No 331. tained in the house of Cameron, and how they should thereafter fall under them, is not so easy to discover.

A general legacy, indeed, of all a defunct's moveables, without referring to a place or situation, may comprehend lying money; (though, when that is intended, the common clause of stile, gold and silver, coined and uncoined, is generally used;) but still that cannot apply to this case, where the word moveables is not only subjoined to furniture, but is further circumscribed by the situation of a place.

As to the claim to the moveable bonds, that is equally ill-grounded, because there was nothing legated by the second deed, but the furniture and moveables contained in a house, which cannot extend to *jura incorporalia*, which have no proper situation, these being only vouchers of debt, and titles of action to recover the money out of the debtor's hands; on which account, they can never be comprehended under a legacy of furniture and moveables contained in a house.

Replied; The will was wrote by the testator himself, who, as he was a merchant, cannot be presumed to have known the most proper clauses of stile; however, he has expressed his intention in very plain terms, viz. That all his moveables should wholely and solely belong to the Doctor; and even the word 'elsewhere' shows, that his design was, that these should go to him, in whatever situation or place they were found; therefore it is begging the question to allege, that the word moveables, when connected with furniture, is of no greater extent than household furniture; for furniture was mentioned as the principal thing the testator had in his eye, being all he then had, which was not disponed by the first deed; nay, it is probable the word 'moveables' was added, as being a more general term; which therefore ought not to be limited by its connection with a particular word, conform to the doctrine laid down, *L.* 12. § 46. *De Instr. vel Instrum. leg.* Besides, the defunct's burdening the pursuer with the expenses of his funerals, creates a presumption, that he did not intend to except any little ready money he should have by him at his death; seeing that is always considered as the most proper fund for defraying such expenses.

The Lords found, That the general deed, granted to Dr Cunningham by the defunct, does not convey the gold, money, bank-notes, and moveable bonds, lying by the defunct, and within the house of Cameron, at his decease.

C. Home, No 53. *p.* 93.

1738. *July* 21. Bannermans *against* Bannerman.

No 332. Where, in a process upon the passive titles, it is objected, that the person is still alive, a decree-dative, nor even a confirmation, will not be proof of the

death, because there is no cognition of the death taken in confirmations; and therefore, in this case, where no circumstances were condescended on to instruct the person's death, other than a decree-dative, the Lords found, that the person's death must be further instructed. No. 332.

Kilkerran, (Executor.) *No* 2. *p.* 171.

1752. *February* 26. John Stachan *against* Lieutenant M'Lauchlan.

No 333.
Cui incumbit probatio of intention? Is innocence to be presumed?

The Duke of Cumberland having led an army into Scotland in January 1746, in pursuit of the rebels, a party of soldiers in the road to Aberdeen having got information against John Strachan, tenant in Redford, that he had been concerned in the rebellion, apprehended his person, carried him prisoner to Aberdeen, where he was put in goal, and continued there a prisoner till after the battle of Culloden. At the same time, they carried along his cattle and sheep, and delivered the same to the commissary of the army. In the year 1749, John Strachan brought a process of spuilzie against Lieutenant M'Lauchlan, who commanded the party, and Laurence Dundas commissary of the army. The defence was laid upon the late act of indemnity, by which it is enacted, 'That all prosecutions and proceedings whatever, for any matter 'or thing done during the rebellion, and before the 25th July 1746, in order 'to suppress the rebellion, or for preservation of the public peace, or for the 'service or safety of the government, shall be discharged and made void, and 'the persons concerned in such acts shall be indemnified against every person 'whatever,' &c. It was *answered*, That in every case where the benefit of the indemnity is pleaded, it is incumbent upon the defender to prove that the facts complained of, though not justifiable at common law, had an immediate and direct tendency to suppress the rebellion, or to preserve the public peace, or to do service to the government.

The dispute resolved into the following point *cui incumbit probatio*. It occurred to me, that the indemnity reaches every case where the fact is done in order to suppress the rebellion. *Ergo*, if a man does an action which in effect tends to suppress the rebellion, but without intending it, the act does not protect him. On the other hand, if the action be done with an intention to suppress the rebellion, the action is indemnified, though in fact it does not tend to suppress the rebellion.

The intention then is the governing circumstance, which in all cases must be gathered from circumstances. And with regard to M'Lauchlan, the two circumstances of putting the man in prison, and delivering his effects to the commissary of the army, infer a presumption that the facts libelled were done by him with an intention to suppress the rebellion, unless the contrary can be proved by more pregnant circumstances. And accordingly the Lords sustained the defence upon the act of indemnity.