

I think the case falls under the common law relating to review, by which the Superior Court has power to remit to the inferior for the purpose of carrying out its judgments. It would be hard indeed if the Circuit Court of Justiciary had not that power. No statute has been shown which excludes it, or the case might have been different. It is of importance for every Court of review, however limited the grounds upon which review is competent, to have the power which was exercised in this case, and to render unnecessary any return of the parties to the Court of review for the purpose of having its judgment carried out.

The Court dismissed the appeal, with additional expenses.

Counsel for Suspendor and Appellant—Asher—Lang. Agents—Crawford & Guthrie, S.S.C.

Counsel for the Respondent—Macdonald—M'Kechnie. Agents—Adamson & Gulland, W.S.

Thursday, November 9.

## FIRST DIVISION.

### MACPHERSON AND ROBERTSON *v.* DUNCAN AND REID.

*Process—Evidence—Competency—Hearsay.*

Circumstances in which held that in the trial by jury of a question of pedigree, hearsay evidence of deceased persons was rightly rejected by the presiding Judge, in respect that it did not appear that they had special means of knowledge.

*Observations (per Lord President)* as to the rules which govern the admissibility of hearsay evidence of dead persons in questions of pedigree.

This was a Bill of Exceptions against the ruling of the Lord President, who was the presiding Judge in the trial by jury of conjoined petitions for special service to Christina Cockburn Ross of Shandwick.

There were three sets of claimants—First, Mrs Mackintosh; second, Mrs Macpherson and Andrew Ross Robertson, who claimed as heirs-portioners; and third, John Ross Duncan and Andrew Gildart Reid, who also claimed as heirs-portioners.

The circumstances of the case were as follows:—William Ross of Shandwick executed an entail of the Shandwick estates, dated 5th May 1790. He died unmarried in the same year, survived by one sister, whose descendants became extinct upon the death of the said Christina Cockburn Ross, and on that event occurring the succession under the entail opened to the nearest and lawful heirs whatsoever of William Ross. William Ross' father, David Ross, had brothers both older and younger than himself. Mrs Mackintosh claimed to be descended from Walter Ross, the immediate younger brother of David Ross, and it was admitted that if she proved her claim she would be entitled to succeed before either of the other sets of claimants. Mrs Macpherson and Mrs Ross Robertson claimed to be descended from George Ross, the youngest brother of David Ross, and it

was admitted that if Mrs Mackintosh failed, and they established their pedigree, they would be preferable to Mr Duncan and Captain Reid, who claimed to be descended from Andrew, an elder brother of David Ross.

The pedigree which Mrs Macpherson and Andrew Ross Robertson had to establish was as follows:—Mrs Macpherson and Andrew Ross Robertson's mother were daughters of George Ross, sometime in the Sutherland Fencibles, and latterly at Lochee, near Dundee. His father was Andrew Ross, who was a small farmer or crofter at Loans of Tullich, in Ross-shire, and this Andrew was a son of George Ross, the youngest brother of the entailer's father. There was no difficulty in proving this pedigree, except in regard to the last link, namely, that Andrew Ross of Tullich was a son of George Ross, the entailer's uncle.

George Ross, the entailer's uncle, died in Gottenburg in 1783, and according to the Gottenburg register of deaths he was then sixty-six years and three months old. It was proved that this George Ross went to Gottenburg about the year 1788, and Mrs Macpherson and Andrew Ross Robertson averred that Andrew Ross, the farmer of Tulich, was the offspring of a marriage which George Ross had contracted before going to Gottenburg with a woman called Margaret or Merran Manson.

At the trial the first witness produced for Mrs Macpherson and Andrew Ross Robertson was the former, who stated her pedigree to be as given above, having principally derived her information from her father. It was then proposed to read to the jury the deposition of Alexander Mackenzie, residing at Balintore, in Ross-shire (which had been taken in the course of the cause upon adjusted interrogatories), who by reason of great age and infirmity was unable to attend the trial.

