

and on the substitution of the contract of marriage 1759, calling his heirs and assignees whatsoever to the succession. As to the first, the decision in the case of Mackerston, and other like decisions in like cases, were highly commended and approved of. And as to the second, the decision in the case of Waygateshews, allowing parole evidence to explain the words of a settlement, in themselves sufficiently clear and even technical, was greatly condemned, and held to be no precedent; being a single judgment, not reclaimed against, and afterwards compounded at considerable expense; condemned by many eminent lawyers, even at the time of pronouncing it.

Against this interlocutor a reclaiming petition was presented, solely upon this ground, that the Duke of Douglas, (October 16,) *anno* 1744, had executed a deed, whereby, —“ To the end, that, in failure of himself, and the heirs-male and female of his body, his estate might descend to, and continue with the heirs of the ancient investitures, he thereby revoked all deeds and settlements formerly made by him thereof, preceding that date, declaring the same to be null; reserving power to make new settlements thereof; and dispensing with the not-delivery.” And as this deed remained uncanceled at his death, though the other deeds in favour of the heirs-male were, it was contended to be a settlement of the succession, and not simply a revocation; and that thereby the heirs of the former investitures, *viz.* the heirs-male, were called, even in terms of the contract of marriage, preferably to heirs and assignees whatsoever. And the petition prayed the Lords to alter their former interlocutor, and to find that heirs-male whatsoever were called to the succession before heirs and assignees whatsoever. But, upon advising petition and answers, the Lords, 4th March 1777, were of a contrary opinion; refused the petition, and adhered to their former interlocutor.

Lord Alva and Lord Covington were of a different opinion.

HEIR AND EXECUTOR.

1777. January 29. MACKENZIE *against* MACKENZIES.

THE annuity to the widow is a burden upon the *heir*, unless it is laid clearly and expressly on the *executor*. This also is the case with all burdens bearing *tractus futuri temporis*.

In this case, “The Lords found, that the annuity to the widow falls as a burden upon the heir, and not upon the executors, except in case of deficiency.”

See Fount., I. 783, *Calder against Russell*, 8th July 1697.