HOUSE OF LORDS.

Thursday, March 31, 1892.

(Before the Lord Chancellor (Halsbury) and Lords Watson, Herschell, Morris, and Field.)

RENEY *v.* MAGISTRATES OF KIRKCUDBRIGHT.

(*Ante*, vol. xxviii. 242, and 18 R. 294.)

Ship — Reparation — Harbour — Alleged Contributory Negligence of Master of Vessel—Expenses.

A vessel in entering a harbour grounded, and the owner sued the harbour trustees for the injuries she received. The master of the ship was in command, and had the helm, being assisted by two local fishermen. The accident occurred within the jurisdiction of the harbour-master, who gave directions from the shore in answer to inquiries from those on board. The harbour-master was ignorant that the tide had begun to ebb, and a wrong course was steered. *Held* (*rev.* judgment of First Division) that the defenders were liable in damages as the harbour-master was in fault in the directions he gave.

James Reney sued the Magistrates of Kirkcudbright for damages caused to his schooner by the negligence of the defenders' harbour-master, whom the ship's company were bound to obey in terms of 10 and 11 Vict. cap. 27, sees. 52 to 68, incorporated by 16 and 17 Vict. c. 93.

The dock of Kirkcudbright Harbour lies on the south bank of the river Dee between two piers. From the western pier a shoal, which varies with the tide, runs out towards the channel. Ships desiring to enter the dock are usually anchored at Moat Brae, about 150 yards below, and warped into the dock, although at flood-tide ships have been sailed into the dock.

It was proved that a ship will be kept off the shoal by a flood-tide, but driven on to it by an ebb-tide. Reney had been once in the harbour nine years before, and as there were no regular pilots, he took on board two local fishermen, Smith and Poland, to assist. At Moat Brae the ship's sails were lowered; Reney was at the helm, and Smith hailed the harbour-master, who stood on the West Pier, for instructions when to let go the anchor. The harbour-master called "Come on," and waved to the ship to proceed on her course, which she did, the master porting the helm and bringing her gradually inshore. Smith again called to the harbour-master, "Mind you tell us when to let go the anchor," and again received the answer "Come on" from the harbour-master, who did not know that the tide was ebbing, and who only ordered the anchor to be let go when it was too late. The ship grounded on the shoal and suffered damage.

The harbour-master said that he intended to bring in the schooner by sailing instead of warping, and admitted that he did not know the tide was ebbing. The fishermen knew of the shoal, and that the tide was on ebb, but thought it their duty to obey the harbour-master.

On 19th December 1890 the First Division, recalling the interlocutor of the Lord Ordinary (Lord Trayner, June 11, 1890), held that the stranding of the vessel was directly due to the fault of the harbour-master, but that the persons navigating the ship were in fault in porting the helm, and that this fault contributed to the accident, and the Court accordingly assoilzied the respondents, with expenses.

The pursuer James Reney appealed.

At delivering judgment—

LORD CHANCELLOR (HALSBURY) — My Lords, the facts of this case are extremely clear, and I entertain no doubt as to the party upon whom the responsibility for the accident rests. This vessel, as I understand the matter, was hindered in her approach to the dock to which she was intended to proceed by reason of going over a bank which is not obvious to anybody not familiar with the place, but which was perfectly familiar to the harbour-master. We start with this concession, about which there can be no doubt, because it is proved by the person who is principally interested in denying it, that the harbour-master was under the impression that the tide was either flood-tide or slack water. The next proposition which is established by the harbour-master is that the manœuvre which he had intended the vessel to execute was not to anchor at all but to come straight into the dock. Now, that immediately raises this question. It is clear that if the tide had been flood-tide, the operation of the tide would have kept the vessel away from the shore, even although she was under a port-helm. The question is a question of yards, so that a yard or two one way or the other would make the whole difference.

The harbour-master's own account of the transaction is that he saw the vessel, and he would know that she was under a port-helm. Now, the harbour-master says—"I intended her to be in the middle channel, and to keep her so that she would be perfectly safe, and therefore what I intended to do was to tell her to keep off, and I afterwards intended to give her further directions when she should be sufficiently level with the entrance to the dock—my intention was to make her keep off." He carries out that intention by directing her to come on. I omit, for the moment, the particular direction which he gave. I do not think that anybody (unless you have the situation of all the persons perfectly crystallised so that it cannot be altered) is able to give a proper verbal description of the way in which the harbour-master's hand waved—whether it was right or left, or backwards or forwards, but that everybody on board understood it to be a direction and an obligation to them to come on, to come

nearer to the dock, is certain—in fact, there is no denial of it at all. The result was, as a matter of fact, that the vessel, being steered by the master, who knew nothing of the particular obstruction which was ultimately caused to the vessel, was steered in the appropriate and proper way to bring her into the dock, assuming that no such obstruction existed, and the accident happened by reason of the vessel grounding on the bank through that wrong steering.

