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 acquaint 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 acquaint 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 liferent" 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 liferent 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.

In January 1876 Adam Dawson *primus*, of Bonnytoun, died leaving a disposition and settlement, dated 23d September 1820, whereby he disponed his estate of Bonnytoun to his eldest son William Dawson, under, *inter alia*, the following declaration—"Declaring always, as it is hereby expressly declared, that the said lands and others are hereby disponed with and under the express and real burden of the sum of £6000 sterling, which shall be divided and payable in manner following, viz., first, £2000 thereof shall belong to my son James Dawson, to whom the principal shall be payable upon his attaining the age of twenty-one years. . . . *Secundo*, £1500 shall, under the conditions and restrictions after mentioned, belong in liferent to each of my daughters Frances and Margaret, viz., £3000 betwixt them, and to their children in fee, the interest at four per cent. being payable to them respectively as alimentary provisions from the term of Whitsunday or Martinmas immediately preceding my death, the principal sum in each case to be divided among the children of each, if more than one, in such proportions as the said Frances and Margaret Dawson may respectively direct by a writing under their hands; or, in the event of their not executing such writing, the sum above provided to each shall be divided among their respective children equally, share and share alike: Providing always, as it is hereby expressly provided and declared, that any husband whom the said Frances and Margaret Dawson may respectively marry shall in no event have any right, either of property, liferent, courtesy, or administration, or any other right or interest whatever, in and to the sums of money above provided to them respectively, or in and to the lands and sums of money hereinafter provided to them, or any part thereof, or the rents, annual-rents, or profits of the same, in virtue of the *jus mariti* or otherwise, nor shall the same be affectable by the debts or deeds of such husband, but the said Frances and Margaret Dawson shall have power to uplift and dispose of the whole subjects and sums of money hereby conveyed to them respectively, and rent, annual-rents, and profits of the same, in any manner not inconsistent with the provisions of this deed, without the consent of any such husband or husbands, and that every deed to be done by them or either of them in relation to the premises, though without the consent of any husband whom either of them may have, shall be as valid and effectual as if they had continued unmarried, or their husbands had consented thereto; as also that in case the said Frances or Margaret Dawson, or either of them, shall have occasion to lend out any sums to which they shall succeed in virtue of these presents, or to purchase therewith any lands or other subjects whatever, the conveyances or securities to be taken by them or either of them shall contain an express exclusion of the *jus mariti* of either."

The other provisions of the deed, so far as material, were as follows—"Fourth, £500, being the remainder of the said £6000, shall belong to my said sons Adam and John, recommending to them to settle the interest thereof upon my son Patrick as an alimentary provision to him, if they can do so without making the same or any part thereof available to his creditors. . . . Declaring also, that if the said William Dawson should at any time wish to disencumber the lands of Bonnytoun of the said sum of £6000 sterling hereby made a lien and real burden thereon, or of any part thereof left in his hands, it shall be in his power to do so if he can point out and obtain another heritable security for the same to the satisfaction of such of my children as are interested therein, such securities to be taken in the same terms (except as to the interest, which shall be legal interest) and under the same conditions as are herein expressed: and I hereby declare that a simple receipt by the said Frances, Margaret, James, Adam, and John Dawson to the said William Dawson for the sums provided to them as above, duly attested, shall be a sufficient discharge to him, and shall, if recorded in the register of sasines, be a complete discharge of the burdens above imposed. . . . In the next place, I do hereby give, grant, and dispone to my said daughters Frances and Margaret, and to the longest liver of them in liferent, and to their heirs or disponees after the death of the longest liver equally in fee, but excluding always as above the courtesy and *jus mariti* of any husband whom either of them may marry, all and whole," certain heritable property near Linlithgow.

Adam and John Dawson were further appointed the residuary legatees of the testator, and there was the following provision in favour of a daughter, Agnes Dawson or Mitchell—"But I hereby desire the said Adam and John Dawson to set apart £250 sterling, to be lent out by them in sufficient security, taking the debtor bound to pay the interest as an alimentary liferent provision to my said daughter Agnes, secluding the *jus mariti* of her present or any future husband, who shall have no power by any acts or deeds of his to touch or affect the said provision in whole or in part, and the principal to her children in such shares as she by a writing under her own hand alone shall point out, and failing her doing so, then equally share and share alike."

