

quire. That being so, the facts are conclusive. We have nothing to do with exemption given in the charter and statute to the professors personally. We have only to deal with the exemption given to property, and there is nothing in the usage to extend the exemption to the subjects for which it is claimed.

LORD ARDMILLAN concurred.

LORD KINLOCH—There is no doubt that at an early period of its history very large and important privileges were conferred on the University of Glasgow, and all connected with it. Not to go further back than the charter by King Charles I., of date 28th June 1630, it was thereby provided that all the professors and students, and official persons, even to the booksellers and bookbinders, should be exempt from all taxations and impositions, not merely as regarded themselves personally, but as regarded their property, real and personal, wherever situated—"infra dictam civitatem Glasgensem et extra eandem." This charter received a ratification, though somewhat generally expressed, from Parliament, on 28th June 1663. Although, according to our Scottish law and practice, this ratification had much less force than belongs to a proper Act of Parliament, yet, undoubtedly, there were thereby conferred very serious and important rights.

But it is not maintained by the University that these extensive privileges now exist; and no further right is demanded than what rests on immemorial usage. It is therefore necessary to look to the usage, both for the existence and measure of the right. For it cannot be disputed that where a right rests on usage, the usage must determine not only the validity of the right, but its extent.

It is admitted, as to the grounds originally held by the University to the east of the High Street, and also certain others immediately adjoining, acquired in the early part of the last century, and appropriated like the others for University purposes, there has been an exemption enjoyed from local and provincial taxation, both by the University as in its corporate capacity owner of these grounds, and by the individual professors resident in the houses built on these grounds, in respect of their occupancy. But the same rule has not been indiscriminately applied in the case of ground or buildings severed in locality from these, even though removed but a little way off, and used equally for University purposes. This is shown in the case of the premises acquired for the chemistry class-room, though only about 120 yards off; and in that of the observatory at Horslethill, some miles to the west, having a house attached for the professor of astronomy, in both of which cases local and other taxes have been paid.

The question now arises, Whether the exemption from taxation is transferred to the new site of the University on Gilmorehill, a mile or two to the west, and to the grounds and buildings there occupied for University purposes? This raises a very serious question. For the practical effect undoubtedly is, that if the claim of exemption is sustained, the burden of a large amount of taxation is lifted off from property hitherto subject to it, and a proportional increase of the burden is imposed on the remaining property within the same burgh or parish.

I am unable to find sufficient legal grounds for sustaining the claim of the University. The usage

on which their claim rests is not a usage which has ever transferred the exemption to any other property than that originally occupied by the University, and the immediately adjoining ground, which for a century and a-half has been incorporated with it. Any usage in regard to property locally severed from this original property is unfavourable to the claim. Proceeding on the principle that the usage must determine both the existence and extent of the right, I cannot find that transferability to other ground is an intrinsic element of the exemption. If, indeed, I could interpret the usage as meaning an exemption possessed by the University property simply as such, and not as situated in that particular locality, I would find, *vi termini*, that the exemption was transferred to the ground at Gilmorehill. But I have no warrant for so interpreting the usage, simply because the usage does not speak on the subject, if indeed it does not speak to the contrary. I cannot put this meaning on the usage unless I find actual usage to this effect. In any other view the usage is, to say the least, silent, and so does not establish the claim.

On this ground I agree with the Lord Ordinary in rejecting the claim of the University. I would only add, that if this difficulty did not exist, it would require, as I think, very serious consideration, and a very careful examination of the taxing statutes referred to, before effect could be given to the claim of exemption,—at least to the full extent claimed. I am not prepared to say that any exemption enjoyed from the taxes leviable at the date of the exemption will necessarily exempt from new and wholly different taxes afterwards imposed; more especially where, as in the case of lighting, watching, and sewerage, what is sought to be exacted is not so much taxation in its rigid sense, as a charge for the supply of conveniences, which otherwise proprietors would have to supply to themselves, and for which they have justly to pay. But into these separate considerations it is unnecessary to go, as the ground already adverted to is sufficient for the disposal of the case.

