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I N S T I T U T E
O F T H E
L A W O F S C O T L A N D.
B O O K I V.

T I T. I.

Of Actions.

IT would import us little, that rights belonged to us, or that persons stood obliged to us, if there were no method by which we might make those rights effectual, and attain the enjoyment of our property, or compel those who stand bound to us to perform their obligations. If we were left at liberty to do ourselves justice, by our own authority, on occasion of every difference with our neighbour, there would soon be an end of government. The judge or magistrate therefore must be applied to, by a proper action. As the special purposes and properties of most of the actions now in use with us, have been already considered at some length, in the course of this treatise, we shall content ourselves with explaining in this place the general nature of actions, and the most material divisions of them received in our law, excepting a few, which, because they have not been handled before, deserve a fuller consideration.

2. The Romans defined an action to be, A right of prosecuting in judgement what is due to us: but that term, in its more common acceptation, is understood of the actual exercise of the right; and in this sense it may be defined, A demand regularly made and insisted upon, before the proper judge, for the attaining or recovering of a right. He who makes the demand is called the *purfuer*, and he who is subject to it, against whom the action is brought, the *defender*.

3. By our ancient law, the greatest part of actions proceeded on briefs issuing from the chancery, which were directed either to the justiciar of Scotland, or judge-ordinary, who tried the matter by an inquest or jury; and upon their verdict, *verdictum*, judgement was pronounced. Briefs were either retourable or not retourable. Retourable briefs were not exe-

cuted against any special defender, but barely published at the market-cross of the county-town; because the parties who applied for them wanted no more, than to declare a right belonging to themselves, without any conclusion in the libel against others. Such were the brieves of inquest, or service of heirs, of tutory, idiocy, &c.; and they were styled *retourable*, because the verdict of the jury was returned to the chancery by the judge to whom the brief was directed. Brieves not *retourable* were the ground of proper actions, to be insisted on before the judge competent; on which account they got also the name of *pleadable*, as the brief of right, of mortancestry, of terce, of division of lands, &c. This sort of brieves must have been served against special defenders; but the judge, after pronouncing sentence according to the verdict of the jury, made no return either of the brief itself, or of the verdict to the chancery. Lord Stair conjectures, *b. 4. t. 1. § 2.* that James I. of Scotland, who had been long bred in England, where brieves are to this day the foundation of all actions pursued in the court of Common Pleas, did, on his return from thence, erect in this kingdom a chancery, and establish the use of brieves after the example of the English: but mention is made of brieves, not only in numberless passages of the books of the Majesty, which are by some excepted to, as of suspected authority, but in the undoubtedly genuine statutes of William I. who reigned upwards of two centuries before the return of James I. and in the first statutes of Robert I. *c. 19.* from whom James was descended in the fourth degree. We have to this day retained the use of sundry brieves which have been already explained; but upon the institution of the college of justice, summonses were introduced into our law in the place of brieves, as the foundation of most of our ordinary actions: and the clerks of the signet are intrusted with the forms, both of them and of diligences; see 1537, *c. 59. 60. 61. &c.*

4. A summons is a writ which goes forth under the authority or direction of the judge before whom the action is to be brought, reciting in the libel or declaration the pursuer's title, with the ground and extent of his right or demand, and concluding with a warrant to the proper officer of court for citing the defender to appear. When it is applied to actions brought before the court of session, it issues from the King's signet of the session, and the warrant for citation is directed to messengers. It ought to be observed, that where mention is made of the word *summons*, or *summonition*, in the old books of our law, or in our statutes prior to the institution of the college of justice, as in 1429, *c. 113.* that term is to be understood, not of the warrant of citation, but of the citation given upon the warrant.

5. By our former practice, when a summons passed the signet, it contained little more than the pursuer's name, the date of signeting, and some words of style; and even when it was executed or served against the defenders, nothing more needed be filled up in it, except their names, and the diets or terms of appearance. It was judged sufficient, if the libel was ingrossed in it, at any time before calling of the summons in court. But as defenders could not possibly come prepared to answer, till they were apprised of the nature and ground of the demand to be made against them, all summonses were, for the greater dispatch of business, directed to be fully libelled, before the citation given to the defenders. This was provided, first, by some temporary acts of sederunt, *Feb. 16. 1723, &c.*; and at last, by a perpetual one, *Feb. 19. 1741.* By the present practice, all summonses must be fully libelled, and every page signed by a clerk to the signet, before they pass the signet.

6. All actions, where the facts laid in the libel were to be proved by witnesses,

nesses, required formerly two several citations to be given to the defender, upon two separate summonses. After the defender was cited on the first, to appear upon a day therein specified, with continuation of days, the pursuer obtained an act for proving, and at the same time letters of continuation, upon which it might be lawful for him to raise another or second summons, after elapsing of the day to which citation was given upon the first. These second summonses were abolished by 1672, c. 6.; and the second citation was authorised to be given upon the same summons that authorised the first, in virtue of a separate warrant contained in it for that purpose; but still it behoved the pursuer to wait the running out of the first diet, before the second citation could be given, till it was made lawful by 1693, c. 12. to give both citations at the same time. One diet of appearance is sufficient in summonses, where the facts set forth by the pursuer are instantly verified *scripto*. The term indulged by law to a defender between his citation and appearance, in which he may prepare for his defence, is called *induciæ legales*. In all summonses not privileged, the *induciæ* allowed to the defender for the first diet of compareance, are twenty-one days if he be within the kingdom; but those who reside in the stewartry of Orkney and Zetland, which is of all others the most remote district from the seat of justice, must be cited on forty days for the first diet, 1685, c. 43. Certain summonses are privileged to pass on shorter *induciæ*; some on fifteen days, and some on six days. They require a previous bill, or short petition, to be preferred to the court, who of course grant warrant for issuing them; and because such warrants were often demanded in the raising of summonses, which had no title to privilege, the special summonses intitled thereto, and the *induciæ* of each, are fixed by act of sederunt, June 29. 1672. In all summonses which require a second diet of appearance, the *induciæ* are six days, if the defenders are within Scotland. Defenders who are forth of the kingdom, must be cited on sixty days for the first diet, and fifteen for the second.

7. All summonses, besides the libel, contain, *first*, an ordinance of the sovereign, or of the judge, in whose name the summons issue, called the *will of the summons*; by which the defender is commanded to appear before the judge, that he may either receive sentence according to the conclusion of the libel, or offer defences against it. *2dly*, They contain a sanction, either express or implied, styled, *the certification of the summons*, which is the penalty to be inflicted on the defender, if he shall neither comply with the will of the summons, nor shew a reason why he is not bound by law to comply with it: and it is so called, because it certifies or gives notice to the defender what the judge is to do, if he shall wilfully, and without legal grounds, refuse obedience to the will or command of the summons. The defender's contumacy, when reiterated, was, by an old temporary act, 1449, c. 29. punished with the forfeiture of his lands and goods to the King; and if he had no estate, with an outlawry. But now the certification is milder; and in the general case amounts to no more, than that if the party cited shall not appear, the judge shall proceed to take cognizance of the cause, as if he had appeared. A special certification is established by custom against pursuers, who, after commencing a suit, neglect to prosecute it: the defender may, in that case, take protestation against the pursuer for not insisting; which, after it is admitted by the judge, has this effect, that the depending process falls, *instantia perit*; but still the pursuer does not lose his right of action, but may bring a new action upon the same ground of right.

8. All executions of summonses must express the day of appearance, which however is commonly left blank, till the summons be called in court.

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The last diet of appearance must be within a year after the date of the summons, where the summons bears, as is frequently the case, the days of appearance to be, "the and days of next to come:" but if the words, *next to come*, are omitted, the first diet of appearance may be made within a year of the date of the summons, and the second diet within a year of the first diet. The summons must be called by the clerk of the process within a year after the last diet, otherwise the depending process falls. This calling of the cause in the outer-house by the clerk of the process, after elapsing of the days of appearance, was the first step taken in it by the pursuer. The most ancient practice required this form to be gone about in the presence of a judge: and though no judge has for a long time past interposed his authority to it in person, yet he is in the judgement of law considered as present; so that it is still to be deemed a judicial step. For this reason, a summons becomes, after being called, a depending process, and as such, though it should lie quite neglected for years together, may be afterwards wakened and insisted in at any time within the years of prescription, *New Coll.* ii. 128.; *Act of sederunt*, Feb. 26. 1718. Though the defender be under age, he must be cited on the summons as a party to the suit: but because a minor cannot stand in judgement by himself, his tutors or curators must also be made parties; not indeed by their special names and designations personally, because it is possible the pursuer has no means of knowing who they are, or where they can be found; but edictally at the market-cross of the the county-town of the minor's residence. These edictal citations are frequently used, even where the minor has no tutors or curators, to cut off all ground of cavilling from such defenders as lay hold of the smallest appearance of a plea to cast actions on a no-process. The forms required by law in the execution of summonses against defenders, have been set forth, *b. 2. t. 5. § 55.*

9. Sundry actions proceed upon a citation by warrant of the court of session, without any summons issuing from the signet, and are therefore denominated *summary actions*. Thus, bills of complaint exhibited against members of the college of justice, or other practisers in the court, relating to the exercise of their employment; or against factors on sequestered estates, or other persons named into any office by the court; or against inferior judges for their contempt of authority, in exercising jurisdiction in an action after an intimated suspension or advocacy; or against officers of the law for oppression; or against litigants in any action brought before the court, who have been guilty of any wrong, pending the suit, may be all tried by a summary action. When reasons of suspension are ordained to be discussed summarily upon the bill, without issuing letters of suspension under the signet, *vid. infr. t. 3. § 19.* that sort of process may without impropriety pass also by the name of a summary action.

10. Actions are divided both by the Roman law and ours into real and personal. A real action, or *actio in rem*, is that which arises from a right in the thing itself, or a *jus in re*; and is grounded, either upon the right of property, which is the highest right that one can have in a subject; or on a right of servitude, hypothec, pledge, &c. which are inferior real rights. A personal action is that which is founded merely in a right of obligation against a person, or a *jus ad rem*. From this difference in the ground of the actions, arises also a difference in their forms and properties. In personal actions, the pursuer can direct his suit against no other than the person who stands obliged to him, or his heirs: but actions that arise from a right in a subject, may be directed against all possessors of that subject, though they should not represent the granter. Though the epithet of *real* actions is, in vulgar speech, applied only to such as relate to heritable rights; yet every

every action founded on a right in any subject, though it should be moveable, is, in a legal sense, real, and therefore may proceed against every person who holds the possession or custody thereof. An heritable bond completed by seisin, being in different respects both a real and a personal right, may be the foundation of both a real action and a personal. The first, a real action upon that security, may be directed against all possessors for the arrears of interest due upon the bond; see § 11.: the other, a personal action, is competent against the granter of the bond, or his representatives, for the principal sum, in virtue of the obligation of payment which is therein contained.

11. Poinding of the ground, though it be properly a diligence or execution, is generally considered by lawyers as a species of real action; and it is styled *poinding of the ground*, to distinguish it from *personal poinding*, which proceeds on obligations merely personal, and can therefore be directed only against the goods belonging to the debtor in the obligation. Every person who has a debt secured upon land, or, as it is commonly expressed, a *debitum fundi*, whether the security be constituted by law or by pactio, is intitled to an action for poinding all the goods on the lands burdened, in order to his payment, even though the original debtor should have been divested of the property in favour of a singular successor after granting the creditors security. This action is therefore competent to an annualrenter for the arrears of interest due upon his infeftment, to a superior for his feu-duties, or for the retoured duties due to him before citation of his vassal's heir in an action of declarator, according to the distinction already stated, *b. 2. t. 5. § 42.*; and, in general, to all creditors in debts which constitute a real burden or *lien* upon lands. But it is not competent to proprietors, nor even to possessors, though not strictly proprietors, as adjudgers, liferenters, or other real creditors, who possess under their different titles; for there is a natural impropriety in poinding the ground of lands possessed by the poidner himself. The only proper process competent to such, for the recovery of their rents, is that of mails and duties, *Feb. 26. 1631, L. Garthland*. As no man can poind the ground of lands of which he is already in possession, neither does a poinding of the ground afford any title of possession to him to whom such poinding is competent: for the poidner has no right to enter into the possession of the lands in consequence of his diligence; he can only levy such part of the rents, in the character of a real creditor, as amounts to his claim; and, in the particular case of poinding on an infeftment of annualrent, the diligence can only proceed for the past and current interest of the principal sum; which, as hath been already taught, *b. 2. t. 8. § 32.* is the only part of the debt that is secured upon land by the infeftment. A creditor therefore in a *debitum fundi* is not intitled to the benefit of a possessory judgement, *Jan. 9. 1668, La. Clerkington; Pr. Falc. 44.*

12. In an action of poinding the ground, not only the tenants and possessors, but the proprietor of the lands, must be made a party to the suit; for he has an obvious interest to shew cause why the diligence ought not to proceed. Hence, where lands are wadset, it is the wadsetter, who is the proprietor, that must be cited, and not the reverser: but the superior need not be called. There is no personal conclusion in the summons against the defender; for the sole intent of the action is, that the goods on the ground may be subject to the pursuer's diligence. And therefore, when a decree is once recovered upon an action of poinding the ground, and letters of poinding issued in consequence thereof, the letters are put to execution, without any previous charge on the decree against the tenants to make payment; for as there is nothing decreed against the te-

nants, there can be no warrant for such charge. Upon the same principle, a poiding of the ground may proceed against the proprietor's apparent heir, without charging him to enter, *Jan. 2. 1667, Oliphant*; because it is not the purpose of that action to make the defender personally liable: it is the lands that are principally considered, and not the heir, from whom nothing is demanded.

13. From this it appears, that the defenders in the said action are made parties to the suit, not as debtors to the pursuer, otherwise there would be a personal conclusion against them, but as having interest in the lands affected by the diligence; and hence it follows, that letters of poiding, when they are once granted, are effectual for recovering payment, not only of the interest fallen due on the right at the first issuing of the letters, but of that which may afterwards become due at any time before executing them, as long as the pursuer is alive, though both the proprietor and the natural possessors, who were cited in the action as defenders, should be dead, or removed from the lands, *June 30. 1624, Keir*; *June 26. 1662, Adamson*. It is otherwise in personal poidings; where the goods are poided, not because they are on the ground of any lands, but because they belong to the pursuer's debtor; and consequently the decree can have no effect but against that debtor. Nothing can be poided upon a decree for poiding the ground, which doth not belong either to the owner of the ground or his tenant; and therefore goods brought on the land by strangers are not subjected to that diligence, *Feb. 6. 1679, Collet*. It has been already explained, *b. 2. t. 8. § 33.* how far it is restricted in the case of goods belonging to tenants. In a competition among real rights for poiding the ground, the rights belonging to the superior, whether of feu-duties or of casualties, are in their nature preferable to any right granted by the vassal; because rights granted by vassals, though they may affect the property of the granter, cannot hurt the superior's right, unless he shall consent to, or confirm them.

14. We have another division of actions, borrowed from the Roman law, into *rei persecutorie* and *penales*. By the first, we pursue barely for the recovery of a subject that is ours, or of a debt which is unjustly withheld from us by the defender. And in this species of action damages are included; for the pursuer is as truly a sufferer in his patrimonial interest by that damage, as by the loss of the subject itself, or its value, *Falc. ii. 183*. In penal actions, the pursuer insists, not only for restitution and real damages, but for extraordinary damages, or reparation, by way of penalty. Some actions are *rei persecutorie* on the part of the pursuer, where he insists for the simple restitution of that which *patrimonio ejus abest*, which yet may be penal with respect to the defender. An instance of this we have in the action of vicious intromission; by which the pursuer frequently recovers the whole debt due to him by the deceased, though it should exceed the value of the goods intermeddled with by the defender. The chief difference between the two branches of this division is, that actions, in which the pursuer insists barely for an indemnification of real loss, are transmitted against heirs; whereas actions in which some demand is made by way of penalty, die with the delinquent or transgressor. The reason of the difference is, that though an heir is considered as *eadem persona cum defuncto*, yet that fictitious identity does not reach to delicts or crimes, and therefore not to penalties, the inflicting of which necessarily supposes a delict or transgression. It is a never-failing axiom, *Culpa tenet suos auctores*; every one is accountable only for his own delicts, and not also for those of his ancestors. An exception however from the rule concerning the transmission of penal actions will be explained before finishing this title.

15. Actions

15. Actions of spuilzie, ejection, and intrusion, are penal where they include the violent profits, which have been treated of, *b. 3. t. 7. § 16*. Spuilzie may, by the definition there given of it, be committed, not only by strangers, but even by the owner of the moveable goods carried off; because a right of property itself cannot justify the proprietor in assuming a power of judging in his own cause, or of turning one out of possession who had acquired it lawfully. The pursuer therefore in an action of spuilzie need prove no more, than that he was in the lawful possession of the subject libelled, which gives him a right to be *ante omnia* restored to the possession; for the action is grounded on this plain principle, That no man is to be stripped of his possession but by the order of law. This action, when it is pursued recently, and includes the violent profits, being penal, is elided by the defender's having a probable ground of excuse; *quilibet titulus excusat a spolio*, *Jan. 27. 1665, L. Bearford; Harc. 860.*; or by his voluntary restitution *de recenti* of the goods illegally carried off, *cum omni causa*. But these defences afford no protection to the defender, except as to the penal consequences of the action; they are utterly ineffectual in so far as concerns simple restitution and damages. The administering of oaths *in litem*, is, in the general case, peculiar to the court of session, as being an *act nobilis officii*; yet as, by special statute, 1503, *c. 65.* recent spuilzies are left open to the cognizance of sheriffs, sheriffs may not only put an oath *in litem* to the pursuer, but modify the extent or quantity of the goods sworn to by him. Spuilzie is not only competent against the *spoliator*, or principal defender, but against all abettors, each of whom is liable *in solidum*, without recourse against the rest, which is indeed the rule in all actions arising *ex delicto*.—Ejection and intrusion are in heritable subjects what spuilzie is in moveable. The difference between the two first has been already explained; and the actions arising from all the three are of the same general nature.

16. The action of contravention of lawborrows is likewise penal. It proceeds on letters of lawborrows, obtained at the suit of him who is disturbed in his person or goods by another, and containing a warrant to charge the party complained of to give security, that the complainer shall be kept harmless from illegal violence. The word is derived from *borrow*, or *borgh*, an old word for cautioner. These letters do not require the citation of the party complained of; because the security which the law requires is only for his good behaviour, which is a duty incumbent on every one as a member of society: but because few persons of estate or credit are found willing to bind as securities for people of low fortunes or turbulent spirits, the complainer, before obtaining letters of lawborrows, must either swear, that he dreads harm from the party complained of, or bring evidence of his malicious inclinations towards him. At first, no letters of lawborrows were granted, except where one suspected his own life to be in danger, 1429, *c. 129.*; but they were afterwards extended in favour of the complainer's family, and even tenants, that none of these should be troubled in their persons or goods, either by the party complained of, or by any of his hounding out, 1581, *c. 117.* When he that is complained on continues, notwithstanding the charge given him, to molest or trouble the complainer, he is guilty of contravention of lawborrows. The penalty of this offence was at first inflicted at the discretion of the council, and the fine equally divided between the crown and the party injured, 1491, *c. 27.*; 1581, *c. 117.* It was afterwards fixed to precise sums, according to the quality of the offender, 1593, *c. 166.*; which however is, from special circumstances, sometimes raised higher by the judge, and sometimes restricted. This sum may be demanded from the contravener, though he should not have given security

security in obedience to the letters, 1597, c. 269.; in which case, the title to sue him, is the charge given him by the pursuer upon the letters. Where security is given, the pursuer's title is the bond of caution, upon which both the contravener and his cautioner may be sued. This action, being penal, is not incurred merely by the uttering of reproachful words, where they are not accompanied with violence, or at least with a real injury: and if the acts of contravention be slight, the penalty is sometimes reduced to a lesser sum; and at other times no more is decreed against the contravener than the real damage sustained by the pursuer, *Spottis. Pr. p. 74. Feb. 3. 1629, Anderson.*

17. The Romans also divided actions into private and popular. Private actions could not be insisted in by such as had themselves no interest in the issue of the cause; but an *actio popularis* might have been carried on by any person. Certain actions *ex delicto*, which are authorised by our law, tho' they cannot be prosecuted by every one, yet carry a reward to the discoverer of the offence or crime, of a determinate proportion of the penalty; as in usury, 1594, c. 222. and in offences against the game, 1707, c. 13. There are sundry offences against the revenue which, by special British statutes, may be brought to a trial by any prosecutor, who, as an encouragement to the detecting of frauds, is intitled to part of the statutory penalty. But we have admitted no actions in our law, upon questions of civil right, which can be pursued by any other than the person interested; except in the case of minors, in favour of whom law has allowed certain actions profitable to them, to be carried on by any of their relations. Thus any kinsman may pursue upon the action of suspect tutory, *St. b. 1. t. 6. § 26.* or insist in a reduction of such deeds as are granted by the minor to his hurt, and ratified by his oath, 1681, c. 19. See also on this head, *Act of Sederunt, Feb. 13. 1730.*

18. The most comprehensive division of actions, is of principal actions, which subsist by themselves, and accessory, which are not so properly actions, as judicial steps of proceeding, subservient to other actions, either previous to or concomitant with them. Principal actions are either rescissory, declaratory, petitory, or possessory. Rescissory actions are those which our law has established for the voiding of deeds, services, decrees, or other writings, or of illegal acts done by any body-corporate or society of men; *ex. gr.* the election of magistrates, or other public officers. They are sometimes called *extraordinary*, because they are extraordinary remedies provided by the law for the security of the subject, and are seldom used till ordinary remedies fail. Rescissory actions are either, *first*, actions of proper improbation, in which the pursuer concludes, that a deed ought to be declared improbate, *i. e.* set aside upon real grounds of forgery and falsehood; but this falls to be explained under *tut. Crimes*; or, *2dly*, actions of reduction-improbation, which are brought for declaring writings to be false and forged, *fictione juris*, only; or, *3dly*, actions of simple reduction, in which the only conclusion is, that the deeds or writings called for by the pursuer shall have no effect, till they be exhibited or produced in judgment.

19. The most effectual method of setting aside deeds granted to one's prejudice, is by the action of reduction-improbation. As no reduction of the deeds under challenge can proceed till they be first produced before the court of session, who have the sole cognisance of rescissory actions, the pursuer of this process lays his libel upon alledged grounds of falsehood, the more effectually to force the production of the writings called for; and a certification is annexed to the summons, that if they be not produced before elapsing of the terms assigned for that purpose by the judge, they shall be

be declared false and forged ; for which reason the action gets the name of *improbation*, though there should be no ground to suspect real forgery. Because the writings called for are libelled to be false, his Majesty's Advocate, who is the public prosecutor of crimes, must concur in the action : but as this is a mere point of form, he may, notwithstanding his concurrence, appear as counsel for the defender, if the writings be not challenged upon grounds of proper falsehood. The certification of this summons is not grounded on a presumption of falsehood arising from the not exhibiting the writings in court ; for certifications are most frequently pronounced against deeds which appear from the clearest evidence to have once truly existed. It is merely a fiction of the law ; so that the pursuer does not really mean, that the deeds are forged, though in the form of words he says so ; but he uses the legal remedy of compelling the defender to exhibit them, that they may be either annulled upon sufficient legal grounds, or their true nature and import ascertained. For this reason, though the deeds called for, and not produced, be declared false, it is only to this special effect, that they shall not afterwards bear faith against the pursuer : but in all questions with third parties, they continue genuine in the judgement of law, which gives them the same force and validity as if no certification had been granted against them.