It is said, in the first place, that the two persons who were on board (whom I decline to dignify by the name of "pilots," for that is not an appropriate description of them, inasmuch as they were merely fishermen who came on board to assist the captain by their local knowledge) knew of the difficulty. Then comes this question. The original blunder was on the part of the harbour-master, who did not know what the state of the tide was, it being admitted that the state of the tide makes a considerable difference in the direction which ought to be given by the person in charge of the operation. He gave directions which would have been appropriate to one state of the tide, in which the tide was not, but which were perfectly inappropriate to the state of the tide at that time. It is said that the two local pilots (I give them their dignified appellation) ought to have seen that there was danger. Now, we must see upon what hypothesis the two local pilots were proceeding. One was under the impression (there can be no doubt about it, not only because they say so, but also because the acts of the persons at the time show what was thought to be intended) that so far from the vessel being sailed straight into the dock, the vessel was being brought up as near as she could be safely got to the pier-head, and was then to drop her anchor, so as to keep the vessel in a proper position for afterwards entering the harbour. Smith called out twice, and the last time in a tone which indicated some anxiety or impatience I think—"Tell me when I am to drop my anchor." Now, upon what hypothesis was the harbour-master acting? If, as he says himself, he was under the impression that the vessel was to sail straight in, what was his duty then? Surely, when these local men (upon whom the Solicitor-General for Scotland relied, and as to whom he urged that we were entitled to consider that they would know what the difficulty was) called out to the harbour-master, the harbour-master must have known from their words that the idea in their minds, and in respect of which they must be supposed to have been acting, was first anchoring, and then warping the vessel in. Instead of acting upon that idea he twice used the words, "Come on." I do not care with what gesture they were accompanied, for everybody concerned was under the impression that he meant the vessel to come on, and she did come on.

Under these circumstances there appears to me to be no doubt as to what was the cause of the mischief and as to who was responsible for it. The harbour-master gave the direction which he did, as he was entitled to do, but I do not think that his evidence and that of another witness are a model of candour. It is admitted that the vessel at that time was under the order of the harbour-master. The effort of the harbour-master is to show that until the vessel has actually got into the dock his authority does not arise, and that all the functions up to that time belong to those who are on board the vessel. It is not necessary to show (because it is admitted on record, and even if it were not admitted on the record it is quite manifest) that the harbour-master was then, in the exercise of his duty and vocation, giving directions to the vessels which were coming into the harbour—he did give directions to this particular vessel—and, as it appears to me, those directions were implicitly obeyed. I do not understand what direction is supposed to have been disregarded or what negligence is supposed to have been committed. The Solicitor-General said that the direction to come on was negligently obeyed, because they came on under a port-helm. What was the thing which was being done? If it was what anybody might suppose from the harbour-master's statements and directions was intended to be done, I do not see any negligence. The witness said that the place where he expected to anchor, and which was within a few yards of where they did actually anchor, was the usual place to anchor. But, as the Lord President very pertinently observes, if the harbour-master had even then called out in time and had ordered the vessel to be anchored, no accident would have happened. I think that the judgment of the Lord President is confirmatory of the view which I take, because in his judgment he says that the harbour-master eventually gave that direction, but that he ought to have given it sooner than he did. My Lords, if that be the true view of the facts there does not seem to me to be room for the defence of contributory negligence. The Solicitor-General, with the candour which distinguishes him, rather repudiated the notion of the matter being decided upon the question of contributory negligence at all. In truth, there is no question here of contributory negligence. The question is, who is responsible for what was ordered? Taking one view, the cause of it was the negligence of one set of people, and, taking the other view, the cause of it was the negligence of the other set of people, there being no contributory negligence upon either hypothesis.

