*Present:* Ennis J. and Shaw J.

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## DIAS *v.* THE ATTORNEY-GENERAL.

*408—D. C. Colombo, 46,162.*

*Riots—Martial law—Motor cars commandeered by the Military—Action for compensation—Prerogative of the Crown to requisition vehicles without paying compensation—Ceylon Indemnity Order, 1915—Order in Council, 1896.*

The Governor, in consequence of serious rioting, proclaimed martial law, and committed to the Brigadier-General the maintenance of order and the defence of life and property. Two cars belonging to plaintiff were commandeered by the Military authorities during the period of martial law. The plaintiff sued the Crown for compensation for the use of the cars.

*Held*, that the action was not maintainable.

*Per* ENNIS J.—If the impressment of the cars was an unlawful act, it would fall within the terms of the Indemnity Order in Council, 1915, as the act was *bona fide* done. There are, however, lawful ways in which the cars might have been impressed.

The Order in Council, October 26, 1896, prescribed the principles upon which impressment of vehicles may be made (*i.e.*, with payment of compensation out of the public funds of the Colony), and it has the force of law in the Colony by virtue of Proclamation of August 5, 1914. The Order in Council, 1896, is not restricted to the eventuality of a foreign invasion; it applies to internal disturbances like the riots of 1915.

An action would lie to determine the question as to whether there was a liability to pay compensation, but not as to the amount. . . . . The plaintiff's suit has been framed to determine the amount of compensation, which is a matter not within the province of the Courts.

*Per* SHAW J.—In the absence of any legislation by which the Sovereign has consented to a limitation of the right, the Crown and the officers of the Crown have the right in time of war, or of civil disturbance endangering the safety of the State, to enter upon and make use of, or even destroy, the property of any subject, if it is necessary for the public safety so to do, without paying any compensation therefor.

The Order in Council, 1896, does not abolish or limit the prerogative to requisition the goods of a subject in cases of necessity without compensation.

If the General purported to act under the prerogative right, and did so unnecessarily, then the act would be a tortious one, for which the officer responsible would be liable in damages, unless he could bring himself within the protection of the Ceylon Indemnity Order, 1915. In no case, however, can the Crown be made liable for the act of the officers if the act be a wrongful one.

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The Governor had no power (till the Order in Council of March 21, 1916) to delegate the powers given to him by the Order in Council, 1896, to another person. In any case the Governor did not, in fact, delegate his powers (under clause 6) to the General, nor did the General purport to act under such authority.

THE facts are set out in the judgment.

*Bawa, K.C.* (with him *Samarawickreme, Hayley, Cooray,* and *Canakaratne*), for the appellant.

*Garvin, S.-G.* (with him *V. M. Fernando, C.C.*), for the respondent.

*Cur. adv. vult.*

February 20, 1918. ENNIS J.—

In this action Mr. C. E. A. Dias sued the Crown for a sum of Rs. 6,750 as compensation for the use of two motor cars impressed by the Military authorities.

It appears that two cars were supplied by the plaintiff on the requisition of the Military authorities, acting on the orders of the Officer Commanding the Troops in Ceylon, and the appellant accepts the finding of the learned District Judge that one car was detained for ninety-one days and the other for thirty-nine days.

It was contended for the Crown that the Officer Commanding the Troops acted under the powers vested in him by a Proclamation dated June 2, 1915, without any agreement, express or implied, to pay compensation, and that in the circumstances (*a*) no action was maintainable against the Crown, or (*b*), assuming an action were maintainable, it is barred by the Indemnity Order in Council of August 13, 1915. In the alternative it was contended that the cars were impressed in the exercise of the prerogative of the Crown to take without compensation.

The Proclamation of June 2, 1915, proclaimed martial law in the Western Province of Ceylon; declared that the maintenance of order and the defence of life and property in the said Province were committed to the Officer Commanding the Troops in Ceylon; and authorized the said officer " to take all steps of whatever nature that he may deem necessary for the purpose aforesaid."

