A-G v De Keyser's Royal Hotel Ltd

Overview | [1920] AC 508, | 89 LJ Ch 417, | **[1920] All ER Rep 80**, | 64 Sol Jo 513, | **122 LT 691**, | 36 TLR 600

Attorney-General (on behalf of His Majesty) v De Keyser's Royal Hotel, Ltd [1920] All ER Rep 80

Also reported [1920] AC 508; 89 LJ Ch 417; 122 LT 691; 36 TLR 600; 84 Sol Jo 513

HOUSE OF LORDS

Lord Dunedin, Lord Atkinson, Lord Moulton, Lord Sumner and Lord Parmoor

1, 2, 4, 5, 8, 9 March, 10 May 1920

Crown — Prerogative — Requisition of land — Payment of compensation — Nature of prerogative — Method of exercise — Defence Act, 1842 (5 & 6 Vict, c 94) s 19 — Defence of the Realm (Consolidation) Act, 1914 (5 Geo 5, c 8) — Defence of the Realm Regulations, 1914.

The Crown, as supreme potestas, is endowed with the right and duty of protecting the realm and for that purpose is entitled to take any man's property. Where, however, Parliament has provided by statute for powers, previously within the prerogative, being exercised in a particular manner and subject to the limitations contained in the statute so that the whole ground of something which could be done by the prerogative is covered by the statute, the statute rules, the prerogative is rendered unnecessary and is superseded by the statute, and the powers can only be exercised by the Crown subject to those limitations, for, inasmuch as the Crown is a party to every Act of Parliament, when a statute deals with something which before the Act could be effected by the prerogative and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to the prerogative being curtailed. The principles of construction to be applied in deciding whether the royal prerogative has been taken away or abridged are well ascertained. It may be taken away or abridged by express words, by necessary implication, or where an Act of Parliament is made for the public good, the advancement of religion or justice, and to prevent injury or wrong. Statutes which provide rent or compensation as a condition to the right of the executive to take over possession of land or buildings on the occasion of public exigency come within the category of statutes made for the advancement of justice and to prevent injury and wrong.

Where a building was requisitioned by the military authorities expressly under statutory powers,

Held: the Defence Act, 1842, and the regulations made under the Defence of the Realm Consolidation Act, 1914, gave the Crown powers to requisition property which were wider than those exercisable under the prerogative and bound the Crown; under the Act of 1842 compensation was given to the owner of property which was taken; and, therefore, the owners of the building in question were entitled to the compensation provided by that Act.

Decision of the Court of Appeal, [1919] 2 Ch 197, affirmed.

Per LORD PARMOOR: The royal prerogative connotes a discretionary authority or privilege exercisable by the Crown or the executive which is not derived from Parliament and is not subject to statutory control. This authority or privilege is in itself a part of the common law, not to be exercised arbitrarily, but per legem and sub modo legis. The royal prerogative has been considerably curtailed as a statutory rule of law has taken the place of the

uncertain and arbitrary administrative discretion.

Notes

Civil proceedings against His Majesty, including petitions of right, were abolished by s 13 of and Sched. 2 to the Crown Proceedings Act, 1947 (6 HALSBURY'S STATUTES (2nd Edn) 46). Civil proceedings against the Crown are now regulated by that Act.

Considered: *Hudson's Bay Co v Maclay* (1920) 36 TLR 469; *Re Ferdinand*, [1921] 1 Ch 107. Applied: *Re Azoff-Don Commercial Bank*, [1954] 1 All ER 947.

Considered: *Bank Voor Handal en Scheepvaart NV v Hungarian Property Administrator*, [1954] 1 All ER 969. Referred to: *R v Daily Mail*, *Ex parte Farnsworth*, [1921] All ER Rep 476; *R v Egan*, *R v Higgins* (1921) 65 Sol Jr 782; *Robinson v R*, [1921] 3 KB 183; *Curling v Matthey* (1921) 37 TLR 717; *Federated Coal and Shipping Co v R,* [1922] 2 KB 42; *A & B Taxis v Secretary of State for Air*, [1922] 2 KB 328; *Matthey v Curling*, [1922] All ER Rep 1; *Re Colnbrook Chemical and Explosives Co*, *A-G v The Co*, [1923] 2 Ch 289; *Commercial and Estates Co of Egypt v Board of Trade*, [1925] 1 KB 271; *Netherlands-American Steam Navigation Co v Procurator-General* (1925) 42 TLR 81; *Rowland et Mackenzie-Kennedy v Air Council* (1927) 96 LJ Ch 470; *France Fenwick v R*, [1927] 1 KB 458; *Austrian Property Administrator v Russian Bank for Foreign Trade* (1931) 47 TLR 550; *Hirsch v Somervell*, [1946] 2 All ER 430; *Port Line, Ltd v Ben Line Steamers, Ltd*, [1958] 1 All ER 787.

As to the royal prerogative see 7 HALSBURY'S LAWS (3rd Edn) 221 et seq, and for cases see 11 DIGEST (Repl) 566 et seq.

Cases referred to:

(1) *Re Petition of Right*, [1915] 3 KB 649; sub nom *Re X's Petition of Right*, 84 LJKB 1961; 113 LT 575; 31 TLR 596; 59 Sol Jo 665, CA; 17 Digest (Repl) 437, 90.

(2) *R v Hampden*, *Ship Money Case* (1637) 3 How St Trs 826; 17 Digest (Repl) 423, 36.

(3) *King's Prerogative in Saltpetre* (1606) 12 Co Rep 12; 77 ER 1294; 17 Digest (Repl) 436, 87.

(4) *Wheaton v Maple & Co*, [1893] 3 Ch 48; 62 LJ Ch 963; 69 LT 208; 41 WR 677; 9 TLR 559; 37 Sol Jo 615; 2 R 549, CA; 19 Digest 55, 317.

(5) *Coomber v Berks Justices* (1883) 9 App Cas 61; 53 LJQB 239; 42 Digest 648, 547.

(6) *Newcastle Breweries, Ltd v R*, [1920] 1 KB 854; 89 LJKB 392; 123 LT 58; 84 JP 125; 36 TLR 276; 18 LGR 781; 17 Digest (Repl) 448, 142.

(7) *Phillips v Homfray* (1883) 24 Ch D 439; 52 LJ Ch 833; 49 LT 5; 32 WR 6, CA; 34 Digest 649, 457.

(8) *Churchward v Ford* (1857) 2 H & N 446; 26 LJ Ex 354; 5 WR 831; 157 ER 184; 31 Digest (Repl) 307, 4448.

(9) *Howard v Shaw* (1841) 8 M & W 118; 10 LJ Ex 334; 151 ER 973; 40 Digest (Repl) 207, 1690.

(10) *Markey v Coote* (1876) 1 R 10 CL 149; 40 Digest (Repl) 194, 850.

(11) *Hellier v Sillcox* (1850) 19 LJQB 295; 15 LTOS 88;. 14 Jur 573; 31 Digest (Repl) 303, 4411.

(12) *Marquis Camden v Batterbury* (1860) 7 CBNS 864; 28 LJCP 335; 23 JP 821; 7 WR 616; 141 ER 1055; sub nom. *Batterbury v Marquis Camden*, 5 Jur NS 1405, ExCh; 31 Digest (Repl) 90, 2408.

(13) *Levy v Lewis* (1859) 6 CBNS 766; 28 LJCP 304; 5 Jur NS 1408; affirmed (1861) 9 CBNS 872; 30 LJCP 141; 7 Jur NS 759; 9 WR 388; 142 ER 343, ExCh; 30 Digest (Repl) 510, 1495.

(14) *Re Bonham*, *Ex parte Postmaster-General* (1879) 10 Ch D 595; 48 LJ Bcy 84; 40 LT 16; 27 WR 325, CA; 42 Digest 691, 1057.

(15) *London and North-Western Rail Co v Evans*, [1893] 1 Ch 16; 62 LJ Ch 1; 67 LT 630; 41 WR 149; 9 TLR 50; 2 R 120, CA; 11 Digest (Repl) 171, 412.

(16) *R v Doutre* (1884) 9 App Cas 745; 53 LJPC 85; 51 LT 669, PC; 3 Digest 332, 207.

(17) *Windsor & Annapolis Rail Co v R & Western Counties Rail Co* (1886) 11 App Cas 607; 55 LJPC 41; 55 LT 271; 51 JP 260; 2 TLR 743, PC; 16 Digest 289, 346.

(18) *Tobin v R* (1864) 16 CBNS 310; 4 New Rep 274; 33 LJCP 199; 10 LT 762; 10 Jur NS 1029; 12 WR 838; 2 March LC 45; 143 ER 1148; 16 Digest 240, 352.

(19) *Rodgers v Maw* (1846) 15 M & W 444; 4 Dow & L 66; 16 LJ Ex 137; 7 LTOS 260; 153 ER 924; 42 Digest 994, 224.

(20) *Smith v Hodson* (1791) 4 Term Rep 211; 100 ER 979; 4 Digest (Repl) 439, 3875.

(21) *New Windsor Corpn v Taylor*, [1899] AC 41; 68 LJQB 87; 63 JP 164; 15 TLR 67; sub nom *Windsor Corpn v Taylor*, 79 LT 450, HL; 17 Digest (Repl) 23, 267.

(22) *The Zamora*, [1916] 2 AC 77; 85 LJP 89; 114 LT 626; 32 TLR 436; 60 Sol Jo 416; 13 Asp MLC 330, PC; 37 Digest 652, 1071.

(23) *Hole v Barlow* (1858) 4 CBNS 334; 27 LJCP 207; 22 JP 580; 4 Jur NS 1019; 6 WR 619; 140 ER 1113; sub nom. *Holl v Barlow*, 31 LTOS 134; 36 Digest (Repl) 262, 122.

(24) *The Fox* (1811) 1 Edw 311; 2 Eng Pr Cas 61; 165 ER 1121; 37 Digest 652, 1070.

(25) *A-G v Horner* (1884) 14 QBD 245; 54 LJQB 227; 49 JP 326; 33 WR 93, CA; 42 Digest 743, 1679.

Appeal by the Crown from an order of the Court of Appeal (LORD SWINFEN EADY, MR, and WARRINGTON, LJ, DUKE, LJ, dissentiente) reported [1919] 2 Ch 197, reversing a decision of PETERSON, J.

The Attorney-General (Sir Gordon Hemart, KC) the Solicitor-General (Sir Ernest Pollock, KC) CF Lowenthal, Austen-Cartmell and Branson for the Crown (appellant).

Sir John Simon, KC, Leslie Scott, KC and W Copping for the respondent company.

The House took time for consideration.

10 May 1920. The following opinions were read.

LORD DUNEDIN:

It will be well that I should first set forth succinctly the facts which give rise to the present petition, all the more as regards them there is no real controversy between the parties.

In April 1916, the Army Council, finding it necessary to have accommodation in London for the headquarters personnel of the Royal Flying Corps and for the Design Section of the same,

communicated with the Board of Works with a view to finding a suitable building. The Department, which had previously had some tentative offers from the receiver and manager, in possession of the premises belonging to the De Keyser Hotel Co, Ltd, came to the conclusion that the building known as De Keyser's Hotel would suit. They communicated with the War Office to that effect on 18 April 1916, and on the same date applied to the receiver to see on what terms he would let. After a short period of ineffectual negotiation the Board of Works, on April 29, informed the receiver that "after full consideration of the matter the Board are of the opinion that it will be to the advantage of all concerned to refer the question of the amount to be paid by the government for the use of such of the hotel premises as will be required to the Defence of the Realm Losses Commission. In these circumstances the Board have no option but to communicate with the War Office with a view to the hotel premises, excluding the shops, being requisitioned under the Defence of the Realm Acts in the usual manner." Following on this communication to the War Office, on May 1, wrote as follows to the receiver:

> "De Keyser's Royal Hotel, EC - I am instructed by the Army Council to take possession of the above property under the Defence of the Realm Regulations, excluding the shops, the other portions sub-let, and the wine cellars … I inclose forms of claim for submission to the Defence of the Realm Losses

> Commission. Compensation, as you are probably aware, is made ex gratiâ, and is strictly limited to the actual monetary loss sustained."

On receipt of this letter the receiver expressed his willingness to facilitate the taking possession, but at the same time he safeguarded his position by the following letter on May 3:

> "I write to inform you that I have instructed Messrs John Barker and Son, Ltd, to represent me at the making of the inventory of the contents of this hotel, and also to meet your representative there tomorrow, and to render every facility in order that the necessary work may be done with the utmost expedition. I desire, however, to inform you that the steps which I am taking are without prejudice to the question whether the Army Council are within their rights in acquiring possession of the above property under their notice dated May 1, 1916, as to which I am being advised."

This was followed up by a letter of May 5, to the following effect:

> "Referring to the letter of the 1st inst. from Captain Cole of the Lands Branch, War Office, it does not seem to me that the acquisition of this building as offices is necessary for the purpose of securing the public safety or the defence of the realm, or that such an acquisition is within the powers conferred by the Defence of the Realm Consolidation Regulations, 1914. I must, therefore, enter a protest against the notice contained in the letter if acted upon, and you must understand that anything which I am doing in the matter is without prejudice to the rights of all parties interested in the hotel. I think that a fair rent might be fixed by personal negotiation between a representative of the authority acquiring the building and myself; but, failing this, I would ask you to agree to submit the question to arbitration."

