

1920  
May 10.

ATTORNEY-GENERAL . . . . . APPELLANT ;

AND

DE KEYSER'S ROYAL HOTEL, LIMITED RESPONDENTS.

*Defence of the Realm—War—Exigencies of the Public Service—Crown—Royal Prerogative—Right of Crown to take Possession of Land and Buildings without Compensation—Defence Act, 1842 (5 & 6 Vict. c. 94), s. 19—Defence of the Realm Consolidation Act, 1914 (5 Geo. 5, c. 8), s. 1, sub-ss. 1 and 2, and Regulations thereunder.*

The Crown is not entitled as of right, either by virtue of its prerogative or under any statute, to take possession of the land or buildings of a subject for administrative purposes in connection with the defence of the realm without paying compensation for their use and occupation.

In May, 1916, the Crown, purporting to act under the Defence of the Realm Regulations, took possession of a hotel for the purpose of housing the headquarters personnel of the Royal Flying Corps, and denied the legal right of the owners to compensation. The owners yielded up possession under protest and without prejudice to their rights, and by a Petition of Right they asked for a declaration that they were entitled

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\* *Present* : LORD DUNEDIN, LORD ATKINSON, LORD MOULTON, LORD SUMNER, and LORD PARMOOR.

to a rent for the use and occupation of the premises, or, in the alternative, that they were entitled to compensation under the Defence Act, 1842:—

*Held*, first, that the suppliants were not entitled to a rent for use and occupation apart from statute, as there was no consensus on which to found an implied contract; secondly, that Regulation 2 of the Defence of the Realm Regulations, issued under the Defence of the Realm Consolidation Act, 1914, when read with sub-s. 2 of s. 1 of the Act, conferred no new powers of acquiring land, but authorized the taking possession of land under the Defence Act, 1842, while impliedly suspending the restrictions imposed by that Act upon the acquisition and user of land; that the Crown had no power to take possession of the suppliants' premises in right of its prerogative simpliciter; and that the suppliants were entitled to compensation in the manner provided by the Act of 1842.

Decision of the Court of Appeal 1919 2 Ch. 197 affirmed.

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APPEAL from a decision of the Court of Appeal (1) reversing a decision of Peterson J.

The following statement of facts is taken from the opinion of Lord Dunedin: "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 their finding a suitable building. That 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 April 18, 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

H. L. (E.) in the usual manner.' Following on this communication the War Office, on May 1, wrote as follows to the Receiver :—

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“ ‘ 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 enclose forms of claim for submission to the Defence of the Realm Losses Commission. Compensation, as you are probably aware, is made, ex gratia, 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 & Son, Ltd., to represent me at the making of the inventory of the contents of this Hotel, and also to meet your representative there to-morrow, 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 as to whether the Army Council are within their rights of acquiring possession of the above property under their notice dated 1st May, 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 instant 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 the 5th instant, 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 para. 4 of 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 :—

"(1.) 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.

"(2.) The sum of 13,520*l.* 11*s.* 1*d.* for use and occupation of your suppliants' premises from the 8th day of May, 1916, to the 14th day of February, 1917.'

"(4.) 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 :—

"(7.) No rent or compensation is by law payable to

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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 *In re A Petition of Right*. (1) Appeal being taken to the Court of Appeal, that Court, by a majority, Sir Charles Swinfen Eady M.R. and Warrington L.J., Duke L.J. 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."

1920. March 1, 2, 4, 5, 8, 9. *Sir Gordon Hewart A.-G.* and *Sir Ernest Pollock S.-G.* (with them *Austen-Cartmell*, *Lowenthal* and *G. A. H. Brandon*) for the Crown. The respondents in their Petition of Right put their claim for compensation under two heads. First, they claim rent against the Crown for the use and occupation of the hotel, and, secondly, they claim compensation under the Defence Act, 1842. The first claim cannot be sustained because a claim for rent for use and occupation is based upon an implied contract, and there was here no consensus: *Churchward v. Ford* (2); *Sloper v. Saunders* (3); *Phillips v. Homfray* (4). The Crown entered in virtue of the

(1) [1915] 3 K. B. 649.

(3) (1860) 29 L. J. Ex. 275.

(2) (1857) 2 H. & N. 446, 448.

(4) (1883) 24 Ch. D. 439, 461.

Royal Prerogative or under the Defence of the Realm Consolidation Act, 1914, and the Regulations issued thereunder, and they entered under the protest of the respondents. Possession was taken in invitum. That is destructive of mutual consent, which is the basis of a contract. Unless the entry of the Crown was in virtue of the Royal Prerogative or under the Defence of the Realm Regulations the Crown is a mere trespasser, but in that case the respondents have no remedy, for the King can do no wrong. The second claim also fails, for it cannot be maintained that possession was taken under the Defence Act, 1842. Not only did the Crown purport to enter under the Defence of the Realm Regulations, but no part of the machinery provided by that Act was put in operation, and the restrictions imposed by the Act upon the acquisition of land were not complied with: see ss. 16, 19, 23. The Defence of the Realm Consolidation Act, 1914, by s. 1, sub-s. 1, provides that the King in Council has power during the continuance of the war to issue Regulations for securing the public safety and the defence of the realm, and by sub-s. 2 any such Regulations may provide for the suspension of any restrictions on the acquisition or user of land or the exercise of any power under the Defence Acts, 1842 to 1875. Regulation 2 of the Regulations issued under this Act empowers the competent naval or military authority, and any person duly authorized by him "where for the purpose of securing the public safety or the defence of the realm it is necessary so to do," to take possession of any land or buildings, but says nothing about compensation. That is the Regulation which applies here. It is said that that Regulation was really made under sub-s. 2, and was designed to get rid of the fetters imposed by the Act of 1842, notwithstanding its silence on the point; that it does not itself confer any power to take possession of land or buildings, but that for that power recourse must be had to the Act of 1842. It is submitted that that Regulation was not made with reference to the Act of 1842 at all. Even if it should be thought that the purpose and effect of the Regulation was to remove the restrictions imposed by that Act—the service of notice to treat and the certificate of the Lord-Lieutenant as to the necessity of

