kind. But then that notion was entirely changed and put an end to by the *Peterhead* case. The Court, both in that case and in the previous case of *Keith*, had given it some countenance by deciding that the cost of building and repairing churches, so far as necessary for the landward part of the parish, should be defrayed by the landward heritors according to their respective valued rents, and that the remaining part of the expense should be defrayed by the feuars according to their real rents. But that doctrine was rejected by the House of Lords as unsound, and the true rule was laid down by Lord Eldon in terms which I think afford the best possible guide to the decision of this case, because his Lordship said—"The true rule is that a parochial burden on lands in the parish must be levied upon all owners according to their real rent."

Now, that is entirely in accordance and in harmony with the view afterwards expressed by Lord Cranworth in the case of *Hay*, and which humbly appears to me to be in accordance with the justice of the case in determining a question of this kind.

I do not think it necessary to consider again in detail the decisions upon which the Lord Ordinary has proceeded, because I entirely agree with your Lordship's observations on these cases. I think none of them is directly applicable to the question we have to consider. If it were held that any of them may have established exemptions which are not altogether in accordance with the views which I have expressed—I do not say that any of them have—but if it were so, the only consequence would be that exemptions from the statute ought to have been provided for in it, and that new cases must be decided according to the just construction of the statute which we are considering.

I only add that throughout the argument, and in the course of the observations which I have made, no distinction was taken between the obligation for the burden of building and repairing churches and those with which we are now concerned—the repairing of manses. I think these burdens rest upon different statutory foundations altogether. I think that the argument in the abstract was rightly conducted, because the practice since 1572 is entirely in harmony with that following on the Act of 1663. Both burdens are laid upon the heritors in the sense which I have explained. I therefore agree with your Lordship.

The Court recalled the interlocutor of the Lord Ordinary, found and declared in terms of the declaratory conclusions of the summons, and granted decree for the sum sued for.

Counsel for the Pursuer—Balfour, Q.C.—Blackburn. Agents—Dundas & Wilson, C.S.

Counsel for the Defenders—Ure, Q.C.—Clyde. Agents—Simpson & Marwick, W.S.

Saturday, February 25.

SECOND DIVISION.

FERRIER'S TRUSTEES *v.* FERRIER.

Succession—Testament—Inchoate Intention—Residuary Clause—Intestacy—Extrinsic Evidence.

A domiciled Canadian left a will by which he gave his second wife the liferent of a piece of ground in Canada and his household furniture and effects absolutely. The will then stated that whereas by the will of his first wife the testator was the owner of certain heritable property in Scotland, and had received 4000 dollars of personal estate, in order to carry out his first wife's wishes, "I do hereby declare that I intend to execute a will in accordance with the law of Scotland, devising said real estate in Scotland to Ferrier Pace of Kirkliston, Scotland, farmer, his heirs and assigns, and have hereinafter devised a sum of 4000 dollars" to certain relations of his wife; "I give and devise all my estate, both real and personal, not hereinbefore specifically devised" to his trustees for certain trust purposes, which included the payment of the 4000 dollars to his wife's relations.

The testator never executed any will leaving the heritable property in Scotland to Ferrier Pace, although a *mortis causa* disposition doing so had been prepared and sent to him for execution five years before his death.

Held (1) that the heritable property in Scotland was not carried by the will to Ferrier Pace, and (2) that it did not fall into intestacy, but passed to the trustees in terms of the residuary clause.

William Ferrier, who was a domiciled Canadian, died on 16th February 1897, in Canada. He stood infeft at the time of his death in certain heritable property in Kirkliston, Linlithgowshire, Scotland, which he had acquired on the death of his first wife Mrs Julia Ferrier. The said property had been in the Ferrier family for sixty or seventy years, part of it having been purchased in 1826, and the remainder in 1832 by Mrs Ferrier's father Robert Ferrier, and he and his family were successively the proprietors thereof until Mrs Ferrier's death in 1889.

