a claim has been put in, this notification is to be given to the person who has the agency or possession of the property libelled at the time of the capture or seizure, if known to the libellant.

Every person thus deposing must be carefully examined and cautioned, and sworn or affirmed to testify the whole truth. The testimony must be reduced to writing only by the Magistrate, or the deponent in his presence, and must be subscribed by the latter. The depositions are to be retained by the Magistrate until he shall deliver it with his own hand into the Court for which they were taken, or they must be sealed up together by the Magistrate, with the reasons of their being taken, and of the notice, if any, which has been given, and remain under his seal until opened in Court. Any person may be compelled to appear and testify before a Magistrate in the same manner as he might be compelled to appear in Court for the same purpose.

In the trial of any cause of Admiralty and maritime jurisdiction, from the decision of which it is lawful to appeal, if either party satisfy the Court, that probably it will not be in his power to produce the witnesses who are there testifying, before the Circuit Court should an appeal be had, and move that their testimony be taken down in writing, it is done by the Clerk of the Court. This testimony may be used on the trial of the appeal, if it appear to the satisfaction of the Court, that the witnesses are then dead or gone out of the United States, or to a greater distance than 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, and not otherwise. The Courts of the United States have full power to grant a *dedimus potestatem* to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice. The Circuit Court, in the same manner as a Court of equity, according to the usages in chancery may direct depositions *in perpetuam rei memoriam* to be taken as to matters which are cognizable in any Courts of the United States.

It is to be regretted 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 was 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. In more modern times the practice of issuing Letters Rogatory has fallen into disuse in the English Courts of Common Law and commissions of *Dedimus potestatum* have offered a feeble substitute. But, however, it may be with respect to the Courts of Common Law, whose practice does not properly fall within the scope of our present inquiry, the principle is fully established in England, that Courts of Admiralty in different countries are to be mutually aiding and assisting to each other, and are ever bound to execute the judgments of each other. The reason which is given, is that they all proceed by the same system of jurisprudence, the Civil Law. 1 Vent. 32. 1 Ro. Abr. 530. 1 Lev. 267. 1 Sid. 418. 2 Keb. 511. 610. 1 Show. 143. 2 Show. 232. Skin. 59. Raym. 473. 2 Ld. Raym. Danv. abr. 265.

Hence it follows, that Letters Rogatory, or a Commission *sub mutuæ vicissitudinis*, may issue from an Admiralty Court in the United States, to a Court of the same nature abroad, for the purpose of taking the depositions of witnesses, or even of executing their own judgments; and it appears also to follow, that if Letters Rogatory come from a Court or Tribunal of a foreign

country, directed as they usually are, to the Judge of a particular place, without any designation, the District Judge, having Admiralty jurisdiction is the proper person to cause them to be complied with.—*Tr.*]

Tit. 20. *The manner of certifying the decree to answer the allegations of the Libel, if the defendant cannot be cited.*

Although every original warrant or mandate contains an arrest of the person of the defendant, yet the decree, or as it is called, the personal warrant to the principal party, to answer the charges comprized in the libel, ought to contain only a citation, like the decree to the principal party in Ecclesiastical causes. But if the defendant abscond, so that a citation cannot be served upon him personally, it is to be certified by the mandatory himself in person upon oath, or by an authentick certificate as in Ecclesiastical causes. And a decree is to be prayed and passed in manner and form against the principal party to the effect above mentioned, viz. to appear on a certain competent day at the pleasure of the Judge. Upon the return of this citatory mandate,[22] if the defendant do not appear, a decree against the fidejussores is to be prayed, directing them to produce the body of the prin-

[22] This practice seems to be contrary to the Civil Law, which requires that the goods of the absconding person should be seized before a decree can be passed against the fidejussores. Did. Lib. 42. Tit. 4. l. 2. *Quibus ex causis in possessionem eatur.*—*Tr.*]

cipal under pain of the penalty into which they have entered.

Yet it is usual for the Judge, at least in the causes of poor people, if the defendant cannot be cited against the day mentioned in the citatory mandate, because he is concealed, to decree that the fidejussores be called by a certain competent day, to produce the body of the principal party for the aforesaid purposes under pain of their stipulation by a certain day, which is to be assigned at the pleasure of the Judge.

TIT. 21. *The manner of executing the aforesaid Warrant* viis et modis.

THE mandatory shall go to the accustomed place of residence of the party who is sued, and shall cite him personally, if possible. But if he cannot apprehend him, he may serve the citation in this manner: he shall affix it upon the door of his house, or upon the gates of the Parish church on a dominical day, or during the unemployed time of divine service; or if the defendant be a merchant of London, or have no certain domicil, he may affix it upon the publick Royal Exchange, where a great crowd of merchants is accustomed to resort. And the officer is bound to affix a true copy of this kind of citatory mandate at the door, gate, or Exchange, as we have said. Likewise, if the fidejussores be concealed, so that they cannot be cited to the foregoing effects, a decree *viis et modis* is to be passed against them, following the manner

and form as has been before directed, against the principal when he absconds.

ADDITIONS TO TITLE 21.

[And this it is which is called *citatio viis et modis*, or *citatio publica*, a public citation, being executed either by publick edict (a copy thereof being affixed to the doors of the house where the defendant dwells, or the doors of the church within whose Parish he inhabits) or (as my author tells me) by publication in the church in time of divine service; or *per campanam*, the tolling of a bell; or *per tubam*, the sounding of a trumpet; *et vexilli erectionem*. This being done, a certificate must be made of the premises, and the citation brought into Court (as is even now mentioned) and if the party cited appear not, the plaintiff's Proctor must accuse his contumacy, (he being first three times called by the crier of the Court) and in penalty of such his contumacy, he must request that he may be excommunicated. Cons. Prac. p. 35.]

TIT. 22. *The Petition of the Proctor for the Plaintiff, when the fidejussores on the part of the defendant being monished to bring in the principal, neither appear themselves, nor have him forthcoming.*

THE Proctor for the plaintiff shall say:

"I exhibit your original mandate, together with a certificate indorsed, (or, to the execution

of which the mandatory here present in Court maketh oath) and I accuse of contumacy X and Y, the fidejussores on the part of the defendant who were ordered to produce him in Court this day, to answer, in person, the positions which are contained in the libel: otherwise to appear personally here this day, by producing the principal party to abide the aforesaid effects, according to the stipulation by them interposed; or to show cause why they should not be declared to have incurred this forfeiture or penal stipulation.* Wherefore I pray that they may be decreed contumacious, and in pain of their contumacy that they be declared to have incurred this forfeiture; and I pray that they be ordered to stand committed until the said forfeiture shall be paid."

Then the Marshal is to make publick proclamation for the aforesaid fidejussores, and upon their failure to appear, they are to be pronounced contumacious, in pain whereof they have incurred the forfeiture and are to be committed until it is paid. Yet this is to be noted, that it is not usual for the Judge, although he does possess the power, to pass this decree on the first day appointed for the appearance of the fidejussores; but to wait one or two Court days and to continue their appearance. If this be done, the Proctor for the plaintiff should take care, that the certificate of the warrant introduced by the fidejussores be also continued, in order that,

* Dig. Lib. 2. Tit. 8. c. 2. §. ult. Qui satisdare cogantur, &c.

if on the same day the fidejussores do not obey the mandate, (that is, if they fail to have the principal party forthcoming) he may immediately charge them with contumacy and pray as before.* And note,† that if the principal party should appear within one or another day (intrà unum aut *alterum* diem) after the interposition of the decree against the fidejussores that they have incurred the penalty of their stipulation, and are about to be committed, and before that decree has been executed upon them, the Judge may moderate the penalty or forfeiture, notwithstanding his decree.‡ But it must be done in such a manner that a part of the sum thus mo-

* Vid Clerke's Prax. in Caus. Ecc. Title 70. per Oughtonum.

