Salus populi suprema lex: The Development of national security jurisprudence prior to the first world war

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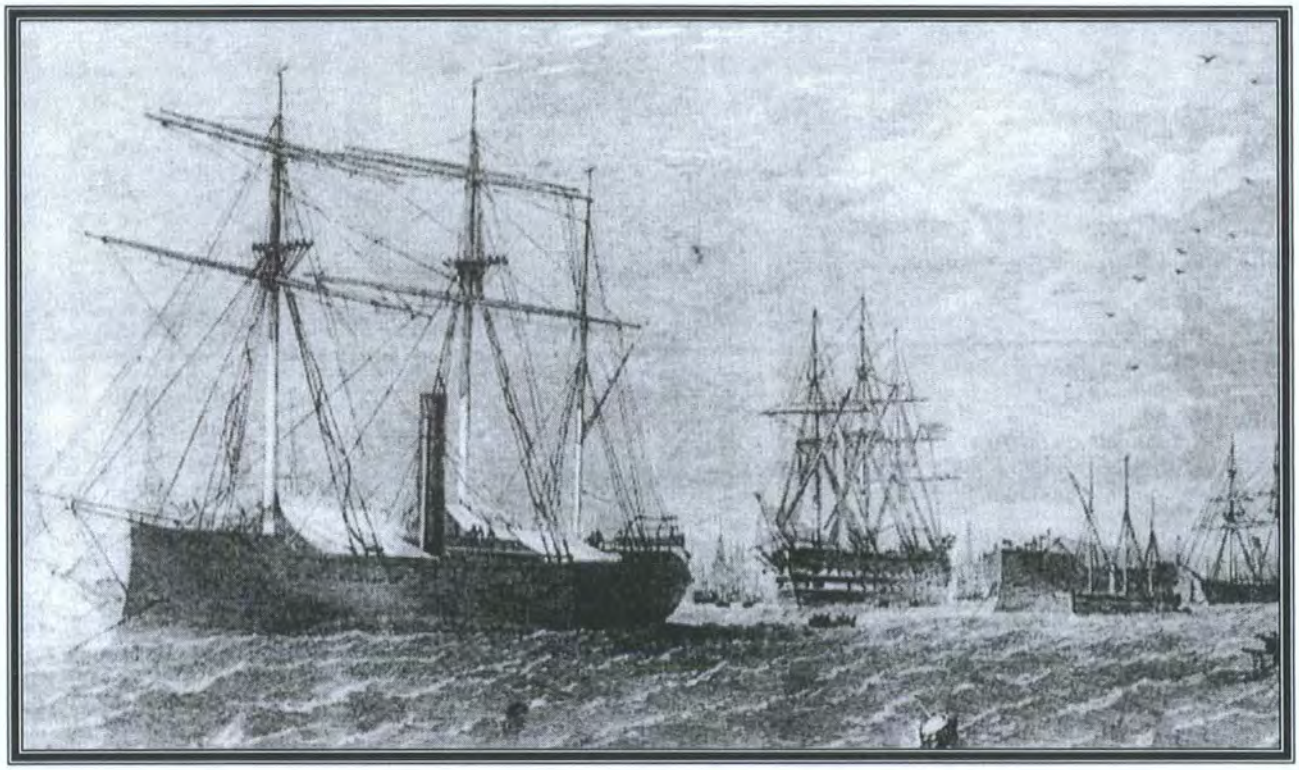
SALUS POPULI SUPREMA LEX

The Development of National Security Jurisprudence Prior to the First World War



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Cover Illustration

Vessels No. 294 and 295 (the "Laird rams"), built by Laird's shipyard, Birkenhead, lie in the Mersey under the watching brief of HMS *Majestic* (centre). Intended to break the Federal blockade of Confederate ports during the American Civil War, their construction threatened Britain's neutrality in the war, and their seizure was the subject of intense legal debate.

Abstract

This study assesses the changing judicial approach to national security concerns in the half century preceding the First World War. This era of jurisprudence has been largely neglected by legal historians, most studies assuming that the modern judicial approach to national security developed only after the first rumbles of the guns of August 1914.

However, pre-war jurisprudence demonstrates the judiciary's increasing familiarity with national-security concerns, through their exposure to what may be described as 'modern' national-security legislation, from the mid-Victorian era onwards. This study therefore considers the judicial approach to such ill-considered statutes as the Foreign Enlistment Act 1819 and its successor the Foreign Enlistment Act 1870, and the Defence Acts 1842-73 (and related enactments). This thesis also examines the judicial response to the application of aspects of nineteenth-century commercial, contract and customs law to protect security concerns. Through detailed examination of each of these areas of law, this study will ascertain the degree of influence that national-security concerns exerted upon judicial interpretation in the years 1860-1914.

It is contended that the cumulative weight of this jurisprudence indicates that the First World War was not the turning point in judicial attitude that it has been widely proclaimed to be, and that the supine approach to national-security concerns characteristic of the twentieth-century jurisprudence can be traced into the Victorian era. Superficial variations in jurisprudence, including shifts from positivist to normative "packaging" of security concerns should not disguise the judiciary's adoption, long prior to the First World War, of a functionalist interpretative approach to national-security arguments.

Acknowledgements

Throughout the writing of this thesis it has been my privilege to be supervised by Professor Ian Leigh, to whom I owe a great debt. I thank him for the free rein that he gave me over my study and for helping to give direction to my thoughts when that freedom led to the limits of my abilities. Without his unfailing advice and guidance I would remain lost in the blind alleys down which I eagerly bounded.

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Lastly, I should mention my old English teacher, Mr. Shaw, for patiently helping to develop my writing skills in the first place, spelling and grammar notwithstanding.

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Contents

[1]

Have the Judiciary Ever Known their Place?

'By the Constitution the defence of the realm is entrusted to the Crown, ... the law has entrusted the person of His Majesty with the care of this defence, [and] in this business of defence the "suprema potestas" is inherent in His Majesty as part of his Crown and kingly dignity.'

Mr Justice Avory (1915)

The Executive, the Judiciary and the Security of the State

Judicial deference to the executive with regard to matters of national security enjoys a distinguished heritage. From Hyde CJ's assertion that 'we trust [the Crown] in great matters,'[1] through Lord Atkinson's conclusion that providing for the defence and security of the realm had ever amounted to 'the special trust and duty of the King'[2] and into the modern day with Lord Diplock's ruling that where action undertaken subject to the 'national security prerogative' conflicts with the procedural impropriety head of judicial review, public law 'must give way,'[3] judges have seemingly ensured that the executive has been only loosely fettered by the law in providing for the security of the state.

This consistent interpretive approach overarches the evolution of national security law through the centuries, as recognition of the limitations upon Crown's *war* prerogative

[1] *Darnel's Case (The Case of the Five Knights)* [1627] 3 Howell's State Trials, 1
[2] *Attorney-General v. De Keyser's Royal Hotel* [1920] AC 508, 538
[3] *Council of Civil Service Unions v. Minister of State for the Civil Service* [1985] AC 374, 412

and in its ability to impose martial law obliged governments to seek statutory interventions to complement these national security powers.[4] Prerogative and statutory powers therefore long co-existed in the national security sphere, with the executive careful to safeguard its capacity to employ the prerogative in response to threats when drafting "emergency" legislation.[5] Such efforts were intended to shield activities undertaken in the interests of national security from judicial review, by making it possible for the executive to claim that it was exercising power under recognised prerogatives.[6] But national security statutes have proven to be a particularly pervasive plant in the United Kingdom's constitutional garden. As early as the Victorian era, when Dicey presaged Avory J's appraisal that both the common law and the prerogative furnish the executive with powers that allow it to provide for defence,[7] he saw fit to caveat that in this field 'the rigidity of the [common] law necessitates the intervention of Parliament.'[8] Today, the prerogative lies buried underneath successive accretions of 'necessary' national security legislation; not simply supplemented, but supplanted.

Nonetheless, the modern statutory elements of the Crown's national security powers are not merely 'a substitution of the despotism of Parliament for the prerogative of the Crown.'[9] They left the judiciary a gateway through which to adjudicate upon the legality of executive action in this field. This study considers the judiciary's willingness to unbolt this gate in the half century preceding the First World War. This introductory chapter places the period in historical context and examines why its significance has been overlooked.

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[4] See Simpson, A., *Human Rights and the End of Empire*, (2001, Oxford), 58-71

[5] For example, the Irish Coercion Acts from 1798 onwards each provided that 'nothing in this Act contained shall be construed to take away, abridge or diminish, the acknowledged right of the Crown to exercise martial law,' 39 Geo. III, c.11 (Irish). See also 43 Geo. III, c.117, 3 & 4 Wm IV, c.4, s.40

[6] The judiciary traditionally accepted that the manner of exercise of a prerogative power was unreviewable, at least until *Laker Airways v Department of Trade* [1977] QB 643, 705, per Lord Denning

[7] *In the Matter of A Petition of Right* [1915] 3 KB 649, 651

[8] Dicey, *The Law of the Constitution*, (1960, 10th Ed., London), 412

[9] *ibid.*, 413

The Age of Treason

The special trust invested in the executive is exemplified by the pedigree of statutes extending the state's ability to respond to threats to national security. Enacted in Norman-French and passed by the first Parliament to sit 'after the interruption of all legal and public business by the great pestilence called the Black Death,'[10] the Statute of Treasons 1351 is not simply 'the oldest criminal statute on our law books,'[11] but detailed what, until very recently, remained 'a uniquely serious crime.'[12] Treason and piracy were the last offences to carry the death penalty in the United Kingdom, as late as the dying days of the twentieth-century.[13] For all practical purposes the offence of treason, and the related common law offence of sedition,[14] have been sidelined by modern legislative developments.

This should not eclipse the Statute's achievement. With little more than minor alterations, notably at the time of the French Revolution,[15] from 1351 until the Victorian era national security law in England existed in the "Age of Treason," with successive incarnations of "the establishment" relying upon this statute through the centuries to protect the social and political order from changing threats. However, the longevity of the Statute of Treason owed less to the prescience of fourteenth-century draftsmen and more to the successive generations of judges who strove to maintain the country's national security law in an operative state. Into the nineteenth century the judiciary incrementally extended the

[10] Stephen, J., *A History of the Criminal Law of England*, (1883, London), vol. II, 248

[11] Lustgarten, L. & Leigh, I., *In From the Cold: National Security and Parliamentary Democracy*, (1994, Oxford), 197

[12] Wharam, A., 'Treason in Rhodesia,' (1967) *Camb LJ* 189, 189

[13] s.37(4) Crime and Disorder Act 1998 amended s.1 Treason Act 1814, replacing the penalty whereby a person convicted of high treason 'shall be hanged by the neck until such person be dead.' Under the amended provision 'such person shall be liable to imprisonment for life.'

[14] 'Sedition is a crime against society, nearly allied to that of treason and it frequently precedes treason by a short interval,' *R. v. Sullivan* (1868), 11 Cox CC 44, 45, per Fitzgerald J

[15] Most notably the expansive Treason Act 1795 (36 Geo. III, c.7), made perpetual by the Treason Act 1814 (57 Geo. III, c.6). The 1795 Act was repealed in s.37(3) Crime and Disorder Act 1998.

bailiwick of these offences through the development of so-called "constructive treasons,"[16] expansions which received belated legislative approval whenever threats to the establishment warranted a new Treason Act.

National security law does not simply provide the mechanism by which the state tackles those who threaten the stability of the nation; it also establishes how the state gains resources necessary to safeguard against or overcome threats. From the outset of the Age of Treason until the aftermath of the Glorious Revolution the power to appropriate property to provide for national defence fell under the King's War Prerogative. Thereafter, outside the exigencies of the Napoleonic Wars, *ad hoc* legislation provided for each specific acquisition of land required for the defence of the realm until the enactment of the permanent provisions of the Defence Act 1842. Security requirements can furthermore oblige the executive to maintain the necessary powers to keep the country from being drawn into conflicts that are not of its own making. In the Age of Treason such requirements were serviced by temporary statutory prohibitions upon arms exports or upon enlistment in foreign armies.[17]

Nevertheless, the existence of these limited knots of security law is hardly indicative of a general understanding of this law in legal circles. The term 'adherence to the King's enemies' might have entered legal parlance in the Statute of Treasons, but this does not signify a modern concept of "national security" within the fourteenth-century English law. And whilst it may be interesting to postulate that as late as the eighteenth and early-nineteenth century the judiciary maintained a broad interpretation of the Royal

[16] Stephen, *op. cit.* n.10, 281
[17] Holdsworth, W., *History of English Law*, (1938, London), vol. X, 365

Prerogative permitting the Royal Navy to press-gang sailors, this indicates nothing more than an embryonic recognition of a particular requirement of national security.[18]

The Age of the Emergency Code

The tracts of legislation, both in times of emergency and in times of relative security, that the judiciary have been called upon to interpret since the outbreak of the First World War contrast markedly with the spartan legislation of the Age of Treason. Uncomfortable with the potential impact of their decisions upon security policy, the courts adopted a doctrine of 'judicial passivity'[19] throughout the great emergencies of the first half of the twentieth century, under which they would avoid 'any significant role in the business of state security.'[20] The passivity enunciated in those wartime decisions inevitably polluted the law outside emergency situations, despite the prescient efforts of some judges to ring-fence this wartime jurisprudence. In the immediate aftermath of the First World War, Lord Sumner forewarned those Crown lawyers who would later seek to rely upon the wartime authorities that 'it must never be forgotten that much was voluntarily submitted to [by the judiciary] which might have been disputed, and that the absence of contest and even of protest is by no means always an admission of the right.'[21] The warning went unheeded.

Of course, this protracted period of supine jurisprudence was punctuated by some of the most forceful dissents ever uttered by senior English judges (indeed, Lord Aktin's 'classic dissent'[22] in *Liversidge v. Anderson*[23] is so famous and so often repeated that

[18] Chitty, J., *A Treatise on the Law of the Prerogatives of the Crown*, (1820, London), 47
[19] Simpson, A., 'The Judges and the Vigilant State,' (1989) *Denning LJ* 145, 157
[20] Simpson, A., *In the Highest Degree Odious: Detention Without Trial in Wartime Britain*, (1992, Oxford), 419
[21] *De Keyser's Royal Hotel*, *op. cit.* n.2, 563
[22] *R. v. Home Secretary, ex parte Khawaja* [1984] AC 74, 110, per Lord Scarman
[23] [1942] AC 206, 244

Dyzenhaus has commented that 'it seems difficult to recall that his judgment was a lone dissent').[24] Indeed, despite the efforts of such (actually) isolated voices, the judiciary have little deserved their Diceyan mantra as the 'guardians of liberty.'[25] From the outbreak of the First World War until the dawn of the twenty-first century they persistently failed to exercise any meaningful restraint on executive action taken in the interests of national security, or to question executive perceptions of such interests. Instead, in cases involving such concerns, the judges have steadfastly 'declined to sit as Court of Appeal from the executive.'[26] Yet this is hardly a criticism unique to the English judiciary. Across the common law world, including the United States,[27] 'when issues of national security arise, judges almost invariably defer to the executive's determination of what is in the national interest.'[28]

The enduring impotence of twentieth-century national security jurisprudence has piqued the interest of various legal academics. In search of the touchstone of this interpretive approach Simpson,[29] Rubin,[30] Foxton,[31] Ewing and Gearty[32] have all disregarded Dicey's injunction that 'the function of a trained lawyer is not to know what the law was yesterday ... or what it ought to be tomorrow, but to state and explain what are the principles of law actually existing in England during the present year of grace.'[33]

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[24] Dyzenhaus, D., 'Intimations of Legality Amid the Clash of Arms' (2004) 2 *Int'l. J. Const. L.* 244, 245
[25] Dicey, *op. cit.* n.8, 137
[26] Scrutton, T., 'The Law and the War,' (1918) 34 *LQR* 116, 130
[27] See Issacharoff, S. & Pildes, R., 'Emergency contexts without emergency powers: The United States's constitutional approach to rights during wartime,' (2004) 2 *Int'l. J. Const. L.* 296, 298. The American system does have the advantage that judicial deference is to two distinct political branches, 'each with different democratic pedigrees, different incentives, and different interests to which they respond,' rather than 'the unified executive-legislative powers of a parliamentary regime.'
[28] Dyzenhaus, *op. cit.* n.24, 246
[29] Simpson, *op. cit.* n.20. This definitive study of internment in the Second World War returns to consider the legacy of First World War cases in its opening chapter.
[30] Rubin, G., *War, Law and Labour: The Munitions Acts, State Regulation and the Unions 1915–21*, (1987, Oxford) & *Private Property, Government Requisition and the Constitution, 1914–27*, (1994, London)
[31] Foxton, D., '*R. v. Halliday, ex parte Zadig* in Retrospect,' (2003) 119 *LQR* 455 & 'Corporate Personality in the Great War,' (2002) 118 *LQR* 428
[32] Ewing, K. & Gearty, C., *The Struggle for Civil Liberties*, (2000, Oxford)
[33] Dicey, *op. cit.* n.8, (1887, 2nd Ed.), 14-15

Instead, they have obeyed Napoleon's dictum and followed the sound of the guns, in this case the evolving judicial approach to national security concerns in the wake of the guns of August 1914.

Logic appears to dictate that a war that had such a cataclysmic effect upon the United Kingdom and the British political system[34] would have a particularly convulsive effect upon national security law. Simpson, taking this cue, asserts that during the First World War 'a comprehensive code of emergency powers was developed, and became the model both in colonial territories and in the United Kingdom itself.'[35] In the Defence of the Realm Act 1914 (DORA) the executive created a new mechanism with which to protect the security of the state. This enactment, with its clutch of attendant regulations, or as Clarke described them, 'vexatious orderings,'[36] would form the model for later emergency legislation.[37]

DORA therefore became as significant in the development of twentieth-century national security law as the Statute of Treasons had been in an earlier era. Upon its enactment on 8th August 1914 onwards, national security law entered the "Age of the Emergency Code." Thereafter, the ability of twentieth-century governments to call upon an emergency code transcended peace and war; Allen reminding his readers that peacetime emergencies could be tackled using regulations promulgated under the Emergency Powers Act 1920.[38]

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[34] Griffith, J., 'The Political Constitution,' (1979) 42 *MLR* 1, 3-5

[35] Simpson, A., *Human Rights and the End of Empire*, (2001, Oxford) 80

[36] Clarke, S., 'The Rule of DORA,' (1919) 1 *JCLIL* (3rd series) 36, 36

[37] Stammers notes that through the 'War Emergency Legislation Sub-Committee' of the Committee for Imperial Defence, government used the DORA and regulations as the basis for draft codes of emergency regulations in the inter-war years. Stammers, N., *Civil Liberties in Britain During the Second World War: A Political Study*, (1983, London), 7-8

[38] Allen, C., *Law and Orders*, (1965), Oxford, 378. The EPA 1920 was repealed under Schedule 2 Civil Contingencies Act 2004 (CCA). See in particular s.20-23 CCA 2004 regarding the present powers for making of emergency regulations.

The First World War therefore remains 'the most significant period [in the twentieth century] in terms of its impact and the legacy it bequeathed to the law and practice of civil liberties,'[39] and moreover, the DORA jurisprudence remains of 'particular doctrinal importance' to the resultant era of national security law.[40]

Adherents to this position draw support from Scrutton LJ's Rhodes Lecture of February 1918; part wistful remembrance of the judiciary's historical and ceremonial functions, upon which the conflict had inconveniently 'pressed heavily,'[41] part hard-nosed defence of the wartime judiciary's performance. This eminent judge accepted that the legal system had required adaptation to meet the exigencies of the conflict, asserting that it was 'obvious' that 'novel problems would arise ... when it is remembered that it is over sixty years since Great Britain was engaged in a European war.'[42] Whilst the country found itself in this perilous situation, Scrutton LJ considered that 'the judges are empowered to make any alterations they think right in the legal obligations to do justice to the particular circumstances of the case as caused by the war.'[43] This empowerment resulted in the emergence of "judicial passivity" towards national security concerns during the course of the First World War.

An Age of Transition?

This focus upon the First World War is therefore built upon the assumption that at the mid-Victorian zenith of Britain's splendid isolation, no threats challenged the security of Britain's position in the world sufficiently to disturb the nation's jurists; that the First

[39] Ewing & Gearty, *op. cit.* n.32, 90
[40] Lowry, D., 'Terrorism and Human Rights: Counter-Insurgency and Necessity at Common Law,' (1977-78) 53 *Notre Dame Lawyer* 49, 53
[41] Scrutton, T., 'The Law and the War,' (1918) 34 *LQR* 116, 118
[42] *ibid.*, 120
[43] *ibid.*, 132

World War marked the development of modern national security legislation and that with this change to the rules of the game, consequent jurisprudence must therefore have abandoned any historic approach to security concerns and adopted an interpretive approach commensurate with these new realities. This study proceeds on the basis that this received logic may prove flawed.

The emphasis upon the First World War has left little room for consideration of national security law in the preceding half century. But it is worth remembering that at one point this conflict was also regarded as the great turning point in English administrative law, an area considered to be 'of mainly speculative interest'[44] in preceding years. However, closer inspection revealed that 'administrative structures did not suddenly emerge during World War I or after.'[45] Rather, as Maitland asserted in 1908, 'if you take up a modern volume of the reports of the Queen's Bench Division, you will find that about half the cases reported have to do with rules of administrative law.'[46] The most that can be said for the wartime period was that there was 'a sudden flowering'[47] of ministerial orders. Indeed this significance was not in relation to the degree of delegation, but rather as to scope.[48] Although the perceived threat of delegated legislation only came to Lord Hewart's none-too-adept legal mind[49] in the aftermath of the conflict (a period when there was no need to reach for the King's Bench reports for evidence of the sheer weight of executive action authorized by Orders in Council),[50] this did not oblige commentators such as Willis[51]

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[44] Ambrose, W., 'The New Judiciary,' (1910) 26 *LQR* 203, 214

[45] Lindseth, P., 'Reconciling the Past: John Willis and the Question of Judicial Review in Inter-War and Post-War England,' (2005) 55 *U.T.L.J.* 657, 657

[46] Maitland, F., *Constitutional History of England*, (1908, Cambridge), 505

[47] Willis, J., *The Parliamentary Powers of English Government Departments*, (1933, Cambridge), 5

[48] The amount of government business which was carried out by delegated legislation did not vastly increase prior to the post-war coalition government. Allen giving figures of 'just over a thousand' orders made yearly from 1894-1900, of an annual average of 1,349 from 1901-1914 and of 1,459 during the war years. Allen, *op. cit.* n.38, 32

[49] Jackson considered Lord Hewart to be 'the worst English judge in living memory.' Jackson, R., *The Machinery of Justice in England*, (1977, 7th Ed., Cambridge), 475

[50] Hewart, Lord, *The New Despotism*, (1929, London)

or Jennings[52] to give credence to the suggestion that such delegation of authority constituted a novel development.

