then be substantially against discharging refuse matter at or near the mills, and thereby polluting the water of the said stream, to the nuisance or injury of the pursuers. No doubt that is a general interdict, but I don't see that we can very well prevent that.

LORD BENHOLME—I quite agree.

LORD NEAVES—I do not think it can be said to be improperly general, because the issue is in these terms. But the difficulty is, they are not in the conclusions.

LORD JUSTICE-CLERK—It is deduced from the conclusions as being the substance of them. I think the interdict should simply follow the terms affirmed by the jury. It does not follow that the Court meant to grant an issue up to all the conclusions of the summons. I will frame an interlocutor granting the interdict as near as may be in the terms found by the jury.

Counsel for Pursuers—Watson and Johnstone. Agents—Gordon & Strathearn, W.S.

Counsel for Defenders—Solicitor-General (Clark), Q.C., and Asher. Agents—White-Millar, Allardice, & Robson, W.S.

Thursday, June 19.

SECOND DIVISION.

[Lord Shand, Ordinary.

GIBB *v.* CITY OF EDINBURGH BREWERY CO.

Jury Trial—Motion to vary Issue—Privilege—Charge—Diligence.

A bill having been protested against A, and he having been charged thereon notwithstanding payment of the contents—*held*, in adjusting issues in an action of damages at his instance, that this was not a case of privilege, a charge being a diligence, not a judicial act, and that it was not consequently necessary to aver malice.

On 11th June the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary approves of the Issue, No. 14 of process, as the issue for the trial of the cause: Appoints the trial to take place before the Lord Ordinary, with a jury, at Edinburgh, on Friday the 27th day of June current, at half-past ten o'clock forenoon: Grants diligence at the instance of the parties against witnesses, and ordains a precept to be issued to the Sheriff for summoning a jury accordingly.

"*Note.*—The Lord Ordinary being of opinion that the facts, as stated on record by the pursuer, do not disclose a case of privilege on the part of the defenders, in obtaining and executing the diligence complained of, has approved of the issue in the terms adjusted in No. 14 of process. Should the case, on the facts as disclosed at the trial, appear to the Lord Ordinary to be one of privilege, the Lord Ordinary will then direct the jury that malice and want of probable cause must be proved in order to entitle the pursuer to a verdict in his favour."

The defender wished the issue taken in this case to be varied, and moved the Court to do so. The ground alleged was that the case, being one of privilege, an averment of malice was necessary. The motion was opposed by the pursuer. The issue was as follows—

"It being admitted that on or about 6th February 1872 the pursuer accepted a bill for £23, 10s., payable three months after date, drawn on behalf of the defenders by James Nisbet, then their *interim* managing director,

"Whether, on or about 20th May 1872, the defenders wrongfully caused the said bill to be protested against the pursuer, and the pursuer to be charged thereon, notwithstanding that payment of the contents of the said bill had been made by the pursuer on or about the 17th day of May 1872, to the loss, injury, and damage of the pursuer. Damages *laid at* £500."

Argued for the defenders—There was no issuable matter apart from malice and want of probable cause. The wrong-doing had begun on the part of the pursuer, who admittedly had been in delay in paying the bill from 9th May 1872 till 17th May. The charge which was given on the 20th May was withdrawn two days afterwards. It was held in *Davies'* case that regard could not be had to the publication of the Black Lists. What the pursuer complained of was therefore simply that the defenders had represented him to the Keeper of the Record, and to himself, to be eleven days behind in making payment, while admittedly he had been eight days behind.

In the case of *Gardner* it had been settled that the mere recording of a protest was not actionable unless it had been done maliciously. In the case of *Doyle* there had been imprisonment, and the illegality of the imprisonment was held to give a ground of action without proof of malice and want of probable cause. The present case was something between the two, for there had been a charge given. A charge was not itself diligence, though it contained an intimation that diligence would be done if it was not obeyed. In *Ormiston* it was held that a charge given wrongfully was not a good ground of action. The case of *Davies* was also an authority in point, for though the Court may have proceeded to some extent on the fact that Davies & Company could have prevented decree passing by seeing that the action was taken out of Court, a similar feature existed in the present case, as the pursuer could have gone to the defenders and got up the bill from them, and so ensured that no protest should be taken.

Authorities—*Davies*, 5 Macph. 842; *Gardner*, 2 Macph. 1183; *Doyle*, 23 D, 13; *Ormiston*, 4 Macph. 488.

Argued for the pursuer—This was not a case of privilege at all. A charge was in every sense diligence.

