1741. *December* 11. ALEXANDER BRUCE of Kennet *against* Colonel WILLIAM DALRYMPLE of Glenmuir.

THIS case is reported by Elchies, *(Servitude, No. 2.)* and more fully in his *Notes*, where the facts are stated.

Lord Kilkerran's Note of it is as follows:

"*November* 6, 1741.—Find that the defender, Colonel William Dalrymple, as heritor of the lands of Clackmannan, is entitled to a servitude on the pursuer's lands, for the use of the colliery in the said lands of Clackmannan; and to keep up the dams as they now stand for that purpose, and therefore assoilyie and decern.

"This interlocutor, and reasoning on which it proceeded, implies a power even to heighten *ultra* in time coming, should the necessary occasions of the colliery so require; though it was thought improper to give any express determination with respect to such future act, not only as it was not directly any part of the debate, but as in the *modus* whereof there might happen to be an excess, it was thought not proper to anticipate, by an express determination on it.

"Where a servitude is established by constitution for a particular use, *e. g.* of a dam of water on a neighbouring heritor's ground for the use of his coal-work, that use ceasing, the servitude also ceases. The dam cannot be keeped up for any different use; so on the other hand, if the necessary occasions of the dominant tenement come, in process of time, to require an extension of the servitude for that particular use for which the servitude was constitute, such extension is implied in the original constitution, *quia concessa jure, &c.* but where a servitude is by constitution, and that not for a particular use but indefinite, take the same example of a dam upon any neighbour's ground without expressing the particular use, then, as the heritor of the dominant tenement may apply it to any use, so he cannot extend it beyond the bounds to which it was either limited in the constitution, or which by possession appears to have been the ancient extent thereof: so far the rules of a servitude by constitution are clear. But in this case, the servitude being not by constitution but by prescription, the question was, whether, as in the law of Scotland the long prescription presumes a title and original constitution, the presumption in this case was, of an original constitution for the particular use of the coal-work of Clackmannan, or for an indefinite servitude. If the first, then the power to heighten was implied; if the latter, then the rule would apply *tantum prescriptum quantum possessum;* and some of the Lords were of opinion that in all cases of such servitudes acquired by prescription they are indefinite servitudes, since there is nothing to shew that the heritor of the servient tenement had consented only to a particular use or limited purpose, and that therefore, in this case, the defender had no right to keep up his dam so as to overflow the pursuer's ground beyond what it did for the space of forty years past. And no doubt, in general, such servitudes acquired by prescription are presumed indefinite servitudes; but a great majority of the Court were of opinion that in this case the presumption was of the original constitution for the particular use of the colliery, and therefore found as above, in which the circumstance was of great weight, that the dam had been heightened and lengthened on the pursuer's ground, from time to time, as the occasions of the coal required, without interruption. One thing however was taken notice of by the Lords who differed from the interlo-

cutor (which had escaped the bar,) that here the overflow on the pursuer's ground was not merely occasioned by heightening the dam for keeping up the water which originally flowed there, but also from the increase of water gathered from the Lord Erskine, a neighbouring heritor's ground, and from the pursuer's own ground, upon a liberty from the pursuer's tenant, paid for by the defender, to which, as the defender could pretend no right from the pursuer, so it could never be presumed to have been in view of the heritor of the servient tenement, at the constitution, to consent to an overflow upon his grounds by means of any water other nor what originally flowed there. But this had no weight with the Court, for if it is once supposed that the defender had right to raise the water which originally flowed there, to such height as the occasions of the coal-work required, it was refining too much to limit him from a lawful acquisition of further water; though still it is true, the defender could not be obliged to allow the new drains to continue that were lately cast within his grounds."

1742. *January* 14. ROBERT M'DOUGALL, second Son to ANN JOHNSTON and JOHN M'DOUGALL of Logan, *against* the creditors of JOHNSTON KELTON.

"THE LORD ELCHIES having found that a process for a judicial sale of the subjects in the inventory, at the instance of an heir served *cum beneficio* was not competent, the pursuers complained by representation, and *inter alia*, referred to Sneidman, *ad* § 5. *de hæredum qualitate et diff.* where he says, that *propter confectionem inventarii constituetur hæres in eo statu ac si hæreditatem non adiisset*, and farther argues, that an heir cannot do justice to himself and creditors, unless he brings the estate to a judicial sale.

"In Holland where the entering of heirs, *cum beneficio*, is allowed as with us, the heir must expose all the subjects in the inventory to a judicial sale; *Voet.* § 21. *ad Tit. De Jure Delib.*

"The practice formerly was to allow the heir to retain the estate upon answering for the value as it should be proved before the Lords. The point decided in these cases is indeed since varied, and the creditors allowed to bring the estate to a sale. But had the heir in these cases agreed to bring it to a sale, the creditors could not have sold it as a bankrupt estate.

"*N. B.* In this case the pursuer was only disponee from the heir *cum beneficio*, whence he was argued to be in the heir's right, and that he might exercise all the powers and faculties competent to the heir.

Interlocutor,—14*th July*, 1742.—"The Lord ordinary having considered the representation, and advised with the Lords: Finds that the pursuer, in the right of Ann Johnston, his mother's heir served *cum beneficio inventarii*, to Captain Robert Johnston of Kelton, her brother, is entitled to bring the subjects of the inventory to a sale before the Lords, and therefore sustains process."