To this the Office of Works replied on May 9:

> "With regard to your letter of 5th inst, the premises, having been commandeered by the military authorities under the Defence of the Realm Acts, the amount of payment to the applicants out of public funds in respect of direct and substantial loss incurred and damage sustained by them by reason of interference with the applicants' property or business through the exercise by the Crown of its rights and duties in defence of the realm will be determined by the Defence of the Realm Losses Commission. Having regard, therefore, to your letter it would seem advisable for the claim to be made on a form prepared for the purpose, a supply of which I believe you have, as soon as possible."

As no settlement was arrived at and the receiver declined to go before the Losses Commission, there was presented a petition of right by the De Keyser company. The relief asked was:

> "(i) A declaration that your suppliants are entitled to payment of an annual rent so long as Your Majesty's Principal Secretary of State for the War Department or Your Majesty's Army Council or any other person or persons acting on Your Majesty's behalf continues in use and occupation of the said premises. (ii) The sum of 13,520 pounds 11s 1d. for use and occupation of your suppliants' premises from the 8th day of May 1916, to the 14th day of February 1917 .... (iv) A declaration that your suppliants are entitled to a fair rent for use and occupation by way of compensation under the Defence Act, 1842.

To this reply was made by the Attorney-General on behalf of His Majesty to the following effect:

> "No rent or compensation is by law payable to the suppliants in respect of the matters aforesaid or any of them either under the Defence Act, 1842, or at all. The suppliants have been offered on behalf of His Majesty payment of

> such sum as, in the opinion of the Defence of the Realm Losses Commission. ought in reason and fairness to be made to them out of public funds in respect of direct and substantial loss incurred and damage sustained by them by reason of interference with their property or business in the United Kingdom through the exercise by the Crown as aforesaid of its rights and duties in the defence of the realm."

The case depended before PETERSON, J, who dismissed the petition, holding himself bound by the decision of the Court of Appeal in *Re Petition of Right (The Shoreham Case)* (1). Appeal being taken to the Court of Appeal that court, by a majority, LORD SWINFEN EADY, MR, and WARRINGTON, LJ, DUKE, LJ, dissenting, reversed the decision of PETERSON, J, and made the following declaration:

> "And this court doth declare that the suppliants are entitled to a fair rent for use and occupation of De Keyser's Royal Hotel on the Thames Embankment in the city of London by way of compensation under the Defence Act, 1842."

Against this order the present appeal has been brought.

I shall mention first, in order to put it aside, one argument put forward for the respondents. It was that the Crown should pay a reasonable sum for use and occupation of the premises upon the ground of an implied contract, the entry of the Crown to the premises having been permitted by the receiver and taken by the Crown in virtue of the receiver's permission. The simple answer to this argument is that the facts as above recited do not permit of its application. In any case of implied contract there must be implied assent to a contract on both sides. Here there was no such assent. There was no room for doubt as to each party's position. The Crown took as a right, basing that right specifically on the Defence of the Realm Acts. The receiver did not offer physical resistance to the taking, and was content to facilitate the taking. He emphatically reserved his rights, and gave clear notice that he maintained that the Crown was wrong in its contention and that no case for taking under the Defence of the Realm Acts had arisen - in other words, that the Crown had in the circumstances, according to their proposals, unlawfully taken. To spell out of this attitude on either side an implied contract is, to my mind, a sheer impossibility.

That the act of taking by the Crown was in itself legal is necessarily admitted by both sides. It is the basis of the case for the Crown, who said at the time that they took under the Defence of the Realm Act, and now add in argument that, whether that was so or not, they took de facto and can justify that taking under the powers of the prerogative. It must necessarily be admitted by the respondents, for if taking in itself was purely illegal then it would be a tort not committed by the Crown, who cannot commit a tort, but by the officers of the Crown, and the petition of right would not lie. The question in the case is, therefore, narrowed to one point and one point only. The Crown having legally taken, is it bound to pay compensation ex lege, or is the offer to pay compensation ex gratiâ, as that compensation may be fixed by the Losses Commission, a sufficient offer and an answer to all demands? I have already quoted the letter of May 1, which shows that the War Office propose to take possession of the hotel under the Defence of the Realm Regulations, but in the argument in the court below and before your Lordships the taking has been justified by the power of the prerogative alone, and there has been a very exhaustive citation of authority of the powers of the Crown in virtue of the prerogative.

I do not think it necessary to examine and comment on the various cases cited. The foundations

of the contention are to be found in the concessions made in the speech of *Mr St John in R v Hampden*, *Ship Money Case* (2) and in the opinion of the consulted judges in King's Prerogative in *Saltpetre* (3). The most that could be taken from them is that the King, as supreme potestas endowed with

the right and duty of protecting the realm is, for the purpose of the defence of the realm, in times of danger entitled to take any man's property, and that the texts gives no certain sound as to whether this right to take is accompanied by an obligation to make compensation to him whose property is taken. In view of this silence it is but natural to inquire what has been the practice in the past. An inquiry as to this was instituted in this case, and there has been placed before your Lordships a volume of extracts from various records. The search is admittedly not exhaustive, but it is sufficient to be illustrative. The learned Master of the Rolls in his judgment has analyzed the document produced. He has divided the time occupied by the search into three periods, the first prior to 1788, then from 1788 to 1798 and the third subsequent to 1798. The first period contained instances of the acquiral of private property for the purposes of defence by private negotiation in all of which, it being a matter of negotiation, there is reference to the payment to be offered for the land taken. With the second period we begin the series of statutes which authorize the taking of lands and make provision for the assessment of compensation, the statutes being, however, of a local and not of s general character, dealing each with the particular lands proposed to be acquired. The third period begins with the introduction of general statutes not directed to the acquisition of particular lands, and again making provision for the assessment and payment of compensation. I shell refer to the statutes presently, but, speaking generally, what can be gathered from the records as a matter of practice seems to resolve itself into this. There is a universal practice of payment resting on bargain before 1708, and on statutory power and provision after 1708. On the other hand, there is no mention of a claim made in respect of land taken under the prerogative, for the acquisition of which there was neither bargain nor statutory sanction. Nor is there any proof that any such acquisition had taken place. I do not think that from this usage of payment there can be imposed on the Crown a customary obligation to pay, for, once the taking itself is admitted to be as of right, the usage of payment so far as not resting on statutory provision is equally consistent with a payment ex lege and a payment ex gratiâ On the other hand, I think it is admissible to consider the statutes in the light of the admitted custom to pay, for in the face of a custom of payment it is not surprising that there should be consent on the part of the Crown that this branch of the prerogative should be regulated by statute. It is just here that the full investigation into the statutory history which has been made in this case, and of which the Court of Appeal and your Lordships have had the advantage, serves to dislodge a view which I cannot help thinking was very influential in determining the judgment of the Court of Appeal in *Re Petition of Right* (1).

Digressing for the moment to that case, I am bound to say that I do not think that this case can be distinguished from that in essential particulars. The existence of a state of war is common to both. As to the necessity for the taking over of the particular subject, the Crown authorities must be the judge of that, and the evidence as to the necessity for the occupation of these premises, in the opinion of the Crown advisers, is just as distinct and uncontradicted in this case as it was in that. I confess that, had I been sitting in the Court of Appeal, I should have held the same view as was expressed by PETERSON, J, namely, that it was ruled by *Re Petition of Right* (1). This, however, is immaterial, for *Re Petition of Right* (1) is not binding on this House, and it

would have been equally proper for SWINFEN EADY, MR, and for WARRINGTON, LJ, who had obviously changed his opinion on further argument, to give your Lordships the benefit of the opinions they had come to on the merits, even if being unable to distinguish between the two cases their judgment had been formally given to the opposite effect from what it was.

The view which I think prevailed in *Re Petition of Right* (1) was that the prerogative gives right to take for use of the moment in a time of emergency, that when you come to the Defence Acts of 1803 and 1842 you find a code for

the taking of land permanently in times of peace as well as of war, and that consequently the two systems could well stand side by side; and then, as there was no direct mention of the prerogative in the statutes, you were assisted by the general doctrine that the Crown is not bound by a statute unless specially mentioned. That in cases where the burden or tax is imposed the Crown must be specifically mentioned no one doubts. Instances are given by the Master of the Rolls in *Wheaton v Maple & Co* (4) and *Coomber v Berks Justices* (5) and there are many others. None the less, it is equally certain that if the whole ground of something which could be done by the prerogative is covered by the statute it is the statute that rules. On this point I think the observation of the learned Master of the Rolls is unanswerable. He says: "What use would there be in imposing limitations if the Crown could, at its pleasure, disregard them and fall back on prerogative?" The prerogative is defined by a learned constitutional writer as "the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown." Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act would be effected by the prerogative and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed.

I have read very carefully and considered the judgments delivered in *Re Petition of Right* (1) and it is, I think, apparent that the view of the series of statutes there presented was that the general statutes had their inception for the purpose of permanent acquisition in times of peace as well as of war, but in the fuller citation that has been made in this case we find that this is not so. It is somewhat significant that in the first statute of all dealing with the acquisition of land, 7 Anne, c 26, we have a reference to "the usual methods" that had been taken to prevent extortionate demands, and the usual methods are said to be a valuation by jury. It is also significant that in the whole statutory series there is no trace of any claim to take under the prerogative and not to pay. On the contrary, for instance, in 31 Geo 2, c 39, dated 1757, we find that during the war (that is, the Seven Years War) land had actually been taken, that extravagant claims were feared, and then that is followed by a statutory provision for vesting the lands taken in trustees till the price may be paid as fixed by assessment by jury, and then on payment the trustees are to hold for His Majesty. But the real point seems to me to be that we find that even before the idea of a general Act, that is to say, when the Acts were limited in time to the continuance of a war, there is provision made for a temporary taking, and for payment, or, in other words, for getting by statute, with the concomitant obligation of payment, that very temporary possession which, according to the view expressed above, was the function of the prerogative to provide free of charge, leaving it to statute to provide for a permanent acquisition. Thus, in 38 Geo 3, c 27, date 1798, in the middle of the war with the revolutionary government of France which began in February 1793, and ended with the peace of Amiens in March 1802, we find in s 10

powers given to His Majesty to authorize a general officer to mark out any piece of ground wanted for the public service, and to treat with the owner thereof or any person or persons having any interest therein "for the possession or use thereof during such time as the exigencies of the service shall require," and in case of refusal to take the land and get the value assessed by jury. This Act was limited to the continuance of the war. War again broke out against France on 29 April 1803, Napoleon being First Consul for life, and 43 Geo 3, c 35,July 1803, repeated the provisions of 38 Geo 3, c 27. It again was limited to the duration of "the present hostilities with France." Then in 1804, there still being war with France and a prospect of invasion by Napoleon, 44 Geo. 3, c 95, was passed. This had no temporary clause. It recited that doubts had arisen as to whether the Act of 1803 authorised permanent acquisition, and it proceeded to provide for temporary taking, using the old phrase "for such time as the exigencies of the public service

may require," and contained the old arrangements for assessment of the payment by a jury. This Act was the forerunner of, and was superseded by the existing Act of 1842, which again repeats the words "during the exigencies of the public service." This Act was passed in time of peace. It thus appears that the inception of the legislation was during that very period and connected with that very requirement which, if the argument in *Re Petition of Right* (1) was sound, was satisfied by the powers of the prerogative alone, that is to say, it dealt with temporary acquisition during a period of war, and the Act of 1842 only continued that legislation. It is, therefore, impossible, in my opinion, to say that the whole field of the prerogative in the matter of the acquisition of land or rights therein was not covered by the Act of 1842. It follows from what I have said above that there is no room for asserting an unrestricted prerogative right as existing alongside with the statutory powers authorising the Crown to acquire on certain terms. The conclusion is that the Crown could not take the petitioners' premises by the powers of the prerogative alone.

I now come to the Defence of the Realm (Consolidation) Act, 1914, the Act under the powers of which the Crown professes to take. Now, just as the statutes must be interpreted in view of what the rights and practices antecedent to them had been, so we must look at the Defence of the Realm Act in view of the law as it stood previous to its passing. The Act of 1914, passed on 27 November 1914, declares by s 1(1) that His Majesty has power during the continuance of the war to issue regulations for securing the public safety and the defence of the realm. Subsection (2) says that any such regulations may provide for the suspension of any restrictions on the acquisition or user of land … under the Defence Act, 1842 to 1875. Pursuant to this Act a regulation was issued on 28 November 1914, which empowered the competent naval or military authority, or any person authorised by him, "when for the purpose of securing the public safety or the defence of the realm it is necessary so to do" (sub-s (a) to take possession of any lend, and sub-s (b) to take possession of any buildings). It is clear that under these subsections the taking possession of De Keyser's Hotel was warranted, but there was no necessity for the public safety of the defence of the realm that payment should not be made, such payment being on the hypothesis that the views above expressed as to the Act of 1842 were sound - a necessary concomitant to taking. The very structure of the Act points the same way. Why provide by sub-s (2) for the suspension of restrictions under the existing Act which allowed of taking of land if a mere taking simpliciter was all that was wanted? The thing may be tested in another way. Suppose the regulation as to taking land had had added to it the words "without making any payment therefor." That would have left no doubt as to the regulation. The question would have

been, was it ultra vires? It could only be intra vires if it were necessary for the safety of the realm, and that is the same question over again, and again the existence of the powers of sub-s (2) of the Act can be appealed to. The argument is practically analogous to the argument that prevailed and I think rightly prevailed, in the judgment of SALTER, J, in *Newcastle Breweries Co, Ltd v R* (6) where the taking of the goods was held a necessity, but the extrusion of the subject where goods were taken from the King's courts in the event of non-agreement as to value was not. It will have been noticed that the regulation which authorises the taking of land says nothing about doing away with restrictions, or, in other words, does not specifically purport to be made in virtue of sub-s (2) of the Act. None the less, it may well be held to be virtually so. There are various restrictions as to the initiation of proceedings, notices, &c, which I have not thought it necessary to quote. These may be taken as swept away by the simple authority to take. There remains the question whether the obligation to pay can be considered as a restriction and also swept away. I think it cannot. The word "restriction" seems to me appropriate to the various provisions as to notice, but not at all appropriate to the obligation to make compensation.