The deposition was in the following terms:—

“*Imprimis*, Do you know the parties, petitioners and respondents in the title to these interrogatories named, or any and which of them, and how long have you known them, and any and which of them? Declare the truth and your knowledge herein. Depones—I know John Ross Duncan, whom I saw with his mother at Shandwick when he was a boy. I know Captain Reid by sight. I know Mrs Jane Ross or Macpherson, and I know Andrew Ross Robertson. I knew the two last all their days. I knew Mrs Macpherson's father when I went to Cromarty, when I was between sixteen and seventeen years of age. I knew Captain Reid since he began to go about Ross-shire some time ago. Mrs Macpherson's father's name was George Ross. He was nicknamed Geodh.

“Being interrogated in terms of the second of said interrogatories, viz.—*Second*, What is your age; where were you born, to what trade or business were you brought up? State the different places where you have resided, and for how long in each. Depones—I am eighty-five years of age. I was born at Tullich of Fearn, close by the Loans of Fearn. I was brought up to the trade of cabinet-making and carpentry. I remained at Tullich, my birth place, till I was seventeen years of age. I then went to Cromarty, where I was four or five years. I went to Edinburgh from Cromarty. I was there about a year. I then went to Ferintosh, to Mr Innes, a millwright, where I was five years, and where I

learned the trade of millwright. I then returned to Fearn, and my father dying I was obliged to take charge of his croft, where I remained until about twenty years ago, when I left for Balintore, where I have resided ever since.

“Being interrogated in terms of the third of said interrogatories, viz.—*Third*, What was your father's name; where did he reside; what was his trade or profession; when and where did he die; what was his age when he died? Depones—My father's name was George Mackenzie. He was a farmer at Tullich of Fearn, where he died more than forty years ago. He was fifty-five years of age at the time of his death.

“Being interrogated in terms of the fourth of said interrogatories, viz.—*Fourth*, What was your mother's maiden name; when and where did she die; how old was she when she died; where was she born? Depones—My mother's maiden name was Flora Ross. She lived a good while after my father's death, but I cannot tell exactly when she died. She died at the farm of Tullich. She was seventy-five years of age when she died. She was born in the Loans of Tullich.

“Being interrogated in terms of the fifth of said interrogatories, viz.—*Fifth*, What was the name of your mother's father; where did he reside; when and where did he die; and how old was he when he died? Depones—My mother's father's name was Alexander Ross, farmer, Loans of Tullich. He died on the Loans of Tullich when I would be about six or seven years of age. I cannot say how old he was when he died. He would be a middling old man. I was only a boy then.

“Being interrogated in terms of the sixth of said interrogatories, viz.—*Sixth*, Can you name any of the relations of your said grandfather, your mother's father? If so, state who they were. Depones—David Ross, commissary-clerk in Tain, was one. He and my said grandfather were first cousins. David Ross, Mulderg, father of William Ross, bank agent, Tain, was another. He was first cousin to my mother. My father's relations were west, about Dingwall, and I did not know so much about them. I don't mind any other relations on my mother's side.

“Being interrogated in terms of the seventh of said interrogatories, viz.—*Seventh*, Did you know George Ross, sometime residing at Lochee; when did you first know him, and where did he then reside; what was his trade or occupation? State also any other places where he resided, and any other trade or occupation which he followed to your knowledge. Was he and his family known by any name distinguishing them from the other families of Ross? If so, what was that name, and how did it originate? Depones—I was well acquainted with the said George Ross. I first knew him by face in Cromarty when I was about seventeen years of age. He then lived in Cromarty. He was then a heckler in the Cromarty factory. I do not remember him being in any other place. Before he went to Cromarty I have heard that he was residing at the Loans of Fearn. From that he went away somewhere, I don't know where. Then he came back to Cromarty, and from that to Lochee, where he died. His father died while he was on the Loans. He kept on the croft for a while. I cannot tell any other work he was at except that and the heckling. He and his family were called Geodh. They got the

name in this way—There was a loch near their house in the Loan of Tullich, and Cadboll would send his geese in the summer time to Andrew Ross, George's father, to take care of. From that they called him Andrew Geodh, and the family Geodhs. I have heard that this George Ross who was at Cromarty was on board a ship for a time. I have heard him say, alluding to this, ‘I was cook there, and would get the best bit for myself.’

