sons combined together to apply their money to two distinct purposes. One of these purposes is admittedly a trade purpose which would constitute a good deduction in a question of excess profits duty, namely, the payment of what was necessary to obtain insurance of the appellants' vessels under a mutual insurance scheme. The other purpose stands upon an entirely different footing. We know nothing about the Shipping Federation or whether the subscriptions paid to it do or do not constitute a proper trade deduction. *Prima facie* they do not, but we really have no information. Further, I should have thought that having regard to the form of the calls there could be no doubt how much of the appellants' contributions was applied to the one purpose and how much to the other. I think it fair, however, that the appellants should have the opportunity of showing, if they can, that the allocation was really different. The practical result is that we negative the main contention of the appellants, but that we allow them to prove, if they can, that the assessment was wrong. In the meantime the assessment stands and the case goes back to the Commissioners to dispose of the appeal upon such new materials, if any, as the appellants lay before them.

LORD CULLEN—The North of England Protecting and Indemnity Association is an association that appears to exist for different and separable objects. One of those is the mutual insurance of its members; another is that of furthering by a particular method the general interests of shipowners, the particular method being membership of a central organisation having for its object the defence or promotion of such interests. The payments which the appellants make from time to time to the Association are made partly for the first of these objects and partly for the second. It seems to me quite clear that in as far as the payments are made for the second object they do not form allowable deductions under Schedule D. Now the payments referred to in the case *prima facie* are of that kind, because they are the amounts of calls made by the Association under the powers of section 62 of its articles of association expressly to enable the Association to contribute to the funds of the Shipping Federation as a central organisation which has for its object the defence and promotion of the interests of shipowners as a body. The Shipping Federation, it may be pointed out, does not in any way insure the appellants. Even, however, if these payments are in some way or other to be regarded as made for both objects of the Association they do not form allowable deductions under Schedule D as long as they are not split up. The appellants, however, have not so far been able to show that any particular portion of the sums paid by them to the Association were payments for insurance. I cannot for my part see any evidence in the case of the appellants not having had a sufficient opportunity, before the Commissioners, of producing such information as might verify the deductions which they claimed. But as the case appears to be a test case I think that as a matter of indulgence the appellants may be given a renewed opportunity of producing such information by a remit.

The Court pronounced this interlocutor—

"Recal the confirmation of the assessments by the Commissioners, and remit to them to give the appellants an opportunity of presenting, if so advised, any evidence upon the question of how much, if any, of the calls referred to in the case properly represent insurance expenditure or a proper trade purpose within the definition of the first rule annexed to the First and Second Cases under Schedule D of the Income Tax Act 1842, and are therefore a proper subject of deduction."

Counsel for the Appellants—Moncrieff, K.C.—Graham Robertson. Agents—Martin, Milligan, & Macdonald, W.S.

Counsel for the Respondent—Lord Advocate (Morison, K.C.)—Candlish Henderson. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Wednesday, December 15.

SECOND DIVISION.

[Lord Cullen, Lord Ordinary on the Bills.

CARLTON (EDINBURGH) HOTEL COMPANY, LIMITED *v.* LORD ADVOCATE AND SECRETARY OF STATE FOR WAR AND AIR.

Process — Emergency Legislation — Summary Petition for Order on Ministers of Crown to Perform Statutory Duty—Duty of Summoning a Jury to Fix Compensation for Premises Temporarily Occupied by War Department—Defence Act 1842 (5 *and* 6 *Vict. cap.* 94), *sec.* 19 — *Court of Session Act* 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 91.

The owners of an hotel which had been temporarily taken possession of by the War Department under the Defence of the Realm Regulations 1914, having been found entitled to such compensation as might be determined under the Defence of the Realm Acts and relative Acts of Parliament, presented a petition, under section 91 of the Court of Session Act 1868, for an order on the Lord Advocate as representing the Secretary of State for War, and also (as the petition was afterwards amended) on the Secretary of State for War, to take steps to cause a jury to be summoned to fix the compensation in terms of section 19 of the Defence Act 1842. *Held* that the petitioners had failed to set forth any statutory duty incumbent on the Ministers in question or either of them which they had refused or unduly delayed to perform, and petition *dismissed* as irrelevant.

Opinion reserved per Lord Dundas as to whether an order under section 91 of the Court of Session Act 1868 could competently be pronounced against Ministers of the Crown for specific performance of a statutory duty.

Opinion per Lord Salvesen that such an order was competent, but that no such statutory duty as was averred by the petitioners existed.

On 2nd July 1920 the Carlton (Edinburgh) Hotel Company, Limited, *petitioners*, presented a petition under section 91 of the Court of Session Act 1868 in which they craved the Court to ordain the Lord Advocate as representing the War Department to take steps to summon a jury or to appoint an arbiter to fix the amount of compensation payable to them in respect of the occupation by the War Department of their hotel.

