give the machinery a trial within a reasonable time.

It is maintained for the defender, in argument, although that is not stated on the record, that it was also implied in this contract that the boiler should be capable of producing steam to the extent mentioned without intermission for a period of 18 hours.

I am of opinion that no such condition was attached to the contract, and that the peculiar application of the water in the defender's manufacture was a matter with which the pursuer, as an engineer, had no concern, unless it had been clearly explained and explicitly made a condition to which he expressly assented. I think it proved that no such condition was imposed or undertaken. It is never referred to in the condescendence, nor is it even mentioned in the record. Further, the defender has endeavoured to prove that no locomotive boiler could have fulfilled this condition, or could have been of any use to them. If it were so, I think the risk lay with them, if the pursuer furnished the article they ordered. I am not impressed by the evidence of Mr Gwynne on this subject. He might very well have regarded continuous service as not excluding some temporary intermission. The defender, on the other hand, had the oportunity at Chatham of seeing the working of a locomotive boiler precisely similar, and no objection on that head prevented the completion of the contract.

6. The boiler was supplied in May 1871. It is now quite clear, although the truth was only partly suspected before, that the pipes were at first so insufficiently laid that it was impossible for the pump furnished by the pursuer to have a fair trial. They were raised and relaid in March 1872. It follows (1) That it does not appear whether the pump, under a pressure of 40lbs. of steam, would have fulfilled the original conditions. It never was tried. (2) That had the pursuer known the actual state of the pipes, he probably would have made no new bargain for the boiler until they were properly laid. And (3) that from causes for which the defenders are responsible, the boiler was not tested in terms of the contract, but the trial of it was delayed for a year.

7. The defenders wrote on the 10th of May finally rejecting both the pump and the boiler. I do not see on what ground it could be said that the pump had failed to fulfil the conditions guaranteed: for the trial which was afterwards made, on the 24th of May, showed that if the application of steam had been continuous the pump could have raised more than the stipulated amount of water to the stipulated height. Much argument was stated on the terms of the stipulation that the pump and boiler should be satisfactory to the defender; but that satisfaction had regard expressly, first, to the working being economical, and second, to the quantity of water. And as to these, (1) There is no ground for saying that the working was not economical, and this was not maintained as a distinct and separate defence. And (2) the second depends entirely upon the quantity of water stipulated for by the contract, and this was fully satisfied.

8. All the trials were imperfect, and the last was stopped by the pursuer himself. We cannot tell for how long the boiler would have maintained the pump at the requisite power, but I think it must be assumed against the pursuer that it could not have done so for 18 hours without some intermission. It certainly has not done so or for any period approaching it; and if that result was guaranteed, the guarantee has not been fulfilled. From these facts I am of opinion:—

(1) That there is no ground for holding that the pumping apparatus has been proved inefficient.

(2) That the pursuer gave no guarantee that the boiler would produce steam power to the stipulated extent for 18 hours, or for any specific time without any interval for cleaning; and that in all respects it was conform to contract.

(3) That the trial was delayed, owing to the fault of the defenders, beyond a reasonable period.

I therefore am for altering the interlocutor of the Lord Ordinary, and for giving decree for the amount sued for.

The other Judges concurred.

Counsel for Pursuers—Millar, Q.C., and Burnet. Agents—Adam & Sang, W.S.

Counsel for Defenders — Solicitor-General and Marshall. Agent—J. Patten, W.S.

Tuesday, December 9.

SECOND DIVISION.

[Sheriff of Forfar.

TOSH (OGILVY'S CURATOR) *v.* OGILVY.

Evidence—Deposit-Receipt — Indorsation—Intromission—Lunatic.

A endorsed a deposit-receipt which she delivered to B, her brother, with whom she resided. B endorsed the receipt to a bank and got payment of the money contained therein, which he stated he handed to A. Thereafter A became insane, and a *curator bonis* was appointed to manage her estate. In an action at his instance against B for payment of the sum of money contained in the receipt,—*Held* that B had failed to prove that he had discharged himself of his intromissions with the sum in question, and that he was liable in payment to the curator.