The Court adhered, with additional expenses.

Agents for University of Glasgow—Maconochie & Hare, W.S.

Agents for Parochial Board of Govan—D. Crawford & J. Y. Guthrie, S.S.C.

Agents for Partick Commissioners of Police—Ronald & Ritchie, S.S.C.

Agents for Commissioners of Supply of the County of Lanark—Morton, Neilson, & Smart, W.S.

Friday, July 19.

ARUNDALE & COMPANY v. PICKEN.

Proof—Judicial Admission—Qualified Admission—Account. In an action for payment of a balance arising on a debit and credit account between the pursuer and defender, each party produced an account which he averred to be correct, and both renounced probation. *Held*, in accordance with the principles laid down in *Milne v. Donaldson*, June 10, 1852, 14 D. 849, that the pursuer was not entitled to cull out items in the defender's account without taking the account as a whole, or to found on admissions on record without their qualifications.

Opinion by Lord Deas, without impugning the decision in *Milne v. Donaldson*, that the defender had so framed his record as to limit the litigation between him and the pursuer to the issue, whether the defender made certain specified furnishings to the pursuer, and that it lay upon the defender to prove these furnishings.

This was an appeal from the Sheriff-court of Ayrshire, at Kilmarnock.

Arundale & Co., hat manufacturers, Glasgow, sued Alexander Picken, bonnet manufacturer, Stewarton, for £83, 14s. 4d., "being the sum due to them for advances made to the defender by bills and in cash, and for returned goods, and over-charges on goods, to the amount of £503, 15s., whilst the defender sold to them goods to the value only of £420, 0s. 8d., leaving due to the pursuers the foresaid sum of £83, 14s. 4d., per debit and credit account between the parties, commencing the 4th day of February 1868, and ending the 23d day of February 1869, annexed hereto."

An account was produced with the summons.

The case turned entirely upon the statements and admissions of the parties on record, the material parts of which were as follows:—

REVISED CONDESCENDENCE for Pursuers;
with REVISED ANSWERS for Defender.

Cond. I.—The pursuers aver as follows, viz.:—That they are hat and cap manufacturers in Glasgow, and the defender is engaged in the trade of bonnet manufacturer in Stewarton; from the beginning of the year 1868 till 1869 the parties had considerable dealings, the pursuers, on the one hand, purchasing and receiving goods made by the defender, as from time to time he was able to supply them, towards the payment of which they accepted four bills to the defender, which were discounted by him, and retired by the pursuers. The said bills are produced and referred to in the account annexed to the summons. Defender's counter averment denied.

Ans. I.—Admitted.

Cond. II.—The said bills amount in value to £465, 4s. 1d., but, in addition to this sum, the pursuers claim for goods returned to the defender, and for certain over-charges made by him, to the amount of £38, 10s. 11d., as shown in the detailed account. In all, the amount of said bills, goods returned, and over-charges, is £503, 15s.

Ans. II.—Admitted that the said bills amount in value to £465, 4s. 1d. Admitted that there were returns and some trifling over-charges. Denied that these amount to £38, 10s. 11d., and explained and averred that the £5, 5s. charged in the account on the debtor side, under date 15th October 1868, is erroneously charged, and is not due, and that the pursuers have admitted this to the defender, and have agreed to withdraw it. *Quoad ultra* denied.

Cond. III.—On the other hand, the defender sold to the pursuers goods to the value of £420, 0s. 8d., as detailed in said account, which, being deducted from said amount of £503, 15s., leaves £83, 14s. 4d. due to the pursuers, being the sum concluded for.

Ans. III.—Admitted that the defender sold goods to the pursuers. *Quoad ultra* denied, and reference made to the defender's Statement of Facts.

REVISED STATEMENT of FACTS for Defender;
with REVISED ANSWERS for Pursuers.

Stat. I.—The several sums specified in the debtor side of the account annexed to the summons, under dates 4th February, 30th July, 7th October, and 31st October 1868, are the amounts of four several bills for the said sums, dated respectively 4th February, 27th March, 5th June, and 31st October 1868, drawn by the defender upon, and accepted by, the pursuers, which were discounted by the former, and retired successively by the pursuers when they fell due. The said bills bear to have been granted for value, and were so in point of fact.