The petition stated — "The petitioners are a company carrying on business at Edinburgh and are the proprietors of the hotel known as the Carlton Hotel, North Bridge Street, Edinburgh. By virtue of an order issued under the Defence of the Realm (Consolidation) Regulations 1914, and signed by the competent Military Authority in Scotland, possession of the petitioners' hotel was taken by the War Department as from 26th January 1917. In consequence of the continued possession of the said hotel by the War Department, the petitioners intimated to the Department a claim for compensation as at 26th August 1919, in the validity of which the Military Authorities refused to acquiesce, with the result that on 18th August 1919 the petitioners raised an action against the Right Honourable James Avon Clyde, K.C., M.P., then His Majesty's Advocate for Scotland, as acting on behalf of His Majesty's Principal Secretary of State for the War Department. The summons in the said action concluded *inter alia* (3) '*Alternatively* it ought and should be found and declared that the sum due to the pursuers as compensation falls to be ascertained and determined by arbitration in the manner prescribed by either the Lands Clauses Consolidation Acts 1845 and 1860, or the Defence Acts 1842 to 1875, or the Military Lands Acts 1891 to 1903.' Defences were lodged on behalf of the War Department to the said action, the record and the various interlocutors pronounced in which are respectfully referred to. After sundry procedure the following interlocutor was pronounced by their Lordships of the Second Division, with the addition of four Judges of the First Division':—'*Edinburgh, 4th June* 1920.—The Lords of the Second Division, with the addition of the four Judges of the First Division, having considered the reclaiming note for the pursuers against Lord Anderson's interlocutor of 20th May 1920 with closed record as amended, and heard counsel for the parties, in conformity with the unanimous opinions of the Seven Judges, Find and declare that the pursuers as proprietors of the Carlton Hotel, North Bridge Street, Edinburgh, are entitled to such compensation as may be found due to them in respect of the occupation and use thereof by the competent Military Authority in Scotland, under and in terms of the Defence of the Realm Acts and relative Acts of Parliament: Find it unnecessary to dispose of any of the other conclusions of the summons (other than the conclusion for expenses): Dismiss the same accordingly, and decern: Find the pursuers entitled to expenses in the cause against the defender and remit the account thereof when lodged to the Auditor to tax and to report.—CHARLES SCOTT DICKSON, *I.P.D.*' The petitioners are entitled to have the compensation due to them in respect of the occupation and use of their said hotel by the competent Military Authority ascertained and fixed by a jury summoned under and in virtue of the provisions of section 19 of the Defence Act 1842, or alternatively, in the option of the War Department, by arbitration as provided for in section 11 (1) of the Ranges Act 1891. Following upon the said interlocutor dated 4th June 1920 the petitioners' law agents, on 15th June 1920, wrote to the law agent for the War Department requesting that all necessary steps might forthwith be taken to have the compensation fixed, and submitting a copy of the petitioners' claim against the War Department brought up to date. . . . Notwithstanding the terms of the said interlocutor of 4th June 1920, and the fact that the petitioners have called upon the Lord Advocate as representing the War Department to take steps to summon a jury or appoint an arbiter to adjudicate upon the said claim, the Lord Advocate either refuses or delays to do so. . . .'

Answers were lodged for the Lord Advocate as acting on behalf His Majesty's Principal Secretary of State for the War Department, in which the respondent denied that he had refused or delayed performance of any statutory duty incumbent upon him.

He further averred — "Explained that the War Department ceased to occupy the said hotel on or about 15th January 1920. Explained further that since the date of the interlocutor of the Court mentioned, which in turn was consequent on a recent decision of the House of Lords (*Attorney-General* v. *The De Keyser's Hotel*, 1920 A.C. 508), the position of the War Department and other Government Departments concerned as representing the Crown in relation to very numerous claims advanced against the Crown by claimants in the same or similar situations to that of the petitioners, and the procedure to be adopted in relation thereto, has been and is being considered. There has been no unnecessary or unjustified delay. Explained further that the said claim does not conform to and is not warranted by the provisions of the said Defence Act of 1842. The respondent submits that the present petition should be dismissed upon, *inter alia*, the following grounds — (1) That the petition is incompetent in respect (*a*) that the Crown is not subject to the jurisdiction of the Court under section 91 of the Court of Session Act 1868, or otherwise at common law in relation to any such order as is in this petition craved; and (*b*) that the respondent as representing the War Department under the Crown Suits (Scotland) Act

1857 (20 and 21 Vict. cap. 44) is not subject to any such order; (2) That the statements in the petition are irrelevant to infer any failure in a statutory duty incumbent on the respondent; (3) That the said statements are unfounded in fact; and (4) That in any event no such order as is craved should be issued, in respect that the interlocutor founded on is not final but is subject to appeal to the House of Lords."

On 30th July 1920 Lord Cullen, the Lord Ordinary officiating on the Bills, dismissed the petition.

Opinion.—"This petition, which is one under section 91 of the Court of Session Act 1868, was presented during the session to Lord Anderson on 2nd July last. Answers were ordered and lodged, but the petition had not been further dealt with by Lord Anderson when the Court rose. Section 91 provides that such a petition may be presented to any Lord Ordinary, or in time of vacation or recess to the Lord Ordinary on the Bills. It further provides that where the petition is presented to the Lord Ordinary on the Bills it may, after the ordinary sittings of the Court have commenced, be transferred to one of the Lords Ordinary in the Outer House in manner provided with respect to Bill Chamber proceedings. There is, however, no express provision for proceedings under a petition presented to a Lord Ordinary during session being continued by the Lord Ordinary on the Bills. This being so, it is maintained for the respondent that as the Lord Ordinary on the Bills I have no power to entertain the present petition, although if it had been withdrawn and another petition in the same terms had been presented to the Lord Ordinary on the Bills during vacation I would have power to deal with the latter. This is an exceedingly technical objection. It does not appear to me to be well founded. I think that on a fair construction of section 91 it is implied in it that a petition presented to a Lord Ordinary during session and not finally disposed of by him shall, when vacation or recess ensues, be taken up by the Lord Ordinary on the Bills.

