No. 16-1466

In the United States Court of Appeals for the Sixth Circuit

KEVIN BROTT; KATHALEEN BONDON; LOUIS CHURCHWELL; PHARQUIETTE CHURCHWELL; FREDRICKS CONSTRUCTION COMPANY; KAREN FRISCO; PATRICIA GREEN; VERONICA HARWELL-SMITH; RICKEY HOLDEN; CAROLYN HOLDEN; ROBERT JONES; JEREMY KEITH; JOEL F. KOWALSKI; SHARON KOWALSKI; THERESA LOPEZ; ILEINE MAXIN; THOMASINE MESHAWBOOSE; THOMAS NAVARINI; LUIS SANTILLANES; YOLANDA SANTILLANES; WESTSHORE ENGINEERING & SURVEYING, INCORPORATED; 2017 8TH, LLC; 2170 SHERMAN, LLC,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids, No. 1:15-cv-00038.
The Honorable **Janet T. Neff**, Judge Presiding.

BRIEF OF PLAINTIFFS-APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-1466 Case Name: Brott, et al. v. United States

Name of counsel: Mark F. (Thor) Hearne, II

Pursuant to 6th Cir. R. 26.1, Kevin Brott, et al.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on April 28, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Mark F. (Thor) Hearne, II

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

A. Supreme Court Decisions

B. Lower Federal Court Cases

State Cases

English Cases and Statutes

Constitutional Provisions

Statutes and Rules

Other Authorities

A. Founding Era Documents

B. Law Review Articles

C. Treatises and Other Authorities

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This appeal arises at the crossroads of the rule of law, the separation of powers and sovereign immunity. The constitutional issues this appeal presents include what Chief Justice Roberts described as "the constitutional birthright of Article III courts."[1] Oral argument will assist the Court and parties refining these important constitutional issues.

[1] See *Executive Benefits Ins. Agency* v. *Arkison*, 134 S.Ct. 2165 (2014), Oral Argument Trans., p. 51, statement of Chief Justice Roberts.

STATEMENT OF JURISDICTION

Twenty-three Michigan landowners filed a three-count complaint in the Western District of Michigan making a Fifth Amendment claim for "just compensation" and asking the district court to declare our Constitution guarantees these owners the right to trial by jury and access to an Article III court. The district court's jurisdiction was invoked under three statutes: 28 U.S.C. 1346 (the Little Tucker Act); 28 U.S.C. 1331 (granting the district court "original jurisdiction of all civil actions arising under the Constitution…."); and, 28 U.S.C. 2201 (the Declaratory Judgment Act).

District Judge Neff dismissed the landowners' complaint on March 28, 2016, concluding the district court lacked subject matter jurisdiction. The landowners filed a timely notice of appeal eleven days later on April 8, 2016.

Title 28 U.S.C. 1291 grants this Court appellate review of the district court's federal question and declaratory judgment decisions.[2] Title 28 U.S.C. 1295(a) provides "the Federal Circuit shall have exclusive jurisdiction of an appeal from a final decision of a district court … if the jurisdiction of that court was based in

[2] Section 1291 provides, "the courts of appeal (other than the … Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts … . The jurisdiction of the … Federal Circuit shall be limited to the jurisdiction described in Sections 1292(c) and 1295 … ."

whole or in part on Section 1346." The Little Tucker Act claim was, thus, separately appealed to the Federal Circuit.[3]

[3] See *Investment Co. Inst.* v. *Bd. of Gov. of Federal Reserve*, 551 F.2d 1270, 1282 (D.C. Cir. 1977) ("We would expect competent counsel to file petitions [for appeal] in both courts, or at least in the court of appeals if there is any doubt as to the appropriate forum for judicial review.").

STATEMENT OF ISSUES

1) Does 28 U.S.C. 1331 grant the district court jurisdiction of these Michigan landowners' Fifth Amendment "civil action arising under the Constitution?"

2) May Congress deny these Michigan owners access to an Article III court in which to adjudicate their Fifth Amendment right to compensation without violating the separation of powers?

3) Does the Seventh Amendment guarantee these Michigan landowners the right to trial by jury when the United States takes their property in violation of the Fifth Amendment?

STATEMENT OF THE CASE

This lawsuit is a taking case by Michigan landowners seeking compensation for property the federal government took from them in violation of the Fifth Amendment. The Fifth Amendment requires the United States to pay owners when it takes their property.[4] To vindicate their constitutional right these owners filed a three count complaint in the Western District of Michigan.

Count one invokes the district court's jurisdiction under the Little Tucker Act which provides "(a) district court shall have original jurisdiction … of … (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution…." The owners invoked the district court's jurisdiction under this provision but plead the provision limiting the district court's jurisdiction to takings less than $10,000 is unconstitutional because (if the Court of Federal Claims (CFC), which is an Article I tribunal, is granted exclusive

[4] See *Preseault* v. *Interstate Commerce Commission*, 494 U.S. 1 (1990) (*Preseault I*); *Preseault* v. *United States*, 100 F.3d 1525 (Fed. Cir. 1996) (*en banc*) (*Preseault II*); and *Toews* v. *United States*, 376 F.3d 1371 (Fed. Cir. 2004) (holding that when federal government converts abandoned railroad right-of-way easements into public recreational trails the Fifth Amendment requires the government to justly compensate the owner of the fee estate). Had the government not invoked §1247(d) of the National Trails Act, these owners would hold unencumbered title to their land. See *Michigan DNR* v. *Carmody-Lahti Real Estate*, 699 N.W.2d 272, 288-89 (Mich. 2005) (when railroad conveyed abandoned right-of-way easement for recreational trail the easement terminated and the owners held unencumbered right to possess the land.). See also *Marvin M. Brandt Rev. Tr.* v. *United States*, 134 S.Ct. 1257, 1265 (2014) ("if the beneficiary of the [railroad right-of-way] easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land").

jurisdiction of claims greater than $10,000) these owners are denied access to an Article III court in violation of the separation of powers. These owners also challenged 28 U.S.C. 2402 which denies the right to trial by jury in a claim brought under the Tucker Act.[5]

Count two is brought under the district court's federal question jurisdiction. Title 28 U.S.C. 1331 states, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, law, or treaties of the United States." The owners' Fifth Amendment lawsuit for compensation is a civil action arising under the Constitution.

Count three is brought under the Declaratory Judgement Act, 28 U.S.C. 2201, providing, "any court of the United States … may declare the rights and other legal relations of any interested party seeking such a declaration …." These owners asked the district court to declare the Constitution guaranteed them access to an Article III court in which to vindicate their Fifth Amendment right to compensation with the right to trial by jury.

The government moved to dismiss claiming the district court lacks subject matter jurisdiction because the Tucker Act confers "exclusive jurisdiction" upon the CFC for Fifth Amendment claims greater than $10,000 and there is no statutory

[5] Section 2402 provides, "[A]ny action against the United States under section 1346 shall be tried by the court without a jury … ." By its express terms §2402 does not extend to actions brought in district court under §1331.

waiver of sovereign immunity granting the district court jurisdiction under the court's §1331 federal question jurisdiction. Gov't Motion to Dismiss, RE 29, Page ID#590-91. District Judge Neff embraced the government's argument and dismissed these owners' complaint holding the district court lacked subject matter jurisdiction. Decision, RE 36, Page ID#935-36. This appeal followed.

Judge Neff's dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and (6) is reviewed *de novo*. For purposes of this appeal, the facts pled by these Michigan owners are undisputed.

> "When a decision on subject-matter jurisdiction concerns pure questions of law or application of law to the facts, this court conducts a *de novo* review." Because the district court's decision was based on pure legal questions and the facts are undisputed for purposes of this appeal, we do not apply the more deferential standard applicable to the district court's factual findings.
>
> *Elgharib* v. *Napolitano*,
> 600 F.3d 597, 600 (6th Cir. 2010).[6]

[6] Quoting *Mikulski* v. *Centerior Energy Corp.*, 501 F.3d 555, 560 (6th Cir. 2007) (en banc).

SUMMARY OF THE ARGUMENT

When the federal government violates the Fifth Amendment by taking private property without compensating the owner Congress may not abrogate the owner's Seventh Amendment right to trial by jury nor may Congress deny an owner the right to adjudicate his Fifth Amendment right to compensation in an Article III court.

The Fifth Amendment is a self-executing constitutional guarantee imposing a "categorical duty" upon the federal government to justly compensate an owner when the government takes the owner's property. As a self-executing constitutional right, the Fifth Amendment does not depend upon a subsequent statutory waiver of sovereign immunity by Congress. And, because these owners' right to compensation is founded directly upon the Constitution, Congress may not by statute abrogate or limit this right by relegating adjudication of their constitutional claim to an Article I legislative tribunal without trial by jury.

Furthermore, separation of powers prevents Congress from denying Article III courts jurisdiction to hear a Fifth Amendment taking claim. The Seventh Amendment guarantee of trial by jury in civil actions is also a self-executing constitutional guarantee that cannot be abrogated by Congress. Neither the text of the Seventh Amendment nor the history of its adoption support the notion that the

right to trial by jury in Fifth Amendment actions depends upon the legislative grace of Congress.

Because Congress may not constitutionally deny these Michigan owners the ability to adjudicate their Fifth Amendment right to compensation in an Article III court with trial by jury, the doctrine of constitutional avoidance directs the jurisdictional statutes be read as granting the district court "original jurisdiction" over these Michigan owners' Fifth Amendment claim as "a civil action arising under the Constitution." See 28 U.S.C. 1331. But, if the jurisdictional statutes are read to deny these owners access to an Article III court and to deny them the right to a jury trial, those provisions of the Tucker Act are unconstitutional.

Either way our Constitution guarantees these Michigan owners the right to vindicate their Fifth Amendment right to be justly compensated in an Article III court with trial by jury. And Congress may not deny these constitutionally-guaranteed rights.

ARGUMENT

I. Title 28 U.S.C. 1331 vests the district court with "original jurisdiction" over "all civil actions arising under the Constitution" which includes these owners' Fifth Amendment claim for compensation.

> *The district courts shall have original jurisdiction of all civil actions arising under the Constitution ... .*
>
> 28 U.S.C. 1331

A. Article III courts have federal question jurisdiction of Fifth Amendment claims under §1331.

Article III §2 provides the "judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States ... ." Beginning with the Jurisdiction and Removal Act of 1875, Congress granted federal courts jurisdiction of all civil actions arising under the Constitution.[7] These Michigan owners' right to compensation arises directly from the Fifth Amendment not from a congressionally-enacted statute or contract. Because the Fifth Amendment is self-executing, no additional congressional waiver of sovereign immunity is necessary.

Section 1331 says the district court's "original jurisdiction" extends to "all civil actions arising under the Constitution." Yet the district court believed it lacked subject matter jurisdiction because the Tucker Act vests "exclusive jurisdiction" over claims greater than $10,000 in the Court of Federal Claims.

[7] 18 Stat. 470, Ch. 137 (March 3, 1875) (now codified as §1331).

Decision, RE 36, Page ID #934-35. The district court's unstated supposition is the Tucker Act grant of jurisdiction to the CFC implicitly nullified §1331's separate grant of federal question jurisdiction to the district court. This supposition is wrong.

B. The Tucker Act does not invalidate federal question jurisdiction of Fifth Amendment claims.

We begin with the text of the jurisdictional statutes.

The Little Tucker Act, 28 U.S.C. 1346(a)(2), provides:

> The district courts shall have original jurisdiction, concurrent with the [CFC], of: Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort ***.

The Big Tucker Act, 28 U.S.C. 1491(a)(1), provides:

> The [CFC] shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

When these provisions are read *pari materia* with §1331 these statutes grant concurrent not exclusive jurisdiction to the CFC for "civil actions arising under the Constitution." The Tucker Act's grant of jurisdiction to the CFC does not *displace* the district court's separate §1331 federal question jurisdiction. No provision of

the Tucker Act invalidates the separate grant of federal question jurisdiction found in §1331. And no statute says the CFC's jurisdiction of claims greater than $10,000 is "exclusive."

In *Bowen* v. *Massachusetts*, the Supreme Court observed:

> It is often assumed that the Claims Court has exclusive jurisdiction of Tucker Act claims for more than $10,000. *** *That assumption is not based on any language in the Tucker Act granting such exclusive jurisdiction to the Claims Court.* Rather, that court's jurisdiction is "exclusive" only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court.
>
> 487 U.S. 879, 910 n.48 (1988).[8]

To be sure, a number of circuits have said things like, "The 'Big Tucker Act' however vests exclusive jurisdiction in the Claims Court for all Tucker Act Claims that exceed $10,000." *Nat'l Ass'n of Counties* v. *Baker*, 842 F.2d 369, 373 n.3 (D.C. Cir. 1988).[9]

But the circuits holding the Tucker Act vests exclusive jurisdiction in the CFC made this statement in the context of lawsuits *founded upon statute or contract* not the *constitutionally-established* Fifth Amendment right to compensation. And these opinions did not consider whether §1331 separately

[8] Emphasis added.

[9] Citation to statute omitted.

granted the district court authority to hear civil actions founded *directly* upon the Fifth Amendment for which there is no need of a waiver of sovereign immunity.[10]

In *Wyodak Res. Dev. Corp.* v. *United States*, 637 F.3d 1127, 1130 (10th Cir. 2011), the Tenth Circuit, similar to *Bowen,* found "Although we have occasionally called the [CFC's] jurisdiction over such claims 'exclusive,' its jurisdiction is only exclusive over claims which no other federal court has the authority to hear. If there is an independent source of subject-matter jurisdiction over a claim against the United States, and some waiver of sovereign immunity other than the Tucker Act, a plaintiff is free to proceed in district court."[11]

The distinction between actions founded directly upon the Constitution and those founded upon statute or contract is critical and it goes back to *Marbury* v. *Madison*, 5 U.S. 137 (1803). Civil actions founded upon statute or contract may

[10] The district court's recourse to *Lenoir* v. *Porters Creek Watershed Dist.*, 586 F.2d 1081, 1088 (6th Cir. 1978), is misplaced. In *Lenoir* this Court recognized, "[t]he Fifth Amendment 'taking claim' arises under the Constitution,' and a remedy for a violation of this provision arguably does not require a waiver of sovereign immunity." *Id.* The Court further noted the constitutionality of the CFC's jurisdiction was "not considered by *Lenoir*." *Ibid.* And, while the Court found "a number of cases indicate that Congress has made the Court of Claims the exclusive and an adequate forum for the Fifth Amendment claims," this Court did not pass on the constitutionality of this scheme. Further, the cases *Lenoir* cited, such as *Duke Power* v. *Carolina Study Group*, 438 U.S. 59 (1978), involved statutory rights not actions founded upon the self-executing Fifth Amendment.

[11] Citation omitted.

require a waiver of sovereign immunity, but a claim founded upon the Fifth Amendment requires no waiver of sovereign immunity.

C. Constitutional avoidance counsels against construing the Tucker Act as granting exclusive jurisdiction of Fifth Amendment claims to an Article I tribunal.

If the Tucker Act is understood to deny an Article III court jurisdiction to adjudicate Fifth Amendment actions we run headlong into a dilemma because such a scheme is unconstitutional.[12] The CFC is an Article I legislative tribunal not an Article III court. Vesting exclusive jurisdiction to adjudicate Article III constitutional claims in the CFC violates the separation of powers.

Thus, this Court is at an impasse. On one hand it may find the Tucker Act does not grant exclusive jurisdiction to the CFC and hold the district court has federal question jurisdiction under §1331. This is a constitutionally-sound holding. Or, if this Court believes (as the district court did) that jurisdiction to adjudicate Fifth Amendment claims greater than $10,000 is vested exclusively in an Article I tribunal, this Court must confront the constitutional issue and declare the offending provisions of the Tucker Act unconstitutional.

The Supreme Court says judges should avoid declaring a statute unconstitutional when the statute can be interpreted to not invite a constitutional

[12] Congress can of course provide the CFC as an *alternative* tribunal if the owner agrees to waive his right to an Article III court. Congress could also establish the CFC as an Article III court.

confrontation. "Where possible [courts should] construe federal statutes so as 'to avoid serious doubt of their constitutionality.'" *Stern* v. *Marshall*, 564 U.S. 462, 477-78, (2011). "But that 'canon of construction does not give [us] the prerogative to ignore the legislative will in order to avoid constitutional adjudication.'" *Id.* at 478.[13]

A corollary to the principle of constitutional avoidance is severability. Should this Court read the Tucker Act as granting the CFC exclusive jurisdiction of all Fifth Amendment claims greater than $10,000 (and thereby denying owners access to an Article III court and trial by jury) it's not necessary to find the entire statutory scheme unconstitutional. Only the specific provisions abrogating the right to bring a Fifth Amendment claim in an Article III court with trial by jury are unconstitutional. See *Executive Benefits*, 134 S.Ct. at 2173. ("The conclusion that the remainder of the statute may continue to apply … accords with our general approach to severability. We ordinarily give effect to the valid portion of a partially unconstitutional statute so long as it 'remains fully operative as a law.'").[14]

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[13] Quoting *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 841 (1986) ("Where such 'serious doubts' [about constitutionality of a statute] arise, a court should determine whether a construction of the statute is 'fairly possible' by which the constitutional question can be avoided.").

[14] Quoting *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010), and *New York* v. *United States*, 505 U.S. 144, 186, (1992)).

D. The history of the Tucker Act and Claims Court demonstrate that, as to Fifth Amendment taking claims, the CFC's jurisdiction is concurrent not exclusive.

Before the Civil War lawsuits against the United States seeking money damages were rare. The antebellum federal judiciary devoted most of its energy to admiralty cases, regulation of interstate commerce and disputes about a national bank. See, *e.g.*, *United States* v. *Amistad*, 40 U.S. 518 (1841); *Gibbons* v. *Ogden*, 22 U.S. 1 (1824); and *McCulloch* v. *Maryland*, 17 U.S. 316 (1819). During this time few individuals sued the federal government because the federal government was selling, not taking, land and there were no federal entitlement programs such as we now have.

The Civil War changed this. Federal officials taking or destroying private property created a plethora of claims for compensation. Waging the Civil War also required the federal government to contract with private businesses and individuals. This gave rise to owners and contractors suing the federal government and federal officials.

Congress originally paid the federal government's obligations by passing private bills appropriating funds to pay specific obligations. This was a cumbersome and unjust procedure. John Quincy Adams, when he returned to Congress after serving as President, observed:

> There ought to be no private claims business before Congress. There is a great defect in our institutions by the want of a Court of Exchequer or a

> Chamber of Accounts. It is judicial business, and legislative assemblies ought to have nothing to do with it. One-half of the time of Congress is consumed by it, and there is no common rule of justice for any two of the cases decided. A deliberative Assembly is the worst of all tribunals for the administration of justice. [15]

The House Committee of Claims described the congressional procedures for claims adjudication as "a system of unparalleled injustice, and wholly discreditable to any civilized nation." William M. Wieck, *The Origin of the United States Court of Claims*, 20 Admin. L. Rev. 387, 392-93 (1968). Congress originally created the Court of Claims as an advisory body. It was not a positive experience. "All the inequality, uncertainty, capriciousness, and corruption commonly associated as defects with a regime of legislative justice, or injustice, characterized this period." Wieck, *supra.* at 397. Senator Browning described the Claims Court's judgments as "a mere mockery on justice" and because the court was a "child of Congress, the court was subject to congressional whim." *Id*.[16]

President Lincoln in his first State of the Union address said, "It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same, between private citizens."[17] In 1855 Congress

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[15] *Memoirs of John Quincy Adams* (Charles Francis Adams, ed.) (Philadelphia, 1874-1877, 12 vols.), VIII, 480 (entry of Feb. 23, 1832).

[16] Citing J.H. Toelle, "*The Court of Claims*," 24 Mich L. Rev. 675 (1926), and *Globe*, 37 Cong. 3 sess., 271, 303 (1863). See also Wheeler and Harrison, *Creating the Federal Judicial System*, Federal Judicial Center (3d ed. 2005).

[17] Annual message to Congress 1861.

empowered the Claims Court to award damages against the United States in actions arising from government contracts.[18] The 1875 Jurisdiction and Removal Act granted federal district courts federal question jurisdiction and in 1887 the Tucker Act expanded the Claims Court's jurisdiction and conferred concurrent jurisdiction in the federal district courts.[19]

But the Claims Court (and its successor the CFC) is not an Article III court but is an Article I legislative tribunal. Claims Court judges do not enjoy lifetime tenure nor are their salaries guaranteed. Further, the CFC is authorized to render advisory opinions. Issuing advisory decisions is incompatible with an Article III grant of "judicial Power." See *Chafin* v. *Chafin*, 133 S.Ct. 1017, 1023 (2013); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 533-34 (1962).

The Federal Courts Improvement Act of 1982 established the present-day CFC and Federal Circuit.[20] One of Congress's animating desires motivating creation of the CFC and Federal Circuit as courts with national jurisdiction was to achieve uniformity in decisions involving issues of federal law such as patents and government contracts. By contrast, when Congress drafted the Federal Tort

[18] Court of Claims Act, 10 Stat. 612.

[19] 24 Stat. 505.

[20] 96 Stat. 25.

Claims Act, it vested jurisdiction in local federal district courts with appeals to the regional circuits because tort claims involved issues of state law.[21]

While a single national court uniformly deciding unique issues of federal law may make sense for claims founded upon government contracts and federal entitlement programs, this rationale does not extend to Fifth Amendment claims. Property rights are defined by state law. State law "creates and defines the scope of the reversionary or other real property interests." *Preseault I*, 494 U.S. at 20 (O'Connor, J., concurring). In *Preseault*, Justice O'Connor explained:

> "In determining whether a taking has occurred, we are mindful of the basic axiom that [p]roperty interests *** are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[22]

Thus, the desire to exclude federal district courts and regional circuits from adjudicating exclusively federal issues, like government contract disputes, is a rationale that does not apply to Fifth Amendment taking claims involving state property law – a topic more familiar to local district court judges and the regional circuit judges than to judges sitting in a remote Washington DC forum.

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[21] 28 U.S.C. 1346(b).

[22] *Id.* (quoting *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1001 (1984), and *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 161 (1980)).

This observation further supports the conclusion that Congress did not intend to cut off the district court's concurrent jurisdiction over Fifth Amendment taking claims. Professor Roger Cramton noted:

> In land dispute cases, then, specific relief should be available in federal district courts. The availability of such an action [in district court] would provide the landowner with an easily accessible and inexpensive local forum. Moreover, the local federal district court would be ideally suited for determining the issues which arise in these cases, since these issues usually involve a blend of state land law and federal statutory law.[23]

Professor Cramton continued, "[t]he Court of Claims is a distant and unfamiliar tribunal, more expensive and time-consuming than is a local federal district court." *Id.* at 446.

Finally, no matter how one construes the Tucker Act, the district court wrongly dismissed the declaratory judgment action. Declaratory judgment under §2201 is not a claim for compensation. The owners' declaratory judgment claim asked an Article III district court to resolve the dispute between these statutory jurisdictional provisions and the Constitution. See *Marbury* v. *Madison*, 5 U.S. at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."). In *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 522 (1998), the Court held, "[T]he Declaratory Judgment Act 'allows individuals threatened with a

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[23] Roger C. Cramton, *Nonstatutory review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction and Parties Defendant.*, 68 Mich. L. Rev. 387, 447.

taking to seek a declaration of the constitutionality of the disputed governmental action before potentially compensable damages are sustained.'"[24]

II. The Constitution guarantees owners the ability to adjudicate their Fifth Amendment right to compensation in an Article III court.

"There is no liberty if the power of judging be not separated from the legislative and executive powers."

Alexander Hamilton,
Federalist, No. 78.[25]

Should this Court find the Tucker Act must be read as granting exclusive jurisdiction of all Fifth Amendment claims greater than $10,000 to the CFC, it then follows that this provision of the Tucker Act violates the separation of powers.

Separation of powers prohibits Congress from delegating exclusive jurisdiction to adjudicate Fifth Amendment taking claims to a non-Article III tribunal. And, unlike civil actions founded upon contracts or statutory entitlements, the Fifth Amendment is self-executing and founded directly upon the Constitution. Hence a Fifth Amendment claim for compensation does not depend upon a waiver of sovereign immunity and is not subject to, nor can it be abrogated by, statute.

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[24] Quoting *Duke Power*, 438 U.S. at 71 n.15.

[25] From *Federalist Papers*, C. Rossiter, ed. (1961), p. 466 (Hamilton was quoting 1 Montesquieu, *Spirit of Laws*, p. 181 (1748)).

A. Separation of powers prohibits Congress from conferring "judicial Power" on non-Article III tribunals.

> *Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches. *** We have not hesitated to invalidate provisions of law which violate this principle.*
>
> *Morrison* v. *Olson*,
> 487 U.S. 654, 693 (1988).

Congress may not grant "judicial Power" to another branch of government because doing so violates Article III and the separation of powers. And, when Congress violates separation of powers, individuals injured by this violation may vindicate this constitutional principle. Here Congress violated separation of powers when it purportedly delegated exclusive adjudication of Fifth Amendment actions to the CFC which is not an Article III court.

1. The authority to decide cases is the "constitutional birthright" of Article III courts which Congress cannot take away.[26]

"Article III establishes an independent Judiciary, a Third Branch of Government with the 'province and duty ... to say what the law is' in particular cases and controversies." *Marbury*, 5 U.S. at 177. The Founders understood "[a] Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." *United States* v. *Will*, 449 U.S. 200, 217-18

[26] See note 1, *supra*.

(1980). "As its text and our precedent confirm, Article III is 'an inseparable element of the constitutional system of checks and balances' that 'both defines the power and protects the independence of the Judicial Branch.'" *Northern Pipeline* v. *Marathon Pipeline Co.*, 458 U.S. 50, 58 (1982). Under "the basic concept of separation of powers, the judicial power can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto." *Bank Markazi* v. *Peterson*, 136 S.Ct. 1310, 1330 (2016) (Roberts, C.J., dissenting) (quoting *Stern*, 564 U.S. at 483).

When Congress impermissibly vests Article III "judicial Power" in a non-Article III tribunal, that delegation of judicial authority will be struck down as unconstitutional. See *Stern* and *Northern Pipeline*, *supra*. In *Executive Benefits*, 134 S.Ct. at 2172, the Court explained:

> [In *Stern*] Congress had improperly vested the Bankruptcy Court with the 'judicial Power of the United States,' just as in *Northern Pipeline*. Because '[n]o public right exception excuse[d] the failure to comply with Article III,' we concluded that Congress could not confer on the Bankruptcy Court the authority to finally decide the claim.[27]

[27] Citing *Northern Pipeline*, 458 U.S. at 85-86. A "public rights exception" is inapplicable here. The Fifth Amendment guarantee of compensation is a "private right," not a "public right." See *Crowell* v. *Benson*, 285 U.S. 22, 50 (1932) ("the distinction is at once apparent between cases of private right and those which arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."). See also *Northern Pipeline*, 458 U.S. at 68 ("The public-rights doctrine is grounded in a historically recognized distinction between matters that

In *Morrison* the Court explained it zealously guards the separation of powers.

> Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches. *** the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." We have not hesitated to invalidate provisions of law which violate this principle.
>
> 487 U.S. at 693.[28]

Chief Justice Roberts recently reminded us "Hamilton warned that the Judiciary must take 'all possible care to defend itself against [the] attacks' of the other branches." *Bank Markazi*, 136 S.Ct. at 1335 (Roberts, C.J., dissenting) (quoting Federalist No. 78). "The bedrock rule of Article III [is] that the judicial power is vested in the Judicial Branch alone. We first enforced that rule against an Act of Congress during the Reconstruction era in *United States* v. *Klein*." *Id.* at 1333 (citing *Klein*, 13 U.S. 128, 140-41 (1872)). Chief Justice Roberts explained, "Article III vested the judicial power in the Judiciary alone to protect against that

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could be conclusively determined by the Executive and Legislative Branches and matters that are 'inherently … judicial.'") (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929)). Determining the compensation an owner is due under the Fifth Amendment is not a "public right" because it is an "inherently judicial" responsibility. See *Monongahela Nav. Co.* v. *United States,* 148 U.S. 312, 327 (1893).

[28] Citing *Bowsher* v. *Synar*, 478 U.S. 714, 725 (1986) (citing *Humphrey's Executor*, 295 U.S. 602, 629-30) (1935), and quoting *Buckley* v. *Valeo*, 424 U.S. 1, 122, 123 (1976)).

threat to liberty. It defined not only what the Judiciary can do, but also what Congress cannot." *Bank Markazi*, 136 S.Ct. at 1333.[29]

Should the Tucker Act be read as denying Article III courts jurisdiction of these Michigan owners' Fifth Amendment claim and vesting adjudication of Fifth Amendment claims exclusively in an Article I tribunal, the Tucker Act becomes precisely the "legislative assumption of judicial Power" which separation of powers forbids.

2. Separation of powers protects these Michigan landowners' liberty and property.

The power granted the three branches of government was separated to protect individual liberty. Individuals injured by a violation of the separation of powers may vindicate this principle. The Supreme Court explained, "Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well." *Stern*, 564 U.S. at 483 (quoting *Bond* v. *United States*, 564 U.S. 211, 222 (2011)). Justice Scalia similarly observed, "The purpose of the separation and equilibration of powers in general … was not merely to assure effective government but to preserve individual

[29] Citing *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995), and quoting *INS* v. *Chadha*, 462 U.S. 919, 961 (1983) (Powell, J., concurring).

freedom." *Morrison*, 487 U.S. at 727 (Scalia, J., dissenting on other grounds). The Court explained "In the precedents of this Court, the claims of individuals – not of Government departments – have been the principal source of judicial decisions concerning separation of powers and checks and balances." 564 U.S. at 222-23.

In *Stern* Chief Justice Roberts explained:

> Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges. The colonists had been subjected to judicial abuses at the hand of the Crown, and the Framers knew the main reasons why: because the King of Great Britain "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence para.11.
>
> The Framers undertook in Article III to protect citizens subject to the judicial power of the new Federal Government from a repeat of those abuses. By appointing judges to serve without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive, but rather with the "[c]lear heads *** and honest hearts" deemed "essential to good judges."

564 U.S. at 482-83.[30]

[30] Quoting the Declaration of Independence, para. 11 and 1, *Works of James Wilson* 363 (J. Andrews, ed., 1896). See also *Commodity Futures*, 478 U.S. at 848 ("Article III, §1, serves both to protect 'the role of the independent judiciary within the constitutional scheme of tripartite government,' and to safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government.'").

The importance of this policy – an independent judiciary – is at its zenith when the dispute is between an individual and the federal government.

3. The Court of Federal Claims is not an Article III court.

The CFC is not an Article III court but an Article I tribunal. See Federal Courts Improvement Act of 1983 §171(a)[31] ("The court [of Federal Claims] is declared to be a court established under article I of the Constitution of the United States."). The Supreme Court noted, "*The Court of Claims is a legislative, not a constitutional court*. Its judicial power is derived not from the Judiciary Article of the Constitution, article 3, but from the Congressional power 'to pay the debts…of the United States,' article 1, §8, c.1." *United States* v. *Sherwood*, 312 U.S. 584, 771 (1941) (emphasis added).

The judges on the CFC, like the bankruptcy judges in *Northern Pipeline*, "do not enjoy the protections constitutionally afforded to Article III judges." *Northern Pipeline*, 458 U.S. at 60. Judges on the CFC are appointed for fifteen-year terms, can be removed by the Federal Circuit, and their salaries are not immune from diminution by Congress. See 28 U.S.C 172, 176.

Article III, §2 directs, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made … [and] to Controversies to which the United States shall be a

[31] Codified at 28 U.S.C. 171(a).

Party." Article III, §1, "provides that these federal courts shall be staffed by judges who hold office during good behavior, and whose compensation shall not be diminished during tenure in office." *Commodity Futures*, 478 U.S. at 847.

4. Adjudicating Fifth Amendment compensation is an "inherently judicial" endeavor.

Determining the compensation these Michigan landowners are due is an "inherently judicial" endeavor, not a matter for the Legislative or Executive Branch.

> By this legislation [specifying the amount of compensation landowners were to be paid] congress seems to have assumed the right to determine what shall be the measure of compensation. But, this is a judicial, and not a legislative, question. The legislature may determine what private property is needed for public purposes; that is a question of political and legislative character. But when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. *The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry*.
>
> *Monongahela*, 148 U.S. at 327.[32]

Monongahela further held, "The right of the legislature of the state by law to apply the property of the citizen to the public use, and then to constitute itself the judge of its own case, to determine what is the 'just compensation' it ought to pay

[32] Emphasis added.

therefor … cannot for a moment be admitted or tolerated under our constitution." 148 U.S. at 327-28.[33]

Delegating the exclusive adjudication of Fifth Amendment taking claims to an Article I legislative tribunal violates the separation of powers and is contrary to the Supreme Court's holdings in *Commodity Futures*, *Northern Pipeline*, *Chadha*, *Monongahela* and *Stern.*

B. "Sovereign immunity" does not excuse the federal government from its constitutional obligation to justly compensate these owners.

When the President does it, that means it's not illegal.

Richard Nixon[34]

The government and district court look to the age of Henry III seeking to excuse the federal government from accountability to an Article III court. The district court relied upon a talismanic incantation of "sovereign immunity" as though the concept is juridical garlic allowing the federal government to ward off accountability to an Article III court. The district court was wrong.

The notion of sovereign immunity is rooted in the nostrum *rex non potest peccare* (the King can do no wrong) and the divine right of kings. See George W.

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[33] Quoting *Isom v. Miss. Cent. R. Co.*, 36 Miss. 300 (1858).

[34] David Frost interview (1977), available at: <https://www.youtube.com/watch?v=HiHN3IJ_j8A> (last viewed May 29, 2016).

Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 Louisiana L. Rev. 476, 478-79 (1953).

> The whole concept of sovereignty; and the theory of the divine right of kings lent support for the proposition that the king was above the law – that he was in fact the law-giver appointed by God, and therefore could not be subjected to the indignity of suit by his subjects.

Our first Chief Justice, John Jay, expressed the Court's skepticism of sovereign immunity, "the whole nation [*i.e.*, the federal government] could in the peaceable course of law, be compelled to do justice, and be sued by individual citizens." *Chisholm* v. *Georgia*, 2 U.S. 419, 478 (1793). Sovereign immunity is not the magical elixir the district court supposed it to be.

1. The Constitution's guarantee of just compensation does not depend upon Congress waiving sovereign immunity.

Harvard Professor Richard Fallon noted the inevitable collision between the ancient notion of sovereign immunity and the rule of law. "Sovereign immunity has proved problematic from the beginning, and for an obvious reason. It simply does not mesh well with the rule of law, and the idea of *Marbury* v. *Madison* that our should be a government of laws not of men." Richard H. Fallon, Jr., *Claims Court at the Crossroads*, 40 Catholic U. L. Rev. 517. Professor Fallon continued, "The two traditions … – one embracing sovereign immunity and permitting only limited suability of government and the other rejecting sovereign immunity and treating review in an article III court as the norm – are inconsistent, at least in

terms of their underlying spirits and assumptions." *Id.* at 522-23. See also Guy I. Seidman, *The Origins of Accountability: Everything I Know about the Sovereign's Immunity, I Learned from King Henry III*, 49 St. Louis L. J. 393 (2005).

Justice Scalia and Bryan Garner observed, "Unsurprisingly, Americans do not take kindly to the notion that the sovereign can do no wrong. Nor to the notion that suit against the government should be entirely forbidden." Scalia and Garner, *Reading Law: The Interpretation of Legal Texts*, pp. 282-83. Scalia and Garner continued, "This rigidity [in applying sovereign immunity] made sense when suits against the government were disfavored, but not in modern times." *Id.* at 285.

This collision of the rule of law and sovereign immunity is easily resolved in favor of the rule of law. It is easily resolved here because it can be avoided in the first instance by recognizing the Fifth Amendment is self-executing – meaning the Fifth Amendment is *itself* a waiver of sovereign immunity – and therefore no additional statutory waiver of sovereign immunity is necessary. But, if we pursue the topic further, we quickly find modern jurisprudence does not recognize sovereign immunity to be the get-out-of-jail-free-card the district court thought it was. Harvard Professor Louis Jaffe noted, "judicial review is the rule. It rests on the congressional grant of general jurisdiction to the article III courts. It is a basic right; it is a traditional power and the intention to exclude it must be made specifically manifest." Louis L. Jaffe, *The Right to Judicial Review I*, 71 Harv. L.

Rev. 401, 432 (1958). See also Louis L. Jaffe, *The Right to Judicial Review II*, 71 Harv. L. Rev. 769 (1958).[35]

Applied here, Professor Jaffe's thesis holds the Tucker Act should not be read as denying Article III courts jurisdiction of Fifth Amendment taking claims because the jurisdictional statutes do not manifest a *specific intention* to deny Article III courts jurisdiction of Fifth Amendment taking claims. (We made this point above.)

But, even assuming the Tucker Act manifests a specific congressional intent to deny Article III courts jurisdiction of Fifth Amendment taking cases, Professor Jaffe notes there are "constitutional impediments" that prohibit Congress from denying Article III courts judicial review of executive or legislative action. Jaffe, 71 Harv. L. Rev. at 432. Separation of powers is such a "constitutional impediment."

The district court's conception of sovereign immunity is anathema to the founding principles upon which our nation was established. "Since the days of the Declaration of Independence, the keystone of American political thought has been responsible government, and the entire history of the American Revolution would

[35] Professor Jaffe's scholarship is favorably cited by Justice Scalia and the Supreme Court. See *Reading Law*, p. 283 n.8; *Schilling* v. *Rogers*, 363 U.S. 666, n.1 (1960); *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, n.40 (1984); *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, n.3 (1986); *B&B Hardware, Inc.* v. *Hargis Industries, Inc.*, 135 S.Ct. 1293, n.2 (2015); *Wellness Intern. Network, Ltd.* v. *Sharif*, 135 S.Ct. 1932, 1965 (2015).

seem to negate the applicability in this country of the English maxim that the king can do no wrong." Pugh, *supra*, at 480. The Supreme Court agrees with Professor Pugh.

> The English maxim does not declare that the government, or those who administer it, can do no wrong; for it is a part of the principle itself that wrong may be done by the governing power, for which the ministry, for the time being, is held responsible; and the ministers personally, like our President, may be impeached; or, if the wrong amounts to a crime, thy may be indicted and tried at law for the offence.
>
> We do not understand that *** the English maxim has an existence in this country.
>
> *Langford* v. *United States*,
> 101 U.S. 341, 343 (1879).[36]

The great weight of modern jurisprudence and scholarship repudiate the district court's obeisance to a capacious notion of sovereign immunity. The Supreme Court directs lower courts to view the government's invocation of sovereign immunity with skepticism not judicial genuflection. "The doctrine of sovereign immunity has never had the effect of insulating official conduct from

[36] The Court's holding in *Langford* echoes Justice James Wilson's opinion in *Chisholm*, 2 U.S. at 454, "To the Constitution of the United States the term SOVEREIGN is totally unknown." Wilson was a signer of the Constitution and the Declaration of Independence and one of the most influential members of the Constitutional Convention in 1787.

judicial scrutiny and control. Any other result would be not only inconsistent with the institution of judicial review but intolerable as a matter of social policy." [37]

Early jurisprudence avoided the unjust strict application of sovereign immunity by recognizing "officer suits" – lawsuits against the King's "wicked ministers."[38] As Justice Scalia said, modern jurisprudence disfavors the notion of sovereign immunity. Professor Cramton similarly observed, "[n]o scholar, so far as can be ascertained, has had a good word for sovereign immunity for many years." Cramton, *supra* p. 20 at 419. Professor Walter Gellhorn likewise noted, "today the doctrine [of sovereign immunity] may be satisfactory to technicians but not at all to persons whose main concern is with justice. … The trouble with the sovereign immunity doctrine is that it interferes with consideration of practical matters, and transforms everything into a play on words." Walter Gellhorn, *Sovereign Immunity in Administrative Law – A New Diagnosis*, 9 PUB. L. J. 1, 22 (1960). Professor Cramton found:

[37] Cramton, *supra*, at 398.

[38] See Scalia and Garner, *Reading Law*, p. 283.

> [The] law [of sovereign immunity] is confused, artificial, and erratic and is likely to produce unjust results as well as wasted effort. The doctrine of sovereign immunity fulfills these unpleasant expectations by distracting attention from the real issues of whether judicial review or specific relief should be available in a particular situation and by directing attention to the sophistries, false pretenses and unreality of present law.
>
> Cramton, *supra* p. 20 at 420.

Professor Cramton cited Professor Jaffe's scholarship and observed there is a "rare uniformity of legal scholarship" criticizing the government's recourse to sovereign immunity. *Id.* at 419.[39]

Professor Cramton described exactly the mistake Judge Neff made. "The confusion in the case law provides justification for the use of a sovereign immunity argument by government lawyers, who are as eager to win their cases as are other lawyers. Busy district judges, less familiar than Judge Friendly with the intricacies of nonstatutory review [and sovereign immunity], are often led to deny a hearing on the merits to some litigants who should receive one." *Id.* at 421.

[39] "The litigation practice of the Department of Justice, however, ensures that sovereign immunity arguments are presented in hundreds of cases each year. The Department asserts sovereign immunity, usually as one of a battery of grounds for dismissal of a plaintiff's complaint. … This practice was recently criticized by Judge Friendly, who said: '[L]aw officers of the Government ought not to take up the time of busy judges or of opposing parties by advancing an argument so plainly foreclosed by Supreme Court decisions.' *Toilet Goods Assn.* v. *Gardner*, 360 F.2d 677, 683 n.6 (2nd Cir. 1966), *aff'd*, 387 U.S. 158 (1967)." Cramton, p. 419.

Even in the context of congressionally-created entitlements, such as fee-shifting statutes, the Supreme Court rejects the government's capacious concept of sovereign immunity:

> [T]he Government seeks shelter in a canon of construction. According to the Government, any right to recover paralegal fees under EAJA must be read narrowly in light of the statutory canon requiring strict construction of waivers of sovereign immunity. We disagree.
>
> The sovereign immunity canon is just that — a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction.
>
> *Richlin Sec. Serv. Co.* v. *Chertoff*, 553 U.S. 571, 589 (2008).

Simply put, sovereign immunity does not exonerate the federal government from its *constitutional* obligation to justly compensate these owners nor does sovereign immunity allow Congress to deny these owners their right to adjudicate the compensation they are due in an Article III court.

2. The Fifth Amendment is a self-executing, constitutionally-founded guarantee of compensation.

An owner's right to be secure in her property is one of the primary objects for which the national government was formed. In *United States* v. *Jones*, 132 S.Ct. 945, 949 (2012), the Supreme Court recalled Lord Camden's holding in

Entick v. *Carrington*, 95 Eng. Rep. 807 (C.P. 1765), "The great end for which men entered into society was to secure their property."[40]

To this end, the Fifth Amendment provides: "No person shall…be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Supreme Court explained, "In any society the fullness and sufficiency of the securities which surround the individual in use and enjoyment of his property constitute one of the most certain tests of the character and value of government." *Monongahela*, 148 U.S. at 324 (followed by *Olson* v. *United States*, 292 U.S. 246, 254 (1934)).[41]

Justice Brennan explained the Fifth Amendment guarantee of just compensation is self-executing:

> As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has already suffered a constitutional violation, and *the self-executing character of the constitutional*

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[40] "Government is instituted to protect property of every sort …. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his own … ." James Madison, *The Complete Madison* (Saul K. Padover, ed., 1953), pp. 267-68 (remarks published in National Gazette, Mar. 29, 1792) (emphasis in original). See also James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3rd ed. 1998).

[41] *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) ("[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights … . That rights in property are basic civil rights has long been recognized."); *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 61 (1993) ("an essential principle: Individual freedom finds tangible expression in property rights.").

> *provision with respect to compensation is triggered.* This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a "taking" compensation *must* be awarded.
>
> *San Diego Gas & Elec. Co.* v. *San Diego*, 450 U.S. 621, 654 (1981).[42]

Justice Brennan's view in *San Diego Gas* was expressed in a dissent. But, in *First English Evangelical Lutheran v. Los Angeles*, 482 U.S. 304, 315-16 (1987), the Supreme Court affirmed Justice Brennan's observation that the Fifth Amendment is "self-executing" and does not "depend on the good graces of Congress."[43] The Court held:

> [A] landowner is entitled to bring an action in inverse condemnation as a result of the "self–executing character of the constitutional provision with respect to compensation" ***. As noted in Justice Brennan's dissent in *San Diego Gas & Electric Co*., it has been established at least since *Jacobs* [v. *United States*, 290 U.S. 13 (1933)] that claims for just compensation are grounded in the Constitution itself *** *Jacobs* *** does not stand alone, for the Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution.
>
> 482 U.S. at 315-16.[44]

Indeed, even before *San Diego Gas* and *First English* the Court found:

> whether the theory *** be that there was a taking under the Fifth Amendment, and that therefore the Tucker Act may be invoked because it is a claim founded upon the Constitution, or that there was

[42] Brennan, J., dissenting on other grounds (emphasis added).

[43] See also Douglas W. Kmiec, *The Original Understanding of the Takings Clause Is Neither Weak Nor Obtuse*, 88 Colum. L. Rev. 1630, 1654-1658 (1988).

[44] Numerous citations omitted.

> an implied promise by the Government to pay for it, is immaterial. *In either event, the claim traces back to the prohibition of the Fifth Amendment* ***.
>
> *United States* v. *Dickinson*, 331 U.S. 745, 748 (1947).[45]

And, even before that, the Supreme Court noted the fundamental principle that the "[Fifth Amendment] prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Monongahela*, 148 U.S. at 325.

When the government takes an owner's property the government has a "categorical duty" to justly compensate the owner. See *Arkansas Game and Fish Comm'n* v. *United States*, 133 S.Ct. 511, 518 (2012), and *Horne* v. *Department of Agriculture*, 135 S.Ct. 2419, 2428 (2015).[46]

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[45] Emphasis added.

[46] "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). Justice Holmes reminded us, "[t]he protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. … We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pa. Coal Co.* v. *Mahon*, 260 U.S. 393, 415, 416 (1922).

Congress may not escape this "categorical duty" by creating a statutory scheme denying owners the ability to obtain just compensation or relegating the adjudication of the amount of compensation the owner is due to an Article I legislative tribunal.

The district court failed to appreciate the fundamental difference between the *constitutionally-created* Fifth Amendment right to just compensation and *congressionally-created* entitlements such as contracts and employment claims. While a statutory waiver of sovereign immunity may be necessary to enforce a *congressionally-created* entitlement, this does not apply when the right being enforced is founded upon *the Constitution itself*. Simply put, the Fifth Amendment's categorical constitutional obligation is not a matter of legislative grace dependent upon a waiver of sovereign immunity but is founded upon the text of our Constitution.

The district court's failure to comprehend this fundamental distinction is why the district court wrongly looked to decisions discussing waiver of sovereign immunity in non-constitutional claims such as Indian trust fund lawsuits, back-pay and contract cases. These non-constitutional claims have no relevance to this case which involves the vindication of the self-executing constitutional right to compensation.

