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

dispositions, the beneficiary would be regarded as the true owner as against all persons and for all purposes. Although as regards third persons the case may be very different when the trust is latent, I do not see how this can affect the relation of the trustee and beneficiary *inter se*. If M'Kay had disposed of the property and converted the proceeds to his own use, he would, I apprehend, have been guilty of a breach of trust, and rendered himself amenable to the criminal law. It is true that an onerous purchaser from him would have obtained an unimpeachable title, but this would not be because the property was his, but because the true owners had permitted him to appear on the register of sasines as the owner, and thus entitled any one dealing with him for value to regard him as such. A register, whether of heritable or any other subjects, would obviously fail of its purpose unless this were the law. A person entrusted with the custody of a negotiable instrument, who has no property in it, may equally give a perfect title to an onerous purchaser. I have thought it well to dwell on these considerations, because it appears to me that there has been some confusion between the case of heritable property held upon a latent trust of which the owner appearing on the register is a bare trustee, and that of heritable property as to which the owner has come under some contractual obligation. The latter was the case in *Wylie* v. *Duncan*. Archibald was there the owner of the property, not a mere trustee; he had bound himself on certain conditions to re-dispone to Wylie from whom he took the subjects. But this was a mere personal contract. If he had sold the property and disposed of the proceeds he might have rendered himself liable to legal proceedings on the ground that he had put it out of his power to fulfil his obligation, but he would not have been guilty of a breach of trust, or brought himself within the reach of the criminal law.

The section of the Bankruptcy (Scotland) Act which relates to the vesting of the bankrupt's estate in his trustees is the 102nd. The first part of that section enacts what is to vest in the trustee; the following sub-sections have in view the making that vesting effectual, and accordingly prescribe what is to be the nature and effect of the vesting. The section commences in these terms:—"The act and warrant of confirmation in favour of the trustee shall, *ipso jure*, transfer to and vest in him, or any succeeding trustee, for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration, with all right, title, and interest, the whole property of the debtor, to the effect following."

For some reason, which is not apparent, this part of the section was not alluded to in the Court below, the only words discussed being those which have reference to the effect of the vesting of the heritable estate. But unless any subject be within the words with which the section commences, the remaining provisions of the section become irrelevant. Wherever, therefore, it has to be determined whether heritable or any other estate vested in the trustee, the first question which arises is, was it the "property of the debtor?" The expression is not a technical one, but is obviously intended to comprise all that would ordinarily be understood as covered by it. It cannot be doubted that it includes all beneficial interests possessed by the bankrupt, even though the property be vested in other persons as trustees for him. On the other hand, I cannot think, unless compelled by authority to take that view, that it includes, or was ever intended to include, estates of which the bankrupt was a bare trustee, and in which he had no beneficial interest.

The 2nd sub-section, which was so much discussed in the Court below, and which only applies, as I have pointed out, to that which comes within the description "property of the debtor," itself commences with these words:—"The whole heritable estate belonging to the bankrupt in Scotland to the same effect," &c. The words "belonging to" are not technical, and I do not think that a heritable estate of which the bankrupt is a bare trustee, and in which he has no beneficial interest, can with any propriety be said to "belong" to him.

It was indeed suggested—and the view found some favour in the Court below—that the trustee in the sequestration was to be regarded as an onerous and *bona-fide* alienee from the bankrupt. I am unable to accede to this view. I do not think that he is an onerous alienee within the principle which renders the title of such a person valid even though it be obtained from a bare trustee in fraud of the beneficial owner. That he is not such an alienee appears to me to be well established in the law of Scotland as regards property other than heritable, and I fail to see any ground for a distinction in this respect between heritable and other descriptions of property.

It is to be observed that the Bankruptcy Act of 1783 required the bankrupt, under the penalty of imprisonment, to make over to the trustee "his whole real and personal estate wherever situated." There were corresponding provisions in the Acts of 1793 and 1814. I cannot think that it was the intention of the Legislature to compel a bankrupt to convey to his trustee for the benefit of his creditors property which he could not dispose of to any creditor at the time of sequestration without being guilty of a criminal breach of trust. The Act of 1839, which preceded the one now in force, vested in the trustee the heritable estates "belonging to the bankrupt in Scotland." I have already commented on these words in connection with their use in the present Act.

