and extravagant—yet here I do think the verdict is of that character. It has been said by Lord M'Laren that £100 for medical assistance and other expenses resulting from the pursuer's illness is a reasonable sum, and I agree in this, but if there is to be added a further sum of £700, then the total is much larger than can, I think, be justified. The figure of £250 has been mentioned as a sum which might be awarded on account of the pursuer's suffering, which no doubt was considerable. I question whether the pursuer or anyone else would choose to endure such suffering for £250, or even for £1000; but I see no good principle in the method of calculating the total amount of compensation by estimating each item separately as in a stated account. It seems to me most difficult, if indeed possible, to name a sum in such cases as representing compensation for pain endured. The way in which I have always understood that such compensation should be estimated, and in which it has been always estimated in practice, is by the jury taking into their consideration the whole circumstances of the case, and, looking at both the present suffering and permanent injury, without trying to put a money figure on each separately, to fix a sum which will do justice between the parties. If in this case the jury, in addition to the sum of £100 to cover all outlays, had given a sum of £400, which with accruing interest would be £50 per annum for the next nine years, this would in my opinion be clearly fair and full compensation, as such compensation must be estimated in money. It is suggested that an allowance at the rate of £100 a year for three years should be made as compensation for loss which the pursuer has suffered or may suffer in her business. There is no evidence, however, that the pursuer has suffered any loss in her business, except a general statement by the pursuer that since her illness the business had not been quite so good. If the loss had been substantial or appreciable there would have been evidence of that fact. On the whole, I am of opinion that the sum I have suggested, making in all £500, which would give the pursuer £50 a-year over a term of years, would have been amply sufficient. The jury having exceeded that amount by £300, which is a very large excess, being nearly three-fifths of the whole, if I were to decide this question sitting alone, I would put it to the pursuer that unless she was willing to abate her claim by that amount, and accept the verdict as £500, a new trial would be granted.

Lord President—If I were to set myself to assess the damages which should be awarded in this case, I cannot say that I would fix the amount at £800, but looking to the facts of the case, and taking all the elements into consideration I do not think that the sum I would name would be a great deal less. Now, the question here is whether a new trial is to be granted, and before granting that the Court must be satisfied that the sum awarded is altogether extravagant, and such as no other jury would have given. I should say that unless it can be said that the verdict should not have been for more than one-half the sum allowed there would be no room for interference. On the contrary, if this question had come up on appeal from a Sheriff-Substitute, then one might have been disposed to strike off £100 or whatever sum seemed reasonable, but that fact is not sufficient to justify us in setting aside this verdict.

Lord Deas was absent.

Rule discharged.

Counsel for Pursuer—R. Johnstone—M'Kechnie. Agent—John Gill, S.S.C.

Counsel for Defenders — Jameson — Shaw. Agents—Millar, Robson, & Innes, S.S.C.

Thursday, November 30.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

INSPECTOR OF POOR OF GOVAN COMBINATION *v.* GLASGOW DISTRICT BOARD OF LUNACY AND GENERAL BOARD OF COMMISSIONERS IN LUNACY.

Poor—Insanity—Lunacy Act (20 and 21 Vict. c. 71), secs. 57 and 59—Discretion of General Board of Lunacy—Statutory Board.

Under section 57 of the Lunacy Act 1857 a parish or county which shall have an asylum or other accommodation for pauper lunatics capable of being validly transferred to the district lunacy board, and which shall make such transference to the district board, "shall be entitled to deduction" from assessments to the extent to the value of the accommodation transferred. *Held* that the district board have a discretion to refuse to accept such a transference if not satisfied with the accommodation tendered.

The 59th section of the same statute provides that where there is in any district an asylum "which shall have sufficient accommodation" for the reception of the pauper lunatics of the district, or can easily be rendered adequate for the reception of such pauper lunatics, or any portion of them, the district board of lunacy "shall, before proceeding to assess for or erect any district asylum, contract" with the proprietors or managers of such asylum for the use of such asylum, any difference between them to be settled by the General Board of Lunacy. Where the accommodation in an asylum in a district was not in the opinion of the General Board of Lunacy adequate and suitable for the accommodation of the pauper lunatics of the district, *held* that the Court had no jurisdiction to interfere with their discretion.