The Ceylon Indemnity Order in Council of 1915 provided that " (1) No action, prosecution, or legal proceeding whatever shall be brought, instituted, or maintained against the Governor of Ceylon, or the person for the time being or at any time commanding the troops in Ceylon, or against any person or persons acting under them . . . . . for or on account of or in respect of any acts, matters, or things whatsoever in good faith advised, commanded, ordered, directed, or done for the maintenance of good order and government or for the public safety of the Colony between the date of the commencement of martial law and the date of the taking effect of this Order. "

The Indemnity Order came into effect on the date martial law was terminated in the Colony, viz., August 30, 1915, and it is agreed that the detention of the cars occurred during the time martial law was in force. .

There can be no doubt that if the impressment of the cars was an unlawful act, it would fall within the terms of the Indemnity Order in Council, for it is conceded by the plaintiff that the act was *bona fide* done.

There are, however, three lawful ways in which cars may be impressed, viz., (1) in exercise of the Royal prerogative in case of urgent necessity; (2) in exercise of the powers vested in the Governor by section 8 of the Ordinance No. 4 of 1840; and (3) in exercise of the powers vested in the Governor by clause III., sub-clause 6, of the Order in Council of October 26, 1896, which came into operation in the Colony by Proclamation on August 5, 1914, and still applies. Under the first of these, compensation is not payable (except as an act of grace); under the second, compensation is payable at the ordinary rates for hire, together with such extra compensation as the District Court shall think reasonable; and under the third, such compensation is payable out of the public funds of the Colony as may be agreed, or as the Board appointed under sub-clause 13 shall determine.

The effect of a proclamation of martial law is concisely stated in the *Manual of Military Law* (*1914, page 4*):—

> In time of invasion or rebellion, or in expectation thereof, exceptional powers are often assumed by the Crown, acting usually (though by no means necessarily) through its Military forces, for the suppression of hostilities or the maintenance of good order within its territories (whether the United Kingdom or British Possessions); and the expression "martial law" is sometimes employed as a name for this common law right of the Crown and its servants to repel force by force in the case of invasion, insurrection, or riot, and to take such exceptional measures as may be necessary for the purpose of restoring peace and order.
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> The intention to exercise such exceptional powers and to take such exceptional measures is generally announced by the issue of a "Proclamation of martial law"; but, on the one hand, such a Proclamation is not necessary, as the right to exercise these powers depends on the actual circumstances and not on the Proclamation; and, on the other hand, the Proclamation of itself in no degree suspends the ordinary law, or substitutes any other kind of law in its stead, but operates only by way of warning that the Government is about to resort, in a given district, to such forcible measures as may be necessary to repel invasion or suppress insurrection, as the case may be. To obviate any question as to the legality of the measures taken for this purpose (whether or not they have been preceded by a Proclamation of martial law), it has been used to pass an Imperial or local Act of Indemnity for the protection of those engaged, so far as the steps taken by them have been reasonably necessary for the purpose and carried out in good faith . . . .

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As to the exercise of the prerogative power to take without compensation, Lord Parker, in the case of *The Zamora*,[1] said: " There is no doubt that under certain circumstances and for certain purposes the Crown may requisition any property within the realm belonging to its own subjects. "

The prerogative right to take without compensation was held in the case of *The King's Prerogative in Saltpetre*,[2] to be exercisable in case of invasion, and in the *Petition of Right of X.*[3] it was held that the prerogative right is not limited to a case of actual invasion rendering immediate action necessary. It is to be observed, however, that this case was really decided on the Statutes, and further, that after an appeal had been lodged the case was settled by the payment of compensation. *The Zamora* case did not decide the question as to when, under Municipal law, the prerogative right could be exercised, because there the case raised a question of International law and not of Municipal law. In the present case it is conceded that the act was necessary, but that there was any urgent necessity is denied. Martial law was declared in the suppression of the Ceylon riots, but that this was anything more than an " emergency " within the meaning of Ordinance No. 4 of 1840 is contested. I do not consider it necessary to decide the point, as the Order in Council of 1896, which was applied directly a state of war existed, prescribes the principles upon which impressment of vehicles may be made, *i.e.*, with payment of compensation out of the public funds of the Colony, and it has the force of law in the Colony.

