

Before the respondent accused the petitioner of a misstatement, he should have been careful to give an accurate account of the matter himself, at least not to give an account of it which he knew might be disproved by writing under his hand. It was not till some time after the respondent had transmitted his accompts to Mr Boswell in November 1794, that the petitioner's son applied to him for a sight of them. The following correspondence, which took place on the occasion, will shew, that the application was made to him upon the 7th of October preceding, consequently while the accompts were still in his own possession.—

Stromness, 7th October 1794. Mr Wm. Young—I have to acquaint you, in my mother's name, and for her interest, that I will call at you for a copy of your accompts of intromissions with the rents and casualties of the estate of Cowbister, which, if you have not yet made out, shall allow you a reasonable time for so doing; and I expect, from a just sense of your duty, that you'll not refuse it to me, to examine and make my remarks upon them. Expecting your answer, I am, Sir, yours, &c. (Signed) JOHN JOHNSTON.—

To this letter, Mr Johnston received the following answer from Mr Young: 'Sir—I have yours of this date; and, in answer, I have nothing to do, either with you or your mother, regarding my accompts. But in a judicial way, when already produced before the Court, you will there have an opportunity of reviling them, in case you think you are a competent judge, and can thereby better yourself or your mother by doing so. I am, Sir, your most humble servant, (Signed) WILLIAM YOUNG.—

Stromness, 7th October 1794.'—This letter is addressed to Mr John Johnston; who, immediately upon receiving it, wrote the following letter to Mr Young:—

Stromness, 7th October 1794.—Sir, In answer to yours this day received—When I applied to you in a friendly manner, for a copy of your accompts, it was with a belief that you would have been ready and willing, from the correctness and justice of them, to have satisfied so principal a proprietor as, you must know, my mother now is, in that estate you are factor over; and I am informed, by many better judges than you, that it is your duty to satisfy, not only her, but any other concern, every six months, if required; but, as you refuse to produce them, I think it high time to compel you, in the judicial manner you incline to; and however incompetent a judge I may be, I do

‘ not think it possible to be inferior to yourself. I am, Sir, yours,
 ‘ &c. (Signed) JOHN JOHNSTON.’

This correspondence has been introduced to show your Lordships, not only that the assertion in the answers is totally groundless, that the application of the petitioner’s son, for inspection of the accompts, was not made until they were out of his possession; but also to give a specimen of the style and manner of treatment which the respondent uses to those who civilly request from him, in his capacity of factor upon this estate, what your Lordships regulations entitle them to demand.

It is further stated, ‘ That, about the beginning of May 1795, when the respondent happened to be in Edinburgh upon other business, he met with the petitioner’s son and his agent, when it was proposed to put an end to all disputes between the parties, by a reference to a respectable accomptant in Edinburgh.’

This assertion is as unfounded as the rest; for the petitioner’s son did not see the respondent upon that occasion. It is true, the petitioner’s agent met with him, and his agent Mr Boswell; when it was proposed, that all the disputes among the heirs of Cowbister themselves, should be settled by arbitration; but it was expressly mentioned, that the respondent’s factory accompts should not be included in this submission, as it was proper that he should account judicially for his intromission, in the Court by whom he had been appointed. The submission was accordingly prepared and extended by Mr Boswell; but when it was sent to Orkney to be signed, Thomas Sands and his grandfather refused to subscribe, by the advice of the respondent, who foresaw, that if every dispute was settled between the principal parties, his judicial factory would terminate much sooner than it was his inclination that it should.

The respondent observes, in the sixth page of his answers, that his factory accompts, which are now completed and produced, afford a satisfactory answer to the petitioner’s allegations, but that it would be improper at present to go into particulars. The respondent has done what he can to prevent the petitioner from going into particulars, because he has neither produced a judicial rental, nor any other evidence whatever, by which his accompts may be checked; and it is not surprising that he himself should not wish to go into particulars, when he has hitherto been so studious to hide these accompts from the face of day; and he had but
 too

too good a reason for his conduct, as will appear from the following specimen of the manner in which he has managed this small estate, which, according to his own showing, amounts only to about 132l. Sterling *per annum*, after deducting public burdens.

