heritors for manse and glebe. There is, then, no doubt that the minister of Ladhope is the minister of a parish, and that he is possessed of a benefice.'

"Therefore, as regards the character of the parish as forming a benefice, and the status and rights of the minister (except in regard to the matters above mentioned), a parish erected *quoad sacra* is placed by the statute in the same position as one erected *quoad omnia*—See opinions of Lord Wood in *Grant* v. *Macintyre*, 11 D. 1379–80, and Lord Medwyn, 1387. Indeed, the statute was passed, and the declaration as to the ministers' rights inserted, in a great measure for the purpose of removing the inconveniences attendant on the previous state of the law as shown in the decisions—*Gordon* v. *The Trustees of the Ministers' Widows' Fund*, 14 S. 509; *Irvine* v. *The Trustees of the Ministers' Widows' Fund*, 16 S. 1024; *Stewarton* case, 5 D. 427, and other cases.

"If then, notwithstanding the distinctive qualifications stated, a *quoad sacra* parish is held to be a benefice, and its minister is declared to have the full status and rights and privileges of a parochial clergyman, is one of those rights or privileges to be withheld because it is said to be a matter of civil right? I think not.

"Although the exemption has civil conquences it is one peculiarly personal to the minister in his clerical character. As Lord Young says in *Hogg* v. *Parochial Board of Auchtermuchty*, 7 R. 995—'It is, I think, undoubtedly a class privilege which the pursuer enjoys only as an individual member of a class, and does not attach to the parish manse and glebe in whose hands soever they may be, but only to his ownership and occupation of them as a parish minister.' Reference may also be made to the opinions of the majority of the Judges in *Grant* v. *Macintyre*, and of Lord Chelmsford in *Hutton* v. *Harper*, 3 R. (H. of L.) 14, as showing that if the right claimed is one enjoyed by and personal to parish ministers, and is not in its nature inconsistent with the position of a minister of a *quoad sacra* parish, the fact that it is of a civil character is no answer to the claim. Indeed, right to participate in a widows' fund is as much a civil right as is exemption from poor rates, and both are personal to the minister in his capacity as minister. In this view *Grant* v. *Macintyre* and *Cheyne* v. *Cook* are authorities directly in point.

"Now, the complainer is in the eye of the law a parish minister, and he claims an exemption personal to parish ministers. I think that I should be putting too restricted an interpretation upon the words of the statute if I were to hold that they do not cover such an exemption.

"In so deciding I have kept fully in view the presumption against exemption from taxation. It is true that the result of holding as I have done is to increase the number of persons entitled to exemption, but that also occurs where a parish is disjoined and erected *quoad omnia*, and I do not understand it to be contended that the ministers of such parishes do not enjoy the exemption.

"So far as I am aware this is the first time that the question has arisen for decision in this Court. The only decision to which I have been referred is one by Sheriff-Substitute Cowan at Paisley, of which unfortunately only a very imperfect report exists, in which he decided in favour of the minister's claim for exemption."

Counsel for the Complainer—Johnston. Agent—J. B. M'Intosh, S.S.C.

Counsel for the Respondents — Low — C. K. Mackenzie. Agents—A. & A. Campbell, W.S.

HOUSE OF LORDS.

Thursday, August 8.

(Before Lords Herschell, Watson, and Fitzgerald.)

RAES *v.* MEEK AND OTHERS.

(*Ante*, July 20, 1888, 25 S.L.R. 737; 15 R. 1033.)

Trust—Bad Investment—Liability of Trustee and of Law-Agent in Trust—Title to Sue.

Trust funds which were held in terms of an antenuptial marriage-contract were lent on the security of houses in the course of erection, and were lost through the insufficiency of the security. The marriage-contract empowered the trustees to lend on heritable securities or personal securities or obligations, and contained a clause which declared that the trustees should not be answerable "for errors, omissions, or neglect of diligence, nor for the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases." An action was raised by the beneficiaries who had a contingent right to the fee of the trust-estate, against the trustees and the law-agents in the trust, "conjunctly and severally, or severally, or in such other way or manner" as should seem just, to restore the money to the trust. Defences were lodged for one of the trustees and for the law-agents.

