appeal. Section 28 of the Summary Procedure Act proceeds on a recital of the inconvenience arising from uncertainty as to whether a proceeding is of a criminal or a civil nature. It then enacts, that "in all proceedings by way of complaint instituted in Scotland, in virtue of any such statutes as are hereinbefore mentioned." Now, the first question which arises is, Whether this is a proceeding by way of complaint "in virtue of any such statutes?" I think that the reference is to the preamble of this particular section, which sets forth that inconvenience has arisen from the uncertainty which exists as to the nature of the jurisdiction conferred by *various Acts of Parliament*, &c. And I think that this is one of such statutes. The next question is, Whether this case falls within the definition of section 28 of a criminal proceeding? It is certainly not a case where the Sheriff is required or authorised to pronounce a *sentence* of imprisonment. Does it fall within the alternative, "where, in default of payment or recovery of a penalty or expenses," the Sheriff is authorised and required "to grant a warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation?" What the Sheriff is required to do by the Medical Act is, failing payment of the penalty and expenses, to grant warrant for recovery thereof by poinding and imprisonment for a certain period. This is not quite the same as the clause in the Summary Procedure Act. The Sheriff is authorised to grant warrant for recovery by imprisonment, and something more. The only doubt is whether the conjunction of the two means of recovery—one by means of a proper civil diligence, and the other by imprisonment for a definite period—is sufficient to prevent this case falling under the definition of criminal. No doubt some curious consequences might follow from this conjunction, about which it is needless to speculate, as they must be held to have been in the view of the Legislature. The question is, whether this ceases to be a case where the Sheriff grants warrant for imprisonment, &c., because he grants a more extensive warrant? I think the distinction is too narrow to take the case out of the definition. I am therefore of opinion that this is a criminal proceeding, and that we have no jurisdiction to entertain this appeal.

LORDS DEAS and ARDMILLAN concurred.

LORD KINLOCH—I am of opinion that, under the provisions of the Summary Procedure Act, 1864, the present must be held a criminal process, and the appeal to this Court incompetent.

The intention of the Summary Procedure Act was to supply, what was much wanted, an easily applied test by which it should be known whether review should be sought from the Court of Justiciary or the Supreme Civil Court. Hence it declared, by section 28, that a case should be held criminal "where, in pursuance of a conviction or judgment, or as part of such conviction or judgment, the Court shall be required, or shall be authorised, to pronounce sentence of imprisonment against the respondent, or shall be authorised or required—in case of default of payment or recovery of a penalty or expenses, or in case of disobedience to their order—to grant warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation."

By the Medical Act, 1858, § 40, any person improperly assuming the title of Doctor of Medicine is liable to a penalty of £20; and by section 41 it is provided, that the court awarding this penalty shall, "failing payment, grant warrant for recovery thereof, by poinding and imprisonment, such imprisonment to be for such period as the discretion of the Sheriff or Justices may direct, not exceeding three calendar months, and to cease on payment of the penalty and expenses." It appears to me that this is, *in terminis*, the case contemplated by the Summary Procedure Act, in which, in default of payment, a warrant of imprisonment for a limited period is authorised.

It is true that recovery may be also enforced by poinding; and, irrespectively of the Summary Procedure Act, this circumstance might have made it difficult to decide whether the case was criminal or civil. Questions may still arise as to the precise course of procedure by poinding or imprisonment respectively, which questions may not be easy of solution. But all these considerations are irrelevant in the present inquiry. The sole question at present is, Whether a part of the sentence, or of the procedure for recovery, is not imprisonment for a limited period? And this being clear in the affirmative, the review lies with the Court of Justiciary, not the Supreme Civil Court.

The Court, in respect that the complaint was, within the meaning of section 28 of the Summary Procedure Act, of a criminal nature, dismissed the appeal, and found the respondent entitled to expenses.

Agents for Forbes—Pearson & Robertson, W.S.
Agents for Adair—Lindsay, Paterson, & Hall, W.S.

Wednesday, December 20.

THOMAS HOULDEN *v.* PETER COUPER.

Reparation — Damages — Process — Jury Trial — Motion for a New Trial—Excess of Damages. Where the trustee on the bankrupt estate of the pursuer's sons had caused the pursuer's dwelling-house to be entered, and an inventory made of the furniture and effects belonging to him contained therein, without legal warrant — *held*, in an action of damages against the trustee, that it was not sufficient defence for the defender to establish that the actings of the pursuer, in conjunction with the bankrupts, his sons, had induced the belief on his part that the house and furniture belonged to the bankrupts, and that he had reasonable ground for believing that they might make away with the said furniture.

Motion for a new trial, on the ground of excessive damages, *refused*, because the damages given were under £100 in amount, and the case one of minor importance, though the Court intimated that in their opinion the damages were excessive.

This action of damages was raised by Mr Thomas Houlden against Peter Couper, the trustee on the sequestrated estates of Mr Houlden's sons, who had carried on business under the firm of Houlden Brothers as fancy stationers, and had become bankrupt in June 1871. Mr Houlden claimed damages against the trustee for having, without judicial warrant, caused Mr George Smith,

auctioneer and appraiser, to enter the house in George Square occupied by the pursuer, and inventory the furniture and effects belonging to him contained therein.

