on this and similar clauses of limitation. From this it follows that the unreported case of *Sharkey* v. *The Corporation of Glasgow*, decided in the Second Division, which was identical with the present case, was well decided.

The language of the statute, it appears to me, could not be expressed in more comprehensive terms. When it speaks of "any wrong done," it means, I think, any wrong done to anybody. If this be so, there is no room for the distinction taken by the Lord Ordinary, and it follows that his interlocutor disallowing the second plea-in-law for the defenders must be recalled.

On 4th December (present, the LORD PRESIDENT, LORD MACKENZIE, and LORD SKERRINGTON) the defenders moved for a proof of the averments relating to their second plea-in-law.

The pursuer moved for the expenses of the reclaiming note, and argued—The case of *Sharkey* had not been quoted to the Lord Ordinary, who would have been bound by it. The carelessness of the defenders as shown on record had caused two weeks' delay in the raising of the action, which was raised only one week beyond the statutory time.

The defenders argued — The argument given by the pursuer here had not been given in *Sharkey*, and the case of *Sharkey* was not the basis of the decision of the Court. The Court had proceeded independently of that decision to construe the section. *Sharkey* had been discovered by accident since the decision in the Outer House. That case had been conducted on behalf of a company with which the defenders were insured, not as in this case by the defenders themselves through their own law agents.

The Court pronounced this interlocutor—

"Recal the interlocutor of 1st June 1915: Allow to the parties a proof of the averments relative to the defenders' second plea-in-law—the defenders to lead—and remit to the Lord Ordinary to take said proof and to proceed: Find the pursuer entitled to expenses since the date of said interlocutor."

Counsel for Pursuer (Respondent)—Anderson, K.C. — Duffes. Agent — James G. Bryson, Solicitor.

Counsel for Defenders (Reclaimers)—Dean of Faculty (Clyde, K.C.) — M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Friday, December 10.

FIRST DIVISION.

[Lord Anderson, Ordinary on the Bills.

THE ADMIRALTY *v.* BLAIR'S TRUSTEE.

Bankruptcy — Sequestration — Crown — Claims—Preference—Damages for Breach of Contract Payable to Admiralty—Prerogative Right of Crown to Preferential Ranking—Act 33 *Henry VIII, cap.* 39, *sec.* 74—*Act* 6 *Anne, cap.* 26, *sec.* 7.

In a sequestration the Lords Commissioners of the Admiralty claimed a preferential ranking in respect of a sum due as damages for failure by the bankrupt to fulfil a contract made with them. The trustee on the sequestrated estate rejected the claim for preferential ranking, but admitted the debt to an ordinary ranking.

Held that the trustee was right in refusing the claim to a preferential ranking and in admitting the debt to an ordinary ranking.

Lord Advocate v. *Galbraith*, 1910, 47 S.L.R. 529, *overruled.*

The Act 33 Henry VIII, cap. 39, section 74, enacts—". . . If any suit be commenced or taken, or any process be hereafter awarded for the King for the recovery of any of the King's debts, that then the same suit and process shall be preferred before the suit of any person or persons; (2) and that our said Sovereign Lord, his heirs and successors, shall have first execution against any defendant or defendants, of and for his said debts, before any other person or persons, so always that the King's said suit be taken and commenced, or process awarded, for the said debt at the suit of our said Sovereign Lord the King, his heirs or successors, before judgment given for the said other person or persons."

The Act 6 Anne, cap. 26, section 7, enacts—". . . The said barons of the Court of Exchequer in Scotland, or any one or more of them, either in court or out of court, shall have full power and authority to take all manner of recognisances and securities for debts, and that all obligations, recognisances, specialties, and other securities for any the revenues, rents, debts, duties, accounts, profits, or other things accruing, or which shall or may become due or accrue to the Queen's Majesty, her heirs or successors, within Scotland, or which shall in any wise concern or relate thereto, or any the officers, ministers, or accountants thereof, or for the same, or which shall be taken in or by order of the said Court of Exchequer in Scotland, or upon any other account for the use or benefit of the Crown, or for securing any the revenues, debts, or duties of the Crown, shall be taken in the name of the Queen's Majesty, her heirs and successors, and to be paid to the Queen's Majesty, her heirs and successors, with other proper words, and with and under such conditions as shall be suitable to

the matter for which they shall be taken, and shall have the full force and effect of any obligations, recognisances, and specialties which have been or may be taken or acknowledged in the Court of Exchequer in England, according to the purport, true intent, and meaning of the statute in that behalf made in England in the three and thirtieth year of the reign of King Henry the Eighth, or any other law or statute, or any practice, custom, or usage in the Court of Exchequer in England, or by virtue of the royal prerogative; and that all suits and prosecutions upon any the said obligations, recognisances, and specialties, or for any revenues, debts, or duties anyways due or payable to the Queen's Majesty, her heirs and successors, within Scotland, shall be in the said Court of Exchequer in Scotland, and Her Majesty, her heirs and successors within Scotland, shall be preferred and have preference in all suits and proceedings in the said Court of Exchequer in Scotland, according to the said statute of the three and thirtieth year of King Henry the Eighth, and according to the uses, course, and practice of the Court of Exchequer in England, and shall have and enjoy such and the same prerogatives as well in and about pleadings and in all other matters and things as by any the laws in England or course of Exchequer in England have been, are, or ought to be allowed, and as well the bodies as the lands and tenements, debts, credits, and specialties, goods, chattels, and personal estate of all debtors or accountants to the Crown, or their debtors in Scotland, shall be subject and liable, and shall and may be made subject and liable by extent, inquisition, and seizures, or by any other process, ways, or means to the payment of such debts, duties, or revenues to the Crown, and in such and the same manner and form to all intents and purposes as hath been or is used in the Court of Exchequer in England in like cases."

The Lords Commissioners of the Admiralty, *appellants*, presented in the Bill Chamber a note of appeal against a deliverance of William Dunlop, trustee on the sequestrated estates of Andrew Blair, *respondent*, by which deliverance their claim for a preferential ranking had been refused, an ordinary ranking only being granted.

On 5th May 1914 the appellants entered into a contract with Andrew Blair, contractor, Glasgow, for the execution of storage works at Castlandhill, Rosyth, at a total cost of £7031. Before the work was completed the contractor's estates were sequestrated. At the date of sequestration the contractor had executed work to the value of £2771, 19s. 10d.; and had been paid the sum of £1800, leaving due to him £971, 19s. 10d. The respondent declined to carry out the contract, and a new contract was entered into with another contractor to complete the work for £6280—making a total cost of £9051, 19s. 10d. This represented a total increase of £2020, 19s. 10d., which, less the sum due to the contractor, viz., £971, 19s. 10d., made the net extra cost £1049. This sum was the amount of damages sustained by the appellants through the failure of the contractor and the trustee on the sequestrated estate to implement and fulfil the contract. For this sum of £1049 the appellants, as representing the Crown, claimed a preferential ranking in the sequestration. The trustee on 30th June 1915 issued the following deliverance—"The trustee rejects this claim so far as made upon the sequestrated estate to a preferred ranking, and to the effect of receiving full payment therefrom. Subject to the production to him of the accepted tender for completion of the work, the trustee admits the claim to an ordinary ranking for £1049."

