quite close to each other. I gave to defender's mother the papers relating to both the house and shop." The defender deponed that Lindsay had never been in her house on 3d April; that she had been in bed in a room at the back of her shop the whole of that day, and had never heard of his coming to the shop. Her mother also denied that Lindsay had been to the shop. On the other hand, a witness deponed that she saw Lindsay go to defender's house on April 3d, and directed him to the shop.

On 15th July 1886 the Sheriff-Substitute found that defender was duly warned to remove, and granted warrant of ejectment as prayed for. The defender appealed to the Sheriff. On 2d August 1886 the Sheriff (CRICHTON) adhered.

The defender appealed, and argued—(1) The citation was bad both as regarded the shop and the house, for the Act required either personal service or by means of a servant. The citation was made upon the defender's mother, which was not good, it not being enough to serve it on anyone who happened to be in the house — Act 1540, cap. 75; Campbell on Citation, p. 25. (2) The action was incompetent, because the defender's husband was not called as a party—Bell's Prin. sec. 1610; Mackay, i. 342; Fraser on Husband and Wife, i. 582.

Argued for the pursuer—(1) The defender entered appearance as "Isabella Cook," not "Isabella Ayre." It was vain at this stage of the proceedings to assume the *status* of a married woman. (2) The citation was good, and in any case the solemnities of the Act were not required in the warning of tenants from urban tenements—Ersk. ii. 6, 47; *Chirnside* v. *Park*, 1843, 5 D. 864; *Macdonald* v. *Sinclair*, 1843, 5 D. 1253.

At advising—

LORD PRESIDENT—There is no difficulty in this case, and without doubt the Sheriff is right. The only question is, whether a warning was given in the case both of the shop and of the house? It is undoubted that these are separate subjects, but it is not essential to a warning to quit that it be given on the premises. The important thing is, that the warning be given to the party, and that may be done either by personal service or at the party's residence. Now, I am satisfied upon the evidence that this woman was living at the shop. It was not a shop merely, but a shop and dwelling-house.

As to the *status* of the defender, she cannot be heard, at this stage of the case, to say that she is a married woman.

It is not necessary to decide the point under the 11th section of the Sheriff Court Act of 1877. But if it were necessary, I should have little hesitation in affirming that a warning is a writing under that statute.

LORDS MURE, SHAND, and ADAM concurred.

The Court pronounced this interlocutor:—

"Find that the appellant (defender) was tenant of the shop and dwelling-house in question for the year ending Whitsunday last, and find that she was duly warned to remove at said term: Therefore dismiss the appeal, and affirm the judgments of the Sheriffs appealed against: Find the appellant liable in expenses," &c.

Counsel for Pursuer—Henderson Begg—Napier. Agents—Tait & Johnston, S.S.C.

Counsel for Defenders—Rhind. Agent—Robert Broatch, L.A.

Wednesday, November 10.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

ELGIN COUNTY ROAD TRUSTEES *v.* INNES.

Road—Road Trustees—Fence—Title to Sue.

Road trustees have the right at common law to take action to have a proprietor who has erected between his lands and the road a fence dangerous to the public or to bestial, ordained to remove the same or make it safe.

Road—Road Trustees—Fencing of Public Road—Barbed Wire.

Where a proprietor had erected at the side of a public road a fence composed for the greater part of barbed wire, the Court, being satisfied on the complaint of the road trustees that the fence was dangerous for travellers and bestial, intimated that unless the proprietor agreed to remove the barbed wires, which were from their position dangerous to persons and cattle using the road, they would direct such wires to removed.

This was an action of declarator and interdict raised by the Elgin County Road Trustees against the Rev. John Brodie Innes of Milton Brodie, in the county of Elgin, by which they sought to have it declared "that the erection of fences composed wholly or partly of barbed or pointed wire, extending along the side of a public road, is illegal," and to have the defender ordained to remove a fence composed of barbed wire, which he had recently erected on his property on the side of the public road leading from Forres by Kinloss to Burghead; then followed a general conclusion that the defender should be interdicted from placing any fences composed of barbed wire alongside the public roads in the county of Elgin.