† When a person has stipulated any thing under any certain penalty, as, if within a certain time he shall not produce a defendant, or if that time being elapsed the penalty shall be forfeited, Justinian still relieves the fidejussor so far as not to exact the penalty immediately, but after a certain time, within which he may purge the delay, by producing the defendant, or by making defence for him. *Farinac. pars* 1. *a prax. crimin. quæs* 34. *n.* 135. *Gœddæus in l.* 12. *Digest. de Verb. Signif. V.* 1. *nu.* 12. *Perez. prælect. in Cod. de fidejuss. n.* 18. Which he could not otherwise obtain, because, regularly, no excuse nor subterfuge will avail to prevent the forfeiture of the penalty on the day prescribed by the obligation; nor is there any necessity for further interposing or monition, when, that day being added, the party is sufficiently justified in requiring the fulfilment of the engagement. *Zas. ad l. si insulam Dig. de Verb. Oblig.*

‡ Because the security is Prætorian. Prætorian Stipulations are favourably received *gl. in l. sancimus Cod. de fidejuss. in verb. pecunias. Vid. Card. Mant. lib.* 16. *Tit.* 20. *n.* 17. *Zas. in l. insulam Dig. de Verb. nu.* 21. *et* 24.

derated shall be given to the plaintiff, on account of the delay and the expenses of his cause.

TIT. 23. *The petition of the fidejussores if they appear on the day appointed for them, to bring in the principal party.*

ACTIONS which are instituted in the Court of Admiralty, are generally between merchants, as well foreign as domestick, and masters and mariners. Therefore if the principal party, for the appearance of whom the fidejussores are summoned, be absent from the kingdom at the time when he should be produced, the fidejussores are bound to appear in order to purge themselves of contumacy, by stating the cause of the impediment, as the absence or illness of the principal, and holding themselves ready and willing to bring him in, on some future competent day to be assigned by the Judge. And if they make oath of the truth of this allegation,* the Judge ought, and he usually does, appoint some future day for the fidejussores to bring in the principal for the aforesaid effect, according to the distance of the residence of the principal.

At this day the Proctor for the plaintiff ought to pray, as above, a continuation of the certificate by him already filed against the aforesaid fidejussores, that if they do not surrender the principal on that day, he may, in pain of their contumacy, demand that they be pronounced

* Vid. Farinac. Prax. Crimin. par. 1. qu. 34. nu. 147.

to have incurred the penalty of their stipulation, as above, Tit. 22. Also the Proctor for the plaintiff may, *ex abundanti* and for greater caution, pray the Judge that he admonish the *fidejussores*, when they have petitioned and alleged as before mentioned, to appear on the aforesaid day, which was assigned to bring in the principal, that they may hear themselves declared to have incurred the forfeiture, provided they do not produce the principal, in which case the sum of forfeiture may be passed, in pain of their contumacy, even though the aforesaid certificate should not have been continued.

And here two things are to be noted; first, that if the plaintiff or his proctor should suspect that the *fidejussores* demand a deliberatory time to produce the principal, for the purpose of delaying the cause, and that on the day assigned for bringing him in, they intend to allege other frivolous reasons to obtain a second delay or respite for bringing him in, or even then to pray a commission to foreign or distant parts for his examination; he may, on the first day of the appearance of the *fidejussores*, when they pray a deliberatory time to produce the principal, call upon the Judge to compel them, at that time, to have the benefit of a commission to foreign parts or places at a distance from the Court, for the examination of the said defendant, under pain of being deprived of that privilege at a future time. And the Judge, for the prevention of delay, has the power and is accustomed thus to decree.

Secondly, the Judge, for cause or for favour, may admit a Proctor to appear for the *fidejussores*, who may state the reasons which have prevented the appearance of the principal, and pray a time to be assigned for producing him. But in that case, from necessity, the certificate is to be continued to the day appointed for the appearance of the principal, in order that if he do not appear, the Judge may pronounce his decree as above, which could not be done if the certificate had been discontinued.

TIT. 24. *The production of the principal and the punishment to be inflicted upon him if he refuse to submit to an examination under oath.*[23]

IF the principal being cited, should appear to answer the charges contained in the libel, it is to

[23] It appears from the whole tenour of this work, that, at the time when it was written, the English Court of Admiralty exercised a much more extensive jurisdiction than it does at present. During the long reign of Elizabeth, in which our authour flourished, we meet with but a single case of a prohibition to the Court of Admiralty and in that their jurisdiction was sustained. Cro. Eliz. 685. It was not until the subsequent reigns of James and Charles I. that a flood of prohibitions, flowing from the enmity which Lord Coke bore towards its jurisdiction, was poured upon that Court. Before that time, it is probable that they took cognizance of every kind of contracts made abroad between or with foreigners. This extent of jurisdiction we find them constantly and strenuously claiming until some time after the Restoration, about which period they appear to have relinquished the unequal contest. *The Aurora*, 3 Rob. 114. *Am. Ed.* This accounts for the circumstance

be produced and an oath administered to him, in the same manner and form as in Ecclesiastical causes;* and he is to be admonished to undergo an examination by a day assigned by the Judge, under a certain penalty, sometimes of forty shillings or five pounds, at the will of the Judge and according to the importance of the cause. And if the party does not submit to the examination before the day appointed he is to be charged with contumacy, and to be pronounced to have incurred the aforesaid penalty or mulct; and he is to be committed until he has paid it and submitted to the examination. The money is to be appropriated, at the discretion of the Judge, to pious uses, especially to the relief of poor prisoners, or sometimes to the plaintiff if he be poor, because the process is impeded by the delay of the defendant, to submit to the examination. Yet the Judge is accustomed, *ex gratiâ* to reserve the forfeiture of the party until some future Court-day, before he decrees him to have incurred the penalty and orders him to be arrested.

of their principal mode of proceeding, anciently being by capias or warrant against the person, and their ordinary stipulation being *de in judicio sisti*, which is in the nature of our special bail. At present their jurisdiction is almost entirely confined to proceedings *in rem*. The stipulations which are now usually given in the English and American Courts of Admiralty, are *de judicatum solvi*, to abide by the judgment of the Court, and pay the sum which shall be awarded. Hence, the learning of our authour concerning the proceedings which are necessary to fix the bail, when the principal party does not appear, is become almost obsolete.—*Tr.*]

* Clerke's Prax. in Caus. Ecc. Tit. 70. per Oughtonum.

Additions to Title 24.

[If the defendant refuse to take the oath to answer to the positions of the libel, or to any other matter, to which he ought, by law, to answer; or doth pretend any frivolous causes why he ought not to take it, he is not to be pronounced *pro confesso*, as confessing the matter, though he have been after admonished and commanded to take the oath; but he is to be denounced as excommunicated, and is thereupon to be signified to the King's Majesty, and to be imprisoned and there detained, until he take the oath. Ecc. Pract. P. 3. cap. 3. §. 4. n. 1.

If the defendant is sworn and do not give a true answer, he may be called again under pain of being pronounced contumacious and declared *pro confesso* "or as one confessing or granting those things, which he refuseth to answer fully to." *ib.* This is called a presumptive confession. *Manual Jur. de verb. signiff. verb. confessio.*

An erroneous confession may be revoked at any time before sentence, provided the errour be made evident. The revocation must be made by the principal party, or by a proctor especially constituted. *Alciat. de confessio.*]

Tit. 25. *The requisition and production of witnesses, and the manner of proceeding if they refuse to be examined.*

Within the probatory term the witnesses are to be required to appear, and their travelling expenses are to be tendered to them. Upon their appearance an oath is to be administered in the form of oaths to witnesses; and they are to be cautioned to submit to an examination under penalty. If they refuse to be examined the same process is to go against them as was before directed against the principal party, in the preceding title.