Ans. I.—Admitted that the bills here specified were granted. Denied that in point of fact full value was given for them, and, as explained by pursuers, they were granted to the defender as he required money and in anticipation that goods to the amount thereof would be supplied, but the defender did not do so.

Stat. II.—In the beginning of January 1868 the parties commenced dealing with each other, and from that period, down to the month of February 1869, the defender supplied considerable quantities of goods to the pursuers. The goods so supplied amount in whole to £495, 11s. 9d.

Ans. II.—Denied. The amount is incorrectly given, and reference is made to the account annexed to the summons, showing the true sum to be £420, 0s. 8d.

In the following articles of his statement the defender averred that on certain specified dates he supplied goods to the pursuers to certain specified amounts, for which he had not received credit, in whole or in part.

The answer for the pursuers was, "Denied. The defender has received credit for all goods supplied by him to pursuers."

Stat. VII.—Towards the end of the parties' dealings, the defender was requested by the pursuers to furnish them with a statement of the accounts between them and him. This the defender did; but through inadvertence, these several sums of 6s., £40, 10s., and £31, 18s. 6d. [mentioned in the preceding articles], were omitted from the said statement by the person who made up the same. The defender's books contain due and regular entries of these sums.

Ans. VII.—Admitted that the statement referred to was furnished, but, as it has fallen aside, the pursuers cannot now speak to its terms.

Stat. X.—The defender produces herewith a correct statement of the accounts between the pursuers and him, showing a balance due by him to them of £2, 18s. 3d. This balance he has offered, and has all along been willing to pay, and he now consigns it in the hands of the Clerk of Court.

Ans. X.—Denied.

The differences between the accounts produced by the pursuers and defender will be found fully stated by the Sheriff in the Note to his Interlocutor of 28th February 1872.

The defender pleaded:—(1) The bills founded on by the pursuers being bills drawn by the defender upon and accepted by them, the presumption is that the pursuers received value for the same, and the latter can only prove that the said bills, or any of them, were not granted for value by the writ or oath of the defender. (2) The action is incompetent, the same being essentially an action for repetition of alleged over-payments by

the pursuers to the defender, which are not averred to have been made in error, and which, on the contrary, were made in the full knowledge by the pursuers of the state of accounts between them and the defender. (3) The first plea, above stated, is repeated. The bills founded upon prove a debt or debts owing from pursuers to defender."

The Sheriff-Substitute (ANDERSON) pronounced the following interlocutor:—

"*Kilmarnock, 25th October 1871.*— . . . Finds the action is at the instance of Messrs Arundale & Company, hat manufacturers, Glasgow, pursuers, and concludes against Alexander Picken, bonnet manufacturer, Stewarton, defender, for £83, 14s. 4d. sterling, as per account appended to the summons: Finds that during the year 1868 the parties had considerable dealings with each other, the defender from time to time forwarding goods to Glasgow, and drawing bills on the pursuers against the goods sent: Finds that four bills, amounting together to £465, 4s. 1d. sterling, were so drawn by the defender, who discounted them in the bank at Stewarton: Finds the said bills, when due, were retired by the pursuers, and are now produced by them: Finds the whole of said bills bear to be drawn for value received, and there is no allegation that any of them were granted for the drawer's accommodation: Finds the pursuers allege upon record that full value was not given for the bills: Finds this allegation can be proved only by the defender's writ or oath, and, unless so proved, that credit must be given for the whole amount in ascertaining the balance of account still due, and appoints the pursuers, within ten days, to lodge a minute, stating what mode of proof they mean to adopt; and decerns."

The pursuers appealed.

The Sheriff (CAMPBELL) pronounced the following interlocutor:—

"*Edinburgh, 13th January 1872.*— . . . Recalls the said interlocutor, and, before answer, allows both parties a proof *pro ut de jure* of their respective averments, and to the pursuers a conjunct probation.