By the Elgin and Nairn Roads and Bridges Act 1863 the public roads and highways of the county of Elgin were vested in the pursuers. They averred that at a certain place on the public road leading from Forres to Burghead the defender had erected recently a fence composed of barbed wire; that the fence separated the public road from the defender's property; that it was on the level of the road, and not separated from it. They further averred that the barbed wire was dangerous to travellers along the public road, and to cattle and sheep; that it interfered with the ordinary traffic, and constituted an obstruction to the road.

The defender admitted the erection of the fence, and as to its position and construction he explained as follows:—"It stands entirely on the defender's ground. At no part of the road

in question is there a less distance than 23 feet between fence and fence, and at no part of the road is it possible for persons or animals keeping to the road to come in contact with the fence. Between the fence and the road there is an intervening space or verge of about three feet which belongs to the defender. The present fence was erected to replace a fence which stood nearer the road. . . . Explained further, that the fence consists of five outer and two inner wires, the former being on the outside and the latter on the inside of the posts. Of the five outer wires the two nearest the top are plain, the two below are barbed, and the lowest is plain. The two outer barbed wires are partially covered by wire netting. The two inner wires are both barbed, but they are accessible only to persons or animals within the defender's fields."

The pursuers pleaded that the erection in question being dangerous to the lieges using said public road the same constituted an illegal obstruction.

The defender pleaded, *inter alia*, No title to sue.

By interlocutor of 30th January 1886 the Lord Ordinary before answer remitted to Mr C. R. Manners, civil engineer and estate agent, Inverness, to inquire and report as to the alleged objections to the wire-fencing libelled, and he reserved consideration of the pursuers' motion for a proof until he had seen the report.

In his report Mr Manners explained that the fence in question formed part of the enclosure fence of a young plantation on the defenders' estate of Milton Brodie; that the general width of the gravelled roadway, along the north side of which the fence ran, was 17 feet, and that upon each side of the roadway there was a grass border or verge of about four feet; that there was nothing to prevent cattle, sheep, or persons walking along the road from going upon this verge or coming in contact with the fence; that the length of the fence as measured along the roadside was 109 lineal yards; that the posts were of wood, and were placed about 14 feet apart; that the wires were seven in number, and were placed five on the outer or road side of the posts, and two on the inner or plantation side; "of the outer wires the two upper and the bottom ones are plain, and the two intermediate ones are barbed, each barb having four prongs or points. The two wires on the inner side of the fence are both barbed, the upper one having four, and the lower one two prongs or points. The barbs having four points are about 6 inches apart on the wires, and those with two points are about 4 inches apart. On the outer or road side of the fence, and between the bottom plain wire at or near the ground level, and the upper barbed wire, and tied to them, there is wire-netting, the mesh or holes of which measure about 1¾ inches across. The spaces or distances between the wires are shown upon the sketch [produced with the report]. The fence is practically on the road level, and is not erected on any mound or elevated ground. The upper plain wires on the outer or road side of the fence, to some extent form a protection against the barbs of the inner wires, but in consequence of the posts being so far apart, and their thickness (which separates the outer and inner wires) being only 2½ inches apart, this protection is not so great as would be the case were the posts placed at the usual distances of from 6 to 7 feet, and should any horse or other heavy body lean or press against the outer wires (except near the posts) the barbs would, I have no doubt, take effect."