The first year of Mr Young's management in 1790, he charges no less than 31l. 16s. 10d. Sterling as the expence of taking the judicial rental. In the year 1791, he charges 2l. 3s. 2d. more on the same account; and, in the year 1792, he charges also, on account of the judicial rental, 6l. 3s. 5d., amounting altogether to 40l. 3s. 5d. Sterling; and in this sum Mr Young charges for his own trouble 14l. 9s. 4d. Sterling, and 3l. 9s. 2d. Sterling for his personal expences on the same business.

Besides this, he charges for factor fee for the first year 16l. 16s. Sterling; so that in the course of the first year's management, this gentleman puts into his own pocket, out of the rents of this inconsiderable estate, upwards of 30l. Sterling of clear profits.

When Mr Young transmitted to Mr Boswell his agent, the incomplete state of his factory accompts in the year 1793, for the purpose of enabling him to give in a petition to the Court in the name of Cecilia Halcro and Thomas Sands, for an act and warrant on the factor, he stated the yearly rent at 124l. 8½d. Sterling. 'And besides this, the factor informs, that one year with another, fourteen tons of kelp may be obtained from the shores of the estate, which, after deduction of all expences, may be considered as yielding with certainty 40l. Sterling, in all 164l. Sterling, from which must be deducted duties to the superior, cess and stipend, amounting to 31l. 18s. 6d. Sterling, leaving neat rent about 132l. 2s. Sterling.'

The accompts now exhibited by the respondent, give a very different statement with regard to the article of kelp; for in place of its yielding an annual profit of about 3l. *per ton*, from the enormous expence laid out by the respondent in manufacturing and selling it, he takes care that it shall not yield of profit to the proprietors above 40s. *per ton*. Thus, in the year 1791, 16 tons 6 cwt. of kelp was sold, at 65l. 2s. 10d.; and the expence of manufacturing and selling this article amounts to 33l. 1s. 6½d. Sterling; out of which Mr Young has 4l. 18s. Sterling for his own trouble, independent of factor fee, and 1l. 13s. 7d. for his personal expences.

In the year 1792, the factor sold 12 tons 16 cwt. of kelp, at 51l. 11s. Sterling; the expence of manufacturing and selling which

which is 24l. 1s. 8½d. Sterling; in which is included 3l. 1s. 9d. Sterling for the factor's own trouble and expence, independent of factor fee. In the year 1793, the factor sold only 10 tons 14 cwt. of kelp, at 42l. 13s. 4d. Sterling; and the expence of manufacturing and selling this is charged at 19l. 6s. 8½d.; in which is included 2l. 18s. 8d. for the factor's trouble and expences, independent of his factor fee.

In the year 1794, the factor sold 12 tons 13 cwt. of kelp, at 50l. 9s. 7d. Sterling; and the expence of manufacturing and selling is charged at 23l. 1s. 11½d. Sterling; in which is included 3l. 8s. for the factor's own trouble and expence, besides his factor fee.

This article of kelp, during the whole course of the factory, is uniformly stated as being sold at 4l. Sterling *per* ton; when it is well known, that the price of kelp for several years past has been rising considerably.

The factor is in the use of drawing annually, out of some of the small farms, the teind of the crop in kind; and the expence charged by the factor on that account is very extraordinary indeed. Thus, in the year 1791, the whole teinds drawn amount to 2l. 2s. 3¼d. Sterling; and the expence incurred by the factor is no less than 1l. 10s. 6d. Sterling, including one guinea for his own trouble, besides his factor fee.

In the year 1792, the whole amount of teinds drawn from said lands is 2l. 2s. 1¼d. Sterling; and the expence incurred in this article is 16s., including 10s. 6d. for the factor's own trouble.

In the year 1793, the whole amount of teind drawn is 19s. 0½d. Sterling; and the expence incurred on that account by the factor is no less than 1l. 3s. Sterling, including 15s. for his own trouble.

In the year 1794, the whole teind drawn is 1l. 1s. 8d. Sterling; and the expence incurred by the factor thereon is 14s. 5d., including half a guinea for his own trouble.