"*Note.*—The defender's own account, No. 14 of process, which is averred by him on record to be a correct account, shows that, according to the course of dealing between the parties, furnishings were made by the defender to the pursuers, and that the pursuers accepted bills to the defender, not only for the amount of the furnishings already received, but to a considerable extent without value, in anticipation of future furnishings. From this account it appears that three out of the four bills founded on were granted for larger sums than were due. To give an instance, the last in point of date was admittedly granted for upwards of £40 more than was due at its date. It cannot therefore be said that the presumption here holds good that the bills were wholly granted for value received. This presumption is displaced by the defender's own judicial statements. And this being so, the question between the parties comes simply to be a matter of accounting, the defender claiming credit for furnishings which the pursuer does not admit, and objecting to things said to be erroneously debited to them. The proper course, in these circumstances, appears to be to allow the parties a proof *prout de jure*. The Sheriff has accordingly done this; but he has done so 'before answer,' in order to save any question that may arise in the course of the proof."

On 12th February 1872 both parties lodged minutes renouncing probation.

The Sheriff pronounced the following interlocutor:—

"*Edinburgh, 28th February 1872.*— . . . Finds that the account sued for, and the account, No. 14 of process, produced and founded on by the defender, are practically all one in regard to all the items, with the following exceptions, viz.:—(1) The item of £5, 5s., charged by the pursuers against the defender, of date 15th October 1868, in the account sued for, which item has not been proved, and is accordingly disallowed; (2) The items of 6s., £40, 10s., and £31, 18s. 6d., charged in the defender's account, No. 14 of process, against the pursuers for goods said to be furnished on the following dates, viz., 4th and 25th February, and 19th June 1868, which are disallowed, in respect that the furnishings are not proved; and (3) The item of £13, 9s. 6d., charged by the defender against the pursuers, of date the 17th December 1868, which, in so far as it exceeds the sum of £10, 13s., admitted by the pursuers, is disallowed as unproved: Finds that, after giving effect to these findings, there remains a balance due by the defender to the pursuers of £78, 9s. 4d. upon the account sued for; for which balance decerns against the defender, with interest thereon from the date of citation till payment: Finds the pursuers entitled to the expenses of process.

"*Note.*—The pursuers and the defender appear to have had mercantile dealings with each other in the years 1868-9, the pursuers purchasing and receiving goods from the defender, and in return accepting and retiring bills drawn by the defender.

"Founding on these dealings, the pursuers libel on the account attached to the summons. The items on the debit side amount *in toto* to £503, 15s., and those on the credit side amount to £420, 0s. 8d., leaving a balance in favour of the pursuers of £83, 14s. 4d., which is sued for.

"On the other hand, the defender produces and founds on an account, No. 14 of process, which he avers to be correct.

"These two accounts only differ in regard to five items. In other respects they substantially agree. The points of difference are as follows:—

"The pursuers in their account charge a sum of £5, 5s. against the defender as of 15th May, which does not appear in the defender's account, and is objected to by the defender. The Sheriff has disallowed the charge. But, subject to that deduction, he has given decree against the defender for the amount of the account sued for.

"The remaining four items in regard to which the accounts differ are contained in the defender's said account, but do not appear in the pursuers'. Three of them are for parcels of goods said to have been furnished by the defender to the pursuers of the following dates, viz.:—

February 4, 1868,	£ 0 6 0
" 25, "	40 10 0
June 19, "	31 10 6

And amounting in whole to £72 14 6

"These furnishings the pursuers deny, and this denial is supported by the defender's own writ; for according to his judicial statement he rendered a state of accounts to the pursuers sometime previous to the raising of the present action, which does not contain, and does not claim credit for these three items. Now, the accounts of a party,

like his books, are not evidence in his favour, but are, *prima facie*, evidence against him,—evidence, however, which may be overcome. And accordingly the defender avers that the account he so rendered was inaccurate, and that, *de facto*, he furnished to the pursuers the three parcels of goods charged for.

“This being disputed by the pursuers, proof became necessary.

