continuous and personal injury, though it may not have gone on up to the time when relief is sought, there arises a different case, and here we have sufficient evidence of such violence. The evidence as to the conduct of the defender shows that he has never done a hand's-turn of work, and lives entirely on his wife's money. Time after time she has had to retreat from her house for fear of his violence. We have her own statement, and further we have the fact that the defender has not come forward to deny that statement. Things have clearly been going on from bad to worse. Her fear has been well founded; and I cannot think that a woman who is being thus treated is bound to abstain from appealing to the Court till she has suffered some grave injury at her husband's hands. On the whole matter, we must recal the interlocutor of the Lord Ordinary, while our judgment will be qualified by the agreement.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the reclaiming-note for the pursuer against the interlocutor of Lord Adam, Ordinary, of date 14th July 1880, Recal the said interlocutor: Find that the defender has been guilty of cruelly abusing and maltreating the pursuer, and that therefore the pursuer has full liberty and freedom to live separate from the defender, her husband, and decern; and ordain the defender to separate himself from the pursuer *a mensa et thoro* in all time coming."

Counsel for Pursuer (Reclaimer)—Macdonald, Q.C. — Thorburn. Agent — Andrew Wallace, Solicitor.

Counsel for Defender (Respondent)—Campbell Smith—Millie. Agent—William Paterson, Solicitor.

Friday, December 3.

FIRST DIVISION.

[Lord Rutherfurd-Clark, Ordinary.

THE TOWN COUNCIL OF EDINBURGH AND ANOTHER *v.* PATERSON.

Statute—Edinburgh Roads and Streets Act 1862 (25 *Vict. c.* 53), *secs.* 30 *and* 33—*Private Street.*

Held that the Town Council of Edinburgh, as in right and place of the City of Edinburgh Road Trust, having executed upon a lane within their district certain operations which amounted to the construction of a new street, and which should therefore have been executed after the procedure prescribed in sec. 33 of that Act, were not entitled to recover the cost of these operations from the adjoining proprietors, who had received no other notice than that provided in the 30th section for the case of repairs of roads already constructed.

Observations on what constitutes a private street within the meaning of the Act.

This was an action at the instance of the Town Council of Edinburgh as in right and place of the City of Edinburgh Road Trust, and Malcolm Skinner Irvine, collector of road assessments, against the defender, who is an owner of lands and heritages having a frontage to Dove Lane, within the city district of roads, for the sum of £104, 8s. 7d., as the proportion duly allocated upon him of the expense incurred by them in putting the carriageway of the lane into a complete and efficient state of repair. The pursuers are, by virtue of the Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. c. 57, sec. 94), the successors and in right and place of the body of trustees constituted by the Edinburgh Roads and Streets Act 1862 (25 Vict. c. 53), and in pursuance of sec. 30 of the latter statute they on 8th April 1879 served a notice upon the owners in Dove Lane, including the defender, calling upon them to repair the carriageway thereof to the satisfaction of the City Road Surveyor; and thereafter proceeded to execute said repairs at their own hand, and at a cost of £272, 15s. 5d., for which they held the owners in Dove Lane liable. The defender denied liability, on the ground that Dove Lane was not a private street within the meaning of the Edinburgh Roads and Streets Act 1862; that the proceedings of the pursuers did not fall within the terms of the section (30) of the statute founded upon, but should have been taken under section 33 thereof; that the repairs, besides being unnecessary, were excessive and costly, amounting in fact to the construction of a new street. A proof was led, from which it appeared that Dove Lane was an ancient public road leading to what was formerly the village of Tipperlin, but for the maintenance of which it did not appear that the defenders, or indeed any other persons, were liable, nor had it in point of fact been regularly maintained as a road by the adjoining proprietors. The nature of the operations executed appears in the opinion of the Lord President.

The Lord Ordinary assoilzied the defender, adding this note:—"1. The first question in this case is, whether Dove Lane is a private street within the meaning of the Edinburgh Roads and Streets Act?

"It is not disputed that it is a public road which has existed for time immemorial, leading to what was formerly the village of Tipperlin. But it is not said that the Road Trustees were bound to maintain it, nor does it appear to have ever been maintained by any public body.