William Ferrier left a will whereby he gave and devised to his second wife Mary Rogerson Ferrier the liferent of a lot of ground in the town of Barrie aforesaid, and gave and bequeathed also to her for her sole use absolutely all the household furniture and effects of which he should die possessed. The will then proceeds to state—"And whereas by the will of my late wife Julia Ferrier I am the owner of certain freehold property in Scotland, and also received about the sum of four thousand dollars of personal estate after payment of all expenses in connection therewith: And whereas, although absolutely entitled to

the said real and personal estate of my said late wife Julia Ferrier, I am desirous of carrying out certain wishes of the said Julia Ferrier as expressed in a memorandum left by her with me, but which was not to be binding upon me in any way: Now to carry out the said wishes of the said Julia Ferrier, I do hereby declare that I intend to execute a will in accordance with the law of Scotland devising said real estate in Scotland to Ferrier Pace of Kirkliston, Scotland, farmer, his heirs and assigns, and have hereinafter devised a sum of four thousand dollars to the parties mentioned in said memorandum in the amount and proportions as described by said memorandum; I give and devise all of my estate both real and personal not hereinbefore specifically devised unto my executors hereinafter named and the survivor of them, and the executors of such survivor, upon the following trusts." The trusts were then specified, and included the payment of 4000 dollars to various relations of Julia Ferrier "for the purpose of carrying out the wishes of the said Julia Ferrier." The testator further declared that the provision made for his wife Mary Rogerson Ferrier should be in lieu of all dower to which she might be entitled out of his real estate. The testator then nominated and appointed executors and trustees of his will.

The "Freehold Property" referred to in the will of the said William Ferrier was the said heritable property in Kirkliston. Ferrier Pace was a nephew of Mrs Julia Ferrier. The testator did not carry out his intention as declared in the will "to execute a will in accordance with the law of Scotland devising said real estate in Scotland to Ferrier Pace," although a *mortis causa* disposition to give effect to this intention had been prepared by a solicitor in Edinburgh, and sent on 4th November 1892 to the testator's solicitor in Barrie for execution.

After Mr Ferrier's death the testator's widow accepted the provisions conferred on her by the will, and the trustees and executors accepted office and proceeded with the administration of the estate. A question arose in the course of their administration as to whether the heritable property in Kirkliston aforesaid was carried by the will to the trustees and executors, or whether it passed under the will to Ferrier Pace, or whether it was undisposed of by the will and descended to the testator's heir-at-law.

For the settlement of the question a special case was presented to the Court by (1) Mr Ferrier's trustees, (2) Mr Ferrier's heir-at-law, (3) Mrs Mary Rogerson Ferrier, and (4) Ferrier Pace.

The questions at law were—"(1) Is the said heritable property in Kirkliston, Scotland, carried to the first parties by the will of the said William Ferrier? Or (2) Is the fourth party, the said Ferrier Pace, entitled to it under said will? Or (3) Does it descend *ab intestato* to the second party as the testator's heir-at-law in heritage?"

Argued for fourth party—The testator in the will sufficiently manifested an intention that the property should pass and belong to him (the fourth party), and in virtue of the will he was entitled to it. A clear indication of intention was all that was required, and such was shown here. The only object of making a declaration of intention in this will was to allow the intention to receive effect if the testator died before executing the formal deed—*Hamilton* v. *White*, June 15, 1882, 9 R. (H.L.) 53, opinion of Lord Selborne, 57; *Colvin* v. *Hutchison*, May 20, 1885, 12 R., opinion of Lord President Inglis, 955; *Forsyth* v. *Turnbull*, December 16, 1887, 15 R. 172; Theobald on Wills, 4th ed. 12; Jarman on Wills, 5th ed. i. 23 and 98; *Jordan* v. *Fortescue* (1847), 10 Beavan 259; *Farrar* v. *St Catharine's College, Cambridge* (1873), L.R., 16 Eq. 19.

Argued for second party—(1) The heritable property in Scotland had not been devised to the fourth party. It did not fall under the class of cases in which the Court had spelt out of ambiguous words a bequest on the part of the testator. It was neither a bequest by implication or a precatory bequest. The testator said he meant to do something, but he never carried out his intention. The clause showed that it was the intention of the testator to execute a formal deed, But he had never executed such a deed, and his intention must be held to have been departed from. The Court could not interpose and make a will for him —*Mathews* v. *Warner*, 1798, 4 Vesey Jr., 186, opinion of L.C. Loughborough, 209; *Hamilton*, *supra*. In the present case it was admitted that a formal will carrying out his intention had lain beside him for years and had never been executed by him. That accentuated the contention that the testator had departed from the intention expressed in the will under dispute. (2) The Kirkliston property fell into intestacy, and was not conveyed by the residuary clause. The scheme the testator had in his mind was that the property should go to his wife's relations. "Specifically devised" in the residuary clause referred to property in Canada. The property in Scotland consequently descended to the second party as heir-at-law in heritage of the testator.