“The defender resisted a proof *pro ut de jure*, and pleaded that the proof should be restricted to his own writ or oath. He put his case thus, viz.—that the pursuers charged against him four bills, amounting together to £465, 4s. 1d.; that these bills were drawn by the defender upon and accepted by the pursuers; that they were then discounted by the defender, and retired at maturity by the pursuers, as the proper debtors therein; that the bills which covered the disputed items of account, and bore to be for value received, could not be contradicted but by the writ or oath of the defender.

“Now, if there had been nothing in the record and relative account to show that the bills were not granted for value, this contention might have received effect. It appears, however, from the record and relative documents, that there was an account-current between the parties, and that the bills were not granted for value but only to account, and, to a considerable extent, by way of cash advance to the defender. The defender's own account, No. 14 of process, which is averred to be correct, shows that none of the bills was granted for full value. The first, according to that account, was accepted for £65 less than value; the second, for upwards of £20 less than value; the third (for £98), entirely without value, and the last for upwards of £45 less than value. In such circumstances, it is impossible to hold that the bills were granted for value received at the time. They were, to a large extent granted *per advance*, and it was quite open to the defender to prove that he had furnished the three parcels of goods above referred to towards extinction of the pursuers' advances.

“Accordingly, the Sheriff allowed a proof to both parties, it being incumbent on the pursuers to prove the item of £5, 5s. above referred to. But both parties, however, having pronounced probation, the case comes back to be dealt with as it stands. Accordingly, the Sheriff has disallowed the disputed item of £5, 5s., which the pursuers decline to prove, and also the three disputed items which the defender declines to prove, amounting, as above mentioned, to £72, 14s. 6d. He has further refused to allow the defender more than the pursuer admits of the charge under date 17th December 1868.

“In regard to all the other items, the accounts of the pursuers and defender, as already mentioned, agree, and the Sheriff has allowed the pursuers the balance that arises in their favour on the items as they so agree.”

The defender appealed to the Court of Session.

GUTHRIE, for him, argued—(1) That as the bills bore to be for value received, want of value could only be proved by the writ or oath of the defender; *Wilson v. Lodes*, Feb. 1, 1848, 10 D. 560; *Chiens*, July 20, 1848, 10 D. 1523; *Brook*, Nov. 11, 1813, 2 Macph. 71; *City of Glasgow Bank*, May 12, 1869, 7 Macph. 757; *Mercer*, Dec. 21, 1864, 3 Macph. 300. (2) Even supposing a proof *pro ut de jure* competent, the presumption of onerosity must be displaced by evidence. The pursuers must prove

their case. They cannot found on admissions made by the defender on record without taking the qualifications adjected, nor can they found on items in the account produced by the defender without taking the account as a whole; *Milne v. Donaldson*, June 10, 1852, 14 D. 849; *Scott v. M'Cartney*, June 23, 1843, reported in 14 D. 1087.

SCOTT and HALL for the pursuers—Where bills have been retired, and are used only as evidence, there is no rule that want of value can only be proved by writ or oath of the drawer. The defender claims credit for certain furnishings alleged to have been made by him, and it falls upon him to prove the furnishings.

After the debate, the pursuers' counsel moved the Court to allow evidence to be taken.

The Court refused the motion, LORD PRESIDENT observing—The question is, whether we are to allow the pursuers a proof, the defender not consenting. There is no doubt of the powers of the Court; and, if we thought necessary for the interests of justice that a proof should be allowed, we should not care much for the desire of either party. But this case stands in a different position. After the Sheriff allowed both parties a proof, they entered into a contract to renounce probation. Then they come here, and one of the parties to that contract asks to be relieved from it, and to be allowed to lead proof. I am for refusing to allow further evidence.