Under these circumstances it appears to me that the cause of the accident is abundantly clear, and the only proposition made here on the other side is a sort of suggestion that the harbour-master had a limited authority by reason of his being aware that those persons who were on board the vessel were more familiar with the local circumstances of the place, and with the navigation, as being fishermen, than he was. My Lords, I think that that would be a very dangerous proposition to lay down. Of course no one supposes that this is a case of wilfully running against an obstruction;

but to say that the harbour-master's authority is limited, or that a person is at liberty to disregard the orders of the harbour-master (who has by law power to give orders) because that person may have the idea in his mind that the harbour-master is making a mistake would be, to my mind, a most dangerous principle to establish. A double authority would probably in many cases be fatal. Those who have the power to give orders have the right to consider that they will be obeyed. It would, to my mind, be a very strong thing to say that a particular direction of the harbour-master in reference to what a vessel shall do, and who is within his right in giving it, should be disobeyed.

I therefore move your Lordships that the interlocutor appealed from be reversed, and that the interlocutor of the Lord Ordinary be restored.

LORD WATSON—My Lords, I also am of opinion that the judgment of the Inner House in this case must be reversed, and the decision of the Lord Ordinary restored. The mistake which caused damage to the ship arose from the vessel porting her helm, in consequence of which she ran on the bank and there stranded. The question is, who was responsible for that mistake?

Now, when the vessel stranded she was confessedly within the harbour-master's jurisdiction, her own captain being in charge. In the performance of his duty he was assisted by two local fishermen. It seems to me to be clearly proved, and to have been assumed by the learned Judges in both Courts below, that the line upon which the vessel was steered by her captain was the very course which the harbour-master by his words and gestures had invited her to pursue. It was suggested in argument by the Solicitor-General that although the captain was ignorant of the danger which following that course as far as the pier would necessarily entail, yet it was known to two persons on board, namely, the fishermen to whom I have referred; and he further argued that the owner of the vessel was affected by the knowledge of these men. My Lords, I consider that (to say the least of it) to be a very doubtful and dangerous proposition. But I do not think it necessary to consider that point, because these two men were not in charge of the vessel at the time. If they had known or understood that the harbour-master intended the vessel to sail straight along the course which I have indicated into the harbour, I think it would have been their duty, seeing the knowledge which they had, to take some steps to prevent that order being followed out. Although they were not in charge, I think it would have been their duty to inform the captain. I do not suggest that their failure of duty in that respect, the captain being in charge, would have absolved the harbour-master, or the respondents in this appeal, whose servant he was, from the consequences of his neglect. But these two fishermen were under the impression (a very natural one) that the captain of the vessel had been directed as to the course which was meant to be pursued, but that the vessel would be ordered to come to anchor before reaching the pier, in order that she might subsequently be warped into the harbour. Accordingly, when they reached that point, they made an earnest appeal, or rather a series of earnest appeals, to the harbour-master to give them directions, and to let them know when they were to drop their anchor. The harbour-master made no response to these appeals for this obvious reason, that at the time they were made it was his intention that the vessel should proceed and enter the harbour under her own sail. He did entertain that intention, and intended to give directions to that effect because he was neligently ignorant of the state of the tide at the time. He discovered his own ignorance just a moment too late, and then he changed his plan and gave the order, which he should have issued before, to drop the anchor, and the consequence of his having been too late is one for which I think the respondents are clearly responsible.

LORD HERSCHELL—My Lords, I am of the same opinion. According to the account which the harbour-master himself gives, for whom the defenders are responsible, he was on the occasion in question inviting this vessel to enter the harbour. He was so inviting her under the impression that the tide was a flood tide, or at all events in ignorance that it was an ebb tide, and it appears clear upon all hands that for a vessel to enter the harbour otherwise than upon a flood tide is a dangerous operation, and one which ought not to be attempted. According, therefore, to the showing of the harbour-master himself, he was giving an invitation which under the circumstances he ought not to have given, because it was one which could not be followed without danger.

Now, that is the case put forward by the defenders' own main witness, on whose action everything turned so far as they are concerned. It seems to me impossible to doubt that the learned judges in the Court below were right in thinking that there was ample evidence to warrant the conclusion (indeed, that only one conclusion was possible) that there had been negligence on the part of the harbour-master, and that for that negligence the defenders were responsible. This was the conclusion of the Lord Ordinary at the close of his judgment in favour of the appellant. But the learned Judges in the Inner House came to the conclusion that although that negligence was established the defenders must be assoilzied because there was contributory negligence on the part of the appellant without which this accident would not have happened. Now, that contributory negligence is alleged to have been the contributory negligence of those in charge of the ship. I think that expression is an unfortunate one, because it seems to me that when negligence is sought to be imputed to the owner of the vessel it

is necessary to inquire who is the particular person for whose negligence you seek to make him responsible. To speak in this way "of those in charge of the ship" is calculated to lead to misunderstanding, and I think to mistake.

