resting-owing. The defender begins his explanation in an awkward manner—(*Reads deposition*)—but that is not his fault, for the deponent has to follow the order of the questions put to him. The fair way to deal with the deposition is to take it as a whole, and examine its import. The defender states distinctly that he and the deceased were on very friendly terms, and in the habit of making small cash advances to one another. These small loans were frequent, and as they did not exactly balance, it became necessary occasionally to adjust accounts. This loan of £30 was one of these transactions. Subsequently, in August of the same year, the defender made a similar advance of £45 to Mackay. Having explained the mode of dealing, the defender goes on to say that there were two settlements after the date of this last loan, one at Glasgow and the other at Kyleakin, and that at the settlement in Glasgow the sums of £30 and £45 were both taken into account, and the balance struck in his (the defender's) favour. The question then comes to be, Is that oath negative of the reference? That raises the question whether the facts inferring extinction of the loan are intrinsic or extrinsic, which is always a nice question. Now, while a mere statement of a counterclaim is extrinsic, a statement and explanation of a settlement of accounts, in which the loan was taken into account and the balance struck, is intrinsic. I am of opinion that the deposition is of the latter class. The loan is stated to have been extinguished in the natural way, looking to the course of dealing of the parties. The deposition is therefore negative of the reference. And it would be strange if it were not so. Assuming the defender's statement to be true, it would be hard if any legal rule prevented us giving effect to it. These two persons were in the habit of accommodating one another with loans—a perfectly intelligible course of dealing. A number of such transactions passed between them. John Mackay dies, and his executor having accidentally some knowledge of one of these loans, pounces on it, and says to the defender, "You must prove that you repaid this." If we were obliged to hold otherwise than I propose, the most manifest injustice might ensue. The defender, who might really have a large balance in his favour, might be called upon to pay this solitary advance, the whole other dealings of the parties being passed by, and consequently would suffer serious injustice. But as I am of opinion that the qualification is intrinsic, and therefore the oath negative of the reference, this misfortune will not occur.

Lord Deas—This is a most perplexing case, but the difficulties chiefly arise out of the way in which it has been managed. If it related to a larger sum, and a re-examination were possible, I would be disposed to order one upon properly adjusted interrogatories; but the expense would be too considerable; we must therefore just construe the oath as best we can. Now, looking at the substance of the oath, I can have no doubt that there is nothing in the law of intrinsic and extrinsic which can prevent our holding the deposition as negative of the reference. The whole deponed to by the defender is of the nature of one and the same transaction. The counter advance which he avers, and the settlements between the parties, are not of the nature of subsequent transactions, but parts of the same transaction or rather course of dealing, and it is settled law that to make a qualification intrinsic it is only necessary that the extinction averred must be in the natural way (that is, looking to the course of dealing of the parties), or must be part of the same transaction.

Lord Ardmillan concurred.

Lord Kinloch—I am of opinion that this oath is negative of the reference. My reason is that, whilst the defender admits receiving £30 from the deceased John Mackay, he depones to having repaid it by statements which I think intrinsic. If, indeed, he had merely said that he on his side had advanced Mackay £45, leaving the debt to be extinguished by the legal force of compensation, I think this would have been insufficient. But he says that, after paying this £45, he and Mackay had a settlement of accounts at Glasgow, as was their practice from time to time, and that at this settlement the £45 were put against the £30, and a balance brought out in his (the deponent's) favour. I am of opinion that this is equivalent to deponing that the sum of £30 was paid in cash to the creditor. The mode of settlement was, in the circumstances, a natural one. There is nothing suspicious in the oath; and I think it legally clears the defender of responsibility for this sum.

Agents for the Appellant—Menzies & Cameron, S.S.C.

Agents for the Respondent—Mackenzie, Innes, & Logan, W.S.

Wednesday, March 15.

SECOND DIVISION.

SPECIAL CASE—GLEN AND CUNNINGHAM.

Legacy—Revocation—Codicil—Instruction to Agent. A memorandum in the following terms was found in the repositories of a deceased lady:—"*Mem.*, 6th December 1867.—To let Mr Tod know that I wish (the bequest and) the name of Cunningham to be erased from my settlement; and I do hereby desire it to be done."—*Held* that this did not constitute a valid revocation of the legacy in question.

This was a Special Case presented in the following circumstances:— Miss Mary Murray died on 21st April 1868, leaving a trust-disposition and settlement conveying her whole estate to certain trustees. The said trust-disposition and settlement contained directions to the said trustees and executors for the payment of various legacies at the first term of Whitsunday or Martinmas happening six months after the death of the truster's sister, Miss Ann Murray, and *inter alia*, "to the three daughters of the late Mrs Archibald or Cunningham, at Newport, equally, or to the survivors or survivor of them, £150 sterling as a small remembrance, and that free of legacy duty." The deed also contained the following clause:—"And I reserve not only my liferent right and enjoyment of the whole premises, but also full power and liberty to myself, at any time of my life, and even on deathbed, to give any additional instructions relative to the disposal of my estate, and to alter, innovate, or revoke these presents in whole or in part as I shall think proper." There was found in Miss Mary Murray's repositories in her dwelling house, after her death, a holograph memorandum in the following terms:—"*Mem.*, 6th December 1867.—