At advising—

LORD PRESIDENT—The summons concludes for payment of £83, 14s. 4d., as a balance arising on a debit and credit account between the parties, commencing 4th February 1868, and ending 23d February 1869. An account is produced with the summons. On one side the pursuers credit the defender with the price of goods furnished by him. On the other they debit him with bills accepted and retired by the pursuers, and also with certain returns and overcharges. The defender has also produced an account, in which he brings out a balance of £2, 18s. 3d. as due by him. The difference between the two accounts consists of various particulars on both sides. The Sheriff, on 13th January 1872, allowed both parties a proof *pro ut de jure* of their respective averments. After this interlocutor was pronounced, minutes were lodged for both parties, renouncing probation. The case therefore fell to be disposed of on the statements and admissions on record, and the Sheriff, by a subsequent interlocutor, disposed of the case in this way. He took the undisputed items in the pursuers' account, and gave effect to them, and decreed against the defender for the balance arising from these undisputed items. The defender says that is just in effect to take one side of an account and leave out the other side, or a considerable part of the other side; and further, he says that what are called undisputed items are so in respect of admissions on record, which admissions are made subject to qualifications; and that, if they are taken with their qualifications, the result must be to bring out the balance stated by the defender.

I have considered the case with a good deal of anxiety. It belongs to a class of cases of great practical importance. I am quite unable to distinguish it from the case of *Milne v. Donaldson*, June 10, 1852. In that case the pursuer stated that the defender had owed £200 to her, and had paid £100 to account, and she claimed the balance. The answer was, “Admitted that the defender was owing £200 originally, and that he had only paid

£100, but the balance is subject to compensation as afterwards stated." The claim of compensation which was stated was one by no means necessarily connected with the claim of the pursuer. Lord Wood decided the case in favour of the defender. His Lordship had been judge in a previous case, *Campbell v. Macartney*, nine years before. In that case he said, "The authorities appear to go to this, that where it is not a case of prescription, and the pursuer founds on the admission of the defender for the support of his claim, he must take the admission as a whole, and cannot cull out such parts of it as are favourable to himself. If a case is to be allowed to stand exclusively upon the admission of the defender, the pursuer cannot take one side of an account given in by the defender without taking the other, although it may be competent to him, while he takes the admission, to rebut the qualifications by evidence. But if he offers none, and makes no reference to oath (which is the case here), so that the case is left on the admission of the defender alone, then the admission must be received with all its adjected qualifications, and the pursuer cannot, by rejecting them, supersede the necessity of leading further proof on his part." To return to *Milne v. Donaldson*, Lord Wood says—"In conformity to the doctrine as thus explained, the result is, that in the case of a qualified admission, a qualification which in an oath on reference might be excluded as extrinsic is not excluded, but is to be taken along with or as a part of the admission, if the opposite party allows his claim to stand exclusively upon the admission. One reason of the distinction seems to be, that, in the case of a reference to oath, no contrary or rebutting proof is allowed to the opposite party, whereas, in the case of a qualified admission, the qualification may be rebutted by contrary proof. In the first, rebutting evidence of an adjected qualification not being competent, the admission may be separated from everything which accompanies it that is not clearly an intrinsic quality, and may be founded on *per se* against the party admitting; while in the last, rebutting evidence of an adjected qualification being competent, things not amounting in law to what in an oath would form an intrinsic quality, must be taken as qualifying the admission, and available to the party admitting against the party founding on the admission." The Court, in reviewing Lord Wood's judgment, adopted his reasoning, and gave full effect to the propositions stated by him. The Lord President, among others, said—"he must take the admission with this qualification. It is a substantial part of the statement. It is an answer to the pursuer's demand, good in law if it be true in fact. It is a plea of compensation, and is part of the quality of the admission. I do not go into the question, whether this would be a relevant statement in an oath of reference. We are not here dealing with a deposition under a reference, but with a judicial admission. I hold that the admission comes to no more than this—'I owe you £200, under deduction of what I have already paid.' I think it is the same thing as if the party had said—'I admit I got £200 from you at one time, but this is the state of our accounts now.' And so, having made out an account in figures, the admission would be on one side of the account, and the qualification on the other, and the balance would be all that was really admitted to be due."