Held (*affirming* the judgment of the First Division) that the action as against the law-agents fell to be *dismissed*, on the ground that these defenders would have been liable only if they had been employed to give advice to the appellants and neglected the duty of so doing; and further, that it did not appear from the evidence that the law-agents had been employed to advise the trustees as to the sufficiency of the security, or that the latter acted upon such advice.

Held (*reversing* the judgment of the First Division) that the trustee was liable, as it appeared from the evidence that he had failed to show the same degree of reasonable care that a man of ordinary prudence would exercise in the management of his own affairs.

This case is reported *ante*, July 20, 1888, 25 S.L.R. 737; 15 R. 1033.

The pursuers appealed.

At delivering judgment—

LORD HERSCHELL—My Lords, the circumstances of this case are somewhat peculiar. The appellants are the children of the marriage of Robert Reid Rae and Jessie Croil, and the defendant Meek is one of the trustees of the marriage-contract between these parties, entered into on the 7th of September 1852. Under this contract Robert Reid Rae and his wife were also appointed trustees, a major part of whom was to form a quorum, the wife during her lifetime being a *sine qua non*. By this contract Jessie Croil conveyed all her estate inherited from her deceased father to the trustees named in it for behoof of herself in liferent, and in case she survived her husband absolutely in fee. In case Robert Reid Rae survived her he was to enjoy a liferent so long as he remained unmarried. Upon his death or marriage the property was to pass to the children of Robert Reid Rae and Jessie Croil. The trustees were authorised to invest the trust property "in the purchase of heritable property, feu-duties or ground annuals, or Government or bank stocks, or heritable securities, or even upon personal securities or obligations," as they might approve of as good and sufficient.

In 1874 the trustees sold a portion of the trust property for £2750, and received payment of another sum of £2000, which had been lent on heritable security. They had thus £4750 to invest. On the 5th of May in that year a meeting of the trustees took place, at which Mr and Mrs Rae and Mr Meek were present, when it was resolved that a loan should be made to Mr William Anderson on the security of unfinished buildings in the Gallowgate, Glasgow, provided Mr Hotson, their law-agent, should be satisfied with the title, and that such part of the loan should be deposited in a bank in the joint names of the parties' law-agents as Mr Burnet, an architect who had valued the buildings, should deem to be sufficient for finishing them.

The loan was accordingly made, and the entire sum of £4500 ultimately paid to Anderson. I shall have presently to revert to the circumstances attending the loan, but it will suffice for the present to state that the transaction turned out a disastrous one for the trustees, and that the money lent has been lost to the trust-estate. This action has been brought by the present appellants to compel the defendant Meek to make good the loss. The law-agents who acted for the trustees at the time of the loan were joined as defendants, and the same relief was claimed against them.

The Lord Ordinary required the appellants to elect whether they would proceed against the trustee or the law-agents, and on their declining to do so, dismissed the action on the ground that the trustee and the law-agents ought not to have been sued in the same action. This interlocutor was recalled by the Inner House, and the parties were allowed to proceed to proof. After proof had been led the cause was argued before the Second Division and three Judges of the First Division of the Court. The Lord President, the Lord Justice-Clerk, and Lord Adam delivered their opinions in favour of all the defenders. Lord Young concurred in thinking that the defender Meek was not liable, but held that a case had been made out against the law-agents. Lords Mure, Shand, and Rutherfurd Clark thought that the liability of the trustee had been established, but that there was no case against the law-agents.