20. A pursuer is intitled to this action, in consequence of either a personal interest or a real. Every one who apprehends himself hurt or affected by a deed, though barely personal, *ex. gr.* a bond or contract granted either by himself, or by any of his ancestors whom he represents, is intitled to an action for setting it aside. To found this personal interest, it is not enough that the pursuer be apparent heir to the grantor ; because no heir can have an interest to pursue such rescissory actions till he be served. But reduction-improbation most commonly proceeds on a real interest in the pursuer. Thus, every proprietor of lands, whether by purchase or descent, has an interest to pursue an action of reduction of all writings affecting these lands, though they have been granted, neither by himself nor by his ancestor. Though a pursuer's interest be equally strong, whether the deeds affecting his lands have flowed originally from his author in the purchase or not ; yet, by our practice hitherto, no writings can be called for in this action which have not been granted by persons with whom the pursuer can connect a title, *St. b. 4. t. 20. § 14. ; Fount. Dec. 16. 1709, Farquharson.* By our older forms, a pursuer whose right in the lands was not completed by seisin, had no title to call for seisions of these lands, in order to their reduction ; he could only force the production of deeds of the same nature with that on which his own action was grounded : but it is now a fixed point, that one whose right to lands is barely personal, not completed by seisin, may nevertheless call for the production of seisions of those lands, provided they have flowed from his author, *Jan. 24. 1739, Keith, observed in Dist. i. p. 445.* Where the writings called for were not granted to the defender himself, but conveyed by the grantee to him under a singular title, the pursuer was, by the former practice, obliged to make that grantee who was the defender's author in the deed, a party to the suit ; but as the task of citing the defender's authors, who were liable to him in warrandice, ought naturally to be laid on himself, defenders must now cite their own authors, *Act of Sederunt, Feb. 16. 1723.*

21. As the certification in this action is the strongest security of our land-rights, which otherwise might long remain fluctuating and uncertain, a decree of certification once pronounced, can hardly be recalled, though it should have been pronounced in absence of the defender, who might have had sufficient defences to plead against it, contrary to the general nature of

all judgements or decrees pronounced in absence, *St. b. 4. t. 20. § 6.*; and therefore the greatest caution is justly used by the court in granting it. Anciently, three terms, one after another, longer or shorter according to circumstances, were assigned to the defender for production: but because this indulgence drew out the action to too great a length, the terms were reduced to two, by 1672, *c. 16. § 25. Concerning the session*; after the expiring of which two terms, the defender is allowed the farther space of ten days to exhibit the writings called for, before certification can be pronounced, by act of federunt, *Jan. 1. 1709.*—Because the title-deeds of churchmen are more liable to accidents than others, our usage suffers no certification to be pronounced against these for not production, *St. b. 2. t. 8. § 29.*

22. In determining how far certification ought to be granted against writings in *publica custodia*, *i. e.* recorded in a public register, the following rules seem to be observed.—Extracts of writings recorded in the books of the supreme court of session, are sufficient to stop certification against the principal or original writings called for: but it may be doubted, whether this rule ought to extend to extracts of charters recorded in chancery; for no charters are inserted in that record after the great seal is appended to them, and therefore the registration in it cannot prove the existence of a charter actually sealed.—An extract from the session-register itself, is no bar to certification, either, *first*, where the pursuer insists upon proper grounds of falsehood, in which case the principal writing which lies in the register must be exhibited in court; nor, *2dly*, if, after search in the register-office, the principal or authentic writing cannot be found. Yet where a deed has been recorded in that period of time in which the writings there recorded have been lost upon occasion of some public commotion, the extract itself will save from certification, without the necessity of producing the original deed, which is in that case presumed to have once truly existed, but to have been destroyed in the public calamity, *Fount. Dec. 28. 1704, Wilson.*—As writings registered in the books of session, are to be considered as in the hands of the clerk of court, being in the custody of the keeper of the records of session, certification cannot be granted against these, even though no extract of them should be produced from the record, provided a condescence or particular of them, specifying the several register-book in which they are inserted, with the dates of their registration, be exhibited by the defender, before extracting the act for the second term, *Forb. MS. Nov. 24. 1713, E. Leven*, compared with *Jan. 11. 1681, Monro.*—In deeds registered in the books of an inferior court, no extract of them can defend against certification: the defender must, in order to satisfy the production, apply for an order of the court of session to transmit the original or principal writing to the clerk of the process, *Dirl. 285.*—In the reduction-improbation of decrees, no certification passes against their warrants, such as summonses, executions, &c. unless they be recently called for; because these, being truly no other than the joinings of a person's title-deeds, consisting merely in form, are not commonly preserved so carefully as proper deeds, *Feb. 20. 1713, Morison.*

23. If the defender in this action produce a title preferable to that of the pursuer, he cannot be compelled to take a term to produce any of the writings called for; for where the pursuer's title is excluded, the action must fall. This plea of the defender to exclude the pursuer's title, ought regularly to be made before his taking a term to produce, because that carries in it an implied acknowledgement of the pursuer's title: yet that defence is sustained, even after his taking a term, provided it be instantly proved and verified. But if it be once pleaded and repelled, the defender will not be allowed

allowed to avail himself of it a second time, upon a new production, in order to exempt himself again from the necessity of taking a term.

24. Simple reductions, where improbation is not also libelled, are now seldom made use of; because the certification in these is only temporary, that the deed called for by the pursuer shall be held as void till it be produced. In consequence of certification obtained by the pursuer, he will enjoy all the fruits or other benefit formerly carried by that deed, till he be put *in mala fide* by the production of it: for after it is produced, at whatever distance of time after pronouncing the decree of certification, that decree loses its whole effect; and the deed may be founded upon even against the pursuer at whose suit the certification was granted. But if the deed called for in an action of simple reduction, be, after its production, declared null by a sentence *in foro contentioso*, that sentence will have full effect. In this process, one term only is assigned to the defender for production, because the certification in the case of not production, is not so heavy as in a reduction-improbation.

25. Hitherto the effect of reductions has been treated of where the writings called for are not produced by the defender. Where they are produced, the pursuer must insist on the special grounds of reduction which he hath set forth in his libel. Reductions on the head of interdictions, inhibitions, deathbed, and minority, have been already discoursed of. Reductions on the head of force or fear, or of fraud and circumvention, must, from their nature, depend wholly on circumstances: and though not any one of those grounds of reduction should be relevant by itself, yet when they are all conjoined, they may be sufficient to set aside the deed, according to the rule, *Quæ singula non prosunt, juncta juvant*. Where therefore there is the least appearance of relevancy, the court are in use, before answer, *i. e.* before pronouncing any interlocutor upon the sufficiency of the grounds libelled, to allow a joint proof to both parties upon the manner of granting the deed.

26. It is not every degree of force or fear that is a good ground of reduction. It must be, both by the Roman law and ours, a *vis aut metus qui cadit in constantem virum*, *l. 6. Quod met. caus.*; such as would shake a man of firmness and resolution. Neither is reduction competent upon reverential fear, arising from the authority of husbands, parents, magistrates, *l. 21. 22. De rit. nupt.*; *l. 3. § 1. Quod met. caus.*; nor of that which proceeds from the regular execution of lawful diligence; for legal execution can import no wrong. Hence a bond of presentation, or of corroboration, granted either by the debtor himself, or by a third party while the debtor is under caption upon the debt corroborated, is not subject to reduction, *Jan. 22. 1667, Mair*. But if the deed which is granted under that circumstance, have no relation to the debt contained in the diligence, it is reducible *ex metu*, *Pr. Falc. 4.* Not only he who is immediately affected by the force or fear, but third persons interposing in his behalf, may be restored against deeds or obligations granted by them for his relief, *l. 9. 10. 11. Quod met. caus.* Thus a bond granted by a son to relieve his father from violence, was declared null *ex vi et metu*, *Dec. 8. 1671, Macintosh*. But the third party thus interposing by his money or credit, if he cannot make his recourse effectual against him who used the force or menaces, is intitled to an action for his indemnification against the party whom he relieved. Thus those who, in the course of the rebellion 1745, advanced contribution-money to the rebels, on the account of boroughs or villages, to prevent the plundering of their effects, recovered it from the corporations for whom it was advanced.

27. All bargains which from their very appearance discover oppression,
or

or an intention in any of the contracters to catch some undue advantage from his neighbour's necessities, lie open to reduction on the head of dole or extortion, without the necessity of proving any special circumstance of fraud or circumvention on the part of that contracter. Thus, in the case of a creditor lending money to an eldest son, which is not made payable by the debtor till he shall succeed to his father, there is *dolus in re*, if the sum payable to the creditor, upon the existence of that condition, be so great, that the risk he runs of the father's surivance bears no just proportion to the premium which he stipulates to himself on account of that risk; and therefore the obligation will be either annulled totally, *in penam* of the creditor, or restricted, according to equity, without the aid of any evidence of circumvention to be brought from collateral facts. But though a deed under challenge should appear hurtful to the granter, and irrational for one in his situation, if it do not carry in its bosom plain marks of oppression, it is not reducible, without an actual proof of dole, even though the granter should appear to be of a facile temper, *i. e.* apt to be imposed upon: for let one be ever so subject to imposition, yet if he has understanding enough to save himself from a sentence of idiocy, the law makes him capable of managing his own affairs; and consequently his deeds, however hurtful they may be to himself, must be effectual, unless evidence be brought that they have been drawn or extorted from him by unfair practices. Yet where lesion in the deed, and facility in the granter, concur, the most slender circumstances of fraud or circumvention are sufficient to set it aside.

28. Another ground of reduction is, That the deed under challenge is granted to the prejudice of creditors; which is borrowed from the Roman law, *l. i. et seqq. Que in fraud. cred.*; and made part of ours, after having been accommodated to the genius and system of our law, by 1621, c. 18. This statute is intitled, *Act against unlawful alienations made by bankrupts*. A bankrupt, in the meaning of this act, is one who has no visible fund for the payment of his creditors, over and above the special subject alienated to their prejudice. The creditors who are intitled to the benefit of it, have sometimes the epithet of *just*, sometimes of *true*, and frequently of *lawful*, given to them in the statute. Conditional creditors are therefore creditors in the true sense of it; for they are properly intitled to all these characters: and even gratuitous creditors; for donation infers a just, true, and lawful obligation against the donor, and carries an implied warrandice against his future deeds.

29. By the first part of this act, all alienations granted after contracting lawful debts, in favour of conjunct or confident persons, without true, just, and necessary causes, may be declared null at the suit of the creditor. A first assignation therefore of a bond or obligation, whether onerous or even gratuitous, affords to the assignee a right of action for voiding a second gratuitous assignation granted by the creditor to another, in breach of the warrandice implied in the first, though it should be intimated before the first, *July 15. 1675, Alexander*. Though the word *alienation* is, in the strict acceptance, applicable only to dispositions, and assignments of deeds, practice has extended it by analogy also to bonds, and even to the consent of the husband interposed to a right granted by his wife, by which his *jus mariti* was cut off, to the detriment of his creditors, *July 27. 1673, Cred. of Scot.* To found action of reduction upon this branch of the statute, *first*, the deed to be reduced must be granted after contracting the debt due to the pursuer; *2dly*, it must be granted in favour of conjunct or confident persons; *3dly*, it must be gratuitous.

30. As to the *first*, one is deemed a prior creditor, whose ground of debt truly existed previously to the alienation or right granted by the debtor, though

though the written voucher of it should bear a date posterior thereto. Thus where a debt, arising from the sale of goods by a shopkeeper, is afterwards constituted, either by the purchaser's bond, bearing the special cause of granting, or by parole-evidence, such debt is considered to have existed as far back as the sale of the goods, without regard to the date of the bond, or degree of constitution, *Jan. 21. 1669, Cred. of Pollock; July 27. 1669, Street.*

31. *2dly*, The deed must be granted to a conjunct or confident person. A conjunct person is one connected with the granter by blood or affinity; and none are accounted conjunct persons in the meaning of this statute, whose relation is not so near, as to bar them from judging in the granter's cause; and therefore neither uncles nor nephews by affinity, nor cousins-german, whether by blood or affinity, fall under it, *Feb. 8. 1712, Lo. Elbank; Forbes MS. June 8. 1714, Macdoul.* By confident persons, are meant those in whom the granter is presumed to place an uncommon trust, from his employing them in certain offices about his person or estate, as a doer, steward, or domestic servant. If a right purchased with the bankrupt's money, be taken in the name of a conjunct or confident person, it falls within the statute, in the same manner as if the bankrupt had first taken the right to himself, and had afterwards made it over to the trustee, *July 2. 1673, Street.* A right taken in the name of the bankrupt's son, if he be minor, and have no employment or estate independent of his father, by which he might have been enabled to acquire it, is presumed to be purchased with the father's money, and is therefore reducible at the suit of the father's creditors, to whom the right alienated will be declared to belong.

32. The act requires, *3dly*, That the deed under challenge be granted gratuitously, or without any valuable consideration given for it by the grantee. But though all gratuitous rights *inter conjunctas personas* are expressly declared reducible by this branch of the act, yet practice has so explained it, agreeably to its title, as to support even gratuitous rights granted to conjunct persons, if the granter had at the time a sufficient fund for the payment of his creditors. And indeed the voiding of donations granted by solvent persons would resolve the act into an interdiction or inhibition, and make persons of good substance incapable of gratifying the friends to whom they have been the most obliged, *Kames, 9.; Dirl. 287.*

33. Provisions in marriage-contracts, either by the bride to the bridegroom in name of tocher, or by the bridegroom or any of his relations to the bride, are accounted onerous deeds; because it is on the faith of suitable provisions secured to the parties in marriage-contracts, that they enter into a married state. Such deeds therefore are not subject to reduction upon this act, even supposing the granter to have been truly insolvent at the time, *Forbes MS. Jan. 22. 1714, Lockhart; Nov. 18. 1729, Cred. of Thoirs, cited in Dict. i. p. 72.* Yet if his insolvency was notorious, or publicly known, fraud is presumed in the person for whose behoof the right was granted, from his contracting with a bankrupt, *Nov. 23. 1680, Wood.* Neither do provisions to wives after marriage, though granted by the husband under a consciousness of his own insolvency, fall under the prohibition of the statute, either where the wife was not otherwise provided, or where her former provision could not avail her in a competition with creditors; for the wife has seldom any fund of subsistence, except what she receives from her husband, whose natural obligation to provide for her becomes more forcible from that consideration. But, *first*, Such postnuptial provision to the wife must be rational; and, *2dly*, There must be no circumstances whence to presume an intention in the husband to prefer his wife to his other creditors, *Jan. 11. 1738, Robertson; Feb. 17. 1738, Mackenzie; both cited in Dict. i. p. 70*.*

34. Provisions to children already existing, are, in the judgement of law,

* See *Home*, 273.

gratuitous, and of consequence may be annulled in a competition with creditors, if the grantor was not solvent *. In these, and the like cases, where the validity of the deed depends on the solvency of the grantor, the period at which he must be proved to have been solvent, is the date, not of the deed, but of its delivery, when the deed becomes effectual to the grantee. Though therefore a bond of provision to children is effectual to them without delivery, in a question with the grantor's heir, it is reducible by creditors on this statute, even after delivery, though the grantor should have been solvent at the date of the right, if he was not also solvent at the time of delivery, when he first put it out of his power to revoke it. It has been explained, *b. 3. t. 2. § 43.* what it is that in our law proves or presumes the delivery of deeds, and from what time deeds are held for delivered. In questions concerning the grantor's solvency, no regard is had to an estate strictly entailed, because the property of such estate cannot be affected by creditors, *arg. June 17. 1712, Ker.* Neither was a personal estate in bonds or moveables, which are not discoverable by any search or inquiry of creditors, computed as part of the grantor's funds; it must have consisted in lands or heritable rights, which may be known by a search in the public records, *Harc. 226.* But it may be doubted whether this doctrine would be found to suit with the present times, when there are numbers of considerable estates, consisting wholly, or for the greatest part, in money.

35. The only manner directed by the act for proving the deed to be gratuitous, or without a just or competent price, is by the writing or oath of the grantee. But this has been so altered by practice, that the grantee, if he be a conjunct or confident person, must support the onerous cause or valuable consideration of the right, not barely by his own oath, but by some collateral evidence, *July 15. 1670, Hamilton; Dec. 15. 1671, Duff.* Where there is no ground however to suspect fraud, the slightest adminicles of the onerosity are admitted in support of the deed, *Kames, 105.* Though no deed can be set aside by the words of the statute, which is not granted to conjunct or confident persons, that ground of reduction is, from the reason of the act, extended against gratuitous deeds, though granted to strangers, if the grantor was not solvent at the time: yet with this difference between the two, that in deeds to children, or other conjunct persons, the onerosity, though asserted in the narrative, must be supported by some collateral evidence; but in deeds in favour of strangers, the narrative, expressing an onerous cause, is sufficient *per se* to support the deed, unless its onerosity be disproved by the writing or oath of the grantee, *June 22. 1680, Trotter.*

36. A gratuitous deed *inter conjunctas personas*, which is subject to reduction upon this act, if it be conveyed to a third party for an onerous cause, subsists as a lawful deed in the person of the purchaser who is not partaker of the fraud. If the conjunction or confidence appear from the deed itself, *ex. gr.* if the deed of alienation expresses that the grantee is brother, son, or steward to the grantor, the purchaser is presumed to be privy to the fraud, since he could not but know *ex facie* of the right acquired by himself, that it was a prohibited alienation, unless he elide this presumption by positive evidence, that the right was assigned to him for a valuable consideration, *Jan. 24. 1680, Craufurd; June 15. 1710, Leslie.* Where the conjunction or confidence cannot be perceived, either from the tenor of the right, or the conveyance of it to the purchaser, the right, though reducible in the person of the trustee, is effectual to the *bona fide* purchaser, *Jan. 9. 1730, Allan,* observed in *Dict. j. p. 75.* But the price stipulated to be paid for the right must in that case be made forthcoming to the bankrupt's creditors, either by the purchaser, if the price be still in his hand, or was in it when he was

* See *Kames, Rem. Dec. 72.*

legally interpellated from paying it, or by the conjunct or confident person, in so far as it has been paid by the purchaser to him.

37. Hitherto of the first branch of the statute, which relates to the case of creditors who have used no diligence against their debtor. It is enacted by a posterior clause in the same statute, for preventing the debtor's partial preference of one creditor to another, that voluntary payments or securities granted by the bankrupt, or any interposed person for his behoof, to any grantee, to the hurt or prejudice of the more timely diligence of another creditor, shall be subject to reduction at the suit of the creditor who had used the prior diligence; and that the creditor who carries on the action of reduction shall be intitled to the sum which was voluntarily paid by the debtor to the other creditor. Rights granted by the debtor for a sum of money instantly advanced to him by the grantee, cannot be declared void upon this clause of the act; *ex. gr.* a disposition of lands in consideration of a price presently paid, *Feb. 8. 1681, Nelfen*; see *Jan. 25. 1681, Bathgate*; or a bond granted for borrowed money, *June 28. 1665, Monteath*; for these are not voluntary rights granted in favour of one creditor to the prejudice of another, but contracts entered into between parties who were perhaps strangers to one another, in the common course of business, and not for the securing any former debt. Neither does a feisin taken by one creditor, on the debtor's heritable bond, after diligence used by another creditor, fall under this prohibition, if the bond upon which the feisin proceeded was prior in date to that diligence, *Fount. Dec. 16. 1696, Cred. of Hunter*: for there the bond is to be considered as the voluntary deed of the debtor, and that is supposed to be granted previously to the diligence of the other creditor; for feisin may be taken upon the bond at any time, whether the debtor will or not, and therefore cannot be accounted his deed.

38. Diligence cannot be said to be used against the debtor, though the creditor should raise letters of inhibition, or a summons of adjudication against him, unless he shall also execute them. Yet this branch of the act is not to be limited to such diligences as are fully perfected; for these would, by the common rules of law, without the aid of any statute, be effectual to the creditor who had used them. If therefore the diligence be but inchoated or begun, it is ground enough for rendering void voluntary rights granted after the diligence, in pursuance of the statute, *Fount. March 16. 1686, Gartshore*; *Fount. Jan. 13. 1697, Elphinston*.

39. The diligence ought to be of that nature or kind which is proper to affect the right questioned. Thus if a creditor use inhibition which is proper to heritage, his begun diligence intitles him to an action for reducing heritable rights in favour of another creditor, of a date posterior to that diligence; or if he should execute letters of poinding, he can challenge a right of moveables granted thereafter by his debtor to a co-creditor, because poinding is a diligence calculated for affecting moveables. Horning is a diligence proper both to heritage and moveables: moveable rights are affected by single escheat consequent upon horning, and heritable rights by liferent escheat. And though the late statute, *20^o Geo. II. c. 50.* has for ever discharged the casualties of single and liferent escheats consequent upon the denunciation at the horn of debtors, in any civil debt or obligation, so that now denunciations can neither affect heritage nor moveables, except upon delinquencies: yet letters of horning continue to be a legal warrant for poinding the moveables of debtors in a civil obligation; and therefore a voluntary right of moveables granted by the debtor to a creditor, after a charge given him upon letters of horning by another creditor, may be voided at the suit of the creditor-charger.

40. Though no definite time is fixed by the act after the begun diligence, within

within which the debtor is restrained from granting voluntary rights to another creditor, it is not to be imagined, that because one creditor had begun to use diligence, no other creditor could to the world's end accept of a security for his debt, without being subject to challenge. Such case may be therefore reasonably judged of by the following words of the statute, *Timely diligence of another creditor duly to affect the bankrupt's lands or goods*; so that if a creditor should delay perfecting his diligence for any considerable time, and so should not duly affect his debtor's estate, he must be construed to have relinquished his begun diligence; after which, another creditor may accept of a right from the debtor which will not be subject to reduction, *March 28. 1707, Gordon; July 9. 1709, Drummond*. No creditor is intitled to the benefit of this act, though his diligence be prior in date to the voluntary right granted to a co-creditor, if that co-creditor have affected the subject by a proper diligence still prior to his. If, for instance, a creditor who had arrested a subject shall get a conveyance of it from the common debtor, another creditor, though he should have used a second arrestment previously to that assignation, has no right to impugn that conveyance, because it was not granted to his prejudice; for the first arrefter was preferable, without drawing any support from the conveyance, which could serve no other purpose than to prevent the trouble and expence of a forthcoming, *Nov. 20. 1677, Archb. of Glasgow; Fount. Jan. 14. 1703, Deans*. Though the act declares all alienations which shall be granted in contradiction to it null, by way either of action or exception; yet the nullity, in so far as it concerns complete feudal rights of heritage, is in practice received only by way of reduction, *July 22. 1664, Lo. Lour*; because infeftments are not by their nature voidable, without production, and the calling of authors, *St. b. 1. t. 9. § 15. vers. Secondly though*. Nay, personal rights of land cannot, in the general case, be set aside but by way of action, *Jan. 5. 1669, Sims*; because heritable rights are of greater importance than moveables, and therefore require greater solemnity, both to their constitution and dissolution, *Mackenzie, Observ. on this statute*. Dispositions of moveable subjects are, in every case, reducible by way of exception, according to the letter of the act, *June 16. 1671, Bowers*.

41. There is still a later statute against the fraudulent alienations of bankrupts, 1696, c. 5. intitled, *Act for declaring notour bankrupts*; by which all deeds granted by the bankrupt, either at or after his bankruptcy, or within sixty days before it, either towards the payment, or for the farther security of any creditor, in preference to the other creditors, are declared null. Fraudulent alienations by the bankrupt, though granted in England, fall within the statute; for not only is the expression in the enactment unlimited, *all and whatsoever voluntary dispositions*; but the obvious meaning and intention of the law strikes with equal force against every fraudulent grant to the prejudice of creditors, in whatever place or country it may be signed, *New Coll. ii. 116*. The characters marked out by this statute for distinguishing a bankrupt, are diligence by horning and caption, and insolvency, joined to either of the following alternatives, imprisonment, retiring, absconding, or forcibly defending one's self from diligence. This act reaches farther than that in 1621; for, by the act 1621, a debtor might, by granting securities, prefer one creditor to any other, where no diligence had been used by that other: but by the last statute, all partial preference of one creditor to another, may be brought in question, even by creditors who had used no diligence, provided the common debtor shall have become bankrupt in the terms of the statute, by the diligence of any one creditor. This enactment strikes against such rights only as are made in favour of creditors; rights therefore granted by the debtor to persons who first become

come creditors by the right granted to them, *ex. gr.* dispositions in consideration of a price instantly paid, are no more affected by this statute, than they were by the act 1621, *Br. MS. Jan. 1. 1717, Burgh.* Though under the words, *deeds granted by the bankrupt*, the delivery of goods, which is a species of alienation, has been sometimes included, yet payment of a debt in cash does not fall under the statute, *New Coll. ii. 243.*; for payment is a natural extinction of debt; and a debt thus extinguished, cannot revive by the debtor's subsequent bankruptcy, if he was not, when the payment was made, bankrupt according to the description of the act, *Jan. 26. 1751, Forbes.*

42. One single caption is sufficient to constitute bankruptcy in the sense of this act, *Fount. Feb. 8. 1705, Cleland*, though it had proceeded on general letters of horning, *Dalr. 36.* Nor is it required that the letters of diligence which have issued against the debtor be executed, if he has fled, or retired to shun their execution against his person, *Feb. 24. 1737, Lo. Kilkerran; Home, 64.* The detention of a debtor for some time in a messenger's custody, if he was discharged from that restraint without imprisonment, has been adjudged not equivalent to imprisonment, in the sense of the act we are now explaining, *New Coll. i. 139.*; because that act having made several innovations and alterations from our former law, ought to receive a strict interpretation, so as it may not affect any debtor who falls not under the precise description of it: but this judgement was reversed upon an appeal, probably from this consideration, that the act being made to prevent frauds, ought to extend to all similar cases, that carry as strong marks of bankruptcy as most of those specified in the statute. If the debt on which diligence was used for constituting the debtor bankrupt, be paid by him, before granting the right in favour of his creditor, such right is secure against any action of reduction upon the statute; but if diligence be only superseded for a while by the creditor, all rights granted by the debtor, during that suspension of diligence, may be set aside, *Kames, Rem. Dec. 118.*

43. It is enacted by the same statute, that all dispositions or heritable bonds granted by the bankrupt, on which seisin may follow, are to be reckoned, as to this case of bankrupt, to be of the date of the seisin following thereupon; and consequently that if seisin be not taken on them till after the bankruptcy, the dispositions or bonds are accounted to have been also dated after that period, which is, by the first clause of the statute, a legal ground for setting them aside. There is a proviso in the statute, that the validity of such heritable grants or bonds, shall not be hurt by the enactment in any other respect. It has been doubted, whether heritable bonds for sums instantly received by the granter, fall under this branch of the law. It was, by former decisions, understood that the enactment was intended for the punishment of those who should keep their deeds latent, and thereby insnare other creditors; and upon this medium it was extended to all heritable bonds, to whomsoever they were granted, *June 19. 1731, Cred. of Merchiston; Nov. 25. 1735, Cred. of Mathison*: but by the later practice, the court adjudged, that that branch of the act was to be interpreted in conformity with the first part of it, so as to strike only against securities granted to persons who had been before creditors to the bankrupt, for their payment, and so did not extend to *nova debita*, or to obligations for sums instantly received, *Falc. ii. 189.*; New Coll. ii. 151.* Where seisin is taken upon a bond or disposition more than sixty days before the bankruptcy, but not registered till with these sixty days, the words of the act are strictly adhered to, which make the date of the seisin, and not of the registration, the rule by which to judge of the constructive date of the bond; such bond therefore being in the judgement of law granted more than sixty days

* See this case observed, *Kames, Rem. Dec. 121.*

before the bankruptcy, cannot fall within the limiting clause of the statute, *Br.* 73.

