ing with her death in consequence—then it was a pity to give them any direction to that effect in point of law, and peril the case. It was superfluous. They would take that view as a matter in their own department. If, upon the other hand, they thought that she, although her object was to pull back her rather tipsy sweetheart, was acting with gross rashness and recklessness in the circumstances, and that she was guilty of contributory negligence—had acted really as I suppose a young woman in pursuit of a tipsy sweetheart may act with recklessness of her own safety—I could not assent to this, that the jury are to be told, "although that is your opinion, yet in point of law you are not entitled to form it if she wanted to rescue him, for then the law is that she was not negligent, however much you may think she was." I do not think that was right; and therefore if there had been an exception to this, upon the ground that it was a matter for the judgment of the jury, and not for the determination of the Judge as a question of law, I should have felt bound to sustain the exception. But in the first place it was not argued to the Judge that it was not a question for him, but a question to be submitted to the jury as a question for them. The argument was, "it is a question for you, but you ought to decide that question the opposite way." And then there is no exception taken to it; and there is an exception taken to the learned Judge's most proper refusal in my opinion to direct the jury that the law was the opposite of that. Now, upon the motion for a new trial I should overcome any mere formal difficulty in the way of the exception being taken in order to do justice in the case. But I feel no such obligation here; and therefore I am prepared for my own part to dispose of the bill of exceptions by holding that there was no exception taken to the direction which the learned Judge informs us he gave, and which I think erroneous, and that the direction which he refused, and his refusal to give which is excepted to, was an improper direction, and very rightly refused by him. Upon the whole matter, therefore, I should state it as my opinion that the bill of exceptions ought to be refused, and that the rule to shew cause why a new trial should not be granted ought to be discharged.

Lord Craighill—I agree in all that Lord Young has said, and in the judgment which he has proposed.

Lord Rutherfurd Clark—I am of the same opinion.

The Court discharged the rule, disallowed the bill of exceptions, and applied the verdict, with expenses.

Counsel for Pursuer—W. Campbell—W. E. Fraser. Agent—William Considine, S.S.C.

Counsel for Defenders—R. Johnstone—Graham Murray. Agents—Hope, Mann, & Kirk, W.S.

Tuesday, July 6.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

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

Husband and Wife—Accounting—Wife's Separate Estate—Proof—Implied Consent.

The income of a share of residue to which a wife was entitled under her brother's trust-settlement, exclusive of the *jus mariti* and right of administration of her husband, was paid by her husband, who was one of her brother's trustees, and latterly the sole trustee from the year 1866 to 1881, when both spouses died, into the separate bank account of the husband. The husband predeceased his wife, leaving a settlement disposing of his whole estate which the wife had signed as a consenter. The wife left no operative settlement. In an action at the instance of the wife's executor-dative against the trustees under the husband's settlement the pursuer called on the defenders to account for the income of the wife's separate estate during the period mentioned. This income survived as an accumulation at the death of the husband, and had not been spent during the subsistence of the marriage. *Held* that the same rules of strict accounting did not apply between husband and wife which applied between strangers; that it was a fair inference from the facts in evidence that the wife knew and assented to the manner in which her income was dealt with; and that therefore her representatives had no claim, as the accumulated income was disposed of by the husband's settlement which the wife had adopted as a settlement of their joint estate.

This was an action at the instance of Allan Edward, executor-dative *qua* one of the next-of-kin of Mrs Margaret Edward or Baxter, widow of Dr John Boyd Baxter, against John Cheyne and Thomas Watt Thoms, trustees and executors of Dr Baxter, for an accounting of their whole intromissions of Dr Baxter with the trust-estate of the late David Edward, merchant and flax-spinner in Dundee, and for payment of £20,000, or of such other sum as shall be found due.

Mrs Baxter was a sister of David Edward, who had died on 22d December 1857 leaving a trust-disposition and settlement under which Mrs Baxter had a liferent interest in a share of the residue of his estate, exclusive of the *jus mariti* and right of administration of her husband Dr Baxter. The trustees who accepted office under the settlement were the truster's brothers Alexander and Allan Edward and Dr Baxter. On 31st December 1857 Dr Baxter was appointed factor on the trust-estate, with full power to uplift all sums, grant discharges, and make payments under the supervision of the trustees. Alexander Edward died on 29th March 1863, and Allan Edward on 16th June 1874. Dr Baxter continued to act as factor or sole trustee down to the date of his death on 4th August 1882. Mrs Baxter died on 15th October 1882; from the date of her husband's death to that of her own she was unable to attend to matters of business.

There was one child of the marriage who predeceased the spouses without issue.

The trust having lapsed by the death of Dr Baxter, a judicial factor was, on 9th February 1883, appointed to the trust-estate. The factor, in consequence of his not having obtained a full statement of Dr Baxter's intromissions with the trust funds, raised an action of accounting against the present defenders, which also concluded for payment of £20,000, or such other sum as might be found to be due. The record in that case was closed on 18th March 1884. An account of Dr Baxter's intromissions was lodged, and on 24th February 1885 objections were lodged to this account.

The pursuer of the present action was appointed executor-dative of Mrs Baxter on 1st June 1883.

