proteſt for *reprobator*, before the witneſs is examined; *i. e.* that he may be afterwards allowed to bring evidence of his enmity, or other inhability. Reprobator is competent even after ſentence, where *proteſtation* is duly entered; but in that caſe, the party inſiſting muſt conſign *L.* 100 *Scots*, which he forfeits if he ſuccumb. This action muſt have the concurrence of the King's Advocate, becauſe the concluſion of it imports perjury; and for this reaſon, the witneſs muſt be made a party to it.

15. The interlocutory ſentence or warrant, by which parties are authoriſed to bring their proof is either by way of act, or of incident diligence. In an act, the Lord Ordinary who pronounces it, is no longer judge in the proceſs; but in an incident diligence, which is commonly granted upon ſpecial points, that do not exhauſt the cauſe, the Lord ordinary continues judge. If a witneſs does not appear at the day fixed by the warrant of citation, a ſecond warrant is granted of the nature of a caption, containing a command to meſſengers to apprehend and bring him before the court. Where the party to whom a proof is granted, brings none within the term allowed by the warrant, an interlocutor is pronounced, circumducing the term, and excluding him from bringing evidence thereafter. Where evidence is brought, if it be upon an act, the Lord Ordinary on the acts, after the term for proving is elapſed, declares the proof concluded, and thereupon a ſtate of the caſe is prepared by the Ordinary on concluded cauſes, which muſt be judged by the whole Lords; but if the proof be taken upon an incident diligence, the import of it may be determined by the Lord Ordinary in the cauſe.

16. Where facts do not admit a direct proof, preſumptions are received as evidence which, in many caſes, make as convincing a proof as the direct. Preſumptions are conſequences deduced from facts known or proved, which infer the certainty, or at leaſt a ſtrong probability, of another fact to be proved. This kind of probation is therefore called artificial, becauſe it requires a reaſoning to infer the truth of the point in queſtion, from the facts that already appear in proof. Preſumptions are either, 1. *juris et de jure*; 2. *juris*; or 3. *hominis* or *judicis*. The firſt ſort obtains, where ſtatute or cuſtom eſtabliſhes the truth of any point upon a preſumption; and it is ſo ſtrong, that it rejects all proof that may be brought to elide it in ſpecial caſes. Thus, the teſtimony of a witneſs, who forwardly offers himſelf without being cited, is, from a preſumption of his partiality, rejected, let his character be ever ſo fair; and thus alſo, a minor, becauſe he is by law preſumed incapable of conducting his own affairs, is, upon that preſumption, diſabled from acting without the conſent of his curators, though he ſhould be known to behave with the greateſt prudence. Many ſuch preſumptions are fixed by ſtatute.

17. *Præſumptiones juris* are thoſe, which our law books or deciſions have eſtabliſhed, without founding any particular conſequence upon them, or ſtaturing *ſuper præſumpto*. Moſt of this kind are not proper preſumptions inferred from poſitive facts, but are founded merely on the want of a contrary proof: thus, the legal preſumptions for freedom, for life, for innocence, &c. are in effect ſo many negative propoſitions, that ſervitude, death, and guilt, are not to be preſumed, without evidence brought by him who makes the allegation. All of them, whether they be of this ſort, or proper preſumptions, as they are only conjectures formed from what commonly happens, may be elided, not only by direct evidence, but by other conjectures, affording a ſtronger degree of probability to the contrary. *Præſumptiones hominis* or *judicis*, are thoſe which ariſe daily from the circumſtances of particular caſes; the ſtrength of which is to be weighed by the judge.

18. A *fictio juris* differs from a preſumption. Things are preſumed, which are likely to be true; but a fiction or law aſſumes for truth what is either certainly falſe, or, at leaſt, is as probably falſe as true. Thus, an heir is feigned or conſidered in law as the ſame perſon with his anceſtor. Fictions of law muſt, in their effects, be always limited to the ſpecial purpoſes of equity, for which they were introduced; ſee an example, Tit. xxx. 3.

Tit. 32. *Of Sentences and their Execution.*

PROPERTY would be moſt uncertain, if debateable points might, after receiving a definitive judgment, be brought again in queſtion, at the pleaſure of either of the parties: Every ſtate has therefore affixed the character of final to certain ſentences or decrees, which in the Roman law are called *res judicatæ*, and which exclude all review or rehearing.