The district court looked to *United States* v. *Mitchell*, 463 U.S. 206 (1983), and *Clay* v. *United States*, 199 F.3d 876 (6th Cir. 1999). *Mitchell* is an Indian trust fund case and *Clay* involved a suit to quash an IRS summons in a tax dispute. These decisions have no relevance to an Article III court's jurisdiction to adjudicate a Fifth Amendment claim founded directly upon the Constitution.

A series of Supreme Court decisions hold the Fifth Amendment guarantee of "just compensation" includes the award of interest. These decisions demonstrate this point. See *Jacobs* v. *United States*, 290 U.S. 13, 16-17 (1933); *Seaboard Air Line Ry. Co.* v. *United States*, 261 U.S. 299 (1923); *Monongahela*, 148 U.S. at 325-26; *Kirby Forest Ind. Inc.* v. *United States*, 467 U.S. 1, 10 (1984); and *United States* v. *Miller*, 317 U.S. 369, 373 (1943).[47] Each of these cases held the Fifth Amendment requires the government to pay the owner interest as well as compensation for the value of the property taken.

Ordinarily interest cannot be awarded against the federal government absent a specific waiver of sovereign immunity by Congress. See *Shaw* v. *Library of Congress*, 478 U.S. 310, 311 (1986) ("The no-interest rule is to the effect that interest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest."). And yet, as

[47] See also Thor Hearne, Steven Haskins & Meghan S. Largent, *The Fifth Amendment Requires the Government to Pay an Owner Interest*, Brigham-Kanner Property Rights Conference Journal, William & Mary Law School, Vol. 1:1 (Sept. 2012).

the series of decisions cited above demonstrate, since *Monongahela* in 1893, the Supreme Court holds the Fifth Amendment compels the award of interest even though Congress has never expressly waived sovereign immunity. So why does an award of interest in a Fifth Amendment taking not require a congressional waiver of sovereign immunity while awarding interest in other actions does require a separate congressional waiver of sovereign immunity? The answer is obvious: Because, unlike other actions, a Fifth Amendment taking claim arises directly from the Constitution.

3. Congress may not abrogate by statute the right to just compensation guaranteed by the Constitution.

Because the right to just compensation arises *directly* from the Constitution, Congress cannot abrogate this right by statute. See *Jacobs*, 290 U.S. at 17 ("the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest….") (citing *Seaboard*, 261 U.S. at 306 and *Phelps* v. *United States*, 274 U.S. 341, 343-44 (1927)).

This principle goes back to *Marbury.*

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. *** It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative

> be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.
>
> 5 U.S. at 176-77.

When a statutory scheme prevents a person from vindicating their constitutionally-guaranteed right to be justly compensated this Court must invalidate the act. Chief Justice Marshall explained:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.
>
> *Marbury*, 5 U.S. at 177-78.

Monongahela demonstrates this point. In *Monongahela*, the United States argued Congress, not the Judiciary, determines the amount of compensation the United States owed Monongahela Company for property the government took. The Supreme Court rejected the government's argument and held, "[If Congress] deems it necessary to take private property, then it must proceed subject to the limitations imposed by this fifth amendment, and can take only on payment of just compensation." 148 U.S. at 336. The Supreme Court emphatically rejected the

notion that Congress could usurp from the Judicial Branch the role of adjudicating the amount of compensation an owner is due. See *id.* at 327.

III. Congress cannot deny these owners their Seventh Amendment right to trial by jury.

The right to trial by jury shall be preserved.

Seventh Amendment

A. The Seventh Amendment guarantees the right to trial by jury in Fifth Amendment inverse condemnation suits.

The Seventh Amendment guarantees "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."[48] The text does not make any exception for suits against the federal government and, as we note below, the history of the Seventh Amendment makes abundantly clear the Founders were *especially concerned* about guaranteeing the right to jury trial in actions against the government.

The Supreme Court repeatedly affirms the fundamental importance of the right to trial by jury. In *Galloway* v. *United States*, 319 U.S. 372, 398-99 (1943),

[48] Fed. R. Civ. P. 38 similarly provides, "(a) Right Preserved**.** The right of trial by jury as declared by the Seventh Amendment to the Constitution – or as provided by a federal statute – is preserved to the parties inviolate…. These rules do not create a right to a jury trial on issues in a claim that is an admiralty or maritime claim under Rule 9(h)."

Justice Black summarized the history animating adoption of the Seventh Amendment.[49]

> [I]n response to widespread demands from the various State Constitutional Conventions, the first Congress adopted the Bill of Rights containing the Sixth and Seventh Amendments, intended to save trial in both criminal and common law cases from legislative or judicial abridgment ***.*** [Patrick] Henry, speaking in the Virginia Constitutional Convention, had expressed the general conviction of the people of the Thirteen States when he said, 'Trial by jury is the best appendage of freedom *** . We are told that we are to part with that trial by jury with which our ancestors secured their lives and property ***. I hope we shall never be induced, by such arguments, to part with that excellent mode of trial. No appeal can now be made as to fact in common law suits. The unanimous verdict of impartial men cannot be reversed.' The first Congress, therefore provided for trial of common law cases by a jury, even when such trials were in the Supreme Court itself.[50]

The Supreme Court's Seventh Amendment jurisprudence holds the "right of trial by jury" is guaranteed as it existed under English common law in 1791 when the Seventh Amendment was adopted. See *Custis* v. *Loether*, 415 U.S. 189, 193 (1974) ("[T]he thrust of the [Seventh] Amendment was to preserve the right to jury

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[49] Justice Blacks' statement was in an opinion dissenting on other grounds. See also *Solem* v. *Helm*, 463 U.S. 277, 286 (1893) (explaining the fundamental nature of the right to trial by jury and tracing the origin of this right to Magna Carta).

[50] Citation omitted. Justice Black further noted, "One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases.' *Parsons* v. *Bedford, Breedlove & Robeson*, 28 U.S. 433, 446 (1830). Of the seven States which, in ratifying the Constitution, proposed amendments, six included proposals for the preservation of jury trial in civil cases." *Id.* at n.3.

trial as it existed in 1791.").[51] As such, the Seventh Amendment guarantees "the right of trial by jury" for all suits involving legal rights – as opposed to proceedings in admiralty or equity. See *Parsons* v. *Bedford, Breedlove & Robeson*, 28 U.S. 433, 446 (1830) ("By [suits at] 'common law,' [the Framers] meant…suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were regarded, and equitable remedies were administered; or where, as in admiralty, a mixture of public law and of maritime law and equity was often found in the same suit.").[52]

At common law the type of damages a plaintiff sought as well as the subject of the action determined which court would hear the case. There were three options: law, equity and admiralty. An action seeking to enforce a legal right would be heard by the law courts with a jury, as opposed to equity and admiralty that sat without a jury. See *Parsons*, *supra.* The Supreme Court held, "if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial whenever the cause of action is legal in nature." *Granfinanciera, S.A.* v. *Norberg*, 492 U.S. 33, 53 (1989).

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[51] In *United States* v. *Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) Judge Story observed, "treating the Seventh Amendment common law 'Suits' as a dynamic category extending to all new types of cases provided only that they determine 'legal rights'" See also George E. Butler II, *Compensable Liberty: A Historical and Political Model of the Seventh Amendment Public Law Jury*, 1 Notre Dame J. L. Ethics & Pub. Pol'y 595, 644 n.172 (1985).

[52] Emphasis in original.

An owner's action to be justly compensated for land the government took is historically a "suit at common law" in which the owner has the right to trial by jury.

There are many examples of federal taking cases tried to a jury. See, *e.g.*, *Boom Co.* v. *Patterson*, 98 U.S. 403, 404 (1878) (a condemnation proceeding removed to federal district court to "'proceed to hear and determine such case in the same manner that other cases are heard and determined in said court.' Issues of fact arising therein are to be tried by a jury, unless a jury be waived. The value of the land being assessed by the jury or the court, as the case may be."); *Marcus* v. *Northeast Commuter Servs. Corp.*, 1992 WL 129637 (E.D. Pa. 1992) (federal district court case in which a city condemned a road through property a railroad corporation acquired for a rail yard in which "[a] jury was summoned … to inquire and find the value of the property taken for the street."); *Upshur Cnty.* v. *Rich*, 135 U.S. 467, 474-76 (1890) (citing *Kohl* v. *United States*, 91 U.S. 367, 376 (1876) (holding that a proceeding to take land and determine the compensation due the owner was "the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents" of such actions including the principle that "[i]ssues of fact were to be tried by a jury unless a jury was waived.").

The Supreme Court explained, "The Seventh Amendment thus applies not only to common-law causes of action but also to statutory causes of action

'analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.'" *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708-09 (1999) (citations omitted). Inverse condemnation actions have *never* been decided by courts of equity or admiralty.

Since King John met the barons on the fields of Runnymede in 1215, the right to trial by jury has been accepted as a fundamental premise of Anglo-American jurisprudence. The Supreme Court observed:

> The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.
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> *Jacob* v. *City of New York*,
> 315 U.S. 752, 752-53 (1942).[53]

Chief Justice Roberts similarly recalled the Fifth Amendment right of compensation arises from Magna Carta:

[53] See also *United States* v. *Booker*, 543 U.S. 220, 239 (2005) ("[T]he right to a jury trial had been enshrined since the Magna Carta.").

> [The Fifth Amendment] protects "private property" without any distinction between different types. The principle reflected in the Clause goes back at least 800 years to Magna Carta *** Clause 28 of that charter forbade any 'constable or other bailiff' from taking "corn or other provisions from any one without immediately tendering money therefor ***. The colonists brought the principles of Magna Carta with them to the New World, including that charter's protection against uncompensated takings of personal property.
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> *Horne*, 135 S.Ct. at 2426.[54]

In England, before 1791, actions by landowners seeking compensation for property taken by the King were tried to a jury. The Magna Carta, §§39 and 52, guaranteed the right to a jury when the King took property.

> No free man shall be taken or imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land ***. If anyone has been dispossessed or removed by us, without the legal judgment of his peers, from his lands, castles, franchises, or from his right, we will immediately restore them to him; and if a dispute arise over this, then let it be decided by the five-and-twenty barons of whom mention is made below in the clause for securing the peace.
>
> Magna Carta[55]

In *De Keyser's Royal Hotel Ltd.* v. *the King*, ch. 2, p. 222 (1919), Swinfen Eady M.R. described English law between 1708 and 1798:

> It appears then to be fully recognized [that by 1708] the land of a subject could not be taken against his will, except under the provisions

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[54] Quoting Magna Carta, Cl. 28 (1215), in W. McKechnie, *Magna Carta, A Commentary on the Great Charter of King John* 329 (2d ed. 1914).

[55] James K. Wheaton, *The History of the Magna Carta* (2012).

> of an Act of Parliament. Accordingly, in 1708, was passed the first of a series of Acts to enable particular lands to be taken compulsorily … provision is made for the appointment of Commissioners to survey the lands to be purchased, and in default of agreement with the owners, *the true value is to be ascertained by a jury*.[56]

The English equivalent to an inverse condemnation action is a common law action called a "petition of right" for which there is the right to trial by jury. See *Baron de Bode's Case*, 8 Q.B. Rep. 208 (1845).[57]

The Seventh Amendment guarantee of a right to jury trial is especially applicable to actions an individual brings against the government.

The Founders were very familiar with a sovereign's desire to avoid jury trials. King George attempted to circumvent American colonists' right to jury trial by assigning disputes over the Stamp Act tax to admiralty courts that sat without a jury. "John Adams voiced the American reaction: 'But the most grievous innovation of all, is the alarming extension of the power of the courts of admiralty. In these courts, one judge presides alone! No juries have any concern there! The law and the fact are both to be decided by the same single judge … .' Colonists

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[56] Citing Statute 7 Anne c. 26 (emphasis added).

[57] See Leonard L. Levy, *Origins of the Bill of Rights* (1999), p. 211. "Under an ordinance of 1164 known as the Constitutions of Clarendon, the sheriff, acting at the instigation of the bishop, could swear twelve men of the countryside to give a verdict – that is, to speak the truth on issues involving property rights … . No one could be evicted or disposed of his land without the prior approval of a jury verdict. A verdict in his favor restored him to possession of the land. Thus trial by jury emerged as the legal remedy for a person who had faced dispossession."

vehemently denounced admiralty courts because they worked without juries … .” Colonists praised [Blackstone’s] remarks [in his *Commentaries*] to the effect that trial by jury was the ‘sacred palladium’ of English liberties … .” Levy, p. 226. The Declaration of Independence included “depriving us, in many cases, of the benefit of trial by jury” in its list of Britain’s offenses against the American colonies.

> The basic argument is that civil jury trials were prized by the populace chiefly for their public law implications, that is for their utility in preventing possible oppression in tax suits, *condemnation proceedings*, and other administrative actions and, if necessary, in obtaining redress for consummated governmental wrongs through collateral suits for damages against officials.
>
> Butler, *Compensable Liberty*.[58]

An owner’s constitutional right to trial by jury when the government takes her property was a clearly established principle of American law before 1791. *Bayard* v. *Singleton*, 1 N.C. 5, 1787 WL 6 (1787), demonstrates the point.

North Carolina confiscated property owned by British sympathizers, including Samuel Cornell, “the richest man in North Carolina.” Cornell deeded thousands of acres of land to his daughter, Elizabeth Cornell Bayard. *Id.* at *8. North Carolina confiscated Elizabeth Bayard’s land and sold it to Spyers

[58] *Supra* p. 635, n.44 (emphasis added) (citing among other authorities, *Damsky* v. *Zavatt*, 289 F.2d 46, 49-50 (2nd Cir. 1971) (Friendly, J.), and *Federalist*, No. 83 (A. Hamilton)).

Singleton. In 1787, Elizabeth Bayard sued to recover title to her family homestead. Elizabeth Bayard argued North Carolina confiscated her property in violation of North Carolina's constitution guaranteeing a right to jury trial. Elizabeth Bayard prevailed, and the North Carolina Supreme Court declared the legislative act authorizing the confiscation of property without a jury trial unconstitutional.

Owners whose property was taken by the federal government likewise enjoyed the right to trial by jury to determine the compensation. *Chappell* v. *United States*, 160 U.S. 499 (1896), is such a case. The United States took an easement across land to allow a clear field-of-view for a lighthouse on Hawkins Point, Maryland. The Court noted "the proceeding, instituted and concluded in a [district] court of the United States, was, in substance and effect, and action at law." *Chappell*, 160 U.S. at 513 (citing *Kohl*, 91 U.S. at 376; and *Upshur Co*., 135 U.S. at 476). The Court held, *"[t]he general rule, as expressed in the Revised Statutes of the United States, is that the trial of issues of fact in actions at law … 'shall be by jury,'* by which is evidently meant a trial by an ordinary jury at the bar of the court." *Id.* (emphasis added). The court continued, noting, "[the landowner] had the benefit of a trial by an ordinary jury at the bar of the district court on the question of the damages sustained by him." *Id.* at 514.

Custiss v. *The Georgetown & Alexandria Tpk. Co.*, 10 U.S. 233, 234 (1810) provides another example. Chief Justice Marshall decided a case arising from land owned by Martha Washington's heirs in the District of Columbia that was condemned for a turnpike. Chief Justice Marshall quoted the act of Congress authorizing the turnpike company to take the Custiss' property provided, "in case of disagreement, 'on application to one of the judges of the circuit court, he shall issue a warrant directed to the marshal of the district to summon a jury of twenty-four inhabitants of the district of Columbia, of property and reputation, not related to the parties, nor in any manner interested, to meet on the land to be valued…[and] the said jury, and when met…shall faithfully, justly and impartially value the lands, and all damages the owner thereof shall sustain, by opening the road through such land."

These Michigan owners' civil action is "a suit at common law" for which the Seventh Amendment guarantees the owner a right to trial by jury. See *Kohl*, 91 U.S. at 376 ("The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute … . It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation made for it, is not, within the meaning of the statute, a suit at common law … ."). The Supreme Court holds that a lawsuit for compensation is a legal action, not an equitable action:

> We have recognized the general rule that monetary relief is legal. Just compensation, moreover, differs from equitable restitution and other monetary remedies available in equity, for in determining just compensation, the question is what has the owner lost, not what has the taker gained. As its name suggests, then, just compensation is, like ordinary money damages, a compensatory remedy. The Court has recognized that compensation is a purpose traditionally associated with legal relief.
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> *Del Monte Dunes*, 526 U.S. at 710-11.[59]

In *Pernell* v. *Southall Realty*, 416 U.S. 363, 370 (1974), the Supreme Court held:

> [t]his Court has long assumed that actions to recover land, like actions for damages to a person or property, are actions at law triable to a jury. In *Whitehead* v. *Shattuck*, 138 U.S. 146, 151 (1891), for example, we recognized that "(i)t would be difficult, and perhaps impossible, to state any general rule which would determine in all cases what should be deemed a suit in equity as distinguished from an action at law…but this may be said, that where an action is simply for the recovery and possession of specific, real, or personal property, *or for the recovery of a money judgment*, the action is one at law."[60]

Actions for money damages against the United States are a legal action, not an equitable action. The CFC has no equitable or admiralty jurisdiction. See *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 520 (1998) ("Such equitable relief is arguably not within the jurisdiction of the Court of Federal Claims under the

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[59] Citing and quoting *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998); *Teamsters* v. *Terry*, 494 U.S. 558, 570 (1990); *Boston Chamber of Commerce* v. *Boston*, 217 U.S. 189, 195 (1910).

[60] Emphasis added (citing *Scott* v. *Neely*, 140 U.S. 106, 110 (1891), and *Ross* v. *Bernhard*, 396 U.S. 531, 533 (1970)).

Tucker Act."). [61] It thus follows that an award of money damages as just compensation for the government's taking of an owner's property is not an equitable action but a legal action subject to the Seventh Amendment's guarantee of right to trial by jury.

B. Congress cannot deny the Seventh Amendment right to trial by jury.

The district court wrongly believed, "the Supreme Court has recognized since the 1800s that the Seventh Amendment does not require a jury trial in cases against the United States." Opinion, RE 36, Page ID#937. This is entirely wrong and the district court provided no authority for this statement.

First, the text of the Seventh Amendment admits of no such qualification. Indeed, the history of the Seventh Amendment, as we discuss above, is most emphatic in guaranteeing the right to trial by jury *especially in actions against the government*.

Second, no authority supports the district court's contention that Congress may abrogate the right to trial by jury *in actions arising under the Constitution*. The district court wrongly relied upon *McElrath* v. *United States*, 102 U.S. 426 (1880). *McElrath* was a back-pay case brought in the Claims Court. *McElrath* did

[61] See also *United States v. Jones*, 131 U.S. 1 (1889) and *Richardson v. Morris*, 409 U.S. 464, 465 (1973) (*per curiam*) (holding the CFC is not a court able to grant equitable relief).

not involve a Fifth Amendment claim arising under the Constitution. Likewise, *Johnson* v. *City of Shorewood*, 360 F.3d 810 (8th Cir. 2004), is inapplicable because: (1) The "holding" for which the district court cites *Johnson* is contrary to the Supreme Court's holding in *Del Monte Dunes*, *Jacob*, *Chappell*, *Upshur*, *Kohl* and other decisions finding there is a Seventh Amendment right to jury trial in inverse condemnation actions; (2) The Eighth Circuit's statement upon which the district court relied is dicta because *Johnson* was decided on other grounds; and, (3) to the extent the Eighth Circuit did address the right to jury trial in matters against the government, the authority the Eighth Circuit cited was limited to actions for matters *other than constitutionally-guaranteed rights*. The Eighth Circuit cited the Supreme Court's decision *United States* v. *Sherwood*, 312 U.S. 767 (1941). But *Shorewood*, like *McElrath*, involved an action to enforce a congressionally-established right – not a constitutionally-guaranteed right. *Shorewood* involved a Court of Claims proceeding to collect on a third-party contract claim.

No authority supports the district court's belief that Congress may deny the Seventh Amendment right to trial by jury in actions against the federal government vindicating the Fifth Amendment's self-executing categorical constitutional guarantee of just compensation. Citing a case that says Congress may deny the right to jury trial in cases founded upon congressionally-created contract claims

does not support the notion that Congress may deny these Michigan owners' Seventh Amendment right to jury trial in an action vindicating their Fifth Amendment right.

CONCLUSION

When the federal government violates the Fifth Amendment, the Constitution guarantees the owner access to an Article III court with right to trial by jury to vindicate this self-executing constitutional right.

In the first instance the Tucker Act does not foreclose the district court's "original jurisdiction" under 28 U.S.C. 1331 over "civil actions arising under the Constitution." But, should this Court conclude the Tucker Act denies these owners access to an Article III court in which to vindicate their Fifth Amendment right to compensation, such statutory provisions violate the separation of powers. And, further, the Seventh Amendment does not permit Congress to deny these owners' their right to trial by jury in a Fifth Amendment action against the United States.

The linchpin of the district court's decision was its reliance upon an erroneous conception of "sovereign immunity." The district court mistakenly believed the Fifth Amendment's "categorical" guarantee the owner will be justly compensated when the government takes their property is not a right but is rather a matter of "legislative grace" dependent upon a subsequent congressional waiver of sovereign immunity. In making this *Cartesian gelandesprung* to alight at its

conclusion the district court failed to distinguish between a constitutional right and a congressionally-established entitlement. The district court overlooked Chief Justice Marshall's lapidary admonition that "we must never forget that it is a constitution we are expounding." *McCulloch* v. *Maryland*, 17 U.S. 316, 407 (1819). These Michigan owners right to compensation emanates directly from the Fifth Amendment and is not dependent upon the good grace of Congress.

Accordingly, we ask this Court to reverse the district court's dismissal, to find the district court has jurisdiction to hear these Michigan landowners' Fifth Amendment claims and to remand this case to the district court to determine the "just compensation" the Constitution guarantees these Michigan owners with trial by jury.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,694 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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June 27, 2016

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 27, 2016, an electronic copy of the Brief of Plaintiff-Appellant was filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system.

The undersigned also certifies that participants who are registered CM/ECF users will be served via the CM/ECF system.

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ADDENDUM

TABLE OF CONTENTS TO ADDENDUM

PLAINTIFFS-APPELLANTS' DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to 6th Cir. R. 30(b), Plaintiffs/Appellants hereby designate the following filings in the district court's electronic record to be relevant documents for purposes of this appeal:

Description of Entry	**Date Filed**	**Record Entry No.**
Complaint	January 14, 2015	R.E. 1
Government's request for a pre-dispositive motion conference	March 17, 2015	R.E. 8
Plaintiffs' response to the government's request for a pre-dispositive motion conference	March 23, 2015	R.E. 11
Amicus Brief of Pacific Legal Foundation	July 14, 2015	R.E. 24
Amicus Brief of Mountain States Legal Foundation	July 14, 2015	R.E. 25
Government's Motion to Dismiss	August 6, 2015	R.E. 28
Government's Memorandum in Support of its Motion to Dismiss	August 6, 2015	R.E. 29
Plaintiffs' Response to the Government's Motion to Dismiss (with exhibits A, B, and C)	August 6, 2015	R.E. 30, 30-1, 30-2, 30-3
Government's Reply in Support of its Motion to Dismiss	August 10, 2015	R.E. 33
Plaintiffs' Notice of Supplemental Authority (with exhibits A, B-1, B-2, and B-3)	January 28, 2016	R.E. 34, 34-1, 34-2, 34-3, 34-4
Government's Response to Plaintiffs' Notice of Supplemental Authority	February 5, 2016	R.E. 35
Opinion and Order	March 28, 2016	R.E. 36
Judgment	March 28, 2016	R.E. 37
Notice of Appeal	April 8, 2016	R.E. 38

[208] BARON DE BODE'S CASE. 1845. A party claiming to have been the owner of lands, by virtue of a cession to him from A., since deceased, offered evidence, before any other proof of the cession, that A. actually managed the property, and, while so managing, declared that he did so in the name of the now claimant. Held (p. 243, &c.), admissible evidence. On Petition of Right, a commission issued, and an inquisition was thereupon found and returned into Chancery. Before any further proceeding, the suppliant filed a bill against the Attorney General to perpetuate testimony, reciting the petition. A commission to examine witnesses issued thereupon. The suppliant proposed to the Crown to join in the commission: but the Crown did not consent; and the commission issued ex parte. The Crown having traversed the inquisition, and the record being sent into this Court: Held (p. 244, &c.), that depositions taken under the commission to examine witnesses were admissible evidence on behalf of the suppliant, where the deponents were without the jurisdiction of the Court. Evidence being offered to prove the law of inheritance at a particular time in Alsace, one of the witnesses called for that purpose, a French lawyer practising in Alsace, stated on cross-examination that the feudal law had been put an end to in Alsace, de facto, "by the torrent of the French Revolution," and that there was a decree of the French National Assembly to that effect, of 4th August 1789; and he said that he had learned this fact in the course of his legal studies. Held (p. 246, &c.), admissible evidence, though no other proof was given of the contents of the decree. Per Lord Denman C.J., Williams and Coleridge Js. Dissentiente Patteson J. B. presented a Petition of Right to the Queen, claiming certain money of the Crown upon the facts therein stated, and praying that the Crown would order right to be done, that the Royal declaration should be endorsed on the petition to that effect, the petition referred to the Court of Chancery and duly received and enrolled, and the Attorney General required to answer it, and that the suppliant might prosecute his complaint against him and such other persons as need might require, and have leave to make him and them parties, and pray to obtain relief. The Queen referred the petition to the Court of Chancery; and the Chancellor indorsed "Let right be done:" and thereupon that Court, by letters patent, appointed W. and others to inquire, upon the oath of jurors, of the truth of the matters in that petition: W., &c. returned into the Court of Chancery an inquisition taken accordingly; and finding that B. was the eldest son of a nobleman who married an English woman in England, and that the father was born in Germany, and B. in England. That, before and since the Peace of Westphalia, the lordship and land of Sultz, in Lower Alsace, was an ancient fief descendible in the male line. That in 1786, the line of feudatories having failed, it belonged to the Archbishop of Cologne to appoint a new line of feudatories; and that he nominated the father of B., who was invested. That, before the Treaty of Munster, Lower Alsace formed part of the Empire of Germany. That, by that treaty, the Emperor of Germany ceded to the King of France all his rights and those of the Empire in Lower Alsace, subject to a proviso that France should leave the then feudatories of Sultz in the liberty and possession they had theretofore enjoyed as immediately dependent upon the Empire. That the treaty was ratified by subsequent treaties, the last named being that of Versailles between England and France in 1783. That, in 1791, B.'s father ceded his rights to B., who was then fourteen years old. That, in 1793, B. and his father left Sultz, and took refuge in the Austrian Army. That afterwards, in the same year, it was, by the French Department of the Lower Rhine (in which Sultz was) decreed that B. and his father should be declared emigrants, and all their property confiscated, in order to its being sold or alienated, agreeably to the laws relating to emigrants. That, in pursuance of the decree, the lordship and lands of Sultz were seized as confiscated by the persons then exercising the powers of Government in France, and were thenceforward treated as national property, and part thereof was sold under the authority of the French Government, and the residue continued in the possession of that Government until after the restoration of the House of Bourbon in 1814 and 1815. That, by the Treaty of Paris between Great Britain and France, 1814, it was stipulated that commissioners should examine the claims of His Britannic Majesty's subjects upon

HeinOnline -- 115 Eng. Rep. 854 1378-1865

ADD-2

the French Government for the value of moveable or immoveable property unduly (indûment) confiscated by the French authorities, loss of debts, or other property unduly detained under sequestration, since 1792. That, by the Treaty of Paris between Great Britain and France, 20th November 1815, incorporating a convention of that date, it was provided that British subjects having claims against the French Government, who had, in contravention of the after mentioned Treaty of Commerce, and since 1st January 1793, suffered in consequence of confiscation or sequestration decreed in France, and their heirs and assigns, subjects of His Britannic Majesty, should, conformably to the Treaty of 1814, be indemnified and paid, after their claims should have been recognised as legitimate, and the amount fixed, as after expressed: namely, that the claims of such subjects arising from laws made by the French Government or any other claim whatsoever (with an exception not comprising B.'s case) should be liquidated and fixed, and a sum be inscribed in the Great Book of the Public Debt of France, as a guarantee for the claimants, and further sums be furnished if necessary: three calendar months to be allowed to claimants resident in Europe to present their claims; and those of British subjects to be examined according to a mode directed. That, by the Treaty of Commerce of 1786, in case of rupture between England and France, the subjects of either residing in the territory of the other were to be allowed to continue residence undisturbed while they conducted themselves legally, and, if ordered to withdraw, should have twelve months to do so, with their property, if they did not conduct themselves contrary to public order. That, in December 1815, M. and others were appointed, under the Great Seal, Commissioners of Liquidation, Arbitration and Deposit, to execute the convention. That, on 12th January 1816, B. transmitted his claim to the Prime Minister of France, who received it on 9th February 1816, but stated that he considered it inadmissible. That, by a convention between Great Britain and France, April 1818, it was agreed that, to effect payment of capital and interest due to British subjects, which had been claimed under the Convention of 1815, an annuity of three millions of francs should be inscribed in the Great Book of the Public Debt of France. That, by stat. 59 G. 3, c. 31, reciting that the commissioners had registered the claimants who presented themselves within the period prescribed in the Convention of 1815, and had paid certain sums, and that three of the said commissioners, by commission under the Great Seal dated 1818, had been appointed Commissioners of Liquidation, Arbitration and Award, to act on behalf of His Majesty in England, to consider the claims of British subjects properly presented, and the remaining commissioners had been appointed Commissioners of Deposit to receive the inscriptions from the French Government; it was enacted that the Commissioners of Liquidation should apportion and distribute the sums provided by France, and order them to be paid to the claimants who had duly registered, in full if the sums paid were sufficient, in part if insufficient: the rejection of claims, subject to appeal to the Privy Council, to be final, and a discharge of both Governments in respect of any registered claim; that unappropriated sums inscribed in the Great Book of France might, by the Commissioners of Deposit, on receiving directions from the English Secretary of State for Foreign Affairs or the Commissioners of the Treasury, be sold, and the proceeds transferred to the Commissioners of Liquidation, to be invested in public securities, for the purpose of being applied to liquidate claims, or, if all were liquidated to such purposes as the Commissioners of the Treasury should direct; and that the public securities should be deposited in the Bank of England in the names of the Commissioners of Liquidation, and the produce paid for the purposes in the Act specified. That B.'s name and claim were not registered till after the passing of the statute. That, after all the registered claimants were paid, a surplus of 482,000l. had remained with the Commissioners of Deposit, of which 200,000l. had been applied to satisfy claims tendered after the time mentioned in the Convention of 1815, and admitted under the authority of the Commissioners of the Treasury given in May 1826; and the residue was paid into the bank on the Government account by direction of the Treasury under stat. 59 G. 3, c. 31. That B.'s property, lost as above, with interest, was of the value of 364,000l. The Attorney General having traversed the matters of the inquisition, and a verdict on the traverse being found for B.: Held (p. 270, &c.), (on cross motions, to enter the

HeinOnline -- 115 Eng. Rep. 855 1378-1865

ADD-3

verdict for the suppliant, and to enter judgment for the Crown non obstante veredicto), that no right against the Crown appeared upon the inquisition. For that, assuming (1) a Petition of Right to be maintainable for money claimed as debt or damages; and assuming (2) that B. was, for the purposes of this petition, a British subject: First, no undue confiscation was alleged so as to satisfy the condition of the Treaties of 1814 and 1815, nothing being shewn but an adjudication by a French tribunal, which this Court could not see to be contrary to the law of France, or pursuant to any law which this Court could pronounce void as against British subjects. Secondly. It did not appear that B.'s claim had been admitted and ascertained according to the treaties, his name not having been registered within the period provided for by the Convention of 1815, and no order appearing to have been given by the Treasury to inquire into B.'s claim, or any request made to them for such order; and, further, it not appearing that no other claimant might possibly come in for the surplus; and the inquisition not shewing whether or not any inquiry had been made by the Commissioners of Liquidation into the merits of B.'s claim. Thirdly. That the Queen could not be said to have received the money, the finding in the inquisition, that the surplus had been paid into the Bank of England on the Government account, not shewing that the Sovereign had received a personal benefit from it.

[S. C. 10 Jur. 773: affirmed in Exchequer Chamber, 13 Q. B. 364; 380; 14 Jur. 970: in House of Lords, 3 H. L. C. 449; 10 E. R. 176 (with note).]

"Pleas, before our lady the Queen, at Westminster, of Hilary term, in the sixth year of the reign of our Sovereign Lady Victoria, by the **[209]** grace of God," &c. "Amongst the pleas of the Queen's Roll (*a*)[1].

"Amongst the records of this year, No. 15."

"England (to wit). Be it remembered, &c., that the Right Honourable John Singleton, Baron Lyndhurst, Lord High Chancellor of Great Britain, on the eleventh day of January in this same term, before our **[210]** present Sovereign Lady the Queen, at Westminster, hath delivered here into Court, with his own proper hands, a certain record, had before our said lady the Queen in her Chancery, in these words, that is to say:

"Pleas, before the lady the Queen, in her High Court of Chancery, on the 2d day of February, in the year of our Lord 1839.

[211] "Be it remembered that, on the day and year above mentioned, the said lady the now Queen sent to the Right Honourable Charles Christopher, Lord Cottenham, Lord High Chancellor of Great Britain, a certain Petition of Right, signed with the sign manual of the said lady the now Queen, to be executed in due form of law, the tenor of which petition follows in these words.

"To the Queen's Most Excellent Majesty, most humbly beseeching, your faithful subject, Clement Joseph Philip Pen de Bode, Baron de Bode, a knight of several orders, now residing at No. 22 Lambeth Road, in the county of Surrey, sheweth to your Majesty that your suppliant is the eldest son of the late Charles Frederic Louis Augustus, Baron de Bode, a baron of the Holy Roman Empire and formerly a colonel of the Regiment of Nassau-Saarbruck German Infantry in the service of the King of France and Knight of the Royal and Military Order of Saint Louis, by Mary his late wife, daughter of the late Thomas Kynnersley, Esquire, of Loxley Park, in the county of Stafford; and that your suppliant's father was born on the family estate at Neuhof, in the bishoprick and principality of Fulda, now forming part of the Electorate of Hesse, and was baptised at Neuhof in the said bishoprick and principality; and that your said suppliant was born at Loxley Park aforesaid on the 23d of April 1777, and was baptised at Uttoxeter on the 2d of May following.

"And your suppliant further sheweth," &c. The petition then stated (*a*)[2], that Sultz was an ancient fief, **[212]** before and since the Peace of Westphalia (concluded between England and France in 1648), and constituted part of the Barony of Fleckenstein in Lower Alsace, and was descendible in the direct male line; and that the archbishops Electors of Cologne were the protectors thereof, having power of appointing a new

(*a*)[1] The proceedings were on the Crown side.

(*a*)[2] The petition is here not fully set out, except so far as is necessary to shew the form of the proceeding; the judgment of this Court having been founded exclusively on the facts as found in the inquisition.

HeinOnline -- 115 Eng. Rep. 856 1378-1865

ADD-4

line of feudatories upon the failure of issue male; that in 1720, on failure of the then branch of feudatories, investiture of the fief was granted to the Prince of Rohan Soubise, a German prince; but, upon the failure of that line in 1786, the Elector nominated to the fief Charles F. L. A. Baron de Bode, the suppliant's late father, who was invested. That, before the Peace of Westphalia, Lower Alsace formed part of the Empire of Germany, and was presided over by an hereditary officer called the Landgrave, who had no authority over the lands of the Barons of Fleckenstein. That the Emperor of Germany and King of France were parties to the Peace of Westphalia; and that the inheritance of the Landgraviate of Lower Alsace belonged to the House of Austria. That, by the Treaty of Munster, which formed part of the Peace of Westphalia, the Emperor, for himself and the House of Austria and the Empire, ceded to France all their respective rights in the Landgraviate of Lower Alsace, the same to be incorporated with the Crown of France, but subject to a proviso that France should be bound to leave the Barons of Fleckenstein in the liberty and possession they had theretofore enjoyed as dependent on the Empire, and the King of France should rest content with the rights that had belonged to the House of Austria. That the Treaty of Munster was ratified by the Treaty of Nimeguen, 1679, by the treaty between England and Spain, 1680, by the Truce **[213]** of Ratisbon, 1688, by the Treaty of Ryswick, 1697, by the Treaty of Utrecht, 1713, by the Treaty of Aix la Chapelle, 1748, by the Treaty of Paris, 1763, and by the Treaty of Versailles, 1783.

That in 1791 the father of the suppliant ceded to him all rights in the lordship of Sultz; that the suppliant was then 14 years old; that in 1793 the suppliant and his father took refuge in the Austrian Army; and afterwards, in the same year, by a decree of the Department of the Lower Rhine, they were declared emigrants and their property confiscated; and that it was afterwards seized and part of it sold, the rest continuing in the possession of the French Government till 1814 and 1815. That the suppliant's father died in 1797.

The petition then stated certain provisions of the Treaties of Paris of 1814 and 1815, and two conventions incorporated therein (see p. 234, post), providing for the indemnification, by the French Government, of British subjects whose property had been unduly confiscated by it, and for the examination of the claims by commissioners. It appeared that by one of these provisions three months were allowed to claimants resident in Europe for presenting their claims; and, by another, a capital producing an annuity of 3,500,000 francs to be inscribed in the Great Book of the Public Debt of France, was provided as a guarantee fund for the claimants; and there was a proviso for furnishing further sums if necessary towards the satisfaction of the claims. The petition then referred to the Treaty of Commerce of 1786; as to which see pp. 235 and 277, post.

Certain cases were then mentioned in which claims had been allowed.

[214] The petition then stated that, by a commission under the Great Seal, dated 27th December 1815, Colin Alexander Mackenzie and four others (see p. 236, post) were appointed Commissioners of Liquidation, Arbitration and Deposit, for the purpose of carrying into effect, on the part of Great Britain, the provisions above mentioned. That on 12th January 1816, being within three calendar months from the signing of the conventions, the suppliant, finding that the British Commissioners had not arrived in France, and being then in the Russian service, delivered a memorial of his claim as a British subject under the Convention of 1815 to the Russian Ambassador at Paris, who had engaged to transmit the same to the Duke de Richelieu, then Prime Minister to the King of France and his Minister for Foreign Affairs, to be forwarded by him to the mixed commission mentioned in the said convention, and composed of an equal number of Englishmen and Frenchmen; which commission had not then entered upon its duties or begun to sit. That, on 9th February 1816, the memorial was forwarded to the Duke de Richelieu, accompanied by a request that he would cause it to be transmitted to the Commissioners of Liquidation, or return it to the Russian Ambassador. That the Duke de Richelieu sent a letter to the suppliant, stating that he considered the claim inadmissible, inasmuch as the suppliant's father was a German; but the duke did not return the memorial. That the letter was shewn by the suppliant, on the 19th February 1816, to the British Ambassador, who was of opinion that the Duke de Richelieu entertained an erroneous view, and that the suppliant was a British subject, and stated that he would himself see C. A. Mackenzie, the **[215]** English Chief Commissioner, on the subject. That the suppliant was unable to meet with C. A.

HeinOnline -- 115 Eng. Rep. 857 1378-1865

ADD-5

Mackenzie until the 22nd February 1816, when he communicated the Duke de Richelieu's letter to C. A. Mackenzie, and at the same time delivered to him a memorial of his claim against the French Government; when C. A. Mackenzie informed him that he (C. A. M.) concurred in the opinion that the Duke de Richelieu had taken an erroneous view, and that the suppliant was entitled to the benefit of the convention, and that the said Duke de Richelieu had done wrong in withholding the said memorial, and that he ought to have transmitted it to the commission, as being the proper authority to judge upon such cases; but, at the same time, C. A. M. informed the suppliant that the register of claims which contained the names of claimants resident in Europe had been closed the day before, namely, on the 21st February; and that he would consult with the commissioners, and the suppliant should be informed what was to be done. That the suppliant was required to produce a certificate from the Duke de Richelieu, stating that he had preferred his claim to the French Government, through the Duke de Richelieu, before 20th February. That he was informed by C. A. Mackenzie that, upon the production of such a certificate, his name would be inserted in the register of claimants: and, in consequence of such information, he presented a memorial to the Duke de Richelieu, from whom, on the 29th March 1816, he received an answer formally certifying that he had received the claim on 9th February 1816. That he communicated the answer, on 29th March 1816, to C. A. Mackenzie. That, at the suggestion of the British Commission, he, on 4th April **[216]** 1816, presented to the commissioners a more detailed memorial of his claims, which the petition described. That, at a subsequent interview with C. A. Mackenzie, that gentleman informed him that the French Commissioners were perfectly satisfied that the Duke de Richelieu had formed an erroneous opinion on the subject of nationality, but that, as his expressed opinion must in a certain manner be a guide for them to act by, they could not act counter to it without documentary evidence establishing the suppliant's nationality. That he was likewise informed by his French agent in Paris, who had seen the French Commissioners on the subject, that they would make no difficulty as to inserting his name upon the list as soon as it should be brought in a regular way before them. The petition then stated that certain evidence on the subject had been transmitted to the commissioners. That, on 29th August 1816, the British Commissioners sent to the French Commissioners a list of sixteen claimants under the Convention No. 7, with a letter stating that the British Commissioners had discovered that these sixteen claims had been inadvertently omitted to be registered in the list closed and signed by them on 21st February preceding, and assuring the French Commissioners that these claims had been presented to them before the signing of the said list, but had escaped their secretary in consequence of the great number of papers he had and the hurry he was in when he prepared the list, and therefore begged the French Commissioners to admit these sixteen claimants in the said list. That, on 7th October 1816, the French Commissioners informed the British Commissioners that the French Government acquiesced in their request. The petition then stated **[217]** several communications with the commissioners, in which the latter required additional evidence; and it alleged that they had fallen into several errors, resulting in a delay of the recognition of his claim till 1818, when the mixed commission was dissolved. It further stated a case laid by him before counsel, and a favourable opinion thereon.

That, by a convention between Great Britain and France, signed at Paris, 25th April 1818, for the final arrangement of the claims of British subjects against the French Government, it was agreed that, in order to effect the payment and entire extinction as well of the capital as the interest thereon due to British subjects, of which the payment had been claimed by virtue of the said first mentioned convention, there should be inscribed in the Great Book of the Public Debt of France a perpetual annuity of 3,000,000 of francs, representing a capital of 60,000,000 of francs, to bear interest from the 22nd March 1818. And "that, upon the negotiations between the British and French Governments, which led to the said Convention of 1818, the sum granted by France, by way of final arrangement of the claims made by British subjects, was expressly increased and augmented for the specific purpose of providing for the liquidation of your suppliant's claims against the French Government in respect of the loss of his said property at Sultz" (*a*).

That by stat. 59 G. 3 (ch. 31, sect. 1), after reciting the appointment of the said

(*a*) See p. 267, note (*a*).

HeinOnline -- 115 Eng. Rep. 858 1378-1865

ADD-6

C. A. Mackenzie, &c., as Commissioners of Liquidation, Arbitration and Deposit, and also that the commissioners had caused to be in-[218]-scribed in a register the names of all the claimants who had presented themselves within the period prescribed by the convention, and had liquidated and caused to be paid certain sums therein mentioned; and also that the said C. A. Mackenzie and two others of the said commissioners had, by commission under the Great Seal, dated 15th June 1818, been appointed Commissioners of Liquidation, Arbitration and Award, for the purpose of acting on behalf of His Majesty in England, according to the provisions of all the several conventions thereinbefore recited, and to take into consideration all the claims of His Majesty's subjects which might have been at due times and in proper form presented to them; and also reciting that the remaining two of the first named five commissioners had, by commission under the Great Seal, been nominated and appointed Commissioners of Deposit, to receive from the Government of His most Christian Majesty at Paris the inscriptions to be delivered over to British Commissioners in and by the several conventions thereinbefore mentioned; and that it was expedient to provide for the execution of the powers vested in the said several commissioners: it was enacted that, in order to enable the said Commissioners of Liquidation, Arbitration and Award to complete the examination and liquidation of the claims of such persons who should have caused their names and claims to be duly inserted in the said registers, it should be lawful for the said commissioners, and they were thereby authorized and empowered, subject to such deductions of two per cent. as therein mentioned, to apportion, divide and distribute the several sums of money stipulated by the said several conventions to be provided by France, and to order the same to be paid [219] to and among the several claimants whose names were duly entered in the said registers; and, where such claimants should have been or should be adjudged to be entitled to payment in the whole or in part of their demands, to pay the sum adjudged to them in full, if the sums received and thereafter to be received for that purpose from the French Government should be found sufficient for the payment in full of all the claims which should be adjudged to be within the intent and meaning of the said several conventions, or any of them; or in part payment thereof in rateable proportions, if the said sums should be insufficient for the payment of such claims in full; and that such payment in full, or in part, and any rejection of any such claims as should by the said commissioners, on appeal to His Majesty in Council in manner thereinafter mentioned, be adjudged not to be within the true meaning of the said conventions or any of them, should be respectively final and conclusive, and should be held to be in full and entire discharge of the French Government and of His Majesty's Government from any demands in respect of any claims falling within the object and true intent, effect and meaning of the said conventions, or any of them, and which had been inserted in the said registers during any period allotted for that purpose by the several conventions. And by the said Act it was further enacted (sect. 16), that, during the time that any capital inscribed in the Great Book of the Public Debt of France, in pursuance and for the purposes of the several conventions thereinbefore recited, or any part of such capital, should remain in the names of the said Commissioners of Deposit, and [220] should not have been appropriated to the liquidation of any claims of His Majesty's subjects under the said conventions or any of them, it should be lawful for the said Commissioners of Deposit, on receiving directions to such effect from His Majesty's principal Secretary of State for Foreign Affairs, and from the Commissioners of His Majesty's Treasury of the United Kingdom of Great Britain and Ireland, or any three of them, to sell and dispose of the whole or any part of such capital so inscribed in the said Great Book of the Public Debt of France, and so unappropriated, and to transfer the proceeds of such sale to England to the Commissioners of Liquidation, Arbitration and Award under that Act, to be by them invested in Exchequer bills, or other public securities bearing interest, for the purpose of being applied to the payment or liquidation of any of such claims, or, in case all such claims should be paid or liquidated, for such other purposes as the said Commissioners of the Treasury for the time being, or any three of them, should direct the said Commissioners of Liquidation, Arbitration and Award to apply the same. And that all such Exchequer bills, or other public securities bearing interest, should be deposited in the hands of the Governor and Company of the Bank of England to the account of and in the names of the Commissioners of Liquidation, Arbitration and Award under that Act, and should be and

HeinOnline -- 115 Eng. Rep. 859 1378-1865

ADD-7

remain in the names of such commissioners for the time being, to be sold, and the produce thereof paid and applied for the purposes therein specified.