“Being interrogated in terms of the eighth of said interrogatories, viz.—*Eighth*, Was the said George Ross married; what was the maiden name of his wife; had he any children; what were their names? Depones—Yes. George Ross was married, and had a family. I do not remember his wife's name. I remember of his children,—Ann, who was the mother of Andrew Ross Robertson; Jane, who is Mrs M'Pherson. I remember his son Andrew, who was a minister. He was the only son. I remember two other daughters, Christy and Margaret. I suppose that was all.

“Being interrogated in terms of the ninth of said interrogatories, viz.—*Ninth*, When did you last see the said George Ross; did you then identify him as the same man whom you had known at Tullich, and at the hemp factory at Cromarty? Depones—The last time I saw George Ross was when he came north to Tain. Mr Andrew Ross Robertson was with him. It was in Tain. The first time I was examined in the Shandwick case I identified him as the same man I had known at Tullich and Cromarty.

“Interrogated in terms of the tenth of said interrogatories, viz.—*Tenth*, Who was the father of the said George Ross of Lochee; was he married; what was his wife's name; where did he reside, and what was his occupation; had he any other children besides the said George Ross; if so, what were their names? Depones—The father of George Ross was Andrew Ross Geodh. He was married, and had a family. His wife's name was Christy, and she was a midwife. Andrew lived in the east end of the Loans of Tullich, where he had a bit farm. He had, besides George, a son called John, who was not wise enough; another son, Donald, who went on board ship and never came back, and a daughter who went south and was never more heard of. George was the eldest son.

“Being interrogated in terms of the eleventh of said interrogatories, viz.—*Eleventh*, Did you know the brothers of the said George Ross of Lochee, or any and which of them? If so, state their names, whether they were married, and when and where they died; do you know where they or any of them were buried? State what you know in reference to the interment of the said George's brother John. Depones—The brothers of George Ross were John and Donald. I have seen and knew John. I have never seen Donald. Neither of them were married. John was a foolish man, and lived with Mr Gallie on the Hill of Nigg, where he died. John got very bad justice. He was not buried in the Shandwick burying-ground at Fearn, where his father, mother, and grandmother were buried. It was Mr Ross, the minister of Fearn for the time, who put against John being put in the Shandwick burying-ground. Mr Gallie wanted to bury John with his father and mother, and was very angry that he was not so buried. They put

John out on a plain spot near the chapel in Fearn churchyard. I don't remember anything else about the funeral. I cannot say exactly how long it is since the funeral.

"Interrogated in terms of the twelfth of said interrogatories, viz.—*Twelfth*, Who was the paternal grandfather of the said George Ross of Lochee; what was his occupation; where did he live; did he go abroad; if so, where did he go? Depones—The paternal grandfather of the said George Ross of Lochee was George Ross, who was the uncle of William Ross of Shandwick. He stayed sometime at Tarrel, working there, and was married there, and got one son, and then took into his head to go to Sweden, where he stopped the rest of his days.