At advising—

LORD COWAN—In this case the Lord Ordinary considers an issue simply resting upon the fact of the wrongful act of the defenders to be sufficient, whereas the defenders' counsel desires that the question of malice should be inserted. That there exists in this matter an essential distinction between judicial proceedings and diligence cannot be doubted. I entirely, on this point, agree with the view indicated by Lord Neaves during the progress of the discussion. That a charge on a decree is not diligence, but a judicial act, I have never heard maintained until now. A charge is the commencement of diligence; it is the first stage therein,

The testator's nearest surviving relatives are:—(1) Mrs Margaret Low or Lawrie, and Mrs Mary Low or Brebner, his full sisters; (2) The family of Mrs Margaret Low or Lawrie, consisting of 1. Jane Lawrie or Whiteworth, wife of Joseph Whiteworth, chemist, London; 2. Sophia Lawrie or Clark, wife of William Clark, engineer, Woolwich; 3. Mary Lawrie or Pithie, wife of the Reverend James M'Christie Pithie, parochial schoolmaster, Tullynessle; 4. Margaret Lawrie or Webster, Aberdeen; 5. Henry Lawrie, shoemaker, Banchory-Devenick; 6. William Lawrie, gardener, Redhall, Kincardineshire; 7. Agnes Lawrie, residing with her mother at Nigg; 8. the family of Mrs Eliza Lawrie or Brown, who predeceased the testator; (3) The family of Mrs Mary Low or Brebner, consisting of two members, John Low Brebner and William Lundie, a son by a former marriage, who both have families; (4) Mrs Low, widow of a half-brother of testator, and her family, consisting of six members.

John Low left two writings holograph of and signed by himself, dated respectively the 22d May 1869 and 22d April 1872. The parties to the Special Case admitted these writings to be holograph of the deceased, and to have been written and signed of the dates which they bear. They also admitted the validity of the nomination of executors contained in the first writing, and the right of the accepting executors to act as such.

The two writings are as follows:—

A.—Writing by John Low, dated 22d May 1869.

14, Windsor Terrace,
Glasgow, 22d May 1869.

"I, John Low, banker in Glasgow, considering it to be my duty to make my last will and testament to prevent disputes after my death, do hereby dispone, assign, convey, transfer, and make over to Mr George Grant, advocate, Aberdeen, Mr John Cruikshank, banker, Aberdeen, Mr Alexander Stephen, late merchant in Aberdeen, and Charles M'Hardy, merchant in Glasgow, all of whom I hereby appoint as my executors, or their nominees, to carry out my wishes as to the disposal of my means and substance, whether that be in cash, bonds, bills, shares in any joint-stock company, heritable property, household furniture, or whatever may belong or be owing to me at the time of my death, and their acts are to be held the same as if done by myself, and they are to be free of all personal responsibility for their actings save the just count and reckoning for the funds.

"*First.*—As to the disposal of my effects, I desire that all my household furniture, bed and table linen, silver plate, books, pictures, &c., be sold, and out of which funeral expenses to be paid.

"*Second.*—All investments to be realized, and the money lent on heritable property or first-class railway debenture bonds.

"I desire the following legacies to be paid free of duty, viz., To John Low Brebner one hundred pounds, John Low Pithie one hundred pounds, John Low Dickie one hundred pounds, John Low Clark one hundred pounds, being all my nephews, and to Free St John's Sabbath Schools twenty pounds, Free St John's Bible Women fifty pounds, Free St John's Local Mission thirty pounds, to be distributed in the local district under my charge, and visited by Mr Crombie and others, in annual sums of five pounds for six years.

"To each of my executors ten pounds.

"I desire the interest on the residue of my estate to be divided into three equal parts (after deducting an allowance to the party who may be appointed as factor for the trust), and given to my two sisters, Margaret Lawrie and Mary Brebner, and my sister-in-law Mrs Low, in half-yearly payments.

"The families of the annuitants to get the interest of their mother until the death of the last annuitant, when at the ensuing money term the residue of my estate is to be divided into two parts—the one-half for the families of my two sisters (excluding the *jus mariti* of their husbands), and the other half to the Treasurer of the Free Church for the Sustentation and College Funds equally. The interest accruing to be applied as a contribution annually from Free St John's Church Glasgow, for the Sustentation and College, and I desire the portion of interest to this last fund to be applied in forming two or more bursaries as the professors may suggest, but their recommendation subject to the approval of Free St. John's Session, Glasgow.

"John Low Pithie to get my Gold Watch and chain, and failing him John Low Clark; John Low Dickie my rings and other personal trinkets.

All former Wills cancelled.

Witness my hand this twenty-second day of May 1869.

JOHN LOW."

B.—Writing by John Low, dated April 22, 1872.

"14 Windsor Terrace,
St George's Road,
Glasgow, 22nd April 1872.

I desire to bequeath as follows:

Annuities
to my sister Margaret £200 p. Annum
Mary 200 p. Annum
Mrs Low 100 p. Annum
£500
free of legacy Duty

to my Nieces
Eliza Lawrie or Brown £1000
for family
equally
Sophia Lawrie or Clark 1000
Mary Laurie or Pithie 2000
Mrs Agnes Low or Dickie 1000

Namesons Brown
Clark
Pithie £100 each 500
Dickie
Brebner

Charities in Glasgow 1000
Do Abdn 1000
£7500

(*On second page*)
Suppose my estate to realize £20000
take off 7500
£12500

Interest at 4 p/c on £12,500 would pay the Annuitants, but if short take out of Capital.

To Agnes Lawrie £1000 at the death of her

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.