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

unentailed estates, which is about £180 per annum. In the event of Mrs Morison's recovery she is herself to receive the whole free income of all his estates, payment of the legacies being postponed till her death. She is thus, at all events during the continuance of her mental ailment, very amply provided for.

"Now, *prima facie*, it is not very easy to see what benefit this lady could derive from the present claim of her curator being sustained, and the question is therefore forced upon the Court, whether there are any circumstances disclosed on the face of this record sufficient to justify the present action?

"It is not said, and there is no reason to suppose, that the trustees are mismanaging the trust-estate of the lady's husband, or are misapplying the income; and as they are directed to retain the whole estate during Mrs Morison's lifetime, it is quite clear that if she should ever be restored to health she will then be entitled to raise the whole question of election, which cannot be decided without discussing some difficult matters of domicile and the construction of the English antenuptial contract. My opinion is that the *curator bonis* has failed to present any case warranting the interference of the Court *in hoc statu*.

"Were he to succeed in this action, his ward would not, in my judgment, be in any way benefited, however much her next-of-kin might be benefited were she to die in her present state of mental alienation. And it is not unimportant to observe that the pursuer, who is brother of Mrs Morison, and consequently one of her next-of-kin, was appointed one of her husband's trustees, but declined to accept that office, and after having been appointed her *curator bonis*, has in that character raised the present action. On the whole, I am of opinion that the action is, to say the least, premature and uncalled for, and ought to be dismissed; but of course it will be in the power of the curator to renew his claim in the event of any natural change of circumstances."

The pursuer reclaimed, and argued—The wife's claim for *jus relictæ* arose at once upon her husband's death, and her *curator bonis* had no choice but to vindicate it; the trustees must show that the testator's provisions are better for her, and of this at anyrate the curator is entitled to judge—*Cowan* v. *Turnbull*, June 13, 1845, 7 D. 872, and 6 Bell's App. 222, *per* Lord Cottenham; the question of election is in the hands of the Court. If the wife were *sui juris*, the trustees could not ask her to postpone election, for she is a creditor of her husband's executors—*Fisher* v. *Dixon*, June 14, 1840, 2 D. 1121, and July 6, 1841, 3 D. 1181, *aff.* April 6, 1843, 2 Bell's App. 63, where a curator had to judge between accepting a provision and coming to an arrangement with the trustees; in doing so he must do his best for his ward, and cannot alter the character of her succession—*Hannay*, Nov. 15, 1843, 6 D. 40; Fraser on Parent and Child, 502. The trustees here do not seem inclined to come to any arrangement, but maintain they are bound to expend a sum of money on the ward which she cannot enjoy, and which is really prejudicial to her health. (In answer to inquiries from the bench, the pursuer's counsel stated it to be the opinion of Mrs Morison's medical attendant, that though her mental illness had no tendency to shorten life it was incurable, and that she was not in a position to enjoy luxuries procurable at great cost, and that the present income of the residue of the estate was £4000 per annum.) *Jus relictæ* can only be barred by express terms—Erskine, iii. 9, 16; Fraser, H. and W., ii., 160; *Trevelyan*, Mar. 11, 1873, 11 Macph. 516. The expressions in the present case cannot include it—*Keith*, July 17, 1857, 19 D. 1040; *Panmure*, Feb. 29, 1856, 18 D. 703; *Breadalbane*, 14 S. 209, and 2 S. and M'L. 377; *Hogg*, July 12, 1804, 4 Paton, 581.

The defenders argued—The curator is bound to protect the interests of the wife, but not entitled to set aside the will of the husband where, as here, he has done his best for all—*Cowan, supra, per* Lord Jeffrey, 7 D. p. 881; *Blaikie* v. *Milne*, 1 D. 18, *per* Lord Cunningham. The right of election passes to the next-of-kin—*Hewson*, 23 Law Journal, Chancery, p. 257; Hope's Law of Lunacy, 339; *Robertson*, 1841, 3 D. 345. The words used in the marriage-contract are equivalent to an express bar of *jus relictæ*—see Keith, *supra, per* Lord Curriehill.

