now contended for, because otherwise there would have been inserted in the Act a clause expressly dealing with the rights of the Crown similar to section 150 of the English Bankruptcy Act of 1883 (re-enacted by section 151 of the Bankruptcy Act of 1914).

LORD PRESIDENT—I agree in the main with your Lordships and with the Lord Ordinary.

My own views in this case may be expressed briefly in the form of propositions. (First) That by the common law of Scotland the Crown possesses no prerogative right such as is laid claim to in this appeal, and consequently is not entitled to a preferential ranking in this sequestration. That proposition, I think, was not disputed. (Secondly) That the prerogative right claimed by the Crown was not imported into the law of Scotland by the Statute of Anne. I can find no words in that statute adequate to that end. It is to my mind inconceivable that a doctrine of the law of England should thus be engrafted on the law of Scotland. We do not know what the law of England on this head is. It is not averred, and it is not proved. (Thirdly) The Statute of Anne did import into the law of Scotland the English process as a means of recovery of Crown debts in Scotland, and particularly the facilities and preference conferred on the Crown by the Statute of Henry VIII. That means, in my view, that in a Scottish sequestration, unless the Crown action is commenced prior to the date of the act and warrant in favour of the trustee in bankruptcy, the preference is gone. That I take to be the meaning of the passage in Bell's Commentaries, 2nd vol. p. 52 of the latest edition, where the author says—"In Scotland the adjudication in favour of the trustee, being a judicial assignment, complete with delivery or intimation, will be sufficient to exclude the Crown's right of preference. But the mere sequestration is not enough, as by relation back to the date of the first deliverance." (Fourthly) In my opinion the Scotch Bankruptcy Act of 1913 binds the Crown. The Crown is expressly mentioned in the Act, and provision is made by which a preference is expressly conferred upon the Crown in certain debts, which are as follows—assessed taxes, property tax, land tax, income tax. With regard to every Crown debt, it is expressly provided that the bankrupt's discharge does not in any way affect that debt, so that when the sequestration is at an end and the bankrupt is discharged his liability for payment of Crown debts still remains. These statutory enactments seem to me to exhaust the Crown's preference. In my opinion no further privilege or priority remains.

We shall therefore adhere to the Lord Ordinary's interlocutor.

The Court adhered.

Counsel for Appellants—Solicitor-General (Morison, K.C.)—Pitman. Agent—Thomas Carmichael, S.S.C.

Counsel for Respondent—Constable, K.C.—M. P. Fraser. Agents—Auld & Macdonald, W.S.

Friday, December 10.

SECOND DIVISION.

[Sheriff Court at Glasgow.

CITY OF GLASGOW FRIENDLY SOCIETY *v.* BRUCE.

War—Process—Maills and Duties—Courts (Emergency Powers) Act 1914 (4 *and* 5 *Geo. V, c.* 78), *sec.* 1 (1) (*b*)—*Leave to Proceed.*

The pursuer in an action of maills and duties is not bound to apply to the Court for leave to proceed under the Courts (Emergency Powers) Act 1914 in respect that the action is merely declaratory of his right and does not enter him into possession of the subjects.

The Courts (Emergency Powers) Act 1914 (4 and 5 Geo. V, cap. 78) enacts—Section 1 (1)—"From and after the passing of this Act no person shall (*b*) levy any distress, take, resume, or enter into possession of any property, exercise any right of re-entry, foreclose, realise any security . . . forfeit any deposit . . . for the purpose of enforcing the payment or recovery of any sum of money to which this sub-section applies, or in default of the payment or recovery of any such sum of money, except after such application to such court and such notice as may be provided for by rules or directions under this Act."

James Reid M'Gavin Smith, British Linen Bank, Glasgow, and others, trustees for the City of Glasgow Friendly Society, *pursuers*, brought an action in the Sheriff Court at Glasgow against John Wilson Bruce, accountant, Glasgow, *defender and appellant*, in which they concluded for declarator that the pursuers as heritable creditors in a bond over property in Glasgow belonging to the defender had right to the rents, maills, and duties of the property, or so much as might be necessary to pay the principal sum and interest.

The Sheriff-Substitute (FYFE) granted decree in terms of the prayer and added to his interlocutor an order in the following terms:—"Meanwhile assigns as a diet for hearing parties upon the question whether the pursuers are precluded from enforcing the decree now granted by the Courts (Emergency Powers) Act 1914, Tuesday, 9th November next at 2 p.m."

The defender appealed to the Court of Session, and argued—The action was irrelevant in respect that the pursuers had not applied for leave to proceed under the Courts (Emergency Powers) Act 1914 (4 and 5 Geo. V, cap. 78), sec. 1 (1) (*b*). The pursuers had entered into possession to the extent that they had put the defender out of possession by interpelling the tenants from paying rents. The Act forbade not merely entering into possession but all its incidents—Titles to Land Consolidation (Scotland) Act 1868 (32 and 33 Vict. c. 116), sec. 119; Heritable Securities (Scotland) Act 1894 (57 and 58 Vict. cap. 44), sec. 3.

