13. It is not surprising that such is the result of a discussion which demonstrates that every argument of the defenders rests upon assumed implication, for which there is not the slightest foundation in reality, and which, if ever at any time countenanced by some lawyers, has long been completely overruled and exploded.

LORD GILLIES concurred in this opinion.

No. II.

The PRINCIPLES on which the JUDGMENTS of the HOUSE OF LORDS in the late Cases respecting the LAW OF ENTAIL rest, and what seems to be thereby established;—referred to at p. 288.*

I. THE heir of entail in possession by a complete title, is fiar or owner of the estate, entitled to exercise every act of ownership, excepting in so far as he is restrained by the terms of the deed made and registered according to the Act 1685. This is clearly laid down by all the writers since the date of the Act.

This rule seemed to be shaken by the decision in the House of Lords, in the first of the Queensberry cases. The entail did not prescribe any term beyond which leases should not be granted. The House of Lords declared leases for a very long and unusual term to come within the prohibition to alienate; but this was agreeable to what was laid down by some of the best authorities in the law of Scotland, which stated long leases to be 'alienations.'

II. No restraint on the heir in possession is to be raised by implication, nor any right vested in the substitute heirs, that is not clearly given by the entail. The intention of the entailer, however manifest, is not to be regarded, if not clearly and technically expressed in the deed. This was fixed by Lord Mansfield's decision in the case of 'Duntreath,' many years ago, and has been adopted in a variety of cases since.

Lord Mansfield's decision or doctrine in the Duntreath case was, with hesitation, followed by Lord Thurlow, Lord Loughborough, and Lord Eldon, who, as equity lawyers, inclined to think that entails were entitled to fair or liberal construction, and that intention, if clear, as it was in the Duntreath case, might be regarded: yet they held themselves bound by the precedent; and accordingly decided in other cases, where the entailer's intention was equally manifest, as in those of Baldastard, Culdares, &c.

III. The rights of the several parties interested under the deed, and the remedies in case of contravention, can only be ascertained by what the deed itself contains. Judges are not at liberty to go out of it, either to give or take away, however plausible or seemingly equitable the construction may be.

Keeping in view those rules of law, the cases that have been lately decided may be very shortly stated; and it will be obvious that the judgments of the House of Lords are conformable.

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* These notes were made and communicated to the reporters by the late Mr Chalmer, Solicitor in London, recently before his death, and have been thought not unworthy of preservation.

In the Ascog case, or 'Stewart *v.* Fullarton,' the heir in possession, taking advantage of an omission or defect in the irritant and resolutive clauses to mention 'sales,' though they were in the prohibitive clause, sold part of the entailed estate. The substitute heirs, though they could not prevent the sale, nor set aside the right of the purchaser, argued, that they were injured by the contravention of the prohibition, which conferred a right on them to have the estate preserved, and laid the heir in possession under an obligation to do so; and, since that was not in his power, to remedy the wrong he had done by purchasing another estate, to be settled to the same uses.

The Court of Session, following the opinion of a majority of the Judges, decreed, in favour of the substitutes, that there should be a reinvestment. The decree was reversed, because, independent of what was ordered being nugatory, it was enough that the entail contained no such obligation on the contravener. A prohibition to do one thing cannot be converted into an obligation to do another thing, without violating the rule as to strict interpretation of entails.

The House of Lords not only negatived the proposed reinvestment, but likewise the declaration in the interlocutor, that the seller was not entitled to apply the purchase-money to his own use; and, in the next case, 'Bruce *v.* Bruce,' the decree of the Court of Session being, the contravener was accountable to the substitutes for the money received by the sale, the reversal establishes generally that he is not accountable; and to justify this, it is only necessary, according to the principles before mentioned, to say, the entail contains no such obligation. The object of the entailer is to preserve the estate mentioned in his deed to all the heirs nominated or described in succession. If the estate is gone irretrievably, there is an end of the entail, and of all right and claim of the substitute heirs. Money cannot come in the place of land. It cannot be entailed. No such thing appears from the deed to have been in the contemplation of the entailer; and a Court has only to look to what he has said and done, and is not entitled to add to it.