As regards the Ordinance No. 4 of 1840, it is clear from the evidence that the Military authorities did not act under it.

As to the effect of the Order in Council of 1896, it was argued in the Court below (*a*) that the Order did not apply to internal dissension; (*b*) that if it did apply, the tribunal to award the compensation was the Board provided for by the Order. The learned Judge found that there was nothing in the Order to restrict its application to the eventuality of a foreign invasion, and held that it was applicable to internal disturbances like the riots of 1915.

In the Supreme Court this finding was not seriously contested, but in place of it it was urged that the Governor could not delegate his powers under the Order so far as they were discretionary and not merely administrative. I have searched the record in vain for any evidence to show that the Governor did not order the impressment of cars. There is nothing but the certificate D 5, which appears to have been issued to Captain Tonks and other officers who carried out the orders of the General, to show that they were acting under his authority. It sets out that the Officer Commanding the Troops was acting " in pursuance of the powers committed to

[1] *85 L. J. (1916), at page 95.* [2] *(1603) 12 Coke's Reports 12.*
[3] *(1915) 3 K. B. 649.*

him under martial law." It does not refer to the Proclamation. The point is entirely new. The plaintiff's fourth issue directly raised the question as to whether the Officer Commanding the Troops had the authority of the Governor to requisition cars, and the first issue framed by the Attorney-General admits that the cars were taken for the service of the Crown. There is nothing in the evidence to show that the authority conferred upon the General in the Proclamation declaring martial law was the only order given by the Governor. The onus of proof on the contention would be on the defendant (*St. James and Pall Mall Electric Light Co., Ltd., v. The King* [1]), and he has not discharged the onus. The presumption is that all orders necessary for the impressment of the cars "for the service of the Crown" were given, and that presumption has not been rebutted. In my opinion the learned District Judge is right in holding that the Order in Council of 1896 was available.

I agree with the learned District Judge that no question of contract can arise in this case. There was no agreement or implied agreement, and the plaintiff-appellant could obtain no compensation, unless the payment of compensation were expressly provided for by legislation, either by Order in Council or Ordinance.

The case of *The Queen v. The Burslem Local Board of Health* [2] and *The Queen v. The Metropolitan Commissioners of Sewers* [3] decided that an action would lie to determine the question as to whether there was a liability to pay compensation, but not as to the amount. On this point it was urged that the plaintiff was entitled to apply to the Courts, as no Board as provided by the Order in Council had been established. It does not appear that there has been any refusal to appoint such a Board, and the plaintiff's suit has been framed to determine the amount of compensation, which is a matter not within the province of the Courts. It would seem, further, that a sum of Rs. 55 was paid (page 19) in respect of compensation of the plaintiff's claim. In the circumstances it would seem that the case is one to determine the amount of compensation. I am of opinion, therefore, that the dismissal of the action was right, and I would dismiss the appeal, with costs.

SHAW J.—

This action is brought by the plaintiff against the Attorney-General, representing the Crown, to recover remuneration for the use of two motor cars, the property of the plaintiff, which were requisitioned by the Military at the time of the riots of 1915, and used by them for periods of ninety-one days and thirty-nine days, respectively. The Judge has found that the sum of Rs. 3,412.50 would be reasonable compensation for the use of the cars, but has

[1] *90 L. T. N. S. 344.*

[2] *1 El. & El. 1077.*

[3] *1 El. & Bl. 694.*

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held that, in view of the circumstances under which the cars were requisitioned, no action lies against the Crown for compensation for their use. From this decision the plaintiff appeals.

The facts very shortly are as follows. On June 2, 1915, serious rioting having broken out in the Colony, His Excellency the Governor issued Proclamation declaring the several Provinces affected to be subject to martial law for the time being, and declaring that the maintenance of order and the defence of life and property therein had been committed to Brigadier-General Malcolm, the Officer Commanding the Troops, who was authorized "to take all steps of whatever nature he may deem necessary for the purposes aforesaid."