The summons in this suit, at the instance of Alexander Tosh, accountant in Dundee, as *curator bonis* to Miss Jane Ogilvy, sometime residing in Roods, Kirriemuir, now an inmate of the Royal Lunatic Asylum, Montrose, against James Ogilvy, residing at Corgibben, Cortachy, in the county of Forfar, concluded for payment of £296, "uplifted and received by the defender for and on account of the said Jane Ogilvy, from the branch of the National Bank of Scotland at Kirriemuir, upon or about the 31st day of July 1868, and which was contained in a deposit receipt granted by the said bank in favour of the said Jane Ogilvy, of date the 13th July 1868, which receipt the defender caused or procured the said Jane Ogilvy to indorse and deliver to him, and which sum of money contained therein he uplifted and received from the said bank on delivery by him of the said deposit receipt so indorsed, with the indorsation also of his own name added thereto, and which sum of money the defender failed to pay or account for to the said Jane Ogilvy, and it is accordingly still due and resting owing by him, with interest on the said sum of £296 from the said 31st day of July 1868 till payment, as also with expenses."

The Sheriff-Substitute (ROBERTSON), after a

proof, pronounced the following interlocutor:—

"*Forfar*, 18*th January* 1872.—The Sheriff-Substitute having heard parties' procurators, and having made avizandum with the proof and whole process, Finds it proved that the defender's sister Jane Ogilvy went to reside with the defender at his house at Parknook in March 1868: Finds that she had been in a nervous and excited state of mind for some months prior to this time; Finds that after she went to reside at Parknook her state of mind became gradually worse, until she was removed to an asylum in September 1868: Finds that in July 1868 she indorsed a deposit receipt for £296 or thereby, which sum was lying at her credit in the National Bank at Kirriemuir: Finds that the pursuer has failed to prove that Jane Ogilvy was either induced or compelled to indorse this receipt by her brother the defender: Finds it proved that the money was uplifted and delivered up to Jane Ogilvy by the defender: Finds that this was done by the express wish and instructions of Jane Ogilvy herself: Finds further, in point of fact, that the pursuer has failed to prove that the defender was either warned or that he knew that his sister was unfit mentally to manage her own affairs at the time this deposit receipt was negotiated. Therefore, in point of law, finds that the defender, having acted as his sister's messenger, is not now accountable for the money he then unlifted and delivered over to his sister; therefore assoilzies him from the conclusions of the summons, and ordains the expenses of the present litigation to be paid by the pursuer as *curator bonis* to the said Jane Ogilvy; remits to the auditor to tax and report in the ordinary way, and decerns.

"*Note.*—The Sheriff-Substitute is not surprised that this action has been raised, for although he has assoilzied the defender there are circumstances connected with the disappearance of this money which reflect upon the defender's discretion if not upon his honesty.

"It must be observed that the object of this action is to make good a loss, not to reduce a donation. It would require strong evidence of intimidation and *mala fides* to support the pursuer's position. The evidence led merely raises a suspicion, it does not establish *mala fides*. The medical men to whom the Court must naturally look for assistance in cases of this nature do not appear to have warned the defender that his sister was unfit to manage her affairs. The only caution given to him about his sister was to 'look after her.'