I apprehend that it is too late to enter into any examination of the soundness or expediency of this

rule in practice. It is now firmly settled, and it is our duty to give effect to it wherever it is applicable. It appears to me that this is a stronger case for its application than that of *Milne v. Donaldson*. Let us look at the record. The pursuers aver (Condescence 2) that certain bills entered on the debit side of the account amount to £465, 4s. 1d., and they also claim for goods returned to the defender, and for certain over-charges made by him, to the amount of £38, 10s. 11d. The answer for the defender is—"Admitted that the said bills amount in value to £465, 4s. 1d. Admitted that there were returns and some trifling over-charges. Denied that these amount to £38, 10s. 11d.; and explained and averred, that the £5, 5s. charged in the account on the debtor side, under date 15th October 1868, is erroneously charged, and is not due, and that the pursuers have admitted this to the defender, and have agreed to withdraw it. *Quoad ultra* denied." Abstracting the matter about the £5, 5s., which is immaterial, the admission is simply that the bills amount in value to £465, 4s. 1d., and *quoad ultra* denied. On the other side, in reference to this matter of bills, the defender states—"The several sums specified in the debtor side of the account annexed to the summons, under dates 4th February, 30th July, 7th October, and 31st October 1868, are the amounts of four several bills for the said sums, dated respectively 4th February, 27th March, 5th June, and 31st October 1868, drawn by the defender upon and accepted by the pursuers, which were discounted by the former, and retired successively by the pursuers when they fell due. The said bills bear to have been granted for value, and were so in point of fact." The pursuers answer that by saying—"Admitted that the bills here specified were granted. Denied that, in point of fact, full value was given for them, and, as explained by pursuers, they were granted to the defender as he required money, and in anticipation that goods to the amount thereof would be supplied, but the defender did not do so." Now, then, in regard to the question, whether full value was given for these bills amounting to £465, 4s. 1d., the parties are distinctly at issue. The pursuers say that full value was not given; the defender says that full value was given.

Now we come to the other side of the account. The pursuers aver—"On the other hand, the defender sold to the pursuers goods to the value of £420, 0s. 8d., as detailed in said account, which, being deducted from said amount of £503, 15s., leaves £83, 14s. 4d. due to the pursuers, being the sum concluded for." The answer is—"Admitted that the defender sold goods to the pursuers. *Quoad ultra* denied, and reference made to the defender's statement of facts." That imports the defender's statement in so far as it refers to the amount of goods furnished. In Stat. II. we find—"In the beginning of January 1868 the parties commenced dealing with each other, and from that period down to the month of February 1869 the defender supplied considerable quantities of goods to the pursuers. The goods so supplied amount in whole to £495, 11s. 9d., instead of £420, 0s. 8d., as stated by the pursuers. The record is made up with reference to two accounts, one produced by the pursuers, and the other by the defender. One brings out the amount of the goods as £420, 0s. 8d., and the other as £495, 11s. 9d. Parties are agreed as to the amount paid by bills, but they are totally at variance as to the other side of the account. The rule established by *Milne*

v. *Donaldson* and other cases, is that you cannot take one side of an account and leave out the other, and that you cannot take an admission without its qualification.

The result is that the pursuers have failed to instruct their averments to the extent of the difference between the balance as brought out by them, and the balance as brought out by the defender. In other words, they can only obtain decree for the balance brought out by the defender.

LORD DEAS—I agree with Lord Wood's remark, that there is not the same distinction between intrinsic and extrinsic in dealing with admissions on record as in an oath on reference, and also I agree that, when both parties produce accounts, the pursuer is not entitled to take the defender's account as an admission of articles claimed in his account, without taking the account as a whole. But I am of opinion that the defender in such an action may so state his defence as to reduce the questions between him and the pursuer to certain specified matters. I am disposed to think that this was done in this case. I read the statements for the defender on record as an admission of the whole items charged against him by the pursuers, with the single exception that he claims credit for those specific quantities of goods, which he says were sent to the pursuers on certain specified days. I think that he reduces, and meant to reduce, the question between him and the pursuers, to the question whether or not the pursuer received these specified quantities of goods. I am not prepared to say that a defender cannot thus limit the litigation. A defender may be quite satisfied that the question between him and the pursuer is limited to two or three items. Is he then to go on to a long and expensive proof, involving an account of perhaps several thousand items, and take his chance of being found liable in the whole expense incurred in proving things which he admitted? The question is, whether the litigation was so limited in this case, and I am disposed to think it was.