To let Mr Tod know that I wish (the bequest and) the name of Cunningham to be erased from my settlement; and I do hereby desire it to be done.—MARY MURRAY." The truster's said sister, Miss Ann Murray, died on the 17th day of December 1869. The said three daughters of the said Mrs Archbald or Cunningham, mentioned in the said settlement, and above named, were connections by marriage of the testatrix through their mother. They all survived the said Mary Murray, but one of them, viz., Miss Barbara Gray Cunningham died intestate and unmarried on 9th December 1869. She is therefore represented by her two sisters and her father. The said memorandum was never communicated during Miss Mary Murray's life to Mr Henry Tod senior, W.S., senior partner in the said firm of H. & H. Tod, who is believed to have been the "Mr Tod" therein referred to; nor was he otherwise made aware of the wish therein expressed. The trustees of Miss Mary Murray declined to pay to the Misses Eliza Campbell Cunningham and Mary Boston Cunningham, and the representatives of Miss Barbara Gray Cunningham, the legacy of £150, on the ground that it had been recalled by the terms of the memorandum. On the other hand, the Misses Eliza Campbell Cunningham and Mary Boston Cunningham, and the representatives of Miss Barbara Gray Cunningham, for their respective rights and interests, claimed the full amount of the said legacy, on the ground that the memorandum did not form a codicil to the trust-disposition and settlement, or a proper testamentary writing, but only contained instructions to the truster's agent (but which were never carried out), and that the legacy was not revoked by the said memorandum; and further that, looking to the phraseology and purport of the memorandum itself, which appeared intended to refer to some one person named Cunningham, and not to the before designed legatees, the intention of the truster in executing the said memorandum failed from uncertainty, even if it could be held that the said memorandum constitutes a proper testamentary writing.

The following were the questions laid before the Court;—

(1). Whether the said legacy of £150, directed by the said trust-disposition and settlement to be paid to the three daughters of the said Mrs Archibald or Cunningham as aforesaid, is now payable; or

(2). Whether the said legacy has been recalled by the said memorandum printed in the appendix.

MACDONALD and ASHER, for the legatees, relied on *Walker* v. *Steel*, 16 Dec. 1825, 4 S. 323; *Stainton*, 17 Jan. 1828, 6 S. 363.

FRASER, for the trustees, relied on *Scott* v. *Sceales*, 2 Macph. 613.

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

Agents—T. & R. B. Ranken, W.S. and H. & H. Tod, W.S.

Friday, March 17.

HARVEY *v.* LIGERTWOOD.

Divorce—Disposition omnium bonorum*—Reduction.* Circumstances in which *held* that a person who had been divorced on the ground of adultery, was not entitled to reduce a disposition *omnium bonorum* embracing provisions due to him under his antenuptial marriage-contract.

In this action Harvey sought to reduce a disposition *omnium bonorum*, granted by him to the defender in 1851. The said deed conveyed, *inter alia*, the provisions due to him under his antenuptial marriage-contract, dated in 1842. By the said marriage-contract the pursuer bound himself to hand over a certain sum to trustees, the interest of which was to be paid to him during his life, and on his death to his widow. The pursuer was divorced from his wife, and by a decree of the Court, dated 16 July 1870, it was decided that the effect of said divorce was equivalent to natural death.

The grounds upon which he now sought to reduce the said deed appear sufficiently from the following interlocutor and note of the Lord Ordinary (ORMIDALE):—"The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, finds that no relevant or sufficient grounds of reduction are averred by the pursuer entitling him to insist in the present action; therefore repels the reasons of reduction, dismisses the action, and decerns; finds the defenders entitled to expenses, allows an account thereof to be lodged, and remits it when lodged to the auditor to tax and report.

"*Note*—This action must be looked at in connection with the former one mentioned in the record, at the instance of the pursuer against his marriage-contract trustees, judgment in which was pronounced by the Court on 12th July 1870, and is reported in 8 Macph. 971. In that former action the pursuer referred to the present as being about to be brought by him in order to clear his title. But the Court, by the judgment referred to, found, independently altogether of the objection that the pursuer's title might be held as affected by the disposition *omnium bonorum* now sought to be reduced, that he had no right to insist in the claims made by him, in respect he had been divorced from his wife on the ground of adultery. This result was arrived at on the ground that the pursuer had forfeited, by the dissolution of the marriage by his adultery, all right to his marriage-contract provisions which might otherwise have been available to him, just as they would have been by his natural death. It was therefore in that action, where the pursuer restricted his claim to the interest or income of the funds held in trust under the marriage-contract between him and his wife, expressly held that, in respect of his divorce for adultery, there were no grounds on which he could maintain such a claim.

"What interest, therefore, the pursuer can have in now insisting in the present action is not apparent. And, at any rate, the Lord Ordinary cannot see that he has set forth any relevant or sufficient ground for insisting in the action: (1) He says it was *ultra vires* of him to have granted the disposition *omnium bonorum*, so far as it had reference to his rights and interests under his marriage-contract, as these rights and interests were declared to be beyond the diligence of his creditors. It is now, however, *res judicata* that in consequence of the dissolution of his marriage, in respect of his adultery, he had forfeited all claim to at least the interest or income of the marriage-contract funds. It was argued, however, that eventually, on the death of his wife, the pursuer's claim to the income or interest of the marriage-contract funds will revive, and the case of *M'Alister*, 18th July 1854, Scottish Jurist, was