

father a power to give the land estate to one, and burden it with provisions to the rest? Unanimously, that he had. 4to, Has the father a power to delegate this power of burdening? Unanimously, that he had.

“ *Elchies* and *Kilkerran*, who only spoke of the side of the above interlocutor, spoke to this purpose: That it is the nature of such obligation *pluribus*, to constitute all of them creditors, *in capita*. Such plainly should be the import of the like obligation in favours of the bairns of another man. Why, therefore, should not the like obligation in favours of one’s own bairns have the same effect, unless either some principle in law to the contrary, or some great inexpediency could be alleged resulting from it, neither of which could be alleged; for, as to what had been said, that, supposing the bairns creditors *in capita*, let a father acquire what conquest he would, he behoved to give each their share, and could not lay the foundation of a family; it was answered that such consequence, did it follow, should indeed amount to an argument in law; wherefore certain such could be no man’s intention at entering into his contract of marriage: but that by no means it did follow, because, at the same time the bairns were creditors *in capita*, that credit in them was still subject to the father’s power of division. And whereas it had been said that there could be no power of division if the children were creditors *in capita*, ANSWERED,—That this was no new notion, for it was the uniform doctrine of our decisions, elder and later, that the children were creditors *in capita*, subject to the father’s power of division. So much was *in terminis* found in *Doway’s* case, *January 1728*; the like in *Rankin’s* case, *February 1736*. And upon the more general point that the father could not give the whole to one, in implement of the contract, the case of *Christian Stenhouse* was observed to be in point. Also the case of *Stuart*, *29 January, 1678*. And as to the case of *Cairns of Torr*, in *February 1719*, and of *Cumin and Kennedy*, *7 July, 1698*, from Fountainhall, quoted of the other side from the record in the first case, and from the case itself, as marked by Fountainhall, both appeared to proceed on specialties; particularly in that of *Cumins and Kennedy* which was next insisted on, that the daughter had in her contract of marriage accepted a sum in satisfaction. Now, if such be the uniform doctrine of our decisions, every man must be supposed by the like clauses in his contract, to have had the same meaning, as such clauses are explained in the decisions.

“The Lords were of opinion that provisions in contracts of marriage to heirs or bairns receive their construction, not from the terms used, of heirs or bairns, but from the nature of the subject; if land, then, whether the provision be to heirs or bairns, it is the heir of the marriage who is understood creditor in the provision; if a tenement in burgh, or money to be laid out and secured, whether to heirs or bairns, as in these cases the continuance of a family is not supposed to have been in view, the whole children are creditors *in capita*, though upon this there was no particular vote or judgment given.”

---

1740. *February 13.*

DOOLY *against* DICKSON.

THE Lords differed upon the question, whether an adjudication upon a special charge, carried bygone rents due between the predecessor’s death and the date of the adjudication.

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 wherever 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 *Wyliccleugh*,