WILLIAM TROTTER and Others, Appellants.—*Sol.-Gen.*—*Adam.* No. 27.

YOUNG TROTTER, Respondent.—*Sugden*—*Campbell.*

Foreign—Testament—Approbate and Reprobate.—A native of Scotland domiciled in India, but who possessed heritable bonds in Scotland, as well as personal property there and in India, having executed a will in India, ineffectual to carry Scotch heritage; and a question having arisen, whether his heir-at-law (who claimed the heritable bonds as heir) was also entitled to a share of the moveables, as legatee under the will;—Held, (affirming the judgment of the Court below), that the construction of the will, as to whether it expressed an intention to pass the Scotch heritable bonds, and the legal consequence of that construction, must be determined by the law of England.

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2D DIVISION.
Lord Pitmilly.

COLONEL CHARLES TROTTER, a native of Scotland, went at an early period of life to the East Indies, where he was engaged in the military service of the Company for upwards of 30 years. In 1809, and subsequent years, he remitted various sums of money to his youngest brother, Mr William Trotter, merchant in Edinburgh, who acted as his attorney, and who deposited them in the Edinburgh Banks. In order to obtain better interest, he drew them out, and lent them to different individuals upon heritable bonds. He communicated to Colonel Trotter what he had done, and received in 1815 a formal power of attorney constituting him his sole commissioner and factor, with full power to receive and discharge all sums due or that might become due to him; and on payment to re-invest and re-employ the sums received, or any other funds that the Colonel might thereafter commit to his charge, on such good heritable or personal security as Mr Trotter might approve of, and to make up feudal titles, &c. Mr Trotter acted on this power; and the result of his operations was, that about L. 1900 were invested in Scotch heritable bonds. Colonel Trotter was also possessed of personal property in Scotland, and in India. In June 1829, without having ever returned to his native country, Colonel Trotter died at Pallamcottah, a remote situation, where legal advice could not be procured, and where, in May preceding, he executed his will, written by himself, in these terms:—

'I, Charles Trotter of Edinburgh, colonel in the East India 'Company's service, for the love, favour, and affection which I 'have and bear to Major-General Thomas Trotter, Mr Young 'Trotter, and Mr William Trotter, my brothers, and to my

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'sisters, Mary, wife of Mr John Pitcairn, and to Miss Christiana 'Trotter, and to Mr Alexander Pitcairn of Edinburgh, husband 'of my sister; and considering it to be my duty, while in health, 'to execute a settlement of all my estate and effects which may 'belong to me at my death,—For this purpose, I do hereby con-'stitute, make, and ordain my brother, Young Trotter, of 'Broomhouse Mill, Dunse, and William Trotter, merchant in 'Edinburgh, to be my executors of this my last will and testa-'ment in Great Britain, and trustees also for the estate of the 'late Captain Dickson, of which I am executor and trustee for 'the children, and to which I nominate Mrs M. Trotter, jointly 'with the house of Messrs Arbuthnot, De Monte, and Company, 'executors, in India; and farther, I do hereby constitute, make, 'and ordain Messrs Arbuthnot, De Monte, and Company, of 'Madras, to be my executors in India, and trustees for bonds, 'bills, and vouchers of every kind; and farther, I hereby nomi-'nate the said Messrs Arbuthnot, De Monte, and Company, of 'Madras, but in trust only, and to the end and for the purpose 'after mentioned—*First*, That they make payment of all my just 'and lawful debts: *Second*, That for the love and affection I bear 'to my sister-in-law, Matilda Trotter, widow of my deceased 'brother, Robert Trotter, they make payment of the sum of two 'thousand (2000) Star Pagodas: *Third*, That they hold in their 'hands the sum of two thousand (2000) Pagodas, for the sole 'benefit of Charles Trotter, a native of India, to be disposed of 'to best advantage: *Fourth*, That they remit the residue and 'remainder of my India estate, as they realize it, to Europe, after 'deducting all expenses of management, to my above-named 'brothers in Edinburgh, my executors in Europe, Young Trot-'ter and William Trotter, who are hereby instructed to divide 'the remainder of my estate as they receive it from India, and 'the whole of my property in Europe, into six equal shares, to 'be paid to each of them, viz. Thomas Trotter, Young Trotter, 'William Trotter, Mrs Mary Pitcairn, Miss Christiana Trotter, 'and Mr Alexander Pitcairn of Edinburgh, share and share 'alike, or to the lawful issue of such of them as may be dead. 'In witness whereof, I have hereunto set my hand and seal, at 'Pallamcottah in India, the 28th day of May in the year of our 'Lord 1819.'