The appellants pleaded, *inter alia*—"(1) In respect that the said sum of £1049 is a debt due to the Crown, it is payable in full before other creditors are paid, and the appellants are entitled to a preferential ranking in the sequestration."

On 9th September 1915 the Lord Ordinary on the Bills (ANDERSON) refused the appeal.

Opinion.—"This is an appeal against a deliverance of the respondent as trustee on the sequestrated estates of Andrew Blair, contractor, Glasgow, whereby, while admitting the claim of the appellants to an ordinary ranking, he refused it a preferential ranking.

"The appellants' claim is in respect of damages for breach of contract by Blair, and the amount claimed is £1049. This claim has not been constituted, but the respondent has accepted as accurate the amount stated by the appellants.

"The appellants maintained their right to preferential treatment on these grounds —(1) that the Crown has an inherent right by way of prerogative to a preferential ranking, and (2) that there is no provision in the recent Bankruptcy Act of 1913 which abrogates or modifies that prerogative of the Crown.

"On the first point the appellants founded on a decision of Lord Cullen (*Lord Advocate* v. *Galbraith*, 47 S.L.R. 529) as being in point. In that case Lord Cullen decided that the Postmaster-General was entitled to a preferential ranking in a sequestration for the amount of a telephone rent, and he based his decision on the alleged prerogative of the Crown to claim a preference over ordinary creditors in a sequestration. The steps whereby Lord Cullen reached this conclusion were these — he first of all showed, by an exhaustive examination of English authorities, that it is part of the common law of England that the Crown posseses this prerogative, which may be asserted in the distribution of a sequestrated estate (*in re Hanley & Company*, 1878, 9 Ch. Div. 469; *in re Bonham*, 1879, 10 Ch. Div. 595; *New South Wales Taxation Commissioners* v. *Palmer*, [1907] A.C. 179). This is also the law of Ireland (*in re Galvin*, Ir. Rep. 1879, 1 Ch. Div. 520). Lord Cullen next examined the law of Scotland, and held that although there was no rule of the common law similar to that of England, the English common law rule on this matter had been made part of the law of Scotland by the provisions of the Act of 6 Queen Anne referred to in Lord Cullen's judgment.

I am unable to agree with this last step of Lord Cullen's reasoning. I cannot hold that the statute of Queen Anne, which purports to deal with procedure of the Court of Exchequer in Scotland, has the additional effect contended for of introducing into the law of Scotland this doctrine of Crown prerogative as applicable to all kinds of debts. If the meaning of the Act of Queen Anne is doubtful, it seems to me that the appellants must fail, as there is a presumption against this principle being part of the law of Scotland. I take this view for these reasons—in the first place because the principle is inequitable. In the case of *Palmer* Lord Macnaghten justifies the doctrine on the ground that its assertion results in the benefit of the general community (that is, the general body of taxpayers) although at the expense of the individual. I should have thought this was a reason for condemning the principle. Why should individuals be made to suffer for the general good, especially in a case like the present, where the general benefit is infinitesimal but the individual loss substantial? In the second place, this alleged prerogative is hostile to the general policy of the Bankruptcy Acts, which aim at equal treatment of all creditors in the matter of the distribution of the estates of a bankrupt.

"But assuming that Lord Cullen's judgment is sound on the foregoing point, I am against the appellants on the second branch of their argument, to wit, that the provisions of the Bankruptcy Act of 1913 have neither modified nor abrogated the alleged Crown privilege. It is to be noted that no reference is made in the case of *Galbraith* to a statute which seems to have a bearing on the question decided in that case—the Preferential Payments in Bankruptcy Act 1888 (51 and 52 Vict. cap. 62). That Act undoubtedly applied to Scotland, as it is inconceivable that the Legislature which passed a similar Act for Ireland in 1889 did not intend that there should be like provisions in Scotland. The effect of the Irish Act was considered by the Irish Courts in the case of *Galvin*, and it was decided by the Court of Appeal (reversing Mr Justice Boyd) that the Crown's prerogative subsisted as to Crown debts which had not been given a preference by the Act. It is unnecessary to consider whether or not that judgment is sound, as the Scottish Bankruptcy Act of 1913 contains a sub-section which is not to be found in the Preferential Payments Acts, and which, in my judgment, leads to a conclusion as to the effect of these enactments as to preferences different from that arrived at by the Irish Court of Appeal. Section 118 of the Bankruptcy Act of 1913 deals with preferential payments in bankruptcy. That section declares that the Act of 1888 shall not apply to Scotland, and the obvious reason for this is that the provisions of section 1 of that Act are re-enacted in section 118 of the 1913 Act—with additional provisions called for by supervenient legislation as to Workmen's Compensation and National Insurance. In construing section 118 with reference to the rights of the Crown I do so in accordance with the recognised canon of construction that the Crown is not reached except by express words or by necessary implication in any case where it would be ousted of an existing prerogative. I also keep in view that one of the general purposes of the Bankruptcy Acts is to accord equal treatment to all creditors. On those principles, the conclusion I have reached is that by necessary implication the Crown is entitled to no other preference than the statutory preference conferred by section 118. The general contention that where preferences are being conferred by statute these are presumably exhaustive, seems to become conclusive when the terms of the new sub-section—(5)—are kept in view. This sub-section reserves a number of other preferences which are not to be affected by the provisions of the Act. I conclude from a consideration of these sub-sections (1) and (5) that section 118 intended to deal with all preferences and prerogatives, and that, there being no reservation of the alleged general prerogative of the Crown, that prerogative has been impliedly abrogated save in so far as it is positively preserved by the provisions of sub-section (1). I am fortified in the result at which I have arrived by the consideration that my judgment determines that on this point the law of Scotland is the same as that of England. By the English Bankruptcy Act of 1914, section 151, the right of the Crown to preferential consideration is expressly limited to the preferences conferred by the Act. I am unable to assume that the Legislature intended the Crown to have higher rights in Scottish bankruptcies than in English, and therefore I conclude that what is expressly provided in the English Act is enacted by necessary implication in the Scottish statute.

"I shall accordingly refuse the appeal."