Argued for first parties—The property at Kirkliston was carried to them by the will whereby the testator gave and devised to his executors all his estate, both real and personal, not thereinbefore specifically devised. Such gift and devise carried this property to them in respect it was not thereinbefore specifically devised, and the testator never gave effect to his expressed intention to dispose of it by a separate will.

Lord Justice-Clerk—I think it will be convenient to take first the second of the questions stated in this special case. The second question is in these terms—"Is the fourth party, the said Ferrier Pace, entitled to it"—that is, the property at Kirkliston—"under the said will?" That question depends on a clause in the will by which the testator declares "that I intend to execute a will in accordance with the law

of Scotland devising the said real estate in Scotland to Ferrier Pace." Now, it is quite true that a testamentary writing is an expression of the testator's intention with respect to his property, and the word intention is very often used to express present intention to do something, as, for example, when a testator says "My will and intention is" so and so, that is expressive of present intention. But in this case it is quite evident that the word is used with a future and not a present application —that it is expressive of what the testator intends to do hereafter. I think that he intimates in the first place what are his present views with respect to the disposal of this piece of property, and that he further intimates his intention to express these views effectively by a deed to be executed in the future. It is a somewhat curious circumstance that the testator had before him for several years prior to his death a deed carrying these views into effect, and that he never executed this deed. The natural conclusion, I think, is that his intention with respect to this property never took and was never meant to take practical effect. I think, therefore, that the second question should be answered in the negative.

The next question is, To whom is the property to go if it is not to go to Pace? Does it fall under the last clause in the will? or has the testator failed to execute any testamentary disposition of the property at all. I am of opinion that it is effectively disposed of under the residuary clause of the will, by which the testator disposes of all that is "not hereinbefore specifically devised." Now, it is clear that this property is not one of the things which are "hereinbefore specifically devised," and it is also well established that intestacy is not to be inferred unless the deed will not bear any other construction. That being so, I am of opinion that the residue clause is expressed in terms sufficiently wide to carry this property. I am therefore of opinion that we should answer the first question in the affirmative and the third question in the negative.

Lord Young—I attended to the argument as carefully as I could, and with every disposition to find any ground for giving the heritable property in Scotland to Ferrier Pace. But I am unable to find any sufficient ground for doing so. The fact that a deed for the purpose of carrying out the intention expressed in his will was sent to the testator and that he never executed it throws great doubt on the question whether the intention expressed in the will continued to be his intention up to the date of his death. Indeed, I think we must assume that the testator intentionally and deliberately abstained from executing the formal deed sent to him. The second question must therefore be answered in the negative.

As regards the first question, whether the heritable property in Kirkliston is carried by the will to the first parties, the testator in his will gives to the trustees all his estate, both real and personal, not thereinbefore specifically devised. If, therefore, this property is not specifically devised in the will it is carried to the trustees. It has been argued that the following words are tantamount to a specific devise—"I do hereby declare that I intend to execute a will in accordance with the law of Scotland devising said real estate in Scotland to Ferrier Pace." If these words were struck out there would be no question whatever that this property was carried by the will to the trustees. I see no ground for coming to any other conclusion than that the will must be read as if these words were struck out. I therefore am of opinion that the first question must be answered in the affirmative and the third in the negative.

Lord Trayner--I am of the same opinion. I have been unable to feel that the case presents any serious difficulty. The will is habile to convey the whole estate of the deceased, and under the last purpose all property not "hereinbefore specifically devised" is carried to the trustees for the purposes there specified. Unless, therefore, this property in Kirkliston is specifically devised it passes to the trustees under this provision, and if it is, the idea of intestacy is necessarily excluded. Nor do I think that the question whether this property has been specifically devised to Mr Pace presents any difficulty. The word intention, no doubt, is an ambiguous word. We are, of course, familiar with the rule which says that in construing a will we are to give effect to the intention of the testator. But I have never heard that it is our duty to carry into effect an intention which the testator has done nothing to effectuate, but which he has merely expressed the intention of doing something to effectuate at a future date. I think that that is all that we have here. I say this altogether apart from the very important circumstance that the testator had before him for several years before his death a deed disponing this estate to Mr Pace which he never executed. The inference, I think, is that he changed his mind in regard to the disposition of this property.