Addition to Title 25.

[The witnesses may be required to appear before the Judge or commissioners. *Wesemb.* in *Paratit. Cod. numb.* 5. *lit. D. Scurf. cons.* 9. *num.* 3. *cent.* 1. *Alciat. test. fol.* 148. *Sect. qualiter sint testes producendi.*]

Tit. 26. *Compulsory process against witnesses who are summoned and do not appear.*

Upon the witnesses being summoned and failing to appear, an oath being made of the service of the summons, and the tender of travelling expenses, a compulsory process is to be decreed against them to appear by a certain day and take the oath usually sworn by witnesses, and to give testimony in the cause. If they cannot be personally cited, a decree *viis et modis* is to be impetrated: and that is to be executed and certified in the manner and form which is prescribed in Tit. 20, 21. If they do not then appear, a decree or warrant is to be

granted for their imprisonment until they submit to be examined.

TIT. 27. *The petition for and issuing of a commission, for the examination of witnesses residing at a distance from the place where the Court sits.*[24]

BEFORE the expiration of the probatory term, if the witnesses dwell at a distance from the seat of judgment, so that they cannot be produced in Court without great expense, and there is danger of a loss of testimony to the litigant parties, a commission is to be prayed and decreed. In the execution of it, the proceedings must be had in the presence of the adverse party or his Attorney, under pain of being declared in contumacy, *in omnibus et per omnia,* as in the Titles which specially treat of these things in *Clerke* Prax. 80. 88. 89. 90. 91. 87. 86. 95. 96. *by Oughton.*

But if the witnesses dwell without the kingdom, which is generally the case in these maritime causes, a commission* *sub mutuæ vicissitudinis obtentu et in juris subsidium,* from the mutual aid granted by different jurisdictions and in support of justice, is to be prayed and granted:

[24 A commission *ad partes,* is a commission to examine witnesses whose places of residence are so distant from that where the Court sits, as to render it inconvenient to have them produced in person. Their depositions are taken by the Registrar or Examiner of the Court, as is usual when they are nigh to the Court.—*Tr.*]

* Vid. Francisci Aretin. consil. 82. quæsito 4°

Also of the manner and form of praying for this commission and for instructions how to proceed under it agreeably to law, read in the same book, *Tit.* 95. 96. But this is to be noted, that in all commissions of this nature, secular, and not ecclesiastical persons are to be named as commissioners. And they are usually directed when sent beyond sea, to the Judges and Consuls administering Law in the town of N—— Secus, in Ecclesiastical causes, because commissions there must be issued to persons of Ecclesiastical dignity.

ADDITIONS TO TITLE 27.

[The commercial Courts or Tribunals on the continent of Europe were formerly called Consuls. In France, *Judges and Consuls;* in Spain *Priors and Consuls;* in Italy, *Maritime Consuls.* Hence the most ancient work, which is extant, on maritime and commercial law is called, the Consulate of the sea. *Il consolato del mare:* that is, the law or jurisprudence received and admitted in the consular or commercial Courts.—Hence also, commercial agents who are sent from one country to another are called *Consuls,* because they formerly had a consular jurisdiction, or cognizance of all commercial and maritime causes between subjects of their own nation; a power which is still exercised in some countries, by virtue of particular treaties. The Consuls of the United States and France were

possessed of this jurisdiction, within the territories of each other, in consequence of provisions to that effect in the consular convention of the 14th Nov. 1788; which became annulled by virtue of the Act of Congress of 7th July, 1798, and has never been since, nor probably ever will be revived.

To these commercial and maritime Courts, therefore, commissions *sub mutuæ* or *letters rogatory* were, in our authour's time, usually directed; and at this day it seems that they might with propriety be directed to the Court or Judge, of the place to which they are sent, exercising admiralty and maritime jurisdiction.

On the subject of commissions vid. Wesemb. paratit. Cod. num. 5. lit. B. Ruland. de commiss. lib. 1. c. 2. n. 7. Gail 1. obs. 89. n. 3. 96. n. 2. Jacob Blum. proc. Camer. tit. 73. p. 39. Alciatus de position. Sect. quid sit. Fol. 131.

Commissions for the examination of witnesses, in England, run *jointly* and *severally*. Notice is given to both commissioners, and if one absents himself after that notice, the other is at liberty to proceed alone. In the case of the *Ceres*, where one commissioner declined acting in the absence of the other, because he thought he had not power to do so, the Court granted a new commission, but said it was solely on the ground of the refusal to proceed. 3. Rob. Adm. Rep. 107. But in the case of *Guppy* v. *Brown* in Pennsylvania, where a commission had been issued to four, jointly, and was executed and returned by three of them, the defendant's counsel objected to the reading of the depositions and cited 1 Bac. Abr. 202. 2. Inst. The Court thought the objection fatal, although two of the three who returned the commission were of the defendant's own nomination. 4. Dall. 410.

As far as my experience extends, commissions usually go to three persons with power to any two to act. Many commissions are excluded from being read on account of their not being executed regularly. No precise directions can be given as to the proper manner of executing them, because each State has its peculiar form; but the commissioner can seldom commit an error if he read his authority with care. Each examination should be signed by the deponent and his signature attested by such a number of the commissioners as are rendered necessary to be present at the examination. The expenses of commissions are usually paid by the party at whose instance the commission issued, or in such other manner as has been agreed upon previous to the issuing of them. In the case of *Lynch* v. *Wood* in Pennsylvania, the plaintiff claimed a variety of expenses which had been incurred in the execution of a commission that had been issued for him *ex-parte*. The Court allowed the charges for swearing the witnesses and for their attendance; but rejected those for agency and for travelling to collect the testimony. 1. Dall. 310.

Under a commission, if a witness disclose a collateral fact to which the inquiry was not directed, the Court will allow a second commission to be issued for the purpose of an examination of that fact 1 New York T. R. 345.

If the notice of an application for a commission contain the names of commissioners, and the party served do not then object he is precluded. *ib.* 5.

A commission to examine may be issued before issue joined, *ib.* 73; but special circumstances must be disclosed to warrant it, 2 N. Y. T. R. 259.

When a rule for a commission has been obtained, it suspends the cause until, on application to the Court, a *vacatur* is ordered and entered. But if the defendant appear and examine witnesses it is a waiver of his commission and the *vacatur* is unnecessary. *ib.* 73.

If the defendant has joined in a commission, the Court will not vacate the rule by which it was granted, on the application of the plaintiff, but will grant a rule to proceed to trial notwithstanding the commission, *ib.* 115. And where a defendant has obtained a rule for a commission, in which the plaintiff does not join, and a term has elapsed without any proceedings under it, the Court will permit to go to trial, *ib.* 503. So where a commission has been sent to England and eight months have elapsed without any return, the Court will give leave to proceed to trial; but this does not prevent cause being shown at the Circuit, why the trial should not then be put off, *ib.* or even if the usual time is not elapsed. 2 N. Y. T. R. 47.

In the case of *Juhel* v. *The United Insurance Company*, October 1801, the Supreme Court of New-York held, that three months was a sufficient time for executing and returning a commission arrived in London. At the January term 1803, of the same Court., it was decided, that where a plaintiff has delayed his own cause by a commission; and it does not appear that due diligence has been used, the defendant may apply for a rule for nonsuit, and compel the plaintiff to stipulate or be non-suited, as if no commission had issued. February 1804, a motion was made for leave to enter a judgment, as in case of nonsuit for not going on to trial. It appeared that a commission had been issued, but not that due diligence had been used in the execution of it, as eight months had elaped between suing it out and the sittings. The Court therefore said the motion should be granted, unless the plaintiff entered into stipulations. 1 N. Y. T. R. 527.