The appellants reclaimed, and argued—By the common law of England the Crown had the right to prevail over the claim of a subject where there was a conflict between the Crown and a subject as to debts—*New South Wales Tax Commissioners* v. *Palmer*, [1907] A.C. 179, opinion. This right was part of the law of Scotland—6 Anne, cap. 26, sec. 7; 2 Bell's Comm., p. 51; *Ogilvie* v. *Wingate*, 1792, 3 Patt. App. 273. A debt due to the Admiralty by a subject was a Crown debt, and could have been recovered by writ of extent in the Court of Exchequer. The Crown's position was not altered by proceeding in bankruptcy instead of in the Court of Exchequer. Any revenue question could be tried at any stage in the proceedings in the Court of Exchequer—*Advocate-General* v. *Beattie*, 1856, 18 D. 378; *Lord Advocate* v. *Hogarth*, 1859, 21 D. 213; *Sharpe* v. *Miller*, 1861, 23 D. 1015. This was the English rule—*Attorney-General* v. *Constable*, 1879, 4 Exch. Div. 172; *in re Bonham*, 1879, 10 Ch. Div. 595. If the Crown was not expressly excluded by statute its rights were maintained. The Crown's rights were not excluded by the Bankruptcy Acts, and power to claim Crown debts in the Court of Exchequer and in bankruptcies remained—*Lord Advocate* v. *Galbraith* (*cit.*); *In re*

Galvin, 1897, 1 I.R. 520; *In re Behan*, 1914, 2 I.R. 29. In conflict between Crown and subject date of Crown writ was immaterial —*Borthwick* v. *Lord Advocate*, 1862, 1 Macph. 94.

The respondent argued—The bankrupt had been divested of his estates, and the Crown claim to a preference was too late—*Ogilvie* v. *Wingate*, 1791, M. 7884; *Robertson* v. *Jardine*, 1822, M. 7891; *Burnet* v. *Murray*, 1754, M. 7873, notes of Lord Kames, p. 7876; *Attorney-General* v. *Leonard*, 1888, 38 Ch.D. 622; *The King* v. *Wells and Allnutt*, 1812, 16 East 278. The trustee had the estate for distribution, and there was no room for a new preference carrying off the whole estate. The Crown rights were prior execution and right of preference among competing diligences but no more.

At advising—

LORD MACKENZIE—The Crown claim a preference in this sequestration for a debt of £1049, the adjusted amount of a claim of damages for breach of contract by the bankrupt. The trustee has rejected the claim for a preference, but admitted it to an ordinary ranking. The Lord Ordinary has affirmed this deliverance. It is common ground that no diligence was done by the Crown, and no proceedings were taken equivalent to the old writ of extent. The bankrupt is divested of his estate, which has vested in the trustee to the effect provided by the Bankruptcy Act of 1913. The ground upon which the claim to a preference is based is not stated in the pleadings. The case presented for the Crown in argument was as follows—The Act 6 Anne, cap. 26, imports the common law of England into Scotland; it is a rule of the English common law that whenever the King's and the subject's title concur the King's shall be preferred; this is in virtue of the royal prerogative and is higher than the preference by writ of extent; it is not affected by bankruptcy, and accordingly this higher right ought to be given effect to in the sequestration by the trustee. The question raised is therefore one of general importance. The case for the Crown is in this somewhat unfortunate position that there is no averment upon record as to what the common law of England is, or rather was, in 1707, when the statute of Queen Anne was passed, which it is said is now the law of Scotland. There is not, with the exception of one case of recent date, any reported decision in our books, nor is there any passage in our text writers, which supports the contention put forward by the Crown. It will be necessary, in order to appreciate the Crown's argument, to refer to the English cases cited; but, strictly speaking, we cannot, as the case has been presented, have any judicial cognisance of what the law of England is on this point. It will be convenient at the outset to consider the way in which the Crown's preference is dealt with by our text writers. As Professor Bell points out—Bell's Com. (7th ed.) ii. 40—"By the treaty of Union the revenue laws of England were extended to Scotland, and instead of the Scottish Court of Exchequer a new Court of Exchequer was instituted for deciding questions concerning the revenues of customs and excise, and having the same power and authority in all such cases as the Court of Exchequer in England." This Court was established by the Act of Queen Anne, which refers to 33 Henry VIII, cap. 39, section 74. "In this new Court the forms of recognisance and other securities for the King's debt, and of suits and prosecutions thereon, were ordered to be regulated according to the forms of England, and the true intent and meaning of the statute of Henry VIII, introducing the extent of the Crown, and other existing laws. In this way the prerogative and preference of Crown debts was established according to Henry VIII's statute, and the usage, course, and practice of the English Court of Exchequer." One exception of great importance was however introduced by which it is declared that real estate in Scotland is not to be affected further or otherwise than such estate may be subject by the laws of Scotland to the debts of the Crown. The whole subject of extents in chief and in aid is dealt with in Bell's Com. (7th ed.) ii, pp. 40-55. The process of extent in chief is a speedy remedy given to the Crown on behalf of the public for recovering money due to the revenue. By 33 Henry VIII, cap. 39, it was authorised to be given to the Crown (1) for attaching at once the body, lands, goods and debts of the King's debtor, and (2) as a remedy on all sorts of debts due to the Crown, whether debts by judgment, recognisance, or bond, or by simple contract, recorded by inquisition. By the Court of Exchequer Act 1856 (19 and 20 Vict. cap. 56), sec. 28, a new form of process was established, and in the 8th edition of Bell's Principles this is explained by the editor, who, however, retains sections 2291-2296 (omitted in the 10th edition). Section 2291 says—"The writ of extent is an exchequer process now issued by authority of a judge of the Court of Session, having, like poinding, two objects—first, the attachment and appraisement of the subjects against which it is directed, and secondly, their sale and adjudication in payment of the Crown's debt. This writ makes effectual a preference for payment of all debts due to the Crown." It may be taken that a writ of extent could have been issued in the Court of Exchequer for recovery of damages for breach of contract—*Lord Advocate* v. *Hogarth*, 21 D. 213. Where the debt to the King is by bond, a writ of extent may, on the showing of the bond, with an affidavit, be issued, without any other preliminary steps, to take the moveables and goods of the debtor. When the debt is by simple contract a commission is issued, on affidavit of the debt, for commissioners to take inquisition of the debt. In Bell's Com. (7th ed.) ii, 43, there is the following—"The general rules as to the effect of the writ of extent and the power of execution are—1. That all goods and chattels, the absolute property of the King's debtor at the date of the teste of the extent, may be taken under it and are bound by the writ, into whose hands soever

