and the rest of the diligence follows, which may end in the incarceration of the debtor. In the Personal Diligence Act 1838 we find the following section—"Provided always, and be it enacted, that diligence executed under the provisions of this Act shall have the same effect as if such diligence had been executed by virtue of letters of horning or letters of caption, or if arrestments and poindings had been executed under the forms heretofore in use." Formerly, diligence proceeded by charge on letters of horning, and if not complied with, letters of caption were expede, also under the Signet, for the apprehension and incarceration of the debtor. The registration of a decree of a competent court is substituted for the old form of diligence, but a charge is still the first step. Does there then exist this essential difference between judicial procedure and diligence? There can be no question of this; and if we look at the consequences following upon the giving of a charge, it is clear that by its mere execution a man's credit may be destroyed, or at least may be seriously affected. I think, therefore, that in the circumstances the simple issue of wrongful is enough. There is no privilege. What was done was not judicial procedure, but alleged wrongful diligence. The Lord Ordinary has taken the right course.

Lord Benholme—My opinion in this case is quite different. We have here a man who began by being in the wrong, and thereafter allowed several days to elapse before making payment; ultimately, when that payment was made, it was not upon the receipt itself, but merely upon a discharge, not bearing to be for anything save money received. Yet the original wrongdoer brings an action and refuses to allow of an issue of malice being laid before the jury. He began the wrong, and in these circumstances, without entering any further into the details of the case, I am humbly of opinion that justice as between the parties requires that he should be put upon his proof in the matter.

Lord Neaves—I agree with the view taken by Lord Cowan. With reference to the case of *Davies* v. *Brown*, the question there was whether an issue of malice was or was not necessary. There cannot be a doubt that malice is necessary in a judicial proceeding while judicial steps are going on, but there is not any indication to be found that *after* decree is taken, and when the party is wrongfully proceeding to execute that decree, malice would be a necessary averment in the question of diligence. That a charge is diligence I have no doubt. Under the Act 1621, a charge is "begun diligence" so that if a person removes goods after a charge he is held to do so to defeat diligence, as he is by the charge under the ban of diligence, and in a position like that of a bankrupt. This is the actual wrong indicted by a charge unless an excuse or explanation is forthcoming to account for it all, but I cannot see how the question of privilege can be raised when a wrong was actually done.

Lord Justice-Clerk—It appears to me that the question as to whether this was a case of privilege or not in no way comes to be affected by the bill being paid when it was due, or by the fact that the receipt does not bear to be a discharge of the bill, but merely an acknowledgement of money paid. These are points which the pursuer will have to prove. A wide distinction has been in our law drawn between a judicial proceeding and diligence, and on the question as to whether the giving of a charge is part of the diligence, I agree with Lords Cowan and Neaves in regarding it as such. Although the recording of a protest might be deemed a judicial proceeding, I have not any doubt that, as regards the technical form, the Lord Ordinary is right in holding a charge as a diligence, and therefore not privileged.

The real position of matters is manifestly that Mr Wright accepted this payment not as a discharge but as a payment to account. This, the vital point of the case, should be opened up at the trial, and being anxious to have it done I should be disposed to insert in the issue after "wrongfully" the words "and in the knowledge that the same had been paid."

The issue was varied in accordance with the suggestion of the Court.

Counsel for Pursuer—H. J. Moncrieff. Agent—A. D. Murphy, S.S.C.

Counsel for Defender—Rhind. Agents—Ferguson & Junner, W.S.

Saturday, June 21.

SECOND DIVISION.

GRANT *v.* MACDONALD.

Succession—Holograph Writ—Validity.

A dated holograph writing commencing "I desire to bequeath," and signed by the writer, *held* to be probative.

Testament—Construction—Implied revocation—Intestate Succession.

The second of two holograph writings found in the testator's repositories disposed of only a portion of his means. It contained no revocation of a previous will found along with it; *held* that there was no implied revocation, and that the residue undisposed of fell to be applied in terms of the first will, and did not fall to the next of kin as intestate succession.