"Passsing to the prayer of the petition, it craves that the respondent be ordered to have the compensation payable to the petitioners ascertained and fixed, alternatively, by causing a jury to be summoned or appointing an arbiter for the purpose. The second alternative is intended to refer to the Ranges Act 1891, section 11. It was pointed out, however, by the Solicitor-General that section 11 of that Act only applies 'where any land is acquired,' and that in the present case the claim is not in respect of land being acquired but in respect of a temporary occupation and use of the petitioners' premises. *Prima facie* this criticism would seem to be well founded. No answer was made to it by the petitioners' counsel, who said he was content to have the crave of the petition regarded as limited to the first alternative, viz., procedure under the Defence Act of 1842, section 19. When one turns to that enactment one finds some difficulty in applying its machinery to the present case. It provides that in default of treating, or where the parties do not agree, the principal officers may require two or more justices, &c., to put them into immediate possession, to which end the said justices, &c., shall issue their warrants commanding possession to be so delivered, 'and shall also issue their warrants to the Sheriff of the county, &c., to summon a jury,' who are to find the compensation to be paid. Thus the function of issuing warrants for the summoning of the jury lies with the justices, &c., consequent upon the granting by them of warrants for taking possession required from them by the principal officers. There is no express provision for the case where no such warrants for taking possession are required and granted, or as to the persons with whom lies the power and duty of summoning a jury in such a case. As I understand the judgment in the *De Keyser* case — and counsel for both the present parties agreed as to this — the declaration made of the petitioners' right to have compensation fixed and paid had reference to section 19 of the Act of 1842, and I think therefore I must take it that with some adaptation of its terms the machinery for fixing compensation by a jury falls to be applied in a case like the present. Even so, however, it is not plain with whom lies the duty or the power of taking steps to have the jury summoned, or what is to be the *modus operandi*. On this matter the somewhat brief discussion which I heard afforded no light. Nor does the petition deal with the difficulty, which apparently had not been considered by the petitioners. It merely tables the section and craves in general terms that the respondent be ordered to cause a jury to be summoned. In the absence of a clearly defined duty laid on the respondent by the statute I doubt whether the case is one suitable for the application of the summary procedure provided by section 91 of the 1868 Act. It is a possible view that the petitioners having right to be paid compensation are themselves entitled to take steps for having warrants issued for the summoning of the jury by whom the compensation falls to be assessed.

"It was submitted by the Solicitor-General that the power given to the Court under section 91 to issue a mandamus or order for performance of a statutory duty does not apply to the Crown, and that no such order can competently be made under the section against officers of the Crown. It was also submitted that, on the opposite assumption, the petition was ill founded in asking an order on the respondent in respect that in any event no duty of causing a jury to be summoned under section 19 of the Act of 1842 fell to be performed directly by the respondent, and that an order for performance of a statutory duty under sanction of penalties should always be addressed to the person or persons with whom directly lies the duty and the power of performance. The Crown Suits (Scotland) Act 1868, it was submitted, does not authorise the order here asked being made on the respondent. These are important and difficult questions,

and had it been necessary to decide them I should have desired a much fuller argument than that which I heard. But if it be assumed that these propositions are not well founded, and also that there exists the duty on the officers of the Crown under section 19 of the Act of 1842 which the petitioners urge, it appears to me that the power of the Court to issue a mandamus is not one to be exercised unless in the case of a clearly ascertained refusal, or a determined course of abstention from action equivalent to such a refusal, to perform the duty; and in the case of a duty lying on the officers of the Crown in the matter of giving effect to a patrimonial right which has already been authoritatively declared by the Court, I think I am bound to make every presumption that they intend to act as the law requires, unless and until it is quite clearly demonstrated that for some reason difficult to suppose they in fact refuse to do so, and in this respect the petitioners' averments appear to me to fail of relevancy. Some weeks have elapsed since the petitioners obtained decree of declarator in their favour. The petitioners are, it appears, in urgent need of the money, and any delay is, no doubt, felt by them to be hard and seems to them inexcusable. But with the statement before me made by the respondent in his answers, which I feel bound to accept, and having in view the difficulty already referred to which arises under section 19 of the Act of 1842, I am unable to hold that there is here made out such a case of refusal of performance of duty as would justify the making of an order under section 91. I shall accordingly dismiss the petition."

The petitioners reclaimed.

The respondent obtained leave to amend his answers by adding the following words: —"It is further explained that any claim the petitioners may have for compensation in respect of the occupation and use of their hotel by the competent military authority now falls to be made to and assessed by the War Compensation Court, as provided by section 2 of the Indemnity Act 1920."

In answer thereto the petitioners obtained leave to add to the petition the following amendment:—"In view of the fact that the said interlocutor was a final interlocutor, and was not the subject of a pending appeal at the date of the passing of the Indemnity Act 1920, the petitioners' claim to compensation is excluded from the scope of the said Act by the terms of section 1 (4) thereof, and falls to be dealt with, not by the War Compensation Court set up under section 2 of the said Act, but by a jury summoned under and in virtue of the provisions of section 19 of the Defence Act 1842."

On 9th November 1920, on the motion of counsel for the petitioners, the Court allowed the petition to be further amended by the insertion in the prayer thereof of a crave against the Right Honourable Winston Spencer Churchill, His Majesty's Secretary of State for War and Air, to have him forthwith ordained to perform the acts set forth in the prayer, and appointed service of the petition as then amended to be made on the said Right Honourable Winston Spencer Churchill.