The case of the 'Executors of the late Duke of Queensberry *v.* the 'Marquis of Queensberry' is somewhat different; but still the judgment of the House of Lords is conformable to the last of the rules laid down above. By the entail of the estate of Tinwald, the Duke was prohibited from granting leases beyond the term of nineteen years, and was required not to let them at an undervalue, but to reserve the best rent that could be reasonably got at the time; and this prohibition was followed up by clauses irritant and resolutive. The Marquis alleged, and offered to prove, that the Duke had granted leases much under the rent that might have been procured from good tenants. At the time of his death, several years of the term of those leases were unexpired; and they could not be set aside, as the entail had not been recorded. The Marquis of Queensberry brought an action against the Duke's representatives, claiming damages, which he estimated by the difference betwixt the rent reserved by the leases and that which he alleged might have been obtained. The Court of Session sanctioned the demand, but the House of Lords reversed the decree. According to the principle laid down, the judgment is well founded. The deed of entail, on which alone the rights of the substitute heirs can be founded, gave no authority for such an action. It prescribed the penalty for contravention, that the contravener should forfeit the estate, at the suit of any of the substitutes. Subject to this penalty, and no other expressed, the Duke took the estate; and

it was in the power of the Marquis to enforce it; but he did not—attempting to substitute another penalty as inferrible from the deed of entail, though not directly expressed. The Act 1685 authorizes the owners of estates to entail them, under such provisions and conditions as they shall think fit. The simple and true question in this, as in similar cases, is, Did the deed impose such a condition as that attempted to be imposed? The deed prohibits certain acts, and imposes a certain penalty on contravention. The conclusion is, that the entailer did not think fit to impose any other; and therefore a Court is not at liberty to do so, nor to add a syllable to the deed which is not to be found in it.

Suppose an entail to contain the strictest prohibition to alienate or burden the estate, but not followed up by irritant and resolutive clauses;—the entailer has, by the deed, given to his disponee the power to exercise every act of ownership; and, with the same breath, prohibited him from doing so in certain respects. In contempt of the prohibition, the disponee or heir sells the estate or encumbers it. The purchaser or creditor is confessedly safe; but the substitute heirs allege they are injured, and their loss must be repaired. The contravener answers, 'How can I be subjected to damages for doing what, 'as owner, the law allowed me to do, and which the deed by which I 'took the estate laid me under no penalty for doing?' The substitute says, 'You were under an implied obligation: You have done an 'immoral or improper act.' To which it must be sufficient to answer, 'There is no room for implication; and, granting what I have done to 'be improper, or, if you please, dishonourable or immoral, where is 'the law that subjects me to pecuniary damages? In what Court 'am I to be tried for the alleged crime? and what Court has right to 'direct how the money is to be disposed of or distributed, if I were 'found liable?' As no law can be pointed out, nor any course which is not merely arbitrary can be pursued, it follows, that the substitutes are without remedy: In short, that the substitutes can have no redress against the onerous deeds of the heir in possession, if the entail does not contain irritant and resolutive clauses, in terms of the Act 1685. If the right of ownership remains, the deeds of the owner must stand.

No. III.

OPINIONS of the Commissaries in Rose v. Ross; referred to at p. 290.

Mr Commissary Tod.—The present case embraces two points,—a question of fact and a question of law. The question of fact, respecting the filiation of the defender, George Ross, has been already investigated, and disposed of by a final interlocutor of this Court, finding that the defender is the son of the late George Ross of Cromarty and Elizabeth Woodman. It remains now to consider the legal question, How far he is the lawful son of those persons? This point is argued in the memorials now before the Court.

The circumstances from which the cause has arisen, and the judicial proceedings which have already taken place, are fully detailed in the