NOVEMBER 16. 1790.

PET.—JOSHUA JOHNSTONE, *&c.*
AGAINST
INNER-HOUSE *Interlocutor.*

ALEX. WALKER, Agent.

UNTO THE RIGHT HONOURABLE

The LORDS of COUNCIL and SESSION,

THE

PETITION

OF

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

HUMBLY SHEWETH,

THAT the petitioners beg leave to reclaim to your Lordſhips againſt an interlocutor pronounced towards the concluſion of the laſt ſeſſion, by which the rents of the eſtate of Coubiſter were ſequeſtrated, a judicial factor appointed, and the petitioners deprived, in effect, of the adminiſtration of their property. Yet it is with much reluctance that they now ſolicit your Lordſhips to review the interlocutor. Had their former anſwers been prepared in a manner more ſatisfactory, affording ſufficient information on the ſubject,

ject, they truſt that your Lordſhips interlocutor would have been different;—if not, they would have acquieſced in the judgment pronounced. The diſtance of Orkney, and the ſlow communication, by poſt, with Edinburgh, renders it impoſſible to obtain, in leſs than three weeks, a return to a letter; but the petitioners ſituation, as will be ſtated afterwards, was ſo peculiar, that it was neceſſary to prepare, and give in their anſwers, long before the arrival of that information by which their anſwers ſhould have been framed.

Perhaps it may be neceſſary to remind your Lordſhips of the circumſtances of the caſe—That the late Hugh Halcro, of Jamaica, entailed his eſtate on his ſon William, an infant, and the heirs of his body; failing whom, on his (the entailer's) ſiſters, Margaret, Cecilia, Jean, Mary, and their heirs; with a ſpecial proviſo, that the ſhares of ſuch as died without iſſue, ſhould accreſce to the ſurvivors. Margaret the eldeſt, her huſband Mr Johnſtone, the preſent petitioners, and Jean, ſince deceaſed, were appointed, by the ſame deed, tutors to his ſon, and adminiſtrators of his property; with a ſpecial power, as his circumſtances were much involved, to raiſe money, upon heritable ſecurity, for the diſcharge of his debts.

The petitioners management commenced in July 1770, and terminated by the death of their pupil in 1786; ſince which, they have properly had no interference in the management. Their pupil died on the 27th November 1786; which entitled them to uplift, on the 12th November 1787, the term of payment, the rents that were due for the former year. The action of compt and reckoning, at the inſtance of the reverend Mr Sands, and his grandſon, a minor, was raiſed in June 1788, and arreſtments were immediately uſed on the dependence; ſo that it was impoſſible for the petitioners to continue their management, by uplifting, at Martinmas 1788, any part of the rents arreſted for crop 1787. Theſe arreſtments amounted to a virtual ſequeſtration of the rents; but the purſuers in the compt and reckoning, while the action was ſtill in dependence, not ſatisfied with ſuch a meaſure, applied to your Lordſhips, laſt ſeſſion, to ſequeſtrate the rents, and to appoint a factor to manage the eſtate. Your Lordſhips, accordingly, upon adviſing the petition, with anſwers that were neceſſarily lame and imperfect, were, of this date, pleaſed to pronounce the following interlocutor:

July 6. 1790

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" The Lords having adviſed this petition, with the anſwers " thereto; They ſequeſtrate the whole rents and iſſues of the e- " ſtate of Coubiſter, and nominate and appoint William Young, " writer in Stromneſs, factor thereon, with the uſual powers; " he always finding caution before extract, conform to the acts " of ſederunt."

This interlocutor the petitioners humbly ſolicit your Lordſhips to review, as they feel themſelves materially affected, and ultimately may be much injured, by being deprived of the management of their own affairs. They are proprietors *pro indiviſo* of a third of the eſtate, and have an equal right with the purſuers to a ſhare of the adminiſtration. Of that they are, however, deprived, for no other viſible reaſon, than that their tutory accompts, which have certainly no relation to their right as proprietors, have not been adjuſted by your Lordſhips judgment. With regard to theſe, the petition, on the part of the purſuers, was ſilent. No notice was taken of the particular ſituation of the eſtate or tenantry, of the petitioners accompts, or of the balance that was due them; but their petition ſtated, *1ſt*, That the petitioners had refuſed to accompt for their intromiſſions, and to admit the purſuers to their ſhare of the property. *2dly*, That the petitioners ſtill perſiſted, notwithſtanding theſe arreſtments, to uplift, as formerly, the whole of the rents. *3dly*, That they continued to manufacture and diſpoſe of the kelp. And, *4thly*, That they had contracted, during the pupilage of the former heir, an heritable debt, on which, as no intereſt had been paid, an adjudication was threatened. For theſe reaſons, your Lordſhips were perſuaded to ſequeſtrate the rents, or rather to commit the eſtate entirely to their management; for Mr Young, the judicial factor, is ſon-in-law to the Reverend Mr Sands, who, in the action of compt and reckoning, purſues as tutor to his grandſon, a minor. To theſe reaſons the petitioners ſhall reply, in a manner, they truſt, ſatisfactory to your Lordſhips.

