No 330. 1735. *January.* Captain Chalmers *against* Sir James Cunningham.

A friend of a family, which was reduced to low circumstances, having undertaken to lay out his money and pains in compounding the family debts, and having accordingly compounded a great number; in a compt and reckoning betwixt the heir of the family and the trustee's heir, a proof was led, which fixed the eases that were got upon several of the debts; and the question was, What rule should be followed as to the debts about which the proof was silent? It was *argued* for the trustee's heir, That his charge was the total debt acquired, unless where a direct proof was made out of the ease. It was *pleaded* on the other hand, That seeing the trustee failed to do his duty by expressing the transacted sum in the conveyance, mentioning only a certain sum in general, in order to avoid discovery, every thing ought to be presumed against him, and he ought to have no claim upon account of any debt purchased in by him, further than he can instruct he paid. The Lords found it presumed, That eases were obtained of all the debts purchased in, and because these debts were of several sorts, some heritable, and some moveable, some better, some worse secured, they found, That the rule for fixing the eases must be to take a medium of what is proved to have been got upon debts of the same kind. See Appendix.

Fol. Dic. v. 2. *p.* 164.

1737. *February* 18.

Dr Alexander Cunningham *against* James Livingston.

No 331.
Import of a deed, appointing all a testator's furniture and moveables in a certain house, &c. to belong wholly to a particular person. Found not to include money and bonds.

The deceased William Livingston, *anno* 1723, made a settlement of his affairs, wherein, for the love and favour he bore the Doctor, he assigned to him a bond of L. 125 Sterling, and some bank-stock, which comprehended all his estate, except the moveables he then had, under the burden of his just and lawful debts; and, about three weeks thereafter, he made another deed by way of codicile; wherein he appointed, "That, after his decease, all his furniture and moveables, contained in the house of Cameron, or elsewhere, should wholly and solely become the property of the Doctor, his heirs and donatars, with the burden of his funeral expenses."

William survived these deeds several years; and, after his decease, there was found, in his repositories in the said house, about L. 30 Sterling, in gold, silver, and bank-notes, together with some moveable bonds due to him; all which the Doctor claimed a right to, in virtue of the above clause in the second deed; because,

1*mo*, With regard to the money, it behoved to fall under the denomination of moveables, seeing, both in the sense of law, and in common language, every thing is moveable which is not heritable. For it is only in the view of its

being a moveable subject, that money belongs to an executor, and, as such, admits a division betwixt the wife and other executors. 2*do*, As to the moveable bonds, they should likewise be decerned to be conveyed to him, seeing, from the whole circumstances of the case, it is evident, the defunct designed that his whole moveables should belong to the Doctor, in whatever state they were at his death; for, by the first deed, he assigned to him all the particular subjects he then had; and, by the second, he likewise disponed to him his furniture, and all his moveables he should have at his death, in order to include whatever he should save betwixt that time and the period of his death. This being the defunct's intention, the rule of law behoved to take place here, viz. That moveable debts are included in a disposition of all moveables, Stair, *Lib.* 2. *tit.* 1. § 3. *l.* 6. *D. De Inst. vel Instrum. leg.* No 331.

Answered for James Livingston; That the money and moveable bonds in question behoved to belong to him as executor *qua* nearest of kin to his brother William, since they were not disponed by the testator; for, as to the first deed, it respected only *jura incorporalia*, or grounds of debt, and the other only furniture and moveables in a house.

It is true, that these deeds would have comprehended every thing the testator was worth in the world, if he had died immediately; but, as they had no reference to what should afterwards be acquired, they cannot be considered as an universal legacy, in order to include the subjects now claimed, which are the product of the defunct's saving, betwixt the date of his settlements and the time of his death; therefore, it is not to the purpose, to plead, that money and moveable bonds are considered as moveable, and not heritable subjects; since there is no dispute here betwixt the heir and executor. The only point now in hand being with regard to the import and construction of the words of a legacy, whether moveables contained in a house, connected with and subjoined to furniture, standing in the same house, is the same as if the question was betwixt the heir and executor. It is true, that such subjects are moveable in the first sense; and, it is only as such, that the defender has a right to them; but, in this question, the will of the party must be determined by the common acceptation of the word, attended by these other words, whereby it is limited or restrained. And, in effect, furniture and moveables are exigetic one of the other; the obvious meaning thereof is no other, than that all moveables are conveyed, such as furniture; and both are limited by the following words, contained (or situated) in the house of Cameron, or elsewhere.

That such is the meaning of the word moveables in the codicil, appears from what the pursuer acknowledges, viz. That all the effects belonging to the defunct at that time, were made over by the first deed; so that nothing was left to be disposed of by the second, but his household furniture; of consequence, the defunct could not, at that time, have it in his view, that any other subjects were comprehended under the words, moveables and furniture con-

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