them. He even attended the first meeting of the directors of the company, and only left it for personal reasons, and on account of some little unpleasantness which occurred.

I cannot see in this case anything of the nature of fraud in the actings of the directors or officials, nor such misrepresentation as would entitle the petitioners to have their names removed from the register. The reason assigned by Mr Esslemont and Mr Clark was just one of that class of conventional excuses which might or might not disclose their true feelings on the matter. They were not in any way bound to assign reasons for declining to be directors; the important fact is, that prior to the petitioners applying for shares they were made aware that Mr Esslemont and Mr Clark had refused to join the board, and so they cannot be held to have relied upon them as directors.

LORD KINNEAR—If the petitioners had been induced to take shares on the representation that Mr Esslemont was to be the chairman and a director of the company, and if they had become shareholders on a belief founded on personal knowledge that Mr Esslemont would not give his name to any concern in which he had not confidence, then no doubt the petitioners, if they subsequently discovered that these representations were false, would be entitled to get their names removed from the register.

But although the prospectus of the first company did hold out Mr Esslemont as a director, that circumstance cannot assist the petitioners much, as that company was wound up.

As regards Mr Esslemont, he was quite entitled to withdraw from the directorate, as he had not bound himself by any final agreement to be a director of this company. Nor can I see that there was anything of the nature of fraud in issuing a prospectus which held out Mr Esslemont as a probable director. If, however, we keep in mind the terms of the circular to which your Lordship referred, it is difficult to see how the petitioners could in any way have relied on Mr Esslemont's name.

I agree with Lord M'Laren that the reason assigned by Mr Esslemont and Mr Clark for not being directors in the second company may have been one of those conventional excuses with which we are familiar.

With regard to the reason assigned in the circular, it was not meant to imply—and did not imply—that these gentlemen (although they were unable to join the board) had unbounded confidence in this concern, and were ready to put their money into it. I do not think that the prospectus implies any such thing. All that the circular did was to warn intending shareholders that Mr Esslemont and Mr Clark were unable to be directors of the company.

I think therefore that the petitioners have failed to show any reason for having their names removed from the register.

LORD ADAM was absent on Circuit.

The Court refused the petition.

Counsel for the Petitioners—Lorimer—Johnston. Agents—Somerville & Watson, S.S.C.

Counsel for the Respondents—M'Kechnie—Dickson. Agents—Carmichael & Millar, W.S.

Tuesday, July 7.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

CRABBE *v.* WHYTE.

Judicial Factor—Curator Bonis—Investment of Ward's Funds — Speculative Security—Culpa—Repetition.

A *curator bonis* lent a portion of his ward's funds on the security of a tenement of houses and shops in a new street which was then in the course of formation in Dundee.

In May 1878, when the money was advanced, the houses and shops were finished, and were for the most part let, but some workshops, of which the tenement also consisted, were unlet and unoccupied, and had since been only partially let.

The loan was made on an estimated rental made up from plans, and on a valuation proceeding on that rental obtained by the borrower and furnished by his agent to the curator. The valuation was made by an architect of professional standing in Dundee, but the buildings themselves were not examined except that they were visited by the valuator when in course of erection, and also by the curator's partner in business, who took charge of the transaction. The security proved wholly inadequate.

In an action by the executor of the ward, *held* that the curator was bound to replace the sum lent.

This was an action by David Milne Crabbe, Southend, Essex, executor of the late Mrs Isabella Milne or Allan, who died in Sunnyside Asylum, Montrose, on 15th April 1888, against Robert Whyte, solicitor, Forfar, her *curator bonis*, to have it found that he was not entitled to take credit in his accounts for a sum of £2700, which the pursuer alleged that the defender had invested on insufficient security.

The defender denied that he had been guilty of any negligence in the investment of the money, or that the pursuer had in any way suffered by his actings.