2. Decrees of the court of Seſſion, are either *in foro contradictorio*, where both parties have litigated the cauſe, or in abſence of the defender. Decrees of the Seſſion *in foro* cannot, in the general caſe, be again brought under the review of the court, either on points which the parties neglected to plead before ſentence (which we call competent and omitted), or upon points pleaded and found inſufficient (proponed and repelled.) But decrees, though *in foro*, are reverſible by the court, where either they labour under eſſential nullities; *e. g.* where they are *ultra petita*, or not conformable to their grounds and warrants, or founded on an error in calcul, &c.; or where the party againſt whom the decree is obtained has thereafter recovered evidence ſufficient to overturn it, of which he knew not before.

3. As parties might formerly reclaim againſt the ſentences of the ſeſſion, at any time before extracting the decree, no judgment was final till extract; but now, a ſentence of the inner-houſe, either not reclaimed againſt within ſix ſederunt days after its date, or adhered to upon a reclaiming bill, though it cannot receive execution till extract, makes the judgment final as to the court of Seſſion. And, by an order of the houſe of Lords, March 24. 1725, no appeal is to be received by them from ſentences of the Seſſion after five years from extracting the ſentence; unleſs the perſon entitled to ſuch appeal be minor, clothed with a huſband, *non compos mentis*, impriſoned, or out of the kingdom. Sentences pronounced by the Lord Ordinary have the ſame effect, if not reclaimed againſt, as if they were pronounced in preſence; and all petitions againſt the interlocutor of an Ordinary muſt be preferred within eight ſederunt days after ſigning ſuch interlocutor.

4. De-

4. Decrees, in abſence of the defender, have not the force of *res judicata* as to him; for where the defender does not appear, he cannot be ſaid to have ſubjected himſelf by the judicial contract which is implied in litiſcontestation: A party therefore may be reſtored againſt theſe, upon paying to the other his coſts in recovering them. The ſentences of inferior courts may be reviewed by the court of Seſſion, before decree, by advocation, and after decree, by ſuſpenſion or reduction; which two laſt are alſo the methods of calling in queſtion ſuch decrees of the Seſſion itſelf as can again be brought under the review of the court.

5. Reduction is the proper remedy, either where the decree has already received full execution by payment, or where it decrees nothing to be paid or performed, but ſimply declares a right in favour of the purſuer. Suſpenſion is that form of law by which the effect of a ſentence condemnatory, that has not yet received execution, is ſtayed or poſtponed, till the cauſe be again conſidered. The firſt ſtep towards ſuſpenſion is a bill preferred to the Lord Ordinary on the bills. This bill, when the deſire of it is granted, is a warrant for iſſuing letters of ſuſpenſion which paſs the ſignet; but, if the preſenter of the bill ſhall not, within fourteen days after paſſing it, expedite the letters, execution may proceed on the ſentence. Suſpenſions of decrees *in foro* cannot paſs, but by the whole Lords in time of ſeſſion, and by three in vacation time: but other decrees may be ſuſpended by any one of the judges.

6. As ſuſpenſion has the effect of ſtaying the execution of the creditor's legal diligence, it cannot, in the general caſe, paſs without caution given by the ſuſpender to pay the debt, in the event it ſhall be found due. Where the ſuſpender cannot, from his low or ſuſpected circumſtances, procure unqueſtionable ſecurity, the Lords admit juratory caution, *i. e.* ſuch as the ſuſpender ſwears is the beſt he can offer; but the reaſons of ſuſpenſion are, in that caſe, to be conſidered with particular accuracy at paſſing the bill. Decrees in favour of the clergy, of univerſities, hoſpitals, or pariſh ſchool maſters, for their ſtipends, rents, or ſalaries, cannot be ſuſpended, but upon production of diſcharges, or on conſignation of the ſums charged for. A charger, who thinks himſelf ſecure without a cautioner, and wants diſpatch, may, where a ſuſpenſion of his diligence is ſought, apply to the court to get the reaſons of ſuſpenſion ſummarily diſcuſſed on the bill

7. Though he, in whoſe favour the decree ſuſpended is pronounced, be always called the charger, yet a decree may be ſuſpended before a charge be given on it. Nay, ſuſpenſion is competent even where there is no decree, for putting a ſtop to any illegal act whatſoever: Thus, a building, or the exerciſe of a power which one aſſumes unwarrantably, is a proper ſubject of ſuſpenſion. Letters of ſuſpenſion are conſidered merely as a prohibitory diligence; ſo that the ſuſpender, if he would turn provoker, muſt bring an action of reduction. If upon diſcuſſing the letters of ſuſpenſion, the reaſons ſhall be ſuſtained, a decree is pronounced, ſuſpending the letters of diligence on which the charge was given *ſimpliciter*; which is called a decree of ſuſpenſion, and takes off the effect of the decree ſuſpended. If the reaſons of ſuſpenſion be repelled, the court find the letters of diligence orderly proceeded, *i. e.* regularly carried on; and they ordain them to be put to farther execution.

