the causes in the petition mentioned." 2. Laws Penn. 384. Dallas's Edition.—*Tr.*]

TIT. 46. *The proposing matter of defence, of propounding exceptions, and of corroborating the evidence of witnesses.*

ALL these matters respectively are treated at length in Oughton's Practice in the Ecclesiastical Courts. Tit. 99. 100. 101. 102. *of the manner of taking exceptions to witnesses, of propounding exceptions on the part of the plaintiff, &c. How often exceptions may be propounded in Ecclesiastical causes, &c.*

Yet note, that according to the ancient style and practice of the Court of Admiralty, exceptions of the same nature are admitted in general; a sufficient time being allowed by the Judge to specify these general exceptions, and for proving as well those in general as those in particular.

ADDITION TO TITLE 46.

[In the third edition this title concludes with the following explanatory remark:

That is to say, when general exceptions are admitted, if a probatory term be allowed for supporting them, and afterwards special exceptions are put in, a new term for proving them is not to be assigned, but the witnesses must be brought forward previous to the expiration

of the term allowed for supporting the general exceptions.—*Tr.*]

TIT. 47. *The suppletory oath.*

THIS oath may be prayed and is granted in all maritime causes: but of the manner in which you must assign cause for obtaining it, read the title *of the suppletory oath of the principal* in the *Practice* Car. Ecc. per Oughtonum, Tit. 186. [a part of which I think proper to translate, and add to this chapter.—*Tr.*]

ADDITIONS TO TITLE 47.

[If the plaintiff has not fully proved his allegation, but has only given a half-proof thereof, (*semi-plena probatio,*) he may appear before the Judge and propound as follows:

"I, N. do allege that I have proved the allegations contained in my libel, &c. I say that I have proved them fully, or at least, half-fully; I refer myself to the acts of Court and to the law, and I therefore pray that the suppletory oath may be administered to me, for so the law and justice require."

Then the Proctor of the adverse party will say:

"I deny that those allegations are true. I protest of their nullity and I allege that the said oath ought not to be administered, referring myself to law."

Then the Judge shall assign a time to hear the parties and decree thereon. And if he shall be satisfied, that the party who prays to have the oath administered to them, has made more than half-proof, or at least, half-proof of his allegation, he is bound to administer the oath to him in those cases in which the law permits it; consult, however, with experienced practitioners, as to what those cases are. Then the party shall make oath, "*that of his own certain knowledge the facts stated in his allegation are true.*"

If, however, the party against whom the oath is prayed, should be proved by his adversary, to be a person of infamous or bad character, the oath is then in no case to be administered to him. *Clerke ut sup cit.* 256.

As by the Civil Law, the testimony of one witness is not sufficient to constitute full proof of a fact, it is necessary sometimes in such and in other cases, when there would otherwise be manifest injustice, to complete the proof by the oath of the party. This is, what is called the suppletory oath. Thus, at Common Law, when a tradesman produces his books as evidence of a claim for goods sold and delivered, or work and labour done and performed, the books not being of themselves, sufficient legal evidence, the party is admitted to swear that they are his books of original entries, that the entries were made fairly, at the time, &c. and that the money which is charged is justly due to him. In this manner the proof becomes complete, and the oath which is administered to the tradesman, comes completely within the description of the

suppletory oath. Indeed it is classed within it, in the civil law countries where tradesmen's debts are proved in the same way. Vid. *Ferriere Dict.* verbo *Serment.*

The administration of justice in different countries does not differ so much, as at first view it appears to do, for justice and right are nearly the same every where.—*Tr.*]

Tit. 48. *The exhibition of instruments in support of the allegations of the parties.*

Of the exhibition of instruments and the allegations that are necessary in that case, the manner of answering the same by Proctors and principal parties, of the form of setting them forth *pro confessis* when they refuse to answer, or do not answer fully, read Tit. 104. 105. 106. 72. 73. 74. 298. 299. concerning these matters in the *Prac. Ecc.* per *Oughtonum.*

But note these variations.

If the Proctor for the principal party refuse to take the oath to answer, or faithfully to dispose touching the libel or other matters proposed, to which by law he is bound to depose; the Judge may commit them to prison on account of this contempt, until they have taken the oath. Or he may warn them to take the oath by imposing some pecuniary fine, and if at length they still refuse, he may pronounce them to have incurred the penalty of the fine, and may order them to stand committed until the same be paid.

Tit. 49. *The comparison of letters.*

Likewise of the form and manner of producing instruments of writing and of alleging, in order that they may be compared with the originals, and of the tenour of the report of those by whom the comparison shall be made, and of the exhibition of the same, and other matters which are necessary on this occasion, read Tit. 225. in the Prac. Ecc. per Oughtonum.

Tit. 50. *The exhibition of instruments of writing in the French, Italian, or German language, in support of the libel or other matter proposed.*

If the instrument or other writing which is produced in proof of the allegation on one side, be written in any of the aforesaid languages, or in any foreign language, the Proctor by whom it is produced shall say:

"In support of the contents of the libel which has been filed in my behalf, I exhibit a certain instrument written in such a language;* and I pray that some one skilled in that language, and also in the English tongue, be appointed to make a faithful translation on oath, by such a day, and that he be admonished to exhibit as well the original as the translated copy on the same day."

* But whether the translation shall be taken without further evidence. Vid. Gomez. Resolut. tom. 2. Cap. 9. nu. 5. et Farinac. de testibus, Lib. 2. Tit. 6. quæst. 63. nu. 45. [I presume the translation would be deemed to be faithful until the contrary were shown.—*Tr.*]

Private ~ Public

Then the Judge shall swear some one who is good and true, and skilful in this matter, and shall admonish him according to the prayer.

Tit. 51. *The exhibition of the translation together with the original, and the petition of the Proctor who presents it.*

The aforesaid original and the copy verified by the oath of the translator being introduced and exhibited, the Proctor shall say, *ex superabundanti*:

"I exhibit the aforesaid instrument originally written in the *Italian* language, together with a copy thereof translated into English; and I allege that all and singular the matters which are contained in the aforesaid instrument are true, and were treated, carried on and done, as is contained in the same, and that the copy which is exhibited is faithfully translated and agrees with the original."

This allegation is to be stated separately and the same being admitted, the Proctor who exhibited the instrument, shall make oath that he has faithfully propounded the instrument and allegation, and he may pray that the Proctor on the opposite side be put on his oath faithfully to answer the same. This oath the Proctor must take and he is bound to make oath, according to his belief, immediately, or at the next term if it be so prayed. And if the Proctor answer that he does not believe these allegations, a decree is to be prayed and passed, for the personal answers

of the adverse party. This being done, the Proctor shall say:

"I pray that a copy of the translation of the instrument be registered, and upon this being done that the original be returned, and that the registered copy may have as full faith and credit as the original."

Then the Judge shall say, "We decree as is prayed." But the Proctor should take care that the original instrument remain with the Registrar, in order to enable his adversary or the Proctor of his adversary to make answer.

Additions to Title 51.

[Instruments are for the most part two-fold, (scil) either publick or private.*

Publick instruments are those which are made by publick persons. And of these, there are many sorts: five of which are commonly observed:

1. An instrument drawn under the hand of a Notary Publick, or other publick person, either in or out of Court.
2. That which is sealed with some publick or authentick seal, (though written by a private) as of a Prince, City, University or College.
3. All writings whatsoever (though private) which are exemplified by the authority of the Judge or Magistrate.
4. All such writings as are taken out of publick registries, &c. or those made at the publick acts; [that is to say, *matters of record.*]
5. Those writings which are subscribed by the person and witnesses. And this is publick as to its effects.

* Wesemb. ff. T. de fide Inst. n. 2.

Private instruments are such as are made without any solemnity; and they are either

1. Accounts.
2. Private Inventories or Registers.
3. Private letters betwixt one friend and another, one tradesman and another.—*Tr.*]

Tit. 52. *The conclusion of the cause and the manner of giving information to the Judge before pronouncing the sentence, and the manner of pronouncing the same.*

Of these matters read the titles *de informationibus Judicia dandis, et de forma prolationis sententiæ in Causis Ecclesiasticis* Tit. 122. 127. 121. 114. 117. per Oughtonum, in which these things are specified and particularly treated.

Tit. 53. *Of an appeal from the definitive sentence.*

It is lawful for either party to appeal from the definitive sentence or interlocutory decree, having the effect of a definitive sentence. It may be done either *vivâ voce* before the Judge or *apud acta* when he delivers the sentence or interlocutory decree, or before a notary and witnesses[30] within the fifteen days* which are allowed by the statutes of this kingdom for bringing appeals.