Section 57 of the Lunacy Act of 1857 (20 and 21 Vict. c. 71) provides:—"If in any county or counties, or parish or parishes, there shall be any asylum or hospital, or other available accommodation for lunatics, provided for such county or counties, or parish or parishes, or part thereof, the use whereof can be validly transferred or made over, or can be made effectually available, to the district board of any district, for their exclusive use for the reception and confinement

of pauper lunatics therein under the provisions of this Act, such county or counties, or parish or parishes, or part thereof, by which any such asylum or hospital or accommodation shall be so transferred, made over, or be made available to the district board, shall be entitled to deduction from the amount of the assessments leviable upon such county or counties, or parish or parishes, or part thereof, to the extent of the value of the asylum or hospital or accommodation to be thereby made over to the district board of such district, such value to be fixed by the board," *i.e.*, the General Board of Lunacy.

Section 59 of the same Act provides:—"In case there shall be any asylum established in any district which shall have sufficient accommodation for the reception of the pauper lunatics of such district, or can be easily rendered adequate to the reception of such pauper lunatics or any portion of them, the district board of such district shall, before proceeding to assess for or erect any district asylum, contract with the proprietors or parties interested in any such asylum for the use of the whole or any part of the same, or for the reception and maintenance of the pauper lunatics of such district, or any portion of them, upon such terms as shall be arranged between the district board and such proprietors or parties interested, and in case of difference between the district board and proprietors or parties interested relative thereto, such difference shall be subject to the decision of the Board [*i.e.*, the General Board of Lunacy]; and where any such agreement shall be completed with a public asylum, the portion of such asylum which shall, in terms thereof, be appropriated to the reception of such pauper lunatics, shall be and remain under the care and management of the proprietors or parties interested therein, subject to the power of inspection and visitation and power of making regulations hereinbefore conferred upon the Board."

The pursuer of this action was Andrew Wallace, Inspector of Poor of the Govan Combination, which comprises the parishes of Govan and Gorbals, as representing the parochial board of the said combination. The defenders were (1) the Glasgow District Lunacy Board, which comprises the whole county of Lanark, and (2) the General Board of Commissioners in Lunacy. The conclusions of the summons were alternative. Under the 59th section of the Act of 1857 the pursuer sought decree of declarator that the parochial asylum at Merryflatts (after mentioned), provided for the parish of the Govan Combination, was an asylum established in the Glasgow Lunacy District within the meaning of the 59th section of the Act which had sufficient accommodation for the reception, or could be easily rendered adequate to the reception, of a portion of the pauper lunatics of the said lunacy district, and that the Glasgow District Board were bound, before proceeding to assess for or erect any district asylum, to contract with the parochial board of the Govan Combination for the use of the whole of the parochial asylum for the reception and maintenance therein of the pauper lunatics of the district, or a portion of them, upon such terms as might be arranged between the district and parochial boards, and in case of difference between them, upon such terms as should be determined by the General Board of Lunacy. Alternatively, under the 57th section of the statute he sought declarator that there was in the parish of the Govan Combination an asylum or hospital or other available accommodation for lunatics, consisting of the parochial asylum at Merryflatts, provided for the parish, the use whereof could be validly transferred, or could be made effectually available, to the district board for their exclusive use for the reception and confinement of pauper lunatics therein under the provisions of the Act, and that the district board were bound to accept a transfer of the parochial asylum from the parochial board of the Govan Combination; and further, that in respect of a tender made by the parochial board, and of their readiness at once to transfer the parochial asylum to the district board, the Govan Combination was entitled to deduction from the amount of the assessments for lunacy leviable upon it to the extent of the value of the parochial asylum, as that should be fixed by the General Board of Lunacy. As against the General Board of Lunacy the pursuer concluded to have them ordained to ascertain and fix the value of the parochial asylum to be so transferred. There was also a conclusion for interdict against either of the boards called as defenders, and all acting under their authority, proceeding to assess or to levy assessments within the Govan Combination for any district asylum until the contract first alternatively concluded for should have been made, or until the value of the asylum for which the Govan Combination should be found entitled to deduction from assessment should be fixed as concluded for in the second alternative.