Similarly, when Townshend asserts that the mid-Victorians subsumed discussion of the 'concepts of public order and public security ... [within] common law language as "the rule of law" and "keeping the peace",'[53] it is possible to read such statements as confirming that the era gave rise to little interesting comment upon national security concerns. However, this should instead encourage even closer consideration of the Diceyan analysis of the rule of law. Such examination reveals that this analysis is shot through with specific references to legal aspects of security issues. His conclusion, for example, that government under the law would prevent the executive from detaining or deporting foreign anarchists on the basis of the demands of national security without first charging them with an offence,[54] provides some evidence that Dicey believed that the constitution brooked no special consideration of such concerns. The same can be said of the significance that he attached to the dismissal of the executive's attempt to act without legislative authority in order to protect public order in *Entick v. Carrington.*[55]

Yet legal historians have long distrusted this Whiggish view of the constitution.[56] Rather than Dicey faithfully 'represent[ing] the situation as he found it,'[57] the suspicion lingers that he was unable 'to divorce totally his political prejudices from his constitutional

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[51] Willis would continue his fight against 'the ghost of *The New Despotism*' into the mid-1970s. See Lindseth, *op. cit.* n.45, 659

[52] Jennings, I., *The Law and the Constitution*, (1959, 5th Ed., London), 239-254

[53] Townshend, C., *Making the Peace: Public Order and Public Security in Modern Britain*, (1993, Oxford), 4. See Dicey, *op. cit.* n.8, 284-311

[54] Dicey, *op. cit.* n.8, 226-227

[55] *Entick v. Carrington* (1765) 19 St Tr 1030, see Dicey, *op. cit.* n.8, 193

[56] Frankfurter memorably described Dicey's *Law of the Constitution* as an 'instance of sociological error surviving through charm and style.' Frankfurter, F., 'Foreword,' in Jennings, I., 'The Courts and Administrative Law – The Experience of English Housing Legislation,' (1936) 49 *Harv.L.Rev.* 426, 426

[57] McEldowney, J., 'Dicey in Historical Perspective – A Review Essay,' in McAuslan, J. & McEldowney, J., *Law, Legitmacy and the Constitution*, (1985, London), 56

and legal analysis.'[58] Ewing and Gearty go to the effort of debunking Dicey's view that authorities such as *Entick v. Carrington* indicate of the common law's protection of civil liberties from encroachment by the executive. They reappraise this celebrated case as little more than a puffed-up judgment predicated upon property concerns.[59] And even if Dicey cannot be proven to be pernicious or misguided, he was the first to recognise that he was at the very least careless with authorities, admitting that 'I have not a good memory for cases; no one has read so many and remembers so few.'[60]

But if *The Law of the Constitution* suggests that Dicey considered that the judiciary should not give special regard to national security concerns in peacetime, this does not mean that in wartime he complaisantly believed 'that liberty in Britain was effectively protected by the common law and an independent Parliament.'[61] In Dicey's view Parliament could subordinate "liberty" in the context of an emergency as grave as the First World War. Ford notes that in relation to the *ex parte Zadig*[62] decision upon internment of British residents and subjects of hostile origin or association, 'Dicey felt that the danger posed by the war justified such Crown action.'[63] Dicey's support for this House of Lords decision was however qualified by his concern, expressed in the last weeks of his life, that 'the court had not given enough thought to [permitting] a vague parliamentary authorization to severely curb individual rights.'[64] Whilst his many critics may consider that Dicey was trying to have his cake and eat it to the very last, it is worth remembering that he clearly conceived of still greater scope for executive action in emergencies more dire than the First

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[58] Barendt, E., 'Dicey and Civil Liberties,' (1985) *PL* 596, 596
[59] Ewing & Gearty, *op. cit.* n.32, 29-33
[60] Letter to Mrs Bryce, 28th September 1895. See McEldowney, *op. cit.* n.57, 54
[61] Ewing & Gearty, *op. cit.* n.32, 36
[62] *R. v. Halliday, ex parte Zadig* [1917] A.C. 260
[63] Ford, T., 'Albert Venn Dicey; The Man and His Times,' (1985, Chichester), 295. See also Cosgrove, R., 'The Rule of Law: Albert Venn Dicey,' (1980, London), 275-278
[64] Letter to Rait, 8th March 1922, in Rait, S., ed., 'Memorials of Albert Venn Dicey,' (1925, London), 286

World War, in 'times of tumult or invasion when for the sake of legality itself the rules of law must be broken.'[65]

These may be good reasons to distrust Dicey's appraisal of how the judiciary should account for national security. Nevertheless, this study will proceed on the basis that in 1885 Dicey was not expounding principles that were 'more froth than ale.'[66] It appears implicit in Lord Sumner's *dicta* that the wartime judiciary had adapted its interpretive approach to the circumstances,[67] and in Scrutton LJ's assertion that for the duration of the war the judiciary regarded themselves as 'serving alongside their sons,'[68] that the First World War decisions saw a judiciary voluntarily curtailing the interpretive approach that they would follow in peacetime. Following these leads, this study will examine whether any evidence indicates the existence of a distinct judicial approach to national security concerns in the period between the twilight years of the Age of Treason and the summer of 1914.

[65] Dicey, *op. cit.* n.8, 412
[66] Ewing & Gearty, *op. cit.* n.32, 32
[67] *De Keyser's Royal Hotel*, *op. cit.* n.2, 563
[68] Scrutton, *op. cit.* n.41, 117

[2]

Pre-War National Security Law in Context

'Confidence waned and prospects clouded over, as the last quarter of the nineteenth century saw Britain slipping from the sunny uplands of mid-Victorian liberal capitalism towards the valley of the shadow of socialism and war.'

Bernard Porter (1987)

Introduction

The academic focus upon the First World War jurisprudence would have been nugatory had it not been for the later generations of judges who found their bearing in national security cases, both in emergency and in peacetime, by revisiting the interpretive approach established in these wartime decisions.[1] This study counters that it was not assured that these decisions would dictate the tone of national security jurisprudence for the remainder of the century.

Instead, in the wake of the First World War the courts could have clearly demarked peacetime from wartime security jurisprudence, an equilibrium the Australian courts would later attain through the 'celebrated triumph of constitutionalism and the rule of law over

[1] Lustgarten, L. & Leigh, I., *In From the Cold: National Security and Parliamentary Democracy*, (1994, Oxford), 320-359. Lustgarten and Leigh provide a detailed discussion of the ongoing influence of the First World War jurisprudence.

national hysteria'[2] in the *Communist Party* case.[3] The existence of any relevant body of peacetime domestic security decisions in the pre-war era should have provided fertile soil for this ultimately uncultivated line of jurisprudence.

However, it will not be the purpose of this chapter to undertake a counterfactual analysis of how the law might have developed, but to probe the existence of a pre-war judicial conception of national security in order to determine whether it should have been so easily dismissed or forgotten. This requires an investigation of the interrelated questions of whether there existed a modern conception of national security within the legal establishment prior to the First World War, and if so whether this conception was confined to unmemorable knots of jurisprudence or coursed through a modern range of national security law. Only if *prima facie* evidence can be found supporting both of these preconditions will it be necessary to establish a structure under which to examine the pre-war jurisprudence in more detail.

The Development of Modern National Security Law

The cumulative effect of the reform, replacement or decline into disuse of many of the traditional elements of security law characterising the "Age of Treason" over the course of the nineteenth century puts pressure upon the traditional acceptance of the First World War as the turning point in this field. In the decades preceding 1914, a new generation of national security legislation was enacted, including measures designed to protect national security during times of peace and stability, and others intended to be animated by the

[2] Winterton, G., 'The Significance of the *Communist Party* Case,' (1992) 18 *Mel. ULR* 630, 630. As Winterton notes, the decision to rule the Communist Party Dissolution Act invalid was 'remarkable at a time of anti-Communist hysteria fanned by the Korean War.'

[3] *Australian Communist Party v. Commonwealth* (1950-51) 83 CLR 1. Despite Australian troops being in combat in Korea at the time of this decision the High Court set these circumstances apart from a grave emergency. See 193-195, 197-198, 202, 206 and 227.

executive in order to respond to an emergency. Whilst in scope and focus such security legislation was undeniably a product of its time,[4] it was nevertheless well developed long prior to the First World War.

This pre-war development of national security infrastructure is attributable to the state of flux of British society and Britain's position in the world in the half century before 1914. Throughout the confident and liberal mid-Victorian era 'ambiguity about the individual and institutional meaning of security was fundamental [to society].'[5] Indeed, until the late nineteenth century legislators clung dogmatically to the belief that the liberties enjoyed by British subjects should not be secured through statutory defences against threats to the nation. This resulted partly from the fear that the state might abuse such powers, and partly from the liberal belief that 'laws and agencies created in order to repress subversion had the very opposite effect. They made people aggrieved, and consequently rebellious.'[6] This 'flawed equipoise'[7] gradually collapsed under the weight or the mounting threats facing the United Kingdom and the British establishment from the 1860s and 1870s onwards.[8] By the turn of the twentieth century, many feared that if these threats could not be overcome, 'it would not merely be a question of decline or contraction, but probably of invasion and enslavement too.'[9]

These fears generated a clamour for a legislative response to threats as disparate as the danger of being drawn into foreign wars, of resurgent Irish republicanism, of foreign dissidents, of espionage, and of the emergence of rival powers which facilitated the state's experimentation with novel means of protecting national security. In this vein, the existing

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[4] Holdsworth, W., 'The Relation between Commercial Legislation and National Defence Historically Considered,' (1918) 30 *Jurid. Rev.* 293, 293
[5] Townshend, C., *Making the Peace: Public Order and Public Security in Modern Britain*, (1993, Oxford), 4
[6] Porter, B., *Origins of the Vigilant State*, (1987, London), 3
[7] Townshend, *op. cit.* n.5, 36
[8] See Porter, *op. cit.* n.6, 1-35. This chapter's opening epigram is taken from page 23.
[9] Porter, *op. cit.* n.6, 151

political offences were sidelined (treason becoming effectively moribund, despite a brief swansong in the 1880s, beyond its application against those adhering to the enemy in wartime)[10] through the Explosive Substances Act 1883 and through the Official Secrets Acts 1889 and 1911. Unresponsive neutrality laws were reformulated in the Foreign Enlistment Act 1870, outlawing both the production of armaments for belligerents that might draw the United Kingdom into war and the enlistment of British subjects in foreign armed forces. A standing legislative mechanism for the expropriation of land was established through the Defence Act 1842.

Moreover, the decades from the 1870s onwards are notable for the progressive accretion of statutory provisions detailing the extraordinary powers that the British government possessed in time of 'imminent national danger or great emergency,'[11] in addition to the residual powers bound up in the royal prerogative of defence. Such powers were evidently capable of being exercised in broader circumstances than those of 'actual or apprehended invasion.'[12] They can be found in legislation such as the Regulation of the Forces Act 1871, the Militia Act 1882, the National Defence Act 1888, the Merchant Shipping Act 1894 and the Aerial Navigation Acts 1911 and 1913, and call into question Dicey's assertion that English law knew no equivalent to the French *état de siège*.[13] Whilst the common law included no such concept, the string of statutes cited above built up an impressive array of powers that could be, and were, exercised in circumstances short of war.[14]

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[10] *R. v. Ahlers* [1915] 84 LJKB 901, *R. v. Casement* [1917] 1 KB 98, *Joyce v. DPP* [1946] AC 347

[11] s.18 Militia Act 1882

[12] An ability to call out the Volunteers on the basis of 'imminent national danger or great emergency' was substituted in place of this phraseology, found in s.17 Volunteer Act 1863, by s.1 Volunteer Act 1900.

[13] Dicey, A., *Introduction to the Study of the Law of the Constitution*, (1960, 10th Ed., London), 230-31

[14] Baty & Morgan list numerous proclamations issued under these powers made in the crucial early days of August 1914, many of which predated the declaration of war which became effective at 11pm, 4th August 1914. Baty, T. & Morgan, J., *War, Its Conduct and Legal Results*, (1915, London), 429-436.

Evidently, by the early years of the twentieth century, the mid-Victorian confidence that had artificially suppressed the development of national security law had been replaced by insularity, uncertainty and no small degree of fear. In this climate, successive governments laid the foundation stones of the modern 'secret state' by establishing the 'organisations and legislation that are concerned with British national security policy.'[15] With the laying of these ample foundations the "Age of Treason" drew to a close, well within Queen Victoria's long reign.[16]

Following the outbreak of the First World War, Baty and Morgan undertook the first comprehensive evaluation of the multifarious domestic legal implications of Britain's fighting a major war in Europe. They considered that previous constitutional jurists had suffered a collective blind-spot obscuring the nature of emergency powers under the maxim *inter arma silent leges.*[17] Looking beyond this failure of legal scholarship, they saw that 'the common law has much to say ... of the safety of the realm and the prerogative in relation thereto.'[18] Not only did modern national security legislation exist prior to the First World War, but that the judiciary had encountered these enactments and developed sophisticated jurisprudence in relation to them.

The Emergence of the term "National Security"

Before turning to analyse the maturity of the judicial conception of national security concerns in the decades preceding the First World War, it is necessary to establish that the judiciary had developed at least the language of security analysis. This requires an

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[15] Rogers, A., *Secrecy and Power in the British State*, (1997, London), 3
[16] The brief exposition above is by no means comprehensive. In the late 1890s Crown lawyers painstakingly amassed fully 576 pages of disparate statutes affecting military operations. See Townshend, *op. cit.* n.5, 46
[17] Cicero, *Oratio Pro Annio Milone*, 54 BC
[18] Baty & Morgan, *op. cit.* n.14, x

explanation of this study's seemingly anachronistic focus upon "national security" concerns in a pre-war period. Whilst this period pre-dates the use of the term in legal circles, a variety of corresponding parlance was used from the mid-Victorian era onwards, and can be shown to overlap with, and ultimately coalesce into, this modern terminology.

Unsurprisingly, the media would coin the phrase long before it premiered in the rarefied air of the courtroom. One early reference came in relation to the Channel Fleet's calamitous manœuvres during its summer voyage to Norway in June 1908, *The Times* describing Admiral Lord Charles Beresford, whose negligent orders almost resulted in a collision at sea, as 'a serious menace to our national security.'[19]

In legal circles the use of the expression likely emerged as an umbrella term covering the subject matter of the various enactments, regulations and proclamations of the initial weeks of the First World War. As Lord Shaw stated in his famous dissent in *ex parte Zadig*, 'after the outbreak of war ... it is plain from the Statute-book that Parliament was much engrossed in the subject of national security and defence.'[20] Through such promptings, counsel would with time have doubtless recognised the advantages of truncating the unwieldy statements of the purpose laid down in the wartime legislation and regulations.[21] However, the importance of one soon-to-be 'much-quoted'[22] *obiter dicta* would ensure that the term "national security" was on the lips of those practitioners, academics and judges engaged in this sphere.

Delving into the historical use of "national security" in legal circles, Lustgarten and Leigh traced the etymology of the term to the Privy Council decision in *The Zamora*. In what was certainly the most intriguing assertion of "national security" in a First World War

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[19] Massie, R., *Dreadnought*, (1992, London), 533
[20] *R. v. Halliday, ex parte Zadig* [1917] AC 260, 278
[21] s.1(1) Defence of the Realm (Consolidation) Act 1914 stated that the Act permitted the issue of regulations for 'securing the public safety and the defence of the realm.'
[22] Lustgarten & Leigh, *op. cit.* n.1, 326

case, Lord Parker asserted that 'those who are responsible for the national security must be the sole judges of what the national security requires. It is obviously undesirable that such matters be made the subject of evidence in a court of law.'[23] It may well be that the repetition of this key phrase, a cornerstone of the Crown's arguments in the remaining wartime cases,[24] did much to cement the phrase "national security" in legal parlance across the common law world,[25] to the detriment of its plethora of predecessors.

The use of "national security" as a legal concept therefore emerged during the First World War as an umbrella term formed 'from earlier notions of the defence of the realm and war powers.'[26] Indeed it emerged as a usurper just as the term 'defence of the realm' appeared to be in the ascendant, replacing the previous label "war powers," most likely because politicians and draftsmen of the time regarded the assumption of extraordinary "defensive" powers 'as having a less aggressive and more morally appealing connotation.'[27]

However, the pedigree of "national security" can perhaps be directly traced to the National Defence Act 1888.[28] Contemporary jurisprudence saw reference to issues of 'national safety,'[29] 'defence of the country,'[30] or statutes that granted the Monarch powers in relation to 'matters affecting the peace and safety of her people and her forces.'[31] With the judiciary still adapting to the mounting assertions of "public interest" made by the

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[23] *The Zamora* [1916] 2 AC 77, 107, per Lord Parker

[24] In *Lipton v. Ford*, for example, Sir F.E. Smith, A-G asserted, supposedly on the basis of *ex parte Zadig* (for reasons of precedent value), but in the language of *The Zamora*, that 'the powers conferred upon those responsible for national security are of the widest possible character.' *Lipton v. Ford* [1917] 2 KB 647, 651

[25] Within a matter of months Lord Parker's conception of the Executive's "national security" powers was eagerly incorporated into Australian jurisprudence; *Farey v. Burvett* (1916) 21 CLR 433, 456, per Isaacs J

[26] Lustgarten & Leigh, *op. cit.* n.1, 323

[27] *ibid.*, 326

[28] The emergent term 'national defense' is also found in U.S. enactments in the pre-war era. See for example the fourth clause of the Defense Secrets Act 1911.

[29] *R. v. Rumble* (1864) 4 F & F 175, 201 per Cockburn CJ

[30] *Hawley v. Steele* (1877) LR 6 Ch. D. 521, 527, per Jessel MR

[31] *Hunter v. Coleman* (1914) 2 IR 372, 381, per Dodd J

increasing interventionism of the state of this era, national security issues were even packaged as matters of 'urgent public importance.'[32]

Probably the best known, and the most venerable, forerunner of "national security" is Cicero's "*salus populi*" maxim.[33] In the hands of English jurists, the assertion that *salus populi suprema lex*, morphed into a Latin forerunner to Lord Parker's assertion in *The Zamora*. Whilst literally translated as 'the good of the people is the supreme law,' Grotius adapted the phrase to encapsulate the argument that in cases of 'extreme and inevitable' peril for the nation, even individual resistance to the sovereign could be justified.[34] Kahn cogently asserts that the history of the maxim in English law dates to the adaptation of Grotius's writings to form the basis of the "reasons of state" arguments prevalent in Civil War-era parliamentarian treatises on the right to resist the Monarch.[35] I ronically this totemic phrase would inform both sides of the legal debate presaging the Civil War, seemingly underpinning the majority opinion in the *Ship-Money* case[36] and the Royalist arguments that the King could not be stripped of the powers necessary to defend the nation.[37]

During the First World War the English courts vigorously reasserted this maxim, and employed its attendant pre-Civil War jurisprudence, to explain their generous interpretation of state powers to deal with emergencies.[38] But this does not mean that it was utterly neglected in the intervening three hundred years. The re-discovery of this rule

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[32] *Blundell v The King* [1905] 1 KB 516

[33] Cicero, '*De Legibus*,' III, 3

[34] Grotius, *De jure belli ac pacis*, (1625) Book I, Chap. IV, Sect. VII and Haakonssen, K., ed., Grotius, *The Rights of War and Peace*, (2005, Indianapolis), 356

[35] Kahn, V., *Wayward Contracts: The Crisis of Political Obligation in England, 1640-1674*, (2004, Princeton), 34 & 37

[36] *R v. Hampden* (1637) 3 Howell's State Trials 825. See Chapter 5 below.

[37] Wentworth to Hutton J, 1639, 'The power of levies of forces at sea and land for the very, not feigned, relief and safety of the publick, is such a property of sovereignty, as were the crown willing, yet it cannot divest itself thereof: *salus populi suprema lex*.' See Holdsworth, W., *History of English Law*, (1924, London), vol. VI, 75

[38] *In the Matter of A Petition of Right* [1915] 3 KB 649, 652, per Avory J

of interpretation in relation to state action can be traced to the case of *The International*, where Phillimore J considered the significance of '*interest reipublicæ*'[39] in relation to the British government's active assertion of the neutrality laws to prevent the country from being drawn into the Franco-Prussian War.[40]

Therefore, from the mid-Victorian era onwards the legal establishment relied upon a variety of expressions that roughly equate to the modern term "national security." Moreover, they applied these expressions across a broad swathe of modern security-oriented legislation. This study must therefore establish a structure facilitating analysis of the judicial application of *salus populi*, and the associated development of the interpretive approaches, from the maxim's mid-Victorian reappearance to its wartime zenith.[41]

The Structure of this Study

The remainder of this chapter constitutes a brief explanation of how the substantive body of this study will dissect the diverse tracts of law involving national security concerns in this pre-war transitional era. Unfortunately, the limitations upon this study prevent the comprehensive appraisal of significant elements of pre-war national security jurisprudence, such as the judiciary's changing conception of martial law. However, a combination of the mid-Victorian anathema towards martial law,[42] the controversial cases of *Nelson & Brand*,[43] *Eyre*[44] and *Marais*[45] spanning the Victorian and Edwardian eras, and the

[39] *Interest reipublicæ* being applied as an alternative to the *salus populi* maxim to denote an interest of state.
[40] *'The International'* (1871) 3 A&E 321, 333
[41] eg; *Norman v. Mathews* (1916) 32 TLR, 303, 304, per Lush J and *Micheals v. Block* (1918) 34 TLR 438, 438 per Darling J
[42] Townshend states that discussion of the topic was a 'public taboo;' Townshend, *op. cit.* n.5, 47
[43] *R. v. Nelson & Brand* (1867), Cockburn's Special Report
[44] *R. v. Eyre* (1867-68) LR 3 QB 487 and *Phillips v. Eyre* (1870) 6 QB 1
[45] *Marais v. The General Officer Commanding the Lines of Communication and the Attorney-General of the Colony, ex parte Marais* [1902] AC 109

contemporary academic debate between Finlason,[46] Dicey,[47] Pollock[48] and Baty & Morgan[49] as to the nature of martial law as a rule of the common law or the prerogative and its role during emergencies or wartime, have ensured that a lasting intrigue has surrounded the topic. Townshend has undertaken detailed consideration of the social and political implications of the changing attitude towards martial law in the nineteenth and early twentieth centuries,[50] whilst Simpson has briefly analysed the topic from a legal standpoint.[51] This existing analysis of the pre-war judicial approach to martial law therefore provides justification for its omission from this study.