My Lords at the conclusion of the argument of the learned counsel for the appellants all your Lordships were of opinion that they had failed to show any ground for their action against the law-agents; I share the difficulty which was felt by the Lord Ordinary. I cannot see how the law adviser could in any view be held liable to restore to the trust fund the money lost, which was the claim against the other defender. If an action be maintainable against them at all it could only be to compel payment of such damages as the appellants have sustained by reason of their failure of duty. And considering the contingent nature of the appellants' interest in the fund it is obvious that this must be something very different from the amount of the loss to the estate. Liability as against the defenders, with whose case I am now dealing, could in my opinion only be established by proof that they were employed to give advice either by the appellants or by some person on their behalf, and that having undertaken this employment they neglected their duty. Now, they certainly were not employed by the appellants, nor do I think they were employed on their behalf. The alleged duty, if it existed at all, was to the trustees and not to the beneficiaries. If there has been a breach of it, the trustees and not the beneficiaries are the parties to sue. There may be cases where, if trustees failed to call to account those who are under liability in respect of acts injurious to the trust estate, the beneficiaries may compel them to do so or even enforce the right themselves. But no such question is raised by the averments in the present action. But further, I think it right to say that in my judgment the evidence does not establish that the law-agents were employed to advise the trustees as to the sufficiency of the security, or that they acted on any such advice. It seems to me therefore that the case against these defenders entirely fails, and that the appeal as against them ought to be dismissed.

I turn now to the case against the defender Meek, which has given rise to such divergence of opinion amongst the learned Judges in the Court below. I may remark at the outset that if a breach of duty on his part has been proved, I think it is competent for the appellants to maintain this action. It is clear that neither Mr nor Mrs Rae could obtain any relief against the defender Meek, for if there has been a violation of duty they were as much parties to it as he was. They cannot claim to have the sum lost replaced, to be held on

the trusts of the marriage-contract so far as those trusts are for their benefit. But I see no reason why the appellants may not claim to have their contingent interest under the trusts of the marriage-contract protected.

The law bearing upon the liability of trustees has been recently considered by your Lordships in the cases of *Whiteley* v. *Learoyd* and *Knox* v. *Mackinnon*, the one coming from the English, the other from the Scotch Courts. I think these cases establish that the law in both countries requires of a trustee the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs. The Lord President in the present case did not adopt this as the test. "We must not demand," he said, "of Mr Meek any more prudence or diligence or knowledge than he actually possesses or uses in the management of his own business. For that purpose we must consider what Mr Meek is." As a result of this consideration he came to the conclusion that Meek was not a man of business habits, or of great intelligence or discretion. I do not think the inquiry thus entered upon was a relevant one. The test which the Lord President applied was rejected as erroneous by this House in *Knox* v. *Mackinnon*. Lord Watson there said—"It was seriously argued that according to the law of Scotland the responsibility of a gratuitous trustee must (apart from any special dispensation by the truster) be tested by reference not to an average standard but to the degree of care and prudence which he uses in the management of his private affairs. The rule which is quite new to me would be highly inconvenient in practice. In every case where neglect of duty is imputed to a body of trustees it would necessitate an exhaustive inquiry into the private transactions of each individual member, the interest of the trustee being to show that he was a stupid fellow careless in money matters, and that of his opponents to prove that he was a man of superior intelligence and exceptional shrewdness."

I think therefore that the ground upon which the Lord President, and the learned Judges who concurred with him, rested their judgments upon this part of the case cannot be supported.

Has it then been shown that the trustee failed to exercise that degree of diligence which a man of ordinary prudence would exercise in the management of his own affairs? In order to answer this question it is necessary to lay the facts before your Lordships more fully than I have hitherto done.

