tically decided in favour of the credibility of that evidence by giving their verdict in accordance with it. That in itself is a very strong ground for not disturbing the verdict. A question of credibility of witnesses is so entirely one for a jury that nothing but the very strongest case would justify the Court in interfering. My own opinion is with the jury on this matter, and therefore, so far as it is concerned, I am the more satisfied that their verdict should stand.

But the second ground stated in support of the motion for a new trial regards the amount of damages given. The defender contends that what was done inflicted no personal loss upon the pursuer, and no loss even of credit, and that therefore the damages, if given at all, should have been limited to a much more moderate sum, and one more justly equivalent to the damage done. I feel the force of this very strongly and I am ready, with your Lordships' concurrence, to grant the rule upon that point, but on that point only,

The rest of the Judges concurred.

Counsel were thereafter heard on the question of excess of damages.

THOMS, with him JAMESON, for the pursuer, in support of the verdict.

SHAND and INNES for the defender.

At advising—

LORD PRESIDENT.—We have now had the benefit of a full argument upon the question, Whether this verdict should be set aside on the ground that the damages are excessive? Such is the name by which too large damages is known in our practice. Of course I need hardly say that the Court will not interfere simply on the ground that they think the jury have given too much. That would be to interfere with a matter which is peculiarly the province of the jury. There must be something laid before them to justify the use of the term excessive—something to shew that the damages given are outrageous, as our brethren in England term it. Unquestionably the Court have the power, and have frequently exercised it, of setting aside a verdict where the damages were outrageous. For instance, in the case of *Snare* v. *Earl of Fife's Trustees*, and again in the more recent case of *Miller* v. *Hunter*, where the jury, on a mistaken view, awarded a very large and indefensible sum of damages, and the Court interfered. The Court have also interfered in the opposite case, where the damages given have been excessively small. For instance, in an old case, where the pursuer was a dancing-master, and had lost his leg in consequence of an accident, and the jury awarded him only £100, a sum hardly sufficient to pay his doctor's bill, the Court granted him a new trial. But, so far as my experience in this Court goes, I am not aware that it has in any case interfered except to redress a very great injustice, and I hesitate very much to apply the principle on which the Court has acted hitherto to a case of such small amount as the present. I do not think that the Court has ever interfered to disturb a verdict on the ground of excessive damages, where the damages given did not exceed £100. And though I am bound to say that the impression which forced itself on my mind during the opening speech in this case, that the damages given were much in excess of what was due, has not been removed, still I do not think that this is the sort of case in which we should be warranted in disturbing a verdict of the jury on the ground of excessive damages only.

The other Judges concurred.

Agent for Pursuer—Lindsay Mackersy, W.S.
Agents for Defender—Lindsay & Paterson, W.S.

Thursday, December 21.

M'NAB, PETITIONER.

Process—Petition—Reclaiming-Note—20 and 21 Vict. c. 56, § 6, and 31 and 32 Vict. c. 100, § 28.

Held that the 28th section of the Court of Session Act, 1868, did not supersede the 6th section of the Distribution of Business Act, 1857, anent reclaiming against orders in certain petitions.

Parent and Child—Patria Potestas—Curator Bonis—20 *and* 21 *Vict. c.* 56, § 4.

Held that a petition for the appointment of a *curator bonis* to a minor, whose father was alive, and charged with maladministration of the minor's property, was competent before the Junior Lord Ordinary under section 4 of the Distribution of Business Act, 1857.

Circumstances in which the father's right of administration of his son's property under the *patria potestas* was set aside and a *curator bonis* appointed.

The application in this petition was for the appointment of a *curator bonis* to a minor, whose father was alive—the minor being entitled in his own right to certain property in bank shares, which, it was alleged, his father had sold, and the proceeds of which he was said to have misapplied. The father opposed the petition, on the ground that, in virtue of his *patria potestas*, he was not bound to give an account to his son till he reached majority.

The Lord Ordinary (MACKENZIE) allowed a proof, before answer, of his averments. The respondent asked leave to reclaim against this interlocutor. The Lord Ordinary reported the case, and asked the direction of the Court as to the course to be followed by him in granting or refusing leave, on the ground that the provisions of the Court of Session Act, 1868, and particularly the 28th section of it, appeared to clash with the provision in the 6th section of the Distribution of Business Act of 1857, anent reclaiming in petitions such as the present.