That, in the year 1819, as soon as the suppliant learned that the British Commissioners had returned to London, and ascertained the spot at which they had **[221]** established their office, he delivered to them a detailed schedule of his different claims. The petition then set forth several communications between the suppliant and the commissioners, and stated that he was not aware that his name and claim had not been placed on the register at Paris until 1st July 1828, when it was ascertained that neither his name nor claim had been placed on the register of claimants until long after the passing of the said Act of Parliament.

The petition then set forth an award of the commissioners, dated 30th April 1822, rejecting the claim, and stating the grounds of the rejection at full length.

"And your suppliant further sheweth that he is advised and believes that the said award is founded throughout upon erroneous views of the facts of your suppliant's case, as well as upon gross and absurd mistakes in point of law: amongst others," &c.: then followed the objections, supported by a reference to other decisions of the commissioners.

That he appealed against the award of the commissioners, and, on 23d June 1823, his appeal was heard before the Privy Council, which confirmed the award. That afterwards, on petition, the suppliant was heard before the Privy Council on the question whether they could rehear the appeal or send the case back to the commissioners: and the Council were of opinion that they had not the power of doing either, and gave their judgment accordingly, accompanied by a remark that the decision had been approved by His Majesty in Council, had been certified to the commissioners, and that, in consequence of that decision so certified, the funds had been actually divided amongst other claimants, and it was therefore clear there could be no redress. **[222]** That, at the time of the giving of the last mentioned judgment, upwards of one million sterling remained in the hands of the said commissioners, which fact appears by the accounts rendered by them.

Then followed objections to the grounds on which it was alleged that the commissioners had decided. The petition then stated that, after the rejection of the claim by the commissioners, and after the confirmation of the award of rejection by the Privy Council, the suppliant presented a memorial to the proper authorities in France, praying for compensation out of the fund provided in France for the indemnity of persons whose property had been confiscated on the ground of their emigration; upon the face of which memorial it was stated that his claim was so made conditionally, with a view to meet the event of his not succeeding in his claim upon the British Government: but the claim was rejected by the French Government on the express ground that all foreigners were excluded from the benefit of the law providing indemnity for emigrants, and that he was a British subject whose claims against France had been paid in the form of a compromise by the French Government under the arrangement ratified and carried into effect by the Convention of 1818.

The petition then stated proceedings before a committee appointed by the House of Commons to examine the claim, which, however, did not report before the dissolution of Parliament; and further steps taken by the petitioner, but unsuccessfully, to obtain a recognition of his claim by the next House of Commons.

That, after payment of all the claims of the duly registered claimants which have been established, a large surplus remained in the hands of the said Com-**[223]**-missioners of Deposit, which surplus has since been paid to the Lords Commissioners of His late Majesty's Treasury. That the suppliant had reasons (which he stated) for believing that one of the commissioners differed from the opinion of his colleagues; that commissioner stating that he found the Duke de Richelieu acknowledged the receipt of the claim; and that he (the commissioner) was of opinion that the presentation was valid, and not contrary to what the convention prescribed; that it was not said in the convention that the claims must be presented exclusively through the British Commissioners; and that he found the register had been reopened to admit other claimants.

That attempts have been made, on the suppliant's behalf, to obtain inspection of the documents relating to his claim; but that certain of these, which he described, were stated to him to be missing.

That, in the then last Trinity term, the suppliant moved the Court of Queen's

HeinOnline -- 115 Eng. Rep. 860 1378-1865

ADD-8

Bench (*a*), for a rule calling upon the Lords Commissioners of the Treasury to shew cause why a writ of mandamus should not issue, commanding them to pay to him the amount of the surplus paid by the Commissioners of Deposit, mentioned in stat. 59 G. 3, c. 31, to the Lords of the Treasury, or so much thereof as might be sufficient to indemnify the suppliant for the loss of immoveable property in Lower Alsace unduly confiscated by the French authorities; which motion was founded upon an affidavit made by the suppliant, wherein he stated in substance the whole or the greater part of the facts hereinbefore set forth. That, upon the motion, the suppliant's counsel drew the attention of the Court to those parts of the affidavit which shewed **[224]** that the funds paid by the French Government under the several Conventions of 1815 and 1818 were received by the Crown in the capacity of trustee for such of its subjects as had been injured by French spoliation, and who came within the terms of those conventions, and the Crown had entered into an implied engagement, both with the French Government and the British subjects interested, that the funds should be distributed in accordance with those conventions; and his counsel urged that, by the statute, the duty of duly administering these funds was removed from the Crown and vested in the said commissioners in respect of the registered claimants, and in the Lords of the Treasury as to any surplus which might remain after the payment of the registered claimants; and that all objections as to his nationality, not only as being a British subject, but as coming within the provision of the conventions, was not only unfounded in law and in fact, but had been abandoned by the French Government at the time when that Government was alone interested in diminishing the amount of claims, and long before the sum had been fixed which France should pay by way of final settlement of those claims. That the Court refused to grant the rule, and by its written judgment assigned two grounds only for such refusal: the first of which grounds was, that the claim was unproved and unliquidated, and that the suppliant could not call upon the depositaries of a gross fund to pay him thereout any portion till he had reduced his demand to a certainty, and that he could not call upon these depositaries to ascertain his claim, they having no power so to do, no power to hear, to inquire, to take proofs, or to determine; that merely as such depositaries, they had none of these powers; and that no law or statute had **[225]** invested them specially with such powers: and the second ground was, that the said Lords Commissioners held the fund as the servants of the Crown, inasmuch as the money was first obtained by the exercise of the Royal functions; that the suppliant's claim was beside the Parliamentary appropriation of any part of that fund; and that the residue had now reverted to the Crown, and was in the hands of the Crown, by its servants; and that it was an established rule that a mandamus would not lie against the servants of the Crown merely to enforce the satisfaction of claims upon the Crown.

That the suppliant is informed and believes he is entitled to relief by Petition of Right in respect of any claim which he may have upon the Crown, and whether the same be of a liquidated or an unliquidated nature. That the value of immoveable property in Lower Alsace, so lost by the suppliant, together with the interest payable thereon, according to the terms of the first-mentioned convention, amounted, on 1st January 1819, to the sum of 13,320,885 francs, 10 sous and a half, of French money, being of the value of 532,835l. 8s. 4d. of English money; and the suppliant accordingly claimed that amount before the Commissioners of Arbitration, Liquidation and Award.

"All and singular which matters, by your suppliant above in his petition alleged, your suppliant is ready to verify in such ways and manners as may be convenient.

"Your suppliant therefore most humbly prays that your Majesty will be graciously pleased to order that right be done in this matter; and to indorse your Royal declaration hereon to that effect, and to refer the petition, with such your Royal order and declaration **[226]** thereon, to your Majesty's High Court of Chancery at Westminster; and that this petition may be duly received and enrolled; and that your Majesty's Attorney General, being attended with a copy thereof, may be required to answer the same; and that your suppliant may henceforth prosecute his complaint herein in such Court, and take such other proceedings herein as may be necessary,

(*a*) *In re Baron de Bode*, 6 Dowl. P. C. 776.

HeinOnline -- 115 Eng. Rep. 861 1378-1865

ADD-9

against the said Attorney General as representing the rights and interests of your Majesty, and also against such other persons, if any, as need may require; and that, for that purpose, your suppliant may have leave to make such Attorney General, and such other persons as aforesaid, parties hereto, and to pray to obtain such relief in the matters aforesaid as under the circumstances hereinbefore stated shall be just. And your suppliant, as in duty bound, shall ever pray," &c. "J. MANNING."

"Whitehall, December 10th, 1838.

"Her Majesty is pleased to refer this petition to Her High Court of Chancery, to consider thereof, and to do what is right and proper therein. "J. RUSSELL."

"2d February 1839.

"Let right be done. "COTTENHAM C."

"Whereupon the said Chancellor, by certain letters patent of the said lady the now Queen, directed to (sic), Martin John West, John Farquhar Fraser, Sutton Sharpe, John Elijah Blunt, Edward Vaughan Williams and Edward Smirke, Esquires, five, four, three or two of them, to inquire upon the oath of good and lawful men of the county of Middlesex, as well within liberties [227] as without, by whom the truth might best be known, of all and singular the matters in the said petition specified and contained, the tenor of which letters patent follows in these words.

"Victoria, by the grace," &c., "to our faithful and beloved Martin John West, John Farquhar Fraser, Sutton Sharpe, John Elijah Blunt, Edward Vaughan Williams and Edward Smirke, Esquires, barristers at law, greeting: whereas, by a certain petition lately presented to us by our beloved and faithful subject Clement Joseph Philip Pen de Bode, Knight, Baron de Bode, and of the Holy Roman Empire, we have been informed," &c. Here followed the statement of the petition in totidem verbis, only omitting the offer to verify the statement, and the prayer.

"We, willing that what is just in this behalf should be done, have assigned you or any five, four, three or two of you, by the oath of good and lawful men of the county of Middlesex, as well within liberties as without, by whom the truth of the matter may be best known, to inquire of the truth of all and singular the matters in the said petition contained and specified. And therefore we command you that, at such day and place, or days and places, as you, or any two or more of you, shall appoint for that purpose, you, or any two or more of you, diligently set about the premises, and do and execute all and singular the matters aforesaid with effect; so that as well the inquisition, as all other matters by you, or any two or more of you, taken and done in the premises, you, or any two or more of you, send and certify to us in our Chancery, under your seals or the seals of you, or any two or more of you, and the seals of those persons by whom such inquisition shall [228] be made, distinctly and openly without delay, together with these our letters patent. We also give full power and authority to you, or any two or more of you, to call and procure to appear before you, or any two or more of you, all persons whomsoever fit to be examined in the premises, and their examinations, they having been first duly sworn before you, or any two or more of you, to receive and take. And we also, by the tenor of these presents, command our Sheriff of our county of Middlesex that, at a certain day and place, or certain days and places, which you, or any two or more of you, shall appoint for that purpose, and on our part made known to him, he cause to come before you, or any two or more of you, so many and such good and lawful men of his bailiwick, as well within liberties as without, by whom the truth of the matter in the premises may be better known and inquired into. And we also, by the tenor of these presents, strictly command all and singular justices, mayors, sheriffs, bailiffs, officers, ministers, and all other our faithful subjects of our said county of Middlesex, as well within liberties as without, that to you, in the execution of these presents, they be attendant, obedient, aiding and assisting, in such manner as you, or any two or more of you, shall make known to them on our behalf. In witness whereof we have caused our letters patent to be made. Witness ourselfs at Westminster, the 23rd of December, in the fourth year of our reign.

"By virtue of which letters patent the said John Farquhar Fraser, Edward Vaughan Williams and Edward Smirke returned a certain inquisition, before them taken, into the High Court of Chancery aforesaid, with the said letters patent thereto annexed, in these words.

HeinOnline -- 115 Eng. Rep. 862 1378-1865

[229] "Middlesex, to wit.—An inquisition taken at Westminster Hall in the county of Middlesex, on Wednesday the 15th June, in the year of our Lord 1842, and, by adjournment, on Thursday the 16th, and Friday the 17th, and Saturday the 18th days of the same month of June, before John Farquhar Fraser, Edward Vaughan Williams and Edward Smirke, Esquires, by virtue of certain letters patent to" M. J. West, &c., "directed, and to this inquisition annexed, on the oath of Richard Carpenter," &c., "to wit fourteen in all, good and lawful men of the county of Middlesex: who say, upon their oath:

"That Clement Joseph Philip Pen de Bode, the suppliant in the said letters patent mentioned, is the eldest son of the late Charles Frederick Lewis Augustus de Bode, Baron de Bode and of the Holy Roman Empire, and formerly a colonel of the Regiment of Nassau-Saarbruck in the service of the King of France, by Mary, his late wife, daughter of the late Thomas Kynnersley, of Loxley Park, in the county of Stafford, Esquire; and that the said suppliant's said father was born on the family estate at Neuhof in Germany, and was baptised at Neuhof aforesaid; and that the said suppliant was born in the said county of Stafford, in the year of our Lord 1777, and was baptised at Uttoxeter, in the same county, on the 2d day of May in the same year.

"And that, both since the making of the Peace of Westphalia, concluded between France and the Holy Roman Empire on the 24th day of October in the year of our Lord 1648, and for many centuries before that time, the lordship and land of Sultz, otherwise called Sultz-am-Staaten, otherwise called Soultz-sous-Forêts, constituting part of the barony of Fleckenstein, in the [230] late province of Lower Alsace, now called the Department of the Lower Rhine, in the kingdom of France, was an ancient fief descendible in the direct male line only, and not liable to be aliened or encumbered without consent of the grantor of the fief; and that in the year 1720, upon the failure of the male line of the Barons of Fleckenstein, nomination to and investiture of the said fief was made and granted by the then Archbishop of Cologne to Hercules Meriadæ Prince of Rohan Soubise; and that, upon the death of the last male descendant of the said Prince of Rohan Soubise, in 1786, it belonged to the then Archbishop of Cologne to appoint a new line of feudatories to the same fief. And that the said Charles Frederick Lewis Augustus, late Baron de Bode, obtained from him a nomination to the said fief and a grant thereof, and was invested by him with it as with a real male fief, by the description of the castle and town of Soultz, and the villages of Hermersweiller, Reschweiler, Meisenthal, Memelshofen, Jaegershofen, and Lausenscholt, together with the vassals, jurisdictions, woods, forests, chases, waters, fisheries, pasturage, franchises, commons, and every thing belonging thereto, without exception, in the same manner as the De Fleckensteins had possessed them and held them; also the right of high and low jurisdiction, and the profits arising therefrom: to hold to the said Baron de Bode and his legitimate male feudal heirs of his body, subject to certain feudal duties in the said grant particularly mentioned; and, among others, that the said Baron de Bode should not sell or assign, sever, or deteriorate the said fiefs, without the consent of the said Elector of Cologne; and that such grant was then formally ratified by the chapter of Cologne; and that investiture of the [231] said fief was then in due form given by the officers of the said archbishop to the said late baron.

"And, further, that, previously to the Peace of Westphalia, the provinces of Upper and Lower Alsace formed part of the empire of Germany. And, further, that the Emperor of Germany and the King of France, who had long been at war, were parties to the said Peace of Westphalia. And, further, that, by the Treaty of Munster, which treaty formed part of the Peace of Westphalia, the Emperor of Germany, for himself and for the House of Austria and also the Empire, ceded to France all the rights which they respectively had in Upper and Lower Alsace, with all jurisdiction and sovereignty, subject, however, to an express proviso that France should be bound to leave the Barons of Fleckenstein, and all the nobility of Lower Alsace, in the liberty and possession they had enjoyed heretofore, as immediately dependent upon the Empire, so that the King should not claim any Royal superiority over them, but should rest content with the rights which had belonged to the House of Austria, and which, by that treaty of pacification, were yielded to the Crown of France, but without prejudice to the sovereignty acquired by France under that treaty in that which had belonged to the House of Austria.

"And, further, that, by the Treaty of Peace concluded at Nimeguen on the 3d

HeinOnline -- 115 Eng. Rep. 863 1378-1865

day of February 1679, between the Empire and France, under the mediation and guarantee of the King of England, it was stipulated that the provisions of the said Treaty of Munster should be and remain in as full force as if its provisions had been inserted, word for word, in the said Treaty of Nimeguen; and that a similar ratification was included **[232]** in the treaty made between the Kings of England and Spain on the 10th day of June 1680. And, further, that, a new general league having been formed against France, in consequence of the violation of the Treaties of Westphalia and Nimeguen, William the Third, King of England, joined it by an Act dated Hampton Court, December the 20th, 1689. And, further, that a similar ratification of the said Treaty of Munster was included in the Treaty of Ryswick, made and concluded on the 30th day of October 1697; and also in that of Utrecht, made on the 11th day of April 1713; and in that of Aix la Chapelle, made on the 18th day of October 1748; and in that of Paris, made on the 10th day of February 1763; and in that of Versailles, made between the Kings of England and France on the 3d day of September 1783.

"And, further, that in the year 1791 the said suppliant's late father made a public cession of all his rights in the said property in the presence of the burghers and vassals of the said lordship of Sultz, to the said suppliant. And, further, that, as the said suppliant was only fourteen years of age at the time of the said cession, the said lordship and lands of Sultz were from thenceforward administered and governed in the name of the said suppliant, by his said late father.

"And that, in the beginning of October 1793, the said suppliant and his father left their residence at Sultz and took refuge in the Austrian Army, then in the neighbourhood. And, further, that, on the 10th day of October 1793, by a decree now remaining in the archives of the said Department of the Lower Rhine, it was decreed by the said department, in full session, that the individuals named in a list which was and is subjoined to **[233]** the said decree should be declared emigrants, and that all their property should be confiscated in order to its being sold or aliened, agreeably to the provisions of the laws relating to emigrants: and that the list of names subjoined to the said decree was as follows, "I. Armann N. N. deux frères Seltz,—Bode de Soultz;" after which followed other names. And, further, that, in pursuance of the said decree, the said lordship and lands of Sultz, including a certain mansion and certain houses, mines, lands, and other property forming part of the said lordship and lands, were seized as confiscated by the persons then exercising the powers of Government in France, and were thenceforward treated as national property, and that part thereof was afterwards sold under the authority of the French Government, and that the residue thereof continued in the possession of the French Government until after the restoration of the House of Bourbon, in the years 1814 and 1815.

"And, further, the suppliant's late father died in Russia in the year 1797.

"And, further, that, by the fourth additional article of the definitive treaty of peace between the Kings of Great Britain and France, concluded at Paris on the 30th day of May 1814, it was stipulated that, immediately after the ratification of that treaty, the commissioners mentioned in the second additional article of the said treaty should undertake the examination of the claims of His Britannic Majesty's subjects upon the French Government for the value of the property, moveable or immoveable, unduly (indûment) confiscated by the French authorities, as also of the total or partial loss of the debts due to them, or other property unduly detained under sequestration, subsequently to the year **[234]** 1792. And, further, that, by the ninth article of the definitive treaty of peace between the Kings of Great Britain and France, signed at Paris on the 10th day of November 1815, it was stipulated that two conventions added to the said treaty should have the same force and effect as if inserted therein. And, further, that, in one of the said conventions, entitled Convention No. 7, between the Kings of Great Britain and France, also signed at Paris the 20th day of November 1815, it was provided, article 1, that the subjects of His Britannic Majesty having claims against the French Government, who, in contravention of the second article of the Treaty of Commerce of 1786, and subsequently to the 1st day of January 1793, had suffered in consequence of confiscation or sequestration decreed in France, and their heirs and assigns, subjects of His Britannic Majesty, should, conformably to the fourth additional article of the Treaty of Paris made at Paris in the year 1814, be indemnified and paid after their claims should have been recognised as legitimate, and the amount thereof should have been fixed, according to the forms and under the con-

HeinOnline -- 115 Eng. Rep. 864 1378-1865

ditions thereinafter expressed. And, further, that the fifth article of the said convention contains the regulation by which the amount of British claimants in respect of immoveable property was to be ascertained. And, further, that, by the seventh article of the said convention, it was stipulated that the claims of the subjects of His Britannic Majesty arising from the different laws made by the French Government, or for mortgages upon property sequestered, seized or sold by the said Government, or any other claim whatsoever not comprised in the articles of the said convention preceding the said seventh article, and which would be **[235]** admissible according to the terms of the fourth additional article of the Treaty of Paris of 1814 and of that convention, should be liquidated and fixed. And that, by the ninth article of the said convention, a capital producing annually 3,500,000 francs, to be inscribed in the Great Book of the Public Debt of France, was provided as a guarantee for such claimants, with a proviso that, if that amount should prove insufficient, further sums should be furnished to the extent of the claims. And, further, that, by the twelfth article of the said convention, a period of three calendar months was allowed to claimants resident in Europe to present their claims; and that the thirteenth and fourteenth articles of the said convention directed the mode in which the claims of British subjects against the French Government should be examined. And, further, that, by the second article of the said Treaty of Commerce in 1786, it was declared that it had been agreed that, if at any time any misunderstanding, interruption of friendship, or rupture, should arise between the two Crowns, the subjects of each party residing in the territories of the other should be allowed to continue their residence and their business without being in any manner disturbed, so long as they should conduct themselves peaceably and should do nothing contrary to the laws; and that, in case their conduct should render them suspected, and the respective Governments should find themselves obliged to order them to withdraw themselves, there should be granted to them for that purpose a term of twelve months, to enable them to withdraw themselves with their effects and their property, as well such as may have been entrusted to individuals as to the public, it being fully understood that this indulgence would not **[236]** be claimed by those who should conduct themselves in a manner contrary to public order.

"And, further, that, by a commission under the Great Seal of Great Britain, bearing date the 27th day of December 1815, Colin Alexander Mackenzie, George Lewis Newnham, George Hammond, David Richard Morier, and James Drummond, Esqrs., were nominated and appointed Commissioners of Liquidation, Arbitration and Deposit, for the purpose of carrying into effect, on the part of Great Britain, the provisions contained in the said convention.

"And, further, that, on the 12th day of January 1816, being within the said period of three calendar months from the signing of the said convention, the said suppliant, being then in the Russian service, directed a memorial of his claims as a British subject, under the Convention of 1815, to the Russian Ambassador at Paris, Count Pozzo di Borgo, who had engaged to transmit the same to the Duke de Richelieu, then being Prime Minister to the King of France and his Minister for Foreign Affairs, to be forwarded by him to the mixed commission mentioned in the said convention, and composed of an equal number of English and French Commissioners; which mixed commission had not then entered upon its duties or begun to sit, the English members of the commission not then having arrived in France. And, further, that on the 9th day of February, 1816, the said memorial was forwarded by the said Count Pozzo di Borgo to the said Duke de Richelieu, so being such minister. And, further, that the said Duke de Richelieu sent a letter to Count Pozzo di Borgo to be communicated to the said suppliant, stating therein that he considered the claim of the said sup-**[237]**-pliant as inadmissible under the said convention, inasmuch as the said suppliant's father was a German. The said suppliant then presented a memorial to the said Duke de Richelieu, from whom, on the 29th day of March 1816, the said suppliant received an answer, formally certifying that he had received the said suppliant's claim on the 9th day of February 1816.

"And, further, that, by a convention," &c. (stating the Convention of April 25th, 1818, for inscribing an annuity in the Great Book of the Public Debt of France, verbatim as at p. 217, ante, down to the words "March 1818.")

"And, further, that, by an Act," &c. "passed in the fifty-ninth year of the reign of King George the Third, to enable certain commissioners fully to carry into effect

HeinOnline -- 115 Eng. Rep. 865 1378-1865

ADD-13

several conventions for liquidating claims of British subjects and others against the Government of France, after reciting, amongst other things, the nominations and appointments of the said Colin Alexander Mackenzie," &c. (the inquisition then set out the recitals and enactments of stat. 59 G. 3, c. 31, sects. 1 and 16, as stated in the petition, ante, pp. 217-220, down to the words "therein specified"). "And that neither the said suppliant's name nor his claim had been placed on the register of the names of claimants until after the passing of the said Act of Parliament.

"And, further, that, after payment of all the claims of the duly registered claimants which have been established, a large surplus, to wit the sum of 482,752l. 6s. 8d., remained in the hands of the said Commissioners of Deposit; of which surplus a sum of 200,000l. and upwards was applied to satisfy claims which had been tendered **[238]** after the time limited by the ninth article of the Convention of the 20th November 1815, and not admitted until the authority of the Lords Commissioners of His Majesty's Treasury was given for that purpose, on the 5th May 1826; and the residue, that is to say, the sum of 200,000l. and upwards, was paid into the Bank of England on the Government account, by direction of the Lords of His Majesty's Treasury, in pursuance of the said Act of the 59th year of the reign of King George the Third, chapter 31.

"And, further, that the value of the immoveable property in Lower Alsace, so lost by the said suppliant, together with the interest payable thereon according to the terms of the said first mentioned convention, amounted, on the 1st January 1819, to the sum of 9,106,650 francs, being of the value of 364,266l. English money.

"In witness whereof, as well the said commissioners as the jurors aforesaid have to this inquisition set their hands and seals, at the place and on the day and year above mentioned, that is to say, this 18th day of June aforesaid.

"Whereupon Sir Frederick Pollock, Knight, Attorney General of the lady the now Queen, who for the said lady the Queen now in this behalf prosecuteth, being asked by the Court here if he has or knows or wishes to say any thing why the said suppliant should not have such relief in this behalf as aforesaid, prayed a day to imparle with the counsel of the said lady the Queen until the 10th of November A.D. 1842: and it was granted to him, &c.

"At which day, to wit on the 10th of November in the year last aforesaid, before the said lady the now **[239]** Queen in her said High Court of Chancery at Westminster aforesaid, came the said suppliant in his own person, and prayed relief as aforesaid. Whereupon the said Sir F. P., Knight, Her Majesty's Attorney General, who for our lady the now Queen prosecutes in this behalf, is again asked if he has or knows or wishes to say any thing why the said suppliant should not have such relief as aforesaid. Which said Sir Frederick Pollock, who for the said lady the now Queen prosecutes, being present now in Court in his own person, protesting that the said petition is not good and sufficient in law, says, for and on behalf of our said lady the Queen, that the said several matters and things in the said petition, and also in the said inquisition (*a*), contained, specified and set forth, are not, nor is any one of them, nor any part thereof, true in fact: and this he, the said Sir F. P. Knight, so being such Attorney General as aforesaid, who sues for our said lady the Queen as aforesaid, prays, on behalf of our said lady the Queen, may be inquired of by the country.

"And, for a further plea on behalf of our said lady the Queen, touching and concerning the matters of the said petition, the said Sir Frederick Pollock, Knight, so being such Attorney General as aforesaid, and who sues for our said lady the Queen as aforesaid, by leave of the Court here for that purpose first had and obtained, according to the form of the statute in such case made and provided, says, on behalf of our said lady the Queen, that the said several supposed causes of petition in the said petition, and also in the said inquisition, con-**[240]**-tained, specified and set forth did not, nor did any or either of them, accrue to the said suppliant within six years next before the presenting and exhibiting the said petition by the said suppliant to our said lady the Queen: wherefore he, the said Sir Frederick Pollock, Knight, so being such Attorney General as aforesaid, who sues for our said lady the Queen as aforesaid, prays judgment for our said lady the Queen, if the said suppliant ought to have or maintain his said petition for relief in that behalf against our said lady the Queen.

(*a*) See, post, p. 243, note (*a*), p. 267, note (*a*), and p. 275, note (*a*).

HeinOnline -- 115 Eng. Rep. 866 1378-1865

ADD-14

"And, for a further plea," &c. (commencement as in the last preceding plea), "that the said several supposed causes of petition in the said petition, and also in the said inquisition, contained, specified and set forth, did not, nor did any or either of them, accrue to the said suppliant since the accession of our lady the Queen to the Crown and Sovereignty of this realm: and this he, the said Sir Frederick Pollock, Knight, so being such Attorney General as aforesaid, who sues for our said lady the Queen as aforesaid, is ready to verify: therefore, he prays judgment for our said lady the Queen, if the said suppliant ought to have or maintain his said petition for relief in that behalf against our said lady the Queen.

"H. WADDINGTON, for THE ATTORNEY GENERAL.

"And the said suppliant protesting that the plea of the said Attorney General by him first above pleaded, and the matters therein contained, are insufficient in law in this, to wit that the same plea is multifarious, and that it puts in issue divers public treaties and conventions, alleged in the said petition, and found by the said inquisition, to have been entered into between divers **[241]** Kings of Great Britain, predecessors and progenitors of our said lady the Queen, and divers foreign princes and States, and also that the said Attorney General has in and by the said first plea denied the existence of a certain Act of Parliament made and passed in the 59th year of the late King George the Third, to enable certain commissioners fully to carry into effect several conventions for liquidating claims of British subjects and others against the Government of France, and has in and by his said first plea referred the alleged non-existence of the said Act of Parliament to the decision of a jury of the country, and that the said plea is in divers other respects informal and insufficient, for replication nevertheless, in this behalf, the said suppliant says that, inasmuch as the said Attorney-General has prayed that the truth of the said several matters and things may be inquired of by the country, the said suppliant doth the like.

"And the said suppliant protesting that the plea of the said Attorney General by him secondly above pleaded, and the matters therein contained, are insufficient in law in this, to wit that the same are wholly inapplicable to a plea pleaded by way of traverse, or in confession and avoidance, of matters contained in an inquisition taken under a commission issued to inquire into the truth of matters alleged in a Petition of Right, for replication nevertheless, in this behalf, the said suppliant says that the several causes of petition in the said petition, and also in the said inquisition, contained, specified and set forth did, and each of them did, accrue to the said suppliant within six years next before the presenting and exhibiting of the said petition by the said suppliant to our said lady the Queen: and this the said suppliant prays may be inquired of by the country. **[242]** And the said Attorney General, on behalf of the said lady the Queen, doth the like.

"And the said suppliant, protesting that the plea of the said Attorney General by him thirdly above pleaded, and the matters therein contained, are insufficient in law, for replication nevertheless in this behalf, the said suppliant says that the several causes of petition in the said petition, and also in the said inquisition, contained did, and each of them did, accrue to the said suppliant since the accession of our said lady the Queen to the Crown and sovereignty of this realm: and this he, the said suppliant, also prays may be inquired of by the country. And the said Attorney General, on behalf of the said lady the Queen, doth the like. "J. MANNING.

"Therefore, to try the several issues above joined, the Sheriff of Middlesex is commanded that he cause to come before our said lady the Queen, on the 11th day of January in the year of our Lord 1843, wheresoever she shall then be in England, twelve good and lawful men of the county of Middlesex, qualified as by law is required, by whom the truth of the matter may be better known, and who to the said suppliant are in no ways related, to recognise upon their oath the full truth of and concerning the premises aforesaid; because as well the said Sir Frederick Pollock, who prosecutes as aforesaid, as the said suppliant, have put themselves upon the said jury. The same day is given to the parties aforesaid."

The case was tried at Bar, in Trinity vacation 1846 (*a*), before Lord Denman C.J., Patteson, Williams, and Coleridge Js.

(*a*) June 20, 21, 22, and 24.

HeinOnline -- 115 Eng. Rep. 867 1378-1865

ADD-15

[243] Hill, Manning Serjt., Mellor, G. A. Young and Anstey appeared as counsel for the suppliant, and Sir F. Thesiger, Solicitor General, Erle and Waddington as counsel for the Crown.

Evidence was offered, on behalf of the suppliant, in support of the several findings in the inquisition (*a*)[1].

To prove that, after the cession (which was not yet proved), "the said lordship and lands of Sultz were from thenceforward administered and governed in the name of the said suppliant, by his said late father" (ante, p. 232), evidence was offered that the father, at a time subsequent to the alleged cession, while administering and governing the lordship and lands, had declared that he did so for the suppliant (*b*).

Counsel for the Crown. The declaration cannot be admitted. According to both the case for the suppliant and the evidence, the cession by the father to the son had taken place before the declaration was made: and, that being so, the father would not be making a declaration in abridgment of his primâ facie interest, which is the only supposition on which the declaration would become evidence. The declarations of a party acting as steward or bailiff cannot be evidence of the title.

Counsel for the suppliant, contrà. If it is to be assumed that there had been a complete and valid cession, the evidence is of course not wanted, because then the pro-**[244]**-perty could have been administered only for the son. But, this being disputed, and no evidence of it having been yet given, the fact simply is, that the father was in apparent absolute possession, and, therefore, was primâ facie owner. His declaration, therefore, that he administered only for the son, falls within the common principle of admitting a declaration made in abridgment of the primâ facie right of the party declaring (*a*)[2].

Per Curiam. We cannot assume any state of things which is not yet in proof. We therefore have only the fact that the father was managing the property. If, when so doing, he declared that he was acting as bailiff for another, that was an admission against his apparent interest, and therefore good evidence.

Evidence admitted.

For the purpose of proving the value of the property, the suppliant's counsel proposed to put in certain depositions made by a party who was shewn, to the satisfaction of the Court, to be abroad and out of their jurisdiction. It appeared that, after the finding of the inquisition, and (as the counsel for the suppliant stated) under the apprehension that the Crown would traverse the inquisition, the suppliant filed a bill against the Attorney General, reciting the proceedings in the Petition of Right, to perpetuate evidence. The cause was entitled the Baron de Bode against the Attorney General. The Attorney General demurred; but the Court of Chancery (Sir L. Shadwell, V.-C.) overruled the demurrer; and the commission issued. The Crown was applied to for the purpose of its joining in the **[245]** commission, but did not join; and the depositions were taken ex parte. They were entitled in the cause in Chancery. The commission directed the commissioners to examine witnesses "upon certain interrogatories, to be exhibited to you on the part of Clement Joseph Philip Pen de Bode, Baron de Bode, complainant, against our Attorney General, defendant."

Counsel for the Crown. This is a proceeding in a different cause, between different parties. The Vice-Chancellor had no power to make any documents evidence on the trial of this traverse.

Counsel for the suppliant, contrà. The depositions could not have been otherwise entitled. Then they become evidence as made in a proceeding springing out of the present one, and, in effect, between the same parties. An opportunity has been given to the Crown to cross-examine the deponent.

Lord Denman C.J. I am of opinion that the evidence ought to be admitted. The proceeding in Chancery must be taken as a proceeding in this cause: and this is, in fact, a commission to examine witnesses in which both the parties now before us might have concurred, and might have had a full opportunity of cross-examining.

Patteson J. As I understand the state of the case, there was, at the time this

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(*a*)[1] A question arose, whether, upon the traverse, any facts were put in issue which appeared in the petition but were not found in the inquisition: but it became unnecessary to decide this. See p. 267, post, note (*a*).

(*b*) It was assumed, on both sides, that the father was dead at the time of the trial.

(*a*)[2] See *Doe dem. Daniel* v. *Coulthred*, 7 A. & E. 235.

HeinOnline -- 115 Eng. Rep. 868 1378-1865

ADD-16

commission issued, no Court except the Court of Chancery in possession of this cause. It would be, therefore, very hard if a commission, which issued in the cause as it then stood, could **[246]** not be read when the inquisition was afterwards traversed.

Williams J. concurred.

Coleridge J. I apprehend that the admissibility of this proof follows from what was said by the Judges in *The Banbury Peerage case* (*a*), in 1809. They were asked, "Whether depositions, taken in the Court of Chancery, in consequence of a bill to perpetuate the testimony of witnesses, or otherwise, would be received in evidence to prove the facts sworn to, in the same way and to the same extent as if the same were sworn to at the trial of an ejectment by witnesses then produced?" They answered: "Such depositions would not be received in evidence, in a Court of Law, in any cause in which the parties were not the same as in the cause in the Court of Chancery, or did not claim under some or one of such parties." It was evidently implied that the depositions would be receivable when the parties were the same. Here they substantially are so: and, not only that, but the commission has issued in this very proceeding.

Evidence admitted.

Evidence was given for the suppliant to shew the state of the law of inheritance in Alsace. A witness, called for the suppliant, and who stated himself to be a French advocate practising at Strasburg, in the Department of Bas Rhin, stated, on cross-examination, that the feudal law had been put an end to in Alsace by the torrent of the French Revolution, de facto, in **[247]** 1789, and by the Treaty of Lunevile, de jure; and, upon being asked whether there was not a decree to that effect, he added, that there was such a decree, of the 4th of August 1789, of the National Assembly; and that he had learned this in the course of his legal studies, it being part of the history of the law which he learned while studying the law.

Counsel for the suppliant. This evidence cannot be admitted, unless the decree itself be proved and put in. The answer offered would be a statement, not of the general principles of feudal or French law, but of the contents of a particular decree. In *Clegg* v. *Levy* (3 Campb. 166), a question arose whether a certain instrument in Surinam, relating to an alleged partnership in goods, required a stamp by the law of that place: and a witness, who had resided as a merchant at Surinam, stated "that in that colony all agreements must be stamped to be of any validity, and that there is a written law of the colony to this effect." Lord Ellenborough said: "I must have more distinct evidence of the law of Surinam upon this subject, than the parol examination of a merchant. The law being in writing, an authenticated copy of it ought to be produced. Although this gentleman supposes that it applies to all agreements, it may possibly contain an exception, like our own Stamp Act, as to agreements for the sale of goods, wares, and merchandizes. In the case of *Bohtlingk* v. *Inglis* (*b*), respecting the right to stop in transitu in Russia, Lord Kenyon required the written law of Russia upon this subject to be **[248]** given in evidence. I will, therefore, admit this agreement to be read, unless you prove in the same way, that by the law of Surinam a stamp was requisite to give it validity." The same rule is laid down in 2 Phill. Ev. 144 (ed. 9), where the cases just mentioned are cited, and also *Picton's case* (30 How. St. Tr. 225, 491). [Lord Denman C.J. mentioned *Millar* v. *Heinrick* (4 Campb. 155).] In *Middleton* v. *Janverin* (2 Hag. Cons. R. 437, 442), the same general rule was admitted; but the case was distinguished on the ground that it was impossible then to procure the regular evidence of the foreign law. In *Lacon* v. *Higgins* (3 Stark. N. P. C. 178), the rule was complied with. There a witness, the French vice-consul, proved that at the Royal printing office in France laws were printed by the authority of the French Government; and a book purporting to be so printed, upon which the witness was in the habit of acting, was received as evidence of the contents of the French Code. It is not necessary to inquire what would be the rule if the question arose on the law as resulting from a large number of written laws: here the answer points to a specific law. Nor does it make any difference that the evidence is offered on cross-examination; for the cross-examination is addressed, not to the correction of evidence given in chief,

(*a*) See 2 Selw. N. P. 756, 757, 10th ed. The case is cited (from a former edition) in 1 Stark. Ev. 332, note (*f*) (ed. 3).

(*b*) 3 East, 381. See *Boehtlinck* v. *Schneider*, 3 Esp. 58; also note (*a*) to *Buchanan* v. *Rucker*, 1 Campb. 65.

HeinOnline -- 115 Eng. Rep. 869 1378-1865

but to the introduction of a distinct and new fact. This evidence is not offered as secondary evidence admissible on account of any difficulty in procuring primary evidence, but as the primary evidence itself. It is as if the original decree were shewn to be now in Court, and yet oral evidence were offered.

[249] Counsel for the Crown, contrà. The witness is competent to speak to the law of France; and it is not necessary that he should produce the original sources from which he has drawn his knowledge. If an English lawyer, in a Court where a question arose upon English law as a fact, were asked how many witnesses were necessary to the attestation of a devise of real property, he surely might, consistently with the English principles of evidence, answer that three witnesses were necessary from 1676 to 1838, and since then two only, without producing the statutes 29 C. 2, c. 3, and 7 W. 4 & 1 Vict. c. 26. The same rule must apply to evidence of law as to evidence of the facts of any other science. Now a medical man may state the result of his knowledge as to medical questions, though, in numerous instances, such knowledge must result from experiments or cases which he knows only by reading or report. So a chemist may speak of facts established by experiments which he has not witnessed. Here, especially, the witness, having shewn, in his examination in chief, the law as it existed during a certain time, may surely be asked, on cross-examination, whether that state of law exists still. No inquiry is made as to the terms of the particular law: the question is how the law has been since a time named. In *Clegg* v. *Levy* (3 Campb. 166), the evidence was given by a merchant, not by a lawyer. *Middleton* v. *Janverin* (2 Hag. Cons. Rep. 437, 442), at any rate shews that there is no such peremptory rule as that contended for on the other side: there the effect of a decree of the Council of Trent was collected by advocates from books. So, in questions upon the law of tithes, the effect of the decree **[250]** of the Council of Lateran is always assumed, without producing the decree.

Counsel for the suppliant, in reply. The contents of a written law must be proved exactly as the contents of a treaty: and it will not be contended that a treaty can be proved otherwise than by producing it, or accounting for the non-production and giving proper secondary evidence. The illustrations suggested from the sciences of medicine and chemistry are in favour of the suppliant. If a medical or chemical witness were asked whether a particular fact were determined by a particular experiment made on a day named by a person named, the question could not be legally answered unless the witness had seen the experiment. On an issue as to the originality of an invention, in a patent case, could the originality be impeached by producing a scientific witness who had heard that the process in question had been performed before? The best evidence must be produced in every instance.

Lord Denman C.J. The witness, upon being questioned as to the state of law in France in 1789, refers to a decree of that date. The form of the question is, I think, immaterial: in effect, the witness is asked to speak to the decree. It is objected that this is a violation of the general principle, that the contents of a written instrument can be shewn only by producing the instrument or accounting for the non-production. But there is another general rule: that the opinions of persons of science must be received as to the facts of their science. That rule applies to the evidence of legal men: and I think it is not confined to un-**[251]**-written law, but extends also to the written laws which such men are bound to know. Properly speaking, the nature of such evidence is, not to set forth the contents of the written law, but its effect and the state of law resulting from it. The mere contents, indeed, might often mislead persons not familiar with the particular system of law: the witness is called upon to state what law does result from the instrument. I do not think that the case of treaties is applicable: there no class of persons are so peculiarly conversant with the subject matter as to invest it with the character of a science. The cases which have been cited raise much less doubt in my mind than the opinion of one of my learned brothers, who differs from me. In *Boehtlinck* v. *Schneider* (3 Esp. 58), Lord Kenyon, according to the report, declined to receive proof of the unwritten law of Russia from "a person conversant with the law of that country;" and asked, can the laws of a foreign country be proved by a person picked up in the street? And he added, "I shall expect it to be made out to me, not by such loose evidence, but by proof from the country, whose laws you propose to give in evidence, properly authenticated." The question is, what is such evidence? And I think the decision can hardly be justified except upon the supposition that the person produced was not scientifically

HeinOnline -- 115 Eng. Rep. 870 1378-1865

conversant with the law of Russia. I think much stress cannot be laid upon *Clegg* v. *Levy* (3 Campb. 166). It was a question as to a foreign stamp law: and in England we require the necessity of a stamp to be very strictly shewn before we exclude a document as insufficiently stamped. It must, however, be allowed that **[252]** Lord Ellenborough's language goes very far. The marginal note of *Millar* v. *Heinrick* (4 Campb. 155), is: "The written laws of a foreign State, can only be proved by copies properly authenticated." The decision itself is perfectly right, but inapplicable to the present question. The action was for seaman's wages earned on board a Russian ship: the defence rested on certain alleged written regulations of the Russian marine, which were expressly incorporated in articles signed by the plaintiff: and the attempt was to prove these regulations by oral evidence. That was properly rejected. It is true that Chief Justice Gibbs said: "That will not do. Foreign laws not written, are to be proved by the parol examination of witnesses of competent skill. But where they are in writing, a copy properly authenticated must be produced." That language certainly was much wider than the case required: the regulations were not the subject of general law, and, on that ground, ought to have been produced. In *Lacon* v. *Higgins* (3 Stark. N. P. C. 178), the question was, whether a particular copy of the Code Napoléon might be produced in evidence. The copy purported to have been printed at an office which the French vice-consul proved to be the authorized office for printing the laws of France; it contained a commentary for the use of students; and he stated that he acted upon it in his own office. The evidence was admitted by Lord Tenterden: and I must say that this appears to me a very strong authority in favour of admitting the evidence now in question. There was no proof that the book was an actual authenticated examined copy: it was merely a book handed by somebody to the vice-consul, and acted upon by him. That evidence appears to **[253]** me open to all the objections which can be urged in the present case: indeed, upon numerous occasions, if a different rule were adopted, there would be very great difficulty in establishing any law: and this might often produce the greatest injustice to individuals, who have, I think, a right, when they can find, in the country where they are put to a trial, a person skilled in the law of another country which is brought into question, to rely upon the knowledge and opinion of a person so skilled. We are not without other authorities to the same effect. In *Picton's case* (30 How. St. Tr. 225, 491), a similar question came under discussion. And Lord Ellenborough said: "The text writers furnish us with their statement of the law, and that would certainly be good evidence upon the same principle which renders histories admissible." He stated a case in which the History of the Turkish Empire by Cantemir was, after some discussion, received by the House of Lords: and he added that he should receive any book which purported to be a history of the common law of Spain. I do not know whether by the term "common law" any distinction was implied between the written and unwritten law of Spain; but I think the same principle applies. A person states that the law is in a book: and, a witness having said that such book is considered of authority, it is received at once as evidence of the law upon the point in question. In *Middleton* v. *Janverin* (2 Hag. Cons. R. 437, 442), Sir William Wynne allowed evidence of a similar description to be given of a decree of the Council of Trent. It is true that what was produced purported to be a copy of the law: but there was no evidence that it was such a copy. There was **[254]** nothing more than the degree of credit given to an historian who would naturally be led to state the law, or to a text writer connecting his opinion with it. The general principle seems to me to be as applicable to the case before us as to that case. But, I confess, I look at this question in a more important and general point of view, which has been suggested by my brother Coleridge. In questions of foreign law, books of the highest authority must frequently be resorted to: Pothier's works, for instance, as to the law of France upon contracts, bills of exchange, policies of insurance, and so on. Now, when Pothier states the law of France, as arising out of an ordonnance made in a particular year, can we exclude that, as being merely his account of the contents of a written instrument? When once we have been told, as we should be by competent persons in any part of the civilized world, that Pothier's works were of high authority, to what extent should we be going if we refused to receive them because Pothier does not confine himself to the unwritten law! I cannot conceive that, in any civilized country, a statement from Blackstone's Commentaries would be rejected which set forth what the law was, when altered, and up to what time continued. Such a statement would

HeinOnline -- 115 Eng. Rep. 871 1378-1865

not relate merely to the contents of the statutes referred to, but to the state of the law before or after the time of its passing. I therefore give to the statement of the law by this gentleman, an advocate of the French Bar, the same credit which I should give to a book which he stated to be of high authority. I find no authority opposed to this view, except that of some dicta which appear to me more strongly expressed than was required by the cases in which they occur: and some decisions which I **[255]** do find appear to me, in principle, to go quite as far as is required to sanction the admission of this evidence; for I can perceive no distinction between proof from a copy of the law, as we find it tendered and received, and the proof now tendered.