"Though a public road, it may nevertheless be a private street within the meaning of the Act; for by the interpretation clause 'private streets' mean 'streets which are or may be maintained by superiors, proprietors, feuars, tenants, bodies politic or corporate, or other persons, and not by the trustees or the road trustees of the county.

"It appears however to the Lord Ordinary, that according to the true construction of the Act the definition implies an obligation to maintain the street. The Act seems to be intended to regulate the enforcement of an existing obligation, and not to create an obligation to maintain a public road.

"If this be so, the pursuers' case fails; for they have not proved that the defender, or indeed any other persons, were under an obligation to maintain Dove Lane.

"But even if, as the pursuers contended, it was sufficient to satisfy the definition by the Act that Dove Lane was *de facto* maintained by the conterminous proprietors, they would not, in the opinion of the Lord Ordinary, be entitled to pre-

vail; for in his judgment they have not proved the allegation on which their case in this aspect of it is based.

"2. The pursuers contended that by paying no attention to the notice which was served on him, and in which Dove Lane was described as a private street, the defender is barred from maintaining that it is not a private street. The Lord Ordinary cannot assent to that view. The pursuers proceeded at their own peril, and if they are not within the Act, the mere silence of the defender will not bring them within it.

"3. The defender maintained other pleas in defence; but in the view which the Lord Ordinary takes of the case it is not necessary to consider them."

The pursuers reclaimed, and argued—Dove Lane was a private street as defined by the Act, for it was not maintained by any road trustees or public body, but was in part maintained by the respondent, who was an adjoining proprietor, and therefore bound for its maintenance—*Duncan* v. *Cozens*, 1872, 10 Macph. 824. Section 33 does not apply, for it has in view a street not already a public thoroughfare—*Miller*, 1873, 11 Macph. 932; *Burgh of Kinning Park*, 1876, 4 R. 528; *Hope*, 1877, 5 R. 694. The road was unfit for use from want of repair, and the character of that repair must be left to the pursuers—see a case of *M'Gregor* in 1877, not reported.

Answered for respondent—The proceedings taken by the pursuers were null, being taken under the wrong section of the statute—see *Campbell* v. *Leith Police Commissioners*, 4 Macph. 853, and 8 Macph. (H. of L.) 51; in *Hope, supra*, sec. 33, not sec. 30, was proceeded upon. Dove Lane was not a private street.

At advising—

Lord President—The claim made in the present action is for £104, 8s. 7d., being the share said to be due by the defender of the expense of repairing a private street in which the defender is an owner, under the provisions of the Edinburgh Roads and Streets Act 1862. The proceedings have been taken under the 30th section of that statute, and the notice given to the defender, which was dated on the 7th of April 1879, expressly bears to proceed upon that section, and states "that Dove Lane is a private street within the City of Edinburgh District of Roads; that the Magistrates and Council require the said owners to repair the causeway of the said street to the satisfaction of the road surveyor; and that if the owners shall fail or neglect, within fourteen days from the date of this notice, to put the causeway of the said street into complete and efficient repair, the Magistrates and Council will forthwith execute those repairs and levy the expense upon the owners." The objection to this notice, and to the operations which were made upon the street, is, in the first place, that the pursuers have proceeded upon the wrong section of the statute. If the operations which have been made upon the street are of the nature of repairs, then confessedly the notice is given under the right section of the statute, sec. 30. But if the operation was not the repair of the street, but the making or construction of a street for the first time, then the proceedings ought to have been taken under the 33d section of the statute. The construction of a street is called in the statute "the making-up, constructing, and causewaying" of the street; the operation under the 30th section is simply repairing; and the distinction between the two sections in these respects is very important, because in the 30th section it is provided that—"In the event of any private street specified in Schedule C hereunto annexed appearing to the trustees at any time prior to their assuming the maintenance of the same to require repair, and also in the event of any other private street within the district being at any time, in the opinion of the trustees, in need of repair, it shall be lawful for them, so often as the same may happen, to require the owners of lands and heritages in such street to repair the same, by leaving within the dwelling-houses or other premises of such owners respectively a copy of a notice to that effect, which shall be deemed sufficient intimation to such owners; and if such owners shall fail or neglect, within fourteen days from and after the date of such notice, to put the said street in a complete and efficient state of repair, it shall be lawful for the trustees, and they are hereby required, to execute all such repairs upon the said street as to them may seem proper or necessary, and to levy the expenses of such repairs as the same shall be ascertained by an account under the hand of their surveyor, or other officer for the time being, from such owners failing or neglecting as aforesaid, and to recover the same in like manner as the assessment hereby authorised is appointed to be recovered, or otherwise according to law." The 33d section, on the other hand, provides that—"In the case of such private streets as are or may be within the district, and as are not specified in said Schedule C, where the carriageway shall not have been made up and constructed, nothing herein contained shall be held or construed to confer any right on the trustees to compel the making-up, constructing, and causewaying of any such street until they have received intimation in writing from the superior that the said street is an open thoroughfare for public use, or until three-fourths of the intended houses in such street shall either have been erected or are in course of being erected, or the areas for such intended houses shall have been feued under an obligation to erect houses, or until the Sheriff on an application by the trustees or any three or more persons assessed in virtue of this Act, setting forth the circumstances of the case, shall determine that it would be for the public advantage that any such street should be made up, constructed, and causewayed; but in any of these cases it shall be lawful for the trustees, and they shall be bound, to require the owners of lands and heritages in any such street to make up, construct, and causeway the same to the satisfaction of the surveyor, or other officer of the trustees for the time being, by leaving within the dwelling-house or other premises of such owners respectively a copy of a notice to that effect, which shall be deemed sufficient intimation to such owners; and if such owners shall fail or neglect, within three months from and after the date of such notice, to make up, construct, and causeway any such street as aforesaid, it shall be lawful for the trustees, and they shall be bound, to make up, construct, and causeway such street in such way as to them may seem proper or necessary, and they shall levy the expense, as the same shall be ascertained by an account under the hand

