

Copy for Margaret Jean Savina
Johnston

1835.

OUTER-HOUSE.

April 13. 1835-

July 29, 1833.

SUM. of DEC.—JAMES JOHNSTON,
AND THOMAS SANDS,
AGAINST
JOHN PURSE JOHNSTON & Others.

DOUGLAS & GRAHAM, W.S., Agents.

Mr. WILSON, Clerk.

SUMMONS OF DECLARATOR,

JAMES JOHNSTON, Esq. of Cowbister, and THOMAS
SANDS, Esq. of Swanbister,

AGAINST

JOHN PURSE JOHNSTON, & Others.

WILLIAM, &c.—WHEREAS it is humbly meant and shewn to us
by our lovites, James Johnston, Esq. of Cowbister, and
Thomas Sands, Esq. of Swanbister, heritable proprietors of the
island, lands, teinds, and others after-mentioned, in virtue of the titles
after specified : That, by an act of the Scottish Parliament passed in
the year 1685, chapter 22, intituled, ' Act concerning tailzies,'
it is statuted and declared, ' That it shall be lawful to his Majesty's
' subjects to tailzie their lands and estates, and to substitute heirs
' in their tailzies, with such provisions and conditions as they shall
' think fit, and to affect the said tailzies with irritant and resolute
' clauses ; whereby it shall not be lawful to the heirs of tailzie to
' sell, annailzie, or dispone the said lands, or any part thereof, or
' contract debt, or do any other deed, whereby the samen may be ap-
' pryed, adjudged, or evicted from the others substitute in the tail-
' zie, or the succession frustrate or interrupted, declaring all such
' deeds to be in themselves null and void ; and that the next heir of
' tailzie may, immediately upon contravention, pursue declarators

JOHN JOHNSTONE, Printer, 19, St James's Square.

8/5/15

Printed by Dr.
Hugh Blair.

Act 1685.

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' thereof, and serve himself heir to him who died last infest in the
 ' fee, and did not contraveen, without necessity anyways to represent
 ' the contraveener; It is always declared, that such tailzies shall
 ' only be allowed, in which the foresaid irritant and resolute
 ' clauses are insert in the procuratories of resignation, charters, pre-
 ' cepts, and instruments of seasing; and the original tailzie once
 ' produced before the Lords of Session, judicially, who are hereby
 ' ordained to interpose their authority thereto; and that a record
 ' be made in a particular register book, to be kept for that effect,
 ' wherein shall be recorded the names of the maker of the tailzie,
 ' and of the heirs of tailzie, and the general designations of the
 ' lordships and baronies, and the provisions and conditions con-
 ' tained in the tailzie, with the foresaid irritant and resolute
 ' clauses subjoined thereto, to remain in the said register, *ad perpetuam rei memoriam*; and for which record there shall be paid to
 ' the Clerk of Register, and his deputes, the same dues as is paid for
 ' the registration of seisings, and which provisions and irritant clauses
 ' shall be repeated in all the subsequent conveyances of the said
 ' tailzied estate to any of the heirs of tailzie; and being so insert,
 ' his Majesty, with advice and consent foresaid, declares the samine
 ' to be real and effectual, not only against the contraveners and
 ' their heirs, but also against their creditors, comprisers, adjudgers,
 ' and other singular successors whatsoever, whether by legal or con-
 ' ventional titles; That the deceased Doctor Hugh Halcro of Cow-
 ' bister, by disposition and deed of entail, bearing date the 13th day
 ' of February, and recorded in the Register of Entails, the 8th day of
 ' August, both in the year 1770, and also recorded in the books of
 ' Our Council and Session the 12th day of April 1773, for the causes,
 ' and upon the conditions, and under the reservations, provisions and
 ' declarations therein, and herein after mentioned, gave, granted,
 ' transferred and disponed to, and in favour of William Halcro, his
 ' son, and the heirs of his body; whom failing, to the heirs male or
 ' female, lawfully procreate, or to be procreate of his the said Dr.
 ' Hugh Halcro's body, either by his then present or any subsequent
 ' marriage; which failing, to Margaret, Cicilia, Jean, and Mary Hal-
 ' cros, his sisters-german, equally betwixt them, and the heirs lawfully
 ' procreate or to be procreate of their bodies; and failing any of them
 ' by decease without such heirs of their bodies, the share or shares of
 ' the deceased to fall to the survivor or survivors equally and their
 ' foresaids; which all failing, to his own nearest lawful heirs,

Entail by Dr.
Hugh Halcro.