The parties put in a joint minute of admissions to the following effect:—"The Govan Parochial Board acquired in 1865 the lands of Merryflatts, situated within the parish of Govan, and erected thereon a building consisting of a poorhouse, hospital, and parochial asylum, and some detached buildings. The asylum was in a block separated from the other buildings by about eighty feet, and was connected with them by a covered way which was removeable. The asylum had all along been under one management with the poorhouse. The plans of the asylum had been submitted to, and, with some alterations suggested by themselves, approved of by the General Board, who after its erection inspected it and consented to its use as an asylum for 180 patients. The building was opened in 1872 for the reception of incurable and harmless lunatics, but a first-class licence was granted in 1873 for the reception therein of all classes of patients, including dangerous lunatics, and such as required curative treatment, and a similar licence had been granted annually since 1873. Since 1876, in addition to the licence for 180, the General Board, in consequence of the increase of the number of pauper lunatics belonging to the Govan Combination Parish, and the scarcity of accommodation in the district, temporarily licensed certain ordinary wards of the poorhouse for 20 male and 20 female patients, which licence was extended on 26th September 1881 to 32 male and 32 female patients. A final licence for the whole number of patients, 122 male and 122 female, was granted on 3d January 1882. Under that licence there were at the date of the action in the asylum and in the wards of the poorhouse temporarily set apart for lunatics about

216 patients, all of whom belonged to the parish of the Govan Combination. That with the view of providing industrial employment for the lunatic patients, for which purpose, however, it had only been partially used, the Govan Parochial Board acquired in 1875 the estate of Crookston-hall, which they now offered to allow the defenders the district board to take over along with the asylum in the event of a transfer. Prior to 1879 the Glasgow District Board did not absolutely require, and had not been called on to erect or provide, any district lunatic asylum. Previous to that year the lunatics belonging to the district were accommodated (1) in parochial asylums; (2) in licensed lunatic wards of poor-houses; (3) in other asylums within and beyond the district. The District Lunacy Board had since acquired a building at Kirklands, Bothwell, designed for the reception ultimately of juvenile lunatics, which they were then using as a district lunatic asylum until district asylum accommodation sufficient for the wants of the district had been erected. This step was rendered necessary by the resolution of the parochial board of the City Parish of Glasgow not to provide additional accommodation for their lunatic paupers, the determination of the directors of the Gartnavel Royal Asylum greatly to reduce the number of pauper lunatics received into it, and the increase of the number of pauper lunatics in the Glasgow district."

The District Board averred in defence that the accommodation at Merryflatts was both in situation and general arrangement defective, and could not be made effectually available to the district board for the reception and confinement of pauper lunatics, since it consisted partly of the detached asylum and partly of wards set apart for lunatics in the ordinary poorhouse, and since it was under one management with the latter, and that it was not practicable to make such alterations on the wards as to render them suitable for the pauper lunatics of the district. The General Board had intimated to the district board that a transference of the accommodation at Merryflatts to the latter under section 57 of the Act, if made, would not be sanctioned by them. They averred in their defences that they had on several occasions felt called upon to draw attention to faults and difficulties in the administration of the Govan lunatic wards since they had been licensed to receive sufferers from all forms of insanity. These faults and difficulties they believed to be largely due to the association of the administration of the asylum with that of the poorhouse, and to the disadvantage arising from the relative position of the original lunatic section of the building and the portions of the ordinary poorhouse subsequently licensed. They also stated that they had intimated to the Govan board that so soon as the district board had provided sufficient accommodation their license would be again restricted to the reception of 180 harmless and incurable lunatics.

The District Board pleaded that neither the 57th nor the 59th section was applicable to the accommodation for lunatics at Merryflatts.