Where a defendant's commissioner has mislaid a commission, in consequence of which it is not arrived but is shortly expected, the Court will not grant a judgment as in case of non-suit, though there has been a former stipulation, but will allow to stipulate anew on payment of Costs. 2 N. Y. T. R. 47. After a second commission has issued, with leave to go to trial notwithstanding, the Court, under special circumstances, which have been discovered afterwards, will vacate the rule as to going to trial and allow a further time for the return. *ib.* 253.

A notice for judgment as in case of non-suit, is not waived by a notice for a commission. 3 N. Y. T. R. 140.

The act for the amendment of the law, of New York, 1 Rev. Laws 351. §. 11. does not specify that the commissioners should live in the State

to which the commission is addressed, and the Court will therefore issue a commission to persons in that State to take the examination of persons in Pennsylvania. 3 N. Y. T. R. 105. *Tr.*]

TIT. 28. *Of the Warrant to be impetrated* in rem *where the debtor absconds, or is absent from the Realm.*

ALL that was written in the preceding Titles is to be understood as applicable to cases in which the defendant is actually arrested to respond in a civil cause. But if he has concealed himself or has absconded from the kingdom, so that he cannot be arrested, if he have any goods, merchandize, ship or vessel upon the sea, or within the ebb and flow of the sea and within the jurisdiction of the Lord High Admiral, a warrant is to be impetrated to this effect, viz: to attach such goods or such ship of D. the defendant, in whose hands soever they may be; and to cite the said D. specially as the owner, and all others who claim any right or title to them to be and appear on a certain day, to answer unto P. in a civil and maritime cause.

ADDITIONS TO TITLE 28.

[This proceeding is in nature of the process of foreign attachments under the custom of London, which has been introduced into most, if not all of the States with great advantage and success.

Its object is to compel the appearance of an absent or absconding debtor, and in case he does appear, to satisfy the debt out of his effects and credits. A respectable writer informs us that this process has gone into disuse in the Courts of Admiralty of England and Ireland. 2 Bro. Civ. & Adm. 435. The reason of it is that the jurisdiction of those Courts in instance causes has been so much narrowed by prohibitions that with the exception, suits for mariner's wages, certain cases of bottomry and salvage, and certain possessory suits for ships, all of which are, in most cases, proceedings *in rem*, there hardly remains to them any subject of civil jurisdiction. The process of attachment, therefore, has been disused, because there have been no occasions which would require a recourse to it. But if a case of debt should arise, clearly within the jurisdiction of a Court of Admiralty, as for instance, a maritime contract made at sea, to be executed at sea, which can indeed but very rarely, if ever happen; yet if such a contract should be made, and the debtor should conceal himself, or be out of the jurisdiction of the Court, there is no doubt but that the process of attachment would lay against him according to the course which is here prescribed by the authour. Huberus, *de jus in vocando*, says it is a remedy which is not warranted by the civil law, but the principle upon which it is founded, may be traced in the maxim of Justinian, *debitor, creditoris, est debitor creditori creditoris.—Tr.*]

"Sequestration, regularly speaking, is prohibited, yet goods may lawfully be attached in these cases:

1. If the defendant be suspected of flight; that is to say, if he does not possess sufficient real or personal property, otherwise not. *Scaccia. dejud. Lib.* 1. *c.* 35. *n.* 6.

2. If he be suspected of embezzlement; and he is said to be so suspected, if his shop remain shut contrary to custom: if at the time he play at unlawful games: if he borrow money upon usurious interest: if he do not possess real property equal to the debt: if he conceal his personal property in secret places, whence it can easily be removed; if he be involved in divers fidejussory securities: if he have played the like trick before: if hitherto he has been backward in paying his debts, and have at present, numerous creditors who are importunate. *Scacc. Lib.* 1. c. 38. n. 10. *Peck. de jure sistendi.* c. 16. n. 2.

This suspicion may be proved summarily and by half-proof; and sometimes by the oath of the creditor without any citation to the opposite party, according to the will of the Judge. *Scacc.* n. 28.

Before making the seizure, a full proof of the debt is to be made to the Judge according to his discretion, as *Scaccia* says, and a citation is issued to the party unless he be suspected of flight, in which case, the citation might be the cause of his absconding.[25] To the granting of the sequestration any kind of proof, either by a publick instrument or instruments is sufficient. To discharge the sequestration, the debt is to be proved by such publick instrument or other writing as would be proof in other cases. *Scacc. n.* 24. &c.

[25] The original is to me obscure. The practice abroad is, to issue a citation before the attachment goes. If the debtor appear a summary hearing takes place; if he does not, the citation being returned is a proof of his absence or absconding.—*Tr.*]

But, according to *Peckius*, the proof may be made in another manner, because there is danger to be apprehended from the delay which might occur before the necessary proof could be obtained, and because an irreparable injury is not done to the debtor who may dissolve the attachment by entering bail. This other proof is according to the discretion of the Judge, who should have respect to persons and accurately examine the causes of suspicion.

3. If he be declared in contumacy, *Scacc. n.* 5. the Judges of our day, according to custom, decree a sequestration at the instance of the creditor alone, without the existence of any suspicion. *Scacc. n.* 11. If nothing is proved to the Judge and nothing is sworn by the creditor, the attachment is granted upon the simple assertion of the creditor. *Peck. nu.* 5.

Neither is it needful to execute summons or citations in such cases, elsewhere, but where the ship or *quarrelled goods* in question lie, or at the usual place of their haunting." Welw. Tit. 5. f. 61. [who quotes *De officio Admiralitatis Angliæ in fin. cum ibi citatis.*]

The debtor may be arrested either on or before the day he is suspected of flight; and so likewise may his goods be attached in order to compel him to put in bail or acknowledge his

obligation, since in the mean time he might die or run away. But in other cases, the plaintiff is not only prevented from doing this by the exception, but he may also be officially hindered by the Judge, as soon as it appears to him that the time is not come.

I cannot reclaim any thing which I have loaned until the lapse of some time, because the borrower could have derived no benefit from it, except in case he be suspected of flight. It is not lawful for the creditor, of his own authority, to enter into the possession of the thing pledged until there has been some delay on the part of the borrower, to conform to the principal obligation on his part, unless there exists a suspicion of his being about to run away.

[28] A merchant became bankrupt and absconded; one creditor was prior, in point of time, to the others: he is to be preferred to the others, who are posterior and whose day had now gone by, if there is any danger in delay as to the prosecution of the pledge—nay he is to be preferred in the pledge. And although there should be no adjudication of the debt on that day or conditionally, yet still there is good cause to petition for security. *Peck. de jure sistendi. cap.* 4. *n.* 6.

The debt for which a person or thing was arrested was void; but the person arrested either

[28 The editor of this last edition has collected a quantity of matter in this note, marked [" "] which is wholly irrelevant to the subject of Admiralty practice, and which also is so difficult to be translated, that I should have omitted it entirely did I not feel myself pledged to give a translation of the fifth edition.—*Tr.*]

for some cause which existed before, or which arose afterwards, was bound to the person arresting: can this void arrest be justified by the subsequent cause of action? This question has its advocates on each side, and there are not a few expounders of the law of the highest authority who think that the arrest which is void in itself may be justified by the subsequent cause of action; and *Soc. in tract. de citat.* says, if a person owed me a debt which became due on a certain day, and I, fearing that he would abscond before that day arrived, caused him to be arrested on a fictitious demand, in order that while it was in dispute, the day of payment of the real debt should arrive, for which he might be arrested, it is well; because those things which are null, not from defect of substance but of form, may afterwards, by the intervention of the true debt, be continued, and the party is not to be arrested anew. But *Baldus* maintains the contrary, on the ground that a case which has not a legal foundation cannot be supported by any subsequent event: and *Paulus. Paris.* at variance with himself, says, that in the first place the arrest is to be declared void and the person is to be restored to liberty; which being done you may afterwards begin anew according to law.