The Court announced their opinion that the 6th section of the Act of 1857 applied to the case, and that the Court of Session Act of 1868 did not interfere at all with the provisions of that Act anent reclaiming. They accordingly directed the Lord Ordinary to refuse the respondent leave to reclaim.

Leave to reclaim against the Lord Ordinary's interlocutor, ordering a proof, having been thus refused, in accordance with the directions of the Court, the parties agreed to allow the said interlocutor to be recalled, and to take the opinion of the Court upon the case as it stood, and they requested the Lord Ordinary again to report. This he accordingly did.

The circumstances in which the petition was presented were as follows:—The petitioner, who was fourteen years of age, was the son of the respondent Peter M'Nab and his wife the late Sarah Bladworth or M'Nab. The late Richard Bladworth, who died in 1839, directed his trustees to

convey to his brother Jonathan Bladworth twenty shares of the National Bank of Scotland, to be held by him in trust for his daughter Sarah Bladworth until she attained the age of fifty years, the annual proceeds being in the meantime paid over to her, excluding the *jus mariti* of any husband she might have, both from the capital and income. Should she die before attaining the age of fifty years, leaving children, the said shares were to be equally divided among the said children. In 1841 the said shares were conveyed by the trustees to Jonathan Bladworth. He drew the annual dividends, but did not account for them to his daughter until 1854, when, in lieu of payment of these dividends, he transferred to her, secluding the *jus mariti*, other fourteen shares in the National Bank, and also three shares of the Edinburgh and Leith Gas Company. In 1856 the said Sarah Bladworth was married to the respondent. On 18th April 1857 the petitioner, her only child, was born. And on 5th May 1857 she died, without attaining the age of fifty years, and intestate. Besides the twenty shares of bank stock held in trust for her, the said Jonathan Bladworth, her father, was due her at her death about £40 of accrued dividends. On 24th June 1857 the said Peter M'Nab unnecessarily, as averred by the petitioner, raised an action in the Court of Session against the said Jonathan Bladworth. This action concluded to have it found and declared that the said twenty shares National Bank stock belonged to the petitioner, as the lawful issue of the said Sarah Bladworth, and to have the said Jonathan Bladworth ordained to execute a transfer thereof accordingly. The said Jonathan Bladworth allowed decree in absence to go against him in this action, which decree in absence was pronounced on 13th November 1857. On 30th December 1857 the said Jonathan Bladworth executed a transfer of said twenty shares, proceeding upon the narrative of Richard Bladworth's trust-settlement, and of the decreet in this action. Again, in 1858, the said Peter M'Nab raised an action in the Court of Session against the said Jonathan Bladworth, concluding that the said Jonathan Bladworth should pay to him, as in his own right, the sum of £198, 12s. 8d. sterling, as the amount of accumulated dividends on the said twenty shares National Bank stock, from 13th July 1841 to 20th January 1857, inclusive, and also the sum of £75, 12s. 9d. sterling, as the amount of the periodical interest on the said dividends during the foresaid period, with interest on these sums from the said 20th January 1857 till payment. The said Jonathan Bladworth defended the said action on the ground, *inter alia*, that, as an individual, and in his own right, Peter M'Nab had no claim in the premises. The action was then abandoned by the said Peter M'Nab. Thereafter, also in 1858, the said Peter M'Nab raised (in the Court of Session) an action in the name of himself, as father and administrator-in-law of the petitioner, against the said Jonathan Bladworth, concluding for payment to him, the said Peter M'Nab, as administrator-in-law of his said son, of the same sums as those which, in his individual name, and as in his own right, he had sued for in the action which has just been alluded to. The said Jonathan Bladworth defended this action also, and stated, *inter alia*, as grounds of defence, that, with regard to the dividends uplifted by him prior to February 1854, and interest effeiring thereto, the said fourteen shares National Bank stock, and three shares Edinburgh and Leith Gas Company stock, had been transferred by him to his daughter the said Sarah Bladworth in payment of these dividends, and the interest thereon; and that, with regard to the dividends since February 1854, he was and had always been willing to hand them over, with interest, to the said Peter Jonathan Bladworth M'Nab, and the said Peter M'Nab as his administrator-in-law. The result of the last mentioned action was, that the Lord Ordinary (KINLOCH), on 8th July 1859, pronounced an interlocutor in which he gave effect to the said defence stated, as regards the dividends prior to February 1854, and interest thereon; and in the event of payment of the dividends posterior to that date, found him entitled to absolvitor from the action. Payment of the said dividends, and interest thereon, was accordingly at once made to the respondent, as administrator-in-law for his son.