The General Board pleaded that the action was irrelevant in respect that upon the facts averred they had no power to act under the 57th and 59th sections, and they were bound under the 54th section to apportion the assessment on all parts of the district, and had no power to grant a deduction to the pursuer or to prescribe terms of agreement between him and the other defenders. They also pleaded—"(5) Assuming that the defenders had any powers to compel a transfer under the 57th section, the Court has no jurisdiction to review their decision. (6) The pursuer's premises being unsuitable for transference to the district board, and as it would not be for the public interest that they should be so transferred, the defenders should be assoilzied."

The Lord Ordinary assoilzied the defenders.

"*Opinion.*—The summons is based alternatively on the 57th and 59th sections of the Lunacy Act of 1857 (20 and 21 Vict. c. 71), and the pursuer maintains that under one or other of these sections the District Lunacy Board of Glasgow, which has resolved to assess for a district lunatic asylum, is bound to take over an existing asylum established at Merryflatts by the parochial board of Govan for the reception of their pauper lunatics, or otherwise to take advantage of the accommodation thereby provided, so as to diminish the assessment which would otherwise be leviable from the parish of Govan. The action is defended both by the District Board of Glasgow and by the General Board of Commissioners of Lunacy, who agree in thinking that the arrangement proposed by the pursuer would be inexpedient, and maintain that there is no provision in the statute under which it can be forced upon them against their judgment.

"The pursuer contends that both the 57th and 59th sections are imperative enactments, imposing a duty upon the district board, which they are bound to exercise by taking over or contracting for accommodation in the asylum at Merryflatts. But assuming the enactments to be imperative in cases to which they are applicable, I am of opinion that they do not apply to the establishment at Merryflatts. I agree with the opinion expressed by Lord Fraser in the case of *The Barony Parochial Board*, June 20, 1882, that such an establishment 'can be regarded in no other light than as the lunacy ward of a poorhouse,' and that the only uses which the statutes authorise to be made of such wards are those defined by the 3d, 4th, and 8th sections of the Act 25 and 26 Vict. c. 54. Assuming, however, that this is an asylum of the kind contemplated by the statute of 1857, I cannot accede to the pursuer's contention that the 57th section makes it compulsory upon the board to accept a transfer of any asylum or hospital which may be tendered to them by the authorities of a county or parish, provided only that the person making the tender is in a position to give a valid and effectual title, or to secure to the district board the exclusive use of the accommodation to be transferred. The provision entitles any county or parish by which an asylum or other accommodation for lunatics, may be effectually transferred, to demand a corresponding deduction from the amount of assessment which would otherwise have been leviable, the extent of the deduction being fixed by the General Board. But there is no enactment requiring a county or parish to transfer, or compelling the district board to accept a transference if tendered.

"There is some force in the pursuer's argument that a power to take over existing asylums has been given for the benefit of the parishes by

which such asylums have been erected, so as to relieve them of the burden of an unnecessary assessment, and to prevent the expense they have already incurred being thrown away. It is said that such a power to a public officer or a public body, for the benefit of persons specially pointed out, implies a duty, and that the persons to be benefited may insist upon its being exercised in the manner contemplated by the statute. But it is impossible by construction to give compulsory force to language that is merely permissive, unless the subject-matter of the enactment is such as to exclude the idea of discretion in the persons empowered. Now, in the present case it can hardly be maintained that the subject-matter is not such as to make a discretion reasonable. Whether the discretion is to rest in the district board or the General Board is not material to the present question. But it cannot be inferred from anything in the statute, and *a priori* it is not to be supposed, that the Legislature intended that any existing building answering to the description of an asylum or hospital should be taken over without reference to its suitability for the purpose of a district asylum. But if the transfer is to depend upon the suitability of the asylum, it necessarily follows that there is a question upon which the judgment of the board is to be exercised, or, in other words, a discretion to accept or reject a transfer; and that appears to me to be inconsistent with the imperative construction for which the pursuer contends.

