No. 57.

1723. *December* 31.

LORD POLWARTH and HOG of Harcarse *against* EARL of HOME, &c.

In an action of division of a common muir, commenced at the instance of parties who had a servitude on that common, the action was sustained, though they had not a joint property.—See APPENDIX.

*** The above appears from the case between these parties, No. 2. p. 2462. *voce* COMMONTY.

*** See what is said about a case between Feuers of Dunse and Hog of Harcarse, p. 2464.

1725. *February* 2:

WILLIAM MACKAY, Merchant in Inverness, and ELIZABETH FOULER, his Wife, *against* THOMAS ROBERTSON, Merchant there.

No. 58.

Mr. Robertson being debtor in a bond for 3000 merks to William Macwhirich, and his heirs, *secluding executors*, John Macwhirich, William's only son, as heir served in general to his father, charged Robertson, the debtor, and took out a caption against him; but the debt being suspended, John executed a deed on death-bed, in which he named the pursuers, Elizabeth Fouler, his mother, and William Mackay, her husband, his executors, " with power to pursue for, uplift, discharge, and otherwise dispose of, the hail debts, &c. due to him at the time of his decease, and particularly of the debt due by the suspender, and another debt therein mentioned, to which bonds he had right, and upon which he had used diligence; and he appointed them, if needful, to confirm."

Mr. Mackay and his wife having confirmed, they insisted for discussing the suspension.

It was objected for the suspender: That the pursuers, as executors confirmed on a testament, had no sufficient active title, the bond charged upon being heritable by destination.

It was answered for the pursuers in general: That since there was no compearance for the heir, it was *jus tertii* to the defender, and that they were willing to give him sufficient security against any claim from the heir. But, 1*mo*, they contended, That a charge upon a bond secluding executors, by the original creditor, would make the bond moveable; he having thereby sufficiently declared his intention to raise his money from the debtor, as in the case of a bond bearing a clause of infeftment. In support of this, a decision *in terminis* was adduced, observed by Newton, 1st March, 1683, No. 109. p. 5552. 2*do*, The charge in the

No. 58. present case was not given by the original creditor, but by his heir, to whose executors the original creditor could have no view, his destination being fully satisfied by the heir's once existing; and of this opinion the Lord Dirleton and Sir James Stewart seem to be: And the executors of an assignee would no doubt have right to a bond secluding executors, though they would not to a bond bearing a clause of infeftment, whereon no charge had followed. *3tio*, The deed by which this bond was conveyed, though it was of a testamentary nature, yet it contained an assignation, by the words "pursue, uplift, discharge," &c. which were most properly applicable to an assignation; and the granter must have had this in his view, because he seemed to make a doubt, if there was any necessity of confirmation.

Replied for the suspender: *1mo*, That there was a great difference betwixt sums that are only declared to be heritable by the nature of the security, and those that are so by destination: A charge in the last case may indeed show that the creditor wants to have his money better secured in the same terms, but it never will import an alteration of his former destination. As to the decision from Newton, it is contradicted by the opinion of our lawyers, and the course of decisions for these thirty years past have gone against it. *2do*, That the destination was not to the creditor's *heir* simply, but to his *heirs*, *secluding executors*, and, while unaltered, must for ever descend from one heir to another of the original creditor, the same as it was at first in his person; a charge by any of his heirs nowise inferring an alteration of the first destination, more than if it had been given by himself; as in the case of an institute or substitute in a bond, who has others substituted to him, but so as he may alter the substitution at his pleasure, if he should charge upon the bond, it would not make the sum go to his executors, or alter the substitution. Dirleton and Sir James Stewart only give their opinions in the case where there was no provision concerning the succession of the person upon whom the bond was in the last place to devolve; and the reason why a bond secluding executors would go to the assignee's executors, is, because the first destination is thereby altered, and contains no destination of the succession of the assignee, whose executors are not therefore secluded. It was replied, *3tio*, That no heritable subjects can be conveyed by testament, or any deed of a testamentary nature, much less on death-bed; neither is there any proper assignation to this subject. The pursuers are named in the writ "executors and universal legatars," and no common clause of stile can alter the nature of the writ; and for that reason the pursuers have confirmed the subject as moveable.

The Lords sustained the objection.

Act. *Ja. Boswell & Ja. Graham, sen.* Alt. *Pat. Grant.* Clerk, *Justice.*

Edgar, p. 159.