And *firſt*, The preceding narrative may convince your Lordſhips, that to debar the purſuers from their ſhare of the rents, or their *pro indiviſo* right to the property, was, from the ſituation of parties, impoſſible. Thoſe rents that were due after the termination of the tutory, (namely, for crop 1787, payable at Martinmas 1788), the purſuers had ſecured by arreſtments, long before they were payable. If they were debarred, as they com-

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plain, from all acceſs to the eſtate, they debarred themſelves. Three years rents remain at this moment in the hands of the tenants, certainly at the hazard of thoſe who uſed the arreſtments. But, ſo completely did they ſecure the rents, that, but for the petitioners exertions, the public burdens had remained unpaid. They perſuaded the purſuers to conſent, not indeed to uplift the rents, but to permit the tenants to pay two years feu-duties, and a year's ceſs; and the petitioners were obliged themſelves to advance the ceſs for the other year. As to the tutory-accompts, they never refuſed to accompt to the purſuers, nor ſuggeſted any unneceſſary obſtacles, in order to prevent or retard a ſettlement. Their adminiſtration was not completed till Martinmas 1787, at which time they uplifted the rents for the crop 1786; and ſome deliberation, and a reaſonable portion of time, were ſurely neceſſary to prepare a ſeries of accompts for ſixteen years. No ſuch indulgence was granted by the purſuers, who applied for an accompt of intromiſſions long before an accompt could be ready; charged the petitioners before the High Court of Admiralty, in which however they were caſt, with expences; and then commenced an action of compt and reckoning before your Lordſhips. During all this period, the petitioners applied to them repeatedly to bring the affairs to an amicable ſettlement, propoſed a communing, and offered to ſubmit their accompts and vouchers to Mr Sands, and Mr Young his ſon-in-law. To theſe propoſals the petitioners received no anſwer. In the action of compt and reckoning, they proponed a dilatory defence indeed, by objecting to Mr Sands's right to purſue, without a confirmation as tutor to his grandſon; for they thought ſuch a confirmation neceſſary to render a diſcharge from him effectual and valid. The defence was overruled: but, that it was not ſtated with a view to retard an adjuſtment, is evident from this, that they never objected to the grandſon's right, nor required his ſervice as heir to his mother, but, on the contrary, informed his grandfather, that his right of apparency would never be conteſted by them, and that the expence of a ſervice ſhould therefore be avoided. A ſervice has however been expeded, as if that right was inſufficient, which was never diſputed; but your Lordſhips, it is truſted, will acquit the petitioners of having either refuſed to accompt for their intromiſſions

intromiſſions as tutors, or debarred the purſuers from acceſs to the property.

The *ſecond* allegation is, That the petitioners have perſiſted, in ſpite of the arreſtments, to uplift the rents. That they have interfered with theſe rents bound by the arreſtments, they deny moſt poſitively. Mrs Johnſtone is liferented in Buxa, a part of the eſtate; and of that her huſband has uplifted the rents. He has alſo received the butter debt of the meadow of Coubiſter, and the rents of two or three cottages; articles unaffected by the arreſtments, which muſt have been loſt or conſumed, had they remained unpaid. Far from amounting to his third of the rents, theſe articles form a very inconſiderable part of the expence he has lately diſburſed for the eſtate.

To the *third* allegation, That he has continued to manufacture and diſpoſe of the kelp; he anſwers, That, without his interference, the kelp muſt have been loſt both to him and to them. Mr Sands was too infirm, and his ſituation was too remote, to permit him to ſuperintend or conduct the manufacture; and his ſon-in-law, Mr Young, had not then acquired your Lordſhips authority to manage the eſtate. What was Mr Johnſtone to do? To permit his property to be diminiſhed, by leaving the ſhores unburnt, and, although a proprietor, to remain inactive, or forego the profits to be acquired by kelp, becauſe another co-proprietor had thought proper to arreſt the rents of the lands? But let this ſatisfy them, that Mr Johnſtone is ready to accompt for the kelp, either at the former rock-rent, or as factor, with a ſuitable allowance for his trouble, juſt as ſhall be judged moſt equitable.