The only case which to my mind can even plausibly be said to be inconsistent with the view I take of the statutes, is the case of *Jeffrey* v. *Paul* in this House. Lord Brougham in pronouncing his decision assigned no reasons for the conclusion at which he arrived. It can therefore only be said to be an authority for the proposition contended for by the respon-

dent if no other ground for the judgment is reasonably conceivable. The circumstances of that case were peculiar. It was a contest between two trustees and the representative of a third who had become bankrupt. All the trustees had made advances to the trust estate, and one contention put forward on behalf of the trustee in the sequestration was, that the bond which was then in question had, by reason of the advances they had made, been held by the three trustees in equal shares in their own right, and not on behalf of their trust. Whether this was the ground of Lord Brougham's judgment it is impossible to say, but I think it much more likely that it was, than that he should have determined, without statement made or reason given, the important principle contended for, affecting as it does so seriously rights of property, and being applicable to every sequestration which should thereafter occur in Scotland.

For these reasons I am of opinion that the interlocutor appealed from should be reversed; that it should be declared that the subjects in question did not pass to the respondent; and that the appellants as beneficial owners are entitled to the sum consigned in bank; and that the respondent do pay the costs of this appeal.

Lord Watson—My Lords, The facts giving rise to the question of law involved in this appeal are fully set forth in a special case submitted by the parties for the opinion of the First Division of the Court of Session, and so far as material may be shortly stated.

The appellants in May 1882 purchased through Daniel Smith M'Kay, who was at that time their manager, certain heritable subjects in Edinburgh at the price of £2150. The disposition, which is absolute and unqualified in terms, was taken to M'Kay as an individual, and was recorded by him in the appropriate register of sasines on the 14th September 1882. Part of the price was obtained by his granting a bond and disposition in security over the subject for a loan of £1450, which was recorded in the register of sasines of the same date with the disposition, and the balance was provided by the appellants. M'Kay ceased to be their manager in February 1886, and on 17th May 1886 he executed in their favour a formal back-bond or declaration of trust by which he acknowledged that he was vested with the subjects in trust only for behoof of the appellants, and undertook that, whenever required to do so, he would subscribe and deliver a formal and valid conveyance in favour of any persons whom they might name.

The appellants neither recorded their back-bonds nor required M'Kay to denude, and the feudal title to the subjects continued to stand in his name as absolute proprietor until the 2nd December 1890, when his estates were sequestrated in terms of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79). The respondent was duly appointed trustee in the sequestration, and in that capacity he asserts his right to hold and realise the subjects as part of the bankrupt's heritable estate for behoof of his creditors, leaving the appellants to rank for a dividend as personal creditors in respect of their beneficial interest. The appellants on the other hand maintain that the subjects did not form part of the bankrupt's estate within the meaning of the Act, and did not pass to the respondent as trustee in the sequestration.

The subjects were sold in March 1891 with the consent of both parties, and under reservation of their respective claims. After paying the heritable bond with interest, and the expenses of sale, there remained a balance of £365 which was consigned in bank to abide the issue of this litigation.

By the interlocutor appealed from, the majority of the First Division, consisting of the late Lord President Inglis with Lords Adam and Kinnear, declared that the respondent, as trustee on M'Kay's sequestrated estate, took the subjects in question which were vested absolutely in the bankrupt, free of the latent trust in favour of the appellants, and that the appellants are only entitled to rank on the sequestrated estate for the value of the subjects, and are not entitled to recover the same from the respondent as their own property. In pursuance of that declaration their Lordships found that the consigned money belongs to the respondent. From that judgment Lord M'Laren, the only other member of the Court, strongly dissented.

It is sufficiently obvious that the controversy between these parties must depend upon the terms in which the right of the trustee in a sequestration is defined by the Act of 1856. Before adverting to the language of the statute I think it may be useful to consider the nature of the relations existing between a solvent trustee who is feudally vested in the heritable estate of the trust by a title *ex facie* absolute, and his *cestuique* trust, whose right rests upon a latent back-bond. As between them there can, in my opinion, be no doubt that according to the law of Scotland the one, though possessed of the legal title, and being the apparent owner, is in reality a bare trustee; and that the other, to whom the whole beneficial interest belongs, is the true owner. Upon that point the opinions expressed by noble and learned Lords in *Union Bank of Scotland* v. *National Bank of Scotland*, 12 App. Cas. 53, and by those learned Judges of the Court of Session with whom their Lordships in that case agreed, appear to me to be conclusive. But in that state of the title the trustee though his action may be in breach of duty, or even grossly fraudulent, can communicate a valid right to a purchaser or a lender on the security of the trust-estate who transacts with him for value, and without notice of the interest of the beneficiary. That rule, which alike applies to moveable and heritable estate, was finally settled in the law of Scotland by the judgment of this House

in *Redfearn* v. *Somervail*, 1 Dow App. 53, an authority which seems to have been regarded by the Lord President as practically decisive of the present case. It must, however, be kept in view that the validity of a right acquired in such circumstances by a *bona fide* disponee for value does not rest upon the recognition of any power in the trustee which he can lawfully exercise, because breach of trust duty and wilful fraud can never be in themselves lawful, but upon the well-known principle that a true owner who chooses to conceal his right from the public, and to clothe his trustee with all the *indicia* of ownership, is thereby barred from challenging rights acquired by innocent third parties for onerous considerations under contracts with his fraudulent trustee.

