the admission and the qualification. It is impossible to take the one without the other. To do so would be contrary to every principle of equity and fair dealing. The case is the simplest imaginable. A pursuer says to a defender, I got from you £400 of goods, but I paid you £500, so I have overpaid you £100. The defender answers, You paid me £500, but the goods you got amounted to £500, so I am owing you nothing. How is it possible that the pursuer can take the admission of the payments without taking also the qualifying statement of the amount of furnishings which these payments went to settle for? The pursuer may of course prove his case otherwise; but if he has no other evidence than the admission of the defender he must of necessity fail.

The Sheriff has proceeded in the following manner. He has compared the two accounts lodged by the parties respectively, and where he finds them to agree, he holds the matter so far settled. Where entries in the one account are not found in the other, he holds the party making these entries bound to prove them; and, no proof being led, he holds they must be struck out. This looks at first sight plausible, but it involves, with all deference, the complete overturn of established legal rules of evidence. The pursuer is bound to prove his account. If his only evidence consists of a reference to the account lodged by the defender, he must take that account with all its entries, whether for or against. He cannot strike out entries in that account, merely because these entries are not in his own account. To say that he can, appears ludicrous on its bare statement. Yet this is what the Sheriff has actually done. He has disallowed entries in the defender's account, and called on the defender for proof of these entries, simply because these entries are not contained in the pursuers' account. This, with deference, is altogether inadmissible.

I am of opinion that the judgment of the Sheriff should be recalled, and that in respect of the pursuer adducing no other evidence of his claim but the defender's statement and account, he is bound to take these as given, and cannot have his demand farther sustained than to the extent of the admitted £2, 18s. 3d.

The Court pronounced the following interlocutor:—

"*Edinburgh, 19th July* 1872.—Recall the interlocutor of the Sheriff complained of; find that both parties having renounced probation the pursuers (respondents) have failed to establish, by the admission of the defender (appellant) on record, that any balance is due to the pursuers on the account libelled beyond the sum of £2, 18s. 3d., admitted and consigned by the defender; grants warrant and authority to the Sheriff-clerk to pay over to the pursuers the said consigned balance of £2, 18s. 3d.; dismiss the action, and decern; find the defender entitled to expenses, both in this and the inferior court; allow accounts," &c.

Agents for Pursuers—J. & R. D. Ross, W.S.
Agent for Defender—James Mason, S.S.C.

Friday, July 19.

SPECIAL CASE—JOHN GEORGE CHANCELLOR AND OTHERS.

Heritage—Disposition—Fee—Survivor.

Five ladies, proprietors of a heritable subject, executed a disposition on the narrative, *inter alia*, that they were anxious that the said subject should, after the decease of the longest liver of them, belong to A for her life, and at her decease in fee to B and C, but they disponed the said subject simply "to and in favour of the said A, B, and C, or the survivors or survivor of them." *Held* that, the dispositive clause being unambiguous, the joint fee to A given by it could not be explained away into a liferent merely by reference to the narrative clause of the deed.

This Special Case set forth the following facts:—Misses Margaret, Elizabeth, Marianne, Henrietta, Jane, and Helen Robertson were proprietors of a house in George Square, Edinburgh. By mutual general disposition, dated 11th July 1833, the said Misses Robertson mutually gave, granted, assigned, and disponed to themselves, and the survivor or survivors of them, who should be alive at the time of their respective deaths, equally among them, or the survivors or survivor of them as aforesaid, the whole heritable and moveable estate belonging to them respectively. Miss Margaret Robertson died in 1839, and by disposition, dated the 23d October 1845, recorded in the Books of Council and Session the 13th February 1864, the five survivors, on the narrative therein contained, and, *inter alia*, on the narrative of their love, favour, and affection for their niece Mrs Helen Hamilton Chancellor, and her daughters Mary Forbes Chancellor and Helen Barbara Chancellor, and of their being anxious that the said tenement in George Square, and all its pertinents, should, after the decease of the longest liver of them (the disponers), belong to the said Helen Hamilton Chancellor for her life, and at her decease in fee to her unmarried daughter or daughters, and if both her said daughters Mary Forbes Chancellor and Helen Barbara Chancellor should marry, then to be sold, and the proceeds to be equally divided between them, or in any other way they might decide upon, therefore they gave, granted, alienated, and disponed to and in favour of the said Helen Hamilton Chancellor, Mary Forbes Chancellor, and Helen Barbara Chancellor, or the survivors or survivor of them, all their said property and respective shares in the said tenement No. 46 George Square, with all parts and pertinents thereunto belonging, heritably and irredeemably, but reserving always to themselves, separately and collectively, their liferent interest therein. Miss Elizabeth Robertson died on 25th February 1858. She was the first of the granters of the said last-mentioned disposition who died. Miss Marianne Robertson, the longest liver of the granters of the said last-mentioned disposition, died on or about the 3d day of February 1864. The said Mrs Helen Hamilton Chancellor was a niece of the said Misses Robertson, being the daughter and only child of their brother Hugh Robertson, clerk to the signet. She had, besides her two daughters Miss Mary and Miss Helen Chancellor, several sons, the eldest of whom was John George Chancellor. The said Mary Forbes Chancellor and Helen Barbara Chancellor were both married before the death of the said Miss Marianne Robertson, the longest