8 Decrees are carried into execution, by diligence, either againſt the perſon, or againſt the eſtate of the debtor. The firſt ſtep of perſonal execution is by letters of horning, which paſs, by warrant of the court of Seſſion, on the decrees of magiſtrates of boroughs, ſheriffs, admirals and commiſſaries. If the debtor does not obey the will of the letters of horning within the days of the charge, the charger, after denouncing him rebel, and recalling the horning, may apply for letters of caption, which contain a command, not only to meſſengers, but to magiſtrates, to apprehend and impriſon the debtor. All meſſengers and magiſtrates, who refuſe their aſſiſtance in executing the caption, are liable *ſubſidiarie* for the debt; and ſuch ſubſidiary action is ſupported by the execution of the meſſenger employed by the creditor, expreſſing that they were charged to concur, and would not. Letters of caption contain an expreſs warrant to the meſſenger, in caſe he cannot get acceſs, to break open all doors, and other lock faſt places.

9 Law ſecures peers, married women, and pupils, againſt perſonal execution by caption upon civil debts. No caption can be executed againſt a debtor within the precincts of the King's palace of Holyroodhouſe: But this privilege of ſanctuary afforded no ſecurity to criminals, as that did which was, by the canon law, conferred on churches and religious houſes. Where the perſonal preſence of a debtor, under caption, is neceſſary in any of our ſupreme courts, the judges are empowered to grant him a protection, for ſuch time as may be ſufficient for his coming and going, not exceeding a month

10 After a debtor is impriſoned, he ought not to be indulged the benefit of the air, not even under a guard; for creditors have an intereſt, that their debtors be kept under cloſe confinement, that, by the *ſqualor carceris*, they may be brought to pay their debt: And any magiſtrate or jailor, who ſhall ſuffer the priſoner to go abroad, without a proper atteſtation, upon oath, of the dangerous ſtate of his health, is liable *ſubſidiarie* for the debt. Magiſtrates are in like manner liable, if they ſhall ſuffer a priſoner to eſcape, through the inſufficiency of their priſon: But, if he ſhall eſcape under night, by the uſe of inſtruments, or by open force, or by any other accident which cannot be imputed to the magiſtrates or jailor, they are not chargeable with the debt; provided they ſhall have, immediately after his eſcape, made all poſſible ſearch for him. Regularly, no priſoner for debt upon letters of caption, though he ſhould have made payment, could be releaſed without letters of ſuſpenſion, containing a charge to the jailor to ſet him at liberty; becauſe the creditor's diſcharge could not take off the penalty incurred by the debtor for contempt of the King's authority: But to ſave unneceſſary expence to debtors in ſmall debts, jailors are empowered to let go priſoners where the debt does not exceed 200 merks *Scots*, upon production of a diſcharge, in which the creditor conſents to his releaſe.

11. Our

11. Our law, from a conſideration of compaſſion, allows inſolvent debtors to apply for a releaſe from priſon, upon a *ceſſio bonorum*, *i.e.* upon their making over to the creditors all their eſtate, real and perſonal. This muſt be inſiſted for, by way of action, to which all the creditors of the priſoner ought to be made parties. The priſoner muſt, in this action, which is cogniſable only by the court of Seſſion, exhibit a particular inventory of his eſtate, and make oath that he has no other eſtate than is therein contained, and that he has made no conveyance of any part of it, ſince his impriſonment, to the hurt of his creditors. He muſt alſo make oath, whether he has granted any diſpoſition of his effects before his impriſonment, and condeſcend on the perſons to whom, and on the cauſe of granting it; that the court may judge, whether, by any colluſive practice, he has forfeited his claim to liberty.

12. A fraudulent bankrupt is not allowed this privilege; nor a criminal who is liable in an aſſythment or indemnification to the party injured or his executors, though the crime itſelf ſhould be extinguiſhed by a pardon. A diſpoſition granted on a *ceſſio bonorum* is merely in farther ſecurity to the creditors, not in ſatisfaction or *in ſolutum* of the debts. If therefore, the debtor ſhall acquire any eſtate after his releaſe ſuch eſtate may be attached by his creditors, as if there had been no *ceſſio*, except in ſo far as is neceſſary for his ſubſiſtence. Debtors, who are ſet free on a *ceſſio bonorum*, are obliged to wear a habit proper to dyvours or bankrupts. The Lords are prohibited to diſpenſe with this mark of ignominy, unleſs, in the ſummons and proceſs of *ceſſio*, it be libelled, ſuſtained, and proved, that the bankruptcy proceeds from misfortune. And bankrupts are condemned to ſubmit to the habit, even where no ſuſpicion of fraud lies againſt them, if they have been dealers in an illicite trade.