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taking the land—it would still be a question of fact whether the Crown proceeded under that Act or not, and on the facts of this case that contention cannot be maintained. If then the House is satisfied that possession here was not taken either under an implied agreement or under the Act of 1842, that is sufficient for the dismissal of this Petition of Right, for the suppliants' claim is put on those two grounds only. But it is submitted further that the entry of the Crown was in right of the Royal Prerogative and under Regulation 2, which recognizes that right. That is a right, not to deprive the subject of his property, but to make a temporary use of the subject's property during the exigencies of war for such period as may be necessary for the defence of the realm, without giving rise to a legal obligation to pay compensation, upon condition of making good the damage done to the property by the Crown's possession. It is a right which arises upon an emergency created by enemy action, and upon nothing else, and it is founded upon the principle that upon such an emergency private convenience must yield to public necessity. There is nothing unreasonable in the origin of this right, which has been recognized in several ancient authorities: *Rex v. Hampden* (1); *The King's Prerogative in Saltpetre* (2); *Hole v. Barlow* (3); *In re A Petition of Right*. (4) The last cited case, which was followed in *Sheffield Conservative Club v. Brighton* (5), subsequently went to the House of Lords, but was settled, and the House expressed no opinion upon the question at issue. (6) In none of those cases is there any trace of any obligation to pay compensation on the exercise of that prerogative. "The municipal law of this country does not give compensation to a subject whose land or goods are requisitioned by the Crown": per Lord Parker in *The Zamora*. (7) The right claimed by the Crown, whether by virtue of the Royal Prerogative or under the Defence of the Realm Regulations, to use the land of a subject during the continuance

(1) (1637) 3 How. St. Tr. 825,  
1195.

(2) (1606) 12 Rep. 12.

(3) (1858) 4 C. B. (N. S.) 334, 345.

(4) [1915] 3 K. B. 649.

(5) (1916) 85 L. J. (K. B.) 1669.

(6) [1916] W. N. 311.

(7) [1916] 2 A. C. 77, 100.

of an emergency created by war is recognized and confirmed by the Defence of the Realm (Acquisition of Land) Act, 1916. That Act was passed at a time when the decision of the Court of Appeal in *In re A Petition of Right* (1) was in full force, and must be regarded as giving statutory authority to that decision: *Attorney-General v. Clarkson*. (2) Sect. 1, sub-s. 1, of that Act provides that possession by the Government of land occupied for the defence of the realm, "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," may be continued for a limited period after the termination of the war. That is an express statutory recognition of the power of the Crown to acquire land for purposes of defence by virtue of its prerogative. Sub-sect. 3 of that section provides for payment of rent by the Government for such continuance of possession, to be assessed in the manner provided by para. 6 of the Schedule to the Act. Sect. 4 provides that any land acquired under that Act may be used for any Government department for the purpose for which it was used during the war or for any other purpose for which it could have been used had the land been acquired under the Defence Acts, 1842 to 1873. Under the law as laid down by the majority of the Court of Appeal the land here was taken under the provisions of the Act of 1842, shorn of certain fringes, and rent was payable whether the war was in force or not. If those judgments are right the rent has to be assessed by the machinery of the Act of 1842 as subsequently amended, and that rent would continue after the war had ceased. That proceeds upon a false assumption, and makes the provisions of the Act of 1916 not only futile but ridiculous. The whole scheme of that Act is inconsistent with the theory that this land was taken under the Act of 1842. Against this body of authority what is adduced by the respondents? They say, first, that no authority can be found in which the claim of the Crown to enter into temporary occupation during an emergency without paying

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(1) [1915] 3 K. B. 649.

(2) [1900] 1 Q. B. 156.



H. L. (E.) compensation has been upheld. But the case should be put the other way round. No authority has been produced in which a claim for compensation in such circumstances has been presented. Then the respondents set up certain statutes as an answer to the Crown's contention. But before considering those statutes it is important to ascertain the nature of the prerogative claimed by the Crown in this case. It is a prerogative which arises and exists in a period of emergency, and it does not extend to a permanent taking of the land. Therefore no assistance can be derived from statutes which provide for the permanent acquisition of land by the Crown. All the statutes relied on by the respondents are of that character, and are not in pari materia with the prerogative claimed in this case. [They referred to 38 Geo. 3, c. 27; 43 Geo. 3, c. 55; 44 Geo. 3, c. 95.] This legislation culminated in the Defence Act, 1842, which is framed upon the earlier statutes. This Act, unlike its predecessors, was passed in a time of peace; it contemplates a period of peace no less than a period of war, and it provides suitable though cumbrous machinery for acquiring land more or less permanently for the purposes of defence. It is supplemental to and distinct from the special prerogative claimed in this case, and the two rights can co-exist. If the statute reproduces some features of the prerogative that does not operate as a merger pro tanto of the prerogative. The prerogative is not taken away by a statute dealing with the same subject-matter unless that intention plainly appears from the provisions of the Act: *Wheaton v. Maple*. (1) "In general, the Crown is not bound by a statute unless expressly mentioned, or referred to by necessary implication": per Cotton L.J. in *In re Henley* (2); *Coomber v. Berks Justices* (3); Bacon's Abridgement "Prerogative" (E) 5; Chitty on Prerogatives of the Crown, p. 383. It is a part of the King's duty to protect and defend the realm: *Attorney-General v. Tomline* (4); and the Courts have upheld very drastic Regulations made for that purpose: *Rex v. Halliday* (5); *Lipton v.*

(1) [1893] 3 Ch. 48, 64.