liver of the granters of the said disposition. The said Mary Forbes Chancellor was married to Colonel George Chancellor Collyer, Madras Engineers (now Royal Engineers), in 1846, and died on or about the 21st day of May 1848, thereby predeceasing all the said granters. She left an only child (a daughter), named Mary Catharine Bedingfield Collyer, now married to Colonel John Heron Maxwell Shaw Stewart. The said Helen Barbara Chancellor was married in 1858 to Hugh Mosman, Esq., of Auchtyfardle. She survived all the Misses Robertson, and died in 1866, leaving five children, of whom Hugh Mosman junior, a pupil, is the eldest son, and his mother's heir-at-law. The said Mrs Helen Hamilton Chancellor survived all the said Misses Robertson, and both her own daughters, and died on the 17th day of March 1872.

Under these circumstances three parties claimed a right in the house in George Square. *First*, Mr John George Chancellor, the eldest son of the said Mrs Helen Hamilton Chancellor. *Second*, Mr Hugh Mosman, the surviving husband of Miss Helen Chancellor, as tutor and administrator-in-law for his son, Hugh Mosman junior. *Third*, Mrs Stewart, only child of Mrs Mary Forbes Chancellor or Collyer.

It was contended for *the first party*, that, according to a sound construction of the disposition of 1845, the share of the tenement in question which would have fallen to Mary Forbes Chancellor (Mrs Collyer), if she had survived the granters thereof, lapsed by her having predeceased them; that Mrs Shaw Stewart was not entitled to the share which her mother would have taken if she had survived the granters; that on the death of the longest liver of the granters on the 3d day of February 1864, an immediate fee in one-half of the property vested in each of the two disponees then in life (viz., Mrs Chancellor and Mrs Mosman) with an eventual fee in the whole to the longest liver, and that accordingly, on the 30th day of July 1866, the day of Mrs Mosman's death, the right to the fee of the whole property became vested in Mrs Chancellor as the longest liver *jure accrescendi*, and without the necessity of service; and that the first party, as her heir at law, was thus entitled to succeed to that fee; or otherwise that, on the death of the last Miss Robertson in 1864, a right to the fee of one half of the said property vested in Mrs Chancellor, and belonged to the said first party as heir at law.

It was contended for *the second party*, that, on a sound construction of the disposition of 1845, a liferent only of the subjects in question was intended to be given, or was given, to Mrs Chancellor; and that on the death of the longest liver of the granters, a right to the fee of the subjects vested in Mrs Mosman, subject to the liferent of her mother, Mrs Chancellor; that on the death of Mrs Mosman, on 31st July 1866, the right to the fee transmitted to Hugh Mosman junior, her eldest son and heir in heritage; or otherwise that, on the death of the longest liver of the granters, a right to the fee of one-half of the said subjects vested in Mrs Mosman, and on her death transmitted to Hugh Mosman junior, her son and heir in heritage as aforesaid.

It was contended for *the third parties*, that a liferent only was given to Mrs Chancellor, and that Mrs Shaw Stewart, as representing her mother, Mrs Collyer, or otherwise in her own right, as only child of Mrs Collyer, and great grandneice of the makers of the deed, was entitled to one-half of the price of the subjects.