they may since have come." The teste was the signature of the judge to the warrant initiating the proceeding. By the Exchequer Act of 1856 it was provided that the execution of a charge by or on behalf of the Crown, or in the case of deceased debtors not charged during life, the execution of any arrestment or poinding is to be equivalent to the teste of a writ of extent according to the then existing law and practice. There have been several cases in Scotland and many in England defining the Crown's rights under writs of extent. It has always been regarded that the goods of the debtor are exposed to seizure by means of the execution following on writs of extent up to the point of time when the debtor is completely divested of the property. The controversy in these cases has been as to the point of time when divestiture takes place—*Ogilvie* v. *Wingate*, 1791, M. 7884, 3 Paton's App. 273; *Robertson* v. *Jardine*, 1802, M. 7981; *Burnet's Creditors*, 1754, M. 7873; *Advocate-General* v. *Magistrates of Inverness*, 18 D. 356. It was argued for the Crown in the present case that a writ of extent (or its equivalent) could still be issued notwithstanding sequestration. To this the answer is to be found in the 5th edition of Bell's Commentaries, vol. ii, p. 330—"the process of the Crown is not defeated by proceedings in bankruptcy, but takes full effect against the estate of the bankrupt, unless that estate has been actually assigned and transferred to the trustee for the creditors previous to the King's writ." This shows that after the trustee is completely vested in the property there can be no writ of extent, nor could it be successfully maintained that the completion of the trustee's title is to have the same effect as if the Crown had done diligence by writ of extent. The estate vests in the trustee for distribution subject to any preference, but unless the Crown has proceeded by writ of extent it is not, consistently with Scots law, to be put in the same position as if it had. The precise stage in which in a sequestration it would be held there was complete divestiture of the bankrupt does not arise for determination here, and it is not necessary to express an opinion on it. It probably is the date of the act and warrant. The same principle applies when the debtor voluntarily divests himself of his property. As stated by Burton on Bankruptcy, vol. i, 91 (114)—"A completed sale or assignment passing the property anterior to the date of the teste will defeat the Crown's preference." In England also there are cases which show that when the transference of the property from a bankrupt is complete the Crown's extent is excluded. In *Wydown's* case, (1807) 14 Vesey 88, Lord Chancellor Eldon said "that in the bankruptcy of Castell the commission was brought to him in the middle of the night to be sealed with the avowed object of preventing an extent, and that considering it to be his duty to hold an even hand between the Crown and the subject, he without reference to the object got out of bed and sealed the commission." On this point reference may be made to Chitty on the Prerogatives of the Crown (p. 286), where it is stated that the extent operates though a commission of bankruptcy has issued, but the Crown cannot take the effects if actually assigned before the fiat or teste, and a provisional assignment is sufficient for this purpose. In *Giles* v. *Grover*, 9 Bing. 128, elaborate opinions were expressed upon what the Judges said had long been a *vexata questio* in Westminster Hall, viz., the stage at which an execution is complete so as to exclude the Crown's extent. In a more recent case—*in re Bonham*, (1879) 10 Ch. D. 595—it was held that the retrospective effect given to the title of a trustee in bankruptcy does not affect the rights of the Crown under an extent issued against the property of the debtor between the filing of the petition and the appointment of the trustee.

These illustrations are given as showing that it has been matter of anxious consideration how long the Crown's right to proceed by extent continues. It is difficult to understand why this should have been made a topic of controversy if the Crown could assert successfully even at the end of the day a pre-eminent right irrespective of whether there had been a writ of extent or not. The position of the law in Scotland, recognised in the text writers and illustrated by the cases above cited, is that the Crown's preference depends on the writ of extent or its equivalent.

The claim of the Crown in the present case is much wider. In order to understand the argument it is necessary to refer to some of the English cases cited. In the Privy Council case of the *New South Wales Taxation Commissioners* v. *Palmer*, [1907] A.C. 179, it was decided that in the administration of a bankrupt's estate under the New South Wales Bankruptcy Act 1898 the Crown is entitled to preferential payment over all other creditors. We do not know what the provisions of that Act are. In giving judgment the Chief-Justice of the Supreme Court of New South Wales concluded as follows:—"In this case no extent issued, but the Crown proved in the bankruptcy. This the Crown had a right to do, but coming under the Act, the debt due to the Crown not being given any preference, they come in the same class as the general body of creditors, and if there were anything to distribute amongst the creditors that must be distributed *pari passu*. In the case of *in re Henley & Company*, (1878) 9 Ch. D. 469, there being no alteration of ownership of the property, the Crown as a matter of course took in priority to the other creditors, and whether this was brought about by the issue of a writ of extent or by arrangement with the liquidators is, in my opinion, of no moment, and has no bearing upon the case we have to consider. The case of *in re Baynes*, (1898) 9 Queensland L.J. 33, before the Supreme Court of Queensland, and the case of *Clarkson* v. *Attorney-General of Canada*, (1888) 15 cap. Ont. 632, fully support the view I have taken." An appeal from this judgment was, however, allowed, and as what Lord Macnaghten says explains the point argued by the Crown in the present

case I quote the following passage—"The attention of their Lordships was called to the case of *in re Baynes*, which has already been mentioned, and a case in Ontario—*Clarkson* v. *Attorney-General of Canada*—in both of which the right of the Crown to preferential payment out of assets being administered in bankruptcy was denied. Their Lordships have carefully considered those cases. With every respect to the courts by which they were decided, their Lordships cannot help thinking that in both cases the learned Judges have not sufficiently kept distinct the two prerogatives which formed separate grounds of decision *in re Henley & Company*. The judgments are devoted in a great measure to a consideration of the prerogative under which the Crown was entitled to peculiar remedies against the debtor and his property, and of the law and the authorities bearing upon it. The principle upon which that prerogative depends is not to be confounded with the principle invoked in the present case. The prerogative the benefit of which the Crown is now claiming depends, as explained by Macdonald, C.B., in *The King* v. *Wells*, 16 East. 278, upon a principle 'perfectly distinct . . . and far more general, determining a preference in favour of the Crown in all cases and touching all rights of what kind soever where the Crown's and the subject's right concur and so come into competition.'" The same is said by Chitty, J., in the case of the *Oriental Bank Corporation*, (1885) 28 Ch. D. 643, and in *Attorney-General* v. *Leonard*, (1888) 38 Ch. D. 622. The ultimate basis upon which the English law is said to rest is thus stated in Chitty on the Prerogatives of the Crown ((1820), p. 244). "Extraordinary remedies are assigned to the King, because, as Lord Coke observes, *Thesaurus regis est fundamentum belli et firmamentum pacis*"—Co. Litt. 131. The same view of the extent of the royal prerogative has been taken in Ireland *in re Galvin*, (1897) 1 Ir. Rep., 520; *in re Niblock*, (1907) 2 Ir. Rep. 559.

There is no authority in Scots law for holding that the royal prerogative had this effect in Scotland prior to the Act of Union. The Crown's case turns on the proper construction to be put on the Statute of Queen Anne, and in support of their contention there was cited the case of the *Lord Advocate for the Postmaster-General* v. *Galbraith (Walker's Trustee)*, (1910) 47 S.L.R. 529. This is a decision of Lord Cullen in the Outer House sustaining the contention of the Crown that the Statute of Queen Anne does more than extend to Scotland the provisions of the Act of Henry VIII. The question is whether that judgment, by which it was held the common law of England was imported into Scotland, is sound or not.