Answers were lodged for the Right Honourable Winston Spencer Churchill submitting that the petition should be dismissed on the following grounds: — "(1) That the respondent is not subject to the jurisdiction of the Court of Session; (2) that the petition is incompetent in respect (*a*) that the Crown is not subject to the jurisdiction of the Court under section 91 of the Court of Session Act 1868, or otherwise at common law in relation to any such order as in this petition craved, and (*b*) that the respondent is not subject to any such order; (3) that the statements in the petition are irrelevant to support the crave of the petition as against this respondent; (4) that the present proceedings by way of petition and summary order thereunder are inept; and (5) that the claim of the petitioners for compensation falls to be dealt with under the provisions of section 2 of the Indemnity Act 1920."

At the hearing in the short roll the reclaimers argued—(1) The Indemnity Act 1920 (10 and 11 Geo. V, cap. 48) did not apply to the case. (2) The compensation fell to be fixed under the Defence Act 1842 (5 and 6 Vict. cap. 94), sec. 19—*Attorney-General* v. *De Keyser's Royal Hotel*, [1920] A.C. 508, *per* Lord Dunedin at 528, Lord Atkinson at 541, 542, 543, 544, Lord Moulton at 550, and Lord Sumner at 560, 561, 562. The machinery of the Act of 1842 had to be set in motion by the Secretary of State for War, because section 19 imposed on the principal officers of Ordnance the statutory duty of summoning the jury. As the Secretary of State for War had not fulfilled this statutory duty the petitioners were entitled to an order under the Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 91. Such an order was the equivalent of a mandamus — Court of Exchequer (Scotland) Act 1856 (19 and 20 Vict. cap. 56), sec. 15—and the petitioners were entitled to such an order primarily against the Secretary of State for War, whom failing against the Lord Advocate—Court of Exchequer (Scotland) Act 1856, sec. 22; Crown Suits (Scotland) Act 1857 (20 and 21 Vict. cap. 44), sec. 1. Where the ministers of the Crown had failed to fulfil a statutory duty an order on them could competently be obtained under the Court of Session Act 1868, sec. 91 — *Duke of Atholl* v. *Postmaster-General*, 1870, 8 S.L.R. 66; *Somerville* v. *Lord Advocate*, 1893, 20 R. 1050, 30 S.L.R. 868, *per* Lord M'Laren at 20 R. 1075, 30 S.L.R. 884; *Reg.* v. *Commissioners of Woods and Forests*, 1850, 15 Ad. & El. 761, *per* Lord Denman, C.J., at 767 (foot-note); *Reg.* v. *Commissioners for Special Purposes of the Income Tax*, 1888 L.R., 21 Q.B.D. 313, *per* Lord Esher, M.R., at 317, and Lindley, L.J., at 322; *Nireaha Tamaki* v. *Baker*, [1901] A.C. 561, *per* Lord Davey at 576; *Rex* v. *Commissioners for Special Purposes of Income Tax, Dr Barnardo's Homes, National Incorporated Association, Ex parte*, [1920] 1 K.B. 26, *per* Earl of Reading, C.J., at 37; *Attorney-General* v. *De Keyser's Royal Hotel* (*cit.*), *per* Lord Parmoor at 575.

Argued for the respondents—(1) The Indemnity Act 1920 applied. (2) The petition

was incompetent in respect that an order under section 91 of the Court of Session Act could not be obtained against the Crown. The penalties of fine and imprisonment imposed by the section were inappropriate to the case of the Crown. The Crown was never put under an obligation unless expressly in a statute. The remedy against the Secretary of State for War was a vote of no confidence in the House of Commons —*Reg.* v. *Secretary of State for War*, [1891] 2 Q.B. 326, *per* Esher, M.R., at 338, and Kay, L.J., at 339; *Rex* v. *Commissioners for Special Purposes of Income Tax, Dr Barnardo's, Homes National Incorporated Association, ex parte*; *Attorney-General* v. *De Keyser's Royal Hotel, cit.* In any event the petition was irrelevant in respect that it did not relevantly aver any failure on the part of the Lord Advocate or the Secretary of State for War to perform a statutory duty. Section 19 of the Defence Act 1842 did not lay upon the principal officers of Ordnance any duty of summoning a jury. The duty of the officers of Ordnance ended with the taking of possession of the lands. The Ordnance Board Act 1855 (18 and 19 Vict. cap. 117), sec. 1, and the Defence Act 1842, secs. 36 and 37, were also referred to.

At advising—

LORD JUSTICE-CLERK—This petition was presented under and in terms of section 91 of the Court of Session Act 1868. I have had an opportunity of reading the opinion to be delivered by Lord Dundas, and subject to the following observations I concur in that opinion.

The application in so far as the alternative crave for the appointment of an arbiter is concerned was not insisted in, but it is still maintained on the basis that section 19 of the Statute of 1842 imposed a statutory duty on the Secretary of State for War to take steps to cause a jury to be summoned to fix the compensation due to the Hotel Company in terms of that section. The original prayer was for an order on the Lord Advocate, but after the reclaiming note was presented the petition was amended to the effect of asking for an order also on the Secretary of State for War as now in the place of His Majesty's principal officer of Ordnance.