At advising—

Lord President—The pursuer in the present case is the *curator bonis* and brother of a lady who is unfortunately at present a lunatic, the widow of the deceased Alexander Morison of Bognie. By his settlement Mr Morison made certain provisions in favour of his wife, who was also then a lunatic, directing his trustees to invest the residue of his estate in good securities, and spend the whole income of the sum thus invested for her comfortable maintenance, "Provided always, and it is hereby 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." He further postpones payment of certain legacies till the death of his spouse, and on that event taking place dedicates the residue of his estate to certain charitable purposes. Now, Mrs Morison had not renounced her legal rights, and the present summons concludes for declarator against the trustees of her late husband that she is entitled to one-half of his moveable estate in name of *jus relictæ*, and to one-third of the free rents of the fee-simple lands in which he was infeft at the date of his death in name of terce, and that the defenders, as his trustees, should be ordained to hold count and reckoning therefor with the pursuer as her *curator bonis*. The meaning of that is, that the pursuer as *curator bonis* intends to elect for his lunatic ward to take her legal rights. The trustees object, and say the *curator bonis* has no right to make such an election; and he, on the other hand, maintains it to be for the benefit of his ward or of her estate to make the election, because if he does not now do so, he and his ward must accept payment of the provisions made in her favour by her husband, and such acceptance will operate as an election, and bar any subsequent election by her, of her legal rights. If I were satisfied that such would be the effect