In this action he stated that having examined the account of intromissions lodged in the process of accounting at the instance of the judicial factor he had found that no proper accounts existed of the payment to Mrs Baxter of her share of the income from David Edward's estate after 11th April 1866; previous to that date the statements of alleged payments were of a very fragmentary and unsatisfactory character. They averred that "No vouchers of any kind for such alleged payments had been produced, and that the account of intromissions lodged by the defenders was, so far as regarded the receipt and payment of Mrs Baxter's share of the income of the estate, entirely supposititious, and not made up from accounts kept by Dr Baxter either as trustee or as factor; that Mrs Baxter did not receive from Dr Baxter payment of any part of the income due to her from the trust-estate, and that Dr Baxter, in place of making payment to her of such income, applied it to his own purposes without her knowledge or consent."

The defenders admitted that no vouchers were produced for the income of that part of the trust fund liferented by Mrs Baxter. They stated that, so far as they could ascertain, that income was received by Dr Baxter as trustee and factor, and paid by him into his own bank account, or otherwise mixed with his own funds with the knowledge and full consent and approval of Mrs Baxter, and they averred that during the whole period from the truster's death in 1857 to her husband's death and her own in 1882 Mrs Baxter never expressed any objection to this course, or any desire that her separate income should be paid over to herself. "Dr and Mrs Baxter were married in 1827, and from that date till the dissolution of the marriage by the death of Dr Baxter on 4th August 1882, a period of fifty-five years, they lived in perfect harmony and unity of interest." "The income was either contributed by Mrs Baxter to the expenditure of the spouses, and was expended for their joint purposes and with joint assent; or otherwise, the income was gifted by Mrs Baxter to her said husband. Mrs Baxter had the most ample confidence in her husband, and desired that he should have the disposal of all funds coming to either spouse."

The pursuer denied that Mrs Baxter's income was received by Dr Baxter with her knowledge and full consent and approval. He denied that Mrs Baxter never expressed any objection to the course followed, or any desire that her separate income should be paid over to herself; and averred that Dr Baxter kept her in ignorance of the true position of matters regarding the trust, and represented that he was unable to pay her income in consequence of its position. The pursuer also averred that although Mrs Baxter was not fully aware of her legal rights with regard to the income payable to her from David Edward's estate and her separate estate generally, she knew that her husband was due her large sums of money, and she repeatedly asked her husband to make it over to her. He further stated that it was from the income of Mrs Baxter's separate estate that the money in Dr Baxter's hands at his death was in great part derived.

The defender made reference to the testamentary settlements executed by the spouses, which were as follows:—There was no antenuptial marriage-contract, but in 1828, the year after their marriage, they made a mutual settlement in each other's favour.

In 1871 Mrs Baxter executed a will by which she assigned and conveyed to her husband, "in case he shall survive me, All and Whole my estate and effects, heritable and moveable: And I do hereby, moreover, nominate, constitute, and appoint the said John Boyd Baxter, in case he shall survive me, to be my sole executor and universal intromitter with my whole moveable means, estate, and effects of every kind, and that for his own use and behoof, with full power to him to do everything competent to him as my executor, it being understood between us, in the event of his surviving me, that he will execute a deed of settlement or trust-deed to take effect at his death, in the terms and for the purposes settled and known to us both, with such necessary alterations as he may consider called for on account of any change of circumstances which may take place; with this duty he is solely and confidently entrusted, and in the discharge of it no one shall interfere." This will did not take effect as Dr Baxter predeceased his wife.

In 1881 Dr Baxter executed a trust-disposition and settlement, by which he conveyed his whole estates to the defenders John Cheyne and Thomas Watt Thoms as trustees. Mrs Baxter also signed this settlement. The testing clause bore—"In witness whereof, I and my said wife have subscribed these presents before these witnesses," &c. The provisions of the settlement were for payment of the income of his estate to his wife in the event of her survivance; for payment of legacies amounting to £26,750, of which £16,000 went to Mrs Baxter's next-of-kin, and £2850 to other relatives of Mrs Baxter; for payment out of the residue after the death of his wife of any further sum the trustees might think fit over and above the sum of £10,000 (paid by him before his death) to University College, Dundee, and for payment of the residue to charitable purposes in the discretion of his trustees.

The pursuer pleaded—"(1) The deceased John Boyd Baxter having acted as trustee and also as factor on the trust-estate of David Edward, and having received and intromitted with the share of the funds of that estate liferented by Mrs Baxter, the present defenders, as trustees and executors of Dr Baxter, are bound to count and reckon with the pursuer as Mrs Baxter's executor, or otherwise to pay to him the sum of £20,000 with interest as concluded for. (2) *Separatim* — The deceased John Boyd Baxter

having received the sums of income payable to Mrs Baxter, exclusive of the *jus mariti*, as residuary legatee of David Edward, and not having accounted to her for the same, his representatives are bound to count and reckon as aforesaid."

The defenders pleaded—"(2) The present action at the instance of Mrs Baxter's representatives is barred by Mrs Baxter's own acquiescence, taciturnity, and homologation down to the date of her death. (3) Dr Baxter having, with Mrs Baxter's knowledge and consent, applied the income of her funds to their joint expenditure during their lives, the pursuer as Mrs Baxter's representative is barred from making the present claim against Dr Baxter's estate. (4) If, and so far as, not so applied, Mrs Baxter having made a donation to her husband of the said income, the present claim against his estate ought to be repelled. (5) The present claim at the instance of Mrs Baxter's representatives is barred by the terms of Dr Baxter's settlement, and of Mrs Baxter's approval thereof, taken in connection with Mrs Baxter's will of 11th July 1871."

