

DECEMBER 18. 1795.

PET. and COMP.—MARGARET HALCRO,

Against

William Young, Factor on the Estate of Cowbister.

Sir J. Colquhoun, Clerk.

Alex. Walker, Agent.

815/14

UNTO THE RIGHT HONOURABLE,
The Lords of Council and Session,
THE
PETITION AND COMPLAINT

O F

MARGARET HALCRO, Relict of the deceased
*Joshua Johnston, Writer in Stromness, one of the
Heirs-Portioners of the Estate 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 Doctor Hugh Halcro conveyed, under the con-
ditions and fetters therein mentioned, his estate of Cow-
bister 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 heirs of their bodies, to the survivors or sur-
vivor, or their heirs, equally.

Feb. 13. 1770.

Aug. 8. —

A

This

This deed vested the management of the estate in the petitioner Margaret Halcro and her late husband, 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. They were also appointed tutors and curators to him; and the deed likewise granted a special power to them to borrow money upon the estate, in order to pay off any debts that might be due by Dr Halcro.

Dr Halcro died soon after executing this deed; and the late Joshua Johnston, the petitioner's husband, uplifted the rents of the estate for some time, as factor thereon, out of which he paid several of the debts due by the granter, and also maintained William Halcro the institute, who returned to Scotland, but 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 married William Sands, she left two children, a son and a daughter: the succession therefore devolved on Margaret Halcro, the petitioner, on Cicilia Halcro, her sister, and on Thomas Sands, the son and heir of Mary Halcro, the other sister.

In order to preserve the estate from diligence, the tutors of William Halcro, in consequence of a clause in the entail, borrowed from the deceased Andrew Cruickshanks, merchant in Stromness, L. 350 Sterling, for which they granted heritable security on the estate; and this enabled them to pay off a great part of the debts due by Dr Halcro, the granter of the deed; but after this was done, the petitioner's late husband, in the course of his factory upon the estate, advanced considerable sums of his own, besides the free rents, to pay off the other debts.

Thomas Sands, one of the heirs-portioners, brought an action of count and reckoning in this Court against the petitioner's husband, for his intromissions as factor upon the estate of Cowbister, which has depended for some time before the Lord Stonefield Ordinary, and in which there is no doubt that there will ultimately be found due to his heirs a considerable balance arising due upon these accounts.

In the course of this process, the pursuer Thomas Sands, with the concurrence of Cecilia Halcro, another of the heirs-portioners, presented a petition to your Lordships, of this date, to sequester the rents of the estate of Cowbister, and to appoint a factor thereon, with the usual powers. And accordingly, on advising this

March 18. 1790.

July 6. 1790.

this petition, with answers, of this date, you were pleased to pronounce the following interlocutor: 'The Lords having advised
' this petition, with the answers thereto, they sequestrate the whole
' rents and issues of the estate of Cowbister; 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 federunt.'

The petitioner and her late husband reclaimed to your Lordships against this interlocutor, as they thought themselves materially affected, and ultimately might be much injured by being deprived of the management of their own affairs, as they were proprietors, *pro indiviso*, of a third of the estate, and had an equal right with the pursuers to a share of the administration; especially as the estate was not bankrupt; and that the appointing of Mr Young as factor thereon was committing the estate entirely to the management of the pursuers; for Mr Young, the judicial factor, was son-in-law to the Reverend Mr Sands, who carried on the process of count and reckoning, as administrator-in-law to his grandson Thomas Sands, a minor. Your Lordships, however, were pleased to refuse this petition; as the application for a sequestration was made in the name of two of the heirs-portioners, and that the petitioner was only one-third concerned. At the same time your Lordships signified, that had you known that Mr Young, the factor, was son-in-law to Mr Sands, you would have appointed another person to be factor in place of Mr Young.

Mr Young accordingly entered upon his factory in the year 1790, and intromitted with three years rents prior to that period, which were secured by arrestments in the tenants hands, and has continued intromitting with the rents ever since; so that he has now in his possession eight years rents of the estate of Cowbister, and has never accounted for the same, either in one shape or other.