"Interrogated in terms of the thirteenth of the said interrogatories, viz.—*Thirteenth*, Was the said grandfather of George Ross of Lochee married before he went abroad; if so, what was his wife's name; had he any child or children by his said wife, and what was or were the name or names of such child or children; when and where did his wife die? State the grounds of your knowledge. Depones—Yes. The grandfather of George Ross of Lochee was married before he went abroad, and had one son, whom he called Andrew, after his own father Andrew Ross of Shandwick, and this last Andrew, who was Andrew Ross Geodh, called his son George Ross, Lochee,—George after his father George Ross, Tarrel. The wife of the grandfather of George Ross of Lochee was Merran or Margaret Manson. George, who went abroad, had no child but Andrew by his wife Merran. He did not wait long with her. Merran was stopping with her son Andrew on the Loans of Tullich, where Andrew had a bit farm. She died sometime before Andrew, and was buried in the Shandwick burial-ground, where Andrew himself was buried the year before William Ross of Shandwick,—that is, Andrew was buried the year before William Ross of Shandwick. Merran died at Tullich, in her son's house. I knew this by all the neighbours. There was no word about it till William Ross of Shandwick was killed, and there was a great talk about who was the heir of Shandwick. I heard this from many, particularly from John Polson the elder, Hill of Fearn. He died about eleven years ago, and was then, I believe, about eighty-nine years of age. [Also from John Vass, Balintore, who was at William Ross of Shandwick's funeral. John Vass is now dead. He died sometime ago, and was about eighty years of age when he died. John Vass has told me that at the funeral of William Ross, the entailer of Shandwick, he got on a gravestone to get a good view, and saw the coffin taken out of the hearse, and heard Simon Graham, the gravedigger of Fearn, call aloud—'Where is George Ross, the heir, till he put his friend's head in the grave.'] That was George Ross, Lochee. I have also heard these things from William Ross, farmer, Hill of Fearn, who himself was well acquainted with George Ross, Tarrel. He is also dead a long time ago. Also from Donald Munro, Loans of Tullich, who is also dead a long time ago. And Alexander Hendry, Tullich, who died a long time since—I am sure fifty years since. All these died old men. It was the common talk of the country. These men I have named above I remember myself to have heard speak of these

matters. They would often come to my father's house on a winter evening, when I was a boy from ten to thirteen, and they would always have some story to speak about; and I, as young boys are, was very ready to take it up.

"Interrogated in terms of the fourteenth of said interrogatories, viz.—*Fourteenth*, Where was the father of the said George Ross of Lochee buried; where was his wife buried; and where was his mother buried? State the grounds of your knowledge. Depones—The father of the said George Ross of Lochee was buried in the Shandwick chapel at Fearn, and his wife and his mother were buried there also. I stated the grounds of my knowledge of this in my answers to the last interrogatory.

"Interrogated in terms of the fifteenth of said interrogatories, viz.—*Fifteenth*, Was there any relationship between the father of the said George Ross of Lochee and William Ross, the entailer of Shandwick? If so, state what was the relationship. State the grounds of your knowledge. Depones—Andrew Ross, the father of George Ross of Lochee, was the first cousin of William Ross, the entailer of Shandwick. The father of the said Andrew was George, who was brother to David, called Dhai Mhore, the father of William Ross, the entailer. I know this as I know the matter stated in my answer to the thirteenth interrogatory.

"Interrogated in terms of the sixteenth of said interrogatories, viz.—*Sixteenth*, Where was the said William Ross, the entailer, buried? State the grounds of your knowledge. Depones—William Ross, the entailer, was buried in the Shandwick chapel at Fearn beside Andrew, his uncle's son, that is, Andrew Geodh. And William Ross' grave is next the wall. I heard this from the persons named in my answer to the thirteenth interrogatory, and from the church officer, Finlay Graham, father to Hugh Graham, the present officer.

"Interrogated in terms of the seventeenth of said interrogatories, viz.—*Seventeenth*, Who was the father of William Ross, the entailer, and who was his paternal grandfather? Depones—The father of William Ross was David Ross of Midfearn, called Dhai Mhore in Fearn, and his paternal grandfather was called Andrew Ross of Shandwick.

"Interrogated in terms of the eighteenth of said interrogatories, viz.—*Eighteenth*, Had Andrew Ross of Shandwick, the grandfather of William Ross, the entailer, any other sons besides the entailer's father David; if so, what were their names? State what you know of their history; state the grounds of your knowledge. Depones—He had. His first son was Andrew Ross, who was a merchant in Tain. The next was Alexander, who had no family; and the next was David, the father of William, the entailer; and the next was George, the youngest of all. He had none but the four sons that I heard of. I never heard of a son called Walter, nor of one called Charles, nor of one called Farquhar. I never heard of a son of his called William, a writer in Edinburgh. I never heard of a son called Hugh, nor of a son called Robert. I heard that Andrew Ross, merchant in Tain, and son to Andrew Ross of Shandwick, had a daughter called Mary, who married Bailie Reid of Tain, from whom is descended the claimant Reid, and another