The deceased John Low was a native of Aberdeen, but went to Glasgow when a young man; and afterwards became secretary to the City of Glasgow Bank, which office he held till Whitsunday 1871. He continued to reside in Glasgow till Whitsunday 1872, and went to stay at the house of Mrs Low, his sister-in-law, in Aberdeen, on the 24th of July 1872. Shortly after he requested Mrs Low to telegraph for her son-in-law, Dr Dickie, who lived at Banchory, about sixteen miles from Aberdeen, to come to him and "to get two men to sign," but it was too late to do anything after Dr Dickie arrived, Mr Low having become insensible in the interval, and he died rather suddenly on the 26th of July 1872.

Mr Low was an elder of the congregation and treasurer of the Sabbath School Society of Free St John's, Glasgow. Down to the time of his death he was a contributor to the Sustentation Fund and College Fund of the Free Church.

He left means invested in various ways, with a considerable sum on deposit-receipt in the City of Glasgow Bank: in all about £20,000. He also left household furniture, and some personal trinkets.

mother, exclusive of the jus mariti of any husband she may marry.

Balance left for further disposal

JOHN LOW."

These writings were found in Mr Low's travelling bag after his death, in his sister-in-law's house in Aberdeen. The first in date was found in a leather case in the travelling bag, along with a dedication of himself to God, and the one second in date was found in a pocket book in the travelling bag, along with a memorandum regarding the amount of his means and estate, and the state of his health.

The testator's name-sons, John Low Brebner, John Low Pithie, John Low Dickie, and John Low Clark, agreed, in the event of the writing second in date being found to be valid and effectual, to hold, but without prejudice to the pleas of other parties, that the legacies of £100 to each of them, in the writing, as substitutionary for the legacies of the same amount in their favour in the testamentary writing first in date, and not as additional thereto. And the other special legatees in the writing second in date have agreed, in the same event, to accept their respective legacies under deduction of legacy duty.

The parties of the first part maintained—(1) That both writings were valid and operative testamentary writings; (2) That the writing second in date superseded the first to the extent of the sum of £20,000 or thereby; and that—(3) The sum of £11,500 was intestate succession of the deceased, and fell to be paid to the next of kin, subject to the burden of the annuities.

The parties of the second part maintained—(1) That the writing first in date alone is a valid and operative testamentary writing, and that the writing second in date is merely a memorandum or jotting, and does not contain the concluded wishes and directions of the deceased regarding the disposal of his estate or any part thereof, nor any revocation of the first. (2) That in the event of its being held that both writings are valid, the second in date should be read under and along with the first, and should only be held to be operative *quoad* the bequests to individuals specified in itself; and (3) That the bequests to congregational charities in the first writing, and the provisions regarding the disposal of the capital of the residue therein made, fall to be given effect to.

The opinion of the Court as to the effect of the writings was requested on the following questions:

1. Is the writing second in date to be held a valid testamentary writing?

   In the event of the first question being answered in the affirmative,

2. Is the writing second in date to be held as excluding and revoking the writing first in date, as regards the disposal of the testator's whole estate in money, investments, &c., ? And

3. Is the balance of £11,500, or thereby, brought out as residue in the second writing, to be dealt with as residue is directed to be dealt with by the first writing, or does it fall to be dealt with as intestate estate, subject to the annuities mentioned in the second writing?

Argued for first parties—(1) The writing second in date is holograph, and dated and signed by the testator, the date is admitted as correct by both parties. The words, "I desire to bequeath," are a sufficient direction as to the disposal of his estate (*Mags. of Dundee* v. *Morris*, 3 Macq. 161; *Robb*, 10 Macph. 692); (2) granting that it is the rule of law as settled in *Grant* v. *Stoddart*, 1 Macq. 163, that if possible the whole testamentary writings of a person should be given effect to if possible; and also that revocation is not to be held as implied without good reason; we have here a revocation of the former deed, so far at least as the disposal of £20,000 or thereby is concerned. The said sum, although only disposed of to the extent of £8,500, is yet all dealt with in the second deed, and at the end thereof the words occur, "Balance left for further disposal." The testator could never have written these words unless he believed that the former settlement of his estate was revoked. The whole scheme of the second deed is inconsistent with the first, and both cannot have been intended to stand. The testator never disposed of said balance, and it is therefore intestate estate in the hands of his executors.