LORD ARDMILLAN—If it were not for the case of *Milne v. Donaldson*, I should be disposed to concur with Lord Deas, that the justice of the case and general expediency of procedure was in favour of his Lordship's views. But I do not think that a judgment so recently pronounced and so well considered as that of *Milne v. Donaldson* can be set aside. With some reluctance, therefore, I concur with your Lordship in the chair.

LORD KINLOCH—The nature of the action raised in this case by Messrs Arundale & Co. against Mr Picken is, I think, very obvious. It is simply to this effect, that Picken supplied them with goods to the extent of £420, 0s. 8d.; that there were payments by bills and otherwise to a certain extent; and returns and overcharges to a certain further extent; and that, on the whole, they had overpaid Picken to the amount of £83, 14s. 4d. They therefore conclude for this amount as (to quote the words of their summons) "the sum due to them for advances made to the defender by bills and cash, and for returned goods and overcharges on goods, to the amount of £503, 15s., whilst the defender sold them goods to the value only of £420, 0s. 8d., leaving due to the pursuers the foresaid sum of £83, 14s. 4d." This was an unquestionably relevant case; but the burden of proving it lay on the pursuers.

The pursuers produced with their summons an account showing this result. The defender produced a counter account, showing only £2, 18s. 3d. due, which he consigned and offered to pay.

The Sheriff allowed to both parties a proof *pro ut de jure*. But both parties lodged minutes renouncing further probation. They did so, no doubt thinking, each of them, that he thereby acquired some advantage over the opposite party. The Court has held that neither party can now, without consent of his opponent, undo this proceeding, and, merely because he now doubts whether the proceeding was so advantageous as he fancied, go back to the allowance of proof made by the Sheriff.

The case must therefore now be determined on the footing on which the parties themselves have placed it. And the point for consideration is, whether, and to what extent, if any, the pursuers have established their demand.

I think it plain that they have no other evidence on which to support their case than the admissions of their antagonist. They have no extraneous documents on which to rest it. They produce, indeed, certain bills; but these are all their own acceptances, bearing to be granted for value, and retired by themselves. These plainly form no vouchers of debt against the defender. On the contrary, they show a debt once due to him, though now extinguished. They are admittedly bills granted for the price of the goods furnished by the defender. If it be said that to any extent they were granted beyond the amount of the furnishings, and to this extent were without value, and the means of raising money for the defender's behalf, this allegation is one which, in the face of the statement on the bills themselves, could only be proved by the writ or oath of the defender. No evidence of this description is tendered.

The pursuers must rely exclusively on the admissions of the defender. And to what do these admissions go? Simply to this, that whilst the account of the pursuers is, generally speaking, admitted to be accurate, this is said under the express qualification that it omits certain furnishings by the defender, which, if added to his credit, and correcting some small admitted errors, reduce the balance to the sum of £2, 18s. 3d. I am clearly of opinion that the defender's admission cannot be taken without taking this qualification. I by no means accede to the doctrine which was pleaded to us, that a pursuer cannot take any admission by the defender, however separate and isolated, without thereby assuming for true the whole statements contained in the defender's record. I can conceive many cases in which an isolated admission may be taken as evidence, without this implying any adoption of the defender's other statements. But when the statement and qualification are directly and naturally connected, the one cannot be taken without the other; and if they are so connected, it does not matter whether the qualification is contained in the answer to the pursuers' averment, or in the defender's own statement. Here the qualification goes to the very essence of the case. The pursuers say that the defender received from them certain payments and returns where he had sold them goods to the extent of £420, 0s. 8d. The defender admits the payments and returns, but says the amount of goods furnished was not £420, 0s. 8d., but £492, 15s. 2d. Hence the alleged overpayment is not £83, 14s. 4d., but £2, 18s. 3d. I cannot imagine a more direct connection than here exists between

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 disposed 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 lifeferent 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 disposed 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 disposed 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 lifeferent 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