Destination.

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or assignees whatsoever, heritably and irredeemably, All and sundry, ^{Lands.} the island, lands, and others, therein and aftermentioned, to wit, all and whole, the island and lands of Cava, with the Ness thereof, as the same is limited and surrounded by the sea on all its parts, together with the teind sheaves of the same included therewith, which were never in use to be separated from the stock, with the vicarage teinds of the said island inherent with the right of property thereof, and which were never in use to be paid or uplifted separately therefrom, with wreck, ware, waith and haill pertinents thereof, lying in the late regality and stewartry, and now sheriffdom of Orkney, with Herezalds, bloodwitts, and the privilege of holding courts therein and emoluments thereof, and haill other privileges belonging thereto; all and haill the three penny land of Cowbister, and half penny land of Orakirk, with the mansion-house of Cowbister, lying in the town of Petertown; all and haill, the five meills malt mailling udal land of Buxa, lying in the town of Claistron; all and haill the one farthing land of Hangaback, the one farthing land of Gosaquoy, the halfpenny land of Gyre, the lands of Skegibister, the halfpenny land of Croval, the one farthing land of Windbreck; all and haill the lands of Lerquoy, the lands of Ingamire; all and haill the lands of Aikers; all and haill the lands of Gairy, the one penny land of Middhouse, the house and lands of Breckney, the one penny land of Soulis, the one penny land of Skebistoun, the lands of Breck, the lands of Swanbister called Stove, the one penny and one halfpenny land of Swanbister called Piggar, the one penny and one farthing land of Inksitter, the halfpenny land of Quoyclerks and Nethermyre; and sicklike, all and haill the one penny and halfpenny land of Cregar, with the mansion-house and dwelling-place of Gyre, with the parsonage and vicarage teinds of the said whole lands included, and whole houses, office-houses, biggings, yards, mosses, muirs, meadows, outbrecks, outsetts, annexis, connexis, commons, com-montys, common pasture, parts, pendicles, quoys, quoylands, cotts, cottages, and haill other righteous privileges and pertinents of the said whole lands, all lying in the towns of Petertown, Claistron, Orphir, and Swanbister, parish of Orphir, mainland and sheriffdom of Orkney; all and haill, the nine settings malt mailling udal land, under the house of Clecking, with the whole houses, biggings, yards, mosses, muirs, meadows, cotts, cottages, annexis, connexis, com-montys, common pasture, outbrecks, onsets, parts, pendicles, and whole privileges and pertinents thereof, lying in the town of Ire-

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Obligation to in-
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land, parish of Stenness, mainland and sheriffdom of Orkney, with all right, title, interest, claim of right, property and possession, he the said Dr. Hugh Halcro, his predecessors or authors, heirs or successors, had or might have, claim or pretend to the said lands and others foresaid, or to any part thereof, and as the same are more particularly described and contained in the original rights, securities, and conveyances thereof: In the which lands, island, houses and others, with the pertinents thereof, the said Dr. Hugh Halcro bound and obliged him, his heirs and successors, as well male as of line, tailzie, conquest, and provision, and all others his heirs and successors whatsoever, renouncing the benefit of the order of discussing them, to duly, lawfully, and sufficiently infest and sease the said William Halcro, his said son, and the heirs of his body, which failing the other heirs and substitutes of tailzie therein and herein before specified, and that by two several infestments and manners of holding the one thereof to be holden of him and his foresaids, in free blench, for payment of a penny Scots money at the term of Whitsunday yearly, in name of Blanch farm, upon any part of the ground of any of the said lands, if the same be asked allenary; and the other of the said infestments to be holden from him and his foresaids, of his immediate lawful superiors thereof, by the same tenure, and as freely as he, his predecessors or authors, heirs or successors held, or might have holden the same, and that either by resignation or confirmation, or both, the one without prejudice of the other; and for effectuating the said infestment by resignation, he thereby made and constituted

Procuratory of
Resignation.

to his lawful superiors, and each of them, his lawful and irrevocable procurators and attorneys for him, and in his name to resign, renounce, surrender, upgive, overgive and deliver, as he thereby resigned, renounced, surrendered, *simpliciter* upgave, overgave and delivered all and sundry the said island, lands and others, as therein and herein before described, with all right, title, and interest, claim of right, property and possession, he, the said Dr. Hugh Halcro, his said predecessors or authors, heirs or successors, had, or might have claim or pretext to the said lands and others foresaid, or to any part thereof, and as the same are more particularly described and contained in the original rights, securities and conveyances thereof, in the hands of his said respective lawful superiors of the same, then presently being, or that should happen to be for the time, or of his or their commissioners, having power to receive resignations thereto