of our adhering to the judgment of the Lord Ordinary, I should think the question an important and difficult one. But I am not satisfied that the wife's election of her legal rights will be barred by her receiving payment in the meantime of her husband's provision for her, and I must hold that the right of election may and will be available to her if she becomes sane, and even though she dies lunatic will be still available to her representatives after her death. Hence it is clear that the *curator bonis* has no legitimate interest or right to make the election for his ward at present. In previous cases the maintenance accepted was not a testamentary provision, but a portion of the estate to which the lunatic had right independently of the provisions of the settlement, as in the case of *Cowan* v. *Turnbull* cited to us. But many others may be referred to, and first the case of *Morton* v. *Young*, Fac. Coll., Feb. 11, 1813. That was a case of legitim, but there is no difference in the application of the principle. The testator there, Robert Anderson, gave large provisions to his only son, with substitution to others. The son was a lunatic, and the substitution, if it took effect, would defeat the son's right of legitim if he died lunatic. The substitution was challenged, and the Lord Ordinary (Polkemmet) pronounced this interlocutor:—"Finds that from the acknowledged imbecility or idiotry of James Arnot Anderson he cannot be held to have accepted the settlement executed by his father in his favour, with the substitution to the persons therein mentioned, so as to bar his representatives from repudiating said settlement and from claiming in lieu thereof, first, his legitim, which on his father's death fell to him in his own right," &c. It was there held, that so long as the party is a lunatic incapable of making an election, his failure cannot tell against him or his representatives, but that the latter are entitled on his death to repudiate the provisions of the settlement, even although the lunatic had been supported by these provisions. After some discussion, the other Judges, with the exception of Lord Meadowbank, concurred, Lord Craigie remarking that the question was just the same as if the tutor had done no act whatever—that is to say, had not accepted of any maintenance whatever. The earlier case of *Robertson* v. *Ker*, M. 8202, reported by Kilkerran under the head of Legitim, p. 333, is to the same effect, though conflicting on different grounds, with which I need not trouble your Lordships. We now come to the case of *Cowan* v. *Turnbull*, affirming the principle that during lunacy the lunatic cannot exercise the right of election between testamentary provisions and legal rights, and that no one can make it for him. There there was a direction to trustees to entail the estate of the truster on the recovery or death of his only child, who was lunatic, but the personal estate and the rents of the heritage prior to the execution of the entail were left undisposed of, and consequently belonged to the heir, so that his curator did not require to avail himself of the provisions of the settlement for his maintenance,—but the general principle was clearly affirmed. The first conclusion of the summons in that case deserves to be attended to. The pursuer asked for declarator that *hoc statu* it is not incumbent upon him, in the exercise of the powers or discharge of the duties of *curator bonis* of his ward, to elect on his behalf between his right of legitim and the provisions in his favour of his father's deed of settlement, and that notwithstanding such election should not be made by him, and notwithstanding the sums necessary for the ward's support and maintenance "being supplied from the estate under the charge of the trustees of his father, . . . the right of the said Thomas Turnbull (the lunatic ward) to make such election in the event of his recovery, or in the event of his dying without having recovered or without having elected the right of his legal representatives to claim his legitim, shall remain entire and unimpaired." The conclusion thus clearly assumes that the curator will not succeed in vindicating the rents of the estate not disposed of by the testament, and so he concludes for a declarator that he may still elect even if obliged to take under the provisions of the will. And, accordingly, the decree of the Court is in terms of the first conclusion of the summons, and finds the heir entitled to the undisposed-of rents of the estate, without prejudice to the right of election by him or his legal representatives. That is therefore a decision in express terms to the effect I have mentioned. I may refer to Lord Campbell's remarks in the House of Lords upon the objection to the form of the decree, that it would allow the representative of the heir upon his death to claim the legitim without accounting for the benefit which he has received under the will. His Lordship said it was quite unnecessary for the decree to make any express provision upon that subject. The point finally decided was that the surplus of the intermediate rents and profits should in all events belong to the son. Upon his death the election might be exercised, and if legitim be preferred it could only be done by giving credit or accounting accordingly. Now, upon these cases we may say it is settled law that when a party cannot elect, the right is not lost by his failing to do so, or by his taking the benefit of the testamentary provisions in his favour, so long as he continues in a state of lunacy, but that the right to elect subsists and will be effectual to him on his recovery or to his representatives if he dies insane. Now, that being so, the pursuer in this case has no legitimate interest in pursuing this action—of course he has a personal interest,—but his interest, and that of all, is protected by the rule of law referred to, and his present proposal is therefore premature and quite unnecessary. I am therefore for adhering to the interlocutor of the Lord Ordinary, and I think it unnecessary now to deal with the question of the effect of the provisions of the marriage-contract.

Lord Deas—I should be sorry to throw any doubt upon what has been stated by your Lordship with reference to the authorities, or upon the right of the representatives of this lady, if she dies insane, to exercise their legal option. At the same time, I do not think it necessary to anticipate the question; for to entitle the pursuer to exercise the right of election now, I think it would be necessary for him to show it to be for the personal benefit of the lunatic that it should be exercised, and that is not shown by the fact that it would be for the benefit of her next-of-kin or of her estate. Further, I think he would require to show that is probable that his ward would have so exercised the option. Now, it is plain that it cannot be shown that the exercise of the option

would be for the personal benefit of the lunatic, and if she were to recover, it is not by any means clear that she would exercise it in favour of her legal rights. I think it probable she would not. Her husband has been liberal to her to excess, and it is not natural for a widow in that situation to do anything contrary to what has been done for her by her husband. Both the elements necessary to the success of the pursuer's present case are thus wanting, and that being so, I am prepared on these grounds alone to adhere to the Lord Ordinary's interlocutor.