Orders were given by the General to Captain Tonks, who was acting as officer in charge of the transport, to "commandeer" cars for the use of the Military. These instructions appear from Captain Tonks's evidence to have been verbal, and not to have related to any particular cars. Acting on these orders, some Military officers went to the plaintiff's house in Colombo and asked for the plaintiff's car "B 27," which the plaintiff accordingly sent to the barracks on the same day. On June 8 the plaintiff received a requisition for his other car, "C 1968," which was at Horana, from the Officer Commanding the Troops at that place. In view of certain contentions set up in the case, the form of that requisition is of some importance:—

C. E. A. Dias, Esq.,
Wawulagoda, Horana.

You are commanded by the General Commanding the Troops to send your car, with driver, petrol, oil, carbide, &c., to Panadure resthouse forthwith.

In the event of your not complying with this order you will be fined Rs. 1,000 for each day of delay.

(Signed) D. WYER, 2nd Lieut., F. A. R. O.,
O. C. Troops, Panadure.

After some correspondence and a further order from the Officer Commanding Motor Transport, couched in somewhat similar terms to the order above set out, and after some delay in consequence of a breakdown of the car, this car was also handed over to the Military in Colombo on July 29.

The cars were retained by the Military until the beginning of September, when they were returned to the plaintiff, and the plaintiff was paid Rs. 55 for repairs to car "C 1968."

Besides the plaintiff's cars, a large number of other cars were requisitioned by the Military. The exact number is not stated in the evidence, but Captain Tonks says that he had in barracks, very roughly, about 300 cars in June, 200 in July, and 100 in August.

It was apparently at one time thought by the Officer Commanding Motor Transport that payment was to be made in respect of cars requisitioned, and the following notice was issued by him and appeared in the " Ceylon Morning Leader " of July 8:—

O. M. S.

All claims in connection with cars commandeered for Military purposes must be sent with full particulars thereof to the undersigned, Echelon Barracks, on or before Thursday, the 15th instant.

OSMUND TONKS, O. C. M. Transport.

Any authority, however, to Captain Tonks to promise compensation for the use of requisitioned cars was subsequently repudiated by the General and the Government, and at the end of August certificates relating to the requisitioned cars were issued by the General in the following form:—

*Certificate.*

I certify that the motor cars requisitioned by ————, in the Town/District of ————, were so requisitioned in pursuance of my directions by virtue of the powers committed to me under martial law for the purpose of the maintenance of public order, and I order that no charge be paid for the use of such motors, except in cases of motors which usually ply for hire only.

(Signed)————, Brigadier-General,
Colombo, August 28, 1915. Commanding the Troops, Ceylon.

Acting on the General's recommendations, the Government has refused to pay the plaintiff any sum as compensation for the use of his cars.

The proposition that, in the absence of any legislation by which the Sovereign has consented to a limitation of the right, the Crown and the officers of the Crown have the right in time of war, or of civil disturbance endangering the safety of the State, to enter upon and make use of, or even destroy, the property of any subject, if it is necessary for the public safety so to do, and that without paying any compensation therefor, appears to me to admit of no question. And this right, although commonly referred to as a Royal prerogative, would seem not merely to be that of the Crown and its officers, but even, should the necessity be sufficient, that of any citizen of the State. In the case of *The King's Prerogative in Saltpetre*,[1] it is stated in the opinion delivered by the entire Bench of Judges: " When enemies come against the realm to the sea coast, it is lawful to come upon my land adjoining to the same coast, to make trenches or bulwarks for the defence of the realm, for every subject hath benefit from it. And, therefore, by the common law, every man may come upon my land for the defence of the realm, as appears in 8 Ed. 4, 23. And in such case on such extremity they may dig for gravel, for the making of bulwarks; for this is for the public, and every one

[1] *(1603) 12 Coke's Reports 12.*

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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 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 able to an action, as it is said in 3 H. 8, fol. 15. And in this case the rule is true, *princeps et respublica ex justa causa possunt rem meam auferre.*"

In *R. v. Hampden* [1] it was admitted by the defence as being law " that in times of war or invasion the maxim ' *salus populi suprema lex* ' must prevail, and that in these times of war, not only His Majesty, but also every man who has power in his hands, may take the goods of any within the realm, and do all other things that conduce to the safety of the kingdom without respect had to any man's property," and Sir Richard Hutton, in the course of his judgment in this case, said: " I do agree, in the time of war, when there is an enemy in the field, the King may take goods from the subjects when there is such a danger that threatens to overthrow the Kingdom."