13. Where a priſoner for debt declares upon oath, before the magiſtrate of the juriſdiction, that he has not wherewith to maintain himſelf, the magiſtrate may ſet him at liberty, if the creditor, in conſequence of whoſe diligence he was impriſoned, does not aliment him within ten days after intimation made for that purpoſe. But the magiſtrate may, in ſuch caſe, detain him in priſon, if he chuſes to bear the burden of the aliment, rather than releaſe him. The ſtatute authoriſing this releaſe, which is uſually called the act of grace, is limited to the caſe of priſoners for civil debts.

14. Decrees are executed againſt the moveable eſtate of the debtor by arreſtment or poinding; and againſt his heritable eſtate, by inhibition, or adjudication. If one be condemned, in a removing or other proceſs, to quit the poſſeſſion of lands, and refuſes, notwithſtanding a charge, letters of ejection are granted of courſe, ordaining the ſheriff to eject him; and to enter the obtainer of the decree into poſſeſſion. Where one oppoſes by violence the execution of a decree, or of any lawful diligence, which the civil magiſtrate is not able by himſelf and his officers to make good, the execution is enforced *manu militari*.

15. A decree-arbitral, which is ſentence proceeding on a ſubmiſſion to arbiters, has ſome affinity with a judicial ſentence, though in moſt reſpects the two differ. A ſubmiſſion is a contract entered into, by two or more parties who have diſputable rights or claims, whereby they refer their differences to the final determination of an arbiter or arbiters, and oblige themſelves to acquieſce in what ſhall be decided. Where the day within which the arbiters are to decide, is left blank in the ſubmiſſion, practice has limited the arbiters power of deciding to a year. As this has proceeded from the ordinary words of ſtyle, empowering the arbiters to determine betwixt and the day of next to come; therefore, where a ſubmiſſion is indefinite, without ſpecifying any time, like all other contracts or obligations, it ſubſiſts for forty years. Submiſſions, like mandates, expire by the death of any of the parties-ſubmitters before ſentence. As arbiters are not veſted with juriſdiction, they cannot compel witneſſes to make oath before them, or havers of writings to exhibit them; but this defect is ſupplied by the court of Seſſion, who, at the ſuit of the arbiters, or of either of the parties, will grant warrant for citing witneſſes, or for the exhibition of writings. For the ſame reaſon, the power of arbiters is barely to decide; the execution of the decree belongs to the judge. Where the ſubmitters conſent to the regiſtration of the decree-arbitral, performance may be enforced by ſummary diligence.

16. The power of arbiters is wholly derived from the conſent of parties. Hence, where their powers are limited to a certain day, they cannot pronounce ſentence after that day. Nor can they ſubject parties to a penalty higher than that which they have agreed to in the ſubmiſſion. And where a ſubmiſſion is limited to ſpecial claims, ſentence pronounced on ſubjects not ſpecified in the ſubmiſſion is null, as being *ultra vires compromiſſi*.

17. But, on the other part, as ſubmiſſions are deſigned for a moſt favourable purpoſe, the amicable compoſing of differences, the powers thereby conferred on arbiters receive an ample interpretation. Decrees-arbitral are not reducible upon any ground, except corruption, bribery, or falſehood.

Tit. 26. *Of Crimes.*

The word *crime*, in its moſt general ſenſe, includes every breach, either of the law of God, or of our country; in a more reſtricted meaning, it ſignifies ſuch tranſgreſſions of law as are puniſhable by courts of juſtice. Crimes were, by the Roman law, divided into public and private. Public crimes were thoſe that were expreſsly declared ſuch by ſome law or conſtitution, and which, on account of their more atrocious nature and hurtful conſequences, might be proſecuted by any member of the community. Private crimes could be purſued only by the party injured, and were generally puniſhed by a pecuniary fine to be applied to his uſe. By the law of Scotland no private party, except the perſon injured, or his next of kin, can accuſe criminally: but the King's Advocate, who in this queſtion repreſents the community, has a right to proſecute all crimes *in vindictam publicam*, though the party injured ſhould refuſe to concur. Smaller offences, as petty riots, injuries, &c. which do not demand