The defender reclaimed, and argued—*On the question of title*—The road trustees had no title to sue an action of this kind. Their powers were statutory; and while they were entitled and bound to interfere in certain cases, they had neither by the General Turnpike Act of 1843 (1 and 2 Will. IV. cap. 43), sec. 94, nor by the Roads and Bridges Act, any general power of supervision committed to them. The control of fencing along the public road was not within their special powers. *On the merits*—This fence was erected entirely on the defender's own ground, while the barbs, so far as the upper part of the fence was concerned, were entirely on the defender's ground, and so could not be called destructive to the public road, as in no case did the barbs intrude on it. Section 91 of the Turnpike Act 1841 did not apply, because it was not alleged that this was a turnpike road, it was only a common country road, and this fence did not occupy any part of the line over which the public were entitled to travel. The facts stated in the report were erroneous and a proof should be allowed.

Replied for the respondents—[The Court intimated that no argument on the question of title from the respondents' side was necessary]—It had often been decided in England, though not in Scotland, that when a road was bounded by two fences, the whole free space, and not merely the track, was public road, and under the care of the road trustees—*see* Turnpike Act 1831, section 91. The fence in question commenced just where the road began to narrow from 33 feet to 25 feet, and so the fence was nearer the centre of the road than the statute allowed. There could be no doubt that this was a dangerous fence—this was made quite clear by the report—and a proprietor was not entitled to cause danger upon a public road by the erection of a fence of this kind.

At advising—

Lord President—The first question which we have here to deal with is an objection which has been taken to the pursuers' title to sue. The pursuers are trustees acting under the Elgin and Nairn Roads and Bridges Act 1863, and in this capacity they manage the whole public roads and highways in the county of Elgin. If, then, it can be shown that the fence which the defender has erected is a source of danger to persons travelling along the road, to cattle, or to sheep, then there can be no doubt that the road trustees have a good title to raise this question, on the general presumption of law that trustees are bound to do their best to defend the trust which has been committed to them. No special statute is required in a case like the present to empower the road trustees to take action, for the trust here being a public road it is a right which they have at common law. That being the view which I take upon the question of title, I am for repelling the objections taken to the pursuer's right to raise this question.

As to the merits. There is no doubt something both novel and interesting in the present enquiry, which arises to some extent from the fact that this method of fencing is now from

various causes becoming very common. While fences of barbed wire may be attended with some danger to those who attempt to climb over them, the question which we have at present to deal with is rather this, whether a fence of this kind is attended with danger to persons who are lawfully proceeding along a public road, or to cattle or sheep which are being driven along it.

It appears that the fence in question was composed, in the first instance at least, entirely of the barbed wire, and I cannot for a moment entertain any doubt that a fence so constructed was a most improper one to erect at the side of a level public road. It would have been quite a different matter if the road had been in a cutting and the fence had been on the line of the embankment, or if the fence had been masked by a hedge or any other protection, to prevent cattle or foot-passengers from coming in contact with it; but the case we have here to deal with is that of a fence composed of this barbed wire, unmasked and unprotected, and erected on one side of a level public road.

I do not attach any importance to that part of the argument which dealt with the fence being erected entirely upon the defender's land, for it is the fence of the road, and while no doubt the defender may be entitled to shift it, yet so long as it occupies its present position he, so to speak, abandons to the use of the public all the ground lying outside of that fence, and in judging of its safety it must be dealt with on the footing as if it were on the very line of boundary between the road and the property of the defender. Such being the position of this fence, I have no hesitation in saying it is dangerous, and were there nothing more in the case I would be prepared to order its removal. But there are some specialities about it which call for notice. In the first place, as to the two inner wires, they are barbed, but it appears that they are attached to the inside of the supporting posts, while upon the outside of the posts, though not quite opposite, there are plain wires, which if kept tightly stretched would go a long way to prevent any accident.

As the fence stands, however, the protecting plain wires do not so act, because owing to the unusual distance of 14 feet apart which the supporting posts at present stand, the protecting plain wires hang so loosely that anyone leaning against them would come in contact with the barbed wire behind. This defect can no doubt be remedied by the defender putting in additional supporting posts so as to make the spaces between them considerably less than 14 feet. If, however, the defender does not offer to erect the additional supporting posts, then we must direct the two rows of barbed wire to be removed.