A proof was taken, from which it appeared that the gross amount of David Edward's estate was about £68,000, and that there remained for division among his five brothers and sisters, after paying certain legacies and expenses, about £55,000. The estate was invested partly in the business of A. & D. Edward, flax-spinners, Dundee, and partly in the estate of Balruddery, which was the property of David Edward. David Edward died in 1857, and by Martinmas 1860 his trustees had realised sufficient to divide £25,000 of capital, Mrs Baxter's share being one-fifth or £5000. In 1862 Mrs Baxter got another fifth or £5000, and in 1866 there was a further division by which she got £2200—£12,200 in all. These sums were invested by David Edward's trustees, and on each occasion there was entered in the minute-book a regular declaration of trust that they held the investments for behoof of Mrs Baxter.

Mrs Baxter had besides this an interest in the estate of her father Allan Edward, who had died in 1823, which amounted to £1316, 13s. 4d. This sum remained in the firm of A. & D. Edward & Company, the interest being paid annually to her, and amounting to about £59. There was also a sum of £12,500 to the liferent of which Mrs Baxter was entitled from the estate of her brother Alexander Edward, who died in 1863 leaving a settlement in terms similar to that of David Edward. Alexander Edward's money was also in the business. After James Edward's death in 1876 there was some difficulty in realising the property of the firm, and for three years after his death Dr Baxter paid no interest to his wife upon her share of the estate, though he paid interest to other beneficiaries.

There was a separate bank account kept by Mrs Baxter with the National Bank from October 1859 to December 1860, when it was closed, and the balance transferred to a new account with the same bank in the joint names of Mr and Mrs Baxter, to be operated on by either. The balance was transferred by cheque, on the back of which was endorsed the following—"Please change this account to the form undernoted, *videlicet*, John B. Baxter Esq., Craigtay, and Mrs Margaret B. Baxter, payable to either.—M. B. Baxter. I concur in the above.—John B. Baxter." This latter account was closed on 11th November 1865, and the balance transferred to Dr Baxter's separate account. There was no direct evidence of the reason for making this change in the manner of keeping the bank account. Mrs Baxter had also a series of deposit-receipts with the same bank from October 1869 down to July 1881, when the last deposit was uplifted and the money was not re-deposited.

The entire income to which Mrs Baxter was entitled from David Edward's estate, amounting to about £800 a-year, was recovered by Dr Baxter, and it was admitted by the pursuer, before the Lord Ordinary, that down to the end of 1865 he might be held to have discharged himself of the amounts received. From April 1866, however, he drew, as factor on the trust-estate, the interest due to his wife, and paid it direct into his own bank account. The interest which was thus dealt with was not spent during the subsistence of the marriage, but remained as an accumulation on Dr Baxter's death. The evidence showed that Dr and Mrs Baxter were a devoted couple, and on that point is given in detail in the opinion of Lord Mure *infra*, as is also the evidence bearing on Mrs Baxter's knowledge of what was done with her money.

The Lord Ordinary (Kinnear) on 8th December 1885 assoilzied the defenders.

"*Opinion.*—The present action relates exclusively to the income which the late Mrs Baxter was entitled to receive during her life from her brother David Edward's estate. It is not disputed that the entire income to which she was so entitled was duly recovered by her husband Dr Baxter as trustee and factor on the trust-estate; nor, on the other hand, that till the end of 1865 he may be held to have discharged himself satisfactorily of the amounts received. But from April 1866 until his death the whole amounts passed into his private bank account, and became mixed with his own funds, and it is conceded that if he were liable to account with his wife's representatives on the same principle as with stranger clients, the defenders could produce no sufficient vouchers to prove payment of his wife's income to herself, and therefore would have no defence to the action in so far as regards the period from 1866. But they maintain, and I think justly, that when a husband has been allowed to receive his wife's income during her life, he is not, in a question with her representatives, to be subjected to the same rules of strict accounting as if he had uplifted the income of a stranger, and that if it be a fair inference from the facts in evidence that the wife had known and assented to the manner in which her income was applied by her husband, her representatives have no claim after her death to recover moneys which she has permitted her husband to appropriate, or to apply at his discretion for their common benefit. It appears to me impossible to doubt that Mrs Baxter was perfectly well aware that her husband was receiving the income in question, or that she was satisfied that he should deal with it as he did. The case is not identical with that of *Hutchison* v. *Hutchison* [*infra*], because the wife's income cannot be shown to have been paid and expended during the subsistence of the marriage. But she knew that in so far as it was not expended it was mixed with her husband's funds. This might

probably be inferred from the bank accounts, for the income from David Edward's estate was at first paid into a separate account in Mrs Baxter's own name, afterwards from 1860 to 1865 into a joint account in the names of both spouses, and from 1866 onwards into Mr Baxter's own account. These changes could hardly have been made without Mrs Baxter's knowledge, if she knew that her husband was continuing to receive the money on her account, which she cannot but have known unless she was wilfully deceived by him, and it is conceded that there is no ground whatever for any such imputation. The mere fact, however, of her money being paid into her husband's bank account with her knowledge might not have been in itself conclusive against the pursuer's claim, but it is a very material consideration when taken in connection with the evidence as to the terms on which the husband and wife lived together, and with the evidence afforded by their testamentary writings.