Readers should also note the want of an analysis of repressive legislation in Victorian Ireland, including the "Westmeath Act,"[52] the "Coercion Act,"[53] the Prevention of Crime (Ireland) Act 1882 and the ruthlessly applied "Irish Crimes Act."[54] However, of these, the 1871 and 1881 Acts carried 'ouster' clauses; judicial supervision of detentions being effectively excluded through the statutory provision that all arrest warrants carried 'conclusive evidence of their own legitimacy.'[55] By contrast the 1882 and longer-lived 1887 Acts were procedural in effect, removing rights to jury trial in relation to certain offences. Dicey's failure to evaluate the effects of all of this legislation properly has certainly not gone unnoticed;[56] Ewing and Gearty alleging that his analysis was influenced by the fact that this repressive legislation 'was oriented against those with whose opinions

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[46] Finlason, W., *A Treatise on Martial Law, as Allowed by the Law of England in Time of Rebellion*, (1866, London)
[47] Dicey, *op. cit.* n.13, 287-290
[48] Pollock, F., 'What is Martial Law?' (1902) 18 *LQR* 151
[49] Baty & Morgan, *op. cit.* n.14, 3-7 & 17-25
[50] Townshend, C., 'Martial Law, Legal and Administrative Problems of Civil Emergency in Britain and the Empire 1800-1940,' (1982) *Historical Journal* 25
[51] Simpson, A., *Human Rights and the End of Empire*, (2001, Oxford), 58-71
[52] 1871, 34 Vict. c.25; This legislation lapsed in 1875.
[53] 1881, 44 Vict. c.4; This legislation lapsed in September 1882 after the dramatic events of the Kilmainham Treaty.
[54] Criminal Law and Procedure (Ireland) Act 1887
[55] Simpson, *op. cit.* n.51, 80
[56] Dicey, *op. cit.* n.13, 231-232.

he was in profound disagreement, in a part of the Kingdom that happened not to be England.'[57] Perhaps the Irish judiciary's silence over these Acts is in itself deafening, but this potentially rich seam will have to await another miner.

Yet the most obvious area of pre-war security law neglected in this study concerns successive governments' efforts to contain the threats posed by foreign anarchists and communards, home-grown socialism, Irish republicanism and espionage. This area is not disregarded for lack of interesting jurisprudence. The need to appease foreign governments angered by the use of the United Kingdom as a refuge,[58] produced the dramatic *Freiheit* prosecutions, where the defendants were convicted of libel for 'eulogising' the Phoenix Park murders,[59] and for incitement to murder for 'exulting' the murder of the Tsar in 1880 in terms likely to encourage further killings of Heads of State.[60] The judiciary accepted that 'libels which bring persons into hatred or contempt may apply to persons outside the dominions of the King, because they are likely to bring the peaceful relations existing between states to an end.'[61]

Significantly, whilst the government response to socialist rioting in Trafalgar Square in 1886 was to bring charges of sedition, for exciting ill will between different classes, against the speakers at the earlier rally (including future cabinet minister John Burns),[62] Cave J responded with a balanced jury direction that Ingraham described as 'the high water mark of English judicial liberalism.'[63]

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[57] Ewing, K. & Gearty, C., *The Struggle for Civil Liberties*, (2000, Oxford), 332
[58] The indictment in *R. v. Most* citing 'the great danger of [dissident incitements] creating discord between our said Lady the Queen, and the said sovereigns and rulers of Europe.' (1880-81) L.R. 7 Q.B.D. 244, 245
[59] *R. v. Mertens* (unreported). See Stephen, J., *A History of the Criminal Law of England*, (1883, London) vol. II, 362
[60] *Most, op. cit.* n.58, 251-252, per Lord Coleridge CJ. See Porter, B., *The Refugee Question in mid-Victorian Politics*, (1979, Cambridge), 208
[61] *R. v. Antonelli and Barberi* (1905) 70 JP 6, per Phillimore J
[62] *R. v. Burns and others* (1886) 18 Cox CC 355
[63] Ingraham, B., *Political Crime in Europe: A Comparative Study of France, Germany and England*, (1979, Berkeley), 209

Moreover, the 1880s saw the first London underground bombings.[64] Conducted in 1883 by Irish Republicans, they were part of a wave of terrorist activity across the United Kingdom. Emergency legislation was rushed through Parliament in a single sitting.[65] A radical overhaul of the state security system was undertaken.[66] Prominent figures prophesied the 'massacre of thousands' at the hands of the bombers,[67] and lambasted moderates amongst the terrorists' community for failing to prevent such outrages.[68] And, significantly, a string of treason-felony cases were brought against suspected bombers, in which the judiciary struggled to maintain the relevance of the dilapidated offences of treason and sedition in order that they remained viable tools to counter the rapidly changing threats to national security in this era.[69]

Lustgarten and Leigh contend that the Official Secrets Acts 1889 and 1911 amounted to the somewhat unlikely legislative successor to sedition.[70] With a government increasingly eager to protect information,[71] and the country increasingly paranoid about espionage,[72] a quiescent judiciary did not demur in the face of efforts to tighten the law by shifting burdens of proof onto defendants.[73]

However, the shift away from 'a state of law [which] seemed more appropriate to Gilbertian utopia than to modern England,'[74] has already received comprehensive attention

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[64] The bombs, exploding on board trains near Praed Street and Westminster Bridge stations, injured seventy-two. See, Short, K., *The Dynamite War: Irish-American bombers in Victorian Britain*, (1979, Dublin), 160-163

[65] The Explosive Substances Act 1883 completed its passage through Parliament on 9th April 1883

[66] The Irish Special Branch was formed as part of the response to this campaign. See Porter, B., *The Origins of Britain's Political Police*, Warwick Working Papers in Social History, No. 3 (1985)

[67] Stevenson, R., *The Dynamiter*, (1885, London), 59.

[68] *ibid.*, 1. Stevenson attacked the silence of Irish nationalist leader C. S. Parnell in the wake of these attacks.

[69] *R. v. Gallagher and others* (1883) 15 Cox CC 291, 315, per Lord Coleridge CJ; 'If three men with these explosive materials did the same acts with the same objects as it required 3,000 men to do in an earlier period when it was a levying of war ... the acts of three men today were equally a levying of war.'

[70] Lustgarten & Leigh, *op. cit.* n.1, 198

[71] Hooper, D., *Official Secrets: The Use and Abuse of the Act*, (1987, London), 17-31

[72] Porter, *op. cit.* n.6, 149-180

[73] See *R. v. Parrott* (1913) 8 Cr App Rep 186. See Williams, D., *Not in the Public Interest: The Problem of Security in Democracy*, (1965, London), 16-38

[74] National Archives, KV 1/35. See Ewing & Gearty, *op. cit.* n.57, 37-43

from legal writers and historians. Whilst it is hoped that the above précis of the relevant jurisprudence will provide a point of reference for readers, the attention of this study will instead focus upon a series of vignettes, each involving significant, but hitherto neglected, bodies of jurisprudence. These cases saw the judiciary, from the 1860's onwards, undertake (or eschew) consideration of their decisions' national security implications. All of these areas of law primarily relate to national security being used as an interpretive tool rather than as a justification for state action. These vignettes were also chosen for their ability to showcase the law in a state of flux, with the judiciary attempting to keep pace with the demands of an ever-expanding sphere of national security policy and legislation.

The first body of case law resulted from foreign conflicts from the early 1860s onwards, and involved the interpretation of the opaque Foreign Enlistment Act 1819, a criminal statute intended to protect Britain from being pulled into a conflict through the involvement of British mercenaries or due to her shipyards building warships for one of the belligerents. In the Foreign Enlistment Act cases, at the height of the American Civil War, the mid-Victorian judiciary considered whether the requirements of national security could influence the interpretation of statutory provisions with implications for the defendant's liberty and property rights, fully half a century before the outbreak of the First World War.

Such decisions on the scope of Britain's neutrality laws continued after the 1819 Act was superseded by the Foreign Enlistment Act 1870. Parliament intended this legislation to seal the loopholes that had emerged in the earlier jurisprudence. The second substantive chapter will therefore evaluate these legislative reforms and the jurisprudence that they spawned during the Franco-Prussian War and beyond, culminating in the application of this legislation in the aftermath of the Jameson Raid.

Property interests are at the heart of the third body of jurisprudence examined within this study. The interplay between such interests and national security is especially

significant in the period under consideration. The provisions of the Defence Acts and their sister statutes permitted the compulsory purchase of land required for the defence of the realm.[75] Their attendant cases involve a clash between the turn-of-the-century judiciary's emerging conception of national security and their supposed proclivity towards property interests.[76] This clash arose both in the courts' assessment of the breadth of the executive's discretion to acquire land under the Defence Acts and in terms of the compensation awarded where land was expropriated under these Acts by comparison to other statutory schemes.

The final substantive analysis focuses upon miscellaneous cases involving national security concerns, tied together by their link to the armaments industry. This disparate pre-war case law throws the judiciary's evolving attitude towards national security concerns into stark relief. Moreover, *Hunter v. Coleman*[77] provides an opportunity to examine the divided loyalties of an Irish judiciary called upon to evaluate orders preventing the import of arms into Ireland as the "Ulster Crisis" peaked. This long-overlooked authority brings this study up to the summer of 1914.

By this point, whether the wartime jurisprudence involved the judiciary ploughing an existing furrow, or marked a new point of departure for judicial interpretation, will be evident. However, in concluding this study attention must focus upon the influence of the pre-war national security decisions upon the direction of the wartime legislation and on providing a comprehensive explanation for the erosion of the mid-Victorian judiciary's apparent liberalism.

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[75] Rubin, G., 'The Royal Prerogative or a Statutory Code? The War Office and Contingency Legal Planning, 1885 – 1914,' in Eales, R. & Sullivan, D., eds., *The Political Context of the Law*, (1987, London), 147; The Defence Act 1842 contained one of the first legislative references to the phrase 'defence of the realm.'

[76] Denning, *Freedom Under the Law*, (1949, London), 67; 'The judges in England in the nineteenth century were inclined to protect these [property] freedoms with as much vigour as they protected a man's personal freedom or his freedom of speech. In this they were wrong. They weighted the scales too heavily in favour of the rights of man.'

[77] *Hunter*, *op. cit.* n.31

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Neutrality in Judicial Hands:

The Foreign Enlistment Act 1819

'In the present enlightened state of the civilised world, it may turn out that the doctrine and those principles are to be preferred which would make us prosperous in peace rather than those that would make us successful in war .'

Chief Baron Pollock (1864)

Introduction

Today the assertion, barely a decade old, that 'cases involving national security, directly or merely as an undertone, do not bulk large in the judicial calendar,'[1] might be considered more truism than truth. In time of national emergency, the prominent and controversial role of lawyers and judges in shaping the law regarding national security belies the numerical insignificance of the associated case load. However, this role does not stretch back into time immemorial. Indeed, whilst it might appear that few periods in recent British history would forgive the above excerpt from the florid judicial hyperbole of Pollock CB,[2] it appears to sit perfectly in the supreme self-confidence of the mid-Victorian era from which it came. Prior to this era it is impossible to trace even the origins of many

[1] Lustgarten, L. & Leigh, I., *In From the Cold: National Security and Parliamentary Democracy*, (1994), Oxford, 320

[2] *Attorney-General v. Sillem* (1864) 159 ER 178, 221

aspects of the modern judicial approach to national security concerns, relevant case law being scarce since the Glorious Revolution.[3]

Yet it is to this era that this study turns for its beginning, in an effort to trace and to place in context, the course of a little-known stream of jurisprudence where *salus populi* did not outweigh all opposing concerns, even in the face of 'imminent danger' to the nation and of the furore in Parliament.[4] This was an era when Britain's role as the world's great maritime power came close to dragging the country into conflicts in which it sought to remain neutral, and when Britain's legal defences against this threat to her neutrality lay in the hands of the judiciary.

Use of the Foreign Enlistment Act Prior to the American Civil War

Whilst its preamble characterises the purpose of the Foreign Enlistment Act 1819 (FEA) as preventing mischief that "may be prejudicial to, and tend to endanger, the peace and welfare of this Kingdom," modern jurists might consider the Act's 'two distinct and several objects'[5] to involve matters only indirectly relevant to the requirements of national security. The legislation's first concern, found in s.2, was 'the enlisting or engagement without licence of British subjects to serve in foreign service.'[6] Its second object, found in s.7, concerned 'the fitting out or equipping in British dominions of vessels for warlike purposes.'[7] Indeed, many of the legal arguments presented in the case law that arose from attempts to seize ships under this provision would be recognised today as disputes over

[3] *Burmah Oil v. Lord Advocate* (1965) AC 75, 99, per Lord Reid
[4] Cobden, R., *Speeches on Public Policy by Richard Cobden, M.P.*, (1908, 3rd Ed., London), Vol II, Speech I, 24th April 1863; calling for a robust application of the Foreign Enlistment Act 1819.
[5] *Sillem, op. cit.* n.2, 230, per Channell B
[6] *ibid.*, 230
[7] *ibid.*, 230

whether the as yet unarmed hulls of vessels that were clearly men-of-war could yet be considered to be dual-use goods.[8]

However, in order to appreciate the significance of the case law relating to these provisions, both the aim of the legislation and the executive's use of it must be considered in context. The involvement of British mercenaries in the insurrections that swept Spain's South American colonies in the wake of the Napoleonic Wars obliged Parliament to enact legislation to prevent the actions of British subjects from dragging the country into war with other powers.[9] Eager to establish these restrictions, known to history as the "neutrality laws,"[10] before relations with Spain were seriously undermined, the government modelled its legislation on an Act of the United States Congress of 1793 which had been introduced in order to prevent the United States from being drawn into the Napoleonic Wars due to French attempts to commission privateers to prey on British shipping from ports such as Baltimore and Boston. During the passage of the 1819 Act, Canning acknowledged that 'if I wished for a guide in the system of neutrality, I should take that laid down by America in the days of the Presidency of Washington.'[11]

Thereafter, as the upheaval of the Napoleonic era gave way to a century of "splendid isolation," the FEA served as a legislative affirmation of the preoccupation of Victorian statesmen with avoiding entanglement in disputes between and within foreign powers. Whilst the very effectiveness of the *pax Britannica* largely stripped the FEA of purpose, even when the opportunity did arise to invoke its provisions, infractions went unchallenged. A notable early example of ignorance of the FEA is the service of Admiral

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[8] This modern term could be equated to the nineteenth-century international law doctrine of *ancipitis usus*, under which an item could be treated as contraband 'where it becomes essential or greatly helpful to the belligerent for his warlike purposes.' Christie, J., 'Contraband of War,' (1898) *Jurid. Rev.* 296, 301 and Baty, T., 'Some Questions in the Law of Neutrality,' (1902) 4 *J. Soc. Comp. Legis. (n.s.)* 128, 128

[9] Macdonell, J., 'Some Notes on Neutrality,' (1899) 1 *J. Soc. Comp. Legis. (n.s.)* 62, 67

[10] Cook, A., *The Alabama Claims: American Politics and Anglo-American Relations, 1865-1872*, (1975, New York), 16

[11] Canning's Speeches, vol. V, 50

Sir Charles Napier during the struggles for the Portuguese Crown as commander of the Portuguese Queen's fleet which broke the blockade of her forces at Oporto in 1833.[12] Porter has noted that as late as the early 1860s the Act was 'very conspicuously neglected by the government'[13] in light of contraventions by those seeking to find recruits for the Polish insurgency or for the British Legion of Garibaldi's army.[14] As late as September 1860, government officials felt secure in the view that such recruitment was 'illegal no doubt, but this is a law which may be enforced or not according to circumstances.'[15] Porter conjectures that the bases for this *laissez-faire* attitude included a fear amongst officials that trials would only serve to publicise such recruitment, an eagerness amongst politicians not to be seen to support illiberal European powers in their struggles against insurgencies which enjoyed the support of the public, and a disgruntled effort to balance these activities against the recruitment amongst Irishmen to fight at the behest the Pope.[16] The FEA languished in this virtually mothballed state, largely unconsidered by the judiciary, until the actions of the Confederacy during the American Civil War of 1861-65 forced the British government to resurrect its provisions in order to uphold Britain's neutrality.[17]

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[12] See *Dobree v. Napier* 2 Bing NC 781 for an example of judicial disregard for this offence when raised by the owners of a British ship seized by Napier's forces whilst running contraband to the forces of Don Miguel.
[13] Porter, B., *The Refugee Question in mid-Victorian Politics*, (1979, Cambridge), 207
[14] When one prominent recruiter for the Polish cause, Captain Alfred Styles, was brought to trial under the FEA it was by the Russian and not the British government; National Archives, HO 45/7514 & TS 25/1281 (14th September 1863)
[15] Waddington to Home Office, 5th September 1860, National Archives, HO 45/7019
[16] Porter, *op. cit.* n.13, 204-208
[17] Some evidence suggests that earlier authorities on the interpretation of s.7 FEA may simply have been lost due to the inefficient system of law reporting prior to the establishment of the Incorporated Council in 1865. Daniel cites a section of a pamphlet of the era, agitating for a system of official Law Reports, which asserts that there had been a decision as to the construction of this provision by Coleman J in the early 1850s, but that 'of this no other than a newspaper report could be found.' Daniel, W., *The History and Origin of the Law Reports*, (1884, London), 87

Early Civil-War Foreign Enlistment Act Cases

On the 13th May 1861, exactly a month after the fall of Fort Sumter and the collapse of the United States into civil war, the Royal Proclamation of neutrality was publicly read from the steps of the Royal Exchange by the Serjeant-at-Arms and Common Crier of the City of London, in accordance with ancient custom. The majority of third states adopted a similar position of neutrality, allowing them 'to prevent the war's spread to Europe, and to continue peaceful trade relations with each of the warring parties.'[18]

The secessionist states, possessing no fighting ships and little shipbuilding industry, were quickly (if, initially, quite ineffectively) blockaded by the Federal navy.[19] The Confederacy therefore looked overseas for shipyards that might provide warships capable of breaking this strangle-hold on her trade. In Britain, shipyards in ports such as Liverpool, a city which the Foreign Secretary, Lord Russell, described as 'specially addicted to Southern proclivities, foreign slave trade and domestic bribery,'[20] were eager to service such requirements.[21]

Initially the British government was slow to react to this Confederate shipbuilding programme, largely conducted under the auspices of Fraser, Trenholm & Company, and in 1862 the *CSS Florida* and the famed *CSS Alabama* were allowed to slip down the Mersey and into history. Lord Russell was initially only prepared to acknowledge that the construction of such vessels 'contravened the spirit if not the letter of the neutrality laws,'[22]

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[18] Chadwick, E., 'Back to the Future: Three Civil Wars and the law of Neutrality,' (1996) 1 *J. Armed Conflict L.* 1, 1

[19] Lincoln declared the Federal blockade on 19th April 1861, but Lord Russell refused to officially recognise the blockade as effective until February 1862.

[20] Russell to Lyons (Britain's representative in Washington), 24th October 1863

[21] See Merli, F., *Great Britain and the Confederate Navy, 1861-1865*, (1970, Indiana). This is the most comprehensive historical analysis of the attempts of Confederate agents to build a navy in European shipyards and the efforts of Federal diplomats to thwart them.

[22] See Adams, D., *Great Britain and the American Civil War*, (1926, New York) vol. II, 118-119

and the government declined to take any action until it was too late. This lackadaisical attitude was born of the uncertainty surrounding international law and whether 'the duty of impartiality [upon neutrals] should extend to state control over private commercial activities such as shipbuilding performed "to order" for belligerent naval operations.'[23] When it was belatedly accepted by the Law Officers that the construction of the then unnamed vessel *No. 290* at Laird Brothers' shipyard in Birkenhead constituted a possible breach of domestic law under s.7 FEA 1819, after considerable evidence had been gathered by United States agents,[24] a series of tragi-comic blunders delayed the order for her seizure until 29th July 1862.[25] She had sailed the day before.[26] The *Alabama* went on to capture nearly sixty Northern merchantmen, making her numerically 'the most successful privateer of modern times.'[27]

By 1863, with the Confederate commerce raiders inflicting an increasing toll on the North's shipping and with the construction at the Laird shipyard of two next-generation 1,500-ton ironclad-rams posing an immediate threat to the North's naval supremacy,[28] the

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[23] Chadwick, *op. cit.* n.18, 7

[24] Atherton & Palmer to Earl Russell, 29th July 1862, in *The Case of Great Britain to be Laid Before the Tribunal of Arbitration, Convened at Geneva*, (1872, Washington), Vol. I, 445-446. Details of the evidence gathered by Dudley, US Consul in Liverpool, can be found from 486-496.

[25] The sudden insanity of the Queen's Advocate, Sir John Harding, of whom Russell sought advice, caused a delay of a crucial four days in the moves to detain the vessel. See Palmer, R, *Memorials*, (1896, London), Part I, Vol. II, 427

[26] See (1893) 94 *LT News* 490 for the story of how Confederate agents intercepted the opinions of one of the Law Officers, who had dispatched them through a rural post office in South Wales whilst on a fishing trip, and accelerated *Alabama's* putting to sea.