In order to arrive at the true meaning of section 6 of the Act 6 Anne, cap. 26 (cited in Blackwood's Acts as cap. 53), sec. 11, it is necessary to keep in view the general purpose of the Act. It proceeds on the preamble that by Art. 19 of the Treaty of Union "it is amongst other things provided that there should be a Court of Exchequer in Scotland after the said union for deciding questions concerning the revenues of customs and excise there, having the same power and authority in such cases as the Court of Exchequer has in England." The statute then proceeds—"To the intent therefore that there may be a Court of Exchequer settled and established in Scotland pursuant to the purport and meaning of the said recited Act and of the nineteenth article therein contained, be it enacted," &c., that "the Court of Exchequer in Scotland shall be and by authority of this Act is hereby erected, constituted, and established, . . . and shall be and is hereby enacted to be a court of record, revenue, and judicature for and within Scotland." Then follow provisions for the appointment of the chief barons and other barons and of officers of Court; a direction that a seal of Court shall be assigned; and a comprehensive definition of the jurisdiction of the Court, which may be summarised as extending to all Crown debts. Provision is made for the practice and rules of the Court, trials, costs, new trials, judgments, and executions, which are to be the same as those of the Court of Exchequer in England. Then follows section 7, upon which the present question arises. That section may be divided up to the following effect, (1) the barons of Exchequer in Scotland are to have power to take all manner of recognisances and securities for debts; (2) all obligations, recognisances, &c., for any Crown revenues, rent, debts, &c., including those which shall be taken in or by order of the Court of Exchequer in Scotland, are to be taken in name of and to be paid to the Queen's Majesty, her heirs and successors, under conditions suitable to the matter; (3) "and shall have the full force and effect of any obligations, recognisances, and specialties which have been or may be taken or acknowledged in the Court of Exchequer in England, according to the purport, true intent, and meaning of the statute in that behalf made in England in the three and thirtieth year of the reign of King Henry the Eighth, or any other law or statute, or any practice, custom, or usage in the Court of Exchequer in England, or by virtue of the royal prerogative"; (4) "and that all suits and prosecutions upon any the said obligations, recognisances, and specialties, or for any revenues, debts, or duties any ways due or payable to the Queen's Majesty, her heirs and successors, within Scotland, shall be in the said Court of Exchequer in Scotland, and Her Majesty, her heirs and successors, shall be preferred and have preference in all suits and proceedings in the said Court of Exchequer in Scotland, according to the said statute of the three and thirtieth year of King Henry the Eighth, and according to the usage, course, and practice of the Court of Exchequer in England; (5) and shall have and enjoy such and the same prerogatives, as well in and about pleadings, and in all other matters and things, as by any the laws in England, or Court of Exchequer in England, have been, are, or ought to be allowed; (6) and as well the bodies, the lands, and tenements, debts, credits, and specialties, chattels, and personal estate of all debtors or accountants to

the Crown, or their debtors in Scotland, shall be subject and liable, and shall and may be made subject and liable by extent, inquisition, and seizures, or by any other process, ways, or means, to the payment of such debts, duties, or revenues to the Crown, and in such and the same manner and form to all intents and purposes as hath been or is used in the Court of Exchequer in England in like cases."

Turning now to the Act 33 Henry VIII, cap. 39, section 74, it enacts—"That if any suit be commenced or taken, or any process be hereafter awarded for the King, for recovery of any of the King's debts, that then the same suit and process shall be preferred before the suit of any person or persons, and that our said Sovereign Lord, his heirs and successors, shall have first execution against any defendant or defendants, of or for his said debts, before any other person or persons, so always that the King's said suit be taken and commenced, or process awarded, for the said debt at the suit of our said Sovereign Lord the King, his heirs and successors, before judgment given for the said other person or persons." The purpose of the statute of Queen Anne as regards Scotland therefore is to carry out the preamble by erecting a Court of Exchequer in Scotland on the same lines, and with the same powers as those of the existing Court of Exchequer in England. The enacting clauses of the Act are directed to this and to this alone, and appear to be complete in every respect for the purpose expressly aimed at. The foundation of the argument for the Crown is in the words which occur in (3) "or by virtue of the royal prerogative." The use, however, which it is sought to make of these words is to import into Scotland a preference in virtue of the royal prerogative which it is said existed by the common law of England in 1707 when the statute was passed. It is not, however, in (3) that the preference of the Crown is dealt with, but in (4), and there the preference of the Crown's suits is to be according to the statute of Henry VIII, and the uses, course, and practice of the Court of Exchequer in England. The meaning of (3) is that in the case of an obligation, *i.e.*, a bond, the Crown may proceed by writ of extent as explained above. In (5) when the Crown's prerogatives are again referred to it is in conection with pleading, which bears out the view that no rights of preference of the Crown were imported other than those which might be secured by process and execution as provided by the Act of Henry VIII. This is the view which prevailed in Scotland before the decision in *Galbraith's* case, (1910) 47 S.L.R. 529. There is little authority on the point, but there is more than one passage of interest in Burton on Bankruptcy, a work published in 1845, upon the subject of the rights of the Crown. I quote the following from volume i, p. 6, where the learned author treats of the question, (8) "Whether the Crown is a privileged creditor, entitled, independently of any process or execution raised, to rank for its debts in preference to the ordinary creditors of the estate?" His answer is that "Independently of statute or its special privileges in precedence of execution, the Crown seems to have no preference." As regards the English law he says—"It is usual to say that the Crown is preferred for its debts over all other creditors. Even, however, if there were such a privilege in England, it would not necessarily extend to Scotland, because the 6th section of the 6th Anne, cap. 26, which extends the law of England on this subject to Scotland, does not give the Crown any new privilege as a debtor, but only conveys to it the English process as a means of recovering its debts; enacting that the debtors and their goods should be liable, by extent, inquisition, and seizures, or by any other process, ways, or means, to the payment of said debts, duties, and revenues to the Crown in such and the same manner as is used in the Court of Exchequer in similar cases, Our own books afford no trace of any privilege to the Crown as a simple creditor." I adopt this view, and therefore hold that the ground upon which the Crown base their claim fails.