Patteson J. I am very sorry that I differ from my learned brothers upon this question: but, looking at it as fully as I can, I have come to the conclusion that the evidence ought not to be received; and it is my duty to state, as I will do shortly, the grounds upon which my opinion rests. I am far from wishing to trench upon the rule that witnesses who, in any matter of skill, are called upon to give their opinion are to be fully received. But I do not consider this to be a matter of opinion. It appears to me to be a question as to the contents of a particular document: and it seems to me that those contents ought not to be received from the mouth of a witness, unless some reason is given for the non-production of that document or an authenticated copy of it. I quite agree that a witness, conversant with the law of a foreign country, may be asked what, in his opinion, the law of that country is. But I cannot help thinking that, as soon as it appears that he is going to speak of a written law, his mouth is closed. By the written law, I do not now mean what may be found in a text-writer, or in the judgment of a Court in any particular case, but, that which I understand to be referred to in the present case, a decree of the supreme power of the State creating a law in the first instance. The rule would, I think, be very different in the two cases. It is not here attempted to shew that there has been any unsuccessful **[256]** endeavour to obtain the law or an authentic copy of it: the evidence is offered as primary evidence. It is contended that an advocate of a foreign country may speak to the written law of that country. I do not mean to say that there is any distinction between a law made yesterday and one made a hundred years ago. In either case, as soon as it appears to be a written law, the witness's mouth is closed. The modes of proof may, indeed, differ in the two cases; proof in one case may be more difficult than in another: but we are now speaking only of the oral evidence which is to be received from a witness. The general rule is not denied: that, when the contents of a written instrument are to be proved, the instrument itself should be produced, or, when the instrument from its nature is proveable by an examined copy, then such examined copy. I cannot see why the rule should not be the same in the case of a written foreign law. It is very true that this Court, on reading the words of a French law, may, at first, be liable to be misled as to the result from not being conversant with the general French law; but, supposing such a difficulty to arise, there would be no objection to our taking from French lawyers, as witnesses, the interpretation put upon the written law in question by the French Courts. The question, here, is as to the mode of proving the written law in the first instance, before such a difficulty arises. Unless, therefore, some authority can be shewn for the reception of this evidence, I think the general rule must be followed, and the evidence be rejected. Now the authorities cited against the reception of the evidence certainly do not go to the whole length of establishing the objection: I think they are open to the observations made by my Lord. In **[257]** *Clegg* v. *Levy* (3 Campb. 166), the witness called was not a professional lawyer, but only a merchant; though Lord Ellenborough did say that the law ought to be proved by a copy. In *Millar* v. *Heinrick* (4 Campb. 155), the decision might have been put on the ground that the regulations of the Russian marine, having been incorporated with the contract, formed a part of it: still Lord Chief Justice Gibbs did, in fact, lay the rule down broadly. In *Lacon* v. *Higgins* (3 Stark. N. P. C. 178), the witness who deposed as to the book was not a French lawyer; and none such appears to have been in Court. Lord Tenterden doubted very much whether he could receive the evidence. He did, however, receive it on the authority of *Picton's case* (30 How. St. Tr. 225, 491). I take it that he could not have received the book as evidence of the law of France, but only as a copy of the written law, which was set out in it verbatim. The Court thus had the very words of the law before it. Whether, if an advocate had been called to state the effect of the law, his evidence would have been received or rejected, the case does not shew: but, if such evidence

HeinOnline -- 115 Eng. Rep. 872 1378-1865

was admissible, it seems strange that it was not produced, and that the question as to the authenticity of a copy of the law should have been raised. *Middleton* v. *Janverin* (2 Hag. Cons. R. 437, 442), appears to me not to be an authority in favour of admitting this evidence. There written evidence was received, containing the opinion of learned advocates of the country from which the question came; and the judgment points out that the advocates actually copied the parts of the written law and ordonnances on which they relied; and the laws were then said by Sir **[258]** W. Wynne to be authenticated. Whether it was right or wrong to receive such copies as evidence of the written laws is not the question; the evidence was at all events different from that which is tendered to us here, oral evidence of the contents of a document. I entirely agree with the passage from Story's Commentaries on the Conflict of Laws (p. 530, ch. xvii. ss. 641, 642), cited by Mr. Phillipps (2 Phill. Ev. 148 (9th ed.). "In general foreign laws are required to be verified by the sanction of an oath, unless they can be verified by some other such high authority as the law respects, not less than the oath of an individual. The usual modes of authenticating foreign laws (as of foreign judgments) are by an exemplification of a copy under the Great Seal of a State; or by a copy proved to be a true copy; or by the certificate of an officer authorized by law, which certificate must itself be duly authenticated. But foreign unwritten laws, customs, and usages, may be proved, and indeed must ordinarily be proved by parol evidence. The usual course is to make such proof by the testimony of competent witnesses, instructed in the law under oath. Sometimes, however, certificates of persons in high authority have been allowed as evidence." He does not seem at all to contemplate proof of the written law by the same mode as that by which the unwritten law is to be proved, but assumes it as quite clear that the written law must be proved by a copy authenticated in some way or other. The analogy suggested respecting treaties appears to me not to be perfect. As at present advised, I do not think that a treaty between two foreign nations, to which this nation is not a party, stands exactly upon the same footing as **[259]** the written law of a particular State. Nor do I mean to say that, where a witness has not stated that there is a direct written law containing that to which he is about to speak, he may not, being an advocate of a foreign country, be asked what the law of that country is: that is a doctrine which I do not mean to impugn. But I conceive that, the moment it appears that the law is written, his mouth is closed, and we must have the law itself or a copy of it. I do not wish to confine what I say to this particular instance of a law which passed fifty or sixty years ago: I think the rule would be just the same if the question related to the French Code as existing at this moment. If a witness were asked what the law now is with respect to a bill of exchange in France, and were immediately cross-examined as to whether that law was not in writing, and answered that it was, I think a copy of the law must be produced. I much doubt whether I have taken a right view, inasmuch as I differ from the rest of the Court. But, so far as I have been able to consider the point, I think this evidence ought not to be received.

Williams J. I entirely agree with the opinion which my Lord and my brother Coleridge have formed on this point: and I think that the opinion of my brother Patteson is the only real authority on the other side; for his own remarks upon the cases cited shew that they do not decide the question. If we could apply the general test referred to by Mr. Hill, that the best evidence must be given to prove a fact, there could certainly be no doubt whatsoever: but we have here to decide in a case where the law recognizes, as admissible, evidence which would not be admissible in other cases. **[260]** It is conceded fully by my brother Patteson, of course, that, if an advocate belonging to a foreign country be called to prove the law of that country, any statement which he may make of law will be admissible, though it appear that he has taken it from a text writer. But I understand that a distinction is raised as to the conclusiveness of the particular evidence. Why, upon what does this kind of evidence depend at all? We hear, in limine, that foreign law is to be proved as a fact. What does that mean? Is it a fact in the ordinary acceptation of the word, as it is a fact that a man was seen walking in a field or riding away with a horse? It clearly means, as applicable to this subject, the result which has been produced on the mind of a scientific person by his reading and intelligence in respect of the particular subject. There is, in this, little analogy to the proof of facts ordinarily so called. Then, if the opinion of an advocate is to be asked, how is he to become

HeinOnline -- 115 Eng. Rep. 873 1378-1865

ADD-21

learned? Either by reading, or by practice, or by both. We need not inquire what the practice might effect, independently of reading. But what is he to read? Only text books? Only writings of a particular kind? What precise kind of reading is to be excluded? If this learned gentleman had cited Puffendorff or Grotius, as the foundation of his opinion, it would not surely have been required that those books should be brought into Court: yet the books themselves would, of course, shew the truth as to their contents more directly than the learned advocate's version of them. Thus it is conceded that a fact of this sort is to be proved by evidence altogether inapplicable to facts in the ordinary sense of the word. Therefore, the only question is, where you are to stop: that is really the single difficulty in the **[261]** case. If we are to understand my brother Patteson as expressing a doubt whether the state of law in France in 1789 was a fact, in the sense in which I have explained the term, to be learned from the opinion of the advocate, I should, with very great deference, differ from him. The lawyer comes to depose, not solely as to the law to-day or yesterday, but as to all that his knowledge of the law may teach him, which may include the state of the law two hundred years ago as well as the state of it four or five years ago. The only question arising here is, "Did the feudal law exist in Alsace in 1789?" "No." "How so?" "It was abolished." Well: is not that the opinion of a lawyer on a point affecting the law of the foreign country? Then comes the question, "If abolished, how?" "By a decree of the Legislature in 1789." It seems to me that the receiving evidence at all from the witness on this subject implies that you must receive from him all the information he can give, from whatever source derived. The decree is just as much a portion of his knowledge as a knowledge of the Statute of Frauds, or the different Statutes of Wills, is a portion of the knowledge of an English lawyer, to which credit would be given in foreign Courts. When my brother Patteson adverts to the necessity of giving some kind of proof before you let in the decree, in order to see what it is in the decree upon which the advocate founds his knowledge, I own this strikes me as not an unimportant difficulty in the way of my learned brother's own opinion. Where are you to search? For what are you to search? What knowledge have we of the place of deposit from which we are to have the primary evidence, using that word in analogy to the use of it in our Courts? We have no such knowledge: **[262]** and yet, if the ordinary rule as to primary evidence is to be applied here, writing does not help it. My learned brother, and the counsel for the claimant, appeared to think that, to a certain extent, a writing would aid the defect. But how so? That occurs only where the writing is an examined copy of the authentic document which is the best evidence where it can be produced. Any other writing is good for nothing. It seems to me that the impossibility of our knowing where to search, what search to make, what is the best document, what, in its absence, is a proper examined copy, furnishes strong reason for holding that, where the question has been fairly put to a skilful man, and he gives his opinion that the law was so and so up to a given time, and then his ground for being of opinion that at such time the law was changed, the document, whatever it be, which supplies that ground, may be referred to by him as the foundation of his opinion. It seems to me, therefore, that, upon the principles applicable to this particular species of evidence, clearly admitted in the course of this discussion at the Bar and on the Bench, the evidence in question is admissible.

Coleridge J. I agree entirely with my Lord and my brother Williams: and I should certainly have expressed my opinion without any hesitation, if it were not for that expressed by my brother Patteson. Except for that authority, and, I should perhaps add, for the great importance (and in some respects novelty) of this question, I should have much preferred abstaining from fatiguing the Court with my reasons. Under the present circumstances, however, I feel it right to give them, and shall do so as briefly as possible. In the **[263]** first place, I think it important to point out the exact state of the evidence which we have to consider. My note is this: "That the feudal law as to this matter ceased in Alsace, de facto, by the revolutionary torrent in 1789; of right it only ceased at a later period, upon the Treaty of Luneville; on the 4th of August 1789, there was a decree of the ruling power, the National Assembly, abolishing feudal rights; it has been published; I have become acquainted with it in the course of my general studies in the law." Upon that the objection arose: and this I state, not to evade the pressure of the argument of my brother Patteson, but because I think it material to look at all the circumstances under which the evidence

HeinOnline -- 115 Eng. Rep. 874 1378-1865

was tendered. The question is, substantially, how, according to our rules of evidence, we are to arrive at the knowledge of the law as arising from a foreign written law. We acquire a knowledge of written law in general as a fact, but a fact, as my brother Williams has stated, of a particular kind, a fact which can be arrived at only as a matter of science, and not as a matter of mere practice. I take it nobody can doubt that a lawyer who, without ever having held a brief or practised out of his chambers, had acquired all his knowledge by reading would be as competent to give evidence respecting the state of the English law as if he had been engaged in the most extensive practice. What then do we mean by a knowledge of the law? That question seems to me to go to the foundation of the whole matter; and it must be determined, with reference to the particular question before us, by a little subdivision. We must inquire, first, as to the sources of our knowledge, and, secondly, as to the time over which we are to range for our **[264]** knowledge. Now, with regard to the sources of the knowledge, we are to find it partly in the actual documents, the writings at first existing as laws, the actual Parliamentary Rolls in this country, the arrêts or decrees (being found in proper custody) in other countries: that is one source. Where these have been lost or have never existed, the knowledge of the law (independently of what is got by practice, which I put out of the question in the case of a document) must be got from text books, reported decisions, records and local customs prevailing in particular districts. First, with regard to the last class. It is, I think, conceded that, though the witness should state that all his knowledge is derived from reading a particular book or a particular decision, he still might give us the result of all his knowledge of the state of the unwritten law. That being so, I cannot, independently of authority, understand why he may not equally give the result of his knowledge as to the law where the original writings still exist. Then, next, as to the time over which our knowledge is to range. When we talk of a man having a knowledge of the law, do we mean a knowledge of the law only as it exists in the Courts of Justice at the present day, or do we mean that knowledge of the law and the changes it has undergone, which he has acquired in the course of the study that gives him the character of a scientific witness? I apprehend we clearly mean the latter. Suppose the witness had been alive in 1789, and had said here, upon cross-examination, "the law of France was so and so, up to a particular day; and after that it was so and so:" and he were then asked, "How do you know there was any such difference;" and were to answer, "Because on that day the law **[265]** was changed by a decree of the National Assembly of France:" could it be said that, the moment the witness proposed to speak of a particular decree which had made a change in the law, his evidence was to be excluded? In the absence of authority, I can understand no principle on which such a distinction can exist. It is said, and this is the point to which my brother Patteson has addressed his argument almost exclusively, that, in deciding according to the view which I take, we break through a great and fundamental rule of evidence, and are getting by oral testimony at the contents of a written instrument without accounting for its nonproduction. There appears to me to be a fallacy in that. The general principle does not seem to me to apply in this case. What in truth is it that we ask the witness? Not to tell us what the written law states, but, generally, what the law is. The question is not as to the language of the written law. For, when that language is before us, we have no means by which we are to construe it. Let me put this case. Suppose a gentleman who, like the vice-consul in *Lacon* v. *Higgins* (3 Stark. N. P. C. 178), (a case which I think admits the distinction I shall presently point out), was not professionally connected with the law, should tell us, "I went to the proper office, and made an examined copy of this section of the Code Napoléon; and here it is." Would that be evidence for this Court what the law of France is? In point of authority, I apprehend it would not be so: certainly it would not be so in point of convenience; for, after all, if we were to attempt extra-judicially to expound that law, we should be liable to the most serious errors. The question for us is, not what the **[266]** language of the written law is, but what the law is altogether, as shewn by exposition, interpretation and adjudication. How many errors might result if a foreign Court attempted to collect the law from the language of some of our statutes which declare instruments in particular cases to be "null and void to all intents and purposes," while an English lawyer would state that they were good against the grantor, and that the Courts have so expounded the statutes! It is no answer to say that other evidence by word of

HeinOnline -- 115 Eng. Rep. 875 1378-1865

mouth may be added for the purpose of giving the interpretation of the written law. I am merely shewing that our Courts require, not the actual written words of a foreign law, but the law itself; for which purpose a professional witness is required to expound it. Now suppose a copy of the Code Napoléon to be regularly proved before us, some provision of which has received an exposition in the French Courts analogous to that which I have been suggesting in the case of English statutes. The French lawyer would tell us, "That is indeed the language of the Code Napoléon, but I, as a lawyer, tell you that the legal meaning of it is so and so." Upon being asked how he arrived at that result, he would answer, "Because I have read such and such books on the subject, and the reports of such and such cases, and have heard such and such decisions." It is clear that he might give all this part of the evidence without producing the written authority: and I cannot understand why, if all such documents and books might be orally deposed to because they constituted only the sources from which he derives his opinion, and because we learn the law not from those sources but from that opinion, a distinction is to be made according to which **[267]** we are to reject oral evidence of another source of his opinion, namely, the written decree. So I conceive the question to stand, upon principle merely. As to the authorities, all I shall say is that I agree entirely with what has been said by my brother Patteson. There is opinion on one side and opinion on the other, but nothing which can be said to be a decision precluding us from admitting the evidence. Upon these grounds, it seems to me that it ought to be admitted.

Evidence admitted.

The jury found for the suppliant on the first issue, and for the Crown on the others.

The verdict was entered as follows, immediately after the venire at p. 242.

"At which day, before our lady the Queen, at Westminster, come as well the suppliant by his attorney aforesaid as the said Attorney General in his own person. And the jurors of that jury, being summoned, also come; who, to speak the truth of the premises being chosen, tried and sworn,

"As to the first issue joined between the parties, say, upon their oath, that the several matters and things in the said inquisition (*a*) contained, specified and set forth are true in fact.

"And, as to the second issue joined between the said parties, the jurors aforesaid, upon their oath aforesaid, **[268]** say that the several causes of petition in the said inquisition contained, specified and set forth did not, nor did any or either of them, accrue to the said suppliant within six years next before the presenting and exhibiting of the said petition by the said suppliant to our said lady the Queen.

"And, as to the issue thirdly joined between the said parties, the jurors aforesaid, upon their oath aforesaid, say that the said several causes of petition in the said inquisition contained, specified and set forth did not, nor did any or either of them, accrue to the said suppliant since the accession of our lady the Queen to the Crown and sovereignty of this realm."

In Michaelmas term, 1844, Hill obtained the following rule.

"Wednesday, the 13th day of November, in the eighth year of the reign of Queen Victoria.

"In the Queen's Bench.—England, Middlesex.

"The Queen and Clement Joseph Philip Pen de Bode, Baron de Bode.—It is ordered that the first day of the next term be given to Her Majesty's Attorney-General to shew cause why the verdict in this cause should not be entered on the record for the suppliant on the first issue; and why judgment should not be entered for the suppliant, notwithstanding the verdict found for the Crown on the second and third issues.

(*a*) The jury expressly negatived the allegation, contained in the petition (p. 217, ante), but not in the inquisition, that the French Government had granted a sum specifically in respect of the suppliant's claim: and a question arose whether, on the particular form of the traverse taken by the Crown, the verdict ought not to negative so much of the petition as was not proved. This, however, it became unnecessary to decide. See p. 275, post, and note (*a*), ibid.

HeinOnline -- 115 Eng. Rep. 876 1378-1865

"Upon notice of this rule to be given to the Solicitor for the Affairs of Her Majesty's Treasury in the mean time.

"On the motion of Mr. Hill, "By the Court."

[269] In the same term, Sir F. Thesiger, Solicitor General, obtained the following rule.

"Wednesday, the 13th day of November, in the eighth year of the reign of Queen Victoria.

"In the Queen's Bench.—England, Middlesex.

"*Clement Joseph Philip Pen de Bode, Baron de Bode,* Suppliant, against *The Queen,* Defendant.—It is ordered, that the first day of the next term be given to the suppliant to shew cause why judgment should not be entered in this prosecution for the defendant on the first issue, non obstante veredicto for the said suppliant on part of the said issue. Upon notice of this rule to be given to the attorney or agent for the said suppliant in the mean time.

"On the motion of Mr. Solicitor General, "By the Court."

In Hilary term and vacation, 1845 (*a*)[1].

Hill, Manning Serjt., Mellor, G. A. Young, and Anstey shewed cause against the Solicitor General's rule: and

Sir F. Thesiger, Solicitor General, Kelly, and Waddington supported the rule.

In the same Hilary vacation the Court directed the counsel for the suppliant to argue in support of Hill's rule: and, accordingly (*b*),

[270] Hill, Manning Serjt., Mellor, G. A. Young, and Anstey were heard in support of that rule.

The Court took time to consider whether the counsel for the Crown should be called upon (*a*)[2].

Cur. adv. vult.

Lord Denman C.J., in this vacation (December 11th), delivered the judgment of the Court.

The general proposition maintained by the suppliant is, that the conventions concluded between England and France, and the proceedings and transactions that have followed, have produced this state of things. The money paid into the bank on the Government account has been virtually received by the Crown in trust for and to the use of the suppliant; that money was in effect provided for the purpose of paying him a compensation for the property which he lost at the period of the French Revolution; he falls as completely within the description of the person to whom that money is now made payable as if the treaty had named him as that person, and had lodged the money in the hands of the Crown of England for the express purpose of being paid over to him.

On the part of the Crown, while this deduction of facts is questioned in all its parts, long and able arguments have been strenuously urged to prove that, supposing all the facts to be well established by evidence and well found by the verdict, still no judgment can be given for the suppliant in this form of proceeding. The Petition of Right is said to be maintainable for no other **[271]** objects than land, or specific chattels, certainly not for a sum of money claimed either as debt or by way of damages (*a*)[3].

(*a*)[1] January 27th and 28th, and February 10th. Before Lord Denman C.J., Patteson, Williams, and Coleridge Js.

(*b*) February 11th and 12th. Before the same Judges.

(*a*)[2] It is considered sufficient to report the judgment of the Court, and to refer to the notes for some of the authorities cited.

(*a*)[3] The following are some of the authorities mentioned on this question, which led to a general enquiry into the nature of a writ of right, and the proper course of the proceeding, as to both substance and form.

Yearb. Tr. 34 H. 6, fol. 50, B, pl. 18; 3 Fitz. Abr. 6 b. (ed. 1565), Peticion, pl. 8; *Ashby* v. *White,* 2 Ld. Raym. 938, 953; case of *Cives Eborum,* Ryley's Pl. Parl. 252 (33 Ed. 1); S. C. 1 Rot. Parl. 165, No. 56; the case of *The Bankers,* 14 How. St. Tr. 1, 48; case of *Bissop de Sallowe,* Ryley's Pl. Parl. 408 (14 Ed. 2); S. C. 1 Rot. Parl.

HeinOnline -- 115 Eng. Rep. 877 1378-1865

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We may at first feel some regret that this line of ob-[272]-jection was not directed at an earlier period against the method adopted by the suppliant for obtaining what he undertakes to prove to be his due. For, whatever de-[273]-gree of doubt

374, No. 30; case of *Wardon*, Ryley's Pl. Parl. 262 (33 Ed. 1); S. C. 1 Rot. Parl. 170, No. 95; *Macbeath* v. *Haldimand*, 1 T. R. 172; 2 Br. Abr. 131 a. Petition, pl. 19 (1 H. 7); 2 Br. Abr. 130 a. Peticion, pl. 2; stat. 2 & 3 Ed. 6, c. 8; 2 Br. Abr. 130, Peticion, pl. 3; the case of *The Wardens and Commonalty of Saddlers*, 4 Rep. 54 b.; stat. 34 Ed. 3, c. 14; stat. 36 Ed. 3, c. 13; case of *Basyng*, Ryley's Pl. Parl. 334 (35 Ed. 1); S. C. 1 Rot. Parl. 179, No. 44; *The Bankers' case*, Skinn. 601, 607; case of *Everle*, Ryley's Pl. Parl. 251 (33 Ed. 1); S. C. 1 Rot. Parl. 164, No. 52; *Viscount Canterbury* v. *The Attorney General*, 1 Phill. Ca. Ch. 306; case of *Gerveis de Clifton*, Yearb. Pasch. 22 Ed. 3, fol. 5, A., pl. 12; case of *Robert de Clifton*, 1 Rot. Parl. 416 (18 Ed. 2), No. 3; 3 Blackst. Com. 234, &c.; 1 Blackst. Com. 243; Finch's Law, b. 4, ch. 3, p. 256 (ed. 1759), 2 Br. Abr. 130 b. Peticion, pl. 12, 15, 16; ib. 131 a. pl. 21; ib. 131 b. pl. 24; Staundforde's Exposition of the King's Prerogative, ch. 22, p. 72 b. &c.; case of *Cadell*, Ryley's Pl. Par. 414 (14 Ed. 2); S. C. 1 Rot. Parl. 378, No. 61; case of *Yerward*, Ryley's Pl. Parl. 414 (14 Ed. 2); S. C. 1 Rot. Parl. 378, No. 62; case of *Northampton*, Ryley's Pl. Parl. 414 (14 Ed. 2); S. C. 1 Rot. Parl. 378, No. 63; case of *Aynesham*, Ryley's Pl. Parl. 251 (33 Ed. 1); S. C. 1 Rot. Parl. 164, No. 48; case of *Estretelyng*, Ryley's Pl. Par. 251 (33 Ed. 1); S. C. 1 Rot. Parl. 164, No. 49; case *De Debitis*, Ryley's Pl. Parl. 253 (33 Ed. 1); S. C. 1 Rot. Parl. 165, No. 59; Palgrave on the Original Authority of the King's Council, p, 23, 27; *Dixon* v. *Harrison*, Vaughan, 36, 47; *Rex* v. *Johnson*, 6 East, 583; case of *Levesham*, Ryley's Pl. Parl. 641 (4 Ed. 3), No. 27; S. C. 2 Rot. Parl. 49, No. 75; case of *Bishop of Exeter*, 1 Rot. Parl. 421 (18 Ed. 2), No. 18; case of *Multon and Lucy*, Ryley's Pl. Parl. 263 (33 Ed. 1); S. C. 1 Rot. Parl. 170, No. 98; case of *Littleover*, Ryley's Pl. Parl. 263 (33 Ed. 1); S. C. 1 Rot. Parl. 170, No. 99; case of *Ely*, Ryley's Pl. Parl. 249 (33 Ed. 1); S. C. 1 Rot. Parl. 163, No. 40; case of *Paynel*, Ryley's Pl. Parl. 231 (30 Ed. 1); S. C. 1 Rot. Parl. 146, No. 2; Co. Ent. 422 a. Petition de Droit, pl. 2; case of *Deyvill*, 1 Rot. Parl. 401 (15 & 16 Ed. 2), No. 82; case of *Hawise*, 1 Rot. Parl. 412 (15 & 16 Ed. 2), No. 150; case of *De Plat*, 1 Rot. Parl. 437 (19 Ed. 2), No. 26; case of *De Audele*, 1 Rot. Parl. 453 (12 Ed. 2), No. 28; case of *De Veer*, 1 Rot. Parl. 479 (incert., Edw. 1 & 2), No. 110; cases in 2 Rot. Parl. 37, 41, 45 (4 Ed. 3); case of *Belhouse*, Ryley's Pl. Parl. 253 (33 Ed. 1); S. C. 1 Rot. Parl. 165, No. 61; case of *Hide*, Ryley's Pl. Parl. 255 (33 Ed. 1); S. C. 1 Rot. Parl. 167, No. 71; case of *Elsefend*, Ryley's Pl. Parl. 256 (33 Ed. 1); S. C. 1 Rot. Parl. 167, No. 75; case of *Hastinges*, Ryley's Pl. Parl. 414 (14 Ed. 2); S. C. 1 Rot. Parl. 377, No. 60; case of *Burgesses of Scardeburgh*, 2 Rot. Parl. 221 (21 & 22 Ed. 3), No. 60; case of *Faversham Abbe*, Ryley's Pl. Parl. 646 (4 Ed. 3); S. C. 2 Rot. Parl. 48, No 68; *Penn* v. *Lord Baltimore*, 1 Ves. sen. 444, 446; 4 Inst. 116; 3 Fitz. Ab. 6 a. (ed. 1565), Peticion, pl. 15. (See note (*a*) to *Smith* v. *Upton*, 6 Man. & G. 251); *Reeve* v. *The Attorney General*, 2 Atk. 223; Mitford's Plead. 31 (p. 33 in 5th ed.); 1 Daniell's Ch. Pr. 138 (2d ed.) ch. 4, s. 2; *The Attorney General* v. *Aspinall*, 2 Myl. & Cr. 613; *In the Matter of the Baron de Bode*, 4 Jurist., 645; Orders in Chancery of 26 Aug. 1841, order 14, Cr. & Phill. 371; Manning's Exch. Pr. 118, 127; *Stockdale* v. *Hansard*, 9 A. & E. 1, 183, 207; *Hill* v. *Bigge*, 3 Moore's Pr. C. C. 465, 476; Madox's Hist. Exch. ch. iii.; Bracton, fol. 107, B, 3, tract. 1, c. 9, s. 1; Britton, Introd. s. 4; De Petitionibus in Parliament, Ryley's Pl. Parl., Appendix, 442, iv. (8 Ed. 1); De Ordinatione de Petitionibus Parliam., Ryley's Pl. Parl., Appendix, 459 (21 Ed. 1); *Rex* v. *Portington*, 12 Mod. 31; case of *Lodelawe*, Ryley's Pl. Parl. 261 (33 Ed. 1); S. C. 1 Rot. Parl. 169, No. 88; Introduction to Rot. Lit. Claus. xxii. xxviii.; case of *Waldeboef*, 1 Rot. Parl. 168 (33 Ed. 1), No. 78; case of *Crist-Church*, 1 Ryl. Pl. Par. 241 (33 Ed. 1); S. C. 1 Rot. Parl. 159, No. 3; *Cotton's case*, Yearb. Hil. 2 Ed. 3, fol. 18, B, pl. 2; Yearb. Mich. 24 Ed. 3, fol. 64, B, pl. 69; 3 Fitz. Abr. 6 b. (ed. 1565), Peticion, pl. 19; Proceedings, &c., of the Privy Council, vol. v., Pref. p. xc., &c., p. 316; 3 Inst. 242; case of *De Grey*, 1 Rot. Parl. 397 (15 & 16 Ed. 2), No. 59; Yearb. Mich. 10 H. 4, fol. 4, A, pl. 8; 1 Rot. Parl. 61 (18 Ed. 1), No. 195; 37 Assis. fol. 218, pl. 11; Yearb. Pasch. 7 H. 7, fol. 10, B, 11, B, pl. 2; Yearb. Mich. 9 H. 4, fol. 4, A, pl. 17; Yearb. Hil. 21 H. 7, pl. 1, fol. 1, A, 3, A; Yearb. Trin. 35 H. 6, fol. 60, A, 61 A, B, pl. 1. *Regina* v. *Tuchin*, 2 Ld. Raym. 1061, 1065; 1 Fitz. Abr. 272 a. (ed. 1565), Dette, pl. 17; 1 Fitz. Abr. 137 a. (ed. 1565), Barre, pl. 121; 2 Bro. Abr. 261 a., Traverse d'Office, pl. 18; *Colebrooke* v.

HeinOnline -- 115 Eng. Rep. 878 1378-1865

may attach on almost every other part of the case, non can be seriously entertained that, if the proceeding were, of its own nature, and in point of law, incompetent for the purpose with which it was commenced, the Lord Chancellor might have been required at the very outset to bring it to an end, and prevent the expenditure of money and the endurance of anxiety for so long a period without the possibility of a favourable result. Considering, however, the length of time that has elapsed since any thing has been practically done in a Petition of Right, the imperfection of all the authorities, and the obscurity that hangs over this portion of our law, as well as the very complicated series of facts related, the course that has been taken can hardly excite surprise; much less should it provoke censure. It was natural, under such circumstances, that the advisers of the Crown should require proof of all the facts that might be found to constitute a claim, without surrendering the point of jurisdiction: the question, namely, how far, on all those proofs being made out, this Court has power to pronounce upon them any judgment in favour of the suppliant. Such at least is the position of things with which we are now to deal.

We may here observe that there is nothing to se-**[274]**-cure the Crown against committing the same species of wrong, unconscious and involuntary wrong, in respect of money, which founds the subject's right to sue out his petition when committed in respect to lands or specific chattels: and there is an unconquerable repugnance to the suggestion that the door ought to be closed against all redress or remedy for such wrong. The reference from the Crown to the law officers, and that of the law officers to the Chancellor, would seem to reject the ordinary rules and analogies of legal proceedings, in order to arrive at the conclusion, whether the subject's right has been in any manner infringed by the Crown, and to shew that, if the infraction is duly proved, reparation ought to be made. The dignity of the Crown itself appears to demand that, when the inquiry which it has enjoined is so terminated, the proper course for giving effect to its second and more important injunction, that right be done, should be pursued. For this reason, without coming to any decision on matters which may be called technical, we feel it to be our duty to examine, in the first place, whether the facts found by the jury establish the right, supposing, for the present, that this remedy is given by our laws.

The Baron de Bodes make his claim in the character of a British subject whose real property in France was unduly confiscated by the French authorities during the revolutionary war, and who was therefore entitled to compensation by the fourth additional article of the Treaty of 30th May 1814, by the Convention of 20th November, 1815, by the convention of 25th April, 1818, and by an Act of the British Parliament passed in 59 G. 3 (*a*). **[275]** He asserts that, after the commissioners appointed under the last Convention and the last Act had examined and decided on all the claims of claimants duly registered, a sum exceeding 480,000l. still remained in their hands; that more than 200,000l. of this sum was applied to satisfy claims made after the time prescribed by the treaty, but examined by special authority from the Lords of the Treasury; and that the residue, also exceeding 200,000l., was paid into the Bank of England on the Government account by their direction. And these sums he claims as liable, in the hands of the Crown, to make good the compensation which became due to him under the treaties and the Act.

There is no one of the propositions which may be called the ingredients of this claim that is not encountered with formidable objections. Our duty is to examine them in detail. And two things are to be premised. First, the burden of proof lies wholly on the suppliant. Secondly, the verdict of the jury which sat in this Court is the conclusive finding of facts, on which our judgment must proceed. They have affirmed the ex parte finding of a former jury summoned by the Lord Chancellor's

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Attorney General, 7 Price, 146; *Priddy* v. *Rose*, 3 Mer. 86, 94; *Ellis* v. *Earl Grey*, 6 Sim. 214, and *Oldham* v. *The Lords of the Treasury*, cit. ib. 220; *Proceedings against the Earl of Portland*, 14 How. St. Tr. 234, 261; Yearb. Mich. 39 H. 6, fol. 27, A, pl. 40; Yearb. Hil. 3 H. 7, fol. 2, B, pl. 10; *Moore* v. *Boulcott*, 1 New Ca. 323; *Willion* v. *Berkley*, Plowd. 223, 248; 3 Inst. 240, &c., ch. 106; *Bruerton's case*, 3 Dyer, 350 b. 360 a. pl. (5); 20 Vin. Abr. 14, Stricti Juris, pl. 8; Yearb. Mich. 11 H. 4, fol. 28, A, pl. 53; Yearb. Tr. 11 H. 4, fol. 80, B, pl. 23; Yearb. Mich. 13 H. 4, fol. 6, B, pl. 15; Yearb. Hil. 13 H. 4, fol. 14, B, pl. 11; Yearb. Hil. 21 H. 7, fol. 18, A, pl. 30.

(*a*) Stat. 59 G. 3, c. 31.

HeinOnline -- 115 Eng. Rep. 879 1378-1865

order, in all its parts: but they have said nothing of the petition, which was the foundation of all the proceeding. The contents of the petition may be said to be put in issue by the Attorney General's traverse of them, as well as of the inquisition: but no evidence was offered in proof of any allegation not found in the latter (*a*)[1]. Does then the inquisition set forth a title to obtain this money from the Crown?

[276] The suppliant's first step in his character of a British subject (*a*)[2]: and this we shall assume, without entering on the argument, to be satisfactorily proved. But, taking it, as such an occasion requires, in its largest sense, the next question to be considered is whether the suppliant is in such a situation that the treaty can apply to him (*b*). In case of any misunderstanding between **[277]** England and France, "the

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(*a*)[1] The following were among the authorities mentioned on the questions, how far the inquisition could be looked into without reference to the petition; whether, on reference to the petition, the Crown's title was sufficiently found by the inquisition; and as to the consequence of a defective finding.

Staundforde, Prerogative, 73 b. ch. 22, tit. Petition; Com. Dig. Prærogative (Dig. 80); Rastall's Ent. 461 a. Petition, pl. 1; Finch's Law, b. 4, ch. 3, p. 256 (ed. 1759); case of *Bishop of Exeter*, 1 Rot. Parl. 421 (18 Ed. 2), No. 18; case of *The Earl of Kent*, Yearb. Hil. 21 Ed. 3, fol. 47, A, pl. 68; Yearb. Mich. 13 H. 7, fol. 11, A, pl. 12; Yearb. Mich. 9 H. 4, fol. 6, A, pl. 20; Yearb. Hil. 4 H. 7, fol. 5, A, pl. 10; Yearb. Hil. 21 H. 7, fol. 18, A, pl. 30; Yearb. Mich. 3 H. 7, fol. 13, B, pl. 19; Yearb. Trin. 9 H. 6, fol. 20, A, pl. 15; Yearb. Mich. 39 H. 6, fol. 3, B, pl. 5.

(*a*)[2] The following were among the authorities cited on this point.

Count Wall's case, 3 Knapp's Priv. C. R. 13; *Countess Conway's case*, 2 Knapp's Pr. C. R. 364; *Countess of Dalhousie* v. *M'Douall*, 7 Cl. & Fin. 817; *Munro* v. *Munro*, 7 Cl. & Fin. 842; case of *Æneas Macdonald*, Foster's Crown Law, 59 (and see ib. 1st Disc. sect. 1, p. 183); *Drummond's case*, 2 Knapp's Pr. Cr. 295; *Daniel* v. *Commissioners for Claims on France*, 2 Knapp's Pr. C. R. 23; *Story's case*, 3 Dyer, 298 b.; Story on the Conflict of Laws, p. 47, s. 48 (Boston, 1834); *Calvin's case*, 7 Rep. 1 a. 6 a.; Co. Lit. 8 a.; 1 Hal. Pl. Cr. 69, 70.

(*b*) Printed extracts from the treaties, &c. were placed in the hands of the Court by the suppliant. Some question arose, how far the Court could look out of the inquisition, and take judicial notice of these documents. It appears that the judgment of the Court does not determine this point, the decision having been against the suppliant upon the assumption that the Court might look at the extracts.

Taylor v. *Barclay*, 2 Sim. 132, and *Van Omeron* v. *Dowick*, 2 Campb. 42, 44, were cited.

The following were among the authorities mentioned as to the construction of the treaties, and of stat. 59 G. 3, c. 31, and their applicability to the facts stated in the inquisition, and with reference to the questions, whether the jurisdiction appeared to be taken from this Court, and whether the matter could be considered as res judicata, or as concluded by the recitals in the statute.

Earl of Leicester v. *Heydon*, Plowd. 384, 398; *Pilkington* v. *Commissioners for Claims on France*, 2 Knapp's Pr. C. R. 7; *Countess Conway's case*, 2 Knapp's Pr. C. R. 364; *Daniel* v. *Commissioners for Claims on France*, 2 Knapp's Pr. C. R. 23; *Drummond's case*, 2 Knapp's Pr. C. R. 295; *Webster's case*, 2 Knapp's Pr. C. R. 386; Fost. Cr. L. 185, 1st Disc. ss. 3, 4; 4 Inst. 163; Com. Dig. Justices of Peace (A, 6), (A, 7), (A, 8); 1 Br. Abr. 145 a. Commissions and Commissioners, pl. 9, 10, 11; *Triquet* v. *Bath*, 3 Bur. 1478; Beames's Elements of Pleas in Equity, p. 88; *Draper* v. *Crowther*, 2 Vent. 362; Mitford's Pl. 224 (p. 263 in 5th ed.); Cooper's Pl. 241; *Earl of Derby* v. *Duke of Athol*, 1 Ves. sen. 202; S. C. 1 Dick. 129; *Bishop of Sodor and Man* v. *Earl of Derby*, 2 Ves. sen. 337, 357; *Lord Coningsby's case*, 9 Mod. 95; *Warwick* v. *White*, Bunb. 106; *Moravia* v. *Sloper*, 2 Com. Rep. 574; S. C. Willes, 30, 34, 37; *Blacket* v. *Lumley*, 1 Vent. 240; *Hanslap* v. *Cater*, 1 Vent. 243; *Pinager* v. *Gale*, 2 Vent. 100; *Sollers* v. *Lawrence*, Willes, 413; *Jennings* v. *Hankyn*, Carth. 11, 12; *Rex* v. *Mayor, &c. of Liverpool*, 4 Bur. 2244; *Cates* v. *Knight*, 3 T. R. 442; *Anonymous*, 1 Freem. C. B. 104; *Delbridge* v. *Pentyer*, 1 Freem. 315; *Harland* v. *Cocke*, 1 Freem. 315; *Stainton* v. *Randal*, 1 Freem. C. B. 260, 266; *Baker* v. *Holman*, 1 Freem. 316; *Anonymous*, 1 Freem. 319; *Higginson* v. *Martin*, 1 Freem. 322; *Godfrey* v. *Saunders*, 1 Sid. 87; *Anonymous*, Fitzgib. 44; *Ramsey* v. *Atkinson*, 1 Lev. 50; *Price* v. *Hill*, 1 Lev. 137; *Wallis* v. *Squire*, 2 (T.) Jones, 230; *Stanyon* v. *Davis*, 6 Mod. 223, 224; *Waldock* v. *Cooper*, 2 Wils. 16;

HeinOnline -- 115 Eng. Rep. 880 1378-1865

subjects of each of the two parties, residing in the dominions of the other, shall have the privilege of remaining and continuing their trade therein, without any manner of disturbance, as long as they behave peaceably, and commit no offence against the laws and ordinances; and in case their conduct shall render them suspected, and the respective Govern-[278]-ments should be obliged to order them to remove, the term of twelve months shall be allowed them for that purpose, in order that they may remove with their effects and property, whether entrusted to individuals or to the State. At the same time it is to be understood that this favour is not to be extended to those who shall act contrary to the established laws." The Treaty of 1814 (additional art. 4) provides for taking of sequesters, and provides that commissioners "shall undertake the examination of the claims of His Britannic Majesty's subjects upon the French Government, for the value of the property, movable or immovable, illegally confiscated" (induement confisqués) "by the French authorities, as also for the total or partial loss of their debts or other property, illegally detained under sequester, since 1792." Next, the Treaty of 20th November, 1815, in its ninth article, declares the necessity of executing the fourth additional article of the preceding treaty. Finally, another convention of the date last mentioned begins with the following article. "The subjects of His Britannic Majesty having claims upon the French Government, who, in contravention of the second article of the Treaty of Commerce of 1786, and since the first of January 1793, have suffered on that account" (ont été atteints, à cet égard, par les effets de la confiscation, &c.) "by the confiscations or sequestrations decreed in France, shall, in conformity to the fourth additional article of the Treaty of Paris of the year 1814, themselves, their heirs or assigns, subjects of His Britannic Majesty, be indemnified and paid, when their claims shall have been admitted as legitimate, and when the amount of them shall have been ascertained according to the forms and under the conditions hereafter stipulated."

[279] At this point one would naturally expect, if the Treaty of Commerce had undergone no alteration, that the suppliant should set forth the particulars in which its second clause has been violated in respect to him: that is, that he had been prevented, on the rupture between the two States, from removing his property and effects. But the first article of the Convention No. 7 certainly extends the operation of the Treaty of Commerce to cases of the undue confiscation of the property of His Britannic Majesty's subjects. Then his allegation ought to have been that his property was unduly confiscated; and the particulars ought to have been shewn. The spirit of the two treaties combined seems to be this. "We have engaged to protect your property, as long as you reside in France under the Treaty of Peace. If you shall make it clear that the Revolutionary Government unduly confiscated instead of protecting it, when the rupture occurred, we will give you compensation for the loss that has ensued." But the inquisition here, as in its former parts, merely states the facts that occurred, and leaves to the Court the duty of drawing the inference that the property was unlawfully confiscated. It does not find that the confiscation followed the rupture, or was caused by it: on the contrary, the cause must be collected from this statement to have been the suppliant's violation of the law of France adjudged by some tribunal in that country. The conduct for which the sentence was passed was called by the name of "emigration": how defined and qualified by the law we are left in ignorance. We cannot take judicial notice of the meaning of that word, nor pronounce the law illegal, or (in the English phrase) undue, unless it were manifest that any law which subjected any act of emigration to [280] the penalty of confiscation must be in its nature void when applied to any British subject residing in France. But this general proposition cannot be maintained, unless the birth in England made the suppliant so exclusively and indefeasibly a British subject that he could not be in any way amenable to French law: and this would be inconsistent with the principle of local

Emery v. *Barlett*, 2 Str. 827; *Dye and Olive's case*, March, 117; *Nabob of the Carnatic* v. *East India Company*, 1 Ves. jun. 370, 388; S. C. as *Nabob of Arcot* v. *The East India Company*, 3 Bro. C. C. 292, 301; *Strode* v. *Little*, 1 Vern. 59; *Cunningham* v. *Wegg*, 2 Bro. C. C. 241; *Jones* v. *Moldrin*, 3 Lev. 141; *Mostyn* v. *Fabrigas*, 1 Cowp. 161, 172; *Baynes* v. *Baynes*, 9 Ves. 462; *Attorney General* v. *Lord Hotham*, Turn. & R. 209, 218; *Sheen* v. *Rickie*, 5 M. & W. 175, 181; *Tebbutt* v. *Selby*, 6 A. & E. 786; *Morgan* v. *Seaward*, 2 M. & W. 544, 561; Yearb. Mich. 35 H. 6, fol. 1, A, pl. 1; *Hill* v. *Reardon*, 2 Russ. 608, 630.

HeinOnline -- 115 Eng. Rep. 881 1378-1865

allegiance recognized by our own law, and conformable, for aught we know, to the law of France. If this law of emigration is not proved to us to be absolutely void as against the suppliant, we find no complaint made of its being unlawfully enforced by the French tribunal which pronounced sentence under it. An inquiry of that nature would indeed be singular, and would lead us to the performance of functions for which we are wholly incompetent. We must constitute ourselves a Court of Error on points of law, and a Court of Appeal in matters of fact, for the revision of all sentences which were pronounced against British subjects, after the rupture, for any offence whatever. In the large sense that must be assigned, for this argument, to the expression "indûment confisqués," any one of them unjustly condemned for highway robbery, whose attainder may have drawn after it the forfeiture of his land, may bring himself within this clause, and entitle himself to full compensation, if a Middlesex jury shall now think the conviction wrong. Whatever we may know historically of the conduct of the Courts during the Revolution, we certainly should not be justified in pronouncing their judgment wrong in any particular case without, at least, some direct proof. But here the inquisition itself records one piece of evidence, without stating that that was all the evidence adduced, which goes far to **[281]** establish what would be commonly understood to be a case of emigration: that the Baron de Bode "took refuge" in the Austrian Army, which was at that time invading the soil of France.

But, supposing now that these doubts are groundless, and that the suppliant has brought himself within the terms of the treaty, the next requisite is, to shew that he has availed himself of its provisions. He is to be indemnified and paid, when his claim shall have been admitted to be legitimate, and when the amount of it shall have been ascertained, according to the forms and under the conditions stipulated.

No statement appears in the inquisition that the claim has been admitted as legitimate, or that the amount has been ascertained; but the contrary in both respects: and recourse must be had to the subsequent Treaty of 1818, and the statute 59 G. 3, c. 31, founded upon it, by which the time of preferring claims was extended for those claimants who had let slip the former opportunity.

The treaty is quoted in general terms for its object; and recites that funds had been provided for effecting it. The Act is also quoted in the inquisition. The claimants, to whom the indulgence is granted, are such persons as shall have caused their names to be inserted in the register provided for claimants within the period prescribed by the Convention of 1818. The suppliant alleges, and the inquisition finds, that neither his name nor his claim had been placed on this register till after the passing of the Act. He, therefore, does not fall within the enacting clause; and his right to receive the money is shaped in a different manner.

The registered claimants are, first, to receive the **[282]** sums adjudged to them; and the Commissioners of Deposit, during the time that any capital remains in their names unappropriated to claimants, are authorized, on receiving directions from the Lords of the Treasury, to part with it for payment of such claims, or, if they are all paid, to apply it to such other purposes as the Lords of the Treasury should direct. And the inquisition finds that, after payment of all the registered claims that have been established, a surplus exceeding 480,000l. remained in the hands of the Commissioners of Deposit, out of which 200,000l. were applied to payment of claims, tendered too late under the Convention of November 1815, but admitted under the authority of the Lords of the Treasury: and the residue was paid into the Bank of England on the Government account by direction of the Lords of the Treasury, in pursuance of the Act. This is the residue, says the suppliant, of the money paid by the French Government to the English, in trust for himself and the other British subjects whose property was unlawfully confiscated: and, as all the other claims have been discharged, I call upon the English Government to apply it towards making good my loss.

We do not see how it is possible to extract any claim, legal or equitable, out of these circumstances, to the payment of any money. The amount does not appear to have been ascertained, nor the claim to any amount established: nor do we find that the Lords of the Treasury have granted the indulgence with which others have been favoured, or even have been requested to institute any inquiry into the validity of the baron's claim. He might very possibly have had just ground for making **[283]** such a request, and might reasonably have expected that they should not lose their control over any sum remaining with the Commissioners of Deposit till such inquiry had been brought to a close: but they might have lawfully, and, perhaps, with good reason,

HeinOnline -- 115 Eng. Rep. 882 1378-1865

refused that indulgence: the inquiry might have turned out unfavourably to the baron's claim: they might have thought others entitled to a preference over him.