The first question to be considered is—Is there any such statutory duty as the petitioners found on? The hotel was taken possession of, as the petitioners aver, by the War Department in 1917 in virtue of an order issued under the Defence of the Realm Consolidation Regulations 1914, signed by the competent military authority in Scotland. The official notice or order to take the petitioners' hotel was in these terms:—"DEFENCE OF THE REALM. By virtue of the powers conferred on me under the Defence of the Realm Consolidation Regulations 1914, and in particular Regulations 2 and 9 thereof, I, Brigadier-General F. C. Gilpin, being a competent Military Authority under the said Regulations, do hereby Order that the Carlton Hotel, North Bridge, Edinburgh, shall be taken possession of by the War Department forthwith, and that the inhabitants of the specified area shall leave the area as may hereafter be determined." Possession of the hotel was taken under and by virtue of that order. Neither the principal officer of Ordnance nor the Secretary of State for War as in his place required to do anything or to require that they should be put in possession of the hotel in terms of section 19 of the 1842 Act. The purposes for which the hotel was originally taken having now been served, the hotel has been vacated by the Government.

The Hotel Company in August 1919 raised an action against the Lord Advocate, as representing the Secretary of State for War, to have it found and declared that they were entitled to compensation. The summons contained also a conclusion for payment of the sum claimed as compensation (over £29,000), or, alternatively, for a declarator that the amount of compensation should be determined by arbitration under, *inter alia*, the Defence Act of 1842. After a good deal of procedure in that action it was delayed until the decision of the *De Keyser* case, [1920] A.C. 508, in the House of Lords should be given. That decision having been given on 10th May 1920, the petitioners' action was disposed of by the interlocutor of 4th June 1920, quoted in the petition. No appeal has been taken against that interlocutor. The present petition was presented on 2nd July 1920. The Indemnity Act of 1920 became law on 16th August 1920.

In the decision of the House of Lords certain pronouncements were made as to the effect of the 1914 legislation on the Act of 1842. It is desirable to note what some of these were. Lord Dunedin expressed it thus (at p. 530)—"There are various restrictions as to the initiation of proceedings, notices, &c., which I have not thought it necessary to quote. These may be taken as swept away by the simple authority to take. There remains the question whether the obligation to pay can be considered as a restriction and also swept away. I think it cannot. The word 'restriction' seems to me appropriate to the various provisions as to notice, but not at all appropriate to the obligation to make compensation." Lord Atkinson, referring to the same statute of 1914 (at p. 543), says that it provided for the naval and military authority taking possession of land, &c., "without any of the preliminaries prescribed by the Defence Act of 1842 . . . As to real property, no preliminary procedure of any kind is prescribed." And he comes to the "irresistible conclusion" that the earlier provisions of 1842 have been suspended by the later legislation of 1914. Lord Moulton (at p. 551) says—"The Regulations and the Act under which they are made must, of course, be read together, and it is in my opinion a sound inference from the language of sub-section (2)—that is, of the said Act of 1914—"that the Legislature intended that so far as the acquisition or user of land was concerned the Regulations should take the form of action under the Defence Act 1842, facilitated by the suspension of some or all of the restrictions which it imposes." He reaches the conclusion that

under the Regulations of 1914 "we ought to consider them as authorising action being taken under the Defence Act 1842, save that no restrictions therein appearing are to be enforced. The duty of paying compensation cannot be regarded as a restriction. It is a consequence of taking, but in no way restricts it, and therefore as the acquisition is made under the Defence Act 1842 the suppliants are entitled to the compensation provided by that Act." Lord Sumner (at p. 560) says—"If, however, formalities not inconsistent with the exigencies of a state of war in 1842 would have been prejudicial to the public service in 1916, the powers given by sub-section (2) of section 1 of the Act of 1914 had only to be exercised, as in fact they were, and all these difficulties would vanish. I see no reason to doubt that the Act of 1842 gave all the powers necessary for the exigencies of the recent war, subject only to the removal of restrictions contained in it."

The result of the judgment in *De Keyser's* case therefore was, in my opinion, that while the preliminaries to, and the restrictions on the taking of land required by the 1842 Act were removed by the legislation and Regulations of 1914, the right to compensation remained.

In the present case, as in *De Keyser's* case, possession was taken by the shorthand method authorised in 1914, the preliminaries and restrictions required by the Act of 1842, *e.g.*, by sections 19 and 23, being dispensed with as unnecessary.

In my opinion section 19 of the 1842 Act imposed no statutory duty as to causing a jury to be summoned on the principal officer of Ordnance. Even assuming there had been any such preliminary duty imposed on that officer by the Act of 1842, the provisions of that statute, so far as any such duty was concerned, were superseded by the Act and Regulations of 1914. There is therefore no basis for a petition under section 91 of the Court of Session Act, because there is no such statutory duty as the petitioners found on.

The respondents maintain that the Indemnity Act of 1920 displaces the jury required by the Act of 1842, and substitutes the tribunal constituted by the 1920 Act. Whether that plea is well founded or not does not seem to me a question fitting to be disposed of in a hearing on a summary petition under the said 91st section. But in any event, while that question was opened to us it was not at all fully argued. There are other cases pending where the point is competently and relevantly raised and must be decided, and I do not find it necessary to deal with it now.

In my opinion the petition should be dismissed as irrelevant.

LORD DUNDAS—In my judgment the interlocutor pronounced by Lord Cullen as Lord Ordinary officiating on the Bills is right, and I concur substantially in the grounds stated in his opinion.