44. Creditors whose debts are contracted after the alienation made by the debtor, though they have no aid from the two statutes now explained, are not excluded from the remedies competent to them by the common rules of law. They are therefore intitled to an action for setting aside every right granted by the debtor to their prejudice, though previously to their own ground of debt, if it carry in it evident marks of fraud; such as, a disposition *omnium bonorum*, especially if it be granted to a son, or where the granter, notwithstanding the right, continues to act as proprietor, *July* 2. 1673, *Street*. Much more is this right of reduction competent to creditors, whose grounds of debt are prior to the alienation, if fraud appear *ex facie* of the right, though their reasons of reduction can receive no support from any of the two statutes before mentioned. Thus a security granted by a debtor knowing himself insolvent, in favour of one set of creditors, to the exclusion of another creditor equally onerous, without being pressed to it by diligence, was adjudged to lay no foundation of a preference to the creditors favoured, *Kames, Rem. Dec.* 95. In that case it was admitted, that the creditors preferred were not privy to their debtor's fraud, and it was thought sufficient *dolum inesse in re*. This seems contrary to the doctrine of the Roman law, where the *actio Pauliana* was not competent against creditors, unless they were *participes fraudis*, *l. 6. §. 6. 8. & l. 10. §. 16. Quæ in fraud. cred.* But however that may be, it is uncontroverted, that one who receives payment of his just debt, is not compellable to repay any part of it to the co-creditors, though the payment had been fraudulent on the part of the debtor, if the creditor to whom the payment was made had no knowledge of the fraud, *New Coll.* ii. 243.

45. Dispositions are frequently made by bankrupts in trust for the behoof of their creditors; and our decisions are far from uniform, whether these trust-rights ought to have any effect against creditors who have not acquiesced in them. By the first upon this point, *July* 12. 1734, *Snee*, it was adjudged, that the bankrupt had no power, by any deed of his, to deprive any one of his creditors who had not consented to it, of the legal right competent to all creditors, of using diligence in the manner they judge most proper for their security or payment, or to impose upon him a trustee not of his own chusing. Afterwards, because trust-rights, when executed fairly and without partiality to any one creditor, were frequently found profitable to all the creditors, as they prevented the exhausting the fund of payment by separate diligences, the court sustained them, if the granter of the trust-right was not bankrupt in the precise terms of the act 1696, which requires imprisonment, retiring or absconding from diligence, *Falc.* i. *Nov.* 13. 1744, *Snodgrafs*; and consequently would not reduce a trust-deed granted by a corporation, *June* 5. 1747, *Grant*; because personal diligence by caption cannot be used against any corporate body. But by the latest decision, *New Coll.* ii. 193. they returned to their first opinion, that no trust-deed, let it be ever so unexceptionable, can stop the diligence of creditors who have not, by some approbatory act, signified their consent to it*.

46. A declaratory action is that in which some right, either of property or of servitude, or some other inferior right, is sought to be declared in favour of the pursuer, but where nothing is demanded to be paid or performed by the defender; as declarators of marriage, of irritancy, of the expiration of a reversion, actions for declaring certain feudal casualties to be fallen to the superior, &c. Under this class may be also comprehended

* The like judgement has been since given in several cases, particularly, *Dec.* 1770, *Trustees of Fairholmes creditors against Johnston*. See also *New Coll.* iii. 149.

such rescissory actions as barely conclude that the deed or right libelled be declared null, without any conclusion against the defender himself. Declarators of the property of heritable subjects are now seldom brought; because all deeds with which property may be charged or burdened are more effectually forced into the field by an action of reduction-improbation, in the summons of which the pursuer inserts a conclusion of his own right or immunity, as a consequence of the voiding that of his adversary. Decrees upon actions properly declaratory confer no new right; they only declare that an antecedent right was in the pursuer, and so have a retrospective quality, looking as far back as the period at which that right first commenced, as in the declarator of liferent escheat: but, as has been already observed, this character is not applicable to many of our decrees, which are improperly called declaratory. Actions of declarator, because they conclude nothing against the defender, may be prosecuted against an apparent heir, without any previous charge given him to enter heir, unless special circumstances shall require a charge, *Dec. 11. 1638, Finlayson; St. b. 4. t. 5. § 3.*

47. Petitory actions are so called, not because something is sought to be awarded by the judge; for in that sense all actions must be petitory; but because some demand is made upon the defender, in consequence either of a right of property or credit in the pursuer. Thus, actions for restitution of moveables, actions of poinding, of forthcoming, and indeed all personal actions upon contracts, or *quasi* contracts, which the Romans called *conditiones*, are petitory. Possessory actions are those in which the point of right is not directly concerned, but barely that of possession. They are competent, either for attaining possession, for holding it after it is got, or for recovering it after it has been lost, analogous to the interdicts of the Roman law, *Quorum bonorum, Uti possidetis*, and *Unde vi*. The actions of our law for recovering possession, which come in place of the interdict *Unde vi*, are those of spuilzie, intrusion, and ejection; of which, *vid. sup. b. 3. t. 7. § 16.* In some possessory actions, a title in writing must be produced, as in removings and molestations; others are grounded on possession alone, as ejections and spuilzies.

48. An action of molestation is a possessory action, calculated for continuing proprietors of land-estates in the lawful possession of them, till the point of right be determined against all who shall attempt to disturb their possession. It is chiefly used in questions of commonry and controverted marches. Before the year 1580 much time was consumed in those actions by the court of session, who examined before themselves all the witnesses adduced by the parties, without being able to come at so distinct a knowledge of the facts as if the proof had been taken upon the controverted grounds. An act of sederunt was therefore made that year, ratified by 1587, *c. 42.* by which all actions of molestation in *possessoria*, whether of property or commonry, were to be remitted by the session to the sheriff of the county where the lands lie, who was by the act empowered to take cognition of the marches, and to put the facts contained in the libel and defences to the knowledge of an inquest, consisting of those who resided in the parish, most of them landed men. This process was therefore called an action of *cognition*: but it is now quite in disuse; for the session, in place of remitting the cause to the judge-ordinary, allow the proof to be brought before themselves, or appoint it to be taken by special commissioners, who afterwards report it to the court of session, in order to their determination. Where a declarator of property is conjoined with an action of molestation, it falls under the proper or exclusive cognizance of the session. Actions upon briefs of perambulation, 1579, *c. 79.* have the like general tendency with actions

actions of molestation, viz. the settling of marches between conterminous lands. The difference commonly stated between the two is, that the first is used where there is no dispute concerning the possession, and where the only question relates to a point of right; whereas in molestation, the pursuer lays his plea also upon possession.

49. The action of mails and duties, or for the payment of the rents and profits of a land-estate, is sometimes petitory, and sometimes possessory. In either case, the action lies against the tenants and natural possessors of the ground, for payment to the pursuers of the rents remaining due by them for past crops downwards from the time libelled, and of the full rent of the lands in all time to come, as the extent thereof shall be proved. It is competent, not only to a proprietor who has a feudal right perfected by feisin, but to a simple donee, or assignee; because a right to the rents is included virtually under a disposition of the lands; and consequently to an adjudger, for an adjudication is a judicial disposition. But in this the two differ, that in the petitory action, the pursuer, because he founds on right, not on possession, ought to make, not only the natural possessors of the ground, but the proprietors or liferenters who are in the civil possession, and from whom the natural possessors derive their right, parties to the suit; and he must support his claim by titles of property or diligences, preferable to those in the person of his competitors: whereas in the possessory action, it is enough that the pursuer calls the natural possessors as defenders, though he should neglect the proprietor; and in questions with tenants who have derived their right from himself, he need produce no other title in this possessory action, than his own or his ancestor's feisin, which is a title sufficient to make possession lawful. If a third party appear in the process with a feisin, to defend the possession of the present possessors, the pursuer must prove, that he, his ancestors, or authors, have been in the possession of the rents for seven years immediately preceding; or at least that they had been in the possession for seven years, and that seven years are not yet elapsed since the discontinuance of it, and that thereby he has the benefit of a possessory judgement.

50. A possessory judgement founded on seven years possession, in consequence either of a feisin or of a lease, has this effect by the law of Scotland, that one, though claiming under a right preferable to that of the possessor, cannot claim the possession until, in a formal action of reduction, he shall get his competitor's title of possession declared void. Its origin hath been probably owing to this, that where there are subaltern rights of the same lands granted to vassals, and by them to subvassals, the vassal or subvassal, not being master of the original title-deeds, which commonly remain with the highest superior, might be turned out of his possession by one, who, though he had no good right at bottom, might yet produce a title prior to any that the possessor himself is master of. This hardship is removed by the privilege of a possessory judgement: for the possessor, when a formal action is brought for reducing his right, hath an opportunity of recovering from the superior, by a diligence, the ancient title-deeds of the lands, by which he may defend his property, *St. b. 4. t. 22. § 14*. It is a consequence of this doctrine, that a defender may support his possession against one who sues upon the petitory action, by the plea of a possessory judgement, though his possession should be founded upon a title posterior to that of the pursuer, who must in such case obtain a decree annulling the defender's title of possession, before he can have access to the rents, *St. b. 4. t. 26. § 3*.

52. The chief accessory actions which do not subsist by themselves, but merely prepare the way for, or are subservient to other actions, are those of exhibition

exhibition of writings, of transumps, of proving the tenor, of transference, and of wakening. An action of exhibition, when it is grounded on a right of property in the deeds libelled, is without doubt a principal action, which subsists by itself; and, being real, may be insisted in by the proprietor against every one who holds the deeds in his custody, not barely that they may be exhibited in court, but that they may be delivered to him the pursuer, to be used by him as his own property; see *St. b. 1. t. 7. § 14*. But such actions of exhibition as are intended for the sole purpose of forcing the production of writings for serving a special purpose of the pursuer, are barely accessory. Of this kind are exhibitions *ad deliberandum*; of which see *supr. b. 3. t. 8. § 56. 57*. Such also were exhibitions pursued by a party in a suit, who wanted to prove a special fact by writings in the possession of third persons against these possessors or havers, that the writings might be exhibited in court, in proof of his allegation. This formerly required a tedious process, *St. b. 4. t. 41. § 4. 5.*; but is now effected summarily, by way of incident diligence, which is granted in the principal action against the havers. The persons cited upon this diligence must either exhibit the writings called for, or must depose, that they neither have them, nor had them since the citation, nor have fraudently put them out of their custody, to frustrate a future citation, nor suspect by whom they were taken away, or where they presently are. If the user of the diligence be not satisfied with the defender's oath in those general terms, he may, by act of federunt, *Feb. 22. 1688*, put special interrogatories to him, the better to discover the truth. Not only third parties, but the defender in the principal cause, may be compelled by the pursuer to exhibit the writings in his custody that are necessary for proving the libel; and, in like manner, the pursuer must exhibit such writings in his hands as may be proper to verify the defender's plea: but in these cases the writings called for must be particularly specified or described; for if a general description, or in our law-style condescendence, were sufficient, one might, upon irrelevant or vague allegations, compel his adversary to expose to him his whole title-deeds, with all their defects, *June 26. 1735, Scot.* Under this limitation the rule is to be understood, *Nemo tenetur edere instrumenta contra se*.

53. An action of transumpt, which is also accessory, is competent to any person who has a partial interest in a writing, or immediate use for it to support his titles or defences in other actions, against him in whose custody the writing lies, to exhibit it, that so a transumpt thereof may be judicially made out, and delivered to the pursuer. This action may be pursued before the judge-ordinary. The pursuer's title in it is most commonly an obligation signed by the defender to grant transumps: but though there should be no such obligation, the action lies, if the pursuer can prove that he has an interest in the writings, *ex. gr.* that they make part of the title-deeds of his lands; but in that case he must bear the whole expence of transuming. After the writings are produced in court, just duplicates of them are made out, collated, and signed by the clerk, which are called *transumps*, and are, by the decree of the judge, declared to bear as full faith or credit as an extract from the record of that court. As therefore an extract from a proper record is as effectual as the principal writing, except in an action of proper improbation, so is a decree of transumpt: and as when a deed, of which an extract is produced, is excepted to on the head of falsehood, a warrant is granted to bring the original deed from the register-office; so when a decree of transumpt is questioned upon a ground of falsehood alledged against the writing transumed, the user of the transumpt must produce the principal writing; for which purpose, he may obtain a diligence against havers for exhibiting it; and if it be not produced, certifi-

cation will be granted against it. The parties chiefly interested in the deeds to be transumed, both granters and grantees, or their representatives, must either be made parties to the suit, or consent expressly to the transuming of the deeds; but all others who pretend interest may be cited edictally, *Fount. Dec.* 13. 1699, *Telfer*; *New Coll.* ii. 98.; *St. b. 4. t. 31. § 5.*

54. The action of proving the tenor is sometimes carried on by itself, without a view to any other, and then it may be considered as declaratory, but it is most frequently used as an accessory action. It may be defined, An action by which the tenor of a writing which is lost or destroyed is endeavoured to be made up. The Romans had a remedy of the same kind, by which one who had lost or mislaid a deed, might bring evidence of the accident whereby it was lost, and of its contents, *l. 18. in fin. C. De testib.* By our old law, such questions were tried by an inquest, whose verdict, that the deed truly existed, supplied the place of the lost deed, *2. Attach. c. 55. § 6.; vid. Jurpr. b. 2. t. 1. § 11.* Because it ought to appear to the court, not only that the deed said to be lost was once a genuine deed, but that it is a right or obligation not yet extinguished, the pursuer must libel and prove the *casus amissionis*, or the accident by which it came to be lost, before the tenor of it be admitted to proof. In obligations which are extinguishable barely by the debtor's destroying or cancelling them, *ex. gr.* in personal unregistered bonds, where the debtor who makes payment rests frequently secure by getting up the obligation from the creditor and destroying it, such a special *casus amissionis* must be proved, as may shew that the bond was lost while in the creditor's hands by some particular accident, *ex. gr.* fire, robbery, shipwreck, or other such misfortune; otherwise bonds truly paid might be again demanded from the debtor as obligations still subsisting, *St. b. 4. t. 32. § 3.* But in deeds which are intended to remain constantly with the grantee, or which require contrary deeds of renunciation to extinguish them, as dispositions, feifins, wadsets, &c. or where the debtor who makes payment does not commonly chuse to rely for their extinction on the bare cancelling of them, as assignments, &c. a more general *casus amissionis* is sufficient, *St. b. 4. t. 32. § 4.*; inasmuch that most lawyers are of opinion, that it is sufficient to libel, that the deed was lost *any how*, even *casu fortuito*.

55. The tenor of a writing may be proved, either by the oath of the granter, or by writing, or by parole-evidence. When it is to be proved by the testimony of witnesses, the pursuer ought, in the general case, to produce some adminicle in writing, *i. e.* some collateral deed referring to that which was lost, in order to found the action before the tenor be admitted to proof; because writings, as they are seldom extinguished, neither ought they to be reared up against any one merely upon parole-evidence. But in personal obligations, where a special *casus amissionis* is proved, *ex. gr.* that the writing, while in the creditor's possession, was taken from him by violence, or consumed by fire, adminicles in writing are dispensed with from the necessity of the case, *St. b. 4. t. 32. § 7.*; see *July 19. 1636, Lo. Fren-draught*. And indeed as personal bonds granted by debtors of good credit are seldom registered, nor have any posterior writings referring to them, the benefit of this action would be utterly lost to the creditor, if written adminicles were necessary in such cases, since relative writings cannot be produced where none such ever existed. As adminicles in writing are designed merely *fidem facere judici* that the deed libelled did truly exist, writings, though not probative, nay bare scrolls of writings, referring to the lost writing as a finished deed, are sufficient for admitting the tenor to a proof by witnesses, where it appears that they were framed before bringing the action, and so not calculated to serve that special turn, 1722, *Erskine contra Preston*.

56. Where

56. Where the tenor of an obligation, disposition, or other ground of debt or of right, is to be proved, the whole contents of the deed must be libelled, with all its limitations and provisos, otherwise a right might be reared up of a quite different nature or extent from that which was lost. If the writings produced as adminicles are in themselves probative, and recite the full contents of the deed lost, the tenor ought to be found proved upon these adminicles, without the aid of any parole-evidence, *St. b. 4. t. 32. § 10.*; *Fount. June 26. 1712, Inglis.* And adminicles, though they should only refer to the deed lost in more general terms, since they afford a presumptive evidence of the existence of the lost deed, are a sufficient foundation for admitting the tenor to be proved by the testimony of witnesses; but if the witnesses adduced do not in such case depose, that they saw the deed signed agreeably to all the legal solemnities, and that it was of like substance with that which was libelled, the process must fall, notwithstanding these general references in the written adminicles.

57. It had been long held for a rule, not to sustain the proof of a tenor, without bringing evidence who the writer and witnesses to the deed were, because the want of these infers a statutory nullity, *July 17. 1713, Blackwood*; and the few judgements pronounced contrary to this rule, proceeded upon special circumstances, *Jan. 13. 1681, Calderwood*; *Dalr. 79.* By this means, the use of a proving of the tenor was brought within too narrow limits; for it was seldom in a creditor's power to bring evidence of that fact, especially when the proof was to be brought at any considerable distance of time from the date of the lost deed. But as the decision in the case of Blackwood, sustaining that objection, was reversed upon appeal, it is not likely that it will be received for the future against a proof of the tenor.

58. By 1579, c. 94. the tenor of letters of horning, and their executions, which are lost, and never were judicially produced, cannot be proved by witnesses; but the statute does not seem to exclude a proof of their tenor by written adminicles. This at least is certain, that the act being correctory, and designed to prevent the bringing again to life that diligence which drew after it such heavy penalties, is to be confined to letters of horning, and not to be stretched against every judicial act, such as decrees, *Dalr. 53.* For though many solemnities are required in decrees, the defects of which might be covered by admitting a proof of their tenor, the same objection lies against extrajudicial deeds, that have also their peculiar forms, without which they are null: and indeed a more forcible one; for in judicial acts, public persons intervene *ex officio*, who are presumed to do their office agreeably to law. Nay, a proof is admitted, by our practice, of the tenor of decrees of apprising, though these are, of all other, the most incumbered with solemnities, *Dirl. 283.* The cognisance of this action, from its importance, and from the dangerous consequences which might follow if the tenor of deeds were to be sustained, which either never existed, or laboured under nullities, or have been since extinguished, is appropriated to the court of session. The witnesses were, by the former practice, examined, not by any one Ordinary, but by the President, in presence of the court; and when a witness could not, through age or other infirmity, be brought into court, the judges named one or two of their own number to examine him; but this strictness hath been of late overlooked.

59. A decree of proving the tenor revives the lost deed, and has the same force given to it by law, as that deed would have had, were it still existing. Improbation upon the head of falsehood, may, without doubt, be offered against it; for it ought to be in no man's power, by destroying a forged deed, and afterwards proving its tenor, to preclude the other party from
insisting

infisting on the grounds which would have been competent to him for declaring it false, had it not been destroyed: but the pursuer in such improbation must have small hopes of success, if the tenor has been proved either by the writer and instrumentary witnesses, or even by the testimony of others, deposing that they saw a deed of the tenor libelled, without any appearance of vitiation or forgery, duly signed by the granter and witnesses.

60. The action of transference is also accessory. Where, during the dependence of a suit, either party dies, the action, before it can be farther proceeded in, must be transferred from the deceased to some person alive who represents him. If the pursuer be dead, it is called a transference *active*; because the title to pursue is an active title, which must be transferred from the deceased pursuer to his representative. Where the defender dies, it gets the name of a transference *passive*; because there it is the title to be pursued, which is a passive title, that falls to be transferred. In a transference *active*, the pursuer must be previously served heir; or if the subject in dispute be moveable, he must make up such a title to it as is proper to moveables; for till then he can have no interest to demand a transference. But an action may be transferred *passive* against a defender's heir, whether he be served heir or not; because the wilfulness of a debtor's heir ought not to bar the creditor from constituting his debt. Yet a transference cannot proceed against a debtor's apparent heir, till the *annus delibelandi* be expired: and the pursuer in the transference ought first to charge him to enter heir, if he cannot otherwise fix a passive title against him.

61. By 1693, c. 15. the necessity of transferring *active* is taken away, so that the pursuer's representative in the subject may, without any new form of law, insist in the principal cause, as his ancestor might have done, upon producing his retour or confirmed testament, or special assignation: but transferees *passive* continue on the former footing; because it was necessary to give previous notice to the heir of the deceased defender, before he should be obliged to defend against a suit, of which perhaps he knew nothing before. Transferences being only incidental to other actions, proceed upon a citation of six days, and can be pronounced by no inferior judge, other than him before whom the principal action depended. Where the representatives of the party deceased do not reside in the territory of that judge, the supreme court alone can transfer, *Gosf. Jan. 9. 1674, Denholm; New Coll. i. 120.*

62. The last accessory action that shall be mentioned, is that of wakening. Though the effect of an action which lies over not insisted in for a year is suspended, and the action for that reason said to sleep; yet it may, at any time within the years of prescription, be revived or awakened by a summons, in which the pursuer recites the last step of the process; and concludes, that it may be again carried on as formerly. An action that stands upon the proper inner-house roll cannot sleep; because the pursuer, by carrying it to that roll, has done all in his power to bring it to a decision: nor can an action, in which a decree is pronounced, suffer any such suspension; because, by the decree, the action has received its full completion; and consequently the decree may be extracted, after the year is elapsed, without the necessity of a wakening.

63. An action of registration, before it fell into disuse, might also have been classed among those which were merely preparatory, either to other actions, or to steps of diligence. As clauses for the registering of bonds, or other deeds, were conceived in the form of mandates, which by their general nature fell on the death either of the granter or of the creditor, the deeds could not be registered after that period, without a formal action of registration, brought either by the creditor, in the event of the granter's death,

death, or by the creditor's heir, where the creditor died; to which the granter himself, or, in case of his decease, his representative was necessarily to be made a party. But as this quality of mandates ought to be limited to those that are revocable at the granter's pleasure, and is not applicable to mandates granted *à leu gratia mandatarii*, it was therefore enacted by 1693, c. 15. That though the creditor should die, the deed might be registered summarily by his heir, executor, or assignee, on production of his retour, confirmed testament, or special assignation. And by a later statute, 1696, c. 39. summary registration may also proceed after the granter's death, in the same manner as if he were still alive. By the present practice, the creditor's representative, or indeed any person who offers a deed for registration to the clerk of the proper record, may get it registered, though he should produce no title to it in himself, notwithstanding the aforesaid proviso in the act 1693.

64. By the Roman law, different actions were frequently competent to the same person upon the same ground of right, by which the pursuer, after he had prevailed in the one action, might have insisted in the other, in so far as it was *pinguius*, or contained more than the first, l. 5. § 1. *Ad leg. Aquil.*; l. 34. *pr. De obl. et act.* But there is no instance in our law of different civil actions, competent upon the same ground, where the pursuer has this privilege: for though in some actions which are in part penal, the pursuer may either restrict his libel to the real damage, or, if he think fit, insist also for the violent profits, as in spuilzies; yet if he shall once restrict his demand to simple restitution, he cannot afterwards sue for the violent profits, though three years should not be elapsed after committing the spuilzie. Our law, however, admits a concurrence of actions, in the special case of facts which may be prosecuted either criminally or civilly; for criminal actions have a different pursuer, and are designed to serve quite a different purpose from civil. Facts are tried criminally at the suit of a public prosecutor, to satisfy the public justice; but civil actions, even when they arise from a delinquency, are brought by the private party for his own redress or indemnification, from which it would be unjust to preclude him, merely because the public resentment is already satisfied. Nay, though in a criminal trial the pannel should be absolved, the private party may insist *ad civilem effectum*; because in criminal trials, nothing can be referred to the pannel's oath, who cannot be compelled to swear against himself, where either life, limb, or forfeiture of goods lies at stake. But as every fact may be referred to the pursuer's oath in a process which is pursued merely to a civil effect, the pannel, though he should be absolved from the crime, for want of proper evidence by witnesses, may be sued by the private party for recovery of his debt and damages in a civil action, where the pursuer may have the benefit of his oath.

