Lord Macnaghten—My Lords, Dr Baxter's trust-disposition states the purpose which Mrs Baxter had in view in affixing her signature to it. That being so, it appears to me that it would not be proper to attribute to her signature a purpose wider than that which is expressed on the face of the document. Her consent and approval must I think be limited to the directions given to the trustees with respect to the payment of the legacies mentioned in the fourth purpose of the trust-disposition. But even so limited her consent and approval appear to me to be inconsistent with the present claim set up by her representatives. The legacies in question are to be paid after Mrs Baxter's death. They are to be paid out of the *universitas* of the testator's estate, which is to be kept together during Mrs Baxter's life. This appears to me to be inconsistent with the claim put forward on her behalf to withdraw from the operation of the will one moiety of the testator's estate, and to leave the legacies payable out of the deceased's part only.

For these reasons, though not agreeing wholly with the grounds on which the decisions of the Court below have been rested, I concur in thinking that the appeal must be dismissed.

Interlocutor appealed from affirmed, and appeal dismissed.

Counsel for the Appellant—Sir H. Davey—M'Clymont—Rutherford. Agent—A. Beveridge, for A. P. Purves, W.S.

Counsel for the Respondent—Asher, Q.C.—H. Johnston. Agent—W. A. Loch, for Mackenzie & Kermack, W.S.

Monday, March 12.

(Before the Lord Chancellor (Halsbury), Lord Watson, and Lord Macnaghten.)

EDWARD (MRS BAXTER'S EXECUTOR) *v.* CHEYNE AND ANOTHER (DR BOYD BAXTER'S TRUSTEES).

(*Ante*, July 6, 1886, 23 S.L.R. 803, and 13 R. 1209.)

Husband and Wife—Appropriation by Husband of Income of Wife's Separate Estate—Implied Consent.

Circumstances in which *held* (*aff.* judgment of First Division) that a wife whose husband had during many years of married life uplifted and applied, apparently at his discretion, the income of her separate estate, had acquiesced in the manner in which he had applied it.

This case is reported *ante*, July 6, 1886, 23 S.L.R. 803, and 13 R. 1209.

The pursuer Allan Edward, Mrs Baxter's executor, appealed.

At delivering judgment—

Lord Watson—My Lords, Dr John Boyd Baxter was married to Margaret Edward in the year 1827, and from that time they continued to live in family together until his death in August 1882. Mrs Baxter died on the 15th of the following October. There was no marriage-contract between the spouses, and the only child of the marriage died before his parents, without issue, in March 1867.

Under the trust-settlement of her brother David Edward, who died in December 1857, Mrs Baxter became entitled, after the lapse of two years from the truster's decease, to the life interest of a fifth share of the residue. The provision was declared to be alimentary, exclusive of the *jus mariti* and administration of her husband, and free from liability to his debts or the diligence of his creditors.

Dr Baxter was one of the accepting trustees of David Edward's settlement, and also acted as factor for the trust, and on the death of Allan Edward in June 1874 he became sole trustee. There appears to have been considerable but unavoidable delay in realising the trust-estate, and a final division was not made until the 11th April 1866, when the trustees fixed and set apart funds and stocks to the value of £12,382 as the share of residue liferented by Mrs Baxter, and appointed the interest to be paid to her during her life.

Between 1859 and 1865 the trustees made payments to Mrs Baxter from time to time on account of her liferent interest. These payments were at first placed to the credit of an account-current with the National Bank in her name, which was closed on the 10th December 1860, and the balance standing at her credit transferred to a new account with the same bank in name of both spouses, but bearing to be payable to either of them. Dr Baxter alone drew upon this last account, all cheques being signed by him "*pro* Mrs Baxter," and it was closed by a draft dated the 11th November 1865 for £409, 1s. 6d. From the allocation of the residue in April 1866 until the death of Allan Edward in 1874 the income arising from Mrs Baxter's fifth was paid by the trustees to Dr Baxter, who placed it to the credit of his private bank account, and the same course was followed after Dr Baxter had become the sole trustee.