The buildings which were to form the security for the loan agreed upon at the meeting of the trustees to which I have referred were an unfinished portion of a large block which the borrower was erecting in Gallowgate upon a site which was part of an area cleared of a very inferior class of buildings in the course of the city improvements. The ground annual upon that portion which was to be the security of the trustees amounted to £192. The buildings in course of erection were intended for use as warehouses and offices, and were of a character hitherto unknown in that locality. The only guide which the trustees possessed as to the adequacy of the security was an estimate of Mr Burnet, who valued the buildings when finished at £6500, over and above the annual feu-duty. This valuation was contained in a letter addressed by Mr Burnet to the agents of the borrower by whom it had been obtained. The trustees sought for no independent valuation. They made no inquiry before agreeing to the loan as to the rentals to be anticipated from the property, and had no estimate of those rentals before them. It has been suggested that they were advised by their law-agents that the security was sufficient. I can find no evidence of this. Mr Meek asked whether they could lend on unfinished buildings, and received the answer that they could, and that such loans were common. I see no reason to doubt that this answer was correct. If the buildings in course of erection had been of the same character as those which previously existed on the same site, and these had been constantly let, I do not think that the mere fact that the new buildings were unfinished would be material if due security were taken for their completion. I lay no stress therefore on the mere fact that they were not completed at the time of the loan. But I have said enough to show that the erection of these warehouses was an adventure on the part of Mr Anderson, the borrower. Whether it proved successful or not would depend entirely upon whether the business the purposes of which they were intended to serve took root in the locality or not. This was a pure matter of speculation. No doubt Mr Anderson was sanguine as to its success, and he was entitled to run what risk he pleased. But the duty of the trustees was to obtain a safe investment which would afford a security for the money advanced, and not to hazard it upon a speculation. The event which happened was such as ought to have been anticipated by any person of prudence, if not as a probable, at least as a possible one. The buildings remained in great part untenanted, the rents never reaching a sufficient sum to discharge the ground annual. Anderson became insolvent, and the trust fund has been lost. I cannot think that under these circumstances the defender Meek exhibited in this transaction the care which a person of ordinary prudence would exercise in the management of his own affairs.

The Lord President, who took the view most favourable to him in the Court below, used the following language with reference to the security taken—"The failure of the security arose from this, that the erection of buildings of the character of those which were erected in this locality—that is, in the Gallowgate of Glasgow—was in itself a very great risk, and an experiment, and turned out to be an entirely unsuccessful experiment." The defender not only advanced money upon such a security, but he obtained no independent opinion as to the value to the property, the rental it was likely of yield, or the prospects of speedily obtaining

tenants. He was content to rely exclusively on the lump valuation of the borrower's architect obtained for the purposes of the loan. To hold that a trustee who thus acted had discharged his duty, and was under no liability if the security proved worthless, would, I think, be highly dangerous.

But it was urged on behalf of the defender that this did not conclude the case against him, inasmuch as he was protected by the clause of immunity contained in the trust-deed. That clause is in the following terms:—"That the said trustees shall not be answerable for errors, omissions, or neglect of diligence, nor for the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases, nor *singuli in solidum*, or for the intromissions of each other or of their factor, but each for his or her actual intromissions only." Such a provision, in terms identical or not distinguishable in their effect, is a common one, and is to be found in many trust-deeds. It does not now come before the Courts for construction for the first time. Its effect was considered with great care in the case of *Seton* v. *Dawson* long before the preparation of the trust-deed with which we have to deal. And it has been the subject of discussion in several cases since the date of that decision. I adopt the law as laid down by Lord Watson in this House, which I think is well warranted by the authorities—"It is settled in the law of Scotland that such a clause is ineffectual to protect a trustee against the consequences of *culpa lata* or gross negligence on his part, or of any conduct which is inconsistent with *bona fides*. I think it is equally clear that the clause will afford no protection to trustees who from motives, however laudable in themselves, act in plain violation of the duty which they owe to the individuals beneficially interested in the funds which they administer. I agree with the opinions expressed by Lords Ivory, Gillies, and Murray in *Seton* v. *Dawson*, to the effect that clauses of this kind do not protect against positive breaches of duty."