Argued for the pursuers—The pursuers were doing none of the things forbidden in

section 1 (1) (*b*) of the Courts (Emergency Powers) Act 1914 (*cit. sup.*) They were not seeking to enter into possession, and though they had got a decree they could not make it operative without a decree of the Court authorising them to take further steps. This required an application under the Courts (Emergency Powers) Act 1914 for leave to proceed. Defender's argument, if well founded, would interfere even with arrestment on the dependance.

LORD JUSTICE-CLERK—This action was raised by the heritable creditors in a bond over certain property in Glasgow against the proprietor, the conclusion being for declarator that the pursuers have right to the rents, maills, and duties of the property under the bond. The Sheriff-Substitute granted decree in terms of the prayer, and added to his interlocutor an order in the following terms—"Meanwhile assigns as a diet for hearing parties upon the question whether the pursuers are precluded from enforcing the decree now granted by the Courts (Emergency Powers) Act 1914, Tuesday, 9th November next, at 2 p.m."

Two points were argued before us. The first was whether there had been a sufficient demand for payment to justify the pursuer in raising an action at all. [*His Lordship gave his reasons for holding that sufficient notice had been given.*]

The other question turns upon the interpretation of the Courts (Emergency Powers) Act 1914 and the relative Act of Sederunt. It was argued that before this action of maills and duties was raised at all there should have been an application to the Court, on the ground that this was really a step in the process of entering into possession, or of enforcing payment or recovering money in terms of section 1 (1) (*b*) of the statute. In my opinion that argument is not well founded. I think an action of maills and duties is not a step in process in any proper sense of the word, but the decree in such an action is really, as Lord President Inglis described it in the case of *Robertson's Trustees* v. *Gardner*, 16 R. 705, 26 S.L.R. 547, only available as giving the heritable creditors a title to enter into possession of the estate.

It is a mere declarator of right which enables the holder of the decree to take further steps to get himself put into possession, but it in no sense enters the holder of it into possession. Further proceedings require to be taken before that result is brought about. I think the view upon which the Sheriff-Substitute proceeded is correct, namely, that a creditor having obtained a decree of maills and duties must then, under the powers given to the Court to stay execution, make an application to have it considered and determined by the proper Court whether such a decree should be put into operation. As Lord Guthrie pointed out in the course of the discussion, if it were necessary that before an action of maills and duties was brought an application under the statute for leave to bring it had to be made and disposed of, the result might be that the circumstances might be entirely changed between the date of the disposal of the application and the date of the final decree. The findings of the Sheriff-Substitute seem to me sufficient for the disposal of the whole case, and I think we should find in terms of his interlocutor and dismiss the appeal.

LORD DUNDAS—[*After dealing with the question as to the sufficiency of the notice*]—As regards the other point of the argument, that it was necessary that the pursuers should, before they raised this action of maills and duties, make application for leave to do so, I agree with what your Lordship has said. I cannot find anything in the Courts (Emergency Powers) Act 1914 or in the Act of Sederunt to give countenance to the view put forward by the appellant's counsel. I think therefore that we should affirm the interlocutor and send the case back to the Sheriff-Substitute in order that he may proceed to hear parties as he proposed to do upon the question whether the pursuers are precluded by the Act of 1914 from enforcing the decree. The Court is entitled to assume that the learned Sheriff-Substitute will deal justly and properly with that application when it comes before him.

LORD SALVESEN— . . . As to the more important question concerning the question under the Courts (Emergency Powers) Act 1914 whether an action of maills and duties can be raised without a previous application under the Act, I have come in the end to have no doubt that such procedure is unnecessary. There may be a good defence upon the merits and no decree may pass. It is time enough therefore to consider whether the decree is to be put into force after it has been obtained. Accordingly I think the action must be allowed to take its course, and if it results in a decree, then the pursuer who wishes to put his decree into force must present an application to the Sheriff-Substitute for leave to do so. At the hearing of that application I have no doubt the Sheriff will take into account all the circumstances that were urged before us as indicating that this was a hard case. It is certainly not a unique case, because at the present time there must be many property owners in the city of Glasgow who are in exactly the same position as the defender, unable owing to the state of the money market to replace existing bonds when they are called up. Accordingly what the Sheriff may do upon this application may be a guide in future cases, but we are not to assume at this stage that the Sheriff will not have due regard to what he is directed by the Act to consider, and will not entertain and deal with any conditions which it may be equitable to impose upon the creditors if they are to have the benefit of the decree which is now being granted to them.