As to the lower wires which are attached to the outside of the supporting posts, it is clear that anyone leaning or coming in contact with them would be more or less injured.

Argument was addressed to us as to the screening or protecting effect of the wire netting which is said to be hung in front of this part of the fence, but we cannot listen to such an argument, for while this netting may to some small extent reduce the length of the barb or spike, it cannot in any sense be said to render it innocuous. Clearly, then, these lower wires must be removed. And in coming to the conclusion which I have done upon this whole matter, I have gone on the facts admitted in the record and in the report. I do not attach any importance to the deductions which the reporter has drawn, because having the facts of the case clearly before us from the two sources I have just referred to, we can easily decide upon these facts whether or not this is a proper fence to be erected at the side of a public road. In the course of the procedure in the Outer House the defender asked for a proof, and in his interlocutor remitting to the reporter the Lord Ordinary reserved the consideration of that motion until he had considered the report which he had ordered. The defender has to-day renewed his motion for a proof, but it does not appear to me that any further inquiry is needed, and, besides, I do not think that the defender is in a favourable position to make such an application now. If he thought himself aggrieved by the Lord Ordinary's remit to a man of skill, and desired to have the facts determined by a proof *prout de jure*, he ought to have reclaimed against this interlocutor of the Lord Ordinary's making the remit, and he could have done this under the Act of Sederunt of 10th March 1870, the 2d section of which provides that the provisions of section 28 of the Court of Session Act 1868 should apply to all the interlocutors of the Lord Ordinary so far as these imported an appointment of proof, "or a refusal or postponement of the same."

Now, the interlocutor of the Lord Ordinary clearly falls under these last words, and by the provisions of section 28 of the Act of 1868 there is a finality in all such interlocutors unless a reclaiming-note is lodged within six days. That was the time within which the defender should have pressed his motion if he objected to the course taken by the Lord Ordinary. He did not do so, for he did not bring the interlocutor of the Lord Ordinary under review within the period allowed by the statute or Act of Sederunt.

I do not by any means say that we might not still allow a proof if the facts disclosed the necessity for further inquiry. That is a matter entirely in our discretion, but it appears to me that in the present case such a course is unnecessary as we have all the information needful for the decision of the present question.

I think therefore that we should pronounce an interlocutor ordering the removal of the barbed wire unless we have an undertaking by the defender that a sufficient number of extra posts will be at once inserted so to make the upper barbed wires harmless, and that the two lower wires be removed to the inside of the posts. The case may be allowed to stand in the roll for a few days to allow the defender an opportunity of carrying out this alteration.

Lord Mure—In the course of this discussion we were asked by the defender to allow him a proof of his averments, especially as to his allegations about the effect of the wire netting in acting as a screen or mask for this barbed wire.

I thought this a somewhat difficult point during the argument, because I considered the interlocutor of the Lord Ordinary making the remit to a man of skill to be an interlocutor which could not be reclaimed against. I now see that I was wrong upon that point; that this was an interlocutor which could have been reclaimed

against, but that the defender has lost his opportunity of insisting upon a proof by not reclaiming within six days.

He has lost the opportunity of asking this proof as a matter of right, though, as your Lordship pointed out, it is still in the discretion of the Court to allow additional evidence if that were necessary, either by means of a proof or by a further remit to a man of skill. I quite agree with the course proposed, to allow the defender an opportunity of putting in extra posts, and by altering the position of these lower wires to make this a safe fence, or on his refusal to make these alterations to order the entire removal of the barbed wire.

Lord Shand—I entirely concur in all that has been said by your Lordship, and I think that the facts of this case are sufficiently before us.

The reporter has seen the ground in question, and has supplied us both in the sketch plans and in his report with the fullest details as to the position of these posts and wires, both in their relation to the road and to the plantation. I do not understand that the reclaimers object to the statement of facts as given by the reporter, but merely to his inferences from these facts, but it is not necessary for us in disposing of this case to look at these deductions of the reporter as we have the facts quite fully before us. Something was said in the course of the discussion about this remit by the Lord Ordinary, and about the propriety of getting at the facts in this manner. I for my part think the Lord Ordinary acted very wisely and in the interests of both parties, and I should deprecate either party being now allowed to get into a proof at large on this question.