There are two other matters as to which I should say a few words. The learned Attorney-General laid great stress on the words of s 1 of the Defence of the Realm (Acquisition of Land) Act, 1916, which, providing for a continuation of powers after the war, begins thus:

> "Where, during the course of or within the week immediately preceding the commencement of the present war, possession has been taken of any land by or on behalf of any government department for purposes connected with the present war, whether in exercise or purported exercise of any prerogative right of His Majesty, or of any powers conferred by or under any enactment relating to the defence of the realm, or by agreement, or otherwise, it shall be lawful, …

This, he argued, was a statutory confirmation and declaration of the power to take under the prerogative. So it may be, but if the views expressed in the first part of my remarks are right it leaves those views untouched. And further, the words used really amounts to this. They do not in any way define the rights which the Crown has to take, but they say if the Crown has de facto taken quocumque modo then it shall be lawful as thereafter provided to continue possession.

The other point is as to the remedy. I am of opinion that a petition of right lies, for it will lie when in consequence of what has been legally done any resulting obligation emerges on behalf of the subject. The Petition of Right does no more and no less than to allow the subject in such cases to sue the Crown. It is otherwise when the obligation arises from tort, but as already insisted on, what was done here so far as the taking of the premises was concerned was perfectly legal. On the whole matter I am, therefore, of opinion that the judgment of the Court of Appeal was right and ought to be confirmed, and the appeal dismissed with costs.

LORD ATKINSON:

The facts have been already stated by my noble and learned friend who has preceded me. If any thing be clear in this important case, it is on the correspondence already referred to this - that the Army Council, acting through their agent, Captain R C Coles, did not claim to take possession of the respondents' hotel by virtue of the unrestricted and unqualified prerogative of the Crown. On the contrary, they justified their action and claimed the right to do what they, in fact, did, by virtue of the power and authority conferred upon them by the legislative provision of the Defence of the Realm Regulations in force on 1 May 1916. It is, I think, equally clear that the

respondents never admitted that the Crown possessed under these regulations the power it claimed to exercise. This is apparent from Mr Whinney's letters of 3 and 5 May 1916.

In only three ways, it would appear to me, could the respondents resist or oppose the action of the Crown: (i) By physical force - which is, of course, impossible; (ii) by immediate proceedings at law; and (iii) by protest. They adopted the last-named of these methods, but subject to that they yielded only to force majeure. Mr Whinney no doubt informed Captain Coles that, notwithstanding what he had said, all those interested in the hotel felt that every assistance should be given to the military authorities, and that no steps should be taken which would cause them inconvenience or delay, and further, that he had caused notice to be given to all the guests in the hotel and would hand over possession in accordance with the notice (ie, the letter of 1 May 1916). Possession was handed over accordingly on May 8. It appears to me impossible, on these facts, to hold that this handing over by the respondents of the possession of their hotel was not in reality done in invitum. The respondents having done this, and expressly preserved all their legal rights, they, like good citizens, without prejudice to those rights, facilitated these officers in taking over the possession in order to help the aerial service to be better carried on. If anything resembling what has taken place in this case had taken place between two citizens, it is obvious that the most appropriate remedy of the party aggrieved would have been to sue in trespass for

damages. The respondents cannot proceed by petition of right to get redress for a tort like trespass, for the King can do no wrong and the principle of respondent superior does not apply to the Crown where the wrong is committed by its officers. It by no means follows, however, that because the respondents cannot sue in tort by petition of right they can sue in contract for compensation for the use and occupation of their premises. It is, no doubt, quite true that a private person or, in some instances, a public body, can, as it is phrased, waive a tort and sue in contract, but that can only be true where both of these remedies are open to him or it. The aggrieved party may then elect which remedy to pursue, and this, though both causes of action arise out of the same transaction. The familiar case of a passenger in a railway train who takes and pays for a ticket to be carried to his destination and is injured in transitu by the negligence of the company's servants is a familiar instance of this. He can sue the company in either form of action. That, however, of course, does not apply to a case where a trespasser enters into and holds possession of a man's land against his will while purporting to act under a power the existence of which the owner challenges, and against the exercise of which he protests.

The Court of Appeal, as I understand their judgment, have held that the Crown should be proceeded against by petition of right to recover compensation in use and occupation for the breach of its contract to pay for the use and enjoyment of the respondents' hotel. Several authorities had been cited to support this view. Differing, as I do, on this point from the views of the two learned lord justices who constituted the majority, and entertaining, as I do, the most sincere respect for the survivor of those two lord justices, as well as for the memory of the distinguished judge since, unhappily, deceased, I feel bound to justify my dissent from their views by an examination of the authorities on the point at greater length, perhaps, than might otherwise be excusable. These authorities establish, I think, this proposition - that in order to recover in the ordinary action for use and occupation the plaintiff must prove the existence of an agreement, express or implied, between him and the defendant to the effect that the latter shall

at least be the tenant at will of the former of the lands or premises occupied, and shall pay for that occupation. In *Phillips v Homfray* (7) BOWEN, LJ, said (24 Ch D at p 461):

> "Actions for use and occupation according to the better opinion have been confined to the class of cases where the defendant is not a trespasser setting up an adverse title, and where there are no circumstances that negative the implication of a contract (see *Churchyard v Ford* (8) per POLLOCK, CB). No doubt the mere enjoyment by one man of another man's property, real or personal, may be held under such circumstances as leave still open as a reasonable inference the presumption that it is taken on the terms of payment, just as a man who takes a bun from the refreshment counter at a railway station takes it on the implied promise to pay for it."

A familiar example of the class of cases in which the circumstances negative the implication of such a contract is where a purchaser enters, with the owner's permission, into possession of property sold under a contract of sale, and the purchase which subsequently goes off. In *Howard v Shaw* (9) PARKE, B, said (8 M & W at p 122):

> "If the defendant had entered under an agreement for a lease, there is no doubt he would have been a tenant at will until the lease was granted. Here he may be assumed to have entered into possession under an agreement for sale which was to be carried into effect by a conveyance .... I quite agree, however, that while the agreement subsisted, the defendant was not bound to pay any compensation for the occupation of the land because the contract shows that he was to occupy without compensation, and so long as it subsisted, he was entitled so to occupy, but still he was tenant at will; when the agreement

> went off he was still tenant at will, but after that there is nothing to show that he was not to pay compensation because the stipulated compensation by payment of the purchase money was at an end. From that time, therefore, he became liable to be sued in an action for use and occupation."

ALDERSON, B, gave judgment to the same effect, as did also PALLES, CB, in *Markey v Coote* (10).

Even on the assumption that the Crown went into possession of the hotel, not by virtue of a legislative title or by force of a paramount power, but by the permission of the respondents, which, for the reason already given, I think it impossible to hold, I am at a loss to see how a permissive occupation can be inferred, in face of the distinct refusal of the Captain Coles in his letter of 1 May 1916, to pay any compensation whatever ex debito, but merely ex gratiâ. POLLOCK, CB, in delivering judgment in *Churchward v Ford* (8) said:

> "There are authorities to the effect that where nothing appears except that one person is entitled to land which another has occupied and enjoyed, an action for use and occupation may be maintained, because a contract may be implied. That explains the decision in *Hellier v Sillcox* (11). But the taking possession as of right by a disseisor could not be turned into a contract on the notion that the trespass may be waived and some imaginary contract substituted. Here the defendant was in possession, claiming title under Mrs Foss, with whom he had contracted. It cannot be implied that there was a contract with the plaintiffs."

It would certainly appear to me that in this case the position of the Crown in reference to this matter resembles more closely that of the disseisor to whom POLLOCK, CB, refers than it does that of a person entering with the permission of the owner of the premises. I now turn to the authorities relied on by the Court of Appeal. The first of these is *Marquis Camden v Batterbury* (12). There a certain builder named J W Elliott entered into agreement with the landlord of certain lands, the plaintiff in the action, to build certain houses on these lands, the plaintiff agreeing that as soon as one or more of these houses should be erected to make a lease to Elliott for a term of years upon certain terms of each messuage upon which a house was built. By the articles of agreement Elliott contracted that until the land with the buildings upon it should be leased to him, he would pay the same yearly rents or sums as were to be reserved, by the lease when granted. Elliott assigned his interest in this agreement to the defendant, who took possession of the lands, erected certain buildings upon them, paid the stipulated yearly sums,

and then assigned his interest to one White. The action was brought for money claimed to be payable by the defendant (White) to the plaintiff in respect of the defendant's use by the plaintiff's permission of certain of the latter's lands and premises. It was held, affirming the judgment of the Court of Common Pleas, that neither Elliott nor the defendant acquired any interest in the land under the building agreement, nor was any tenancy from year to year created thereby, nor by the occupation of the lands and the payment of the stipulated sums. With all respect, this case is, I think, an authority rather against the proposition it was cited to support than in favour of it.

The next case is that of *Levy v Lewis* (13). There Knight, the superior landlord, let the subject of the occupation to Levy the plaintiff. Levy for a term of years underlet to Lewis, the defendant, for the whole term, leaving no reversion to himself. The interest of both having expired together, Lewis applied to Knight to allow him to become his (Knight's) tenant. Knight refused and referred to Levy as still his tenant. Lewis continued to occupy, and Knight, to the knowledge of Lewis, continued to insist on holding Levy liable. Levy then sued Lewis for use and occupation of the land since the expiration of the term and Levy then paid the rent for that period to Knight who accepted it. The trial judge, WILLES, J,

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holding that there was no evidence to go to the jury of the use and occupation of the premises by Lewis as Levy's tenant, directed a nonsuit. The Court of Common Pleas held that there was evidence to go to the jury on an implied contract by Lewis to pay Levy for the occupation of the premises. WILLES, J, in delivering judgment, said (6 CBNS at p 670):

> "Conceding that the relative position of the parties would not have enabled Levy to bring an action, yet their conduct was such that we think there was evidence from which the jury might infer an understanding or implied contract between Levy and Lewis that Lewis should pay for the occupation of the premises .... The jury might have thought that Lewis might have known he was not considered tenant to Knight, but that he was considered tenant to Levy, and that Knight and Levy had severally shown by their conduct that they severally took that view, adding, however, that the court gave no option as to the conclusion to which the jury ought to come."

On appeal to the Exchequer Chamber, WIGHTMAN, CROMPTON and HILL, JJ, held that the decision of the Court of Common Pleas was right and should be affirmed, BRAMWELL and CHANNELL, BB, thought it was wrong and should be reversed, BRAMWELL, B, adding that MARTIN, B, when he left the court was very much of his (BRAMWELL'S) Opinion. If Lewis had immediately on the termination of the term told Levy that be stoutly refused to admit that he was under any legal liability to pay compensation for his future occupation of the premises, there might possibly be some resemblance between this case and the present. As matters stand, there does not appear to me to be any resemblance whatever between them.

The next case is that of *Hellier v Sillcox* (11). In reference to this case, BOWEN, LJ, in *Phillips v Homfray* (7) said:

> "There have been, no doubt, instances in which, nothing further appearing in evidence, but that one person is the owner of land, and that another person has taken possession of it, an action for use and occupation under the statute has been upheld: see *Hellier v Sillcox* (11). In such cases the inference, in the absence of proof to the contrary, has been allowed to be drawn that the enjoyment was by permission of the rightful owner."

Then follows the passage as to the more correct view already cited. But the two facts (i) that the Crown, in my view, did not enter into possession with the free leave and consent of the respondents, but by the coercion by a superior power; and (ii) that the Crown, when it did enter into possession through its officer absolutely refused to acknowledge any legal liability to pay

compensation in respect of the use and enjoyment of the hotel, fundamentally distinguished all these cases from the present case.

In my opinion, therefore, a petition of right, not based upon the statutes of 1798, 1842, or 1914, nor the regulations made under them, but merely on such legal liability as arises between citizens when one occupies and enjoys the property of another with the express or implied permission of that other to pay compensation for that enjoyment would, on the facts of this case, fail. It is an entirely different question whether on those same facts these statutes and regulations do not impose upon the Crown a statutory liability to pay reasonable compensation in the form of a rent or otherwise, for the possession, occupation, use and enjoyment, acquired compulsorily, of the respondents' hotel. The late Master of the Rolls in the following pregnant passage of his judgment put a rather unanswerable question. He said:

> "Those powers which the executive exercises without Parliamentary authority are comprised under the comprehensive term 'prerogative.' Where, however, Parliament has intervened and has provided by statute for powers, previously within the prerogative, being exercised in a particular manner, and subject

> to the limitations contained in the statute, they can only be so exercised, otherwise what use would there be in imposing limitations if the Crown could at its pleasure disregard them and fall back upon prerogative?"