The will was signed and sealed before two witnesses. The Indian executors proved, and transmitted home an exemplified copy of the will.

Colonel Trotter had originally four brothers, but was surviv-

ed by only the two youngest, Young Trotter and William Trotter. June 10. 1829.

As the will did not pass real property in Scotland, Young Trotter made up titles to the heritable bonds in the character of heir of line and conquest. He also claimed his portion of the moveables under the will. His brother and sisters objected, that if he betook himself as heir to the heritage, he could not claim any share of the moveables. He denied that he was obliged to make his election. To settle the disputed point an action of declarator was raised by Young Trotter, to have his right declared, and for payment; and the executors, in order to have the opinion and direction of the Court, brought an action of multiplepoinding against all concerned.

The Lord Ordinary sustained the defences by the legatees, and preferred them to the fund in medio, in terms of their claims.

On the cause being carried into the Inner-House, a joint Case was directed, for the opinion of English Counsel, on the question, 'What would be the construction and effect of the testator's 'will, according to the law and practice of England, so far as 'the interests of the parties to this case are concerned?' Accordingly the opinion of Mr Shadwell* and Mr Scarlett† were taken on a series of queries, which, with the answers, are subjoined.‡ The last brings out the point at issue: 'Whether, on the sup-'position of the question having arisen for trial in England, the 'heir would have been put to his election, if he had claimed 'money secured by heritable bond in Scotland, as well as his 'share of the personal estate under the will?'—*Answer*. 'Con-'sidering heritable bonds in Scotland as real estate, to which 'the heir-at-law is entitled, unless they are conveyed away by 'his ancestor with due solemnity, we think the heir-at-law would 'be entitled, in this case, to claim them without being put to his 'election, if the question had arisen in a Court of justice in 'England.'

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* Now Vice-Chancellor. † Now Attorney-General.

‡ 1. Whether the will would be held sufficient to pass real property by the law of England?

We are of opinion, that the will would not be held sufficient by the law of England to pass real, that is, freehold property.

2. If it would not be held sufficient for that purpose, what are the particular grounds on which it would be considered in England insufficient for that purpose?

Because it is not attested by three witnesses, in the manner required by the Statute of Frauds.

3. If the will be not sufficient to pass real property, does it so express the testator's

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Thereupon the Court altered the interlocutor, and found that Young Trotter was entitled to the legacy left to him by the will out of the personal estate, without being obliged to collate any part of the sums secured by heritable bonds, to which

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intention that it would put the heir to his election in any competent Court in England, whether of law or equity, if he had claimed the English real property, as well as his share of the personal estate under the will?

We are also of opinion, that the will does not so express the testator's intention as to the freehold property, as that it would put the heir to his election in a Court of equity in England, if the heir had claimed the English freehold property, as well as his share of the personal estate under the will.

4. If the words of the will are so defective in form and in meaning, according to the construction of such words by the law of Scotland, that they do not express it to be the meaning of the testator to pass heritable rights in Scotland, would the heir be put to his election in any competent Court, whether of law or equity, in England, were the question to arise there?

Upon the supposition which is put in the fourth question, we think that the heir would not be put to his election in any competent Court in England, either of law or equity, were the question to arise there.

5. Taking into consideration the relative circumstances under which the heritable bonds were severally granted, with reference both to the time of Colonel Trotter's death, and to the authority under which they were heritably invested by his attorney, does the same general principle apply equally to all of them?

We are of opinion, that the same general principle applies equally to all the bonds.

6. What would be the determination of any Court of law or equity in England, in regard to heritable or real property vested by the attorney, under circumstances which left Colonel Trotter in ignorance that the money was so vested at the time he made his will, and when he died? Would the heir, with regard to such real subjects, be put to his election?

We are of opinion, that though Colonel Trotter might be in ignorance that his money was vested in heritable property at the times when he made his will and when he died, yet, as the power of attorney authorized an investment in heritable security, the heir would not, with regard to such real subjects, be put to his election; but that, notwithstanding Colonel Trotter's ignorance of the actual mode of investments, the heritable or freehold property would, in any Court of law or equity, be deemed such as it actually was at the death of the Colonel.