[27] Cook, *op. cit.* n.10, 15

[28] It is difficult to appreciate how revolutionary the ocean-going Laird Rams were at their inception, or the gravity of the threat that they posed to the "wooden-walled" navies of the era. With their great iron prows they resembled updated triremes rather than modern warships. However, in the wake of the iron-clad *CSS Virginia's* action at Hampton Roads, on 8th March 1862, when she had rammed and sank the 1,700 ton corvette *USS Cumberland* (the corvette's shells being seen to bounce off its armoured assailant) it was evident that iron-clads were the weapon with which the Confederacy could end the North's stranglehold on her trade. Confederate commissioning officer Captain Bulloch wrote that 'I designed these ships for something more than harbour or even coast defence, and I confidently believe ... they could sweep away the entire blockading fleet of the enemy.' See Adams, *op. cit.* n.22, vol. II, Chapter XIII, 116–151

Federal government became increasingly vociferous in their complaints.[29] The intended recipient of these vessels may have been common knowledge, but the Liberal government again insisted that there were no grounds on which such a seizure could be warranted.[30] Adams, Lincoln's ambassador in London, bitterly remarked in correspondence with Lord Russell that 'it would be superfluous in me to point out to your Lordship that this is war.'[31] Whilst Baty regarded such posturing as an 'absurd position,'[32] in his recent study of these events, Lord Bingham notes that 'the message was meant and understood as a serious threat.'[33] Thereafter the vessels were indeed placed under surveillance and subsequently seized,[34] although when the lawfulness of this seizure was challenged, 'the outcome of the trial was regarded as ... so uncertain' that the government instead brought an end to the legal proceedings by purchasing the rams for £220,000 for the Royal Navy.[35]

The government's avoidance of a trial not simply out of concern for public opinion[36] but was more importantly a by-product of the vagaries of s.7 FEA 1819. In full this section ran to a phenomenal five hundred words. Yet even at this length this was an overloaded provision, attempting to create offences of not only equipping, furnishing or fitting out with intent, but also of attempting or endeavouring to equip (with intent), procuring to be equipped (with intent) and furthermore aiding, assisting or being concerned in equipping (with intent). The operative part this provision asserts;

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[29] Chadwick, *op. cit.* n.18, note 43; It is ironic to note that less than a decade earlier the U.S. refused to sign the 1856 Paris Declaration respecting Maritime law on the basis that it needed privateers.
[30] TS 25/1270 (24th July 1863) & TS 25/1274 (19th August 1863)
[31] Adams to Russell, 5th September 1863. See Adams, *op. cit.* n.22, vol. II, 144
[32] Baty, *op. cit.* n.8, 208
[33] Bingham, Lord, 'The *Alabama* Claims Arbitration,' (2005) 54 *ICLQ* 1, 8
[34] It must be noted that correspondence of 3rd September 1863 indicates that 'Russell had already decided to stop the Laird rams before the United States' ultimatum of 1863 reached him.' Cook, *op. cit.* n.10, 27
[35] Bingham, 'The Alabama Claims Arbitration,' (2005) 54 ICLQ 1-25, 8
[36] Which certainly played a role, Bingham noting that 'Russell was very keen to avoid a trial in Liverpool;' Bingham, *op. cit.* n.33, 8

'That if any person, within any part of the United Kingdom, or in any part of His Majesty's dominions beyond the seas, shall, without the leave and licence of His Majesty for that purpose first had and obtained as aforesaid, equip, furnish, fit-out or arm, or procure to be equipped, furnished, fitted-out, or armed, or shall knowingly aid, assist, or be concerned in the equipping, furnishing, fitting-out, or arming of any Ship or Vessel with intent or in order that such Ship or Vessel shall be employed in the service of any Foreign Prince, State, or Potentate, or of any Foreign Colony, Province, or part of any Province or People, ... as a Transport or Store-ship, or with intent to cruise or commit hostilities against any Prince, State, or Potentate, ... with whom His Majesty shall not then be at war, ... every such person so offending shall be deemed guilty of a misdemeanour...'

The difficulty that the Crown would face in enforcing s.7 FEA during the Laird-rams debacle, and thereafter against the other recalcitrant shipyards of the Thames, the Clyde and the Mersey, became apparent following the seizure of the 300-ton screw sloop *Alexandra* as she approached completion at the Miller and Son yards in April 1863. Decisions upon the resulting case, *Attorney-General v. Sillem*[37] run to nearly one hundred pages in the law reports. The trial, and subsequent appeals, testify to the authorities' 'face-about on declared policy'[38] when contrasted with their previous studied ambivalence towards the construction of suspected Confederate cruisers in British shipyards. But

[37] *Sillem, op. cit.* n.2

[38] Historian Douglass Adams referred to this *volte-face* as the 'April Policy,' after the date of the seizure of the Alexandra. Adams, *op. cit.* n.22, Vol. II, 144

paradoxically, the court decisions threw the limitations upon s.7 FEA into sharp relief, and were undoubtedly influential in averting a high-profile trial in the Laird-rams case.

It was contended that the *Alexandra* had been equipped with the intent that she be employed by the Confederate States of America, and naval authorities certified 'that her build was apparently for a gun-boat with low bulwarks, over which pivot guns could play and ... that she was not qualified for mercantile purposes.'[39] However in her unfinished condition, there had been no attempt, and no evidence of intent, to arm the *Alexandra* with pivot guns or cannon, and her builders attempted to invoke this loophole in the law to resist the seizure in the courts.

The hearing, which took place in late June 1863, was moved to London because of local feeling. However this relocation could not protect government policy from the ravages of the redoubtable Pollock CB. His jury direction adopted a narrow interpretation of s.7 FEA, which he justified on the basis that as the provision did nothing to prevent the sale of weapons of war other than ships. Instead, this provision only singled out the fitting-out belligerent vessels due to the danger of their coming 'into hostile communication before they passed the neutral line;'[40] thereby bringing the war to British waters. Moreover, a broad reading of the Act would conflict with his interpretation of international law, which 'did not prohibit the sending of armed vessels, as well as munitions of war, to foreign ports for sale.'[41] Therefore the only question left for the jury was whether the defendants intended to fully fit her out at a British port, enabling her immediate engagement in hostile action. The defendants were found not guilty of such an offence without the jury even leaving the courtroom to deliberate.[42]

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[39] *Sillem, op. cit.* n.2, 237, per Pigott B (referring to the evidence of Captain Englefield of *HMS Domestic*)
[40] *ibid.*, 182
[41] *The Santissima Trinidad*, 7 Wheaton's Amer. Rep. 240, 283, per Story J
[42] *The Times*, 25th June 1863

The Crown's appeal against this decision was heard in November 1863. The resulting decision may well be considered something of a showcase for the quirks of the English legal system prior to the Judicature Acts, for not only did Pollock CB give the leading judgment in an appeal from his own decision, but the majority decision by two Barons was opposed by the dissent of two Barons. Fortunately, such idiosyncrasies do not undermine the significance of the judgment.

Given the circumstances in which the *Alexandra* was seized, and the loose language of s.7, the opposing lead barristers in this case, Attorney-General Sir Roundell Palmer and his predecessor as the Government's chief law officer, Sir Hugh Cairns, both recognised that the interpretation of this provision largely turned upon what the court considered to be the legislation's purpose. Cairns considered that 'the legislature never intended to prohibit the building of ships for belligerents, for it is not every description of equipment, furnishing and fitting out, which is forbidden, but only an equipment with intent or in order that the vessel may be used as a transport, or cruise or commit hostilities.'[43] He further made comparison with s.8 FEA, which permitted the equipping or repair of a belligerent vessel that entered a British port, provided that she did not augment her warlike force (for example, by taking on additional cannon). Any lessening of the requirements of the *actus reus* for this offence would thus produce an absurdity, whereby 'the 7th section prohibits all equipments, whether warlike or not, and the 8th section allows a ship armed with intent to cruise and commit hostilities to receive any equipment, provided it is not of a warlike character.'[44]

By contrast, the interpretation sought by the Attorney-General attempted to conflate the "intention" with the "equipping," meaning that it would be possible for the intent on the

[43] *Sillem, op. cit.* n.2, 192
[44] *ibid.*, 193

part of the shipbuilders to colour the actual equipment of a vessel. The Crown contended that the seizure of an incomplete vessel would be possible if it was able to show that the shipyard intended to deliver to their clients a warship, even if she would be incapable of action on her departure from British waters. In such circumstances it was contended that even the laying down of a keel with such intention 'would be a misdemeanour and a forfeiture of the keel.'[45]

Whilst the four Barons who heard the case in the Court of Exchequer railed as one against the ineffective wording of s.7, their judgments displayed four diverse solutions to this problem. The interpretations of s.7 adopted by Pollock CB and Bramwell B required that the state prove that there was at least an intent to arm the vessel within the United Kingdom or its dominions, whilst the dissenting decision of Channell B and the decision withdrawn by Pigott B,[46] both interpreted the provision more broadly, in order that it might permit the seizure of the *Alexandra* in her existing state.

Pollock CB based his narrow interpretation of s.7 upon the view that the FEA had sought to single out vessels from any other munitions, which could be freely supplied to either belligerent, 'to prevent our shores from being made the points of departure of hostile expeditions commissioned and equipped to commit hostilities against a belligerent not at war with us.'[47] Thus, to contravene s.7 FEA, a shipyard would have to equip a vessel with the "means" to the "end" of committing hostilities, as 'in all common sense and understanding, if the nature of the equipment has no reference whatever to the commission of hostilities, it cannot be the "means to that end," and there is no breach of the statute by

[45] *ibid.*, 192, per Sir Roundell Palmer A-G
[46] Pigott B withdrew his judgment, seemingly at the behest of the Lord Chief Baron (*ibid.*, 242), allowing the government's rule for a new trial to be discharged. Interestingly, in an appraisal which appears to be obviously borne out in this case, Polden asserts that Pigott B was 'overshadowed by Pollock and Bramwell, [and] left little mark in the law reports.' Polden, P., 'Pigott, Sir Gillery (1813–1875)', *Oxford DNB*, (Oxford, 2004), [http://www.oxforddnb.com/view/article/22252, accessed 28th March 2006]
[47] *Sillem, op. cit.* n.2, 222

that sort of equipment.'[48] Bramwell B adopted a similar approach to the question of equipment, considering that if s.7 had instead made it illegal to "equip with intent or in order that the ship shall be employed in the service of a merchant in the whale fishery," then 'could it be said that any equipment or intent would be within the [scope of the] Act, unless the equipment was meant to be fit for whaling?'[49]

Pollock CB found support for this narrow interpretation in s.8 FEA, which made it illegal to augment the armament of a foreign warship that entered a British or dominion port. The thrust of this argument,[50] was that if the Crown's interpretation was accurate, 'a Federal vessel of war coming into our ports would be allowed, no doubt, to repair sea damage and to supply lost stores, in order to reach some other port, but the shipbuilder in our port would be equipping, furnishing, and fitting out that vessel knowing that the commander might cruise and commit hostilities against the so-called Confederate States.'[51] However rather than ruminate upon the supposed 'inconsistency and absurdity, and may I add injustice,'[52] evident in such a comparison, Pollock CB might instead have recognised that this provision had its own distinct aim of encouraging reciprocal treatment of British warships when they required assistance from foreign powers.

As to how the intent with which a vessel was built might affect the level of "equipment" that would breach the FEA, Bramwell B returned to his whaling analogy, stating that 'if a man builds a ship [for another person] to go on a whaling voyage, ... he does not build her with the intent that she shall go whaling unless he particularly adapts her

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[48] *ibid.*, 220, per Pollock CB
[49] *ibid.*, 224
[50] Somewhat contradicted by the dubious assertion that as s.8 was not restricted to belligerent warships, the aim of the legislature was that 'our ports are not to be disturbed by a warlike armament at all,' *ibid.*, 218. This was despite the fact that a warship could be legally built for any power with which Britain was not at war.
[51] *ibid.*, 218
[52] *ibid.*, 222

to that service.'[53] Unhappy with the inevitable conclusion of this argument, the *Alexandra* being designed as a warship, he unsatisfactorily concluded that 'if "building" with intent that the vessel should be employed to cruise had been forbidden, I think that the forfeiture would have been incurred, for by her build she is particularly adapted for that purpose; but the word "equip" is used, and there is no forfeiture unless there is an equipment particularly fitting her for cruising.'[54] He further muddied the waters by conceding that it remained possible for 'a ship, though not armed, [to be found to be] equipped for warlike purposes,'[55] if she had 'a fighting crew, muskets, pistols, powder, shot, cutlasses and boarding appliances.'[56] Some idea of the degree to which Bramwell B was merely toying with words, rather than offering a coherent approach towards the naval issues upon which he was adjudicating, can be gleaned by considering how a "warship" so equipped might fare against any vessel with a cannon.

By contrast, the dissenting judgments approached the FEA very differently, Channell B using the preamble as 'a key to unlock the meaning of the Act where it is doubtfully expressed.'[57] He took two insights from the statute's preamble that would colour his interpretation of s.7, firstly that this was an Act 'aimed at the prevention of the offence, not at punishment merely,'[58] and furthermore, that the FEA had not the sole object of 'the prevention of acts which, if done, must endanger the peace of the kingdom, but ... [was] aimed also at acts which may possibly excite such feelings in other nations as will have that effect.'[59]

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[53] *ibid.*, 224, per Bramwell B
[54] *ibid.*, 224
[55] *ibid.*, 225
[56] *ibid.*, 225
[57] *ibid.*, 230, per Channell B
[58] *ibid.*, 229
[59] *ibid.*, 230

He translated these insights into a broad interpretation of s.7, which nevertheless avoided many of the semantic pitfalls that plagued the majority judgments. For example, he considered that whether an act constituted building, which remained legal under the FEA, or equipping for a military purpose, which was not, should be left to the jury. He was prepared to entrust a jury with a broad discretion, considering that 'I do not even say that acts done to the structure of the vessel may not be equipments. I should say that you were equipping a ship for an Arctic expedition by strengthening her framework in order to enable it to resist the pressure of the ice.'[60]

Furthermore, Channell B tentatively affirmed the Crown's contention that the actual role of equipment which may or may not be warlike may be discovered using evidence of the intent.[61] If the jury were allowed to assess whether the *Alexandra* could be regarded as a "dual-use" good,[62] requiring only the addition of armament, then should the intent to put guns aboard be manifest, then it would be possible for a jury to deduce 'that when her guns are on board, the mainsail with which she has been equipped in Liverpool may assist her in chasing an enemy's vessel; ... [and] that the mainsail is an equipment in order that she may be employed to cruise.'[63]

Whilst Channell B would have ordered a re-trial on the basis that 'the explanation given of an extremely difficult and obscure Act of Parliament was not so full or so clear as a jury ought to have had in a case of so great importance,'[64] Piggot B was, ironically given his withdrawal of his judgment, more pugnacious. Taking to its logical conclusion the majority argument of the need for a vessel to be using a British port as a base of hostilities, he concluded that the *Alexandra* 'might have its pivot guns on board, and yet no offence be

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[60] *ibid.*, 232
[61] *ibid.*, 233
[62] Again relying on the doctrine of *ancipitis usus*, explained at n.8 above.
[63] *Sillem*, *op. cit.* n.2, 233
[64] *ibid.*, 233

committed against the statute, because without the cannon balls and powder her equipment would still be useless for actually committing hostilities [and] ... the 7th section would still not be violated.'[65]

He was also more emphatic over the question whether intent alone could render equipment illegal, asserting that, 'I am of the opinion that any act of equipping, furnishing or fitting out done to the hull or vessel, of whatever nature or character the act may be, if done with the prohibited intent, is expressly within the plain language and also within the evident spirit of the enactment.'[66] He continued that in his view;

> 'the prohibited intent is the main ingredient, and any act of equipping done in furtherance of that intent, will constitute the whole offence; for assuming the same intent to be present in two persons, I do not see the difference between the agent who did put on board this ship the cooking apparatus sufficient for 150 or 200 man ... and the man who might have put on board a pivot gun ... Both would be acting with common object, and the part contributed by each would equally conduce to the fulfilment of it.'[67]

Even if this view of the intent with which equipment was carried out was not upheld by his fellow Barons, it was superfluous to his arguments as he felt able to conclude solely from the evidence 'of the fitting stanchions for hammock racks and the cooking apparatus for a crew of 150 or 200 people,'[68] that the vessel was equipped as a warship.

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[65] *ibid.*, 240-41, per Pigott B
[66] *ibid.*, 240
[67] *ibid.*, 241
[68] *ibid.*, 242

At this point in the examination of *Attorney-General v Sillem*, having analysed the legal arguments that carried the day, it is easy to be sympathetic with a frustrated *New York Times'* condemnation of the court for deciding so significant a case through an exercise in semantics.[69] However, this conclusion ignores the advocates' subtle interplay of policy concerns with legal arguments, and how these concerns found their way into the four judgments. With so much dependent upon the 'obviously incorrect wording' of s.7 FEA, Sir Hugh Cairns looked to 'the history of the legislation and the policy of the legislature in passing the Act.'[70] Under this line of enquiry s.7 FEA appeared to constitute an example of legislation undertaken in various states with an aim 'to restrain the subjects of a neutral power from doing that of which either of the belligerents might complain.'[71] However, Attorney-General Palmer gave short shift to the suggestion that the FEA amounted to a narrow 'expression of international law,'[72] noting that 'apart from municipal legislation, a ship completely armed and equipped might be sold (to a warring party) within the neutral territory, and a belligerent would have no right, upon any principle of international law to complain of it.'[73]

However, under pressure from these arguments, the Attorney-General voiced the national security concerns at stake in the interpretation of s.7 FEA, which was required 'not because foreign powers had, by international law, a right to demand it, but because it was considered necessary to enable the Crown to take measures which might prevent entanglements with foreign powers, and preserve the peace of the kingdom. It is manifest that the enlistment of men and equipment of ships within the realm might involve the

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[69] *New York Times*, 8th December 1863
[70] *Sillem, op. cit.* n.2, 183, per Sir Hugh Cairns
[71] *ibid.*, 184
[72] *ibid.*, 191
[73] *ibid.*, 196, per Sir Roundell Palmer A-G

country in a war as to which it is neutral.'[74] The starkest warning of this threat was an assertion that 'a foreign government having cause of complaint that the ports of this country were made arsenals for its enemies, would not enquire whether the armament took place within or without the boundary line (of international waters).'[75] Cairns countered that 'it is a wrong mode of construing a penal statute to extend its provisions beyond what the legislature intended because it may by possibility be evaded.'[76] Moreover, he contended that the Attorney-General's invocation of national security concerns had no basis in law, asserting that 'it is said that the ports of this country ought not to be used as arsenals for belligerent powers. If that means that the ports of this country ought not to be used for furnishing belligerent ships with implements of war, it is conceded; but if more than that be meant (i.e., the building of vessels that could, with armament, be used as warships) the proposition is not correct.'[77]

Any hopes that the Crown had entertained during these proceedings that Pollock CB, the driving force behind the Court of Exchequer, had reconsidered his appraisal of s.7 FEA, would have been quickly dispelled when, adopting a tool that would thereafter become the virtual touchstone of judicial opposition to the supposed requirements of national security, he began his judgment by invoking the spectre of the Star Chamber, and declaring that 'no opinions of jurists, no decisions of foreign Courts, will enable us, or ought to induce us to declare, if the act be not within the words of the statute, that the scope and object, the spirit and intention of the statute include the case before us, though it be not plainly and clearly expressed by the legislature.'[78] He was indignant that the Attorney-General had the temerity to advance arguments based upon national security, stating that

[74] *ibid.*, 197
[75] *ibid.*, 201
[76] *ibid.*, 193, per Sir Hugh Cairns
[77] *ibid.*, 194
[78] *ibid.*, 214, per Pollock CB

'we have nothing to do with the political consequences of our decision or the dissatisfaction which it may create in any quarter anywhere, and I cannot help expressing my regret, not unmixed with some surprise, that the learned Attorney-General has more than once adverted to the consequences that may arise from our holding that what the defendants have done is not contrary to our municipal law.'[79]

He unconvincingly sought to resist the use of the preamble to import issues of national security into the Act, asserting that 'the expression "peace and welfare of the kingdom" ... relates, as far as "peace" is concerned, only to that tranquillity which is in the care of the magistracy, and has nothing whatever to do with the relations of peace or war with respect to other countries.'[80] Thus he retained the steadfast view that even in the face of the complaints of a powerful state that considered the actions of British subjects to amount to acts of war, protecting the "welfare and peace" of the country constituted no reason to alter the construction of an Act. Rather it remains the duty of judges 'to ascertain the true legal meaning of the words used by the legislature and to collect the intention from the language of the statute itself.'[81]

However, Pollock CB appeared to abandon this conception of judicial duty as to statutory construction within a matter of paragraphs; in asserting that, as under s.7 FEA, 'building ships is not prohibited, even building ships for war is not prohibited, provided they be not "equipped, furnished, fitted out, or armed" in our ports with either of the intents stated,'[82] the words of this provision 'ought to be construed (if they can be so construed) so as to leave the commercial interests of shipbuilders untouched.'[83] Indeed, his attitude to the needs of industry clearly influenced his narrow interpretation of s.7, concluding on the

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[79] *ibid.*, 214, per Pollock CB
[80] *ibid.*, 215
[81] *ibid.*, 216
[82] *ibid.*, 217
[83] *ibid.*, 217

basis that the provision applied only to British territory, that 'the great object of the statute, therefore, was not to prevent the building of ships by British shipbuilders for one of two belligerents, with neither of whom we were at war, but to preserve the ports of this country from being made ports of hostile equipment against a friendly belligerent; it was not in any way to fetter the commerce of this country or the trade of shipbuilding beyond what was necessary for that purpose.'[84]

Bramwell B did at least appear more sanguine about the use of novel techniques of interpretation, acknowledging that 'in this, as in other cases of doubtful meaning, it is legitimate to resolve that doubt by ascertaining the general scope and object of the enactment.'[85] Yet, while he conceded that arguments on the basis of international law, the American Act of 1793, and the legislative history and circumstances of the enactment of the 1819 Act might be considered, this came with the caveat that even taken together 'they afford no certain clue to the meaning of this enactment,'[86] and that if a judge 'disregards [the wording of a statute] and decides according to its makers' supposed intent, he may be substituting his for theirs, and so legislating.'[87] This attitude goes far to explaining why he considered it 'necessary, then, minutely to scrutinize the words of our statute.'[88]

Furthermore, Bramwell B carefully steered a course between the competing policy influences at issue. He dismissed suggestions 'that the interests of the shipbuilding or any other trade are so concerned in this matter as to afford an argument in favour of the defendant's construction.'[89] On the other hand, he rounded upon the Attorney-General's raising of national security concerns, asserting that he refused 'to be influenced by the