It is unnecessary to consider what the effect of the Bankruptcy Act of 1913 would have been if the common law of Scotland was, prior thereto, what the Crown contend for. It was strongly urged that the terms of sections 97, 118, and 147 are sufficient to exclude any claim on the part of the Crown to a preference even if they had it before the Act. I have difficulty in assenting to this view, because if the Crown had a preference at common law the estate vested in the trustee for distribution among the creditors. This is expressly provided in section 117. It is unnecessary to consider what the effect of the English Bankruptcy Act of 1914 is. The law of Scotland, therefore is, in my opinion, as follows—(1) The Crown's prerogative writ of extent issued against moveables binds them into whatever hands they may have passed from the date of the teste (or its equivalent), whether in questions between separate writs of extent or in questions between the Crown and the subject creditor. (2) Complete divestiture of the debtor, whether voluntary or by sequestration, passing the property anterior to the date of the teste, will defeat the Crown's preference. (3) The Crown had not before the Act of Union a preference in all cases and touching all rights of what kind soever when the Crown's and the subject's right concur, and so come into competition. (4) The Act 6 Anne, cap. 26, did not import into Scotland this preference which the Crown contends exists by the common law of England.

The result is that, in my opinion, the interlocutor of the Lord Ordinary ought to be affirmed,

LORD JOHNSTON—[*Read by Lord President*]—This case is a rather unfortunate one in its circumstances by which to raise the question of an extended application in Scotland of the Crown's prerogative preference for its debts. It would, if acceded to, result in this, that the Crown, which

through the Board of Admiralty has got a considerable amount of contract work done by the debtor for which it is prepared to allow his bankrupt estate credit in accounting, would get a preference for a claim of damage for failure to complete the contract, and presumably over, *inter alios*, the men who supplied the debtor with material and the funds to carry the work so far. This does at first sight look like pressing the doctrine that "the interests of individuals are to be postponed to the interests of the community" to an extreme. It does not, however, affect the law of the case. But it leads one to scrutinise with extreme care the grounds of claim which are presented.

I have accordingly given my best consideration to the case, and to the judgment prepared by my brother Lord Mackenzie, which I have had an opportunity of perusing, and which I adopt. I should, however, wish to explain shortly my views upon an aspect of the subject which I have no doubt that he had before him, but which he has not expressly dealt with, viz., that of *contemporanea expositio*.

I must take it that by the law of England the Crown has "two distinct prerogatives," viz.—(1) a prerogative under which the Crown is "entitled to peculiar remedies against the debtor and his property," and (2) a prerogative "perfectly distinct . . . . and far more general, determining preferences in favour of the Crown in all cases and touching all rights of what kind soever, where the Crown's and the subject's right concur and so come into competition." I quote from Lord Macnaghten's judgment in the Privy Council in the case of *Palmer*, [1907] A.C., p. 185, where his Lordship is himself quoting and adopting the language of Macdonald, C.B., in *Rex* v. *Wells*, 1812, 16 East. 278, and 14 R.R. 347. Were I not so informed I should have been led, as a stranger to the law of England, to conclude that the prerogative second mentioned was the expression of an abstract right, and that first mentioned but a limiting description of the concrete method of enforcing that right—the abstract right depending on the common law of England and the concrete engine of enforcement with its limitation being provided by the statute of Henry VIII, 1541, c. 39, notwithstanding that it is couched in general terms, and does not expressly refer to the writ of extent in Exchequer.

While then I accept that by the law of England as judicially developed between the statute of Henry in 1541 and the Privy Council case of *Palmer* in 1907 the Crown in England has two separate and distinct prerogatives, the higher and general prerogative of right, and the lower or prerogative process of execution, I think that in judging of the question before us, which is truly whether the law of England is to be read into a statutory provision made for Scotland in 1707, and to overthrow the contemporaneous and since continuing interpretation of that provision in Scotland, we are justified in looking a little behind this English doctrine of the two separate prerogatives at the reality of the situation as it must have presented itself to the Legislature in 1707 and to the Court created in Scotland by the legislation of that year.

I think I may assume that prior to 1541 there was in England a prerogative preference of Crown debts of the widest. I think further that it is not too much to deduce from the English Act of 1541, cap. 39, section 74, there had probably been irregular and oppressive modes of enforcement of that prerogative right in use, and that the object of that enactment was to regularise and particularly to limit the mode of enforcement. For the sting of the provision lies in its tail—"so always that the King's said suit be taken and commenced, or process awarded for the said debt at the suit of our said Sovereign Lord the King, his heirs or successors, before judgment given for the said other person or persons." The interpretation of that condition and the adaptation of the whole provision to the ordinary process of execution in Exchequer has frequently occupied the English Courts, and is now perfectly defined and understood.

I cannot but conclude that the legislation of 1541 was not indeed an express but a practical limitation of the Crown's prerogative preference, and I think it not unlikely that it was at the time recognised as such. For it is difficult to see how the more extreme theoretical right should effectually survive if the recognised methods of enforcement were limited. This then was the situation of matters in 1707 when the union of the two kingdoms was completed. And the intention and effect of the legislation which sanctioned the union, and of that which was provided for by its terms and conditions, and which immediately followed, must I think be read in the light of that situation.

But in 1707 bankruptcy law, and particularly statutory provision for the administration of estates in bankruptcy, were in their infancy. Certain elementary attempts had been made by the Legislatures of the two countries respectively. But it was not until 1772 that in Scotland the first general sequestration statute was enacted. I cannot pretend any knowledge of the history of this matter in England. But I may safely refer to the introductory chapter of George Joseph Bell's work written in 1816. I quote from the 5th edition, which the treatise had reached in 1826, vol. i, p. 11, where, speaking of the commission in bankruptcy introduced by the 34th of Henry VIII, and modified by the 13th of Elizabeth, the author says—"It was not to be expected that a system which so completely outraged that (the common) law in particulars so important would be suffered to reach beyond the range of necessity which gave it birth. And although by the first statute of bankruptcy in Henry VIII's reign the commission was not restricted but made applicable to all ranks of men when the law came to be renewed in the 13th year of Queen Elizabeth, it was limited to merchants, and other persons were left to the rules of the common law, neither restrained by the energy nor favoured with the indulgence

of this peculiar code. It has in this way happened that till lately in England no system of equality was devised for the creditors of those unconnected with trade—that no restraint was imposed upon execution by individual creditors." It was not, I think, until about the same time as in Scotland, if not indeed later, that the development of the present statutory system of administration of estates in bankruptcy in England commenced. I have little doubt from consideration of the train of decisions to which we were referred that in connection with this movement and with the necessity for it the question of the position of Crown debts in bankruptcy become prominent, and it is not to be wondered at that the higher prerogative of the Crown not having been expressly limited, it has been resorted to by the English courts during the last century in explicating this new phase of an old question. But neither this question nor its possible solution had dawned on the courts or the profession in England in 1707.