7. On the other hand, what effect would be given to the circumstance, that an heritable or real security, which Colonel Trotter had previously approved of, and which exceeded in amount the new investments alluded to in the preceding query, had been uplifted by his attorney under circumstances which left Colonel Trotter in ignorance that the money had been so uplifted at the time he made his will, and when he died? Would that circumstance affect the heir's obligation to elect as to the posterior real investments alluded to in the preceding query?

We are of opinion, that if an heritable or real security, which Colonel Trotter had previously approved of, and which exceeded in amount the new investment alluded to, had been uplifted by his attorney under circumstances which left Colonel Trotter in ignorance that the money had been so uplifted at the times when he made his will and when he died, that circumstance would not affect the heir's obligation to elect as to any posterior real investments alluded to in the sixth query. But having regard to the terms of the power of attorney, whether the Colonel's pro-

he was entitled to succeed as heir, and decerned accordingly. June 10. 1829.
And on reconsidering the question, on Cases, adhered.*

William Trotter, and others, the residuary legatees, appealed.

Appellants.—1. This is a question of equity. A Court will not permit a party to take that which cannot be his but by virtue of the disposition of the will, and at the same time to keep what by the same will is given, or intended to be given, to another person. No person can accept and reject the same instrument. That rule is common to both England and Scotland. In order to apply this rule, it is only necessary to inquire, Whether the testator has plainly and unequivocally expressed his intention to pass both heritable and moveable property? The terms of the will, and the admitted extraneous circumstances, shew that he did intend to convey his moveables in India, and his whole property in Europe, without distinction. With that reading the expressions of the will are lucid and consistent; but, according to the respondent's view, the terms cease to receive their ordinary and authorized acceptation. The testator may have been in a mistake, when he thought that both real and personal property could be administered and divided by executors; but if he totidem verbis, or by plain inference, did by intention pass both to be held for the behoof of the legatees, that is enough to support the appellants' doctrine. The respondent, therefore, in seeking to take the heritable property, acts against conscience, and defeats the testator's purpose; and, if he persists in claiming as heir-at-law, must leave all the moveables to the legatees.

2. The opinions of the English Counsel may be well-founded, and yet not touch the present question. This is not a suit as to real estate in England, but as to Scotch heritable bonds; and although it may be necessary to resort to the opinions of foreign lawyers, to clear up mere technical and formal difficulties in foreign instruments, no such necessity exists to discover what

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perty was money in the hands of his attorney, or heritable security, it must, as between his heir and executor, be taken to be such as it in fact was at the time of the Colonel's death.

The use of the word "real," that is, freehold property, appearing ambiguous, the additional question was put, and the answer received as in the text, p. 409.

* 5. Shaw and Dunlop, No. 57.

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was the intention of the party by whom the instrument was executed. The Scotch Courts ought to have light enough in themselves to determine that point; and reference to English authority should be the more avoided in the present matter, as the very question of intention seems, in the law of England, to be dependent on names and technical views. But if the Scotch Courts are to decide on the intention, no difficulty can remain as to the result. The terms of the will, although not sufficient feudally to pass the heritage, leaves no doubt that de facto he did intend both heritage and moveables to be held for the legatees.

Respondent.—1. Before evidence of intention can be gained, the will must be expounded; but as it is disputed by what law that exposition is to be made, that inquiry must have precedency. The testator's will must be regulated by the law of England. He was domiciled in India,—executed the will there according to the formalities and solemnities of the English law—the law which regulated his moveable succession. India was the forum domicilii et contractus, and, in the eye of the law, the locus rei sitæ. In inquiring, therefore, what the testator meant, recourse must be had to the English law. It is only that law which can give, as it were, the legal translation of the will. His intention must be held to be what the English law decides; and there is no more room nor excuse for interposing the Scotch law on that point, than if it were proposed to adjudicate, according to Scotch principles, what was the kind of English property which the words passed. There is no authority for limiting this doctrine to mere technical expression. It is a general rule, and, if departed from, would lead to the utter defeat of a testator's real intentions, and create collision in the judgments of the two countries. The proper Court in which this question ought to have been tried was an English or Indian Court; and they certainly would not have looked to the law of Scotland for the means of reaching the testator's intention. Besides, it is only ex comitate that the Scotch Courts entertain an English will, where the object is to affect indirectly, through the English will, Scotch heritage; but still the will must be construed according to the law of England. Formerly, no doubt, the Scotch Courts were in the use of giving their own interpretation of such foreign deed as they had occasion to decide upon; but this practice was corrected by a series of reversals by the House of Lords, and latterly has been altogether abandoned. Foreign law is a fact, and must be proved as a fact; and when proved, must be acted upon as such.