The following questions of law were submitted for the opinion and judgment of the Court:—

"1. Whether, on the death of the last of the granters of the disposition of 1845, Mrs Shaw Stewart, as representing her mother, the deceased Mary Forbes Chancellor or Collyer, or otherwise in her own right, became entitled to a share of the fee of the subjects thereby disponed?

"2. Whether, on the death of the last of the granters of the aforesaid disposition, a right to a liferent of the said subjects vested in Mrs Chancellor, and a right to the fee thereof in Mrs Shaw Stewart and Mrs Mosman equally, or wholly in Mrs Mosman?

"3. Whether, on the death of the last of the granters as aforesaid, a right to a fee of the said subjects vested in equal *pro indiviso* shares on Mrs Chancellor, Mrs Shaw Stewart, and Mrs Mosman, or only in Mrs Chancellor and Mrs Mosman; and whether the said first parties to this case, as representing Mrs Chancellor, are now in right of the fee of the whole of the said subjects; or whether all of the parties to this case, or the first and second parties only, are in right of equal *pro indiviso* shares of the said subjects?"

MARSHALL, for the first party, cited Ersk. iii, 8, 35; *Bisset* v. *Walker*, Nov. 26, 1799.

ADAM, for the second party, cited *Mearns* v. *Mearns*, July 27, 1775, M. 13,050; *Hamilton* v. *Hamilton*, Feb. 8, 1837, 16 S. 478; *Aitken's Trustees* v. *Wright*, Dec. 22, 1871, 10 Macph. 278; *M'Call* v. *Denistoun*, Dec. 22, 1871, 10 Macph. 281.

FRASER, for the third party, argued that the condition *si sine liberis decesserit* applied in this case, and cited *Sutherland* v. *Sinclair*, 1 Ross' Leading Cases, p. 45; *Douglas* v. *Scott & Yorke*, Dec. 17, 1869, 8 Macph. 360; *Thomson's Trs.* v. *Robb*, July 10, 1851, 13 D. 1326.

At advising—

LORD PRESIDENT—By the disposition of 1845 the Misses Robertson did "dispone to and in favour of the said Helen Hamilton Chancellor, Mary Forbes Chancellor, and Helen Barbara Chancellor, or the survivors or survivor of them, all our said property and respective shares in the tenement, No. 46 George Square, Edinburgh, with all parts and pertinents thereunto belonging, heritably and irredeemably, but reserving always to ourselves, separately and collectively, our liferent interest therein." Now that is the dispositive clause of this disposition, and it is the whole of the dispositive clause; and if the expression of that clause in the deed is clear and unambiguous, it is not allowable to go to other parts of the deed in order to contradict that clause. It is agreed that the expressions in the clause are not ambiguous, except in one trifling particular. The effect of the clause is to give Mrs Chancellor and her two daughters, Mary and Helen, a joint-fee, and, conditionally, to institute the survivor, if any of the three should predecease the granters. The words upon which the effect of the clause turns are the words "or the survivors or survivor." If the destination had been to the three ladies and the survivor of them, it would have been different, but the word "or" plainly points to this, that the fee is given to those of the three ladies who are in existence at the time when the deed takes effect, that is at the death of the longest liver of the granters. If there was any ambiguity about the matter, it might be competent to go to other parts of the deed to see if any par-

ticular destination were to be presumed; but I entirely deny the competency of going to other parts of the deed to make out that the dispositive clause gives a liferent to Mrs Chancellor when it expressly gives a fee.

So Mrs Chancellor and Mrs Mosman having survived all the granters, and Mrs Collyer having predeceased all the granters, the property, on the death of the longest liver of the granters vested in Mrs Chancellor and Mrs Mosman, equally between them, and belongs to their heirs. So I am of opinion that the first and second parties are each entitled to one-half of the subjects.

LORD DEAS—I agree with your Lordship in the chair, that the result of this case must depend entirely upon the dispositive clause, and it seems to me that the meaning of the dispositive clause depends upon whether the word "or" is to be taken as meaning "or" or "and." Now, although this question depends entirely upon the dispositive clause, yet if there is an ambiguous word in that clause I think that it is allowable to look at the other clauses in the deed to see if they throw light upon the dispositive clause, and, in the present case, looking at the whole deed, I think that the most probable meaning of the dispositive clause is, that the property is to go to those surviving the granters, and that it therefore vested in Mrs Chancellor and Mrs Mosman.