65. Actions are said to be accumulated, where different actions are included in one libel. This was not admitted by the Romans, though the several actions had been founded upon the same ground of right, l. 43. § 1. *De reg. jur.*; for they had a different *formula* for every different species of action, which it behoved the pretor to observe, when he remitted the cause to the *judex pedaneus*: but where one had several distinct claims against another, all which proceeded on obligations of the same nature, and were productive of the same species of action, he might by that law have thrown all his claims into one libel, because there all the actions being of the same species, one *formula* served for all. Thus, if Titius had entered into a copartnership with Seius, first in one branch of trade, and afterwards in another distinct from the first, he might have sued his partner upon both copartnerships in one and the same libel, because it was the same action *pro socio*,

which arose from both contracts, *l. 52. § 14. Pro soc.; l. 25. § 3. Fam. ercisc.* We who are strangers to the Roman *formulae*, daily comprehend in the same libel, different conclusions upon the same ground of right, rescissory, declaratory, and petitory, if they be not repugnant to each other. Thus, where a pursuer is to set aside a deed by which a consequential right accrues to himself, he may libel, not only a reduction of the defender's right, but a declarator of his own, in the same summons. And though my right of action against the defender should arise from different grounds of debt, *ex. gr.* if he was debtor to me in one sum by bond, in another by contract, and in a third, for which I can bring no proof but his oath, all these separate claims may be ingrossed in one libel. This holds, not only where the same person is debtor in all the grounds of debt, but where the debtors are different. Indeed where the libel is laid upon distinct grounds of debt, it is not properly an accumulation of different actions into one libel; for every separate claim is in that case understood to make a separate libel, and requires a separate discussion; *quot articuli, tot libelli*. There is however one kind of accumulation rejected by our law. Where two several creditors have the same person for their debtor in separate debts, they cannot be joint pursuers against their common debtor. If the two creditors want that both debts be sued upon in the same libel, for saving expence, the one must previously convey his debt to the other, and the assignee must sue upon both; upon the one as original creditor, and on the other as assignee. Upon this medium, an adjudication was set aside, because it was grounded on a summons raised by two different creditors, for distinct sums due to them by the same debtor, without a previous conveyance from the one to the other.

66. This title may be concluded with a few sentences upon exceptions or defences. These are the pleas offered by the defender against whom an action is brought, in order to elide or exclude the action.—Defences are either dilatory or peremptory.—Dilatory, are those which have the temporary effect of obtaining for the defender a sentence absolving him from the depending suit, without cutting off the pursuer's right of bringing a new action. They arise generally from some defect in the libel, or form of proceeding; *ex. gr.* that the action is not competent in the form in which it is laid, or that the pursuer has not a *persona standi in judicio*, or that all having interest are not made parties to the suit, or that the executions are informal. Such defences as have the effect of putting off the action to some more distant period, and arise from some privilege or right in the defender, may be also ranked in the class of dilatory; as the exception of minors, upon the rule, *Minor non tenetur placitare*; the privilege of members of parliament not to be sued for any civil cause while the parliament is sitting, &c.—Peremptory defences are positive allegations, which enter into the merits of the cause itself, and tend to overthrow the very ground of action, or extinguish its effects. Such are the exceptions of *res judicata*, that the question between the parties hath already received a final decision; the exceptions of payment, of compensation, &c. or such as arise from the head of force, fear, or circumvention. These are said *perimere causam*, to put an end to, or exhaust the cause; for they not only free the defender from the *instantia* or *lis pendens*, but totally extinguish the pursuer's right of action upon that claim.

67. Dilatory defences, as they relate to the preliminaries of a cause, must be offered *in limine judicii*, before litiscontestation; and therefore where a peremptory defence is once made, the defender is justly accounted to have passed from all his dilatory defences. Those dilatory defences which are grounded upon informalities in the libel or executions, and are called *non-processes*,

proceſſes, proceed frequently from a diffidence in the defender of the juſtice of his cauſe, or from an unjuſtifiable view of heaping up unneceſſary coſts upon the adverſe party, and are therefore unfavourably received by the judge. Hence a defender cannot offer, firſt one dilatory defence, and after that another, but muſt make them all at once, *Act of ſederunt*, Nov. 20. 1711, § 16.: hence alſo they muſt be inſtantly verified, unleſs they be offered *peremptoriè*, *St. b. 4. t. 39. § 13.*; that is, as Lord Bankton explains it, *b. 4. t. 25. § 3.* the defender, if he fail in the proof of his dilatory defence, muſt ſubmit to a ſentence condemnatory, in the ſame manner as if the defence, in the proof of which he failed, had been peremptory. But as dilatory defences, when they ariſe from a right conferred by law on the defender, have nothing unfavourable in their character, he who pleads ſuch a defence, if he ſhould not be able to verify it inſtantly, is allowed a reaſonable time to prove it, *Feb. 24. 1676, Kello*. Lord Stair, *b. 4. t. 39 § 14.* reckons the declinature of a judge as a ſpecies of dilatory defence: but a declinature is not a defence of any kind, but, on the contrary, an expreſs reſuſing to make defences; for it is an intimation by the defender to the court, or a proteſtation entered there, that he does not acknowledge its ju- riſdiction, nor think himſelf bound to appear before it.

68. Peremptory defences, becauſe they are drawn from the cauſe itſelf, need not be made at once, nor in any determinate or fixed order, but may be offered at any time before ſentence, *l. 2. C. Sent. reſc. non poſſe*. Though therefore a defender ſhould deny the libel, he may, on the purſuer's proving it, enter a plea, that the debt is paid off or compensated, *l. 43. De reg. jur.*: or though he ſhould at firſt offer a defence, which takes for granted the truth of the libel, he may, if he fail in the proof of it, deny the libel itſelf, *l. 9. De except.*: yet to diſcourage affected delays, a rule hath been eſtabliſhed in our practice, that if an act before anſwer, of which *infr. § 69.* hath been extracted in a cauſe, admitting certain facts to proof, parties are precluded from founding a plea upon any new allegation, tho' it ſhould be competent, which was neglected to be offered when the act was pronounced, *Act of ſederunt, July 23. 1674.* After a defender has undertaken to prove, by way of exception, that any of the purſuer's titles are forged, no other exception is competent to him; and even when he inſiſts upon any exception whatever againſt the libel, which implies an acknowledgement of it, *ex. gr.* payment or compensation, he muſt, in the opinion of Lord Stair, *b. 4. t. 40. § 39.* when he offers it, reſerve to himſelf the exception of improbation, otherwiſe he will be precluded from it; becauſe where a defender has once acknowledged a libel to be true, he cannot afterwards deny it, unleſs he reſerve to himſelf that ſpecial right of offering improbation againſt the grounds of debt libelled upon. In proper ſpeech, nothing ought to get the name of an *exception*, which is not a poſitive allegation, ſuppoſing or admitting the ſufficiency of the libel, if it had not been elided by that allegation, *ex. gr.* the exception of preſcription, of dole, &c.; and in like manner, a reply muſt be a poſitive allegation, which takes for granted the relevancy of the exception; all other pleas ought to paſs by the name of *allegations* and *anſwers*, *St. b. 4. t. 40. § 15.*: but theſe terms are not ſo ſtrictly diſtinguiſhed in common language.

69. After the purſuer had exhibited his claim, and the defender his defences, before the proper judge, the proceſs or *lis* was, by the Roman law, ſaid to be conteſted: and this litiscontestation was conſidered as a judicial *quasi* contract entered into between the parties, by which both of them agreed to ſubmit or refer the cauſe to the deciſion of the judge. As this *quasi* contract was entirely grounded on the preſence and acquieſcence of both parties, it follows, that where the defender, through contumacy, did not

not appear, the judge had no power by that law to pronounce a definitive judgement on the cause itself; all he could do was to enter the pursuer into the possession of the defender's estate, *Nov. 53. c. 4.* By the usage of Scotland, litiscontestation cannot be formed without extracting an act or warrant, by which a proof of special facts is granted to either party, or to both. Formerly no warrants were issued for the proof of any allegation, but what the court had previously sustained as good or sufficient to infer the conclusion drawn from it, according to the rule, *Frustra probatur quod probatum non relevat*; but by the later practice, warrants have been equitably granted before fixing the relevancy, allowing either party to prove such facts as, in the opinion of the court, tended to throw a clearer light on the cause. The warrants of the first sort, where the relevancy is previously determined, are called, in the most proper sense, *acts of litiscontestation*; but litiscontestation, when that term is taken in a larger acceptation, may be also formed by warrants of the last kind, which get the name of *acts before answer*, *St. b. 4. t. 40. § 12.*; and even by the pursuer's taking a term to prove his libel, in absence of the defender, which is styled *litiscontestation, reo absente*, or *parte non comparente*, *St. b. 4. t. 40. § 9.* As there is no room for supposing any *quasi* contract formed betwixt the parties, where the defender, who is one of them, does not appear in judgement; therefore, in that kind of litiscontestation which is made either in absence of the defender, or where, after his appearance, he withdraws or passes from it, (which any defender may lawfully do before litiscontestation, if he have offered no peremptory defence), the decree given forth in the cause is, in the opinion of Lord Stair himself, considered barely as a decree in absence; of which *infr. t. 3. § 6.* But where litiscontestation is formed by a warrant granted by the court for proof, after the defender has appeared in judgement, and has not passed from his appearance, any definitive sentence that may be afterwards pronounced in the cause is truly a decree *in foro contentioso*; for the defender cannot, after litiscontestation, pass from his appearance, though he would, *St. ibid. § 12.*

70. Besides this effect which our law hath given to full or proper litiscontestation, *reo presente*, it hath several other properties, both by the Roman law and ours. In consequence of the judicial contract implied in it, there arises a *nova causa obligationis*; a new quality is communicated to the action, by which, though it be penal, and consequently would, in the common case, fall by the death of the delinquent, it is perpetuated, and made transmissible against heirs, *Feb. 7. 1712, Stuart; Dec. 1726, Brebner.* Upon the same principle, parties are considered by litiscontestation, as acquiescing in what shall be determined by the judge, according as the points contained in the act are or are not proved, *St. b. 4. t. 40. § 8.* Litiscontestation also does in sundry instances put the defender *in mala fide* with respect to the *fructus rei alienæ* gathered or received by him, *supr. b. 2. t. 1. § 29.* And lastly, the defender is barred from making any dilatory defence after litiscontestation, *supr. § 67.*

71. All acts of litiscontestation, and all interlocutors whatever admitting a proof of special facts, whether by writing or witnesses, are carried into execution by letters issuing from the signet of the session, by which the possessors of the writings, and the witnesses, are required to appear before the court on the day fixed, there to make oath upon the points contained in the letters; and they are styled *diligences*, to be explained below, *t. 2. § 30.* As to the forms observed in the proceedings of the court, during the dependence of a civil action, they seldom dip into points of law, and must in their nature be subject to frequent alterations. They may be collected chiefly from the statute 1672, *c. 16.* in that branch
of

of it concerning the session, from the articles of regulation settled in the years 1695 and 1696, and from the several acts of federunt made by the session for regulating the forms of judicial proceedings. It shall only be observed upon this head, that by the ancient practice, parties, after having been heard by themselves or their counsel, withdrew from the court; after which the judges reasoned on the cause, and pronounced judgement in it with shut doors: but now, by 1693, c. 26. all civil causes must be advised (*i. e.* considered and decided) with open doors, that parties may have an opportunity of setting right the judges in any fact which appears to have been either overlooked or misapprehended by them.

T I T. II.

Of Probation.

ALL averments made by parties to a suit, whether by the pursuer in his libel, or by the defender in his plea for eliding the libel, must be supported by proper evidence or proof. Proof may be admitted, according to the different nature of the facts, either, *first*, By writings signed by him against whom the fact is alledged, which is called a proof *scripto*; and in this way all points may be proved against a party without exception. *2dly*, By the parties oath or *juramento*; and by this manner of evidence most allegations may be also proved, with very few exceptions, which shall be soon taken notice of. *3dly*, When the point to be proved is of such a nature, that it is capable of proof, not only by the writing or oath of the party, but by witnesses or parole-evidence, that manner of proof gets the name of *probatio prout de jure*, because it includes every kind of legal proof: but there is a variety of facts, in which evidence by the testimony of witnesses is not receivable.

2. The single combat was admitted in the Gothic system as a legal method of proof, not only in criminal accusations, but in civil questions; *ex. gr.* in dowries, *Leg. Alem. t. 56. § 1.*; and debts, *Leg. Burg. t. 45.* And in this kind of evidence, which was indeed an appeal to Providence, God himself was said to be the judge, *ibid.* It is certain, that by the most ancient law of Scotland, *Reg. Maj. l. 3. c. 13. § 4.* actions, arising from contract or obligation, might have been proved by the ordinary means of proof, of which the single combat is there mentioned as one; and it appears, by *St. Rob. III. c. 16.* that this kind of evidence continued to be received with us, as far down as the reign of that prince, for determining questions of capital crimes, in the special case where the accusation was supported by presumptions, without any direct evidence by writing or witnesses; *vid. infr. t. 4. § 49.*

3. The proper order in which the different methods of proof still received in our law ought to be undertaken by parties, is, first, by the writing of the person against whom the proof is brought; for while there is any room for this manner of evidence, the putting of unnecessary oaths to the litigants or witnesses ought to be avoided. Under this head may be included any acknowledgement or confession made by the party, though it should be verbal; in which case, the allegation being instantly verified, needs no term for probation: but if it be a written declaration, not in the hands of him who pleads it, a term is allowed for recovering it by diligence. If the evidence which the party offers by writing be insufficient, he may have recourse, either to the testimony of witnesses, or to his adversary's oath: but if he should first betake himself to the proof by oath, he cannot afterwards

use any other mean of probation, for the reason assigned *infr.* § 8. And on the other hand, a pursuer who had brought a proof by witnesses, upon an extracted act, was not allowed, after that proof was found insufficient, to have recourse to the oath of the defender, *Home*, 75. Evidence by writing hath not such undoubted force, nor does it secure the party who brings it, so strongly as a proof by oath or by witnesses; for the first writing pleaded as evidence may be rendered ineffectual by a posterior derogatory from the first, or may be declared forged upon grounds of proper falsehood: but oaths are not subject to improbation; neither can any proof be received against the testimony of concurring witnesses, though reprobators may be admitted for proving the inhability of witnesses; of which, *vid. infr.* § 29.

4. As to proof by writing, the solemnities essential both to private deeds, and to public, as notarial instruments, and executions by the officers of the law, have been already explained, *b. 3. t. 2. § 15. et seqq.* Sundry private deeds, though not subscribed by the party, are in some respects probative. Thus books of accounts, kept by merchants, manufacturers, shopkeepers, and other dealers in business, are, without subscription, probative against themselves, whether they be holograph, or written by a clerk; because he who keeps books is presumed to intend, that they should pass for a legal evidence of the state of his affairs, and have the same force as if he had signed a declaration subjoined to every article, *Fount. July 6. 1710, Watson*. Yet jottings in loose papers not subscribed ought not to prove against him, though they be written by himself; because these are frequently designed as notes for the memory, where things may be marked as already finished, merely from the view that they are to be immediately transacted, *July 1. 1665, Naismith*. No merchant's books can be full evidence in his own favour; but if they be regularly kept, and contain his whole transactions, they ought to afford at least a *semiplena probatio*; and therefore if they be supported by one witness in articles which admit of parole-evidence, they will be received as a legal proof, provided the merchant himself, if required, make oath in supplement, that the transaction is there fairly stated, *Gosf. June 5. 1672, Wood*. But after all, the authority due to the books of a merchant depends much upon his character, and on the particular circumstances of the case: see *supr. b. 3. t. 2. § 24.*

5. Notarial instruments, executions of messengers, and other such public writings, are not probative in all respects, though they be formal as to the legal solemnities. Where indeed the law has made the instrument of a notary, or the attestation of any public officer intrusted for that purpose, an essential part of the constitution of a right, the instrument, attestation, or execution, afford so strong evidence of the facts therein set forth, that they cannot be over-ruled or redargued, otherwise than by a proof of falsehood. This is the case of instruments of resignation, seisin, requisition, consignation, intimation, and some others; and also of all executions upon summonses and letters of diligence. Hence an instrument of requisition was sustained, though it was offered to be proved by the oaths of the procurator and instrumental witnesses, that part only of the sum was required, *Fount. June 30. 1680, Ruthven*, cited in *Dist. ii. p. 242.* But this evidence goes no farther; it is no proof of any extrinsic facts therein asserted which have no relation to the solemnities of the instrument or execution: nor do such instruments afford so much as presumptive evidence of the warrant upon which they proceed; *non enim creditur referenti, nisi constet de relato*. Thus an instrument of seisin proves not the existence of the charter to which it refers, *Dec. 20. 1664, Norvel*. Nor is the intimation of an assignment sustained as a proof of the existence, either of the conveyance it-

self,

self, or of the bond conveyed. Thus also, though an instrument of con-
signation makes a full proof against the wadsetter, that the wadset-fums
have been conveyed by the reverser, it affords no proof against the con-
signatary, that he hath received them, for the reason which hath been af-
signed, *b. 2. t. 8. § 19.*

6. Where a notary is required to make out or extend an instrument upon
any fact which may be proved otherwise than by the instrument, or, in
other words, where an instrument is not considered in law as a solemnity,
it is not admitted *per se* as evidence of the facts therein attested, but must
be supported, either by the testimony of the notary and instrumentary wit-
nesses, or by some other proof, *Feb. 4. 1671, Laury; Br. 111.* Though it
be the duty of notaries to insert a just copy of all the instruments made out
by them, in the protocol given them by the clerk of the notaries at their
admission, yet such instruments as are omitted to be so inserted, have the
like validity with others. All notarial instruments were, by 1540, *c. 76.*
declared null, which were extended by such notaries as had not at their ad-
mission signed their names, according to their usual way of subscribing, in
a book appointed to be kept by the sheriff for that purpose; but that act, if
it was ever in observance, soon fell into disuse. An extract, signed by a
clerk of court, containing the judicial proceedings that have been had in a
law-suit, proves that there were truly such proceedings, because the extract
is by the law presumed to be conformable to the interlocutors and other
warrants of it: but, *first*, where the extract is challenged *de recenti*, the
warrants must be produced, in order to support the legal presumption; and,
2dly, though extracts should afford sufficient evidence of what was pleaded
in judgement by the parties, they are never admitted as evidence of the
truth of those pleas; which must be proved *aliunde* by proper vouchers.
No notarial instrument, attestation by a messenger, or extract signed by a
clerk of court, can be excepted to, upon an allegation that the subscriber
was not a notary, or messenger, or clerk, without a formal action of re-
duction; for the admitting of such objections in the first instance, would
be a great obstruction to the free and ready course of justice: and even in
the case of reduction, the subscribers being habite and reputed notaries,
&c. would sufficiently support those public instruments or attestations a-
gainst that conclusion, *St. b. 4. t. 42. § 12.*

7. In the proof of ancient facts, *ex. gr.* the proximity of blood, primo-
geniture, &c. histories compiled by writers of credit, near that age when
the facts happened, are probative, if they be not contradicted by other hi-
storians as ancient, and of equal authority, *St. b. 4. t. 42. § 16.*

8. Though one's right may be taken away by his own oath, when, upon
a solemn appeal to God, he is forced to acknowledge that his claim is ill
founded, or cut off by a just exception; yet it is a self-evident proposition,
that no man's right can, in the common case, be either proved by his own
oath, or extinguished by that of his adversary; because there are no more
than the averments of the parties themselves in their own favour. From
this rule however there is an exception in the case of oaths which are called
oaths of verity, where the pursuer, confiding in the defender's veracity, or
perhaps sensible that he can bring no other evidence, refers the point in con-
troverly to his oath: for if the defender shall, upon such reference, swear
that the pursuer's claim was either groundless from the beginning, or is
now extinguished by payment, it is entirely cut off by such oath, though
the strongest evidence should be afterwards brought that his claim was good.
In the same manner, the right of a pursuer may be proved by his own oath,
affirming it to be good, when the defender refers the point in issue to it. An
oath of verity has so strong an effect, not because it can work any convic-
tion

tion in the judge from the nature of the evidence ; for no single testimony upon oath, of the most unsuspected witness, can be received as evidence ; but it depends entirely on the transaction that is supposed to intervene between the party referring, and him who deposes, by which they put the issue of the cause upon what shall be sworn. Accordingly the Romans considered such oath as a species of transaction, *l. 2. De jurej.* which consequently had the force of a final judgement : and by our usage also, this contract or transaction is so strictly regarded, that the party referring cannot afterwards, in a civil action, ground a plea upon any deed against the party deposing, inconsistent with his oath, *Kames, 31.* It would indeed seem, that though the Roman law refused to admit of any proof by witnesses in support of a claim that had been sworn to be groundless by an oath upon reference ; yet where it appeared by writings afterwards recovered, of which the party deposing could not be ignorant, that he had sworn falsely, he was not allowed to avail himself of his perjury, *l. 13. C. De reb. cred.* But that doctrine, however agreeable it may have been to equity, was hardly to be reconciled to the transaction implied in a reference to a party's oath ; for after the oath, the only point to be inquired into is the import of it, *quid juratum est.* Since therefore the party referring cannot afterwards controul the oath, either by the production of writings, or the testimony of witnesses, it is a most reasonable practice, for preventing the snares that may be laid for perjury, that the party to whose oath of verity a point is referred, may refuse to swear, till the adverse party not only renounce all other methods of proof, but depose that he knows of none, and particularly, that he is possessed of no probative writing by which he may make good his plea, *St. b. 4. t. 44. § 2.* The party to whose oath a point is referred, sometimes defers it back to the oath of his adversary ; but this is not indulged, unless it appear that the person deferring cannot himself depose in the matter with distinctness ; so that the judge hath a discretionary power to ordain either of the two parties to make oath, whom he has ground to think had the best opportunities of knowing the fact.