2. The opinions of the English Counsel establish, that no question of election is raised in the present case, and their opinions are well founded. In order to create such a question, there must appear upon the face of the instrument a clear and manifest intention to pass the particular estate as to which election is to be raised. Mere general words will not have that effect. The point must be raised in the most direct and express terms. Neither is it permitted to travel into other matters to find out the intention,—you cannot go *dehors* the will. But the will itself, fairly construed, does not afford such plain and decisive evidence of intention to pass both heritage and moveables, as is required to put the heir to his election. There may be surmises, or guesses, that the testator might have intended more than the words speak out. But looking to the words themselves, heritage neither was passed, nor intended to be passed. The testator knew that part of his property was invested in heritable bonds; and had he intended that his heir should not take these heritable bonds, he would have executed the instrument proper to effect that object, or, at all events, he would have plainly avowed what in this respect were his wishes.

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The House of Lords ordered and adjudged, that the interlocutors complained of be affirmed.

LORD CHANCELLOR.—My Lords, There is another case which stands for your Lordships' judgment, that of Trotter *v.* Trotter, which is an appeal from various interlocutors pronounced by the Second Division of the Court of Session. The facts of the case I shall state in a very few words to your Lordships. Colonel Trotter had been long resident, in a military capacity, in India. He died there in 1819, having shortly previous to his death made his will; and it is upon the construction of this will, and the circumstances arising out of it, that the question depends. Colonel Trotter, at the time of his death, left two brothers, Mr Young Trotter and Mr William Trotter. The latter then acted as his agent in Edinburgh. Colonel Trotter had been in the habit of sending, from time to time, to Mr William Trotter, money, for the purpose of being invested in securities in Scotland. The money was originally invested only in personal security; but William Trotter took upon himself (thinking it would be more advantageous for his brother) to call in a part of that property to lay it out in heritable bonds. This was afterwards communicated to Colonel Trotter,—he did not disapprove of it; and a power of attorney was sent out to Colonel Trotter, three or four years before his death, for him to execute,—authorizing his brother, William Trotter, to call in his property, and to reinvest it either upon personal or upon heritable securities.

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A part of the property was vested in heritable securities at the period of the death of Colonel Trotter,—a sum above L.1900. This, by the law of Scotland, is real property; and it is perfectly clear, and has not been disputed, that the monies so invested upon heritable security, being real property, did not fall by the will. The consequence was, that Young Trotter, who was the immediate heir, claimed and made up titles to this, which was real property, and also claimed his portion under the will. That was contested by the other legatees; and a suit was instituted in Scotland by Young Trotter, for the purpose of obtaining a declaration of his right; and also a multiplepoinding was instituted by the other parties: and under these two proceedings, interlocutors were pronounced, from which this appeal has originated.

One question, and a most material and important question was, how the will, which was executed in India, was to be interpreted? by what law? It was considered in the Court below, and undoubtedly it was held most properly, that the will was to be interpreted by the law of the land where it was made, and where the testator had his domicile, namely India, that is, by the law of England; and it was held, and properly held, as I conceive, by the Court below, that although that will was the subject of judicial inquiry in the Courts of Scotland, the same rule was to be applied to the interpretation of it, as if the will had been the subject of consideration and adjudication in the Courts of England. I think the Court of Session, in this respect, decided with perfect correctness.