Assuredly, there is no account in which this or any other sum stands to his credit. The Court is left, once more, to draw an important inference which the suppliant ought to have drawn for himself, stating the premises whence it flowed. The inference suggested is, that the whole 200,000l. is virtually his: the premises must be that no other claimant can possibly come in to claim any part of it. But this fact is unknown to us, and can by no means be deduced from the length of time that has elapsed. The baron's own claim, so recently brought forward, is an example which demonstrates the contrary proposition.

We must not pass over one of the allegations appearing in the petition, which is not affirmed by the finding in the inquisition,—the award made by the commissioners in 1822, rejecting the claim, and confirmed by the Privy Council on appeal in 1823; not that we conceive ourselves at liberty to assume this fact to be true, even as against the suppliant who states it, but that we may not be supposed to have omitted all consideration of it. In truth, it suggests a dilemma to which, as an argument, great weight is due. The inquisition, the only subject of our deliberation, states nothing on the subject. Then, either an inquiry has taken place on **[284]** the suppliant's application and turns out unfavourable to him, or none has taken place and he is not in a position to ask for the money. We are, in either case, left without the means of seeing that the surplus has been received to his use by any one.

Even if that could be maintained, the question would remain, whether Her Majesty can be said to have received the money. This is not found. We cannot adjudge the fact on the allegation that it was paid into the Bank of England on the Government account, which may be true, in numerous modes of construing language so indefinite, without any participation of the Sovereign (*a*). The attempt to fix the Sovereign, individually, from the decision of my brother Coleridge (*b*) in the Bail Court, when he discharged the rule for a mandamus to the Lords of the Treasury to pay the baron, on the ground that they were, in fact, the servants of the Crown in holding the money, cannot prevail. They were, by the very supposition on which that rule was obtained, the servants of the Crown, acting for the Crown in parting with the money: and the incongruity of the Sovereign issuing a writ to the Sovereign would have occurred if this Court had directed the mandamus to those servants. This preliminary objection dispensed with any examination of the others. It has no bearing on the proof, required in support of a **[285]** Petition of Right, that the Sovereign has or has had a personal benefit from that which is sought to be received at his hands.

We have thought it right to express the doubts that have been felt among us on some of the earlier points alluded to. But on the point last mentioned none of us feel any doubt. We all think that this money has not been received by the Sovereign, and, further, that it has not been received to the suppliant's use.

Hill's rule discharged.

The Solicitor General's rule made absolute.

The following entry was made, immediately after the verdict stated in p. 268, ante.

"And, because the Court of our said lady the Queen now here are not as yet advised of giving their judgment of and upon the premises, day thereof is given to the parties aforesaid, until the 2d day of November in the year of our Lord 1844, before our said lady the Queen, at Westminster, to hear their judgment thereupon, for that the said Court of our said lady the Queen here are not yet advised thereof.

"At which day, before our said lady the Queen, at Westminster, come as well the said suppliant by his attorney aforesaid as the said Attorney General in his own proper person. And, because the Court," &c. (continuances by Curia advisari vult, down to 2nd November, 1815).

(*a*) The following were among the authorities mentioned on this point. *Rex* v. *The Lords Commissioners of the Treasury*, 4 A. & E. 286, 298; *In re Baron de Bode*, 6 Dowl. P. C. 776; 3 Blackst. Com. 254, &c.; stat. 4 & 5 W. 4, c. 15; Yearb. Mich. 9 H. 4, fol. 4, A, pl. 17; Yearb. Hil. 4 H. 7, fol. 1, A, pl. 1; Yearb. Mich. 7 H. 4, fol. 33, A, pl. 20; *Newland* v. *Attorney General*, 3 Mer. 684; *Mitford* v. *Reynolds*, 1 Phil. Ch. Ca. 185; *Gidley* v. *Lord Palmerston*, 3 Br. & B. 275.

(*b*) *In re Baron de Bode*, 6 Dowl. P. C. 776, 792.

HeinOnline -- 115 Eng. Rep. 883 1378-1865

"At which day," &c. "Whereupon, all and singular the premises being seen by the Court of our said lady the Queen here, and fully understood, and mature deliberation thereof being had, it is considered, by the **[286]** said Court here, that the said suppliant take nothing by his petition aforesaid, but, for his false claim, be thereof in mercy, &c.: and that the said Attorney General of our said lady the Queen may go thereof without day, &c."

DAVIS *against* CURLING. Wednesday, December 10th, 1845. Declaration, in case, charged that defendant was, under the Highway Act (5 & 6 W. 4, c. 50), surveyor of the parish of T.; that gravel had been placed on a highway in T., by means of which gravel the highway was obstructed, and the gravel was a nuisance to the public: that defendant had notice, and was requested to remove the same; but he, well knowing, &c., did not nor would, in a reasonable time, remove or cause it to be removed, but, on the contrary, conducted himself with gross negligence, and knowingly, wilfully and wrongfully, and in violation of his duty as such surveyor, permitted, suffered and caused the gravel to continue and be upon the highway, obstructing the same, remaining and being a nuisance to the public, for a long and unreasonable time, without taking any care or precaution to guard against danger or damage to persons passing, contrary to his duty in that behalf as such surveyor: by means of which plaintiff's carriage was overturned. It was proved that defendant had notice of the gravel being laid, and had been guilty of want of care in leaving it there, and that this had caused the accident. Held, that defendant was charged with a thing done in pursuance of the Act, and was therefore entitled to notice under sect. 109.

[S. C. 15 L. J. Q. B. 56; 10 Jur. 69. Applied, *Newton* v. *Ellis*, 1855, 5 El. & Bl. 123; *Wilson* v. *Halifax Corporation*, 1868, L. R. 3 Ex. 120. Discussed, *Jolliffe* v. *Wallasey Local Board*, 1873, L. R. 9 C. P. 81.]

Case. The declaration charged that, whereas, before and at the time of the committing of the grievances, &c., and after the passing of a certain Act, &c. (Highway Act, 5 & 6 W. 4, c. 50), defendant was a surveyor, appointed under the said Act, in and for the parish of Tottenham in Middlesex; and whereas, also, before the committing, &c., a large quantity of gravel, stones, &c., had been and was laid, put and placed upon and in a certain public highway within the said parish, called Marsh Lane, and which said public highway, before and at the time of the committing, &c., was under the survey, care and superintendance of defendant as such surveyor; and by means of which said gravel, &c. the said highway was very much straitened and obstructed; and the said gravel, &c. had become, and **[287]** were, a nuisance to the public passing along the said highway; of all which premises defendant before the committing, &c., to wit on, &c., had notice, and was then requested to remove or cause the same to be removed from and out of the said highway: yet defendant, well knowing the premises, but contriving, &c. to injure plaintiff, did not nor would, although a reasonable time for his so doing passed and elapsed after he had such notice, and before the happening of the injury to plaintiff after mentioned, remove or cause or procure to be removed the said gravel, &c., from and out of the said highway; but, on the contrary thereof, defendant from the time of his receiving and having such notice, to wit from, &c., "continually, up to and until the happening to the plaintiff of the injury hereinafter mentioned, behaved and conducted himself with gross negligence in and about the premises, and knowingly, wilfully and wrongfully, and in violation of his duty as such surveyor as aforesaid, allowed, permitted, suffered and caused the said gravel," &c., "to remain, continue and be in and upon the said highway, straitening and obstructing the same, and remaining and being a nuisance to the public passing along the said highway, for a certain long and unreasonable space of time in that behalf, to wit six weeks, without taking any care or precaution whatsoever to guard against danger or damage to persons passing along the said highway, contrary to his, the defendant's, duty in that behalf as such surveyor as aforesaid." By means and in consequence of which premises, and of defendant's said breach of duty, and not otherwise, afterwards, and before the commencement of this suit, to wit on, &c., in the night time of the said day, a certain carriage of the plaintiff, of great value, **[288]** to wit, &c., with the plaintiff therein, then going and passing in and through the said

HeinOnline -- 115 Eng. Rep. 884 1378-1865

In re A PETITION OF RIGHT OF DE KEYSER'S ROYAL HOTEL, LIMITED.

DE KEYSER'S ROYAL HOTEL, LIMITED *v.* THE KING.

[1917 D. 582.]

C. A.
1918
July 18, 19, 22, 23; *October* 22; *Dec.* 3, 17.
1919
Jan. 21, 22, 23; *April* 9.

War—Crown—Royal Prerogative—Defence of the Realm—Right of Crown to take Possession of Land and Buildings without Compensation—Defence Act, 1842 (5 & 6 *Vict. c.* 94)—*Defence of the Realm Consolidation Act*, 1914 (5 *Geo.* 5, *c.* 8), *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 property of a subject and use it for administrative purposes in connection with the defence of the realm, without paying compensation for its use and occupation.

Upon an examination of the records from a very early period down to the present time, with regard to (*a*) acts of interference by the Crown with private property in land for the purpose of the defence of the realm; (*b*) claims by subjects for compensation in respect of such interference (1.) as a matter of right, (2.) as a matter of grace; and (*c*) the manner in which claims of this nature have been dealt with and the results thereof, it does not appear that the Crown has ever taken the subject's land for the defence of the country without paying for it, nor is there any trace of any claim by the Crown to such a prerogative.

So held by Swinfen Eady M.R. and Warrington L.J. (Duke L.J. dissenting).

Decision of Peterson J. reversed.

In re A Petition of Right [1915] 3 K. B. 649 distinguished.

APPEAL from a decision of Peterson J. dismissing a petition of right presented by De Keyser's Royal Hotel Co., Ld., in which they claimed (par. 4) to be entitled as of right to a fair rent for the use and occupation of their premises, of which possession had been taken by the Government for national purposes during the war. The following statement of facts is taken from the judgment of Swinfen Eady M.R.

The suppliants are the owners for a term of years of certain lands, buildings and hereditaments situate on the Thames Embankment near Blackfriars Bridge in the City of London, known as "De Keyser's Royal Hotel." The company had created and issued debenture stock, and by an order of the Chancery Division made on June 25, 1915, Mr. Arthur Francis Whinney, chartered accountant, was appointed receiver

ADD-33

C. A.
1919
DE KEYSER'S ROYAL HOTEL, LD., *In re.*
DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.

of the undertaking, property and assets of the company comprised in the debenture trust deed and to manage the business of the company. Mr. Whinney accordingly carried on the hotel business of the company until possession of the hotel and premises was taken on behalf of the Secretary of State for War as hereinafter mentioned.

On April 18, 1916, the Supplies Division of His Majesty's Office of Works applied to Mr. Whinney by letter and asked at what rent he would be prepared to let the whole of the hotel premises (with the exception of the shops) to that Department for use as offices for the remaining period of the war, and, not improbably, say for a maximum period of three months after the conclusion of peace. There had been an inspection of the property on behalf of the Government and an interview with Mr. Whinney before this letter was written. Mr. Whinney answered, suggesting a rent of 19,000*l.* a year, subject to various conditions fully set forth in his letter. An interview followed on April 28, 1916, between Mr. Whinney and a representative of the Office of Works, at which Mr. Whinney states that he was asked whether he could not make the rent 17,500*l.* The next day a letter was written to Mr. Whinney from the Office of Works stating that the Board were of opinion that it would be to the advantage of all concerned to refer the question of the amount to be paid by the Government for the use of the premises to the Defence of the Realm Losses Commission; and added that in these circumstances the Board had no option but to communicate with the War Office with a view to the hotel premises (excluding the shops) being requisitioned under the Defence of the Realm Acts in the usual manner.

The Defence of the Realm Losses 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," which words have always been held by the Commissioners to exclude all cases where the applicant had or claimed to have any rights enforceable in a court of law under any statutory enactment or under any agreement to which the Crown was party.

On May 1, 1916, Mr. Whinney answered by declining to concur in the suggestion that the amount to be paid by the Government for the use of the hotel should be referred to the Defence of the Realm Losses Commission, but nevertheless offering to facilitate the acquisition of the premises by the War Office and consenting to possession of the premises being given to the authorities' representative (Mr. R. C. Cole) on Monday, May 8, at 11, subject to the consent of the Court (as he was receiver under the Court), which was duly obtained.

The attitude adopted by Mr. Whinney throughout was to give effect to the wishes of the authorities and not to put them to any unnecessary trouble or delay, but to preserve all legal rights. He consented to give possession, and did give possession, to Mr. R. C. Cole, of His Majesty's Office of Works, on May 8, having previously arranged for all the guests to leave the hotel.

There is a further letter of May 1, 1916, from the Lands Branch of the War Office, stating that the Army Council will take possession on May 8 under the "Defence of the Realm Regulations"; also enclosing a form of claim for submission to the Losses Commission, and stating that compensation is made ex gratia, and is strictly limited to the actual monetary loss sustained.

Thus the authorities were given possession on May 8, 1916, and have ever since retained it.

At the trial Sir Charles Ernest Neath, Deputy Quartermaster-General to the Forces, gave evidence that the premises were required for the Air Service, but that when the Air Board was formed the Air Service moved from De Keyser's Hotel to the Hotel Cecil. According to the evidence of Mr. Fane (of the Office of Works), after the Flying Corps left De Keyser's the premises were used by the Government for other sections of the War Office brought from other premises. There is not any further evidence as to the purposes for which these hotel premises are still being used by the Government. Throughout the whole period the premises have been used for administrative purposes, for which they were considered

C. A. 1919 — DE KEYSER'S ROYAL HOTEL, LD., *In re.* DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.

suitable, having regard to the large number of rooms and the lighting and central heating arrangements.

On May 5 Mr. Whinney wrote to the Office of Works, informing them that notice had been given to all the guests of the hotel to leave, and that possession would be given to the authorities on May 8; the letter proceeded as follows: "The loss involved in the closing of the hotel will be very heavy, and I do most earnestly ask the authorities to assist me in minimizing as much as possible by concurring in the steps necessary to fix, and then paying, a fair occupation rent for the premises. I think that a fair rent might be fixed by personal negotiation between the representative of the authority requiring the building and myself, but failing this, I would ask you to agree to submit the question to arbitration. From a single arbitrator, such as the President of the Surveyors' Institute, or Royal Society of British Architects, an award of the fair rental might be expeditiously obtained, and the question of compensation could be left to be dealt with by some other tribunal. As I have to pay a head rent you will, I am sure, appreciate the urgency of fixing an occupation rent without delay. You may rely upon my taking all necessary steps to hand you possession on Monday, and doing everything in my power to facilitate your arrangements."

On May 8, 1916, possession of the hotel was given to Mr. Fane, of the Office of Works, by Mr. Whinney giving him the keys. The same day Mr. Whinney wrote to Mr. A. J. Durrant, the Controller of Supplies, at the Office of Works, informing him of that fact, and enclosing a memorandum of what had been discussed at the interview. Clause 7 of that note is as follows: "H.M. Office of Works do not recognise any claim for occupation rent, and they require that claim for compensation shall be sent in to the Office of Works for transmission to the Duke Commission." (1) Sir Charles Heath stated in evidence at the hearing that he had to determine what premises should be taken, and that he dealt with De Keyser's Hotel; that he knew it was a matter of urgency, and as there appeared to be a prospect of delay he sanctioned

(1) The Defence of the Realm Losses Commission.

the taking over of De Keyser's under the Defence of the Realm Act; but on cross-examination stated that there was no difficulty about possession, and an arrangement could have been made to settle the rent by arbitration afterwards.

Peterson J. held that he was bound by the decision of the Court of Appeal in *In re A Petition of Right* (1) and dismissed the petition. The suppliants appealed.

P. O. Lawrence K.C., *Leslie Scott K.C.* and *Copping* for the appellants.

The suppliants have a legal right to compensation for the use and occupation of their property. Peterson J. in dismissing the petition considered himself bound by *In re A Petition of Right* (1), but that case was analogous to an entry upon land by the sea coast to dig trenches. The aerodrome was required for the defence of the coast against aerial hostilities, and the case has no application to the present, where land and buildings have been taken for purely administrative purposes.

[WARRINGTON L.J. That distinction is only applicable upon the question of the Royal prerogative ?]

Yes. The Crown has no right either by virtue of the prerogative or under any statute to take the property of the suppliants and use and occupy it for such purposes as in the present case without any obligation to make compensation. As regards statutory authority the Crown relies upon the Defence of the Realm Acts and the regulations thereunder. But although it may have been necessary for the safety of the realm for the Government to take and occupy the premises, it is not necessary that they should do so without compensation. Under the Defence Act, 1842, and the Defence of the Realm Acts, 1914, which must be read together, the Crown is bound to pay, and the regulations cannot override the Acts; they are only intended to invest the competent authorities with power to exercise the Acts in accordance with law. They were not intended to give any wide authority to the executive to confiscate the subject's property. If

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

C. A. 1918

DE KEYSER'S ROYAL HOTEL, LD., *In re.*

DE KEYSER'S ROYAL HOTEL, LD. v. THE KING.

the regulations go beyond what is necessary for the safety of the realm they are ultra vires.

[WARRINGTON L.J. That point was not taken before this Court in *In re A Petition of Right.* (1)]

No; but it was in the House of Lords, where however the case was compromised.

[WARRINGTON L.J. The answer appears to be that the regulations give power to take the land, and you have to show that there is an obligation on the Crown to pay compensation.]

The regulations derive their validity solely from the Act of 1914; if they go beyond the scope of the Act they are ultra vires. The Act gives no power to confiscate the subject's property even temporarily.

[DUKE L.J. How does what has been done in this case differ from military exclusion from a certain area?]

Widely. The canon of construction to be applied is that laid down by Brett M.R. in *Attorney-General* v. *Horner* (2), and again alluded to by Bowen L.J. in *London and North Western Ry. Co.* v. *Evans.* (3) Lord Davey again deals with it in *Cape Colony Commissioners* v. *Logan.* (4) We also pray in aid what was said by Swinfen Eady M.R. in *Cannon Brewery Co.* v. *Central Control Board* (*Liquor Traffic*). (5)

Approaching the Act in the light of those authorities it empowers "the making of regulations" by which is meant the regulating of existing powers. The regulations must be for the securing of public safety and the defence of the realm; and even if the wider view contended for by the Crown be taken it cannot be said that public safety or the defence of the realm necessitates the taking of the property of individual subjects without compensation; any regulation therefore which purports to do that is ultra vires, because there is nothing in the Act which says that it may be done. It could not be done except by very clear provisions. The Act may provide for the suspension of restrictions upon the acquisition of land, and it is said that there is such a suspension in sub-s. 2.

(1) [1915] 3 K. B. 649.
(2) (1884) 14 Q. B. D. 245, 256, 257.
(3) [1893] 1 Ch. 16, 28.
(4) [1903] A. C. 355, 363.
(5) [1918] 2 Ch. 101.

The answer to that is that the restrictions there referred to do not affect the right to compensation. They refer to such restrictions as the giving of the requisite notices and matters of that nature. Suspending a restriction is not equivalent to doing away with a right. The right to payment might be suspended but cannot be taken away. The regulations ought to be construed intra vires if possible. If construed in the wide sense contended for by the Crown, namely, as taking away the right to compensation, they are ultra vires.

[SWINFEN EADY M.R. Does the defence of the realm justify the taking, without compensation, of property for every branch of the administrative services ?]

In the case of property required for the housing of munition workers the Crown has disclaimed the right to acquire without compensation. It is difficult to see the distinction.

On the question of the prerogative the right is explained in Dicey on the Law of the Constitution, 8th ed., cap. 14, p. 421. See also Allen on the Prerogative (1849), pp. 157, 158. The right to enter upon a man's land in time of war for the purpose of public defence is not confined to the Sovereign ; any member of the public may do it. It is not therefore a prerogative right. It is not disputed that the King, under certain circumstances, may by his officers enter upon the subject's land, but there is no right in the King to dispossess the subject for such purposes as this hotel has been taken for. There is no case, except *In re A Petition of Right* (1), which has gone to the length of deciding that the subject may be dispossessed without compensation. Under the Great Charter no freeman may be disseised without lawful judgment of his peers or by the law of the land. That has been many times confirmed. See 5 Edw. 3, c. 9 ; 28 Edw. 3, c. 3 ; 16 Car. 1, c. 14. It is the same under the common law. See Co. Litt. 115b. ; Blackstone's Commentaries, i., 138, 139. In case of emergency the King and any of his subjects may enter on a man's land for purposes of public defence, but only so long as the emergency lasts. Two instances of this right are referred to in the *Saltpetre Case* (2), namely, the right to enter and make bulwarks or

(1) [1915] 3 K. B. 649. (2) (1606) 12 Rep. 12.

C. A. 1918 — DE KEYSER'S ROYAL HOTEL, LD., *In re.* DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.

trenches for defence of the realm, and the right to pluck down a house in order to stop a fire. But nowhere is it laid down that a man may be ejected from and dispossessed of his property without compensation. The Crown cannot invoke the prerogative when there is a statute providing for compensation : *British Cast Plate Manufacturers* v. *Meredith* (1) ; Chitty on the Prerogatives of the Crown, p. 49.

In order to give rise to the prerogative right to enter upon the subject's land there must be an immediate and urgent necessity for the acquisition of the land in order to meet the emergency. No such necessity can arise where the same result may be attained by the exercise of existing statutory powers. It is only imminent danger to the country that justifies the exercise of the prerogative : *Rex* v. *Hampden* (2) ; *The King's Prerogative in Saltpetre* (3) ; *The Case of the Bankers* (4) ; Broom's Constitutional Law, 2nd ed., p. 225.

No case of urgency existed here. There were statutory powers which might well have been exercised. There was no impasse at all. The Crown could have had—indeed, did have—immediate possession. The proceedings constitute a deliberate taking of the subject's property for administrative purposes and without recognition of the right to compensation. All that was necessary could have been done under the Defence Act, 1842, and the regulations under the Act of 1914. The Crown is challenged to produce any precedent for the action taken.

In Halsbury's Laws of England, vol. vi., s. 690, p. 448, the existing rights of the executive are summed up.

Sir F. E. Smith A.-G., Sir Gordon Hewart S.-G., Austen-Cartmell, Lowenthal and *Branson* for the Crown.

The question is whether the hotel premises were occupied under the Defence Act, 1842. That is clearly not the case, for none of the conditions necessary under that Act were complied with by either party. The occupation was either under the Defence of the Realm Consolidation Act, 1914, or by virtue of the Royal prerogative.

(1) (1792) 4 T. R. 794.
(2) (1637) 3 How. St. Tr. 825, 903, 1005, 1159, 1162.
(3) 12 Rep. 12.
(4) (1700) 14 How. St. Tr. 1.

In Dicey on the Law of the Constitution, 8th ed., p. 421, the term "prerogative" is defined "as equivalent to the discretionary authority of the executive." That is the modern description of the prerogative. The doctrine was laid down in *Rex* v. *Hampden* (1); *The King's Prerogative in Saltpetre* (2); and *Hole* v. *Barlow.* (3)

The appellants have challenged the Crown to produce cases where it had even been attempted to take land without compensation. The absence of such authority is in favour of the Crown. No one can doubt that there must have been cases where the Crown has done acts which were injurious to the property of the subject for the safety and defence of the realm. On the other hand there is no case in which a claim by a subject for compensation has been successfully asserted. This is not immaterial if history be looked at. Contests in days gone by were more local, and the idea then was that the loss should lie where it fell. It is a later conception that it should be distributed over the whole community. It must be assumed here, having regard to the fact that the premises were originally required for the Air Service, that they were taken for the safety and defence of the realm, and that therefore the prerogative arose.

The Zamora (4) shows that the statement of the competent authority that the property is required is conclusive.

In *Sheffield Conservative and Unionist Club, Ld.* v. *Brighten* (5) Avory J. held that the decision of the competent military authority by whose order the premises are taken, as to such necessity, provided that he acts reasonably and in good faith, is conclusive.

In all the cases cited in previous arguments the doctrine is laid down that the prerogative arises if the use of the land is necessary for securing the public safety and defence of the realm during the war. That point was considered and discussed in *In re A Petition of Right.* (6) The defence in that case was based on the Defence Act, 1842.

(1) 3 How. St. Tr. 825.
(2) 12 Rep. 12.
(3) (1858) 4 C. B. (N. S.) 334.
(4) [1916] 2 A. C. 77, 106.
(5) (1916) 85 L. J. (K. B.) 1669; [1916] W. N. 277.
(6) [1915] 3 K. B. 649.

C. A. 1918 — DE KEYSER'S ROYAL HOTEL, LD., *In re.* — DE KEYSER'S ROYAL HOTEL, LD. v. THE KING.

It cannot be said that the prerogative does not arise if there is some other means of taking the land. If it is necessary that certain land should be acquired for the safety of the realm the subject is not entitled to insist that it should be acquired in a particular way.

When once it is conceded that the national interest requires that the land should be acquired the prerogative is available for that purpose. Take for example the *Saltpetre Case* (1) and *Rex* v. *Hampden* (*Ship Money Case*). (2)

[SWINFEN EADY M.R. In the *Saltpetre Case* (1) was not the saltpetre paid for ?]

It would not appear so from the report.

In *In re A Petition of Right* (3) Warrington L.J. cites the passage from the *Saltpetre Case* (1): "But when enemies come against the realm to the sea-coast, it is lawful to come upon my land adjoining the same coast, to make trenches and 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 Edward IV. 23."

The view of the Crown is that the property is taken under the prerogative, and under the prerogative there is no right to compensation.

[SWINFEN EADY M.R. The question really arises as to the extent of the prerogative.]

We rely on the dicta in *Hampden's Case* (4), *Saltpetre Case* (1) and *Hole* v. *Barlow* (5), cited by Avory J. in *In re A Petition of Right*. (6)

[SWINFEN EADY M.R. *Hole* v. *Barlow* (5) has been overruled and is no longer law.]

The authorities show (1.) that in times of grave danger the Crown may seize the property of a subject and (2.) that where the danger is proved there is no right to compensation.

The first reference to compensation is in the Act of 1798 (38 Geo. 3, c. 27). The Act is intituled "An Act to enable

(1) 12 Rep. 12.
(2) 3 How. St. Tr. 825.
(3) [1915] 3 K. B. 649, 665.
(4) 3 How. St. Tr. 825, 1194, 1198.
(5) 4 C. B. (N. S.) 334, 345.
(6) [1915] 3 K. B. 649, 652.

His Majesty more effectually to provide for the defence and security of the realm during the present war, and for indemnifying persons who may suffer in their property by such measures as may be necessary for that purpose."

Sect. 10 provides that His Majesty may authorize persons to treat for the use of ground for the public service, who may, in case of refusal or inability of the party to treat, apply to two justices, or deputy lieutenants, to put His Majesty's officers into possession, which they shall do, and direct the sheriff to summon a jury to ascertain the compensation to be paid. The verdict of the jury is to be certified to the Receiver-General of the Land Tax, who is to pay the compensation. No ground is to be taken without the owner's consent, unless the necessity be certified by the Lord-Lieutenant, etc., or in case of actual invasion. The language of that section is wide enough to include permanent acquisition. The statute would be unnecessary if it were confined to temporary acquisition. You cannot justify the prerogative unless you can show imperative necessity.

Sect. 3 of 44 Geo. 3, c. 95, empowers His Majesty to authorize persons to survey and mark out lands and treat either for the absolute purchase thereof for the public service or for the possession or use thereof, during such time as the exigence of the public service shall require.

Sect. 10 provides that lands shall not be taken without the consent of the owners except in case of actual invasion.

Sect. 9 of the Defence Act, 1842 (5 & 6 Vict. c. 94), enables principal officers to purchase lands, etc., and take leases on behalf of the Crown. Sect. 10 gives power to bodies politic and others to treat. Sect. 16 authorizes principal officers to treat with the owners of lands for the absolute purchase thereof. Sect. 18 enables bodies politic to agree for the sale of lands. Sect. 19 contains provisions for assessing the value of the premises where the parties do not agree to treat.

[SWINFEN EADY M.R. They seem to have regarded use and occupation as something different from a lease.]

The kind of interest contemplated is either the acquisition of the fee simple or a lease of the property—not a temporary

C. A. 1918

DE KEYSER'S ROYAL HOTEL, LD., *In re.*

DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.

dealing. The statute contemplated that the acquisition would be for a longer period.

[SWINFEN EADY M.R. See the last two lines of s. 16, "for the possession or use thereof during such time as the exigence of the public service shall require."]

You must take the statute as a whole and consider whether it is dealing with the same matter as the prerogative does. It was not, it is submitted, the intention of the Legislature to make any inroad on the prerogative.

Sect. 23 provides that lands are not to be taken for the defence of the realm without the consent of the owners except in certain cases—e.g., unless the enemy shall have actually invaded the United Kingdom at the time when such lands, buildings or other hereditaments shall be so taken.

The Defence of the Realm (Acquisition of Land) Act, 1916 (6 & 7 Geo. 5, c. 63), s. 1, sub-s. 1, shows that the Legislature conceived of possession of land being taken for the purposes of the defence of the realm in exercise of the prerogative, and made provision for the continuance of the possession of the land so occupied on that basis.

To summarize :—

1. There must always be in the case of national defence in every civil community a residuum of power in the executive which will enable it to deal with an emergency.

2. There are innumerable cases in which land has been taken by the Crown for the defence of the realm, and there is no case in the books which suggests that the subject is entitled to enforce in the courts a legal claim for compensation.

The inference is that there is no known right in law to claim compensation, but it is given only as a matter of grace.

If the Crown desired to acquire the fee it is not suggested that the prerogative would apply. In the case of a lease the rent is determined by agreement or by the Commission.

The Defence of the Realm Act, 1914, and the regulations thereunder give larger powers than those founded upon the prerogative.

The Defence of the Realm Consolidation Act, 1914 (5 Geo. 5, c. 8), confers on the King in Council power during the

continuance of the war "to issue regulations for securing the public safety and the defence of the realm." *Rex* v. *Halliday* (1) affords guidance as to the scope and general character of the regulations. The dicta of Lord Dunedin and Lord Atkinson in that case make it clear that it cannot be successfully argued that the regulations do not contain new powers, but only define the exercise of previously existing powers.

The object of the regulations is the defence of the realm. It is for the executive to determine what is necessary for that. "Those who are responsible for the national security must be the sole judges of what the national security requires": *The Zamora.* (2) In *In re A Petition of Right* (3) this matter is carefully considered. See also *Sheffield Conservative and Unionist Club, Ld.* v. *Brighten* (4); *Lipton, Ld.* v. *Ford.* (5)

The argument used against the regulations is that it cannot be necessary to take land without compensation when it might be taken by paying compensation. All that it is necessary for the Crown to show is that it is entitled to take the land, and that it is for the defence of the realm. When that is done it is for the suppliants to show that they are entitled to compensation. The case for the Crown has always been that there is no legal right to payment but that all payments contemplated under the regulations are ex gratia. In the regulations the King defines the manner in which such ex gratia payments are to be made.

The Defence of the Realm (Acquisition of Land) Act, 1916 (6 & 7 Geo. 5, c. 63), by s. 1, sub-s. 1, makes lawful the continuance of possession after the war of land occupied for the purposes of the defence of the realm. *In re A Petition of Right* (6) had made the possession during the war lawful.

By s. 3 (5.) provision is made for what is to happen after the war.

The result is to show that the Legislature could not have

(1) [1917] A. C. 260, 270, 275.
(2) [1916] 2 A. C. 77, 107.
(3) [1915] 3 K. B. 666.
(4) 85 L. J. (K. B.) 1669; [1916] W. N. 277.
(5) [1917] 2 K. B. 647.
(6) [1915] 3 K. B. 649.

C. A. 1918

DE KEYSER'S ROYAL HOTEL, LD., *In re.*

DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.

taken the view that in the case of land acquired for retention after the war the terms on which it should be acquired should be those provided by the Lands Clauses Act.

Under the prerogative the only question is: Is the taking of the land necessary? That is the only condition precedent. If it is then it is for the executive to determine what course it will follow.

Copping in reply. Where, as in this case, statutory provision is made for the taking of the subject's property with compensation, the prerogative right no longer exists.

[DUKE L.J. The Crown is not affected by legislation in the absence of express words to take away the prerogative.]

Generally speaking that is so, but it does not apply to such a case as the present; where power is given by statute to do certain things with certain consequences the Crown cannot proceed in another way. The prerogative only exists (1.) in case of urgent necessity and (2.) where there are no other means of doing what is necessary. The Court is not concerned with expediency or policy where the statute has provided a way of doing it. This property might have been taken under the following statutes: 5 & 6 Vict. c. 94; 8 & 9 Vict. c. 18; 23 & 24 Vict. c. 106; and 54 & 55 Vict. c. 54. There may be a necessity in the interests of public security to take the suppliants' property, but there is no necessity to do so without paying compensation. The suppliants have always admitted the necessity of taking the property, reserving nevertheless their right to compensation. The contention of the Crown that there was power under the prerogative to take the land and chattels of the subject without payment of compensation cannot now be supported. The *Saltpetre Case* (1) is no authority for that proposition.

The Crown was challenged to produce any authority or record of the taking of land without payment, and none have been produced. Search has been made by the suppliants, but no such record has been found. If the prerogative right claimed had existed there would have been no necessity for the Emergency Legislation.

(1) 12 Rep. 12.

The Act of 1916 was referred to by the Attorney-General (6 & 7 Geo. 5, c. 63). That Act provides for the continuation of possession of land occupied under the exercise of any purported prerogative right. See s. 1.

[At the conclusion of the arguments the case was ordered to stand over and be mentioned again on October 22, steps being taken in the meantime to examine the records with regard to instances of interference by the Crown with private property in land for the purpose of the defence of the realm, and claims by subjects for compensation in respect of interference of that nature. The case was accordingly mentioned on October 22 and again on December 3 and 17, the search having proceeded in the meantime, and on each occasion the further hearing was adjourned.]

1919. Jan. 21. The appeal came on for final hearing, and the result of the search was submitted to the Court in the form of a volume of extracts from the records.

Sir John Simon K.C., *Leslie Scott K.C.* and *Copping* for the appellants.

Amongst the documents revealed by the search in the records are ancient statutes passed from time to time when emergency required the acquisition by the Crown of land and other property for the defence of the realm. The history of the right of the Crown to take land for the purposes of national defence has been analogous to the history of the Lands Clauses Acts. From time to time when the country was threatened with invasion statutes were passed, and many of the provisions contained in them were embodied in the Defence Act, 1842. The Crown did not rely on its prerogative, it being always considered essential to take statutory powers for doing what was necessary for public defence.

The first of these statutes was 4 Hen. 8, c. 1, which empowered the justices of the peace to appoint such boroughs and towns as they should think needful to make bulwarks and fortifications for the defence of the south coast of Cornwall, and further empowered all the King's subjects under the

C. A. 1919 — DE KEYSER'S ROYAL HOTEL, LD., *In re.* DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.

direction of the justices to make such bulwarks as should be necessary, and without any manner of payment to be demanded for any of the premises or any manner of action by any one to be maintained against any of the King's subjects for any such matter or cause. The Act was to endure to the next Parliament. [The following Acts were also referred to: 14 Car. 2, c. 20; 22 & 23 Car. 2, c. 23; 1 James 2, c. 11; 4 & 5 W. & M., c. 24; and 11 & 12 Will. 3, c. 13.] There is also a series of statutes from the time of Queen Anne showing that even in time of war it was necessary to appoint commissioners with power to summon juries for the purpose of assessing the compensation to be paid for property taken for public defence. The Act 31 Geo. 2, c. 39, is an example of that kind of legislation.

[SWINFEN EADY M.R. Are there any statutory provisions for compensation apart from absolute purchase?]

Sect. 10 provides for the compensation of the owners of adjoining lands "injuriously affected" by the taking. None of the statutes, nor the commissions under them, reveal any claim by the Crown to a prerogative right to take the subject's property without payment. Other temporary defence Acts were passed in 1761 (2 Geo. 3, c. 37); 1763 (4 Geo. 3, c. 35); 1780 (20 Geo. 3, c. 38); 1798 (38 Geo. 3, c. 27); 1803 (43 Geo. 3, c. 55); and 1804 (44 Geo. 3, c. 95). These temporary Acts were finally consolidated by the Defence Act, 1842 (5 & 6 Vict. c. 94).

[Counsel then commented on a large number of Ordnance Minutes and War Office Records contained in the Book of Extracts above referred to.] None of these documents show any right in the Crown to take property without paying for it. [A series of documents embodied in the Extracts was then referred to relating to grants by the Crown, by virtue of its prerogative, of licences to search for and get saltpetre for the manufacture of gunpowder. These grants were made before the abolition of monopolies by the Act 21 James 1, c. 3.]

It is submitted that when there is a statutory power to occupy land upon paying compensation, such as is provided

in this case by the Defence Act, 1842, there is no necessity for the Crown to take it otherwise.

[WARRINGTON L.J. referred to Brooke's La Graunde Abridgment, Prerogative le Roy, No. 18.]

It is submitted with regard to the documents revealed by the search and now before the Court, although most of the precedents for payment of compensation by the Crown upon taking possession of land occurred in times of peace, there were some instances in times of emergency and national stress. It is true also that in most instances the absolute interest in the property was acquired, but there were cases in which temporary possession only was taken. The real strength of the appellants' case upon the extracts lies in the absence of any which support the contention of the Crown. There is no recorded instance of the Crown having taken property without payment. According to the authorities on international law, even when the forces of the Crown are invading a foreign country, it is the rule that all property of enemy subjects requisitioned must be paid for. It would be curious if subjects of the Crown were to be treated worse than enemies. The present case is not covered by the decision of this Court in *In re A Petition of Right*. (1)

[*China Mutual Steam Navigation Co.* v. *MacLay* (2) was also referred to.]

Sir Gordon Hewart A.-G., Sir E. Pollock S.-G., Austen-Cartmell, Lowenthal and *Branson* for the Crown. The claim of the Crown is only to exercise its prerogative for the purpose of securing the public safety, and to occupy land for such period as is necessary during times of emergency, and to do that without the obligation of payment. There is nothing in the documents now before the Court to show that the Crown has lost its prerogative. What might have been done in the time of the Tudors under the prerogative is now provided for by statute. Certain prerogative powers formerly exercised in times of war have been extended by statute to conditions of peace: Anson on the Law and Custom of the Constitution, vol. ii., c. 8, s. 2; Hallam's Constitutional

(1) [1915] 3 K. B. 649. (2) [1918] 1 K. B. 33.

C. A. 1919

DE KEYSER'S ROYAL HOTEL, LD., *In re.*

DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.

History (ed. 1876), vol. i., p. 304, and vol. ii., pp. 99, 213. No doubt where a matter within the prerogative is provided for by statute the prerogative is merged in the statute. But unless the ground is completely covered by a statute which purports to take away the prerogative right of the Crown, to the extent to which it is not so covered, the prerogative remains. No case has been produced where proceedings have been taken by a subject for compensation against the Crown or for trespass against its executive officer.

[SWINFEN EADY M.R. If the Crown has always paid it would not be expected that any such case would be found.]

It is conceded that before 1803 (43 Geo. 3, c. 55) there was no statutory provision for compensation for the temporary occupation of land by the Crown. The Act of 38 Geo. 3, c. 27, s. 10, was relied upon by the appellants. The power there given was ancillary to, but did not take away the prerogative right of the Crown. That Act definitely indicates that in certain circumstances (e.g., invasion) there was some other method of law which might be invoked. If the statute does not cover the ground the prerogative may still be invoked.

[SWINFEN EADY M.R. It is said against you that the Defence of the Realm Acts do cover the ground.]

We submit not.

[Counsel then referred at length to the extracts from the Records.] The instances relied upon by the appellants of compensation paid by the Crown are for the most part indeterminate, and may very well have been cases of ex gratia payments. No case has been produced in which proceedings by petition of right have been taken against the Crown or any executive officer. The Crown has never refused to pay compensation in a proper case though not under any obligation to do so. The right and duty of the Crown to enter upon land for the purposes of public defence are of immemorial antiquity. Temporary occupation of land by the Crown for purposes of public defence is not a disseisin within the prohibition of Magna Charta.

[SWINFEN EADY M.R. Does the "prerogative" mean

more than the power which the executive exercises without Parliamentary authority ?]

It imports the duty of the Crown to protect the realm : *Attorney-General* v. *Tomline.* (1)

Although the Crown does not refuse to pay compensation the amount is to be determined by the Losses Commission.

Leslie Scott K.C. in reply.

Cur. adv. vult.

1919. April 9. SWINFEN EADY M.R. The suppliants are De Keyser's Royal Hotel, Ld., and they appeal from the judgment of Mr. Justice Peterson dismissing their petition of right.

The case raises a question of great public importance—namely, whether the Crown is entitled as of right to use and occupy any lands, buildings, and premises of subjects required for administrative purposes in connection with the defence of the realm for an indefinite period, without any obligation to make any compensation for such use and occupation.

The suppliants insist that although it may have been necessary for the organization and administration of a force required for the safety and security of the realm that the Government should occupy their premises, there is not, and never was, any necessity for the safety of the realm to refuse to pay for the same, and the suppliants further insist that the Government are bound by statute to pay.

[The Master of the Rolls then stated the facts, and continued :] Upon the facts, the conclusion must be arrived at that the hotel and premises were occupied and taken and possession thereof given by the consent of the owners, although they reserved all their rights to rent or compensation. The attitude taken by Mr. Whinney on behalf of the owners was quite a proper one. He facilitated by all means in his power the occupation of the premises by the Government, and was active in taking steps for the departure of all the guests, but he reserved all his legal rights.

The claim of the suppliants is for rent or compensation for

(1) (1880) 14 Ch. D. 58.

C. A. 1919 — DE KEYSER'S ROYAL HOTEL, LD., *In re.* — DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING. — Swinfen Eady M.R.

use and occupation during the period of occupation by the Government. The ground rent payable by the company for the premises, under their leases, we were told amounted to 2757*l.* 8*s.* 7*d.* a year.

The Attorney-General by his answer claims that possession of the said premises was lawfully taken by or under the authority of the competent military authority for the use of His Majesty, 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 by His Majesty in Council. He further states that His Majesty claims as against the suppliants no right or interest in the premises beyond the right to take and use them for so long as may be necessary for securing the public safety and the defence of the realm during the continuance of a state of war between His Majesty and any foreign Power. He denies that any rent or compensation is by law payable to the suppliants either under the Defence Act, 1842, or at all.

It is therefore necessary to consider what powers are by law vested in the Sovereign, and exercised by the executive Government, over the lands and houses of subjects required for the defence and security of the realm.

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? Indeed it was expressly admitted by the Solicitor-General (Sir Ernest Pollock), and in my opinion rightly admitted, that where a matter within the prerogative is provided for by statute, the prerogative is merged in the statute. In *Ex parte Postmaster-General* (1)

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

Sir George Jessel, Master of the Rolls, said: "The general rule, as expressed in Bacon's Abridgment (7th ed., at p. 462), is 'that where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, the King shall be bound by such Act, though not particularly named therein.'" As instances of the exercise of the Royal prerogative in the past, which are dealt with in the law books, the Crown relied particularly upon the right of entering upon the land of a subject to dig trenches and make fortifications, and to the right to take saltpetre for the purpose of making gunpowder. Various passages from writers of authority were cited dealing with these matters. Thus in Chitty on the Prerogatives of the Crown (chap. IV., s. 5, p. 44): "As the constitution of the country has vested in the King the right to make war or peace, it has necessarily and incidentally assigned to him on the same principles the management of the war; together with various prerogatives which may enable His Majesty to carry it on with effect. Thus . . . . the King is solely entitled to erect, fortify, and govern forts and other places of strength, within his dominions." (1) And at p. 49, "In case of necessity the King may enter on the lands of his subjects to make fortifications." (2) In the *Saltpetre Case* (3) it was resolved: "When enemies come against the realm to the sea coast, it is lawful to come upon my land adjoining to the same coast, to make trenches or bulwarks for the defence of the realm, for every subject hath benefit by it. And therefore by the common law, every man may come upon my land, for the defence of the realm, as appears by 8 Edward IV., chapter 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 danger 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

(1) 2 Inst. 30. 1 Ibid. 5. (2) (1616) 1 Rolle, 152.
(3) 12 Rep. 12.

C. A. 1919 — DE KEYSER'S ROYAL HOTEL, LD., *In re.* — DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING. — Swinfen Eady M.R.

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 Henry VIII., fol. 15." Although it thus appears by the *Saltpetre Case* (1) that at common law even the public were entitled to enter upon another man's land to dig for gravel to make bulwarks, a statute to the same effect was passed in 1512: 4 Hen. 8, c. 1. This provided that it should be lawful for all the King's subjects, by the advice and assignment of the justices of the peace or sheriff, to make all manner of bulwarks in every man's ground, and to dig and delve for earth and stones for the making of the bulwarks and without any manner of payment, or any manner of action by anyone, against any of the King's subjects for any such matter or cause. The Act was a temporary one to endure to the next Parliament.

The power to enter to make trenches and erect bulwarks obviously has reference to preventing or repelling invasion, when enemies come against the country and when active measures are necessary at or along the coast, and particularly at or near the places threatened.

With regard to saltpetre, this was a matter of "purveyance," and was paid for. The first warrant for searching for it, in evidence in these proceedings, is 7 Hen. 7 (1492); it assigned to James Hede to take material "suitable and requisite for the making of saltpetre for our ordnance, wheresoever they can be found, as well within liberties as without, the fee of the Church only excepted, for our moneys in this behalf reasonably to be paid." Another warrant, in the 6 Hen. 8 (1515), granted to Hans Wolf for the like purpose (Extracts, p. 406), provides for all damage being agreed and paid for. Another warrant, 31 Eliz. (1589) (Extracts, p. 407), requires the petre or powder-makers to make good all damage, making up all places, "Digged or overthrown in as good perfection and state as they or any of them did find the same." A similar warrant, of much

(1) 12 Rep. 12.

greater length (Extracts, p. 409), was issued under the Privy Seal, in 41 Eliz. (1599). This requires the grantees, at their own proper costs and charges, to make up and repair every place "hindered or defaced" by their operations; and concludes, by a clause which should satisfy those who contend for the greatest prerogative—"notwithstanding any statute, Act of Parliament, Order, Proclamation, Ordinance, law, usage, custom, or any other matter whatsoever to the contrary." In the Book of Extracts there follows a warrant by King James I., and the last of the series was granted by King Charles I. on April 28, 1629. (Extracts, p. 431.) This recites that: "At this present time, we have more than ordinary occasion to provide good and sufficient saltpetre and powder to furnish our stores for the defence and safety of our realms and dominions." It then grants powers to take all material fit for making saltpetre and to make the saltpetre into gunpowder, and for that purpose "to have and take workhouses for our said service and houses and stables, outhouses and yards, of any of our subjects and therein to set up vessels and to bestow their servants' cattle and other necessary provisions for the effecting the same our service, paying unto the owners or present possessors of such houses, barns, stables, yards, and outhouses, reasonable rents and rates for the same for the time they shall be used for our service." It will be noticed that this grant was not a private monopoly. It was made after the abolition of monopolies by the statute 21 James 1, c. 3. It was for the obtaining material for the defence of the realm, and the occupation of all lands and buildings was to be paid for. We were told that after the year 1665, or thereabouts, there are not any documents of record referring to saltpetre, as the substance was then obtained in increased quantities from India. In any case, the right to take saltpetre was described as a "purveyance," and purveyances were abolished in 1660 by the statute 12 Chas. 2, c. 4.