9. Stair affirms, *b. 4. t. 44. § 5.* that an oath of verity cannot be put to a party, for supplying the want of a written instrument, if that instrument be not barely a mean of proof, but a solemnity essential to the right, as in feifins, intimations, &c. Thus a debtor, who had made payment to the original creditor, cannot be compelled to swear, whether he knew, when he made the payment, that the sum was assigned to another ; for supposing him to have known that it was, he also knew that intimation was a solemnity necessary for completing the conveyance, without which therefore he was not bound to regard the imperfect assignation, *March 14. 1626, L. Westraw.* But if it be supposed, that the conveyance was properly intimated to the debtor, the written intimation of which was afterwards lost, it is hardly to be doubted, that the assignee might refer to the debtor's oath of verity, that the assignment was completed by an intimation made to himself, and that he was thereby put *in mala fide* to make payment to the cedent. Oaths of verity cannot be urged against a defender in any trial properly criminal, so as to compel him to depose against himself, *vid. infr. t. 4. § 94.* : but in trespasses, where the conclusion draws no deeper than the damage of the person wronged, or a pecuniary fine, a defender may be compelled to swear ; as in bloodwits before an inferior judge, *Feb. 13. 1634, B. of Melrofs* ; in batteries, *Fount. July 24. 1678, Gordon*, cited in *Dict. ii. p. 14.* ; and in injuries verbal or real, *Home, 5.*

10. The oath of a party upon reference, has full effect in favour of or against the litigants, their heirs and representatives : and hence, according to the opinion of Stair, *b. 4. t. 44. § 8.* the oath of a *correus debendi*, made upon

upon the creditor's reference, extinguishes the creditor's claim, not only with respect to the swearer, but as to all the other *correi*; because the law considers him to have put the fate of his whole claim upon the oath of him to whom he had referred it. But it is certain, that an oath of verity, however it may be available to third parties in this particular case, (of which there seems great reason to doubt, notwithstanding the authority of Lord Stair), cannot hurt them in any case, being *res inter alios acta*, l. 9. § 7. l. 10. *De jurej.* Thus, though the creditors of a person deceased may prove their debts by the oath of the executor, in so far as the executor's proper interest extends, since all debts may be proved by the oath of the debtor, yet a debt cannot be proved by the oath of the executor, to have been due by the deceased, so as to affect the shares belonging to the widow, next of kin, or creditors of the deceased. As to these portions of the debt, the executor cannot be considered as debtor, but merely as trustee for the debtors; and no debt can be fixed against a trustee by the oath of the trustee. Hence also, a bankrupt's oath is not effectual to establish a debt as due by him, to the prejudice of his other creditors *. On the same principle, the reference by a bankrupt, to whom a debt is due, to the oath of his debtor, cannot hurt the bankrupt's creditors, l. 9. § 5. *De jurej.* In like manner, a wife's oath, acknowledging a debt contracted by her previously to her marriage, will operate against herself, or against any subject belonging to her not falling under the *jus mariti*, but cannot hurt the husband, *March* 9. 1627, *Ker.* The same doctrine holds in tutors, whose oaths, with regard to debts alleged to have been due by the minor's ancestor, cannot affect the minor; but their oath in relation to acts of administration done by themselves as tutors, must, from the nature of the thing, prove against the minor, that these acts were truly done or performed, *Dec.* 12. 1661, *Hepburn.*

11. An oath, upon reference of the party, is sometimes qualified by special limitations expressed in the oath, which restrict the import of it. It is of great consequence to know, in what cases oaths thus qualified ought to be taken in their full extent as they stand, and in what cases one part of them should be so separated from the rest, so as the party referring shall not be obliged to admit them with all their qualities. Where the quality cannot be separated from the other parts of the oath, it is called *intrinsic*; when it may and ought to be separated, the quality is *extrinsic*. All qualities must necessarily be intrinsic, which, as Dirleton expresses it, are inherent to the matter in dispute, or to the point to be proved. Thus, if a promise to pay a determinate sum be referred to the defender's oath, and he depose that the promise was made under a condition not yet performed, the oath is to be received with the quality adjoined to it; because the condition under which the payment was promised, was *pars negotii*, and so not to be disjoined from the promise itself. This rule nearly coincides with another, that where the quality adjoined to the oath relates precisely to the point which is truly referred to oath, it ought to be accounted intrinsic: and no facts contained in a libel are *in dubio* understood to be referred by the pursuer, but such as he himself is bound to bring evidence of, in order to prevail in his suit; for no man is presumed to refer a fact to the defender, the proof of which lies, by the nature of the action, not on himself, but on the defender. An instance or two may serve to illustrate this. A shopkeeper, who sues for payment of an account within the three years of prescription, must indeed prove the furnishing, but it is the defender, and not he, who must bring evidence that the debt is already satisfied. If therefore the defender should, on a reference to his oath, acknowledge that the goods were furnished, but should adjoin a quality, that he had also made payment, such quality is extrinsic; because it was the furnishing only, and not the pay-

* See *Kames*, *Rem. Dec.* 70. where a contrary decision seems to have been given.

ment, which was referred to oath : if, on the contrary, the shopkeeper should bring his process after the expiration of the three years, he must prove, either by the writing or oath of the defender, not only that the goods were furnished, but that the price is still due ; consequently, though the defender, to whom the debt is referred, should acknowledge the receipt of the goods, yet if he depose at the same time that he paid the price, the quality contained in the last part of his oath, relating to the payment, must be deemed intrinsic, since not only the constitution, but the subsistence of the debt, is understood to be referred to oath, *Fount. Dec. 22. 1702, Nicolson ; July 6. 1711, Clerk*. But in the case of a holograph bond, the granter who is sued upon it, after elapsing of the vicennial prescriptions, falls to be condemned in payment of the debt, if, on a reference to his oath, he shall acknowledge that the debt is genuine, though he adject a quality, that he had made payment of the sum contained in it ; because the bond continues to be a good ground of debt, even after the twenty years, if it be acknowledged by the granter that he subscribed it, 1669, c. 9. ; and for that reason, it is barely the verity of the granter's subscription, and not payment made by him, which is the point in the libel understood to be referred to his oath. Where the quality which is adjected to the oath of a defender does not import an extinction of the debt, but resolves barely into a counter claim or *mutua petitio* against the defender, it is considered as extrinsic : if, for instance, he should swear, that the debt libelled was indeed just, but that he delivered goods or disbursed money on the pursuer's account to the full amount of it ; for every one who lays his plea upon a counter claim, must bring legal evidence to support it other than his own oath, to which therefore it is not *in dubio* presumed that the pursuer hath referred it, *Dec. 23. 1707, Brown*. Nay, though such counter claim were a sufficient ground of compensation, which by the Roman law is accounted an extinction of the debt, the quality has been by our practice adjudged to be extrinsic, *Dec. 9. 1664, Learmont* ; because compensation does not operate *ipso jure* by the law of Scotland *.

12. These observations may be applied with equal force, where the defender refers any point to the pursuer's oath. Thus, where the defence of payment is referred to the oath of the creditor ; if the creditor acknowledge the receipt of a sum from his debtor, but adject a quality, that it was in pursuance of a separate bargain, and not in payment of the debt sued upon, that quality, being a direct denial of the payment, which was the point referred to oath, cannot be separated from the other part of the oath acknowledging the receipt of money from the debtor, *Nov. 27. 1705, Sinclair*. But if the creditor should admit in his oath, that he received a sum from the debtor in payment, it would not avail him, though he should add, that he had afterwards expended that sum on the debtor's account ; for the only point referred to oath being the payment, every quality which can of its own nature be separated from that point, must, as an extrinsic quality, be proved *aliunde* by legal evidence.

13. In the solution of such questions, the nature, both of the debt sued upon, and of the payment made, is to be considered. Where a debt not constituted by writing is referred to the oath of a defender, the quality of payment adjected to it is intrinsic, and so ought to be deemed part of the oath ; for where no written voucher exists against the debtor, he need take no written voucher for the discharge of the obligation ; since his oath, by which alone the constitution of the debt can be proved, ought to be as effectual for proving the extinction of it, according to the rule, *Unumquodque eodem modo dissolvitur quo colligatur, Home, 47*. Yet a defender will not get free from his obligation, in such debts constituted without writing, the

* See *New Coll.* iii. 21.

payment of which ought by their nature to be verified by written vouchers. Thus, a tutrix, to whose oath certain articles of charge against her were referred, was not allowed to adject any quality in order to discharge these articles, the proof of which rested entirely upon her own oath; because tutors ought to make no payments, except in the smaller articles of incident charges, without proper acquittances in writing, *Newbyth, Nov. 15. 1665, Cant. ; Dec. 23. 1707, Brown.* Where a defender acknowledges himself upon oath to be debtor by a written obligation, which subsists during the course of the long prescription of forty years, *ex. gr.* a bond, or a docket subjoined to an account, no quality in his oath, affirming the debt to be extinguished by payment or otherwise, is to be considered as intrinsic; because a debtor, when he pays off, or otherwise satisfies a written obligation, ought to take a proper discharge in writing from the creditor who hath received satisfaction, otherwise he must even rely upon his veracity, *Nov. 21. 1679, Allan ; Dec. 24. 1679, Home.* A defender to whose oath a libel is referred, if he want to adject to his oath particular qualities or circumstances which may tend to elide any part of the libel, may protest for a qualified oath, *i. e.* that the qualities adjected by him may be held as part of his oath; but he must in such case declare in court, when the diet is assigned for his deposing, the special facts which he intends to adject, that the court may, if they be judged relevant, insert them in the act for proving: for the particular circumstances on which the defender is to swear, ought to be specially mentioned in the act of court, which is the warrant for taking his oath; see *Act of federunt, Dec. 7. 1613*, preserved by Spottiswood in his *Practics, p. 244.*

14. Oaths of verity, as they have been now explained, are oaths referred voluntarily by one party in a suit to his adversary; which therefore are finally decisive of the cause. But oaths of verity are sometimes put by the judge *ex officio*, without reference by either party to the other; which, because they are necessary, and not grounded on any implied contract between the litigants, are not final; so that sentences proceeding on them may be declared void upon proper vouchers afterwards recovered; or the cause may be brought from the inferior court to the session, on this ground, That the judge ought not to have ordained the party to swear. Such oaths are commonly put by the court, where there is a *sempilena probatio*, to supply an imperfect or defective evidence by the parties own oath, and are therefore styled *oaths in supplement*; *ex. gr.* in the case of furnishings made by shopkeepers, &c. where the quantities furnished, or the prices of them, are not proved by two concurring testimonies; or in the case of disbursements by a factor or steward on account of his constituent, the nature of which does not well admit of legal evidence; for the articles, if they appear proper to the management, will be sustained, on the steward's deposing that they were truly disbursed by him: but where the imperfect evidence laid before the judge does not, in his apprehension, amount even to a *sempilena probatio*, the parties oath in supplement ought not to be put, *Fount. Dec. 28. 1695, Thomson.* Where one who makes oath as to a debt or payment, either upon a reference by his adversary, or by order of the judge, deposes *non memini*, such oath has, in the common case, the effect of an absolvitory sentence in favour of him who hath sworn, as the oath is no evidence of the point referred; but since, at the same time, it does not import a denial of it, he who made the reference is allowed to support his plea by other methods of proof. Such negative oath, when it is emitted upon a recent fact, of which the swearer cannot, from the circumstances of the case, be presumed ignorant, is considered as a concealing or dissembling of the truth; for which reason, he who swears is justly held as confessed, or *pro confesso*,

confesso, in the same manner as if he had refused to depose, *Feb. 6. 1675, Irvine; Harc. 738.*

15. Where an oath, either of verity or in supplement, is made in general or doubtful terms, particular interrogatories may be put to the deponent, upon a re-examination, for farther clearing the point; but he cannot be examined on any special fact which may involve him in perjury, *Dirl. 453.* Where the oath is clear and particular, a re-examination is not to be admitted on any pretence; otherwise an oath, in place of being the end, might be more properly called the beginning of strife.

16. To prevent calumnious suits and false allegations, oaths of calumny have been authorised, as far back as 1429, *c. 125.* which ordains both parties to swear, either by themselves or their counsel, at the beginning of every cause, that the facts set forth by them in the libel or defences are just and true. This oath *de calumnia* was, in practice, never put to any party, unless where the adverse party demanded it; and it has always had the effect to bar the swearer from insisting in those parts of his libel which he himself has acknowledged upon oath to be false or groundless. But as it is an oath, not of verity, but barely of credulity or opinion, the party who puts it to his adversary is not understood to refer the allegation finally to his oath, or to renounce all other probation, but may nevertheless use what collateral evidence he can bring by writing or witnesses, and may, after all, refer the point to his adversary's oath of verity, *St. b. 4. t. 44. § 20.* Upon this ground, no party is bound to make oath *de calumnia* upon recent facts done by himself, *Act of federunt, Jan. 13. 1692;* seeing such oath would resolve into an oath of verity, which, by the nature of an oath upon reference, excludes all other proof. By the more ancient practice, oaths of calumny might have been put to a pursuer, immediately before sentence, though the points of the libel had been fully proved, *Jan. 13. 1625, Lo. Duffus; Jan. 26. 1628, L. Drum;* for it was deemed contrary to equity that the pursuer should recover a decree upon any claim which he himself believed to be groundless: but now such oaths, when they are put after leading the proof, are used merely to supply the want of legal evidence, and therefore are confined to the case where the proof is not full, *Fount. Dec. 22. 1699, Graham.* Oaths of calumny have no place against a pursuer in an action of reduction-improbation before the writings called for are exhibited; for the pursuer's allegation in the libel, that these deeds are false, proceeds barely on a *factio juris*, which was introduced the more effectually to force the production of the deeds challenged: so that the pursuer, tho' he do not truly believe that the deeds are false, may have good reason to bring that action, *Dalr. 159.* Such oaths have not been much in use since the act of federunt, *Feb. 1. 1715, § 6.;* by which any party, against whom a matter of fact shall be pleaded, may be compelled, without making oath, to confess or deny it: and if it shall appear that he has denied it falsely, he is subjected to all the expence to which the other party has been put through his calumnious denial.

17. Where a party is cited to depose in a cause, whether upon reference by his adversary, or *ex officio judicis*, a certification is either expressed or implied. that in default of his appearance on the day prefixed, he shall be held *pro confesso*, as if he had acknowledged the fact upon oath; which arises from this reasonable presumption, that he declines to appear, from a consciousness that the fact is against him: but in order to subject a party to this penal certification, he must have been either cited personally by a messenger to appear, or *apud acta, i. e.* the day of appearance must have been notified to him by the judge when he was present in court. If the party be forth of the kingdom, or have no fixed or known residence, an edictal citation at the

the market-cross of Edinburgh, and pier and shore of Leith, is sufficient. The effect, however, of being held *pro confesso*, is not in every case so strong as if the party had expressly acknowledged what was referred to his oath; for he will be restored against the certification, upon his shewing good cause why he did not appear, either by proving the execution false, or by giving evidence of his sickness, or other reasonable ground of excuse: and slighter excuses are admitted, where the party offers *de recenti* to purge his contumacy, provided he refund to his adversary the expence he has brought on him by not appearing on the day to which he was cited. But no person can be restored *ex intervallo*, except on the most pregnant grounds; because the adverse party might thereby lose the benefit of other evidence, by which he could have proved his allegation, *ex. gr.* by witnesses dying in the mean time, or leaving the country. Where one is restored *ex iustitia*, because, for instance, the citation given him laboured under some nullity, the effect of his being held as confessed is quite taken off; but if he be restored *ex gratia*, and should die before his making oath, the presumptive confession will militate against his heir, *Harc. 741.*

18. From the general rule set forth, § 8. That no right can be proved by the oath of him who pleads it, an exception is universally admitted in the case of an oath *in litem*, which is an oath deferred by the judge to a pursuer, for ascertaining either the quantity or the value of goods that have been taken from him by the defender, without the order of law, or for fixing the extent of his damages. The oath, as it is the bare affirmation of a party in his own behalf, is not received, except where there is clear evidence that the defender hath been engaged in some illegal act, *ex. gr.* in a spuilzie, or in an unwarrantable intermeddling with the pursuer's goods, or where the public police has made the effect given to that oath necessary, as in the case of the edict, *Naute, caupones, stabularii*: and it hath been introduced, both *per modum pene* to the delinquent, and from the necessity of the case; because the amount of the pursuer's damage does not admit of full evidence in any other way; so that if it were not for this expedient, atrocious wrongs might be frequently perpetrated, without any, or at least without an adequate redress. Because an oath *in litem*, as to the quantities, is in effect an oath of verity, it is not received as evidence, where a concurring testimony of witnesses is brought in proof of them; see *Fount. Jan. 16. 1697, Fea*; and upon this ground, when the oath was found competent for want of such concurring testimony, the court simply deferred the quantities to the pursuer's oath, and made it the rule of the decree condemning the defender, without assuming any discretionary power of taxing or diminishing these quantities by any modification, *Harc. 740. 744.* But the oath being, as to the quality and price of the goods, no better than an oath of credulity or opinion, has been always subject to the modification of the session, *Colvil, Feb. 1581, Balfour; Harc. 740.*: and to prevent the undue advantages frequently taken in that kind of evidence, by the pursuer setting an exorbitant value on his own goods, or swelling his damage too high, he is, by the more modern practice, ordained, before making oath as to the quantities, to exhibit a special condescendence, or particular, of the prices of his goods, and his damage, with the grounds on which it proceeds. This is taxed by the court, *Nov. 19. 1737, Man*, observed in *Dict. ii. p. 11.*; and then the oath *in litem* is admitted, not exceeding that previous modification.

19. It does not appear that the testimony of witnesses was rejected by the Romans in any case, unless when it was used to over-rule the authority of written deeds or instruments, *l. 1. C. De testib.* By our law also, in those ages when the art of writing was in a great measure confined to the clergy,

and when an universal simplicity of manners prevailed, proof by witnesses was admitted in almost every case. It has been already observed, that the possession taken upon heritable rights themselves depended at first on the testimony of the *pares curiæ*; and all moveable debts and contracts might have been proved by witnesses, even the borrowing of money and fidejussory obligations, *Reg. Maj. l. 3. c. 1. § 6. 22. 23.*: but after writing became a more general accomplishment, the lubricity, and uncertain faith of testimonies, made it necessary to bring the doctrine of parole-evidence within narrower limits. This point shall be shortly considered, as it concerns, *first*, the constitution of rights or of debts; and, *2dly*, their extinction.

20. All contracts and bargains relating to moveable subjects, which have known prestations naturally arising from them, are by our law capable of a proof by witnesses to the highest extent; which has been introduced for the more free currency of trade. Under this head are comprised contracts of sale, barter, loan, location, &c. *Jan. 27. 1665, Scot.* But the testimony of witnesses is rejected in all bargains where writing is either essential to their constitution, as in those relating to land; or where it is commonly used, as in the borrowing of money, cautionary obligations, or engagements of relief, *New Coll. ii. 142.*: yet a debt constituted by *mutuum*, where it did not exceed L. 100 Scots, was allowed to be proved by witnesses, *March 5. 1628, Hammermen of Glasgow.* This mean of proof is also received to the amount of L. 100, in verbal and nuncupative legacies, and in such verbal agreements as are not distinguished by the name of any known contract, and where something is to be mutually given or performed by either party, *June 26. 1706, Anderson*; a doctrine probably borrowed from an ordinance published by Charles IX. of France, *anno 1566*, which ordained all contracts for sums exceeding 100 livres to be reduced into writing; but it is absolutely rejected, let the sum be ever so small, in promises which are merely gratuitous, *Jan. 19. 1672, Deuchar.* The reason why a stronger kind of evidence is required to the constitution of verbal agreements, which cannot be proved by witnesses, where the sum exceeds L. 100 Scots, than to that of contracts, seems to be this. In contracts which lay mutual obligations on both parties, naturally flowing from the contracts themselves, their meaning can hardly be misapprehended by witnesses; whereas in verbal agreements, in which the articles to be fulfilled by the parties do not necessarily grow out of the nature of any known contract, but depend entirely on the import of the words uttered by the parties, inattentive hearers may, either by misplacing what was spoken, or by mistaking its true meaning, be apt to change the obligation into something quite different from what the debtor intended. Where writing is required as a solemnity, as in notorial instruments, and executions by messengers, the defect cannot be supplied by witnesses, more than by the oath of the party; *vid. supr. § 9.*; because without these written instruments, the rights, of which they are the solemnities, are null.

21. In the extinguishing of rights or obligations, we observe the rule of the Roman law, That the effect of writing cannot be taken off by the testimony of witnesses; and therefore our general rule is, that where a debt is constituted by writing, no payment, either of the whole or of part of it, can be proved by witnesses, *July 15. 1624, Nisbet*; *July 1. 1626, Hay.* This rule, however, suffers the following limitations: *first*, Where the written obligation binds the party to the precise performance of special facts, the facts performed in consequence of that obligation, *ex. gr.* the delivery of corns, or other mercantile commodities by the debtor, have been frequently adjudged capable of a proof by witnesses, *Nov. 25. 1624, Bisset*; *Jan. 7. 1662, E. Lauderdale*; though one might reasonably conclude, that a

a debtor, where he is bound by writing, ought to take care to get the discharge of his obligation also vouched by writing. *2dly*, Witnesses are received as evidence of such facts as hardly admit of a proof by writing, especially where they import violence or wrong, though such proof should have the effect to extinguish a written obligation. Thus, a bond may be declared null *ex dolo*, upon parole-evidence; and thus a proof, by the testimony of witnesses, was admitted to set aside a bill, even against an onerous indorsee, with regard to facts which were not in their nature capable of a proof by writing, *New Coll.* ii. 73. *3dly*, Payment of a debt, though constituted by writing, whether in grain, or even in money, if it be made, not by the debtor himself, but by another, may be proved by witnesses to the highest extent, *ex. gr.* the rents received from tenants by a creditor out of his debtor's estate: for as the debtor himself had it not in his power to take written vouchers of the payments made by his tenants, it were hard to make him suffer for the tenants neglecting to do it; and such payments are *facti* as to the debtor, which he cannot possibly prove but by witnesses, *Feb.* 4. 1671, *Wishart*; *Jan.* 25. 1711, *Baillie*. As for debts constituted without writing, the payment of the whole debt, if it be within L. 100, or if it should amount to more, any partial payment within that sum may be proved by witnesses, *Jan.* 7. 1662, *E. Lauderdale*; see more upon this head, *supr.* b. 3. t. 4. § 7.

22. The next inquiry proper to this title, concerns the question, Who ought or ought not to be admitted to bear testimony? There is a full enumeration in *Stat.* 2. *Rob. I. c.* 34. of such as were then incapable of being admitted as witnesses; but our later practice has varied from the old in many articles. Objections against the hability of witnesses arise either, *first*, from their state, with respect either to age or sex; or, *2dly*, from their moral character; or, *3dly*, from such connection between the witness and the party as may create partial affection, or undue influence. As to the *first*, The testimony of pupils is rejected, because they are presumed ignorant of the nature, and incapable of the impressions of an oath: but a minor *pubes* may be received as a witness, in relation to occurrences which happened during his pupillage, if he was, at the time of such occurrences, of an age sufficiently capable of distinguishing facts. Women are admitted to bear testimony in criminal trials, *Pr. Falc.* 74.; in clandestine marriages, *July* 31. 1732, *Barber*; in facts happening during childbed, *Fount.* *Dec.* 7. 1686, ; in the maltreatment of wives by their husbands, and other facts of a domestic nature, *Fount.* *June* 15. 1698, *Duch. of Gordon*; *Fount.* *Nov.* 23. 1698, *Fletcher*; *Fount.* *Dec.* 17. 1709, *Neulson*: but not in bargains proveable by witnesses, *July* 21. 1675, *Wilkie*; nor in settling of marches, *Feb.* 1730, *Dunbar*, collected in *Dict.* ii. p. 529.; nor in actions for voiding deeds *ex capite lecti*, *Jan.* 13. 1736, *Wifeman*, collected *ibid.*; nor in questions relating to the onerous cause of deeds, *June* 18. 1706, *Birrel*. It is absurd to affirm, that the law hath rejected the testimony of women, in these last instances, from any supposed incapacity of judging rightly concerning them; since it allows them to be named tutrices, and even sole tutrices; an office which requires a much greater degree of judgement, than understanding the import of the most intricate of the above particulars. It would therefore be more agreeable to the character justly due to the softer sex, in point of capacity, to say, not that women are debarred, but that they are excused from bearing testimony in courts of law, except where there is a penury of witnesses, in which case their giving evidence is necessary*.

23. On the score of immorality or a bad character, the testimony of infamous persons is rejected, *i. e.* of those who have been either convicted of crimes which by the law infer infamy, or who have been declared infamous

* By our more recent practice, the testimony of women is admitted in every case.

by a sentence of the session or justiciary, *Jan. 31. 1671, L. Milton*. Those are also improper witnesses, who have been convicted of any gross crime which may infer a disregard to an oath, *ex. gr.* a known habitual liar, a scoffer at religion, one guilty of falsehood or oppression, or who has accepted of bribes, or concealed the offer of them, or who has prevaricated or deposed inconsistently, *St. b. 4. t. 43. § 7*. But other crimes which are more consistent with the reverence of an oath, though they infer *infamia facti, i. e.* infamy in the opinion of the virtuous part of mankind, are no sufficient ground for rejecting the testimony of the persons convicted of them.

24. As for the third class of objections, partial affection and undue influence, persons are rejected as witnesses in the causes of certain near relations. Mackenzie, § 8. *b. t.* considers all those who are within the degrees of consanguinity or affinity forbidden in marriage, to fall under this objection; and Sair, *b. 4. t. 43. § 7*. extends it still farther against cousins-german, at least where other unsuspected witnesses may be had. It would appear from the analogy of our law, however, that all such relations as may lawfully sit in judgement in one another's cause by 1681, *c. 13*. may be also received as witnesses for them; for that connection which is presumed to give a wrong bias to a person acting as a judge, may be supposed to have the same effect upon him when appearing as a witness. Agreeably to this, no relations are deemed conjunct persons in the sense of the act 1621, but those who may be declined or excepted to as judges, *Feb. 8. 1712, Lo. Elibank*. The later decisions too, in so far as they relate to the ability of witnesses, favour this opinion. Thus the testimony of uncles-in-law is admitted, *Br. MS. Nov. 30. 1716, Moncrief*; but that of brothers-in-law rejected, *Jan. 15. 1679, Brown*. Though one cannot be produced in behalf of his near kinsman, he may against him, *Nov. 24. 1709, Monteith*; in which case the kinsman against whom he is brought, though he could not have produced him himself, may, during the examination, cross-question him, that he may come at the truth the more effectually. Wives and children cannot be compelled to give testimony against their husbands and parents, *ob reverentiam personarum, et metum perjurii, Fount. July 23. 1700, Erskine; Fount. eod. die, Drummond*. Children, however, have been admitted as witnesses, in an action brought by the mother against her husband for a separate maintenance, on the account of his harsh treatment of her, there having been no servants at the time in the family by whom the fact might have been proved, *Falc. i. 249*. A witness is rejected upon his propinquity of blood to him who produces him, though he stand in as near a relation to the adverse party who makes the objection, *New Coll. i. 48*.; inasmuch that his testimony is not received, even *cum nota, New Coll. ii. 31*. It is a common opinion, that the testimony of a bastard who is related to a party by the father's side, ought to be received in behalf of that party, though the father should have acknowledged him for his son; because a bastard hath in the judgement of law no father, and consequently no kinsman by the father. But though that *filius juris* holds, when the question relates to the civil rights of lawful children; yet it is observed, that natural affection operates frequently with as great force upon bastards, as on lawful children; and it is the bias or partiality produced by natural affection which alone disqualifies near relations for being judges in the causes of each other. The decisions, however, on this point, none of which are of a late date, differ. Bastards were admitted to bear testimony, *Hadd. Nov. 22. 1622, Grant*; *Nov. 6. 1624, L. Bonington*; but they were rejected, *Hadd. Nov. 6. 1610, L. Lyes; Hadd. Dec. 1610, Aikman*.