It is also necessary to keep in view that the rule of personal bar, which thus protects transactions with the trustee from challenge by the *cestuique* trust, only applies to transactions which affect and create an interest in the trust-estate. Personal creditors of the trustee who neither stipulate for nor obtain any conveyance to that estate do not, in the sense of law, transact on the faith of its being the property of the trustee. As Lord M'Laren observed in this case (18 R. 1175)—"Creditors in general do not give credit to a bankrupt in reliance upon any supposed presumption that property standing in his name is his private property. Unless they are going to advance money on heritable security, they know nothing of his title-deeds, and trust only to his personal credit." Accordingly, the contraction of the debts by the trustee whilst the trust is latent creates no *nexus* over the trust-estate in favour of personal creditors. If they proceeded to attach the trust-estate on the footing of its belonging to their debtor, the beneficiary could defeat their diligence by appearing to vindicate his right. An adjudging creditor gives no new consideration for the interest in the estate which he secures by the process of adjudication, and, in my opinion, he can be in no better position in a question with the *cestuique* trust than if he had obtained a conveyance without value from the trustee. That appears to me to have been the ratio of the decision in *Thomson* v. *Douglas, Heron, & Company* which is reported in Morrison's Dictionary (November 15, 1784, Mor. Dict. 10,229), and also by Lord Hailes (Hailes' Dict. 1002). In that case Thomson disponed his lands to his agent Armstrong, "in order that he might sell the same and apply the proceeds for behoof of Thomson." In making up a title by charter of resignation Armstrong omitted these words from the procuratory, so that the qualification of his right did not appear on the record. He then, instead of selling, borrowed money for his own purposes from Douglas, Heron, & Company, and conveyed the lands to them in security of the debt, and subsequently some of his general creditors obtained decrees of adjudication, upon which they were not infeft. Thomson brought a reduction of Armstrong's title, and of these rights flowing from him, upon the allegation of Armstrong's fraud, and the Court found "that the allegation of fraud was not relevant against the heritable securities and infeftments, but that it was relevant as to the creditors' adjudgers." The report in Morrison, which is taken from the Faculty Collection, contains certain observations which are said to have been made by the Bench, but Lord Hailes, who was himself a party to the decision, has noted the opinions delivered by the Lord Justice-Clerk (Braxfield), and by Lord Monboddo, as containing what he at the time understood to be the grounds upon which it proceeded. Lord Braxfield, than whom there is no higher authority in this department of the law, said—"I think that Mr Armstrong might have sold for a price, and the purchaser would have been secured by his *bona fides*. The same is the case as to heritable creditors. The case is different as to adjudgers. They are not on the same footing with Mr Armstrong selling for a price." The same distinction based upon the obvious fact that the heritable creditor does, and the adjudging crediditor does not, give value for the interest which he takes in the land is thus tersely stated by Lord Monboddo—"An heritable bond is good because it is the price of the estate; the adjudger seeks to mend his former security."

It was argued for the respondent, on the strength of some *dicta* by institutional writers, that *Thomson* v. *Douglas, Heron, & Company* was over-ruled in the subsequent case of *Russell* v. *Ross' Creditors*, January 31, 1791, Mor. Dict. 10,300, but the argument when examined is really destitute of foundation. Among the observations attributed to the Bench in Morison's report of the earlier case is one to the effect that the adjudging creditors "must take the right of their debtor *tantum et tale* as it was in his person." A second and brief report of the same case in Morison (Dict. 10,299) bears that "the Court did not mean to lay down the rule in general that adjudgers must take *tantum et tale*," and the same remark was made by the Court in *Russell* v. *Ross' Creditors*. What appears to me to have been decided in *Thomson* v. *Douglas, Heron, & Company* was, that creditors who have given no value for the right cannot carry off from the true owner property standing in name of their debtor in which he has no beneficial interest—a decision perfectly sound in principle. In *Russell* v. *Ross' Creditors* there was no question of trust, and it was sought, unsuccessfully, to apply the doctrine of *tantum et tale* to creditors who had completed a feudal title by adjudication to lands of which their debtor was the beneficial owner, in competition with others who had prior but merely personal rights to demand a conveyance from him. I do not doubt that in such circumstances the doctrine of *tantum et tale* has no application. It was rejected by the Court of Session in *Mitchells* v. *Ferguson*, February 13, 1781, Mor. Dict. 10,296; *Wylie* v. *Duncan*, December 8, 1803, Mor. Dict.