daughter called Catherine, who was married to David Ross, commissary-clerk, Tain, from whom is descended the claimant Duncan. [I remember John Polson the elder, at Fearn, telling me that shortly after William Ross, the entailer, came to Shandwick, he, Polson, was present while a conversation took place between his father George Polson and Andrew Ross Geodh; that George Polson said in this conversation to Andrew Geodh—you'll be a grand man now since this rich friend of yours came here; and that Andrew answered—Well, supposing he died without a family, my children would have a right to all he would leave.] Mr Hood told me how many sons there were of Andrew Ross of Shandwick, besides other people. I don't see any occasion to give you any more of the history of the sons of Andrew Ross of Shandwick.

“Interrogated in terms of the nineteenth of said interrogatories, viz.—*Nineteenth*, Had the said Andrew Ross of Shandwick any daughters; if so, name them? State what you know of their history. State the grounds of your knowledge. Depones—I did not hear that there were any daughters.”

Counsel for Mr Duncan and Captain Reid objected to this evidence being received; and the Lord President rejected the evidence so far as contained in the answers to the 12th and 13th interrogatories (with the exception of the sentence beginning—“Also from John Vass” and ending “in the grave”), and in the answers to the 14th, 15th, and 18th interrogatories (except the sentence beginning—“I remember John Polson” and ending with “would leave”), and *quoad ultra* the Lord President admitted the evidence. The portions of the 13th and 18th answers which were admitted are in brackets.

The ruling of the Lord President was excepted to by the counsel for Mrs Macpherson and Mr Robertson in so far as any part of the evidence was thereby excluded.

The deposition in answer to the interrogatories-in-chief, so far as not excluded, was then read to the jury, but the cross-examination was not read to the jury, being withdrawn by the counsel for Mr Duncan and Captain Reid, with the consent of counsel for Mrs Macpherson and Mr Robertson.

The jury finally returned a verdict finding for the defenders in the issues in which Mrs Mackintosh, Mrs Macpherson, and Mr Robertson were respectively pursuers, and for the pursuers in the issues in which Mr Duncan and Captain Reid were pursuers.

Argued for Mrs Macpherson and Andrew Ross Robertson—By the law of Scotland the hearsay evidence of a dead person was admissible, with the proviso that it was such evidence as the deceased person if alive could have given. There was no reason in principle why in reference to events which occurred so long ago hearsay of hearsay should not also be admissible, and the contrary had never been decided. In this case, however, all the rejected evidence was not hearsay of hearsay, for the deponent says that one of his informants, viz. William Ross, was “himself well acquaint with George Ross, Tarrel.” Such evidence was clearly admissible where the main thing to be proved was the fact that this “George Ross, Tarrel,” was married to a certain woman. But it was said, on the authority of the English cases, that in questions of pedigree hearsay evidence was only

admissible if it was the evidence of members of the family or of relatives. That was no authority, for the general rule in England was that the hearsay of dead persons was inadmissible, whereas in Scotland the general rule was that it was admissible. Lastly, it was objected that the evidence here tendered was mere rumour—common talk of the country. The facts spoken to may have been the common talk of the country, but the evidence was more. The old men, whose evidence it was that the deponent gave, had all of them exceptionally good means of knowing as to the truth of the facts to which they spoke. John Vass lived at Balintore, William Ross at Hill of Fearn, and Donald Munro and Alexander Hendry at Tullich. All these places were within a few miles of Shandwick House, the headquarters of the family, and Tullich was the very place where, until his death in 1789, Andrew Ross lived, and where his mother Merran Manson lived. The evidence of immediate neighbours was perfectly good evidence as to who was a man's father or a woman's husband in a rural district such as this was.