It was not contended - it could not, I think, be successfully contended - that the Act of 1842 and the Defence of the Realm Consolidation Act, 1914 (hereinafter referred to as the Act of 1914) do not bind the Crown, seeing that they deal with what is the special trust and duty of the King to provide for - namely, the defence and security of the realm - or that they did not prescribe the mode in which and the methods by which land or its use is to be acquired by the Crown's officers, the Ordnance Department, the Admiralty, the Army Council, the members of His Majesty's forces and other persons acting on his behalf, for these very purposes, whether one applied the test suggested in BACON'S ABRIDGEMENT (7th Edn, vol 7, p. 462) quoted apparently with approval by JESSEL, MR, in *Re Bonham*, *Ex parte Postmaster-General* (14) (10 Ch D at p 601) or that laid down by LORD LINDLEY in *Wheaten v Maple & Co*. (4) ([1893] 3 Ch at p 64) namely, that the Crown is never bound by a statutory enactment unless the intention of the legislature to bind the Crown is clear and unmistakable. I think these statutes and regulations satisfy those tests. Before dealing with them I desire to express my complete concurrence in the conclusion at which the late Master of the Rolls arrived as to the result of the searches made by the Crown touching the nature and particulars of the commission issued in early times to determine what sums were to be paid ex gratiâ where lands were taken by the Crown or its officers for the defence of the realm, and the occupation of them connected therewith by the military. The conclusion, as I understand it, is that it does not appear that the Crown has ever taken for these purposes the land of the subject, without paying for it, and that there is no trace of the Crown having, even in the times of the Stuarts, exercised or asserted the power or right to do so by virtue of the royal prerogative. I also concur with the conclusion at which that distinguished and learned judge arrived as to the purpose, object and effect of the body of legislation passed from the year 1708 to the year 1798, enabling land, or the use of it, to be compulsorily acquired by the Crown on the terms of the owner being paid for it. I further concur with him in his analysis of the provisions of the Acts passed in 1803, 1804, 1819 dealing with the public service. I agree that in all this legislation there is not a trace of a suggestion that the Crown was left free to ignore these statutory provisions and by its unfettered prerogative to do the very things these statutes empowered it to do, but free from the statutory conditions and restrictions imposed by them. It is quite obvious that it would be useless and meaningless for the

legislature to impose restrictions and limitations upon, and to attach conditions to the exercise by, the Crown of the powers conferred by a statute, if the Crown were free, at its pleasure, to disregard all these provisions and by virtue of its prerogative do the very thing the statute empowered it to do. One cannot in the construction of a statute attribute to the legislature, in the absence of compelling words, an intention so absurd. It was suggested that when a statute is passed empowering the Crown to do a certain thing which it might theretofore have done by virtue of its prerogative, the prerogative is merged in the statute. I confess I do not thing the word "merged" is happily chosen. I should prefer to say that when such a statute is passed expressing the will and intention of the King and of the three estates of the realm, it abridges the royal prerogative while it is in force to this extent - that the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance. Whichever mode of expression be used, the result intended to be indicated is, I think, the same, viz, that after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject

to all the limitations, restrictions and conditions thereby imposed, however unrestricted the royal prerogative may theretofore have been.

If that be so, as I think it is, then the first question to be determined is what particular things the Defence Act, 1842, which is really the culmination of the legislation passed from 1800 downwards, enacts, what the Defence of the Realm Consolidation Act, 1914, coupled with the regulations issued under it, empowers the Crown to do, and what are the conditions, if any, imposed upon the doing of it. By s 2(1) of the Defence of the Realm Consolidation Act, 1914, passed on 27 November 1914, the two previous statutes, the Defence of the Realm Act, 1914, and the Defence of the Realm (No 2) Act, 1914, are repealed, but it is provided that nothing in that repeal shall affect any order made thereunder, and that all such orders in Council shall until altered or revoked by an order in Council under the Consolidation Act, continue in force and be in effect as if made under this latter Act.

By s 1(1) it is provided that during the continuance of the then present war, His Majesty may issue regulations for securing the public safety and the defence of the realm, and as to the powers and duties for that purpose of the Admiralty and Army Council, and the members of His Majesty's forces and other persons acting on his behalf, and may by such regulations authorize the trial by court-martial, or, in cases of minor offences, by courts of summary jurisdiction, and punishment of persons committing offences against the regulation, and in particular against any of the provisions and regulations designed for the five particular purposes mentioned. The regulations must be designed to secure the public safety and defence of the realm. Section 3 provides that any such regulations that is, any regulations issued to effect those two objects - may provide for the suspension of any restrictions on the acquisition or user of land, or the exercise of the power of making by-laws, or any other powers under the Defence Acts, 1842 to 1875, or the Military Lands Acts, 1891 to 1903. There is no independent express provision in this Act of 1914 enabling the Crown, in the emergency of the war, to acquire land or the use of it for the purpose of securing the public safety and the defence of the realm. It must, therefore, I think, be assumed that, by reason of the provisions of this second section, it was designed and intended by the legislature that the ample powers for the acquisition of land or the use of it, either by agreement for purchase or compulsorily, conferred upon the Crown by the Act of 1842

should be availed of. Whether the land or its use were presumed to be acquired by voluntary purchase under its sixteenth section, or compulsorily under its nineteenth section, the owner in each case was to be paid or compensated for what he parted with. In addition, by its twenty-third section, a further restriction was placed upon the exercise of the power of compulsory purchase. That section enacted that no lands or building or other hereditament should be taken without the consent of the owner, unless the necessity or expediency of taking it should be certified by the Lord Lieutenant of the county in which the land or hereditament lay, or, in the alternative, by one or more of the other public functionaries named, and unless the taking of the land or buildings or other hereditament should be authorised by a warrant signed by the Lord High Treasurer or one or more of the Commissioners of the Treasury of the United Kingdom for the time being.

The methods of modern warfare have so vastly changed since this Act of 1842 was passed that, if it was availed of by the Crown in the course of the late war as it stood, the restrictions might seriously delay and embarrass the Crown in taking, through its officers, adequate measures to secure the public safety and the defence of the realm, while, if the restrictions were removed, its amended machinery might be adequate for the occasion. It is apparently with this view that s 2 of the Act of 1914 is confined to the removal of those restrictions. There is no attempt to set up new machinery. The powers conferred by the Act of 1842, thus unfettered, are to be allowed to remain operative and available for use though

the procedure is altered. The words of s 2, however, are "restrictions on the acquisition or use of land." When those restrictions are examined it is, to my mind, clear that the legal obligation to pay for the land or its use, temporarily or permanently acquired, is not a restriction upon the acquisition of either, or the condition precedent to the acquisition of either. There is nothing in the statute to suggest that this liability to pay is to be taken away by the regulations which may be issued, and if the regulations purported to do that, I doubt if they would not, having regard to the wording of s 2, be ultra vires. Neither the public safety nor the defence of the realm require that the Crown should be relieved of a legal liability to pay for the property it takes from one of its subjects. The recognised rule for the construction of statute is that, unless the words of the statute clearly so demand, the statute is not to be construed so as to take away the property of a subject without compensation. BOWEN, LJ, in *London and North-Western Rail Co v Evans* (15) said ([1893] 1 Ch at p 28):

> "The legislature cannot fairly be supposed to intend, in the absence of express words showing such intention, that one man's property shall be confiscated for the benefit of others or of the public without any compensation being provided for him in respect of what is taken compulsorily from him. Parliament in its omnipotence can override or disregard this ordinary principle … if it sees fit to do so, but it is not likely that it will be found to disregard it without plain expression of such a purpose."

There is not in the Act of 1914, or in the regulations framed under it, any indication of such a confiscatory purpose.

The regulations 2 and 2A do not expressly suspend any restrictions on the acquisition of or user of land imposed by the Defence Act, 1842. They commence with the statement that the enjoyment of property will be interfered with as little as may be permitted by the emergency of the measures required to be taken for securing the public safety and the defence of the realm, and provide that the Admiralty, Army Council, and Air Council, and members of the Naval and Military Forces and the other persons exercising the regulations shall, in carrying them into effect, observe these general principles. Thus by s 2 it is further provided that the naval and

military authority (defined in rag 62) or any person duly authorised by him, may, when necessary for the purpose expressly indicated - namely, for securing the public safety and defence of the realm - do several things involving the taking possession of land and user of the real property of the subject without any of the preliminaries prescribed by the Defence Act, 1842; for instance, he may take possession of any land, construct military roads thereon, and remove any trees, hedges, or fences therefrom; take possession of any buildings or other property, including works for the supply of gas, electricity, or water, or any sources of water supply; take such steps as may be necessary for placing any buildings or structures in a state of defence; cause any buildings to be destroyed, and finally to do any other act involving interference with the private rights of property for the aforesaid purposes. As to real property, no preliminary procedure of any kind is prescribed, and no mention whatever is made as to payment or compensation in respect of it. As regards personal property, however, it is provided by the last clause of s 2 that if, after the competent naval authority has issued notice that he has taken or intends to take possession of any movable property in pursuance of that regulation, any person having control of any such property sells, removes, or secretes it without the consent of the competent military authority, he shall be guilty of an offence against the regulations. Presumably some such notice should be given in the case of real property, though that is not expressly provided. Then one finds a most significant provision in s 2B - namely, that where any goods the possession of which has been so taken are acquired by the Admiralty, Army Council, or Air Council, or the Minister of Munitions, the price to be paid for them is to be determined in the manner provided. These

regulations on their very face justify an immediate taking possession of the real property of the subject without any preliminary formality or procedure. They are in absolute conflict with the provisions of the Defence Act, 1842, imposing restrictions on the acquisition of land or its use and prescribing formalities. The two cannot be reconciled, and the irresistible conclusion must, therefore, be that the earlier provisions have been suspended by the later.

Again it appears to me to be almost inconceivable that the Crown should claim the right to do such things as prostrate fences, take possession of the great industrial works mentioned, or cause any buildings to be destroyed, without being bound at law to compensate therefor the owners thereof. The fact that no provision to a contrary effect has been introduced into these regulations touching real property, while one is introduced touching goods required, suggests, I think, that the provisions of the Defence Act, 1842, touching payment or compensation for real property taken or used were left to apply. There is nothing in these regulations inconsistent with their being so left. Much reliance was placed by the Crown on the fact in the Defence of the Realm (Acquisition of Land) Act, 1916, first, because in its first section it recognises that possession of land may be taken by a government Department for the purposes connected with the war, in exercise of a prerogative right of His Majesty, as well as under any statute relating to the defence of the realm or by agreement or otherwise, and enables this Department to continue in possession of the land for any period not exceeding two years after the termination of the war, and secondly, because by the same section it provides that the Department which continues to occupy the lands after the termination of the war shall pay a rent in respect of this continued occupation. As the regulations to be issued under the Defence of the Realm Consolidation Act, 1914 can only be issued and be operative during the war, of course they could not deal with possession of land after the war had ended, and, therefore, the further possession had to be

provided for; but it is difficult to see upon what just or rational principle the owner of land should be paid a rent for his land in respect of the possession of it, while held by a Department after the war had terminated (obviously for the purposes of winding-up the business of the Department) and not paid a rent or compensation for its use and possession by a Department of the State while the war continued. This last provision it would appear to me hinders rather than helps the contention of the Crown. I should be sorry to attempt to lay down any rule of general application by which the limits of the royal prerogative might be determined. That is not necessary, in my view, in this case. In my opinion, in this case a statutory liability is imposed upon the Crown to pay for the use and occupation of the respondents' property. I base that opinion upon the facts of the case and the provisions of the legislation upon which the officers of the Crown justified their action. The Attorney-General in his able argument relied much on the words "temporary " - "temporary use," "temporary occupation." What does the word "temporary" mean in such a connection? It might cover years, if it meant only the duration of the war. In this case it covered over three years. At the beginning or early stages of a war its duration never can be prophetically fixed, even approximately. It has already been decided in your Lordships' House in several instances that contracts whose performance is interrupted by war are terminated because the duration of the interruption cannot be, even approximately, foretold.

The only remaining point is whether a petition of right will lie in respect of the statutory liability for an unliquidated amount, not a fixed sum. In my opinion, based on the authority of *R v Doutre* (16) and *Windsor and Annapolis Rail Co v R & Western Counties Rail Co* (17) such a petition will lie. I can see no valid distinction between a sum due under such a contract or grant made on behalf of the Crown as is mentioned by ERLE, CJ, in *Tobin v R* (18) and compensation due for the lawful and authorised use and enjoyment by the officer of the Sovereign, on the Sovereign's behalf, of the lands or buildings of a subject. Both seem equally untainted by tort, both equally untouched by the principle that the King can do no

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wrong. I, therefore, think that the appeal fails, that the judgment of the Court of Appeal was right and should be affirmed, and this appeal be dismissed with costs.