"For similar reasons I think the pursuer's case upon the 59th section is equally untenable. The language of that section is imperative; for it provides that in certain cases the district board 'shall contract' with the proprietors or parties interested in existing asylums for the reception of pauper lunatics. This appears to lay a duty upon the district board. It is true that what they are required to do is to *contract*, which implies a voluntary agreement; and I see no ground for holding that the Legislature intended to compel the proprietors or managers of asylums to afford accommodation to the district board if they do not desire to do so. But there is no inconsistency in holding that the board may be imperatively required to contract if the proprietors are disposed to do so, although the latter are free to contract or not as they think fit. There seems to be ground therefore for holding that the 59th section imposes a duty upon the district board. But the question remains, in what circumstances and at whose instance the enactment can be called into operation; and I am of opinion that the pursuer is not entitled to enforce it in this action. I cannot hold that the Legislature intended to give proprietors or persons interested in asylums an absolute right to insist upon their accommodation being accepted whether it is suitable or not. It is only when the accommodation of an existing asylum is adequate that the district board are required to contract with its owners or managers; but in the present case the accommodation is, in the judgment of the General Board, so unsuitable that they decline to sanction a transfer. The Court, therefore, cannot compel a transfer without determining that the reasons assigned by the General Board for their opinion are insufficient; but I think it impossible for the Court to overrule the judgment or interfere with the discretion of the General Board upon such a matter. The result is that the pursuer is not in my opinion entitled to decree under either of the alternative conclusions of the summons."

The pursuer reclaimed, and argued—The accommodation at Merryflatts was sufficient for pauper lunatics and harmless and incurable cases, with a view to which the building had been erected, even if not fitted for first-class lunatics or for dangerous and curable cases. The accommodation being sufficient, the district board were bound, under the said 57th and 59th sections—coupled with the 95th section of the same Act and the 10th section of the Act of 1862 (25 and 26 Vict. c. 54)—to take over the asylum offered by the parochial board, and the General Board to sanction the transfer so made, before proceeding to assess for the erection of fresh accommodation—the provisions of these sections being in that respect imperative.

Authorities—*Barony Parochial Board of Glasgow*, June 20, 1882, *ante*, vol. xix., p. 728; *Palmer v. Russell*, Dec. 1, 1871, 10 Macph. 185.

The defenders' counsel were not called upon.

At advising—

Lord Justice-Clerk—In this case we have had the advantage of a most able argument, but for my own part I do not wish further argument, for the statement of the pursuer's case involves a proposition to which I cannot for a moment assent—that is, that a building which had been erected and used as an asylum by a parochial board may be held by us, under sections 57 and 59 of the Lunacy Act, to be sufficient for the accommodation of the pauper lunatics of a district, and the district board ordained to take it over, when the General Board has declared that in its judgment it is not sufficient. I think that by the statute the General Board is constituted the sole judge of that matter, and that we are precluded from holding it as an open question. It might be a totally different matter if the General Board had given no decision, or if the difficulty had been raised on the part of the district board in face of an assent given by the General Board. But in the circumstances the result of upholding the plea of the pursuer would be that we should have to find, first, against the General Board, that the building was capable, and then ordain the district board to take it over from the parochial board. To declare this parochial asylum capable of being incorporated in the general system after the General Board has declared as a matter of administration, of which the Act constitutes it the final judge, that it is not capable of being so incorporated, is what I think we cannot do. I therefore think the Lord Ordinary's judgment should be affirmed.

Lord Young—I am of the same opinion, and have only to add to what your Lordship has said that we do not as a rule interfere with the discretion of statutory boards when acting within the scope of their authority unless a case is presented to us for making an exception to that rule. It might be different if they were refusing to act in a matter within the scope of their authority, and within the sphere of their statutory duty for the public interest. But it is not suggested that they are not acting within the scope of their authority in giving according to their judgment a decision on the suitability of the building for the accommoda-

tion of lunatics required by the district board. Nor is it said that they are refusing to perform their duty within the scope of their authority. I think there is no doubt that they have exercised that judgment, and that the case is within the rule, and we should not interfere.

Lords Craighill and Rutherfurd-Clark concurred.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Mackintosh—Pearson. Agent—John Gill, S.S.C.
Counsel for Defenders the Glasgow District Board of Lunacy (Respondents)—Trayner—Ure. Agents—Webster, Will, & Ritchie, S.S.C.
Counsel for Defenders the General Board of Lunacy (Respondents)—Mackay—Jameson. Agents—Henderson & Clark, W.S.