(4) (1880) 14 Ch. D. 58, 61, 66.

(2) (1878) 9 Ch. D. 469, 482.

(5) [1917] A. C. 260.

(3) (1883) 9 App. Cas. 61, 65.

*Ford.* (1) Not only is the Defence Act of 1842 not referred to in the correspondence in this case, but that Act does not contemplate in any special way the emergencies of war. In such emergencies it is possible to suggest many uses of land to which the machinery of that Act is wholly inapplicable. For these reasons it is submitted that the Act of 1842 leaves the prerogative here claimed entirely untouched. Further, the remedy by Petition of Right does not apply to a case of this description. "The only cases in which the Petition of Right is open to the subject are, where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money, or where the claim arises out of a contract, as for goods supplied to the Crown or to the public service": per Cockburn C.J. in *Feather v. Reg.* (2); *Thomas v. Reg.* (3); *Windsor, &c., Ry. Co. v. Reg.* (4); Petition of Right Act, 1860 (23 & 24 Vict. c. 34), s. 7.

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*Sir John Simon K.C.* and *Leslie Scott K.C.* (with them *W. Copping*) for the respondents. The argument on behalf of the Crown shows some misapprehension as to the effect of the legislation which led up to the passing of the Defence Act, 1842. It is a misapprehension to say that that Act is an Act dealing with the permanent or lasting acquisition of land as distinguished from temporary occupation. It deals with both cases, and furnishes a complete code with reference to the acquisition and occupation of land by the Crown for the defence of the realm; and it secures to the subject a right of compensation in each case. The Act of 1798 (38 Geo. 3, c. 27) and the Act of 1803 (43 Geo. 3, c. 55) were both temporary Acts passed at very critical times in the history of the country, and they covered the same ground. Those Acts contemplated the taking of land by the Crown, not permanently, but during such period as the exigencies of the public service should require, but the land was not to be

(1) (1917) 33 Times L. R. 459.

(4) (1886) 11 App. Cas. 607,

(2) (1865) 6 B. &amp; S. 257, 294.

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(3) (1874) L. R. 10 Q. B. 31.

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taken without the consent of the subject, except upon a certificate of the Lord-Lieutenant as to the necessity or expediency of taking it, and payment was provided for in every case. Those Acts were followed by the Act of 1804 (44 Geo. 3, c. 95), which was a permanent Act, and was passed to remove a doubt which had arisen under the Act of 1803, whether the Crown could take land for the exigencies of the public service for a definite period. Sect. 10 dealt with the exercise of the power of taking land on an invasion, and covered the case of occupation upon a sudden emergency and also the case of occupation for a term, and the Act provided machinery for the assessment of the compensation. The compensation so provided was not limited to the case where the Crown acquired the land of the subject out and out or for a term, but applied equally to the temporary use and occupation of the land during the period of the exigency. That Act was the foundation of the Act of 1842, which again dealt with both kinds of acquisition, and provided similar machinery for compensation. If then the Act of 1842 governs this matter, it provides a code which precisely covers the case to be dealt with here. Then, has the Crown another right, covering the same ground, under which it can do precisely the same thing without paying compensation to the subject? When Parliament has provided that on the happening of a certain state of things certain statutory consequences follow, it is idle for the Crown to repudiate the statute and to refuse to abide by those consequences. The real question here is not whether the Crown has lawfully entered the premises—that has never been denied—but whether the Crown can lawfully refuse compensation. The prerogative has been defined by a learned author as “the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown.” It is the ultimate resource of the executive, and when there exists a statutory provision covering precisely the same ground there is no longer any room for the exercise of the Royal Prerogative. It has been taken away by necessary implication because the two rights cannot live together: *Gorton Local Board v. Prison*

*Commissioners.* (1) The prerogative is merged in the higher title derived by the Act of Parliament: *New Windsor Corporation v. Taylor.* (2) See also Bacon's Abridgement, "Prerogative" (E) 5; Rolle's Abridgement, vol. ii., p. 179, "Prerogative Le Roy" (Y) 5; *Crooke's Case.* (3) No doubt, in the actual stress of military exigencies, the Crown has the right to go in invitum upon the land of any subject, but in such an emergency a similar right is given to the subject; and the act of the Crown is to be justified not specially as an exercise of the prerogative, but as an act of necessity. Thus in *Maleverer v. Spinke* (4) it was recognized that the commission of a tort might be justified on the ground of the public good; "as in time of war a man may justify making fortifications on another's land without licence; also a man may justify pulling down an house on fire for the safety of the neighbouring houses; for these are cases of the common weal." In any case the right of the Crown to occupy the land of a subject compulsorily for the purpose of erecting bulwarks or cutting trenches in order to repel an invasion by the enemy differs essentially from the right alleged in this case to take land for the purpose of housing the administrative staff of a military department in time of war. The distinction between these two rights is not to be explained by the difference in the manner of conducting warfare in modern times, but is a distinction in kind. In the latter case the Crown is not entitled in virtue of its ancient prerogative apart from statute to take the land of a subject compulsorily. This ancient prerogative is a far narrower thing than has been suggested in argument, and is a right exercised to deal with a concrete emergency: *Hampden's Case.* (5)

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Further, the exercise of this power of taking possession of the land of a subject in invitum for the exigencies of the public service does not connote that the subject is left without any right of compensation, and no case can be found in which this right has been exercised without payment. See *Newcastle*

(1) [1904] 2 K. B. 165n., 167n.

(2) [1899] A. C. 41, 49.

(3) (1690) 1 Shower, 208.

(4) (1537) 1 Dyer, 355, 365.

(5) 3 St. Tr. 825, 1162.