The *fourth* and moſt material allegation is, That an heritable debt has been contracted, of which the intereſt has never been paid, and on which an adjudication is threatened at preſent. The petitioners are unwilling, becauſe it is perhaps irregular, to enter into the particulars of the action of compt and reckoning; but it is neceſſary to ſtate the ſituation of the property at the commencement of their tutory, in order to explain the reaſons for contracting ſuch a debt. The groſs rental of the eſtate never exceeded 95 l. Sterling, and, during their adminiſtration, fluctuated between that and 83 l. Sterling *per annum*. The eſtate was burdened, at the death of the entailer, with the following debts.

	L.	s.	d.
Heritable debt to Mr Honyman of Græmſay -	268	0	0
Heritable debt to Mr Balfour - -	100	0	0
500 merks to each of the four ſiſters of the entailer, provided to them out of the eſtate by their father —2000 merks, or - - -	111	2	$2\frac{2}{3}$
Perſonal debts, to the extent of about 200 l. Sterling	200	0	0
L.	679	2	$2\frac{2}{3}$
The intereſt of the above, yearly, is - L.	33	19	0
The widow of the entailer had an annuity on the eſtate of 180 l. Scots, and a cow's graſs 9 l. Scots	15	15	0
Helen Halcro had alſo an annuity thereon of 36 l. Scots	3	0	0
The board, clothes, education, and other furniſhings to the minor, amounted, at an average, to about 200 l. Scots yearly - - -	16	13	4
L.	69	7	4
The annual amount of the feu-duties, ceſs, and other public burdens, cannot be eſtimated with any preciſion, as the feu-duties that are payable in kind fluctuate in their value from year to year.—State them at - - - -	10	10	0
Sum L.	79	17	4

From this view, your Lordſhips muſt perceive how much the eſtate was burdened; how inconſiderable any ſurplus might be that aroſe from the rents of particular years, and how inſufficient it was for the liquidation of the debts. The fact is, that during the whole of Mr Johnſtone's adminiſtration, he was always largely in advance for the eſtate; and, at preſent, it owes him 1491 l. 7 s. 7 d. Scots. Mr Balfour had a leaſe of the kelp-ſhores at a ſmall rock-rent; and Mr Honyman had poſſeſſion of a conſiderable part of the eſtate, the rents of which were retained by both theſe gentlemen, in extinction of the intereſt of their heritable debts. Some plan was therefore neceſſary to diſcharge theſe debts, in order to render the rents more effectual; but the petitioners forbore to exert the powers with which they were entruſted by the deed of entail, till the year 1781, when the minor granted, with their conſent as his curators, an heritable ſecurity for

for 350 l. Sterling; which, with the intereſt, which the creditor, the late Andrew Cruickſhanks, from his friendſhip to the petitioners, ſuffered to run on for ſome years unpaid, was judged ſufficient, with proper management, for the extinction of thoſe more oppreſſive debts, by which the eſtate was exhauſted, and would have ſoon been ruined. Accordingly, the debts due to Meſſrs Honyman and Balfour, were diſcharged; the 2000 merks of proviſion to the entailer's ſiſters, creditors not leſs urgent than the former, were paid; with the exception of 500 merks, the ſhare that is due to the petitioner Mrs Johnſtone; and the perſonal debts were almoſt all diſcharged. At preſent, the only claims that can affect the eſtate, are, as far as is known to the petitioners,

Heritable bond to Mr Cruickſhanks for 350 l. with intereſt from October 1781.

500 merks of proviſion due to the petitioner, with intereſt from 1768.

A proteſted bill by the late Dr Halcro for 10 l.

The balance due to the petitioners, on their factory accompts, is 1491 l. 7 s. 7 d. Scots.

A proportion of the expence of repairing the manſe, part of which has been already paid, *per* advance, by Mr Johnſtone.

