

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 Foulter, 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 comparence 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, *Imo*, 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 infertment. In support of this, a decision *in terminis* was adduced, observed by Newton, 1st March, 1683, No. 109. p. 5552. *2do*, The charge in the