The appellant, as executor-dative of Mrs Baxter, now sues the respondents, who are the testamentary trustees of her husband, for an account of his intromissions with her separate income derived from her brother David's trust. In bar of an accounting the respondents maintain, in the first place, that Mrs Baxter made a donation to her husband, which stands unrevoked by her, of all moneys which came to her from David Edward's trust excepting such sums as he paid to her for her own use; and in the second place and alternatively, that such portions of her income as were in his possession at the time of his death were disposed of, with her consent, by his trust-disposition and settlement. The appellant disputes both of these propositions, and with respect to the period preceding 1866 he contends that there are four sums with which Dr Baxter became chargeable as her trustee or agent. It is not said that Dr Baxter intromitted with any part of her income arising before 1866 other than these sums, and in that condition of the argument I think it will be convenient first of all to deal with the income arising after the allotment of the share of residue liferented by Mrs Baxter.

By the law of Scotland, as well as by that of England, a married woman may make an effectual gift of her separate income to her husband, with this difference, that by Scotch law she has the

privilege, even after her husband's death, of reclaiming the subject of her gift in so far as it has not been *bona fide* consumed. The wife's consent to give need not be in writing, nor in terms express, but may be matter of inference from the circumstances of the case or the conduct of the spouses. So far as I am aware there is no case in which the Court of Session has had occasion to determine what conduct or circumstances will imply a gift by the wife unless the case of *Hutchison* v. *Hutchison* (4 D. 1399, and 5 D. 463) is to be regarded as an authority; but English courts of equity have frequently considered the point, and their decisions being in *pari materia* are in my opinion applicable to the present case. There can be no reason why the same circumstances which are in England held to imply donation should be deemed insufficient to sustain a similar inference in the Court of Session.

In *Caton* v. *Rideout* (1 Macnaghten & Gordon, 599) a widow objected to being charged as executrix of her husband with a cash balance of £555 standing at the credit of the deceased with Child & Company. The lady had a separate right to the dividends of stock standing in the name of trustees, of whom her husband was one. The trustees kept their banking account with Currie & Company, who at first paid the dividends to Child & Company on her account, but for fourteen years before his death it had been their uniform practice to pay to Childs on the husband's account, and the sum in question was admittedly part of the dividends so paid to him. Vice-Chancellor Knight Bruce was of opinion that in these circumstances it had not been made out that the husband had received the dividends in any other character than that of her trustee or agent, but his judgment was reversed by the Lord Chancellor (Cottenham), who thus stated the rule applicable to such cases—"If the husband and wife living together have for a long time so dealt with the separate income of the wife as to show that they must have agreed that it should come to the hands of the husband to be used by him (of course for their joint purposes), that would amount to evidence of a direction on her part that the separate income which she would otherwise be entitled to should be received by him." His Lordship also said—"That separate money of the wife paid to the husband with her concurrence or direct authority, to be inferred from their mode of dealing with each other, cannot be recalled. If I were to hold the contrary I do not know to what extent such a decision would go. In ninety-nine cases out of a hundred separate property which is introduced as a protection to the wife does not take effect; all things going right, and no destination being made, the question of separate property does not arise; the property is used as a common fund for the benefit of the family, and in that way naturally falls under the control and management of the husband."

The expression "of course for their joint purposes," occurring in the first of these quotations, may appear to be somewhat ambiguous, but it is obvious from his decision that the noble and learned Lord merely intended to say that the wife's tacit assent to her husband's receiving and using her separate income for joint family or other purposes would constitute an effectual gift, whether the sums received by her husband were expended on these purposes or were allowed to accumulate.

In *Beresford* v. *Archbishop of Armagh* (13 Simons, 743) Vice-Chancellor Shadwell in similar circumstances sustained the right of a husband's executor to a sum of £11,000, being the balance of the wife's separate income received by him and remaining unspent at the time of his death. In Scotland the claim made by the surviving wife in *Caton* v. *Rideout* would have been sustained, not because there had been no gift, but on the ground that she had power to recal it.