At this critical time, according to the view which I take, the person in charge of the ship was the master of the ship. These fishermen (local pilots, if you will) who had been taken on board by him for his assistance and guidance, were not at that time in fact in charge of the ship. The evidence is this, that when a vessel comes to a certain point she must from that point obey the instructions of the harbour-master. The master himself was at the helm, and so far from these men assuming any command or control of the vessel they were looking for instructions, as is clear from the request which they made to the harbour-master to direct them what to do. Therefore if they had ever had charge of the ship they had abandoned it, and there was no obligation that they should have charge of her. The master himself was steering the ship, and was looking to the harbour-master for directions. I am therefore quite unable to take the view that these two men were in any sense in charge of the ship—the master was in charge of her. It may still be that if there had been any failure to give information which the captain ought to have received from them, they might have been to blame, and a question would then have arisen whether that blame could under the circumstances be imputed to the master of the vessel. But it is unnecessary to give any opinion upon that point.

Now, who was guilty of the contributory negligence which is alleged? Was it the master? The master of the vessel no doubt was the person who ported the helm, which is said to have been a wrong manœuvre. But it appears to me obvious that the master of the vessel was led to port the helm by the act of the harbour-master; and if the tide had been a flood tide, as the harbour-master supposed that it was, my impression is that the accident would not have happened, and that the vessel would have passed this bank with safety. The witnesses all say that the set of the ebb tide was towards the bank, and that the set of the flood tide was from the bank, and that in flood tide there would have been no danger in the manœuvre. The porting of the helm, though no doubt erroneous in an ebb tide, was erroneous only to a person who knew the condition of the river. There was nothing in the state of the river, as far as could be seen, to indicate to a person not acquainted with it any danger in coming on in the course which the "Janets and Ann" was taking. The master was ignorant of the state of the river—he had only been there once before, I think nine years before. How is it possible to say that the master was guilty of any negligence with a direction from the harbour-master to come on, whatever the gesture connected with it may have been, and to come on as the master of the vessel says (and there is no contradiction of it so far as I can see) in a course which was appropriate for entering the harbour, according to ordinary navigation, but for the existence of a bank of which he was ignorant? How it can be said that under such circumstances he was guilty of any negligence at all I am entirely at a loss to see.

But then it is said that there was negligence on the part of the two pilots, and that their negligence may be imputed either to the master or to the owner of the vessel—I do not quite know in which way the case is put. I think that there is very great difficulty in imputing the negligence of these fishermen either to the master or to the owner of the vessel. But was there any negligence on their part at all? They, it is quite true, knew of the bank; but because they knew of the bank they very naturally interpreted the manœuvre suggested by the harbour-master in a different way from that in which it was interpreted by the captain. He not knowing of the danger understood that he was to make the best of his course into the dock. It was natural enough that they, knowing of the danger which there would be if the vessel came too near in towards the pier, should understand that she was merely being brought near the pier for the purpose of anchoring in order to be warped in. Therefore they called out to the harbour-master "Let us know when we are to let go our anchor," imagining that he would give that order so as to save her from going on the bank, and if he had given that order in time no accident would have happened. Was there any negligence on their part in doing so? It is quite true that he let them go on too long. It is quite true that they were apprehensive that if he let them go on too long danger would ensue. But when did the time come at which these men ought to have disregarded the orders of the harbour-master, and to have taken upon themselves to anchor instead of obeying his orders? It is obvious that by disregarding his order danger might have followed. If it had followed that would have thrown the entire responsibility upon them. I fully agree with my noble and learned friend the Lord Chancellor in his statement that when a vessel is within the jurisdiction of the harbour-master, and he is giving his orders as to the place of anchorage, it is only in the last resort and when the danger is fully obvious that any rational man would think that the harbour-master's orders should not be strictly attended to. I very much doubt whether the negligence of these men could, under the circumstances, be treated as negligence of the person in charge of the ship for which the owner was responsible; but even assuming that it could, I cannot see that there was any negligence at all.

I should add this further, that the harbour-master saw the vessel coming under a port helm, which is said to have been a wrong manœuvre, and seeing her coming under a port helm he called out again "Come on." That was not done in a way which would unmistakably and unequivocally indicate to her that she was in the

direction of danger, and must change her course and carry out an entirely different manœuvre.

Under these circumstances I think that the defenders are responsible for the negligence of the harbour-master, and that there was no contributory negligence negativing that responsibility.