As to the title to sue, I am clear the Road Trustees have a good title. The defender has allowed the public the use of the grass verge between the track and the fence by erecting his fence on the inner or plantation side of it, and when a fence of this description is erected by a proprietor on one side of a public road the Road Trustees are quite entitled to object to it if it appears to them to be attended with danger to those who use the road.

As a general rule a fence is erected to protect land from intruders, while in the present case these barbs not only protect the land but seem also to protect the fence, and I agree with your Lordship that no one is entitled to put up a fence of this kind along a public road.

It is clear that the outside plain wires must by means of extra posts be kept stretched tight in order to shield those passing along the road from the inner barbed wire. As to the lower barbed wires nothing can be said for them; the wire netting by which they are said to be protected seems to me only to make matters worse as it tends to put passers-by off their guard. The only condition upon which the defender can keep up this fence is by removing the lower wires to the inside of the posts, and by erecting additional posts to keep the protecting plain wires tight.

Lord Adam—I concur with your Lordship in the chair. From the way in which the Lord Ordinary has expressed his interlocutor I think he would not have insisted on the removal of the lower wires if only additional posts had been inserted. No doubt extra posts will do some good, but I am not sure that that will be sufficient. I am inclined to think that to make this fence quite safe not only must the lower wires be removed to the inside of the posts, but that a protecting plain wire should also be erected on the outside similar to those screening the upper wires.

On 18th November the defender by minute consented to erect extra posts as suggested by Mr Manners, and to remove the two low barbed wires from the outside of the posts to the inside, and to erect two additional plain wires as a further protection on the side next the road.

Counsel for Pursuers—D.-F. Mackintosh, Q.C. —Low. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defender—Balfour, Q.C.—Guthrie. Agents—Mackenzie, Innes, & Logan, W.S.

Friday, November 12.

FIRST DIVISION.

CLARK (CRUMPTON'S CURATOR BONIS) *v.* ACCOUNTANT OF COURT.

Judicial Factor—Curator bonis—*Trust—Investment of Factory Funds—Trusts (Scotland) Amendment Act* 1884 (47 *and* 48 *Vict. cap.* 63), *secs.* 2 *and* 3.

Held that a *curator bonis* may, in virtue of the Trusts Amendment Act 1884, invest the ward's money in the stock of Colonial Governments approved by the Court of Session, notwithstanding that the Bank of England, at which such stocks are transferable, declines to take cognisance of trusts, and that therefore the stocks must be registered in name of the curator as an individual.

By section 2 of the Trusts (Scotland) Amendment Act 1884, trustee shall include . . . judicial factor, and (section 3) trustees may, unless specially prohibited by the constitution and terms of the trust, invest the trust-funds in, *inter alia*, the purchase of "East India stock, and stocks or other public funds of the Government of any Colony of the United Kingdom approved of by the Court of Session, and also bonds or documents of debt of any such Government approved as aforesaid, provided such stocks, bonds, or others are not payable to the bearer."

On the petition of Mrs Agnes Crumpton, residing at 10 Jeffrey's Road, Clapham, London, Thomas Bennet Clark, C.A., Edinburgh, was in May 1884 appointed *curator bonis* to William Thomas Crumpton, who was of unsound mind and an inmate of the Crichton Royal Institution, Dumfries.

On 26th June 1885 the curator made the following investment of a portion of the trust-funds, viz., £700 4 per cent. stock of the Government of Queensland, and on 15th July following he purchased £800 inscribed 4 per cent. stock of the Government of New Zealand. The investments were made, according to the statement in Mr Bennet Clark's accounts, in respect of the powers conferred by the Trusts (Scotland) Amendment