Hutchison v. *Hutchison* has not a very direct bearing upon the present case, although it does illustrate the principle upon which such questions are dealt with between husband and wife. In that case a widow sued her husband's representatives for an account of his intromissions with certain rents and interests from which his *jus mariti* was excluded. She alleged that the moneys had been received and accumulated by her husband, and were still extant, whereas it was averred by the defenders that they had been spent by him for family purposes. Her right to recover the moneys, so far as these remained unconsumed and could be traced, was not in dispute. When the case first came before them the Second Division (4 D. 1399) recalled the Lord Ordinary's finding that the wife was not bound to contribute out of her separate estate towards the maintenance of the family, and remitted to him to hear parties as to the legal presumption applicable to the case, and as to the relevancy of any offer of proof made by either party. When the case went back to him the Lord Ordinary found that it was relevant for the defenders to aver that such parts of the pursuer's income as were applied by her husband to the maintenance of the family were applied with her knowledge and consent, and also that her knowledge and consent might be competently proved by facts and circumstances only as well as by direct evidence. The defenders reclaimed, on the ground that the *onus* of proof was laid upon them, and the Second Division decided (5 D. 463) that it was incumbent upon the widow to prove that the money was applied by the husband to increase his own funds, and was not used for family expenditure. Their Lordships also decided that if the widow failed in such proof effect must be given to the presumption that all sums received by him had been used and consumed with her sanction and concurrence.

So far as it relates to Dr Baxter's intromissions with his wife's income between 1866 and the time of his death, I am unable to distinguish the present case from *Caton* v. *Rideout*. For eight years the interest of her fifth share of residue was regularly paid to him by David Edward's trustees as it accrued, and was by him at once mixed with his own funds, and dealt with in all respects as his own property, and the same practice was invariably followed after he became the sole trustee. It must in my opinion be presumed (in the absence of evidence to rebut the presumption) that the uniform course of dealing which was continued for sixteen consecutive years without any assertion of her separate right by Mrs Baxter had all along her consent, or at least her tacit acquiescence. Proof has been adduced by both parties, but it does not appear to me to alter the aspect of the case. The bulk of it consists of the per-

sonal impressions (which are not evidence) of individuals connected with the family derived from their observation of the terms upon which the spouses lived together, and from expressions used by Mrs Baxter in their hearing. These expressions are quite consistent with the theory of Mrs Baxter having consented to place her separate income at the absolute disposal of her husband.

I shall now advert to the facts connected with the specific sums, which the appellant argues were held by Dr Baxter as trustee or agent for his wife. On the 10th December 1860 Mrs Baxter drew £280, 10s. from her own bank account, which was on the same day applied to the purchase of thirty shares of the Dundee and Arbroath Railway Company. Owing to that undertaking having been amalgamated with the Scottish North-Eastern, which in its turn was absorbed by the Caledonian Railway Company, it has become impossible to discover in whose name the investment was made, and there is no evidence to show that Dr Baxter received the proceeds. On the 9th June 1869 £500 of Mrs Baxter's money was lent to the Dundee and Arbroath Railway Company upon a mortgage in her own name. The money was repaid on the 15th May 1869, when it was received by Dr Baxter and mixed with his own funds. On the 11th November 1864 another sum of £1000 was invested in a mortgage of the North-Eastern Railway Company payable to the spouses jointly or the survivor of them. It was repaid at Martinmas 1867, when the proceeds were not reinvested in similar terms, but were paid into Dr Baxter's private account and were dealt with as part of his own funds. Again on the 9th of November 1865, £625 of Mrs Baxter's money was lent along with £375 of her husband's on a mortgage of the North-Eastern Railway Company, payable in the same terms as the preceding. That mortgage was paid off by the company in November 1868, but there is no evidence to show how the proceeds were disposed of.

The appellant has failed to establish the receipt by Dr Baxter either of the £280, 10s. invested in 1860 or of the £625 invested in the year 1865. Assuming, however, that he did receive all of the four sums in question at the time when the investments were realised, I think that in the circumstances of this case the presumption must be that they were received by him as his own for family or other purposes with the knowledge and acquiescence of Mrs Baxter. Without her intervention they could not have been realised, and in my opinion she cannot presumably have been ignorant of the manner in which the proceeds were thenceforth dealt with by her husband. The first investment in railway shares has not been traced, but the three subsequent mortgages were paid up in 1867, 1868, and 1869, respectively. During these years Mrs Baxter was in the practice of giving to her husband for some purpose or other, the whole of her separate income from her brother David's trust-estate, then amounting to nearly £500 per annum, a practice which continued until his death in 1882, and it appears to me to be neither an improbable nor an unreasonable inference from the facts proved that she also gave him her savings during the time when her separate income from that source was much less than it became after 1866.