LORD GUTHRIE—I agree. . . . With regard to the second question, I think that in view of the admission that section 1 (*a*) of the Courts (Emergency Powers) Act 1914

necessarily involves an application after the proceedings there referred to have been gone through, it would be difficult to suppose that sub-section (*b*) would be framed in any other view. I agree with your Lordships that the words are quite clear, and that the result is just what one would expect, namely, that if and when any question of hardship arises, the Court must be in the position of knowing and considering as at that time all the circumstances, the creditor's as well as the debtor's, and deciding whether they are to grant or refuse the application *simpliciter*, or whether they are to grant it under conditions, and it is equally clear that it is only after decree that this question can be properly considered.

The Court dismissed the appeal, found in fact and in law as in the interlocutor of the Sheriff-Substitute, of new found, declared, and decerned as craved in the initial writ.

Counsel for the Pursuers and Respondents—Sandeman, K.C.—Lippe. Agents—Simpson & Marwick, W.S.

Counsel for the Defender and Appellant—M'Lennan, K.C.—Walker. Agent—S. F. Sutherland, S.S.C.

Tuesday, November 30.

SECOND DIVISION.

[Sheriff Court at Glasgow.

HALCROFT *v.* WEST-END PLAYHOUSE, LIMITED.

Contract—Theatre—Reparation—Construction of Contract—Breach of Contract—Condition—"Subject to the said Theatre being in the Occupancy and Possession of the Management."

A troup of theatrical artistes entered into a contract with a company to perform at the company's theatre for a week "subject to the said theatre being in the occupancy and possession of the management." The theatre was not completed by the date when the contract fell to be fulfilled, and the company cancelled the contract. In an action by the artistes against the company for payment of a week's salary the Court *assoilzied* the defenders, *holding* that the clause did not imply a representation or warranty that the theatre was actually in the defenders' occupation and possession at the date of the contract being entered into or of its fulfilment, and that the exemption contained in it applied to the case of the theatre not being completed.

Charles Halcroft, London, *pursuer*, brought an action in the Sheriff Court at Glasgow against the West-End Playhouse, Limited, Glasgow, *defenders*, to recover £25 damages for breach of contract which had been cancelled by the defenders, and under which the pursuer was to have played in the defenders' theatre.

The defenders pleaded, *inter alia*—"(2) The defenders' theatre not being in the occupancy and possession of the defenders on said 3rd March 1913, they are not in breach of contract and should be assoilzied with expenses. (3) It being impossible to perform said contract, through no fault of the defenders, they are not liable in breach thereof and are entitled to absolvitor with expenses."

The *contract* was as follows:—

"Contract, dated 23rd August 1912.

"Veuillez lire les conditions inserees sur l'autre cote de la page. Man ist hierdurch ersucht die Bedingungen auf der andere seite zu lesen. Si prega di leggere le condizioni scritte nell' altra parte della pagina.

"WEST-END PLAYHOUSE, LTD., GLASGOW.

STAMP. Six Pence. The Glasgow Pavilion, Ltd. Lyceum Theatre, Ltd., Govan, Glasgow.

"THE 'AWARD' CONTRACT For Music Halls in the Provinces, working on the "Twice-a-Night" System.

"N.B.—No Commission MUST be charged STAMP 10/- by any Manager doing business direct with an Artiste.

"An agreement made the 23rd day of August 1912, between West-End Playhouse, Ltd., Glasgow (Note.—A condition of the acceptance of this contract is that the Management have power to transfer the Artiste to the Glasgow Pavilion, Ltd., or Lyceum Theatre, Ltd., Govan, Glasgow, by giving notice on receipt of billing matter), hereinafter called the Management of the one part, and 3 Royal Dreadnoughts, hereinafter called the Artiste of the other part, witnesseth that the Management hereby engages the Artiste, and the Artiste accepts an engagement to appear as shooting act (or in his usual entertainment) at two performances every evening at the theatres, and from the dates, for the periods, and at the salaries stated in the schedule hereto, subject to the said theatre being in the occupancy and possession of the Management, and upon and subject to the under-mentioned conditions:—

"1. The word 'Artiste' shall, when more than one is included in the performance, include the plural.

"2. The Artiste agrees to appear at any matinees required by the Management, and shall be paid at the rate of one-twelfth of the weekly salary for each matinee.

"3. Where this contract relates to a partnership, troupe, or sketch, the Artiste shall, at the time when the contract is signed, furnish the Management, in writing, with such names as the Management may require, and shall not substitute a performer for a person so named without the written consent of the Management.

"4. The Artiste may be transferred during the whole or any part of the engagement (not less than one week) to any other theatre owned or controlled by or associated with the Management, with the consent of the Artiste, such consent not to be unreasonably withheld. If such transfer is made in the Provinces, reasonable expenses shall be allowed.

"5. Barring Clause.—The Artiste shall not, without the written consent of the Management, appear at any place of entertainment within a radius of ten miles for fifteen months prior to his appearance, nor for two weeks afterwards—according to this contract—excepting in a town which has a population of more than 70,000 inhabitants (according to the London A B C Railway Guide), and is situated beyond a radius of six miles.

Artistes will please intimate here what other dates they hold in Glasgow.