[30] In the United States an appeal cannot regularly be interposed before a Notary. It has been so decided by the Supreme Court in the case of *Glass & Gibbs*, v. the *sloop Betsey*. 3 Dall. *in not.*—*Tr.*]

* Even within ten days; for the Stat. 24. Hen. VIII. cap. 12. speaks of appeals in Ecclesiastical causes only.

But of the manner and form of interposing these appeals, read the titles 289. 295. 274. 275. 290. 291. 294. 292. 293. 276. 277. *de appellationibus in causis Ecclesiasticis per Oughtonum.*

* Yet quere whether an appeal from a sentence in a possessory action will lie, because the effect of that sentence may be counteracted in a petitory action, or by the same Judge on an appeal from the sentence delivered in the petitory action.

Additions to Title 53.

[In England fifteen days are allowed to interpose an appeal, and the appeal must be entered within that time, Godolph. in Sea Laws, p. 208. This is by statute, for at civil law, ten days only are allowed. By the law of the United States, an appeal from the decree of a District Judge must be to the next Circuit Court, to be held in the same district. Vid. Judiciary Act, 24 Sept. 1789, §. 21. 1. L. U. S. 61. An appeal is given only from final decrees. As the appeal is expressly directed to be made to the next Circuit Court, a variety of questions may arise. It may be asked, can the appeal be entered at any time before the first day of the next Circuit Court, or must it be done within fifteen days after the pronouncing of the decree as by statute in England, or ten days according to the rule of the Civil Law? Again, if the decree should be pronounced the very day before the first day of the sitting of the Circuit Court, a circumstance which often occurs, must the appeal be entered immediately, without any time being allowed for consultation and deliberation? *Quere.* In New York the appeal must be entered within ten days or the decree may be executed. *Reg. Cur.—Tr.*]

* On this question vid. Maraut. Spec. par. 6. act. 2. Et quandoque appellatur n. 305. Scacc. de Appell. q. 17. lin. 6. nu. 36. 37. 38.

By the Judiciary Act above cited, §. 22. a writ of error, and not an appeal, lay from the decrees of the Circuit Courts in Admiralty causes; but by a subsequent law, passed the 3d of Mar. 1803, the former mode of proceeding by appeal is restored. 6 L. U. S. 315. The Act does not say that the appeal is to be brought to the next Supreme Court, nor within what time it is to be entered.

New evidence may be given in the appeal. *ib.* p. 316.

By the rules of the Civil Law also, new evidence may be adduced on an appeal, provided it be relevant to the matters which were alleged in the Court below; because on the appeal no allegations which are entirely new are to be admitted. *Per hanc divinam sanctionem decernimus, ut licentia quidem pateat in ex consultationibus tum appellanti quam adversæ parti novis etiam adsertionibus utendi; vel exceptionibus* quæ non ad novum capitulum pertinent *sed ex illis oriuntur,* et illis *conjunctæ sunt, quæ apud anteriorem judicum noscuntur propositæ.* Cod. l. 7. Tit. 63. l. 4.—*Tr.*]

TIT. 54. *That it is not lawful to appeal from grievances, or an interlocutory decree not having the effect of a definitive sentence.*

ALTHOUGH you may file matter which is conclusive against your adversary, or take conclusive exceptions to his witnesses; or within the term you shall pray a commission to parties for the examination of witnesses or the like, and the Judge shall refuse to admit those things: yet it was always the practice,* not to allow an appeal from such grievances, nor from any interlocutory decree which has not the effect of a definitive sentence. Because relief may be had against such inconveniencies by an appeal from the definitive sentence; for in an appeal from such a sentence, it is lawful to allege whatever has not been before alleged, and to prove what has not before been proved.

TIT. 55. *What shall be called an irreparable grievance, and a decree waiving the effect of a definitive sentence, from which it is lawful to appeal.*†

IF any one arrest your goods as the property of himself or of another person, and you have appeared at the proper time before the Judge, and alleged your interest in the goods, and prayed to be admitted to interpose and prove

* This practice is more agreeable to the Civil Law as appears from Marantæ Part 6. Act. 2. et quandoque appellatur nu. 303.

† Vid. Marant. Spec. part 6. parte 3. verb. et demum fertur Sententia. n. 42.

your interest, and that justice and right be administered upon your case: Here, if the Judge tacitly reject your prayer, by proceedings contrary or prejudicial to your petition, as by proceeding to the first, second or third default, so that he may on the day of the fourth default adjudge your goods to be the property of another, or expressly decide against you, this is called *gravamen irreparabile*, and an interlocutory decree having the effect of a definitive sentence. Nor can you hope for any other sentence in that decree; and if, in such a case, you neglect to put in an appeal* your goods will be adjudged to another.[31]

So it is, if your creditor sue you for a debt, and in order to defeat his suit you allege that another action is pending against you for the same debt and before a competent tribunal; and the Judge either tacitly, by admitting *scilicet* the libel and proceeding in the cause, or expressly should reject your allegation, it is lawful to appeal as above. For these evils cannot be repaired in an appeal from a definitive sentence, nor can any other sentence upon such matters

* Vide tamen Sichard. in l. 2. Co. Ne ux. pro marit. in prin. where it is said that execution against the goods of another who was protested *de hoc*, is void.

[31] Brown, who takes Clerke for his guide in matters of Admiralty, here introduces a rule which deserves attention. He says, it is incumbent on the Proctor, unless otherwise directed by his client, to appeal, either *apud acta*, or before a Notary *in scriptis*: for if he omits to appeal from a definitive sentence and any damage thence ensue, he is liable to an action by his client. 2. Bro. Civ. & Adm. Law. 437.—*Tr.*]

be expected. Read Tit. 123 *Quod sit decretum interlocutorium*, &c. *in causis Ecclesiasticis.*

Additions to Title 55.

[An appeal from grievances is interposed when witnesses are supposed to be admitted or rejected improperly. *Wesemb. parat.* ff. *de Appell. n.* 5.

An appeal from an interlocutory decree or from any thing but a final sentence, does not appear, as we have already observed, to be allowed from a Circuit Court to the Supreme Court of the United States. But, *quere*, will such an appeal lie from a District to a Circuit Court? In England where the appellate Courts are constantly sitting, there is but little inconvenience in allowing such appeals; but here, the Circuit Courts sit only twice in a year, and if appeals were to be brought from interlocutory, as well as final decrees, Admiralty suits would be without end. Perhaps there may be cases of *irreparabile gravamen*, where the District Courts would permit and the Circuit Courts receive an appeal, but they must necessarily be very few; no instance of the kind, I believe, has yet occurred.—*Tr.*]

Tit. 56. *Appeal from the Court of Admiralty.*

Inasmuch as it is lawful to appeal from the definitive sentence and the aforesaid interlocutory

decree having the effect of a definitive sentence in the Court of Admiralty, to his Royal Majesty in his Court of Chancery, so from all definitive sentences, interlocutory decrees and grievances, by whatsoever inferior Civil Judges, or Vice-Admirals in the kingdom, it is lawful to appeal to the Honourable the Lord High Admiral of England, and that eminent man, the President of his Court of Admiralty, the Judge or Deputy whomsoever he may be of the same Court. For the Judge of this Court has jurisdiction over all causes of this sort.

Additions to Title 56.

[By the Act of March 1803, appeals are allowed from the District to the Circuit Court, from all final judgments or decrees, where the matter in dispute exceeds the value of fifty dollars exclusive of costs.

In the same manner an appeal lies to the Supreme Court from any Circuit Court or from any District Court, sitting as a Circuit Court in cases of equity, of Admiralty and Maritime jurisdiction, and of prize or no prize. But the matter in dispute must exceed the value of two thousand dollars exclusive of costs. This value may be proved by affidavit.

In appeals to the Supreme Court, no new evidence can be received, except in Admiralty and prize causes; and such appeals are subject to

the same rules, regulations and restrictions, as are prescribed in law in cases of writs of error.

But on error there can be no reversal in either Court for error committed in ruling any plea in abatement, other than a plea to the jurisdiction of the Court, or such plea to a petition or bill in equity, as is in the nature of a demurrer, or for any error in fact. Writs of error must be brought within five years after the decree which is complained of, is passed. But in cases of infants, *femes covert, non compotes* or imprisonment, they are allowed the same term after the disability is removed.