On 5th June 1862 the testator executed a codicil to his settlement, in which he provided that his sons Adam and John, "by accepting the provisions in their favour contained in the foregoing disposition and deed of settlement, shall be bound, from the share of my heritable and moveable property thereby devised to them, to provide the sum of £1000 sterling, to be laid out by them on sufficient heritable security, or in the purchase of heritable property, the necessary deeds to be taken in their own favour as trustees for behoof of my said daughters Frances Dawson and Margaret Dawson, who shall have right to the said principal sum and interest thereof, or to the said heritable property and rents thereof, equally share and share alike."

Adam Dawson *primus* died in 1836, and his eldest son William thereupon entered into the possession of his heritable estate under the settlement above narrated, and subject to its provisions. In 1844 William sold the estate of Bonnytoun, of which he was thus in right, to his brother Adam *secundus*, under the real burden of the above-mentioned sum of £6000, which the latter was thereby taken bound "to pay to and apply for behoof of the parties to whom the same was so bequeathed, all in terms of the directions given in said deed of settlement."

Adam Dawson *secundus* died on 1st October 1873, leaving a trust-disposition and settlement by which he conveyed to John Dawson of Greenpark, and others, as trustees, his estate of

Bonnytoun. The trustees were infeft, and thereafter sold the property, receiving the price.

The above-named Frances Dawson had died unmarried upon 27th March 1867, leaving a trust-disposition and settlement by which she disponed her whole heritable and moveable estate to certain trustees, of whom John Ramade Dawson was at the date of this Special Case the sole acceptor and survivor. Proceeding upon that disposition, and the previous deed of Adam Dawson *primus*, Frances Dawson's trustees expede a notarial instrument in their favour in the real burden of £1500, being her half of the £3000 bequeathed, as above narrated, to herself and her sister between them. During her lifetime she had regularly received the interest of that sum from her brother William Dawson, and after him from Adam Dawson *secundus*, and after her death it was paid to her trustees till Whitsunday 1873, the last term before Adam's death. It was also paid at Martinmas 1873. At Whitsunday 1874 payment was refused by Adam Dawson's (*secundus*) trustees, on the allegation that the fee of the £1500 had not vested in Frances Dawson.

William Dawson died in June 1872, leaving a trust-disposition and settlement dated in 1871, whereby he disponed his whole heritable and moveable estate for certain purposes therein mentioned, to trustees, of whom likewise, as of Frances' trustees, John Ramage Dawson was at the date of this case the sole survivor.

The trustees of Adam Dawson *secundus* thereafter intimated that they considered that Frances Dawson's right to the £1500 was one of alimentary liferent only, and that on her decease the benefit of it accresced to Adam Dawson *secundus*, and now belonged to them. Accordingly, they, of the first part, and Frances Dawson's trustee, of the second part (who maintained that the £1500 had vested in her and was transmitted to him), and William Dawson's trustee, of the third part (who maintained that the provision was one of alimentary liferent only, and had vested at Frances Dawson's death in William Dawson as eldest son and heir of his father and original disponee of the estate of Bonnytoun), agreed to present a Special Case for the opinion and judgment of the Court.

The following were the questions of law—"(1) Whether, under the said disposition and settlement and codicil of the said Adam Dawson *primus*, the fee or capital of the £1500 thereby provided for the said Frances Dawson vested in her and was transmitted by the party hereto of the second part by her trust-disposition and settlement above mentioned? (2) In the event of the preceding question being answered in the negative, Whether is the said principal sum of £1500, so provided for the said Frances Dawson, with interest since her death, the property of the parties hereto of the first part, or of the party hereto of the third part?"