Since the reign of James I., when the *Saltpetre Case* (1) was resolved by all the judges of England, the methods

(1) 12 Rep. 12.

C. A. 1919 — DE KEYSER'S ROYAL HOTEL, LD., *In re.* — DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING. — Swinfen Eady M.R.

of scientific warfare have vastly increased. For the safety and security of the kingdom permanent forts and works have to be constructed, great naval, military and aerial organizations have to be maintained, requiring many depots, and a very large staff of officials to provide for manufacture and supply of every kind, pay and control. It was found necessary to resort to Parliament to obtain powers to enable the executive Government to carry out effectively the proper protective measures, and from an early date the permanent acquisition of land, or the temporary occupation and use of it for such a period as the exigence of the public service shall require, has been regulated and provided for by statute. At first separate statutes were passed for the acquisition of particular properties for forts, batteries, naval harbours and the like. Then, in times of national danger, during the Napoleonic wars, statutes were passed regulating the taking possession of and user of land, but the operation of such statutes was limited in duration to the period of the French War. The next step was to consolidate the provisions into a permanent Defence of the Realm Act, allowing land to be permanently acquired or temporarily occupied, subject to certain restrictions, where the owners did not agree to the Crown's proposal. Then when a state of war again arose, statutes were passed enabling regulations to be made for relieving against these restrictions. This is a general outline of the course of legislation, but it will be necessary to refer to these statutes in detail.

It was urged on behalf of the Crown during the argument, that where in the past lands had been taken over, occupied or used in connection with the defence of the realm, and military occupations connected therewith, there was not any legal obligation on the part of the Crown to pay anything, but that commissions had been issued from time to time to determine what payments should be made by the Crown ex gratia, and that on a search being made particulars of these commissions could doubtless be obtained, and the case stood over from time to time to enable the records to be searched and information obtained with regard to (*a*) Acts

of interference by the Crown with private property in land for the purpose of the defence of the realm. (*b*) Claims by subjects for compensation in respect of such interference (1.) as a matter of right, (2.) as a matter of grace and as to the basis of such claims. (*c*) The manner in which such claims were dealt with and the results thereof. The result of the searches which have been made is that it does not appear that the Crown has ever taken the subject's land for the defence of the country without paying for it; and even in Stuart times I cannot trace any claim by the Crown to such a prerogative. A considerable search in the records has been made, and the results appear in the book of extracts from our Public Records. The time covered by the search may be divided into three periods. First, before 1708; secondly, between 1708 and 1798; thirdly, subsequent to 1798. In the first period instances are given of land being required for fortifications, for mounting guns and otherwise for the defence of the country; but the land taken or occupied was paid for. Thus in 1668 it was determined to construct two new batteries at Chatham "for the better security and safety of His Majesty's Navy in that harbour," and instructions on the subject were given by the Board of Ordnance. These contain a direction (p. 21 of Extracts). "You are to contract for and buy such and so much parcel of ground at each of the aforesaid places of the owners and proprietors thereof as will serve to build the said batteries or redoubts upon, and at the cheapest rates you and they can agree for." Again, in 1681, there was a proposal to erect a new fortification at Hull, and there is a minute of the Board of Ordnance dated September 1, 1681 (p. 9 Extracts), with regard to inquiries as to the measures taken for the new works at Plymouth, and "after what method the owners of those lands were satisfied and paid for the same"; and also "To see what statutes there are concerning taking up of people's lands for building of fortifications thereupon." The Royal authority for executing the work at Hull appears at p. 37 of the Extracts. It contains a provision that "If any ground which is not our own shall be found necessary to be taken in

C. A.
1919
DE KEYSER'S ROYAL HOTEL, LD., *In re.*
DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.
Swinfen Eady M.R.

for this service, we do hereby authorise and empower you to cause the same to be contracted for and bought of the owners at the cheapest rates the same may be had."

The second period begins in 1708. It appeared then to be fully recognized that the land of a subject could not be taken against his will, except under the provisions of an Act of Parliament. Accordingly, in 1708, was passed the first of a series of Acts, to enable particular lands to be taken compulsorily. By the statute 7 Anne, c. 26, which recites that it was necessary to enlarge and strengthen the fortifications of Portsmouth, Chatham and Harwich, and to purchase lands for the purpose, and that some proprietors desiring to make an unreasonable gain to themselves might insist on extravagant rates, provision is made for the appointment of Commissioners to survey the lands to be purchased, and in default of agreement with the owners, the true value is to be ascertained by a jury. We were informed by counsel for the Crown that between 1708 and 1798 every case of taking or occupying land was covered by the wide provisions of the Acts passed from time to time, so that there was not any room for the exercise of any alleged prerogative during the period. The third period dates from 1798. On April 5, 1798, was passed the statute 38 Geo. 3, c. 27. This Act recites that it is expedient that provision should be made to enable His Majesty to procure ground which may be wanted for erecting batteries, beacons and other works which may be deemed necessary for the public service and also to provide for the indemnity (in certain cases) of persons who may suffer in their property by measures which may be taken for the defence and security of the country, and annoyance of the enemy. This Act then provides by s. 10 that His Majesty may authorize persons to survey and mark out any ground wanted for the public service and to treat and agree for the possession or use thereof, during such time as the exigence of the service shall require, and in default of agreement, the compensation is to be ascertained by a jury, and with a restriction upon taking without the consent of the owners, unless the enemy shall have actually invaded the kingdom at the time when

the piece of ground shall be so taken. By s. 22 the Act was to have continuance during the war with France.

By statute 43 Geo. 3, c. 55 (passed June 11, 1803), intituled "An Act to enable His Majesty more effectually to provide for the defence and security of the realm during the present war," power was given to His Majesty to survey and mark out ground wanted for the public service and to treat and agree for the possession and use of it, during such time as the exigencies of the service should require, and in default of agreement the compensation to be paid for the possession or use was to be ascertained by a jury. Sect. 22 shows that the Act was confined to "the present hostilities with France." Doubts arose whether this Act extended to authorize the absolute purchase and taking of lands for permanent purposes, and accordingly next year was passed the Act 44 Geo. 3, c. 95 (July 28, 1804), enabling land so required to be purchased absolutely and the price to be ascertained by a jury in default of agreement.

In 1819 a question arose about some land between Sandgate and Hythe which the Master-General of the Ordnance required for the use of the Crown to erect batteries and form a camp there. The owner was willing to grant a lease of the land during the war, but the Master-General declined that proposal and expressed himself as determined for the benefit of the country to purchase the land in question, "and in case Mr. Jeffery persisting in the refusal to sell to bring in a Bill in Parliament to empower the Board of Ordnance to purchase the land in question, and to have the value ascertained by a jury as is usual": Book of Extracts, p. 449. No suggestion of taking by virtue of any prerogative was advanced by the Ordnance.

The Defence Act, 1842, recites various Acts of Geo. 3, Geo. 4 and Will. 4, whereby various provisions have been theretofore made for the purchase of land and hereditaments for the public service, and for the defence and security of the realm, and that it is expedient to consolidate, amend and enlarge such powers and provisions. The Act then provides by ss. 5 and 6 for vesting in the principal officers of Her

C. A. 1919 — DE KEYSER'S ROYAL HOTEL, LD., *In re.* — DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING. — Swinfen Eady M.R.

Majesty's Ordnance lands and hereditaments acquired and thereafter to be acquired for the defence and security of the realm. Sect. 9 confers power on the principal officers of Ordnance to purchase or take on lease lands desirable to be purchased for the defence of the realm and to enter into any necessary contracts. Sect. 16 authorizes the principal officers of Ordnance to enter on, survey and mark out any lands or hereditaments wanted for the defence of the realm, and to treat and agree with the owners of the same "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." By s. 19, if the parties interested fail to agree within 14 days upon the consideration for the absolute purchase or the annual rent or sum for the hire, either for a time certain or for such period as the exigence of the public service may require, then certain justices of the peace or other persons named in the statute are authorized and required to put the said principal officers into immediate possession of the said lands and hereditaments and to issue their warrants to the sheriff to summon a jury, to value the premises and assess the compensation to be paid for the absolute purchase or for the possession or use thereof as the case may be. Then follows a proviso that it shall not be lawful for the principal officers to use any lands, buildings or hereditaments taken under the compulsory process for the barrack service or to erect any barrack buildings thereon. By s. 23 it is provided that no lands, buildings or hereditaments shall be so taken without the consent of the owners, unless the necessity or expediency of taking the same shall be first certified by the Lord-Lieutenant or certain other persons, or 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 will thus be seen that the statute applies as well in time of peace; but in time of war, and actual invasion by the enemy, one of the restrictions on using the compulsory powers—namely, the certificate of the Lord-Lieutenant or other named persons—is unnecessary. This restriction, however, remains in war time, if the enemy has not actually invaded

the kingdom ; and there is also the restriction of having to allow fourteen days to elapse before the principal officers are entitled to require that they shall be put into immediate possession of the property. The subsequent assessment and payment of compensation is not a restriction. The obligation to pay follows on the acquisition of the interest in the land, but the assessment and payment take place after possession of the property has been given to the principal officers and does not hinder or affect the principal officers in putting the property to such uses as they may think fit.

After the outbreak of the great war two statutes were passed in August, 1914, the Defence of the Realm Act, 1914, and the Defence of the Realm (No. 2) Act, 1914. His Majesty in Council was thereby authorized, during the continuance of the war, to issue regulations for securing the public safety and the defence of the realm, "and may by such regulations also 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." These statutes thus provide for regulating the existing powers. Orders in Council were made under the powers of these statutes. The Defence of the Realm Regulations, 1914, and the Defence of the Realm (No. 2) Regulations, 1914, were issued, and amended by an Order in Council dated September 17, 1914. These Regulations provide for the suspension of certain restrictions. The fourteen days' delay provided for by s. 18 of the Defence Act, 1842, disappears, as authority is given to take immediate possession of land and buildings where necessary for the public safety or defence of the realm. Again, compulsory acquisition, whether permanent or temporary, is authorized, without the need for any invasion of the United Kingdom as a condition precedent to the exercise of compulsory powers. Thus during the continuance of the great war, and while the Defence of the Realm Regulations remain in force, the powers of acquiring land compulsorily (whether permanently or temporarily) under the Defence Acts are extended, and restrictions on its exercise removed, but no

C. A. 1919 — DE KEYSER'S ROYAL HOTEL, LD., *In re.* — DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING. — Swinfen Eady M.R.

power was or could be conferred by the regulations to take the land of a subject without payment. In order to secure the public safety and the defence of the realm, it may be necessary to obtain immediate possession of land and buildings, but neither the public safety nor the defence of the realm requires that the value of the subject's land, or of the temporary possession of it, should be confiscated. Again, if the Executive Government is authorized under the Defence Acts to take and occupy land on paying compensation, there is no necessity for the safety of the realm to take any other course so long as any restrictions upon acquiring the immediate possession of the land are removed. Moreover there is not any Defence of the Realm Regulation purporting to abolish the right to compensation; even if there had been such a regulation it would not, in my opinion, have been authorized by the powers conferred by the Defence of the Realm Act, 1914, or the (No. 2) Act, 1914. On this point I may refer to what was said by Brett M.R. in the *Attorney-General* v. *Horner* (1), that: "It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it." And also to the judgment of Bowen L.J. in *London and North Western Ry. Co.* v. *Evans.* (2) "The Legislature cannot fairly be supposed to intend, in the absence of clear words showing such intention, that one man's property shall be confiscated for the benefit of others or of the public, without any compensation being provided for him, in respect of what is taken compulsorily from him. Parliament in its omnipotence can, 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." The contention of the suppliants that the entry of the Crown upon the land was in fact under the Defence Act, 1842, and subsequent provisions, and that the liability to pay compensation arises directly under the statute, cannot be met by saying that the King is not bound by legal fiction. The suppliants do not rely on any fiction, and they

(1) 14 Q. B. D. 245, 257. (2) [1893] 1 Ch. 16, 28.

urge that a contract express or implied arises under the statute. In the case of a contract for letting, followed by occupation, without the amount of rent having been fixed, an action for use and occupation would lie. The action is for damages for breach of agreement to pay for the use of the owner's property. Lord Ellenborough said, in *Dean and Chapter of Rochester* v. *Pierce* (1): "The action for use and occupation does not necessarily suppose any demise. It is enough that the defendant used and occupied the premises by the permission of the plaintiff." Where premises have been used or occupied by the permission or sufferance of the owner, and there is not any demise or agreement at a fixed rent, the law will imply a contract or promise to pay to the owner a reasonable sum for such use and occupation. *Marquis Camden* v. *Batterbury* (2); *Levi* v. *Lewis* (3); *Hellier* v. *Sillcox* (4), explained in *Churchward* v. *Ford.* (5) This obligation to pay is a contractual one. The fact that the claim of the suppliants is for an unascertained amount of compensation or even a claim for damages for breach of contract, would not be any objection to a proceeding by petition of right. *Reg.* v. *Doutre* (6) was a claim by petition of right for damages for breach of contract to pay the suppliant a reasonable sum for professional remuneration, and it succeeded, although the point was taken by the Attorney-General of Canada in his defence that the suppliant was not entitled to proceed by petition of right. Again in *Windsor and Annapolis Ry. Co.* v. *The Queen* (7), Lord Watson in delivering the opinion of the Board said: "Their Lordships are of opinion that it must now be regarded as settled law that, whenever a valid contract has been made between the Crown and a subject, a petition of right will lie for damages resulting from a breach of that contract by the Crown. Sect. 8 of the Canadian Petition of Right Act (39 Vict. c. 27, Dom. Parlt.) contemplates that damages may be recoverable from

(1) (1808) 1 Camp. 466, 467.
(2) (1859) 5 C. B. (N. S.) 808; (1860) 7 C. B. (N. S.) 864.
(3) (1859) 6 C. B. (N. S.) 766; (1861) 9 C. B. (N. S.) 872.
(4) (1850) 19 L. J. (Q. B.) 295.
(5) (1857) 2 H. & N. 446, 449, 450.
(6) (1884) 9 App. Cas. 745.
(7) (1886) 11 App. Cas. 607, 613.

C. A. 1919 — DE KEYSER'S ROYAL HOTEL, LD., *In re.* — DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING. — Swinfen Eady M.R.

the Crown by means of such a petition; and the reasons assigned by Lord Blackburn for the decision of the Court of Queen's Bench in *Thomas* v. *The Queen* (1) appear to their Lordships necessarily to lead to the conclusion that damages arising from breach of contract are so recoverable. A suit for damages, in respect of the violation of contract, is as much an action upon the contract as a suit for performance; it is the only available means of enforcing the contract in cases where, through the act or omission of one of the contracting parties, specific performance has become impossible. In *Tobin* v. *The Queen* (2) Chief Justice Erle, whilst affirming the doctrine that the Sovereign cannot be sued in a petition of right, for a wrong done by the executive, took care to explain that 'claims founded on contracts and grants made on behalf of the Crown are within a class legally distinct from wrongs.' It was argued for the respondent that in *Thomas* v. *The Queen* (1) the claim of the suppliant was not for damages, but for a pecuniary consideration alleged to have been due in terms of the contract; and consequently that it was unnecessary for the Court to decide anything as to the liability of the Crown for unliquidated damages resulting from breach of contract. But Lord Blackburn, in that case, deals with the suppliant's petition as alleging certain breaches of promises made to the suppliant on behalf of the Queen; and his reasoning appears to this Board to be quite as applicable to a claim of unliquidated damages for breach of contract, as to a claim for the contract price. Lord Blackburn rests the judgment mainly upon the *Bankers' Case* (3), which was a suit for annuities granted by letters patent under the great seal; but his Lordship at the same time points out that, from the time of Lord Somers, there had been repeated expressions of opinion by eminent judges in favour of the view that a petition of right lay against the Crown on a contract. It is unnecessary to cite these opinions, which are all collected in *Thomas* v. *The Queen*." (1) There are also given in Mr. Clode's book on Petitions of Right, p. 135, particulars of

(1) (1874) L. R. 10 Q. B. 31.
(2) (1864) 16 C. B. (N. S.) 310, 355.
(3) 14 How. St. Tr. 1.

unreported cases in the Court of Appeal, where this Court has accepted as law the judgment in *Thomas* v. *The Queen*. (1)

Peterson J. decided against the suppliants, as he considered that the present case was governed by *In re A Petition of Right*. (2) In that case the Crown took possession of an aerodrome near Brighton. It was justified in argument, upon the same ground as entering upon land adjoining the sea coast to dig trenches. The aerodrome was actually required for the conduct of hostilities in the air. The case was taken on appeal to the House of Lords and there compromised. But whether rightly decided or not—and it is of course still open to review in the House of Lords—it has no application to such a case as the present—namely, taking possession of lands and buildings for administrative purposes. If the argument for the Crown in the present case be well founded, any lands and buildings required for offices or administrative purposes for any branch of the fighting services, as War Office, Admiralty and Air Force, may be taken by the Crown from the subject at the pleasure of the Executive without express statutory authority and without payment.

I am of opinion that the judgment appealed from should be reversed, and that judgment should be entered in favour of the suppliants that they are entitled to the relief sought by para. 4 of the claim made by their petition.

The judgment will be in accordance with the provisions of s. 9 of the Petitions of Right Act, 1860, the suppliants to have the costs in the Court below and of this appeal, and any costs paid under the judgment below to be repaid to the suppliants.

WARRINGTON L.J. In the month of May, 1916, the officers of the Crown, being of opinion that for the purpose of securing the public safety and the defence of the realm it was necessary so to do, took possession of a large hotel near Blackfriars Bridge called De Keyser's Hotel, and have remained in occupation since that time. The question raised by this petition of right is whether the suppliants, the lessees of the hotel,

(1) L. R. 10 Q. B. 31. (2) [1915] 3 K. B. 649.

ADD-65

C. A.
1919
DE KEYSER'S ROYAL HOTEL, LD., *In re.*
DE KEYSER' ROYAL HOTEL, LD. *v.* THE KING.
Warrington L.J.

are legally entitled to be paid any and what sum for the use of the hotel. The Crown insists that they are entitled as of right to nothing, but is willing that they should be paid ex gratia such sum for direct loss or damage to property or business as the Commission, usually known as the Losses Commission, may determine. It will be observed that this offer on the part of the Crown is confined to direct loss or damage to business or property, and does not extend to the making of any payment for the occupation of the premises analogous to the payment of rent or compensation for the use and occupation.

The hotel was originally taken for the accommodation of the headquarters staff of the Royal Flying Corps, and was for some time occupied by them ; it was afterwards occupied by the staff of certain departments of the War Office.

The petition was heard by Peterson J. on March 22, 1918. He held that the case was covered by the judgment of this Court in *In re A Petition of Right* (1), and dismissed the petition. It is not disputed by the suppliants that under the Defence Act, 1842, or under the powers conferred by the Defence of the Realm Consolidation Act, 1914, and the regulations made thereunder, or under both of these legislative provisions combined, the Crown was entitled to take possession of the hotel, but they contend that by whatever authority possession was taken they are entitled as a matter of legal right to compensation in the ordinary sense—that is to say, to a payment in the nature of rent or purchase money for the occupation by the Crown of their property. The Crown, on the other hand, insists that possession was taken either by virtue of the Royal prerogative or of the powers conferred by the Defence of the Realm Acts and Regulations, and that in the case of possession being so taken no compensation of any kind is by law payable to the subject. It contends further that possession was not taken under the Defence Act, 1842, and that even if it were the right to compensation thereby given was suspended by the recent Defence of the Realm Acts and Regulations, and cannot be enforced by the suppliants.

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

The building in question is a large hotel of a modern type with from 300 to 400 rooms. The outbreak of war had deprived it of much of its custom, and at the time in question it was in the possession of Mr. A. F. Whinney as receiver and manager appointed in a debenture holders' action, and was being carried on at a loss. The Government required accommodation for the headquarters staff of the Royal Flying Corps, and early in April, 1916, entered into negotiation with Mr. Whinney with the view to their occupation of the premises at a rent. The parties did not come to terms, although negotiations were not finally broken off when on May 1, 1916, Mr. Whinney was informed that possession would be taken under the Defence of the Realm Acts. Mr. Whinney, without prejudice to his rights, offered no opposition, and on May 8 he delivered possession to the officer of the Crown, having previously taken steps to procure the evacuation of the hotel by the guests then staying there. This was, as he says, "under protest," but on looking at his evidence I think what he protested against was the resort to the Acts while the correspondence as to rent was still pending, and indeed from subsequent correspondence it is clear that he considered this question as still open. See particularly Mr. Whinney's letter of May 5. On the facts I should come to the conclusion that so far as possession was concerned he gave this without compulsion on the footing that the question of compensation might be the subject of negotiation. It was not till afterwards that Mr. Whinney understood that the Crown finally denied his right to compensation.

The present case differs in its facts from those in *In re A Petition of Right* (1), first, in that the subject-matter of that case—an aerodrome or aviation ground on the coast—was of itself of military importance; and, secondly, that in that case possession seems to have been taken altogether in invitum. Moreover there is a great mass of material before the Court which was not before it in the previous case, and considerations and arguments have been submitted to us which were not submitted to the Court then, and I propose

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

ADD-67

C. A. 1919 — DE KEYSER'S ROYAL HOTEL, LD., *In re.* — DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING. — Warrington L.J.

to consider the question for the moment as if the Court were unfettered by the previous decision, to the consideration of which I will return later. I propose to confine the present judgment strictly to the consideration of the question we have to determine, namely, whether where the Crown, i.e., the executive authority, acting in the interests of the community at large and on the ground that what it has done is necessary for the national security and the defence of the realm, has taken possession of and has occupied land of a subject, that subject has a legal claim to compensation for what has been so taken and used. It is really not disputed by the suppliants that in the circumstances I have mentioned the Crown has power by its officers to take possession of and use or occupy the subject's land, the sole question is as to the legal right to compensation. The first contention on the part of the Crown is that the power in question is part of the Royal prerogative. We have had an interesting historical and constitutional discussion on this subject, and we have had submitted to us many ancient records pertinent thereto. These last have at least this negative value, that there is no trace in any of them of an assertion on the part of the Crown of a right to take and hold possession of the subject's land without paying for it. It is unnecessary however in this case to decide whether an exercise of the prerogative would give rise to any, and what, rights in the subject, inasmuch as counsel for the Crown admitted (and in my opinion rightly) that where an act of the Crown is authorized by statute any pre-existing prerogative right to do the same act is merged in the statutory authority, and the act in question must be deemed to have been done by virtue of the latter. In my opinion it is clear that under the Defence Act, 1842, possession of the land might have been obtained subject to the restrictions in that Act contained; and further, that those restrictions were suspended by the regulations made under the Defence of the Realm Acts, so far at all events as to enable the competent naval or military authority to take possession without going through any of the preliminary steps or satisfying any of the conditions prescribed by the Defence Act, 1842. The act therefore

was done under statutory authority, and prerogative is out of the question. Does the exercise of this statutory authority involve a legal liability on the part of the Crown to pay compensation ?

Before the year 1798 a number of Acts of Parliament were passed, the earliest of which was of the year 1708, authorizing the officers of the Crown to acquire compulsorily on its behalf land in various parts of the country on or near the coast for the purpose of fortification in view of a possible invasion or attack. In each case provision was made for the payment of compensation, to be assessed in default of agreement by a jury. The operation of these Acts was confined to certain localities and to the permanent acquisition of land, but in the year 1798 an Act of a more general nature was passed. It provided means by which certain officers of the Crown might, by taking the steps thereby prescribed, obtain either by agreement with the owners or compulsorily the possession of any ground wanted for the public service during such time as the exigence of the service should require, and it provided for the assessment by a jury and payment of compensation for the possession or use of such ground. Certain conditions had however to be fulfilled before the compulsory power could be put in force. Similar Acts were passed in 1803 and in 1804, in each case provision being made for the assessment and payment of compensation. The Act of 1804 expressly removed any possible doubts which may have existed under the previous Acts as to the power of the Crown to acquire land for permanent purposes. All these Acts were passed in time of war or national emergency, and with the object of more effectually securing the defence of the realm. The point that is material for the present purpose is that even under such circumstances provision is in every case made for payment of compensation whether the land is taken permanently or temporarily. The Acts hitherto mentioned have all either expired by effluxion of time or have been repealed. They have, however, been replaced by the Defence Act, 1842, passed in time of peace. This Act in ss. 16 and 19

C. A.
1919
DE KEYSER'S ROYAL HOTEL, LD., *In re.*
DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.
Warrington L.J.

contained provisions corresponding in all material respects with those contained in the previous Acts I have referred to as to the compulsory taking of lands either permanently or temporarily, and required substantially the same preliminary steps before possession could actually be obtained, and in s. 23 certain conditions were imposed, the fulfilment of which was made essential to the compulsory taking of land. In this as in the previous Acts provision was made for the ascertainment by a jury of compensation described in the case of temporary occupation as "the compensation to be paid for the possession or use of the premises." Sect. 34 authorizes the officers of the Ordnance to take proceedings in their statutory name in regard to lands vested in them, with a saving of the legal rights, privileges and prerogatives of the Crown in reference to such proceedings, but the Act contains no further express reference to or saving of the Royal prerogative. So matters stood until the outbreak of the war, and the passing of the Defence of the Realm Acts of 1914. There was, as it seems to me, an obvious inconvenience and danger, having regard to modern conditions of warfare, and in particular to the suddenness with which an attack upon our shores can now be made, in the restrictions and conditions by the Defence Act, 1842, imposed upon the compulsory taking possession of land, and there was every reason why these restrictions and conditions should be removed so that possession might at once be taken without the necessity of observing any preliminary formalities or fulfilling the conditions previously imposed on the exercise of compulsion. These considerations however have no application to the provisions as to the ascertainment and payment of compensation; provided possession can be had at once the question of compensation can be settled at leisure without danger to the public safety. Under these circumstances the Defence of the Realm Consolidation Act, 1914, was passed on November 27, 1914. It repealed two previous Acts passed for the same purpose in August, 1914, with a provision (s. 2 (2.)) that nothing in that repeal should affect any Orders in Council made under those Acts, and all such

Orders in Council should, until altered or revoked by an Order in Council under the Consolidation Act, continue in force and have effect as if made under that Act. The Act declared (s. 1 (1.)) that 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, and as to the powers and duties for that purpose of the Admiralty and the Army Council and of the members of His Majesty's forces and other persons acting on his behalf. It was enacted by sub-s. 2 that any such regulations might provide for the suspension of any restrictions on the acquisition or user of land under (amongst other statutes) the Defence Act, 1842. There is no reference in the Act I am now dealing with to the taking possession of land, and as a matter of construction I should come to the conclusion that the object was not to confer power to do this, but to recognize and rely on the power existing under the Defence Act, 1842, and at the same time enabling the Crown to make the process of putting it in force easier and more speedy.

On November 28, 1914, certain regulations under the Act were made by Order in Council. Regulation No. 2, so far as it is material, is as follows: "It shall be lawful for the competent naval or military authority and any person duly authorised by him, where for the purpose of securing the public safety or the defence of the realm it is necessary so to do (*b*) to take possession of any buildings; (*f*) to do any other act involving interference with private rights of property which is necessary for the purpose aforesaid." The regulations contain no express provision for the suspension of any restrictions in the acquisition or user of land under the Defence Act, 1842, nor any provision for compensation for acts done under the powers conferred by Regulation 2. There are references to compensation in regard to other matters, particularly in Regulation 2 B, relating to the taking possession of war material, food and certain other articles, and the same regulation mentions "the tribunal by which claims for compensation under these regulations are, in the absence of any express provision to the contrary, determined." I

C. A. 1919 — DE KEYSER'S ROYAL HOTEL, LD., *In re.* — DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING. — Warrington L.J.

have however failed to discover in the regulations any provision constituting or identifying this tribunal. Unless however the provisions as to the ascertainment of compensation contained in the Defence Act, 1842, are suspended there would, in relation to land, be express provisions to the contrary, and this compensation would fall to be determined as provided for by the last-mentioned Act, and it would be unnecessary to inquire further as to what is meant by the tribunal referred to in Regulation 2 B. The competent naval or military authority is defined by Regulation 62, and may be any commissioned officer not below the rank of lieutenant-commander in the Navy or field officer in the Army.

The true result of this legislation appears to me to be that the Defence Act, 1842, the Act of 1914, and the regulations must be read together, and that the power to acquire possession is still derived from the Defence Act, 1842, but its exercise is regulated by the Act of 1914 and the regulations. If this be so, then unless the Act of 1914 and the regulations suspend the provision for compensation contained in the Defence Act, 1842, that provision would remain in force and be applicable in the present case.

I must now return to the consideration of *In re A Petition of Right.* (1) The matters actually decided in that case were first, that the Crown has power under the prerogative to take possession of, and to hold and use without paying compensation, such premises as were in that case in question, namely, an aerodrome on the coast, of actual military importance in providing for the defence of the realm; and secondly, that the Defence Act of 1842, and the Defence of the Realm (Consolidation) Act, 1914, and the regulations are separate and independent legislative enactments, the first of which is not applicable in a national emergency such as in fact existed and for which the second alone provided.

As to the first point the present case is in my opinion distinguishable, first, by reason of the essentially different nature of the premises of which possession is taken; and, secondly, by reason of the admission of the Crown that where,

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

as is in my opinion the case here, complete and sufficient statutory powers are conferred, the power conferred by the prerogative is merged therein.

As to the second, a new point not raised in *In re A Petition of Right* (1) was taken before us, namely, that the two enactments are not separate legislative enactments, but that they must be read together, the power of obtaining possession being derived from the earlier of the two, the officers authorized to act being appointed by, and the inconvenient and dangerous restrictions being suspended by the later. This view, which I am satisfied is the correct one, disposes of the difficulties which led the Court to hold that the Defence Act, 1842, was not applicable to the existing circumstances, and not having been then presented to or considered by the Court may in my opinion be acted upon in this case notwithstanding the previous decision.

There remains the question as to whether the provision for compensation as well as the provisions affecting the power to take possession contained in the Defence Act, 1842, are suspended by the recent statute. On this point all three members of the Court (Pickford L.J. with considerable hesitation) expressed the view that they were so suspended. Having regard, however, to the view expressed as to the non-applicability of the Defence Act, 1842, this point was not necessary to the decision, and the view so expressed was therefore obiter. I do not hesitate to say that though I expressed that view I am now satisfied, after the further argument we have heard, and on the further materials we now possess, showing the course of legislation and practice in time of national danger, that it was not correct. The question is one of construction, and the circumstances under which the Act was passed must be taken into account. These circumstances amply justify the view that Parliament intended to make the taking possession of land as easy and rapid as possible, but I fail to see how they lead to the conclusion that it intended also to deprive the subject of the right to compensation which had always been recognized even in times

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

C. A. 1919 — DE KEYSER'S ROYAL HOTEL, LD., *In re.* — DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING. — Warrington L.J.

of grave national danger. The regulations do not in terms suspend any restrictions; their provisions however are inconsistent with the observance of the formalities and conditions provided by the Defence Act, 1842, and these must in my judgment be held to be impliedly suspended. There is, however, no such necessity in the case of the provision for compensation, and this in my opinion remains unaffected.

The result is in my opinion that possession of the suppliants' hotel was taken and held by the Crown under statutory authority, the exercise of which gave the suppliants a legal right to compensation to be assessed and paid as provided for by the Defence Act, 1842. This right is in the nature of a contractual right, and can, in my opinion, be enforced by means of a petition of right. The compensation is in the Act described, in the case of temporary use, as "the compensation to be paid for the possession or use of" the premises, and I think this introduces the same measure as that resorted to in actions for use and occupation, that is to say, what the occupation is worth, and I do not think the suppliants are entitled in addition to compensation for loss arising from their being prevented from carrying on their business.

I think, therefore, the suppliants are entitled to a declaration such as is claimed in para. 4 only of the prayer of the petition. They are not in a position to obtain any further order, but the officers of the Crown would, no doubt, act on the declaration if made.

DUKE L.J. The suppliants upon this petition of right are owners of a valuable block of premises in the City of London called De Keyser's Royal Hotel, who have been dispossessed of their property since May, 1916, under an Order made by the Army Council directing that possession of the same should be taken for purposes of public defence. They claim from the Crown compensation for the use and occupation of the hotel upon the basis of an alleged rental value of 17,500*l.* per annum. On the part of the Crown a right is alleged to enter upon and occupy the premises without

any legal obligation to pay compensation, but at the time of the entry an offer was made to pay out of public funds such a sum as should be determined by the Royal Commission on Defence of the Realm Losses to be the amount of the loss or damage actually caused to the suppliants by reason of the occupation. Important questions of principle underlie the dispute, as to the basis on which the suppliants ought to receive compensation out of public funds, which actually led to the litigation.

The suppliants allege in their petition a voluntary delivery of the premises in question by them to the representatives of the Crown upon an agreement for payment by the Crown of a fair rent or other compensation. Apart from the alleged agreement they claim further that they are entitled to be paid rent or compensation by virtue of the Defence Act, 1842. The alleged agreement is traversed on behalf of the Crown. The Crown alleges necessity by reason of the existence of a state of war for the occupation of the premises for the purpose of securing the public safety and the defence of the realm, and says that the possession complained of 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 made thereunder by His Majesty in Council. He says also that no rent or compensation is by law payable to the suppliants under the Defence Act, 1842, or at all. Peterson J. gave judgment for the Crown upon all the questions raised by the pleadings.

The questions of difficulty in this appeal arise upon the issues other than those joined upon the alleged right of the suppliants to payment under an agreement. The prerogative powers which are claimed could only come in question in the event of the security of the kingdom being threatened by a foreign enemy. The alleged rights of the Crown, if they exist, have their origin before the time of legal memory and are incongruous with modern practice. The process by which the suppliants seek to enforce their alleged rights is for remedial purposes of very limited scope, the jurisdiction of the Court

C. A. 1919

DE KEYSER'S ROYAL HOTEL, LD., *In re.*

DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.

Duke L.J.

being no greater for any practical purpose than it was in the seventeenth century.

For the determination of the appeal four things have to be ascertained—namely, the true state of the facts as to the alleged agreement; the rights of the Crown, if any, apart from agreement in respect of the property; the rights of the subject apart from agreement in respect of the alleged acts of the public authorities; and the jurisdiction of His Majesty's Courts to pronounce a judgment upon the suppliants' several matters of complaint.

Before May, 1916, negotiations had taken place between the Lands Branch of the War Office and Mr. Whinney, receiver and manager of the suppliants' business, with a view to the conclusion of an agreement between the suppliants and the Crown for the occupation of De Keyser's Hotel for purposes which the Government deemed to be essential for national defence, and upon terms of payment of an agreed rental. Mr. Whinney was prepared to let the premises for a net sum of 19,000*l.* per annum subject to various onerous conditions, and after some inconclusive communications the advisers of the Crown determined that the premises should be acquired not by agreement but by requisition under the Defence of the Realm Regulations; and on May 1, 1916, Mr. Cole, an officer of the Lands Branch, notified Mr. Whinney that he was instructed by the Army Council to take possession of the property under these regulations, adding this: "I enclose forms of claims 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." Mr. Whinney, by letters addressed to various representatives of the Crown, protested against the decision which had been taken. In particular he wrote on May 5: "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 being acted upon, and you must understand that anything which I do is without prejudice to the rights of all parties interested in the hotel." Mr. Whinney also applied in the Chancery Division of the High Court for directions of a judge. He had no course open to him other than to deliver up possession of the premises unless he were to take personal proceedings against the representatives of the Crown to restrain them from carrying their declared intention into effect, and he quite properly gave up possession under protest. Representatives of the Crown have been ever since in occupation of the hotel. On November 16, 1916, in a letter complaining that no compensation was being paid to the suppliants by the Crown, Mr. Whinney wrote: "I would point out that it is now over six months since the hotel was commandeered." The nature of the transaction could not have been more plainly expressed. The allegation in the petition that the premises are being occupied by the Government under an agreement between the Crown and the suppliants manifestly could not be sustained. The learned judge who tried the case says upon this subject: "I find it impossible to come to the conclusion that, as is alleged in the petition, possession was voluntarily delivered or that the Crown uses or occupies the hotel by the suppliants' permission. The Crown was acting or purporting to act under what it conceived to be its compulsory powers, and that act on the part of the Crown was protested against by Mr. Whinney." No other conclusion seems to me to be possible. I pause to add that on the principle laid down in *Thomas* v. *The Queen* (1), upon the authority of the *Bankers' Case* (2), an affirmative finding upon the suppliants' allegation of an agreement between them and the Crown would have entitled them to the judgment of the Court, and that my ultimate opinion upon their appeal depends in the first place upon the fact that there was no such agreement.

The right of the Crown to occupy the suppliants' premises for necessary purposes of public defence in time of war was based by the Attorney-General upon the Royal prerogative,

(1) L. R. 10 Q. B. 31. (2) 14 How. St. Tr. 1; 5 Mod. 29; Skinner, 601.

C. A. 1919 — DE KEYSER'S ROYAL HOTEL, LD., *In re.* — DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING. — Duke L.J.

and, alternatively, upon the Defence of the Realm Consolidation Act, 1914, and the Defence of the Realm Regulations. The ground of prerogative was the ground most elaborately discussed before us. The argument for the Crown was in effect that at common law there is in the Sovereign the duty of defending the realm, that this duty carries with it all necessary rights for the doing of things incident to the performance of the duty, so far as they are not unlawful, and that one of these incidental things is the occupation of land whenever military necessity so requires. As to legality it was said for the Crown that temporary occupation for defence is not a disseisin within the prohibition of Magna Charta. As to necessity it was contended that the Sovereign is constitutionally the arbiter. The common law duty of the Sovereign to defend the realm appears clearly in the arguments and judgment in *Hampden's Case* (1)—the *Case of Shipmoney*. The right of the Crown to enter upon lands of a subject for purposes of public defence was affirmed by the unanimous opinion of the judges given consultatively to the Crown in the *Case of Saltpetre.* (2) Mr. St. John's argument against the Crown in the *Case of Shipmoney* (1) throws a clear light upon the class of questions here under discussion, and the judges there, although they were divided as to the matter which was immediately to be decided, were unanimous as to certain questions which are material to the present case. I shall refer only to the judgments of two of the judges whose opinions were given adversely to the claim of the Crown. Crooke J. said in discussing the prerogative (3): "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 hath been the practice of all former kings." Hutton J. said(4): "The care for the defence of the kingdom belongeth inseparably to the Crown."

(1) 3 How. St. Tr. 825.
(2) 12 Rep. 12.
(3) 3 How. St. Tr. 1134.
(4) 3 How. St. Tr. 1195.

Mr. St. John for the defendant had said (1): "It must needs be granted that in this business of defence, the suprema potestas, is inherent in His Majesty." "Neither hath the law only entrusted the care of defence to His Majesty, but it hath likewise . . . . put the armatam potestatem and means of defence wholly into his hands. . . . . Neither . . . . is His Majesty armed only with his primitive prerogative of generalissimo and commander in chief . . . . but also with all other powers requisite for the full execution of all things incident to so high a place, as well in times of danger as of actual war." One of the grounds on which Hampden's resistance to shipmoney was based by Mr. St. John was the existence of "the many prerogatives which the law hath settled in the Crown for the defence of the kingdom." A right to summon all subjects to defend the realm by personal service (Foster's Crown Law, 157, 158; Fitzherbert's Nat. Brev., 192; Co. Litt. 75, 76); the power of the Crown to issue commissions of array (Parliament Rolls, 3 Rush. 1229); power of impressment of ships and men for the Navy (Chitty, cap. iv., Selden, Mare Clausum, cap. xx.; Blackstone's Commentaries, i., 406); *Ex parte Fox* (2); and the exclusive authority to erect fortifications (Comyn's Digest, Tit. Prerogative), have been considered clear instances of prerogative rights which existed at common law. The right to enter upon lands within the realm as and when military defence requires it is claimed in this case as such a right; and is said to be exemplified in the decisions of various Courts of law which were cited in *In re A Petition of Right* (3) with regard to the raising of bulwarks to repel invasion. As was pointed out for the suppliants, these were all decisions in litigation between subjects and not express determinations as to the rights of the Sovereign. Litigation upon such a question as between the subject and the Crown could hardly occur. The subject would not be likely to ask or get the Royal fiat for a petition of right, and the Sovereign obstructed in what he deemed the necessary defence of the

(1) 3 How. St. Tr. 860. (2) (1793) 5 T. R. 276.
(3) [1915] 3 K. B. 649.

C. A. 1919 — DE KEYSER'S ROYAL HOTEL, LD.. *In re.* DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING. — Duke L.J.

realm would probably not resort to a prosecution for misdemeanour. The absence of legal records was relied upon by the suppliants as proof of non-existence of the alleged right. It is true that the Year Books, the more modern Reports, the Parliament Rolls, and the public accounts show no trace of a previous occurrence of such a controversy as this. It is equally true that within the time of legal memory armies arrayed under the authority of the Crown have repeatedly occupied large areas of land in all parts of the country to the exclusion for longer or shorter periods of time of the owners of the land. There are no records of complaints by action at law or, so far as I know, by petition to the Crown, or by Parliamentary protest, and the searches made by the parties in the Record Office produced no proofs of payment except for lands purchased or rented under statutory powers or by agreement. On the whole the absence of decided cases and of records of payments or other admissions of liability by the Crown seems to me not to support the suppliants' case in this regard, but rather to tend to destroy it. The cases between subjects in which the plea of necessity in time of war for public defence was successfully raised in early times in actions of trespass are fairly numerous. In 8 Edw. 4 (1) a custom in Kent "when the enemy come to the coast" to enter upon land adjoining the same coast in defence and safeguard of the realm and then to make there trenches and bulwarks for the defence of the realm was held to be well pleaded. In 21 Hen. 7 (2) entry upon land in time of war pur faire bulwark in defence du Roy et le Realm was held to be "justifiable as a thing necessary for the commonwealth though otherwise illegal." In 14 Hen. 8 (3) the opinion of the Court of Common Pleas is recorded to the effect that "suburbs d'cities seront plucked down in temps d'guerre; pur ceó que ceo est pur le commonwealth chescun poit faire sans aver action." This alleged right is affirmed in Chitty on the Prerogative. (4) The *Case of Saltpetre* (5) declares the opinion of all the judges in

(1) Year Book, 8 Edw. IV. H. 41.
(2) Year Book, 21 H. VII. T. 27b.
(3) Year Book, 14 H. VIII. pl. 16.
(4) Book 4, par. 5.
(5) 12 Rep. 13.

1607 that there is in the Crown a right of entry on all lands for a purpose essential for defence, though the purpose originated within the time of legal memory. That is to say, the right is not limited to cases in which it has from time to time been exercised. Not the nature of the user but the fact of necessity is the decisive consideration which governs the right. In my opinion the law was before the Defence Acts and now is that in case of necessity for public defence the Crown may of right enter upon the land of the subject and may remain in occupation while the necessity continues. This Court so decided in *In re A Petition of Right* (1), and I think that the observations of Lord Parker in *The Zamora* (2) indicate the concurrence of the noble and learned Lord in the view of the law expressed in that decision.

The answer of the suppliants to the claim made under the prerogative was, first, that whatever rights of the kind in question existed at common law—not admitting them—such rights have been abrogated by modern legislation. Reliance was placed upon a series of enactments, temporary measures enacted at intervals in the period from 4 Hen. 8 to 38 Geo. 3, and, among permanent Acts, the Defence Acts, 1842 to 1875, but more particularly the Defence Act, 1842. That an Act of Parliament may determine once and for all an ancient right of the Crown could not be disputed. Many rights under the prerogative in respect of defence have been abolished by statute. The legislation of the reign of Charles II. was cited, and the argument is well illustrated by numerous Acts of older date relating to purveyance. All these statutes however were specifically directed against the prerogative powers with which they dealt. The rights of the Crown are not taken to be abated by statute unless the intention of the Legislature to that effect is clear and unmistakable upon the face of the statute. See per Lindley L.J. in *Wheaton* v. *Maple & Co.* (3) There must be express words or plain and necessary implication: *Coomber* v. *Berks Justices.* (4) It is probably not too strong a statement that the implication

(1) [1915] 3 K. B. 649.
(2) [1916] 2 A. C. 106.
(3) [1893] 3 Ch. 48, 64.
(4) (1883) 9 App. Cas. 61, 66.

ADD-81

C. A 1919 — DE KEYSER'S ROYAL HOTEL, LD., *In re.* DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING. — Duke L.J. —

will not be made unless otherwise the legislation would be unmeaning. (Per Day J. in *Gorton Local Board* v. *Prison Commissioners.* (1)) That the temporary statutes, including 38 Geo. 3, c. 27, can be supposed to affect the prerogative seems to me impossible. And there is nothing in the language of the Defence Act, 1842, which suggests to me an intention on the part of the Legislature to deprive the Crown of any of its common law powers. All the clauses are enabling clauses, and none of them goes beyond the objects expressed in the title and the preamble—namely, the vesting and purchase of lands and hereditaments. The words "lands and hereditaments" must be taken to include interests therein. I am of opinion that the powers of the Crown under the prerogative are not abated by any of the temporary Acts which were cited or by the Defence Act, 1842.

Para. 2 of the answer and plea of the Attorney-General on behalf of the Crown justifies the possession complained of not only by the prerogative but also by the powers conferred by the Defence of the Realm Consolidation Act, 1914, and the regulations thereunder. The terms of s. 1 of this Act of 1914 are therefore material for consideration. The section declares the powers of the Crown in terms which appear to me to affirm the existence of prerogative rights, but it also confers new powers undefined by particular description and absolute in character. The effect of s. 1 was considered in the House of Lords in *Rex* v. *Halliday* (2), a case dealing not with right in property but with the liberty of the subject. The absolute nature of the powers reposed in the Crown by the section is clear in the light of the judgments there delivered. The powers must of course be exercised honestly by those entrusted with them by the Crown, but "there is no . . . . other limit upon the acts that the regulations may authorise" (per Lord Wrenbury (3)). Regulation 2, made under the absolute powers of the Crown declared or conferred by s. 1 of the Act of 1914, provides that it shall be lawful for the competent naval or military authority where for the purpose

(1) (1887) [1904] 2 K. B. 167 n. (2) [1917] A. C. 260.
(3) [1917] A. C. 307.

of securing the public safety or the defence of the realm it is necessary so to do (*a*) to take possession of any land, and (*b*) to take possession of any buildings. The terms of s. 2 of the statute were relied upon by the suppliants' counsel as a constructive limitation of the powers declared in s. 1; but I see no reason in s. 2 for supposing that the Legislature intended to fetter the powers declared and conferred in s. 1 by imposing any of the conditions which regulate the acquisition of land under the Defence Act of 1842. The effect of the words in the regulation—"where it is necessary"—does not properly arise for consideration in this case, as the suppliants have not challenged the action of the Crown on the ground of absence of necessity. An argument was founded, however, on these words in furtherance of a suggestion that possession without compensation cannot be necessary for the defined purposes. I cannot construe the words as having any relation to the question of compensation. So far as the Crown itself is concerned the fact of necessity seems to me to be incontestably established by the determination of the Crown. It could not be challenged even by petition of right to recover possession except with the assent of the Crown. The view which I have expressed as to necessity is, I think, that taken by Lord Parker in *The Zamora*. (1) Confirming the declaration of the law which was made in this court in *In re A Petition of Right* (2) Lord Parker uses these words: "Those who are responsible for the national security must be the sole judges of what the national security requires."