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in his or their names, in favour, and for new infestment thereof, to be made, given and granted to the said William Halcro, his said son, and the heirs of his body; which failing, to the other heirs and substitutes of tailzie therein, and herein before mentioned, heritably and irredeemably, in due and competent form; reserving always to him, the said Dr. Hugh Halcro, his own liferent right and use of the haill premises during all the days of his lifetime, with power to him to make and grant such heritable securities as he should think proper upon the whole, or any part of the said subjects, for whatever debts or provisions were due by his said father or him, or for whatever debts he might contract at any time thereafter during his lifetime; reserving the liferent of the said two rouses and lands of Gyre and Buxa, and pertinents thereof, foresaid, to such person or persons as he should appoint by a writing under his hand, of the date of the said entail; reserving, also, to Margaret Honyman, his mother, widow of the deceased William Halcro, late of Cowbister, his father, such a terce or jointure out of the said lands, or any part thereof, as she should be entitled to according to law, or such provisions as might be settled upon her in lieu thereof: As also, reserving to Jean Warning, *alias* Halcro, then spouse of the said Dr. Hugh Halcro, or to any his subsequent spouse, such a terce also out of the said lands, or any part thereof, as she, in the event of surviving him, would in law be entitled to, or to such provisions as may also be settled upon her in lieu thereof, with power also to him to provide any, his younger children, (if he any had,) in reasonable provisions out of the said estate: And it is by the said disposition and deed of entail declared, that the said William Halcro and his foresaids, and the other heirs of entail therein written, in the order of succession therein prescribed, should be holden, and obliged to satisfy, pay and fulfill all the obligations and provisions prestable and payable by the said Dr. Hugh Halcro, and all the debts, both personal and real, contracted by his said father or him, and annual rents thereof resting unpaid at the time of his decease, with the expenses of his sickness and funeral charges: And also, it is by the said disposition and deed of entail, expressly provided and declared, that it should, at no rate, be allowable for the said William Halcro, his said son, or his foresaids, nor for any other of the substitutes in the said disposition of entail, to sell or dispose upon the whole, or any part of the subjects thereby disposed, or to contract debts, or do any other deed, whereby the same, or any part

Reservation of his
own liferent, and
power to grant he-
ritable securities.

Reservation of a
jointure to his mo-
ther.

and to his spouse.

Power to provide
his younger chil-
dren.

Obligation on the
heirs of entail to
pay and fulfil all
debts and obliga-
tions of entailer
or his father.

Prohib. clause

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Irritant Clause.

Resolutive Clause.

Power to the Heirs of Entail to pay or give security for Debts due by the Entailer or his Father.

Power to provide Spouses,

And Younger Children.

Nomination of Tutors and Curators.

Declaration that any of the Entailer's Sisters paying the Debts due shall be entitled to relief against the others.

thereof, might be carried off or evicted from the succeeding member or members thereof, or their hopes of succession thereto in any manner evaded; and if his said son, or any other of the said preceding members should do in the contrary, it is thereby declared, in the *first* place, that such deed or deeds of contravention should be absolutely and utterly void and null, and of no avail or effect whatsoever, — and, in the *second* place, that the contravener, and the descendants of his or her body should, *ipso facto*, forfeit and lose all right to the subjects thereby disposed, and all benefit of succession therein; and the same should furthwith access to the next heir or heirs in the present substitution, who immediately, on such contravention, might commence an action of declarator thereof, and serve heir to the person who died last invest in the said subjects, passing by the said contravener without representing him or her, or being anyways liable to the said contravener's deeds, debts, or obligations. Nevertheless, it should be allowable for any of the heirs above mentioned to satisfy and pay off, or give sufficient and reasonable securities on the said subjects, for what debts or provisions might be resting unpaid, provided, or due by the father of the said Dr. Hugh Halcro, or him, provided they did not exceed the privilege or liberty granted them by this faculty: As also it should be in the power of the heir for the time, whether male or female, he to provide his spouse, and she to provide her husband, in such terce or courtesy as they would be entitled to out of the said lands, according to law: And also to provide their younger children in reasonable provisions, payable out of the same, after the former debts and provisions are first paid off: And it is by the said disposition and deed of entail expressly provided and declared, that the management of the said estate, in the absence of his the said Dr. Hugh Halcro's said son, who was then in Jamaica, until he arrived and settled in Orkney, and until he attained to the age of twenty-one years complete, should belong to Joshua Johnston, writer in Stromness, and the said Margaret Halcro his spouse, and to the said Jean Halcro, the said Dr. Hugh Halcro's said sisters, or to any one or more of them in life for the time; and for that purpose he thereby nominated and appointed them, or any one or more of them, to be tutors and curators to his said son, and all his other children that should be within the years of tutory and curatory, with certain powers, privileges, and immunities, particularly mentioned in the said disposition and deed of entail: And it is also thereby declared, in the event of his said sisters, or any of