After stating these facts, the petitioner then set forth that, "on the death of his mother, the said Sarah Bladworth, he became entitled to (1) the said twenty shares of National Bank stock; and (2) the dividends thereon which had been uplifted by the said Jonathan Bladworth subsequent to February 1854, and interest effeiring thereto. That it was also a question whether he did not become entitled to the sums of £267, 8s., and £108, 15s., realised by the sale of the said three Edinburgh and Leith Gas Company shares, and fourteen shares of National Bank stock, on the footing that the said sums were the property of the said Sarah Bladworth at the time of her death, exclusive of the *jus mariti* of her husband. That the said Peter M'Nab, his father, had wrongfully appropriated to his own purposes the said twenty bank shares, to which the petitioner had right as aforesaid. He had also appropriated to his own purposes the said £40 of accrued dividends and interest, and he had, from time to time, as they fell due, uplifted and applied to his own purposes the dividends effeiring to the said twenty shares National Bank stock during the period between December 1857 and 12th May 1871. That on or about 12th May 1871, when the petitioner had attained the age of fourteen years, the said Peter M'Nab induced him to accompany him to the office of the National Bank of Scotland in Edinburgh, and there sign a deed or document. The petitioner did not know what the said document was, or why he was asked to sign it, and it was not read over to him. From inquiries, which have since been made, it has been ascertained that the said document was a transfer of the said twenty shares National Bank stock. That the said Peter M'Nab, on 12th May 1871, received the sum of £574 sterling as the price of the said twenty shares, and thereafter applied it to his own purposes, and used it in the course of his trade as an ironmonger, as if it was his own proper money. And that said Peter M'Nab was in insolvent circumstances.

"That, in the circumstances above set forth, it had become necessary that a *curator bonis* should be appointed to the petitioner the said Peter Jonathan Bladworth M'Nab, for the purpose of vindicating his rights as regards the matters before alluded to, and to protect his interests for the future, until such time as he arrived at the age of majority."

In his answers to this petition, the respondent averred the refusal of Mr Jonathan M'Nab to account for the funds held in trust for his daughter

and her son, and for the annual proceeds thereof, and the necessity of the action already mentioned in order to vindicate the petitioner's right to the said property. He stated that the expenses incurred in these actions amounted to the sum of £355, 13s. 9d., and that the price realised from the sale of the twenty National Bank shares was £572. The principal part of the balance was invested by him in the purchase of the fee of a house in Juniper Green on his son's behalf,—the said house being liferented by a lady between sixty and seventy years of age. He also stated that he had expended a considerable sum annually on the maintenance, clothing, and education of the petitioner, to an amount much exceeding the dividends on the twenty shares of the National Bank of Scotland, uplifted by him as administrator-at-law of his son. That, as there were no other means for reimbursing him the expenses which he had disbursed on the petitioner's behalf, the petitioner concurred with him, in the month of May last, in selling the twenty shares of the National Bank stock belonging to him. The proceeds were received by him, and will be duly accounted for at the proper time, and, so far as necessary, will be duly applied and expended in the affairs of the petitioner. That he is perfectly solvent, and is willing to aliment and educate the petitioner in a suitable manner. He has an undoubted right to regulate both the aliment and education of his son, and there is no allegation that he has failed in his duty in that respect. And he submitted that the prayer of the petition, which in effect sought to deprive him of his power and rights as administrator-at-law of his son, for which there is no relevant or sufficient ground set forth, and which it was not competent for their Lordships to do, ought to be refused, with expenses.

On the Lord Ordinary's report to the Inner-House, PATTISON was heard for the respondent, and contended that this was not a petition which fell under the Act of 1857 at all. It was not the ordinary case of the appointment of a *curator bonis*, but was in effect an application for the removal of a trustee, or rather one looked upon by the law with even more favour than a trustee, and for the appointment of a *curator bonis* in his stead. That this was not competent before the Lord Ordinary. He farther contended that there was no case on the merits.

RHIND in reply.