[84] *ibid.*, 217
[85] *ibid.*, 222, per Bramwell B
[86] *ibid.*, 223
[87] *ibid.*, 225
[88] *ibid.*, 223
[89] *ibid.*, 223

foolish threats that have been uttered.'[90] Yet he could not avoid the policy issues at stake, and had 'no doubt that the vessel was building and equipping for the Confederates, and in order that they might use her, when armed and equipped for hostilities, against the Federals,' and that she might well be armed just outside territorial waters and 'thus the spirit of international law may be violated, and the letter and spirit of the municipal Act evaded.'[91] Despite this realisation, he dogmatically pursued a constructivist interpretation of this statute, declaring that 'important as are the objects of this statute, it must be construed on the same principles as one regulating the merest point of practice or other trifling matter.'[92]

Unsurprisingly, given the prevailing judicial attitudes, the dissenting judges made little effort to acknowledge the influence of national security concerns to their decisions. Channell B went so far as to decry any suggestion of judges acting as 'legislators ex post facto.'[93] Instead he emphasised the use of the preamble as an interpretive tool, and only tacitly affirmed that this imported national security concerns by indicating that the statute should be interpreted as undertaking the 'prohibition and prevention of a mischief which may be prejudicial to and tend to endanger the peace and welfare of the kingdom.'[94] The preamble was, moreover, used by Channell B to avoid taking the discussion of s.7 off on the tangents that Sir Hugh Cairns advocated, asserting that if 'the words of the 7th section *read with reference to the other part of the Act* do, by a reasonably fair interpretation of our statute and the evidence, embrace the case of the *Alexandra*, then in my judgment it scarcely becomes necessary to consider what have been the decisions of the Courts of

[90] *ibid.*, 226
[91] *ibid.*, 226
[92] *ibid.*, 225
[93] *ibid.*, 237, per Channell B
[94] *ibid.*, 230

America upon Acts of Congress in the main much the same, but, in not unimportant respects, different from our own Act.'[95]

Pigott B was similarly reluctant to consider a multitude of novel interpretive techniques, asserting that arguments as to international law 'necessarily embraced a very wide field, and no doubt those obligations are the foundations of this legislation, but, in my opinion, they are pushed too far, if urged as the necessary limit of a municipal enactment.'[96] Therefore, instead of interpreting the FEA merely as was required by international law, Pigott B more openly acknowledged national security concerns as underpinning the statute, considering that;

> 'the neutral state as between itself and its own subjects may find it expedient so to legislate that between the attempt to commit acts of hostility and the completion of them by their subjects, an opportunity would be afforded to arrest such completion; and where the object is a prevention of mischief, on which the peace of the country is supposed to depend, I should expect *à priori* that such would be the course adopted.'[97]

His uncompromising construction of s.7 was evidently motivated by a desire to prevent the flaunting of the neutrality laws, 'either as was done by the *Alabama*, whose armaments went out in another ship, or by completing the peaceful equipments first, and

[95] *ibid.*, 229, Author's emphasis
[96] *ibid.*, 238, per Pigott B
[97] *ibid.*, 238

then putting the guns on board as the last act in port, probably occupying a few hours at most, and giving no opportunity for seizure and prevention.'[98]

In conclusion, despite having reached a point in history when the judiciary were not cowed by national security concerns, the culmination of this quest is strangely unsatisfactory. Pollock CB's judgment appears to be a product of his concern for the effect of the neutrality law on shipyards eager to profit out of the civil war rending the United States, rather than his concern for the rules for the interpretation of penal statutes. Bramwell B's flawed and pedantic interpretation of s.7 FEA is little improved for not being the result of a capitulation to policy concerns. Indeed, the vociferous rejection of national security concerns by these judges suggests that they might have been influenced by the same concerns that prevented the Palmerston administration from pushing reform of the FEA through Parliament. Historian Adrian Cook noted that despite the defunct nature of the statute, 'Palmerston's ramshackle party could not be relied upon to support an amending Bill created by foreign pressure.'[99] The matter was certainly at issue in the case, the Attorney-General having to deny under pressure that the government had been in any way influenced or coerced by Federal representatives.[100]

Ironically, the dissenting opinions appear admirably logical by comparison. Clearly fully aware of the darkening international situation that surrounded the instant case, and

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[98] *ibid.*, 241

[99] Cook, *op. cit.* n.10, 27. See also Bulloch, J., *The Secret Service of the Confederate States in Europe, or How the Confederate Cruisers Were Equipped*, (1959, London), 295-375 for this senior Confederate procurement agent's views on the fetters binding the policy of the Palmerston government, and National Archives, PRO 30/22/97 (5th Dec 1863); Lord Russell to Lord Lyons: Seward's proposal for altering Foreign Enlistment Act was to be deflected by pledging that it would be considered after trials of *Alexandra* and *Laird rams* cases.

[100] *Sillem*, *op. cit.* n.2, 197, per Sir Roundell Palmer A-G. Ironically, on 10th March 1838, during the Canadian rebellion, the United States passed a temporary amendment to their neutrality law to allow government to seize ships on mere suspicion that they were fitting out to be used against the United Kingdom. In Parliamentary debates on the FEA Cobden used this example as evidence that 'the American Government have, from the very formation of their Union, shown a willingness to observe, maintain, and enforce a strict neutrality in reference to the wars which have frequently taken place amongst European States.' Cobden, *op. cit.* n.2

faced with a provision that even Pollock CB admitted 'a whole fleet of ships might sail through,'[101] they undertook to interpret the statute in line with the intention manifest in its preamble. And yet in these judgments the genesis of a later judicial approach to national security concerns is equally evident. Consider Channell B's declaration that 'if it is in the interest of the nation that the law shall be other than we interpret it, if our construction of this Act of Parliament may endanger the peace of the nation, then I say that it be the duty of Parliament to enact a new law; but it is not our duty to look elsewhere than at the present statute for an interpretation of it.'[102] Effectively this amounted to judicial sleight of hand, for his interpretation of s.7 was indeed intended to preserve the peace of the nation, yet he considered himself justified in adopting such a construction of the provision because the preamble invited him to do so.

The effect of the affair on government policy was profound. Foster notes that;

> 'the *Alexandra* case and its resulting newspaper coverage ... brought considerable attention to Confederate operations in Great Britain and to the inadequate British neutrality laws. This attention forced the government to take decisive action to enforce neutral behaviour upon its citizens during later crises: policy prevailed over law.'[103]

This dilemma for the government was most evident in early September 1863, as Russell agonized over whether or not to seize the Laird rams in the face of the trial

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[101] *Sillem, op. cit.* n.2, 222
[102] *ibid.*, 237
[103] Foster, K., 'The Diplomats Who Sank a Fleet: The Confederacy's Undelivered European Fleet and the Union Consular Service,' (2001) 33(3) *Prologue*, (www.archives.gov/publications/prologue/2001/fall/confederate-fleet-1.html)

judgment in *Attorney-General v. Sillem*, and thereafter in the action taken to avoid bringing the case of the rams to trial. However even the delay produced by this case was significant, for the three-month period of uncertainty between the *Alexandra's* seizure and trial resulted in a hiatus in Confederate shipbuilding that left the construction of the Laird rams sufficiently behind schedule to permit government action.

As for the little gunboat herself, she would never enter Confederate service. This, it has to be noted, did not result from any farsighted interpretation of s.7 FEA by the judiciary, but rather 'through the extreme slowness of the legal processes in which Russell had succeeded in entangling her.'[104] Further appeals by the Crown found their way up to the House of Lords, only to be rejected on preliminary points.[105] The same process of delaying proceedings in the wake of the seizure of a vessel would be used to deny the Confederates the use of the 1,300 ton "super-*Alabama*" being built on the Clyde and seized in December 1863. Ironically, given the naval opinion that she was unfit for mercantile service, she would begin a career as a blockade runner under the name *Mary*. She would end the war, if not her litigious career,[106] in Nassau in the Bahamas, in a series of cases resulting from her detention there under suspicion that she had been attempting to arm.[107]

The Developing Foreign Enlistment Act Jurisprudence

The *Times* concluded at the end of the *Alexandra* trial that the Court had not been disposed to 'favour illegal privateering, but that a law against equipping privateers in this

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[104] Bourne, K., *The Foreign Policy of Victorian England*, (1970) Oxford, 94
[105] *Attorney-General v. Sillem* 11 ER 1200
[106] *The Mary* LR (1867) 1 A & E 335 and LR (1868) 2 A & E 319. See also *Prioleau v. United States & Johnson* (1866) LR 2 Eq 659 and *United States of America v. Wagner* (1867) LR 3 Eq 724 and (1867) LR 2 Ch App 582
[107] For the full story of the claims surrounding ownership of the vessel in the wake of the American Civil War, see Bingham, Lord, 'Of Good Report,' (2005), ICLR Annual Lecture, 20 *Daily Law Notes* 7

country must be a dead letter so long as they can be built here and equipped at sea or elsewhere.'[108] Yet the FEA could not be reformed until 1870, lest the Government of the most powerful nation on Earth be accused of capitulating to foreign pressure. Therefore, in an effort to make government policy effective, efforts had to be made to reanimate this dead letter law. Central to this policy would be not simply attempting to prevent belligerent ships from sailing, but pursuing the returning crews of vessels in order to discourage those who might follow in their footsteps.

This was certainly true for the remainder of the American Civil War, providing an excellent looking glass through which to view the development of the mid-Victorian judicial attitude to national security concerns. The first such case was that of *R. v. Jones* in which the defendants were accused under s.2 FEA 1819 of procuring sailors in Liverpool in order to enlist them in the navy of the Confederacy. They were partners in the shipping firm Jones & Co., and recruited a crew for the *Japan* for the ostensible purpose of a voyage to China. However, echoing the fears of the judges in *Attorney General v. Sillem* that the neutrality law could be openly flaunted, the *Japan* rendezvoused with a small steamer in the English Channel, off Brest, which transferred aboard guns, ammunition and officers of the Confederate States Navy. The vessel was renamed the *CSS Georgia* and the defendants persuaded several men to enlist before returning to England. However the defendants maintained that these actions were not illegal as s.2 FEA only made it an offence *within* the United Kingdom to induce a person to enlist to serve a foreign power and the Crown were unable to prove 'intent on the part of the persons hired to enter into the foreign service at the time when they were engaged by the defendants in this country.'[109]

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[108] *Times*, 25th June 1863
[109] *R v. Jones* (1864) 4 F & F 25, 31-32

However, in his jury direction, Cockburn CJ was prepared to read s.2 FEA broadly, asserting that the defendants would be in breach of the provision if the jury found that they 'procured the persons mentioned in the indictment, or either or any of them, to go and embark from this port for the purpose of being enlisted, entered or engaged in the Confederate service.'[110] Furthermore he ensured that the jury were aware of the importance of their decision, instructing them 'not to deal lightly with the case,' as it involved 'a very important Act of Parliament, without which the neutrality of this country could not be maintained, or would at least be seriously jeopardized.'[111] The jury, faced with such an appraisal of the law, found the defendants guilty.

This decision was quickly followed by the case of *R. v. Rumble*, which involved fully one hundred and sixty-six counts brought under the Foreign Enlistment Act 1819 against the purchaser, recruiter and crew of a vessel intended for the service of the navy of the Confederate States of America during the American Civil War. The case involved the purchase from the Admiralty of the decommissioned iron steam gun-boat *Victor*, and its fitting out at Sheerness under the auspices of undertaking trade with China. Once sea-worthy, the *Victor* undertook a trial voyage to Calais under the command of Rumble, where it hoisted the Confederate flag and where officers in grey uniform took command. Again, indicative of a sea change in judicial opinion, Crompton J, in delivering his charge before the grand jury, could 'hardly help feeling that it is of immense importance that the government of the country should be enabled to preserve neutrality, and take measures to prevent what may tend to endanger our relations of amity and peace with any foreign

[110] *ibid.*, 35, per Cockburn CJ
[111] *ibid.*, 37

state.'[112] Nevertheless, this apparent shift in judicial thinking still had to overcome an 'extremely ill-penned' statute that gave rise to 'great difficulty in construction.'[113]

In considering the troublesome s.7, Crompton J was of the opinion 'that it cannot be necessary that there should be a complete equipment, or that you should wait until the last gun is put on board; for then you may be too late, and the scope of the Act is prevention.'[114] Whilst he did acknowledge that 'the Act applies only to equipment necessary or useful for purposes of war,'[115] he thereafter sought to clarify to the grand jury what he meant by this by echoing Channell B's approach to the provision, stating that 'it may be difficult in many instances to say what would or would not be for warlike purposes. A mainsail, for instance, may be as useful for warlike purposes as anything else; but the great thing is the intention that the vessel shall be used for warlike purposes by a belligerent.'[116]

As to the provisions against enlistment in s.2 FEA, Crompton J was unwilling to suggest such a broad reading of the statute, noting that the Act outlawed the enlistment of 'sailors.' The problem of the advance of technology seemingly beyond the language of the statute is lost today with the advantage of hindsight allowing us to see that the word 'sailor' resisted the onset of steam propulsion and iron ships. But in the mid-1860s Crompton J had a genuine concern that this seemingly increasingly dated term in the 1819 Act related specifically to 'a person who navigates a sailing vessel and manages the sails,'[117] and rather than attempt to stretch the meaning of the statute, he questioned whether the Act 'applies to persons engaged on board steamers, such as engineers, boiler workers or the like.'[118]

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[112] *R v. Rumble* (1864) 4 F & F 175, 180, per Crompton J
[113] *ibid.*, 183
[114] *ibid.*, 181-182
[115] *ibid.*, 182
[116] *ibid.*, 182
[117] *ibid.*, 183
[118] *ibid.*, 184

Despite Crompton J's favourable interpretation of s.7 FEA, this case seemed to slip away from the Crown. Lacking evidence of the *Victor's* intended purpose, the Solicitor-General, Sir Robert Collier, was forced to withdraw all charges relating to equipping. Indeed, Cockburn CJ appeared to adopt a stricter line towards the interpretation of s.7 in concluding that as 'nothing appears to have been done to furnish or equip [the *Victor*], or supply her, with materials or munitions of war,' he could not see 'how the trifling things which the defendant is alleged to have done – not amounting to an "equipment" – could be a ground for convicting him under these counts of the indictment.'[119] Furthermore, the Solicitor-General was forced to concede that all of the defendants alleged to be recruits declined to enter into Confederate service when invited to do so at Calais.

This left the charges of procuring recruits levelled against the named defendant, Rumble. Despite the jury intimating that they believed that Rumble was not party to an engagement of men with a view to enlistment in the Confederate service, believing his assertions that he had only travelled to Calais to see to the payment of his men for their labours in making the vessel seaworthy and completing the sea trial, verdict was still sought against him on the charges of enlistment. Cockburn CJ directed the jury that 'no nation professing neutrality ought to tolerate that its subjects should take it upon themselves to assist one or other of two belligerent Powers.'[120] Interestingly, he expressly disclaimed that the present prosecution was required to ensure 'national safety,' and with a jingoism possibly tailored to the prejudices of the jury, rather sought to dispel any Confederate sympathies or thought that the prosecution had been brought at the behest of the Federal government on the basis that the application of this Act was to uphold 'national honour.'[121]

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[119] *ibid.*, 198, per Cockburn CJ
[120] *ibid.*, 201
[121] *ibid.*, 201

Whilst the terms of s.2 FEA only outlawed recruitment within the United Kingdom, Cockburn CJ drew their attention to the persuasive value of the 'strong and undisputed fact'[122] that when, to Rumble's knowledge, 'the vessel had shown her true colours ... when the Confederate flag was hoisted and Confederate officers were on board of her and in command of her ... he neither remonstrated with those who (as it is represented) made him their dupe and their fool in the transaction, nor did he wash his hands of all further participation in the enterprise; but, on the contrary, he went on engaging men.'[123] However, the jury either disbelieved that Rumble acted with the ulterior purpose of getting the crew 'into a position in which they might be induced to enlist in the Confederate service,'[124] or believed that this voyage was actually a sea trial and not an attempt 'to get out of the reach of the English authorities,'[125] for seemingly against the weight of evidence they found the Rumble not guilty.

The last of the cases arising from the American Civil War that requires consideration is that of *ex parte Chavasse*, despite only being linked peripherally to the FEA. This case was an appeal by creditors of the bankrupt Grazebrook after their petition for an apportionment of the proceeds of the joint venture with Grazebrook was rejected by a Commissioner under the Bankruptcy Act 1861. This was because the joint venture was an attempt in April 1862 to run the blockade of the Confederacy in the steamer *Modern Greece* with a shipment of rifles and ammunition, which the Commissioner deemed to be an illegal activity.[126] This proposition relied heavily upon the terms of a Royal

[122] *ibid.*, 197
[123] *ibid.*, 197
[124] *ibid.*, 199
[125] *ibid.*, 200
[126] Unfortunately for the enterprise, this attempt to run the blockade ended when the vessel was wrecked off Wilmington with much of the cargo lost.

proclamation of 13th May 1861.[127] Indeed the respondents went so far as to assert that 'the illegality of the present adventure was shown beyond all controversy by the terms of the Royal proclamation.'[128]

Even with the national security concerns evidenced in this proclamation Lord Westbury LC was dismissive of this contention, stating that 'he need not observe that it is the object of a proclamation to make known the existing law and it can neither make nor unmake law.'[129] He instead concluded that this Proclamation was intended firstly as a declaration 'that the provisions of the Foreign Enlistment Act would be strictly enforced; and, secondly, not to prohibit the exportation of warlike stores, but to warn the subjects of the realm that if any subject carried contraband of war to either belligerent he would incur the penal consequences of the law of nations.'[130] Lord Westbury therefore overturned the Commissioner's decision, describing a neutral trader's transport of munitions of war to a belligerent country as 'quite lawful,'[131] the conflicting and co-existent right of the belligerent's enemy to capture and condemn such a cargo as contraband notwithstanding. According to this interpretation of international law, and regardless of s.7 FEA, Lord Westbury considered that 'if a British shipbuilder builds a vessel of war in an English port, and arms and equips her for war *bonâ fide* on his own account as an article of merchandise, and not under or by virtue of any agreement, understanding or concert with a belligerent power, he may lawfully, if he acted *bonâ fide*, send the ship so armed and equipped for sale

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[127] The terms of this proclamation of neutrality amounted to a warning by the government 'to all persons whatsoever entitled to our protection, that if any of them shall presume, in contempt of this our Royal proclamation and our high displeasure, to do any acts in derogation of their duty as subjects of a neutral Sovereign in the said context, or in violation or contravention of the law of nations ... as for example ... by fitting out, arming or equipping any ship or vessel to be employed as a ship of war or privateer or transport by either of the said contending parties; or by carrying ... arms, military stores or materials or any article or articles considered and deemed to be contraband of war ... all persons so offending will occur and be liable to the several penalties and penal consequences by the said statute or by the law of nations.'

[128] *Re Grazebrook, ex parte Chavasse* (1865) 12 LT 249, 250, per Aspinwall QC

[129] *ibid.*, (1865) 46 ER 1072, 1075, per Lord Westbury

[130] *ibid.*, 1075

[131] *ibid.*, 1074; see Smith, F., *International Law*, (1900, London), 158

as merchandise in a belligerent country.'[132] Lord Westbury's *obiter dictum* clearly sits uncomfortably with the FEA's preventative role, constituting either an inaccurate and throw-away attempt to illustrate the legality of blockade running, or an effort to undermine the new approach to the FEA. Odd though it may seem, given the profile of the FEA jurisprudence, mistake appears more likely than attempted re-interpretation. An effort to reinvigorate the majority interpretation from the *Alexandra* case would seem to be an odd response from a Cabinet minister, even one wearing his judicial hat. In either case, this decision provides an insight into how far the judiciary of this era were prepared to uphold the interests of commerce; 'a right to interchange the products of labour with the inhabitants of every other country,'[133] unless directly confronted by a conflict with an issue such as national security.

After the American Civil War

The *CSS Alabama* and her sisters went on to write their place in international law, through the celebrated *Alabama* Claims Arbitration, but consideration of these issues is beyond the scope of this study,[134] especially with domestic FEA jurisprudence continuing to develop through the 1860s. *Burton v. Pinkerton* was the first of the Foreign Enlistment Act cases to arise after the American Civil War, involving the war between Peru and Spain that began in January 1866. Interestingly the action was not brought by the government, employing the Act to protect the nation's neutrality, but by a mariner recruited to serve aboard a ship, the *Thames*, undertaking a supposedly commercial voyage with an initial

[132] *ibid.*, 1075
[133] *ibid.*, 1074
[134] An award of $15,500,000 was made against the United Kingdom, largely accounting for the predations of the Confederate cruisers. See Cook, *op. cit.* n.10

destination of Rio de Janeiro. However, the vessel soon began sailing in concert with, and with the commencement of hostilities as a tender vessel under the direction of, two powerful British-built Peruvian iron-clad rams engaged in action against Spain. The claimant alleged that by sailing under these circumstances, Pinkerton, the ship's master, had committed a repudiatory breach of contract. Not only did he allege that continuing aboard the *Thames* would expose him to risks of war to which he had not consented, but that the contract now involved service aboard a tender ship that stood contrary to s.2 Foreign Enlistment Act. Surprisingly the government intervened in this case to argue for a narrow interpretation of s.2 FEA because, as the *Thames* 'was fitted out and started on her expedition before the commencement of war,'[135] the Crown was not interested in bringing charges against those involved in the voyage.

Kelly CB, delivering judgment for himself, Martin and Pigott BB, found for the claimant on the basis of his first contention; that by placing his vessel under Peruvian orders, Pinkerton had breached the contract, because these 'orders might have been such as to expose her to an attack from a Spanish ship of war.'[136] However, despite the contentions of the Solicitor-General, who must be taken to have been fully apprised of the security implications of these activities, and despite consideration of the FEA being unnecessary to the outcome of this case, Kelly CB proceeded to consider whether this voyage was also illegal. He concluded that a crewing tender vessel in the service of a belligerent power was not only 'against the spirit and intent of that Act of Parliament,' but, under a broad reading of what constitutes service aboard a ship being used for a 'warlike purpose,' that those serving aboard the *Thames* had breached s.2 FEA.[137] That this approach was driven by Kelly CB's appraisal of the exigencies of national security is confirmed by his stating that,

[135] *Burton v. Pinkerton* (1867) LR 2 Exch 340, 343, per Pollock S-G
[136] *ibid.*, 347, per Kelly CB
[137] *ibid.*, 348

'it is impossible not to see that, by adventures like these, this country has been brought to the very verge of war – first with the United States, and latterly with Spain.'[138] This clarification of the law was intended to close any loopholes that might have encouraged such adventures and can be contrasted with the doubting judgment of Bramwell B, which focused solely on the contractual position of the parties.