10,269; and in *Mansfield* v. *Walker and Others*, 11 Sess. Cas., 1st series, 813, which was appealed to this House, and there affirmed—1 W. & S. App. Cas. 203—upon the special ground that the board of corroboration upon which the appellant relied was granted by the bankrupt after he had been divested of his estates through the operation of the Act 54 Geo. III. chap. 137. These authorities were brought fully under your Lordships' notice by counsel; but, in my opinion, they have little, if any, bearing upon the point which your Lordships have to decide, because in all of them the competition related, not to estate held by the bankrupt under a bare trust, but to estate of which he was the beneficial proprietor.

I agree with the late Lord President in thinking that the opinions expressed by Lord Westbury in *Fleming* v. *Howden*, 6 Sess. Cas., 3rd series, H. of L., 121, with reference to the nature of the interest which a trustee in sequestration takes in the heritable estate of the bankrupt, require considerable modification. They were strictly *obiter*, because in that case the clause of devolution upon which the successful claim of the heir-substitute depended, whether it be regarded as constituting a trust in the bankrupt or a qualification of his right, was apparent upon the face of his recorded title.

But these considerations as to preferences between the trustee and a creditor, and as to the doctrine of *tantum et tale*, when the subject of competition is the undoubted property of the bankrupt, are, in my opinion, of very secondary importance in this case. It does not admit of dispute that all property, whether heritable or moveable, in which the bankrupt has a beneficial interest, whether the title be in him or in a trustee for him, to the extent of that interest, passes to and vests in the trustee in his sequestration, under the Act of 1856, which also makes provision for the extent and effect to which it shall vest in the trustee, as in a question with creditors having claims upon it. What shall vest, and what shall be the effect of vesting, are two different things, and they are separately dealt with in the statute. In my opinion two questions arise in this case upon the Act of 1856—*First*, do the subjects in question fall within the statutory definition of property which passes to the trustee for behoof of the bankrupt's creditors? *Secondly*, if they do, what is the right of the appellants as against the respondent? It is manifestly idle to consider what may be the effect of these subjects vesting in the respondent until it has been shown that they did vest in him. Yet the learned Judges of the First Division seem to have confined their attention to the second of these questions. They all (Lord M'Laren included) refer to and discuss the enactments relating to the effect of vesting, and they take no notice of the statutory definition of the property which is to vest.

Section 102 of the Bankruptcy (Scotland) Act contains the whole of its provisions which deal expressly with the vesting of the bankrupt's estates in his trustee, and its effect. The structure of the clause is worthy of observation. It first of all prescribes what property is to vest in the trustee, and then goes on to define, in three sub-sections, to what effect (1) moveable estate and effects wherever situated, (2) heritable estate in Scotland, and (3) heritable estate in England, Ireland, or any of Her Majesty's dominions, are to become vested in him. Omitting the sub-sections, clause 102 is in these terms—"The act and warrant of confirmation in favour of the trustee shall, *ipso jure*, transfer to and vest in him or any succeeding trustee, for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration, with all right, title, and interest, *the whole property of the debtor*, to the effect following."

Were the subjects in dispute the property of M'Kay, within the meaning of that enactment, at the date of his sequestration? Upon the language of the statute, that appears to me to be a very simple question, admitting only of a negative answer. An apparent title to land or personal estate, carrying no real right of property with it, does not, in the ordinary or in any true legal sense, make such land or personal estate the property of the person who holds the title. That which, in legal as well as in conventional language, is described as a man's property is estate, whether heritable or moveable, in which he has a beneficial interest which the law allows him to dispose of. It does not include estate in which he has no beneficial interest, and which he cannot dispose of without committing a fraud. It is true that the law will sustain a right created by his fraudulent alienation in the person of a *bona fide* alienee for value, but not, as has been already pointed out, upon the ground that the thing alienated was the property of his author. The respondent, as representing creditors who had no dealings with the bankrupt in relation to the estate of which the appellants had the beneficial fee, and who have given no value for the interest which he claims on their behalf, does not stand in the position of an onerous and *bona fide* alienee, and cannot take benefit from the principle which validates the right of the latter.

I am confirmed in these views by a reference to previous statutes regulating the process of sequestration in Scotland, of which there were no less than five prior to the consolidating Act of 1856. The first of them (12 Geo. III. chap. 72), passed in 1772, only applied to the personal estate of the debtor; but the next and all subsequent Acts embrace his heritable as well as his personal estate, making them a common fund for distribution among his creditors, according to their respective rights and preferences. The object of the progressive legislation, which has culminated in the Act of 1856, has not been to alter or extend the definition of the bankrupt's property available for distribution, but to simplify procedure, and to put an end to the possibility of individual creditors obtaining pre-

ferable securities over the estate, after sequestration, by giving the trustee when appointed, a complete and absolute title as at its date.