25. Tutors and curators are, from a like suspicion of partial favour, accounted improper witnesses for their minors; and advocates and agents for their

their clients, in the causes in which they are employed, but not in other causes. Tutors, however, may bear testimony against their pupils or minors; and advocates and agents against their clients. These last cannot indeed be compelled to discover upon oath such secrets of their client's cause, as they may have learned from himself; but in the case of an exhibition of writings, an advocate or agent may be compelled to swear to the contents of a deed, though it should have been shewed to him by his own client, *Dec. 21. 1675, Cred. of Wamphray*. If one cannot be witness in a cause where his near kinsman is to gain or lose by the decision, far less can his testimony be received, where his own pecuniary interest is concerned; yet burgesses may be admitted in questions concerning the revenue of the community; for these are the rights, not of the individual burgesses, but of the corporation as such, *June 13. 1672, Bor. of Inverness*: but where the private burgesses have any pecuniary interest at stake, their testimony is rejected; see *Fount. Jan. 17. 1679, Lo. Hatton*. The testimony of menial or domestic servants is rejected, on account of their masters influence over them, which tends to cramp or restrain that freedom that witnesses ought to be possessed of at making oath; but masters may bear testimony in behalf of their servants. Tenants who had no written tacks, and so might be removed at the will of the landlord on the elapsing of every year, were, by our former practice, considered as inhabile witnesses for their landlord, on account of their dependence on him, and his influence over them: but as little of that influence now remains, it was established as a rule, upon the occasion of a question between Colonel Erskine and Blackader, *Jan. 15. 1735*, That no such objection should be sustained for the future, against the testimony even of such tenants as possessed by verbal tack. Artificers, and labourers hired by the day or week, are deemed competent witnesses for the person who employs them, *Fount. Feb. 26. 1685, Erskine*.

26. In occult or more private facts, where there must in most cases be a penury of unexceptionable witnesses, some of the disqualifications above mentioned are overlooked. Thus domestic servants are received as witnesses in transactions that are managed within doors, *Dec. 31. 1708, Smith; New Coll. ii. 70.*: and even brothers and sisters may be produced in clandestine marriages, where frequently no other witness is called to attest them, *July 31. 1732, Barber; Home, 107*. Such witnesses are said to be admitted *cum nota*; and their testimony, though it be not totally rejected, is not so credible as that of other witnesses, but is to have such a degree of weight given to it, as the judge shall think it deserves. And indeed there are some witnesses, who, though they be liable to no legal exception, may be more suspected than others, *ex. gr.* near cousins, intimate acquaintance, tenants, and even vassals, where the superior is a person of power or interest; so that there is in most cases place for the rule, *Testimonia ponderanda sunt, non numeranda*.

27. None of the objections derived from partial favour, undue influence, or the witnesses immoral character, can be moved against instrumentary witnesses, *i. e.* witnesses who attest the subscription of parties; for these are called for that purpose, by the joint consent of both parties, which bars all challenge: but neither pupils, *Dec. 12. 1738, Davidson*, nor women, can be instrumentary witnesses; nor creditors nor executors, where the testament or bond attested is granted in their own favour, *Hope, Testament, July 1. 1613, La. Innerleith; Nov. 21. 1627, Robertson*. As parties, when they concur in calling the instrumentary witnesses, have no other view but to get their own subscription attested, and of consequence the genuineness of the deed supported, they may therefore object to the ability of those witnesses upon any sufficient ground, if they should be afterwards produced for the

proof of extrinsic facts that may be pleaded for setting the deed aside, *ex. gr.* for proving the state of the granter's health when he signed the deed, *June 19. 1713, Cred. of Orbiston.*

28. All witnesses must, before they make oath, be purged of partial counsel; that is, they must depose that they can neither lose nor gain by the event of the suit, nor have given advice how to conduct it; that they have not been taught how to swear; that they have got no bribe, nor promise of bribe or good deed, from any of the parties; and that they bear no enmity or ill-will to either of them. These particulars, because they are put to the witness previous to his making oath, are styled, *Initialia testimonii*. If a party bring present evidence of a witness's partial counsel, in any of the above points, the examination cannot proceed, though the witness should offer to purge himself by oath; but bare expressions of ill-will, where the enmity hath not been pushed forth into action, is not sufficient to stop the examination. The character of a witness cannot be justly impeached, though he own he had been prompted how to swear, unless he has also undertaken to swear as he had been prompted; yet the testimony of such witness is rejected, *in odium* of the party who had thus attempted to corrupt him, *Jan. 31. 1671, L. Milton*. The objection which is considered by some writers as one of the *initialia testimonii*, that the witness has told what he is to depose, is seldom sustained; for one of the most entire character may, without any reproach, acquaint his friend, either before or after his citation, what facts are consistent with his knowledge, *Gosf. Nov. 9. 1669, La. Torwie; Fount. Feb. 13. 1679, contra cited in Dict. ii. p. 526*. And indeed it is often necessary for a party to inquire at third persons what they know of the matter in dispute, that they may be the better directed whom to produce as witnesses.

29. Where one offers a relevant objection against a witness, of which he cannot bring instant proof, it can be no bar to his examination; but in such case, the party objecting may, immediately before the party makes oath, protest for a reprobator, *i. e.* protest that he may be allowed afterwards to bring evidence of the witness's enmity to him, or of his partial counsel in some other article. Actions of reprobator were admitted by our former practice, though no such previous protestation had been entered, so long as sentence was not pronounced in the principal cause in which the witness had deposed: but in the case of the intermediate death of other witnesses who could have sworn to the same facts, that action was not admitted without such previous protestation, even where the principal cause was still pendent, *Fount. July 13. 1700, Goodin*; for there the producer of the witness, who saw no objection offered against his testimony, had reason to rest upon his evidence; whereas if protestation had been entered by the adverse party, he might have brought others then alive in support of his allegation, *Feb. 6. 1679, Irvine*. But by the present practice, which is not so favourable to actions of reprobator, they are received in no case where they have not been previously protested for, even though he who produced the witness cannot shew that he has suffered any prejudice by the intermediate death of others, *Home, 46.*; from a presumption, that the party who insists for the reprobator, if he truly had a sufficient objection against the witness, would have entered the usual protestation before his making oath. When protestation is properly made, the action of reprobator is competent, even after sentence pronounced in the principal cause, *June 26. 1623, Cochran*; and in such case, that action may be properly included under rescissory actions; because the plain intention of it is, to set aside a decree grounded on the oath of an inhabile witness: but commonly the decision in the principal cause is put off till the reprobator be discussed.

Where

Where the principal cause is determined before discussing the reprobator, the party insisting must consign a sum, at the discretion of the judge, which he forfeits, if he fail to make good his ground of reprobator, *Dec. 3. 1635, Robertson*. This action must have the concurrence of the King's Advocate, because the libel concludes, that the witness is guilty of perjury; and for this reason, the witness who is excepted to as inhabile, must be made a party to the suit, *Nov. 9. 1676, Paterson*. The ground of reprobator may be proved, not only by the oath of the party who produced the witness, to which mean of proof some of our ancient writers have confined it, but also by the testimony of witnesses, provided these witnesses be *omni exceptione majores*, *July 14. 1671*, and *Feb. 20. 1672, L. Milton*.

30. The interlocutory sentence or warrant of the judge, by which parties are authorised to bring their evidence, is either by way of act, or of incident diligence. In either case, where a witness does not appear on the day fixed by the warrant of citation, a second warrant is granted, called letters of *second diligence*, which is of the nature of a caption, and contains a command to the messenger, whose name is filled up in the warrant, to apprehend him, and bring him before the court. If the witness answers on the first warrant, he is intitled to his expence from the party who cites him, which is ascertained at a certain rate *per diem*, as he travels on horseback, or walks a-foot; but if the party is put to the trouble of obtaining a second diligence, the witness must bear his own charges.

31. By the ancient usage, parties were neither allowed to be present at taking the proof, or at the court's taking it under consideration; nor had they access to see the depositions or written testimonies of the witnesses, lest they might be cramped in deposing, from the apprehension of drawing on themselves the resentment of others on account of what they had deposed, *St. b. 4. t. 46. § 17*. But by 1686, *c. 18*. the witnesses are ordained to be examined in presence of the parties, to whom the clerks to the process are directed to communicate the depositions. If a witness be unable to travel, or reside in foreign parts, a commission is granted by the court for taking his oath at his own domicile; and in such case, the nomination of the commissioners for examining the witnesses cited by the one party, is commonly given to his adversary; and failing these, the magistrate, or judge of the jurisdiction where the witnesses reside, is generally named in their place *sub-fidiariè*. A witness who swears either before the court, or upon commission, may, *ex recenti*, demand to have any mistake rectified, which he apprehends he may have made at emitting his oath; but it might be of dangerous example, if law allowed him to insist for a re-examination upon that pretence, *Fount. July 16. 1701, Irvine*. If after an action is commenced, either party apprehend himself in danger of losing the benefit of a witness's testimony, through his old age or some growing infirmity, the court are in use to examine the witness immediately, and ordain his oath to be lodged with the clerk of process, to lie *in retentis*, or with the other writings which concern that process, that it may be considered along with the rest of the proof, when the cause comes to be advised by the court, *Fount. Dec. 9. 1685, Hamilton; Fount. Feb. 28. 1696, E. Lauderdale*.

32. Where a party, to whom a proof is granted, brings none within the term allowed by the warrant, an interlocutor is pronounced *circumducing the term*, *i. e.* declaring the time elapsed, without any proof brought by him who had demanded it, and precluding him from bringing farther evidence. The word *circumduce* is made use of nearly in the same sense in *l. 73. § 1. 2. De judic*. Where evidence is brought in proper time, if it be upon an act, the cause is called after elapsing of the term, not before the Lord Ordinary who was originally judge in the cause, for he ceased to be Ordinary

in the cause after pronouncing the act or warrant for proving, but before the Ordinary upon the acts for the time, who 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, which is usually granted on points which do not exhaust the main question in dispute, the relevancy or sufficiency of it may be determined by the Ordinary in the cause.

33. Some lawyers reckon proof by verdict, or by the sentence of a jury, to be a distinct species of proof. But such sentence has no better title to that appellation, than the sentences of any judge; for the jury, in matters triable by jury, are truly the judges of the evidence laid before them. The sentences of a jury are indeed sometimes final, and so cannot be traversed by any court; in which case they get the name of *probatio probata*: but that in reality means no more, than that such sentences are not liable to any review; which is a character equally applicable to all sentences or decrees of any court, from which there lies no appeal.—Beside the above-mentioned ordinary means of proof, Lord Stair mentions two, which he calls *extraordinary*, without the intervention either of writing, oath, or witnesses.—*First*, Proof by a notoriety of the fact on which the libel or defence is grounded, *St. b. 4. t. 45. § 4.*; that is, that the fact is notoriously known, either to the whole nation, or to the neighbourhood; and this evidence is not elided, though some few individuals should be ignorant of that fact. The knowledge which the judge himself may have of the truth of the fact makes no proof; for he cannot be both judge and witness in the same cause, and he must give forth his sentence *secundum allegata et probata*; but his knowledge of the notoriety is sufficient, unless it be over-ruled by pregnant contrary evidence. Thus, it is held for proved, barely from notoriety, that such lands lie in such a county, or are subject to such a jurisdiction, or that a wife who sues her husband stands to him in the relation libelled.—The *second* extraordinary mean of proof mentioned by Stair, is, proof by the confession of the party against whom any fact is to be proved. By act of federunt, *Feb. 1. 1715, § 6.* formerly quoted, if the party, on being required either to confess or deny the fact, refuse, and if the fact be afterwards proved, he shall be condemned in costs. In the absence of the party himself, the judge may put it in like manner to the party's advocate to confess or deny; and his judicial confession, either in his pleading, if it be minuted by the clerk, or in the informations, petitions, or answers in the cause, is sufficient evidence that the fact is against his client, *St. b. 4. t. 45. § 5. 6.*

34. In all inquiries into facts, that kind of proof ought to satisfy the judge, that is adapted to the nature of the facts of which evidence is to be brought. Where facts therefore do not admit of a direct proof, the laws of all nations allow of a proof by circumstances and presumptions, which in many cases carries as high a degree of conviction as the direct. Presumptions are consequences drawn from facts notorious, or already proved, which infer the certainty, or at least a strong probability, of other facts to be proved: and hence presumptive evidence is by Aristotle, and after him by Tully, called *artificial*; because it requires a *discursus*, or reasoning, to draw the conclusion from the premises.

35. Presumptions are either *juris et de jure*, or, 2dly, *juris*, or, 3dly, *hominis vel judicis*. The presumption *juris et de jure*, takes place where law or custom establishes the truth of any point on a presumption, so that its effect cannot be traversed by any contrary evidence. Thus the testimony of a witness who forwardly offers to depose without being cited, is, from a presumption of his partiality, rejected, let his character be ever so entire. Thus also a minor, because he is presumed, *presumptione juris et de jure*, incapable

incapable of managing his own affairs, is deprived of the power of acting, without the consent of his curators, though it should be offered to be proved that he is master of the greatest prudence and discretion. Many such presumptions are established by the Roman law, and many by our statutes. Gifts of escheat taken in name of the rebel, are presumed simulate and fraudulent; and on that presumption are declared null, 1592, c. 145. Gratuitous deeds are declared null, in a question with prior creditors; upon a presumption that they are granted to disappoint or defraud them, 1621, c. 18. And all deeds of alienation of heritable subjects granted on death-bed may be declared null, from a presumption, that persons under such heavy bodily distress, cannot act with that firmness and judgement that they ought to be possessed of, in granting deeds of such importance; see 1696, c. 4. and 1690, c. 21.

36. *Præsumptio juris*, is that which is in general terms established by our law or decisions as a presumption, but without founding any consequence upon it, or statuting *super præsumpto*; so that it is taken for true, only till the contrary shall appear to the judge to be supported by stronger evidence. Of this kind the following are instances: The property of moveables is presumed from the possession of them; he who makes payment of a sum on account of interest, is presumed to be debtor in a capital sum corresponding to it; the entertaining of one who is come of full age at bed and board, is presumed to be a gift, if there were no previous bargain for board, &c. It is obvious that many of the *præsumptiones juris*, are not presumptions grounded on positive facts, but rather general rules, which, though they are in the form of words positive, may be easily converted into negative propositions, and derive their force entirely from the want of contrary proof. Thus the rules, That every man is presumed honest, That immunity from servitude is presumed, That life is presumed, with many others of the same kind, are, in other words, that guilt is not presumed, nor servitude, nor death: which propositions are, without the aid of any presumption, supported upon this obvious principle, That without evidence brought of guilt, or of servitude, or of death, by the pursuer who grounds his plea upon any of these allegations, the defender falls to be absolved. All *præsumptiones juris*, whether they be of this last kind, or proper presumptions arising from the supposition of certain facts, may be elided, not only by a direct contrary proof, but by contrary pregnant presumptions: for a presumption is nothing more than a conjecture, or strong probability, inferred from what commonly happens; and all conjectures built upon common events must lose their force, when others arising from extraordinary or uncommon occurrences afford a stronger degree of probability to the contrary. Many instances accordingly occur, both in the Roman law, and in our own practice, Dec. 7. 1678, *Sands*; Dec. 20. 1710, *Henderfon*, &c. in which the presumptions of law have been elided by more forcible presumptions on the other side. The legal presumption for life was, by a late decision, *New Coll.* ii. 268. over-ruled, barely upon fame or common report; which itself is no more than a presumption that may be elided by a direct contrary evidence.

37. The *præsumptiones hominis vel judicis*, differ from the *præsumptiones juris* only in this, that the *præsumptiones juris* are those which are laid down in our statutes, or established by custom or decisions; whereas the last daily emerge from the various circumstances of the special cases, and on which it is the duty of a judge to lay more or less weight, according to the several degrees of evidence which they carry with them. They have frequently the force to over-rule a *præsumptio juris*, especially when it is of that kind which owes its whole force to the want of contrary evidence. Thus a deed

may be declared forged, from a concurrence of circumstances tending to invalidate it, notwithstanding the presumption of law, that all deeds are genuine.

38. A *fictio juris* is somewhat quite different from a presumption. Those things are presumed which are likely to be true; but a *fictio juris* is a supposition of law, that a thing is true, which is either certainly not true, or at least is as probably false as true: and it is defined by some doctors, An assumption of falsehood for truth in a possible thing, that it may have the effect of truth, in so far as is consistent with equity. Thus, in the Roman law, one was by adoption held for the son of him who adopted, though he was not his son: and because there is no place for fiction but in things possible, no person could adopt, who was not at least eighteen years older than him whom he adopted. One instance, however, occurs of a fiction of a thing impossible, which obtains both in the Roman law and ours, viz. that an heir is *eadem persona* with his ancestor. By the law of Scotland, deeds, against which a decree of certification is awarded in an action of reduction-improbation, are adjudged to be false *fictio juris*, though the most convincing proof should be brought, that they had once existed, and were genuine: but because fictions of law must be limited, in their effects, to the purposes of equity for which they were introduced, that fiction operates only in favour of the pursuer who called for the production of the deeds; for they continue to have the same legal validity which they had formerly in all questions with third parties.

39. Before proceeding to the next title, which treats of final sentences or decrees, a short account may be given of the method competent by the law of Scotland, of reviewing interlocutory sentences pronounced by inferior judges, before they come the length of an extracted decree. The remedy of appeal from the sentence of an inferior court to a superior, has been admitted by the laws of all civilized states; but that law-suits might not be drawn out to perpetuity, that remedy was in most nations laid under considerable restrictions, especially in point of time. By the *jus antiquum* of the Romans, parties were understood to acquiesce in the sentence of the inferior judge, if appeal was not entered within two days after pronouncing it, *l. 1. § 5. 11. Quand. appel. fit*; but the time was enlarged to ten days, by *Nov. 23. c. 1.* Appeals were by our ancient law styled, *falsing of dooms*, *2. Attach. c. 13.* They were to be entered immediately after doom or sentence was pronounced, *1429, c. 117.* and they were admitted, not only against definitive, but interlocutory sentences, *1471, c. 42.* But because the forms of this process were both tedious and expensive, as appears by a complaint recited in *1503, c. 95.* it was enacted by *1487, c. 105.* That the party who apprehended himself hurt by a sentence, if he did not chuse to pursue the former method, might bring his complaint against the inferior judge to the King's council, who were authorised to set aside the sentence, where it appeared to them irregular or iniquitous. From the date of this statute, the old form of appeals fell gradually into disuse, and at last gave way to the present method of redress, by advocacy, suspension, and reduction. The two last are the only remedies received by our law after decree; and therefore the suspension and reduction of decrees shall be handled under the next title, which treats of the doctrine of decrees. This title shall be concluded with some account of advocations, which are only competent while the cause is depending before the inferior court.

40. A party, who has either in due time and manner excepted to the jurisdiction of an inferior judge, before whom he had been cited to appear, or who thinks himself aggrieved by any interlocutory sentence pronounced in the cause, may, at any time before decree, apply to the court

court of session for letters of advocation, that is, as may be gathered from the name, letters for calling the action from the inferior court to themselves *. The grounds therefore on which a party may pray for these letters, are incompetency and iniquity. Advocation on the head of incompetency is regularly pleadable by the defender only; for a pursuer, who voluntarily brings a defender before a judge, in a matter which admits of a prorogated jurisdiction, appears thereby to pass from all objections which he might otherwise have urged against the competency. Under *incompetency*, in this sense of the word, is included not only want of jurisdiction in the judge, but every ground for declining a jurisdiction though in itself competent, flowing either from privilege in the party, or suspicion of the judge. Advocations may be granted by the session, as the supreme civil court, upon incompetency, even in causes of which they themselves have not the immediate cognisance, *ex. gr.* in maritime causes; and by the former practice, in causes which were entirely without their cognisance, *supr. b. 1. t. 3. § 34.* because the competency of a court is a point of civil jurisdiction. But in these they decide only upon the ground of advocation; and if they pronounce the court incompetent, they remit the cause itself to the competent court; if they repel the ground of advocation, they send the cause back to the court from whence it came. Advocations are sometimes applied for on the head of intricacy, where the cause is involved in difficulties, by the variety either of facts or points of law: and this head coincides nearly with that of incompetency; for though the inferior court should be competent to causes of the same general nature, yet advocation may proceed, because that particular action is, from its intricacy, considered to be above the cognisance of inferior judges.

41. Where the defender has once acknowledged the judge's authority, in a cause in which his jurisdiction may be prorogated, advocation is not received, but on the head of iniquity; and this ground may be pleaded either by the pursuer or defender. A judge is said to commit iniquity, when he repels a plea or defence which he ought to sustain, or sustains what he ought to repel; or, in general, when he either does, or neglects to do, any thing in the exercise of his jurisdiction contrary to law. If the Ordinary, to whom a bill of advocation is preferred, shall pass it, that interlocutory sentence, or as it is called, deliverance, is a warrant for issuing letters of advocation from the signet, which have the effect, after being intimated to the inferior judge, to stop his farther proceeding in the cause, unless it shall be afterwards remitted to him by the session. If he shall presume to go on, notwithstanding the intimated advocation, his sentence is null; and both he, and the private party insisting, are punishable by that court for contempt of authority. After advocation, the cause is carried on before the session, precisely by the same forms as if it had been originally brought before them: for which reason Lord Stair considers advocations as actions, and gives them the name of *actions extraordinary*, or *in the second instance*, to distinguish them from those which are brought directly before the session, by a summons issuing from the signet.

42. Though the ground on which advocation proceeds is simply personal, respecting that judge alone who is incompetent, or hath committed iniquity; yet letters of advocation carry an injunction, by their usual style, not only to the judge from whom the cause is advocated, but to all inferior judges, not to take cognisance of it; and even where these words of style happened to be omitted, a general prohibition was adjudged to be implied

* Advocation is competent at any time before the decree is extracted, *Nov. 1766, Wright against Taylor.* See *Fount. July 27. 1711, Scot.*

in the nature of an advocation, *July 18. 1623, Cranston*. But an advocation not intimated, can neither restrain judges from deciding, nor parties from insisting; for judges are, by their office, bound to take cognisance of the causes regularly brought before them, till they be interpellated by the order of a superior court.

43. That the session may not waste too much time in causes of smaller importance, no cause for a sum below two hundred merks Scots can be advocated to that court, from any inferior one which the law has made competent to it, 1663, *c. 9.*; so that parties have no remedy against the iniquitous proceedings of an inferior competent court, in lesser causes, till after decree. But causes carried on before an incompetent judge fall not within that statute; and therefore may be carried from the inferior court to the session, let the subject be ever so inconsiderable: and were it not for this limitation, inferior judges might stretch their jurisdiction in lesser causes, without any possibility of controul. This statute is now, by the aforesaid jurisdiction-act, 20^o *Geo. II.* extended to advocations of actions for sums not exceeding L. 12 Sterling.

T I T. III.

Of Sentences and their Executions, and of Decrees-arbitral.

THAT property may not continue for ever fluctuating and precarious, which must have been the case if debateable points might, after receiving a definitive judgement, be brought again into question at the pleasure of either of the parties, every state has affixed the character of *final*, or *irreversible*, to certain sentences or decrees, which in the Roman law are called *res judicate*, and which exclude all rehearing or review, either of the court that hath pronounced the sentence, or of any other.

2. As superior courts have an inherent right of reviewing the decrees of inferior ones, except in so far as it may be limited by statute or usage, it is the supreme court alone, or the court of the highest resort, whose judgements are irreversible. Upon this ground, the decrees of the court of session, though it be the supreme court of Scotland in civil causes, have not the full effect of *res judicate* as to the parties in the suit; because they are, since the union of the two kingdoms in 1707, subject to the review of the House of Lords of Great Britain. But by a rule of that sovereign court, *March 24. 1725*, the time of receiving petitions of appeal by them, from the decrees of session, is limited to five years; *vid. supr. b. 3. t. 7. § 21*. When a writ of appeal to the House of Lords, against a judgement of the session, is served upon him in whose favour the judgement was given, and who is called *the respondent*, it hath the effect to stay execution of the sentence, till the appeal be either discussed by that House, or passed from by the appellant.