"In a case of gradual mental decay, extending over many months, it is one of the most difficult points in medical jurisprudence to say exactly at what date unfitness to manage money matters arises. This point has given rise to many jury trials, and not a few actions of damages. Now it is proved that Jane Ogilvy, at the time she went to reside with her brother, understood her affairs well enough. She asked her nephew to hand over to her the documents and receipts she had left in his house, where she resided a short time. She examined and counted them over, expressing herself satisfied with their accuracy. She retained them in her own custody all the time she lived with her brother, until the doctors at last, in September, spoke out and declared her unfit to reside there any longer. There is no evidence of oppression or unkind treatment by the defender. His sister was free to come and go, and had she been ill-used or intimidated, she could have returned to her own house in the Roods of Kirriemuir. The allegation that the defender caused and procured her to indorse and deliver over to him the deposit receipt in question is unsupported by any evidence; it is a mere averment. And if so, the negotiation of the receipt was only the carrying out of Jane Ogilvy's wishes, for which the defender cannot be held responsible. It certainly would have been more satisfactory had the defender taken advice how to act at this juncture, knowing, as he did, that his sister's mind was affected. But seeing that the medical men never imparted to him their real views as to his sister's mental state, he may well be excused for not knowing the exact time at which she should have been cognosced—a point which has puzzled many juries, and on which probably no two medical men would agree.

"For these reasons, the Sheriff-Substitute declines to order the defender to make good the loss of the money sued for."

On appeal, the Sheriff (HERIOT) pronounced the following interlocutor:—

"*March* 28, 1872.—The Sheriff having considered the appeal for the pursuer against the interlocutor of 18th January last, along with the relative reclaiming petition and answers, and having also considered the record, proof, and whole process, dismisses the said appeal, and adheres to the interlocutor appealed against, and decerns.

"*Note.*—Jane Ogilvy went to reside with her brother the defender in March 1868. She was not very well at the time, her mind being to some extent affected. She continued to gradually get worse until the end of September, when she was removed to the lunatic asylum. On or about 13th July, Jane Ogilvy, who had a sum of £296 deposited in the National Bank at Kirriemuir, signed the deposit receipt, and asked her brother to draw the interest and get a fresh deposit receipt for the money. This he did.

"The pursuer alleges 'that the defender then caused or procured the said Jane Ogilvy to indorse and deliver the said deposit receipt, and upon or about the 31st day of the said month of July 1868, the defender uplifted and received the said sum of £296.' The Sheriff is of opinion that the pursuer has entirely failed to prove the first part of this statement. The deposit receipt is admittedly indorsed by Jane Ogilvy, but there is no evidence to show that the defender either 'caused or procured' her to do it.

"It is admitted that the defender presented the deposit receipt indorsed by Jane Ogilvy, and got up the money from the bank.

"The defender alleges that he did so at her request, and that he gave her the money on his return; the pursuer alleges that the defender 'failed to pay or account for the said sum to the said Jane Ogilvy.'

"The defender's allegation is supported, first, by the fact of Jane Ogilvy having indorsed the deposit receipt; and second, by the evidence of his wife, who says she saw the money paid over to Jane Ogilvy.

"The pursuer maintains that, it having been established by written evidence that the defender got the money at the bank, he having signed his name on the deposit receipt, he is bound to prove by written evidence that he delivered the contents to his sister. The Sheriff cannot sustain this contention. It is not usual or necessary for a party who happens to draw money for a friend to get a

stamped receipt on handing over the money. He is a mere messenger, and if no complaint is made at the time the presumption is that he has faithfully done his duty.

"The peculiarity of this case, however, is, that it is said that on this 31st of July Jane Ogilvy was insane and incapable of managing her affairs, and that the defender must have known this. No doubt the medical men, *on a review of all the facts*, now say that at that time 'she could not have been in her sound mind.' Still, the fact is that she was at large, in the management of her affairs, and legally entitled to do so. Every one seemed to be aware that her mind was to some extent affected. Dr Webster had told the defender to look after her; but it was not till the end of September that the doctors considered her mind to be so much affected as to require her to be removed to the asylum.

"Having got the money, the defender either handed it to Jane Ogilvy, or he did not. If he did not, then of course the pursuer should prevail in this action; but the evidence and the presumption point the other way — viz., that he did hand it to her. Let it be assumed that he did this, Is he to be compelled to pay it a second time? The pursuer himself does not carry his argument so far. His fifth statement is, 'that the defender failed to pay or account for the said sum of £296 to the said Jane Ogilvy,' thus assuming that if he had paid it to her he would be free. The defender may have acted imprudently in handing money to a person whose mind he knew was *to some extent* affected; but is he to be punished for his imprudence and his want of discretion? The pursuer says the money can't be traced to Jane Ogilvy. This is not surprising. She may have given it away, or lost it, or hid it, or destroyed it. But, assuming that the defender handed the money to his sister, the Sheriff cannot hold that he must now pay it again to her *curator bonis*.