This is a summary petition under section 91 of the Court of Session Act 1868 for an order for specific performance of an alleged statutory duty. The remedy thus sought is peculiar and drastic. It has not, I believe, been frequently resorted to; I am aware of only one reported instance—*Adamson*, (1872) 10 Macph. 553. Those who invoke this remedy must, I think, be careful to aver a clear statutory duty which those on whom its performance is incumbent have refused or unduly delayed to perform, and to state in precise terms the order which by their prayer is sought from the Court. Such an order is more or less equivalent to the English mandamus, as to the nature and application of which there is much authority in England. It was argued as an objection *in limine* that this petition is incompetent, because section 91 does not apply to the Crown, and no such order or mandamus can lie against the ministers who are called as respondents, or either of them. The question is interesting and not unimportant, but I agree with Lord Cullen that it is unnecessary to consider or decide it here, because the petition is radically irrelevant, and must on that ground be dismissed. It appears to me that even assuming the petition to be competent the petitioners have failed to set forth relevantly any statutory duty incumbent on the ministers in question, or either of them, which they have refused or unduly delayed to perform.

In an action by the petitioners against the Lord Advocate as representing His Majesty's Principal Secretary of State for War, this Division, in conformity with the unanimous opinions of Seven Judges, pronounced an interlocutor on 4th June 1920, by which, following the House of Lords judgment in the *De Keyser* case ([1920] A.C. 508) they found and declared that the pursuers "are entitled to such compensation as may be found due to them in respect of the occupation and use" of their premises "by the competent Military Authority in Scotland, under and in terms of the Defence of the Realm Acts and relative Acts of Parliament." The petitioners, after quoting this final judgment, aver that they are entitled to have the compensation "ascertained and fixed by a jury summoned under and in virtue of the provisions of section 19 of the Defence Act 1842, or alternatively, in the option of the War Department, by arbitration as provided for in section 11 (1) of the Ranges Act 1891." This alternative was verbally abandoned by counsel before Lord Cullen and at our bar. The petition, I should here observe, was brought on 2nd July 1920, the Lord Advocate being called as respondent, but leave was asked at our bar and granted, to cite the Secretary of State for War "personally," who lodged answers, objecting, *inter alia*, to the jurisdiction of this Court. The petitioners go on to aver that notwithstanding the interlocutor of 4th June, and the fact that they have called on the Lord Advocate as representing the War Department to take steps to summon a jury, his Lordship either refuses or delays to do so, and that the petition has been rendered necessary in order to have the Lord Advocate and also the Secretary of State for War personally ordered forth-

with to take steps to summon a jury. The prayer is that the Court should order the Lord Advocate and the Secretary of State for War personally "forthwith to take such steps to have the compensation . . . ascertained and fixed as may be necessary for the fulfilment of the statutory duty imposed upon the said Principal Secretary of State by the Defence of the Realm Acts and relative Acts of Parliament by causing a jury to be summoned," &c. These are the whole material parts of the petition as amended. They nowhere contain any specific statement of the precise nature and extent of the statutory duty alleged to be incumbent upon either minister, and the prayer is so loose and vague that it would, in my judgment, be impossible for the Court to pronounce a penal order in terms of it. I agree with Lord Cullen, save that I scarcely share his doubt when he says that "in the absence of a clearly defined duty laid on the respondent by the statute, I doubt whether the case is one suitable for the application of the summary procedure provided by section 91 of the 1868 Act."

It is not surprising that the petitioners have failed to state the precise nature and extent of the alleged statutory duty, for it is clear that the parties are at issue and the petitioners themselves are in doubt upon the matter. Section 19 of the 1842 Act is not easy to construe, or to apply to the circumstances here present, and even the petitioners are not clear that it is the duty, or solely and exclusively the duty, of the Secretary of State for War to initiate the desired procedure under the section. Grave questions were mooted and to some extent debated at our bar—(1) whether the 1842 Act is really now applicable here, or whether it is the Indemnity Act 1920 which must be called in aid—an Act passed, be it observed, subsequent to the *De Keyser* decision, the interlocutor of this Court on 4th June 1920, and the presentation of the petition; (2) in what manner, if at all, and by whom, section 19 of the 1842 Act ought to be set in motion and operated. I do not see how these difficult problems can be fittingly solved as incidental to this summary application; still less, how the Court could grant, apart from any question of competency, a penal order to compel performance of a statutory duty the very existence of which, apart from its precise nature and extent, could only be ascertained after involved investigation into various statutes. Section 91 was, in my judgment, never intended to provide a medium for the expiscation of intricate and doubtful duties, but rather for the summary enforcement of clearly existing ones, the due performance of which is neglected.

The truth seems to me to be that this petition has been brought hastily and ill-advisedly. The interlocutor of this Court was dated 4th June. The petition was brought on 2nd July after a brief and perfunctory correspondence. The Indemnity Act became law on 16th August. In the Lord Advocate's answers, lodged 13th July, it is stated that since the Court's judgment on 4th June "the position of the War Department and other Government Departments concerned as representing the Crown in relation to very numerous claims against the Crown by claimants in same or similar situations to that of the petitioners, and the procedure to be adopted in relation thereto, has been and is being considered. There has been no unnecessary and unjustified delay." Having regard to this statement, which he felt bound to accept, Lord Cullen was "unable to hold that there is here made out such a case of refusal of performance of duty as would justify the making of an order under section 91." Lord Cullen had not, of course, before him the Indemnity Act, which had not then become law. At our bar the Lord Advocate in person assured us that the departments were seriously considering the very difficult problems in relation to this and other cases, that there had been no unnecessary delay, but that the departments were not yet able to take up a definite position as to the claimants' demands and the procedure to be followed. I think that such statements, responsibly made by or on behalf of a minister, ought to be, and are in use to be, accepted by the Court, at all events in the absence of very pointed and specific counter statements—*cf., e.g., Dalziel School Board*, 1915 S.C. 234, pp. 245 top, 247 top.