I am accordingly of opinion that the whole funds of which the appellant demands an account in this action were vested in Dr Baxter as his own property at the time of his death, and now belong to the respondents as trustees under his disposition and settlement. In that view it is unnecessary for the disposal of this appeal to enter upon the second branch of the argument submitted by the respondents in support of the judgments of the Courts below. But having heard a full argument upon that part of the case I desire to say that if there had not been a complete gift of these funds to Dr Baxter, or if they had merely been placed in his hands with a view to their being disposed of by the testamentary disposition of both spouses, I should have been of opinion that the appellant was entitled to judgment. I had occasion to express in another case, and need not here repeat, my opinion as to the legal effect of Mrs Baxter's signing her husband's settlement in token of her consent. The instrument does not profess to deal with any estate except that of the husband, and I do not think that Mrs Baxter's signature could have been held as implying her assent to the disposal of any part of her separate estate then subject to her dominion which she had agreed to settle by a joint-deed.

I therefore think the interlocutor appealed from ought to be affirmed, and the appeal dismissed with costs, and I move accordingly.

Lord Macnaghten—My Lords, in this case the executor-dative of Mrs Baxter seeks to recover from the testamentary trustees and executors of her husband John Boyd Baxter the aggregate amount of the income of a share of the estate of her brother David Edward to which she was entitled for life, for her separate use under her brother's will.

Mr and Mrs Baxter were married in 1827 without antenuptial contract. Mr Baxter died in August 1882. Mrs Baxter survived her husband for a short time, but during that period she was not competent to do any act affecting her right. The question therefore must depend on the rights of the parties at the date of the husband's death.

The facts of the case are few and not really in dispute. The dispute is as to the proper inference to be drawn from the facts.

David Edward died in 1857, but several years elapsed before his estate was realised. It was not until 1866 that the securities representing Mrs Baxter's share which amounted in value to about £12,000 were set apart. Mr Baxter was a trustee, and after the 16th of June 1874 the sole trustee of David Edward's estate. He was also factor to the trust. It cannot be doubted that Mrs Baxter was aware generally of her rights under her brother's will. For a time the intention seems to have been to preserve her separate title to the moneys coming to her from the trust. On the first division of income an account was opened in her name with the National Bank, and for a time her share of the income with the exception of what was paid to her personally was placed to that account. In December 1860 the account was closed, and the balance was carried to a new account opened in the joint names of Mr and Mrs Baxter with power to either to draw upon it. This account was

closed in November 1865, when the balance was transferred to Mr Baxter's banking account. From that time Mrs Baxter's separate income was paid directly to Mr Baxter's account and mixed with his moneys. From 1869 to 1880 inclusive, deposits were made from time to time in Mrs Baxter's name with the National Bank. In July 1881 the ultimate balance standing to the deposit-account was drawn out and paid to Mr Baxter's account. In four instances, the latest of which occurred in November 1865, sums derived from Mrs Baxter's separate income are traced into investments either made in Mrs Baxter's name or in which she was recognised as having an interest. But these investments in course of time were realised or paid off, and it may be inferred if it be not proved that the proceeds came into Mr Baxter's account and under his sole dominion.

Mr and Mrs Baxter lived together on most affectionate terms. They lived frugally. Mr Baxter's own income was quite sufficient to meet their joint expenditure, and the result was that at his death the property of which he was at least the ostensible and apparent owner was largely composed of funds derived from Mrs Baxter's separate income.

What is the proper inference from these facts? On the one side it is said that Mr Baxter was never divested of the character of trustee, that he acted as his wife's banker, and that her representatives are therefore creditors on his estate for so much of her separate income as may appear to have been received by him and not duly accounted for. It was contended that at the very least his estate ought to be held liable for the proceeds of the four investments of her separate property which came to his hands. On the other side it was not disputed that originally Mrs Baxter intended to keep her own property to herself, but it was said that she drifted away from that purpose and finally abandoned it altogether. A reason for this change, it was suggested, might be found in the death of the only child of the marriage who died without issue in March 1867; after that event Mrs Baxter could have no object in keeping her property separate. And it was argued that the proper inference from the facts and circumstances of the case was that Mrs Baxter made a gift of her separate income to her husband.