"Taking all the circumstances into consideration, the reasonable inference appears to me to be, that if Mrs Baxter's income was paid into her husband's bank account, this was not because he had failed to account to her for the money which he held in trust for her, but because she desired that it should be at his disposal for purposes upon which they had agreed. If it had been actually spent for the common benefit of the spouses, there could have been no further question. But it is said that the actual result has been to allow the husband to make accumulations of his wife's income, which she would have been entitled to recover from him, or from his estate. But on the other hand, if there were such accumulations, they will fall into Dr Baxter's estate, and be disposed of in accordance with his testamentary settlement, and when the terms of that settlement, to which Mrs Baxter was a consenting party, are considered along with her own will of 1871, it would appear to me that this is exactly what both spouses intended. Under the husband's settlement the wife, if she survives, has the liferent of his entire estate, and he gives considerable legacies to her relations, leaving the residue for charitable purposes. In the previous case (11 R. 1002) the Lord Justice-Clerk pointed out that the true inference from the facts was that this was done by arrangement with Mrs Baxter, and observed further that the will executed by her in 1871, although it can have no testamentary effect, was important as shewing beyond all doubt that all the provisions of her husband's settlement had been arranged between the spouses before that deed was executed. It appears to me to be equally important in this case, because I think it shews that the estate, as to which she says that they agreed as to the purposes for which it should be settled, included her money as well as his. If any part of her income therefore was mixed up with his funds, so as to be carried by his will in so far as extant at her death, this may reasonably be ascribed to the agreement which they had made for the settlement of both estates. The only evidence to the contrary is what is said by some of the witnesses as to Dr Baxter having stated to them, or to his wife in their hearing, that he had not paid her a farthing from either Alexander or David Edward's estate. But I do not think it doubtful that this was a mere misapprehension. It appears that after Mr James Edward's death in 1876 there was a good deal of difficulty in realising the property of the firm of which he had become the sole partner, that the debts to former partners and their representatives could not be paid till this was done, and that, in particular, there was a great deal of delay in paying Mrs Baxter the share to which she was entitled, either of her father's, or of her brother Alexander's estate. It appears that for three years after Mr James Edward's death, Dr Baxter paid no interest to his wife on account of her share of Alexander Edward's estate, although he was paying interest to other beneficiaries. But she had a double interest in the winding up of Messrs A. & D. Edward's estate, on account of her interest in her father's, and of her interest in her brother Alexander's estate. Dr Baxter, therefore, might very well have spoken of two estates from which she was receiving nothing, and it was not unnatural that her nephews, who were not fully acquainted with the circumstances, should suppose him to have referred to David Edward's estate as one of them. It is impossible, however, that he could have done so, for David's estate was in no way mixed with the realisation of the property of the firm, and he was himself uplifting, as it fell due, the income to which his wife was entitled. He could not, therefore, have represented to her or to her nephews that there was any difficulty in recovering the income from that estate, or any part of it, except with a deliberate intention to mislead; and, as already observed, it is conceded that there is no ground for imputing to him any such intention. The evidence of Mr Kenrick Edward is not so easily reconcileable with this supposition as that of the pursuer, but I cannot say that I have confidence in the accuracy of his recollection as to the particular words used by Dr Baxter, although I do not doubt that he states quite truly the impression which he believes that he received at the time."

The pursuer reclaimed, and argued—The result of the evidence was that Mrs Baxter knew generally that she was entitled to income from David and from Alexander Edward's estates, that she was not getting it, and that she was entitled to get it. She was under the impression that owing to the difficulty of realising the business of A. and D. Edward, she could not get any payments from either estate. In order to make the defender's case complete, it would be necessary for them to prove donation—which they had not done. Acquiescence on the part of the wife, would imply that she knew what was being done with her money, and there was nothing to shew that. From Mrs Baxter's will of 1871 it appeared that she anticipated she would have money to leave; but she could only have it in the shape of accumulations. If Dr Baxter's settlement had been intended to carry both estates, it would have said so. The defenders had failed to shew that Dr Baxter had any authority to receive Mrs Baxter's income, or that he had any authority to dispose of it as he had done. There was no plea open to the defenders that in this accounting part of the wife's money should be applied to the joint expenses of the spouses. The money here survived, and had not been spent as in *Hutchison* v. *Hutchison's Trustees*, June 10, 1842, 4 D. 1399; *Allan* v. *Hutchison's Trustees*, Feb. 1, 1843, 5 D. 469; *Hewats* v. *Robertson*, Nov. 30, 1881, 9 R. 175.

