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.

No 333.

But, *queritur*, What if there be no circumstances to discover the intention by presumption, or what if the circumstances in either scale weigh equally, must the presumption lie in favours of the defender and for his innocence? I think not. It is sufficient for the pursuer insisting upon a spuilzie, to show that the action was unlawful by the law of the land, for this founds an action at common law. If the defender plead the act of indemnity, it is incumbent on him to show that his case comes under the act.

Sel. Dic. No 5. p. 7.

*** The report of this case as in Fac. Col. is No 57. p. 4726. *voce* FORFEITURE.

1774. *August* 6. JEAN STEWART, in Wigton, *against* SAMUEL M'KEAND.

No 334.
Whether the oath of a person sued for the aliment of a bastard child, acknowledging that he had carnal knowledge of the mother eleven kalendar months preceding the day fixed on in the libel as the child's birthday, but not posterior to that period, affords a proof of his being the father of that child?

AN action was brought against the defender, at the instance of Jean Stewart, before the Sheriff of Wigton, for payment of a certain sum, as the maintenance of a bastard child of which she was delivered on the 3d January 1772, with the expense of inlying, and of process.

The defender having denied that he was the father of the child, the pursuer authorised her procurator to refer to his oath, if, or not, he had carnal knowledge of her within twelve months prior to the birth of the child?

It was *argued* for the defender, That he was not obliged to depone in terms of this reference, as no law could father a child upon a man because he could not purge himself of guilt with a woman for twelve months prior to the birth. The Sheriff, however, ordained the defender to depone, leaving the merits of the objection to after consideration. Accordingly the defender deponed as follows: 'Depones and acknowledges to have had carnal knowledge of the 'pursuer eleven kalendar months preceding the 3d January last, being the 'time condescended on in the libel for the birth of the child, but not posterior 'to that time.' Upon advising this oath, the Sheriff assoilzied.

The pursuer then brought her cause, by advocation, before this Court, upon the following grounds; 1*mo*, That the defender had expressly acknowledged his having carnal dealings with the pursuer, and no regard could be had to his quality as to the time, because it was not to be supposed that his memory could be exact in that particular; 2*do*, That it was possible a woman might go for eleven months with child, particularly with the first child.—Upon a motion of the pursuer's, the defender was also re-examined, upon special interrogatories, by authority from the Lord Ordinary, who afterwards reported the case to the Court.

The pursuer admitted, that, upon this last examination, nothing very material had occurred: It only appears, that the eleven months, the defender had formerly deposed to, were as scrimp as possible. But the question between the