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

Act 1884, as interpreted in *Orr (Maclean's Trustee)*, December 20, 1884, 12 R. 529.

When the factorial accounts for the period from June 1884 to July 1885 were submitted for approval to the Accountant of Court, he raised several objections to these investments with the view of getting the authority of the Court to guide him on the present occasion and for the future. He accordingly prepared a report to the Lord Ordinary setting forth the practical difficulties which appeared to him to arise in connection with this class of investments for funds under the charge of judicial factors.

The Accountant pointed out (1) that in England and the Colonies trusts were not recognised, and such purchases of Colonial Government stock must be registered in the name either of the ward, which was not available when a transfer had to be accepted, as a minor or lunatic cannot sign a transfer, or of the factor, as in the case before him, in which the vouchers were two receipts by the sellers in favour of "Thomas Bennet Clark" and a certificate by the chief accountant of the Bank of England, dated 27th April 1886, that the sums of £700 and £800 above mentioned stood in the name of Mr Bennet Clark. On those receipts Mr Bennet Clark had written a declaration that the stock in the certificate was held as *curator bonis* for William Thomas Crumpton. These stocks thus being registered in the factor's name were entirely under his control. The Accountant then pointed out complications which might arise if the factor died or became bankrupt.

The Accountant stated that apart from the special objections he thought the investments were eligible in themselves.

The Lord Ordinary (Trayner) reported the case to the First Division.

On 15th July 1886 a minute was lodged by the Accountant of Court, in obedience to the orders of the Court, containing information obtained from the chief accountant of the Bank of England specially relating to the transfer of stocks. The most important statement which it contained was as follows:—"The Bank of England declines to take cognisance of trusts, and therefore stock held by a curator for his ward can only be registered in the name of the curator as an individual."

At advising—

Lord President—Mr Thomas Bennet Clark, who had been appointed *curator bonis* to William Crumpton, has in the administration of the estate made two investments, one of £700 inscribed 4 per cent. stock of the Government of Queensland, and the other £800 inscribed 4 per cent. stock of the Government of New Zealand.

When the annual accounts of the factory were presented to the Accountant of Court it occurred to him that an important question was raised by these investments, and he accordingly reported the point to the Lord Ordinary, who thereupon reported the matter to us. We have conferred with the other Judges, and I have now to state the result of our deliberations. The Accountant states in his note to the Lord Ordinary that these two investments were made by the authority of the "Trusts (Scotland) Amendment Act 1884," and he refers to the case of *Orr (Maclean's Trustee)*, decided by my brother Lord Adam in December 1884. Now, section 2 of that Act thus defines "trust" and "trustee." "'Trust' is to "mean and include any trust constituted by any deed or other writing, or by private or local Act of Parliament, or by resolution of any corporate or public or ecclesiastical body, and the appointment of any tutor, curator, or judical factor by deed, decree, or otherwise." "'Trustee' is to include . . . curator, while 'judicial factor' shall mean any person judicially appointed . . . upon the estate of a person incapable of managing his own affairs . . . and *curator bonis.*" Now, this is the case of a *curator bonis*, and it falls therefore under the definition of a trustee, and accordingly what we have to deal with here are the actings of a trustee in a trust-estate. Is the curator then entitled, under the provisions of section 3, to make these investments? Now, section 3 provides that trustees may, unless forbidden by the constitution or terms of the trust, invest the trust-funds in a variety of enumerated investments, and in art. 7 of that section "East India stocks, or other public funds of the Government of any Colony of the United Kingdom approved by the Court of Session . . . provided such stocks . . . are not payable to bearer." Now, this is a purchase of stock, and it falls under number 7 of the enumerated investments which may be made with trust-funds.

The investments in the present case are public funds of Colonial Governments, and if "approved by the Court of Session" they certainly fall within the class of securities which may be purchased with trust-funds. It is not suggested that this is a bad investment, or that there is anything doubtful about the security, and so it may be assumed that this is an investment which has been made with the approval of the Court of Session.

But the Accountant has suggested a number of difficulties in connection with these investments, and the objections which he has stated are applicable to many other investments of trust-funds than those which are here enumerated. The chief objection arises from the Bank of England refusing to recognise trusts, and from their consenting to take the names of individuals only, and that without any qualification whatever.

If we give effect to these objections, then not only would the whole class of investments provided for by the Trusts Act of 1884 be rendered of no avail for trust-funds, but the Court would not be able to give effect to the purchase of stock of the Bank of England or consols, or any of the public stock of the United Kingdom. Such a result would be in direct opposition to the whole scheme and object of the Trusts Act of 1884, and it would practically render it null.

That appears to me to be quite a sufficient ground for the disposal of the present question, and I do not consider it necessary to consider in detail the various difficulties raised by the Accountant's report. What we have to do is to follow as closely as possible the provisions of the Act of Parliament.

Lord Mure concurred.

Lord Shand—I am of the same opinion. If we were to dispose of this application otherwise than we are going to do, the effect would be that we would shut out from trust-funds a number of sound investments. Of course the Accountant of Court will see that as far as possible there is some

process of ear-marking the various investments to show to what estates they severally belong.