The defenders argued—Dr Baxter had received the sums due to his wife with her authority—such authority as would have been sufficient to discharge the trustee if he had been a separate person. If it were assumed that Dr Baxter had authority to collect the income, then the case on the other side must come up to this, that while Mrs Baxter supposed Dr Baxter was doing one thing, he was doing another. The true position of matters was that the spouses agreed they should have a joint purse for certain purposes. Probably donation was the foundation for the testamentary arrangements; and though there was no direct evidence of donation, yet it was to be inferred from the conduct of parties, and the way the money was treated. The fact that Mrs Baxter got interest on the £1300 due to her from her father's estate, and did not get the income of her share of David Edward's estate, led to the inference that she got the one as pin money, but that *quoad* the other she and her husband were to make a common purse. The will executed by Mrs Baxter in 1871 shewed that she intended her husband to get all her estate in the event of his survivance. Further, Mrs Baxter consented to the settlement by Dr Baxter in 1881, and that deed carried the funds now in question—*Baxter's Trustees* v. *Baxter's Executor, &c.*, June 27, 1884, 11 R. 996; *Newlands* v. *Miller*, July 14, 1882, 9 R. 1104.

At advising—

Lord Mure—This action has been brought by the executor-dative *qua* next-of-kin of Mrs Boyd Baxter to have an account taken of her liferent interest in a share of the residue of the estate of her brother Mr David Edward, which was bequeathed to her exclusive of the *jus mariti* and right of administration of her husband, the late Dr Boyd Baxter of Dundee. The action is directed against the trustees of Dr Boyd Baxter, who left a settlement by which his whole property was appointed to be disposed of by his trustees, to which his wife Mrs Baxter was a consenter. He was one of, and ultimately the sole surviving trustee of Mr David Edward, and the ground upon which the present demand is made against the defenders is, that Mrs Baxter did not receive from her husband payment of any part of the income due to her from Mr David Edward's estate, and that instead of making payment to her of that income he applied it to his own purposes without her knowledge and consent. While this is denied by the defenders, they admit that no regular vouchers can now be produced for that part of the trust funds of Mr David Edward's estate which was liferented by Mrs Baxter, and they state that the income so due to her when received by Dr Baxter was, after the year 1865, generally paid into his own account, or otherwise mixed with his funds, with, as they believe, Mrs Baxter's knowledge and consent.

The case as thus stated is now presented to us for decision in a somewhat different aspect from that alleged on the record. For it is not, as I understand, now disputed that from the date of Mr Edward's death in 1857 down to the month of April 1866 the accounts shew that the payments of interest received on Mrs Baxter's account may be held to have been properly applied. This is distinctly stated in the opinion of the Lord Ordinary to have been conceded in the discussion before him. But his Lordship adds, and I think correctly, that "from April 1866 until Dr Baxter's death the whole amounts passed into his private account, and became mixed with his own funds, and it is conceded that if he were liable to account with his wife's representatives on the same principle as with stranger clients, the defenders could produce no written vouchers to prove payment of his wife's income to herself, and therefore would have no defence to the action in so far as regards the period from 1866. But they maintain, and I think justly, that when a husband has been allowed to receive his wife's income during her life, he is not, in a question with her representatives, to be subjected to the same rules of strict accounting as if he had uplifted the income of a stranger, and that if it be a fair inference from the facts in evidence that the wife had known and assented to the manner in which her income was applied by her husband, her representatives have no claim after her death to recover moneys which she permitted her husband to appropriate or to apply at his discretion for their common benefit."

And his Lordship then goes on to explain the grounds upon which he has come to the conclusion that Mrs Baxter was aware that her husband was receiving the income in question, and was satisfied that he should so receive it and deal with it as he did.

I agree with the Lord Ordinary in the opinion he has thus expressed as to the way in which a case of this sort should be dealt with in a question between a husband and his wife and their representatives, and what we have, as I conceive now to consider is, whether it is a fair inference from the facts here disclosed in evidence that Mrs Baxter was aware of and had assented to the manner in which her money was disposed of, and so approved of and acquiesced in her husband's administration of her estate.

As regards the earlier period of the trust, viz., from its commencement till the beginning of 1866, it appears to me that the evidence is distinct to the effect that Mrs Baxter was in the knowledge of the manner in which the income received from her brother David's estate, or large portions of it, was applied. This is shewn from the accounts-current and other documents which we were referred to at the discussion.

I have examined those accounts, the first of which is kept in Mrs Baxter's own name, and the other in the joint name of Mrs Baxter and her husband in connection with the excerpts from the sederunt-book of David Edward's estate, and with the entries in the print, and I find that the date of the entries on the credit side of those accounts of cash paid in correspond substantially with the dates when a division of income is made among the beneficiaries by Mr Edward's trustees, although the sums paid do not always correspond exactly in the amount with the sums apportioned in the minutes. Thus the entry in Mrs Baxter's own account of £100 on 25th November 1859 is made the day after a larger sum of income is apportioned to her at a meeting of the trustees. The same observation applies to the £100 entered on the 6th of June 1860, while the £120 entered on 26th November is the exact sum as that which is apportioned to her at the meeting of trustees held of that date. These are payments made into Mrs Baxter's in-

dividual account, which on the 10th of December is by her express directions closed after she had herself drawn a cheque upon it for £280, and instructed the bank to open a new account for her moneys in the joint name of her husband and herself.