H. L. (E.) *Breweries v. Rex* (1); *Reg. v. Abbott*. (2) [Upon this point they also referred to Maitland's Constitutional History, pp. 418, 419, 461; *Rex v. Broadfoot* (3); Selden's *Mare Clausum*, Book II., c. xx., pp. 352-4; Rushworth's Historical Collections, Part III., vol. i., p. 655; 18 Edw. 3, Stat. 2, c. 7.] Assuming that the respondents have succeeded in establishing the following propositions: 1. That the Defence Acts, 1798-1842, occupy the field, not only when the Crown takes an estate from a subject, but also when the Crown temporarily takes possession of the premises of a subject, for the defence of the realm; 2. that it follows by necessary implication that, whatever prerogative the Crown might have had originally, it cannot since the passing of these statutes have a residue of prerogative power to do the same thing; 3. that there is nothing either in the nature of the power or in the authorities which lends colour to the view that the subject is deprived by the exercise of this power of his right to compensation; then can it be said that a Regulation made under the Defence of the Realm Consolidation Act, 1914, has altered the whole of that law? Suppose a Regulation which said in express terms that the historic rights of the subject were thereby swept away, would such a Regulation be within the terms of the Act? Everything done by a Regulation made under this Act must be done for securing the public safety and the defence of the realm, and a Regulation which authorizes the taking away of a right to compensation from a person who would otherwise be entitled to it cannot be justified as a compliance with the Act, because it has nothing to do with the purposes for which alone Parliament gave authority for Regulations to be made: *Newcastle Breweries v. Rex*. (1) If the respondents are correct in their view of the rights of the subject up to August, 1914, this Act ought not to be construed as abolishing the right of the subject to payment for being dispossessed of his property. Then as to the remedy, procedure by petition of right is open to the subject whenever

(1) (1920) 36 Times L. R. 276.

(2) [1896] 2 I. R. 362, 405.

(3) (1743) Foster's Cro. Cas. 154, 160.

the question is whether the subject has a legal right to the payment of money by the Crown. If the claim has a legal basis it need not have a consensual basis in the full sense; and there are many cases where a contract is implied by law where there is no suggestion of any consensus in fact: see *Harding v. Metropolitan Ry. Co.* (1) The only limitation upon this mode of procedure is that the King can do no wrong. In this case there is no allegation of a tort. It is conceded that the Crown has entered lawfully, and the only question at issue is whether certain legal consequences follow from that entry. It is a fallacy to say, as has been contended on behalf of the Crown, that the remedy by petition of right is limited to certain defined classes of actions. This procedure was designed to ascertain the legal relations existing between the subject and the King in a manner consistent with the dignity of the King. It is obviously impossible to obtain a mandamus against the King, and therefore all that is sought by this procedure is a declaration of the rights of the subject in the full assurance that the Crown will give effect to those rights: *Monckton v. Attorney-General* (2); *Blundell v. Rex* (3); *De Bode's Case* (4); Manning's Exchequer Practice, p. 84.

The attempt to use the Defence of the Realm (Acquisition of Land) Act, 1916, in support of the Crown's contention completely breaks down. That Act was passed after the date when possession was taken by the Crown in this case, and it deals with the de facto situation, and does not purport to alter the law at all upon any matter relevant to the present inquiry. It is not limited to land taken under some exigency of war, but covers all land used for any purpose of the present war, and land taken under any statute for the defence of the realm. That will include the Defence Acts, under which compensation is payable. If for the reasons advanced on behalf of the respondents these lands were taken under the Defence Act, 1842, it is not necessary to inquire into the extent of the prerogative, but it is submitted that the prerogative

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(1) (1872) L. R. 7 Ch. 154.

(3) [1905] 1 K. B. 516.

(2) (1850) 2 Mac. &amp; G. 402, 412.

(4) (1845) 8 Q. B. 208, 273, 274.

H. L. (E.) has never gone the length of asserting that a subject who has been dispossessed of his land by the Crown is not to be paid.

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*Sir Ernest Pollock S.-G.* in reply. The Defence Act of 1842 conferred on the Crown certain restricted powers of taking lands, but did not exhaust the prerogative of the Crown in that regard. Side by side with that Act there existed a residue of prerogative power, which enabled the Crown to enter into temporary occupation of the land of a subject in the exigencies of war, and that residue of prerogative power was exercised under the Defence of the Realm Acts and the Regulations made thereunder. The question ultimately turns upon the interpretation to be put upon Regulation 2. That Regulation was originally issued under the first Defence of the Realm Act of 1914 (4 & 5 Geo. 5, c. 29), which contained no provision corresponding to sub-s. 2 of s. 1 of the Defence of the Realm Consolidation Act, 1914, and contained no reference to the Act of 1842. By the later Act power was given to the Legislature to issue Regulations providing for the suspension or modification of the restrictions imposed by the Defence Act, 1842, but that power was never exercised, and when the Defence of the Realm Regulations were repromulgated Regulation 2 remained as it was before. That Regulation ought to be construed to-day in the same way as it would have been construed at the date when it was originally issued, and so construed it can have nothing to do with the Act of 1842. The powers contained in the Regulations were fresh powers given to the executive, and were a portion of the residue of authority vested in the Crown.

The House took time for consideration.

1920. May 10. LORD DUNEDIN (after stating the facts). My Lords, I shall mention first, in order to put it aside, one argument put forward by 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 Act. 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 Act had arisen: in other words, that the Crown had, under 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.

Now, 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 gratia*, as that compensation may be fixed by the Losses Commission, a sufficient offer and an answer to all demands?

My Lords, 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 on the powers of the Crown in virtue of the prerogative.