In Scotland there seems to be no reported decision bearing directly upon the point. Where donations between husband and wife are liable to be revoked during the lifetime of the donor, the question could only arise in an exceptional case like the present, and so the dearth of authority is not to be wondered at.

In England from early times there have been numerous decisions and *dicta* upon the subject where husband and wife have lived together, and the husband has received the income of his wife's separate estate without objection on her part. In the older cases, generally speaking, no distinction appears to have been drawn between pin money and other separate income of the wife, and in some it is laid down that the wife shall have no account against her husband or her husband's representatives; in others it is said that the Court will only give the account for one year. Subject to these observations, the rule in equity is clear from the earliest times (and the cases go back to the time of Lord Macclesfield) that when husband and wife have lived together the wife cannot charge her husband or her husband's estate as her debtor for arrears of her separate income which she has permitted him to receive. The object of the rule, according to Lord Hardwicke, was "to prevent such accounts between husband and wife which it is impossible to determine according to the rights after death of the parties" (*Peacock* v. *Monk*, 2 Ves. S. 190). Since the *Duchess of Northumberland's* case (*Howard* v. *Lord Digby*, 11 Cl. & F. 634), which was before this House in 1834, a distinction between pin-money and other separate income of the wife has always been recognised, and since that case there is no English decision, so far as I am aware, which lends countenance to the notion that the Court will give any account againt the husband or his representatives in respect of arrears of the wife's separate income received by him with her express or implied permission. Where the circumstances are such that the wife's consent or acquiescence may fairly be presumed, the presumption arises on each receipt by the husband, and bars all claim on the part of the wife or her representatives. To displace the rule it is not sufficient to show that the wife's separate income has accumulated in the husband's hands and remains unspent—*Beresford* v. *Archbishop of Armagh*, 13 Simons, 643—or that the husband is himself a trustee of the wife's separate income—*Caton* v. *Rideout*, 1 M. & G. 599—or that the wife is restrained from anticipation by the terms of the instrument under which her title is derived—*Rowley* v. *Unwin*, 2 K. & J. 138.

Caton v. *Rideout* is generally referred to as the leading case upon the subject. There was no question or dispute there as to the rule; the difficulty arose simply from the position of the husband, who was one of the wife's trustees. Lord Cottenham there held, under circumstances similar to those in the present case, that the payment with which the wife sought to charge her husband's representatives was made to him as husband and not as trustee. He states the rule to be that "separate money of the wife paid to the husband with her concurrence or by her direct authority, to be inferred from their mode of dealing with each other, cannot be recalled;" and he adds that "the practice between the husband and the wife is proper evidence to show acquiescence and concurrence." Lord Cottenham refers the foundation of the rule to broad grounds of convenience and practice, and points out that the rule is necessary for the peace of families. Indeed, if the rule were otherwise it would be, as his Lordship observes, "impossible to tell what confusion might not be introduced into a family." It appears to me that a rule which rests on such a basis is a safe guide in considering a case to the circumstances of which if they had occurred in England it would undoubtedly have been applicable.

There remains to be considered the minor point as regards the proceeds of the four investments of moneys derived from Mrs Baxter's separate income—a point which does not seem to have been pressed in the Courts below. It appears to me that these proceeds fall within the same rule. Assuming, in accordance with the principle laid

down in *Rich* v. *Cockell* (9 Vesey, 369), that it is incumbent on the husband's representatives to show by clear evidence that the separate trust in these moneys has been destroyed, I think the evidence is sufficient for the purpose. The investments represented accumulations of income. After Mrs Baxter consented, as it must be taken she did, to her husband receiving her separate income, and dealing with it as his own, there was no reason for making a distinction between accruing income and income that had already accumulated when the accumulations were turned into money. As the investments representing these accumulations were realised from time to time, Mrs Baxter's receipt must have been required and obtained. It is impossible to doubt that the payment to Mr Baxter in each case was made with his wife's concurrence, that he received the proceeds in the character in which he was at the time receiving her separate income, and that he was as free from liability to account in the one case as he was in the other.