Cecilia Halcro, one of the heirs-portioners, who at first concurred with Mr Sands in getting Mr Young appointed factor upon the estate of Cowbister, soon came to discover that the estate, of which she was one of the three heirs-portioners, was under very bad management; for, in place of Mr Young's accounting to her for the free rents of one third of the estate, it was with the greatest difficulty that she could recover from him a small aliment of L. 20 yearly, in consequence of a warrant obtained upon him
from

from your Lordships; and therefore, being unable to engage with Mr Young in an expensive litigation, to get him to account for her share of the rents, she judged it more adviseable, in terms of a clause in the entail, to sell her third share of the estate to the petitioner Margaret Halcro, another of the heirs-portioners; and this transaction was completed accordingly, by Cecilia Halcro's granting to the petitioner, in the year 1794, a disposition to her third share of the estate of Cowbister.

The petitioner being thus proprietor of two thirds of the estate of Cowbister, she considered herself well intitled to enquire at Mr Young what he was doing with the rents of the estate; and in the course of last year, 1794, she applied to Mr Young, through her son, John Johnston merchant in Stromness, for a sight of Mr Young's factory-accounts. But this he thought proper positively to refuse, informing her son, that the factor had nothing to do with either him or the petitioner; and if they wanted to see his accounts, they might go from Orkney to Edinburgh and look at them, as he was not bound to account to them, but to the Court of Session, for his intromissions on that estate.

The petitioner wrote to her agent at Edinburgh, to enquire whether Mr Young's accounts were lodged in Court, and to examine them on her part: But on enquiry, he found that no such accounts had been lodged with the clerk to the act.

In the course of last summer-session, Mr Young came to Edinburgh, on pretence of lodging his accounts; and the petitioner, on being informed of this, dispatched her son to Edinburgh after him, in order to see these accounts before they were settled, as she could not obtain a sight of them in Orkney.

When the petitioner's son came to Edinburgh last summer-session, he found that Mr Young had been in town for several weeks, but that he had thought proper to carry back his accounts with him to Orkney, without lodging them in Court.

The petitioner's son stated to Mr Young's agent what had passed betwixt them relative to the accounts; and that, after every application to Mr Young in Orkney, neither he, nor the petitioner, his mother, had ever been able to obtain a sight of these accounts. Mr Young's agent was much surpris'd at his refusing to show his accounts in Orkney to those who were unquestionably entitled to see them; and therefore he sent a letter to Mr Young, along with the petitioner's son, desiring him to show
his

1794 Cecilia
sells her

his factory accounts in Orkney, to the petitioner, or any person appointed by her; and afterwards to transmit them to Edinburgh, in order that they might be judicially settled.

The petitioner's son returned to Orkney in June last, and delivered to Mr Young the letter from his agent; and repeated applications have since been made to Mr Young, in Orkney, on the part of the petitioner, both verbally and in writing, for a sight of his factory accounts, but hitherto without effect.

The petitioner is therefore under the necessity of complaining to your Lordships of this very extraordinary conduct upon the part of Mr Young, the factor appointed by you upon her estate.

Your Lordships know, that a special act of federunt was made, of date the 13th of February 1730, containing wise and salutary rules and regulations for factors appointed by your Lordships faithfully and punctually fulfilling their trust. Yet, though William Young writer in Stromness, was, as far back as the 6th of July 1790, appointed factor by your Lordships upon the estate of Cowbister, he has not, to this hour, obeyed any one of these rules or regulations contained in that act of federunt.

By that act, it is declared, in the second regulation, 'That such factor shall, within six months after extracting his factory, make a distinct and special rental of the estate committed to his management, and lodge the same in the hands of the clerk to the act appointing and authorising him to be factor on said estate, where it shall lie, and be made forthcoming; and the inspection and perusal thereof be allowed unto all persons having interest, without fee or reward, to the end the same may be examined; and the said factor charged thereby, or otherwise, as shall be found just.' And if any alteration happens in the rental, the factor is ordained by the third regulation, within three months of its happening, to put the same into the hands of the clerk, to the end mentioned in the act. And if the same shall be deficient, or if he omit to add any increase, the factor shall be decerned in the double of such deficiency and omission respectively.