It is impossible to draw any hard and fast line between the want of that care which a man of ordinary prudence would display in the management of his own affairs and that high degree of negligence which is termed *culpa lata*. But I have arrived without hesitation at the conclusion that there was *culpa lata* in the present case. Indeed, I think that to advance money on such a security, with only such information and under such circumstances as I have described, was a positive breach of duty on the part of the trustee towards those beneficially entitled to the trust fund.

I feel some regret at being compelled to arrive at the conclusion that the defender is liable, for I should be most unwilling to press the case hardly against any trustee who has acted honestly and without any improper motive. But it is the bounden duty of the Courts to enforce against trustees the obligations they have undertaken, and to protect the trust funds committed to their charge.

I have already said that no order ought to be made in this case from which Mr or Mrs Rae can obtain any benefit. It is impossible therefore to ordain *simpliciter* that the defender should replace the lost trust fund, and that the fund thus replaced should be held subject to the trusts of the marriage-contract. I think the order should be as follows:—That the judgment be affirmed, and the appeal dismissed as regards the respondents other than John Meek, and that as regards that respondent the judgment appealed from be reversed, and that the case be remitted to the Court below with directions to ordain the said respondent to pay to a judicial factor to be appointed by the Court the sum of £4500, to be held by him for the trusts and purposes following—that is to say, to pay to the said John Meek the interest derived from the investment of the fund, less the necessary expenses, during the joint lives of Robert Reid Rae and Jessie Rae. In case the said Jessie Rae should survive the said Robert Reid Rae, then to transfer the said £4500, or the securities representing the same, to the said John Meek, but in case the said Robert Reid Rae should survive the said Jessie Rae, then to pay to the said John Meek the interest derived from the investment of the fund, less the necessary expenses, so long as the said Robert Reid Rae shall live and remain unmarried, and upon the decease or second marriage of the said Robert Reid Rae to hold the fund upon the trusts declared by the marriage-contract. And to further ordain that upon payment of the aforementioned sum to the judicial factor the security relating to the Gallowgate property be transferred to the respondent Meek at his expense, if he shall so require. And that the said respondent do pay the appellants their expenses of process in the Court below, so far as occasioned by his defence to the action; and that the said respondent do pay to the appellants two-thirds of their costs of this appeal, to be taxed in the manner usual when the appellants sue *in forma pauperis*. I move your Lordships accordingly.

LORD WATSON—My Lords, I have had an opportunity of considering the terms of the judgment which has just been delivered, in which I entirely concur.

LORD FITZGERALD—My Lords, I have carefully listened to the judgment delivered by the noble and learned Lord on the Woolsack, and I entirely concur in it; in fact it is in accordance with what we agreed upon at the close of the argument.

Interlocutor appealed from, so far as regarded the respondents the law-agents, affirmed, and appeal dismissed; and so far as regarded the respondent the trustee, reversed.

Counsel for the Appellants—Asher, Q.C. —Rhind—A. S. D. Thomson. Agent—A. Beveridge, for W. Officer, S.S.C.

Counsel for the Respondent Meek—D.-F. Balfour, Q.C.—G. W. Burnet. Agents—

Wm. Robertson & Company, for J. W. & J. Mackenzie, W.S.

Counsel for the Respondents Hotson and Howie — Rigby, Q.C. — Law. Agents— Murray, Hutchins, & Stirling, for Hotson & Brown, Glasgow.

COURT OF JUSTICIARY.

GLASGOW CIRCUIT.

Thursday, October 17.

(Before Lord M'Laren.)

NELSON *v.* M'PHEE.

Justiciary Cases—Glasgow Police Act 1866 (29 *and* 30 *Vict. cap.* 273), *sec.* 271—*Possession of Animal, &c., unfit for Human Food "with a View to Sale"—Whether Sale means Sale as for Human Food.*

The Glasgow Police Act 1866 provides, sec. 271—"Every person who is found in possession of any animal, or part of an animal, which died of disease, or of any animal, or part of an animal, or any fruit or vegetable or fish which is unsound or unwholesome or unfit for human food, shall be presumed to have kept or concealed the same knowingly with a view to sale, until the contrary be shown, and shall be liable in respect thereof to a penalty," &c.