LORD ARDMILLAN—I agree with your Lordship in the chair. On the first and most important point, viz., that we must give entire effect to the dispositive clause, and that, unless it is defective or dubious, we are not entitled to go further. The dispositive clause here gives the succession to Mrs Chancellor and her two daughters, or the survivor or survivors of them, and that means to those surviving the last of the disponers. Now Mrs Chancellor's daughter Mary predeceased all the Misses Robertson, and there is no room in this case for the rule *si sine liberis*, so the result is that Mrs Chancellor and her daughter Helen were at the death of Miss Marianne Robertson entitled to the estate equally between them.

LORD KINLOCH—I find it difficult, indeed impossible, to construe satisfactorily the deed of 1845, executed by these five ladies. In the narrative clause they declare it to be their intention that Mrs Chancellor should have the liferent of the property, and her two daughters the fee; the result of which would be that Mrs Chancellor would enjoy during her lifetime the whole annual proceeds of the property. Yet in the dispositive clause, literally construed, Mrs Chancellor is made a joint fiar along with her two daughters, with the benefit of survivorship, the granters expressly declaring that they "grant, alienate, and dispone to and in favour of the said Helen Hamilton Chancellor, Mary Forbes Chancellor, and Helen Raeburn Chancellor, or the survivors or survivor of them, all our said property." The effect of this is to give Mrs Chancellor only one-third of the proceeds during the joint lives. If I could read the dispositive clause as importing, by a retrospective reference, a liferent to Mrs Chancellor and a fee to her daughters or the survivor, I would willingly give it this effect. But I feel I cannot take such a liberty with this primary and leading clause of the deed. As it stands, it imports, by clear language, a joint fee to the mother and daughters. I cannot insert the words as regards the mother, "in liferent for her liferent use allenarly." To do so would be against all principle, and would form a perilous precedent in conveyancing. I am therefore forced to the conclusion that, however inconsistent the dispositive clause may be with the narrative of the deed, I can give to that clause no other than its own legal interpretation; that is to say, hold it to import a joint fee to the mother and daughters, with the benefit of survivorship.

The question remains, What is the legal scope and extent of the benefit of survivorship. I am of opinion that the words have reference to the period of the death of the last deceasing Miss Robertson; and that their effect is to give the fee to the survivors or survivor at that date. The destination is not a general one to the three ladies "and the survivor," or, according to the phrase in our older deeds, "and the longest liver of them." It is to the three ladies, "or the survivors or survivor of them." This, I think, does not mean the ultimate individual survivor of the three disponees; it means the survivors or survivor, either one or more, at the death of the last Miss Robertson. If two then survived, the fee I think vested absolutely in these two, and went in equal shares to their heirs. There was no second survivorship provided for as regards these two. In legal character the clause as to survivorship was not one of substitution at all. It was one of conditional institution, that is to say, it embodied a conditional institution of the survivors at the last Miss Robertson's death. When these survivors were fixed by this event, the conditional institution was satisfied—there was no legal right beyond—and the fee became absolute in the individuals jointly, and descended to their respective heirs.

In this view, as Mrs Chancellor and Mrs Mosman both survived the last Miss Robertson, the property vested in them jointly, and the first and second parties, as their heirs respectively, are entitled to it in equal proportions.

I am clearly of opinion that there is no room for the application of the principle *si sine liberis*, so as to bring the children of Mrs Collyer into their mother's room.

Agents for First Partty—MacAllan & Chanellor, W.S.

Agent for Second Party—James F. Tytler, W.S.

Agents for Third Party—M'Ewen & Carment, W.S.

Friday, July 19.

SECOND DIVISION.

SPECIAL CASE—LORD ADVOCATE *v.* CARLOS PEDRO GORDON.

Revenue Duty on Entailed Succession—Statute 16 *and* 17 *Vict.* §§ 2 *and* 10.

Under an entail by which an estate was disposed to A, as institute, and a certain series of heirs, whom failing to B and the heirs-male of her body, the destination to B and the heirs-male of her body having come into operation, and the last heir in possession having died without leaving any heirs-male of his body, the present possessor (uncle of the last heir in possession) succeeded as next heir-male of B.—*Held* that the heir of entail last in possession was, in the sense of the Succession Duty Act, the predecessor of the present possessor.