But *Peckius de jure sistendi.* cap. 17, says, if it manifestly appear that the arrest was not legally made, it is to be declared void, and the person at whose instance it was made is to be condemned to pay costs and damages: but, on account of the new debt which intervenes, the debtor is to be detained and not released.—

Therefore, he may be said to be liable to arrest, for the law does nothing in vain.

When a debtor is arrested for two causes and only one of them is proved, he is not to be released, nor is the creditor to be condemned in costs; for although in things which are indivisible, the useful is vitiated by the useless, yet it is not the case in those which are divisible and separable, although they may be in the same part or article. For debts are of different kinds, being not only divisible in their own nature but also in the estimation of the creditor; because he exacts them on different accounts; as on account of money lent and goods sold, things which have nothing common between them. The smaller sum is contained in the greater from the nature of the thing, because sums or quantities of money are divisible, not merely in the opinion of the person concerned. When he demands a greater sum, as for instance, £100 and £50 only are really due, he in plain terms, exacts the £100 *ex mutuo*, as so much due. Therefore there is no room to suppose that the £50 which are really due, are included in that demand. It is simply a debt which is demanded, and it is limited by £100; but the real debt is limited by £50, and so is not a part of the £100. The person who stipulates for £100 would not be content with £50. Therefore as he demands precisely that sum, he requires a definite amount which is greater than what is actually due. He will therefore be condemned in costs, damages and interest, *(interesse.)* The person sued will be acquitted, and the arrest be declared to have

been unduly made. It is a different thing to demand more than is due in one action, from what it is to demand it in several actions: because with respect to each sum, he appears to institute a separate action, and so will be viewed as two different creditors, of whom one proves his claim and the other does not. With regard to the case which is proved, the person who was arrested is considered as a litigious person; indeed, in France, a defendant who is condemned to pay a smaller sum, than was demanded, is obliged to pay costs as a rash litigator, in not paying what he really owes. In the case which is not proved, the plaintiff will be condemned to pay the costs which the person arrested incurred by that suit: as he would not have been subjected to that expense, if he had not been compelled to prove the injustice of the claim: the reason of this is that in the latter case the defendant is successful.

He who could conduct his cause well but upon the whole does ill, does nothing: he who has done well in one part upon which the action can be sustained, although he may have failed in another part or cause is successful. It is sufficient that one of many causes which were suggested be true or good, as in sentence and appeal, where many things are necessary to complete an act, if one be wanting, the whole is vitiated; but to justify an arrest, the concurrence of many things is not necessary. But one cause being proved is, of itself sufficient. *Peck. de jure Sistend.* c. 47.

Tit. 29. *Of the execution of the aforesaid Warrant.*

The Marshal or other officer of the Judge, by virtue of the aforesaid Warrant must attach the goods wherever they may be, and keep them in safe and secure custody: and he must cite the defendant at the place where the goods are, and all others having or pretending to have any title or interest in them, by publick proclamation to those who are present, and also to those in whose possession the goods may be at the time of the attachment, that he doth peremptorily cite as well the said D. (the defendant in particular) as all others in general who have or pretend to have any title or interest in the goods which he has attached, to appear, each and every of them at the time and place specified in the said Warrant, to answer unto P. in a certain civil and maritime cause, as to justice shall seem meet.

Tit. 30. *Certificate of the execution of the Warrant for the attachment of the goods.*

The Marshal, or other officer by whom the above Warrant is executed, ought to certify it, with a copy of the schedule of the property annexed, and he should specify the time when, and the place where, it was executed, and that he cited the defendant according to the tenour of the Warrant. But if the mandatary be in remote places, then this execution is to be certified by an authentick certificate as above in Tit. 6. *of the certificate of the aforesaid Warrant.*

Tit. 31. *The exhibition or return of the said Warrant, and the Petition of the Proctor for the Plaintiff.*

I, N. exhibit my proxy for P. and I make myself a party to the same: and I exhibit the original mandate with the certificate indorsed, or, upon the truth of which certificate, O. the Marshal makes oath. And I accuse, of contumacy, D. the defendant, who was specially cited, and all others in general, who may have or pretend to have title or interest in the goods which have been attached, to appear here on this day, to answer the aforesaid P. in a certain civil and maritime cause. And I pray that they and each of them be declared contumacious; and in pain of their contumacy that they be decreed to have incurred the first default.* Publick proclama-

* Default, though it commonly signifies an offence in omitting that which we ought to do, yet here it is taken for a non-appearance in Court at a day assigned. *Cow. Interp. Verb.* Default. [vid. 1. Inst. 259. 1 Salk. 216. *Tr.*]

"Levatâ querelâ in Curiâ Admiralitatis, actore comparente et reo contuma citèr absente, omninò procedendum est ad defaltas et non ad sententiam definitivam, eo quòd non liquet de causâ. Rought. in fine, in nig. Lib. Adm."

"If the party pursued be contumacious and will not appear to defend himself or his ship, or things challenged, the Judge, after three or four citations from the Admiralty, called *quatuor defaltæ* (for that called *unum pro omnibus* is not sufficient to convince one of contumacy,) especially in the claim or vindication of a ship, any part thereof or any other such like thing or goods, may proceed *ad primum decretum*. *Welw.* Tit 5. f. 60.

tion is then to be made three times, as well for those who were cited in particular as for those in general, and upon their failing to appear, they are to be pronounced in contumacy by the Judge, and in penalty thereof they are to be decreed to have incurred the first default, and the certificate of this decree is to be continued until the next Court day, or other day to be assigned by the Judge.

TIT. 32. *The manner of attaching goods or debts in the hands of others, to which the officer cannot have access.*

SOMETIMES the person, who, by loan or other maritime contract, is indebted to another, cannot be approached so as to be arrested; nor has he any property which the officer can attach. Yet you may be informed of persons in whose hands there are goods which belong to your debtor, or who may be indebted to him. In such a case you may obtain a Warrant similar to that which is mentioned in Tit. 28. *of other manner of proceeding*, &c. And the officer may go to the person in whose possession the goods are deposited, or who is indebted to your debtor, or which are liable or responsible to your debtor*, and attach

See Malines Lex Mercat. c. 18." [I believe this book is of no authority in questions of practice.—*Tr.*]

* For the debtor of a creditor is the debtor to the creditor of the creditor. *Sichard.* ad l. 3. Cod. de his quæ vi metûsve causâ, &c. n. 8. et ad l. 2. Cod. Quando Fiscus vel privatus. Where it is held that a sentence rendered against one who is indebted to me, if it be not paid, may be enforced against one who is indebted to

such goods or credits in his hands. He is to cite that person and all others to appear as before prescribed in Tit. 28. It is to be noted that in this Warrant the words, *the goods, debts, or sums of money belonging to a certain R. and being in the hands of the aforesaid person*, are to be included. These words are omitted in the case or warrant which was before mentioned.

TIT. 33. *The certificate of the aforesaid Warrant against goods remaining in the possession of another.*

THIS Warrant is to be certified as the former one which was treated of in Tit. 6. and the persons who are cited, whether in general or in particular, are to be accused of contumacy and proceeded against in all things, as well as to the contumacy of the persons in particular as of those in general, according to the directions contained in Tit. 31. *of the exhibition or judicial introduction of the aforesaid Warrant, and of the Petition of the Proctor for the Plaintiff.*

TIT. 34. *Of the manner of proceeding upon the appearance of the person in whose hands the goods were attached.*

ALTHOUGH the person upon whom the attachment is served may not have any goods in his possession, yet he is bound to appear on the day

him. Et vide L. ult. Dig. Lib. 18. Tit. 3. De lege Commissoriâ.

assigned, and to allege that he had not any goods or debts belonging to D. at the time when the writ was served nor since, nor at the present time: and that it is not by means of any fraud nor collusion that there are none in his possession.