If, then, it be the case, as we are told, that the prerogative process is a distinct and separate prerogative from the prerogative right in English law, then it may be enough for the decision of the present case to say that the higher prerogative right of England had no existence in Scotland prior to the Union, and that the Act of 6 Anne, cap. 26, did not introduce into Scotland anything but the English prerogative process based upon the Act of 33 Henry VIII. But if there could be any doubt about the limited terms of the Act of 6 Anne the above conclusion is, I think, put beyond controversy when, firstly, the practical situation as it existed in England in 1707, and what was then required to place the recovery of Crown debts in Scotland on the same practical platform as in England is kept in sight, and secondly, when the *contemporanea expositio* is regarded. That the effect of the Act of 6 Anne as I have stated it was the understanding of the Scottish courts and the Scottish profession in and since 1707 is, I think, clear from the fact that no suggestion has been made in any case to the contrary until the recent case of *Galbraith*, before Lord Cullen in the Outer House, and the present, and that the leading authority on the subject, who wrote about 100 years after the Union and more than 100 years before the recent raising of the question, has distinctly stated the law of Scotland in terms inconsistent with the present attempt. I have thought that this contemporaneous and continued interpretation of the situation as it existed in 1707 receives confirmation from the considerations on which I have ventured to enlarge.

But I also think that that interpretation has really been adopted by the Legislature in our recent Bankruptcy Statutes. The express provisions made for the ranking of Crown debts seem to me to be consistent with it making the provision which was considered necessary for the new situation created by the modern system of administration of estates in bankruptcy, and to be inconsistent with the present higher claim of the Crown.

LORD SKERRINGTON—This is a reclaiming-note for the Lords Commissioners of the Admiralty against an interlocutor of Lord Anderson refusing an appeal by them against a deliverance of the trustee on the sequestrated estates of Andrew Blair, a contractor who became bankrupt before he had completed certain work which he had undertaken to perform for the Admiralty. The claim is for £1049 in name of damages for breach of contract. The trustee admitted this claim to an ordinary ranking, but rejected it so far as made to a preferred ranking. The reclaimers plead that they are entitled to a preferential ranking in the sequestration in respect that the said sum of £1049 is "a debt due to the Crown." Their counsel did not maintain that the Crown as such has in Scotland any right to priority of payment as regards the heritable estate of its debtors, and the case was argued upon the assumption that the whole assets were moveable. It is material to notice that no diligence was used by the Crown either before or after the date of the sequestration. Further, Crown counsel did not argue that sequestration is by any statute made equivalent to the issue of a writ of extent.

Although the claim is in form one made within the sequestration and not adversely to it, the Solicitor-General argued that notwithstanding the sequestration the Crown was still entitled to use separate diligence in order to enforce its preference, and that its claim fell to be disposed of on that assumption and as if diligence had been or would be used. I concede that if it were clear and certain that notwithstanding the act and warrant in favour of the trustee in the bankruptcy the Crown was still entitled to attach the moveable estate of the bankrupt either by writ of extent or by the equivalent procedure provided by the Act 19 and 20 Vict. cap. 56, sections 16 and 42, or by any other process, it would be the duty of this Court not to impose on the Crown the trouble and expense of instituting such proceedings, but to deal with the claim as if such steps had been actually taken. On the other hand, if the Crown's right to resort to separate and adverse diligence or other legal procedure were doubtful, then the appropriate course for the Crown would have been to move to have the present appeal sisted in order that it might have an opportunity of taking such proceedings. I am not surprised that no such motion was made, as it seems clear that any adverse proceedings of the kind referred to would be incompetent.

As regards the competency of issuing a writ of extent after the date of the act and warrant vesting the property of a bankrupt in the trustee for his creditors, Professor Bell, Commentaries, *ii*, p. 52, states that "in Scotland the adjudication in favour of the trustee being a judicial assignment, complete without delivery or intimation, will be sufficient to exclude the Crown's right of preference." In his opinion in *Crown* v. *Magistrates of Inverness*, (1856) 18 D. 366, at p. 373, Lord Mackenzie said—"It was said that the Crown is not bound by the

Bankrupt Acts. This proposition, however, seems to be stated too broadly, for it never was doubted that the Crown process is excluded by a completed transference in favour of a subject. And according to the authorities it seems equally clear that an act and warrant in a sequestration will operate as a transference of the bankrupt's property to the trustee so as to defeat any subsequent attachment by the Crown, and in this way the Crown is necessarily affected by the Bankrupt Acts. Whether a discharge in a sequestration will protect the bankrupt from debts of the Crown is a point that was raised in the discussion before us, but upon which it does not seem necessary for the Court to give any opinion." On the other hand, it would seem that the Crown will secure a preference as regards the bankrupt's moveable estate if the writ of extent be issued or equivalent diligence be done in terms of the Act of 1856 after the date of the petition for sequestration but before the date of the act and warrant in favour of the trustee—*Borthwick* v. *Lord Advocate*, (1862) 1 Macph. 94. The English authorities are equally clear to the effect that a writ of extent binds nothing except that which was the property of the debtor at the time of the issue of the writ, and that accordingly it is ineffectual after his assets have been transferred to a trustee in bankruptcy. In the case of *In re Bonham*, 1879, 10 Ch. Div. 595, the Court of Appeal upheld the preference of the Crown under an extent issued against the property of the debtor between the filing of a petition for liquidation and the appointment of a trustee, but that was solely on the ground that the filing of such a petition even when followed by the appointment of a receiver did not divest the debtor until the creditors had determined that they would adopt some course which would have that effect.