In appeals a citation must issue to the appellant, who is entitled to at least thirty days notice; but this is not necessary if the appeal be prayed at the same term in which the decree was passed.* When the citation is necessary, it must accompany the writ or it will be dismissed.† But upon a suggestion that it was served, the Court will grant a certiorari. 3 Cranch 514. No appeal or writ of error lies in a criminal case.‡—*Tr.*]

Tit. 57. *Of the inhibition of the appeal.*

On the interposition of the appeal, an inhibition is to be prayed from the Judge, before whom the appeal is lodged as in Ecclesiastical causes. Vid. *Cler. Prax.* Tit. 307. 303. 304. 301. 300. by Ought. Conset. Part V. §. 1. And

* 2 Cranch 349.
† *Ib.* 406.
‡ 3 Cranch 159.

that inhibition not only contains a command to the Judge, from whose decision the appeal is made, that he proceed no farther in the cause, and to the appellee in particular and all others in general, as in Ecclesiastical causes, but also an arrestation of the party appellee and a warrant or primary mandate in a civil cause to hold him to bail, until he shall appear to answer the appeal in the cause of appeal.

Addition to Title 57.

[Writs of inhibition are not in use in the Courts of the United States. The Courts below take notice of the appeal, and of their own accord abstain from further proceedings, and the parties do the same. Yet it seems that it would be more regular to issue that process in all cases, as the party might otherwise be with difficulty brought into contempt, if he should proceed farther notwithstanding the appeal.—*Tr.*]

Tit. 58. *Form of the execution and certificate of the aforesaid inhibition.*

This writ of inhibition is directed to the party appellate, and to all other persons in general, as in Ecclesiastical causes. But the party appellate is to be arrested and detained in goal, unless he put in proper fidejussory security for his legal appearance, as in Tit. 4. *of the interposition*

of bail, &c. and the inhibition is to be certified in like manner as an original warrant.

Tit. 59. *Of putting in fidejussory security in the appeal.*

If the plaintiff in the first instance shall appeal, he is not allowed to file a libel until he has put in fidejussory security to prosecute the cause, to pay the costs, to submit to the judgment and to confirm the acts of his Proctor. If the defendant in the first instance appeal, he is bound to put in fidejussory security to all the effects, to which *he*[32] was bailed in the first instance.* This, however is to be said, that although the defendant should appeal, if he should not succeed in the appeal, the cause is to be remanded to the Judge before whom it originated, with costs; which being paid, the other fidejussores who were bound on the part of the defendant *de judicato solvendo* are not released, but remain bound, in the same manner as if there had been no appeal. Why therefore should the defendant, as appellant, be bound to give new fidejussores *de judicato solvendo* in the appeal?

To objections of this sort, I answer, 1. There has been considerable dispute, whether the fidejussores who were put in in the first instance

[32] In the original, the word here used is, *Reus.* I apprehend that we should read *Actor*, as the appellant is the *actor* in the appeal.—*Tr.*]

* For the fidejussores in the principal cause are not bound in the appeal. l. penult. Dig. jud. solvi et gl. Marginist. ibid. Bartol. in l. citat. gl. in l. 2. Co de procurat. vide Fachin, Controvers. lib. 8. c. 57.

were not released by the sentence of the Judge, especially if that sentence was in favour of the defendant.

2. That sometimes it happens that the defendant has a just cause for litigating, because the Judge, in the first instance, condemned him to pay a greater sum than was really due. In such a case the sentence is reversed as to the excess, and the defendant is to be condemned in the real debt. In this instance the cause is not remitted to the Judge from whose decision the appeal was made. And therefore how can the plaintiff obtain the debt adjudged to him in the appeal, unless there are fidejussores in that appeal, who are bound *ad solutionem judicati?*

Also, let it be granted, that sometimes it happens, on account of new proof being introduced, or even upon that which has been adduced in the Court below, that the defendant upon his appeal is condemned to pay a greater sum than was adjudged in the sentence from which he appeals, and that that sentence, so far is retracted?

Whether in such a case, execution of the thing adjudged can be issued against the fidejussores in the first instance? Certainly not. Therefore, as it is said above, it was always the practice for the defendant upon his appealing, to give fidejussores *de judicato solvendo.**

* Vid. Scacc. de Appell. qu. 17. lim. 2. nu. 77. usque ad nu. 82.

Tit. 60. *The manner of proceeding in a cause of appeal.*

Of the manner and form of proceeding in appeals as to the propounding of a libel, the decree to transmit the process, of the privilege of the appellant to allege what he has not before alleged, to prove what he has not before proved, of the manner of justifying in the appeal from grievances, of the exhibition of the proceedings before the Judge from whose tribunal the appeal is made, and other proceedings in these cases, read the chapter in Ecclesiastical practice, in which these matters are specially treated. With this exception only, that the Ecclesiastical Judges, in punishing contumacy and contempt, employ the spiritual sword of excommunication against such persons as offend. But the civil Judges, whether in original causes or in appeals, resort to the secular punishments of imprisonment and fine.

Tit. 61. *Of the petition for a decree to show cause why sentence of execution ought not to be demanded.*

If the party against whom sentence was passed, shall have appealed at the time of delivering the sentence, and a term have been assigned for prosecuting the same, and a certificate of the prosecution of the same, and in the interim the Judge has not been prohibited from further proceedings, the Proctor who obtained the sentence ought to pray that the adverse party should be

called upon to show cause why sentence of execution should not be ordered, and the costs be taxed. And this decree contains only a citation or nomination, and not an arrest.

But if no appeal was entered when the decree was passed, upon the expiration of the fifteen days which are allowed by the statutes for the interposing of the appeals, the aforesaid decree to show cause, &c. is to be prayed, as in Ecclesiastical causes.

Tit. 62. *Of the sentence of execution.*

If the appellant, upon being cited extra-judicially to show cause why sentence of execution should not be ordered, should allege that he had entered his appeal at the proper time and place, as in Ecclesiastical causes, a term is to be assigned, at which he must prove that he has appealed. When that has elapsed, and there being no inhibition to the Judge, the sentence may be executed in the presence of the Proctor, who has alleged as before that an appeal has been entered. Likewise, if the appellant, at the time of delivering the decree, being cited, as before, to show cause, &c. upon his appearing, either in person or by proxy, shall not allege any cause why execution should not be ordered, it is to be ordered. But if he does not appear, it is to be ordered in pain of his contumacy, and he is to be proceeded against in all things as in Ecclesiastical causes. Tit. 130. 331. 131. per Oughtonum.

TIT. 63. *The decree against the principal party to pay the sum which has been adjudged with costs.*

AFTER the Judge, either in pain of contumacy, or upon the failure of the party to make his appearance, or in the presence of his Proctor in consequence of no cause having been assigned for which sentence of execution should not be ordered, shall have directed the sentence to be executed, a bill of costs is to be exhibited, which is to be taxed, and an oath upon that taxation is to be administered.

Then the Proctor shall say:

"I pray that monition issue to the principal party to pay as well the thing adjudged as the costs taxed within some competent time, and in case that it be not paid, that he be taken in custody and imprisoned until it is paid."

The Judge shall say:

"We decree as is prayed," appointing a certain time of payment, to wit, within twenty, thirty, or forty days, at his pleasure.

TIT. 64. *Decree or monition against the fidejussores to pay the thing adjudged, if the principal party abscond.*

THE aforesaid mandate being brought into Court with a certificate that the person has fled, or concealed himself, so that he cannot be admonished according to the tenour, the Proctor must pray as follows:

"I allege that D. the principal party has been sought for the purpose of admonishing him, according to the tenour of the mandate issued at my instance and that he is concealed, so that he cannot be admonished to pay the debt. Wherefore I pray that his fidejussores be admonished to pay, as well the principal sum as the costs, within some certain day, otherwise that they be taken in custody until the same is paid."

The Judge shall say, "We decree it," appointing a day as before in Tit. 63. Yet the Judge may, in the first instance, decree that the fidejussores be called, as before in Tit. 20, and he may decree that the principal party be called, to the aforesaid effect, by publick proclamation, as in Tit. 21. and if then the principal party do not appear nor satisfy the aforesaid mandate, the Judge may decree that the fidejussores be called as aforesaid, in the present title.

TIT. 65. *The decree against the fidejussores to pay the sum adjudged, without regard to the decree against the principal party.**

IF the party, who is condemned, dwell without the kingdom, or has no certain habitation within it, so that he cannot be admonished to pay the sum adjudged, the Judge may, if he please, especially if the premises be proved to him on oath, or if the fact be notorious, as soon as may

* The fidejussores are bound notwithstanding the death of the principal. Vid. Pryn. in 4. Inst. Coke, p. 123, 124.

be after the time allowed for prosecuting and certifying has elapsed, decree that the fidejussores be summoned to show cause why the sentence of execution which is demanded should not be executed, without citing the principal party. So also, the Judge, after the sentence of execution shall have been demanded, and the bill of costs taxed, may, if he will, for the causes beforementioned, decree a monition against the fidejussores to pay the sum which is adjudged, omitting as above, the monition against the principal party.