The petitioners preſume, that the preceding ſtatement will convince your Lordſhips of the neceſſity of raiſing a ſum by heritable ſecurity, in order, if poſſible, to retrieve the eſtate. If diligence has been lately threatened by the creditor, that muſt be imputed to the meaſures adopted by the purſuers. The rents have been locked up, and all adminiſtration of the eſtate ſuſpended, for three years. Theſe rents might have been applied to the extinction of the intereſt, and the creditor might have been ſatisfied; but it is certainly natural for Mr Cruickſhanks's heirs, when they ſee the eſtate in confuſion, and the rents endangered by the failure of tenants, to uſe ſuch diligence in rendering their debt effectual, as, the petitioners are convinced, had *they* continued in the management, would not have been employed. They have only to add on this ſubject, that had their propoſal been adopted, the debt might have been extinguiſhed. They propoſed to the purſuers, at the termination of their tutory, that each of the co-proprietors ſhould undertake

undertake a third of the debt, and diſcharge it according to their reſpective abilities; but that was diſregarded, with many other propoſals, equally amicable, and equally beneficial.

Such are the allegations urged on the part of the purſuers, to induce your Lordſhips to grant a ſequeſtration; allegations to which the petitioners have anſwered perhaps too diffuſely, but more with a view to vindicate their characters, than as pertinent to the cauſe; the merits of which, the petitioners are afraid, have been miſunderſtood, becauſe the cauſe itſelf has been conducted in a manner moſt irregular. An accumulation of actions is tolerated in law; but wherever actions, different in their nature and tendency, are accumulated in the ſame ſummons, much circumſpection and care is neceſſary, leſt concluſions, regarding one of the actions, be drawn from premiſes that belong to another. It is apprehended that ſuch is the preſent caſe. An action of compt and reckoning is raiſed on a ſummons, that contains a concluſion for obtaining poſſeſſion, *pro indiviſo*, of a third of the eſtate. In the compt and reckoning, the purſuers proſecute as neareſt of kin, demanding a ſettlement of tutory accompts; but, in the concluſion, demanding a ſhare of the eſtate, they ſue as proprietors, for their heritable rights: actions of a different nature, that ought to have been ſeparate; becauſe the latter, which has never been conteſted, and ought to obtain an immediate deciſion, is ſuſpended till the former be finally determined, by an extracted decree. Their poſſeſſion, as proprietors, had no connection with their claims as next of kin to the deceaſed; nor are the petitioners intromiſſions, as tutors, connected with their ſubſequent right as proprietors; yet the compt and reckoning has been rendered inſtrumental to every meaſure for attaching their property. Arreſtments might have been uſed on the compt and reckoning; but, in fact, the arreſtments have been uſed on the other petitory concluſion, for admiſſion to the property, as they affect the rents indiſcriminately, the purſuers as well as the petitioners ſhares. Yet theſe arreſtments are to ſubſiſt, at leaſt as far as the petitioners are concerned, during the action of compt and reckoning, although they are founded on a different concluſion. Sequeſtration was incompetent upon the compt and reckoning; as a perſonal, indefinite claim, neither liquidated nor conſtituted, could have no operation on an heritable ſubject. The ſequeſtration muſt be founded on the other concluſion for a ſhare of the property; yet

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its duration is determined by the action of compt and reckoning, to which it has not the ſlighteſt relation. The ſequeſtration is applied for, to preſerve the property for all concerned; and the property muſt be preſerved by judicial authority, becauſe the purſuers do not chooſe to aſſume the poſſeſſion before the termination of a perſonal action in which they are concerned; and thus, the action of compt and reckoning is the meaſure and cauſe of a ſequeſtration, that can only proceed upon a claim of property. If the petitioners are liable for a balance in their tutory accompts, (which balance is, on the contrary, much in their favour), let them be ſued in a perſonal action; if the purſuers want their ſhare of the property, (which was never withheld), let them obtain it: But why muſt the whole rents be ſequeſtrated, and the petitioners deprived of the adminiſtration of their own affairs, becauſe it is ſtill undetermined, whether a balance be due to them on their tutory accompts? They can aſſign a reaſon for theſe proceedings: The purſuers wiſh to exclude them entirely from the management of the property, by getting a factor appointed, who is either one of their number, or ſo connected with them, as to be entirely in their intereſt: And this they have effected.

But the petitioners apprehend, that the proceedings on the part of the purſuers, are irregular; at leaſt, that they have not adopted ſuch a mode as the law points out, in ſimilar caſes, as the moſt expeditious. They purſue in an action of compt and reckoning, for a *pro indiviſo* ſhare of the property; and on that plea have obtained a ſequeſtration, till their claims, as next of kin, to rents formerly uplifted by the tutor, and *in bonis* of the deceaſed, be determined by your Lordſhips. A ſubject may be enjoyed at the ſame time *pro indiviſo* by different proprietors, if they act in concert; and, either by a private, amicable tranſaction, divide the ſubject, to be ſeparately adminiſtered; or commit the management to one, who is accountable to the others for their reſpective ſhares of the produce. If a difference ariſes concerning the management, or if one be excluded or injured with regard to his ſhare, he may either ſue the others for his proportion of the rents, or, if he wiſhes himſelf to adminiſter his property, he may purchaſe a brieve from Chancery, and, by that, effect a diviſion of the ſubject. Now, had the purſuers been deſirous merely to obtain their ſhares by the eaſieſt and moſt expeditious method, they might have procured a brieve from