The next authority to warrant consideration could have come from the pages of a *Boy's Own* annual. On 11th May 1869, at a time of insurrection against Spanish rule in Cuba, the *Salvador* left the Bahamas under fire from a Royal Navy cutter, loaded with Cuban separatists and arms and destined for the Cays on Cuba's eastern coast. Having landed this force, she evaded a Spanish warship and returned to Nassau, where she was seized by Her Majesty's Receiver-General, under warrant from the Governor alleging a breach of s.7 Foreign Enlistment Act 1819.

Whilst neither the Vice-Admiralty Court in the Bahamas, nor the Privy Council raised national security arguments, this case remains significant because of the broad interpretation of the FEA the judiciary adopted. Argument as to whether the vessel fell within s.7 FEA centred upon whether "equipping," as contemplated by the Act, required an addition or alteration to the vessel. The ship owners contended that their actions, adding 'provisions, water, and repairing certain tools belonging to the engine do not come under that definition.'[139] A second line of argument concerned the Act's applicability to the circumstances of the instant case, as it 'contemplates a state of war between two parties in which England is declared to be neutral, and that the present disturbances in Cuba cannot

[138] *ibid.*, 348
[139] *The 'Salvador'* (1870) [L R] 3 P C 218, 225, per Rothery J

be considered, ... as indicating a state of war between Spain and the inhabitants that are at present in a state of insurrection.'[140]

In tackling the first of these issues, Rothery J found little assistance in the authorities, as 'all the cases that have yet occurred are cases of ships of war, and the meaning of the terms "equip, fit-out, or furnish," may be very different when applied to ships of war and when applied to a transport or store-ship.'[141] Nevertheless, he adopted the broad interpretation that equipping 'includes anything necessary for carrying out the object you have in view, and, as applied to a vessel, I consider it to mean supplying it with anything which it may require to carry out the voyage it may be engaged on. Now, what more necessary things can there be for a vessel, intended to be used as a transport-ship, than water and provisions?'[142]

Rothery J was similarly emphatic in asserting that 'a vessel carrying over a large body of fighting men, with weapons ready to their hands, is a transport.'[143] Furthermore, he accepted that the evidence of the *Salvador*, 'going among the Cays at the eastern end of Cuba, where there was no port of entry, their evident dread of a Spanish man-of-war, and lastly, the fact of the passengers immediately on landing preparing for defence or attack,'[144] indicated that she had been equipped for action against the government of Spain. Despite this, in the absence of sufficient evidence of actual "belligerents" that this transport was intended to support, he felt unable to uphold such a seizure.

Before the Privy Council, Attorney-General Collier contended that the evidence of the Spanish Governor's proclamation of a state of insurrection was sufficient evidence that the expedition was in aid of a 'government' opposing Spanish rule by force as required by

[140] *ibid.*, 225
[141] *ibid.*, 225
[142] *ibid.*, 226
[143] *ibid.*, 226
[144] *ibid.*, 226-227

s.7 FEA. The interesting fact is not that the court agreed with him, but that it did so through the leading judgment of the then Lord Chancellor, Lord Cairns. During his career as an advocate Cairns had picked holes in the FEA so assiduously. Yet, when confronted with this same statute as a judge, he acknowledged that 'the interpretation of that section is attended with some difficulty, mainly owing to the great quantity of words which are used in the clause.'[145] His decision to affirm the seizure was based upon the fact that the vessel in question was employed as a transport or store-ship in the service of a body of insurgents known to be undertaking hostilities against Spanish rule in Cuba; and that Rothery J had erred in confining his attention to the requirement that the insurrectionists being aided must be exercising powers of government. He was of opinion that there was no difficulty in upholding the seizure, 'because their Lordships find these propositions established beyond all doubt, - there was an insurrection in the island of Cuba; there were insurgents who had formed themselves into a body of people acting together, undertaking and conducting hostilities; these insurgents, beyond all doubt, formed part of the province or people of Cuba; and beyond all doubt the ship in question was to be employed, and was employed, in connection with and in the service of this body of insurgents.'[146]

Conclusion

An overview of the FEA cases relating to the American Civil War presents the paradox that just as the issue of detaining Confederate raiders declined in importance as the Union gained the upper hand, the judiciary appear to have belatedly recognised the threat that building and crewing of ships for belligerents posed to national security and began to

[145] *ibid.*, 229, per Lord Cairns
[146] *ibid.*, 233

read s.7 FEA expansively in an effort to curtail these activities. Thereafter, when the statute was raised in relation to the "little wars" that sprang up in the 1860s, with even the Solicitor-General affirming that there were no national security issues at stake, the judiciary progressively tightened the ineptly drafted s.2 and s.7 FEA.

Even Pollock CB's interpretation of the FEA in the manner demanded by commercial interests can be cast as a natural response to the disarray of the executive. The charges brought in the *Alexandra* case were anathema to a system of commercial law which from the early-nineteenth century was predicated by 'the elimination of all provisions based on the necessities of national defence.'[147] The resurrection of a statute nearly half a century old and largely overlooked in that period, was unlikely to lead a judiciary to abandon their regard for freedom of contract.[148] Well might Lord Bingham conclude that the majority opinion in *Sillem* 'was a tenable interpretation of the section, read literally, but it ignored the spirit and purpose of the enactment.'[149] Pollock CB would undoubtedly retort that he was reading the statute in line with the whole body of nineteenth-century commercial law. Admiral Napier had led a Portuguese fleet in time of war. Widespread recruitment was under way in the United Kingdom for the causes of Polish and Italian independence, not to mention recruitment to the Federal and Confederate causes.[150] None of these activities had been significantly curtailed despite their illegality under the

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[147] Holdsworth, W., 'The Relation between Commercial Legislation and National Defence Historically Considered,' (1918) 30 *Jurid. Rev.* 293, 294

[148] Atiyah concluded that Bramwell B's interest to the historian of nineteenth-century law is that 'he made no secret of his political convictions, and because it is not difficult to trace the influence of these convictions on his legal judgments in a wide variety of cases.' Atiyah, P., *The Rise and Fall of Freedom of Contract* (1979, Oxford), 374. 'Bramwell's political principles were those of the classical school of nineteenth-century liberalism, and he sincerely believed that the principle of *laissez-faire* permeated the common law of England.' Taylor, M., 'Bramwell, George William Wilshere (1808–1892)', *Oxford Dictionary of National Biography*, (2004, Oxford), [http://www.oxforddnb.com/view/article/3245, accessed 29th March 2006]

[149] Bingham, Lord, 'The Judges: Active or Passive?' The British Academy Maccabaean Lecture in Jurisprudence, 27th October 2005, 17

[150] National Archives, TS 25/1267 (2nd July 1863), TS 25/1355 (24th October 1864) and TS 25/1360 (19th November 1864); the last of these records details the detention of Brunel's famous *Great Western* on suspicion that she was ferrying volunteers to the Federal army.

FEA. So it could hardly be surprising that some judges would object to the country's shipbuilding interests being saddled with a burden of strict neutrality laws, in excess of the requirements of international law, simply because this was the interpretation demanded by national security concerns.

This leaves the all-important question of why the judiciary's attitude towards these provisions changed so dramatically. Certainly it may simply be that different judges, more alive to national security concerns, abandoned the interpretation of the FEA adopted by Pollock CB and Bramwell B. However the later cases simply ignore the interpretive malaise of *Sillem*, rather than attempt to distinguish or overrule the decision. It appears possible to conjecture that this change in judicial attitude tallies with the decline in foreign pressure for the government to enforce the FEA, which appeared to be so contentious in the *Alexandra* case. Those *laissez-faire* arguments advanced by the defence in the *Alexandra* case were not accepted by the court on the basis of their legal merit, but because they provided a sufficient basis on which the judiciary could resist foreign and government pressure. Certain judges considered that such threats to national prestige outweighed the risks to national security attendant to their decisions.

Yet even if the charge of jingoism can therefore be levelled against the mid-Victorian judiciary, then at least the later FEA jurisprudence indicates that most judges had not closed their minds to the dangers of ignoring national security concerns. Instead, the efforts of the judges in these cases, particularly by Kelly CB in *Burton v. Pinkerton*, to imbue mundane cases with national security significance indicates the eagerness of individual judges to develop precedents that would allow of their successors, if faced once again with highly-charged cases, to read the provisions of the FEA broadly, without facing the accusation that they were bowing to foreign pressure.

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In Hot Haste:

The Foreign Enlistment Act 1870

'It is ridiculous to say that a builder did not know that the vessel he was building was for war purposes; and it is less evil that the shipbuilding interest should suffer a little, than that the whole nation should be involved in difficulties.'

Viscount Bury (1870)

A New Foreign Enlistment Act ...

The judiciary's commitment to a new interpretive approach to the Foreign Enlistment Act 1819 would never be tested in circumstances equivalent to the strained relations between the United States and the United Kingdom in the 1860s. Aware of the Act's shortcomings with regard to the equipment of warships for belligerents, the Derby government established a Neutrality Commission, under the chairmanship of the former Lord Chancellor, Lord Cranworth. The Royal Commission reported in 1868,[1] but this report was not acted upon until two years later when the outbreak of the Franco-Prussian war threw the inadequacies of the existing neutrality law into sharp relief. As the above excerpt from Viscount Bury's contribution to the debate in the House of Lords indicates,

[1] Cranworth, Lord, *et al.*, 'Report of the Neutrality Commission,' HC (1867-8) xxxii, 265: presented to the House of Commons on 28th May 1868.

Parliament was not prepared to run the risk of a repetition of the *Alexandra* debacle.[2] Passing through the legislature at a speed rarely surpassed before or since,[3] the Foreign Enlistment Act 1870 may be considered the prototypical piece of emergency legislation. In spite of severe criticism in *The Times* over this Bill being 'introduced in hot haste and hurried through Parliament,' to the detriment of its quality,[4] comparisons to the efforts of legislators facing later emergencies would be invidious given how thoroughly the ground work had been laid by the Neutrality Commission.

Two words dominated the Commission proceedings and the subsequent debates in Parliament; *Alexandra* and *Alabama*.[5] Indeed, the Commission's recommendations indicate the degree to which these cases coloured legal thought on the Foreign Enlistment Act. Laboured consideration upon the Act's shipbuilding provisions left the Commissioners unable to examine the provisions relating to enlistment thoroughly, despite their manifest failure to prevent the engagement of British citizens in foreign wars over the previous half century. At the Second Reading the Attorney-General, Sir Robert Collier, affirmed that 'with respect to enlistment, the provisions of the Bill are very much the same as those of the existing Act; but they are, I think, expressed in clearer language.'[6] Many of these provisions, enacted in 1870 and still in force at the time of writing, have yet to result in a successful prosecution.[7]

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[2] HC Deb, 3rd Series, vol. 203, col. 1381, 1st August 1870

[3] The First Reading of the Foreign Enlistment Bill was held on 19th July and the legislation was enacted on 9th August 1870.

[4] *The Times*, 18th January 1871

[5] So much so that at least one MP is shown by Hansard to confuse the two cases; HC Deb, *op. cit.* n.2, col. 1373, per Mr Staveley Hill

[6] HC Deb, *op. cit.* n.2, col. 1368, per Sir Robert Collier A-G

[7] Second Report of the Foreign Affairs Select Committee, (3rd February 1999), HC (1998-99) 100-II, para 92, asserted that the FEA was an 'antiquated piece of legislation [which] was passed on the outbreak of the Franco-Prussian war and makes it an offence to engage in military or naval service of "a foreign state at war with any foreign state at peace with Her Majesty." ... Sir John [Kerr] told us that there had never been a successful prosecution under the Act in connection with illegal enlistment or recruitment, and that the standard of proof it required was probably unattainable.'

As for the overhaul of the s.7 prohibition of equipping warships for belligerents, the Commission proposed the 'very important addition ... that it should apply not merely to the arming and equipping, but to the building of a ship.'[8] In an effort to quell fears for the shipbuilding industry, Sir Robert Collier commended this tightening of language to the House on the basis that 'if such a provision were contained in the existing Act, the *Alabama* could not have escaped, and the *Alexandra* must have been condemned.'[9] It is surely no coincidence, given the position of Bramwell B on the Commission, that in the *Alexandra* case he asserted that this wording would have allowed him to uphold the seizure.[10] A further example of this Act being ahead of its time was the introduction of the evidential presumption 'that if it is shown that a vessel has been ordered to be built for a belligerent, and is supplied to that belligerent and used for warlike purposes, that shall be held to be prima facie evidence that she was built for the warlike service of the belligerent, unless the innocent destination of the vessel can be established.'[11] However, beyond these additions and the sensible deconstruction of the mammoth s.7 into individual offences, the weight of change lay in enhanced punishments for defiance of the Act, leading former Commissioner, Vernon Harcourt MP, to lament, 'that the punitive clauses, which, in certain states of public feeling, could not be carried out, had been multiplied, and that the strength of the Bill had not been thrown into the preventative clauses.'[12]

Alteration of these provisions was certain to spark a debate about the new balance that had been struck between ship-building interests and national security, and it is interesting to note how argument in Parliament covered much the same ground as the Court

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[8] HC Deb, *op. cit.* n.2, col. 1368, per Sir Robert Collier A-G
[9] *ibid.*, col. 1368
[10] *Attorney-General v. Sillem* (1864) 159 ER 178, 224, per Bramwell B. Bramwell B also took a leading role in the inquiries and discussions that preceded the Procedure Acts, the Judicature Acts and the Public Companies Act. See Knott, J., 'Lord Bramwell,' (1892) 4 *Jurid. Rev.* 347, 350-351
[11] HC Deb, *op. cit.* n.2, col. 1368-1369, per Sir Robert Collier A-G
[12] *ibid.*, col. 1375

of Exchequer had traversed seven years earlier. Sir Robert Collier was adamant that 'Her Majesty's Government have been less careful to ascertain what foreign nations would be entitled to require from us than what we consider due to ourselves – to our own dignity and our own self-respect.'[13] However, that such dignity only stretched so far, is evidenced by the response of the Attorney-General to complaints that the shipbuilding industry was unfairly singled out by the FEA. In particular, figures such as former Commissioner, Lord Houghton, submitted that a complete prohibition upon the export of munitions of war had been 'advocated by some of the most experienced and distinguished members.'[14] Sir Robert Collier responded that, 'during the American War, large quantities of arms, ammunition and other contraband of war were supplied by us both to the Federals and the Confederates; but, although the United States complained of us for having allowed the *Alabama* to escape, they made no complaint that we did not undertake to prevent the exportation of contraband of war.'[15] However, the best justification for the more stringent restrictions upon shipbuilding was provided by the future Master of the Rolls, George Jessel, who stated simply that, 'if Parliament wished now to give powers which, to some extent at least, exceeded those hitherto claimed by the Government, it must be admitted that, as the world went on, modifications in what was called the Law of Nations were admissible.'[16]

It may appear that little of the above evaluation of the Commission Report and Parliamentary debate is relevant to a study of the judiciary's approach to the national security concerns at issue under the FEA. However, when the Attorney-General spoke of the Commission consisting of 'men of the greatest eminence,'[17] he was referring to a body

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[13] *ibid.*, col. 1366
[14] HL Deb, *op. cit.* n.2, col. 1676, 8th August 1870
[15] HC Deb, *op. cit.* n.2, col. 1371, 1st August 1870
[16] *ibid.*, col. 1505, 3rd August 1870
[17] *ibid.*, col. 1367, 1st August 1870

that contained no fewer than seven figures who were at some point judges, including three Lord Chancellors, past and future. Amongst this preponderance of judges and jurists were many of the leading protagonists in this saga; Sir Roundell Palmer, Lord Cairns, Phillimore J of the High Court of Admiralty and Bramwell B, although some attempt was made to offset their influence through the inclusion on the Commission of figures representing the interests of commerce, such as the merchant banker, Thomas Baring.

It is therefore possible to characterise the FEA 1870 as an attempt, with the approval of senior members of the judiciary, to develop a legislative formula that would circumvent the narrow interpretation of s.7 FEA adopted by Pollock CB in the *Alexandra* case. More unusually, however, Sir Robert Collier was prepared to criticise this interpretation before Parliament, and there appears to be personal venom in his consideration of the 'failures' endured by the Palmerston administration under the existing legislation;[18]

> 'We all know that a suit was instituted against the *Alexandra*, and although it appeared that the vessel had been built for the Confederate Government, and was to a certain extent equipped for their service, still the late Chief Baron directed the jury that, because she was not so completely equipped as to be in a condition to commence hostilities when she left our ports, therefore the Foreign Enlistment Act did not apply. ... I believe the ruling to have been wrong, though I am not entitled so to pronounce it ... but if the law

[18] Sir Robert's annoyance could stem from his being the legal opinion upon which Ambassador Adams had relied in seeking the seizure of Confederate vessels. His speech can be contrasted with how Lord Halifax approached the same matter when piloting the Bill through the Lords. It was his opinion that 'in the case of the *Alexandra* and of the rams, proceedings before legal tribunals resulted in a proof that the government had not sufficient power in the matter.' HL Deb, *op. cit.* n.2, col. 1679, 8th August 1870

was rightly laid down by the Chief Baron, that law ought to be amended, and no other *Alexandra* ought to be allowed to escape...'[19]

The tightened language of the key provisions of the new legislation, considered above, indicates that the judicial members of the committee were not overly eager to exercise a wide discretion in making the sensitive decisions required under the FEA. However, it was clear that they regarded these as judicial decisions. Complaints regarding the seizure of vessels would in the wake of this legislation have to be brought before a single judge in the High Court of Admiralty rather than before the judge and jury of the Court of Exchequer. That this change in jurisdiction was at the behest of the Commission suggests that it cannot simplistically be attributed to the government seeking to avoid what had come to be regarded as an unreliable tribunal,[20] although it was unlikely that the executive would ever be adverse to the proposal. Nevertheless, there remained those in Parliament prepared to characterise this move as a conspiracy against 'the mercantile public,' who 'had very little confidence in the Court of Admiralty.'[21] Staveley Hill MP asserted that 'it was very possible that the decision of the late Lord Chief Baron in the matter of the *Alabama* (sic.) might have been unsatisfactory to the Government; but it was to be regretted that, after the decision had been given, the Government should, in the first Bill on the subject, try to do away with the old method of hearing such cases before one of the Judges of the Common Law Courts and a jury, and send those cases to the Admiralty

[19] HC Deb, 3rd Series, *op. cit.* n.2, 1st August 1870
[20] Commission member Vernon Harcourt MP declared that, 'the most important decision at which the Commissioners arrived' was that of jurisdiction, and, somewhat melodramatically, that, 'if this clause were omitted the Royal Commission would have sat in vain.' HC Deb, *op. cit.* n.2, col. 1511, 3rd August 1870
[21] *ibid.*, col. 1502, per Mr Norwood

Court, where there would be no jury to hear them at all.'[22] Yet rather than amounting to a conspiracy against "the mercantile public," or a slight against the Court of Exchequer, this shift in jurisdiction was made for pragmatic reasons. Firstly, there was the question of the experience of the tribunal, Commissioners considering that 'the Court of Admiralty, having to decide questions of prize in time of war, was the best fitted to determine questions of neutrality.'[23] Secondly, there was the uncomplicated motivation of removing the difficulties that had been thrown up by hearing such complicated cases before juries, the Attorney-General stating, 'that proceedings in the Court of Admiralty would be speedier, cheaper and in every respect preferable.'[24] Finally, almost imperceptibly, there was the national security justification for the shift in jurisdiction, Mr Bourke acknowledging that leaving cases under this Act in the hands of a jury would be to abandon them to 'be decided by passions and prejudices.'[25] However, the doubt still lingered with some members that whilst 'cases which involved the question of peace or war should be tried by one of the Superior Courts without a jury ... it was questionable whether any single judge ought to decide momentous questions.'[26]

... An Old Problem?