3. The decrees of the session are given forth, either *in foro contentioso*, where both pursuer and defender have pleaded judicially on their several interests, or in absence of the defender. Those pronounced by the court *in foro contradictorio*, cannot, in the general case, be brought under their review, either upon points which the party neglected to insist upon before sentence, which are called *Competent and omitted*, or on points founded on by the party, and declared insufficient by the judge, which get the name of *Proposed and repelled*, 1672, *c. 16. § 19*. in the branch of the act concerning the session. But a decree of session, though *in foro*, is reversible by the court, when it labours under essential nullities; *ex. gr.* when it is *ultra petita*,

tita, i. e. when more is awarded to the pursuer than is contained in his libel, or when the sentence is not conformable to its grounds and warrants, or when it is founded on an error in calculation, &c. In the opinion of Stair, *b. 4. t. 1. § 44.* and of Mackenzie, *§ 1. b. t.* the session may also reduce their own decrees upon the emerging of any new fact or voucher in writing, not pleaded formerly by the party, if it shall appear that it was not known to him before decree, or that he did not omit it wilfully, with a view to protract the cause: nor is this opinion in any degree inconsistent with the above-quoted act of regulations 1672; for a defence of which a party is ignorant, and which therefore it is not in his power to plead, cannot be called Competent and omitted. No defender is intitled to the plea of *res judicata*, or that the cause has been already finally determined, unless the decree founded on in proof of that allegation have been given forth in a process litigated between the same parties, or their ancestors or authors, respecting the same subject, and proceeding upon the same *media concludendi* that are contained in the subsequent action brought against him by the pursuer.

4. The rule, That all final sentences are considered in law as grounded upon truth and justice, *Res judicata pro veritate habetur*, hath place universally within the limits of the state whose judge pronounces the sentence, whether the obtainer of the sentence be demanding the execution of it from another judge within the dominions of the same state, or be defending himself against an action pursued by his adversary, who complains of the decree as unjust. There could therefore be no limitation of this rule by the Roman law, in either of these cases; because as the whole known world was subject to the Roman empire, the judgement of the supreme court of one province must have had all the effects given by their law to a *res judicata* in any other province of that empire: but now that Europe is divided into many separate independent kingdoms, the question, What effect a *res judicata*, or definitive sentence, pronounced in the dominions of one sovereign state, ought to have in any other? may be resolved by distinguishing between the *actio* and the *exceptio rei judicate*. Where the obtainer of a decree, given forth in one state, demands the execution of it, by an action brought before the court of another state, that court, who are not bound to interpose their authority to it *ex necessitate*, but only *ex comitate*, have a right, previously to their interposition, of inquiring into the merits of the question in dispute, that they may form a judgement, whether there be sufficient ground, either in law or in equity, for awarding execution upon the decree, *Kames, 21.; New Coll. i. 173. **; and indeed the pursuer, by applying to the court for their aid, virtually submits the justice of his demand to their determination. But where one who hath been condemned by a sentence which hath received full execution in one state, brings a process for redress in another, the defender, in whose favour the decree was given, and who thereby acquires a right that cannot lawfully be taken from him, but by a court who hath the power of reversing the decree, excludes the action by his *exceptio rei judicate*; for he does not in such case apply to the court for its aid, but, on the contrary, rests entirely on the sentence recovered by him in a foreign court confessedly competent in the cause; and so in effect excepts to the jurisdiction of the judge before whom he is called, as having no authority over that court, nor any right of reviewing its sentences, *July 21. 1731, Hamilton, collected in Dict. i. p. 324.*

5. As parties might, by our former practice, reclaim against the sentences of the session, at any time before extracting them, without limitation, their

* This last-quoted decision was reversed upon an appeal; but the defenders did not appear.

judgements were not final till extract : but by act of federunt, July 9. 1709, no sentence pronounced in presence of the whole Lords, or in the inner-house, can be reclaimed against, after six federunt-days from its being signed ; and by a posterior act of federunt, Nov. 26. 1718, only one reclaiming petition is to be received against an interlocutor of the inner-house ; so that now an interlocutor *in presentia*, if it be not either reclaimed against within the limited time, or if it be affirmed by a second interlocutor upon a reclaiming bill, has, even before extract, the full effect of a *res judicata* as to the court of session, though it cannot receive execution till it be extracted. Sentences, when pronounced by the Lord Ordinary, have the same effect, if not reclaimed against by a petition to the court, as if they had been pronounced *in presentia* of the whole Lords ; because parties are in that case understood to acquiesce in the judgement of the Ordinary : and therefore in all extracts of decrees, even when pronounced by an Ordinary, the style is the same as that of a decree *in presentia*, the Lords declare ; the Lords adjudge. All petitions to the court, against an interlocutor of the Ordinary, must be preferred within eight federunt-days after it is signed, *Act of federunt*, July 9. 1709 *.

6. Decrees in absence of the defender, have not the force of *res judicata* against him ; for where the defender does not appear, he cannot be said to have referred his cause to the decision of the court, in virtue of the contract implied in litifcontestation, *vid. supr. t. 1. § 69. 70.* which is the true ground upon which a decisive sentence becomes final : the defender, therefore, may be restored against such decree ; but if he was personally cited, he must first make payment to the pursuer of the costs he has incurred in recovering it. It has been already observed, that where a defender, without offering peremptory defences, passes from his appearance before litifcontestation, the decree pronounced afterwards in the cause is considered as in absence, *supr. ibid.* If, in the defender's absence, decree be given against the pursuer, it has as strong an effect as if the defender had appeared ; because the pursuer, by bringing his action before the judge, is understood to subject himself to his determination ; and a judgement in behalf of a defender, ought not to have weaker effects, or the less force, that it is pronounced without any defence offered by him in support of his allegation, or for eliding the action.

7. Sentences or decrees of inferior courts have so little the authority of *res judicata*, as to the supreme court, that though one should neglect to offer a relevant defence, and through such neglect should be condemned in payment, the sentence may be reviewed by the session upon that very defence which was competent before the inferior court, but neglected to be offered ; because a *copia peritorum* is not presumed to be had before inferior courts ; and parties ought not to suffer for employing inexpert procurators, when perhaps there are none other practising in the court.

8. Suspension and reduction are not only remedies against the iniquitous or ill-founded decrees of inferior judges, but are also methods of redress competent to parties to get free of the effects of such decrees of the session given forth to their prejudice, as can be again brought under their own review on account of any essential defect. Reduction is the proper remedy, either where the decree hath already received full execution, by payment or satisfaction ; or where it decrees nothing to be paid or performed, but

* In reckoning the days for reclaiming to the inner-house, Saturday is not counted, unless it happen to be among the last five federunt-days of the session, *Act of federunt*, Feb. 1. 1715, § 3. — For representing to a Lord Ordinary, ten outer-house federunt-days are allowed, in which Saturday is always reckoned, *Act of federunt*, Feb. 16. 1723.

barely declares a right in favour of the pursuer : for in those decrees which have already had all the completion that their nature can admit of, there can be no room for suspending them, or staying their execution. What has been already said on the reduction of writings, is for the most part applicable to the reduction of decrees. This only observation may be added, that though a person who brings reduction of a deed or decree upon one ground, should be cast in his suit, it is competent to him to insist in a new action for declaring it null, upon different allegations in fact. This Lord Stair justly complains of, as putting it in the power of the wealthy and litigious to oppress, by wilfully protracting law-suits, and so loading the adverse party with expence, *b. 4. t. 40. § 16. ; b. 4. t. 52. § 3.* Suspension is that form of law, by which the effect of a sentence condemnatory, that hath not received execution, is stayed or put off, till the cause be again considered.—As the nature of writs for staying of diligences, cannot be thoroughly understood without a previous knowledge of the diligences which are competent to creditors for putting the decrees recovered by them to execution, the doctrine of these shall be shortly laid down, in so far as they have not been already considered.

9. As to execution against the debtor's person by imprisonment, it was not probably known by our most ancient customs, except in a single case to be mentioned, § 16.; at least no notice is taken of it, either in the remains of our own statute-law, or in the books of the Majesty, *Histor. law-tracts, tit. Personal execution.* It seems to have made its first appearance in the letters issuing from the signet, which got the name of letters of *four forms*, because the debtor was thereby charged to make payment four times successively, in different styles, each charge upon three days. By the fourth writ, he was charged either to pay the debt, or to enter himself into one of the King's prisons therein specially mentioned ; and if he performed neither of the alternatives within the days of the charge, the messenger was commanded to denounce him rebel. This charge given to the debtor, either to pay the debt, or to enter himself into prison, under the pain of rebellion, has probably given the hint to a clause of style introduced afterwards into bonds, bearing the debtor's consent, that horning should proceed against him, in default of payment, under the same penalty of rebellion. Letters of horning, being both less tedious and expensive than the other, were authorised to pass on liquid debts by 1584, *c. 139.* ; but letters of four forms continued also in use till Nov. 23. 1613 ; for which see *Spottisw. Pr. p. 149. 150.* Letters of horning were not originally allowed to pass, except on decrees of the session ; for horning could not issue on the decree of an inferior court, by our ancient practice, till it had been judicially exhibited before the session, and the authority of that court interposed to it by a decree of their own ; which, because it was made out in the precise terms of the other, was called *a decree conform.* To prevent the unnecessary expence that was thus brought on creditors, authority was given for issuing letters of horning, by warrant of the court of session, without the necessity of a decree conform ; first, on the decrees of magistrates of boroughs, by 1593, *c. 177.* ; then of those of sheriffs, stewards, and bailies, by 1606, *c. 10.* ; afterwards on those of admirals, by 1609, *c. 15.* ; and of commissaries, by 1612, *c. 7.* ; and, lastly, on the decrees of the commission of tithes, by 1633, *c. 8.* ; not only on such as had been recovered at the suit of the minister himself who applied for the horning, but of those also obtained by any of his predecessors in office, *Act of sederunt, June 22. 1687*.*

* It may be observed, that in all those cases there must previously be a bill to the Lords before letters of horning can be issued, and that bill cannot be presented till so many days are elapsed from the date of the decree, as must have been allowed to the defender had he been charged upon the decree.

Lord Bankton affirms in general terms, That letters of horning may issue upon the decrees of the justices of the peace : but the act 1661, c. 38. which is quoted in support of this opinion, expressly confines that privilege to sentences pronounced by them at the suit of their collector for fines upon delinquencies ; and so extends not to decrees for servants wages, or for other civil debts that may fall under their cognifance, with which their collector has nothing to do ; see *New Coll.* i. 198.

10. The number of days indulged to a debtor, within which he may make payment, after a charge given him on letters of horning, varies according to the nature of the decree on which the diligence proceeds, or of the tenor of the debtor's obligation. If it be founded on a decree of session, the charge is given on fifteen days, which is also the term given in charges upon commissary decrees. Horning on the decrees of magistrates of boroughs, or of sheriffs, or of admirals, or of the commission of tithes, were, by the acts before cited, directed to proceed on ten days charge : but by the present practice, horning on the decrees of boroughs and of sheriffs, pass also on a charge of fifteen days ; probably from a notion taken up, as if the *inducie* in these had been lengthened by 1612, c. 7. When horning proceeds on a registered obligation, by which the debtor consents, that diligence shall proceed against him on a determinate number of days therein mentioned, that consent must make the rule ; and if no precise number of days be specified, the days of the charge must be fifteen, which is the term of law, unless where special statute interposes, *ex. gr.* in bills, upon which the debtor may be charged on six days, by 1681, c. 20. But if a debtor reside on the north of the river Dee, he cannot be charged on less than fifteen days, 1600, c. 25. *

11. General letters are those which issue against societies or bodies of men, and contain a warrant directed in general against all of that society or corporation, without particularly mentioning their names ; and so are granted without any previous sentence or citation of any of the individual members who compose that society. Thus, by statute 1597, c. 232. the session is authorised to issue letters of horning against the parishioners, to build and repair their church-yard dikes ; and, by 1572, c. 48. letters may be issued against possessors of land to remove, barely on the certificate of a church-court, declaring that they had designed or marked out the field possessed by them for a manse or glebe to the minister. Thus, by usage, charges are granted summarily against landholders for payment of the land-tax, or other public burdens due by them to the crown ; or against the heritors of a parish for the minister's stipend, upon a decree of locality, or old letters of horning obtained by the minister's predecessor, though all the heritors be dead that were alive at the date of the old horning. As the party who obtained such letters frequently abused the powers intrusted with him, by charging persons not truly comprehended in the warrant, all general letters of horning are simply prohibited, except for the King's revenue, and for the stipends of ministers on decrees of locality, or on poindings of the ground, 1690, c. 13. Bankton seems to think, *b. 4. t. 37. § 10.* that this prohibition against issuing general letters no longer affects universities, schools, and hospitals, since act 1696, c. 14. ; because it is thereby declared, that they shall have the same summary process for collecting their rents, that ministers have for levying their stipends.

12. If a debtor, who is charged on letters of horning, fail to make pay-

* Those who reside in Orkney and Zetland cannot be charged on less than forty days, 1685, c. 43. But this act contains an exception of letters to be raised on writs registered of consent, where, in the clause of registration, the party consents to a shorter time.

ment within the days of the charge, the charger, after getting him denounced rebel, and registering the letters with the executions, may apply for letters of caption, for laying hold on the person of the debtor, and securing it in prison. Notwithstanding the acts 1592, *c.* 126. and 1597, *c.* 264. requiring denunciation to be made at the head borough of the defender's domicile, denunciations at the market-cross of Edinburgh, against debtors not residing within that county, are sustained to the special effect of authorising a writ of caption, *St. b. 4. t. 47. § 9.* Nay, denunciations, tho' never registered, were accounted a sufficient foundation for caption, till the clerks of the bills were, by act of sederunt, *Nov. 19. 1679,* prohibited to receive any bill of caption, upon unregistered hornings.

13. Letters of caption are directed to sheriffs, and other judges-ordinary, because it was part of their office, by our ancient forms, not only to pronounce sentence within their respective territories, but to put it to execution; though messengers, as sheriffs in that part, have now of a long time been employed in the execution of sentences. They contain a warrant to the messenger, who is named sheriff in that part, and to whom the letters are directed, for charging all messengers and magistrates to concur with and assist him in apprehending the person denounced, where-ever he can be found; but if he give not to the magistrate whose concurrence he demands, some probable account where the debtor is lurking, nor offer to attend him, the magistrate may safely disregard the charge, *Hadd. June 18. 1608, Boyd.* By magistrates in this question, are understood such only as the law obliges to have sufficient prisons, as sheriffs, stewards, bailies of subsisting boroughs of regality, or magistrates of royal boroughs. Hence a bailie of barony, because he lies under no such obligation, cannot be charged to concur in the execution of a caption, *March 13. 1623, Bailies of Dumf.* A magistrate who is lawfully and regularly charged by the messenger to concur, and nevertheless refuses to assist him, or to receive the debtor into prison after he is seized, is liable *subsidiariè* for the debt in the caption; and if there be more than one, they are liable conjunctly and severally*. If the magistrates be not themselves solvent, the burden of paying the debt falls on the community, *Falc. i. 164.* The magistrate thus refusing his concurrence, may, on the messenger's setting forth that fact in his execution, be charged by the creditor, upon second letters, to seize the debtor within three days, and, in default thereof, may be denounced, and letters of caption may issue against him. Before any caption can be put to execution within the city of Edinburgh, the magistrates must be applied to for their concurrence, which they grant of course. Letters of caption contain an express warrant to the messenger, if he cannot get access, to break open doors, and other lockfast places, where he suspects the debtor may lie concealed.

14. After a debtor is imprisoned, he ought not to be indulged with the benefit of the free air, either on his parole, or even under a guard; for every creditor has an interest that their debtor be kept under close confinement, that by the *squalor carceris* he may be brought to the payment of his just debt. A magistrate therefore, or jailor having the charge of a prison, who suffers a prisoner to go abroad, though the state of his health should require it, and though he should return to prison, without either a warrant of the court of session, or an attestation upon oath of the prisoner's sickness by a physician, surgeon, or the minister of the parish, is liable *subsidiariè* for the debt, by act of sederunt, *June 14. 1671.* Magistrates become also obliged for the debt, if the prisoner shall make his escape through the negligence or connivance of the jailor, *New Coll. ii. 68.* or through the insufficiency of their prison, *Act of sederunt, Feb. 11. 1671.*: but if he shall

* See *New Coll.* iii. 30.

escape in the night-time, by the use of instruments, or by open force, or by any other accident, which cannot justly be imputed either to the magistrates, or to the jailor, for whom they must answer, they are not chargeable with the debt, *Fount. Dec.* 14. 1687, *Feudar*; *New Coll.* ii. 191. upon their bringing evidence, that immediately after the prisoner's escape, they made all possible search for him. Any person who has been assisting in the escape of the prisoner, is not only liable conjunctly and severally with the magistrates for the debt, but may be compelled to relieve the magistrates, upon an action of recourse against him, if they shall have made payment to the creditor, *New Coll.* ii. 68.

15. Where a debtor is imprisoned upon letters of caption, any other creditor who hath also obtained letters of the same kind against him, may arrest his person in prison; and after that arrestment is intimated to the magistrate in whose prison he is confined, the prisoner cannot be set free, until he have made payment, or obtained letters of suspension and liberation, of the debt contained in the diligence upon which he was arrested. By our more ancient practice, no prisoner could regularly have been released, though he should have offered full payment of the debt contained in the diligence, without letters of suspension, containing a command to the jailor to set him at liberty; for the creditor, though he might, by his sole consent, have discharged all punishment to which the debtor might have been subjected upon his account, he could not release him from the penalty he had incurred by his offence against his sovereign in disobeying the will of the letters. But to save this expence to debtors in small sums, jailors are, by act of federunt, *Feb.* 5. 1675, authorised to set prisoners at liberty, where the debt does not exceed two hundred merks Scots, upon production of a written discharge or acquittance, in which the creditor consents that he shall be freed from confinement*.

16. Decrees are executed against the debtor's moveable estate, either by arrestment or pouding; as to which see *supr. b. 3. t. 6.*: and against his heritage, either by inhibition, *b. 2. t. 11.* or adjudication, *b. 2. t. 12.* As to the diligence competent to creditors, upon the decrees of inferior courts; if it has been made a doubt, whether even our supreme court might, by our most ancient practice, enforce their decrees against debtors by personal execution, *supr.* § 9. it may be concluded, *a fortiori*, that the law did not confer that right on barons, or even sheriffs, whose power of imprisonment could be exercised against no other than criminals or delinquents. It was the magistrates of boroughs alone who were in use, by our most ancient customs, to grant acts of warding, or imprisoning debtors, if they failed to pay within the days of the charge given them upon the magistrates precept: but now diligence against the person of debtors may proceed upon all such decrees of inferior courts, to which a decree conform may be interposed by the session; and, in Bankton's opinion, *b. 4. t. 16. § 3.* horning may pass, even upon a baron-decree, if the sheriff shall adopt it for his own, by interposing his authority to it. Justices of the peace have no right to imprison debtors for civil causes, as it would be fruitless to confer that power on a court who have no proper civil jurisdiction; and even when they assume to themselves a cognisance in civil debts, which is frequently the case, where the debt or other subject is inconsiderable, they have no right to grant warrants of commitment, in default of payment, *New Coll.* i. 111. In criminal cases, the justices of peace, in order to enforce their sentences against delinquents, may either order the offender to

* By our present practice, debtors are liberated in every case on a discharge, without letters of suspension and liberation.

jail, till he make payment of the fine awarded against him, or the collector named by the justices may obtain letters of horning, upon which he may be charged, according to the directions of the act 1661. As to the diligences of poinding and arresting, all execution by these was, by our former practice, allowed to pass upon obligations registered in the court-books of boroughs, without any warrant other than the registration itself: but by act of federunt, Dec. 10. 1713, execution upon such registered obligations is prohibited, unless the extract bear a special warrant for that purpose. Sheriffs and barons have been in use to insert in the precept granted by them against debtors for charging them to pay within fifteen days, a warrant to their officers to poind and arrest their moveables in default of payment.

17. If a tenant, or other possessor who is decreed to remove from or quit the possession of lands, shall forcibly oppose the execution of the decree, or shall obstinately refuse to give obedience to it, notwithstanding a charge given him upon letters of horning, the obtainer of the decree may procure letters of ejection issuing from the signet, and directed to the sheriff, who is required to dispossess him, and to put the pursuer in the possession; or if the decree be pronounced by a sheriff, he himself may grant a precept of ejection directed to his own officer for the same purpose. These letters or precepts are executed, by throwing out of the house some part of the defender's household-stuff, and extinguishing his fire. If a party was so obstinate as to oppose by force the execution of these letters of ejection, and still to continue his possession in despite of the law, the Scots privy council, while that court subsisted, granted letters of fire and sword, authorising the sheriff to call for the assistance of the county, and dispossess him by all the methods of force. But by our present practice, since the union of the two kingdoms in 1707, where one opposes by violence the execution of a decree, or any lawful diligence, which the civil magistrate is not able by himself and his officers to make good, application is made to the military for assistance, who enforces the execution *manu militari*.

18. Having handled at some length the several kinds of diligence or execution competent on decrees for civil debts, the different methods of staying diligence fall to be explained. Diligence may be stayed, either, *first*, by the interlocutors of the session, or their decrees recovered at the suit of the debtor, upon an allegation, that it has not proceeded on a just and lawful debt, or that that debt has been satisfied in whole or in part, or that the diligence used upon it has been carried on irregularly, without observing the forms required by law; or, *2dly*, Diligence may be suspended without any such application to the session, in consequence either of statute or of usage, or of the creditor's consent. The first step to be taken by the debtor for obtaining a stay or suspension of diligence in the first way, is by preferring a bill or short petition to the Lord Ordinary on the bills. This bill, when it is passed, *i. e.* when the desire of it is granted, is a warrant for letters of suspension, which is a writ issuing from the signet, and staying execution of the decree craved to be suspended, till the process of suspension be discussed; but if the presenter of the bill shall not, within fourteen days after passing it, expedite the letters, or if the Ordinary shall not allow him a longer time for expediting them, execution may proceed on the sentence, Act of federunt, July 3. 1677. A stay granted on a bill without passing it, expires also in fourteen days, Act of federunt, Nov. 9. 1680. Suspensions of the decrees of session *in foro*, and of decrees of removing, and of the high court of admiralty, suspensions and liberations, suspensions on juratory caution, of a second protestation, and of the duties of excise, and bills of suspension, where a former bill in the same cause has been refused, cannot be passed but by the whole Lords in time of session, and by three in vacation—

vacation-time; but other decrees may be suspended by any one of the judges of session.

19. As suspension has the effect of staying the execution of the creditor's lawful diligence, it ought to be proceeded in with as little prejudice to the charger as possible. Hence, *first*, Suspensions are not to be passed, but upon reasons instantly verified; see *Act of sederunt*, Feb. 9. 1675. This is, however, so softened in practice, that where a relevant ground of suspension is offered, which requires a proof or a diligence for the recovery of writings, execution is stayed for such time as may be necessary for bringing the proper evidence to support it, Jan. 22. 1674, *Sim.* *2dly*, No suspension is, in the general case, granted, without security given by the suspender to pay the debt, if it shall be found due, *Act of sederunt*, Jan. 29. 1650: but where the suspender, from his low or suspected circumstances, cannot procure a sufficient cautioner, the suspension is allowed to pass on juratory caution, *i. e.* such security as the suspender swears is the best he can give, granting at the same time a disposition *omnium bonorum* in security to the charger; in which case the court are to consider the reasons of suspension with particular accuracy at advising the bill, *Act of sederunt*, Nov. 8. 1682. In special cases, suspension is refused, though the most sufficient security should be offered. Thus, charges given by ministers for their stipends, by professors of universities, or masters of schools for their salaries, or by directors of hospitals for their rents, cannot be suspended, except either on the production of discharges, or on the consignation of the sums charged for, 1669, *c. 6.*; 1696, *c. 14.* But this privilege is personal to the minister, or other person privileged, and cannot be pleaded by their assignees, *Fount.* June 2. 1697, *Exec. of a minister.* A charger who is satisfied that his debt is secure without a cautioner, may, for the greater dispatch, apply to the court to get the debtor's grounds of suspension discussed summarily upon the bill, in which way no security can be demanded from the debtor.

20. Though he in whose favour the decree suspended is pronounced, be always called the charger, yet a decree may be suspended, before any charge hath been given to the suspender, if a decree be extracted, on which a charge may be given. Nay, where there is no decree, there may be a suspension, though not in the strict acceptation of that word; for suspension is a process authorised by law, for putting a stop, not only to the execution of iniquitous decrees, but to all encroachments either on property or possession, and, in general, to every unlawful proceeding, *tit. ff. De nov. oper. nunc.* Thus, a building, or the exercise of any illegal power which one assumes to himself, is a proper subject of suspension: and though it might seem that the election of magistrates for a borough cannot be suspended, because the right is fully perfected by the election, such suspensions are daily admitted, suspension being in that case considered merely as a summary way of bringing the question under review, which would consume too much time, if the complainers were left to the ordinary method of reduction.