Friday, December 1.

SECOND DIVISION.

[Lord Fraser, Ordinary.

COLLINS *v.* COLLINS AND EAYRES.

(*Ante*, May 16, 1882, vol. xix. p. 596, and 9 R. p. 785).

Husband and Wife — Divorce — Adultery — Evidence of Adultery.

A husband having become aware of certain acts of adultery on the part of his wife, condoned her adultery on condition that she should never again speak or write to her paramour. Having become aware that several meetings had taken place between them, and that on one occasion they had been together after dark in a lonely place, he raised an action of divorce, alleging that on this occasion an act of adultery had again taken place. *Held*, on a proof, that no adultery had taken place at this meeting, and therefore that no adultery which could be founded on for the purpose of obtaining divorce had been proved.

Condonation—Whether Condonation can be Conditional.

Condonation by the law of Scotland is absolute in its nature, and it cannot be made conditional by paction. Where, therefore, adultery has been condoned, though it may be proved in an action of divorce brought on allegations of subsequent adultery by the guilty parties in order to throw light on the relations subsisting between them, it cannot itself be made the ground of divorce in consequence of the breach of any condition attached to the condonation.

Condonation — Conduct not amounting to Condonation.

A husband having received from a detective whom he had employed to watch his wife information which led him to suspect that an act of adultery had been committed by her, submitted the evidence he had procured to a lawyer with a view of obtaining an opinion as to whether any steps ought to be taken to procure a divorce. Meantime he continued matrimonial cohabitation with his wife till such opinion should be obtained. *Held* that he had not thereby condoned the act of adultery in question, assuming it to have been committed.

On 4th February 1882 Alexander Glen Collins raised an action of divorce against his wife on the ground of adultery, calling as co-defender William Henry Eayres, against whom the summons contained a conclusion for damages. The adultery founded on was (Cond. VI.) said to have been committed after dark on the evening of 26th January 1882 in or near an unfinished or unoccupied house described in the condescendence, or in or near a masons' shed adjoining thereto. The pursuer also averred a previous course of adulterous intercourse between his wife and the co-defender (after detailing certain specific acts of adultery) in February, May, and June 1881, but as to this he stated:—"(Cond. III.) The defender admitted to the pursuer that she on several occasions in the previous part of that year, and particularly in the months of February, March, May and June, had been criminally intimate and had committed adultery with the co-defender. This conduct on her part, however, was forgiven by the pursuer for the sake of his children, on the express condition, undertaken by the defender at the time as the condition of the condonation, that she should never again speak or write to the co-defender. The said condition has been broken by the defender as after mentioned," that is to say, by her having held various communications and interviews with the co-defender, and by the alleged act of adultery on 26th January 1882. The summons contained a conclusion that the pursuer ought to be found entitled to the custody of the children of the marriage.

Both the defender and co-defender denied the alleged adultery in January 1882, but both admitted having in that month met and spoken to each other several times in the street. The defender also averred that the pursuer knew, on or before 28th January, of her previous meetings with the co-defender, and notwithstanding continued to cohabit with her down to 2d February 1882.

The defender pleaded—"(2) The averments in article III. of the condescendence are not relevant to be admitted to probation, and *separatim*, they cannot form ground of a decree of divorce against the defender. (3) The pursuer having continued matrimonial cohabitation with the defender in the knowledge and belief aforesaid, he cannot found to any effect upon the acts alleged in Cond. III.; and *separatim*, he cannot obtain decree of divorce on the ground thereof." The co-defender repeated, *inter alia*, substantially the defender's second plea.

The Lord Ordinary, after hearing parties in the procedure roll, allowed the parties a proof of their averments, and to the pursuer a conjunct probation, on the ground that the condonation admitted by the pursuer was alleged by him to be conditional, but expressing the opinion that but for that condition the acts condoned could not competently be admitted to proof. On a reclaiming note for the defender the Second Division adhered to this interlocutor, reserving the effect of proof of the alleged prior acts of adultery should they be established, and remitted to the