Parliament did not have long to wait before such "momentous questions" fell to a single judge under the new Act. By late November 1870 the Franco-Prussian War was going badly for France. Preparing to evacuate the soon-to-be-besieged Paris, the "Government of National Defence" contracted with the owners of the *International*, a

[22] HC Deb, *op. cit.* n.2, col. 1373, 1st August 1870
[23] HC Deb, *op. cit.* n.2, col. 1511, 3rd August 1870, per Mr Vernon Harcourt
[24] *ibid.*, col. 1505
[25] *ibid.*, col. 1512
[26] *ibid.*, col. 1511, per Sir James Elphinstone

steam-ship specifically fitted to lay underwater cables and in no way adapted for purposes of war, to lay down in the sea a series of telegraph cables along the French coast. However on 28th December 1870, on the brink of her departure from London, the *International* was detained by the Foreign Secretary, under s.8 Foreign Enlistment Act 1870, on the basis that she was to be employed in the military service of a foreign state in a war in which the United Kingdom had declared neutrality.[27]

In a measure of the significance of this detention, the Crown's case in answer to the subsequent application for the ship's release was conducted by both Attorney-General Collier and Solicitor-General Coleridge. In an attempt to fit this case within the meaning of "military service" as provided by the interpretation clause introduced in s.30 of the new Act, the Crown claimed that 'laying a submarine cable is a service of a special and important nature, and when such service is performed in order to keep up communication between military forces, it is a military or naval service.'[28] Whilst this provision specifically included "military telegraphy," this meant field telegraphy and as such differed substantially from laying an underwater telegraph cable. Nevertheless, as this provision was indicative rather than exhaustive, the Attorney-General urged the Court to consider instead, 'whether the main object of laying the cable was to subserve military operations; if it was, then the laying of the cable must be regarded as a military or naval service.'[29] In a forceful argument he contended that when the *International* was contracted to lay cable, the French government was preparing to evacuate to Bordeaux, and given that 'communications by land between the north and south of France were to a great extent interrupted, and to a still greater extent endangered by the German armies ... it is obvious

[27] Confusingly s.8 FEA 1870 is the amended version of s.7 FEA 1819
[28] *'The International'* (1871) 3 A&E 321, 330 per Sir Robert Collier A-G
[29] *ibid.*, 330

that the object of the cable was to open a new and safe means of communication between the seat of government and the armies in the field and the arsenal at Cherbourg.'[30]

As Phillimore J undertook the first interpretation of the statute that he had helped draft, he did not resist the urge to congratulate himself, declaring the reformed FEA to be 'very important and very valuable - strengthening the hands of Her Majesty's government, and enabling it to fulfil more easily than heretofore that particular class of international obligations which may arise out of the conduct of Her Majesty's subjects towards belligerent foreign states with whom Her Majesty is at peace.'[31] Nevertheless, in a robust judgment, he set out to confound those parliamentarians who foresaw the Court of Admiralty bending to the government's wishes. He recognised that the Court's duty was to perform a balancing act that would become familiar in national security jurisprudence; to construe the statute 'to give, if possible, due and full execution to its main purpose, and on the other hand not to strain the provisions of it so as to fetter the private commerce of Her Majesty's subjects beyond the express limits which the statute ... has prescribed.'[32]

Whilst such a momentous decision could not be taken without a degree of hyperbole, Phillimore J lingering upon the backdrop of 'the terrible and devastating war, which ... began to cover France with blood,'[33] his judgment upon the substantive question of whether laying a telegraph cable could in the instant case constitute "military service" was concise and authoritative. He firstly recognised that 'the statute, by specifying "military telegraphy," has not ... excluded the possibility of showing that in the particular circumstances of the case "postal telegraphy" may be considered as telegraphy employed in the military service of the state.'[34] However, despite acknowledging that 'the present

[30] *ibid.*, 331
[31] *ibid.*, 332, per Phillimore J
[32] *ibid.*, 332
[33] *ibid.*, 333
[34] *ibid.*, 337

circumstances of France are certainly such as to make the means of communication between her armies and her government of the utmost value to her,' Phillimore J concluded that military communication was neither the main object of this cable, 'nor could it, without additions and adaptations, with which this company has no concern, be made even partially to subserve this end.'[35] The cable as laid would be suitable only for postal telegraphy, and 'the applicants are no parties, directly or indirectly, to any intention or project of adapting this so to speak civil telegraphy to military purposes.'[36] Whilst it was probable 'that the line may be occasionally used for military among other purposes; such a probability is not sufficient to divest the line of its primary and paramount commercial character, and to subject this company to the very severe penalties imposed by the statute.'[37]

However, despite ordering the unconditional release of the ship, consideration must be given to the balance of Phillimore J's judgment. Not only did he read s.30 FEA expansively, allowing future government action against a wide range of figures that they considered to be undertaking "military service," but in an effort not to dissuade such prosecutions in the future, he was willing to find that the government had "a reasonable and probable cause" to detain the *International* and for making the applicants defend their contract with a belligerent, and in such circumstances he made no order as to costs or damages.

The final case that warrants consideration also arose from the Franco-Prussian War, when a Prussian merchant ship, the *Lord Brougham*,[38] was captured in the Channel by the French cruiser *La Provence*. Storms forced the French prize crew on board to anchor her within British waters, and in order to convey the damaged ship safely to France, the French

[35] *ibid.*, 338
[36] *ibid.*, 338
[37] *ibid.*, 338
[38] An ironic name for this particular vessel, given Lord Brougham's Parliamentary support for an extension of categories of contraband at the outset of the American Civil War, 16th May 1861, Hansard, H.L. Deb, 3rd Series, vol. 157, col. 2083

Consul at Dover engaged a British tug, the *Gauntlet*, to tow her to Dunkirk Roads on 25th November 1870.

Again the interpretation clause in s.30 was at issue in this case, and whether in the light of this provision the actions of the *Gauntlet* constituted employment in the military or naval service of France for the purpose of the s.8 prohibition. The interpretation clause enacted;

> 'That naval service *shall*, as respects a person, *include* service as a marine, employment as a pilot in piloting or directing the course of a ship of war or other ship when such ship of war or other ship is being used in any military or naval operation, and any employment whatever on board a ship of war, transport, store-ship, privateer, or ship under letters of marque; and as respects a ship, include any user of a ship as a transport, store-ship, privateer, or ship under letters of marque.'

Phillimore J again resisted the argument by the applicants, 'that the interpretation clause limits and restrains the enacting clause, and that inasmuch as "steam-tug" is not among the vessels therein enumerated there is a *casus omissus* in the statute which disposes of the present case in favour of the defendants,' declaring that he was of the opinion 'that the interpretation clause is not of a restrictive but of an enlarging character.'[39] The Crown would have to prove that the act of towing a prize vessel from neutral waters to a belligerent port amounted to a military service. It was therefore contended that, through

[39] *Dyke v. Elliot* (1871) [L R] 3 A&E 381, 388 per Phillimore J

various factors, 'the towing was connected with the original seizure,'[40] and was an offence sufficient to incur the penalty of condemnation. Not only was taking a vessel from neutral waters into the waters of the captor's country a continuance of that belligerent act, relieving the captor from the necessity of protecting his prize during the transit across the Channel and permitting the condemnation of the *Lord Brougham* by a Prize Court in France, but the *Gauntlet* was furthermore under the direction of a French captain aboard the captured vessel, which might therefore be considered an extension of the capturing ship of war.

However, these seemingly persuasive arguments had little impact on Phillimore J, who found himself 'unable to assent to the main position with respect to the completion of the act of capture by the employment of the *Gauntlet*, having regard to the circumstances of this case.'[41] He disputed the argument that a French Prize Court could not complete the capture whilst the *Lord Brougham* lay in neutral British waters on the basis, 'that with the permission of the neutral state, the prize locally situate in his waters might be condemned by the belligerent tribunal sitting in the belligerent state.'[42] However, Phillimore J recognised that this conclusion raised more questions than it answered, asserting that 'whether the neutral state, by such permission might not provoke a serious question as to the strict maintenance of her neutral character, and whether such permission must not be equally granted to both belligerents, and whether even such a course would not involve the neutral state in great difficulties, are grave considerations into which I have not to inquire.'[43] This specious statement might well appear to be answered by the fact that the British government, in seizing the *Gauntlet*, clearly did intend to maintain strict neutrality and avoid the 'great difficulties' that Phillimore J alluded to, but he pressed on with the

[40] *ibid.*, 389
[41] *ibid.*, 389
[42] *ibid.*, 392
[43] *ibid.*, 392

argument that if the *Lord Brougham* had *jure belli* become a French vessel, 'then it was as lawful for the neutral steam-tug to tow her as it would have been for her to have towed any merchant vessel, originally French, across the Channel, though she had been hired for this purpose by the captain of a belligerent ship with the approval and intervention of the French consul.'[44] As to whether the actions of the *Gauntlet* had relieved the belligerent ship from the encumbrance of protecting her prizes and enabled her either to go into action against the enemy or to make fresh prizes, Phillimore J skirted round the issue, concluding that 'the *Gauntlet* was in no way whatever, directly or indirectly, connected with, or ministering to, the capture of the vessel. She had, indeed, "reasonable ground to believe" at the time when she was hired that the vessel which she was employed to tow had been captured from the German belligerent, but that was all.'[45] Finally, he dismissed the claim that a captured vessel with a prize crew was a ship of war, and that to tow her therefore constituted employment in the naval service of the belligerent, formulaically asserting that the *Lord Brougham* 'was not commissioned, and was not a ship of war.'[46]

The Crown appealed this decision to the Privy Council, where the judgment of the court was given by James LJ. His response, to arguments largely unchanged from those before the Court of Admiralty, differed substantially from that of Phillimore J. Acknowledging the argument that the supposedly "highly penal" FEA needed to be strictly construed, 'their Lordships have, ... no hesitation in concurring with the learned judge that the words in the definition can have no effect in restricting the meaning to be put on the words of the prohibitory section. And the whole question is really what is the meaning of the words in that section "naval service".'[47] Whereas in the Court of Admiralty this

[44] *ibid.*, 392
[45] *ibid.*, 393
[46] *ibid.*, 394
[47] *Dyke v. Elliot* (1872) 17 ER 373, 377 per James LJ

decision turned upon Phillimore J's opinion that it was not essential for the completion of the capture that the prize be towed to French waters, the Privy Council asserted that this 'is not the only way in which ... service can be rendered to a belligerent in connection with a prize. It would seem to be quite as important, to say the least, to complete a capture *de facto* by lodging it in a place of safety, as to complete it *de jure* by bringing it within the jurisdiction of the captors' Prize Court.'[48] Moreover, assisting the Lord Brougham was comparable to providing naval service to any French warship, because the prize crew;

> 'had in our waters the right of a French man-of-war, as against any action of our municipal law, in respect either of their prisoners or their booty. Their Lordships agree, therefore, with the contention on the part of the Crown, that it is impossible to distinguish such a ship, because it had been a prize, from the case of a tender, or a pinnace, detached for any purpose from a ship of war, or any other vessel taken up by or for the belligerent Power in the course of its naval operations.'[49]

Finally, in response to the contention that 'naval service' must mean service directly connected with some warlike naval operation, James LJ found that 'detaching a prize crew after capture to take charge of the prize, and to bring it and the prisoners safely home, is essentially a warlike naval operation - as much and as important a warlike operation as the chase before the capture.'[50]

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[48] *ibid.*, 377
[49] *ibid.*, 377-378
[50] *ibid.*, 378

Given this decision by the Privy Council, Phillimore J's ruling that in spite of the threat that her actions posed to Britain's strict neutrality the seizure of the *Gauntlet* was unjustified, requires some explanation. Indeed, despite his machinations, he acknowledged that, 'it may indeed be, that however innocent as to intention, the *Gauntlet* has, as a matter of fact, violated the provisions and incurred the penalties of the statute; but it is certainly a conclusion at which the Court would be reluctant to arrive.'[51] The reason for that reluctance is most likely related to the role played by the Customs inspector at Dover in this affair. As Phillimore J related the events at issue; 'the English collector of customs tells the French consul that this vessel cannot remain in English waters, he is the person who originates and demands her removal. The consul says, and says quite truly, that he had accidentally found a steam-tug which would tow her away; the collector is perfectly satisfied; no suggestion of anything illegal in the transaction is made; and the tug proceeds to do her ordinary work for the ordinary price.'[52] Clearly there was some degree of sympathy on the part of the judge for the predicament in which government officials had left the owners of the *Gauntlet*, a sympathy which he, though not the Court of Appeal, felt outweighed the threat to Britain's neutrality in a war that had already ended several months before the trial stage of this case concluded in early August 1871.

Freebooters and Empire-Builders under the Foreign Enlistment Act

The amended FEA was designed to prevent the United Kingdom from being drawn into conflict with friendly states, regardless of whether they were already involved in a conflict. Under s.11 FEA, it is a criminal offence, within the United Kingdom or the

[51] *Dyke v. Elliot, op. cit.* n.34, 393
[52] *ibid.*, 393

dominions, to 'prepare or fit out any naval or military expedition to proceed against the dominions of any friendly state.' The FEA therefore became a useful means of disowning the embarrassing or dangerous activities of mercenaries, adventurers, traders and explorers, purportedly acting in the name of, and who at the very least embarked upon their follies from within, the British Empire. It was in just such a case that the late-Victorian judiciary can finally be seen to lay the ghosts of the *Alexandra* affair to rest.

Colonel Sandoval, a resident alien, purchased two Krupp cannon in Sheffield and ammunition in Birmingham. These were shipped to Amsterdam, and there the cannon were installed aboard a steamer ironically named the *Justitia*. The ammunition was loaded into her hold. Sandoval then captained the *Justitia* on a voyage to the West Indies, before passing control of the vessel to the Venezuelan General Pulgar, off Trinidad. Clearly not eager to become involved at the business end of this expedition, Sandoval then left the ship. Thereafter, the steamer's arrival off the coast of Venezuela corresponded, supposedly coincidently, with an uprising.[53]

The British government, at the time attempting to settle its own border disputes with Venezuela, took a dim view of this activity. On his return to England, Sandoval was charged and convicted of breaching s.11 FEA. He sought a re-trial, producing paperwork to attest to the expedition starting out as a commercial venture and only taking on the "military" character forbidden under s.11 after he had left the ship. Drawing inspiration from the American Civil War era jurisprudence concerning s.7 FEA 1819, he argued in the alternative that s.11 FEA only applied to the complete 'preparation or fitting out' of an expedition within territory controlled by the Crown.

[53] The *Justitia's* limited contribution to this rising was the ineffective shelling of a custom-house, before she was damaged in a one-sided encounter with a Venezuelan warship and fled to San Domingo.

Not retiring before passing judgment, lest that be construed as showing doubt as to the interpretation of these provisions,[54] the High Court dismissed these arguments. The tone of the judgments was set when Day J rejected contentions that this was a commercial expedition, advanced on the basis of the *Justitia's* paperwork, on the incredible basis, 'that the ship's papers were thoroughly regular (which one might expect in a transaction which was not *bonâ fide*).'[55] Thereafter he concentrated his judgment on what constituted illegal equipping of an expedition under s.11, asserting that he would not countenance an interpretation of the provision that would require an expedition's 'every last biscuit' be taken on board within the FEA's jurisdiction. All that was required was 'any overt act of preparation' within the Empire, in this case satisfied by the purchase of cannon and ammunition.[56] Day J openly adopted this broad interpretation in order that 'the mischievous consequences likely to ensue to this country may be prevented.'[57] Wills J, who similarly displayed a passion for embellishing national security concerns to amplify their interpretive effect that would only increase with time,[58] stated that;

> 'Nothing can be more mischievous than that persons who acted as the present defendant had done, may suppose that they can escape the responsibility for acts done in violation of the municipal law passed to maintain the requirements of international comity – acts which might be followed by consequences most mischievous and

[54] *R. v. Sandoval* (1887) 56 LT 526, 527, per Day J
[55] *ibid.*, 528
[56] *ibid.*
[57] *ibid.*
[58] See *Cooper v. Hawkins* (1904) 2 KB 164, 173, per Wills J, discussed in Chapter 6

which under certain circumstances it might be impossible to exaggerate.'[59]

The FEA's propensity to produce legal *causes célèbres* was affirmed when, being employed in its role as the government's preferred method of distancing the United Kingdom from the activities of private "empire-builders,"[60] it formed the basis of the legal fallout to one of late-Victorian imperialism's most prominent misadventures, the Jameson Raid. This fiasco saw Cecil Rhodes and Levander Jameson, the leading figures in the British South Africa Company, employ the false pretext of Boer abuses of British mining communities to justify an invasion and unsuccessfully attempt to subjugate the Transvaal Republic on 29th December 1895, using 500 men of the Company's armed forces (permitted to enable the Company to fulfil its government responsibilities in South Africa). Their real aim was to integrate the Transvaal into British South Africa, thereby extending the empire.[61]

Jameson surrendered to the Boers on 2nd January 1896. On being handed over to British military authorities he was returned to England for trial, the charge alleging a breach of s.11 FEA by preparing and fitting out a military expedition against a friendly state without licence from the Crown. As might be expected, the combination of the "heroic" defendant,[62] the media attention, and the international controversy surrounding Jameson's application to quash the indictment against him produced a judgment that can only be considered anti-climatic for the purposes of this study. The case against Jameson was, of

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[59] *Sandoval*, op. cit. n.54, 529

[60] At least when they proved unsuccessful. For Cecil Rhodes, the exemplar "empire-builder," seized huge tracts of land in Matabeleland and Bechuanaland (thereafter Rhodesia) without facing government retribution.

[61] Massie, R., *Dreadnought*, (1992, London), Chapter 11, 213-231 provides a concise overview of the raid and its political consequences.

[62] See the suitably sycophantic description of the raid by Poet Laureate Alfred Austin, *The Times*, 11th January 1896

course, so open and shut that, despite the array of legal talent assembled by both the prosecution and defence, points of law on which the indictment could be disputed were thin on the ground. The combined talents of no less than eight eminent defence counsel produced the, at best speculative, argument that in s.11 'the word "therein"[63] is ambiguous, and might mean that the Act was in force in some other part of the dominions.'[64] Unsurprisingly it did not require much effort from the five prosecuting counsel, including both the Attorney-General and the Solicitor-General, to counter that all that was required under s.11 was that 'the place where the Acts complained of were committed' was within the limits of Her Majesty's dominions.[65]

Lord Russell CJ needed no faculties beyond common sense to conclude that, 'the area within which a statute is to operate, and the persons against whom it is to operate, are to be gathered from the language and purview of the particular statute.'[66] In the instant case the express language of the statute militated against it being read as only applicable to the United Kingdom and its area of operation clearly covered Jameson's actions without any need to resort to an extensive interpretation of the provision in light of national security. The defendant was thereafter tried before Lord Russell, and found guilty. Having stifled courtroom demonstrations in support of Jameson, the Lord Chief Justice sentenced him to fifteen months imprisonment. He was pardoned after four months.[67]

This does not mean that the raid sheds no light upon judicial conceptions of national security in the late-Victorian era. Adopting the purpose of the FEA as their bearing, after Jameson's guilt had been established the courts actively sought to impose further liabilities

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[63] Referring to the need for the illegal preparation or fitting out to be carried out within the United Kingdom or dominion territory.
[64] *R. v. Jameson* (1896) 2 QB 425, 426, per Clarke QC
[65] *ibid.*, 427, per Sir Robert Webster A-G
[66] *ibid.*, 430, per Lord Russell CJ
[67] Massie, *op. cit.* n.61, 229

upon the organisers of the raid, so as to discourage future "private" attempts to extend the empire, even if this meant twisting traditional legal principles.

In *Burrows v. Rhodes* the claimant was a member of the British South Africa Company's armed forces. Duped into believing that he was participating in an action sanctioned by the Crown to protect British citizens within the Transvaal Republic, he was severely injured at the Battle of Doornkop. He claimed £3000 in compensation, with the defendants demurring that the offence under s.11 FEA was one of strict liability, and that Burrows was therefore 'just as much a criminal as the defendants who had knowingly broken the law.'[68] The High Court held that even if this was the case, the claimant was not barred from claiming compensation from the defendant, as would ordinarily be the case if injury occurred during a criminal enterprise. 'Public policy' in the instant case would be better served by ensuring that action could be taken against the defendants' "deeper-dyed" criminality.[69]

Conclusion

The Foreign Enlistment Act cases mark the first occasion in modern legal history when the judiciary had to undertake detailed interpretation of statutes aiming to fulfil such an important national security function as securing neutrality, and where their decisions might have a direct impact on Britain's ability to avoid entanglement in a conflict. And yet these cases, possibly the "missing-link" precursor to modern national security jurisprudence, have since been forgotten. This can largely be attributed to the legal *niche*

[68] *Burrows v. Rhodes & Jameson* [1899] 1 QB 816, 823, per Grantham J
[69] *ibid.*, 831, per Kennedy J

in which they are found, which would not thereafter provide specific precedents, and should in no way tarnish their significance.

Whilst even the post-1870 jurisprudence shows no uniform judicial response to the specific conflicts of interest under the FEA, it is possible to provide some explanation of those judgments that appear to flaunt the requirements of national security. The government's use of the newly enacted Foreign Enlistment Act 1870 must have appeared overzealous to Phillimore J. He had been a Neutrality Commissioner, and helped to draft the report upon which this statute was based, so it should come as no surprise that he considered the actions of the *International* and the *Gauntlet* to be a world away from the building of warships that he had sought to prevent. He considered the *International* to be a mere carrier of contraband, and his decision in the case of the *Gauntlet* was likely influenced by her actions being cleared by customs officers and through the national security concerns at issue being rendered nugatory by the conclusion of the war.

In spite of these judgments successive administrations, saddled with the *aide memoire* of the payments imposed by the Alabama Claims Arbitration,[70] continued to apply the shipbuilding provisions of the Foreign Enlistment Act more strictly than many commentators considered necessary.[71] In marked contrast to the ordinarily *laissez-faire* policy of this era,[72] this practice including the detention of Turkish ironclads under construction during the Turco-Russian war of 1877,[73] the 'unaccountable' removal from the Naval Reserve of British officers who captained vessels of the Japanese navy on their

[70] A full statement of the Award may be found in Moore, C., *History and Digest of the Arbitrations to which the U.S. have been a Party*, (1898, Washington), 653-59

[71] Macdonell, J., 'Some Notes on Neutrality,' (1899) 1 *J. Soc. Comp. Legis. (n.s.)* 62, 67: The United Kingdom's Proclamation of Neutrality at the outbreak of war between the United States and Spain 'not only recites the Foreign Enlistment Act, but also the three rules of the Washington Treaty.'

[72] Holdsworth, W., 'The Relation between Commercial Legislation and National Defence Historically Considered,' (1918) 30 Jurid. Rev. 293, 307-317

[73] HO 45/9435/64038A. Long after the *Alabama* claims Baty continued to press that 'it can scarcely be that a neutral nation is bound, by the outbreak of war, to be so extremely solicitous about the interests of belligerents.' Baty, T., 'Some Questions in the Law of Neutrality,' (1905) 6 *J. Soc. Comp. Legis. (n.s.)* 201, 208

voyage from shipyards in Genoa to the Far East during the Russo-Japanese War,[74] and the seizure of the supposed torpedo boat *Caroline*.[75]

Suggestions that the preponderance of the judiciary that remained oblivious national security concerns into the 1870s are untenable. Such concerns had yet to take on the talismanic quality which would thereafter characterise their hold on the judiciary, and in the confident and liberal mid-Victorian era there was as yet little impetus towards such a development, coupled with judicial willingness to face down what was widely considered to be over-restrictive state action.

However, through the course of these cases the judiciary exhibited a growing recognition of national security concerns and a willingness to consider them overtly in judgment. The genesis of the later approach to national security is evident. In the *International* the first judicial nod to '*interest reipublicae*'[76] can be found; judicial shorthand for the '*salus populi*' maxim that would thereafter colour statutory interpretation. By the 1880s and *Sandoval* the judicial transformation was complete. Not only did Day J and Wills J recognise the national security concerns at issue, they dramatised them, and they construed s.11 FEA accordingly.[77] Pollock CB must have been turning in his grave.

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[74] *ibid.*, 208
[75] National Archives, MEPO 3/167 (1904-1909) & CUST 46/314 & 46/315 (1904-05)
[76] '*The International*,' *op. cit.* n.28, 333 per Phillimore J
[77] *Sandoval*, op. cit. n.54, 528 & 529

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Executive Expropriations of Land under the Defence Acts

'[The question] is whether these are rightful or wrongful acts, whether wrongful in the case of an individual, and rightful in the case of the military authorities.'