Argued for the second parties—The second deed is simply a jotting or memorandum for a more formal deed, and bears on the face of it to be unfinished, and not to dispose of all the testator's estate; (2) even admitting its validity as a testamentary writing, it can only be good as regards the specific bequests mentioned therein. A revocation of a well considered and comparatively formal will is not to be sustained except on very strong grounds. A bequest once deliberately made, can only be revoked by words expressing equal deliberation and equally strong evidence of intention as those by which it is granted, and there are no such words here.

Cases relied on by both sides—*Lowson* v. *Ford*, 4 Macph. 631; *Preston*, 18 D. 1246; *Scott* v. *Sceales*, 2 Macph. 613, and 3 Macph. 1130; *Forsyth*, 10 Macph. 618; *Sibbald's Trustees*, 9 Macph. 399; Erskine, iii, 9, 5; Stair, iii, 8, 33; *Alves*, 23 D. 712; *Horsburgh*, 9 D. 324; Williams on Executors, i, 177; *Duncan*, 8 Macph.

At advising—

LORD COWAN—The testator left two writings purporting to regulate his succession, the validity and effect of which form the subject of the queries attached to this Special Case. These writings are respectively dated 22d May 1869 and 22d April 1872. Both are holograph and subscribed by the deceased. The first writing in 1869 is in every respect a regular and testamentary deed, containing the appointment of executors, with directions as to the realisation of his means and effects, and disposal of his estate when realised in special legacies and residuary bequests; and it contains a declaration "all former wills cancelled." The second writing, of April 1872, is of a different character from the first. It is quite informal. It states the writer's desire to bequeath the special legacies therein mentioned, but contains no disposal of the residue, and concluding with the words "balance left for further disposal."

The testator's death occurred in Aberdeen on 24th July 1872, whither he had gone on a visit to his sister-in-law Mrs Low. The writings referred to were found in his travelling bag after his death; the first in date was found in a leather case in the said travelling bag, along with a dedication of himself to God, and the one second in date was found in a pocket book in the said travelling bag, along with a memorandum regarding the amount of his means and estate. These admitted facts

show the care with which the deceased preserved both documents in his personal custody. And it is not immaterial to observe that from the memorandum as to his means, it appears that his fortune between the dates of the two writings had very considerably increased.

The first question for consideration is whether the imperfect writing second in date is to be regarded as testamentary and entitled to effect as such. This is not unattended with difficulty. The writing no doubt is holograph and signed, and is thus probative; but the question still is, What is the character of the writing? Is it a will or not? There are expressions in the writing which give rise to grave doubts whether it was not written as a mere jotting, to be afterwards completed and put into the form of a proper deed, either by himself or by a man of business. On the other hand, there are words expressive of testamentary intention and of direct bequest to individuals named; and the writing itself is not in the form of instructions to a law agent with the view of its contents being embodied in a formal deed. Nor is there any extrinsic evidence of its being intended to be used for that cancellary purpose and no other. That was the peculiarity which led the House of Lords in the leading case af *Monro* v. *Coutts*, July 7, 1813, 1 Dow, 437, to reverse the judgment of this Court, and to hold a writing subscribed by the party, and purporting to be "codicil to my will," not testamentary. And, on the same principle, it was that the decision in *Lowson* v. *Ford*, March 20, 1866, proceeded in rejecting three of the four writings there in question, and in holding only one of them testamentary. The three rejected papers were regarded as mere directious to be acted on by the gentlemen to whom they were addressed, making an addition to the previous will, while the fourth writing would have suffered the same fate had it not contained a clear expression of intention—that whether added to the will or not it was to have effect in her succession. In this case the writing of April 1872 does not partake of that character at all. It contains a clear expression of the testator's will as to the matters with which it deals affecting his succession. Then it is found in the same place of deposit with the complete writing of prior date, although not put up with it in the same cover—the two writings, however, being carried with him in his travelling bag, evidently not less for safety than to have them under his immediate control. It would be inconsistent, in my opinion, with the principle on which the Court in such questions has invariably acted, to refuse effect to this writing as testamentary. I am therefore of opinion that the first question should be answered in the affirmative.