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them, succeeding to the said estate, in virtue thereof, that such of them as should pay the whole, or any part of such of the said debts that might be due, should be entitled to relief from the rest, in proportion to their shares of the said subjects; and also, in the event foresaid, it should be in the power of either of them to sell to the other the whole, or any part of the share of the said estate that falls or belongs to them, but to none else: And it is also by the said disposition and deed of entail expressly provided and declared, that the foregoing irritant and resolute clauses should be contained in the infeftments following thereupon, and repeated in all the subsequent and other conveyances, retours, and infeftments of the said estate and pertinents thereof, thereby disposed, as the same from time to time should pass from one to another; and that the failure therein by any of the said heirs or substitutes, should import and incur a contravention against the ommitter, and his or her heirs, so as to make the said inheritance fall to the substitute next in order to the succession, as therein prescribed, who might from that time forward sue for a declarator of the delinquency of the said estate, and establish the right to the same in the person of the prosecutor or prosecutors, in the manner therein mentioned; and upon the said resignation, acts, instruments, and documents, one or more to call for and receive, and, in general, every other thing to do, or cause to be done, in relation to the premises that the said Dr. Hugh Halcro might have done himself, if he were personally present, all which he should hold firm and stable without revocation, as the said disposition and deed of entail, containing an assignation to the writs and rents, precept of sasine, and sundry other clauses in itself more fully bears: That upon the death of the entailer, the said deceased Dr. Hugh Halcro, he was succeeded in the said lands and estate, contained in the said disposition and deed of entail, by his son, the said William Halcro, the institute, who, in virtue thereof, and of the precept of sasine therein contained, obtained himself duly infeft and seased in the said lands and estate, conform to instrument of sasine in his favour, bearing date the 4th day of October, and recorded in the particular register of sasines, at Kirkwall, the 30th day of November, 1781: That the said William Halcro having died in the year 1786, unmarried, and without leaving lawful issue of his body, and no other issue, male or female, existing of the body of the said deceased Dr. Hugh Halcro, the entailer; and the said Jean Halcro having predeceased the said William Halcro, without lawful issue of her body, and the said Mary

Power to sell to each other their shares of the Estate.

State of the succession upon the death of Dr. Halcro and of the Institute.

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Conveyance by
Cicilia Halcro
to her sister,
Margaret Hal-
cro, of her one
third of the
estate.

Titles made up
in the persons
of the pursuers.

Halcro having also predeceased him, the succession to the said lands and estate devolved upon the said Margaret Halcro and Cicilia Halcro, the two surviving sisters of the entailer, the said Dr. Hugh Halcro, and upon the pursuer, the said Thomas Sands, only son of the said deceased Mary Halcro, as heirs-portioners under the destination of the said disposition and deed of entail: That in exercise of the privilege conferred by the said disposition and deed of entail upon the sisters of the entailers, in the event of their succession to the said lands and estate, the said Cicilia Halcro, by disposition and assignation, dated the 2d day of October, 1794, and recorded in the Books of Council and Session, the 24th day of October, 1831, sold and disposed her one just and equal third part, *pro indiviso*, of the said lands and estate to her sister, the said Margaret Halcro, then relict of the deceased Joshua Johnston, writer in Stromness, grandfather of the pursuer, the said James Johnston: That the said Margaret Halcro died without any feudal title in her person to the said two-thirds, *pro indiviso*, of the said lands and estate, to which she had right as aforesaid, and was succeeded therein by her only lawful son, John Johnston, father of the pursuer, the said James Johnston: That the said John Johnston possessed the same upon apparenacy for several years, and was succeeded at his death by the pursuer, the said James Johnston, his eldest surviving son: That the pursuers, the said James Johnston and Thomas Sands, have now jointly completed a feudal title in their persons to the said lands and estate, contained in the said disposition and deed of entail, as will appear from the following titles to be produced in the action to follow hereon; viz., RETOUR of the GENERAL SERVICE of the pursuers as nearest and lawful heirs portioners of tailzie and provision to the said deceased William Halcro, their cousin, under the said disposition and deed of entail, whereby they acquired right to the unexecuted procuratory of resignation therein contained, which service was expedie before the bailies of the Canon-gate, upon the 16th day of January 1832, and duly retoured to Chancery; CHARTER of RESIGNATION and CONFIRMATION under the great seal, of the said lands and estate, in favour of the pursuers, proceeding upon the said unexecuted procuratory of resignation; but with, and under the conditions, declarations, provisions, limitations, clauses irritant and resolute, contained in the said disposition and deed of entail; which charter is dated the 3d, and written to the seal, and registered and sealed at Edinburgh, the 22d days of February, 1832; INSTRUMENT of SASINE following thereon in favour of the pur-