Tit. 66. *Peremption* of suit.*

You may proceed in the same manner not withstanding an appeal[33] if it be not prosecuted within the term allowed by law, or if it be abandoned before the expiration of the term which was allowed by the Judge, from whose decision the appeal is made, although the appellant should have justifiable cause to appeal, as is noted in Tit. *de decreto dicendum causam*, &c. 321. *De modo procedendi cum appellans*, &c. 322. *De modo probandi appellationem esse desertam.* 324. *Cler. Prax. per Oughtonum.*

So of a civil cause, after it is instituted, if it

* L. properandum Cod. de judic. Authen. Ei qui Co. de tempor. et repar. appell.

[33 A suit at Civil Law is said to be perempted from the Latin word, *perimere*, to destroy, when it is not prosecuted within a certain time prescribed by law. It is analogous to a *non pros* at Common Law.]

be not finished and sentence given within three years, the instance is peremptory,* and no reason can be alleged or objected to impede the said peremptory instance. But the Judge, without respect to the justice of the cause, is bound to pronounce the instance to be peremptory.

Tit. 67. *The manner of proceeding in causes of contempt.*

In the same manner as the Ecclesiastical Judge and the Ecclesiastical Jurisdiction, in executing process and other matters is contemned, so, very often, the civil Judge is contemned, not only in the execution of his mandates, but also by instituting actions before secular Judges, for matters relating to the jurisdiction of the Lord High Admiral and his Supreme Court of Admiralty of England. Ex. gr. If any one should institute an action in a secular case before the Mayor, or his deputies of the City of London, on account of a cause or matter which ought to be agitated and tried in the Court of Admiralty of England, and the cognizance of which belongs to the Lord High Admiral of England and his Supreme Court of Admiralty of England. The Proctor for the party injured is accustomed in those cases, to allege before the Judge of the Court of Admiralty, that a certain person, under colour of a maritime contract made and concluded without the kingdom, pre-

* And a sentence delivered after the peremptory instance is void. Marant. Par. 4. Distinct. 16. nu. 40. and Part. 5. nu. 58.

tending that his client was indebted to him in a certain sum of money, had caused him to be arrested in a secular Court: and to inform the Judge in a summary manner of the truth of this allegation, he exhibits a copy of the complaint, or, as it is called, the declaration, filed in the secular Court. And he prays the Judge to decree that the said plaintiff be attached, until he shall appear in the Court of Admiralty, to answer articles in a case of contempt, which it is usual for the Judge to grant upon an inspection of the declaration.

Tit. 68. *The appearance of the person who is attached in a case of contempt.*

If the person who is arrested should appear, the Judge is accustomed *ex officio*, in order to avoid expense, publickly to exhibit to him a copy of the declaration, and to interrogate him whether the debt, which he claims, be founded upon a contract concluded in parts beyond the seas, or within the jurisdiction of the High Court of Admiralty of England.

And if he confess the fact, he is to be admonished forthwith to withdraw the aforesaid action. If he do this without delay, it is usual for the Judge not to consider him in contempt. But if he pertinaciously adhere to it and refuse to withdraw the action, although it is confessedly a cause of maritime jurisdiction, he is to be pronounced in contempt, and is to be committed to prison, and there detained until he withdraw the aforesaid action.

And he is also, for this contempt, not only condemned to pay the costs of the party grieved, but also he is mulcted in a pecuniary fine.

But at the time, if it do not appear from the declaration that the cause was instituted upon a maritime contract, which commonly happens, because in order to give jurisdiction to the secular Court, they are accustomed in these declarations to allege that the contract upon which the action is founded, was executed in a certain parish and ward in the City of London, although the party who is represented as having made it never was in that City: or if the party who is attached, expressly deny that the action is founded upon any maritime contract, then he who procured the attachment is obliged to file articles or interrogations in a case of contempt, and to specify the place where, the time when, and the cause for which the said contract was formed. If he prove his allegations, he is to be allowed his costs, and the person who was attached is, as before, to be punished for his contempt.

But the process or manner of proceeding in these cases, is a summary proceeding, as in other maritime causes, and as they are accustomed to proceed in the Ecclesiastical Court.* It is to be noted that if the party proceed to justify the contempt *ut in § sed dato non constare*,[34] he is obliged to find fidejussores to submit to the judgment and pay the costs. Note, that the

* Vid. Cler. Prac. per Oughtonum, Tit. 30. 31. 33.

[34] I copy these words from the original, with a confession that I am utterly unable to explain them.]

Judge is not accustomed to decree a warrant for the contempt, unless, in the first place, the party who prays it, puts in sufficient fidejussores to answer the action in the Admiralty Court, if the party who is charged with the contempt, be willing to prosecute his action in the same Court. The like process or manner of proceeding is to be had against any other persons who contemn the jurisdiction of the Court of Admiralty; as, by the manner of executing the mandates of the Court, or by speaking scandalous words against the Judge or any officer of the Judge, on account of his executing a warrant.

PART III.

A FORMULARY

OF

LIBELS AND OTHER INSTRUMENTS

USED IN THE

ADMIRALTY PROCEEDINGS.

And know, my Son, that it is one of the most honourable, laudable and profitable things in our Law, to have the science of well pleading in actions reals and personals; and therefore I counsaile thee especially to imploy thy courage and care to learn this.

LITTLETON.

More jangling and questions grow upon the manner of pleading, and exceptions to forme, than upon the matter itselfe, and infinite causes are lost or delayed for want of pleading.

COKE.

PART III.

A

BRIEF DISCOURSE

SHOWING THE ORDER AND STRUCTURE OF A

LIBEL OR DECLARATION.*

Nihil dictum, quod non prius is a maxim, as true as it is general. So that to enlarge or say any thing in this discourse more than what others (of great learning and practice,) have said before, is a thing I aim not at; neither would I have any so far mistaken in me, as to think me guilty of so much vain glory and ostentation.—Neither were it possible for me (or any else, as I think) to reduce this discourse to a better method than *Wesembeck* † has done, whose words I shall insert, with some additions out of other authours, which will render this discourse so complete, as the meanest capacity (our insipid proctors, I mean of) may form a libel, without inspecting their precedent books; which they can no more be without, than a cripple without his crutches. I question not but the learned advo-

* Consetio's Practice of the Ecclesiastical Courts. *London*, 1708. [This essay, although it relate to the practice of the Ecclesiastical Court, is equally applicable to the Admiralty Courts.]

† Parat. ff. T. de edendo.

cates are so well stored with discourses of this nature, that this can be of little use to them.

1. *What a libel is.*
2. *How many and what are the parts of a libel.*
3. *How many sorts of libels.*
4. *What things are said to be proper to a libel.*
5. *What is the efficient cause of a libel.*
6. *The matter of a libel.*
7. *The form of a libel; deduced also from a syllogistical argument.*
8. *The next, and not the remote matter, ought to be expressed in a libel.*
9. *The end of a libel.*

A libel is said to be a diminutive, *a libro*, a book; whence formerly a paper was offered: in general it signifies every writing: figuratively the matter is put for the thing contained in it.—But properly in this argument, a libel is taken for the writing which contains the action:* Or a libel is nothing else but a fit conception of words, setting forth a specimen of the future sute.†According to *Lcnfranc. (c. quoniam. de petition. n. 7.)* it is defined, the lawyer's argument.

2. It is said to consist of three parts. (*scil*) 1. the major proposition; which shows a just cause of the petition. 2. The narration, or the minor proposition. Whereby is inferred (in the species of the fact propounded) that there is cause just for the petition. 3. The conclusion or the conclusive petition, which conjoins both the prepositions, and includes the minor in the major.* A libel therefore is a practical and judicial syllogism, as it were. Though *Speculator de Libelli confectione, Sect. quid Libellus, n.* 3 recites in parts somewhat otherways; for in the first place, he puts the cause of libel, which is the major proposition: in the second place, the obligation, which is the minor proposition; and in the third place, the action, which is the conclusion: For the petition itself is said to be the action: the conclusion consists in the petition, and not in the words related. And this is the chief part of the libel, which ought especially to be regarded in civil actions; not so in criminal actions or causes, because in them there needs no conclusion. By this the † plaintiff concludes, justly desiring from the premises and the things propounded, that the defendant may be condemned, both in the principal and the charges.‡

3. In respect of the subject-matter of the libels, there are only two sorts in use; the one of which is conventional or civil, (*à conveniendo*, from convening) the other criminal, (*à crimine seu querimonia.*) *In respect of its form, it is either simple (which absolves or declares the action, in a continued speech or oration as it

* Alciat. in prax. fol. 18. Speculator de libell. conf. sect. 1.