Authorities—*Robertson*, 3 Macph. 1077; *Wardrop* v. *Gossling*, Feb. 6, 1869, 7 Macph. 532; *Mitchell*, July 20, 1864, 2 Macph. 1378; *Earl of Buchan*, Dec. 21, 1839, 2 D. 275; *Stevenson's Trustees* v. *Dumbreck*, 19 D. 462; *Johnstone* v. *Wilson*, 1 S. 558; *Govan*, M. 16,263; *Forbes*, M. 16,287; *Wilkie*, M. 16,311; *Boswell*, M. 16,353; *Graham*, M. 16,383; *Glasford*, 11 D. 1030; *Barclay*, 4 Brown's Sup. 405; Bell's Prin. § 2068; 20 and 21 Vict. c. 56, § 4.

At advising—

LORD PRESIDENT—It is always a very delicate exercise of our office, and one which requires the greatest consideration, when we are called on to interfere with the rights and authority of a father over his children and their property. But there often do occur circumstances which render such interference indispensable. But a preliminary question is here raised, Whether we have a competent application before us? Now, with regard to the competency of this petition, I can have no doubt at all. It was properly brought before the Lord Ordinary under the 4th section of the Distribution of Business Act, 1857, simply for the reason that it is an application for the appointment of a *curator bonis*. And I am not aware that since the passing of that Act the Lord Ordinary's jurisdiction has been called in question in any such application.

As regards the merits, I must add that I think the respondent has placed himself in a very unfavourable position. His son's small fortune, which had come to him from his maternal granduncle, was invested in stock of the National Bank. We all know very well that that is just one of those investments most suitable, and generally resorted to, for the investment of funds under such circumstances. It was therefore a most peculiar act of administration on the part of the father to sell out this stock, and convert it into cash, unless there were some pressing necessity. There is no doubt that the father availed himself of his influence over his son to obtain his signature to the transfer of this stock, and when he is now asked to give some account of the way in which he has disposed of the proceeds, the only statement he makes is this—That he had succeeded in vindicating the petitioner's right to the property, and in so doing had incurred expenses to a considerable amount. That he had invested a sum of £120 in a most unproductive purchase. And that he had expended a considerable sum annually in the maintenance, clothing, and education of the petitioner. And then farther on he proceeds—"As there were no other means for reimbursing the respondent, the expenses which he had disbursed on the petitioner's behalf, the petitioner concurred with the respondent, in the month of May last, in selling the twenty shares of the National Bank stock belonging to him. The proceeds were received by the respondent, and will be duly accounted for at the proper time, and, so far as necessary, will be duly applied and expended in the affairs of the petitioner." Now, the meaning of that paragraph is simply this, that the money was applied in paying the expenses of his son's education, and that he was willing, when his son came of age, to account for the balance. This is placed beyond all doubt by the correspondence between the agents, though it is reluctantly admitted by the respondent's counsel.

The demand made upon Mr M'Nab was this—"You will furnish us with a statement shewing the manner in which the whole monies belonging to your said son, with accumulations thereon, are now invested, and the present amount thereof." It was not for some time after receiving this request that any answer was made at all. Then a note of expenses was sent consisting mainly of the expenses incurred by Mr M'Nab in three actions against Mr Bladworth, his father-in-law, as trustee for his wife and her son under the will of Mr Richard Bladworth. Of that note of expenses, amounting to more than £350, at least £100 was paid to Mr Bladworth under the decree of the Court in his favour; and about £60 more is the expense of an action at M'Nab's own instance, which he was obliged to abandon; and the remainder are most questionable charges. And what does his letter say about these charges? Merely that they were incurred in vindicating his son's right to the property. Now, keeping in view the question which this letter and account of expenses was intended to answer, what meaning can we put on the respondent's statements? Simply that he has frittered away the property in questionable litiga-

tion, and has invested the chief part of what remained in an unproductive purchase, the value of which is already half eaten up by interest. Now, I must say that the respondent's whole proceedings appear to me to have been a very gross violation of his duty as a parent, and I think that the Court is bound to interfere for the protection of the petitioner's interests. The result which I have come to is that, if your Lordships concur, the Lord Ordinary will find in terms of the prayer of the petition.