The Act 23 Geo. III. chap. 18, the first which brought real estate within the scope of the sequestration, by section 19, made it incumbent on the bankrupt, when ordered by the Court, to execute a disposition or dispositions making over to the trustee and his successors in that office, "his whole real and personal estate, wherever situated." In the event of his refusal to convey, the Court was authorised to punish the bankrupt by imprisonment; and, if necessary, to issue a decree finding "the property of the whole sequestrated estate and effects, real and personal," to be in the trustee, and adjudging to him the whole lands and heritable estate within its jurisdiction. These provisions were in substance re-enacted by the 23rd section of 33 Geo. III. chap. 74, in which the property which the bankrupt was bound to convey, under pain of imprisonment, is described as "his whole estate and effects, heritable and moveable, real and personal, wherever situated." Similar provisions were made for vesting the sequestrated estate in the trustee by section 29 of the Act 54 Geo. III. chap. 137, which describes the property to be conveyed to him by the bankrupt in the same terms with the preceding statute of 1793. In 1839 the Act 2 and 3 Vict. cap. 41, the immediate predecessor of the Act of 1856, by section 79 vested directly in the trustee, by force of statute, and without the intervention either of the bankrupt himself or of the Court, the whole heritable estates "belonging to the bankrupt in Scotland."

I venture to think that the property described in these four Acts as falling within the sequestration includes no heritable or other estate of which the bankrupt was not the true owner. That construction gives effect to the literal meaning of their language; and it is to my mind hardly conceivable that the Legislature should have intended to confiscate the property of persons other than the bankrupt for the behoof of his creditors, by requiring him to execute a disposition in favour of their trustee, which but for the statute he could not have granted without being guilty of the crime of breach of trust and embezzlement. I can find nothing in these statutes which lends countenance to the suggestion that the Legislature meant to compel any such fraudulent proceeding.

The principle which ought to govern the decision of this case was, in my opinion, rightly understood and applied by the Court of Session in *Gordon* v. *Cheyne*, 1 Sess. Cas., 1st series, N.E. 566, and an unreported case of earlier date—*Dingwall* v. *Maccombie*. There is not a report of the opinions, if any, delivered in *Gordon* v. *Cheyne*, but *Maccombie's* case is reported in a footnote (1 Sess. Cas., 1st series, N.E. 567, *et seq.*), together with the opinions of the Judges by whom it was decided. The same point was raised in each of these cases. In *Dingwall* v. *Maccombie* the debtor was *ex facie* absolute proprietor of two shares of the Aberdeen Shipping Company, which he held in trust for Dingwall; and the trust being still latent, he being at the time insolvent, conveyed these shares to Maccombie for behoof of his creditors. In *Gordon* v. *Cheyne*, the bankrupt at the date of his sequestration held one share in the same company as absolute proprietor under a latent trust for Gordon, the true owner. Accordingly, the competition in both cases lay between the true owner and a trustee for creditors, the only difference being that in the one the trustee had a legal, and in the other a voluntary disposition of the whole property belonging to the insolvent. The Court in both decided in favour of the *cestuique* trust; and their decisions have since been accepted as conclusively settling that incorporeal personal rights, affected by a latent trust, though vested in the bankrupt by a title *ex facie* absolute, do not pass to the trustee in his sequestration.

The decision of this House in *Redfearn* v. *Somervail* (1 Dow. App. Cas. 60), which appeared to one learned Judge to be conclusive against the appellant, related to an incorporeal moveable right, being a share in a private trading society. If that decision were adverse to the appellant's claim, it would *a fortiori*, be fatal to the authority of *Dingwall* v. *Maccombie* and *Gordon* v. *Cheyne*. The rule followed by the House in *Redfearn* v. *Somervail* does not conflict with these cases, which decide, in my opinion rightly, that a trustee for general creditors whether by voluntary conveyance from the bankrupt, or taking right under the Sequestration Acts, cannot plead the equities competent to a person who has acquired an interest in the trust property from the bankrupt in *bona fide*, and for onerous cause. And so far as concerns the right of the trustee in sequestration, I am unable to discover any ground, either in common sense or in legal principle, for making a distinction between heritable and moveable rights vested in the bankrupt subject to a latent trust, and for holding that the heritable right is, and that the moveable right is not, carried by the sequestration.

Lord Adam and also Lord Kinnear appear to have held that the present question was concluded by the decision of the Court of Session in *Wylie* v. *Duncan*, Mor. Dict. 10,269, and of this House in *Jeffrey* v. *Paul*, 1 S. and M'L. App. Cas. 767, but I venture to think that their opinion is based upon a misapprehension of what was really decided in these cases.