Chancery for a diviſion, or they might have ſued Mr Johnſtone for the rents of each particular year uplifted by him, and withheld from them. No other method appears to be competent; for a petitory concluſion for their reſpective ſhares, which neither accelerates the diviſion of the ſubject, nor regulates the future diſtribution of the rents, is in effect a declarator of that right which they enjoyed already by the deed of entail; and your Lordſhips cannot award with effect a *pro indiviſo* poſſeſſion, which depends entirely on the mutual confidence and good underſtanding that ſubſiſt between the different parties. But the purſuers, on an irregular concluſion, inſerted at random in a perſonal action, namely, that they were excluded from their ſhares, have arreſted the rents, before any part of the rents from which they were excluded were payable, and, becauſe theſe arreſtments muſt ſubſiſt till a final deciſion of the perſonal action, have applied to your Lordſhips for a ſequeſtration of the ſubject from which they were never debarred, and to which, if the arreſtments were removed, they might obtain, either by an action for rent, or a brieve of diviſion, immediate acceſs.

Perhaps the petitioners have detained your Lordſhips too long on a ſubject, not, of itſelf, of the utmoſt conſequence; but they felt their characters materially affected by theſe circumſtances, which, when inſerted in a printed petition, are diffuſed through the country; and to them the adminiſtration of their own concerns is of much importance. A judicial factor, who acts according to your Lordſhips inſtructions, is bound to a rigorous exaction of the rent; but, on the petitioners property, much lenity is neceſſary with tenants, who are often unable to pay at a preciſe day, and, if urged for payment, may be rendered inſolvent to the ruin of the eſtate. Of this, the petitioners have had much experience; as, during their tutory, although credit was taken for the rents at the term of payment, the tenants continued frequently long in arrear; nor was there any remedy for this, but ſuch as would have impaired the property, while it ruined the tenants. Beſides, the petitioners are not conſcious of any action that ſhould ſubject them to the danger of having their credit impaired, by the diſgrace of having their property ſequeſtrated. They are not inſolvent; their accompts are fair, and their circumſtances unembarraſſed. The right of property is not doubtful; a third of the eſtate is theirs; of that third they claim the adminiſtration and immediate poſſeſſion. If the purſuers deſire

ſire a diviſion of the property, let them purchaſe a brieve from Chancery. If they think it more expedient that the eſtate ſhould be preſerved entire, and adminiſtered for the benefit of all concerned, the petitioners are willing to undertake the management, and will give ſuch ſecurity as the Court may require for their conduct, and their future intromiſſions. This they offer judicially; but are unwilling that the property which belongs to them, ſhould be either intruſted to the purſuers, or committed by your Lordſhips to a judicial factor. They muſt ſay, that the ſequeſtration of an eſtate is a new mode of effecting a diviſion among different proprietors.

One thing is ſtill to be added, to explain the reaſon for their former anſwers being ſo defective. The petition for ſequeſtration was preſented to your Lordſhips after the accompts were lodged in proceſs; but the purſuers required the production of obſolete vouchers, reſpecting the payment of feu-duties and other public burdens, for ſixteen years paſt; articles which they were conſcious were all diſcharged. Mr Johnſtone, when written to by his agent, collected theſe, and prepared whatever information was neceſſary, but found them altogether too bulky to be tranſmitted by poſt; and at that time, on account of the impreſs, no veſſels from Stromneſs ſailed to the Forth. The papers were therefore neceſſarily delayed; and Mr Johnſtone was obliged at laſt to diſpatch his ſon with them to Edinburgh, both that the conveyance might be ſafe, and that ſuch verbal information might be obtained, as could not be procured in the courſe of correſpondence.

May it therefore pleaſe your Lordſhips, to alter your former interlocutor; to recal the ſequeſtration of the whole rents and iſſues of the eſtate of Coubiſter; to ſuperſede the factor formerly appointed; and either to appoint the petitioners, on giving ſufficient caution, to the adminiſtration of the whole, or to find them entitled to the management of their third of the eſtate; or to give ſuch other relief as you ſhall judge meet.

According to juſtice, *&c.*

MALCOLM LAING.