Argued for the trustees of Adam Dawson *secundus*—There were only two cases where the liferenter was fiar—(1) Where he had a power of disposal; and (2) where the fiars were not in existence. The word "alimentary" was a taxative word, and an alimentary fee was unknown. There was no trust created, but the intention of the testator was apparent, because (1) there was a declaration of the mode of division among children, indicating two separate interests in the parents and children; (2) the annual income alone of the fund was to be given; (3) there was a power of apportionment on the part of the parent. The power to uplift, and the exclusion of the husband's interest, imported only a fiduciary fee. The estate had therefore been disburdened of the provision which enured to Adam Dawson, and through him to his trustees.

Authorities—Bell's Comms. (M'Laren's ed.) ii. 55; *Seton* v. *Seton's Crs.*, M. 4219; *Ramsay* v. *Beveridge*, March 3, 1854, 16 D. 764.

Argued for Frances Dawson's trustee—The general tenor of the deed showed an intention to convey the fee to the daughters. They had large powers of disposal. Alimentary provisions were given clearly when so intended in other portions of the deed. The dispositive clause was almost precisely the same here as in *Frog's* case. There was no authority for the doctrine that the word "alimentary" was taxative. The fact of the existence of a power of apportionment did not affect the decision in *Gordon* v. *Mackintosh*, 4 D. 192, affirmed (H. of L.) 4 Bell's App. 105.

Authorities—*Frog's Crs.* M. 4266; *Porterfield* v. *Graham*, 1779, M. 4277; *Kennedy* v. *Allan*, 1825, 3 S. 554; *Douglas* v. *Sharpe*, March 9, 1811, Hume's Decisions 173; *Gerran*, M. 4402, 3 Ross' Leading Cases (H. R.) 659; *Macintosh*, January 28, 1812, F.C., 3 Ross' Leading Cases (H. R.), 708; *Ferguson's Trs.* v. *Hamilton and Others*, July 13, 1860, 22 D. 1443; *Hutton's Trs.* v. *Hutton*, Feb. 11, 1874, 9 D. 639; *Cumstie* v. *Cumstie's Trs.*, June 30, 1876, 13 Scot. Law Rep. 594; *Maule* (petitioner), June 14, 1876, 13 Scot. Law Rep. 532.

Argued for William Dawson's trustee—The provision of £1500, being one of liferent only, and Frances having died unmarried, Adam Dawson *primus* died as regards it intestate. Alternatively, as disponee in the estate William Dawson was entitled to the provision.

At advising—

LORD PRESIDENT—[*After narrating the facts*]—The question here is, Whether there was given to Miss Frances Dawson a liferent interest only, or a fee? It appears to me that the words which occur under the second head of the disposition—[*reads as above*]—are sufficient to solve that question. The liferent of each of the daughters is to be alimentary, and it is carefully provided that the provision is to be protected, not only against the right or interest of any husbands whom the ladies may marry, but also against the diligence of creditors. It occurs to me that such an alimentary provision would be a very futile and inexpedient mode of settling a fund of this kind if a declaration that it was to be alimentary and an exclusion of the diligence of creditors were to be followed by a vesting of the fee—of course operating so as to open it to the diligence of creditors. Yet that is the result of the contention of Frances Dawson here. If it prevailed, she could do what she liked with the money, and it could be attached by creditors. What would then become of the alimentary provision? It would perish with the fee which was to produce it. So that there would be an absolute inconsistency in giving a liferent which is declared to be alimentary, while at the same time the deed is so framed that the provision is made to vest in fee.

But if anything else is necessary in support of the view I have now stated, it is to be found in the whole scope of the deed. A perusal of all

portions of it leaves no doubt on my mind. There was no intention that any fee should vest in the daughters, and there is nothing in the terms of the deed to prevent our arriving at that conclusion. They are certainly to have power to deal with the matter of re-investments, but that clause is inserted for the purpose of excluding the rights of husbands. That is the leading provision of the deed with regard to the fund in question. I therefore answer the first question in the negative, and hold that the £1500 was not transmitted by Frances Dawson's settlement to the party of the second part.