The facts established by the proof which was allowed by the Lord Ordinary are summarised in the following passage in his Lordship's opinion:—"The defender was *curator bonis* to the late Mrs Allan. At Whitsunday 1878 he lent £2700 of his ward's funds to Messrs Kinnes, builders in Dundee. The security was a tenement of houses,

shops, and workshops, situated in Victoria Road, Dundee. Victoria Road was a new street then in course of formation, in the line of an old street known as Bucklemaker's Wynd, which had been removed, or was in course of removal by the Dundee Improvement Trust. When the loan was arranged the tenement in question was not nearly completed; but at Whitsunday 1878, when the money was advanced, the houses and shops were finished, the workshops being also finished except as regards their internal fittings. At that date also the houses were let and occupied, as were also one or perhaps two of the shops; but the workshops were unlet and unoccupied, and have never yet been more than partially let. The loan was made on an estimated rental, made up from the plans, and on a valuation proceeding on that rental, obtained by the borrower, and furnished by his agent to the curator. The valuation brought out a value of £4200, the rental being estimated by the valuator at about £300. The valuation was by Mr Maclaren, architect, Dundee, a gentleman of undoubted character and professional standing. The buildings themselves were not examined, except that they were visited by the valuator when in course of erection, and also by the curator's partner in business, who took charge of the transaction. The security has in result proved wholly inadequate. The curator has for some years been in possession, and the interest is at present in arrear to the amount of over £300. The gross rental has never exceeded £250, and is at present only £237; and the feu-duty being £73, and the taxes and repairs considerable, there is no donbt that the interest is unsecured, and that the property if now sold, would realise considerably less than the amount of the loan."

On 10th April 1891 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"Finds that the defender is not entitled to take credit in his accounts, as curator, for the sum of £2700, invested by him as at Whitsunday 1878, on the security of the house property in Dundee, referred to on record: Finds that he is bound—on receiving an assignation of the said security and payment, or credit in his account for all sums of interest received therefrom, and credited to the ward in his account—to replace in the funds of the curatory the said sum of £2700, with interest at the rate of four per cent. per annum from the date of the loan until replacement, &c.

In his opinion the Lord Ordinary, after narrating the facts as above, proceeded as follows:—"These facts are undisputed. I do not enter into some other matters which bulk largely in the proof, and as to which there is more or less controversy. I refer to the unsubstantial character of the buildings, the non-allocation of the feu-duty, and certain departures from the plan which reduced the cost of the building. The facts as I have stated them are, as I have said, undisputed, and are enough for my judgment.

"The question is, whether the ward's representatives are bound to accept or are entitled to repudiate the investment. They say that it was a bad investment, and that the curator has failed to show that he used ordinary care and prudence in making it.

"I consider that there is no law applicable in such cases except the general rule that a trustee must exercise in making investments ordinary care and prudence. Certain subordinate rules are said to have been established by the decisions, but I doubt whether that is so. More particularly—I hesitate to say universally—that a loan is bad merely because the security consists of unfinished or unoccupied buildings. Such a loan certainly requires to be justified, but cases may be conceived in which it might be so. So also it is not, I think, conclusive that the loan has been made on what is called a borrower's valuation, or that the premises forming the security have been converted to some new purpose, or are situated in a new street or a new locality. All these things, separately, might pass; and I do not consider that either the recent case of *Rae* v. *Meek*, or any of the numerous cases there cited, have established any rule of law to the contrary.

"But the present case presents an unfortunate combination of unfavourable features. There is not, indeed, any suggestion of improper motive. The curator, I do not doubt, did for his ward what he would have done for himself; and, in so far as he erred, he did so, I have no doubt, in company with other experienced men of business whom long immunity had at that period led into loose practice. But, however honest the curator was, I am unable to hold that a loan can be supported as a proper trust investment which is made on the security of unlet or unfinished buildings in a new and unestablished street, and which proceeds upon a valuation obtained by the borrower, and based upon an estimated rental calculated from plans and untested by experience. All these features unfortunately concur here, and where they do concur, I fear there is no room for doubt that a curator or trustee who makes such a loan does so at his own risk, and is bound to replace the money advanced when required to do so by the beneficiaries.

I shall therefore find that the curator is bound to account for the sum of £2700 in question, with interest from the date of the loan at the rate of four per cent., he, on the other hand, receiving credit for all interest hitherto paid, and being entitled to receive an assignation of the security in his own favour and at his own expense."

The defender, with leave, reclaimed, and argued—That the loan had been made after careful consideration, and had proceeded on the opinion and valuation of an architect of good standing in Dundee. The defender had taken every reasonable precaution to secure a safe investment for the money, and if it was partially or totally lost this was occasioned by causes which could not easily have been foreseen, and for which he should not now be held responsible. This was not a case in which

the defender ought to be held liable, as there was wanting here the circumstances which rendered the truster liable in the case of *Rae* v. *Meek*, July 20, 1884, 15 R. 1033, and 16 R. (H. of L.) 31.