I do not think it necessary to examine and comment on the

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H. L. (E.) various cases cited. The foundations of the contention are to be found in the concessions made in the speech of Mr. St. John in *Hampden's Case* (1), and in the opinion of the consulted judges in the *Saltpetre Case* (2)—I do not quote them, for they are fully quoted in the judgment of the Courts below—and in the opinions of the learned judges in *In re A Petition of Right*. (3) The most that could be taken from them is that the King, as *suprema 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 give 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 the 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 analysed the documents 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 acquisition 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 a 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 shall refer to the statutes presently, but, speaking generally, what can be gathered from the records as a matter of

(1) 3 How. St. Tr. 825.

(2) 12 Rep. 12.

(3) [1915] 3 K. B. 649.

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. My Lords, 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 gratia*. 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 the case of *In re A Petition of Right*.<sup>(1)</sup> 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 the case of *In re A Petition of Right*.<sup>(1)</sup> This, however, is immaterial, for *In re A Petition of Right* (1) is not binding on this House, and it would have been equally proper for the learned Master of the Rolls, Sir Charles Swinfen Eady,

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H. L. (E.) and for Warrington L.J., 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.

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Now the view which I think prevailed in *In re A Petition of Right* (1) was that the prerogative gives a 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 the cases of *Wheaton v. Maple* (2) and *Coomber v. Berks Justices* (3), 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 could 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.

(1) [1915] 3 K. B. 649.

(2) [1893] 3 Ch. 48, 64.

(3) 9 App. Cas. 61, 66.

I have read very carefully and considered the judgments delivered in *In re A 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, date 1757, we find 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, it 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 exigence of the service shall require," and,

(1) [1915] 3 K. B. 649.

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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 April 29, 1803, Napoleon being First Consul for life, and 43 Geo. 3, c. 55, June, 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 being still 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 authorized permanent acquisition, and it proceeded to provide for temporary taking, using the old phrase "for such time as the exigence of the public service shall 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 such time as the exigence of the public service shall require." 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 *In re A 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 authorizing 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 Act of 1914, the Act under the powers of which the Crown professed 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

(1) [1915] 3 K. B. 649.

at the Defence of the Realm Act in view of the law as it stood previous to its passing. The Defence of the Realm Consolidation Act, 1914, passed on November 27, 1914, declares by s. 1, sub-s. 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. Sub-sect. 2 says that any such regulations may provide for the suspension of any restrictions on the acquisition or user of land . . . under the Defence Acts, 1842 to 1875. Pursuant to this Act a Regulation was issued on November 28, 1914, which empowered the competent naval or military authority, or any person authorized by him, "where 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 land, and (sub-s. (b)) to take possession of any buildings. It is clear that under these sub-sections the taking possession of De Keyser's Hotel was warranted, but there was no necessity for the public safety or 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 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 the case of *Newcastle Breweries Co. v. Rex* (1), 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

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in the event of non-agreement as to value was not. It will have been noticed that the Regulation which authorizes 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, etc., 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, etc."

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 amount 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 quocunque 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 affirmed, and the Appeal dismissed with costs.

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LORD ATKINSON. My Lords, the facts have been already stated by my noble and learned friend who has preceded me. If anything 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 Regulation in force on May 1, 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 May 3 and 5, 1916.

In only three ways, it would appear to me, could the respondents resist or oppose the action of the Crown: (1.) By physical force—which is, of course, impossible; (2.) By immediate proceedings at law; and (3.) by protest. They adopted the last named of these methods, but, subject to that, 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 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 (i.e., the letter of May 1, 1916). Possession



H. L. (E.) 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.

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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 respondeat superior does not apply to the Crown where a 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 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, held that the Crown could 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. And several authorities had been cited to support this view. H. L. (E.)

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 Lord Justice 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* (1) Bowen L.J., as he then was, said:—

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“Actions for use and occupation, according to the better opinion, have been confined to the class of cases where defendant is not a trespasser setting up an adverse title, and where there are no circumstances that negative the implication of a contract: see *Churchward v. Ford* (2), per Pollock C.B.; *Birch v. Wright*. (3) No doubt the mere enjoyment by one man of another man's property, real or personal, may be had 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, the purchase of which subsequently goes off. In *Howard v. Shaw* (4) Parke B. said:—

“If the defendant had entered under an agreement for a

(1) 24 Ch. D. 439, 461.

(3) (1786) 1 T. R. 378.

(2) 2 H. & N. 446.

(4) (1841) 8 M. & W. 118, 122.

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lease, there is no doubt he would have been a tenant at will until the lease was granted. Here it may be assumed that he entered into possession under the agreement for sale, which was to have been carried into effect by the conveyance. . . . I quite agree, however, that while the agreement subsisted, the defendant was not bound to pay a compensation for the occupation of the land, because the contract shews that he was to occupy without compensation . . . but still he was tenant at will. When the agreement went off, he still continued tenant at will ; but after that, there was nothing to shew that he was not to pay a compensation for his occupation, because the stipulated compensation, by payment of the purchase money, was at an end. From that time, therefore, he became liable to be sued for such compensation, in an action for use and occupation."

Alderson B. gave judgment to the like effect, as also did Palles C.B. in *Markey v. Coote*. (1)

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 an agreement binding at law to pay compensation for the occupation can be inferred, in face of the distinct refusal of Captain Coles in his letter of May 1, 1916, to pay any compensation whatever ex debito, but merely ex gratia.

In *Churchward v. Ford* (2) Pollock C.B. in delivering judgment 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 *Hellicr v. Silcox*. (3) 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

(1) (1876) I. R. 10 C. L. 149.

(2) 2 H. &amp; N. 446, 448.

(3) (1850) 19 L. J. (Q. B.) 295.

contract substituted. Here the defendant was in possession claiming title under Mrs. Foss with whom he in fact contracted. It cannot therefore 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 whom Pollock C.B. mentioned than it does that of a person entering with the permission of the owner of the premises. I now turn to the authorities relied upon by the Court of Appeal.