of their surveyor or other officer for the time, from such owners failing or neglecting as aforesaid, and shall recover the same in like manner as the assessment hereby authorised is appointed to be recovered, or otherwise according to law." The points of distinction between the two sections are, as I have said, very important. The trustees under section 30 are entitled to proceed upon their own opinion entirely as to whether a street wants repair, but in the case of the making up, constructing, and causewaying they cannot proceed. They are prohibited from proceeding except upon certain conditions, and the condition applicable to the case before us is that the Sheriff on an application by the trustees shall determine that it is for the public benefit that this shall be done; and when that deliverance has been obtained from the Sheriff, then they are to give notice, and to allow three months, instead of fourteen days as in the other section, to the owners and occupiers to make up, construct, and causeway the street themselves. The two operations are undoubtedly of a very different character in other respects. The repair of a street may be a very slight affair, and generally is a very much less important affair than the making up, constructing, and causewaying of a street for the first time, and accordingly the trustees have much more unlimited power in the one case than they have in the other.

If, then, what the trustees have done is not to repair the street, but to make up, construct, and causeway the street—that is to say, to make the street for the first time—it is quite plain that they have proceeded under the wrong section of the statute. That, of course, is a matter of fact, and to be determined upon the evidence. But it is not necessary to go very far into the evidence in order to clear up this matter, because Mr Proudfoot, the surveyor to this Road Trust, is examined as a witness, and when he is asked what is the character of this street as being a public or private street, he says—"It was a private street until recently, when it came to be constructed," referring to the operations of the trustees. "I say that because it was not maintained by the public authorities. With the exception of putting down a little material now and then to prevent danger of accident, they did nothing to it at all." He says further on—"I have seen it often," meaning this portion of Dove Lane. "It was an open piece of roadway, without any proper metal, a channel, or anything to give it the character of an average made road. The Road Trust never took it over at any time, or undertook the maintenance of it. I never saw anything put upon it, with the exception of some stones and rubbish, which I thought came principally from the gardens adjoining on the north side of the lane. Once or twice I have observed barrowfuls of the clearings of walks. In consequence of a letter from the town-clerk, dated 20th December 1878, enclosing one from Macrae, Flett, & Rennie, I examined Dove Lane, and reported to Mr Skinner in a letter dated 25th January 1878." That ought to be 25th December 1878, for that is the date of the letter. "The statements in that letter are correct." Now, that letter is before us, and it states—"This road extends from the east entrance of Abbotsford Park, Morningside Road, to Tipperlin Road, adjoining the entrance to Viewfield House. The east portion of the road in front of Albert Terrace is maintained by the town. The west portion, extending from the west end of Albert Terrace to Tipperlin Road, is still unmade, and is not maintained by the town. This road is in bad order, and is in much the same condition as the Tipperlin Road adjoining, neither of these roads having yet been properly constructed, and they have not been taken over as public roads." Further on, in cross-examination, he is asked—"Is it correct to describe this road from end to end as simply a beaten track, and brown earth with grass growing over it?"—and he replies—"That would be about the character of it from the time I knew it until the Magistrates paved it."