The second inquiry relates to the effect of this second deed upon the first writing, dated in May 1869—whether it excludes and revokes its contents as regards the disposal of the testator's whole estate, or merely alters and modifies its contents. Leaving the nomination of executors untouched, it is contended by the first parties that the second deed is a total revocation of the disposal of the testator's means and estate contained in the first deed, at least to the extent of £20,000; while the second parties contend that the second deed is effectual merely to alter the first deed in the matter with which it specially deals. Were the former view to prevail, the result must be that the testator's estate, except in so far as specially bequeathed by the second deed, must be held intestate succession. But the contents of the second deed are not, as I think, such as to justify that view of the testator's intention.

By the first dated deed the testator had in due form effectually disposed of his whole estate. That deed was found carefully preserved by him in his personal custody at his death. It was found in a perfect state, without mutilation in any respect. Had there been any intention of revoking the deed, or of recalling any of its provisions, there was nothing to have prevented him cancelling or destroying the writing if he was so inclined. No doubt it was open to the testator to have expressly recalled this deed, in whole or in part, by a separate writing, but such writing must in express terms recall the previous will, and mere doubtful expressions will not operate that effect. In the present case there are no words of revocation at all. There are certain bequests provided for holding the deed to be testamentary, and the only words alleged by implication to indicate an intention in the testator's mind to change the destination of the residue of his estate are "balance left for further disposal." The previous will had disposed of his whole residue. The words may possibly be viewed as indicating some intention at a future time to consider whether he should adhere to that disposition of it, or to make an alteration on it in whole or in part. They truly indicate no more—if they can be held to be applicable to the whole residue disposed of by his will of May 1869 at all. The view I take of the import of the words is, that he might possibly at some after time make a further disposal by legacies to individuals, or otherwise, similar to what he had done in this very writing; and although such bequests when made would diminish the amount of the estate, there is no indication of a desire—far less an intention—to disturb the destination of residue generally contained in his prior testamentary deed. When a testamentary writing is left by a testator unexceptionable in itself, doubtful or equivocal expressions in a subsequent testamentary writing will not infer the revocation of the previous will. The whole of this doctrine underwent consideration in the case of *Horsburgh*, (May 4, 1845, 9 D. 824), and more recently in the case of *Stodart* v. *Grant* (June 1852, 1 Macq. 153), in which case it was held by the House of Lords, reversing the judgment of this Court, to be a fixed principle that the mere fact of making a subsequent will does not work a total revocation of a prior one, unless the latter expressly revokes the former, or the two be incapable of standing together. The rule in such cases was held by the House of Lords to have been well stated in the opinion of Lord Moncreiff, who was in the minority in this Court, that "where a person deceased has left various writings, probative in themselves, for disposing of his or her property, they are to be understood as constituting one testamentary settlement, in so far as they have not been revoked, and are not inconsistent with each other." The same principle is stated even more strongly in the opinion of Lord Fullerton, who also was in the minority. I consider this authority directly applicable to this case. The two writings were found together in the testator's repositories, and were to be held and given effect to as one testament. There is no inconsistency or difficulty in giving to both of them their just effect and meaning as regulating the testator's succession,

as will be immediately shown. And, in my apprehension, to hold that the doubtful or equivocal words in the last deed, on which reliance is placed as amounting to a revocation of the first deed, would be to disregard the established principles to which I have adverted. For these reasons, I am of opinion that the second and third questions must be answered—the second in the negative, and the third in the affirmative.

As regards the effect of the second writing and its several provisions, its true construction, I think, must lead to these results:—

1. That the annuities provided to his two sisters and to Mrs Low supersede the bequest in the first writing to them of the interest on the residue, to be taken in three equal parts in half-yearly payments.

2. That the families of the annuitants take the interest of their mothers' until the death of the last annuitant.

3. That the two bequests to charities in Glasgow and charities in Aberdeen are void from vagueness and uncertainty.

And 4. That the residue, as appointed by the first deed, will fall on the death of the last annuitant to be divided between the parties, and for the purposes and in the manner prescribed by the testator in that deed.

