

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."

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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 Sneiderman, *ad* § 5. *de hæredum qualitate et diff.* where he says, that *propter confectioem inventarii constituetur hæres in eo statu ac si hæreditatem non adisset*, 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,—*14th 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."