LORD DEAS—The first question is simple enough—namely, Whether the application is competent before the Lord Ordinary? Now, unless we shut our eyes to the plain words of the statute altogether, there can be no doubt that, if competent at all, the application is so before the Lord Ordinary. The question, whether the application should be granted or not, is a different one. That the Lord Ordinary was right in allowing a proof, provided it was necessary, is clear. But if enough appears without proof, I am of opinion with your Lordship that it would be a great misfortune for the parties to have to go into a proof under the circumstances. I think that enough has been admitted to warrant us in passing the application without proof. This boy's small fortune came to him through his mother. It is quite clear that the money, if it had been left with the trustee appointed by the person who bequeathed it, would have been safe enough. But the father enters into an unnecessary litigation with this trustee, making claims on his own account as well as his son's, and much of the expense of that litigation is found against him. And when he does get the money, what does he do with it? He applies most of it to the payment of those expenses which he has thus incurred. This will infallibly raise a question between father and son when the son comes of age. Now, it is admitted that he got this boy, at the age of fourteen, to sign a transfer of this bank stock. No reason is given for this step, except that it was to convert it into cash and apply two or three hundred pounds of it to the liquidation of the expenses above mentioned, and which, it may very well be, he is not entitled to take out of the boy's funds at all. And all he says is, that he will account at the proper time. I am humbly of opinion that enough is admitted, and necessarily admitted, in these answers to entitle the Court to interfere. This is not a case of poverty on the part of the parent personally, but one of conflicting claims; and the circumstances render it absolutely necessary that some third party should be appointed to take charge of the boy's interests in the meantime.

LORDS ARDMILLAN and KINLOCH concurred.

Agents for Petitioner—Menzies & Cameron, S.S.C.

Agents for Respondent—Ferguson & Junner, W.S.

Friday, December 22.

MUNRO'S TRUSTEES *v.* MURRAY & FERRIER.

Trustee—Factor—Remuneration—Indefinite Payment—Interest on Business Accounts. Circumstances in which the established rule, that, where the business of a trust is conducted by a firm, of which one of the trustees is a member, the firm is not entitled to professional remuneration, but only to reimbursement of actual outlay, was *held* to apply.

Held that the agents were not entitled to appropriate any part of an indefinite payment to items, subject to the foregoing objection.

Held that, where an ordinary business account is not rendered yearly, the agents are not entitled to accumulate interest with principal at the end of each year, but only to simple interest.

The late Hugh Munro of Barnaline died in March 1844, leaving a trust-disposition and settlement, by which he appointed several trustees, and among them Walter Ferrier, W.S. Subsequently new trustees were assumed, of whom John Wilson Ferrier, W.S., was one. Walter Ferrier and John Wilson Ferrier, by themselves, and the different firms of which they were members, acted as agents of the trust from its coming into operation in 1844 to 1st February 1850. Subsequent to that date the business was conducted by T. G. Murray and T. H. Ferrier, neither of whom was ever a trustee under the settlement of Hugh Munro. In 1851 Messrs Murray and Ferrier raised an action against the then trustees of Hugh Munro, viz., Archibald Macarthur, who was also the principal beneficiary under the trust, Alexander Campbell, and Walter Ferrier, for payment of the business account incurred to them and to preceding firms in right of which they stood. No appearance was made for the defenders. The accounts were taxed in the ordinary way, and the pursuers, in February 1852, obtained decree in absence for £620, 6s. 1d., and also for £19, 16s. 10d. of expenses, and 13s. 10d., being the dues of extract.

The decree was afterwards opened up by a suspension at the instance of Messrs Macarthur & Campbell, Mr Walter Ferrier being now dead.

The principal objection taken by the suspenders to the account was that, for the period between March 1844 and February 1850, the accounts had been incurred to a series of firms, of which one or more of the trustees were members, and therefore nothing but actual outlays could be charged. The respondents admitted the rule, which had been established by decisions subsequent to the rendering of their account, but founded on certain special circumstances, viz., that Mr Archibald Macarthur, one of the trustees, and also the principal beneficiary, had approved of the accounts, and had made an indefinite payment of £500 to account, which they maintained they were entitled to appropriate to the items worst secured, or at least to those first in date.

Certain other objections were taken to the account, which sufficiently appear from Lord Kinloch's opinion.

After much delay, a remit was made by the Lord Ordinary (JERVISWOODE) to Mr Edmund Baxter, W.S., *qua* Auditor of the Court, and *qua* Accountant, who gave effect to the defenders' objections, and reported that the sum of £620, 6s. 1d. ought to be reduced to £492, 1s., as at 31st July 1851.

The Lord Ordinary approved of the Auditor's report.

The respondents reclaimed.

HORNE and CAMPBELL SMITH for them.

WATSON and HUTCHISON for the judicial factor upon the estate of Hugh Munro, who was now sisted as a party to the process, in room of the suspenders.