† Ummius disp. 6. th. 8. n. 38.

* Alciat. ubi supra Jason. Zasius & alii in prin. Inst. de Action.

† Alciat. ut supra.

‡ Speculator ubi supr. Sect. species. glos. in d. c 1. Lanfr. c. quoniam. ad verb. petition. de prob. n. 1. Alciat. in prax. fol. 103. Ummius disp. 6. th. 8. Rosbach pros. tit. 33.

* Oldendor. p. de forma Lib.

were) or articulate, in which the merits of the cause are propounded by articles.

4. The properties of a libel, or those things which are said to be particularly proper to a libel, are these, *(scil.)* that it be round, (as the civilians term it) dilucid, concluding, not obscure uncertain, nor general or alternative.*

5. The efficient cause of a libel is the law, which deposeth a libel to be offered: But it commands principally that it be offered to the Judge (seeing his office is implored upon this petition) and then also to the adverse party.

6. As to what respects the matter of a libel: It is be offered in all causes, about which the judgment is stirred up, and a suit is commenced betwixt two: and that as well in civil as criminal causes, &c. but not always in summary causes, *(viz.)* in executions: for in these, any manner of petition is sufficient, though it be without writing: like as when it proceeded by way of inquisition, or where the office of Judge is implored in an extraordinary manner.

7. The form of a libel, (although it ought especially to be drawn, according to the style and custom of every court, yet there is no special custom extant,) ought to be drawn in writing; and in such manner, as that it may contain these five things, comprehended in these following verses.

Quis, quid, coram quo, quo jure petatur et à quo,
Recte compositus quique Libellus habet.†

* Ferrar. in forma Lib. contr. opp. lib. &c.

† Hortiensis de Libell. obla. Alciat. ubi sup. fol. 18.

Each plaintiff and defendant's name,
And eke the Judge who tryes the same;
The thing demanded, and the right whereby
You urge to have it granted instantly:
He doth a libel right and well compose,
Who forms the same, omitting none of those.

But the particular form of a libel* consists in the conclusion, which (what it ought to be) *Jason in sect. huic autem n.* 13 *Institut. de Action.* copiously disputes; so also *Myns. in Inst. de Action.* At this day, such respect is had to the conclusion, that it be sufficient to gather from its form, of what nature the action is, though no name be expressed: which seems to have been otherways formerly, at least by the law of *Codices.* To make this form the more dilucid and clear, we will dispose it into an argument or a syllogism,† *in Darii,* which shall in short comprehend the whole matter, and all the parts of a libel.

Every one who defames an honest man ought to be Ecclesiastically punished.

A. G. *hath defamed a certain honest man,* J. G.

Therefore the said A. G. *ought to be Ecclesiastically punished.*

8. Civil actions are either singular, general or universal, as was shown in the Practice. Those actions which are singular, are also either real personal, or mixt, as has been shown. Now in a real action, the next cause, and not the re-

* Ita formari debet ut ex narratis sufficiat jus agendi implicité resultare et in postea explicité in probationibus declarari. Wesemb. ubi s. n. 8. Anchor. cosil. 148. n. 6.

† Lanfr. c. quoniam. de prob. ad verb. petition n. 8.

mote, ought to be expressed, * as for example, I demand ten pounds of *Titius* which I lent him, and I desire he may be condemned to pay me that sum: here now the contract, or the lending money, is the next cause in a real action, and it is the remote cause in a personal action; for the obligation or bond arising from the contract, is the next or nearest cause in a personal action, and the remote cause in a real action: wherefore in a real action, if you say in your libel, I ask ten pounds of *Titius*, which he owes me upon bond; here your libel is so general, as it is in danger of being avoided, if the defendant excepts against it: but if in this action, you say in this manner, I ask ten pounds of *Titius* which I lent him, the libel is dilucid, by your making mention of the next cause: and so observe the quite contrary in a personal action.† But in a general or universal judgment or action, there is no need of mentioning any cause.

9. The end of the libel is, that it may propound the plaintiff's desire, and instruct the Judge and the adversary, as to the nature of the future sute, and to the foundation of judgment: for both the articles of the proofs are to be accommodated to the form of the libel, and the sentence is to be pronounced according to the same. Wherefore to the intent that the judgment be begun in due order, and be founded upon a certain thing, it is necessary that a libel be given by the plaintiff, though not admonish-

* Lanfr. ubi s. n. 3. Myns. Inst. de Act. in Rub. n. 15. et Sect. omnium autem. n. 14, 15.

† Lanf. ubi supra n. 3, 4, 5, 6.

ed thereto: the omission whereof doth vitiate the proceedings. Whence a libel is deservedly ranked among the substantial proceedings: for no libel existing, the proceedings are rendered null, &c.

10. Agreeable to what has been said, I will here obviate the form of a libel, as it is offered before the Judge of the Ecclesiastical Courts. And in the first place, it must be drawn in the name and style of the Judge, as *Alciatus* has also observed in his form, set down in his practice, at fol. 18. (*viz.*)

> In the name of God amen. *Before you the worshipful* H. W. *Doctor of Laws, principal official of the beautiful consistory court of* York, *&c. The party of* J. G. *against* A. G. *&c. allegeth and complaineth, and propoundeth, &c.*

Imprimis, He doth propound and article, that the said *J. G.* was and is a man very honest, just and upright, of good fame, life and honest conversation, aspersed, defamed, with no crime (at least such as is notorious) except such as is afterwards mentioned, and is commonly reputed, had, named and esteemed as such, &c.

Item, That notwithstanding the premises, the said *A. G.* out of a malign spirit, in the months of *A. M. I. &c.* in this present year, 1630, in in one or other of the said months, within the said parish * of *D.* aforesaid, or some other

* Ratio hujus apud Myns. Inst. de Action. Sect. Malef. et Sect. curare autem.

place within the said parish, maliciously and out of an intent of defaming and injuring the said *J. G.* hath defamed and injured him, and hath said, uttered, &c. some reproachful and defamatory words, of and against the said *J. G.* and especially these words following, or the like in effect, (*viz.*) the said *A. G.* said and reported (though falsely,) diverse and sundry times, or at least once, speaking to the said *J. G. thou hast got a wench with child,* &c. The party doth propound and article, as to such a time and manner of speaking the words, &c.

Wherefore proof being made upon the premises, the party of the said *J. G.* doth request or petition, that the said *A. G.* for such excessive rashness in the premises, and concerning the same, may be corrected and punished according to your pleasure; and also that he may be condemned in charges, made and to be made in this cause, on the behalf of the said *J. G. &c.*

Mynsinger in Inst. de injuriis Sect. in summa, concludes thus. Wherefore the plaintiff desires that (in order to repair his fame and good name) the defendant aforenamed, may be compelled by you, and your definitive sentence, to disown, confess and declare publicly, that the said defamatory and injurious words, were unadvisedly and against the truth, spoke and uttered by him, &c. or otherways, that right and justice be administered, &c.

No. 1.

*Summons of a Judge or Justice of the Peace to the Master, to answer a claim for wages.**

TO A. B. MASTER OF THE SHIP FAME.

You are hereby required to attend at my office, No.— ——Street, in the City of Baltimore, on Monday next, the —— day of —— at —— o'clock in the forenoon, to show cause why process of attachment should not issue against the said ship Fame, whereof you are Master, her tackle, apparel and furniture, according to the rules of Admiralty Courts, to answer the claims of Thomas Tackle for services as a Mariner on board the said ship during her voyage from the port of —— to the port of —— which voyage ended on the —— day of ——.

Given under my hand, this —— day of—— in the year aforesaid. T. G.

one of the Justices of the Peace for Baltimore County.

No. 2.

Certificate of the Magistrate to the Clerk of the District Court.

I do hereby certify, that there appears to me sufficient cause of complaint whereon to found

* *Vide* p. 7. *ante.*

Admiralty process against the ship Fame, her tackle, apparel and furniture, to answer the complaint of A. B. late a Mariner on board the said ship.

No. 3.

Libel for Seamen's Wages.