The next question was, how the Court of Session were to ascertain what the law of England was with respect to this will? how this will was to be interpreted, according to the law of India, or, in other words, according to the law of England? They followed that course which had been adopted on other occasions, in the cases of Robertson *v.* Robertson,—Wightman *v.* Delile's trustees, and other cases,—the course which they have been in the habit of taking to ascertain how the law stood,—namely, to direct a case to be prepared, stating all the circumstances necessary for the purpose of raising the question of law, for the opinion of lawyers in this country. Accordingly, by one of the interlocutory decrees, it was directed that cases should be stated on both sides. It was afterwards agreed, that a joint case should be stated, with the concurrence of both parties; and that the opinion of the present Vice-Chancellor and the present Attorney-General should be taken, with respect to the import of this will according to the law of England.

My Lords,—It was said at the Bar, and I see by the papers it was also argued below, that, in cases of this description, it is not unreasonable that, when any technical points arise in the construction of a will of this description, the Court of Session should resort to the opinion of lawyers of the country where the will or instrument was executed; but that this applies only to technical expressions,—that, where a will

is expressed in ordinary language, the Judges of the Court of Scotland are as competent to put a proper construction upon it as Judges or lawyers of the country where the will was executed. But, my Lords, the Judges below were not of that opinion; and it is impossible, as it appears to me, that such an opinion can be reasonably entertained. A will must be interpreted according to the law of the country where it is made, and where the party making the will has his domicile. There are certain rules of construction adopted in the Courts, and the expressions which are made use of in a will, and the language of a will, have frequently reference to those rules of construction; and it would be productive, therefore, of the most mischievous consequences, and in many instances defeat the intention of the testator, if those rules were to be altogether disregarded, and the Judges of a foreign Court, (which it may be considered, in relation to the will), without reference to that knowledge which it is desirable to obtain of the law of the country in which the will was made, were to interpret the will according to their own rules of construction. That would also be productive of another inconvenience, namely, that the will might have a construction put upon it in the English Courts different from that which might be put upon it in the foreign country. It appears to me, my Lords, that there is no solid ground for the objection; but that where a will is executed in a foreign country by a person having his domicile in that country, with respect to that person's property the will must be interpreted according to the law of the country where it is made. It must, if it comes into question in any proceeding, have the same interpretation put upon it as would be put upon it in any tribunal of the country where it was made. It appears to me, therefore, that the Judges were perfectly right in directing the opinion to be taken of English lawyers of eminence, with respect to the import and construction of this will according to the law of England.

My Lords,—The main question that was ultimately put to the learned persons to whom I have referred is this, 'Whether, on the supposition 'of the question having arisen for trial in England, the heir would have 'been put to his election, if he had claimed money secured by herit-'able bond in Scotland, as well as his share of the personal estates 'under the will?' The answer is in these terms,—'Considering herit-'able bonds in Scotland as real estate, to which the heir-at-law is 'entitled, unless they are conveyed away by his ancestor with due 'solemnity,—we think the heir-at-law would be entitled in this case to 'claim them without being put to his election, if the question had 'arisen in a Court of justice in England.' When that opinion was communicated to the Court in Scotland, the Court immediately affirmed that opinion, and decided in favour of the heir-at-law. The heir-at-law was undoubtedly entitled to take the real estate, that is, the heritable bond; and the sole question was, whether, when he came in to claim under the will his proportion of the personal estate, it was

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reasonable that he should be put to his election, that is, whether he would take the one or the other? whether he would allow the real estate to be connected with the personal, so as to form one mass of the property, and the whole divided, or he would take the real estate and give up the personal estate? Whether he was obliged or not to do this, depended entirely on this consideration—whether, upon the face of the will, there was sufficient to manifest a clear intention, that the testator designed by his will to dispose of his real estate? Because, if he intended to dispose of his real estate, although he had not carried that intention effectually into execution, the party taking under that will would not be entitled to have the benefit of the will, and at the same time to defeat the intention of the testator. The question was therefore simply a question of construction:—Does it appear upon the face of the will, that it was the intention of the testator to dispose of his real estate, that is, of these heritable bonds? Now, my Lords, the rule of law in England, with respect to subjects of this kind, is well ascertained, and well defined, and it is this,—That you are not to proceed by probability or by conjecture, but that there must be a clear and manifest expression of the intention, on the face of the will, to include that property which is not properly devised, before the heir can be put to his election.

