JUNE 26. 1790.

ANS. JOSHUA JOHNSTON, &c.
TO THE
PET. THOMAS SANDS, &c.

Geo. Andrew, Agent.

ANSWERS

FOR

JOSHUA JOHNSTON, Writer in Stromneſs, for himſelf, and MARGARET HALCRO, his Wife, one of the Heirs-portioners of the Eſtate of Coubiſter;

TO THE

PETITION of THOMAS SANDS, only Son of the deceaſed William Sands, ſon of the Rev. Mr Robert Sands, Miniſter of Hoy and Græmſey 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 Coubiſter.

THE demand made in the petition now to be anſwered, is of a very ſingular nature:—It is, that your Lordſhips would be pleaſed to ſequeſtrate the eſtate of Coubiſter, and appoint a factor thereon, not for the behoof of creditors, nor for behoof of thoſe who, in the iſſue of the cauſe, ſhall be found to have beſt right to it, but merely to indulge the propenſity of the purſuers to wanton and unneceſſary litigation.

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The reſpondent does moſt expreſsly deny that he ever ſhowed any backwardneſs to ſettle accounts with the petitioners: He was anxious, indeed, that the ſettlement ſhould be made in Orkney by the parties themſelves, in an amicable manner, without troubling this Court to interpoſe its authority; and, for that reaſon, he was unwilling to proceed in legal meaſures, while there was any hope of deciding all differences in a more eligible manner. With the view of accompliſhing this purpoſe, he wrote repeatedly to the Rev. Mr Sands, making propoſals to this effect, as would appear from his letters, if produced; but none of theſe propoſals were accepted, although it is very evident, that the carrying on a proceſs of this nature, at ſo great a diſtance from the reſidence of the parties, muſt be attended with much trouble and expence, which might have been ſaved, had the Reverend petitioner been as well diſpoſed to an amicable ſettlement as the reſpondent.

The death of William Halcro happened ſubſequent to Martinmas 1786, ſo that the whole rents of that year fell under the right of management granted to the reſpondent and his wife, by the deceaſed Dr Hugh Halcro: The firſt year's rent, therefore, which fell under the right of the heirs of William Halcro, was that of crop 1787; and as the ſummons in the preſent action was executed on the 31ſt of May 1788, and arreſtments uſed ſoon after, upon the dependence, it is evident that the reſpondent can have had no poſſeſſion of theſe rents, for the tenants were prevented, by the arreſtments, from making payment of them to any perſon, and they have ever ſince that time remained in their hands, excepting in ſo far as was neceſſary for paying the feu-duty, and ſome part of the public burdens, which has been done by conſent of parties. The apprehenſions therefore which the petitioners pretend to entertain, from theſe rents remaining in the poſſeſſion of the reſpondent, muſt be altogether affected, at leaſt they are totally without foundation, as none of them have been intromitted with by him, except thoſe of ſome very ſmall pendicles, which were omitted in laying on the arreſtments. But there is a danger of another ſort, that of the tenants becoming inſolvent, from which, if any loſs ſhould happen, it muſt fall upon the petitioner Mr Sands, to whom it is owing that theſe rents have not been recovered in due time, by thoſe who had right to them.

The reſpondent is no leſs deſirous than the petitioners, to have the eſtate divided, and each of the co-heirs put in poſſeſſion of the ſhare which belongs to them; but he does not ſee how this object will

will be forwarded by the ſequeſtration of the eſtate, and the appointment of a factor. If the petitioners chuſe to manage the ſhares to which they are entitled, by means of a factor, they have it in their power to appoint one; but there is no reaſon why the reſpondent ſhould be obliged to put his affairs under the care of a factor, when he is deſirous, and ſufficiently able to manage them himſelf.

The ſequeſtration of a land eſtate is an extraordinary remedy, to which your Lordſhips are not in uſe to have recourſe, except in caſes of evident neceſſity. No ſuch neceſſity has been ſhown in the preſent caſe. It does not yet appear that the reſpondent is in the ſmalleſt degree indebted to the petitioners; on the contrary, it will appear, when his accounts are fairly ſtated and examined, that they are conſiderably in debt to him. In this ſituation, it would be a very great hardſhip upon the reſpondent, to take from him the management of his own affairs, upon ſuch ſurmiſes as are contained in the petition.

According to the opinion of Mr Erſkine, B. II. tit. 12. § 55. and 56. 'Sequeſtration is competent, either where it is doubtful 'in whom the property of the lands is veſted, or where the eſtate 'is charged with debts, equal, or nearly equal to its value.' He adds, 'that as it is a rigorous diligence, it is not to be granted 'ſummarily, without deſcending into an enquiry concerning the 'foundation and extent of the claims affecting the ſubject; nei-'ther ought it to be granted of ſubjects that are not brought be-'fore the Court, by the diligence of creditors; for it is the de-'pendence in Court, of the competition among the ſeveral credi-'tors who have affected the ſame diſputed ſubject, by their di-'ligences, which alone founds a juriſdiction in the Judges, to 'take that ſubject into their poſſeſſion, till the right of the com-'petitors be determined;' and he concludes with obſerving, 'that 'no creditor, whoſe debt is not made real upon the eſtate, has a 'title to demand ſequeſtration.' If this doctrine, which is exactly conformable to what is laid down by Lord Bankton, and by Lord Stair, be well founded, the petitioner can have no chance of prevailing in his demand: The right of ſucceſſion is clear, and the reſpondent is ſo far from diſputing it with the petitioners, that he is ready to concur with them in every proper meaſure for obtaining a diviſion of the eſtate, and putting each of the heirs in poſſeſſion of what belongs to them. If the petitioners demand

B. 1. t. 15. § 15.
B. 4. t. 50. § 28.

demand the ſequeſtration as creditors, their plea is, if poſſible, ſtill worſe founded: They not only are not real creditors, but it does not even appear that they are creditors at all; nor is there the leaſt appearance of any competition. Upon theſe grounds, the reſpondent truſts, that your Lordſhips can have no difficulty in refuſing the deſire of the petition, and finding the reſpondent entitled to the expence of theſe anſwers.

In reſpect whereof, &c.

DAVID SMYTH.