The fourth regulation is in these words: 'Such factor shall once every year give in a scheme of his accounts, charge and discharge, to the clerk aforesaid, that all concerned may have access to see and examine, and provide themselves with proper means

‘ means for checking the same; wherein if the said factor fail, he shall be liable to such a mulct as the Lords of Session shall modify, not being under an half-year’s salary.’ And the tenth regulation is in these words: ‘ If the factor fail in any part of the premisses, it shall be a ground of removing him, without prejudice of the several particular certifications aforesaid.’

Now, the fact is, That William Young, the factor upon the estate of Cowbister, has not fulfilled or obeyed any one of these regulations. He has lodged no rental, which he was bound to do within six months after extracting his factory; and he has lodged no scheme of accounts in the clerk’s hands, which he was bound to do once every year, although it is now above five years since he was appointed; and he either has, or ought to have eight years rents of the estate in his possession.

Your Lordships are in use to appoint factors upon the estates of minors, of bankrupts, of those absent, who have appointed no person to act for them, or of these incapable of managing their own affairs; and no doubt your Lordships are intitled to appoint a factor for uplifting a third part of the rents of this estate belonging to Thomas Sands, a third heir-portioner, who is still a minor. But the petitioner has all along considered it to be a great hardship, and unnecessary expence upon her, to be burdened with the expence of a judicial factor. She is in no shape under one or other of the descriptions of those over whose estates your Lordships are authorized to appoint factors. She is not insolvent: Her circumstances are unembarrassed: The right of property is not doubtful: A third part of the estate has all along belonged to her in her own right; and she has acquired right to another third part from her sister Cecilia Halcro, in terms of the deed of entail; so that she has an unquestionable title to the possession of two third parts of the estate of Cowbister, and the administration thereof, without being controuled, or burdened with the expence of any factor whatever: And she is now humbly to apply to your Lordships, to reinstate her in the immediate possession of her two third parts of that estate accordingly.

The conduct of Mr Young, the factor, clearly proves, that he is unworthy of being intrusted longer with the management of any part of that estate; and without farther argument, the trusts, that your Lordships will see cause for removing him from his office,

fice, and inflicting on him such mulct as you shall think proper, in terms of your own acts of sederunt.

May it therefore please your Lordships, to take the premisses into your consideration; and in respect of the said William Young the factor's wilful neglect of every regulation contained in your Lordships act of sederunt, to remove him from his office, and to find him liable in such mulct as your Lordships shall modify; and also in the expences of this application: And further, to recall the sequestration of the whole rents and issues of the estate of Cowbister; and find that the petitioner is intitled to the immediate administration and possession of two third parts of the said estate and rents; and, if necessary, to appoint any other person your Lordships shall think proper, as factor for managing the third part of the estate belonging to Thomas Sands, still a minor; or to give such other relief in the premisses as your Lordships shall see just.

According to justice, &c.

MALCOLM LAING.

Edinburgh, 18th November 1795.

I Anthony Mactier, clerk to Alexander Walker writer in Edinburgh, doer for the petitioner, did intimate to Robert Boswell writer to the signet, doer for William Young, the factor on the estate of Cowbister, and also doer for Thomas Sands, one of the heirs-portioners of Cowbister, and Mr Robert Sands his grandfather and administrator-in-law, That copies of this petition were to be put into the Lords boxes this day, in order to be moved by their Lordships to-morrow. This I did, by delivering to the said Robert Boswell a printed copy of this petition, with a note of intimation, subjoined thereto, to the above effect, betwixt the hours of ten and twelve forenoon, before these witnesses, James Davidson writer in Edinburgh, and Thomas Walker, apprentice to the said Alexander Walker.

ANTHONY MACTIER.