Argued for Mr Duncan and Captain Reid—The evidence was rightly excluded (1) because it was incompetent; (2) because if not absolutely incompetent, it was altogether worthless. It was incompetent because it was nothing more than rumour—country gossip. In cases of pedigree the English rule excluded all who were not relations. The principle on which that rule was founded was that unless the witness had some interest to know as to the matter to which he spoke his evidence was not reliable. Applying here the test of interest, the evidence must be excluded. The witnesses were not shewn in any way to have special means of knowledge. The mere fact that they lived in the same district was worth nothing. Even if the evidence was competent, it was so untrustworthy as to be utterly worthless, and it was the duty of the presiding Judge to refuse to admit such evidence.

Authorities—*Alexander v. Officers of State*, 30th March 1868, 6 Macph. (H. L.) p. 54 (Lord Chelmsford's opinion p. 62); *Smith v. Bank of England*, 7th December 1826, 5 S. 98; *Scott v. Napier*, 11th June 1869, 7 Macph. p. 35; *Stair*, iv. 43, 15; *D. of Roxburghe v. Sharpe*, M. voce. Witness, No. 38; *Hume* xi. 406; *Steen v. Bowman*, 13 Curtis' Supreme Court Decisions, p. 126; *Taylor on Evidence*, i. 375; *Whytock v. Baker*, 13 Vesey 514 (Lord Eldon's opinion); *Vowles v. Young*, 13 Vesey 140; *Place v. Earl of Breadalbane*, 17th July 1874, 1 R. 1202.

At advising—

LOED DEAS—The exception here has raised the question whether we are to admit or reject a portion of the evidence of an aged witness (Alexander Mackenzie) who was eighty-five years of age, and was examined on commission, and as I read that evidence there were two points which, if admitted, were of importance for the case of the party now taking this exception. He says that George Ross, the paternal grandfather of another George Ross, known as George Ross of Lochee, whom he knew, was a member of the Shandwick family; and the other thing he says is that the wife of the first George Ross was one Merran or Margaret Manson, and that she died after her husband had gone to Sweden, and was buried in the Shandwick burying-ground. These are the two points on which he speaks. Now, I understand that it was admitted

that a George Ross had gone to Sweden; but it was contended that there were two George Rosses, and it was a question from which of them the claimants Mrs Macpherson and Mr Ross Robertson were descended. The date when George Ross the elder is said to have gone to Sweden does not appear, but it is certainly a very old story, and the witness could know nothing of it except what he had heard from other parties; and the second point, whether Merran Manson was or was not buried in the Shandwick burying-ground, must depend upon the same kind of evidence. Now there can be no question at all that by the law of Scotland the testimony of a living witness as to what he heard from a dead one may be admitted in certain circumstances. The law of England, as I understand it, does not admit testimony of this kind to the same extent as ours. We are not here to decide which is the better law of the two.

Now, according to our law one thing is essential in a question of genealogy, viz., that the old witnesses should have some special means of knowledge of the thing about which they are said to have spoken. I do not say they must be members of the family whose genealogy is in question. It is quite conceivable that they might have special means of knowledge without being so. Now, as regards the facts spoken to by Mackenzie, it does not appear that the old people from whom he had his information had any special means of knowledge; and when I consider the great antiquity of the things to which he speaks, and the vagueness of the manner in which he came by his information, it appears to me that your Lordship was quite right in not admitting his evidence. There is no allegation that these people had any special means of knowledge as regards Merran Manson's burial, and it is remarkable that her burial is not said to have been taken notice of by anyone until William Ross, the entailor, was killed in a duel in 1790. The witness Mackenzie heard nothing of it till he was twelve or thirteen years of age, long after it had been spoken about. Again, although he speaks of persons from whom he heard these things, he sums up his authorities by saying—"It was the common talk of the country." These men I have named above I remember myself to have heard speak of these matters. They would often come to my father's house on a winter evening, when I was a boy from ten to thirteen, and they would always have some story to speak about; and I, as young boys are, was very ready to take it up." That is applicable to the whole matter, and that seems to me to denote a mere rumour, and a rumour among persons who had nothing to do with the matter they spoke of, and who knew nothing more of the matter than the whole of the country. Now, while we admit the evidence of dead persons, we only admit it under such circumstances that reliance can be placed on it. If the testimony is of no value as evidence, the Judge is neither bound nor entitled to allow it to go to the jury. This is not properly a question of competency. The evidence becomes inadmissible because it is not evidence; it might have misled—it could not have informed—the jury, and therefore I agree with your Lordship that it cannot be admitted.