Now, there is a good deal of evidence to the same effect; but it seems to me to be quite unnecessary to go further when we have this clear statement by the road surveyor of the pursuers. The result of his statement is this, that the west portion of Dove Lane, with which we are dealing, was never a made or constructed road or street at all; it was just a public right-of-way over the surface of the ground, to which nothing had ever been done that could be called construction or making up. And what is it that was done by the Magistrates when they came, under their notice under the 30th section, to deal with this lane? They causewayed it from end to end, and at a very considerable expense, as might be gathered from the amount sued for in this action. The amount expended upon this lane, which is 80 yards long, is £272, 15s. 5d. Plainly, that is not the expense of a mere repair of a road of this kind, but the expense of making it; and accordingly the account of the contractor shows very clearly that the operation which he performed under the employment of the pursuers was the laying down and making of a street, with hollow channels, and all the usual accompaniments of a causewayed street. The kind of causeway is described as ordinary mashed rubble stones, and that is not so expensive or so valuable as causeway of a different description; still it is a distinct causewaying of the street.

I am therefore very clearly of opinion that the pursuers here have proceeded under the wrong section of the statute, and the consequence is that their whole proceedings are invalid, and they cannot be allowed to recover this money.

But this ground of objection to the assessment is not that upon which the Lord Ordinary has proceeded, and it would be quite wrong not to notice his grounds of judgment also. And I have no hesitation in agreeing with the Lord Ordinary's grounds of judgment, and think that they are sufficient also for the determination of this case against the pursuers. I am quite satisfied that this was not a private street within the meaning of the Act of Parliament. A private street is defined in the interpretation clause of the statute to mean "streets within the district which are or may be maintained by superiors, proprietors, feuars, tenants, bodies politic or corporate, or other persons, and not by the trustees or the road trustees of the county." Now, there are two requisites here to distinguish private streets from other streets. The one is that they are or may be maintained by private persons, being either superiors, proprietors, or something of that kind; and secondly, that they are not maintained by the trustees under this statute, or by the road

trustees of the county. If these conditions are fulfilled, then the street becomes a private street, as distinguished from other streets, not as distinguished from public streets—for that is not one of the terms of this statute—but from streets generally, and the word "street" is described as including "any square, court, or alley, highway, lane, thoroughfare, or public passage, or place within the district defined in this Act open to be used by carts and carriages." And therefore if there is an open space—no matter whether it be a lane or a court or anything else—or a passage used by carts and carriages which does not answer the conditions of the definition of private streets, then that is a street generally under this statute. In the present case the pursuers' contention is that this is a street which is maintained by the proprietors alongside, and therefore is a private street. The Lord Ordinary is of opinion that unless the proprietors or superiors, or somebody in that position, maintain the street, in virtue of an obligation upon them to that effect, the words of the definition will not cover the street. I think it is not necessary to determine that absolutely, but I should rather be inclined to put this question—Is this street, in point of fact, or has it been, maintained by the proprietors alongside of it in virtue of any obligation imposed upon them, or is it maintained in any way at all answering to the sort of description of maintenance which would be expected of persons who were under an obligation to maintain it? In short, I do not think it is necessary to prove the obligation independently of the maintenance. If a street is maintained by private proprietors, indicating an obligation upon their part so to maintain it, that, I think, might sufficiently answer the description in this interpretation clause. But here there is not only no appearance of any obligation upon the part of the defender and the other proprietors in the street to maintain this lane, but, in point of fact, as I think the Lord Ordinary holds upon the evidence that it had never been so maintained, I quite agree with him in that view. I think the passage which I have already read from the road surveyor's evidence clearly points in that direction; but there is more evidence to the same purpose, the general result of which is that nobody ever repaired or maintained this lane. It was left entirely to itself. Somebody might lay down a barrowful of stones to fill up a hole, or something of that kind, but beyond that kind of temporary repair, which indicates nothing like a general obligation to repair, nothing has ever been done; and therefore upon both grounds I am clearly of opinion that the pursuers are not entitled to prevail.

