There is a case collected in the Dict., Vol. II. p. 401, *Marquis of Clydesdale* against *Earl of Dundonald*, which seems to countenance a contrary doctrine, even in general settlements; but the decision, as collected, proceeds upon a mistake; for, upon looking into the papers, it appears that the disposition upon which the charter proceeded was to heirs-male; whereas the charter proceeding upon that disposition was expede to heirs whatsoever. When challenged, therefore, it was found disconform to its warrant, and the heir-male prevailed.

This decision has led Mr Erskine into a mistake, on this point, in his Institutes, p. , where he quotes it.

1777. *March* 4. ARCHIBALD DOUGLAS of DOUGLAS *against* DOUGLAS, DUKE of HAMILTON.

19th December 1776. "ON report of the Lord President, in absence of the Lord Justice-Clerk, Ordinary, and having advised the information for Douglas, Duke of Hamilton and Brandon, and his curators, and information for Archibald Douglas of Douglas, Esq., with the respective processes of reduction and declarator, raised by the said parties, now conjoined; in so far as concerns the declaratory conclusions, (those of reduction not being insisted in,) and writs therein referred to by each party,—the Lords find, that Archibald, late Duke of Douglas, was unlimited fiar of his whole estates in question, including the baronies of Bothwell and Wandell: That, under the clause of substitution, to his heirs and assignees whatsoever, in his contract of marriage, executed in the year 1759, the said Archibald Douglas, now of Douglas, as heir of line, was called to succeed to the said Duke, in his whole estates, including as aforesaid: That the parole evidence offered by the Duke of Hamilton, to the effect of giving a different meaning to the said clause in the contract of marriage, is neither competent, nor the condescendence of facts relevant; and, therefore, refuse to allow any such proof: repel the whole other defences pleaded by the Duke of Hamilton against the said Archibald Douglas's declarator; sustain those pleaded by Archibald Douglas against the three several processes of declarator at the Duke of Hamilton's instance against him; assoilyie Archibald Douglas from these processes, and decern. And also decern, at his instance, in the declarator against the Duke of Hamilton and his curators: And, in respect the said Archibald Douglas is already found to have a preferable right to the Earl of Selkirk to these estates, by final judgments of this Court, in former processes which depended between these parties,—Find it unnecessary to give any judgment in the processes of declarator at the Duke of Hamilton's instance, so far as the same concern the interest of the Earl of Selkirk, who has not made any appearance in these processes, now depending in Court."

At advising this cause, the Lords were unanimous; and rested their opinion chiefly upon the positive prescription creating the late Duke unlimited fiar of his whole paternal estates, (for, as to his own purchases, there was no question,)

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 uncanceiled 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*, 8*th July* 1697.