To the Honourable *James Winchester*, Judge of the District Court of the United States, for Maryland District,

The Libel of Thomas Bowling, Mariner, humbly showeth:

That your Libellant, on the tenth day of June in the year of our Lord one thousand eight hundred and four at the Port of Baltimore in the said District, at the request of Daniel Jones, Master of the ship Henrietta, then lying at anchor in the said Port, shipped as a Mariner on board said ship, to perform a voyage on the *high seas* and within the jurisdiction of this Honourable Court, to wit, from the said Port of Baltimore to Liverpool, thence to any other port in Great Britain, and thence back to the said Port of Baltimore, at the wages of twenty dollars per month, as will more fully appear by the shipping articles signed by your Libellant, in which his contract for the said voyage is fully set forth, and which he prays may be produced by the said Daniel Jones to this Honourable Court.

And your Libellant further showeth, that he proceeded on the said voyage in the said ship to the said port of Liverpool, whence he proceeded to the port of London and thence back to the Port of Baltimore aforesaid, at all times and in all things doing his duty faithfully as a Mariner on board the said ship. And your Libellant further showeth, that the said ship arrived at the said Port of Baltimore on the —— day of —— in the year of our Lord one thousand eight hundred and ——, where she was safely moored and her cargo safely landed, and your Libellant was discharged from the said ship without being paid the wages so by him earned as aforesaid or any part thereof, except what is duly credited in the schedule hereunto annexed; and there is now due unto your said Libellant, by reason of his said services, the sum of —— dollars, which the said Daniel Jones hitherto hath altogether refused and still doth refuse to pay, although often thereto required by your Libellant.

[* Your Libellant further showeth, that the said ship is about to proceed to sea before the end of ten days next after the delivery of her cargo; and unless your Libellant can obtain immediate process he may not be able to enforce the payment of his aforesaid wages by the decree of this Honourable Court.]

To the end therefore that your Libellant may

* This allegation is necessary when, the vessel being about to proceed to sea before the expiration of ten days from the delivery of her cargo, the seaman requires immediate process, without the delay of a summons—*Vid* 1. *L. U. S.* p. 134. § 6.

obtain relief in the premises, he prayeth process of attachment against the said ship Henrietta, her tackle, apparel and furniture, according to the course of Admiralty Courts, and monition as is usual in like cases generally and in special to the said Daniel Jones, that he may on his corporal oath, true and proper answers make to this Libel and to the interrogatories hereunto annexed. And your Libellant prays that the said ship Henrietta, her tackle, apparel and furniture may be condemned and sold to pay the wages due as aforesaid to your Libellant, and that he may have such further relief in the premises as to justice shall seem meet.

☞ The Proctor will annex such interrogatories as may suit his case, and a statement upon oath, of the Libellant's, claim, in the form of an account against the vessel.

No. 4.

*Attachment against the Vessel.**

THE UNITED STATES OF AMERICA:

MARYLAND DISTRICT, SS.

To the Marshal for Maryland District, Greeting:

We command you, that you attach, seize, take, and safely keep the —(A. B. master of the ——) *her tackle, apparel and furniture, commanded by* ——, *and now lying at the Port of*

* The Attachment against the person is similar to the above, excepting, that the words printed in *italicks* are omitted, and those included in a parenthesis are inserted.

Baltimore, to answer the libel of ——, and how you shall execute this precept you make known to us in our District Court for the District aforesaid, at the Court-house in the City of Baltimore, ——, and have you then and there this writ.— Witness the Honourable James Winchester, Esq. Judge of our said District Court, this —— day of —— 180

Clk. Dist. Court Maryland.

No. 5.

*Monition against the Vessel.**

THE UNITED STATES OF AMERICA:

MARYLAND DISTRICT SS.

To the Marshal for Maryland District Greeting:

Whereas —— ha — exhibited — Libel or Complaint in the District Court of the United States for Maryland District, stating, alleging and propounding, that [*here recite the purport of the Libel.*]

And whereas the Judge of the District Court for the District aforesaid, hath ordered and directed —— next, *for all persons concerned* (the said ——) to be cited and intimated to appear in the Court-house in the City of Baltimore, and show cause, if any *they have,* (he hath) why

* In the Monition against the person the above form is used, with this difference, that the words printed in *italicks* are omitted, and those which immediately follow them, included in a parenthesis, are inserted.

judgment should not pass as prayed:—You are therefore hereby authorised, empowered and strictly enjoined, peremptorily to CITE and ADMONISH —— *persons whatsoever, having or pretending to have any right, title, interest or claim in or to the said* —— (the said ——) libelled against as aforesaid, by *publickly affixing* (shewing) this monition *on the Main-Mast of the said* —— (to the said ——) *for some time, and by leaving there affixed* (and leaving with him) a true copy thereof: and by all other lawful ways, means and methods whatsoever, whereby this MONITION may be made most publick and notorious, to be and appear at the time and place aforesaid, before the Judge aforesaid: and also to attend upon every session and sessions to be held there and from thence, until a DEFINITIVE sentence shall be read and promulged in the said business inclusively, if *any of them* (he) shall shall think it *their* (his) duty so to do; to hear, abide by and perform all and singular such judicial acts as are necessary and by law required to be done and expedited in the premises; and further to do and receive what unto law and justice shall appertain, under the pain of the law and contempt thereof, the absence and contumacy of *them* (him) *and every of them in any wise notwithstanding*.—And whatsoever you shall do in the premises, you shall duly certify unto the Judge aforesaid, at the time and place aforesaid, together with these presents.

Witness, the Honourable James Winchester, Judge of our said District Court, this —— day of —— in the year of our Lord ——

Libel for Materials furnished to a Vessel.

TO THE HONOURABLE, &c.

The Libel of T— F— and J— K—, Merchants, trading jointly by the name of F— and K—, humbly showeth:

THAT your Libellants, at sundry times, between the fourth day of December in the year of our Lord eighteen hundred and seven, until the twenty-seventh day of June in the year eighteen hundred and nine, at the special instance and request of J— S— and W— B. S— who were employed in building a new brig or vessel in Nanticoke River in the said District, did provide, furnish and deliver to the use of the said brig, certain rudder and irons, spikes, cordage and other materials necessary in the building and rigging of the said brig, and for her safety and navigation on the high Seas; which materials and the cost of them are particularly set forth and described in the Account or Schedule hereunto annexed, and amount to the sum of three hundred and seventy-one dollars and nineteen cents, current money.

Your Libellants further show, That although the said brig is not yet completely finished, and hath not, to their knowledge, received any name whereby to distinguish her, the owners are about to send her out of this District, without paying your Libellants for the materials furnished by them as aforesaid, and which have been applied upon the said brig; and your Libellants have not accepted any other security for their said

claim than their *lien* on the said brig, which they have not in any manner consented to release.

To the end therefore that by the decree of this Honourable Court, your Libellants may obtain relief in the premises, they pray process of attachment against the said new brig, now lying at Vienna in Nanticoke River, her tackle, apparel and furniture, according to the custom of Admiralty Courts, and MONITION as is usual in like cases, generally, and in special to the said J— S— and W— B. S—, that they may, on their corporal oaths, true, full and perfect answer make to this Libel, and all the matters herein set forth, and may disclose and declare whether any and what name has been given to the said brig, so that the same may be inserted in and made a part of this Libel. And your Libellants pray that by the Decree of this Honourable Court, the said brig may be condemned and sold for the payment of the claim of your Libellants, and that they may have such further and other relief as the nature of their case may require, and they will pray, &c.

Libel in a Case of Damage.

TO THE HONOURABLE, &c.

THE Libel of *I. P.* owner of the brig called the *Constitution* against the ship called the *Perseverance*, whereof *T. J.* now is or lately was master, her tackle, apparel and furniture, humbly showeth:

THAT in the month of —— in the year of our Lord —— the said brig *Constitution*, whereof your Libellant was master, was at the Port of Baltimore, and designed on a voyage thence to the port of London with a valuable cargo on board and was at that time, and at the time of the damage hereinafter plead, a tight, staunch and well built vessel, of the burthen of eighty tons or thereabouts, and was completely rigged and well and sufficiently found and furnished with tackle, apparel and furniture, and had on board and in her service the said *J. P.* and four mariners, which were and are a full and sufficient complement or number of hands to take care of and navigate the said brig or any other vessel of the like burthen and rigging, on the like service.