In these circumstances the petitioners have not, in my judgment, at all made out such a case as would justify an application under the peculiar and drastic provision of section 91 of the Court of Session Act. They do not—indeed cannot—aver definitely and precisely what statutory duty is incumbent on the respondents or either of them, nor have they been able to show that there has been up to the present undue delay, still less refusal, on the respondents' part to pay compensation when the proper mode of assessing it has been ascertained or agreed. I am not without sympathy for the petitioners, who naturally desire to get their money with all speed. But I think they have sought a remedy to which they are not entitled. When this petition, however, is out of the way I venture to hope that the Crown authorities may be able to arrange with the petitioners for a satisfactory settlement which might render unnecessary any resort to legal proceedings.

The petition is, in my judgment, radically irrelevant. It must therefore be dismissed and Lord Cullen's interlocutor adhered to.

Since writing the above I have had an opportunity of reading the Lord Justice-Clerk's opinion, and as regards the point therein elaborated, which was not argued to us, I am, as at present advised, disposed to agree with his Lordship's view.

LORD SALVESEN—I am unable to concur with the view of Lord Dundas that we should refuse to decide or indicate our opinion upon any of the questions of law which arise out of the petition and which have been fully discussed before us, on the ground that the petition is itself irrelevant. The petitioners aver that they are entitled

to have the compensation due to them in respect of the occupation and use of their hotel by the competent military authority ascertained and fixed by a jury summoned under and in virtue of the provisions of section 19 of the Defence Act 1842. This averment is not challenged by the respondents, and indeed could not be so, because of the decision of the House of Lords in the *De Keyser* case, [1920] A.C. 508, which expressly settled that section 19 provides the only machinery by which that claim can be ascertained. On the petitioners' construction of this section the only person who can put the machinery in motion is the minister who represents the principal officer referred to in the section, and that minister must either be the Secretary of State for War or the Lord Advocate as representing him, in terms of the Act 20 and 21 Vict. cap. 44, section 21, if that section applies to a proceeding such as the present. I do not think the Court can avoid deciding this question, which is one of the construction of an Act of Parliament, on the mere ground that the section admits of more than one construction. If, as the petitioners maintain, the principal officer mentioned in the section is the only person who can apply to the justices or other tribunal specified therein in order to obtain a warrant to the Sheriff to summon a jury for the purpose of assessing their claim to compensation, I can imagine no reason why the statutory duty thereby imposed should not be declared by the Court in an application brought as this one is under section 91 of the Court of Session Act 1868. To decide otherwise would be to hold that when a duty was laid by Act of Parliament on a minister of the Crown it must remain a dead letter so far as the rights of private individuals are concerned. It falls on us to consider and determine whether in fact such a duty is laid on the principal officer, or whether the machinery can be set in motion by an application to the justices or other equivalent tribunal at the instance of a claimant whose property has been taken possession of against his will by some agent of the Government.

Section 19 makes it a condition of the principal officer being put into immediate possession of property belonging to a subject without his consent that he shall obtain a warrant from the tribunal specified commanding possession to be so delivered. When this section is invoked, it follows from the warrant being granted that compensation shall be paid to the person so dispossessed, and it is imperative upon the tribunal to issue a warrant to the Sheriff to summon a jury for the purpose of assessing compensation. It is, however, not expressly stated that such warrant can only proceed on the application of the principal officer, and I see no adequate reason to conclude that what is not expressed must be implied, or that the warrant for summoning a jury must be concurrent with the warrant for putting the principal officer in possession of the subjects which he requires for Government purposes. On the contrary I can quite well imagine that it would often be more convenient that the claim for compensation, where the principal officer only desired to have possession of land or buildings for a limited time, should not be assessed until the possession had come to an end, and I see no good reason why the claimant should not take advantage of the machinery prescribed for this purpose at his own hand. In my opinion therefore the petition falls to be dismissed, not because a statutory duty on the principal officer is not relevantly averred, but on the ground that on a sound construction of section 19 such a duty does not exist.

Strictly speaking, that is sufficient for the decision of the case, and it becomes unnecessary to consider whether the Indemnity Act 1920 has abrogated the rights which the petitioners would otherwise have had under section 19 of the 1842 Act. I regret that your Lordships in the view you have taken of the case have decided that this point must be reserved for future litigation, because we have before us the materials and the arguments on which this short and sharp question of law could have been decided. In these circumstances I content myself by saying without detailing my reasons that at the debate I formed an opinion in favour of the petitioners on this point.

I agree with Lord Dundas in the sympathy which he expresses for the petitioners, and in the hope that the respondents will not put difficulties in the way of the petitioners having their claim ascertained. They have been deprived of the use of their property for the public benefit, and they may well complain that their claim has not yet been adjudicated upon, although a considerable period of time has already elapsed since the competent military authority vacated their premises. The claim appears to me to be of the simplest character, although some of the items may no doubt give rise to controversy, but it ought to be capable of being disposed of by a jury (or by arbitration if the respondents should so elect) within a much shorter period than this petition has been under the cognisance of the Court.