LORD MORRIS—My Lords, in the view which I take of this case I consider that the pursuer is affected by the knowledge of Smith and Poland, the pilots, and that if contributory negligence could be brought home to Smith and Poland it would affect the pursuer. The captain took those two men on board as pilots. I see that at the trial it seems to have been the object of the defenders to disparage Smith. It was suggested that he was rather a poacher than a pilot. Now, it would appear that it was rather the object of those on the part of the pursuer to show that Smith was only a fisherman. He was accepted by the captain as a pilot. The captain in his evidence says that because of this he took these men on board. He took their directions right through. He allowed Smith to hail the harbour-master while he was standing on the dock. The answer of the harbour-master was to the hailing of Smith, who was the pilot at all events on that particular occasion. He was accepted by the captain, and an observation was made by the harbour-master by which he was really as much affected as the captain himself. I am therefore clearly of opinion that the captain must be affected by the knowledge of Smith and Poland, and if so, the pilot was in the place of the owner of the ship on that occasion, and if contributory negligence is brought home to Smith and Poland I think that the case ought to be decided in favour of the defenders.

But on the assumption that that is so, I am still of opinion that the judgment which has been moved is the proper one. What exactly did the harbour-master say? "Come on" was admittedly his phrase. I leave out of consideration his gesture or the wave of his hand; but at the time when he was asked, "When are we to anchor?" he said "Come on." Ordinarily speaking to one who is not a nautical person, that means "come on" in the direction of the person who is making the observation—that is to say, "Come on" in the course that you are going. The harbour-master saying that, whoever is in charge of the vessel is under the impression that "Come on" means that he is to port his helm and come in the direction of the speaker, that is, a distance of 150 yards. The case now of the harbour-master is, that by "Come on" he intended that the vessel should sail right through into port. In answer to the question, "When shall we anchor?" which appears to be a very natural question, the harbour-master says "Come on." Anchoring is not a mode of progression. Even taking the most favourable view of it, it appears to me, looking at the captain's story, that he was never under the impression at that time when this observation was addressed to him in answer to the question, "When are we to anchor?" that the vessel was to sail right through into port. Those words would bear to him a totally different character. The question being "When are we to anchor?" the reply would not convey to him the idea that "Come on" meant "Come right on into port." I am under the impression that the harbour-master, it being a flood tide, thought that the vessel could advance with safety under a port helm. They did not see the danger until one of the pilots, Smith, again hailed the harbour-master, and said "Be sure to tell us when to anchor." Smith said that seeing the approaching danger; but neither Smith nor the harbour-master, who had as much knowledge of the bank as these two pilots had, could have come to the conclusion that they were tilting up against the bank, or why should they have pursued a course which led them towards the bank? Both Smith and the harbour-master, in my opinion, thought the vessel was approaching the bank. Smith seems to have been more wary than the harbour-master, and to have seen that the vessel was getting into danger. The harbour-master, as it appears to me, did not at first think so, but at last he said "Now let go the anchor." That would not have been the observation of a man who intended the vessel to sail right through and not to port the helm. In addition to that it seems to me that seeing the vessel going along that river about 150 yards (because the accident took place at about 50 yards, and it would occupy three or four minutes), if the harbour-master had seen that to be the wrong course he would have remonstrated, instead of which he encourages those on board to keep their course.

In my opinion, my Lords, there is no contributory negligence established against Smith. He hailed the harbour-master twice at least, and put the question to him which I have stated, and he acted under the impression that although he might have apprehended danger, that danger was not of a manifest and plain character, and he thought that he might stop in time to avoid actual danger, he taking the course which was prescribed to him.

LORD FIELD—My Lords, I am also of opinion that this appeal should be allowed. The question is one of fact. Now, the Lord Ordinary and the learned Lords of Session have all been of opinion that the act of porting the helm, when and where the helm was ported, was directly due to the act of the harbour-master, and I see no reason whatever to differ from that conclusion. The only point which seemed to me capable of being argued at your Lordships' bar with any prospect of success was whether or not the master, and those on board the ship, were guilty themselves of such negligence, directly conducing to the accident, as to absolve the defenders from blame.

