It was by several of the Lords thought, that though an adjudication upon a *cognitionis causa* did carry such bygones, as affecting the *hereditas jacens*, and carrying every thing which would have been carried by the heir's service; yet where the adjudication proceeded upon a constitution and special charge, it carried only right to the particular subject adjudged, and of course to the mails and duties from its date.

That such only was the effect of comprisings before the 1672; and the case must be the same of adjudications, which are come in place thereof. That there is no difference in this respect between an adjudication on a special charge on the apparent heir's proper debt, and where it is on the predecessor's debt; for whereever a constitution is obtained, the debt becomes the proper debt of the apparent heir, and it would be singular, that an adjudication for the proper debt of the apparent heir should carry bygones due prior to its date.

Notwithstanding, the contrary opinion prevailed; and it was found, "that the adjudication on a constitution and special charge, carried the bygones since the death of the predecessor."

There appeared to be no habile method of affecting such bygones, but by adjudication; wherefore, though a comprising before the 1672 might not carry bygones, but that an extraordinary adjudication was necessary to carry these, yet now, that adjudications are come in place of comprisings, it was thought that no more was necessary than one adjudication to carry both the land and bygones.

Kilkerran, p. 4.

1740. *Nov.* 6. THOMAS WILKIE *against* THOMAS M'NEIL.

This case is reported by Elchies (*Pactum Illicitum*, No. 11.) and by C. Home, (p. 259.) Lord Kilkerran's note of it is as follows:—

"Found there is sufficient evidence that the charger and suspender were partners in the bargain, as to the brandy purchased from Wallace; and find that the delivery by Wallace to Wilkie was equal to delivery to M'Neil, and, therefore, repel the reason of suspension, and remit to the Ordinary to hear parties upon the abatement obtained by Wilkie from Wallace.

"In the view in which the Lords took this case, viz. that M'Neil did not buy from Wilkie, but was assumed partner with him, neither had the late act of parliament any thing to do with the case, nor the general point in law that before delivery, the buyer would not be liable, which last was the ground the Lord Ordinary had gone upon, as he explained himself.

"But then the President moved that point determined in the case of Morison in St. Andrews; and had he met with encouragement from his brethren, seemed inclined to have it found, that all bargains of whatever kind, for rum, brandy, &c. were *pacta illicita*, and afforded no action; but this not being relished was dropt."

1740. *December* 17. AGNES and JANET TRENTS and OTHERS, *against* the EARL OF LAUDERDALE and SIR ROBERT DICKSON.

THAT the by-gone annual-rents upon an adjudication belong to the heir of the adjudger, and are carried by a service, was determined in the case of *Wyliecleugh*,

1*st December*, 1738. And upon the same principles, it was in this case found, that where an adjudication had been conveyed to a creditor in security of a personal debt, by which the said personal debt became heritable, the heir of the creditor did, by his general service, carry the debt itself, and the adjucation and annual-rents due thereon.

Kilkerran, p. 6.

1741. *January* 19. WILLIAM WALKER and OTHERS, Representatives of WILLIAM WALKER in Westertown of Bedlormy, *against* ALEXANDER LIVINGSTON of Bedlormy.

THE said William Walker in Westertown of Bedlormy died without heirs of his body. The defender pretending to be one of the nearest of kin, and his claim being opposed by the pursuers, who alleged that they alone were the nearest of kin, an agreement was made between the parties, by which, on the one hand the defender discharged the pursuers of all claims he might have against them as executors of the deceased, and they, on the other hand, became bound to pay him L.100 Sterling.

John Martin, one of the next of kin, did not subscribe this contract, although his name is inserted in it as one of the parties bound to the defender.

The pursuers conceiving that they had been imposed upon by the defender, who was alleged to have truly had no claim whatever on the succession, brought a reduction of the agreement.

PLEADED for the pursuers *inter alia*,—that as the contract was not signed by Martin, it would not be binding on the defender, and consequently neither could it be binding on them, because in mutual contracts both parties must be bound or neither: *Lady Ednam* against *Stirling*, *25th March*, 1634, *(Spotiswood Contract:) Hope* against *Cleghorn*, 6 *January*, 1727.

ANSWERED—Supposing the pursuers not to be bound for the share of Martin, who did not subscribe, they ought still to be liable for their own shares. It may be true, that in the case of *indivisible obligations*, where one out of a number of *correi* does not subscribe, the whole are free; but the same does not hold in divisible obligations like the present, where, from the nature of the thing, no one of them has any interest in the accession of the rest to the agreement, because their claims against each other were still to remain entire. As to the inference drawn from the alleged rule of mutual contracts, the defender observed, 1*st*, that it was not in his power to get free; that although *quoad* Martin, he might be free, and might still dispute the propinquity with him, he was bound as to the rest, the case being the same as if he had entered into separate contracts with each of them. 2*dly*, that the alleged rule of mutual contracts is not a universal rule, *e. g.* in contracts between a major and minor, the one is bound while the other is free; see also *L.* 47, § 1, *ff. De Minor. Lamington* against *Foulis*, 14 *February*, 1632. The decisions quoted on the other side do not apply. That of Lady Ednam proceeded on specialties, particularly, that the deed had not been delivered. The other case differs from the present, in respect that both parties might have had an interest in the accession of the *correi* who did not subscribe, whereas here the pursuers had no interest in the accession of Martin.