

old mill is not now a public place, for it has for long ceased to exist; and in the view I take of the evidence it never was a public place in the sense in which that expression is understood in dealing with questions of this description. There being admittedly no road beyond the mill in the direction of Cougie, it was not a place the general public had anything to do with, or ever required to go to, and the road to it was merely for the use of those who required to go to the mill, viz., the tenants on the Guisachan property or any other parties who required or were entitled to have their grain ground at the mill. There is, as I read the proof, no sufficient evidence of this road having been used for any other purpose; and as there is no public right of way beyond the old mill it is difficult to see who the public were that were to use the road from Tomich to the mill except those who required to go to the mill. In the most favourable view of the case therefore for the pursuer, the use, as I conceive, amounted to nothing more than the use of a servitude road to a mill, and when the mill ceased to exist, which it did many years ago, that use necessarily came to an end. That is the view I take of the evidence of use apart from the question raised upon the proof, though not upon the record, as to the effect of the expenditure made by the road trustees upon a part of the road for some years prior to 1861. Upon that point I concur in the opinion of Lord Adam.

The Court pronounced this interlocutor:—

“Recal the Lord Ordinary’s interlocutor: Find and declare in terms of the second conclusion of the summons, and of the first alternative of the third conclusion of the summons, with the exception of the portions of the said conclusions relating to the bridge erected across the Leth Alt Burn, of which it is unnecessary to dispose, the said bridge having been removed by the defender since the date of the summons: Find and declare with reference to the fifth conclusion of the summons, and of consent, (1) that there is a public right of way for passengers, horses, and cattle and sheep from Glenmoriston to Strathglass by the road marked No. 5 on the plan, No. 6 of process, produced by the pursuers, from Glenmoriston to the point where it meets the road marked No. 6, and therefrom by the road marked No. 6 on said plan, until it reaches the north side of the Burn Allt Ball a Chladaich, and thence by the track or course coloured brown, and marked with the letters G H on the plan produced by the defender, No. 10 of process, and thereafter by the road leading past Guisachan steading to Tomich, also coloured brown on the said last-mentioned plan; and (2) that there is a public right of way for passengers, horses, and cattle, and sheep by the road from Corriemony, marked No. 7, to the point where it meets the road marked No. 7B on the said plan, and thence past the Guisachan steading to Tomich by the road coloured brown on the said plan produced by the defender: *Quoad ultra* assoilzie the defender from the conclusions of the summons, and decern: Find neither party entitled to expenses.”

Counsel for the Pursuers and Respondents—Sol.-Gen. Robertson—Sir C. Pearson—Guthrie—Macphail. Agents—Hagart & Burn Murdoch, W.S.

Counsel for the Defender and Reclaimer—Asher Q. C.—Mackay—Ure. Agents—J. & A. Peddie & Ivory, W.S.

HOUSE OF LORDS.

Thursday, 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*, June 27, 1884, 21 S.L.R. 670, and
11 R. 996.)

Husband and Wife—Jus Relictæ—Implied Renunciation—Wife’s Signature to Husband’s Settlement.

A husband by his trust-disposition and settlement gave his wife the liferent of his whole means and estate, and in the fourth purpose directed his trustees “after the death of the survivor of me and my said wife, and with her consent and full approval (in token of which she has subscribed this deed),” to pay over a large number of legacies, many of them to relatives of his wife. By the fifth purpose he directed that after the death of his widow his household furniture should be divided among certain of her relatives. The residue was to be devoted to religious and charitable purposes. The wife signed the deed. She survived her husband only a few weeks. Her executor, in a multiplicity brought by the husband’s trustees, claimed her terce and *jus relictæ*, maintaining that her consent had been given to the legacies only, and not to the whole settlement.

Held (*aff.* judgment of Second Division) that the fourth purpose and the antecedent provision of liferent were so intimately connected with each other that the wife by her consent to the legacies must be regarded as having assented to her husband’s disposal of the whole estate.

This case is reported *ante*, June 27, 1884, 21 S.L.R. 670, and 11 R. 996.

The claimant Allan Edward, Mrs Baxter’s executor, appealed.

At delivering judgment—

LORD WATSON—My Lords, I have come without difficulty to the conclusion that the interlocutors appealed from ought not to be disturbed.

The general principles of law applicable to the case have not been disputed. When there is no antenuptial contract, and the husband makes a voluntary provision in favour of his widow, as in full of her legal claims, she is put to her election, and in the event of her death before she has had the opportunity of making her choice, the right

of election passed to her representatives. On the other hand, if the wife has consented to accept the provision in substitution for her legal claims she may retract her consent as a *donatio inter virum et uxorem*, but her right of revocation being strictly personal cannot be exercised by her representatives.