The first of these is the case of the *Marquis Camden v. Batterbury* (1), on appeal from the common pleas. 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, 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 plot 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 received 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, or 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 *Levi v. Lewis* (2), affirmed on appeal to the Exchequer

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(1) (1860) 7 C. B. (N. S.) 864.

(2) (1859) 6 C. B. (N. S.) 766.

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(1) (1861) 9 C. B. (N. S.) 872.

(2) 6 C. B. (N. S.) 770.

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*. (1) In reference to this case Bowen L.J. in *Phillips v. Homfray* (2) 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 had taken possession of and enjoyed it, an action for use and occupation under the statute has been upheld: see *Hellier v. Sillcox*. (1) 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 follow the passages as to the more correct view already cited. The two facts: (1.) that the Crown, in my view, did not enter into possession with the free leave and consent of the respondents but by the coercion of a superior power; and (2.) that the Crown, when it did, through its officers, enter into possession absolutely refused to acknowledge any legal liability to pay compensation in respect of the use and enjoyment of the hotel, fundamentally distinguish 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, or 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 respondent's hotel.

The late Master of the Rolls in the following pregnant

(1) 19 L. J. (Q. B.) 295.

(2) 24 Ch. D. 439, 461.

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H. L. (E.) passage of his judgment put a rather unanswerable question.  
He said :—

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“Those powers which the executive exercises without Parliamentary authority are comprised under the comprehensive term of the 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 and provisions 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 on 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 of 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—and 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 applies the test suggested in Bacon's Abridgement, 7th ed., vol. vii., 462, quoted, apparently, with approval by Jessel M.R. in *Ex parte Postmaster-General* (1) or that laid down by Lord Lindley in *Wheaton v. Maple* (2), 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 both 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 commissions issued in early times, in order to determine what sums were paid *ex gratia* where lands were taken by the Crown or its officers for the defence of the realm, and the occupation of them connected

(1) (1879) 10 Ch. D. 595, 601.

(2) [1893] 3 Ch. 48, 64.

therewith by the military. The conclusion, as I understand it, is this: 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.

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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 do the very things the statutes empowered the Crown to do, but free from the conditions and restrictions imposed by the statutes.

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 these provisions, and by virtue of its prerogative do the very thing the statutes 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 think the word "merged" is happily chosen. I should prefer to say that when such a statute, expressing the will and intention of the King and of the three estates of the realm, is passed, 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,



H. L. (E.) and that its prerogative power to do that thing is in abeyance. 1920  
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 Lord Atkinson. Whichever mode of expression be used, the result intended to be indicated is, I think, the same—namely, 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 by it 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 of 1842, which is really the culmination of the legislation passed from 1800 downwards, enacts: what the Defence of the Realm Consolidation Act of 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, sub-s. 2, of the Defence of the Realm Consolidation Act, 1914 (6 Geo. 5, c. 8), passed on November 27, 1914, the two previous statutes (4 & 5 Geo. 5, c. 29, and 4 & 5 Geo. 5, c. 63) are repealed, but it is provided that nothing in that repeal shall affect any orders made thereunder, and that all such Orders in Council shall, until altered or revoked by an Order in Council under this Act (i.e., 5 Geo. 5, c. 8), continue in force and have effect as if made under the latter Act.

By s. 1, sub-s. 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 Regulations, and in particular against any of the provisions and Regulations designed for the five particular purposes there mentioned. The Regulations must be designed to secure the public safety and defence of the realm. Sub-s. 2

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 power 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 sub-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 of 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 building or other hereditament should be authorized 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, as it stood, by the Crown in the course of the late war, 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

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adequate for the occasion. It is apparently with this view that sub-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. The words of sub-s. 2, moreover, are "restrictions on the acquisition or user of land." When those restrictions are examined it is, in 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 a condition precedent to its acquisition. There is nothing in the statute to suggest that the liability to pay is to be affected or 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 sub-s. 2, be ultra vires. Neither the public safety nor the defence of the realm requires that the Crown should be relieved of a legal liability to pay for the property it takes from one of its subjects. The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation. Bowen L.J. in *London and North Western Ry. Co. v. Evans* (1) said: "The Legislature cannot fairly be supposed to intend, in the absence of clear words shewing 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, of course, override or disregard this ordinary principle . . . if it sees fit to do so, but, it is not likely that it will be found disregarding it, without plain expressions of such a purpose." There is not in the Act of 1914 or in the Regulation framed under it any indication of such a confiscatory purpose.

The Regulations 2, 2A, do not expressly suspend any restrictions on the acquisition of or user of land imposed by the Defence Act of 1842. The Regulations commence with

(1) [1893] 1 Ch. 16, 28.

the statement that the enjoyment of property will be interfered with as little as may be permitted by the exigencies 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 executing the Regulations shall, in carrying them into effect, observe these general principles. Thus by Regulation 2 it is further provided that the Naval and Military Authority (defined in Regulation 62); or any person duly authorized 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 of 1842; for instance, he may take possession of any land, construct military roads thereon, 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 do any other act involving interference with 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 Regulation 2a 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 Regulation 2b—namely, that where any goods, the possession of which has been so taken, are required

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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 therein 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 of 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 the owners therefor. The fact that no provision to a contrary effect has been introduced into these Regulations in reference to real property, while one is introduced touching goods acquired, suggests, I think, that the provisions of the Defence Act of 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 Defence of the Realm (Acquisition of Land) Act, 1916 (6 & 7 Geo. 5, c. 63). First, because in its first section it recognizes 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 it enables this department to continue in possession of the land for any period not exceeding two years after the termination of the war. And, second, 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 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 has 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 respondent's 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 word "temporary"—"temporary use," "temporary occupation." What does the word "temporary" mean in such a connection ? It might cover years, yet mean 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 could 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 ; so that the word "temporary" would in the result mean in most cases of this kind the duration of the war, which might be years.