A person charged under this section proved that he had the animals complained of in his possession with a view to sale for boiling down for the manufacture of soap and similar products. He was convicted.

Held that the words "with a view to sale" mean with a view to sale as or for human food, and conviction *quashed.*

Thomas Cormack Nelson, auctioneer, Glasgow, was charged before the Police Court of Glasgow, at the instance of Donald M'Phee, Procurator-Fiscal of Court, upon a complaint which set forth that he had, "contrary to the Glasgow Police Act 1866, particularly section 271 thereof, on 12th September 1889, in Yorkhill Slaughter-house, in Pointhouse Road, Glasgow, been found in possession of the carcases of four oxen which were unsound and unwholesome and unfit for human food." Evidence was led, and the Magistrate found the charge proven, and convicted the accused, who took this appeal to the next sitting of the Court of Justiciary on Circuit in Glasgow.

He averred that the four carcases were found in his possession on the date libelled. They were not, however, in his possession as or for sale as human food, they were not offered by him as or for sale as human food, nor were they intended by him to be used as or to be offered for sale for human food. On the contrary, the appellant had them in his possession, and had ordered them to be sold for boiling down for the manufacture of soap and similar products. . . . The foregoing facts were proved at the trial. The presiding Magistrate held it proved that the appellant had the cattle in his possession for sale, though not for the purpose of sale for human food, but being of opinion that the appellant was not entitled to have in his possession for sale for any purpose, even for boiling down, any carcases of cattle unfit for human food, he convicted the appellant.

He pleaded, *inter alia*—"(1) The said Magistrate had no jurisdiction to pronounce the said conviction. (2) The appellant not having had possession of the said carcases as or for sale as human food, and not having offered the same as or for sale as human food, but having only had the same in his possession in order to sell them for manufacturing purposes, and having so sold them, the appeal should be sustained."

The Glasgow Police Act 1866 (29 and 30 Vict. cap. 273), under the general heading 5, "Unwholesome or Adulterated Food," provides, sec. 268—"Every person who sells or exposes for sale, or keeps for the purpose of sale for human food any of the following articles shall be liable to a penalty not exceeding ten pounds, or to imprisonment for a period not exceeding sixty days:—Any animal or part of an animal which died from disease; any animal or part of an animal, or any fish, or any fruit or vegetable which is unsound or unwholesome or unfit for human food; any blown, stuffed, or pricked meat." Section 269—"Every occupier of any building, or part of a building, or place used for the sale of any article of food, who does not keep the same clean and in good condition shall be liable to a penalty not exceeding twenty shillings." Section 270—It shall be lawful for the Inspector of Nuisances, or for any constable to seize, impound, and convey to the Police Office any animal or part of an animal, or any fruit or vegetable, or any meat, or any article of food sold or exposed for sale, or kept in any place used for the sale of such article, in respect of which there is reasonable ground for supposing that a penalty has been incurred under any of the provisions hereinbefore contained, and if such penalty is imposed it shall be lawful for the magistrate to declare such articles forfeited." Section 271—"Every person who is found in possession of any animal or part of an animal which died of disease, or of any animal or part of an animal, or any fruit or vegetable, or fish which is unsound or unwholesome, or unfit for human food, shall be presumed to have kept or concealed the same knowingly with a view to sale until the contrary be shown, and shall be liable in respect thereof to a penalty not exceeding ten pounds, or to imprisonment for a period not exceeding sixty days, and it shall be lawful for the magistrate, whether he imposes such penalty or not, to declare such animal or part of an animal, fruit, vegetable, or article of food to be forfeited." Section 272—"It shall be lawful for the magistrate,