Lord Deas—It is very plain that this is a notice to repair given under the 30th section of the Act, and that it ought to have been a notice of making up and constructing the street under the 33d section. I think that objection is quite conclusive, and I do not go any further, and do not consider it necessary to go further.

Lord Mure—I agree with your Lordships that this proceeding has been taken under the wrong section of the statute. I think it is perfectly plain, from the reading of the 30th and 33d sections, that they relate to totally distinct matters. The 30th section puts it in the power of the authorities to repair the streets that have been made, and are streets under the statute, and recognised as such. The 33d section, on the other hand, is the section which applies to a lane such as this, which had never been made up regularly into a street before. The distinction is palpable on the face of the statute, and the whole question comes to be, whether or not, as matter of fact, this lane ever was made up into a street so as to bring it into the position of what the 33d section contemplates as a made-up street, and so put it into the power of the Magistrates to enforce the provisions of the 30th section? Now, upon the evidence which your Lordship has referred to—that of the surveyor—and I think there are other witnesses who speak to it—Mr Melville and Mr Niven—it is quite distinct that this lane never was a made-up street in the sense in which that word is used in the statute. In these circumstances I am of opinion that the Lord Ordinary has arrived at a right result in assoilzieing the defender. With regard to the ground upon which the Lord Ordinary has gone, I am also disposed to agree with your Lordship that he has taken a substantially correct view of the statute, even on the ground as to this not being a private street; but I go principally upon the objection raised as to the application of the 30th section of the Act.

Lord Shand—I think the evidence in this case, particularly that of the contractor, and the account of expense which we have with reference to this operation, clearly show that the operation itself was not a repair, but was a making-up, constructing, and causewaying of this road for the first time. That being so, I agree with your Lordship in thinking that the proceedings should have been taken under section 33 of the statute. And this is no mere technical point. It is a matter of substance, of very considerable importance to the persons affected; for if what is proposed is for the first time to make up and construct a new road, then the feuars and persons who are to be at the expense of it are entitled to be heard on the question whether the time has arrived for making up that road. And accordingly I agree with your Lordships in holding that proceedings which really are such as should be taken under section 33 cannot be taken under section 30 under the mere cover of a repair, for if that were allowed it would deprive the feuars of the opportunity of being heard before the Sheriff on the question whether the road ought to be made up at all, or at all events at the time when it was so asked. I may further say that I am not surprised at the course taken by the feuars in this case—the persons whose properties abut on the roadside. They seem to have taken no notice of the notices that were served on them. But then those notices merely informed them that what was about to be done was a repair of the road, and that they should ultimately have to pay for the repair. I confess if I had been placed in the position of one of those gentlemen I should have expected that something a great deal less than the making-up and constructing of the road was to take place, and while quite willing to allow the Magistrates to go on and repair the road and levy from me my share of the expense, I can quite understand that when they found that the thing actually done was not a re-

pair, but the construction of a road by causeway-ing it for the first time at considerable expense, and then levying the expense of it,—finding that for the first time,—they should take the steps which they have done in resisting payment of the amount. It appears to me, for the reasons I have now stated, that having resisted it, their defence is well founded. Upon the other point, of whether this is or is not a private street, I confess I have not the same clear opinion as your Lordship has expressed. I think that is a question attended with very considerable delicacy. The statute is very broad in its provision that where streets are maintained by persons whose properties adjoin, and not by the trustees, these must be regarded as private streets, and I think it is possible that a certain amount of maintenance may be insufficient to bring a street within that character. I prefer in this case to say that I rest my judgment entirely on the first point with which your Lordships have dealt, and that I am not prepared to say that I concur in the opinion that this is not a private street within the meaning of the Act.