LORD MOULTON:

The present appeal is in the matter of a petition of right presented by De Keyser's Royal Hotel, Ltd, the owners of the well-known hotel of that name, for compensation for the compulsory occupation of certain parts of their premises by the War Office, acting in the name and on behalf of the Crown, for purposes connected with the defence of the realm during the late war. The Crown contests the right of the suppliants to compensation for such compulsory acquiring, and pleads that it was the exercise of the royal prerogative and gave no right of compensation to the suppliants.

The facts of the case are not substantially in dispute, the real issue being a question of law of great and general importance. I shall, therefore, deal very shortly with the evidence as to what actually took place at the time when occupation of the premises was taken by the Crown. In April 1916, the authorities at the War Office came to the conclusion that the premises in question were the most suitable for housing the heads of the Department having charge of the Army Air Service, and accordingly they, by a letter dated 18 April 1916, instructed the Office of

Works to make immediate arrangements to acquire them for that purpose. Negotiations were thereupon commenced between the Office of Works and Mr Whinney (who then represented the suppliant's interests) for such acquisition. It was at first proposed that they should be acquired voluntarily at an agreed rent, but, as the parties differed as to the amount of this rent, the Board of Works abandoned the negotiations and informed Mr Whinney that they were about to "communicate with the War Office with a view to the total premises (excluding the shops) being requisitioned under the Defence of the Realm Acts in the usual manner."

The War Office agreed to this course being taken, and on May 1, the Office of Works, by their direction, wrote to Mr Whinney a letter the material parts of which are as follows:

> "De Keyser's Royal Hotel, EC - Dear Sir, - I am instructed by the Army Council to take possession of the above property under the Defence of the Realm Regulations (excluding the shops, the other portions sub-let, and the wine cellars) .... We do not propose to take possession until the 8th inst, but I shall be glad if you will accept this as formal notice of the department's intention to take possession on that day."

In accordance with this notice a representative of the War Office attended on the 8th inst. and took possession of the premises, which were forthwith occupied by the military authorities and continued to be so occupied throughout the period of the war. It is in respect of this occupation that the suppliants claim compensation.

The representatives of the Crown have throughout insisted that possession was taken of the premises under the royal prerogative, and that, therefore, the suppliants were not entitled as or right to any payment by way of compensation, but that their sole remedy was to apply to a certain commission, named the Defence of the Realm Losses Commission, for an ex gratiâ allowance in respect of the losses that they would suffer by the occupation of their premises on behalf of the Crown. This commission was appointed by Royal Order on 31 March 1915,

> "to inquire and determine and to report what sums (in cases not otherwise provided for) ought in reason and fairness to be paid to applicants … in respect of direct and substantial lose and damage sustained by them by reason of interference with their property or business in the United Kingdom through the exercise of the Crown of its rights and duties in the defence of the realm."

It is evident that the existence of the powers of this commission can have no bearing upon the question raised by this petition of right. Its jurisdiction is restricted to "cases not otherwise provided for," and the whole basis of this petition of right

is that the case is already provided for. The suppliants claim that they have a legal right to the compensation, and it is that right which they are seeking to enforce by this petition. In the petition the suppliants put forward an alternative ground for their claim - namely, that the premises were given up to the government by them voluntarily in circumstances which would, in law, imply a contract on the part of the Crown to pay for use and occupation of the premises. Without discussing the conditions under which such a contract may be implied, it suffices to say that, in my opinion, it is abundantly clear that the premises were not surrendered voluntarily, but were taken compulsorily. Both parties, in their letters written at the time, treat it as a case of commandeering, as it in fact was, and Mr Whinney protested strongly against the action of the government in the matter. In short, he did everything to prevent their taking the premises short of refusing to give them up unless the government used physical force to obtain an entry. Had he gone further in his resistance than he actually did, he would clearly have put himself in the wrong, for, whatever be the suppliants' right as to compensation, the government were entitled to commandeer the premises if they needed them for the purposes of the defence of the realm.

In deciding the issues raised herein between the Crown and the suppliants, the first question to be settled might in the present case be treated as a question of fact namely: Was possession in fact taken under the royal prerogative or under special statutory powers giving to the Crown the requisite authority? Regarded as a question of fact, this is a matter which does not admit of doubt. Possession was expressly taken under statutory powers. The letter of 1 May 1916, from the representative of the Army Council to Mr Whinney says:

> "I am instructed by the Army Council to take possession of the above property under the Defence of the Realm Regulations."

It was in response to this demand that possession was given. It is not competent to the Crown, who took and retained such possession, to deny that their representative was acting under the powers given to it by these regulations, the validity of which rests entirely on statute. It was not a matter of slight importance whether the demand for possession purported to be made under the statutory powers of the Crown or the royal prerogative. Even the most fervent believer in the scope of the royal prerogative must admit that the powers of the Crown were extended by the Defence of the Realm Consolidation Act and the regulations made thereunder. It was for that purpose that the Act was passed and the regulations made. But even if that were not so, there was a manifest advantage in proceeding under the statutory powers. It rendered it impossible for the subject to contest the right of the Crown to take the premises by the exercise of the powers given by the statute. The statutory powers of the Crown were formulated in the regulations in a manner which was beyond mistake. For example, the regulations gave to the Crown the power "to take possession of any buildings," Mr Whinney, therefore, was clearly bound to surrender the premises when demanded. It would have been a very different matter had the demand been made under the royal prerogative. This litigation itself is enough to show how debatable a proposition it would have been if the claim had been made that the ancient prerogative of the Crown covered the taking of a hotel in London for the more comfortable housing of a military staff and its clerks and typists. All such questions were put at rest by the legislature giving express statutory authority by the regulations. There could henceforward be no doubt that the Crown possessed the powers formulated in the regulations and this was the object of the legislation. But when the Crown elects to act under the authority of a statute, it, like any other person, must take the powers that it thus uses cum onere. It cannot take the powers without fulfilling the condition that the statute imposes on the use of such powers.

The Defence of the Realm Consolidation Act, 1914, commenced by enacting that:

> "His Majesty in Council has power to issue regulations for securing the public safety and the defence of the realm and as to the powers and duties

> for that purpose of the Admiralty and Army Council and of the members of His Majesty's forces and other persons acting on his behalf."

It then goes on to particularise certain subjects to which these regulations may relate, and in sub-s (2) it deals with the question of the acquisition of land as follows:

> "(2) Any such regulations may provide for the suspension of any restrictions on the acquisition or user of land or the exercise of the power of making by-laws or any other power under the Defence Acts, 1842-1875, or the Military Lands Acts, 1891-1893."

The Defence Act, 1842 (which may be taken to represent the whole of the Defence Acts, inasmuch as the later Acts only modify it in details which do not concern the matter in this case) is the last of a series of Acts regulating the acquisition of lands and interests in land for purposes

of the defence of the realm. These acts commence in 1708 and occur at intervals up to 1842. At first they related only to land for fortifications at places mentioned in the Act, but later they became more general in their character and authorised the Crown to select suitable land and acquire it. In all cases compensation was given to the owners for the land taken. But it is not necessary to dwell on their provisions, seeing that the Defence Act, 1842, repealed all such existing Acts and laid down general provisions which have regulated since that time the procedure for the acquisition by the Crown of land for such purposes. This Act gives very wide powers to the Crown. It has unrestricted powers of selection of the necessary lands, buildings, &c, to be taken. It contemplates in the first instance voluntary purchase, but, if that cannot be arranged, then the lands, &c, may be acquired compulsorily, subject to certain certificates being obtained as to the necessity or expediency of the acquisition or in case of actual invasion. I am satisfied that it enables the Crown to acquire either the property or the possession or use of it as it may need. In all cases compensation is to be paid by the Crown, the amount to be settled by a jury. The regulations, and the Act under which they are made, must, of course, be read together, and it is, in my opinion, a sound inference from the language of sub-s. (2) that the legislature intended that, so far as the acquisition or user of land was concerned, the regulations should take the form of action under the Defence Act, 1842, facilitated by the suspension of some or all of the restrictions which it imposes. The particular provisions relating to the taking of land or buildings are to be found in s 2 of the regulations. They empower the military authorities to take possession of any land or of any buildings where, for the purposes of the defence of the realm, it is necessary so to do. These are very wide powers, but so general are the powers of the Defence Act, 1842, that they would be attained by simply suspending the restrictions therein contained and allowing its powers to be put in force without them. Reading, therefore, this regulation with sub-s. (2) of the Act I think it is clear that in the case of acquisition and user of land under the regulations we ought to consider them as authorizing action being taken under the Defence Act, 1842, save that no restrictions therein appearing are to be enforced. The duty of paying compensation cannot be regarded as a restriction. It is a consequence of the taking, but in no way restricts it, and, therefore, as the acquisition is made under the Defence Act, 1842, the suppliants are entitled to the compensation provided by that Act.

On these grounds, therefore, I am of opinion that the suppliants are entitled to our judgment in this appeal. But it would be unsatisfactory in a case of such general importance to leave unconsidered the question whether, apart from the fact that the Crown expressly purported to be acting under powers given to it by statute, the suppliants' claim could be maintained. To decide this question one must consider the nature and extent of the so-called royal prerogative in the matter of taking or occupying land for the better defence of the realm. I have no doubt that in early days, when war was carried on in a simpler fashion and on a smaller scale than is

the case in modern times, the Crown, to whom the defence of the realm was entrusted, had wide prerogative powers as to taking or using the lands of its subjects for the defence of the realm when the necessity arose. But such necessity would be in general an actual and immediate necessity arising in face of the enemy and in circumstances where the rule salus populi suprema lax was clearly applicable. The necessity would in almost all cases be local, and no one could deny the right of the Crown to raise fortifications on or otherwise occupy the land of the subject in the face of the enemy, if it were necessary so to do. Nor have I any doubt that in those days the subjects who had suffered in this way in war would not have been held to have

any claim against the Crown for compensation in respect of the damage they had thus suffered. It must not be forgotten that in those days the costs of war were mainly borne by the royal revenues, so that the King himself was the heaviest sufferer. The limited and necessary interference with the property of the subjects, of which I have spoken, would have been looked upon as part of the damage done by the war which it had fallen to their lot to bear, and there is no reason to think that anyone would have thought that he had a claim against the Crown in respect of it. Certainly no trace of any such claim having been put forward is to be found. This state of things lasted for several centuries. The record of the preparations made by Queen Elizabeth to resist the attack of the Spanish Armada, which are contained in the papers in this case, show that it was in full force in her time. I am not surprised that the careful (though necessarily incomplete) researches into the public records have found no precedent for the claim as of right against the Crown for acts done under its prerogative in occupying or using land under the stress of such a necessity as I have spoken of, and I do not think that a complete investigation would have met with greater success. But in the last three centuries very important changes have occurred which have completely altered the position of the Crown in such matters. In the first place, war has become far more complicated, and necessitates costly and elaborate preparations in the form of permanent fortifications and otherwise which must be made in times of peace. In the second place, the cost of war has become too great to be borne by the royal revenues, so that the money for it has to come from the people through the legislature, which has long ago assumed and has since retained the command of all national resources. In the third place, the feeling that it was equitable that burdens borne for the good of the nation should be distributed over the whole nation, and should not be allowed to fall on particular individuals, has grown to be a national sentiment.

The effect of these changes is seen in the long series of statutes relating to the occupation of land for the purposes of fortifications or otherwise for national defence, to which I have already referred, and which cover the last two centuries. In all these Acts provision was made for compensation to the individual whose lands were taken or used, and indeed there is clear evidence that for many years prior to the first of these statutes the Crown acted on this principle. It is not necessary to examine these Acts in detail. They were mostly local in their operation and frequently temporary, and usually related to specific fortifications which it was proposed to erect. But towards the beginning of the last century the Acts take on a more general and permanent form, and eventually they culminate in the Defence Act, 1842, which gives to the Crown, through its properly appointed officials, the widest possible powers of taking land and buildings needed for the defence of the realm under a minutely defined procedure set out in the Act. It contemplates that the acquisition shall, as a rule, be by agreement, but it gives ample powers of compulsory acquisition if the necessity be duly vouched, or in case of an actual invasion. In all cases compensation for the taking or using of the land by the Crown is to be assessed by a jury who (in the words of the Act) have to find "the compensation to be paid, either for the absolute purchase of such lands, buildings, or other hereditaments or for the possession or use thereof, as the case may be." This Act was not limited either in time or place, and with small modifications, which are not material for our present purpose, is still in force.

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What effect has this course of legislation upon the royal prerogative? I do not think that it can be said to have abrogated that prerogative in any way, but it has given to the Crown statutory powers which render the exercise of that prerogative unnecessary, because the statutory

powers that have been conferred upon it are wider and more comprehensive than those of the prerogative itself. But it has done more then this. It has indicated unmistakably that it is the intention of the nation that the powers of the Crown in these respects should be exercised in the equitable manner set forth in the statute, so that the burden shall not fall on the individual, but shall be borne by the community. This being so, when powers covered by this statute are exercised by the Crown it must be presumed that they are so exercised under the statute, and, therefore, subject to the equitable provision for compensation which is to be found in it. There can be no excuse for reverting to prerogative powers simpliciter - if, indeed, they ever did exist in such a form as would cover the proposed acquisition, a matter which is far from clear in such a case as the present - when the legislature has given to the Crown statutory powers which are wider even than anyone pretends that the prerogative possessed, and cover all that is necessary for the defence of the nation, and which are, moreover, accompanied by safeguards to the individual that are in agreement with the demands of justice. Accordingly, if the commandeering of the buildings in this case had not been expressly done under statutory powers, I should have held that the Crown must be presumed to have acted under these statutory powers, and thus given to the subject the statutory right to compensation. In the argument for the Crown reference was made to the Defence of the Realm (Acquisition of Land) Act, 1916. This Act was passed subsequently to the taking of the suppliants' lands, and, therefore, has no bearing on the question before this House. There is nothing in it which apparently takes away any right already acquired by the suppliants, and if it modifies in any way the quantum of the compensation it is a matter for the tribunals which have to assess it, and is not relevant to the present appeal. I am, therefore, of opinion that the suppliants are entitled to the declaration in the form approved of by the Court below, and that this appeal should be dismissed with costs.