That on or about the —— day of —— in the year aforesaid, the said brig *Constitution* with the said *J. P.* as master and her aforesaid crew or complement of hands on board, found, provided and furnished as aforesaid, and loaded with a valuable cargo as aforesaid, sailed from the Port of Baltimore on her aforesaid voyage: that on the following day your Libellant being then upon the deck of his said brig *Constitution*, and the said brig being upon her starboard tack, with the wind all South-west or thereabouts, under close reefed top-sail, upon the high seas, within the flux and reflux thereof, and within the jurisdiction of this Honourable Court, discovered the ship *Perseverance* whereof the said *T. J.* then was master coming or her larboard tack, right for the said brig *Constitution*; whereupon your libellant and his crew hailed the said ship *Perse-*

verance and begged the master and people on board of the said ship *Perseverance* to bear up or they would certainly run on board: yet the master and crew of the said ship *Perseverance* although they heard your Libellant and his crew calling to them and cautioning them to bear up as aforesaid, either from malicious obstinacy or want of skill or power, refused or neglected so to do.

That there being no other means of preventing damage but by putting both the said vessels about on the other tack, the people on board the said brig *Constitution* put their said brig about on the other tack accordingly, and your Libellant doth expressly allege that if the people on board the said ship *Perseverance* had done the like no damage whatever would have happened; but instead of so doing, the people on board the said ship *Perseverance* did not so much as shiver or back one sail, but come with all the force the wind and her sails could give her against the said brig *Constitution*, struck her on the larboard quarter of her stern, broke her stern post, upset her quarter-deck, broke several planks on her larboard quarter, and did her other considerable damage, and thereupon some of the Mariners on board the said brig *Constitution* conceiving her to be sinking from the violence of the blow took to the boat to save their lives, and notwithstanding the same was observed by the people on board the said ship *Perseverance*, they sailed away from and left the said brig *Constitution*, without affording the least assistance to her or her crew.

That after the said brig *Constitution* was so struck and received the damage aforesaid, your Libellant did every thing that an able and experienced Mariner could do for the preservation of his said brig and her cargo; but finding, notwithstanding the pumps were kept working, and every exertion was made to stop her leaks, that she was in a sinking condition; he, your Libellant, to prevent the said brig and cargo from being totally lost, determined to and did run the said brig on shore near Cape Fear, with all posible care and diligence.

Wherefore your Libellant prays, &c.

☞ This Libel is abridged from one which is inserted in Judge Marriot's *formulare*. The case is undoubtedly within the jurisdiction of Admiralty, in England, but I understand that a contrary doctrine has been held in Pennsylvania by Judge Peters, who dismissed a libel. My information, however, is not positive. By the Laws of Oleron art. 14. and the ordinance of Wisbuy art. 26. 50. 67. and 70. each ship must bear a moiety of the damage if the injury was accidental. But if the party running against the other do not swear that he did not do it designedly, he must pay the whole loss.

In England, Sir James Marriott says, that, when the Judge has any doubts in regard to the manner of navigating ships course, position and situation, he calls for the assistance of two masters of the Trinity House, to explain. In our Courts I presume that experienced masters would be summoned, as witnesses, for this purpose.

Salvage.

To the Honourable *Richard Peters*, Esq. Judge of the District Court of the United States, in and for the Pennsylvania District:

The libel of *J. W.* owners of the ship *Amiable* and *W. P.* Captain of the said ship, for themselves and all others entitled, humbly showeth:

That on Saturday the 10*th* day of Nov. inst. about 7 o'clock in the morning, the said *W. P.* being on a voyage in the said ship from Charleston, in South-Carolina to Philadelphia, he discovered a ship in distress, upon which he shortened sail, hauled up for her, and found her to be a ship *La Bella Creolle* of Bordeaux, commanded by — Denney, bound for P. au P. to B. That the Captain declared that they were in great distress the ship being sinking under them and entreated the said *W. P.* to stay by them, to which the said *W. P.* agreed; and the wind then blowing very fresh, the said *W. P.* made light sail in order to continue in their company—that the people on board the said *La Belle Creolle* not understanding his intentions appeared alarmed and renewed their signals of distress, upon which the said *W. P.* wore ship and ran under their stern, when they again besought him not to leave them as their ship would undoubtedly founder; upon which the said *W. P.* assured them that he would stay by them and relieve them as soon as the weather moderated—that the next day about 11 o'clock he sent his yawl with his mate and four hands on board the said ship *La Belle Creolle*, who assisted to pump out the said ship, and to

bend the fore top-sail; that the said mate on his return reported that the said ship was old and rotten, and in a very bad situation, and in his opinion unfit to proceed on her voyage, whereupon the mate by the orders of the said captain *P.* returned to the said ship with assurances that he the said captain *P.* would stay by them until the next day, upon which the said captain *D.* wrote a note to the said captain *P.* requesting him to stay by them and endeavour to bring them into some Port, and that he should be allowed whatever the Law would give, to which the said captain *P.* agreed—that the said ships continued in company during the rest of the day, and during the rest of the night, continued to make signals of distress and so continued during the ensuing day the 12*th* inst. That the said captain *D.* on the 12*th* inst. being hard blowing weather, threw overboard part of his cargo; that on the 13*th* inst. the weather moderated in some degree when the said *P.* run down and on consultation with the said captain *D.* sent his boat on board to lighten the ship and to take her in tow—the boat returned with a few bags of Coffee, in which boat the said captain *D.* came on board the *Amiable*, to propose that the said vessel should be taken in tow when the weather moderated—that it continued to blow fresh that night and the 14*th*. The said captain *D.* continued to make signals of distress, but on the 15*th* the weather moderated, and at half past 3. P. M. the said captain *D.* hoisted colours half mast high, upon which the said captain *P.* bore down to them when they declared their ship was sink-

ing and begged to be taken out—that he ordered them to hoist out their boat and put provision into her and fall to leward and he would bear down and take them in—that it again began to blow fresh with a heavy sea, and as they were hoisting out their boat she dropped in pieces, whereupon they begged the said *P.* to send his boat to their assistance; that the said *P.* called together his officers and crew to enquire which of them would undertake in the high wind and heavy sea which then prevailed to go and bring away the crew; that his two mates, and two of the seamen agreed to go and got out the boat, that with considerable pains and danger bringing provisions and two men at a time they removed the captain and his whole crew consisting of twenty three men and one passenger; that previous to leaving the said ship, the crew proposed to set her on fire, to which however, the said captain *P.* upon being informed of the proposal objected, and the said captain *D.* and his crew being on board the *Amiable,* declared that they relinquished and abandoned the said ship *La Belle Creolle* and every thing on board her—that the next morning being the 16*th*, the said captain *P.* hoisted out the yawl and in the course of the day took out of the said ship as much of the cargo as possible amounting as your Libellants believe to be about twenty thousand wt. of Coffee, four or five barrels a few kegs of Sugar, twelve or thirteen bales of Cotton, and about twenty-three bags of Indigo, &c. &c. &c. *(specifying the Articles saved;)* that night coming

on, the ship sinking fast, and there appearing no chance of preserving her, at the renewed request of the said captain *D.* and to prevent her injuring other vessels, they set fire to the said ship and left her, and the said captain *P.* with the said captain *D.* and his crew and passengers aforesaid arrived in the Port of *P.* the 19*th* of November inst.

Now inasmuch as the said *W. P.* hath with so much difficulty and danger saved from the said ship *La Belle Creolle* the Articles aforesaid, which would otherwise in all human probability have been totally lost; may it please your honour to order the said articles being now on board the said ship *Amiable* to be attached and taken by the process of this honourable Court, and that a MONITION issue to all persons concerned to show cause, if any they have, why a reasonable Salvage should not be decreed thereout to the Libellants and all others intitled, and that such further and other steps shall be taken as the course of this honourable Court shall require.

J. W.
W. P.

W. RAWLE, *Attorney for Libellants.*

To the honourable JOHN SLOSS HOBART, *esquire, Judge of the District Court of the United States for the New York District.*

The libel of Silas Talbot esquire commander of the United States ship of war the *Constitution* on behalf as well of the United States as of himself and the officers and crew of the said ship; against the ship *Amelia*, her tackle, apparel, furniture and cargo:

The said Libellant for and on behalf as aforesaid, doth hereby propound, allege and declare to this honourable court, as followeth (to wit)

First, That pursuant to instructions for that purpose from the President of the United States this Libellant in and with the said United States ship of war the *Constitution* and her officers and crew, did subdue, seize and take upon the high seas, the said ship or vessel called the *Amelia* of the burthen of about 370 tons, with her apparel, guns, and appurtenances, and a valuable cargo on board of the same, consisting of cotton, sugar, and dry goods in bales, and hath brought the said ship or vessel and her cargo into the port of New York, where they now are.