Lord Mure—If it were necessary now to decide the question whether or not the curator is entitled or bound to make the election on behalf of his ward, I should have some difficulty in doing so satisfactorily to my own mind. If the interests of the estate under his care were alone to be considered, there would be strong grounds for saying the election should now be made. But the interests of the lunatic herself must also be taken into account, and we must see they are duly secured. Now, I have always understood the rule to be that the curator had to preserve the estate in as nearly as possible the same condition as it was in when he was appointed to manage it. This lady may recover, and may prefer the large annuity settled on her by her husband to taking the half of his moveable estate, and if the curator were allowed to elect now in favour of the latter, could she on her recovery repudiate that election? I offer no opinion on that point, but the question might arise, and I am of opinion that we should not allow the curator by electing at present to put his ward in a position to which in the event of her recovery she might be opposed. I am therefore for adhering.

Lord Shand—I agree with your Lordships in holding that the *curator bonis* is not entitled to exercise his ward's right of election on her behalf at present, and that the action should be dismissed, and in doing so I adopt entirely the grounds stated by your Lordship in the chair. If I were of opinion that the representatives of this lady, in the event of her dying without recovering, would be at her death precluded from exercising the right of election, I could not have concurred in the judgment, for in that case, if the curator failed to elect, the right to elect would have been lost to the lady, and her representatives I should then have held entitled and bound to make the election. The only question is, What is for the benefit of the lunatic? The pursuer in judging for another is bound to elect so as to enlarge the estate, for that is for the benefit of his ward. In the present case, if the right of election were now exercised, this lady would simply have a legal claim for half her husband's estate, about £40,000, but she might, if she chose, accept provisions of less value, adopt her husband's will, and renounce her legal rights. The curator, however would not be entitled to do so, and if his actings were to preclude her right to elect I could not allow him to make the election now. Of course, she might adopt the terms of her husband's settlement, but that would require an exercise of will on her part which the curator could not make on her behalf, and the Court cannot assume that she would do so without more information as to the relations which subsisted between husband and wife. But I agree with your Lordship in the chair, that on the authorities her representatives have the right of election at her death, and that confirms the view that the law regards it as for the benefit of the lunatic that her estate should be enlarged. No other principle could give her representatives that right, but they have it because the lunatic herself had the right to enlarge her estate. There is, moreover, no necessity for the right of election here being exercised. There are no interests of families involved. Had there been so, I should have been inclined to say it should have been exercised under the direction of the Court, and in the direction of increasing the ward's estate.

The Court adhered.

Counsel for Pursuer and Reclaimer—Kinnear—Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defenders and Respondents—J. G. Smith—Gebbie. Agents—Adamson & Gulland, W.S.

Tuesday, November 30.

FIRST DIVISION.

[Lord Craighill, Ordinary.

LE CONTE *v.* DOUGLAS AND RICHARDSON.

Reparation—Wrongous Use of Diligence—Persons Liable—Poinding—Small Debt Act (1 *Vict. c.* 41), *sec.* 20.

A poinding under a Small-Debt decree and subsequent sale of goods, consisting of articles of household furniture, pictures, prints, and engravings, slumped together in the report of poinding and valued at various nominal sums, to make up the amount of the debt and expenses, *held* in the circumstances to be illegal and oppressive, there having been no serious or substantial valuation by the appraisers of the effects poinded, and the officer who executed the poinding, as well as the poinding creditor, who had adopted the actings of the officer, found liable in damages.

Question, Whether it is necessary to put the appraisers in a poinding of this nature on oath?

The pursuer Le Conte on 19th June 1879 raised an action against the defender Douglas, in which he sought reduction of (1) an execution or report of poinding dated 20th May 1879, following upon a decree of the Sheriff Small-Debt Court of Midlothian obtained against him on 12th July 1876 at the instance of the said defender; and (2) an execution or report of sale following upon said poinding, dated 23d May 1879; and to have the goods thereby said to have been legally poinded and sold restored, or £195 paid to him as the value thereof; and further, to have a sum of £300 paid to him in name of damages. Thereafter on 27th October 1879 he raised another action containing similar conclusions against the defender Richardson, the sheriff-officer who carried through the said poinding and sale, and sought to have this conjoined with the former action. This was done accordingly, and a proof allowed in the