Lord Moncreiff—I am of the same opinion. I think that the distinction between what the testator intended to do and what he actually did is focussed in the passage in this will where the testator says that he *intends* to execute a will as to the heritable property in question, and that he *has* hereinafter devised the sum of 4000 dollars. That shows the distinction between an intention to execute a deed in the future and a present testamentary intention. I quite agree as to the inference to be drawn from the circumstance that the deed dealing with the estate in Kirkliston remained in his possession unexecuted from 1892. I think that the reasonable inference is that he changed his intention in regard to that property.

On the question whether the property in Kirkliston fell into intestacy or passed under the residuary clause to the trustees,

there is, I think, room for argument, because at the time the testator wrote his will it was undoubtedly not his intention that this property should pass under the residuary clause. But, on the whole, I think that the presumption against intestacy is too strong.

The Court answered the first question in the affirmative, and the second and third in the negative.

Counsel for the First Parties—A. S. D. Thomson. Agent — Andrew Newlands, S.S.C.

Counsel for the Second Party—J. H. Millar. Agent—John Simpson, Solicitor.

Counsel for the Third Party—Sandeman. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Fourth Party — John Wilson. Agent—Andrew Newlands, S.S.C.

Tuesday, February 28.

FIRST DIVISION.

[Lord Low, Ordinary.

BARR *v.* COMMISSIONERS OF QUEENSFERRY.

Arbitration—Clause of Reference—Sist of Action till Questions Falling under Reference Disposed of by Arbiter—Convenience.

In an action raised by a contractor against his employer, the pursuer claimed (1) a sum due to him for work executed, and (2) damages for breach of contract on the part of the employer. The contract between the parties provided that all questions as to the execution of the work should be referred to an arbiter; and the defender pleaded that the action should be sisted until the arbiter had determined the amount of the first of the pursuer's claims.

The Lord Ordinary (Low) having allowed a proof, reserving however any questions which might arise under the clause of reference, the Court (*dub.* Lord M'Laren) *recalled* the Lord Ordinary's interlocutor, and remitted to his Lordship to sist process in order that the questions falling within the scope of the reference might be first determined.

This was an action raised by William Barr, contractor, against the Commissioners of the Burgh of Queensferry, concluding for payment of £900.

The pursuer's case was that he had contracted with the defenders to execute the mason, brick, and plaster-work of certain swimming-baths which they proposed to erect, and that the contract price was £1531. He had executed work to the amount of at least £1200, receiving payment to account of £550, when the defenders' architect, professing to be dissatisfied with the work done, took the remainder of the plaster-work out of his hands. This, the pursuer maintained, was a breach of contract. (Cond. 5) "By said breach of contract on the part of the defenders the pursuer has sustained loss and damage to the extent of at least £200." Payment of the balance of the amount due for work done had been refused.

The defenders founded upon a provision in their contract with the pursuer to the effect that in the event of any difference arising with respect to the execution of the work, "the parties shall refer and submit such differences to the determination of" the defenders' architect. They averred that many important questions with regard to the character of the work executed fell to be determined by their architect, who had meanwhile declined to certify any sums due to the pursuer. They denied breach of contract, and averred facts and circumstances tending to show that it was the pursuer who was in breach.

The pursuer pleaded—"(1) The sums sued for being addebted and resting-owing by the defenders to the pursuer, decree should be granted as concluded for, with expenses. (2) The defenders having by their actings condescended on broken their contract with the pursuer, are bound to make reparation to the pursuer for the damage he has thereby sustained."

The defenders pleaded—"(2) The action being barred by the arbitration clause in the contract, ought to be dismissed, or at all events sisted until the arbiter has determined the matters in dispute between the parties."

On 22nd December 1898 the Lord Ordinary (Low) allowed the parties a proof of their respective averments, "under reservation of any question which may arise during the course of the inquiry, falling within the scope of the reference contained in the contract" between the pursuer and the defenders.

Opinion.— . . . "I think that it is plain that that clause does not empower the arbiter to assess damages for breach of contract, and accordingly that part of the action is not excluded by the reference.

"The question of the ascertainment of the balance, if any, still due to the pursuer for the work which he has done is attended with more difficulty. The defenders argued that in order to ascertain the balance a number of questions required to be determined, which under the contract fell to be decided by the arbiter, such as the question whether there had been undue delay in executing the work whereby penalties had been incurred.

"Now, the clause of reference in this case is to Mr Henry, not as architect, but as an individual, whom failing, to an arbiter to be appointed by the Sheriff. That is a proper clause of reference, and not a mere executorial clause in the sense of being only a provision for the speedy settlement, during the course of the work, of questions naturally falling within the province of the architect for the time.

"I do not think, however, that the clause applies to the existing state of matters.