This account is accordingly opened with the balance of £144, 8s. 5d., which remains of the old account after debiting Mrs Baxter with the cheque for £280, 10s. drawn on the 10th of December, and the next entry in the joint account of £175, 11s. on the 20th of June 1861 is the sum apportioned to her by the trustees on the 12th of June 1861. It is unnecessary I think to follow this matter further in detail, as the same observation applies to the greater part of the other entries on the credit side of this account, and more particularly to those of £407, 3s. 5d. and £250, 13s. 7d., which are the precise same sums as those apportioned to Mrs Baxter of corresponding dates as shown in the minutes of Mr David Edward's trustees.

It is thus to my mind very clearly established that up to the end of 1865 Mrs Baxter knew quite well that she was receiving large half-yearly payments of income from her brother David's estate, and that these moneys, or the greater part of them, were paid into the account which she had directed to be opened in her own and her husband's name, and which was so kept till the year 1866.

In these circumstances, one, if not the main question for consideration is, whether it is proved that Mrs Baxter, as alleged by the pursuers, was kept in ignorance of the fact that this joint account was closed in 1866, and that her income was thereafter mixed up with her husband's funds, and disposed of by him for his own purposes without her knowledge and consent. Of the reason for making this change in the mode of keeping the bank account, or of how it came about, there is unfortunately no direct evidence, but I am quite unable to come to the conclusion that this must have been unknown to Mrs Baxter, and done with the improper motive alleged in this record. She was by that time quite well aware that half-yearly payments of income from her share of her brother David's estate had been regularly set apart for her, and were paid into the account kept in the joint names of her husband and herself, and that these payments were to be continued. It is in evidence, moreover, that they were continued to be made, and, as I understand the evidence of the accountant, Mr Myles, they are to be found entered in Dr Baxter's own account as payments made from David Edward's estate on behalf of Mrs Baxter, and were shewn in several instances to have been invested along with moneys belonging to Mr Baxter in their joint names, and the bonds taken to the survivor. It is, in my opinion, most improbable that in such circumstances the wife was, or could be, kept in ignorance of the way in which her estate was being administered. I should be disposed to hold that the inference was all the other way in any case where a husband and wife were known to have lived for years on a most amicable and confidential footing, which Dr and Mrs Baxter are proved to have done.

Now, upon this the importance of this evidence is distinct. Mr Cheyne, who married one of Mrs Baxter's nieces, says he "was frequently at Craigtay, and had constant opportunities of seeing Dr and Mrs Baxter together. They were about the most united and devoted couple I ever came across. They seemed to have no separate interests, nor diversity of views or purposes; they were singularly united." And he adds at another part of his evidence—"I should think Dr Baxter and she had no secrets from each other." In this Mr Cheyne is corroborated by his wife and by her sisters, the eldest of whom says—"I consider I had ample means of knowing the relations which subsisted between Dr Baxter and his wife. Those relations were always of the happiest and most harmonious kind. (Q) As to Mrs Baxter's confidence in her husband, what would you say? —(A) Beyond question. The harmony which subsisted between them was a noted fact in our family, and frequently spoken of amongst us." In this the family are very distinctly corroborated by the evidence of Mrs Buchan and her sister, who had for long been in Mrs Baxter's service, and there is no evidence to a contrary effect. In the case of parties who had lived for so many years upon the footing thus described the inference is, I think, irresistible, that the husband would not conceal from his wife the way in which her money was dealt with, but would consult with her as to its disposal.

But this is not left to mere inference. The evidence of Mr Cheyne and others of the witnesses shewed that Mrs Baxter knew, generally at least, how her money was being administered and how it was disposed of. In the early part of his evidence Mr Cheyne says that when he and Dr Baxter were conversing about his father-in-law Mr James Edward's estate, which was rather difficult of extrication, "Mrs Baxter would interpose with the remark 'When was she to get her money,' referring, as I understand, to £1300 which came to her from her father's estate. Dr Baxter would say she would get it when the mills were sold, or that she could afford to wait better than others," and he adds that "the debt thus due to Mrs Baxter has not yet been paid." When further examined on the same subject Mr Cheyne says—"When she asked when she was to get her money, she did not do so at all complainingly; it struck me it was rather done jocularly in order to turn the conversation, because Dr Baxter got rather gloomy when he talked of his brother-in-law Mr James Edward's estate. I never heard Mrs Baxter ask her husband to make over any funds to her. I have mentioned the only thing I ever heard pass between them in regard to money. I have no doubt Mrs Baxter knew she had a large yearly income; but I do not know that she knew exactly the pounds, shillings, and pence. I think she knew generally what was being done with her money; but I do not know that she knew on every occasion. I should think Dr Baxter and she had no secrets from each other. Dr Baxter subscribed £10,000 to the College scheme shortly before his death—I think about a year before. The subscription was in Dr Baxter's own name; it took the form of a deed of endowment, to which he and his relative, Miss Baxter of Ellangowan, were the parties. I cannot charge my memory with that matter having been talked about by Dr and Mrs Baxter in my presence, but he and I had many a talk about it. I quite understand the £10,000 was a joint contribution by Dr and Mrs Baxter. In speaking of it he said