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 *Reg. v. Doutré* (1) and *Windsor, &c., Ry. Co. v. Reg.* (2), there is no valid distinction between a sum due under a contract or grant made by or on behalf of the Crown as

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(1) (1884) 9 App. Cas. 745.

(2) 11 App. Cas. 607.

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 1920 a liability, due for the lawful and authorized use and  
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 GENERAL- behalf, of the lands or buildings of a subject. Both seem  
 v. equally untainted by tort, both equally untouched by the  
 DE principle that the King can do no wrong.  
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I therefore think that the appeal fails, that the judgment  
 Lord Atkinson. of the Court of Appeal was right and should be affirmed, and  
 this appeal be dismissed with costs.

LORD MOULTON. My Lords, the present appeal is in the  
 matter of Petition of Right presented by De Keyser's Royal  
 Hotel, Ld., 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  
 occupation, and pleads that it was an exercise of the Royal  
 Prerogative, and gave no right of compensation.

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 April 18, 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 suppliants' 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 :—

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"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 of 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 gratia* 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 March 31, 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 loss and damage sustained by them by reason of interference with their property or business in the United Kingdom through



H. L. (E.) the exercise by 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.

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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 under 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 undoubtedly 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 in the present case might be, to my mind, 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 May 1, 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.

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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 typewriters. 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

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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 particularize 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:—

"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 bye-laws, or any other power under the Defence Acts, 1842 to 1875, or the Military Lands Acts, 1891 to 1903."

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 authorized 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, etc., to be taken. It contemplates in the first instance voluntary purchase, but, if that cannot be arranged, then the lands, etc., 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.

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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 lex* 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 records 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. H. L. (E.)

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 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 as I have already said 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

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 1920 " the compensation to be paid, either for the absolute purchase  
 ATTORNEY- of such lands, buildings, or other hereditaments, or for the  
 GENERAL possession or use thereof, as the case may be."

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 DE This Act was not limited either in time or place, and with  
 KEYSER'S small modifications, which are not material for our present  
 ROYAL 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 than 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 it possessed under the prerogative, and which cover all that can be necessary for the defence of the nation, and which are moreover accompanied by safeguards to the individual which 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 purports to take away any right already acquired by the suppliants, and, if it modifies in any way the quantum of the compensation, that is a matter for the tribunal which will 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.

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LORD SUMNER. My Lords, 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 gratia 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



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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* (1); 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 an action for conversion would lie against the servant and for money had and received against the company: cf. *Smith v. Hodson*. (2) 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,

(1) (1846) 15 M. &amp; W. 444, 448.

(2) (1791) 4 T. R. 211.

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.

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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 April 29, 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 were in fact exercised.

To begin with 1914, the question 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 November 27, 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. Now 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,

H. L. (E.) 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.

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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. Sect. 1, sub-s. 1, provides for the first kind; s. 1, sub-s. 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 Regulation 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 Regulation 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 authorized? It is true that it authorizes the competent naval or military authority to do the above-mentioned things "for the purpose of securing the public safety of 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. (1) 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 sub-section, couched as it is in general terms only, to be construed as authorizing the Crown to do by Regulation what the Legislature itself has already fully provided for by

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(1) (1915) 84 L. J. K. B. 1961, 1963.

H. L. (E.) 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.

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The next question must be, is the Defence Act, 1842, with the other Defence Acts, adequate to enable the Crown to effect for the purpose of the defence of the realm such an object 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 spent in negotiating for a rent, and the parties got as close together as 19,000*l.* and 17,500*l.*, 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 1916, 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 Regulation 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, (see *New Windsor Corporation v. Taylor* (1)), 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 Regulation 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 ;

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(1). [1899] A. C. 41, 49.

H. L. (E.) 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 two hundred years.

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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?

My Lords, 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 Regulation 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 case of *The Zamora*. (1)

(1) [1916] 2 A. C. 77.

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.

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H. L. (E.) As to the judgment in *The Zamora* (1), 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 it. 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, second, that, if on comparison of the municipal laws of different countries the power of requisitioning was found to be exercisable in some cases with compensation and in some without (of which latter class this country was an example: p. 100), 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* (1) 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*, as it is now called, for obvious reasons meagrely reported as to the facts under the name of *In re A Petition of Right* (2), 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

(1) [1916] 2 A. C. 77.

(2) [1915] 3 K. B. 649.

*Shoreham Case* (1) were assumed to have been analogous to the case of raising bulwarks. H. L. (E.)

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* (2) 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.

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(2) [1916] 2 A. C. 77.

(3) 12 Rep. 12.

H. L. (E.) My Lords, I think that the judgment of the Court of  
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 affirmed.

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LORD PARMOOR. My Lords, 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 restate 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.

On May 8, 1916, Mr. Fane, of the Office of Works, attended at the hotel to take over possession from Mr. Whinney, who delivered possession by giving the keys to Mr. Fane. Mr. Whinney protested against the proceedings, and only surrendered possession under protest. It was stated that the Office of Works did not recognize any claim for occupation rent, and required that any claim for compensation should be sent to them for transmission to the "Defence of the Realm Losses Commission," and that the premises had been commandeered for military purposes under the Defence of the Realm Acts. It is contended by the appellant that compensation, if payable at all, is only payable ex gratia at the discretion of the Commission, and not as a matter of legal claim. This Commission was appointed to inquire and report to the Treasury with regard to claims for direct and substantial loss and damage "in cases not otherwise provided for." In my opinion the case under appeal is a case "otherwise provided for," and therefore a case which the Commission would have no jurisdiction to entertain.