In *Hale v. Barlow* [2] this right of the Sovereign is recognized by Willes J. in his judgment, as it also is by many writers on Constitutional law, to whose opinions we were referred in the course of the argument.

To come to recent times, this prerogative right has been expressly affirmed in the case of *In re a Petition of Right*,[3] where it was held to apply to the requisitioning of land, without compensation to the subject, save by way of grace on the part of the Crown, in a case where actual invasion had not taken place but was apprehended only. It is true that two of the Judges in that case based their judgments on the right given under the Defence of the Realm Act, 1914, to take land without compensation; but the right of the Crown to take the land under the Royal prerogative without compensation was expressly recognized by all the Judges, and the only doubt that can be raised as to the finding in that case is whether, on the facts of the case, sufficient necessity for the exercise of the prerogative existed.

In the case of *The Zamora*,[4] which was an unsuccessful attempt to extend the right so as to include requisitioning the goods of a neutral on board a neutral ship which had been stopped at sea and brought into an English port by a ship of war, the right to requisition the goods of a subject without compensation is expressly affirmed. In the judgment of the Privy Council delivered by Lord Parker, at page 99, it is stated: " There is no doubt that under certain circumstances and for certain purposes the Crown may requisition

[1] *(1637) Howell's State Trials 825.*
[2] *(1856) 4 C. B. N. S. 334.*
[3] *(1915) 3 K. B. 649.*
[4] *(1916) 2 A. C. 77*

any property within the realm belonging to its own subjects," and, further, on page 100: " The Municipal law of this country does not give compensation to a subject whose land or goods are requisitioned by the Crown."

It is true that in none of the cases I have referred to is mention expressly made of necessity arising from civil disturbance, but I can see no distinction that can properly be drawn between cases where the danger to the public arises from foreign enemies and those where it arises from internal disturbance: in each case the maxim " *salus populi suprema lex* " applies.

In the present case, the Colony being already in a state of war, civil disturbances broke out that occasioned so much danger to the public that it was thought necessary by the Government to issue Proclamations declaring martial law to be in force in the various Provinces affected, and declaring that the General Commanding the Troops had been authorized to take all necessary steps for the maintenance of order and the defence of life and property. The proposition that these Proclamations invested the Military with no greater powers than they had already possessed under the existing law, and only amounted to an intimation to the public that such powers would be exercised, is so well established that it is unnecessary to quote authority therefor. The General Commanding the Troops had, therefore, under the circumstances that had arisen, the right to requisition the property of any subject, without paying compensation for its use, if such requisition was necessary for the safety of the public, and unless such right had been limited by legislation. Whether it was in fact necessary under the circumstances that existed to requisition the plaintiff's cars under the prerogative powers I have been referring to, and whether or no the cars were kept longer than the necessity demanded, I need not discuss, for if the General purported to act under the prerogative right, and did so unnecessarily, then the act would be a tortious one, for which the officer responsible would be liable in damages, unless he could bring himself within the protection of the Ceylon Indemnity Order in Council, 1915. In no case, however, can the Crown be made liable for the act of its officers if the act be a wrongful one, for an action will only lie against the Crown in Ceylon in such cases as a remedy would be available by way of Petition of Right in England, and no such remedy is there available in respect of a tort (see *The Colombo Electric Tramway Company v. The Attorney-General* [1]).

It was contended on behalf of the appellant that the Crown had, by the Order in Council of October 26, 1896, brought into force in Ceylon by the Proclamation of August 5, 1914, limited any rights that may have existed under the Royal prerogative to requisition property without compensation. That Order in Council invests

[1] *(1913) 16 N. L. R, 161.*

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the Governor with various powers, such as are given to His Majesty in Council in England by the Defence of the Realm Act, 1914. It gives power to the Governor to do numerous things that he would clearly have no authority to do under the ordinary law, or under the Royal prerogative that I have referred to, such as prescribing the maximum prices for food, controlling the trade in alcoholic liquors, providing for a *moratorium*. &c. It also provides, by clause 6, that "The Governor may require any person to supply any animals, vehicles, ships, boats, or other personal property belonging to or under the control of such person to the Government, if such property be required in aid of or in connection with the defence of the Colony, and in default of the person supplying the same may seize and take possession of and retain such animals, vehicles, boats, or other personal property for such purposes."