Alternatively the Solicitor-General contended that by the common law of England (which according to his argument had been imported into the law of Scotland by the Court of Exchequer Act, 6 Anne, cap. 53) the Crown had a right of preference or priority "whenever the right of the Crown and the right of a subject with respect to the payment of a debt of equal degree come into competition." He argued that this preference was altogether independent of the use of any process or execution by the Crown, and that it was one which it was the duty of every Court in the country to take notice of and to enforce in so far as such preference had not been limited by some statute, as, for example, the English Bankruptcy Act of 1914. In view of the opinion of Lord Macnaghten in the Privy Council case of *New South Wales Taxation Commissioners* v. *Palmer*, [1907] A.C. 179, and the authorities there referred to, and also the opinion of Chitty, J., in *Attorney-General* v. *Leonard*, [1888] 38 Ch. Div. 622, it is difficult for a Scottish lawyer to assert that the preference in question does not exist according to the law of England as at present understood. Even upon that assumption, however, it still lies upon the Crown to demonstrate that this principle of English law has been made part of the law of Scotland. It was so decided in the Outer House by Lord Cullen in the case of *Lord Advocate* v. *Galbraith*, (1910) 47 S.L.R. 529, but I am unable to agree with him. The clause of the Act of 1707 chiefly relied on by the Crown was section 7. It contains three enactments which I shall summarise in my own words and consider separately. (1) The first part of the section relates to "all obligations recognisances specialties and other securities" for Crown debts which shall be taken in or by order of the Scottish Court of Exchequer or upon any other account for the use of the Crown. It enacts that such obligations, &c., "shall have the full force and effect of any obligations recognisances and specialties which have been or may be taken or acknowledged in the Court of Exchequer in England according to the purport true intent and meaning of the statute in that behalf made in England in the three-and-thirtieth year of the reign of King Henry the Eighth or any other law or statute or any practice custome or usage in the Court of Exchequer in England or by virtue of the royal prerogative." I do not think that an illiquid claim of damages such as that with which we are concerned, even though founded on a written tender and acceptance, is an "obligation" of the kind referred to in the section. Further, the purpose of the enactment is probably satisfied by holding that it makes valid and effectual for diligence bonds and obligations not duly executed according to Scots law and bonds not for a specific sum, such as are referred to in sections 38 and 39 of the Act of 1856. (2) The section then enacts that all suits and prosecutions for Crown debts shall be in the Court of Exchequer in Scotland, and that the Sovereign shall have preference in all suits and proceedings in that Court according to the Statute of Henry VIII, "and according to the usage, course, and practice of the Court of Exchequer in England, and shall have and enjoy such and the same prerogatives as well in and about pleadings and in all other matters and things as by any the laws in England or course of Exchequer in England have been, are, or ought to be allowed." These words seem to me to refer to the Crown's right to insist that Exchequer causes shall have precedence over all other causes (a right reserved to the Crown by section 25 of the Act of 1856), and also to the "right of first execution" referred to in the Statute of Henry VIII. Lastly (3) the section enacts that "as well the bodies as the lands and tenements debts credits and specialties goods chattels and personal estate of all debtors or accountants to the Crown or their debtors in Scotland shall be subject and liable and shall and may be made subject and liable by extent inquisition and seizure or by any other process ways or means to the payment of such debts duties or revenues to the Crown and in such and the same manner and form to all intents and purposes as hath been or is used in the Court of Exchequer in England in like cases," saving and excepting always the debtor's heritable estate in Scotland. This

enactment seems to refer exclusively to the attachment (*a*) by Exchequer process of (*b*) the property of the Crown debtor or of his debtors. *Ex hypothesi* the Crown debtor is divested by the appointment of a trustee in bankruptcy, and accordingly this part of the clause has no application to the circumstances of the present case. I admit, however, that the language of section 7, taken as a whole, may be interpreted as having the effect which Lord Cullen attributed to it. But here it is important to notice that during the two centuries which have elapsed since the passing of the Act such a construction has never been put on it, and apparently has never until a few years ago occurred either to the Crown or to any Scottish lawyer. Although this *contemporanea expositio* may not be conclusive, it throws light upon the intention of the Legislature.

The Act of Queen Anne proceeds to enact that the Scottish Court of Exchequer "shall have exercise and put in execution within Scotland all and every the powers authorities and jurisdictions as to all matters and things whatsoever arising or happening or which have or shall arise and happen within Scotland touching or concerning any the aforesaid revenues or duties of customs and excise and other revenues debts or duties obligations securities judgments or specialties or the recovery of the same or of any other the premisses which the Court of Exchequer in England or the barons or officers thereof by virtue of the said statute made in England in the said three and thirtieth year of the reign of King Henry the Eighth or of any other statute made and in force in England or by the constitution course or practice used in the Court of Exchequer in England have or ought to have performed or put in execution in England as fully and amply to all intents and purposes as if the same powers authorities and jurisdiction were in this Act particularly expressed and thereby enacted yet so nevertheless that nothing be done to make the real estate in Scotland of any debtor or accountant to the Crown there subject or liable to the payment of any debts or duties to the Crown farther or otherwise than they may or ought to be by the laws of Scotland according to the purport of the proviso last herein-before mentioned." The Solicitor-General referred in his argument to the case of *Sharpe* v. *M'Leod or Miller*, (1861) 23 D. 1015, and to sections 14 and 17 of the Act of 1856, for the proposition that the Court of Exchequer established by the Act of Anne possessed, and that the present Court of Exchequer still possesses the power, if it chooses to exercise it, of restraining proceedings in other courts relating to the royal revenue or of removing such proceedings from inferior courts. The reference to this power does not help the Crown. If the absolute priority which was sustained in the case of *Palmer* has been imported into the law of Scotland, then it is the duty of every Court in Scotland to give effect to it whether separate Exchequer proceedings are or are not still competent. On the other hand, if the Crown's priority depends upon its power to institute separate Exchequer proceedings after the bankrupt's estate has vested in a trustee, it lay on the Crown to show that some such form of process was or would in 1707 have been competent in England in circumstances similar to the present where the writ of extent cannot be resorted to. Nothing of the kind was attempted by Crown counsel. In this connection I may refer to the observations of Lord Kinnear in the case of *Lord Advocate* v. *M'Laren*, (1905) 7 F. 984, at p. 993, 42 S.L.R. 762, where the question was whether the Scottish Court of Exchequer had or had not conferred upon it by the Act of Anne jurisdiction to modify penalties exigible under the Income Tax Act of 1842.

For the foregoing reasons I am of opinion that the Crown's claim for a preference was properly rejected. I am not, however, prepared to adopt the Lord Ordinary's opinion to the effect that if the Statute of Anne had conferred upon the Crown an absolute preference over the moveable estate of its debtors in all cases where its rights and those of a subject come into conflict in respect of debts of equal degree, such right of priority would necessarily have been abrogated *in toto* by the provisions of the Bankruptcy (Scotland) Act 1913. Reliance was placed upon section 104, which it was said placed all the creditors in the position of having used diligence against the moveable estate of the bankrupt, and therefore distinguished the present case from that of *Palmer*, which arose out of an Australian bankruptcy. Such fictional diligence would, however, operate in favour of all the creditors equally, including the Crown, and would not, as it seems to me, defeat the Crown's right to an absolute priority out of the proceeds of the moveable estate, assuming that such a right would otherwise have belonged to it. Counsel also founded on section 118, which confers upon the Crown a novel priority for assessed taxes, land tax, and property or income tax which is not confined to the moveable, but, on the other hand, which is limited to a single year's assessment, and which ranks *pari passu* with certain other specified debts. He also referred to section 147, which enacts that the Act shall not extend to discharge Crown debtors unless the Treasury give their consent. It is difficult to suppose that the framers of the Scottish Act contemplated that after the Crown's taxes had been paid in full the Crown should carry off the whole remaining moveable estate for payment of its claim for debts other than taxes. None the less I can find nothing in these sections which must necessarily be construed as depriving the Crown of any priority which it may previously have enjoyed according to the law of Scotland in respect of debts other than taxes. Indeed, section 117 rather suggests the contrary, as it directs that unless otherwise provided in the Act the whole estate shall be divided among the creditors according to their several rights and interests. It is, however, legitimate to refer to the Act of 1913 as evidence that at its date the Crown possessed no such preference in Scotland as is

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