If he make oath upon the Holy Evangelists of the truth of his allegations, 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, &c. he is to be admitted to do so, and if he make out his proof, he should recover them with his costs. And note, that in this case the garnishee, in whose hands there appear to be goods or credits belonging to the defendant, is bound to respond to the plaintiff in this action, and to produce fidejussory security to all the effects mentioned in Tit. 12. *of the introduction of fidejussory caution by the defendant, and of the stipulations which are to be entered into by them.* And on the contrary, the plaintiff must give security as in Tit. 14. *of the production of security on the part of the plaintiff;* then a libel is to be given and in all things the proceedings are to be the same as in ordinary maritime causes which are instituted, directly for debt.

* For that being executed, *quere* whether it is lawful to prove the contrary?

Tit. 35. *The granting of the second, third and fourth default.*

In the cases which have been mentioned, the process is against the goods or debts attached; and when neither he whose goods are attached nor any other person appears, the proceeding is to be against them in pain of their contumacy as was prescribed in Tit. 30. *of the exhibition or judicial introduction of the aforesaid Warrant.* In the same manner as they are pronounced contumacious on the first day and in punishment thereof are declared to have incurred the first default; so, on the second day their contumacy is to be accused, and in punishment thereof, they are to be declared to have incurred the second default. Also the certificate is to be continued to the next Court day, or third or fourth Court-day, at the pleasure of the Judge. But on that Court-day, the proceeding and prayer are to be in the same manner as above, and he and the others are to be declared to have incurred the third default. The certificate is also to be continued to the above Court-day, and on that day the same course of praying, accusing and pronouncing is to be pursued and all who have been cited are to be declared to have incurred the fourth default.* The Proctor for

* Four defaults are to be pronounced against the defendant, if he do not appear within the term assigned to him by the Judge, before the Judge shall decree the plaintiff to be put in possession of the goods of the defendant, which is contrary to the ancient usage of the Court of Admiralty. Roughton *in fine* in Nig. Lib. Adm.

the plaintiff should then *ex superabundanti* accuse the contumacy of all the persons who have been cited as well in particular as in general ; and in pain of this contumacy should say, after this manner :

" I give an article upon the first decree, and I allege, pray and do, &c. as is contained in the same ; and I pray that the same be admitted, that justice and right be done and administered, and that a decree pass in favour of my client, to put him in possession of the goods which have been attached according to the first decree."

The Judge shall then order proclamation to be three times made, for all the persons cited as aforesaid, as well those in general as those in particular. Upon their failing to appear, he shall pronounce them to be in contumacy and in pain thereof, he shall say, " We admit this article."

Then the plaintiff or his proctor, in support of the contents of the article, that is, in proof of the existence of the debt which he claims, ought to exhibit the letters obligatory or other instruments upon which the debt arose. And the principal party or sometimes the Proctor, according to information which he believes to be true, is obliged to make his corporal oath,* to be administered to him by the Judge of the truth of his claim. This being done, the Judge is accustomed to read the aforesaid article and say, " We pronounce and decree according to the prayer of the plaintiff."

* In debitis minoribus Vid. Tit. Prax. Ecc. 235. 236 per Ought.

Then the plaintiff or his Proctor shall give a bill of costs which the Judge shall tax : And upon oath being made by the Proctor, or the principal if he be present in Court of the disbursement of the sums as taxed, he may decree the goods or vessel attached to be appraised.— When the appraisement has been made according to the true value, and security has been given by the plaintiff to answer any one having interest in that behalf, that is, in the goods, provided he intervene for the same within a year, he is to be put into possession as far as the amount of his claim, if they be sufficient, otherwise as far as they may be sufficient.

Additions to Title 35.

[The effect of the first decree, is only, in the first instance, to put the party in possession of the thing, and gives no power over the proceeds. All further proceedings of sale and power over the proceeds, must be by subsequent application to the Court ; although upon such application a decree of sale and possession of the proceeds are almost matters of form and usually obtained as ordinary process of course. 2 Bro. Civ. & Adm. 403.—*Tr.*]

After the fourth default, the Judge should decree a mandate of execution, and he should issue his decree to the Marshal of the Court, directing him to put the plaintiff in possession of the goods of the defendant, wheresoever they

may be found, to the extent of the debt claimed and declared for in Court, if they be sufficient, together with costs and damages. And if *bona mobilia* to such a value are not found by the Marshal, then to put him in possession of the *bona immobilia* to a sufficient amount, in order that the defendant being affected by the grievance, may be compelled to answer within the year and recover the possession of his goods, at first duly valued in the presence of the Marshal, and warranted upon this obligation in Court to be sufficient to abide the sentence and to pay the sum in which the party was condemned, and having given sufficient satisfaction for the expenses sustained on the part of the aforesaid party, *as Cod. 7. Tit. 72. de bonis authorit. Jud. poss. &c. auth. Et qui jurat. Collat. 5.* Tit. 8. Novel. 53. de *exhibendis* et *introducendis Reis cap.* 4. &c. *Decretal. Lib. 2. Tit.* 6. *de Litis non contest. c. 5. quoniam frequenter.* But if it is manifest, and the suit was not contested, the proceeding is at all times to sentence and not to defaults. *Roughton in fine.*

If he appear not before the time be fully expired, the Judge may proceed and adjudge the propriety of the ship to the plaintiff. Welw. Tit. 5. f. 60.

See Maline's Lex Merc. c. 18.

Tit. 36. *What things are contained in the aforesaid article upon the first decree.*

The plaintiff is bound to declare or relate in the aforesaid article, in what manner and upon

what contract the debt which is claimed by him was become due: and in his conclusion, he must pray that right and justice be done, and that he be put in possession of the goods which have been attached as far as they are sufficient to pay the debt which he claims.

Tit. 37. *Of the manner of proceeding if the person appear to whom the goods which have been attached belongs.*

As it often happens in civil actions, that a person is arrested who is not indebted to the plaintiff, so likewise may goods be attached when nothing is due. In such a case as soon as you are apprised of the attachment, it behoves you to appear, lest the course which is prescribed for obtaining a default should be adopted, and in pain of your contumacy, your adversary be put into possession of the property *ex primo decreto.*

If you introduce fidejussory security to all the effects which were mentioned in Tit. 12, *of the introduction of fidejussory security by the defendant,* the attachment is to be dissolved and the goods are to be delivered to you.

The plaintiff is obliged to put in security, file his libel, establish his claim and proceed, in the cause in all respects in the same manner, as if the cause had been originally instituted against the person of the debtor. Yet if you are pronounced in contumacy and have incurred any of the defaults, before you have intervened for your interest, it is necessary for you to pay all

the expenses which have been incurred, before your goods are delivered, or you can be heard in the cause.*

TIT. 38. *Of the appearance of a third person to claim goods which have been attached as the property of another.*

IF your goods are attached as the property, or for the debt of another, and you intervene for your interest before the promulgation of the first decree; and yet nevertheless, the Judge shall have pronounced you to have incurred any of the defaults, the costs of these defaults must be paid before you can be heard, as in the preceding Title. This being done, your interest is to be propounded and alleged, and fidejussory security is to be given by you to abide the judgment, to pay the costs in case you fail in supporting your claim, and to ratify the acts of your Proctor. The plaintiff must also give fidejussory security to abide the decision, to pay the costs if you proceed, and to ratify the acts of his Proctor. During the litigation of the cause, the goods are kept under the arrest or sequestrated. And if you prove your interest they are to be delivered to you, and the plaintiff must pay the costs; and, *e contra*, if you fail they must be paid by you.

* The expenses of this sort of contumacy are uncertain, for if you be pronounced to have incurred one default, one sum is to be paid, and if you are in many defaults, it is to be increased according to the number of those defaults.