The defender stated that circumstances had been brought to his knowledge, in the course of the judicial examination of the bankrupts and otherwise, which gave him reason to suppose that the bankrupts were really tenants of the house in question, and that they had an interest in the furniture, which it was his duty to secure for their creditors. That the actings of the pursuer, in conjunction with his sons, had given him reasonable grounds for this belief. And that, farther, he had good reason to suppose the bankrupts intended to make away with this furniture. The case was tried before Lord Ormidale and a jury upon the following issue:—

"Whether, on or about the 26th day of June 1871, the defender wrongously and unwarrantably caused George Smith, auctioneer and appraiser in Edinburgh, to enter the pursuer's dwelling-house, in or near George Square, Edinburgh, and to inventory household furniture belonging to the pursuer therein, to his loss, injury, and damage?

"Damages laid at £200 sterling."

The jury returned a verdict for the pursuer, and assessed the damages at £90.

In the course of his charge, the presiding Judge directed the jury as follows:—"If the jury are satisfied on the evidence that the house referred to in the issue was, when the acts therein complained of took place, in the occupation of the pursuer as the tenant thereof as his dwelling-house, and also that the furniture referred to in the issue as having been inventoried, or part of it, belonged to the pursuer, then, in law, the defender was not entitled, without judicial authority or warrant, or the consent of the pursuer, to enter by himself or another into said house and inventory said furniture, and that his having done so was wrongous and unwarrantable in the sense of the issue."

To this direction the counsel for the defender excepted, and insisted that the Judge should give the following direction:—

"That if the jury be of opinion on the evidence that the pursuer, by his actings in conjunction with the bankrupts, his sons, induced the belief on the defender's part that the house in George Square was the house of the bankrupts, and that the furniture, or a substantial part thereof, belonged to the bankrupts, and that the defender, when he ordered the inventory to be made, had reasonable ground for believing that the bankrupts *might* make away with the furniture, the pursuer is not entitled to a verdict in his favour on the issue."

Lord Ormidale refused to give this direction to the jury, whereupon the counsel for the defender again excepted.

A bill of exceptions was accordingly laid by the defender before the Inner-House, containing the two exceptions above narrated. The defender, at the same time, moved for a rule to show cause why a new trial should not be granted, in respect that (1) the verdict was contrary to evidence, and (2) that the damages were excessive.

Innes, for him, was heard on the motion for a rule.

At advising—

Lord President—As your Lordships are agreed that the bill of exceptions should be disallowed, it is as well to dispose of that in the first place. The question submitted to the jury in this case was—(*reads issue*). Now, the presiding Judge told the jury, in his direction to them,—(*reads direction first excepted to*). I think that direction was not only sound in itself, but also very well adapted to the circumstances of the case, and very well calculated to lead the jury to a correct decision. There were two main points for the consideration of the jury—First, Whether the house in George Square was the dwelling-house of the pursuer? and second, Whether the furniture in that house was the pursuer's furniture. These were really the two main facts at issue between the parties. His Lordship told the jury that if they were satisfied that they were the house and furniture of the pursuer, then the defender was not entitled to do what he did, and his having done so was wrongous and unwarrantable in the sense of the issue.

It is needless to say more about this part of the exception. But the defender asked a farther direction from the presiding Judge, and, of course, if that was sound in law, and at the same time necessary for the guidance of the jury, or if the want of that direction was calculated to mislead the jury, then the defender, that direction having been refused, is entitled to succeed in this bill of exceptions. But I am of opinion that such was not the case. This is what may be called a negative exception—an exception to what the Judge did not do. The defender must therefore satisfy the Court not only that his proposed direction was sound in law, but that it was also necessary for the proper guidance of the jury. If he fail in either point he is not entitled to prevail.

I think the defender has failed on both these points. I do not think that his direction is good and sound in point of law, for it is as follows—(*reads direction proposed in second exception*). That is to say, that if these things are so in point of fact, then the act of the defender complained of was not an illegal proceeding which entitled the pursuer to claim redress. Now, certain actings of the pursuer, in conjunction with his sons, might very well induce the belief, on the part of the defender, that the house and furniture belonged to the bankrupts, without being attended with any such results, in point of law, as those contended for. The actings of the pursuer might lead to the conclusion, as they have here, without any good grounds for the belief, and I cannot accept it as matter of law that such erroneous belief will warrant or even excuse the defender in proceeding as he did. But, in the second place, it appears to me that, so far as the jury is concerned, it would have been most misleading, for it necessarily suggests the question, Whether the actings of the pursuer and his sons did give rise to such a belief? Now, it seems to me that the evidence in the case does not raise that question at all, and that if the direction had been given, the jury would have been misled by it accordingly. On these grounds, I think that the bill of exceptions ought to be disallowed.

With regard to the motion for a new trial, on the other hand, we have it urged upon us that there are two grounds for setting aside the verdict. First, because it is against evidence. Now, the two main questions of fact in the case being, as I have already remarked, Whether the house is the property of the pursuer? and Whether the furniture is also his,? on both these points there is conflicting evidence. There was certainly raised, on the part of the defender, a very important question as to the credibility of some of the pursuer's witnesses, especially of John Houlden. The jury have prac-

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