Lord Adam—I concur. I only wish to add that in the case of *Orr* (*Maclean's Trustee*), which has been referred to, I did not mean to decide anything further than that the stocks there reported on were eligible for the purposes of that case only, not that they were to be held as good in all time coming. I make this remark as I understand that a somewhat different opinion of what I then decided prevails in the profession.

The Court remitted to the Accountant to sustain the investments.

Counsel for *Curator Bonis*—G. W. Burnet. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Accountant of Court—Moncreiff. Agents—Mackenzie, Innes, & Logan, W.S.

Friday, November 12.

FIRST DIVISION.

[Lord Trayner, Ordinary.

HORSBRUGH'S TRUSTEES *v.* WELCH.

Trust—Bond and Disposition in Security—Clause of Warrandice—Personal Liability of Trustee.

A trustee, who had been consenter to certain bonds and dispositions granted by the beneficial owner of heritable property falling under the trust, borrowed "as trustee" a sum for trust purposes, binding himself "as trustee," and his successors, to repay the same, and disponing the lands in security. This deed contained the words, "I grant warrandice." The holders of one of the prior bonds, to the granting of which he had been consenter, entered into possession of the property, which was insufficient to meet the bonds on it. *Held* that the executor of the trustee, he himself having died, was liable under the warrandice, because the granting of consent to the prior bonds was a "fact and deed" which the warrandice covered.

This was an action by the marriage-contract trustees of the deceased William Horsbrugh, Clerk of the Peace for the county of Fife, against Ralph Welch, executor and universal disponee of the late Charles Welch, otherwise Charles Welch Tennent of Rumgally, in which the pursuers sought decree against the defender for £375, with interest from 15th May 1884. The circumstances out of which the action arose were as follows:—

In March 1858 William Wright of Hallfields, in the county of Fife, executed a trust-deed for behoof of creditors in favour of Charles Welch, by which he, *inter alia*, conveyed the estate of Hallfields, which was then entailed, so far as was consistent with the entail. Welch was duly infeft on the said deed, but by the end of the same year the truster's debts were all paid.

In December 1858 Welch reconveyed to Wright by disposition and assignation which was recorded, but (also on 30th December 1858) Wright executed a bond of relief and disposition and assignation in favour of Welch, the terms of which are explained *infra* in the opinion of Lord Trayner, it being sufficient here to say that it was a deed of trust providing that Welch should, after operating relief of a cautionary obligation, hold the estate for certain specified purposes.

Wright, however, then resumed the management of the estate.

Certain sums were borrowed by him (Wright) over Hallfields. On the 4th May 1870 he borrowed £5000, and shortly after a sum of £1300, giving bonds and dispositions in security therefor, which bore—"And in security of the several personal obligations before written, I, the said William Wright, with consent of Charles Welch, writer in Cupar, and I, the said Charles Welch, for all my right and interest in the premises, and we both, dispone to and in favour of," &c., &c. In December 1872, Welch, acting under the powers of the bond of relief, disposition, and assignation above mentioned, borrowed the sum of £375 from Robert John Brody, residing at Gillingshill, by Pittenweem, and granted him a bond and disposition in security over the lands of Hallfields on the narrative of the said bond of relief and power of relief therein contained, and that the sum was necessary to enable him to execute the purposes of the deed. It was set forth in the body of the deed that the money was borrowed for trust purposes, and Welch acknowledged the loan in these words—"I, as trustee foresaid, grant me to have instantly borrowed and received" £375, "which sum I, as trustee foresaid, bind myself and my successors to repay," &c. The only other part of the deed which it is necessary to refer to is the clause of warrandice, which was in these terms—"I grant warrandice." In 1876 this bond was assigned by Brody to Horsbrugh's trustees, the pursuers of this action, and they received the interest till 1884. The creditors in the prior bond for £5000 ultimately took possession of Hallfields, which was insufficient to meet the heritable debts upon it, and drew the rents.

Welch died in 1884.

It was in these circumstances that the present action was raised by Horsbrugh's trustees (the assignees of the bond for £375) against Welch's executor.

The plea upon which the pursuers ultimately prevailed, and which was added after the closing of the record, was in these terms—"The late Charles Welch, and the defender as his representative, in respect of the warrandice granted by him in the bond taken over by the pursuers, became bound to purge the then existing incumbrances on the estate, or to make good the loss sustained by the pursuers in consequence of the eviction by the prior bondholder."

The Lord Ordinary (Trayner) on 29th March 1886 found the defender liable in the sum sued for.

"*Note.*—On 23d December 1872 the late Mr Charles Welch granted a bond and disposition in security for £375 over the lands of Hallfields in favour of Mr Brody, who in February 1876 assigned the same to the pursuers. The pursuers in this action seek decree against the executor and general disponee of Mr Welch for the amount contained in the bond, and interest thereon from Whitsunday 1884—the interest due prior to that date having been paid.

"The bond in question proceeds upon the