"The question therefore again arises, has the pursuer established that he failed to pay it? There are two circumstances that are in the defender's favour on this point. The sister, who was at large, and constantly seeing people, and who seemed to take care of her money, never seems to have complained to any one that she had not got her money. Then the sister had got another deposit receipt for a larger amount, which the defender took from her and gave up to the pursuer. There are, no doubt, some somewhat suspicious circumstances in the case; but, on the whole, the Sheriff is of opinion that the pursuer has failed to prove his case."

The pursuer appealed to the Court of Session.

After hearing parties, the Court ordered the examination of the defender and his wife, which took place before the Lord Justice-Clerk. Thereafter, the Court ordered the examination of Miss Ogilvy in the asylum, and she was examined by a commissioner, and stated that the contents of the deposit receipt had not been delivered to her.

Parties were again heard on the report of the commissioner.

The Court, at advising, reversed the interlocutor appealed from, and decerned against the defender, with expenses in both Courts, on the ground that at the time of the transaction in question Miss Ogilvy was to the knowledge of the defender in a facile state of mind, and that the defender had failed to prove that he had discharged himself of his intromission with the sum in question,—Lord Benholme dissenting.

Counsel for Pursuer—Solicitor-General (Clark) and Watson. Agent—L. M. Macara, W.S.

Counsel for Defender—Macdonald and Lang. Agent—D. Sang, W.S.

Wednesday, December 10.

SECOND DIVISION.

[Bill Chamber.

CLARK *v.* THE BOARD OF SUPERVISION.

Poor Law Amendment Act 1845, § 56—*Inspector of Poor—Board of Supervision—Right to Dismiss —Jurisdiction.*

The Board of Supervision having resolved that the office of Inspector of Poor was incompatible with that of member of the School Board of the parish, called upon one of their inspectors, who held the double office, to resign the one or the other, and in consequence of his declining to do so threatened to dismiss him from the office of inspector. In a suspension at the instance of the inspector —*held* that the opinion of the Board was a competent exercise of the powers possessed by the Board under section 56 of the Poor Law Amendment Act; further, that the opinion was final and not subject to review by the Court, and that the Board were not bound to state the grounds on which their opinion was founded.

The complainer, Inspector of Poor of the parish of Portmoak, in the county of Kinross, was elected a member of the School Board of the parish of Portmoak under the provisions of "The Education (Scotland) Act, 1872." The respondents were the Board of Supervision for relief of the poor in Scotland, created by the Act of Parliament 8 and 9 Vict., cap. 83, entituled "An Act for the amendment and better administration of the laws relating to the relief of the poor in Scotland." On 8th May 1873 the respondents adopted and issued a minute with reference to the Education Act in the following terms:—"The Board having considered the provisions of the Education (Scotland) Act, 1872, are of opinion that it is inexpedient that inspectors of poor should act as members of school boards, as managers appointed under section 22 of that Act, or as officers appointed under section 70, being satisfied that such a union of offices is, or may be found to be, incompatible with the due and independent discharge of the duties attached to the office of inspector of poor. The Board accordingly direct the secretary to call upon every inspector who holds any of the three first-mentioned offices, either to resign it or the office of inspector of poor." A copy of this minute was transmitted to all parochial boards and inspectors of poor, and one was received by the complainer. On 12th June 1873 the respondents adopted and issued another minute with reference to the Education Act. The said minute proceeds on the narrative, "that considerable misapprehension exists as to the object and effect of the Board's minute of 8th May last, prohibiting inspectors of poor from acting as members of school boards, as managers appointed under section 22 of the Education (Scot-