I have already stated what I believe to have been the import of the judgment in *Wylie* v. *Duncan* and similar cases, and I have only to remark further, that a personal obligation to convey heritable estate, undertaken by one who is the beneficial as well as the feudal owner, does not, according to the law of Scotland, denude him of his beneficial interest, or confer upon the person to whom it was contracted either the character or the rights of a trust beneficiary.

The case of *Jeffrey* v. *Paul* was very special in its circumstances. Harley, an insolvent, compounded with his creditors, and in order to secure the cautioners for his composition, conveyed certain heritable subjects belonging to him, to himself and them in trust, with power to sell or burden, for repayment of any advances made by them on his behalf, and for payment of any balance remaining to himself, his heirs or disponees. The trustees sold part of the subjects, and took from the purchaser a heritable bond and disposition in security for £400, payable to three of their number, Cook, Cuthill, and Paul, as individuals. Cuthill became bankrupt, at a time when the sums advanced and liabilities incurred by the cautioners exceeded the value of the trust-estate. Jeffrey, as trustee in Cuthill's sequestration, claimed one-third of the sum contained in the bond as belonging to the bankrupt, and was opposed by the solvent cautioners who maintained that the bond was trust property. The Court of Session rejected Jeffrey's claim, but on appeal to this House it was sustained. The report in the Court of Session, 12 Sess. Cas., 1st series, 718, assigns no reasons for the judgment; and in this House, Lord Brougham, sitting alone, moved its reversal without explanation or comment. In these circumstances I find it impossible to regard the judgment of that noble and learned Lord as a decision upon the point raised in this appeal. The pleadings of the appellant in this House disclose that he claimed a third share of the bond on the footing that the bond by its terms was equivalent to a payment in cash by the trust to Cook, Paul, and the bankrupt, and in my opinion it is exceedingly probable that the case was decided in his favour upon that view. At all events, the decision cannot be regarded as establishing the rule that a trustee in sequestration takes, by force of statute, property vested in the bankrupt subject to a latent trust.

For these reasons I concur in the judgment which has been moved by the noble and learned Lord on the Woolsack.

LORD MACNAGHTEN—My Lords, if this House were compelled to uphold the decision under appeal, I rather think I should be inclined to doubt whether the law of bankruptcy in Scotland was in a condition altogether satisfactory.

One M'Kay, a bankrupt, at the time of his bankruptcy stood infeft in certain heritable estates consisting of houses in Edinburgh, on a title upon the face of it absolute and unqualified. M'Kay had been the manager of the appellant company. The houses in question had been bought by him for and on behalf of his employers; the purchase money, so far as any money passed, was paid by them. But for the sake of convenience the company took the conveyance in the name of their manager. Some years afterwards M'Kay left the company's employment, and then he executed a declaration in writing in which he confessed and declared that he held the premises "in trust only for behoof of the company," and undertook on request to transfer the trust property according to their directions. No transfer however was executed, nor was the declaration of trust registered. So there was nothing in the public records at the time of the bankruptcy to show that the bankrupt was not the real and true owner. In this state of things the First Division of the Court of Session (Lord M'Laren dissenting) has held that these houses form part of the bankrupt's sequestrated estate applicable to the payment of his debts, and that the company for whom he declared himself trustee can only claim in the bankruptcy for the value of the property.

Is that decision right? It was argued that the question depends upon the feudal law of Scotland and upon certain provisions of the Bankruptcy Act of 1856. I venture to think that it turns wholly upon the language of the Act, and that a decision in favour of the company would not in the slightest degree trench upon the principles of the feudal law.

Under the Act of 1856, proceedings in bankruptcy are commenced by a petition for sequestration. If the case is within the Act the Lord Ordinary or the Sheriff is directed to issue a deliverance awarding "sequestration of the estates which then belong or shall thereafter belong" to the bankrupt before the date of his discharge, and declaring the estates "to belong to the creditors" for the purposes of the Act. A trustee is to be elected by the creditors. On the election being confirmed the Sheriff-Clerk is directed to issue "an act and warrant" in a prescribed form, and it is provided that such act and warrant shall be evidence of the trustee's right and title to the sequestered estate for the purposes of the Act. The bankrupt is required to make up and deliver a state of his affairs specifying his whole property," and also "a rental of his heritable property." It is provided by section 102 that "the act and warrant of confirmation in favour of the trustee shall *ipso jure* transfer to and vest in him or any succeeding trustee for behoof of the creditors absolutely and irredeemably, as at the date of the sequestration, with all right, title, and interest, the whole property of the debtor to the effect following." Then follow three sub-sections. The last deals with the bankrupt's real estate out of Scotland, but within Her Majesty's dominions. The first is concerned with the effect of the vesting as regards the moveable estate and effects of the bankrupt wherever situated. It is admitted that with regard to moveable estate the only property which passes to the trustee is property of which the bankrupt was the true owner. The doctrine of reputed ownership, at least as regards moveable property, has no place in the bankruptcy law of Scotland. The second sub-section on which the opinions of the First Division are founded deals with the effect of the vesting as regards "the whole heritable estate belonging to the bankrupt in Scotland." It declares that the vesting is to be "to the same effect as if a decree of adjudi-