**LORD MURE**—I have come to the same conclusion. The witness Mackenzie is brought to speak to the relationship of the George Ross who

left the country in 1738 to the claimants Mrs Macpherson and Mr Ross Robertson. It is proposed to prove this by the statements of this witness as to what he had heard from older men. Now, this evidence can only be admitted where the persons from whom the information comes had peculiar means of knowledge, or were related to the parties whose family history is in question. Now, the first question put to him which it is necessary to consider was—"Who was the paternal grandfather of the said George Ross of Lochee; what was his occupation; where did he live; did he go abroad; if so, where did he go?" His answer is—"The paternal grandfather of the said George Ross of Lochee was George Ross, who was the uncle of William Ross of Shandwick. He stayed sometime at Tarrel, working there, and was married there, and got one son, and then took into his head to go to Sweden, where he stopped the rest of his days." Now, it is in evidence that George Ross who went to Sweden died in 1783, which was seven years before this witness was born; consequently that statement cannot be within his own knowledge, and there is nothing to show what the ground of his knowledge was, and therefore I think this answer is inadmissible as evidence. In his next answer he does give the grounds of his knowledge of the facts he there speaks to, and the question is whether they are sufficient or not? I think they are not. The authority he gives is nothing but the common gossip of the country; he gives, no doubt, the names of various persons from whom he "heard these things," but I find nothing in his answer to show that they had any peculiar means of knowledge of what they are speaking about, and it is plain that neither they nor the witness could have any personal knowledge of the circumstances of which they speak. John Polson, for example, must have been born in 1775. One of the things he spoke of is George Ross' going to Sweden; but that happened about thirty-seven years before he was born. The only witness who was strongly pressed to us as having special means of knowledge was William Ross, farmer, Hill of Fearn, but he also is not shown to have had any such peculiar means of knowledge as would be required to make his evidence admissible. It is merely said "he was well acquainted with George Ross, Tarrel." On the whole, I concur with Lord Deas in thinking that this evidence was rightly excluded by your Lordship.

**LORD PRESIDENT**—There can be no doubt that in a question of pedigree, family tradition, if it have a relevant bearing on the question at issue, is good evidence; but it is equally clear that the gossip of the locality in which the family is planted is inadmissible. Every question of this kind must be tested by inquiring whether the evidence tendered belongs to the one class or the other. Now, family tradition is not only admissible, but if it be a constant tradition is very valuable. What you must have is, that the existence of a certain connection, as of the relation of father and son, between certain persons, has been matter of belief, and has been handed down uninterruptedly from one member of the family to another.

The difference between our rules as to the admissibility of such evidence and the English rules I take to be this—In English family tradition can

only be proved by the direct statement of members of the family, or by the statements of witnesses not belonging to the family of what they have heard from members of the family, whereas we admit such statements repeated at second hand if made originally by persons who have special means of knowledge, although they are not members of the family; and I must confess that our rules seem to be rational and intelligent, for there may be members of a family who know very little of its history, while friends of the family may know much. I think that the means of knowledge which the witness has should be the test of the value and of the admissibility of his evidence. Both laws exclude common gossip—that is, talk between persons having no special means of knowledge.