But the first question put to us being thus answered in the negative, a further arises, viz., Whether the £1500 so provided is to belong to the parties of the first part or of the third. The parties of the first part are the representatives of Adam Dawson *secundus*, the second son of Adam *primus*, the maker of the deed, and the party of the third part is the representative and executor of William Dawson, the eldest son of Adam *primus*, to whom the conveyance of heritable estate was made originally. It is here necessary to consider a deed made after the death of Adam *primus*, by which William conveyed the same estate as he had taken from his father to Adam *secundus*. It was not a gratuitous deed, but quite the reverse. It was the outcome, on the face of it, of an onerous transaction. In consideration of a sum of very considerable amount, the property was conveyed to Adam, subject to the same real burden as previously. Indeed, the estate could not be conveyed except under that burden. And it was quite right and proper that in the conveyance the burden should be repeated and reconstituted. There was also added in this deed a personal obligation to pay as regarded Adam Dawson, which did not exist in the case of William. All that was done in the previous deed was to constitute the real burden, but here the brother is likewise put under a personal obligation to pay and apply the £6000 for behoof of the parties to whom the same was bequeathed. Adam Dawson's trustees contend that he got the estate subject to the real burden — a portion of that burden has now lapsed and become extinguished, and the necessary consequence is that the estate has become disburdened of it, and therefore it enures to them. William's trustee disputes that, and denies that that is the legitimate effect of Frances dying without issue. He maintains that as his father's heir-at-law William is entitled to the benefit of the £1500, or alternatively, to the relief from it which was given by the death of Frances, he being the party to whom the estate originally belonged.

These may be difficult questions to solve, but there seems to be one consideration to be attended to in the first place, and that is, that there may be another party entitled to claim if this lapsed legacy falls back into the residue of the estate of Adam *primus*. In the deed of September 1820 I find he conveys to his sons Adam and John "in general all my goods, means, and estates not above disponed, of whatever denomination, heirship as well as others included, which presently belong or which shall belong to me at the time of my death." Now, whether the £1500 is a heritable or moveable subject in a question of this kind is not perhaps of very great consequence, because if it reverts to the estate of Adam *primus* it falls under the residuary conveyance of his deed, and the parties thereto entitled are not parties to this suit. It is therefore quite impossible for us to determine here the rights of parties maintaining their claims as they do on delicate grounds, while the property at stake may fall back really into the residue of the original estate. Therefore I think it is not possible to decide the second question put to us without having the residuary legatees here.

Lord Deas—The first question in this case is of a very special kind, and the decision can never be applied to any other deed unless the wording of it be similar. I agree with your Lordship in the views which you have expressed upon it.

As regards the second point, the whole parties interested are not here.

Lord Mure—I have arrived at the same conclusion with your Lordships. The provision in favour of the daughters is limited to one of a mere liferent. That is just as clear from the phraseology used as it would have been if the word "allenarly" had been used. In the case of *Ramsay* v. *Beveridge* (March 3, 1854, 16 D. 777) Lord Wood (than whom there could be no better authority upon such a question) said—"Assuredly it is not to be said that the purpose to give a liferent interest only cannot be otherwise as emphatically declared as by the adjection of such taxative expressions to the term liferent, or that there is any legal impediment in principle or authority to prevent the will of the testator, if so declared, receiving full effect." That is in my opinion sufficient to take this case out of the rule laid down in the case of *Frog's Creditors*, M. 4262. I may say that at first sight I had difficulty in the matter, and particularly in regard to the provision for the uplifting and disposing of the fund by the two ladies, but then we find that that is qualified by the words which follow—"in any manner not inconsistent with the provisions of this deed."

Upon the second point I am of the same opinion with your Lordships.

The Court pronounced an interlocutor answering the first question in the negative, but declining to answer the second, on the ground that all parties interested were not represented.

Counsel for Trustees of Adam Dawson *secundus* —Lord Advocate (Watson)—M'Laren. Agents—Wotherspoon & Mack, W.S.

Counsel for Frances Dawson's Trustee—Balfour —Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for William Dawson's Trustee—Lorimer. Agents—Duncan & Black, W.S.

REGISTRATION APPEAL COURT.

[County of Dumfries.

Monday November 6.

NELSON *v.* M'GOWAN.

Franchise—Alteration of Register—Assessor—County Voters Act 1861, *sec* 44.

A voter who had formerly been a joint-tenant of a farm, obtained a new lease as sole tenant, and was so entered in the Valuation