LORD SUMNER:

The petition alleges in substance two rights to compensation - one for a rent for the use and occupation of this hotel, of which the Crown took possession with Mr Whinney's permission; the other for a fair rent as compensation because he voluntarily delivered possession, though protesting against the rights then alleged and maintaining his own claims of right, whatever they might be. The answer and plea, beside traverses, allege an exercise of the royal prerogative for the defence of the realm, and also rely on the Defence of the Realm Consolidation Act, 1914, and the regulations issued thereunder. Mention is made of an offer to pay whatever the Defence of the Realm Losses Commission might award, but I think this topic has no relevance. The payment would have been none the less an ex gratiâ payment, though the sum to be paid had been calculated under the forms of a judicial proceeding. Its acceptance would have involved a waiver of the suppliants' alleged right; its refusal cannot be an answer to that right, if they can establish it. Another introductory argument may be mentioned to be put aside. The appellant, as I understand it, contends that what was done was done under the prerogative and not otherwise. If the prerogative was exceeded, then every servant of the Crown who used the premises would be personally guilty of trespass, and; trespass being the suppliants' real remedy, the Crown succeeds. It is the typists and the clerks who are liable. If, on the other hand, the prerogative was not exceeded, the Crown succeeds again. The singularity of this result certainly invited criticism, and I was at first inclined to think that there might be an answer analogous to the rule of waiving a tort and suing on an implied assumpsit. When a civil right may be vindicated in more ways than one, there is a choice of remedies: *Rodgers v Maw* (19) nor does it necessarily

follow that this choice only arises between such remedies as are available against one and the same party. If the servant

of a company, acting ultra vires the company, converts a stranger's chattel and, having sold it, pays the proceeds into the company's account as its servant, I suppose conversion would lie against the servant and money had and received against the company: of *Smith v Hodson* (20). I have, however, come to the conclusion that no real advantage will be gained by pursuing arguments, turning on forms of actions, for this reason. The suppliants must make out their right, and when they allege a right under the Defence Acts, they negative any wrong done in the name of the Crown. There was no trespass by the clerks and the typists. They acted on a possession lawfully taken by the Crown, but a possession taken upon terms, and those terms were such as gave the suppliants a right to compensation. The only question is whether there is a statutory right against the Crown under the Defence Acts.

In terms the Crown purported to requisition under the Defence of the Realm Acts, and, on the correspondence, I think that there was no such request by the Crown for leave to occupy, followed by consent on the part of the respondents, as would support a claim to a quantum meruit compensation or rent apart from the statutes. There was, nevertheless, such assent as prevents the occupation from having been taken wholly in invitos, so as to leave the respondents no position but that of the sufferer of a wrong. Obviously, Mr Whinney's duty and interest alike impelled him to insistence on compensation, not to resistance to taking possession. It was money, not the hotel, that he wanted, and it does not matter whether he knew or not on what legal ground to put his claim. The question does not really turn on permission or submission. On the facts he cannot say that he so gave possession as to imply a contract for rent, but I see nothing in them to exclude his assertion of a right to compensation, if he can establish that right in law. The Crown has throughout purported to act on statutory rights (whether fully or correctly referred to or not) and the prerogative has not been vouched except in argument in the present case. I do not mean that it is not open to the law officers to rely on the prerogative now, or that I assume the writer of the letter dated 29 April 1916, to have had any authority to bind the Crown by an election between its statutory and its prerogative rights. If, however, under the statutes, including the Defence of the Realm Acts, which deal with taking buildings for the public safety and the defence of the realm, the Crown had the power to requisition this building on terms as to compensating the respondents, I think it cannot contend now that by the course taken the exercise of statutory powers was excluded and that none was in fact exercised.

To begin with 1914, the question then arises whether the premises could have been acquired simply under the Defence of the Realm Consolidation Act, 1914 and the regulations made thereunder, to the exclusion of the Defence Acts, and so to the exclusion of any right to compensation, or whether, if statutory powers were exercised at all, they must have included the powers (and the obligations) for which these Acts provided. I think that no real importance attaches to the rearrangement of s 1, which was made when the statute of 27 November 1914, superseded that of August 8. The Defence of the Realm Consolidation Act, 1914, does not purport to embody in the form of an enactment the Crown's existing prerogative. The Act empowers the Crown to issue regulations. There is no prerogative to make regulations, though it may be that some. of the things which may be regulated under the Act might also be done under

the prerogative. It is, however, also clear that some things which may be validly ordered under regulations under the Act could not have been done under the pre-existing prerogative. Further, under this Act alone no building could be requisitioned unless and until some regulation had been issued to that effect. Two kinds of regulations might be issued, one for the purpose of securing the public safety and the defence of the realm, and the other in order to alter existing Acts of Parliament for the time being by providing for the suspension of any restrictions on the acquisition or user of land contained in sundry named

Acts. Section 1(1) provides for the first kind; s 1(2) for the second. Of the regulations, No 2 is that material to the present purpose; it deals with taking possession of any buildings and with doing any act (other than those specially described) involving interference with private rights of property. If the Crown were to exercise the powers of taking buildings which are given by the Defence Acts, this regulation could well be held to dispense with the formalities prescribed by them. They would be restrictions which the regulations would have suspended. The obligation to pay compensation to the dispossessed owner, which that Act provides for, is, however, not a restriction on the acquisition of his land. It might discourage the exercise of the power of acquisition, but it does not limit that power. The power is complete independently of payment, and it is fully exercised before the obligation to pay arises.

The next question is: Should reg. 2 be regarded as having been made in exercise of the powers given by the first or by the second sub-section of s 1, of the Defence of the Realm Consolidation Act? In other words, is it to be regarded as an exercise of a power to requisition under regulations issued for the purpose, or as an exercise of the power to facilitate requisitioning already authorised? It is true that it authorises the competent naval or military authority to do the above-mentioned things "for the purpose of securing the public safety or the defence of the realm," but that is the purpose mentioned in s 16 of the Defence Act, 1842, and the words may only be a reference to that section. Furthermore, the regulation deals with many matters beside the acquisition of land and buildings, and these would in any case require a substantive reference to the above purposes, which sufficiently accounts for the use of the words without its being necessary to read them as pointing to the exercise of a new power of requisitioning. With all respect to the opinion expressed by AVORY, J, in *Re Petition of Right* (1) (84 LJKB at p 1963) I think it should be treated as only an exercise of the power of suspending restrictions given by sub-s (2). If it were held that this regulation is to be deemed to have been made, so far as the acquisition of land or buildings is concerned, in exercise of new powers given by sub-s (1) on the ground that the regulations to be issued are regulations as to the powers of the Army Council from time to time and not merely as to the exercise of its powers, then it would follow that the Crown, having full power of accomplishing the desired acquisition under the Act of 1842, and of suspending any inconvenient restrictions on that power, must be deemed to have been advised to exercise a new power of accomplishing the same object, differing from the existing power in one respect only - namely, that it is accompanied by no obligation to pay the subject anything. I think it should not be assumed that, even if the Crown has such a power under s 1, it has been advised to exercise it solely to avoid paying a subject for the exclusive use of his property. The presumptions must be both that the executive action was taken under powers by which it can be justified, rather than beyond all powers whatever, and that the available powers have been exercised so as to prevent and not so as to cause avoidable injury to the subject. Further, the Defence of the Realm Consolidation Act, by sub-s (2) of s 1, gives an express and

limited power of altering by regulation what is enacted by the Defence Acts. I think that no further power of restricting those enactments is intended to be conferred by the general words of sub-s (1) nor ought that subsection, couched as it is in general terms only, to be construed as authorising the Crown to do by regulation what the legislature itself has already fully provided for by statute, least of all when that regulation would have the effect of taking the subject's property without compensation contrary to the intention of the prior Acts.

The next question must be: Is the Defence Act 1842, with the other Defence Acts, adequate to enable the Crown to effect such an object for the purpose of the defence of the realm as that involved in the taking of this hotel? It is true that the Act enables much more to be done, and that the provisions for a greater or a less exercise of the power of taking lands are not kept separate. The same series of sections enables the Crown to take lands under the Act in peace or in war in

absolute ownership and in perpetuity or for temporary occupation only, but there is no difficulty in severing these provisions. It is true that, except for an express saving in s 34, the royal prerogatives are not named, but the powers of taking land are such as only the Crown, by its proper officers and Departments, can exercise, and the restrictions on the exercise of the statutory powers, which the Act requires, must necessarily be restrictions upon the powers of the Crown. It is true that some of these restrictions might in time of war be inconvenient in moments of extreme peril; of these the most formidable is the giving of a fourteen days' notice, though I observe that some overtures for this hotel were made in November 1915, and, when the officials came to business in 1916, eleven days were passed in negotiating for a rent, and the parties got as close together as 19,000 pounds and 17,500 pounds before it was thought necessary to refer to the Defence of the Realm Act. If, however, formalities not inconsistent with the exigencies of a state of war in 1842 would have been prejudicial to the public service in 1910, the powers given by sub-s (2) of s 1. of the Act of 1914 had only to be exercised, as in fact they were, and all these difficulties would vanish. I see no reason to doubt that the Act of 1842 gave all the powers necessary for the exigencies of the recent war, subject only to the removal of restrictions contained in it, and there is, therefore, nothing to rebut the natural presumption that reg. 2 is, in so far as it deals with matters to which the Defence Acts would apply, only an exercise of the power of removing existing statutory restrictions, and is not new legislation by which the Crown takes new and unrestricted powers in order to obtain the same result.

The appellant further contended that all that was done could be done, and was done, independently of any statute by virtue of the royal prerogative alone. I do not think that the precise extent of the prerogative need now be dealt with. The legislature by appropriate enactment can deal with such a subject-matter as that now in question in such a way as to abate such portions of the prerogative as apply to it. It seems also to be obvious that enactments may have this effect, provided they directly deal with the subject-matter, even though they enact a modus operandi for securing the desired result, which is not the same as that of the prerogative. If a statute merely recorded existing inherent powers, nothing would be gained by the enactment, for nothing would be added to the existing law. There is no object in dealing by statute with the same subject-matter as is already dealt with by the prerogative, unless it be either to limit or at least to vary its exercise, or to provide an additional mode of

attaining the same object. Even the restrictions (such as they were) imposed by the Defence Acts on any powers of requisitioning buildings in time of war were in no way inconsistent with an intention to abate the prerogative in this respect, if not absolutely: *New Windsor Corp v Taylor* (21) at least for so long as the statute operates. In truth, the introduction of regulations so reasonable only strengthens the substance of the royal authority by removing all semblance of arbitrary power. When, however, the matter is looked at, as it now must be, in the light of rag 2, no room for doubt remains. The regulation has the force of statute and under its amelioration of the Defence Acts everything could be done for this purpose that could be done under the prerogative equally efficiently and with equal speed. One difference, and one only, can be found. According to the argument, under the prerogative the subject could claim no compensation for losing the use of his property; under the statute he could. Is it to be supposed that the legislature intended merely to give the executive, as advisers of the Crown, the power of discriminating between subject and subject, enriching one by electing to proceed under the statute and impoverishing another when it requisitions under the alleged prerogative? To presume such an intention seems to me contrary to the whole trend of our constitutional history for over 200 years. Nor is it a reasonable interpretation to say that the object of the Defence Acts was merely to supplement the prerogative by enabling the Crown to pay compensation out of public funds to a subject damnified by the exercise of the prerogative, which otherwise it would not be able to do. A prerogative right to take without paying must have been

a right to take without paying out of the royal funds, but, in truth, prerogative can at most extend to taking, and stands quite apart from payment. There is no prerogative right to elect not to pay. Conversely, if there is adequate power to do all that is required by proceeding under the statute, where is the emergency and public necessity which is the foundation for resort to the prerogative?

For these reasons I think that the executive did not take possession under the prerogative, for the Defence Acts had superseded it; that the Act of 1914 and reg 2 did not in themselves enable possession to be taken; that the taking of possession must be referred to the powers given by the Defence Acts, and that, in consequence, the suppliants are entitled to be compensated in accordance therewith. I do not refer to the many statutes which preceded the Defence Act, 1842, from the time of Queen Anne, because they only seem to me to justify without altering my reasons for this conclusion.

