

doubt that the MS. is conclusive on the subject ; and I agree with your Lordship in thinking that that document is entitled to weight.

The Court adhered.

Counsel for Complainers — Kinnear — Low.
Agents—Macandrew & Wright, W.S.

Counsel for Respondent—Asher—J. P. B.
Robertson. Agents—Mackenzie & Black, W.S.

Friday, December 3.

SECOND DIVISION.

[Lord Adam, Ordinary.

M'GAAN v. M'GAAN.

Husband and Wife—Separation.

Where a woman proved on the part of her husband continuous intoxication followed by threats and personal violence, which caused her reasonable fear for her life, the Court granted decree of separation, the wife having agreed to pay her husband an alimentary annuity of £25 out of her separate estate.

Mrs M'Gaan raised an action of separation and aliment against her husband on the following grounds, as stated in her condescendence:—Almost immediately after her marriage she became aware that her husband was much addicted to drinking. In April 1877 his drinking habits had increased to such an extent that scarcely on any night did he return home sober, while his language was most violent and abusive. In the month of June he returned one day about twelve noon from his work much intoxicated, and finding his wife in bed, to which she was confined, as his violence had made her ill and nervous, ordered her to rise, threatening that in the event of her not doing so he would throw both her and the bed over the window. Afraid to live with him, she then went to reside with her sister in Ayrshire for about a month, but on her return she found no improvement in his behaviour. He still continued to come home drunk, threatened to murder her, pushed her about, pinched and squeezed her, twisted her arms, and otherwise maltreated her. In the month of March 1879 he came home one night late very drunk and very violent. He knocked over some of the furniture, threw water in his wife's face, and on his threatening to do for her she in her terror took refuge with a neighbour for the night, and when she returned next day he locked her out of the house. In the afternoon he admitted her, and on his promising amendment she was persuaded to remain with him. In June 1879 he one day came home drunk, behaved with the same violence, and by his threats compelled her again to seek shelter in the house of her nephew. In July 1879 he again compelled her to escape from his violence to some friends in Glasgow, where she remained about a month. In October he again drove her in terror from the house, to take refuge in the stair, where she remained for about an hour. There she induced one of her neighbours to accompany her back to the house in order that she might get her hat and

jacket. She remained in lodgings for about a week, and only returned home on his promising that he would leave her in peace for the future. In February 1880 he was continually intoxicated, and very violent and abusive. On one occasion she locked herself into her bedroom, but he smashed the panel of the door with an axe and burst it open, threatening to do her bodily harm. On another occasion he threatened to kick her out of the house and to take her life. He seized her, twisted her arm, tearing her dress, and as she much frightened ran to the door he shut the door on her, squeezing her severely between the door and the doorpost, and injuring her severely. She shortly after managed to escape from him, and took refuge in the house of their next-door neighbour, after which the pursuer removed to a friend's house in Edinburgh, where she still remains. He lived entirely on money belonging to the wife, and though he in 1877 was earning a salary of £100 as a traveller in a wine merchant's firm in Leith he never contributed anything to her support.

The defender in defence denied the alleged threats and acts of violence, stating that it was owing to the pursuer's irritable temper that they could not live happily together.

In the proof which was taken in the case before the Lord Ordinary the pursuer's averments were substantially proved, and no attempt was made by the defender to meet those averments.

The Lord Ordinary (ADAM) assolized the defender from the conclusions of the action.

The pursuer reclaimed, and it was argued for her—She was entitled to decree of separation, because (1) in point of fact the alleged continuous intoxication, violence, and threats were clearly proved; and (2) in point of law it was enough to show that there had been well-founded fear produced by threats or violence used when under the influence of continuous intoxication.

Authorities—*Paterson v. Russell*, August 9, 1850, 7 Bell's App. 337; *Fulton v. Fulton*, June 28, 1880, 12 D. 1104.

It was agreed by the parties at this stage of the case that a minute of agreement should be put in process by which the defender agreed to decree of separation being pronounced against him; the wife on her part undertaking to pay her husband an annuity of £25 out of her separate estate.

At advising—

LORD JUSTICE-CLERK—(who delivered the judgment of the Court)—It is not necessary for me to go into the grounds on which we were prepared to alter the judgment of the Lord Ordinary. I think the proposed agreement is perfectly right and proper; but we must give judgment on the evidence. I am quite of opinion with the Judges in *Fulton's* case, and that of *Paterson*, that mere habits of intoxication are not good grounds for separation when taken by themselves. The decision in *Paterson's* case was to the effect that mere moral torture, but unaccompanied by such violence as rendered it impossible for the woman to live with the husband, was not sufficient to warrant separation, and the Judges in *Fulton's* case regretted they could not give effect to intoxication continuous and chronic when unaccompanied by acts of personal violence.

Where, however, on the other hand, there is

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 Rutherford-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-