TIT. 39. *Of a third person intervening for his interest after the first decree.**

A third party intervening for his interest after the first decree has been pronounced, is not to be heard, as was said before in Tit. 37. unless the costs as then taxed be paid, and then the interest is to be propounded and alleged, and fidejussory security is to be given according to the effects which were mentioned in Tit. 38. of the appearance of a third person, &c. As the person who would have had the goods upon the first decree, introduces another fidejussory security at the time of pronouncing the first decree, as in the conclusion of Tit. 35. he is bound only to give security for his appearance from time to time, and at the hearing, to submit to the sentence, to pay the costs and to confirm the acts of his Proctor.

But in the same manner that the Proctor for either party is discharged from his office, and ceases to be the Proctor when the definitive sentence is pronounced, his office may also terminate as soon as he obtains the first decree, and the principal is put into possession of the goods, &c. Thus the person who intervenes for his interest in this way is obliged to summon the principal if he be alive, or his fidejussores who are bound for him, as above, to answer whatsoever, &c. as above in Tit. 35. to show cause why he should not be admitted to propound for his inter-

* De tertio interveniente Vid Gail. Lib. I. obs. 69. et Sequent. per totum. Peckius de jure sistendi. cap. 40. per totum et nu. 10

est in certain goods which were lately taken under a first decree, as the goods of such a person; and he is to be admitted to defend his interest in this manner. If the persons who are cited do not appear, a Warrant is to issue for the attaching and arresting of them until they do appear. But if they have appeared, the third person ought to be admitted to prove his interest, and the proceedings are to be in all things, as in ordinary cases.

TIT. 40. *That the plaintiff may obtain a first decree, as well against the person to whom the goods which are attached are alleged to belong, as against all others who do not appear.*

ALTHOUGH a third person intervene for his interest in goods which have been attached by you, as the property of another who is in your debt, yet you may proceed and follow the aforesaid arrest, in the manner prescribed against your debtor, and against all others. And in pain of his contumacy and of those who are cited in general, excepting the person who has appeared, you may proceed to defaults and obtain a decree for putting you in possession of the goods, *quoad* those persons who have been declared in contumacy. But the goods are not to be delivered to you during the controversy between you and the third person who has intervened for his interest.

TIT. 41. *The manner of arresting your own goods when they are detained, occupied or possessed by another.**

It often happens, and especially in time of war or commotion, that your goods or vessel are taken by enemies or pirates, and afterwards brought to this kingdom; or are possessed or detained by others in some other manner; or the factor or agent of your correspondents in parts beyond seas, may consign certain goods to your use or benefit, and they are detained unjustly possessed by some person. In such cases you may obtain a Warrant to arrest the goods after this manner as your proper goods: and also a citation as well against those in particular thus occupying or detaining, as against all others in general, who have or pretend to have any interest in them, to answer you in a certain cause of a civil and maritime nature. Which Warrant being executed and returned as above, in Tit. 33, if no one appear, the proceedings are to be in all things as above, Tit. 31, and after the fourth default, the goods are to be adjudged to you; not for a debt as in the former case, but the decree is to be that in pain of the contumacy of those who have not appeared, the goods belong to you, and being your property, you are to be put in possession of them.

* Si bona fuerint in aliquâ navi vel intra jurisdictionem admiralli; imò et si sint in terram exportata, et in cellario imposita. Nam et personæ passunt capi in terrâ, in excambio vel alibi, et arrestari, et hoc fit quotidiè. Vid. Brooke's Abridg. Tit. Admiral §. 1.

Additions to Title 41.

[This Title, and the two immediately following, are the only sections in this whole work, that relate to a proceeding which may be called properly and directly *in rem*, that is, a suit against goods or affects which the actor claims to be his property, or to be entitled to seize or possess by virtue of some lien express or implied; for the attachment of the goods of absent debtors, being intended for the purpose of compelling an appearance, may be considered as a suit *quasi in personam*. Here, then, clearly appears the falsity of the maxim which has so long prevailed in the Courts of Common Law, that the jurisdiction of the Court of Admiralty was merely *in rem*. It is to be lamented that the blind jealousy of those Courts with respect to this particular juridicature, has often carried them beyond the bounds of justice and even of truth. Vid. 3 Durn. & East. 348.

It is remarkable that no notice is taken in this title of vessels or goods taken by English subjects of their enemies. The fact is, that until the 44th year of Elizabeth, the prize jurisdiction was not vested in the High Court of Admiralty, but in a Board of Commissioners, called "The Commissioners for causes of depredations." But in this year, (1602) the Queen issued a proclamation for the purpose of repressing depredations upon the high seas, by the third article of which she ordained, "*that all admyrall causes, (except those depending before* the Commissioners for causes of depredation) *should be*

summarily heard by the Judge of the High Court of Admiralty, without *admitting any unnecessary delay*. Rob. Collect. Marit. 26.

Such is the origin of the prize jurisdiction of the High Court of Admiralty of England. At the time when our authour wrote it was merely a Civil Court of Instance; and therefore we must not be astonished at not finding any mention of its powers or practice as a Court of Prize. It appears, however, that it took cognizance, incidentally, of matters which are now clearly within the jurisdiction of Admiralty Courts, as in the case which is mentioned in the text of English vessels taken by enemies, and afterwards brought into England. The property to these was often disputed on various grounds: such as their not having been brought *infra præsidia* of the captors, and other similar points, which from the old prohibition cases appear to have been, in former times, very much litigated in the Court of Ammiralty; and the Courts of Common Law showed a disposition, more than once, to prohibit its proceedings in cases of that description. Even so late as the 9th year of William III. Lord Holt and another Judge were of opinion that a prohibition should go to a suit by the original owner of a vessel taken by the French in time of war and carried into Bergen in Norway, in which the principal question was, whether she had been legally condemned. *Shermoulin* v. *Sands*. 1. Lord Raym. 271. At that time, such a suit was considered as within the jurisdiction of the *Instance*, and not of the Prize Court; for the appeal from the Court of Admiralty, in that

case was carried to the Delegates, as in an ordinary suit, and not to the Lords of Appeal in Prize causes. Lord Raym. *ut supra.*

But in recent times, we find that cases precisely similar have been determined, not in the Instance, but in the Prize Court, and the appeals have been carried to the Lords of Appeal as in other cases of prize. *The Hendrick and Maria.* 4. *Rob.* 35. *Am. Ed.* 43. *Eng. Ed.* 6 *Rob.* 138. *Eng. Ed.* Same case, on appeal; and see Robinson's Reports, *passim.*

It is evident, from a passage in this title, that the Court of Admiralty, at the time when *Clerke* wrote this *Praxis*, had, or at least took, cognizance of bills of lading and freight. It is certain that in all their contests with the Courts of Common Law, they invariably claimed, among others, that particular branch of jurisdiction. But it was at length wrested from them, and they have been obliged to acquiesce. It does not seem, however, to have been disputed during the reign of Queen Elizabeth; for our authour appears to consider it as a part of the regular and well established jurisdiction of the Court.—*Tr.*]

Tit. 42. *The manner of proceeding in possessory and petitory actions.*[23]

If your goods have been arrested as the property of another, and you, either in proper person or by another in your name and for your use, were in possession of them at the time of the arrest, you may appear in person before the Judge, or your Proctor may allege as follows:

[23] A *petitory* action at Civil Law, is a suit in which the right of property is in question: a *possessory* suit is that in which the right of possession only is contested.

"I exhibit my proxy literally for N. and I make myself a party to the same and to all in better right, &c.—moreover I allege to every effect in law, that at the time of the interposition of the arrest, my client was in peaceable and quiet possession of the goods attached not by force, concealment, threats, nor at the will of another. And therefore I pray that possession of these goods be decreed to my client in preference to all others, and that he be maintained in his possession; that the attachment which was interposed by others by the authority of the Court be dissolved, and that justice and right be done and administered."