Secondly, That the said ship or vessel called the *Amelia* at the time of the said capture thereof, was armed with eight carriage guns, and was under the command of Citoyen Etienne Prevost, a French officer of Marine, and had on board besides the said commander thereof, eleven French mariners—that as this Libellant hath been informed, the said ship or vessal with her said cargo being the property of some person or persons to the said Libellant unknown, sailed some time since from Calcutta, an English port in the East Indies, bound for some port in Europe—That upon her said voyage she was met with and captured as a prize by a French national corvette called *La Diligente*, commanded by L. T. Dubois, who took out of her the captain and crew of the said ship *Amelia*, with all the papers relating to her and her cargo, and placed the said Ettienne Prevost and the said French mariners on board of her and ordered her to St. Domingo for adjudication, as a good and lawful prize—And that she remained in the full and peaceable possession of the French from the time of the capture thereof by them for the space of ten days, whereby this Libellant is advised that as well by the laws of nations as by the particular law of France, the said ship became and was to be considered as a French ship.

Lastly, this Proponent doth allege, propound and declare, that all and singular the premises are and were true, publick and notorious, of which due proof being made, he humbly prays the usual process and monition of this court in this behalf to be made, and that the said Etienne Prevost, and all other persons having or claiming any interest in the said ship *Amelia*, her apparel, guns, appurtenances and cargo, or any part thereof, may be cited in general and special, to answer the premises, and that right and justice may be duly administered in this behalf, and all due proceedings being had, that the same ship or vessel, her apparel, guns, appurtenances and cargo, for the causes aforesaid and others

appearing, may, by the definitive sentence and decree of this honourable Court be condemned as forfeited, to be distributed as by law is provided respecting the captures made by the publick armed vessels of the United States; or if it shall appear that the same or any part or parcel thereof ought to be restored to any person or persons as the former owner or owners thereof, then that the same may be so restored upon the payment of such salvage as by law ought to be paid for the same.

RICHARD HARRISON,
Advocate for Libellant.

Answer to the foregoing Libel.

THE Claim and Answer of Hans Frederick Seaman to the Libel of Silas Talbot, Esquire, Commander of the United States ship of war the *Constitution*, on behalf as well of the United States as of himself and the officers and crew of said ship, against the ship *Amelia*, her tackle apparel, furniture and cargo, in behalf of Messrs. Chapeau Rouge and Company of Hamburg, merchants, owners of the said ship *Amelia* and her cargo.

THE said Hans Frederick Seaman, saving and reserving to himself all benefit of exception to the said Libel, answereth and saith, that the said ship *Amelia*, commanded by one Jacob Frederick Engelbrecht, as master, sailed on or about the twentieth day of February one thousand seven hundred and ninety eight from the Port of Hamburgh on a voyage to the East Indies, where she arrived safe.

That she left Calcutta commanded by the said Jacob Frederick Engelbrecht some time in the month of April last past, bound to the Port of Hamburgh aforesaid. That at the time of the said ship *Amelia* leaving Hamburgh and Calcutta as aforesaid, and at the time of her capture by the French hereinafter mentioned, she belonged with her cargo, consisting of the Articles in the said Libel mentioned, unto Messieurs Chapeau Rouge and Company, Burghers or Citizens of Hamburgh, and that the same if restored, will be the sole property of the said Chapeau Rouge and Company and of no other person. That the said ship *Amelia* was captured on or about the sixth day of September last, on the high seas as she was prosecuting her last mentioned voyage to Hamburgh aforesaid, by a French armed vessel whose name as this Claimant has understood was *la Henrietta of Rochfort*, commanded as he understood by Citizen Dubois—that the said captain Dubois, or whoever the said captain of the said armed vessel might be, took from the said ship *Amelia* the master thereof, the said Jacob Frederick Engelbrecht, and thirteen of her crew, with all her papers, leaving on board this Claimant who was mate of the said ship *Amelia*, the doctor and five other men; that the French captain sent on board of the said ship *Amelia* twelve hands, and ordered her to proceed to St. Domingo, and parted company with her the fifth day after her capture as aforesaid—that on or about the fifteenth day of September last past, the said

ship *Amelia* while in possession of the French, was captured without any resistance on her part by the said ship of war the *Constitution,* and brought into the port of New York—That the *Amelia* had eight carriage guns, it being usual for all vessels engaged in the trade she was carrying on to be armed even in times of a general peace, and this Claimant further sayeth, that there being peace between France and Hamburg at the time of the capture first above mentioned, and also between the United States and Hamburg, and the United States and France, the possession of the *Amelia* by the French in the manner and for the time stated in the said Libel could neither by the laws of nations nor by the laws of France nor by those of the United States change the property of the said ship the *Amelia* and her cargo, or make the same liable to condemnation in a French court of Admiralty; that the same could not be considered as French property, therefore the said Hans Frederick Seaman, as mate, and the only officer of the said ship *Amelia* now in this port, hereby humbly claims the said ship *Amelia* and her cargo, and prays that the same may be delivered up and restored to him in the like plight and condition as at the time of the capture by the said ship the *Constitution,* for the benefit of the owners thereof, and that he may be hence dismissed with his costs and charges in this behalf sustained.

HANS FREDERICK SEAMAN.

3d November, 1799.

Libel for the restitution of a ship captured without authority.

TO THE HONOURABLE RICHARD PETERS, ESQ. &c.

The libel of Robert Findley, &c.

That your Libellants are the true owners of the SHIP WILLIAM, James Leggat master, now lying in the port of Philadelphia and within the jurisdiction of this Honourable Court.

That on the third day of May last, the said ship being on her voyage from Bremen to Potowmac river, in the state of Maryland, and within nine miles of the sea coast of the United States, received an American pilot on board for the purpose of conducting her safely up the Chesapeake bay to the place of her destination.

That after receiving the said pilot on board, she continued on the same course until she had arrived within about two miles of Cape Henry, the southern promontory of Chesapeake bay, in five fathom water, and as near the shore as the pilot thought it proper to go; when she was forcibly seized and taken into possession by a number of armed men under the command of Peter Joanene, captain of an armed schooner then coming out of Chesapeake bay, called the *Citizen Genet,* and bearing the national colours of the republick of France, as a prize to the said schooner, and hath since been detained and now is in the possession of the said Peter Joanene, who also then and there made prisoners of the captain, officers and crew of the said *ship William,* and them as prisoner doth detain.

Your Libellants not admitting that the said schooner the *Citizen Genet*, was duly commissioned and authorized to make prizes of vessels belonging to British subjects, which they pray may be inquired of, humbly insist that according to the premises, the said ship *William* was, at the time of her being so taken, upon neutral ground within the territorial jurisdiction and under the protection of the United States, who are now at peace with the King and people of Great Britain, and that the said Peter Joanene and the persons under his command had no permission or authority from or under the United States to capture British vessels within that distance from the sea coast, to which by the laws of nations and the laws of the United States, the right and jurisdiction of the United States extended.

Inasmuch, then, as the said capture and detention of the said ship *William* and the captain, officers and crew thereof are manifestly unjust and contrary to the laws of nations and the laws of the United States, your Libellants humbly pray that the said ship *William*, her cargo, tackle, apparel and furniture and all other things belonging to her may by the sentence and decree of this Honourable Court be restored to your Libellants. That the said captain, officers and crew thereof may be relieved from imprisonment for the purpose of navigating her to her destined port, and that full satisfaction may be made by the said Peter Joanene and all others concerned, as well for the said unlawful capture and detention of the said ship, as for the imprisonment of the said captain, officers and crew thereof, and all

damages, charges and expenses incurred thereby.

For which end your Libellants humbly pray process of attachment, arrest and monition as in like cases is customary.

Rawle,
Proctor pro Libellant.

June 3*d*, 1793.

Plea to Jurisdiction.

To the Honourable, &c.

The plea of Pierre Arcade Joanene, a citizen of the French Republick, in behalf of himself and all concerned in the capture of the British ship *William* and her cargo, to the Libel and petition exhibited to this Honourable Court, by &c.

The said Pierre Arcade Joanene by protestation not confessing or acknowledging any of the matters and things in the Libellant's said petition and libel contained to be true in such manner and form as the same are therein and thereby alleged, for plea to the said Libel and petition says; that he was, at the time of his attacking in an hostile manner and making prize of the said ship *William*, her cargo and people, and now is, duly commissioned by the French Republick as captain on board the armed schooner *Citizen Genet*, fitted out by and belonging to citizens of the said Republick, to attack all the enemies of the said Republick wherever he might find them, and take them prisoners with their ships, arms