On February 14, 1917, the respondents presented a Petition of Right, alleging that Mr. Whinney had delivered up possession of the hotel to representatives of the Crown, and that the use and occupation thereof by the Executive Government was by

permission of respondents, and they claimed a sum as rent in respect thereof. Having come to the conclusion that the representatives of the Crown took possession under rights conferred by statute, it is not necessary to determine whether or not there was any use and occupation of the hotel by permission of the respondents. The respondents further claimed that they were entitled to a fair rent for use and occupation by way of compensation under the Defence Act, 1842, and it is under this head that a declaration had been made by the Court of Appeal in their favour. On October 15, 1917, the Attorney-General filed his answer and plea, on behalf of His Majesty, traversing the allegation in the petition that Mr. Whinney voluntarily delivered up possession of the hotel to the representatives of the Crown, and that the Crown's use and occupation of the hotel was by permission of the respondents, and pleading that such possession was properly and lawfully taken by virtue of His Majesty's Royal Prerogative, as well as by virtue of the powers conferred by the Defence of the Realm Consolidation Act, 1914, and of the Regulations issued thereunder, and that His Majesty had acquired no right in or over the premises, beyond the right to take and use the same for so long as might be necessary for securing the public safety in the defence of the realm during the continuance of war. Peterson J. dismissed the petition with costs, but this judgment was reversed in the Court of Appeal, and a declaration made that the respondents were entitled to a fair rent for use and occupation by way of compensation under the Defence Act, 1842.

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

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H. L. (E.) 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.

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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 gradually curtailed, as a settled rule of law has taken the place of an 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 of 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 generalization 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. Whinney 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 the hotel, 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 such lands, buildings or other hereditaments shall be so 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

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H. L. (E.) 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.

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The precedents on which the appellant relies in support of his appeal are *Hampden's Case* (1); *The Saltpetre Case* (2); *Hole v. Barlow* (3); and *The Zamora*. (4) No one would dispute the high character of the arguments of Mr. St. John against the Crown in the case of ship money, 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 L.J., 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 provideth 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 care for the defence of the Kingdom belongeth inseparably to the Crown." There is no need to question the accuracy of this

(1) 3 How. St. Tr. 825.

(2) 12 Rep. 12.

(3) 4 C. B. (N. S.) 334.

(4) [1916] 2 A. C. 77.

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* (1) 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 8 Ed. 4, 23. And in such case 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 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 H. 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

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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 respondents 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 authorizes everyone of the King's subjects under the conditions mentioned to enter upon land for the making of bulwarks, etc., 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 L.J. 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 decisions in these cases do not, in my opinion, assist to solve the questions raised in this appeal.

*The Zamora* (1) 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* (2) 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

(1) [1916] 2 A. C. 77.

(2) (1811) Edw. 311.

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* (2) 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 gratia*. Consequently a search was made with the result stated in the judgment of the Master of the Rolls. "The result of the searches which have been made is that it does not appear that the Crown has ever taken subject's 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

(1) [1915] 3 K. B. 649.

(2) 4 C. B. (N. S.) 345.

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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 November 24, 1668, and on December 22, 1688, there are two ordinance 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 Bishopp's hall." Both these minutes appear to relate to a case of temporary use and occupation. On September 4, 1805, a letter was written urging the necessity of obtaining the mills at Cheshunt for purposes of increasing the supplies of gunpowder 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 gunpowder 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, authorizing 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 a 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 a 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 June 20, 1813, a report was made on the claims of a 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 gateway 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 the respondents for temporary use and occupation during war without the payment of compensation or by referring the respondents to a Commission which could only make grants "ex gratia" 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. I 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 principle 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 the land and buildings of the respondents, bring the case within the above principle. It would be an untenable proposition to suggest that Courts

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H. L. (E.) 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 Abridgement, 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 statutory 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 exigence of the public service may require. Sects. 11 and 12 provide compensation either for the purchase of land or for its temporary

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use. In 1842 the Defence of the Realm 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. Sect. 16 empowers the principal officers of Her Majesty's Ordnance to treat and agree with the owner or owners of lands, 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. Sect. 19 enacts that if bodies or other persons thereby authorized to contract on behalf of themselves or others or other person or persons interested in any such lands, buildings, or other hereditaments, 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 exigence 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.

Sect. 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

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Sect. 34 empowers the principal officer of Her Majesty's Ordnance to bring actions, suits, or other proceedings, provided that in all such actions, suits, 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 respondents 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 the 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 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 byelaws 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 authorized 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 Regulation 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 Regulation 62. Nor is any such provision necessary. Compensation was already assured under statutory enactment. Regulation 2B 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.

My Lords, I agree in the view expressed by Warrington L.J. that the Defence Acts, 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 adapt the exercise of the powers conferred by the Defence Act of 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 to the public: *Attorney-General v. Horner* (1); *London and North Western Ry. Co. v. Evans*. (2) 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

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(1) (1884) 14 Q. B. D. 245.

(2) [1893] 1 Ch. 16.



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 v. judgment of the Court of Appeal in that case, but when that  
 DE case came before your Lordships' House, an arrangement was  
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The appellant in the statement of contentions tabled in the appellant's case, claimed "that the Legislature had, by the Defence of the Realm (Acquisition of Land) Act, 1916, recognized 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 time, 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 May 9, 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 Head No. 4 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. This 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.

My Lords, in my opinion, the appeal should be dismissed with costs.

*Order of the Court of Appeal affirmed, and appeal dismissed. The costs incurred by the respondents in respect of the appeal to be paid to them in the manner directed by 23 & 24 Vict. c. 34.*

*Lords' Journals, May 10, 1920.*

Solicitor for the appellant : *Treasury Solicitor.*

Solicitors for the respondents : *Miller & Smiths.*

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