—'We think we can give £10,000,' or, 'We cannot give more than £10,000,' meaning, as I understood, himself and Mrs Baxter. Dr Baxter used to call his wife Maggie. (Q) And did he say, 'Maggie and I think we can give' so and so?—(A) Yes; but I could not be sure of that. He did not talk to me of his private matters. To strangers he was very reticent and reserved. I first heard that I was one of the trustees under his will from Mrs Baxter a few days before his death. She handed me his will, saying that I was one of the trustees under it, and had better take charge of it. That is the will which has been called the mutual will, and which is signed by Mrs Baxter. She told me that the late Dr Watson, Dundee, who had been a very intimate friend of Dr Baxter, had been a trustee, but that on his death they had made a new will, in which I was one of the trustees. *By the Court*—(Q) Did she speak of it as 'their' will?—(A) Yes. (Q) You quite understood that she spoke in the plural?—(A) Of course, I saw that the thing was backed a mutual will. (Q) But did she call it 'our will,' or 'my husband's will'?—(A) My recollection is that she called it their will, because she said—'We made a second will after Dr Watson's death.' *Examination continued*—She did not tell me how she had come into possession of the will, but I heard from my sister-in-law, who was living in the house, how it had got into her possession. Mrs Baxter often spoke of her private 'pose.' I imagined at the time that that might be a few pounds that she might have out of which to make presents to her grandnieces, but during her last illness I discovered that it was a sum of about £600 in bank-notes which she had in her wardrobe. I rather think there were a few sovereigns, but the greater part of the money was in bank-notes. There were two or three £20 notes, perhaps twenty or twenty-five £5 notes, and the remainder in £1 notes. Apart from references to that private 'pose,' I never heard anything to indicate that she had a private or separate purse from her husband's."

When examined on the same subject Mrs Cheyne says—"Dr and Mrs Baxter lived together on the most devoted terms. I never heard of a wrangling word between them. Mrs Baxter appeared to have the most implicit confidence in her husband. I never heard anything pass between them to indicate that they had separate purses, or anything of the kind." And she further says—"I can say positively that she never spoke complainingly about her money. She never said anything to lead me to suppose that her husband was keeping back money from her against her will, or anything of that kind. If anything of that sort had passed I must have remembered it."

Similar evidence is given by Mrs Cheyne's sisters, and particularly by Mrs Small, who says with reference to Mrs Baxter's patrimony—"She apparently thought her money was in the mill, and that that was the reason why she could not get it. (Q) Did she say anything about 'It does not matter John, oors is a' ane'?—(A) Yes, certainly I have heard her say that, or something to that effect, more than once;" and when she is further asked—"What was your opinion of their relations in money matters. Do you think Mrs Baxter was willing that Dr Baxter should dispose of her moneys or manage them?—(A) I think she was quite willing her moneys should be in his keeping."

But in addition to all this there is the written evidence of Mrs Baxter herself to the same effect, viz., the will executed by her in 1871, which contains a clause appointing her husband her sole executor, with full power to him to do everything competent to him as executor, "it being understood between us, in the event of his surviving me, that he will execute a deed of settlement or trust-deed to take effect at his death, in the terms and for the purposes settled and known to us both, with such necessary alterations as he may consider called for on account of any change of circumstances which may take place; with this duty he is solely and confidently entrusted, and in the discharge of it no one shall interfere."

Now, this document though inoperative as a will, owing to the circumstance that Mr Baxter predeceased his wife, may, I think, be looked at as evidence, as was done in the case of *Baxter's Trustees*, referred to by the Lord Ordinary (11 R. p. 996), that the spouses were at one as to the disposal of their property, and had talked over its settlement, and that Mrs Baxter was satisfied that her moneys, though paid into her husband's account and invested in his name, should be disposed of by him. This was accordingly done, not by a deed executed after her decease, but by the trust-settlement executed by him during her life with her consent, and duly signed by her in September 1881, and which she herself handed over to Mr Cheyne a few days before her husband's death as their mutual will, in order that he might take charge of it as one of the trustees.

On this state of the evidence, and of the leading circumstances of the case, and having regard in particular to the very confiding terms in which Dr and Mrs Baxter are proved to have lived together for upwards of half a century, I have been unable to come to any other conclusion than that at which the Lord Ordinary has arrived. I think that the fair and reasonable inference to be deduced from all that took place is that Mrs Baxter's income from her brother David's estate was paid into her husband's bank account after 1865, because she wished it to be placed there, and to be at his disposal for purposes as to which they were agreed. During the whole of their long married life they seem to have had no other idea as to their money but this, that their respective funds were to constitute a communion of goods between them. The terms of the will or mutual settlement executed by them in 1828, the year after their marriage, indicated this pretty clearly. For by that deed each conveys to the other all that they respectively possessed. And so matters appear to have stood till Mrs Baxter executed her settlement in 1871, containing the declaration I have referred to. What the deed executed by Dr Baxter between that date and 1881, referred to by Mr Cheyne, contained, we have no means of ascertaining. But there is no reason to suppose that it was framed on any other model than that on which those which have been laid before us proceed. The last of those, viz., that executed by Dr Baxter in 1881, with his wife's consent and approval, and delivered by her to Mr Cheyne to keep as one of their trustees, and which she described as their mutual will, seems to me to show conclusively

that she adopted it as the settlement of their joint estate, in terms which they had deliberately talked over and approved.

On these grounds I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

The LORD PRESIDENT, LORD SHAND, and LORD ADAM concurred.

The Court adhered.