LORD ORMIDALE — This petition is presented under section 91 of the Court of Session Act 1868, which enacts that "it shall be lawful for the Court upon application by summary petition . . . to order the specific performance of any statutory duty under such conditions and penalties (including fine and imprisonment where consistent with the statute) in the event of the order not being implemented as to the Court shall seem proper." It was directed in the first instance only against the Lord Advocate, but after it was brought into the Inner House by reclaiming note the petitioners asked for and obtained an order for service also on the Secretary of State for War. Answers have been lodged by both the Lord Advocate and the Secretary of State. Both respondents plead, *inter alia*, that the statements in the petition are irrelevant. In my opinion this contention falls to be sustained, and I think it unnecessary to deal with the other questions which were discussed.

The failure to obey an order pronounced under the petition may be followed by highly penal consequences. The statutory duty, therefore, which the petitioners say the respondents were under obligation to perform must be clearly set forth. The petitioners' averments must also clearly show that the respondents have without good reason failed to perform the duty. Now, without quoting them, the terms of the order craved by the petitioners are, in my judgment, so vague and indefinite that it is impossible for the Court to grant such an order. They suggest that not in one Act but in several Acts of Parliament, none of which is cited, the alleged statutory duty is to be discovered. The averments of the petitioners, on the other hand, refer to only one Act of Parliament, viz., the Defence Act 1842, and their contention was that section 19 of that Act discloses the statutory duty which the respondents have neglected to perform. There is no mention, it may be noted, in the interlocutor of 4th June 1920 of this Act of Parliament. But the petitioners maintain that they are entitled to have the compensation to which they are entitled ascertained and fixed by a jury summoned under and in virtue of section 19. They do not, however, aver that the statute imposes on the respondents or either of them any duty to summon the jury. All that they say is that the present application has been rendered necessary by the failure of the Lord Advocate to take steps to summon a jury. These averments therefore appear to me, strictly read, to be irrelevant to instruct any duty incumbent on the Lord Advocate or the Secretary of State for War to summon a jury.

But however that may be, the petitioners have, in my judgment, further failed, both in their averments and on their construction of section 19, to show that the respondents have imposed upon them any duty so clear and well defined as to warrant the Court in pronouncing in a summary process like the present petition an order for specific performance. The leading and primary purpose of section 19 of the 1842 Act is—when the parties interested fail to come to an agreement on the question of the consideration to be granted — to enable the principal officers to require the justices or other persons named in the section to put them into possession of the lands, &c., and the justices are required so to do by issuing warrants commanding possession to be delivered. The question of compensation is thereafter to be determined in the manner set forth in the concluding part of the section. But in the present case the petitioners' premises were not taken possession of under the provisions of section 19, but were requisitioned by the military authorities under the Defence of the Realm Acts and Regulations. The petitioners, however, contended, on the authority of *Attorney-General* v. *De Keyser's Royal Hotel*, that while that was so it left unaffected that portion of section 19 which dealt with compensation and the procedure to be followed in order to determine its amount. Assuming that that is so, the language of the section is, to say the least of it, obscure and uncertain in its meaning and effect, and this summary petition is not in my opinion a process appropriate to solve the question raised by the petitioners, viz., whether or not the duty of taking the initial steps in the procedure by which the compensation is to be ascertained is imposed exclusively on the respondents. Section 91 was intended to operate in cases where a statutory duty is plainly incumbent on the party against whom an order for specific performance is sought. The only case cited in this connection—*Adamson* v. *Edinburgh Street Tramways Company* (10 Macph. 533) —is a good illustration of what I mean.

Further, I am of opinion that at the date when the petition was presented the bare averment that the Lord Advocate refused or delayed to perform the alleged statutory duty required of him is irrelevant. The interlocutor ascertaining the petitioners' right to compensation had been granted only four weeks earlier, and although several months have now elapsed it was explained that the present proceedings, raising many important questions, have hitherto proved a stumbling block in the way of further useful consideration of the extent to which the petitioners are entitled to relief.

I agree in thinking that the reclaiming note should be refused.

The Court adhered.

Counsel for the Reclaimers (Petitioners) —MacRobert, K.C.—Maconochie. Agents— Fraser, Stodart, & Ballingall, W.S.

Counsel for the Respondents—The Lord Advocate (Morison, K.C.)—Young. Agent —Campbell Smith, S.S.C.

HIGH COURT OF JUSTICIARY.

Tuesday, December 7.

(Before the Lord Justice-General, Lord Mackenzie, and Lord Cullen.)

ROSS *v.* CAMERON.

Justiciary Cases—Statutory Offence—Betting—Public Place—Railway Goods Yard Separated by Earthen Embankment from Ground Temporarily Unfenced — "Enclosed Place to which the Public have a Restricted Right of Access"—Street Betting Act 1906 (6 *Edw. VII, cap.* 43), *sec.* 1 (1) *and* (4).

In a complaint under the Street Betting Act 1906 the accused were charged with frequenting a railway goods yard for the purpose of betting. At the time of the alleged offence the yard was not merely open on the side adjoining the railway system, but was also open or at least unfenced on another side, on which it was bounded by private property lying between it and the public street. On this property building operations were being carried on which required the removal of the fence which formerly separated it from the street, and the only division between that property