cation in implement of sale as well as a decree for adjudication for payment and in security of debt subject to no legal reversion had been pronounced in favour of the trustee, and recorded at the date of the sequestration."

Such being the main provisions of the Act of 1856, I cannot help thinking that the learned Judges who formed the majority of the First Division have dwelt too much upon the effect of the vesting, and that they have paid too little attention to the thing which is vested. The vesting is absolute. It strips the bankrupt of every shred of interest. But what is the thing which is vested? It is "the property" of the bankrupt. As regards his real estate in Scotland it is "the heritable estate belonging to him." The words "property" and "belonging to" are not technical words in the law of Scotland. They are to be understood I think in their ordinary signification. They are in fact convertible terms—you can hardly explain the one except by using the other. A man's property is that which is his own—that which belongs to him. What belongs to him is his property. No one in ordinary parlance would speak of land or funds held only in trust for another as the property of the trustee. Land or funds so held are not the trustee's property in any real sense any more than a bankrupt's sequestered estate is the property of the trustee in bankruptcy. It is true that in the present case the complete feudal title was in the bankrupt. It is true that in a strict legal view the right of the beneficiaries was only a personal claim against their trustee. But for all that the bankrupt could not have applied the property to his own purposes, or used it for his own benefit without committing a fraud for which he might have been made criminally responsible. The beneficiaries were the true owners all along. The bankrupt, though he had the feudal title, though he might have made a perfectly good title to a person dealing with him on the faith of the register without notice of the trust, was in reality only nominal owner without any property or proprietory right. It seems to me that in bankruptcy, by the very terms of the Bankruptcy Act, the Court is bound to look not to the form of the feudal title, but to that which Lord President Hope, in contrast to the feudal or "nominal" title, as he terms it, described in one case as "the substance and reality of the right of property"—*Giles* v. *Lindsay*, 1 Ross' L.C. 491.

My Lords, I think it would be idle for me to refer to the authorities which have been so fully explained by my noble and learned friend Lord Watson. I am satisfied that there is nothing in any one of the cases which conflicts with the view which has been presented to your Lordships. And I entirely concur in the motion that the interlocutor under appeal should be reversed with costs.

LORD FIELD—My Lords, the only question in this appeal is, whether the net proceeds of the heritable estate in question belong to the appellants or to the respondent, and the answer to the question depends upon the construction which your Lordships ought to place upon the 102nd section of the Bankruptcy (Scotland) Act of 1856.

By that section there is undoubtedly transferred to and vested in the respondent for and on behalf of the creditors of the bankrupt, amongst other subjects, his whole property, with all rights, title, and interest in his whole heritable estate in Scotland.

Now, the subjects in question are heritable estates in Scotland, and in one and a somewhat limited sense might be understood, as it was contended for the respondents they ought to be, as the property of the bankrupt. He was *ex facie* the disponee of them—he was the only recorded owner of them known to the public, and he was so recorded as the absolute owner, and without mention of any trust or limitation—and they were feudally vested in him. His disposition of them, although fraudulent and dishonest on his part, would have passed the property to an onerous disponee without notice.

In a larger and broader sense, however, they were not his. The consideration for the disposition to him was provided by the appellants, and the bankrupt only took and was recorded as owner for their convenience for whom he has always held them as a trustee.

But it is clear from the authorities referred to by my noble and learned friends that the law of Scotland recognises as property the beneficial interest in the subject, so that if the two interests, the legal on the one hand, and the whole beneficial interest on the other, are vested in different persons, the apparent owner who has only the legal title is, as between him and the beneficial owner, a bare trustee, and the *cestuique* trust is the true and real owner.

In this state of the law, therefore, the language of the section is capable of two possible constructions, and it is a sound rule of construction of a statute that if there are two constructions, one of which will do great and unnecessary injustice, and the other will avoid that injustice and keep exactly within the purpose and objects for which the statute was passed, it is the bounden duty of a Court to adopt the second and not the first of those constructions—*per* Lord Chancellor Cairns in construing the analogous English Bankruptcy Act in the case of the *East and West India Dock Company* v. *Hill* (9 App. Cas. 453), and adopted by the judicial committee in the case of an Insolvent Act of the Victoria Legislature in *Railton* v. *Wood* (15 App. Cas.) This rule does not depend upon any principle or authority peculiar to the English law, but may safely be applied to the construction of an analogous statute forming part of the law of Scotland.

