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.

The Lord Ordinary *repelled the reasons of reduction.*

But upon advising a petition and answers the Court altered his interlocutor. Lord Kilkerran's note of the case is as follows:

" *Jan.* 19, 1741. The Lords found that Martin, one of five persons inserted in the contract to have been intended to sign the contract, not having signed the contract, the contract is void.

" It is a maxim in the matter of mutual contracts that one party can not be bound and the other loose; wherefore if Bedlormy could in this case have been freed, the decision was just; and there is no doubt but had they been intended to be bound to him for the L.100 conjunctly and severally, he was freed if any one did not sign; for then he had not the security he had stipulated; nor could these who signed have been heard to say that they were willing to pay the whole as if all had signed, so *nihil tibi deest;* for that was to have made him accept of a different contract, and so it was decided *March* 25, 1634. *Lady Edham* against *Stirling, (Spotiswood* voce *Contract,)* taken notice of in this petition. But then, as they were not intended to be bound for the L.100 conjunctly and severally, but only conjunctly, and so, each for his own part, some of the Lords were of opinion that Bedlormy could not have been free as to those who had signed, in regard it resolved into so many different contracts with the several persons; as to which severally his renunciation implied an obligation to make over such right as he had, on payment of their part of the money, and consequently the contract was binding upon the signers for their part of the money, agreeable to the decision observed also by Spotiswood, same *voce* contract *February* 24, 1632. *Lamington* against *Foulis,* taken notice of in the answer.

" There was but little reasoning on this case, when this interlocutor was pronounced; and it is a case of that kind that must have the less weight, as the ugly appearance of Bedlormy's behaviour, in bringing about this contract with poor, ignorant people, must have had an involuntary bias with the Court.

" However, upon farther reflection, I incline to be of opinion with the decision, on the foundation of the general maxim above mentioned, for I think Bedlormy must have been free, had he been so minded, even as to the signers; on the ground that he should have been heard to say, that he would not at all have transacted and agreed to renounce his pretensions to the succession, but in the view of a sum certain, and of being free of all pleas whatever, whereas by one standing out, he lay exposed to the same plea, and at the same expense as that plea for the whole succession should have cost him."

N. B. This case is reported by Lord Elchies, *(Locus Pœnit. No.* 5.)

1741. *February* 26. REPRESENTATIVES of COMMISSARY MACKENZIE *contra* ANNA LIDDEL.

EVEN a first adjudication will be allowed to pass, reserving defences *contra executionem,* where a signal prejudice would arise to the pursuer of the adjudication, by putting off the decerniture, till the defences, however relevant, should be determined.

For which reason, it was allowed in this case, where the granter of the bond was only an apparent heir of great age, not in the kingdom, and alleged to be dead, the proof whereof was reserved *contra executionem.*

Kilkerran, p. 8.