The case of *Borrie v. Coldstream* (5 D. 1297) is an authority to the effect that the consent of the wife may be effectually given by her subscribing for that purpose a testamentary deed of the husband standing unrevoked at the time of his death. The same point was decided by this House in *Dunlop v. Boyd* (3 Macph. (H.L.) 46), in which it was held that the wife's consent remained valid and binding on her representatives, although the husband had subsequently revoked certain portions of the deed which did not affect the wife's provision, or the conditions upon which her consent was given. In *Leighton v. Russell* (15 D. 126) Lord Fullerton (p. 132) expressed an opinion that a wife's consent expressed by her signature to a deed, revocable at the will of the husband, ought not to exclude her legal rights, but his opinion was not shared by the majority of the Court, and it is in direct conflict with the subsequent decision of this House in *Dunlop v. Boyd*. The points actually decided in *Leighton v. Russell* do not appear to me to touch the present case. There the husband survived his wife, and after her decease he revoked all prior settlements executed by him, and made a new testamentary disposition of his whole means and estate. After his death the wife's next of kin sued his executor for their share of the goods in communion at the time of her death, the defence of the executor being that the claim was extinguished by the wife's consent to the revoked settlement. It was admitted that the deed was not extant, and the executor, in order to instruct his defence, brought an action for the purpose of proving its tenor. The majority of the Court gave judgment in favour of the wife's next of kin upon these two grounds—(1) that the efficacy of her consent was dependent upon the deed becoming operative; and (2) that assuming its tenor to have been as alleged by the executor, her consent related exclusively to her rights in the event of the husband dying before her, and had no reference to the rights arising to her next of kin upon her own predecease.

By his trust-disposition and deed of settlement the late Dr Baxter conveyed his whole estate, heritable and moveable, to the respondents as his trustees, with directions, first, to pay debts; secondly, to make certain payments to a college in Dundee; and, thirdly, to pay over the free annual proceeds or income of his estate to his wife, in the event of her survival, during the whole period of her life. The fourth purpose of the trust runs thus—"I direct and empower my said trustees, after the death of the longest liver of me and my said wife, to realise and convert into money all my estate and effects, or such part or parts thereof as they may think proper, or in such manner and at such time or times, and at such prices as they think fit, and after the death of the survivor of me and my said wife, and with her consent and full approval (in token of which she has subscribed the deed), I direct and appoint my said trustees as soon as they conveni-

ently can, or at such time or times as they consider proper, with full power to postpone the payment of any of the legacies underwritten if my trustees think it expedient to do so, to pay to the institutions, societies, and persons after mentioned, or to hold in trust for behoof of such females as are after specified, whose husbands' rights are excluded, the following sums or legacies which I hereby legate and bequeath to them respectively." Then follows an enumeration of legacies to certain institutions and endowments to the amount in all of £26,750, of which £16,000 is given to relations of the wife. The fifth purpose of the trust makes specific bequests of household articles and other personal effects; and by the sixth purpose the testator bequeaths the residue of his estate to such charitable uses as may be selected by his trustees.

Apart from any consent given by Mrs Baxter to her husband's trust-deed, it is clear that had she survived him she would have been put to her election between the liferent thereby provided to her and her legal rights as widow; and the only point arising for decision is whether Mrs Baxter by her subscribing the deed consented to accept the liferent, and thereby deprived the appellant of the right which he would otherwise have had to make an election now. That is a question depending upon the construction of the deed.

I cannot assent to the argument submitted for the respondents to the effect that Mrs Baxter by subscribing the settlement as one of the parties to its execution, without any limitation appearing in the testing clause, became a consenter to all its terms and provisions. It is unnecessary to consider what would have been the effect of her subscription if there had been no reference in the body of the deed to the purpose for which it was adhibited, because part of the deed, the fourth purpose, expressly bears to have been made "with her consent and full approval (in token of which she has subscribed this deed)." I think that declaration must be taken to be conclusive as to the purpose for which she signed, and I am consequently of opinion that her consent cannot be carried beyond the fourth purpose, except in so far as her assent to its provisions necessarily implies approval of other parts of the deed. It appears to me, however, that the fourth purpose, and the antecedent provision of liferent in the third purpose, are so intimately connected with each other that Mrs Baxter must be held by plain implication to have accepted that provision. In the event of her being the survivor of the spouses payment of the legacies bequeathed by the fourth purpose is deferred until her death; and upon the occurrence of that event they are made a first charge upon the estate to be held at that time by the trustees, consisting of the *universitas* of the testator's estate under deduction only of proper debts. In my opinion her consent to that arrangement plainly implies that Mrs Baxter not only agreed that the legacies should be paid, but made it a condition of her agreement that they should not be paid until the expiry of the liferent right provided to her by the third purpose of the settlement.

I accordingly move that the interlocutor appealed from be affirmed, and the appeal dismissed with costs.

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 be-

tween 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 trustor's decease, to the life interest of a fifth share of the residue. The provision was declared to be alimentary, exclusive of the *ius 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 life-entitled 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 life-entitled 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 life-entitled 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