Besides these articles charged for the factor's trouble alone, a separate charge is every year made for factor's fee.

For the year 1790	-	L. 16 16 0
For the year 1791	-	9 10 10
For the year 1792	- -	7 7 4
For the year 1793	-	8 3 10
And,		
For the year 1794	- -	7 8 7

besides

besides 8l. 10s. 2d. Sterling for his personal expences during these years. Adding, therefore, the whole factor fee, extra trouble, and personal expences together, it appears that he has put into his own pocket out of this estate, yielding only, as he says, 132l. Sterling of neat rent, in the course of his five years management, no less than 86l. 18s. 1d. Sterling; and all that the petitioner has drawn during that period, as proprietor of one-third of the estate, is only 50l. Sterling. This must satisfy the Court, that if matters are allowed to go on as they have hitherto done, it is much better to be a factor than a proprietor of this estate; and it fully explains the cause of Mr Young's anxiety to have his office continued.

Another extraordinary circumstance appears in Mr Young's accompt. The petitioner has always understood, that when any arrears are due by the tenants of one year, these arrears are carried to the charge against the factor for the subsequent year. But this regular mode of accounting has not been followed by Mr Young. He takes care indeed, every year, to take credit for large sums of arrears due by the tenants, but he forgets to charge himself afterwards with these arrears; and thus, the whole are stated against the proprietors as a total loss to them yearly, when in fact Mr Young has actually recovered all, or the greater part of them, and has them now in his pocket, and interest upon them, which he made the tenants pay from the time they became due. If Mr Young is bold enough to deny this fact, the petitioner will undertake to prove it, by recovering the receipts out of the tenants hands for these very arrears taken credit for by Mr Young, and not afterwards charged against himself.

The amount of the arrears thus taken credit for by Mr Young, are,

	<i>Scots.</i>
For the year 1790 and precedings	L. 98 15 0
For the year 1791 - - -	305 10 0
For the year 1792 - - -	415 10 0
For the year 1793 - - -	76 8 8
For the year 1794 - - -	356 17 2
	L. 1253 0 10

In Sterling, 104l. 9s. 2d. Thus, in the course of five years, the factor takes credit for no less than 104l. 9s. 2d. Sterling of arrears, when, as already stated, he has the greatest part of that money in his pocket, with interest upon it, actually paid him by the tenants.

By the act of federunt, every judicial factor is bound to account for the interest of all rents which he shall recover, from and after one year from the time that these rents shall become due. It appears, from Mr Young's own state of accompts, that in the end of the year 1791, he had in his hands, after deductions of the rents for 1790, 254l. Sterling; and the year following, besides the above sum, he had in his hands, after all payments and deductions made by him of crop 1791, a balance of 101l. Sterling; and yet he does not charge a single farthing of interest against himself upon these balances. From all which it is perfectly clear, that the factor enjoys more than double the emoluments drawn from this estate by any one of the three proprietors.

Without entering into a more minute investigation of the respondent's accompts, your Lordships cannot but be satisfied, from what has been already said, that this factory has been made a shameful job of for the factor's own benefit; and that a measure which was certainly intended by your Lordships for the advantage of all concerned, has proved a dead loss to the petitioner of at least one half of the rents which she would otherwise have drawn from her share of the estate. But though there may be no redress for what is past, she hopes that in future the evil will be prevented; and that your Lordships, sensible how grossly the office which you conferred has been abused, will recal the sequestration, and allow the co-heirs to manage the joint property themselves, which may be done without any trouble or inconvenience; or, at least, that you will appoint a judicial factor, who will not consume the whole produce upon himself, and who will consent to follow the regulations which the act of federunt has prescribed.