21. Letters of suspension bear the form of a summons, which contains a warrant to cite the charger to appear before the court, against a day therein specially mentioned, to hear sentence pronounced in the cause. This makes it likely, that those letters have been at first made use of in the way of summons; but now of a long time they have been considered as a diligence barely prohibitory, staying execution on the debt or right suspended, so as the suspender cannot by any citation compel the charger to appearance, though the letters contain a warrant for that purpose, but must, if he himself would turn provoker, bring his action of reduction in common form;

as

as was adjudged in the suspension of election of magistrates, *Feb. 1722, Magistr. of Edinburgh* *. By the forms of the court, the charger cannot insist to get the reasons of suspension discussed, till the expiration of the day against which he was by the letters of suspension cited to appear; and the suspender frequently took care to have a long day assigned, on purpose to postpone the payment of his debt. To remove this hardship on the creditor, he might have brought an action for shortening that term, which was therefore called an action *prævento termino*; and the same expedient was practised when too long a term was assigned in letters of advocacy: but a fixed rule came at last to be observed, in respect of the days of appearance, both in letters of suspension and advocacy, which has superseded the necessity of those obsolete actions. If the suspender shall not, within the days mentioned in the letters for the charger's appearance, produce his suspension in court, that the reasons of it may be discussed, the charger may put up a protestation in the minute-book against him for not insisting; and this protestation, after it is duly extracted, gives him a right to proceed in his diligence, in the same manner as if the debtor had obtained no suspension. A suspender is not confined to the special grounds of suspension set forth in his bill, but may add new ones; because suspension is in effect a process or action; and in all actions a party may, during the dependence of the suit, without limitation as to time, offer any relevant plea or defence, under the restrictions contained in acts of sederunt, *July 23. 1674, and Nov. 20. 1711, § 8. 16.*

22. If, upon the court's considering the suspension, the reasons shall be sustained, sentence falls to be pronounced, *suspending the letters of diligence* on which the charge was given, *simpliciter*; which is styled, in a proper sense, *a decree of suspension*, and hath the like effect with a reduction, as it takes off the force and validity of the decree suspended to perpetuity. But if the reasons of suspension be repelled, the court *finds the letters of diligence orderly proceeded, i. e.* warranted by law, and regularly carried on; and they ordain these letters to be put to farther execution: upon which sentence the charger may obtain an extract of the bond granted by the cautioner in the suspension, and afterwards use all diligence both against the debtor and his cautioner. If upon advising the suspension of a decree, it shall appear to the court that the decree suspended is defective as to form, though the debt due to the charger may be just, they frequently turn the charge into a libel; the meaning of which is, that though the charge given is to have no longer the effect of a proper charge, yet to save the expence to the creditor of bringing a new action for the debt, it is held as equivalent to a citation given by him to his debtor upon a summons; so that the debtor or suspender must offer his defences against the debt, *tanquam in libello*, as if he had been cited in a common action.

23. Where diligence is used or threatened against a debtor, at the suit of two or more different competitors, all claiming right to the same debt or subject, the debtor may bring the different claimants into the field by a suspension of *multiple or double poinding*; so called, because poinding was a term which anciently denoted any distress or diligence, in order to debate and settle their several preferences. This suspension, or rather action, is most frequently brought by an arrestee, in the case of several arrestments used in his hand for affecting any special subject; or by tenants, in the case of several adjudgers, all of whom have recovered, or are in the course of recovering, decree of mails and duties against them for the same rents.

* Of late it has become usual to execute suspensions, and to call them as summonses.

Where the question is, Who hath the preferable right to the rents of an estate? this action may be brought by any of the competitors, in name of the tenants liable in the rents, though there should in fact be no double distress, and though the tenants should refuse their concurrence to the suit, or should even disclaim it; because the law has established that action as the proper remedy for getting all such competitions determined, with the least possible expence to the parties. Persons, though not called in this action, may, if they have any interest in the subject in controversy, appear and plead that interest, as if they were original parties; which is received as a general rule in all competitions of diligence relating to a subject yet *in medio*, that so equal justice may be done to all concerned, and the multiplicity and protracting of law-suits prevented. The intention of this action is, *first*, That the pursuer be found liable only in once and single payment; *2dly*, That the several parties called in the suit, and appearing, may debate their preferences; and that he who shall be declared to have the best right, may, by the decree, be intitled to the full right of demanding the debt or subject from the debtor or possessor. A decree of preference grounded on this action, secures the pursuer who makes payment, agreeably to the directions of the decree, from the claims of all persons whomsoever. The creditors, or claimants, who were made parties to the suit, have no remedy left them; but as those who were neither called as defenders, nor appeared for their interest, cannot be hurt, as to their right of recovering from a third person what he had received in consequence of an erroneous decree, to which they were no parties, they are intitled, if they are found to have a right truly better than that of the creditor preferred, to an action against that creditor for recovery of the sums received by him, *Nov. 29. 1679, Bayne.*

24. The execution of captions may be also stayed by special protections, either judicial or voluntary. Where a debtor under caption, who is concealing himself from the messenger, is upon any occasion cited to appear personally before the session, justiciary, or exchequer, *ex. gr.* to give testimony as a witness, the judges are impowered by 1663, *c. 4.*; 1681, *c. 9.* to grant him a protection for such time as may be sufficient for making his appearance in court, and for his return, not exceeding a month in all. And because the power of staying the execution of personal diligence might, if abused, greatly impair the right competent to creditors for the recovery of their debts, protections for every other cause are prohibited by those statutes; and the judges, if they grant any such, are declared liable for the debt. All judicial protections must be registered in the books of the court from whence they issue; and the person who applies for them must make oath, that the witnesses to be cited are material ones, said 1681, *c. 9.*; and before a protection is granted, the creditor must be cited on fifteen days, that he may have an opportunity of shewing cause why it ought to be refused, 1698, *c. 22.* Creditors sometimes grant voluntarily a surcease of personal execution in behalf of their debtor, which is commonly called a *superfedere*; and the creditor who signs, or promises to sign it, if he use personal execution within the time indulged to the debtor, is for his breach of faith liable to him in damages. If such surcease be agreed to at a general meeting of creditors, all the creditors present, and not objecting, are understood to agree to the common measure there concerted; but creditors are at liberty to use all execution against the debtor's estate, notwithstanding this voluntary superfedere, if the surcease of diligence be not expressly extended to his estate as well as his person.

25. Execution of personal diligence is disallowed in many cases, without the debtor's either procuring lifts upon bills of suspension granted by the session,

feffion, or obtaining protections in the manner above explained. This may arise from privilege, belonging either to the person exempted from it, or to the place where he happens to be. As to the *first*, by the articles of Union, the privileges of the English Peers having been communicated to the Scottish, the persons of Peers are secured from diligence, *art. 23.*; which has been extended to the widows of Peers, *New Coll. i. 212.* Such commoners also as are elected to serve in parliament, are secured against personal execution by the privilege of parliament. Minors not yet past the age of pupillarity, are intitled to this privilege, by 1696, *c. 41.*; and women clothed with husbands have been ever secured in their persons from all such diligence proceeding upon civil debts. As to the *second*, no caption for debt can be executed within the precincts of the King's palace of Holyroodhouse. This exemption has probably been granted originally to the place of the King's residence, where-ever he happened to keep his court, that he might not be deprived of the assistance or advice of his subjects, on any misfortune befalling them from a civil cause; but even after the accession of our kings to the crown of England, constant usage hath continued that privilege to the Abbey of Holyroodhouse, where our kings used mostly to reside before the union of the two crowns. The King's castles have not this right, *Falc. ii. 218.*; nor even the palace of Holyroodhouse, when it is claimed by the King's own debtors; for that would be in effect, to use a privilege which arises merely from the respect due to the sovereign, against the sovereign himself. Sanctuaries, or *asyla* in the Roman law, seem first to have been intended for protecting slaves against the severity of their masters; and after the establishment of Christianity, they seemed to serve this only purpose, to secure debtors in civil debts from the effects of their creditor's diligence, *l. 1. C. De his qui ad eccl. conf.* In Justinian's reign, the *termini sanctorum*, by which may be meant either the precincts of churches, or the altars dedicated to saints, afforded a protection against smaller delinquencies, but not against the grosser crimes of murder, adultery, &c. *Nov. 17. c. 7.* Not long after, churchmen scrupled not to make churches and religious houses sanctuaries for the most enormous and execrable offenders; but our kings' palaces have at no time afforded protection to criminals. If therefore fraudulent bankrupts, or such as conceal any funds belonging to them from their creditors, have taken sanctuary in the Abbey of Holyroodhouse, they may, upon a proof of the fraud, be dragged from it by a warrant from the court of session, and committed to prison.

26. Our law, from a consideration of compassion, has allowed insolvent debtors to apply for the liberty of their persons, upon a *Cessio bonorum, i. e.* on making a full surrender to their creditors of their whole estate real and personal. Before a debtor has right to make this demand, he must be under actual confinement, *Act of sederunt, Feb. 8. 1688*; for it is in itself incongruous, and might be of bad example, that one should claim the privilege of personal liberty, who is not truly deprived of it. The benefit of *Cessio* must be insisted in by way of action, in which the prisoner must make all his creditors parties to the suit; and it is cognisable only by the session. The pursuer must set forth in his libel the misfortune or accident by which he became insolvent, and bring proper evidence of it, *Act of sederunt, Dec. 1. 1685.* He must produce with the process a certificate under the hand of one of the magistrates of the borough where he is imprisoned, bearing, that he hath been a month in prison, without which certificate the process is not to be sustained, *Act of sederunt, July 18. 1688.* He must exhibit upon oath, according to the directions of the act of sederunt, *Feb. 8. 1688*, a particular inventory of his estate, and depose, That he has neither heritage nor moveables, other than is contained in that inventory, and that he hath made no conveyance

conveyance of any part thereof, since his imprisonment, to the prejudice of his creditors: he must also declare upon oath, whether he hath made any such conveyance before his imprisonment, and point out the persons to whom, and the cause of granting it, that the court may judge whether he has, by any fraudulent or collusive practice, forfeited his claim to liberty; and he must make over to his creditors the whole of his estate absolutely, and without the least reservation. The decree ordaining the prisoner to be set free, can have no effect as to future debts contracted by him, nor even as to posterior corroborations of former debts; neither can it affect creditors who were not called as defenders in the action upon which the decree proceeded; and therefore if the debtor shall, after his release, be again imprisoned upon any such debt, he cannot avail himself of his former decree, but must raise a new action of *Cessio*.

27. The disposition which is granted by a debtor to his creditors upon a *Cessio bonorum*, is not in satisfaction or *solutum* of the granter's debts, but merely in farther security. If therefore the debtor shall acquire any estate after the decree recovered by him upon the *Cessio*, such new acquisition may be affected by his creditors, as if there had been no *Cessio*: but still he may retain as much of it as is necessary for his own maintenance. This is agreeable to our ancient law, *2. Attach. c. 7. § 3.* and likewise to the Roman, where it is called *beneficium competentie*, *l. 4. pr. De cess. bon.* No debtor, whose debt arises from a crime or delict, is intitled to this privilege; which is also conformable, both to the Roman law, from whence we have borrowed it, *l. 1. 4. C. Qui bon. ced. poss.*; *l. 37. § 1. De minor.*; *arg. l. 51. De re jud.*; and to the analogy of the act of grace, to be immediately explained. Hence it is not competent to fraudulent bankrupts, nor to criminals liable in an assythment, *i. e.* in a sum in name of damages or indemnification to the party injured, though the crime itself should be extinguished by a pardon, *Falc. ii. 230.* nor to those whose debts have been contracted by fraud or breach of trust*. Where a prisoner is set at liberty upon a *Cessio*, he must, if his creditors shall insist on it, wear for the future a particular habit appropriated by custom to dyvours or bankrupts; as to which, see *Acts of sederunt*, May 17. 1606, quoted in *Statute-law abridged*, v. *Prisoner*, Feb. 26. 1665, Jan. 23. 1673, and July 18. 1688. The court of session, by the act last quoted, declared, that they would not dispense with the wearing of the habit, except in the case of mere misfortune; and they are by a still later statute, 1696, c. 5. prohibited to dispense with that mark of reproach, if it be not libelled in the summons of cession, and sustained and proved, that the bankruptcy was owing to misfortune. Hence a bankrupt was condemned to wear the dyvour's habit, though no suspicion of fraud lay against him, because he had been a dealer in the smuggling or running of goods, which is an illicit trade, *New Coll. i. 4. †*

28. Anciently there was no legal provision for the maintenance of those imprisoned for debt; and as they could not be allowed to starve, it frequently happened, that royal boroughs who had received them into their prisons, were burdened with the expence of their maintenance. It was therefore provided by 1696, c. 32. usually called *the act of grace*, that where any prisoner for a civil debt shall make oath before the magistrate of the jurisdiction, that he has not wherewith to maintain himself, the magistrate may require the creditor, upon whose diligence he is imprisoned, to provide and give security for an alimony to him, at a rate not under three pence a-day; and if the creditor refuse or delay, for ten days after,

* See *Kames*, *Rem. Dec.* 126.; *New Coll.* iii. 135.

† The Lords have pronounced the same decision in several other cases which have occurred since that time, particularly *Dec. 15. 1768, Grichton*.

to exhibit the alimony ascertained, it shall be lawful for the magistrate to fet the prisoner at liberty. The debt and diligence upon which the debtor was imprisoned, are not discharged by the magistrates setting him free upon this statute; and therefore the creditor may again use personal execution against him, upon the former caption, *New Coll.* ii. 186. But if he abuse that power in an oppressive manner, he may be condemned in a fine for that abuse; and the debtor will have relief by a suspension. This obligation upon creditors to support their indigent debtors, took its rise from the Romans, *Nov.* 135, c. 1. and was not altogether unknown in our ancient law, *St. 2. Rob. I. c. 19. § 5.* If the magistrates themselves shall, after the creditors refusal to exhibit alimony to the prisoner, chuse to be at the expence of his subsistence, rather than dismiss him from prison, they may continue his confinement, *Fount. Dec.* 28. 1710, *Durham*; *Feb.* 20. 1713, *Grierfon*. This statute is expressly limited to the case of prisoners for civil debts; and therefore no person imprisoned, either for not performing a fact which was in his power, *Fount. Dec.* 2. 1709, *Turner*, or for the not payment of a fine, or of a sum awarded against him in name of damages, upon a delict or penal law, *Nov.* 23. 1738, *Maclefly*, observed in *Dict.* ii. p. 174. can claim the benefit of it.

29. A decree-arbitral or award, which is a sentence proceeding upon a submission or reference to arbiters, bears some resemblance to a judicial sentence, though in some respects the two differ. A submission is truly a contract, entered into between two or more parties who have debateable rights or claims against one another, by which they refer their differences to the final determination of an arbiter or arbiters, and oblige themselves to acquiesce in their decision. Where there are two or more arbiters, the submission sometimes bears, that in case the arbiters shall disagree in their opinions, a certain person therein named, as oversman, shall have power to determine finally; and sometimes the nomination of the oversman is left to the arbiters. If in either case the oversman shall pronounce a decree before the arbiters have differed in opinion, the decree is null; for the power of determination is, in the first place, given to the arbiters; it is only upon their disagreeing that it is transferred to the oversman; and the decree-arbitral must express specially that the arbiters differed in opinion, *Dalr.* 161. Where the day within which the arbiters are to decide is left blank in the submission, their powers of deciding has been, by practice, limited to a year. As this hath proceeded from the words of style, by which the arbiters are empowered to determine against the day of next to come; which clause, in what way soever the blanks shall be filled up, cannot possibly reach beyond the year; therefore, where the submission contains no blank, but refers indefinitely the subjects in question to the decision of arbiters, without limiting them to any determinate time, it ought, like other contracts or obligations, to subsist for forty years. Upon this ground, a bond obliging the granter to refer certain debateable questions between him and another to persons named in the bond, hath been by several decisions adjudged to be perpetual; so as the other party might, at any time within the years of prescription, bring his action against the granter for performance, if the arbiters should continue alive so long, *Feb.* 25. 1630, *Hay*; *Feb.* 3. 1669, *Boswall*. The reason of these judgments is equally applicable to submissions themselves, which are as truly obligations, as bonds obliging the granter to submit. Submissions, like mandates, expire by the death of any one of the submitters; see said *Feb.* 25. 1630. Submissions of debts, or of money-claims, are sometimes executed by the debtor granting a bond to the creditor, and the creditor granting a release or discharge to the debtor, both blank in the sums, which are delivered to the arbiter, with power to him to fill up the blanks as he shall

find just: and though it has been affirmed, that such deeds are null since the statute 1696, prohibiting blank writings, *Spottisw. note on Mack. Infl. § ult. b. 1.*; yet that statute prohibits such deeds only as are taken blank in the name of the creditor or person in whose behalf they are granted; but does not strike against writings, where the name of the grantee is inserted, though they should be left blank as to the sum.

30. Formerly arbiters, who had accepted of a submission, might have been compelled by letters of horning to pronounce sentence. This summary execution proceeded from the style of submissions in those days, by which not only the parties, but the arbiters, consented to the registration of the submission, that diligence might proceed upon it against them. As this part of style is now disused, summary diligence against the arbiters by horning is without doubt incompetent; but it is not so clear, whether an arbiter accepting of a submission, without a clause of registration, may afterwards renounce the office at pleasure, as a mandatary may throw up his mandate, or whether an action lies for compelling him to pronounce sentence. The Roman law is express, that an arbiter, after accepting of the office, is bound to decide, *l. 3. § 1. De rec. qui arb.* unless in a few extraordinary cases, which make exceptions from the general rule, *l. 15. 16. eod. tit.* But the court of session, in a submission, where the arbiter had not consented to the clause of registration, would not interpose to supply that defect, or compel him to perform his office, *Fount. June 30. 1699, Chiefly.* In a later decision, however, observed by the same collector, *Dec. 4. 1702, Bruce*, it is affirmed, that the court were of opinion, that arbiters once accepting, might, conformably to the Roman law, be compelled to give forth their final sentence or award; see *Fount. July 6. 1708, Skene.*

31. Arbiters are but private persons, in whom the law hath not vested jurisdiction; and hence they cannot compel witnesses to appear and depose before them, or possessors of writings to exhibit them: but this defect is supplied by the court of session, who, at the suit, either of the arbiters, *Jan. 6. 1670, Ker*, or of either of the parties, are in use to grant warrants in course for the citing of witnesses, or for the exhibition of writings before the arbiters. On the same ground, arbiters have no powers other than to decide: the execution of all decrees belongs to those alone who are invested with jurisdiction; and therefore if any of the parties submitters refuse to fulfil what they are obliged to by the decree-arbitral, the arbiters have no power of compelling them; that must be done by a common action brought before the judge competent, *March 12. 1707, Knox*: but where parties expressly consent in the submission to the registration of the decree which is to follow upon it, to the end that horning and diligence may pass against themselves, such consent is doubtless a sufficient foundation of summary diligence for the performance of their respective parts of the decree-arbitral.

32. Seeing it is from the consent of the parties submitting, that the whole power of arbiters is derived, their award or decree, if it be not given in conformity to those powers, is null, not being founded upon any proper authority. Hence arbiters cannot inflict, on the parties submitting, any penalty or fine higher than that which they themselves have agreed to in the submission, *Home, 117.* Hence also, if the submitters limit the power of the arbiters to any fixed day, decree cannot be pronounced after that day; though it may, *in ipso termino, i. e.* on the very day betwixt and which the arbiters had powers given them to decide, *Fount. June 30. 1694, Wilson.* Nay, it would seem, that they cannot in any decree, though pronounced in due time, reserve to themselves a power to direct the execution of it, by prescribing rules to the parties, after the day limited

limited by the submission: they cannot, *ex. gr.* ordain the writings, which the parties were by the decree to grant *hinc inde* to others, to be extended at their sight, when the term of their powers shall be elapsed; since that would be assuming a right to themselves, *ultra vires compromissi*, which the submitters had thought fit to deny them. Yet submissions, being intended for a most favourable purpose, the amicable composing of differences, ought to receive the most ample interpretation of which the words are capable. A submission therefore, drawn in general terms, of all controversies and questions between the parties, is understood to authorise the arbiters to decide upon questions, not only of moveable, but of heritable bonds, *Dec. 15. 1631, Kincaid*. This, however, ought not to be so stretched, as to include rights that cannot be presumed to have fallen under the view of the submitters, *ex. gr.* an heritable right, of which one of the submitters had been in the possession, without any challenge or interruption made by the other party prior to the submission.

33. From this rule, That submissions ought to be liberally interpreted, it has also arisen, that where arbiters in a special submission decree general discharges to be granted mutually by each of the parties to the other, the decree is nevertheless valid, in so far as relates to the special subjects falling under the submission; and the effect of the general discharge is restricted to these special subjects, that so the decree-arbitral may not be utterly ineffectual, *Fount. Dec. 25. 1702, Crauford*. But where arbiters in a special submission take upon them expressly to determine in points not referred to them, there is no room for a large or favourable interpretation; and the decree-arbitral may be declared null, upon an action of reduction, as being pronounced *ultra vires compromissi*. An award or decree-arbitral, by which a part only of the claims submitted was determined, and the rest left open to the decision of the judge-ordinary, was wholly void by the Roman law, *l. 25. pr. § 1. De rec. qui arb.*; because the presumed intention of parties, to have the whole claims submitted finally determined, was in this way defeated. Such partial decree, however, is valid by our practice, in so far as it goes, *March 20. 1630, Stark*: but if the arbiters, in a submission of this kind, should presume to pronounce judgement upon all the articles claimed on the one side, and leave all those on the other undetermined, the decree is null, *June 30. 1625, Falconer*; for it can, by no just construction, be presumed to be the meaning of parties, that one of them should have the benefit of a final decision of the several claims competent to him, while the other party is left to make good every one of his by a law-suit. To prevent all questions concerning the validity of partial decrees-arbitral, submitters, where it is intended to give that special power to the arbiters, do, by the present practice, express it by a proper clause in the submission.

34. A decree-arbitral, pronounced by the majority of the arbiters, was effectual, though the submission contained no express power to the majority to determine, both by the Roman law, *l. 17. § 5. 6. De rec. qui arb.* by the books of the Majesty, *lib. 2. c. 5.* and by our statute-law, 1426, *c. 88*: but it was adjudged, *Fount. Feb. 10. 1693, More*, that in such cases, all the arbiters ought to agree in opinion, in the same manner that in a mandate granted to several mandataries all of them must concur; because the mandant is presumed to rely on the fitness, not of any one, nor even of any number of them, but of them all taken jointly.

35. Decrees-arbitral, as their force arises from the express compact of the parties submitting, by which they agree to acquiesce in whatever the arbiters shall determine, could not be set aside by the Roman law on the head of injustice or iniquity, more than transactions, *l. 27. § 2. De rec. qui arb.*: and indeed the sustaining of that ground of reduction would not only be repugnant

repugnant to the nature of a reference, but would render decrees-arbitral of little use; since, where they do not destroy the very seeds of a law-suit, their most valuable purpose is frustrated. Nevertheless decrees-arbitral were, by our usage, subject to reduction, on the head of iniquity in the judge, or of enormous lesion of the party, till by *Art. Regul.* 1695, § 25. it was declared, that no decree-arbitral, proceeding on written submissions, should, for the future, be reducible on any ground, but those of corruption, bribery, or falsehood.

36. Where the term of a submission hath expired, without any decree pronounced by the arbiter, an oath made by one of the submitters, upon a reference by the other, while the submission was current, may be received as evidence in any subsequent process. This arises from the transaction implied in a reference by one party to the oath of another, which has been already explained. The testimony of witnesses, on points where a proof by witnesses may be received, is also sustained in any after process, with this proviso, or restriction, that the party against whom such evidence is brought, may be admitted to offer objections against the ability or competency of the witnesses. But depositions taken by arbiters upon points which our law does not allow to be proved by parole-evidence, cannot be received afterwards by any judge; for judges ought to lay no weight whatever upon that kind of proof which the law rejects.

T I T. IV.

Of Crimes.

HITHERTO of the law of Scotland, as it concerns questions of private and civil right. This treatise shall be concluded with a summary view of that part of our public law which relates to crimes, after the example of Sir George Mackenzie, the order of whose titles has been precisely followed. All that is proposed is, *first*, To give an account of the nature and properties of a crime in general: *2dly*, To enumerate the chief facts that are considered by our statutes or usage as criminal; and, in some particular instances, to compare the punishments inflicted by us upon offenders, with those that obtained by the Jewish or Roman laws: and, *lastly*, To make a few observations relating to the forms of proceedings in criminal trials, and the different ways of extinguishing crimes.

2. *Crime*, in the largest acceptation of the word, signifies any breach or transgression, either of the law of God, or of the positive law of our country. It is generally divided into crimes properly so called, and delicts. Delicts are commonly understood of slighter offences, which do not affect the public peace so immediately; and therefore may be punished by a small pecuniary fine, or by a short imprisonment, as petty riots, injuries, offences against inferior jurisdictions, &c.: whereas crimes are those breaches of the law which have a more direct tendency to subvert the government or constitution, or loosen the bonds of society; and therefore call for the public justice, or the *publica vindicta*, that the transgressors may be punished by the judge who is invested with a proper criminal jurisdiction, for the terror of others, that they may not commit the like in time to come. The more atrocious crimes, if they were declared such by a special constitution, *l. i. De publ. jud.* got the name of *public* by the Roman law, because they might be prosecuted by any member of the commonwealth, in consideration of their hurtful tendency to the state, § 1. *Inst. De publ. jud.*; whereas the lesser or private crimes could not be tried, except at the suit of the