If the plaintiff, at whose instance the attachment was made, denies these allegations, they are to be considered separately and conjointly, and a time is to be assigned for proving them.

Yet it is expedient that a protestation be made by you, that it is not your intention to proceed by petitory but by possessory title. And the plaintiff who hath attached the goods as his property, can allege himself to have been and to be the lawful possessor, and in the possession of these goods, and make his replication as follows:

Thus, an action of ejectment at Common Law, is within the latter description, while a suit of right is comprized within the former.—*Tr.*]

"That so far as the aforesaid N.* was at any time *de facto* in possession of the aforesaid goods, the same possession was obtained and is held by force, violence, threats, craft, fraud, or at the will of another."

And that allegation is to be proposed separately and conjointly; and the same being admitted on both sides, the proceeding is to be possessory, and upon proving the same, he shall obtain the possession of the goods attached, although the aforesaid allegations were put in generally, which mode is to be preferred. Yet it is lawful for the parties to specify and declare these general allegations according to the truth and fact of the case.

But this is to be noted, that before the party shall be put in actual possession of the aforesaid goods, they are to be appraised by order of the Judge, according to their true value, and upon proof of the appraisement, the party who obtained the possessory decree is to be bound in fidejussory security, to answer the adverse party in a petitory action—that is to say, he shall be bound to restore the aforesaid goods without waste, in case his adversary shall succeed in the petitory cause: and also to abide by the sentence, to pay the costs and to ratify the acts of his Proctor in that behalf: this, at least is to be done if his adversary shall have prayed proceedings in a petitory action, or shall have protested against proceeding in the same.

But allowing that the adversary is unwilling to proceed to the petitory action, on account of

* He who intervened for his interest.

the proof which was exhibited in the possessory action, because he who has succeeded in the former will probably succeed in the latter; yet, in further confirmation of his right in the aforesaid goods, the person who succeeded in the possessory action may proceed to a petitory action and obtain sentence *in petitorio*.[29] But he is bound to file a libel *de novo*, and if the witnesses who were produced in the possessory shall not support the right of the party in the petitory, he is at liberty to produce others. But if the complaint of the plaintiff was sufficiently established by the witnesses who were produced in the possessory action, and the proceedings in that cause are exhibited* in the petitory action they shall have full faith and credit. And the defendant may do all things, if not satisfied with the sentence in the possessory, he shall proceed

[29 Formerly, and particularly at the time when this work was written, the Court of Admiralty of England had cognizance of petitory suits for ships when the right of property or ownership thereof was in controversy. See the case of the *Aurora* 3 Rob. 114 Am. Ed. By successive prohibitions it had been restricted to the enforcement of certain maritime liens, such as hypothecations and mariner's wages; but the Admiralty Court still entertains possessory suits for ships and vessels in certain cases, such as between part owners, 2 Bro. Civ. & Adm. Law. 406. And in some other cases, of which instances may be found in Robinson's Reports.

But in those cases the Court will not decide the question of property: and in passing a decree on the right of possession, it will look only to the clear legal title, without taking notice of any equitable claims which must be enforced in other Courts. The *Sisters* 5. *Rob. Adm. Rep.* 144. *Am. Ed.—Tr.*]

* For the records in one judgment are proof in another. Gail. Lib. 1. Obs. 103. in fine.

to his petitory action. And if he succeed in that cause, the aforesaid goods are to be adjudged to him and his adversary is to be condemned to pay the costs which have been incurred. In this petitory action the proceedings are to be in all things as in other maritime causes. And note, that the plaintiff,* before he is admitted to propound for his interest in the petitory action, is bound to give fidejussory security to prosecute his cause, to pay the costs, to ratify the acts of his Proctor, and to submit to the sentence. But although it is said above, that he who obtains judgment in the possessory action, is held to give fidejussory security for the restitution of the goods without injury; yet if they are in danger of perishing during the pendency of the petitory action, they ought to be valued according to the directions in the following Title.

TIT. 43. *Sequestration of the goods* pendente lite. *Vid. Cler. Prax. Eccl. Tit.* 189. *per Oughtonum.*

WHILE the cause, whether it be petitory or possessory is in Court, the goods are to be sequestrated or kept under arrest, and delivered to the custody of some one who stands indifferent between the parties. But if the goods be such that they are liable to injury by being kept, or be otherwise deteriorated in value before the determination of the cause, the Judge, on the petition of one of the parties, although the

* He who first attached the goods.

other oppose it, if the premises be made apparent to him, may decree that the goods shall be valued by skilful and impartial men, named by the parties and approved by the Judge. The value of them is to be deposited with the Judge or his Registrar for the use of him who may succeed in the cause.

TIT. 44. *The arrest of goods by different creditors.*

IF any one be indebted to divers persons, and different Warrants are sued out against his property, and if the same be attached for the purpose of securing the payment of these debts; in this case, if the goods thus attached, be not sufficient for the payment of all the creditors, he is to be preferred who instituted the first action or procured the aforesaid goods to be attached, and he shall obtain the first decree of the Judge to put him in possession.

Also this same order and form is to be observed respecting the other creditors, if any property remain after the first creditor has been paid, although there be not sufficient to discharge all the claims.

TIT. 45. *Of the oath of calumny and what clauses are contained in it.*

OF the oath of calumny and what clauses are contained in it, read the title 151, in Clerke's Practice of the Ecclesiastical Court.

Additions to Title 45.

[The following is the oath here referred to:

You shall swear that you believe that the cause you move is just; that you will not deny any thing you believe is truth, when you are asked of it; that you will not (to your knowledge) use any false proof; that you will not out of fraud request any delay, so as to protract the suit: that you have not given, or promised any thing, neither will give, or promise any thing in order to obtain the victory, except to such persons to whom the laws do permit. So help, &c.

Or, thus, as an elder authour quaintly gives it in verse:

You this shall swear that this your suit doth mean
Right just to be; at least in your esteem.
That you, when ask'd, the truth will not deny;
Nor promise aught: neither that knowingly
You any false proofs will employ,
Nor urge delay, the cause to 'noy.

Clerke gives it in Monkish Latin verse, thus:

Illud juretur, quod lis tibi justa videtur,
Et si quœretur, verum non inficietur,
Nieu promittetur, nec falsa probatio detur,
Ut lis tardetur, dilatio nulla petetur.

This oath, says Clerke, in the title above cited, p. 213, is the *general* oath of calumny. It is to be taken once in the course of the suit, and generally immediately after the *contestatio litis*; that is, as soon as the cause is at issue; but, if it be then omitted, the Judge may require it at any subsequent stage of the proceedings. But there

is also a *special* oath of calumny, otherwise called *malitiæ non committendæ*, which the Judge may administer to the parties and even compel them to take, either before or after contestation of suit, whether the *general* oath had been previously taken or not.

The oath of calumny has often afforded a subject of mirth to the practitioners of the Common Law, as being a useless ceremony and as often leading to perjury. But in an illiberal anxiety to detract from the merit of that excellent code, which has grown grey by *the awful hoar of innumerable ages*, its opponents seem to forget that many oaths analogous to this may be found in the Common Law itself. The *affidavit to hold to bail* is, so far, an oath of calumny: so is the affidavit which is usually made to postpone or continue a cause, that the testimony of an absent witness is material to the point in issue. An affidavit of defence, as it is called, which is made on a motion to open a judgment taken by default and in other cases, and which states that the defendant conceives he has a just and legal defence to the plaintiff's demand, is of the same nature. In Pennsylvania, the party who applies for a divorce, under an act of Assembly of that State, is obliged to make oath "that the facts contained in his or her petition are true, to the best of his or her knowledge and belief; that the complaint is not made out of levity, nor by collusion between the husband and wife, nor for the mere purpose of being freed and separated from each other, but in sincerity and truth, for