

MAY 18. 1790.

815/114

PET.—THO. SANDS,

FOR A

Factor on Cowbister,

R. BOSWELL, AGENT.

UNTO THE RIGHT HONOURABLE
THE LORDS OF COUNCIL AND SESSION,

T H E

P E T I T I O N

O F

THOMAS SANDS, one of the joint-heirs of the Estate of Cowbister, and only son of the deceased WILLIAM SANDS, son of the Reverend Mr ROBERT SANDS Minister of Hoy and Græmsy in Orkney, and of the said Mr ROBERT SANDS, as administrator-in-law of the said THOMAS SANDS his grandson, and of Miss CECILIA HALCRO, another joint-heir apparent of Cowbister ;

HUMBLY SHEWETH,

THAT, by a deed of settlement and entail, of this date, which was duly recorded in the register of tailzies, the deceased Dr Hugh Halcro conveyed, under the conditions and fetters therein mentioned, his estate of Cowbister, to his son William Halcro, and to the heirs of his body; whom failing, to his four sisters, Margaret, Cecilia, Jean, and Mary Halcro, and the heirs of their bodies; and the shares of those dying without

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1770.
Aug. 8.
1770.

without heirs of their bodies, to the survivors or survivor, and their heirs equally.

Margaret Halcro, the eldest sister, was married to Joshua Johnston writer in Stromness; and the deed vested the management of the estate in Mr Johnston and in his wife, and in Jean Halcro, another of the sisters, and in the survivor of them, during the minority and absence of William Halcro the institute, who was then in Jamaica.—The same persons were also appointed tutors and curators to him.

The deed likewise granted a special power to these persons to borrow money upon the estate, in order to pay off any debts that might be due by Dr Halcro.

Dr Halcro died not long after executing the deed; and Joshua Johnston and his wife entered into the possession of the estate. William Halcro, the institute, afterwards returned to Scotland, and lived in family with Mr and Mrs Johnston; but he died in November 1786, unmarried; and by that time his aunts, Jean and Mary Halcro, were also dead. Jean died without issue; but Mary, having been married to the above-mentioned William Sands, left two children, the petitioner Thomas Sands and a girl. The succession therefore devolved on Margaret Halcro (Mrs Johnston) on Cecilia Halcro, her sister, and on the petitioner, as heir of Mary Halcro.

Mr Johnston continued to possess the lands, without communicating to the petitioner any part of the proceeds, or giving any kind of account of his intromissions. On the other hand, the petitioner Thomas Sands, and his sister, had been maintained and educated at the sole expence of Mr Robert Sands, another petitioner, their grandfather; and he received information, that Mr Johnston had proved by no means a prudent manager of the estate; that he had contracted considerable debts upon it; and that the creditors complained extremely of not receiving regular payments of their interest. He therefore made fundry private applications to Mr Johnston for an account of his management, and for a share in the possession, but obtained no satisfaction. He became alarmed for the interest of his grandson; and in summer Session 1788, an action was accordingly commenced in this Court, in the name of the petitioners, concluding against Mr and Mrs Johnston, (and also against Cecilia Halcro, for her interest) for count and reckoning of their intromissions, for exhibition of the titles, and for yeilding up immediately possession of the estate, to the extent of one-third *pro indiviso*, and for a random sum. Arrestments were used on the dependence.

Defences were given in for Cecilia Halcro, stating, that she had had no intromissions, and was rather disposed to concur with the pursuers

fuers, being about to commence an action for her interest against Mr Johnston.

Appearance was made, but no defences were put in for Mr and Mrs Johnston; and after sundry delays, the petitioners, of this date, obtained decree against them from Lord Stonefield, Ordinary. A representation was thereafter put in, in which Mr and Mrs Johnston objected to the petitioners title, and maintained, that a grandfather was not an administrator-at-law for his grandson, and that the petitioner Thomas Sands had established no title in his person to enable him, even with a proper administrator, to maintain the present action; and that upon his making up proper titles, and obtaining proper authority, they were always ready to settle accounts with him. They, therefore, prayed to be assailed, or at least that the pursuer should be ordained to make up titles.

Nov. 25.
1788.

The petitioners put in answers, in which they maintained, That a grandfather's authority was sufficient to authorise an orphan grandson to carry on the present action: That it was not requisite to make up any titles to enable the petitioner Thomas Sands, in his admitted state of apparenacy, to claim possession *pro indiviso* of the estate that belonged to him in common with the defenders, and to which they have made up no better title than he had. In fine, that it was the defenders withholding the rights of the estate, that prevented the petitioner from making up titles. The Lord Ordinary, of this date, granted diligence to the pursuer for recovering writings, and afterwards second diligence.

Jan. 21.
1789.
March 6.

The petitioners were afterwards amused with promises of giving in their accounts of intromissions, but none such have appeared, although an express order was obtained from the Lord Ordinary for the purpose, appointing them to be lodged in process with vouchers, against the box-day of last vacation.

An extract of Dr Halcro's deed of settlement, together with an instrument of sasine taken thereupon by William Halcro, upon the 4th of October 1781, were, however, recovered in consequence of the above diligence; and a brieve having been purchased to serve the petitioner Thomas Sands, as heir of entail to William Halcro, information has been received that he was served accordingly, but the retour has not yet arrived.

In the mean time the petitioners have been informed, that Mrs Cruikshank of Stromness, a considerable heritable creditor upon the estate, has threatened to insist in an adjudication of it, in consequence of Mr Johnston's failing, for several years past, to make payment of any interest on her debt: That notwithstanding the petitioners

tioners endeavours to interpel Mr Johnston from continuing his intromissions with the proceeds of the estate, by their arrestments in the hands of the different tenants, he has nevertheless found means, under colour of being a *pro indiviso* proprietor, to persuade the poor ignorant people to pay to him as formerly; and, that there is besides one valuable part of the proceeds of the estate, *viz.* the kelp, which yields about 100 l. *per annum*, and is kept in Mr Johnston's own hand, that it was impossible to arrest. In these circumstances, the petitioners were advised, that it was dangerous to wait longer the delays of a count and reckoning in an ordinary action, where the remoteness of Orkney was a never-failing pretext for retarding the proceedings; and that, in particular, as the season for gathering and preparing the kelp was now at hand, it was necessary, if possible, to prevent Mr Johnston from continuing his intromissions with that commodity.

The other petitioner, Cecelia Halcro, is also now as much alarmed as the other petitioners at the situation of the estate; and she has ordered, accordingly, an action to be raised against Mr Johnston for his intromissions; and concurs in the present application to your Lordships.

It will be observed, that the defenders have, under the deed of entail, no right of managing the estate, except during the minority or absence of the deceased William Halcro, and that, therefore, from November 1786, when he died, down to the present hour, Mr Johnston's right of intromission was merely as husband of Margaret Halcro, an apparent heir in one third *pro indiviso* of the estate; so that the petitioners Thomas Sands and Cecilia Halcro, under their rights, as heirs apparent in the other two thirds of the estate, have ever since November 1786, the same right of possession that Mrs Johnston (Margaret Halcro) and her husband have.

Under all the circumstances, therefore, of this case, it is humbly hoped, your Lordships can have no difficulty to sequestrate the rents of the estate, and appoint a factor over it for behoof of all concerned.

May it therefore please your Lordships to take the premisses under your consideration, to sequestrate the whole rents and issues of the estate of Cowbister, and to appoint a factor thereon, with the usual powers, and give such other relief in the premisses as you may judge meet.

According to Justice, &c.

ALLAN MACCONOCHIE.

Edinburgh,