Before I pass from the question of the existence in the Crown of powers for the occupation of land other than those of the Defence Acts 1842 to 1875 and the Military Lands Acts, I think it worth while to mention that in s. 1 of the Defence of the Realm (Acquisition of Land) Act, 1916, the Legislature takes notice of the fact that during the present war possession of land has been taken by the Crown for purposes connected with the war "in exercise or purported exercise of prerogative

(1) [1916] 2 A. C. 77, 107. (2) [1915] 3 K. B. 649.

C. A. 1919

DE KEYSER'S ROYAL HOTEL, LD., *In re.*

DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.

Duke L.J.

rights" as well as under powers conferred by enactments relating to the defence of the realm.

It would be pedantic in an argument such as occurs in this litigation to ignore the reflections naturally provoked by insistence upon prerogative rights at a time when most of the relations of the subject with the Crown have for centuries been determined by statute and when large powers outside the prerogative have been created by statute in regard to the particular matter. That consideration relates, however, to public policy and not to legal right. Any restriction of clear powers of the executive Government in times of public peril is properly subjected to careful scrutiny. Powers which under conditions of personal autocracy might be regarded as invidious may under modern conditions be not only valuable but essential. Parliament is well able to prevent an oppressive exercise of such powers by the executive.

The several grounds of claim in respect of which the suppliants ultimately asked for judgment were these, an implied agreement giving a right to recover reasonable payment for use and occupation, a common law right to compensation for loss caused by any exercise of the prerogative, and a right to have the same pecuniary advantages which would have resulted to them from the exercise of the powers of the Crown under the Defence Act, 1842.

Before dealing in detail with these claims I propose to consider what are the powers of the High Court of Justice in respect of demands made against the Crown by petition of right. This process is available to the subject for the recovery of real or personal property which is wrongfully in the possession of the Crown, and for obtaining judicial authority for payment out of the Exchequer of money due upon contractual obligations of the Crown. As to the former of these classes of objects, Holt C.J. pointed out in the discussion in the *Bankers' Case*, reported as *Rex* v. *Hornby* (1), that the function of a petition of right is "to destroy the King's title." As to the second class, the decision of the House of Lords in the *Bankers' Case* (1), as applied by the Court

(1) 5 Mod. 29, 57; 14 How. St. Tr. 34; Skinner, 608.

of Queen's Bench, in *Thomas* v. *The Queen* (1), establishes the authority of English Courts of law to examine upon petition of right money claims of the subject against the Crown, provided they arise ex contractu. The jurisdiction declared in *Thomas* v. *The Queen* (1) extends to the ascertainment of the rights of the subject against the Crown in respect of contracts broken by the officers of the Crown as well as in respect of contracts performed. Beyond these two classes of cases the jurisdiction of the Courts upon petition of right does not extend. Speaking generally, the long series of enactments from the statute of Westminster the Second—13 Edw. 1, c. 24—to the Judicature Act, which confer a large part of the powers exercised daily by the Courts of this country, do not give any rights to the subject as against the Crown. The amendments made by the Petition of Right Act, 1860, are amendments of procedure only, and are coupled with a proviso in s. 7 that "nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this Act."

In the present case the suppliants are not proceeding under the jurisdiction the Court has to restore possession of property. They seek to recover payment of a debt upon one or other of the grounds of claim on which they rely.

The claim of the suppliants for money due for use and occupation was in my opinion rightly disallowed by the learned judge at the trial. An agreement for such a payment cannot be implied where the occupation which is relied upon has been had against the will of the claimant or where the circumstances are inconsistent with a contract for payment. See *Churchward* v. *Ford* (2) and *Sloper* v. *Saunders*. (3) The facts of the case, as I have already stated them, show that this ground of claim cannot prevail.

The claim of the suppliants that an entry upon land in the exercise of the prerogative of the Crown always gives a right to compensation was not supported by reference to any

(1) L. R. 10 Q. B. 31. (2) 2 H. & N. 446.
(3) (1860) 29 L. J. (Ex.) 275.

C. A. 1919

DE KEYSER'S ROYAL HOTEL, LD., *In re.*

DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.

Duke L.J.

authority, but was said to be warranted by the past practice of the Crown and by necessary presumption. In the case of *The Zamora* (1), however, Lord Parker expressed his opinion that " the municipal law of this country does not give compensation to a subject when land or goods are requisitioned by the Crown." The same view appears in the old cases with regard to necessary entry upon land for defence. Counsel for the suppliants cited statutes and text-books on subjects such as purveyance, the requisition of ships, and the requisition of vehicles, and relied much upon a variety of documents produced from the Record Office which showed payments by the Crown for lands acquired under statutory powers with right of compensation or purchased or rented. No instance appeared in these documents of payment upon any claim such as is made in the present case, or indeed, of the occurrence of such a claim. It is the fact that when prerogative rights existed which have been abolished by statute, they, in some cases, carried with them at the time of their abolition certain customary or common law rights on the part of the subject to receive payment in respect of the exercise of the prerogative. The origin of every such right on the part of the subject can, I believe, be traced. The course of events in such cases is well illustrated by the history of the Royal prerogative with regard to the impressment of ships. Selden in his famous treatise on the Maritime Rights of the Crown (Mare Clausum, ed. 1636, c. 20), sets forth writs issued during a period commencing with the reign of King John, which seem to be in a common form, and which direct the impressment of ships without provision for payment. The Rolls of Parliament show that in many successive reigns this compulsory service without a legal right to payment, or with such payment only as the Crown might direct, was recognized by the House of Commons as a burdensome but lawful obligation of ship-masters, and one for which some relief ought to be devised. For instance, in 1347 (21 Edw. 3)—Parliament Rolls 2, p. 172—the House of Commons by an address to the Crown represents

(1) [1916] 2 A. C. 100.

"that whereas shipmen are assessed to all taxes and tallages, nevertheless their ships are taken and sometimes lost without reward to them, and by long continuance of such losses English shipping is in danger of being destroyed." To the prayer that the King "will be pleased to ordain a remedy" the King replies: "Le roi l'avisera." There is a like transaction in 1371, and in 47 Edw. 3 the King upon petition that compensation might be given to shipowners for necessary repairs and renewal of masts and rigging replies: "Tiel regard nad pas este fait avant les heures." A like representation was made in 2 Rich. 2 (Parliament Rolls 3, p. 46) without effect, but upon a renewed address in the following year (Parliament Rolls 3, p. 66*a*) there is the record of an ordinance by the Crown that when ships are arrested for the service of the King they shall have their reward for each quarter of a year 3s. 4d. per ton and that this ordinance shall continue till the next Parliament. The continuance or discontinuance of payment under this provision is the subject of memorials in the same reign and in the reigns of Henry IV. and Henry V. (Parliament Rolls 3, pp. 223*a*, 253, and 554; Parliament Rolls 4, p. 79*a*), and the payment is ultimately described in the Parliament Rolls as customary. Selden's statement of the case in Mare Clausum shows that in Stuart times the practice of payment had become established, and that when ships were impressed for the Royal Navy congrua merces esset praestanda. Ultimately (as counsel for the present suppliants pointed out) statutes were passed making impressment of ships without payment illegal. The distinction between statutes of this kind and the statutes dealing with entries by the Crown upon land of the subject is that none of these latter statutes renders illegal an entry by the Crown under any pre-existing right.

Assuming the occupation of the suppliants' premises by the Crown to be an occupation by virtue of the Royal prerogative, I am of opinion that such an occupation does not of itself create or raise the presumption of a right in the suppliants to have compensation assessed to them. The reasons for this opinion extend to claims in respect of an

C. A. 1919 — DE KEYSER'S ROYAL HOTEL, LD., *In re.* DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING. — Duke L.J.

occupation under the Defence of the Realm Consolidation Act, 1914, s. 1, taking the view which I take as to the effect of s. 2. Payment is, I think, left at the discretion of the Crown.

There remains the claim of the suppliants under the Defence Act, 1842. Sect. 1, sub-s. 2, of the Defence of the Realm Consolidation Act, 1914, empowers His Majesty in Council to provide by regulation 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." Regulation 17 (*a*) made in November, 1914, is an exercise of the authority so provided in respect of the making of bye-laws. No regulation has been made to suspend the restrictions on the acquisition or user of land under the several Acts mentioned in the section. Regulation 2, on the other hand, gave an unqualified power to the competent naval and military authorities to take possession of land and buildings for purposes of public safety or the defence of the realm during the war. Regulations have been made providing for the assessment of compensation in respect of some acts done under the powers of the Act of 1914 in derogation of the rights of the subject. So far as regards the exercise generally of the exceptional powers of the Crown, during the war, the only provision which has been made is that contained in the Royal Commission. Regulation 8 (*c*) was discussed before us as being possibly a reference to hearing before the Commission as " the manner in which . . . . claims for compensation under these regulations are determined." I do not know whether this is its true meaning, and it is not necessary to form an opinion on the subject. No regulation made under the statute of 1914 purports to create any right to compensation in respect of the occupation of land or to provide any means of assessing compensation for lands taken, in place of the means provided in the Act of 1842. It was contended that in the interests of justice (in the popular sense) the possession of the Crown must be " deemed to be " acquired under the Act of 1842. The suppliants might have raised

this contention, relevantly if erroneously, upon a motion for a writ of mandamus to the Army Council to take the necessary proceedings for an assessment of compensation, but I believe there is no authority for holding that, in the absence of such proceedings, and of an award of compensation thereunder, there is any debt due from the Crown to the suppliants which one of His Majesty's judges can direct to be paid out of the Exchequer. To say that the Ministers of the Crown must be "deemed" to have proceeded under the Act and that a liability results as matter of law, is to set up a ground of claim founded upon a legal fiction. As between subjects this is permissible. As between subjects and the Crown the rule seems to apply which was laid down by the unanimous decision of the judges in *Sheffeild* v. *Ratcliffe* (1), that the King is not bound by legal fictions.

The decision of this Court in *In re A Petition of Right* (2) is, I think, opposed to all the contentions of the suppliants under the Acts of 1842 and 1914.

To dispose of one remaining question in the case, it is necessary to consider whether if the suppliants had rights and no effective remedy, under their main contentions, they could maintain a claim analogous to that which arises between subject and subject in respect of a breach of statutory duty which causes damage. Examination of the authorities upon actions on the case (see *Edgcomb* v. *Dee* (3); *Miller* v. *Taylor* (4)) shows that such a claim is a pure claim for damages for a wrong, and could not be maintained against the Crown.

On the whole, I am of opinion that the case of the Crown is made out, that the suppliants have not the rights for which they contend, and that if they had in fact had the grievance complained of under the Defence Act, 1842, there is no jurisdiction in any judge to redress it by a judgment on a petition of right.

I sincerely regret the difference of opinion which has obliged me to deal at length with a subject of much complexity,

(1) (1616) Hob. 334; Jenkins, 287.
(2) [1915] 3 K. B. 649.
(3) (1670) Vaugh. 89, 101.
(4) Tidd's Practice (6th ed.), 963; Tidd's Forms (6th ed.), 379.

C. A. 1919 — DE KEYSER'S ROYAL HOTEL, LD., *In re.* — DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.

and as I think of great importance, with regard to national defence and to the relative rights of the subject and the Crown.

Solicitors for the appellants: *Miller & Smiths.*
Solicitor for the Crown: *The Treasury Solicitor.*

G. A. S.

C. A. 1919 — *May* 27, 28.

PATENT CASTINGS SYNDICATE, LIMITED *v.* ETHERINGTON.

[1918 P. 804.]

Company—Manager's Remuneration—Agreement—Construction—Commission on "net profits"—Deduction of Excess Profits Duty—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *ss.* 35, 40, 45, *sub-s.* 3.

By an agreement dated October 30, 1916, the defendant was appointed works manager of the business of the plaintiff company at a salary. The company agreed also to pay him at the end of each business year of the company, and within seven days of the holding of the annual general meeting, a further sum by way of commission being a percentage upon the "net profits" for the year. There was a proviso that the certificate of the company's auditor should be conclusive as to what constituted net profits at the end of any such business year:—

Held, on construction, that "net profits" of the business for the year were the excess of the receipts for the year over the current expenses and outgoings of the same year—i.e., the fund which for that year was capable of being lawfully applied by the company to the payment of a dividend.

Held, as matter of law, that that fund could only be arrived at after deducting excess profits duty, which was a debt of the company to the Crown.

Held, therefore, that the commission ought to be calculated after deduction of excess profits duty.

Held, also, that (for the present purpose) no analogy between the incidence of income tax and that of excess profits duty exists.

Collins v. *Sedgwick* [1917] 1 Ch. 179 and *In re Condran* [1917] 1 Ch. 639 approved and followed.

Thomas v. *Hamlyn & Co.* [1917] 1 K. B. 527, *William Hollins & Co.* v. *Paget* [1917] 1 Ch. 187 distinguished and explained.

S. J. & E. Fellows, Ld. v. *Corker* [1918] 1 Ch. 9 overruled.

Decision of Younger J. [1919] 1 Ch. 306 affirmed.

uninclosed, some of the witnesses said that such owners of the uninclosed lands had a right of common without stint; but that after any of them had inclosed his land, such person had no right of common at all in the said fields, or either of them. Another witness said, if a man inclosed all his lands in the fields, he lost his right of common totally; but that if he left any bit, only an acre uninclosed, he used to enjoy his common in regard to that acre uninclosed, just as before, and used to put in any number of cattle without stint. Several other old witnesses swore to the same effect, and here the defendants rested their case; whereupon the Judge was of opinion that the defendant had not proved the custom, which he said was entire, that several of the witnesses had proved that if a man inclosed 19 acres out of 20, it was the custom for him in respect to the one acre not inclosed, [274] to put on to the uninclosed lands as many cattle as he pleased without stint, and as he had done before he inclosed the 19 acres, and therefore the Judge was pleased to tell the jury, that he thought the defendant had not proved the custom entirely, and that if they believed the land inclosed in question was discharged and freed from any person having a right of common thereon, they should find for the defendant; if not, that they should find for the plaintiff; whereupon the jury gave a verdict for the plaintiff.

It was now moved for a new trial, for the misdirection of the Judge; 1st, for that the custom to inclose was fully and clearly proved; and 2dly, that the right of common before inclosure made, was for cattle levant and couchant upon each person's uninclosed lands; and this matter is not at all in issue, but is admitted on the pleadings by both sides; the right of inclosure with its consequence, viz. its being freed from any person's former right of common thereon, was the only matter in issue, the other was a legal consequence, and not traversable, (to wit,) that the owner of such inclosed land is barred of any future right to common on the uninclosed land in these fields, and what some of the witnesses said of common without stint is nothing to the purpose, for there is no such thing as common without stint belonging to land; common belonging to land can only be for cattle levant and couchant thereon: that the custom to inclose was clearly proved, as appears by the evidence before stated; and when the land is inclosed, it is freed and discharged from any person's former right of common thereon: and of this opinion was the whole Court, and said, 1st, that the parties agree by the pleadings, that while the lands in these open fields are uninclosed, all have a right of common for cattle levant and couchant; 2dly, the custom to inclose, and that the land as soon as, and while inclosed, is free from common, is fully proved; the 3d matter is a consequence in law, and wanted no proof, viz. that as soon as any person has inclosed, he has excluded himself from any right of common on any of the uninclosed lands; and any judgment given upon this record cannot be a bar to any other party who may claim common in these fields without levancy and couchancy. Per totam Curiam.—The verdict must be set aside for misdirection of the Judge, and there must be a new trial.

[275] JOHN ENTICK, Clerk, *versus* NATHAN CARRINGTON AND THREE OTHERS, Messengers in Ordinary to the King. C. B. Trespass for breaking and entering plaintiff's house, &c. Special justification under a warrant of the Secretary of State.

[S. C. 19 How. St. Tri. 1030. Referred to, *Dillon* v. *O'Brien*, 1887, 20 L. R. Ir. 316; *Jones* v. *German* [1896], 2 Q. B. 423; [1897], 1 Q. B. 374.]

In trespass; the plaintiff declares that the defendants on the 11th day of November in the year of our Lord 1762, at Westminster in Middlesex, with force and arms broke and entered the dwelling-house of the plaintiff in the parish of St. Dunstan Stepney, and continued there four hours without his consent and against his will, and all that time disturbed him in the peaceable possession thereof, and broke open the doors to the rooms, the locks, iron bars, &c. thereto affixed, and broke open the boxes, chests, drawers, &c. of the plaintiff in his house, and broke the locks thereto affixed, and searched and examined all the rooms, &c. in his dwelling-house, and all the boxes, &c. so broke open, and read over, pryed into, and examined all the private papers, books, &c. of the plaintiff there found, whereby the secret affairs, &c. of the plaintiff became wrongfully discovered and made public; and took and carried away 100 printed charts, 100 printed pamphlets, &c. &c. of the plaintiff there found, and other

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100 charts, &c. &c. took and carried away, to the damage of the plaintiff 2000l. The defendants plead, 1st, not guilty to the whole declaration, whereupon issue is joined. 2dly, as to the breaking and entering the dwelling-house, and continuing four hours, and all that time disturbing him in the possession thereof, and breaking open the doors to the rooms, and breaking open the boxes, chests, drawers, &c. of the plaintiff in his house, and the searching and examining all the rooms, &c. in his dwelling-house, and all the boxes, &c. so broke open, and reading over, prying into, and examining the private papers, books, &c. of the plaintiff there found, and taking and carrying away the goods and chattels in the declaration first mentioned there found, and also as to taking and carrying away the goods and chattels in the declaration last mentioned, the defendants say, the plaintiff ought not to have his action against them, because they say, that before the supposed trespass, on the 6th of November 1762, and before, until, and all the time of the supposed trespass, the Earl of Halifax was, and yet is, one of the Lords of the King's Privy Council, and one of his principal Secretaries of State, and that the earl, before the trespass on the 6th of November 1762, made his warrant under his hand and seal directed to the defendants, by which the earl did in the King's name authorize and require the defendants, taking a constable to their assistance, to make strict and diligent search for the plaintiff, mentioned in the said warrant to be the author, or one concerned in the writing of several weekly very seditious papers, intitled *The Monitor, or British Freeholder*, No. 357, 358, 360, 373, 376, 378, and 380; **[276]** London, printed for J. Wilson and J. Fell in Paternoster-Row, containing gross and scandalous reflections and invectives upon His Majesty's Government, and upon both Houses of Parliament, and him the plaintiff having found, to seize and apprehend and bring together with his books and papers in safe custody, before the Earl of Halifax to be examined concerning the premises, and further dealt with according to law; in the due execution whereof all mayors, sheriffs, justices of the peace, constables, and all other His Majesty's officers civil and military and loving subjects, whom it might concern, were to be aiding and assisting to them the defendants, as there should be occasion: and the defendants further say, that afterwards and before the trespass, on the same day and year, the warrant was delivered to them to be executed, and thereupon they on the same day and year in the declaration, in the day time about 11 o'clock, being the said time when, &c. by virtue and for the execution of the said warrant, entered the plaintiff's dwelling-house, the outer door thereof being then open, to search for and seize the plaintiff and his books and papers in order to bring him and them before the Earl of Halifax, according to the warrant, and the defendants did then and there find the plaintiff, and seized and apprehended him, and did search for his books and papers in his house, and did necessarily search and examine the rooms therein, and also his boxes, chests, &c. there, in order to find and seize his books and papers, and to bring them along with the plaintiff before the said earl, according to the warrant; and upon the said search did then in the said house find and seize the goods and chattels of the plaintiff in the declaration, and on the same day did carry the said books and papers to a house at Westminster, where the said earl then and long before transacted the business of his office, and delivered the same to Lovel Stanhope Esq. who then was, and yet is an assistant to the earl in his office as Secretary of State, to be examined, and who was then authorized to receive the same from them for that purpose, as it was lawful for them to do; and the plaintiff afterwards, (to wit) on the 17th of November in the said year, was discharged out of their custody, and in searching for the books and papers of the plaintiff the defendants did necessarily read over, pry into, and examine the said private papers, books, &c. of the plaintiff in the declaration mentioned then found in his house; and because at the said time when, &c. the said doors in the said house leading to the rooms therein, and the said boxes, chests, &c. were shut and fastened so that the defendants could not search and examine the said rooms, boxes, chests, &c. they, for the necessary searching and examining the same, did then necessarily break and force open the said doors, boxes, chests, &c. as it was lawful for them to do; and on the said occasion the defendants necessarily stayed in the house of the plaintiff for the said four hours, and unavoidably during that time disturbed him in the possession thereof, they the defendants doing as little **[277]** damage to the plaintiff as they possibly could, which are the same breaking and entering the house of the plaintiff, &c. (and so repeat the trespass covered by this plea) whereof the plaintiff above complains; and this, &c., wherefore they pray judgment, &c. The

HeinOnline -- 95 Eng. Rep. 808 1378-1865

ADD-92

plaintiff replies to the plea of justification above, that (as to the trespass thereby covered) he, by any thing alledged by the defendants therein, ought not to be barred from having his action against them, because he says, that the defendants at the parish of Stepney, of their own wrong, and without the cause by them in that plea alledged, broke and entered the house of the plaintiff, &c. &c. in manner and form as the plaintiff hath complained above; and this he prays may be inquired of by the country; and the defendants do so likewise. There is another plea of justification like the first, with this difference only, that in the last plea it is alledged, the plaintiff and his papers, &c. were carried before Lord Halifax, but in the first, it is before Lovel Stanhope, his assistant or law clerk; and the like replication of de injuria sua propria absq. tali causa, whereupon a third issue is joined. This cause was tried in Westminster-Hall before the Lord Chief Justice, when the jury found a special verdict to the following purport:

The jurors upon their oath say, as to the issue first joined, (upon the plea of not guilty to the whole trespass in the declaration,) that as to the coming with force and arms, and also the trespass in declaration, except the breaking and entering the dwelling-house of the plaintiff, and continuing therein for the space of four hours, and all that time disturbing him in the possession thereof, and searching several rooms therein, and in one bureau, one writing-desk, and several drawers of the plaintiff in his house, and reading over and examining several of his papers there, and seizing, taking and carrying away some of his books and papers there found, in the declaration complained of, the said defendants are not guilty. As to breaking and entering the dwelling-house, &c. (above excepted,) the jurors on their oath say, that at the time of making the following information, and before and until and at the time of granting the warrant hereafter mentioned, and from thence hitherto, the Earl of Halifax was, and still is one of the lords of the King's Privy Council, and one of his principal Secretaries of State, and that before the time in the declaration, viz. on the 11th of October 1762, at Saint James's, Westminster, one Jonathan Scott of London, bookseller and publisher, came before Edward Weston Esq. an assistant to the said earl, and a justice of peace for the City and liberty of Westminster, and there made and gave information in writing to and before the said Edward Weston against the said John Entick and others, the tenor of which information now produced and given in evidence to the jurors followeth in these words and figures, to wit, "The voluntary information of J. Scott, in the year 1755. I proposed setting up a paper, and mentioned it to Dr. Shebbeare, and in a few days one Arthur Beardmore, an [278] attorney at law, sent for me, hearing of my intention, and desired I would mention it to Dr. Shebbeare, that he, Beardmore, and some others of his friends had an intention of setting up a paper in the city. Shebbeare met Beardmore, and myself and Entick (the plaintiff), at the Horn Tavern, and agreed upon the setting up the paper by the name of *The Monitor*, and that Dr. Shebbeare and Mr. Entick should have 200l. a-year each. Dr. Shebbeare put into Beardmore's and Entick's hands some papers, but before the papers appeared Beardmore sent them back to me (Scott). Shebbeare insisted on having the proportion of his salary paid him; he had 50l. which I (Scott) fetched from Vere and Asgills by their note, which Beardmore gave him. Dr. Shebbeare upon this was quite left out, and the monies have been continued to Beardmore and Entick ever since, by subscription, as I supposed, raised, I know not by whom; it has been continued in these hands ever since. Shebbeare, Beardmore, and Entick all told me that the late Alderman Beckford countenanced the paper; they agreed with me, that the profits of the paper, paying all charges belonging to it, should be allowed me. In the paper of the 22d May, called *Sejanus*, I apprehend the character of Sejanus meant Lord Bute; the original manuscript was in the handwriting of David Meredith, Mr. Beardmore's clerk: I before received the manuscript for several years till very lately from the said hands, and do believe that they continue still to write it. Jona. Scott, St. James's, 11th October 1762."

The above information was given voluntarily before me, and signed in my presence, by Jona. Scott. J. WESTON.

And the jurors further say, that on the 6th November 1762, the said information was shewn to the Earl of H. and thereupon the earl did then make and issue his warrant directed to the defendants, then and still being the King's messengers, and

HeinOnline -- 95 Eng. Rep. 809 1378-1865

ADD-93

duly sworn to that office, for apprehending the plaintiff, &c. the tenor of which warrant produced in evidence to the jurors, follows in these words and figures: "George Montagu Dunk, Earl of Halifax, Viscount Sunbury, and Baron Halifax, one of the Lords of His Majesty's Honourable Privy Council, Lieutenant-General of His Majesty's Forces, Lord Lieutenant-General and General Governor of the kingdom of Ireland, and principal Secretary of State, &c. These are in His Majesty's name to authorize and require you, taking a constable to your assistance, to make strict and diligent search for John Entick, the author, or one concerned in the writing of several weekly very seditious papers, intitled *The Monitor, or British Freeholder*, No. 357, 358, 360, 373, 376, 378, 379, and 380; London, printed for J. Wilson and J. Fell in Paternoster-Row; which contain gross and scanda-[279]-lous reflections and invectives upon His Majesty's Government, and upon both Houses of Parliament, and him having found, you are to seize and apprehend, and to bring, together with his books and papers, in safe custody before me to be examined concerning the premises, and further dealt with according to law; in the due execution whereof all mayors, sheriffs, justices of the peace, constables, and other His Majesty's officers civil and military, and loving subjects whom it may concern, are to be aiding and assisting to you as there shall be occasion; and for so doing this shall be your warrant. Given at St. James's the 6th day of November 1762, in the third year of His Majesty's reign. Dunk Halifax. To Nathan Carrington, James Watson, Thomas Ardran, and Robert Blackmore, four of His Majesty's messengers in ordinary." And the jurors further say, the earl caused this warrant to be delivered to the defendants to be executed, and that the defendants afterwards on the 11th of November 1762, at 11 o'clock in the day-time, by virtue and for the execution of the warrant, but without any constable taken by them to their assistance, entered the house of the plaintiff, the outer door thereof being open, and the plaintiff being therein, to search for and seize the plaintiff and his books and papers, in order to bring him and them before the earl, according to the warrant; and the defendants did then find the plaintiff there and did seize and apprehend him, and did there search for his books and papers in several rooms and in the house, and in one bureau, one writing-desk, and several drawers of the plaintiff there, in order to find and seize the same, and bring them along with the plaintiff before the earl according to the warrant, and did then find and seize there some of the books and papers of the plaintiff, and perused and read over several other of his papers which they found in the house, and chose to read, and that they necessarily continued there in the execution of the warrant four hours, and disturbed the plaintiff in his house, and then took him and his said books and papers from thence, and forthwith gave notice at the office of the said Secretary of State in Westminster unto Lovel Stanhope Esq. then before, and still being an assistant to the earl in the examinations of persons, books, and papers seized by virtue of warrants issued by Secretaries of State, and also then and still being a justice of peace for the City and liberty of Westminster and county of Middlesex, of their having seized the plaintiff, his books and papers, and of their having them ready to be examined; and they then and there, at the instance of the said Lovel Stanhope, delivered the said books and papers to him: and the jurors further say, that, on the 13th of April in the first year of the King, His Majesty, by his letters patent under the Great Seal, gave and granted to the said Lovel Stanhope the office of law-clerk to the Secretaries of State; and the King did thereby ordain, constitute, and appoint the law-clerk to attend the offices of his Secretaries of State, in order to take the depositions of all such persons whom it may be [280] necessary to examine upon affairs which might concern the public, &c. (and then the verdict sets out the letters patent to the law-clerk in hæc verba,) as by the letters patent produced in evidence to the jurors appears. And the jurors further say, that Lovel Stanhope, by virtue of the said letters patent long before the time when, &c. on the 13th of April in the first year of the King was, and ever since hath been, and still is law-clerk to the King's Secretaries of State, and hath executed that office all that time. And the jurors further say, that at different times from the time of the Revolution to this present time, the like warrants with that issued against the plaintiff, have been frequently granted by the Secretaries of State, and executed by the messengers in ordinary for the time being, and that each of the defendants did respectively take at the time of being appointed messengers, the usual oath, that he would be a true servant to the King, &c. in the place of a messenger in ordinary, &c. And the jurors

HeinOnline -- 95 Eng. Rep. 810 1378-1865

further say, that no demand was ever made or left at the usual place of abode of the defendants, or any of them, by the plaintiff, or his attorney or agent, in writing, of the perusal and copy of the said warrant so issued against the plaintiff as aforesaid, neither did the plaintiff commence or bring his said action against the defendants, or any of them, within six calendar months next, after the several acts aforesaid, and each of them were and was done and committed by them as aforesaid; but whether, upon the whole matter as aforesaid by the jurors found, the said defendants are guilty of the trespass hereinbefore particularly specified in breaking and entering the house of the plaintiff in the declaration mentioned, and continuing there for four hours, and all that time disturbing the plaintiff in the possession thereof, and searching several rooms therein, and one bureau, one writing-desk, and several drawers of the plaintiff in his house, and reading over and examining several of his papers there, and seizing, taking and carrying away some of his books and papers there found; or the said plaintiff ought to maintain his said action against them, the jurors are altogether ignorant, and pray the advice of the Court thereupon; and if upon the whole matter aforesaid by the jurors found, it shall seem to the Court that the defendants are guilty of the said trespass, and that the plaintiff ought to maintain his action against them the jurors say upon their said oath, that the defendants are guilty of the said trespass in manner and form as the plaintiff hath thereof complained against them; and they assess the damages of the plaintiff by occasion thereof, besides his costs and charges by him about his suit in this behalf laid out, to 300l., and for those costs and charges to 40s.; but if upon the whole matter by the jurors found, it shall seem to the Court that the said defendants are not guilty of the said trespass, or that the plaintiff ought not to maintain his action against them, then the jurors do say upon their oath that the defendants are not guilty of the said trespass in manner and form as the plaintiff hath thereof complained against them: and as to the [281] last issue on the second special justification, the jury found for the plaintiff, that the defendants in their own wrong broke and entered, and did the trespass as the plaintiff in his replication has alledged.

This special verdict was twice solemnly argued at the Bar; in Easter term last by Serjeant Leigh for the plaintiff, and Burland, one of the King's Serjeants, for the defendants, and in this present term by Serjeant Glynn for the plaintiff, and Nares, one of the King's Serjeants, for the defendants.

Counsel for the plaintiff.—At the trial of this cause the defendants relied upon two defences; 1st, that a Secretary of State as a justice or conservator of the peace, and these messengers acting under his warrant, are within the statute of the 24th of Geo. 2, c. 44, which enacts, (among other things,) that "no action shall be brought against any constable or other officer, or any person acting by his order and in his aid, for any thing done in obedience to the warrant of a justice, until demand hath been made or left at the usual place of his abode by the party, or by his attorney in writing signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for six days after such demand," and that no demand was ever made by the plaintiff of a perusal or copy of the warrant in this case, according to that statute, and therefore he shall not have this action against these defendants, who are merely ministerial officers acting under the Secretary of State, who is a justice and conservator of the peace. 2dly, that the warrant under which the defendants acted is a legal warrant, and that they can well justify what they have done by virtue thereof, for that at many different times, from the time of the Revolution till this time, the like warrants with that issued against the plaintiff in this case have been granted by Secretaries of State, and executed by the messengers in ordinary for the time being.

1. It is most clear and manifest upon this verdict, that the Earl of Halifax acted as Secretary of State when he granted the warrant, and not merely as a justice of the peace, and therefore cannot be within the statute 24 Geo. 2, c. 44, neither would he be within the statute if he was a conservator of the peace, such person not being once named therein; and there is no book in the law whatever that ranks a Secretary of State quasi secretary among the conservators of the peace; Lambert, Coke, Hawkins, Lord Hale, &c. &c. none of them take any notice of a Secretary of State being a conservator of the peace, and until of late days he was no more indeed than a mere clerk; a conservator of the peace had no more power than a constable has now, who is a conservator of the peace at common law. At the time of making this statute,

HeinOnline -- 95 Eng. Rep. 811 1378-1865

a justice of peace, constable, headborough, and [282] other officers of the peace, borsholders and tithingmen, as well as Secretary of State, conservator of the peace and messenger in ordinary, were all very well known; and if it had been the intent of the statute, that a Secretary of State, conservator of the peace, and messenger in ordinary, should have been within the statute, it would have mentioned all or some of them, and it not having done so, they cannot be within it. A messenger certainly cannot be within it, who is nothing more than a mere porter, and Lord Halifax's footmen might as well be said to be officers within the statute as these defendants. Besides, the verdict finds that these defendants executed the warrant without taking a constable to their assistance; this disobedience will not only take them out of the protection of the statute, (if they had been within it,) but will also disable them to justify what they have done, by any plea whatever; the office of these defendants is a place of considerable profit, and as unlike that of a constable or tithingman as can be, which is an office of burthen and expence, and which he is bound to execute in person, and cannot substitute another in his room, though he may call persons to assist him. 1 Hale's P. C. 581. This warrant is more like a warrant to search for stolen goods and to seize them, than any other kind of warrant, which ought to be directed to constables and other public officers which the law takes notice of. 2 Hale's P. C. 149, 150. How much more necessary in the present case was it to take a constable to the defendants' assistance? The defendants have also disobeyed the warrant in another matter, being commanded to bring the plaintiff and his books and papers before Lord Halifax; they carried him and them before Lovel Stanhope, the law-clerk, and though he is a justice of peace, that avails nothing, for no single justice of peace ever claimed a right to issue such a warrant as this, nor did he act therein as a justice of peace, but as the law-clerk to Lord Halifax. The information was made before Justice Weston; the Secretary of State in this case never saw the accuser nor the accused; it seems to have been below his dignity; the names of the officers introduced here are not to be found in the law-books, from the first Year-Book to the present time.

2. A power to issue such a warrant as this, is contrary to the genius of the law of England, and even if they had found what they searched for, they could not have justified under it; but they did not find what they searched for, nor does it appear that the plaintiff was author of any of the supposed seditious papers mentioned in the warrant, so that it now appears that this enormous trespass and violent proceeding has been done upon mere surmise; but the verdict says such warrants have been granted by Secretaries of State ever since the Revolution; if they have, it is high time to put an end to them, for if they are held to be legal the liberty of this country is at an end; it is the publishing of a libel which is the crime, and not the having it locked up in a private drawer in a man's study; but if having it in one's cus-[283]-tody was the crime, no power can lawfully break into a man's house and study to search for evidence against him; this would be worse than the Spanish Inquisition; for ransacking a man's secret drawers and boxes to come at evidence against him, is like racking his body to come at his secret thoughts. The warrant is to seize all the plaintiff's books and papers without exception, and carry them before Lord Halifax; what? has a Secretary of State a right to see all a man's private letters of correspondence, family concerns, trade and business? this would be monstrous indeed; and if it were lawful, no man could endure to live in this country. In the case of a search warrant for stolen goods, it is never granted, but upon the strongest evidence, that a felony has been committed, and that the goods are secreted in such a house, and it is to seize such goods as were stolen, not all the goods in the house; but if stolen goods are not found there, all who entered with the warrant are trespassers. However frequently these warrants have been granted since the Revolution, that will not make them lawful, for if they were unreasonable or unlawful when first granted, no usage or continuance can make them good; even customs which have been used time out of mind, have been often adjudged void, as being unreasonable, contrary to common right, or purely against law, if upon considering their nature and quality they shall be found injurious to a multitude, and prejudicial to the common wealth, and to have their commencement (for the most part) through the oppression and extortion of lords and great men. Davis 32 b. These warrants are not by custom; they go no farther back than 80 years and most amazing it is they have never before this time been opposed or controverted, con-

HeinOnline -- 95 Eng. Rep. 812 1378-1865

sidering the great men that have presided in the King's Bench since that time; but it was reserved for the honour of this Court, which has ever been the protector of the liberty and property of the subject, to demolish this monster of oppression, and to tear into rags this remnant of Star-Chamber tyranny.

Counsel for the defendants.—I am not at all alarmed, if this power is established to be in the Secretaries of State; it has been used in the best of times, often since the Revolution. I shall argue, 1st, that the Secretary of State has power to grant these warrants, and if I cannot maintain this, I must 2dly shew that by the statute 24 Geo. 2, c. 24, this action does not lie against the defendants the messengers. 1. A Secretary of State has the same power to commit for treason as a justice of peace. *Kendale and Roe*, Skin. 596. 1 Salk. 346, S. C. 1 Ld. Raym. 65. 5 Mod. 78, S. C. Sir Wm. Wyndham was committed by James Stanhope, Secretary of State, to the Tower for high treason the 7th of October 1715; see the case 1 Stra. 2; and Serjeant Hawkins says, it is certain that the Privy Council, or any one or two of them, or a Secretary of State, may lawfully commit persons for treason, and for [284] other offences against the State, as in all ages they have done. 2 Hawk. P. C. 117, sect. 4. 1 Leon. 70, 71. Carth. 291. 2 Leon. 175. If it is clear that a Secretary of State may commit for treason and other offences against the State, he certainly may commit for a seditious libel against the Government, for there can hardly be a greater offence against the State, except actual treason. A Secretary of State is within the Habeas Corpus Act, but a power to commit without a power to issue his warrant to seize the offender and the libel would be nothing; so it must be concluded that he has the same power upon information to issue a warrant to search for and seize a seditious libel, and its author and publisher, as a justice of peace has for granting a warrant to search for stolen goods, upon an information that a theft has been committed, and that the goods are concealed in such a place; in which case the constable and officers assisting him in the search, may break open doors, boxes, &c. to come at such stolen goods. Supposing the practice of granting warrants to search for libels against the State be admitted to be an evil in particular cases, yet to let such libellers escape who endeavour to raise rebellion is a greater evil, and may be compared to the reasoning of Mr. Justice Foster in the case of pressing, 159, where he says, "that war is a great evil, but it is chosen to avoid a greater. The practice of pressing is one of the mischiefs war brings with it; but it is a maxim in law and good policy too, that all private mischiefs must be borne with patience, for preventing a national calamity," &c.

2. Supposing there is a defect of jurisdiction in the Secretary of State, yet the defendants are within the stat. 24 Geo. 2, c. 44, and though not within the words, yet they are within the reason of it; that it is not unusual in Acts of Parliament to comprehend by construction a generality where express mention is made only of a particular; the Statute of Circumspectè Agatis concerning the Bishop of Norwich extends to all bishops. Fitz. Prohibition 3, and 2 Inst. on this statute. 25 Ed. 3 enables the incumbent to plead in quare impedit to the King's suit; this also extends to the suits of all persons. 38 Ed. 3, 31, the Act 1 Rich. 2 ordains, that the warden of the Fleet shall not permit prisoners in execution to go out of prison by bail or baston, yet it is adjudged that this Act extends to all gaolers. Plowd. Com. case of *Platt*, 35 b. the Stat. de Donis Conditionalibus extends to all other limitations in tail not there particularly mentioned, and the like construction has been put upon several other statutes. Tho. Jones 62. The stat. 7 Jac. 1, c. 5, the word constable therein extends to a deputy constable. Moor 845. These messengers in ordinary have always been considered as officers of the Secretaries of State, and a commitment may be to their custody, as in *Sir W. Wyndham's case*. A justice of peace may make a constable pro hac vicê to execute a warrant, who would be within the Stat. 24 Geo. 2. [285] So if these defendants are not constables, yet as officers they have power to execute a warrant of a justice of peace; a constable may, but cannot be compelled to execute a warrant out of his jurisdiction; officers acting under colour of office, though doing an illegal act, are within this statute. Vaugh. 113. So that no demand having ever been made of the warrant, nor any action commenced within six months, the plaintiff has no right of action. It was said that a conservator of the peace had no more power than a constable has now. I answer, they had power to bind over at common law, but a constable has not. Dalton, cap. 1.

Counsel for the plaintiff in reply.—It is said this has been done in the best of times ever since the Revolution; the conclusion from thence is, that it is the more

HeinOnline -- 95 Eng. Rep. 813 1378-1865

inexcusable, because done in the best of times, in an æra when the common law (which had been trampled under the foot of arbitrary power) was revived. We do not deny but the Secretary of State hath power to commit for treason and other offences against the State, but that is not the present case, which is breaking into the house of a subject, breaking into his drawers and boxes, ransacking all the rooms in his house, and prying into all his private affairs; but it is said if the Secretary of State has power to commit, he has power to search, &c. as in the case of stolen goods. This is a false consequence, and it might as well be said he has a power to torture. As to stolen goods, if the officers find none, have they a right to take away a man's goods which were not stolen? Pressing is said to be a dangerous power, and yet it has been allowed for the benefit of the State; but that is only the argument and opinion of a single Judge, from ancient history and records, in times when the lower part of the subjects were little better than slaves to their lords and great men, and has not been allowed to be lawful (without an Act of Parliament) since the time of the Revolution. The Stat. 24 Geo. 2 has been compared to ancient statutes, naming particular persons and districts, which have been construed to extend to many others not named therein; and so the defendants, though no such officers are mentioned, by like reason, are within the Statute 24 Geo. 2; but the law knows no such officers as messengers in ordinary to the King. It is said the Habeas Corpus Act extends to commitments by Secretaries of State, though they are not mentioned therein: true; but that statute was made to protect the innocent against illegal and arbitrary power. It is said the Secretary of State is a justice of peace, and the messengers are his officers; why then did the warrant direct them to take a constable to their assistance, if they were themselves the proper officers? it seems to admit they were not the proper officers; if a man be made an officer for a special purpose to arrest another, he must shew his authority; and if he refuses, it is not murder to kill him; but a constable or other known officer in the law need not shew his warrant.

[286] Lord Chief Justice.—I shall not give any opinion at present, because this case, which is of the utmost consequence to the public, is to be argued again; I shall only just mention a matter which has slipped the sagacity of the counsel on both sides, that it may be taken notice of upon the next argument. Suppose a warrant which is against law be granted, such as no justice of peace, or other magistrate high or low whomsoever, has power to issue, whether that magistrate or justice who grants such warrant, or the officer who executes it, are within the stat. 24 Geo. 2, c. 44? To put one case (among an hundred that might happen); suppose a justice of peace issues a warrant to search a house for stolen goods, and directs it to four of his servants, who search and find no stolen goods, but seize all the books and papers of the owners of the house, whether in such a case would the justice of peace, his officers or servants, be within the Stat. 24 Geo. 2? I desire that every point of this case may be argued to the bottom; for I shall think myself bound, when I come to give judgment, to give my opinion upon every point in the case.

Counsel for the plaintiff on the second argument.—If the Secretary of State, or a Privy Counsellor, Justice of Peace, or other magistrate whatever, have no legal power to grant the warrant in the present case, it will follow, that the magistrate usurping such an illegal power can never be construed to be within the meaning or reason of the statute of 24 Geo. 2, c. 44, which was made to protect justices of peace, &c. where they made blunders, or erred in judgment in cases within their jurisdiction, and not to give them arbitrary power to issue warrants totally illegal from beginning to end, and in cases wherein they had no jurisdiction at all. If any such power in a Secretary of State, or a Privy Counsellor, had ever existed, it would appear from our law-books; all the ancient books are silent on this head; Lambert never once mentions a Secretary of State; neither he, nor a Privy Counsellor, were ever considered as magistrates; in all the arguments touching the Star-Chamber, and petition of right, nothing of this power was ever dreamt of; State commitments anciently were either per mandatum Regis in person, or by warrant of several of the Privy Counsellors in the plural number; the King has this power in a particular mode, viz. by the advice of his Privy Council, who are to be answerable to the people if wrong is done; he has no other way but in Council to signify his mandate. In the case of *The Seven Bishops* this matter was insisted upon at the Bar, when the Court presumed the commitment of them was by advice of the Privy Council, but that a single Privy Counsellor had this power was not contended for by the Crown lawyers then. This Court will require it to be shewn

HeinOnline -- 95 Eng. Rep. 814 1378-1865

that there have been ancient commitments of this sort; neither the Secretary of State or a Privy Counsellor ever claimed a right to administer an oath (but they employ a person as a law-clerk, [287] who is a justice of peace, to administer oaths, and take recognizances); Sir Barth. Shower in *Kendale and Roe's case*, insisted they never had such power. It would be a solecism in our law to say, there is a person who has power to commit, and has not power to examine on oath, and bail the party; therefore whoever has power to commit has power to bail; it was a question formerly, whether a constable as an ancient conservator of the peace could take a recognizance or bond? In the time of Queen Eliz. there was a case wherein some of the Judges were of one opinion and some of another. A Secretary of State was so inconsiderable formerly, that he is not mentioned in the Statute of Scandalum Magnatum; his office was thought of no great importance; he takes no oath of office as Secretary of State, gives no kind of security for the exercise of such judicial power as he now usurps. If this was an ancient power it must have been annexed to his office anciently, it cannot now be given to him by the King; the King cannot make two Chief Justices of the Common Pleas, nor could the King put the Great Seal in commission before an Act of Parliament was made for that purpose. There was only one Secretary of State formerly, there are now two appointed by the King; if they have this power of magistracy, it should seem to require some law to be made to give that power to two Secretaries of State which was formerly in one only. As to commitments per mandatum Regis, see Stamf. Pl. Coron. 72. 4 Inst. c. 5, Court of Star-Chamber. Admitting they have power to commit in high treason, it will not follow they have power to commit for a misdemeanor; it is of necessity that they can commit in high treason, which requires immediate interposition for the benefit of the public. In the case of commitment by Walsingham Secretary of State, 1 Leon. 71, it was returned on the habeas corpus at last, that the party was committed ex sententia & mandato totius Concilii Privati dominæ Reginæ; because he found he had not that power of himself, he had recourse to the whole Privy Council's power; so that this case is rather for the plaintiff. Commitment by the High Commission Court of York was declared by Parliament illegal from the beginning; so in the case of ship-money the Parliament declared it illegal.