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suers, bearing date the 12th, and recorded in the particular register of sasines, &c., at Kirkwall, the 14th days of November, 1832; PRECEPT of CLARE CONSTAT by the pursuers, for infesting themselves as nearest and lawful heirs of tailzie and provision to the said William Halcro, in the said island, lands, and others, dated the 15th day of January 1833; INSTRUMENT of SASINE following thereon in favour of the pursuers bearing date the 15th, and recorded in the particular register of sasines, &c., at Kirkwall, the 17th days of January, 1833; PROCURATORY of RESIGNATION *ad remanentiam* by the pursuers, in their own favour, bearing date the 21st day of January, 1833; and INSTRUMENT of RESIGNATION *ad remanentiam* following thereon in favour of the pursuers, bearing date the 21st, and recorded in the particular register of sasines, &c., at Kirkwall, the 22d days of January, 1833; By all which deeds the pursuers have now a good and undoubted right and title to the said lands and estate contained in the said disposition and deed of entail; and upon decree being obtained in the terms aftermentioned, the pursuers will dispone and convey to each other their respective shares or proportions of the said lands and estate, according to their respective rights and interests therein as before-mentioned: That the said disposition and deed of entail is anomalous, inconsistent, and defective, in the following respects; viz., *First*, in the destination of the said lands and estate therein contained, by the substitution of the heirs of the body of the said William Halcro, the institute, and the heirs male or female of the body of the entailer, the said Dr. Hugh Halcro, and particularly by the substitution of the entailer's sisters, the said Margaret, Cicilia, Jean, and Mary Halcro, and the heirs of their bodies, but without any provision in case of the succession of heirs portioners of the said William Halcro, or of the entailer, or those of the entailer's said sisters and their descendants, by the usual and necessary clause in all deeds of entail, declaring that the eldest heir female, excluding heirs portioners, should always succeed, without division, throughout the whole course of succession: *Second*, The prohibitory, irritant, and resolute clauses of the said deed of entail are so worded and expressed, as to apply and be effectual against such heirs only who are under the destination thereof, entitled to succeed to, and hold the said lands and estate as a *whole* and undivided property; and upon the succession of the said Margaret Halcro, and Cicilia Halcro, and of the pursuer, the said Thomas Sands, the heir and representative of the

Subsumption.