The Court adhered.

Counsel for Pursuers and Reclaimers—Lord Advocate (M'Laren, Q.C.)—Kinnear—Jameson. Agent—William White Millar, S.S.C.

Counsel for Defender and Respondent—Trayner—Moody Stuart. Agents—Macrae, Flett, & Rennie, W.S.

Friday, December 3.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

YOUNG (MRS MORISON'S CURATOR) *v.* MORISON AND OTHERS (MORISON'S TRUSTEES).

Insanity—Curator Bonis—*Approbate and Reprobate.*

A *curator bonis* to a lunatic is not entitled to make election on behalf of his ward between legal rights and testamentary provisions, but the right of election is in abeyance during the ward's lunacy, and is not barred by the curator's acceptance of testamentary provisions for the support and maintenance of his ward, but will be available to the ward on recovery, or to her representatives if she dies without having recovered.

The late Alexander Morison of Bognie and Frendraught, in the county of Aberdeen, and Larghan, in the county of Perth, died on 30th December 1879, leaving moveable property of the value of £85,000 or thereby, and heritable property, being the estate of Larghan, of the yearly value of £185. The other estates of Bognie and Frendraught were held by him under the fetters of a strict entail. He left no children, but was survived by his wife Mary Catherine Young or Morison, who became entitled, under an antenuptial contract of marriage, executed on 19th April 1837, by herself and her husband, in the English form, to the sum of £2500 thereby provided to her. With reference to that provision it was by the said contract "agreed and declared that the provision hereinbefore made for the said Mary Catherine Young shall be, and the said Mary Catherine Young doth hereby accept the same, in satisfaction and bar of the dower or thirds and freebench to which by the common law, or by custom or otherwise, she would otherwise be entitled in, from, or out of all or any hereditaments in Great Britain or elsewhere of which the said Alexander Morison now is or shall during the said intended coverture be seized for any estate to which dower or freebench is incident."

Mr Morison left a settlement, dated 5th April 1876, in favour of the defenders, by which he conveyed to them as trustees his whole means and estate, heritable and moveable, and directed them, after making payment of his debts and funeral expenses and the expenses of the trust, to invest the whole residue in heritable securities, Government funds, or the mortgages or debentures of any incorporated company, and to expend the whole income thereof for the comfortable maintenance of his said spouse, over and above her rights under the marriage-contract, and also under a bond of annuity granted by him in her favour over the entailed estates for £900, to increase to £1800 upon the death of the widow of the previous heir of entail. Certain legacies were also bequeathed by the truster, but these were of comparatively small amount, and their payment was postponed till the death of his wife, and he declared that it should be imperative upon the trustees to expend the whole of the said income for her support and maintenance. He further directed that upon her death, should she survive him, the said residue should be paid over by the trustees to certain parties named, for the benefit of Dr Scott's Hospital for decayed business men and women in Huntly, for the purpose of erecting and endowing an additional wing, to be called Morison's Wing. On 17th March 1880 the pursuer was, upon the petition of himself and his sister Mrs Grace Julia Young or Carlyon, being the next-of-kin of the said Mrs Morison, appointed her *curator bonis* in respect of her mental incapacity; and on 31st May 1880 he raised the present action to have it found and declared that his ward was entitled to one-half of the moveable estate of her said husband in name of *jus relictæ*, and that the defenders, as trustees foresaid, should be ordained to hold count and reckoning with him as *curator bonis*, and make payment to him of the sum of £60,000, or such other sum as should be ascertained to be due by them as the balance of their intromissions with Mr Morison's estate, with interest. The defenders pleaded that the pursuer as *curator bonis* was not entitled, on behalf of the widow of the truster, to claim her legal rights, and that these were barred by the terms of the contract of marriage.

The Lord Ordinary (CURRIEHILL) dismissed the action as prematurely brought. In the note to his interlocutor, after narrating the facts before mentioned, his Lordship said—" . . . The sum provided to Mrs Morison by the marriage-contract (which is in the English form) is £2500; and in addition to that sum and the said bond of annuity the free income which she is entitled under her husband's settlement to have supplied for her support is the annual income of his moveable estate, which both parties are agreed is of the value of about £85,000, and the income of his