This being so, there are only two further matters to which I wish to refer. They are the search which was made into the public records at the suggestion of the late Master of the Rolls, and the passages which have been cited from the opinion of the Judicial Committee in *The Zamora* (22). That the search for documents relating to the taking of land for fortifications and similar purposes in times past was left incomplete, and, indeed, was not much more than begun, is matter of considerable regret. So far as it went, it is said to have been inconclusive. Probably it will never go any further, for the result has scarcely been such as would encourage the executive to proceed with it, and the subject does not greatly attract the student of history. The records cover both peace and war. The result, as it stands at present, seems to be this. Many documents are forthcoming which relate to the taking of land for such purposes by agreement and on payment of compensation. None can be found relating to taking land as of right and without any compensation at all even in time of war. No petition of right is to be found in which a

suppliant seeks to recover compensation, but whether this be, as the Crown suggests, because no subject ever had the temerity to put forward such a contention or, as the respondents argue, because the Crown never gave him occasion to do so, is a matter which remains unknown. There appears to be no reported case which has decided that the subject is entitled to compensation for lands taken by the Crown in purported exercise of the prerogative, but to this circumstance the same observation applies. The point that no suppliant has presented a petition of right with such an object seems to me to be in itself of minor importance. Experience in the present war must have taught us all that many things are done in the name of the executive in such times, purporting to be for the common good, which Englishmen have been too patriotic to contest. When the precedents of this war come to be relied on in wars to come, it must never be forgotten that much was voluntarily submitted to which might have been disputed, and that the absence of contest, and even of protest, is by no means always an admission of the right. In a lesser degree I see no reason why similar courses may not have been taken in times of less gravity. At any rate, the fact remains that the claim of prerogative right maintained by the appellant is one of the exercise of which history has preserved no record.

As to the judgment in *The Zamora* (22) I conceive what was there said to have been correct, but I think that it has been pressed beyond anything for which, truly understood, it is an authority. What has to be borne in mind is that no issue as to the royal prerogative arose for determination in that case. The question was whether it was consistent with the law of nations that a Court of Prize should release to the Crown, against deposit of the value in court, the property of a neutral held in its custody pending adjudication, whenever the Crown duly declared that it was necessary for the defence of the realm to requisition them. As part of the reasoning of the judgment their Lordships dealt with two points: first, that such requisitioning imposed no greater burden on the neutral than was borne by the subject, but rather less; and, secondly, that, if on comparison of the municipal laws of different countries requisitioning was found in some with compensation and in some

without (of which latter class this country was an example) this circumstance would only show that the right contended for was, as against the neutral, as moderate as any municipal law warrants and more so than what is warranted by our own. The legislation on the subject of national defence was not material and was not discussed. I think it is plain that the judgment in *The Zamora* (22) made, and could make, no attempt to formulate an exhaustive definition of the prerogative as to requisitioning; that it took and could only take decisions on the subject as it found them, in order to draw from them legitimate inferences throwing light on the matter in hand. *The Shoreham Case* (1) as it is now called, for obvious reasons meagrely reported as to the facts under the name of *Re Petition of Right* (1) was the most recent exemplification of the ancient rule, traced back to the Year Books, that for the purpose of repelling invasion the King, and, indeed, the subject too, may enter another's close in order to raise bulwarks therein without committing a trespass. Rightly or wrongly, the facts of the *Shoreham Case* (1) were assumed to have been analogous to the case of raising bulwarks. No question arose of the taking of buildings for the mere use of administrative officials, although employed in one of the combatant branches of the Administration. The statement about the absence of compensation was an exact statement of the state of the reported cases then existing. It did not purport to lay down that no right to compensation could exist in law, but merely recorded that none had been decided to exist. The statement that no court ought, in time of war, to require of the officers of

the Crown proof (ex hypothesi public proof) of the reasons of State which had led them to hold that in a particular case a certain course should be taken seems to me to be an obvious statement. It is not in conflict with what seems to me to be an equally obvious proposition - namely, that, when the court can see from the character and circumstances of the requisition itself that the case cannot be one of imminent danger, it is free to inquire whether the conditions, resting on necessity, which were held to exist in the *Shoreham Case* (1) are applicable to the case in hand. If so, the argument in the judgment of *The Zamora* (22) did not touch such a case. Unless the court has such a power, the mere fact that the competent military authority honestly believed that what he demanded was needed for the defence of the realm would, on the appellant's argument, enable everything to be taken and nothing paid. Of course, with the progress of the art of war, the scope both of emergencies and of acts to be justified by emergency extends, and the prerogative adjusts itself to new discoveries, as was resolved in the *Saltpetre Case* (3) but there is a difference between things belonging to that category of urgency, in which the law arms Crown and subject alike with the right of intervening and sets public safety above private right, and things which, however important, cannot belong to that category, but, in fact, are simply committed to the general administration of the Crown. I think that the judgment of the Court of Appeal was in accordance with the law and ought to be affirmed.

LORD PARMOOR:

The question in debate in this appeal is whether the respondents are entitled to rent or compensation for the temporary use and occupation of the De Keyser's Royal Hotel, on the Thames Embankment. Possession of the hotel was taken, during the war, by the executive government, as representing the Crown, for purposes admittedly connected with the defence of the realm. It is not necessary to re-state in detail to your Lordships the negotiations and letters which passed between the representatives of the executive government and the respondents in connection with taking possession of the hotel.

The first question raised and argued at great length before your Lordships was whether the executive government could justify their action in taking possession of the hotel, without payment of rent or compensation, under the sanction of the royal prerogative. The royal prerogative connotes a discretionary authority or privilege exercisable by the Crown, or the executive, which is not derived from Parliament and is not subject to statutory control. This authority or privilege is

in itself a part of the common law, not to be exercised arbitrarily, but per legem and sub modo legis. In the present appeal it is not alleged that, if the royal prerogative did authorize the taking of possession of the premises of the respondents for temporary use and occupation without payment of rent or compensation, the authority was used improperly or in an arbitrary manner. Under this head no objection is put forward. The growth of constitutional liberties has largely consisted in the reduction of the discretionary power of the executive and in the extension of Parliamentary protection in favour of the subject, under a series of statutory enactments. The result is that, whereas at one time the royal prerogative gave legal sanction to a large majority of the executive functions of the government, it is now restricted within comparatively narrow limits. The royal prerogative has of necessity been considerably curtailed as a statutory rule of law has

taken the place of the uncertain and arbitrary administrative discretion. A similar tendency may be traced in the growth of our legal system. Portions of the common law have been systematically incorporated in or modified by Acts of Parliament, and in this way the obligations which the law imposes have become more definite and more certain in their application. Apart from the implication from precedents, which will be referred to later, the appellant states that he relies on the royal prerogative because, in a case of necessity for the public defence, the Crown has by the common law a prerogative right, which has not been abated, abridged, or curtailed by any of the Defence Acts, 1842-1873, or by any other statute, to enter upon or to take possession of or to occupy and use the land of any subject without payment of compensation. It is not necessary to inquire how far, in certain cases of necessity, for the public defence, the executive has power to act without statutory authority, but a generalisation of this wide character requires careful analysis in its application to special conditions such as have arisen in the present appeal.

In this instance the De Keyser Hotel was required for administrative purposes. Under modern conditions the use and occupation of land for administrative facilities is a matter of necessity for public defence, but the necessity is not of the same character and cogency as arise when the use and occupation of land is required on the occurrence of invasion, or during the occurrence of actual fighting. On this point I agree with the decision of the Court of Appeal. Assuming that there is a public necessity to take possession of land for administrative purposes in connection with public defence, there can be no reason why this necessity should be urged as an answer to a claim for compensation. It is clear on the negotiations and correspondence that Mr Whiney did not raise any objection to handing over the hotel for the use and occupation of the executive government, but that his protest was limited to the claim of the executive government to take this action and, at the same time, to deny any claim for compensation, except such as might be offered as a matter of grace by a reference to the Defence of the Realm Losses Commission. An illustration of the distinction which arises in the character and cogency of the necessity when land or buildings are required for the exigency of the public service is to be found in s 23 of the Defence Act, 1842, which provides certain safeguards for the protection of the subject "unless the enemy shall have actually invaded the United Kingdom at the time when the land or buildings have been taken." It is further noticeable that the prerogative right claimed is limited to an entry upon, or to taking temporary possession of, or to the temporary occupation and use of the land of any subject without payment of compensation. It is not claimed that it can be extended to a case of disseisin. Since Magna Carta the estate of a subject in lands or buildings has been protected against the prerogative of the Crown. It is not easy to see what the distinction is between disseisin and an indefinite use and occupation which may extend beyond the estate of any particular owner. The later statute law gives the same claim to compensation to the subject in either case. An analogy arises in the case of taxation. Money is of primary necessity for public defence during war, but it has long been established that, in order to obtain the

requisite supplies, the executive must follow constitutional precedent and obtain Parliamentary sanction. If, however, it could be established that there had been at one time such a prerogative right as is claimed by the appellant, I am unable to accept the further proposition that such right has not been abated, abridged, or curtailed by any of the Defence Acts, 1842-1873, or any other statute. The provisions, however, of the statute law, as they affect the royal prerogative which the appellant claims, will be considered subsequently.

The precedents on which the appellant relies in support of his appeal are *Hampden's Case* (2) the *Saltpetre Case* (3) *Hole v Barlow* (23) and *The Zamora* (22). No one would dispute the high character of the arguments of Mr St. John against the Crown in the *Hampden's Case* (2) but admissions made in such an argument do not constitute precedents, and the arguments applicable to the royal prerogative before the revolutionary period must be read subject to the restrictions which have been subsequently imposed. DUKE, LJ, in his exhaustive review refers to the judgments of two of the judges whose opinions were given adversely to the claim of the Crown, and quotes passages from the judgments of CROOKE, J, and HUTTON, J The quotation from CROOKE, J, is:

> "The law provides a remedy in case of necessity and danger, for then the King may command his subjects, without Parliament, to defend the kingdom. How? By all men of arms whatsoever for the land, and by all ships whatsoever for the sea, which he may take from all parts of the kingdom and join them with his own navy, which has been the practice of all former kings."

This opinion of CROOKE, J, would, in any case, be no precedent for the claim made in the present appeal, but it is doubtful whether the royal prerogative would at the present time cover so wide an exercise of authority. During the war a Conscription Act was passed and Parliamentary authority was obtained. The quotation from Hutton, J, is: "The King is bound to defend the kingdom." There is no need to question the accuracy of this general statement, but it cannot be intended to cover the proposition that the executive government is entitled, without regard to the limitations which have been imposed from time to time, to take all such steps as in the discretion of the government, for the time being, may be considered necessary for this purpose. *The Saltpetre Case* (3) was decided in 1606 at a time when the claim to act by royal prerogative was carried to an extreme limit. This case, however, is no precedent for the contention put forward by the appellant. The saltpetre was taken under the right of purveyance and payment was made. Purveyances were abolished in 1660 by 12 Car 2, c 4. The volume of extracts from public records made for the purposes of this case by the Record Agent contains warrants for the searching for saltpetre, but in every case on the payment of rent or compensation. The importance of the case consists in the terms of the resolution of the judges:

> "When enemies come against the realm to the sea coast it is lawful to come upon my land adjoining to the same coast, to make trenches or bulwarks for the defence of the realm, for every subject hath benefit by it. And therefore by the common law every man may come upon my land, for the defence of the realm, as appears by 8 Edw. 4, c 2, and in such cages on such extremity they may dig for gravel for the making of bulwarks; for this is for the public, and everyone hath benefit by it; but after the damage is over, the trenches and bulwarks ought to be removed so that the owner shall not have prejudice in his inheritance, and for the commonwealth a man shall suffer damage: as for the saving of a city or town, a house shall be plucked down if the next be on fire; and the suburbs of a city in time of war for the common safety shall be plucked down; and a thing for the commonwealth every man may do without being liable to an action, as it is said in 3 Hen 8, fol 15."

A right common both to the Crown and all subjects is not, in the strict sense, a prerogative right of the Crown. Royal prerogative implies a privilege in the Crown

of a special and exclusive character, but in any case the illustrations contained in the resolution cannot be relied upon in support of the claim made by the appellant. To take premises for administrative purposes is essentially different from an entry upon land adjoining to the coast to protect the realm from a landing by enemy forces. The analogy of plucking down a house if the next be on fire, for the saving of a city or town, is an apt instance of the restrictive limitations under which the right referred to in the resolution can be exercised, and it would be impossible to suggest that any subject would have been entitled to take possession of the hotel of the respondent for temporary use and occupation. A statute of 4 Hen 8, c 1 (1512) which was to

endure to the next Parliament, makes special provision for the protection of the county of Cornwall against invasion from Bretayne and also the Haven of Brest, and authorises every one of the King's subjects under the conditions mentioned to enter upon and for the making of bulwarks, &c, without any manner of payment to be demanded or any manner of action by any manner of person or persons at any time thereafter to be attempted. This statute illustrates the nature of a right which is based, not on an exclusive privilege of the Crown, but on the duty of all subjects within the specified area to make common cause in defence of the realm. DUKE, LJ, refers to a series of cases between subjects in which there was no determination of the rights as between the Crown or the executive government and the subject. The decision in these cases do not, in my opinion, assist to solve the questions raised in this appeal.