Counsel for Pursuer (Reclaimer)—H. J. Moncreiff—Low. Agent—A. P. Purves, W.S.

Counsel for Defenders (Respondents)—D.-F. Mackintosh, Q.C.—H. Johnston. Agents—Mackenzie & Kermack, W.S.

Thursday, July 8.

SECOND DIVISION.

[Sheriff of Forfarshire.

GRAHAM (COUTTS' TRUSTEE) *v.* WEBSTER.

Bankruptcy—Cash Payment within Sixty Days of Bankruptcy—Fraud.

A debtor while insolvent, and knowing himself to be so, sold a piece of moveable property over which a creditor had lent him money, and with the proceeds paid off the loan in cash. The creditor was no party to having the sale effected, and was not in any way in collusion with the debtor. *Held* that the payment being a cash payment was effectual, and could not be cut down by the trustee of the debtor, who was made notour bankrupt and decree of cessio obtained against him within sixty days of the sale and payment.

Thomas v. *Thomson*, Jan. 13, 1865, 3 Macph. 358, *followed.*

On 20th October 1879 Webster & Littlejohn, solicitors, Arbroath, on behalf of Mrs Webster, a widow, residing at 1 Kersland Terrace, Hillhead, Glasgow, advanced the sum of £200 to Messrs D. & W. Coutts, traction-engine owners, Arbroath. In security of the advance they took a document from the borrowers bearing that they sold thereby to Mrs Webster a traction-engine, threshing machine, waggon, &c. A relative back-letter was however granted stating that the disposition was truly to be held only till the bill of the same date for £200 with interest should be paid, failing payment of which on demand the machine was to be Mrs Webster's. A bill at one day's date was granted by D. & W. Coutts, William Gordon, Arbroath, signing the bill also as an obligant. Interest on the sum of £200 was regularly paid till Martinmas 1884. In 1880 D. & W. Coutts bought a new engine from John Doe, and paid instalments of the price till they had paid £185 up to December 1884, when Doe, who had raised an action for the balance of the price, obtained decree against them therefor with expenses. In this action Webster & Littlejohn acted for D. & W. Coutts by putting in defences and endeavouring to negotiate a settlement, but they did not appear for him at the proof, and decree went by default. About the beginning of September 1884 D. & W. Coutts had begun to get into difficulties. The fact of their being so was known to Webster & Littlejohn. On 8th November 1884 Messrs Webster & Littlejohn wrote to D. & W. Coutts stating that they would require to get possession of the engine sold to Mrs Webster, and sell it so as to save loss; and they stated in this letter that unless Doe could be arranged with the bankruptcy of D. & W. Coutts would probably supervene. On 1st November D. & W. Coutts sold to a man named Clarke the engine mentioned in the disposition to Mrs Webster, and various other articles, and with the proceeds paid in cash £175 to Webster & Littlejohn, having some weeks before paid them £25, in satisfaction of their client's debt. Webster & Littlejohn had nothing to do with bringing about this transaction with Clarke, but it was admitted in this case that D. & W. Coutts knew themselves to be insolvent and thought Mrs Webster had a preferable claim on them, and considered that they had made Doe a reasonable offer, which had been refused.

On 22d December 1884 decree of cessio was pronounced against D. & W. Coutts by the Sheriff-Substitute of Forfarshire, at the instance of David Souter, a creditor.

David Morgan Graham, auctioneer, Forfar, was appointed trustee on the estate of D. & W. Coutts, and on 30th April 1885 he raised an action in the Sheriff Court of Forfarshire against Mrs Webster, with consent of John Doe, for all right and interest competent to him, for £200.

The ground of action as laid by the pursuer appears from the following articles of his condescendence and from his pleas-in-law:—"(Cond. 6) At the time said articles were so sold the said Webster & Littlejohn acted as the agents of the defender, and also as the agents of the said D. & W. Coutts and William Coutts, and the said Webster & Littlejohn and D. & W. Coutts and William Coutts were all well aware that they, the said D. & W. Coutts and William Coutts, were and had been, from at least 1st September 1884, bankrupt and insolvent. In point of fact they were rendered notour bankrupt in or about the beginning of December 1884, and at all events within 60 days of the date when the said articles were sold as aforesaid, and the proceeds thereof paid to or on behalf of the defender. (Cond 7) The whole of the said articles so sold to the said John Clarke had been, on or about the said 17th November 1884, transferred by the bankrupts to the defender, or taken possession of by or on behalf of the defender, and were sold by her or for her behoof to the said John Clarke; or otherwise, the said articles were, on or about said date, sold to the said John Clarke by the defender, or for her behoof, and for the purpose of paying her said claim of £200, or by the said bankrupts on the instructions or at the instance of the defender or her said agents, and for the purpose of paying her said claim *in fraudem* and to the prejudice of the bankrupts' other creditors, the said bankrupts and the defender or her said agents well knowing that said bankrupts were then, as they have been ever since, and still are, bankrupt or insolvent; or otherwise, the said articles were sold to the said John Clarke in the full knowledge by the bankrupts and by the defender or her said agents that the bankrupts were then bankrupt or insolvent, and with the purpose of paying the defender's said claim *in fraudem* and to the prejudice of the bankrupts' other creditors; and the said transfer and sale of