Clause 7 provides that the Governor may take and retain, for such period as he may think necessary, possession for public purposes of any land or building or other property, and clause 12 provides for payment out of the public funds for, *inter alia*, property temporarily taken possession of or removed or destroyed by virtue of the Order, such compensation in default of agreement to be awarded by a Board to be appointed under the Order.

I cannot agree with the contention that this Order in Council was intended to, or does in fact, abolish or limit the prerogative to requisition the goods of a subject in cases of necessity without compensation. The powers given are clearly greater than those under the prerogative, and extend to cases where sufficient necessity cannot be shown to justify the exercise of the prerogative, and the power to requisition and pay compensation in respect of such requisitions appears to me to be given in addition to, and not to the exclusion of, such prerogative right. It would seem most improbable that the Crown would, immediately on the outbreak of war, bring into effect an Order in Council limiting the rights it already possessed for securing the safety of the State.

It was then argued on behalf of the appellant that the Governor, by the Proclamation of martial law, delegated to the General Commanding the Troops his powers under the Order in Council in so far as they were necessary for the maintenance of order and the defence of life and property during the existence of martial law, and therefore the General had authority to requisition the plaintiff's cars under clause 6 of the Order. and must be taken to have acted under that authority, and the plaintiff is therefore entitled to be compensated under the terms of the Order.

The first answer to this contention appears to be that the Governor had no power to delegate the powers given to him by the Order in Council to another person. *Delegatus non potest deligari*, and although the Governor might of necessity delegate the administration of his orders to others, he could not delegate the discretion

vested in him personally by the Order in Council. This seems to have been recognized by His Majesty in Council, for, by an Order in Council of March 21, 1916, the Order in Council of 1896 has been amended, and provision made that "The Governor may if he thinks fit delegate to the Naval or Military authorities in the Colony any of the powers under the principal Order."

A second answer to the contention is that the Governor did not, in fact, delegate his powers under clause 6 to the General, nor did the General purport to act under any such authority. The Proclamation of martial law did not, as I have already said, invest the General with any further powers than those he otherwise had, and merely amounted to a notification that such powers were going to be exercised, and that a direction had been given to the General to exercise such powers; and it is clear that the General himself did not purport to be acting under the Order in Council, for in the form of the orders used in requisitioning cars there is a threat to exact a penalty of Rs. 1,000 for each day of delay in complying with the order; whereas the Order in Council of 1896 provides for a fine of not less than forty shillings and not more than ten pounds in the event of failure to comply with a requisition under the Order in Council. The form of certificate issued by the General on August 28, 1915, as to the payment for requisitioned cars also tends to negative the fact that he purported to act under the Order in Council in making the requisitions.

One other contention put forward on behalf of the appellant remains to be noticed, namely, that under the circumstances in which the cars were taken and retained there arose an implied contract on the part of the Government to pay for their use.

That a contract may sometimes be implied for the purchase or hire of goods where possession has been assumed of another person's goods without any specific mention of terms of contract, and where the circumstances are such that an intention to contract can be inferred, is no doubt true; but the circumstances under which the cars in the present case were taken possession of by the Military expressly negative any idea of a contract. It is only necessary to look at the terms of the order under which the car "C 1968" was requisitioned to show that there could have been no contract between the parties; and the plaintiff in his letter of June 9, 1915, addressed to the Officer Commanding the Troops, Panadure, protesting against the requisitioning of this car, speaker of his other car, "B 27," having been already "commandeered."

For the reasons I have given I think the Crown is under no legal liability to pay compensation to the plaintiff for the use of his cars by the Military, and any such compensation can only be obtained as a matter of grace from the Crown.

I would affirm the decision of the District Court, with costs.

*Affirmed.*