Counsel for the defendants on the second argument.—The most able Judges and advocates ever since the Revolution, seem to have agreed that the Secretaries of State have this power to commit for a misdemeanor. Secretaries of State have been looked upon in a very high light for two hundred years past. 27 H. 8, c. 11, their rank and place is settled by 31 H. 8, c. 10. 4 Inst. 362, cap. 77, of precedency. 4 Inst. 56, Selden's Titles of Honour, C. Officers of State; so that a Secretary of State is something more than a mere clerk, as was said. Minshew verb. Secretary; he is é Secretioribus Conciliis domini Regis. Serjeant Pengelly moved that Sir Wm. Windham might be bailed; if he could not be [288] committed by the Secretary of State for something less than treason, why did he move to have him bailed? this seems a concession that he might be committed in that case for something less than treason. Lord Holt seems to agree that a commitment by a Secretary of State is good. Skin. 598. 1 Ld. Raym. 65. There is no case in the books that says in what cases a Secretary of State can or cannot commit; by what power is it that he can commit in the case of treason, and in no other case? The resolution of the House of Commons touching the Petition of Right, Selden, last volume, Parliamentary History, vol. 8, fol. 95, 96. Secretary Coke told the Lords, it was his duty to commit by the King's command. *Yoxley's case*, Carth. 291: He was committed by the Secretary of State on the Statute of Eliz. for refusing to answer whether he was a Romish priest; *The Queen and Derby*, Fortescue's Rep. the commitment was by a Secretary of State, Mich. 10 Annæ, for a libel, and held good. (Note; Bathurst, J. said, he had seen the habeas corpus and the return, and that this was a commitment by a Secretary of State.) *The King and Earbury*, Mich. 7 Geo. 2, 2 Bernard. 346, was a motion to discharge a recognizance entered into for writing a paper called the *Royal Oak*. Lord Hardwicke said it was settled in *Kendale and Roe's case*, that a Secretary of State might apprehend persons suspected of treasonable practices; and there are a great number of precedents in the Crown-Office of commitments by Secretaries of State for libels against the Government. After time taken to consider, the whole Court gave judgment this term for the plaintiff.

Curia.—The defendants make two defences; first, that they are within the stat.

HeinOnline -- 95 Eng. Rep. 815 1378-1865

24 Geo. 2, c. 44; 2dly, that such warrants have frequently been granted by Secretaries of State ever since the Revolution, and have never been controverted, and that they are legal; upon both which defences the defendants rely.

A Secretary of State, who is a Privy Counsellor, if he be a conservator of the peace, whatever power he has to commit is by the common law: if he be considered only as a Privy Counsellor, he is the only one at the board who has exercised this authority of late years; if as a conservator, he never binds to the peace; no other conservator ever did that we can find: he has no power to administer an oath, or take bail; but yet it must be admitted that he is in the full exercise of this power to commit, for treason and seditious libels against the Government, whatever was the original source of that power; as appears from the cases of *The Queen and Derby*, *The King and Earbury*, and *Kendale and Roe's case.*

We must know what a Secretary of State is, before we can tell whether he is within the stat. 24 Geo. 2, c. 44. He is the keeper of the King's signet wherewith the King's private letters are signed. [289] 2 Inst. 556. Coke upon Articuli Super Chartas, 28 Ed. 1. Lord Coke's silence is a strong presumption that no such power as he now exercises was in him at that time; formerly he was not a Privy Counsellor, or considered as a magistrate; he began to be significant about the time of the Revolution, and grew great when the princes of Europe sent ambassadors hither; it seems inconsistent that a Secretary of State should have power to commit, and no power to administer an oath, or take bail; who can commit and not have power to examine? the House of Commons indeed commit without oath, but that is nothing to the present case; there is no account in our law-books of Secretaries of State, except in the few cases mentioned; he is not to be found among the old conservators; in Lambert, Crompton, Fitzherbert, &c. &c. nor is a Privy Counsellor to be found among our old books till *Kendall and Roe's case*, and 1 Leon. 70, 71, 29 Eliz. is the first case that takes notice of a commitment by a Secretary of State; but in 2 Leon. 175 the Judges knew no such committing magistrate as the Secretary of State. It appears by the Petition of Right, that the King and Council claimed a power to commit; if the Secretary of State had claimed any such power, then certainly the Petition of Right would have taken notice of it; but from its silence on that head we may fairly conclude he neither claimed nor had any such power; the Stat. 16 Car. 1, for Regulating the Privy Council, and taking away the Court of Star-Chamber, binds the King not to commit, and in such case gives a habeas corpus; it is strange that House of Commons should take no notice of the Secretary of State, if he then had claimed power to commit. This power of a Secretary of State to commit was derivative from the commitment per mandatum Regis: Ephemeris Parliamentaria. Coke says in his speech to the House, "If I do my duty to the King, I must commit without shewing the cause;" 1 Leon. 70, 71, shews that a commitment by a single Privy Counsellor was not warranted. By the Licensing Statute of 13 & 14 Car. 2, cap. 33, sec. 15, licence is given to a messenger under a warrant of the Secretary of State to search for books unlicensed, and if they find any against the religion of the Church of England, to bring them before the Secretary of State; the warrant in that case expressed that it was by the King's command. See Stamford's comment on the mandate of the King, and Lambert, cap. Bailment. All the Judges temp. Eliz. held that in a warrant or commitment by one Privy Counsellor he must shew it was by the mandate of the King in Council. See And. 297, the opinion of all the Judges; they remonstrated to the King that no subject ought to be committed by a Privy Counsellor against the law of the realm. Before the 3 Car. 1 all the Privy Counsellors exercised this power to commit; from that æra they disused this power, but then they prescribed still to commit per mandatum Regis. Journal of the House of Commons 195. 16 Car. 1. Coke, Selden, &c. argued that the King's power to commit, meant that [290] he had such power by his Courts of Justice. In the case of *The Seven Bishops* all the Court and King's Council admit, that supposing the warrant had been signed out of the Council, that it would have been bad, but the Court presumed it to be signed at the board; Pollexfen in his argument says, we do not deny but the Council board have power to commit, but not out of Council; this is a very strong authority; the whole body of the law seem not to know that Privy Counsellors out of Council had any power to commit, if there had been any such power they could not have been ignorant of it; and this power was only in cases of high treason, they never claimed it in any other case. It was argued that if a Secretary of State hath power to commit in high

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treason, he hath it in cases of lessor crimes: but this we deny, for if it appears that he hath power to commit in one case only, how can we then without authority say he has that power in other cases? he is not a conservator of the peace; Justice Rokeby only says he is in the nature of a conservator of the peace: we are now bound by the cases of *The Queen and Derby*, and *The King and Earbury*.

The Secretary of State is no conservator nor a justice of the peace, quasi secretary, within the words or equity of the Stat. 24 Geo. 2, admitting him (for arguments sake) to be a conservator, the preamble of the statute shews why it was made, and for what purpose; the only grantor of a warrant therein mentioned, is a justice of the peace; justice of peace and conservator are not convertible terms; the cases of construction upon old statutes, in regard to the warden of the Fleet, the Bishop of Norwich, &c. are not to be applied to cases upon modern statutes. The best way to construe modern statutes is to follow the words thereof; let us compare a justice of peace and a conservator; the justice is liable to actions, as the statute takes notice, it is applicable to him who acts by warrant directed to constables; a conservator is not intrusted with the execution of laws, which by this Act is meant statutes, which gives justices jurisdiction; a conservator is not liable to actions; he never acts: he is almost forgotten; there never was an action against a conservator of the peace as such; he is antiquated, and could never be thought of when this Act was made; and ad ea quæ frequenter accidunt jura adaptantur. There is no act of a constable or tithingman as conservator taken notice of in the statute; will the Secretary of State be ranked with the highest or lowest of these conservators? the Statute of Jac. 1, for officers acting by authority to plead the general issue, and give the special matter in evidence, when considered with this Statute of 24 Geo. 2, the latter seems to be a second part of the Act of Jac. 1, and we are all clearly of opinion that neither the Secretary of State, nor the messengers, are within the Stat. 24 Geo. 2, but if the messengers had been within it, as they did not take a constable [291] with them according to the warrant, that alone would have been fatal to them, nor did they pursue the warrant in the execution thereof, when they carried the plaintiff and his books, &c. before Lovel Stanhope, and not before Lord Halifax; that was wrong, because a Secretary of State cannot delegate his power, but ought to act in this part of his office personally.

The defendants having failed in their defence under the Statute 24 Geo. 2; we shall now consider the special justification, whether it can be supported in law, and this depends upon the jurisdiction of the Secretary of State; for if he has no jurisdiction to grant a warrant to break open doors, locks, boxes, and to seize a man and all his books, &c. in the first instance upon an information of his being guilty of publishing a libel, the warrant will not justify the defendants: it was resolved by B. R. in the case of *Shergold* v. *Holloway*, that a justice's warrant expressly to arrest the party will not justify the officer, there being no jurisdiction. 2 Stran. 1002. The warrant in our case was an execution in the first instance, without any previous summons, examination, hearing the plaintiff, or proof that he was the author of the supposed libels; a power claimed by no other magistrate whatever (Scroggs C.J. always excepted); it was left to the discretion of these defendants to execute the warrant in the absence or presence of the plaintiff, when he might have no witness present to see what they did; for they were to seize all papers, bank bills, or any other valuable papers they might take away if they were so disposed; there might be nobody to detect them. If this be lawful, both Houses of Parliament are involved in it, for they have both ruled, that privilege doth not extend to this case. In the case of *Wilkes*, a member of the Commons House, all his books and papers were seized and taken away; we were told by one of these messengers that he was obliged by his oath to sweep away all papers whatsoever; if this is law it would be found in our books, but no such law ever existed in this country; our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law. The defendants have no right to avail themselves of the usage of these warrants since the Revolution, and if that would have justified them they have not averred it in their plea, so it could not be put, nor was in issue at the trial; we can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society; for papers are

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often the dearest property a man can have. This case was compared to that of stolen goods; Lord Coke denied the lawfulness of granting warrants to search for stolen goods, 4 Inst. 176, 177, though now it prevails to be law; but in that case the justice and the informer must proceed with great caution; there must be an oath that the [292] party has had his goods stolen, and his strong reason to believe they are concealed in such a place; but if the goods are not found there, he is a trespasser; the officer in that case is a witness; there are none in this case, no inventory taken; if it had been legal many guards of property would have attended it. We shall now consider the usage of these warrants since the Revolution; if it began then, it is too modern to be law; the common law did not begin with the Revolution; the ancient constitution which had been almost overthrown and destroyed, was then repaired and revived; the Revolution added a new buttress to the ancient venerable edifice: the K. B. lately said that no objection had ever been taken to general warrants, they have passed sub silentio: this is the first instance of an attempt to prove a modern practice of a private office to make and execute warrants to enter a man's house, search for and take away all his books and papers in the first instance, to be law, which is not to be found in our books. It must have been the guilt or poverty of those upon whom such warrants have been executed, that deterred or hindered them from contending against the power of a Secretary of State and the Solicitor of the Treasury, or such warrants could never have passed for lawful till this time. We are inclined to think the present warrant took its first rise from the Licensing Act, 13 & 14 Car. 2, c. 33, and are all of opinion that it cannot be justified by law, notwithstanding the resolution of the Judges in the time of Cha. 2, and Jac. 2, that such search warrants are lawful. State Trials, vol. 3, 58, the trial of Carr for a libel. There is no authority but of the Judges of that time that a house may be searched for a libel, but the twelve Judges cannot make law; and if a man is punishable for having a libel in his private custody, as many cases say he is, half the kingdom would be guilty in the case of a favourable libel, if libels may be searched for and seized by whomsoever and wheresoever the Secretary of State thinks fit. It is said it is better for the Government and the public to seize the libel before it is published; if the Legislature be of that opinion they will make it lawful. Sir Samuel Astry was committed to the Tower, for asserting there was a law of State distinct from the common law. The law never forces evidence from the party in whose power it is; when an adversary has got your deeds, there is no lawful way of getting them again but by an action. 2 Stran. 1210, *The King and Cornelius. The King and Dr. Purnell*, Hil. 22 Geo. B. R. Our law is wise and merciful, and supposes every man accused to be innocent before he is tried by his peers: upon the whole, we are all of opinion that this warrant is wholly illegal and void. One word more for ourselves; we are no advocates for libels, all Governments must set their faces against them, and whenever they come before us and a jury we shall set our faces against them; and if juries do not prevent them they may prove fatal to liberty, destroy Government and introduce anarchy; but tyranny is better than anarchy, and the worst Government better than none at all.

Judgment for the plaintiff.

[293] HILARY TERM, 6 GEO. III. 1766.

ADDISON *versus* GREY. C. B. Debt upon an arbitration-bond; an award good in part and bad in part.

Debt upon an arbitration-bond. The defendant craves oyer of the condition, which is, that if the defendant Gray and one Mary Birkwood shall perform the award of William Bradley and John Bellamy, arbitrators, chosen between the said Gray and Birkwood, and the plaintiff Addison, concerning all matters in difference between them, so as the award be made in writing on or before the first of September then next, then, &c. which being read and heard, the defendant pleads no award was made. The plaintiff replies, and sets out an award, whereby the arbitrators awarded that all actions, suits, quarrels, and disputes to the day of the date of the bond should cease between the parties, and that the plaintiff should hold and enjoy three acres of meadow in Glatton till the 10th of October then next, and then he should quit the

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CHAPTER XXV.

AN ACT for making more effectual the Provision out of the forfeited Estates in Ireland for the building of Churches and augmenting small Viccaridges in Ireland.

Rot. Parl. 1 *Anne*, *p.* 4. *n.* 11.

WHEREAS by an Act lately made intituled An Act for granting an Aid to His Majesty by Sale of the forfeited [& other '] Estates and Interests in Ireland and by a Land Tax in England for the several Purposes therin mentioned It is enacted That the Trustees therein named or any Seven or more of them should and might and they are thereby required after such a Time and in such a Manner as is therein mentioned to convey all and every the Rectories Impropriate with the Tythes Oblations Obventions Glebes Advowsons of Vicaridges and other Things thereunto severally and respectively belonging or appertaining forfeited by reason of the Rebellion therein mentioned and therein before vested in the said Trustees to such Person or Persons and their Heirs as the Bishop of each respective Diocese wherein such Rectories Impropriate respectively are shall nominate in Trust for the rebuilding or repairing Parish Churches and for the perpetual Augmentation of small Rectories or Viccaridges in the Kingdom of Ireland in such Manner as is therein mentioned And whereas several such Rectories Impropriate Tythes Oblations Obventions Glebes Advowsons of Vicaridges and other Things thereunto severally and respectively belonging or appertaining have been jointly charged or incumbred or liable to the Payment of some Debts Charges or Incumbrances together with other Lands Tenements or Hereditaments by the said Act vested in the said Trustees wherefore for the making the before mentioned Trust more effectual and beneficial for the pious Ends and Purposes aforesaid May it please Your most Excellent Majesty that it may be enacted and be it enacted by the Queens most Excellent Majesty by and with the Advice and Consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the Authority of the same That where any such Rectories Impropriate Tythes Advowsons or other Things so vested in the said Trustees and directed to be conveyed in Trust as aforesaid are charged with or liable unto any Debts Charges or Incumbrances jointly with any other Lands Tenements or Hereditaments by the said Act vested in the said Trustees such other Lands Tenements or Hereditaments in the first Place be liable to and shall answer and satisfie such Debts Charges and Incumbrances and the said Trustees or any Seven of them are hereby authorized and required to make Sale of such other Lands Tenements or Hereditaments or of a competent Part thereof for or towards the paying off clearing and discharging such Debts Charges and Incumbrances and as soon as conveniently may be from and after such Sale and the clearing and discharging such Debts and Incumbrances such Rectories Impropriate Tythes Advowsons and other Things so vested in the said Trustees and directed to be conveyed in Trust as aforesaid as are together with such other Lands Tenements or Hereditaments jointly charged or incumbred shall be conveyed And the said Trustees or any Seven of them are hereby authorized and required to convey the same to such Person and Persons and in such Manner and to such Uses Intents and Purposes as in the said recited Act is directed and appointed freed and discharged of and from all such Debts Charges and Incumbrances be the same by Matter of Record Mortgage or otherwise.

Recital of Stat. 11 W. III. c. 2. § 47.

Reasons for passing this Act.

Where such Rectories, &c. so vested in the said Trustees are charged or liable jointly with other Lands, &c. so vested, such other Lands shall be in the first Place liable; and the said Trustees are to sell the same and apply the Proceeds accordingly, and then to convey such Rectories, &c. according to the said recited Acts, free from the said Charges.

CHAPTER XXVI.

AN ACT for the Relief of the Protestant Purchasers of the forfeited Estates in Ireland

Rot. Parl. 1 *Anne*, *p.* 4. *n.* 12.

WHEREAS by One Act made in a Parliament holden at Westminster in the Eleventh Year of the Reign of our late Sovereign Lord King William the Third intituled An Act for granting unto His Majesty an Aid by Sale of the forfeited and other Estates and Interests in Ireland and by a Land Tax in England for the several Purposes therein mentioned Itt is provided that the Sum of One and twenty thousand Pounds therein mentioned should be paid to and amongst the several Persons who were Purchasers of any Estate of Inheritance of any of the forfeited Lands or Estates in Ireland under the Grantees thereof who should prove the actual Payment of their Purchase Money before the Trustees mentioned in the said Act for Sale of the forfeited Estates in Ireland on or before the Tenth Day of August One thousand seven hundred to be divided amongst such Purchasers in Proportion to the Sums by them respectively paid for their several Purchases And whereas in pursuance of the said Act several Persons did before the said Trustees prove the actual Payment of the Sum of Fifty nine thousand five hundred and two Pounds for the Purchases of the several Estates of Inheritances to the several Grantees thereof (which said Sum of One and twenty thousand Pounds Part of the said Purchase Money was by the said Act charged on the Lands so purchased respectively) according to the Directions of the said Act And whereas no considerable Part (if any) of the said Sum of One and twenty thousand Pounds hath been as yet paid to the said Purchasers And whereas it may very much conduce to the strengthning and Preservation of the Protestant Interest in Ireland to continue the said Purchasers in the Possession of the respective Lands by them respectively purchased and that some further Relief may be given the said Purchasers May it please Your Majesty (at the most humble Suit of the said Purchasers that it may be enacted and be it enacted by the Queens most Excellent Majesty by and with the Advice and Consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the Authority of of the same That all and every of the said Persons who purchased Estates to them and their Heirs for ever under the Grantees of any forfeited Lands in Ireland (and to whom the

Recital of Stat. 11 W. III. c. 2. § 32.

Reasons for passing this Act.

Certain Purchasers herein mentioned to enjoy according to the Interest of their respective Conveyances;

' interlined on the Roll.

ADD-104

said Sum of One and twenty thousand Pounds was adjudged by the said Trustees pursuant to the said Act to be allowed and their respective Heirs and Assigns shall be permitted to have hold and enjoy the several Manors Castles Towns Lands Tenements and Hereditaments whatsoever respectively conveyed to them by the several and respective Grantees therof mentioned in the several Deeds of Purchase by them respectively produced and proved before the said Trustees before the said Tenth Day of August One thousand seven hundred and allowed by the said Trustees according to the true Intent and Meaning of their several and respective Conveyances or Deeds of Purchase thereof the said Purchasers their Heirs and Assigns paying unto the said Trustees or any Seven or more of them in the Manner and for the Uses expressed in the said first recited Act Thirteen Years Purchase for the Premisses to them respectively to be conveyed for an absolute Estate of Inheritance in Fee Simple clear of Incumbrances where such Estate is vested in the Trustees and according to the Valuation of Six Years and an Half Purchase for an Estate for Life in Possession or for an Estate of Inheritance in Fee Simple in Reversion or Remainder expectant upon an Estate for Life in Possession and so in Proportion for other Interests according to Common Rules of Purchase where the said Trustees are only intituled to lower or lesser Interests in the said Premisses whether for Life or otherwise in Possession Reversion or Remainder according to the Rents at which the said Lands and Premisses were let in the Year of our Lord One thousand seven hundred and one (the Yearly Quit Rents Crown Rents and Composition Rents payable to Her Majesty Her Heirs and Successors being first deducted)

paying to the said Trustees Thirteen Years Purchase, and other Valuations as herein mentioned.

II. Proviso as to Allowance of £21,000 to Purchasers, in part of Payment.

AND be it further enacted by the Authority aforesaid That the Sum of Twenty one thousand Pounds by the said former Act appointed to be paid in part of the said Fifty nine thousand five hundred and two Pounds so proved by the said Purchasers their Heirs or Assigns to have been actually paid for the purchased Premisses to the several Grantees thereof and allowed by the said Trustees to have been paid as aforesaid shall if not before paid by the said Trustees be allowed to the several and respective Purchasers their Heirs or Assigns in part of Payment of the Money after the Rate of the said Thirteen Years or other Purchase appointed to be paid to the said Trustees by this Act

III. Power to the Trustees to make Allowance to Purchasers to remain a Charge upon purchased Estates.

AND wheras several Estates Charges and Incumbrances have been or upon Claims yet to be made before the said Trustees may be adjudged and allowed by them to be charged upon or out of the said purchased Premisses and wherewith the same are or will be chargeable and affected Be it further enacted by the Authority aforesaid That there shall also be deducted and allowed by the said Trustees or any Seven or more of them to the said respective Purchasers their Heirs and Assigns out of the said Thirteen Years or other Years Purchase all and every Sum and Sums of Money which is or shall be allowed by the said Trustees to any Person or Persons whatsoever on their said Claims and an Allowance or Abatement of so much out of the said Purchase Money as shall by the Judgment of the said Trustees or any Seven or more of them according to a reasonable Valuation be made for Estates and Interests by them allowed charging or affecting any of the said purchased Lands respectively and the said Sum and Sums of Money and Valuations so allowed or to be allowed by the said Trustees or any Seven or more of them shall be and remain a Charge and Incumbrance on the said respective purchased Estates severally and respectively according to the Allowance Valuation Judgment or Decree of the said Trustees

IV. Purchasers who have been allowed and who have proved the Payment of Purchase Money, to have such Discount as herein mentioned.

AND it is further enacted by the Authority aforesaid That all and every the Person and Persons aforesaid Purchasers of Estates of Inheritance of any Parts of the said forfeited Lands or Estates in Ireland under the Grantees thereof and who have proved the actual Payment of their Purchase Money before the said Trustees as is aforesaid and who are hereby allowed to be Purchasers after the Rate of Thirteen Years or other Years Purchase and the Inheritance of whose Estates shall remain in the Trustees of the forfeited Estates notwithstanding any Act or Acts passed in this present Session of Parliament shall have a Discount and (1) Abatement out of the said Thirteen Years or other Years Purchase over and above a proportionable Share of the said Twenty one thousand Pounds if not before paid [off1] One Third Part more (the whole in Three equal Parts to be divided) of their several and respective original Monies proved by them to have been actually paid for their several and respective Purchases And that upon their Payment of the Surplus of the said Thirteen Years or other Years Purchase over and above the said proportionable Share of the said Twenty one thousand Pounds and over and above the said Third Part of their original Purchase Money they shall have the same Benefits and Advantages by vertue of this Act as if the said Thirteen Years or other Years Purchase Money had been fully paid by them and that (2) Surplus over and above the respective Proportions of the said Twenty one thousand Pounds and the said other Third Part further allowed by this Act which shall be payable for such Estates after the Rate of Thirteen Years or other Years Purchase as aforesaid (Deductions being made according to the Provisions of this Act) shall be paid by the said several and respective Purchasers their Heirs or Assigns to the said Trustees or any Seven or more of them for the Uses in the said first recited Act mentioned on or before the Twenty fifth Day of March One thousand seven hundred and three And that upon Payment thereof the said Trustees or any Seven or more of them shall at the Request Costs and Charges of the said respective Purchasers their Heirs and Assigns convey unto them respectively and to their respective Heirs Executors and Assigns the Premisses so by them respectively purchased and all their Estate and Interest therin to be held and injoyed by the respective Purchasers their Heirs and Assigns for and according to such Estates and Interests as by the said first recited Act are vested in the said Trustees and that after such Payment and until such Conveyance the said Purchasers their Heirs and Assigns shall be intituled to the Possession Rents and Profits of the Lands and Premisses so to be purchased

Upon Payment of Surplus over and above the said £21,000, Purchasers to have such Advantages as herein mentioned;

the said Surplus to be paid for the Uses in the said first recited Act.

Upon such Payment the Trustees to convey as herein mentioned.

After Payment and until Conveyance Purchasers entitled to Possession, &c.

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ADD-105

V. If Purchasers make Default in Payment, Trustees may sell and dispose of Purchase Money as herein mentioned.

PROVIDED always That in case any of the said Purchasers their Heirs or Assigns shall make default in paying the Remainder of the said respective Purchase Monies by the Time aforesaid it shall and may be lawful to and for the said Trustees or any Seven or more of them and they are hereby required to sell the respective Lands and Premises so purchased by any such Person or Persons who shall so neglect to pay in the Remainder of the said Purchase Monies as aforesaid to pay to such Person or Persons their Executors Administrators or Assigns the respective Proportions of the said Twenty one thousand Pounds and the said other Third Part further allowed by this Act

VI. After Payment of Purchase Money, the Purchasers to hold and enjoy as under Stat. 11 W. 3.

AND be it further enacted That after Payment of the said respective Purchase Monies as this Act directs the said respective Purchasers and their Heirs and Assigns respectively shall have hold and enjoy the several Manors Lands Tenements and Hereditaments so by them respectively purchased in such Manner and Form and with the like Benefits and Advantages as if the said respective Purchasers had [actually'] purchased the same from the said Trustees under and by vertue of the said Act made in the Eleventh Year of His said late Majesties Reign

VII.

AND to the end that none of the said purchased Premisses may ever descend or come to any Papist or Papists or Persons professing the Popish Religion but that the same shall descend and come and remain to be held and injoyed by Protestants for the strengthning and supporting of the English Interest and the Protestant Religion in Ireland Be it enacted by the Authority aforesaid That if any Person educated in the Popish Religion or professing the same and being under the Age of Eighteen Years shall not within Six Months after he or she shall attain the Age aforesaid take the Oaths of Allegiance and Supremacy and also subscribe the Declaration set down and exprest in an Act of Parliament made in the Thirtieth Year of the Reign of the late King Charles the Second intituled An Act for the more effectual preserving the Kings Person and Government by disabling Papists from sitting in either House of Parliament to be by him or her made repeated and subscribed in the Courts of Chancery or Kings Bench in England or Ireland or Quarter Sessions in any County in England or Ireland where such Person shall reside (which said Oaths and Declaration the said Courts and Quarter Sessions are severally hereby impowred to administer) and continue to be a Protestant after the taking the said Oaths and Declaration aforesaid every such Person shall in respect of him or her self only and not to or in respect of his or her Heirs or Posterity be disabled and is hereby made incapable to inherit or take by Descent Devise or Limitation in Possession Reversion or Remainder any of the Lands Tenements Hereditaments or Premisses aforesaid or any Rent or Profit issuing out of the same or any Part thereof and that during the Life of such Person or until he or she shall take the said Oaths and make repeat and subscribe the said Declaration in Manner aforesaid the next of his or her Kindred who shall be a Protestant shall have and enjoy the said Premisses without being accountable for the Profits by him or her received during such Enjoyment as aforesaid

Papists under 18 and not within Six Months after obtaining that Age, taking the Oaths and subscribing the Declaration of Stat. 30 Car. II.

and shall not continue to be a Protestant after taking the said Oaths, &c. disabled for himself, but not for his Heirs, &c.

and during his Life his Protestant next of Kin may enjoy.

VIII. Papist disabled from purchasing any of the said Lands, &c.

AND it is further enacted That every such Papist or Person making Profession of the Popish Religion shall be disabled and is hereby made incapable to purchase either in his or her own Name or in the Name of any other Person or Persons to his or her own Use or in Trust for him or her any of the Lands Tenements or Hereditaments or Premisses aforesaid or any Rents Profits Terms or Interests in or out of the same And that all and singular Estates Terms and any other Interests and Profits whatsoever in or out of the Premisses and all Conveyances and Declarations of Trust concerning the same which shall be made suffered or done to or for the Use Benefit and Behoof of any such Person shall be utterly void and of none Effect to all Intents Purposes and Constructions whatsoever

and Conveyances to such Persons void.

IX. Leases for Lives, or for Terms for Years, of any of the said Lands, &c. to be made to Protestants only; and if made to or in Trust for Papist,

AND it is hereby further enacted That all Leases for Life or Lives or for any Term of Years or otherwise which shall at any Time hereafter be made of any the Lands Tenements or Hereditaments hereby directed to be conveyed by the said Trustees as is aforesaid shall be made to such Persons only as are of the Protestant Religion and to none other And if any Lease for Live or Lives or for Years or otherwise shall at any Time hereafter be made of any the Lands Tenements or Hereditaments aforesaid to or in Trust for any Papist or if any Lease of any such Lands Tenements or Hereditaments shall be made to a Protestant and the same shall afterwards be assigned to or in Trust for any Papist every such Lease so made to or in Trust for any Papist and likewise every such Assignment shall be void and the same is and are hereby adjudged and declared to be ipso facto null and void to all Intents and Purposes whatsoever And in such Case as well the Person making any such Lease or Assignment as the Person to whom or for whose Use or Benefit the same shall be made (in case such Person shall accept such Lease or Assignment) or shall occupy any the Lands or Tenements therein contained shall forfeit Treble the full Yearly Value of all the Lands so let assigned or occupied One Moiety thereof to Her Majesty Her Heirs and Successors and the other Moiety to such Person (being a Ptotestant) who shall sue for the same in any of Her Majesties Courts of Record at Dublin by any Bill Plaint or Information wherein no Essoign Protection Wager of Law or Imparlance shall be allowed

the same to be null and void.

Penalty.

X. Proviso for Leases of certain Cottages, &c.

PROVIDED always That nothing in this Act contained shall extend to make void any Lease that is or shall be made of any Cottage or Cabbin under the Yearly Value of Thirty Shillings per Annum to any Day Labourer whatsoever

' interlined on the Roll.

ADD-106

XI. Proviso for certain Rectories, &c. vested in the said Trustees under Stat 11 W. III. c. 2. § 1.;

but Trustees to make a Deduction out of Purchase Money, as herein mentioned.

PROVIDED also That nothing in this Act contained shall be construed to extend to any Rectories Impropriate or Viccaridges Tythes Oblations Obventions Glebes or other Things to the same Rectories or Viccaridges severally and respectively belonging or appertaining which were by a Clause in the aforesaid Act vested in the Trustees in the said Act named to the Uses Intents and Purposes therein mentioned But that all such Rectories and Viccaridges Tythes Oblations Obventions Glebes and other Things thereunto belonging with their Appurtenances shall still continue to be vested in the said Trustees to such Uses as are in and by the said Act directed and appointed Any thing in this Act to the contrary in anywise notwithstanding But in such Case the said Trustees are to make a Deduction and Allowance after the Rate of Thirteen Years Purchase out of the Purchase Money to be paid unto them for such Rectories or Viccaridges or other Matters aforesaid to all and every Person or Persons who had purchased the same their Heirs or Assigns

XII. Trustees acquitted of Rent, &c. received before Payment of Remainder of the said 13 Years Purchase.

PROVIDED also and be it further enacted That the Trustees in the said Act named for Sale of the forfeited Estates in Ireland shall be and are hereby acquitted and discharged of and from all Rents or Profits or other Sums of Money by them or any for or under them received or to be received for or out of any the Lands Tenements and Premisses aforesaid at any Time before the Payment of the Remainder of the said Thirteen Years Purchase by the said Purchasers respectively and of and from all Actions Suits and Demands for or in respect thereof

XIII. General Saving.

SAVING nevertheless to Her Majesty Her Heirs and Successors all Rents issuing and payable out of or for the said Premisses and also saving to all Bodies Politick and Corporate their Heirs and Successors and to all and every other Person and Persons their Heirs Executors and Administrators (other than the said Trustees in the said Act named) all such Estate Right Title Interest Claim and Demand whatsoever of into and out of the said Premisses as they or any of them might have had in case this Act had not been made Any thing herein contained to the contrary thereof in any wise notwithstanding.

XIV. Reasons for passing this Enactment.

Stat. 11 W. III. c. 2.

AND for the better Preservation and Encouragement of the Protestant Interest in the said Kingdom of Ireland and to the End that none of the Honours Mannors Baronies Castles Messuages Lands Tenements Rents Reversions Services Remainders Possessions Royalties Franchizes Jurisdictions Priviledges or Appurtenances thereunto belonging or in any wise appertaining Rights of Entry Rights of Action Titles Conditions Uses Trusts Powers or Authorities Leases for Life Lives or Years Pensions Annuities Rent-Charges or Hereditaments whether Freehold Copyhold or of what Nature or Kind soever they be within the said Realm of Ireland nor any of the Estates or Interests whatsoever in the said Kingdom of Ireland which by an Act made in the Eleventh Year of the Reign of His late Majesty King William the Third intituled An Act for granting an Aid to His Majesty by Sale of the forfeited and other Estates and Interests in Ireland and by a Land Tax in England for the several Purposes therein mentioned were vested and settled in the Persons in that Act named (Trustees nominated and appointed for putting in Execution the Powers and Authorities in the said Act enacted relating to the said forfeited and other Estates and Interests in Ireland) and their Heirs Executors Administrators and Assigns respectively or which by the said Act or by any subsequent Act or Acts are ordered or directed to be disposed of or sold by them or any of them for the Purposes in the said Act or Acts mentioned may ever hereafter descend or come by Limitation Purchase or otherwise to any Papist or Papists or Person or Persons professing the Popish Religion but that the same forthwith from and after the Disposition and Sale thereof may be possessed and enjoyed and from thenceforth for ever hereafter descend come and remain to be held and enjoyed by Protestants for the strengthning and supporting of the English Interest and the Protestant Religion in Ireland Be it enacted by the Authority aforesaid That all Dispositions and Sales of all and every the said Estates and Interests which shall be made by the said Trustees or any of them shall be made unto Protestants only And that every Person being a Papist or professing the Popish Religion shall be disabled and is hereby made incapable to purchase either in his or her own Name or in the Name of any other Person or Persons to his or her Use or in Trust for him or her any of the Honors Manors Lands Tenements Royalties Franchizes and other Hereditaments of what Nature or Kind soever vested in the said Trustees in order to the selling the same or any Rents Profits Terms for Years or other Interests whatsoever in or out of the same and that all and singular Estates Terms for Years Interests or Profits whatsoever in or out of the said Premisses and all Conveyances and Declarations of Trust concerning the same which shall be made suffered or done to or for the Use Benefit or Behoof of any Papist or Person making Profession of the Popish Religion shall be utterly void and of no Effect to all Intents Purposes and Constructions whatsoever

Sales and other Dispositions of the said Estates by the Trustees, to be made to Protestants only.

Papists, &c. incapacitated;

and all Terms and Conveyances, &c. for the Benefit of Papists, &c. void.

XV.

Papists, &c. further incapacitated.

AND for preventing the said Premisses and every Part thereof at all Times hereafter from coming into the Hands of Papists or Persons professing the Popish Religion Be it enacted by the Authority aforesaid That no Papist or Person professing the Popish Religion during the Time of his continuing a Papist or professing the Popish Religion shall be a Person capable to inherit take or make Title unto by Descent Purchase Limitation Devise or other Conveyance whatsoever in Possession Reversion or Remainder or to have hold or enjoy any of the said Honours Manors Hereditaments and Premisses or any Trust or Interest therein or any Rent or Profit issuing out of the same or out of any Part thereof and that if any Person professing the Popish Religion or educated in the same and not having solemnly and publickly renounced it being of full Age shall not within the Space of Six Months after the accrewing of his or her Title or being under the Age of Eighteen Years shall not within Six Months after he or she shall attain the Age aforesaid take the Oaths of Allegiance and Supremacy and also

Such Persons having attained their Age as herein mentioned, not taking the Oaths of Allegiance and Supremacy, and subscribing the Declaration of

subscribe the Declaration set down and expressed in an Act of Parliament made in the Thirtieth Year of the Reign of the late King Charles the Second intituled An Act for the more effectual preserving the Kings Person and Government by disabling Papists from sitting in either House of Parliament to be by him or her made repeated and subscribed in the Courts of Chancery or Kings Bench in England or Ireland or Quarter Sessions in any County in England or Ireland where such Person shall reside (which said Oath and Declaration the said Courts and Quarter Sessions are hereby severally impowred to administer) and continue to be a Protestant after the taking the said Oath and Declaration aforesaid every such Person shall in respect of him or her self only and not to or in respect of his or her Heirs or Posterity be disabled and is hereby made [incapable[1]]to inherit or take by Descent Devise or Limitation or Purchase in Possession Reversion or Remainder any of the said Honors Manors Lands Tenements Hereditaments or Premisses aforementioned or any Trust or Interest in Rent or Profit issuing out of the same or out of any Part thereof and that during the Life of such Person or until he or she shall take the said Oaths and make repeat and subscribe the said Declaration in Manner aforesaid the next of his or her Kindred who shall be a Protestant shall have and injoy the said Premisses without being accountable for the Profits by him or her received during such Enjoyment as aforesaid.

Stat. 30 Car. II. Stat. 2. c. 1. § 1.

which the Courts are to administer; and not continuing a Protestant, disabled,

and Protestant next of Kin to take during the Life of such Person, or until he shall take the Oaths, &c.

XVI.

AND it is hereby further enacted That all Leases for Life or Lives or for any Term of Years or otherwise which shall at any Time hereafter be made of any the Honors Manors Lands Tenements Hereditaments and Premisses above mentioned shall be made to such Persons only as are of the Protestant Religion and to none other And if any Lease for Life or Lives or for Years or otherwise shall at any Time after such Sale be made of any the Honors Manors Lands Tenements Hereditaments or Premisses aforesaid unto or in Trust for any Papist or Person professing the Popish Religion or if any Lease of any such Honors Manors Lands Tenements Hereditaments or Premisses shall be made to a Protestant and the same shall afterwards be assigned unto or in Trust for any Papist or Person professing the Popish Religion every such Lease so made unto or in Trust for any such Papist or Person and likewise every such Assignment shall be void and the same is and are hereby adjudged and declared to be ipso facto null and void to all Intents and Purposes whatsoever And in such Case as well the Person making any such Lease or Assignment as the Person to whom or for whose Use or Benefit the same shall be made (in case such Person shall accept such Lease or Assignment) or shall occupy any the Lands or Tenements therein contained shall forfeit Treble the full yearly Value of all the Lands so let assigned or occupied One Moyety thereof to Her Majesty Her Heirs and Successors and the other Moiety to such Person (being a Protestant) who shall sue for the same in any of Her Majesties Courts of Record at Dublin by any Bill Plaint or Information wherein no Essoign Protection Wager of Law or Imparlance shall be allowed

Leases for Lives and Years of the said Lands, &c. to be made to Protestants only.

Leases and Assignments to Papists, &c. void.

Penalty on Lessor and Lessee.

XVII.

PROVIDED always That nothing in the last foregoing Clause contained shall extend to make void any Lease that is or shall be made of any Cottage or Cabbin under the yearly Value of Thirty Shillings per Annum to any Day Labourer whatsoever

Proviso for Leases of Cottages, &c.

XVIII.

PROVIDED That nothing herein contained shall extend or be construed to extend to make void impeach or prejudice any Lease of [any of[1]] the said forfeited Estates or [other[1]] Interests made or to be made by the said Trustees for any Term not exceeding One Year

and for Leases not exceeding One Year.

XIX.

AND whereas His said late Majesty King William in consideration of a Fine of Six hundred and eighty five Pounds Sixteen Shillings and Four Pence stated by the Commissioners of Accounts in Ireland to be due from His said Majesty to Major Walter Delamar for Arrears of Pay for his Services in the Kingdom of Ireland did in the Month of October One thousand six hundred ninety six make a Lease to the said Major Walter Delamar of some forfeited Estates in the said Kingdom for the Term of Twenty one Years the said Estates being subject to great Incumbrances and a Jointure for the Life of Plunkett the Relict of Ignatius Plunkett And whereas William Palmer Esquire did purchase from the said Major Delamar Part of the said Estates called Dirpatrick in the Barony of Deece and County of Meath for the Sum of Five hundred Pounds the said Sum being by him paid to the said Walter Delamar for the Remainder of the said Term of Twenty one Years subject to the said Jointure and hath since also laid out Six hundred Pounds and upwards in buying in the said Jointure Estate in the said Lands in dreining a Bogg and building and planting upon the said Estate to the great Improvement thereof And whereas notwithstanding there are but about Fourteen Years to come in the said Lease the same is made void by the late Act of Parliament for reassuming the Forfeitures in that Kingdom And the said William Palmer hath (unless relieved by Parliament) lost the Money so paid and laid out by him and of which the Publick hath had and will have the Benefit Be it therefore enacted by the Authority aforesaid That the said Trustees shall within Twelve Months pay to the said William Palmer his Executors Administrators and Assigns the Sum of One thousand one hundred Pounds and in default of such Payment as aforesaid it shall and may be lawfull to and for the said William Palmer his Executors Administrators and Assigns to have hold and injoy the said Premisses called Dirpatrick aforesaid with the Appurtenances for and during the Residue of the said Term of Twenty one Years according to the said Lease and Assignment therof to him made And in case of such Default the said Lease (as to the Premisses called Dirpatrick) and the said Assignment therof shall be and is hereby confirmed and made effectual the said Act or any thing therin contained to the contrary in any wise notwithstanding subject nevertheless to all and every the Clauses Matters and Things in this Act contained directed to be done and performed by the said other Protestant Purchasers

Reasons for passing this Enactment.

The Trustees to pay Wm. Palmer £1,100, and in default thereof the said W. Palmer to enjoy the Premises called Dirpatrick, as herein mentioned.

[1] uncapable *O.* [2] interlined on the Roll.

ADD-108

XX. Proviso for Omission of enjoining Parties to take the Oath of Supremacy in Acts relating to the forfeited Estates in Ireland.

AND be it further enacted by the Authority aforesaid That in all Acts which have passed this Session of Parliament relating to the forfeited Estates or Interests in Ireland which do enjoyn the taking the Oath or Oaths of Allegiance by any Person or Persons whatsoever and wherein the obliging the taking the Oath of Supremacy is omitted all and every the Person and Persons who are thereby injoined to take the Oath of Allegiance shall be and are hereby obliged and enjoined at the same Time to take the Oath of Supremacy also under the like Penalties Forfeitures and Disabilities as are in the said respective Acts mentioned and contained for and in Default of taking the Oath or Oaths of Allegiance and subscribing the Declaration therein mentioned

XXI. Proviso as to Quantity of Land to be let with Cottages, &c.

Leases to the contrary void.]

Penalty on Lessor and Lessee.

AND it is hereby further enacted and declared That there shall not be let with any Cabbin or Cottage to any Day Labourer (as by any Acts of this Session of Parliament relating to the forfeited Estates in Ireland is permitted) above the Quantity of Two Acres of Land and not above One Cottage or Cabbin with such Land to any one Day Labourer and that in case any other Lease or Leases shall be so made or more Land be let than as aforesaid the Lease of such Cottage or Cabbin as well as of the said Land shall be and is hereby declared to be ipso facto null and void to all Intents and Purposes whatsoever and as well the Person making as the Person taking such Lease or occupying such Cottage or Cabbin or Lands shall forfeit Treble the full Yearly Value of the said Cottage Cabbin or Land to be sued for recovered and distributed as any other Penalties by the said Acts are to be recovered and distributed

XXII. Public Act.

AND be it further enacted That this Act shall be taken and allowed in all Courts as a Publick Act and all Judges and Justices are hereby required to take Notice thereof without special pleading the same

CHAPTER XXVII.

AN ACT for confirming a Purchase made by Her Majesty and an Exchange between Her Majesty and the Deane and Canons of the Kings free Chappell within the Castle of Windsor

[From the Original Act in the Parliament Office, No. 31.]

Recital of the Title of the Dean and Canons.

Premises.

WHEREAS the Deane and Canons of the Kings free Chappell of Saint George the Martyr within his Castle of Windsor are lawfully seized and interested in the severall Messuages Barnes Stables Orchards and Forty Acres of Land Meadow and Pasture in the Parish of New Windsor in the County of Berks herein after more particularly described (that is to say) All that their Stable Barne and Garden on the South Side of Pound Street in the Borough of New Windsor and Two Tenements on the North Side of the said Street And also all those Four Tenements and an Orchard containeing an Acre lying in the said Street late in the Possession of John Topham Esquire Two Acres of Land adjoyning to a certaine Meadow called the Shutes Three Acres of Meadow Part in the Great Avenue and the rest in the said Shutes in the Possession of Doctor Jones, a Close of Meadow Ground called Heathers Close containeing by Estimation Seven Acres Four Acres and an Half more of Meadow Ground in the Shutes late in the Possession of the said John Topham Esquire Fourteen Acres of Meadow Ground in Datchett Mead One Acre of Land in Mill Field and Eight Acres more in Datchett Mead The far greatest Part of which Premisses have of late been made use of and employed for and towards the making the great Avenue from Windsor Great Park to the said Castle and Inlargement of the Little Park and for other convenient and usefull Accomodations to the Royall Palace there and the Residue lyes so disposed that the said Dean and Canons cannott without Prejudice sell Part of the same Premisses without disposeing of the Whole And therefore it is Her Majesties Pleasure to become Purchaser of all the said Premisses from the said Dean and Canons and she hath agreed to make them an equivalent Satisfaction for the same

And that Her Majesty would become the Purchaser.

II. Recital of the Title of Richard Dalton to an Annual Rent of £48. 7s. 9d. herein mentioned.

And that the Prebends out of which same issued are enjoyed by said Dean and Canons subject thereto, and that said Dean and Canons are willing to accept said Rent in Exchange for the Premises first herein-before described, and that Her Majesty had

AND whereas Richard Dalton of Saint James's Parish Westminster in the County of Middlesex Gentleman is seized in Fee of an Annuall Rent of Forty eight Pounds Seven Shillings and Nine Pence reserved and issuing out of severall Præbends Rectories Mannors Lands Tenements and Hereditaments in the County of Devon City of London and elsewhere in the Kingdom of England which (amongst other Things) by certaine Letters Patents of King Edward the Sixth under His Great Seal of England bearing Date the Seventh Day of October in the First Yeare of His Reign were granted to the said Deane and Canons and their Successors under the said Yearly Rent as by the said Letters Patents now remaineing upon Record may appeare Which said severall Præbends Rectories Mannors Lands Tenements and Hereditaments now are enjoyed by the said Dean and Canons or their Undertenant(?) subject to the said Yearly Rent which Rent the said Dean and Canons are willing to take and accept in Exchange for the said Premisses herein before particularly described and mentioned to be scituate lying and being in the said Parish of New Windsor in the County of Berks And Her Majesty by the Advice of the Lords Commissioners of Her Treasury and of Her Surveyor Generall hath agreed that the said Rent shall be conveyed to or vested in the said Dean and Canons and their Successors to the end the Premisses out of which the same was reserved and made payable may be held by them freed and discharged of and from the same And in order to make