Now, I have followed with great care the observations which have been made by both of my noble and learned friends who have preceded me, and I cannot help con-

curring in the view which has been expressed by my noble and learned friend opposite (Lord Herschell) upon the question whose negligence it is that is alleged to be contributory so as to afford protection to the defenders. It must be the negligence either of the master or of the two so-called pilots who were on board. I agree in thinking that the ship at the time when she ported her helm was in charge of the master. It is true that he had the two men on board who were acquainted with the river, but it seems to me that he is the person upon whom the negligence ought to be fixed if it can be fixed at all. Now, was he justified in doing what he did? He himself was a stranger to the river. The harbour-master was the person whose orders, in my judgment, he was bound to obey. The bye-law is very express; it points out that as soon as a ship arrives at the Moat Brae she is not to proceed if the harbour-master's orders are that she is not to do so.

Now, was the master guilty of any negligence? or did he act reasonably in what he was then doing. Now it is difficult, of course, with a considerable conflict of evidence as to what did take place, to decide upon what is the exact truth; but there is evidence that the harbour-master said "Come on." It is also said that he waved his hand, and that the master of the ship was himself ignorant of the state of the water or of the condition of the river. It seems to me, therefore, that the harbour-master certainly acted in such a way as that the master and everybody concerned thought that he was inviting the ship to come on, both by his language and by his gesture; and that under these circumstances it is impossible to impute to the master of the ship such negligence as to destroy the pursuer's right to sue.

Then with regard to the two persons who are called pilots, they certainly did know of the danger which the ship was running; but looking to the terms of the bye-law, and also to the power of the harbour-master and the ordinary course of practice in the river, it seems to me that they might not unreasonably act upon the view that the harbour-master was going to stop them, and to answer their inquiry made twice, "Where shall we anchor?" and "Let us know when we are to anchor," in time to prevent any injury. Therefore I think that they did not act unreasonably in proceeding as far as they did.

Interlocutors of the 19th December 1880 and 26th February 1891 appealed from reversed: Interlocutor of the Lord Ordinary of the 11th of June 1890 restored: Cause remitted to the Court of Session: The respondents to pay to the appellant the costs of the action in the Court of Session, and the costs incurred by him in respect of the appeal to this House.

Counsel for Appellant—W. R. Kennedy, Q.C.—J. G. Witt, Q.C. Agents—Pritchard & Sons, for Moss & Sharpe, Chester.

Counsel for Respondents — Sol.-Gen. Graham Murray, Q.C. — G. L. Crole. Agents — Stibbard, Gibson, & Wills, for John Bell, W.S.

Tuesday, August 9.

(Before Lords Herschell, Watson, Macnaghten, and Field).

HERITABLE REVERSIONARY COMPANY *v.* MILLAR (M'KAY'S TRUSTEE).

(*Ante*, vol. xxviii., p. 929, and 18 R. 1166).

Bankruptcy—Vesting of Heritable Estate in Bankrupt's Trustee—Latent Trust in Bankrupt—Tantum et tale—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 102.

Held (*rev.* the judgment of the First Division) that a sequestration does not vest in a trustee in bankruptcy heritage to which the bankrupt holds an unqualified feudal title in his own name, if it can be shown that he only holds it in trust for another.

This case is reported *ante*, vol. xxviii., p. 929, and 18 R. 1166.

The Heritable Reversionary Company appealed.

At delivering judgment—

LORD HERSCHELL—My Lords, the question which arises in this case is, whether heritable property vested in a bankrupt which is subject to a latent trust, passes to the trustee in his sequestration free of that latent trust, and is held for distribution amongst the bankrupt's creditors.

The facts may be shortly stated. Daniel Smith M'Kay, the bankrupt, was the manager of the appellant company. On the 17th of May 1882 he purchased certain tenements of houses in Edinburgh, which were exposed for sale by public roup at the upset price. The subjects were conveyed to him by a disposition dated the 16th and 17th July 1882, and he was duly infeft by recording the disposition in the appropriate register of sasines on the 14th September 1882. The purchase was made by M'Kay for behoof of the appellants, and on the instruction of their directors, and the purchase money, save in so far as it was raised by a bond and disposition in security over the subjects, was provided by the appellants. They were not, however, *ex facie* of the deeds, parties to the purchase, and although in May 1886 M'Kay executed a declaration of trust, it was not recorded in the register of sasines. On the 2nd of December 1890 the estates of M'Kay were sequestrated in the Sheriff Court of Glasgow. In these circumstances the question has arisen whether the property which became vested in M'Kay as above stated, formed part of the sequestrated estate, and passed to the respondent as trustee for the bankrupt's creditors.

It seems beyond dispute that as between M'Kay and the appellants he was a bare trustee, and they were the true and beneficial owners of the property. I do not understand it to be questioned that the law of Scotland recognises such a relationship, or that, if it appeared *ex facie* of the