An insinuation is thrown out in the 6th page of the answers, highly injurious to the petitioner, without being of the slightest service to the respondent's argument. Your Lordships are given to understand, that the petitioner took advantage of her sister's necessitous situation, and obliged her to sell her interest in the estate upon very disadvantageous terms. Whether this were the fact, or not, it is certainly *jus tertii* to the respondent, who has no concern whatever in that matter. At the same time, the petitioner, in her own justification, must take the liberty to state what the terms of this bargain were. The estate, after deducting the interest of debts and other burdens, does not yield *per annum* 100l. Sterling to the heirs in possession, independent of the enormous expence of management by the judicial factor. The petitioner gave to her sister Cecilia Halcro, for her third share in this estate, 300l. Sterling in cash, and a bond of annuity for 20l. Sterling more

more during her life. It is submitted, therefore, that this was a bargain extremely advantageous for Cecilia; more especially, when it is considered, that she and the petitioner, for a period of five years, drew in all only 50l. Sterling each, as appears from the factory accompts now produced; and it was with the greatest difficulty that they could extort this sum from the respondent, even after they had obtained the acts and warrants upon him from the Court.

The respondent complains that the petition was given in at a season of the year when the intercourse with the county of Orkney is almost entirely suspended; and this is represented as an attempt to create an unfavourable impression against him in your Lordships minds.

In the *first* place, it may be observed, that at no season of the year is the intercourse between Edinburgh and Orkney entirely suspended, though sometimes perhaps it may suffer a short interruption. The post goes regularly once a week in Winter as well as Summer; and it scarcely ever happens, that an answer to a letter cannot be obtained, at farthest, in four weeks. But, in the *next* place, your Lordships will observe, that it very ill becomes the respondent to complain of this circumstance, after the unmerited insolence and ill usage with which he treated the petitioner's son, after the needless trouble and expence which he occasioned him, and after bandying him from Orkney to Edinburgh, and from Edinburgh to Orkney, to procure a sight of accompts, of which he was entitled, by your Lordships regulations, to have immediate inspection. It has been mentioned, that when he applied in October 1794 for a sight of these accompts, he received for answer, that they were lodged in Court at Edinburgh, although it is now admitted that they were then in the respondent's own possession, and not sent to Edinburgh till November following. When young Mr Johnston came to Edinburgh in May 1795 on the same errand, he was told by Mr Boswell, that the accompts were too inaccurate to be produced in Court, and that Mr Young had carried them back to the country. Sensible, however, of the propriety of Mr Johnston's seeing them, he gave him a letter to the respondent, desiring him to permit inspection of them. When he returned to Orkney and delivered this letter, the respondent asserted that Mr Boswell was in a mistake, for that the accompts were still in Edinburgh in that gentleman's possession; endeavouring thus to shuffle off Mr Johnston altogether, and to prevent him from getting a sight of them, which he never would have had

an opportunity of doing, had it not been for the present application to your Lordships. In the month of June 1795, he wrote to the respondent, telling him, that unless he showed him the accompts, he would be under the necessity of giving in a complaint against him to your Lordships. But of this letter the respondent thought proper to take no notice whatever. After waiting a due time for an answer, Mr Johnston wrote to his agent here to prepare a complaint; but the letter did not arrive till the last day of the Summer Session 1795; and consequently it could not be given in till the commencement of the Winter Session following.

Having shown that the respondent has not complied with any one regulation contained in the act of federunt, and that he has managed the estate to the immense loss of the proprietors, and his own shameful emolument, it is apprehended, that enough has been said to induce your Lordships to deprive him at least of the office of judicial factor. If that is to be done, it is *jus tertii* in him to maintain an argument why the sequestration should not be recalled altogether; and unless some good reason is stated for its continuance, on the part of Sands or his curator, it is imagined your Lordships will be inclined to recal it upon the bare motion of the petitioner, who is in right of two-thirds of the property. It may be mentioned in general, that what is stated in the petition is unquestionably fact, that the single circumstance which weighed with the Court in awarding it originally, was the concurrence of a majority of the co-heirs in demanding it; for, every other reason advanced at that time in its favour, received a satisfactory answer. There can be no difficulty in different proprietors enjoying an estate at the same time *pro indiviso*, if they act in concert, and, either by 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 rent, or, if he wishes himself to administer his property, he may purchase a brieve from Chancery, and thus effect a division of the subject. Any thing surely would be better for all concerned in this property, than to allow such an enormous proportion of its profits to be uselessly consumed by the respondent.

In respect whereof, &c.

GEO. CRANSTOUN.