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said Mary Halcro, as heirs portioners substituted by the said deed of entail, the said prohibitory, irritant, and resolute clauses became inapplicable and inoperative against them, and their descendants succeeding to them, in their respective shares or proportions of the said lands and estate, the said deed of entail resolving thereafter into a simple destination of the said lands and estate, in favour of them and the other heirs therein mentioned: And the said prohibitory clause contains no prohibition against altering the order and course of succession appointed by the said disposition and deed of entail, of a form so complete and substantive, or expressed in such clear, distinct, and appropriate words, as to be a valid and effectual prohibition to that effect: *Third*, The clause in the said deed of entail, whereby the entailer's sisters, the said Margaret, Cicilia, Jean, and Mary Halcro, in the event of their succession to the said lands and estate, are empowered to sell to each other the whole or any part of the shares that should fall or belong to them, is a special exception in their favour from the said prohibitory clause of the said deed of entail, (in so far as they are thereby prohibited to sell or dispose of the said lands and estate,) and in virtue of which they might lawfully convey to each other their respective shares or proportions of the said lands and estate or any part thereof, for a price or other consideration in any way they might think proper,—in respect the said deed of entail does not in express terms provide that such shares, or parts thereof, when sold in virtue of the said clause, shall be conveyed and held under the fetters imposed by the said deed of entail, and in no respect regulates the mode of carrying such sale or sales into effect, nor does it exclude the purchaser from being a creditor for the price, and having all the other legal rights and privileges over the part and portion acquired by him: And the power thus conferred upon his sisters by the entailer, the said Dr. Hugh Halcro, is such as by law passes to the heirs of their bodies succeeding to and representing them in their respective shares or proportions of the said lands and estate: That the said disposition and deed of entail being in itself so anomalous, inconsistent, and defective, and not being so framed as specially required by the before recited act of Parliament, 1685, c. 22, nor such an entail as was contemplated or intended to be sanctioned by the same, is neither a legal, valid, nor binding entail of the said lands, and estate therein contained, nor entitled to the protection of the foresaid act of Parliament: And the pursuers respectively are, therefore, entitled to do, exercise, and

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perform every act and deed, faculty and power, relative to the said lands and estate, or their respective shares or proportions thereof in the same manner, in all respects, as if they were proprietors thereof in fee simple; or at least to do, exercise, and perform such acts and deeds, faculties, and powers as Our said Lords shall find competent to and in the power of the said pursuers respectively: That with a view of ascertaining, by a decret of Our Lords of Council and Session, the nature and extent of the powers which the pursuers have over and relative to the said lands and estate contained in the said disposition and deed of entail, they have instituted the present action of declarator against all the heirs of entail now in life under the same: And, therefore, John Purse Johnston, the only surviving brother of the pursuer James Johnston, and fourth son of the said deceased John Johnston, and the heir of entail called by the said disposition and deed of entail to the succession next after the pursuer, the said James Johnston, to his share or proportion of the said lands and estate therein contained; and Margaret Jean Lavinia Johnston, eldest daughter of the said deceased John Johnston, now or lately residing in Arbroath; Ann Maria Johnston or Nugent, second daughter of the said deceased John Johnston, and wife of Lieutenant John Nugent, of the Royal Navy, now or lately residing in Ireland, and the said John Nugent, her husband, for his interest; Jessy Johnston or Smith, fourth daughter of the said deceased John Johnston, relict of the deceased Rev. William Smith, preacher and sometime schoolmaster in Arbroath, and now or lately residing there; and Tomima Smith, Maria Smith, William Smith, James Smith, and Jessy Smith, children of the said Jessy Johnston and William Smith; Ann Matilda Johnston, fifth daughter of the said deceased John Johnston, now or lately residing in Ireland; Margaret Johnston or Halcro, relict of the deceased William Halcro of Bea, now or lately residing in Orkney; Betsy Halcro or Ferguson, wife of James Ferguson, officer of excise, sometime residing in Kirkwall, now or lately in Stromness; and the said James Ferguson, her husband, for his interest; and Margaret Garrioch or wife of
 and the said
 her husband, for his interest, and Betsy Garrioch, children of the said Betsy Halcro and the deceased William Garrioch, shipmaster in Stromness, her late husband; Margaret Halcro or White, relict of the deceased Alexander White, candlemaker in Edinburgh, now or lately residing in Stromness; and William White, Margaret White, and Grace White, children of the said Margaret Halcro and Alexander White; Jean Halcro or Robertson, wife of Edward Robertson,

Object of the
action.

Heirs of entail
called as de-
fenders.