My Lords,—It has been contended at the Bar, that the construction put upon this will by the learned Counsel whose opinions have been taken by the Court of Scotland, was erroneous. My Lords, I have looked at the opinion, and read it carefully over several times, and I see no reason for dissenting from the construction which is put upon this will. There are words in this will sufficiently large to carry the real estate; but comparing one provision of this will with another, it chiefly points to personal estate, and to personal estate only. Executors are appointed—nothing is given to the executors, but they take merely by virtue of their character as executors; they take personal property only. There are executors appointed in Scotland; there are executors appointed in India; and the executors in India are directed to remit the residue, after payment of debts and legacies, to the executors in Scotland; and then the whole of the residue of the Indian estate, and the whole of the property in Scotland, are directed to be divided into six portions, and paid to the respective legatees. Throughout all these provisions there is nothing to satisfy my mind, with that clearness which is necessary to raise a case of election, that it was the intention of the testator to dispose by this will of the heritable bonds. If I am asked to conjecture what his intention was, I have no hesitation in saying that I should conjecture that it was his intention; but there is not such an expression of intention on the face of this will, as I think can justify your Lordships in giving it that effect. It is nothing more than conjecture. The intention is not expressed as it ought to be, for the purpose of raising a case of election. I beg leave therefore to say, that I concur in the opinion expressed by the learned individuals to whom I have re-

ferred; and I think, under these circumstances, I must recommend to your Lordships to affirm the judgment in the Court below. June 10. 1829.

Appellants' Authorities.—Kerr *v.* Wauchope, 1. Bligh, No. 1.; Robertson, Feb. 16. 1816, (F. C.); Dundas, Feb. 25. 1783, (15,585.); Gibson, June 20. 1786, (620.); Martin, March 4. 1794, (not reported); affirmed in House of Lords; Henderson, Jan. 31. 1797, (15,444.); reversed in House of Lords, May 29. 1802; Robertson, May 25. 1812, (not reported); Minto, Feb. 14. 1823, (2. Shaw and Dunlop, No. 166.); affirmed in House of Lords, (1. Wilson and Shaw, p. 678.); 2. Vesey and Beames, 125.

Respondent's Authorities.—1. Voet, 4. 19.; 23. 2. 85.; 28. 5. 16.; Voet de Statutis, 9. 2. 10.; 3. Erskine, 2. 39. and 42.; Hay Balfour, March 11. 1793, (affirmed 10. F. C. App. 1.); Dundas, Feb. 25. 1783, (15,585.); Henderson, Jan. 31. 1797, (15,444.); reversed ut supra; Wightman, June 16. 1802, (F. C. App. 1.); Robertson, Feb. 16. 1816, (F. C.)

JAMES CHALMERS—SPOTTISWOODE and ROBERTSON, Solicitors.

JOHN LEE ALLEN, Appellant.—*Sol. Gen.*—*Adam.* No. 28.

JAMES BERRY, Respondent.—*Murray*—*Campbell.*

Lease.—A way-going tenant, whose ish was from the houses and grass at Whitsunday, and from the arable land at the separation of the crop from the ground; and who was bound to consume on the farm the whole fodder, except hay and the fodder of the last crop; and undertook sufficiently to cultivate, labour, and manure the land,—found entitled (affirming the judgment of the Court of Session) to the value of the straw remaining on the farm at the way-going Whitsunday, (not amounting to more than necessary for the purposes of the farm until the possession expired), and to the dung made since last wheat seed time; it having been the tenant's unchallenged practice, and agreeable to the received rules of good husbandry in the district, to preserve the manure for the wheat crop.

THE Appellant, John Lee Allen, Esq. of Errol, let to the respondent, James Berry, two farms, the one called Daleally, and the other Loan of Errol, for 19 years and crops from and after the term of entry, which was declared 'to have commenced at 'Whitsunday 1802, as to the houses, yards, and natural grass, 'and as to the land at the separation of the crop 1802 from the 'ground.' By the lease, Berry bound and obliged himself 'to 'consume upon the ground of the said subjects the whole fodder 'that shall be raised thereupon, except* hay; but the whole 'fodder of the last crop on the farm of Daleally, notwithstanding 'the above restriction, he shall have liberty to dispose of as he 'shall think proper, saving always the landlord's right of hypothec for the rent; and also, the said James Berry binds and June 10. 1829.

2D DIVISION. Lord Cringletie.

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* In Vol. v. of Shaw and Dunlop, p. 213. for *from* read *except*.