Now, in which of these two senses is the language of the act now in question to be understood? It is like all bankruptcy or insolvent statutes a "special law having for its object the distribution of the debtor's estate equitably amongst his credi-

tors"—*per* Lord Justice James in *ex parte* Waller, 17 Chan. Div. 756. It is the debtor's estate and not the estate of any third person. The purpose and object of the statute is to distribute amongst the creditors of the bankrupt in satisfaction of his debts his estate and property, and not that of anybody else who is not within the purview of the statute.

The effect of the construction contended for by the respondent, and adopted by the majority of the Court below, would be the distribution, not of the bankrupt's estate which his creditors might have rendered liable to the payment of their debts, or which he might honestly and without fraud have parted with to them in satisfaction, but of the property of the *cestuique* trust to which the trustee could only have created a title in a third person by fraud, and which his personal creditors could not have in any way attached or rendered liable to the payment of their debts.

This construction would involve the great injustice of applying one man's property in satisfaction of another man's debt. Whereas the other construction is free from any such injustice, and is quite consistent with the fair object of the Act, which is to free the bankrupt upon taking from him and giving to his creditors everything which might have been rendered available for the payment of their debts.

The only possible injustice which such a construction might give rise to, would be in the case of any creditor who had given credit to the bankrupt upon the faith of the apparent title vested *ex facie* in the bankrupt; but as my noble and learned frends Lord Watson and Lord M'Laren in the Court of Session have both dealt with that point, I will only add that in other Bankruptcy Statutes reputed ownership clauses have been expressly included in the scheme of distribution in order to deal with that possible evil in the case of moveables, but have not, that I am aware of, extended the provision to heritable estate. It seems to me, therefore, that heritable subjects of which the bankrupt is a bare trustee do not pass by the warrant of confirmation.

I have thus far dealt with the case solely upon general principles of construction, and have not adverted to the numerous authorities cited at the bar and commented upon by the Lords of Session in their various judgments. It has been my duty to examine them, but my noble and learned friends have so fully placed them before your Lordships and commented upon them so exhaustively, that it is quite unnecessary for me to say more than that I concur in the view taken of them by them, and by Lord M'Laren who dissented from the interlocutor appealed from.

I concur in the motion proposed to your Lordships.

Their Lordships decided that the interlocutor appealed from should be reversed, and that it should be declared that the subjects in question did not pass to the respondent, and that the appellants, as beneficial owners, were entitled to the sum consigned in bank; and that the respondent should pay the costs of this appeal.

Counsel for the Appellants—H. Johnston—Goudy. Agents—A. Beveridge, for Watt & Anderson, S.S.C.

Counsel for the Respondent—Lorimer—Hunter. Agents—Keeping & Gloag, for Morton, Smart, & Macdonald, W.S.

Tuesday, April 5.

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

ANGLO-AMERICAN BRUSH ELECTRIC LIGHT CORPORATION *v.* KING, BROWN, & COMPANY.

(*Ante*, vol. xxvii. p. 963, and 17 R. 1267.)

Patent — Validity — Infringement — Prior Publication.

A specification which described a process in a manner clear and intelligible to men of education and technical knowledge of the subject, and capable of giving instructions for the making of the machines—*held* to be sufficient publication to invalidate a subsequent patent for the same process.

Patent—Validity—Prior Use.

Where an electric machine was constructed and set up in the works of general engineers, who employed it on one occasion for photographic purposes, and on another occasion to light apparatus with which they were making experiments for their ordinary business, that was *held* to be sufficient prior public use to invalidate a later patent for a machine of the same type.

This case is reported *ante*, vol. xxvii. p. 963, and 17 R. 1267.

The defenders appealed.

At delivering judgment—

LORD CHANCELLOR (HALSBURY) — My Lords, this is an appeal against an interlocutor of the First Division of the Court of Session affirming the interlocutor of the Lord Ordinary setting aside the patent, of which the appellants are the assignees, on the ground that the portion of the invention patented (with which under the circumstances it is alone material to deal) had been previously published.

The patent so set aside is known as Brush's patent, and bears date the 16th of November 1878, and the question in debate is, whether a patent taken out by Mr Samuel Alfred Varley in 1876 does or does not so anticipate the patent of 1878, of which the appellants are the assignees, as to make the latter patent bad?

The patent has relation to the particular form of dynamo-electric machines, all of