The Zamora (22) was a prize case which raised a question of the authority of royal prerogative in international law and of the right to requisition vessels or goods in the custody of the Prize Court of a belligerent Power. As regards the authority of the royal prerogative the dictum of LORD STOWELL in *The Fox* (24) was disapproved, and it was held that, prior, at any rate, to the Naval Prize Act, 1864, there was no power in the Crown, by Order in Council, to prescribe or alter the law which Prize Courts have to administer. So far, the case cannot be quoted in favour of the claim to take possession of the property of the subject without payment of compensation. In the course of his judgment LORD PARKER does incidentally refer to the authority of the royal prerogative within the domain of municipal law, but this was not a matter in issue in the case, and there was no argument addressed to the question now in appeal before your Lordships. So far as the *Shoreham Case* (1) is concerned, it need only be added that LORD PARKER was sitting in your Lordships' House when the arrangement was come to which made a formal judgment unnecessary. The dictum of WILLES, J, in *Hole v Barlow* (28) is not in favour of the contention of the appellant. It states the general proposition that every man has a right to the enjoyment of his land, and then, by way of illustration, limits the application of the power of the royal prerogative to the event of a foreign invasion.

Apart from legal precedent, it was urged by the appellant in the Court of Appeal during the argument that, where lands had been taken over for temporary use and occupation for the purposes of the defence of the realm, without obligation on the part of the Crown to pay rent or compensation, special commissions had been issued from time to time to determine what payment should be made by the Crown ex gratiâ. Consequently, a search was made, with the result stated in the judgment of the Master of the Rolls:

> "The result of searches which have been made is that it does not appear that the Crown has ever taken subjects' land for the defence of the country without paying for it, and even in the Stuart times I cannot trace any claim by the Crown to such a prerogative."

These latter words are important in considering the claim of the executive government in the present case to act under the royal prerogative. If no precedents can be found prior to the year 1688 of a claim to use and occupy the land of the subject for an indefinite time without the payment of compensation, it would be improbable

that such precedents would be found at a later date. The documents and warrants extracted from public records give no support to the claim put forward by the appellant. A large number of them are concerned with the acquisition of estates in land, which admittedly could not be

acquired compulsorily by the exercise of the royal prerogative. In some of the instances it is difficult to determine whether an estate in the land was acquired or possession was taken for temporary use and occupation. The extracts to which the attention of your Lordships was specially directed during the argument are as follows. On 24 November 1668, and on 22 December 1688, there are two ordnance minutes ordering in one case the payment of rent for ground upon which a battery is standing, and in the other case compensation for damage at the time of "Ye proveing the Morter peece nere Bishopps hall." Both these minutes appear to relate to a case of temporary use and occupation. On 4 Sept 1805, a letter was written urging the necessity of obtaining the mills at Cheshunt for purposes of increasing the supplies of gunpower for His Majesty's service. The Board concurred in the opinion and recommended to the Master-General to authorize the mills of Cheshunt to be taken possession of under the Defence Act, which will be attended also with the further advantage of removing some legal obstacles arising from a claim of the poor of the neighbourhood to have their corn ground at the mill. Proceedings were accordingly taken under the Defence Act to get possession of the mills in order that, by the acquisition of the water, the manufacture of gunpower might be increased. The subsequent orders and minutes relate to valuation for the purchase of all interests in the premises. At this date the Act 43 Geo 3, c 55, was in force, authorising His Majesty to survey and mark out ground wanted for public service and to treat and agree for "possession and use of it during such time as the exigence of the public service shall require," and, in default of agreement, compensation to be paid for possession and use, to be ascertained by the jury. In the following year a further Act was passed enabling land required for the exigencies of the service to be purchased absolutely and for ascertainment of the price by jury in default of agreement. These Acts were temporary in character, but contained provisions similar to those which were made permanent in the Defence Act, 1842. On 20 June 1813, a report was made on the claims of Mr Cowl, of Margate, and other persons in reference to damage done by stopping up gateways by which farmers drew up seaweed from the beach as a manure for lands at a time when an enemy landing was apprehended. A money payment appears to have been made in each case with the further recommendation that the gateways should be reopened at the expense of the government. It was stated at the hearing before the Court of Appeal that the documents which had been extracted were illustrative, and that there was no reason for thinking that a further search would disclose documents of a different import. The conclusion is that the executive government has not established a right under the royal prerogative to take the hotel of respondents for temporary use and occupation during war without the payment of compensation or be referring the respondents to a commission which could only make grants ex gratiâ within the limits of its jurisdiction.

I am further of opinion that the plea of the appellant that the prerogative right of the Crown, whatever it may have been, has not been abated, abridged, or curtailed by any of the Defence Acts, 1842-1873, or by any other statute, cannot be maintained. We propose to examine the main statutory provisions which regulate the rights of the subject and the obligations of the executive when lands or buildings are taken temporarily for use and occupation on the occasion of a public exigency. The constitutional principal is that when the power of the executive to interfere with the property or liberty of subjects has been placed under Parliamentary control and directly regulated by statute, the executive no longer derives its authority from the royal prerogative of the Crown, but from Parliament, and that in exercising such authority the executive is bound to observe the restrictions which Parliament has imposed in favour of the subject. I think that the statutory provisions applicable to the interference by the executive with land and buildings of the respondents

bring the case within the above principle. It would be an untenable proposition to suggest that courts of law could disregard the protective restrictions imposed by statute law where they are applicable. In this respect the sovereignty of Parliament is supreme. The principles of construction to be applied in deciding whether the royal prerogative has been taken away or abridged are well ascertained. It may be taken away or abridged by express words, by necessary implication, or, as stated in BACON'S ABRIDGMENT, where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong. Statutes which provide rent or compensation as a condition to the right of the executive to take over the temporary possession of lands or buildings on the occasion of public exigency come, in my opinion, within the category of statutes made for the advancement of justice and to prevent injury and wrong. This is in accord with the well- established principle that, unless no other interpretation is possible, justice requires that statutes should not be construed to enable the land of a particular individual to be confiscated without payment. I am further of opinion that where a matter has been directly regulated by statute there is a necessary implication that the regulation must be obeyed, and that as far as such regulation is inconsistent with the claim of a royal prerogative right such right can no longer be enforced.

In 1798 (38 Geo 3, c 27) power is given to take possession of land during such time as the exigencies of public service should require, with a provision for compensation, but this Act was limited in its operation to the continuance of the then present war. In 1803, by 43 Geo. 3, c. 55, similar powers are given. This, again, was a temporary Act during the then present war with France. A doubt arose whether this Act would enable the executive to take land for a definite period of time extending beyond the immediate exigency. In consequence it was repealed in 1804, and 44 Geo. 3, c. 45, enacts that land may be acquired either by absolute purchase for public service or for use and possession during such time as the exigency of the public service may require. Sections 11 and 12 provide compensation either for purchase of land or for its temporary use. In 1842 the Defence Act was passed to consolidate and amend the laws relating to the services of the ordnance Department, and the vesting and purchase of lands and hereditaments for those services and for the defence and security of the realm. This Act has been subsequently amended, but not on any subject material to this appeal, prior to 1914. Section 16 empowers the principal officers of Her Majesty's Ordnance to treat and agree with the owner or owners of land, buildings, and hereditaments, or with any person or persons interested therein, either for the absolute purchase thereof or for the possession or use thereof during such time as the exigence of the public service shall require. Section 19 enacts that if bodies or other persons thereby authorised to contract on behalf of themselves or others, or other person or persons interested in any such lands, buildings, or other hereditaments, which shall for the space of fourteen days next after notice in writing decline to treat or agree, or shall refuse to accept such sum of money as shall be offered for absolute purchase, or such annual rent or sum as shall be offered for hire or rent thereof either for a time certain, or for such period as the exigency of the public service may require, the principal officers may require two or more justices of the peace, or other authority named, to put them or any person appointed by them into immediate possession of such lands, buildings, or other hereditaments. Then follows a complete provision for summoning a jury to assess the compensation to be paid either for the absolute purchase of such lands, buildings, or other hereditaments, or for the possession or use thereof, as the case may be. Section 23 provides that no such lands, buildings, or other hereditaments shall be taken without the consent of the owner or owners or other interested

person or persons unless the necessity or expediency of the taking the same has been certified as directed, or "unless the enemy shall have actually invaded the United Kingdom at the time when such lands, buildings, or other hereditaments shall be taken." This latter provision is important, since it clearly shows that the legislature was providing against such an emergency as invasion

which might occur during a period of war and introducing in such a case an exceptional procedure. Section 34 empowers the principal officer of Her Majesty's Ordnance to bring actions, suit, or other proceedings, provided that in all such actions, suit, or other proceedings, the legal rights, privileges, and prerogatives of Her Majesty, her heirs and successors, shall not be defeated or abridged. It is not alleged that procedure by petition of right defeats or abridges the legal rights, privileges or prerogatives of the Crown if the conditions are such as entitle the respondent to resort to this form of procedure. If this Act and the amending Acts prior to 1914 had stood alone it would have been no answer to say that the statutory conditions were inconvenient or unduly cumbrous to meet the exigency of the public service in defence of the realm. It is for Parliament to determine what the exigency of the public service may require and, if amending provisions are found to be necessary, to enact them in an amending statute. It will appear subsequently that this course was followed on the outbreak of war in 1914.

It was further argued on behalf of the appellant that, apart from the royal prerogative, or from any power vested in the executive under the preceding statutes, a subject was deprived of his right to compensation by virtue of the powers conferred by the Defence of the Realm Consolidation Act, 1914, and of the regulations issued thereunder. Under this Act "His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm." There is a special provision that such regulations may provide for the suspension of any restrictions on the acquisition or user of land, or the exercise of the power of making by-laws, or any other power under the Defence Acts, 1842 to 1873, or the Military Lands Acts, 1891 to 1903. The regulations issued authorize the competent naval or military authority, and any person duly authorised by him, where for the purpose of securing the public safety or defence of the realm it is necessary so to do, to take possession of any land, building, or other property, or to do any other act involving interference with private rights of property which is necessary for the purpose aforesaid. The effect of this regulation is to enable the competent naval or military authority to take immediate possession of land or buildings where it is necessary for securing the public safety or defence of the realm. In reg 62 the competent naval or military authority may be any commissioned officer, not below the rank of a lieutenant commander in the Navy, or field officer in the Army or Air Force. There is no provision for compensation for acts done under the powers conferred by rag 2. Nor is any such provision necessary. Compensation was already assured under statutory enactment. Regulation 2(b) does contain a method of determining the price to be paid on taking possession of war material, food, forage, and stores, in default of agreement, and the attention of your Lordships was not called to any preceding statute containing a right to compensation. I agree in the view expressed by WARRINGTON, LJ, that the Defence Act, 1842 to 1873, and the Act of 1914 and the regulations made thereunder must be read together. The power to take possession of land or buildings for temporary use or occupation is derived from the Defence Act, 1842, and the Act of 1914 and the regulations made thereunder. The Act of 1914 and the regulations made thereunder adapt the exercise of the powers conferred by the Defence Act, 1842, to the

exigencies of modern warfare during a period of war, but they do not affect the provisions of the Defence Act which confer a right to compensation and provide procedure for assessment of the amount in default of agreement. I think that there is no difficulty in applying the ordinary rules of construction, but, if there is room for ambiguity, the principle is established that, in the absence of words clearly indicating such an intention, the property of one subject shall not be taken without compensation for the benefit to others or of the public: *A-G v Horner* (25); *London and North-Western Rail Co v Evans* (15). So long as the possession of land or buildings can immediately be taken for purposes of public safety there is no inconsistency in subsequently determining under statutory procedure the amount of payment, either by way of

rent or compensation. It is not necessary in your Lordships' House to distinguish the present appeal from *Re Petition of Right* (1). PETERSON, J, thought that the present case was covered by the judgment of the Court of Appeal in that case, but when that case came before your Lordships' House, an arrangement was made rendering it unnecessary to give a formal judgment. The appellant, in the statement of contentions tabled in his case, claimed "that the legislature had, by the Defence of the Realm (Acquisition of Land) Act, 1916, recognised the existence of and had confirmed the prerogative." Reliance is placed on the words in s 1, which allows the government department in possession of lands to continue in possession for the specified times, where possession had been taken whether in exercise or purported exercise of any prerogative right of His Majesty, or of any powers conferred by or under any enactment relating to the defence of the realm. This section does not enlarge or extend the royal prerogative in any direction, or deprive the subject of compensation if, apart from this section, he would have been entitled to claim it. In the letter of 9 May 1916, the Controller of Supplies states that the premises have been commandeered by the military authorities under the Defence of the Realm Act, and this statement is, in my opinion, well founded. If the respondents are entitled to a declaration in the terms of the petition of right, the proper form of procedure to obtain such a declaration in favour of a subject against the Crown has been followed. There is no allegation of any tortious conduct on the part of the Crown. On the contrary, the claim to compensation assumes that the entry on and the taking of possession of the hotel are acts which are legally justifiable. In an ordinary case under the Lands Clauses Acts, when promoters enter into possession of lands in conformity with their statutory rights, and delay or refuse to put in force the necessary procedure for the assessment of compensation in default of agreement, the remedy is by mandamus. The remedy would not be applicable against the Crown. I did not understand the Attorney-General to raise any objection to the procedure by petition of right if the respondents could establish a claim to compensation, or to the form of the declaration made by the Court of Appeal. In my opinion, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Reported by WE REID, ESQ, Barrister-at-Law.

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