The evidence tendered in this case was tendered to prove that the paternal grandfather of Mrs Macpherson's ancestor was a member of the Shandwick family, and the youngest uncle of the entailer, by name George Ross. The case on the other side was, that although she is descended from a George Ross, it was not from George Ross of Shandwick, but from another George Ross, a miller and wright in Tarrel. The 12th interrogatory is—"Who was the paternal grandfather of the said George Ross of Lochee; what was his occupation; where did he live; did he go abroad; if so, where did he go to?" The answer is—"The paternal grandfather of the said George Ross of Lochee was George Ross, who was the uncle of William Ross of Shandwick. He stayed sometime at Tarrel, working there, and was married there, and got one son, and then took into his head to go to Sweden, where he stopped the rest of his days." Now, taking that answer by itself, I agree with Lord Mure that it is plainly inadmissible, because the events spoken of took place long before the time of which this witness could have any personal knowledge. But I was inclined at the trial, and still am inclined, to take a more lenient view of the evidence, and to connect this answer with the answer to the following interrogatory. In the answer to that he states who the persons were from whom he derived his information, and I think that the same authority is applicable to the answer to the 12th interrogatory. Now, his means of knowledge are these—"I knew this by all the neighbours. There was no word about it till William Ross of Shandwick was killed, and there was a great talk about who was the heir of Shandwick. I heard this from many, particularly from John Polson the elder, Hill of Fearn. He died about eleven years ago, and was then, I believe, about eighty-nine years of age. Also from John Vass, Balintore, who was at William Ross of Shandwick's funeral." Then there occurs a passage as to what happened at the entailer's funeral, and that I admitted, because the witness heard it from John Vass, who was present at the funeral. Then he goes on—"I have also heard these things from William Ross, farmer, Hill of Fearn, who himself was well acquainted with George Ross, Tarrel. He is also dead a long time ago. Also from Donald Munro, Loans of Tullich, who is also dead a long time ago. And Alexander Hendry, Tullich, who died a long time since—I am sure fifty years since. All these died old men. It was the common talk of the country. These men I have named above I remember myself to have heard speak of these matters. They would

often come to my father's house on a winter evening, when I was a boy from ten to thirteen, and they would always have some story to speak about, and I, as young boys are, was very ready to take it up." Now, I can hardly conceive a more graphic description of mere gossip, and it was because it was not shown nor alleged that any of these persons there mentioned had peculiar means of knowledge that I rejected this evidence at the trial.

Now, it was said that William Ross, Hill of Fearn, had special means of knowledge; he is said to have been "well acquainted with George Ross, Tarrel." The fact of this acquaintanceship, however, depends on the testimony of Alexander Mackenzie, the witness, and he could know nothing of it, for George Ross died long before he was born. But even if we take it to mean that William Ross told the witness of it, we require something more than a mere loose statement of this kind to show that the witness's informant had special means of knowledge. We are not told what the nature of the acquaintance was, and we have no ground for believing that George Ross had any reason to place confidence in William Ross, and accordingly this too drops into the general pool of scandal and gossip, which is the thing reproduced in this evidence.

The Court repelled the exception.

Counsel for Mrs Macpherson and Andrew Ross Robertson—Lord Advocate (Watson)—Nevay—Asher—Low. Agents—Ronald & Ritchie, S.S.C.

Counsel for John Ross Duncan and Andrew Gildart Reid—Fraser—Guthrie Smith—Blair—Hall. Agents—Philip, Laing, & Munro, W.S., and W. J. Sands, W.S.

Friday, November 10.

## FIRST DIVISION.

### SPECIAL CASE—JOHN DAWSON AND OTHERS.

*Succession—Fee and Liferent—Alimentary.*

A testator by deed of settlement directed that a certain sum should "belong in life-rent" to his daughter and to her children in fee, the interest being payable to her as "an alimentary provision." In the event of marriage the *jus mariti* was excluded, and the fund was guarded so as to be not "affectable by the debts or deeds" of any husband. A power to uplift and dispose without the consent of such husband "in any manner not inconsistent with the provisions" of the deed was further given her. The daughter died unmarried, and in a question as to the nature of the right so conveyed to her—held that under the terms of the deed it was one of life-rent only.

*Process—Special Case.*

Circumstances of a Special Case in which the Court declined to answer a question put to them, on the ground that all parties interested were not represented.