The other Judges concurred.

Counsel for First Party — Solicitor-General (Clark), Q.C., and Jameson. Agent—John Auld, W.S.

Counsel for Second Parties — Cleghorn and Innes. Agents—Dalmahoy & Cowan, W.S.

Saturday, June 21.

SECOND DIVISION.

SPECIAL CASE—THE TRUSTEES OF JAMES SPEARS AND OTHERS.

Trust—Residue—Advances to Children.

Circumstances in which *held* (1) that a widow was not entitled to a liferent of a residue; and (2) that trustees (though not bound) were entitled to make advances from the income of the estate for the education and maintenance of the children.

James Spears died on 1st June 1853. He left a trust disposition and settlement, by which he conveyed his whole estate to trustees for the following purposes:—1st, Payment of debts and funeral expenses; 2nd, Liferent of residue to his widow; 3rd, On the death of his widow, payment of dividend of certain stock to a niece; and the residue of the estate to be held in trust for the use and behoof of his son George Spears in liferent. The deed then went on to narrate as follows:—"And after the death of the said George Spears, I appoint my said trustees to hold the whole of the remaining residue of the said funds and effects for behoof of any children to be procreated of the said George Spears by his present or any subsequent marriage, share and share alike, in fee, but always subject to the general provisions and powers after mentioned; and failing the whole of said children by death, then, and in that case, the said trustees shall divide the residue, and convey the same as follows:—*First*, To Isabella Burns Brown and James Spears Brown, children of Alexander Brown, residing at Trip Bridge near Stirling, the said Edinburgh Water Company's stock, with the interest and profits thereon; *Second*, The remainder of said residue equally amongst Annie Spears or Rutherford, spouse of Neil Rutherford, presently residing at the Bridge of Allan, the said James Burns, and the children of my brother George Spears, residing at Haddington, share and share alike: Declaring that the shares of the children of my brother George Spears shall be burdened with an annuity of £50 sterling, to be paid to him during all the days of his life, which I hereby appoint to be paid to him: And declaring further, that should any of the parties die, the lawful issue of such of them as shall predecease shall be entitled to the share of their deceased parent: Declaring that the said trustees are to hold the whole property, estates, funds, and effects, heritable and moveable, real and personal, before conveyed, in trust, for the liferent use and fee of the several parties before mentioned in their order, as all before mentioned, and shall pay over the free annual rents, interests, and produce of the said whole property, estates, funds, and effects, conveyed as aforesaid, to each of the parties according to their several rights, deducting all necessary charges and expenses, and that weekly, monthly, quarterly, or half-yearly, as my said trustees shall think proper; and the said free annual rents, interest, profits, and dividends are hereby declared to be strictly alimentary, and shall not be attachable by the diligence of the respective creditors of any of the foresaid several parties, nor be assignable, nor subject to the deeds or obligations of any of said parties: Declaring that the shares of any of the foresaid parties who may be under age, or of their children, in the event of their leaving sons, shall not be paid over or conveyed to them respectively till they each attain the age of twenty-one years complete; and the shares of such of them as are daughters until they each respectively attain the said age of twenty-one, or marriage, whichever event shall first happen: Declaring further, that the shares of the children or child predeceasing the said respective terms of payment without lawful issue shall accresce to the survivors equally among them, and to the lawful issue of such survivors, such issue being in all cases entitled to come in room and place of, and to claim the same rights with their respective parents: And declaring that until the respective terms of payment of said shares, the said trustees, after the death of both parents, shall have full power to pay the interest or free produce of the respective shares of the said trust estate, or such part thereof as they in their discretion shall think proper, to the children who may ultimately be respectively entitled to the said shares, and likewise to advance such sums as the said trustees shall think reasonable to any of the said children out of their share of the capital stock for the purpose of putting them to any profession or business, or furthering their prospects in life."

James Spears' widow died in 1866. After her death the trustees paid dividends of certain stock to the neice of James Spears, as directed by the trust-disposition and settlement, and the free annual proceeds of the residue of the trust-estate to George Spears, down to his death in August 1871. Prior to the death of James Spears, George Spears was married to Miss Jane Smith, who died