For these reasons I am of opinion that the appeal must be dismissed.

Lord Chancellor—My Lords, I only desire to say that had it been necessary to decide any questions with reference to the signature to the will, I should have been entirely of the same opinion as my noble and learned friends, but it seems to me that neither in the present case nor in that which we have just disposed of, is there any real doubt upon the principles of law on which it ought to be decided. The questions are simply questions of fact. I entirely concur in the view which has been taken of those questions of fact by my noble and learned friends, and I merely wish to add my assent to the judgment proposed and the reasons which have been given for it.

Interlocutors appealed from affirmed, and appeal dismissed, the costs to be provided out of the estate.

Counsel for the Appellant—Sir H. Davey—M'Clymont—Rutherford. Agent—A. Beveridge, for A. F. Purves, W.S.

Counsel for the Respondent—Asher, Q.C.—H. Johnston. Agents—W. A. Loch, for Mackenzie & Kermack, W. S.

HIGH COURT OF JUSTICIARY.

Friday, March 16.

(Before the Lord Justice-Clerk, Lord Craighill, and Lord Rutherfurd Clark.)

GAIRNS *v.* MAIN.

Justiciary Cases—General Police and Improvement (Scotland) Act 1862 (*25 and 26 Vict. cap.* 101), *sec.* 308—*Byelaw regulating Hackney Carriages—Contravention—Driver Licensed by another Burgh.*

The driver of a hackney carriage licensed in one burgh, contravened, while driving through another burgh, one of the byelaws made by the magistrates of that burgh in terms of the General Police and Improvement (Scotland) Act 1862, sec. 308. The driver was convicted. On appeal, *held* that the byelaw only applied to hackney carriage drivers licensed within the burgh, and conviction *quashed.*

Ante, p. 28. Thomas Gairns, hackney carriage driver, Leopold Place, Edinburgh, was charged in the Leith Police Court on 17th November 1887 at the instance of Alexander Main, Procurator-Fiscal of Court, with "having between the hours of eleven and twelve of the clock on the forenoon of Sunday, 13th November 1887, in Commercial Street, Leith, while passing the place of public worship known as Free Saint Ninian's Church, and while divine service was being conducted in said church, failed to drive a horse and hackney carriage under his care at a walking pace, and with having driven said horse and hackney carriage at the rate of eight miles an hour, contrary to section eight of the amended bye-laws for regulating hackney carriages made in terms of the General Police and Improvement (Scotland) Act 1862, by the Magistrates of Leith, whereby he was liable to a penalty of two pounds, and in default of payment, to imprisonment not exceeding one month."

The General Police and Improvement (Scotland Act 1862 (25 and 26 Vict. cap. 101), referred to, provides by section 308 that "the magistrates may from time to time (subject to the restrictions of this Act) make byelaws for all or any of the purposes following—that is to say, for regulating the conduct of the proprietors and drivers of hackney carriages plying within such prescribed distance in their several employments, and determining whether such drivers shall wear any and what badges, and for regulating the days and hours within which they may exercise their calling." . . . For the meaning of the words "such prescribed distance" it is necessary to refer back to section 278, which provides that the magistrates may license such number of hackney carriages as they think fit to ply for hire within five miles from the principal post office of the burgh. The byelaw libelled was in the following terms:—"Every driver shall, during the hours of divine service on Sundays, or other days set apart for public worship by lawful authority, drive at a walking pace while passing any place of public worship."

The accused was convicted and fined 10s., with the alternative of five days' imprisonment.

Gairns took a case for appeal to the High Court of Justiciary.

The Magistrate stated that the following facts were proved, viz.—"(1) That the appellant was an Edinburgh hackney carriage driver, licensed by the Magistrates of Edinburgh, and that the hackney carriage which he was driving was also licensed by the Magistrates of Edinburgh; (2) that neither the appellant nor the hackney carriage he was driving was licensed by the Magistrates of Leith; (3) that on the forenoon of Sunday 13th November 1887, being the occasion referred to in the complaint, the appellant's carriage was hired as a hackney carriage, at a stance in Union Place, Edinburgh, to carry and did convey certain persons to the docks at Leith, for which the appellant was paid the usual fare from that stance to the docks; (4) that the appellant on the said occasion, in the