Counsel for the respondent were not called upon.

At advising—

LORD M'LAREN—This is a reclaiming-note against an interlocutor of Lord Kyllachy, in which it is found that the defender, a *curator bonis*, is not entitled to take credit in his accounts for a sum of £2700, which the Lord Ordinary holds to have been invested on insufficient security. The security consisted of a tenement of houses, shops, and workshops, which at the time of arranging the loan were being put up in a street in Dundee, which is described as being then in course of reconstruction. I cannot state the facts on which the liability of the *curator bonis* is said to be founded better or more shortly than by reading a few sentences from the Lord Ordinary's judgment—[*His Lordship here read the statement of the facts of the case contained in the Lord Ordinary's opinion and quoted above*].

I agree with the Lord Ordinary that the obligation of a trustee in the matter of investments is that he shall exercise ordinary care and prudence in judging of the sufficiency of the security offered. In the two recent cases in the House of Lords—*Knox* v. *Mackinnon* and *Rae* v. *Meek*—the diligence required of a trustee was described as that which a prudent man of business would use in his own affairs. In applying this rule we must of course assume parallel cases. A prudent man of business may be a builder by profession, or a dealer in subjects which are more or less speculative, but which on the average of all his transactions yield him a profitable return. Such an illustration is evidently not at all to the point. We must suppose a prudent man desirous of placing a sum of money in a state of safe investment, such as will produce only the ordinary interest of a loan on heritable security. The point for consideration is then the safety of the security. I shall not be thought to state the rule with undue severity against trustees when I say that a trustee will, in my view, only be personally responsible for losses when it appears that he has not made due inquiry as to the safety of the security, and that the security is not in fact such as a trustee ought to accept.

A trustee is not required to exercise a personal judgment in matters of professional skill; he is therefore entitled to act on the opinion of a conscientious and skilful valuator, selected by himself to advise him as to the suitability of the property as a security for trust money. If he takes such advice and acts according to the best of his judgment, I should not hold him responsible for supervening loss.

But again, a trustee may have omitted to take advice, and may have acted without much consideration, and loss may result. Still, if he can satisfy the Court that the investment was such as a trustee would have been advised by competent judges to accept, or that it was such as a trustee might lawfully and prudently accept, he will not be responsible, because in the case supposed, although the trustee was negligent, the loss was not caused by his negligence, but is due to the depreciation of property or other causes.

In the present case I agree with the Lord Ordinary that the security was not such as a trustee ought to have accepted, because it was a security of a speculative character, consisting of unlet and unfinished buildings in a new and unestablished street, the rental being calculated from plans and measurements, and not based in any fair sense on actual transactions. I am also of opinion that the defender was negligent—I do not mean that he was intentionally negligent; only that he did not take the proper means of satisfying himself as to the suitability of the security for the purposes of trust investment. I do not overlook the fact that the defender was furnished with a valuation prepared by an architect and valuator, who is admitted to be of high standing in his profession. But this was a valuation obtained by the borrower. I assume that the valuation was a fair one, just such a valuation as might guide a company or a private lender who might be willing to lend on such security, taking on himself a certain risk for which he might be indemnified by charging suitable interest. But the opinion of the architect was never asked as to the propriety of lending trust money on such a security, and I am not going to assume from the statements made in the valuation that the answer to such an inquiry would be an affirmative answer. I think it must be taken that the defender acted without due inquiry and without taking account of the considerations which made this heritable property an unsafe investment for trust money, and that the defender may therefore be properly required to replace the money advanced on receiving an assignation to the security. It follows, in my opinion, that the reclaiming-note should be refused and the interlocutor affirmed.

LORD KINNEAR—I am entirely of the same opinion. I agree with the Lord Ordinary both as to his statement of the facts and of the law applicable to these facts. I think that the case of *Rae* v. *Meek* is directly applicable, and rules the present case.

The LORD PRESIDENT concurred.

LORD ADAM, who was absent on Circuit during the greater part of the case, delivered no opinion.

The Court adhered.

Counsel for the Pursuer—D.-F. Balfour, Q.C.—Law. Agent—James D. Turnbull, S.S.C.

Counsel for the Defender—Asher, Q.C.—Dickson. Agents—Macrae, Flett, & Rennie, W.S.