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farmer, now or lately residing in the town of Ireland, Orkney, and her said husband, for his interest, and William Robertson, James Robertson, Joshua Robertson, Edward Robertson, and Elizabeth Robertson, children of the said Jean Halcro and Edward Robertson; Marjory Johnston or Urquhart, relict of the deceased John Urquhart, merchant in Stromness, and now or lately residing there; Margaret Urquhart or Paterson, wife of William Paterson, now or lately innkeeper in Stromness, and the said William Paterson, her husband, for his interest; and David Paterson, William Paterson, James Irvine Paterson, and Nicol Robertson Paterson, children of the said Margaret Urquhart and William Paterson; Margaret Hill Paterson or Pride, wife of George Pride, shipmaster, Dundee, now or lately in South America, or elsewhere abroad, and the said George Pride, her husband, for his interest: Marjory Paterson or Scott, wife of James Scott, shipmaster, now or lately residing in Sunderland, and the said James Scott, her husband, for his interest; Catherine Hood or Fitch, wife of John Fitch, sometime merchant in Glasgow, and now or lately residing there, and the said John Fitch, her husband, for his interest; and Alexander Fitch, William Fitch, Mary Fitch, Catherine Hood Fitch, and Isabella Fitch, children of the said Catherine Hood and John Fitch; Margaret Hood, now or lately residing in Glasgow; Jean Johnston, relict of the deceased Thomas White, shipmaster in Stromness, and now or lately residing there; and Eliza White, Margaret White, and Catherine White, children of the said Jean Johnston and Thomas White; Jean Harris White or Irvine, wife of James Irvine, sometime shipmaster in Annan, Dumfriesshire, now or lately residing in Liverpool, and the said James Irvine, her husband, for his interest; and George Irvine, and James Irvine, children of the said Jean Harris White and James Irvine; Thomas White, innkeeper in Stromness, and Ann White, only daughter of the said Thomas White; and Robert Sands, eldest son of the pursuer, the said Thomas Sands, now or lately residing in London, the heir of entail called by the said disposition and deed of entail to the succession, next after the pursuer, the said Thomas Sands, to his proportion or share of the said lands and estate therein contained, and Robert Sands, only son of the said Robert Sands; Alexander Watt Sands, Isabella Sands, and Mary Sands, the remaining children of the pursuer, the said Thomas Sands; Margaret Sands or Minto, now or lately residing in

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London, relict of the deceased George Minto, shipmaster,
 and George Minto and Thomas
 Minto, sons of the said Margaret Sands and George Minto ;
 Mary Minto or Nichols, wife of John Nichols, now or lately mate
 of the ship Carlisle of the port of Sunderland, and her said
 husband, for his interest, and George Nichols, Margaret Nichols,
 and Jane Nichols, children of the said Mary Minto and John
 Nichols, all defenders ; being the whole heirs of entail,
 so far as known to the pursuers, at present in existence,
 called to the succession, by the said disposition and deed
 of entail ; and the tutors and curators of such of them as are
 minors, if they any have, for their interest, Ought and Should be
 Convened before our said Lords of Council and Session ; and it
 OUGHT and SHOULD be FOUND, DECERNED, and DE-
 CLARED, by decree of our said Lords, that the foresaid *pro in-*
diviso lands and estate, the succession and right to which have now
 devolved on the pursuers, as the heirs and representatives of the
 said Margaret Halero, and Mary Halero, and which are possessed
 by them under the foresaid titles, are not subject to the fetters
 imposed by the said disposition and deed of entail before narrated,
 or, at least, that the said fetters are no longer binding or effec-
 tual against the pursuers, their heirs and assignees ; and that the
 pursuers are entitled to sell and alienate the same, onerously or
 gratuitously, to contract debt thereon, and to alter the succession
 thereto ; and, generally, to do, exercise, and perform every act
 and deed, faculty and power, relative to the said lands and estate,
 or their respective shares or proportions thereof, in the same
 manner, and in all respects, as proprietors thereof, in fee simple :
 And that the defenders, or any of them, have no claim or
 demand, of any description, against the pursuers, or their respec-
 tive heirs, or representatives, for, or in respect of, the doing
 or exercising any such act or deed, faculty or power, aforesaid :
Secundo, Without prejudice to the general conclusion before in-
 serted, it OUGHT and SHOULD be FOUND and DE-
 CLARED, by decree foresaid, that the pursuer, the said James
 Johnston, is entitled to hold and possess that third part or share,
pro indiviso, of the said lands and estate acquired by his grand-
 mother, the said Margaret Johnston, from her sister, the said
 Cicilia Halero, and now belonging to him as the heir and repre-
 sentative of his said predecessor, as the absolute and unlimited
 fiar thereof, without being subject to any of the fetters, burdens,

Conclusions.

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or conditions of the foresaid disposition and deed of entail, and that he is entitled to contract debt thereupon, and to sell and dispose of the same, or any part or portion thereof, either onerously or gratuitously, in fee simple or otherwise, and that the price or other consideration given for the same is the absolute and exclusive property of the said James Johnston, and that he is entitled to use and dispose of the same at pleasure, and it OUGHT and SHOULD be FOUND and DECLARED, that the pursuers have undoubted right and title in implement of the before recited disposition and assignation by the said Cecilia Halcro to the said Margaret Halcro, gratuitously to dispoise and convey in favour of the pursuer, the said James Johnston, and his heirs and assignees whomsoever, the foresaid third part or share of the said *pro indiviso* lands and estate thereby conveyed, in fee simple or otherwise, free of the fetters imposed by the said disposition and deed of entail, or any of the burdens, conditions, or clauses therein contained: *Tertio*, Without prejudice to the other conclusions before inserted, it OUGHT and SHOULD be FOUND and DECLARED, by decree foresaid, that the pursuers have full and undoubted right and power mutually to sell and alienate in fee simple or otherwise in favour of each other, the remaining two-third parts or shares, *pro indiviso*, of the said lands and estate to which they have succeeded respectively as the heirs and representatives of the said Margaret Halcro and Mary Halcro, or any part or portion thereof, for a price or other consideration, unfettered by the said disposition and deed of entail, or any of the conditions, burdens, or clauses therein contained, and that the price or prices, or other consideration given for the same by the pursuers, or by either of them, to each other, when so sold or alienated, belong absolutely and exclusively to the pursuers respectively, and that they are entitled to use and dispose of the same at pleasure: *Quarto*, It OUGHT and SHOULD be FOUND and DECLARED, by decree foresaid, that the pursuers are entitled to apportion and divide between them, according to their several rights and interests therein, the whole of the foresaid *pro indiviso* lands and estate, and to hold and possess their respective shares or proportions thereof, when ascertained and divided, as separate and distinct properties in all time coming; and that they have full and undoubted right and power for that purpose, mutually to dispoise and convey their said respective shares or proportions of the same, and that either to and in favour

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of each other, and to their respective heirs and assignees in fee simple; or to the heirs substituted and entitled to succeed to them therein respectively, by and in virtue of the destination appointed by the said disposition and deed of entail, and with and under the burdens, conditions, and provisions, and clauses, irritant and resolute, therein contained, according to the nature and extent of the powers possessed by the pursuers, over and relative to the foresaid *pro indiviso* lands and estate, as the same shall be determined by the decree to be pronounced herein by our said Lords of Council and Session: *Quinto*, In the event of our said Lords finding that any part of the said *pro indiviso* lands and estate is still subject to the fetters and conditions imposed by the said disposition and deed of entail, it OUGHT and SHOULD be FOUND and DECLARED, by decree foresaid, that there is no valid and effectual prohibition operating on the pursuers, as the heirs-portioners in possession, from altering the order of succession appointed by the said disposition and deed of entail, and that the pursuers have full and undoubted right and power mutually to dispoise and convey their respective shares, or proportions thereof, in favour of each other, and of such heir or heirs as they may think proper to call to the succession of the same; and that the defenders, or any of them, have no claim or demand of any description against the pursuers respectively, or against their respective heirs and representatives, for, or in respect of such alienation, or disposal of the said lands and estate, or any part thereof: And, in case the defenders, or any of them, appearing, and unduly opposing the pursuers in obtaining decree to the effect foresaid, they OUGHT and SHOULD be DECERNED and ORDAINED, by decree foresaid, to make payment to the pursuers of the sum of £200 sterling, or such other sum, less or more, as the expenses of the process, and extracting the decree to follow hereon, all conform to the laws and daily practice of Scotland, used and observed in the like cases, as is alleged.—OUR WILL IS HEREFOR, &c.

Dated and Signeted 13th April 1835.

I Alexander Brown Messinger at Arms by virtue of a Libelled summons of Declarator of which the above and fourteen pages are a full double to the will dated and signeted the thirteenth day of April Eighteen hundred and thirty five years raised at the instance of the before designed James Johnston Esquire of Cowbister and Thomas Sands Esquire of Swanbister Pursuers
 in & Alexander Brown

in His Majesty's name and authority Lawfully Summon you
and charge you the also before Deceased Margaret Jean
Lavinia Johnston Eldest daughter of the deceased John John
now or lately residing in Arbroath, to compare before the Lord
of Council and Session at Edinburgh or where it may hap
them to be for the time the Twelfth Seventh day next after
this my Citation in the hour of course with continuation of
days to answer at the instance of the said Pursuers in
the matter above labelled in said Summons with Cer
tification conform to said Summons in all points
This I do upon the Third day of September by these
hundred and thirty five years before these witnesses
Alexander Penny and David Tyrie both
residents in Arbroath

Alex Brown