Sir George Jessel MR (1877)

Introduction

Property rights, and especially landed interests, have long been considered the preoccupation of the Victorian and Edwardian judiciary.[1] In an era when 'the nature and extent of state control over private property form[ed] a subject of deep political and social interest,'[2] this study must consider how the judiciary reconciled their supposed proclivity towards property interests with executive assertions of national security, the conundrum with which Jessel MR is wrestling in the opening epigram.[3]

Most of the blame for the lack of clarity inherent in this area of law prior to the First World War attaches to the Stuart Kings. Their attempts to appropriate property or money through the royal prerogative were prominent amongst the causes of the Civil War. The *Ship Money* case[4] was the most glaring example of such injudicious use of the prerogative

[1] Ewing, K., & Gearty, C., *The Struggle for Civil Liberties*, (2000, Oxford), 29
[2] Randolph, C., 'The Eminent Domain,' (1887) 3 *LQR* 314, 314
[3] *Hawley v. Steele* (1877) LR 6 Ch. D. 521, 528
[4] *R v. Hampden* (1637) 3 Howell's State Trials 825

litigated in this era. The majority accepted that the King could, under the prerogative, require his subjects to pay for the construction and upkeep of such ships as he considered necessary to protect the Kingdom from peril and danger without having to levy these funds through statute.[5] This conception of the prerogative was born of the opinion of 'lawyers and statesmen who, like Bacon, favoured the increase in royal authority.'[6] Dicey notes with some sympathy that whilst these advocates of the prerogative, 'no doubt underrated the risk that an increase in the power of the Crown should lead to the establishment of despotism,'[7] they 'did not intend to sacrifice the liberties or invade the ordinary private rights of citizens; they were struck with the evils of the conservative legalism of Coke, and with the necessity for enabling the Crown as head of the nation to cope with the selfishness of powerful individuals and classes.'[8] To these jurists, the prerogative was the most effective means of stirring the state into action, especially in circumstances, akin to those in *Ship Money*, where national security demanded action.

However, with the defeat of these arguments on the battlefields of the Civil War, even Clarendon, 'one of the most zealous supporters of the King's prerogative,'[9] recognised that when the prerogative powers of expropriation were abused, 'the law and the judges were looked upon by the subjects as the asylum for their liberties and security.'[10] The failure of the common law to constrain the prerogative in the supine *Ship Money* judgment

[5] Note that the minority conceived of a prerogative confined to circumstances of emergency; 'In time of peace, and of no extreme necessity, legal courses must be used and not Royal power.' *Ship Money, ibid.*, 1162, per Croke J

[6] Dicey, A., *The Law of the Constitution*, (1960, 10th Ed., London), 63

[7] Such benevolence of intention is questionable, given that Francis Bacon was the last Attorney-General to oversee the use of torture, under the Royal Prerogative, in *The Case of Edward Peacham, for Treason* (1614) 2 Howell's State Trials, 869

[8] Dicey, *op. cit.* n.6, 370

[9] Mackenzie, V., 'The Royal Prerogative in War-time,' (1918) 34 LQR 152, 157

[10] Clarendon, Earl of, *The History of the Rebellion and Civil Wars in England Begun in the Year 1641*, (1888, Oxford), vol. I, 89

constituted a 'scandal' and resulted in the centuries of 'deserved reproach and infamy that attended the judges, by being made use of in this and like acts of power.'[11]

The vigorous backlash against this judgment produced considerable confusion in relation to the executive's power to expropriate property. In response, 'so far as concerned the taking of land for defence purposes in time of peace or war, Parliament from the beginning of the 18th century onwards had begun to step in and to confer and regulate by statute the necessary power.'[12]

The Origins of the Defence Acts

In the aftermath of the Glorious Revolution and the protections afforded to property rights under the Bill of Rights 1689, it was clear that in peacetime 'the Crown [had] no power at common law to enter upon the lands of a subject, or to expropriate them, or to seize his goods.'[13] Thus the doctrine of "eminent domain," which provides that a 'proprietor may be compelled to sell his property for an adequate price, where an evident utility on the part of the public demands it,'[14] but which had proven so prone to abuse by the Stuarts, was ousted from English common law.[15] All that remained was an obstinate fragment of expropriation power, triggered upon invasion by an enemy and thereby existing as an element of the war prerogative.

Expropriation of land by the state, at least in peacetime, became a matter for statute. From 1708 onwards, the statute book was littered with items of legislation permitting

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[11] *ibid.*, 88
[12] *Burmah Oil Company v. Lord Advocate* [1965] A.C. 75, 121, per Viscount Radcliffe
[13] Baty, T. & Morgan, J., *War, Its Conduct and Legal Results*, (1915, London), 59
[14] Rankin, J., *Erskine's Principles of the Law of Scotland*, (1911, 21st Ed., Edinburgh), ii, 1
[15] This doctrine remains in use in the United States, 'even in the absence of explicit provision in the written constitution.' Rubin, G., *Private Property, Government Requisition and the Constitution, 1914–27*, (1994, London), 12

distinct acquisitions of land by the state for defence purposes. During the Napoleonic Wars, the threat of invasion required more flexible powers of compulsory purchase. Acts in 1798[16] and 1803[17] provided for purchase powers limited to the duration of the ongoing hostilities with France. The 1804 Act, enacted when Napoleon was poised to invade,[18] marked a further extension in the executive's power in this field. It was not limited to the duration of the hostilities, and furthermore provided for a scheme of compulsory acquisition (and compensation) under statutory powers 'for the defence and security of the Realm,'[19] with the acquisitions being permitted 'for such time as the exigency of the public service shall require.'[20] This Napoleonic-era legislation moreover reaffirmed the monarch's prerogative to take land without consent, but only in the context of an ongoing invasion by enemy forces,[21] providing the executive with leeway to turn to the prerogative should an enemy invade. It was expanded upon by a series of later enactments.[22] Unfortunately, no detailed record of the application of these schemes was maintained.[23]

The Defence Act 1842 constituted an effort to impose a degree of order upon these disparate enactments. Passed at a time when renewed tensions with France were on the minds of many Parliamentarians,[24] and with the immediate intention of enabling a scheme of coastal fortification, this first Defence Act is clearly distinguishable from its predecessors. Firstly, the provisions of the Act permitting that land could be appropriated by the state, by compulsory purchase if necessary,[25] for the purpose of 'the defence and

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[16] 38 Geo. III, c. 27
[17] 43 Geo. III, c. 55
[18] 44 Geo. III, c. 95
[19] Preamble, 44 Geo. III, c. 95
[20] s.11 44 Geo. III, c.95
[21] s.10 44 Geo. III, c.95. See Mackenzie, *op. cit.* n.9, 153
[22] 1 & 2 Geo. IV c.69, 3 Geo. IV, c.108, and the 2 & 3 Will. IV, c.25
[23] National Archives; HO 45/7919; 'Fear of Invasion of England, 1798-1807' (1866)
[24] Less than two years previously, in October 1840, the then Foreign Secretary, Lord Palmerston, had advised the British ambassador in Paris as to the destruction of his archives 'in the event of [his] coming away.' Woodward, L., *The Age of Reform*, (1962, Oxford), 239
[25] s.19 Defence Act 1842

security of the realm'[26] were not restricted to time of emergency, but were applicable 'at any time or times hereafter.'[27] The grant of executive discretion as to expropriation powers distinguished the Defence Acts from previous peacetime enactments. No longer was legislation required for each of the executive's expropriations of land. Instead, as Lord Moulton outlined when he evaluated the statute nearly eighty years after its enactment;

> 'This Act gives very wide powers to the Crown. It has unrestricted powers of selection of the necessary lands, buildings, etc., to be taken. It contemplates in the first instance voluntary purchase, but, if that cannot be arranged, then the lands, etc., may be acquired compulsorily subject to certain certificates being obtained as to the necessity or expediency of the acquisition or in case of actual invasion.'[28]

This basic procedure remained little changed by the series of Defence Acts passed up until 1873, although alternate, and increasingly bureaucratic, procedures by which land could be expropriated and vested with the Secretary of State for War waxed and waned in a plethora of Victorian legislation,[29] culminating in the Military Lands Acts 1892 to 1903 (MLA).[30] Therefore, in assessing the response of the courts to the expropriation of

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[26] s.9 Defence Act 1842

[27] s.6 Defence Act 1842

[28] *Attorney-General v. De Keyser's Royal Hotel* [1920] AC 508, 550-551. The necessary certificates could be gained from two justices under s.29 Defence Act 1842.

[29] Statutes such as the Rifle Volunteer Grounds Act 1860, the Volunteer Act 1863, the Military Forces Localization Act 1872, the Drill Ground Act 1883, the Artillery and Rifle Ranges Act 1885, the Barracks Act 1890 and the Ranges Act 1891 all contained compulsory purchase provisions for defence purposes.

[30] The 1892 Act imposed a turgid procedure upon compulsory purchase. Notice of the proposed purchase had to be served on the owners and occupiers and a public local inquiry had to be convened to allow them to express their views (s.2(5)-2(7) MLA 1892). After the inquiry report into the expropriation, if the Secretary of State still considered the purchase necessary, he could make a provisional order to that effect. However,

property in the interests of national security, this study will consider litigation arising from any of these related statutes.

Significantly, the procedures for acquiring land for military purposes were 'similar to that laid down in the Lands Clauses Consolidation Acts, which represent a standardisation by Parliament of the conditions which it will impose on local authorities and public companies seeking powers of compulsory purchase.'[31] Indeed, not only did the mechanics of these expropriation schemes overlap,[32] but through their standing powers of expropriation these enactments have been described as forming 'code[s] regulating the law and practice of the eminent domain.'[33]

However, it remains to be seen whether the judiciary distinguished these enactments on the basis of the disparate purposes for which they permitted expropriations. In interpreting the Defence Acts the judiciary were required to evaluate statutes directly concerned with national security, but without an atmosphere of imminent threat to the nation overshadowing claims against executive action. This chapter will examine whether the executive was able to use compulsory expropriation powers more broadly in the context of defence than in other fields, even in peacetime, through consideration of the judicial response to claims of nuisance brought against expropriating authorities. Attention will then turn to how the judiciary approached compensation claims under the Defence Acts and under alternate statutory expropriation schemes. Finally, analysis will turn to how this pre-war Defence Act jurisprudence fed into the fierce debates over the relationship between prerogative and these statutes during the First World War, and whether any authority from

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such an order would have no effect until a private Act of Parliament was enacted to confirm it (s.2(9) MLA 1892).

[31] Baty & Morgan, *op. cit.* n.13, 60

[32] s.29 Defence Act 1860, for example, allowed the military to pursue expropriation for defence purposes under the provisions of the Lands Clauses Act 1845.

[33] Constable, A., 'The Expropriation of Land for Public Purposes,' 13 *Jurid. Rev.* 164, 164

the 1850s onwards supported the broad expropriation power that the government claimed under the war prerogative.

Consideration of the pre-war judicial decisions in these spheres will not simply indicate how the judiciary approached any conflict between property interests and national security concerns before the First World War, but also the degree to which the wartime expropriation cases were presaged by this earlier jurisprudence.

Actions for Nuisance against Works under the Defence Acts

Whilst the land owner whose property has been partially expropriated can claim compensation for any injurious affectation[34] caused to his remaining holding by the use of the land acquired under statute, the same claim was not open to any neighbouring landowners suffering the same effects of the public works. As the Law Commission recently stated, 'strictly speaking, injurious affection where no land is taken from the claimant is not part of the law of compulsory purchase. The right to compensation is not dependent on compulsory purchase, but on loss in the value of land due to public works.'[35] Such a claimant must instead bring an action in nuisance.[36]

This section will focus upon the outcome of such actions in the context of military expropriations of land and draw comparison to nuisance actions against bodies enjoying similar powers of compulsory purchase, such as railway companies. In the cases considered below, whether the land purchase occurred under the Defence Acts or their

[34] See *Buccleuch (Duke) v. Metropolitan Board of Works* (1872) LR 5 HL 418 for a successful claim of injurious affectation to retained land arising from noise, dust and loss of privacy caused by the construction of a new road upon land the claimant had sold to the defendant.
[35] Law Commission 286, 'Towards a Compulsory Purchase Code: (1) Compensation,' (2003), para. 11.2
[36] *Broadbent v. Imperial Gas* (1859) 7 De G. M. & G. 436, 447-8, per Lord Cranworth

close relatives, or under the Lands Clauses Consolidation Act 1845,[37] the expropriating body asserted legislative authority as justification for its actions in response to the claim of nuisance. This defence required the judiciary to evaluate whether the expropriating body had acted *ultra vires* its authorizing statute. Had the Crown acted *ultra vires*, then its defence of legislative authority would fail. Therefore, in the context of the various schemes of compulsory purchase propagated in the nineteenth century, actions for nuisance provided a form of judicial review by proxy.

The significance of property interests in nineteenth-century jurisprudence can only be appreciated once the privileged protections enjoyed by such concerns are recognised. Whereas nuisance actions could be employed to challenge the activities of the state where they interfered with private property, the general rule remained that civil actions against the Crown would not lie, and that remedy could only be attained through recourse to a petition of right.[38]

The mid-Victorian era initially saw the judiciary give little weight to national security concerns in the face of property interests. In *Raphael v. Wigram*, an injunction was obtained to prevent all use by the Tower Hamlets Rifle Volunteer Brigade of rifle butts that they had obtained near Plaistow, in Essex. Raphael was the owner of the land lying a little distance in the rear of the butts, and the injunction was granted upon the basis that the bullets which passed the butts reached his land, killing cattle grazing there and rendering it dangerous to go upon it.[39]

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[37] Or the closely related Railway Clauses Consolidation Act 1845

[38] *Tobin v. Reg.* 14 CB (NS) 505. Note that this was no defence to liability where the officer of the Crown committed a criminal act; *Feather v. Reg.* 6 B & S 257, 296, per Cockburn CJ

[39] *Raphael v. Wigram* (unreported), 25th July 1864. See *Holt v. Gas, Light and Coke Co.* (1872) 8 LR 7 QB 728, 729-30

Similarly, under the Rifle Volunteer Grounds Act 1860, Colonel Bigge, officer commanding the Middlesex Volunteers,[40] obtained a lease over a rifle range at Willesden. However, with bullets regularly crossing his property, a nearby farmer sought an injunction to prevent the use of this range until it had been made safe. The defence countered, 'that it was necessary, for the safety of the Kingdom, that artillery and [rifle] practice at ranges approved of by the authorities, should not be stopped, where, ... every precaution has been taken to prevent accident and annoyance.'[41]

Despite the evidence that if the Middlesex Volunteers were to be an effective force they desperately needed rifle practice (the farmhouse, fully 600 yards from the range and 200 yards out of the line of fire, had been hit by bullets), Romilly MR concluded that 'it is impossible to say that this is safe now, though the defendants themselves say that it can be made safe.'[42] On this basis he injuncted use of the range until it had been made safe. Whilst it is difficult to see why such a speculative defence was mounted, it is significant that Romilly MR passed no comment upon the national security concerns at issue, neither dismissing them out of hand nor giving any apparent weight to them. This case perfectly fits the proposition that, whilst Parliament can legalise acts which may be dangerous or may constitute a nuisance to private interests, 'the courts have invariably construed [such statutes] with an eye to the protection of those rights or interests which are liable to be interfered with.'[43]

The judicial approach to expropriations undertaken in the interests of defence was reappraised in *Hawley v Steele*. Ash Common was a large tract of land which had been purchased under the terms of the Defence Act 1842 and was used for training troops from

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[40] The Volunteers, together with the militia, were the forerunners of the modern Territorial Army. They were merged into this body in the Territorial and Reserve Forces Act 1907.
[41] *Banister v. Bigge* (1865) 34 Beav 287, 287, per Mr. Selwyn
[42] *ibid.*, 288, per Romilly MR
[43] Lucas, W., 'Crown and Private Rights,' (1915) 27 *Jurid. Rev.* 45, 47

the nearby Aldershot camp. This action was brought after the defendant, Lieutenant-General Sir Thomas Steele, ordered the erection of a rifle range on part of Ash Common adjacent to the claimant's property. The claimant sought an interlocutory injunction preventing the use of this range by firing parties who, from before 6a.m., undertook target practice from positions as close as 100 yards from his house.

Jessel MR gave short shift to this nuisance action. In keeping with his reputation amongst barristers for having 'decided the case almost before they had opened it,'[44] he did not even call the defence.[45] Beyond technical grounds for dismissing the claim, the nature of the defendant was clearly the most significant substantive factor in Jessel MR's decision, for, 'if Sir Thomas Steele had been the owner of this land, and if the persons who caused that noise and vibration had not been troops of the Government, I should have had no hesitation in granting the injunction.'[46]

At issue was whether this use of the land by the military was sanctioned by the Defence Acts, which necessitated consideration of what activities could be described as being undertaken 'for the purpose of securing the military defence of the country.'[47] Jessel MR considered that if, 'the Acts of Parliament authorize ... the Secretary of State for War to acquire these lands for the purpose of general instruction, and that [if] the use made of them was a reasonable use, it seems to me no action would lie against the individual who, under the authority of the executive government, made such a use of the land.'[48]

Whilst the Defence Act 1842, 'is not perhaps worded in such a way as to be beyond argument as to the meaning'[49] of what activities could be considered to be undertaken in

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[44] Jones, G., 'Jessel, Sir George (1824-1883),' *Oxford DNB*, (2004, Oxford) [http://www.oxforddnb.com /view/article/14803, accessed 25th March 2006]
[45] Which included Sir John Holker, A-G.
[46] *Hawley, op. cit.* n.3, 525
[47] *ibid.*, 527
[48] *ibid.*, 527
[49] *ibid.*, 527

the interest of the defence of the realm, Jessel MR expansively construed the possible range of activities that amounted to 'reasonable military purpose,'[50] concluding that 'except in the case of an outrageous departure from all reasonable use, it is not for a Court of Justice to say what is the reasonable use of land for military requirements.' Rather, it lay at the discretion of the government, 'to say that such land is wanted as a camp for exercise and instruction, such other land is wanted for a fortress, and such other land is wanted for an arsenal.'[51]

He did warn the authorities that it remained possible for the court to intervene where land taken for the purpose of a camp of instruction was used for purposes, 'so entirely opposite to a camp of instruction, that the court would say at once it was a mere subterfuge, and not a *bonâ fide* use of the land.'[52] However, 'the moment the court is satisfied that it is a *bonâ fide* use of the land for the purposes of a camp of instruction it appears to me that the court's function stops, that it has no right to say that the tents shall be pitched on another piece of land, or that targets are to occupy a different piece of land.'[53]

Baty and Morgan contended that *Hawley* evidenced a level of judicial oversight whereby, 'if the War Office puts the lands taken to a use not contemplated by the statute under which it acts, it could be restrained by injunction from so using them. The courts claim the right to consider whether the use to which they were put was "reasonable".'[54] This position bears no more than a superficial resemblance to the decision in *Hawley*. If Jessel MR did not utterly abdicate judicial supervision of the *vires* of executive action where security concerns were at stake, he heavily mortgaged such oversight. This

[50] s.9 Defence Act 1842
[51] *Hawley, op. cit.* n.3, 528
[52] *ibid.*, 529
[53] *ibid.*, 529
[54] Baty & Morgan, *op. cit.* n.13, 61

disinterested analysis of whether the land was being used for the stated purpose introduced a *de facto* divide between expropriation schemes for defence and for other purposes.

The significance of this decision is best contextualized by considering the implications drawn from the *Arlidge* case,[55] decided in the fateful summer of 1914. The House of Lords upheld an order by the Local Government Board preventing the claimant landlord from leasing a property that had been found by an inspector to be uninhabitable, in spite of his claims of procedural unfairness. Ewing and Gearty cast this famous decision as evidence of the Law Lords being 'prepared to bend with the political winds,'[56] even in the face of assertions of property interests.

But it should hardly be surprising that, in an era when ideological battle-lines were frequently drawn in the courtroom and when key judicial appointments were politically motivated,[57] a panel of predominantly Liberal-appointed Law Lords would uphold the public interest inherent in the Housing, Town Planning, etc., Act 1909. Conversely, *Hawley* indicates that over thirty years before it became, 'common for statutes to empower Government departments to decide questions affecting rights of property,'[58] judges were already willing to interpret expropriation powers flexibly in the interests of national security, even when the decision undermined the very same 'liberty of man to do what he chooses with what is his own.'[59]

Baty and Morgan, however, suggest that the better companion for *Hawley* is the decision in *Metropolitan Asylum v. Hill.*[60] Certainly this decision is indicative of the respect that the legal establishment ordinarily accorded to property interests in the mid-

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[55] *Local Government Board v Arlidge* [1915] AC 120
[56] Ewing & Gearty, *op. cit.* n.1, 28
[57] Steve ns, R., 'Government and the Judiciary,' in Bogdanor, V., (ed), *The British Constitution in the Twentieth Century*, (2003, Oxford), 335
[58] *Arlidge, op. cit.* n.55, 129, per Viscount Haldane LC
[59] *ibid.*, 130
[60] *Metropolitan Asylum District Managers v Hill (No.2)* (1880-81) LR 6 AC 193

Victorian period (illustrated by the Solicitor-General, Sir Farrer Herschell, appearing in this case on behalf of the private respondents). A jury sustained the claim by Mr Hill that the construction of a small-pox hospital near his property constituted a nuisance. However, with the injunction upon the use of the hospital stayed by Pollock B, the Metropolitan Asylums' Board appealing on the basis that, as statute provided that, 'asylums may be provided under this Act for the reception and relief of the sick, insane, or infirm or other class or classes of the poor chargeable in unions or parishes,'[61] they therefore had legislative authority for the construction of this hospital. The Law Lords, however, had little sympathy for this argument, Lord Watson asserting that;

> 'where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the Legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer licence to commit nuisance in any place which might be selected for the purpose.'[62]

Baty and Morgan conclude that *Metropolitan Asylum* is authority for the proposition that 'unless it can be shown that the legislation has contemplated that a thing "shall at all events be done," the courts will presume that it cannot be done in such a way as to take

[61] s.5 Metropolitan Poor Act 1867
[62] *Hill (No.2)*, *op. cit.* n.60, 213, per Lord Watson

away or injuriously affect the common law rights of the subject.'[63] They use this case, alongside *Hawley*, as authority for the proposition that the Defence Acts were indeed 'interpreted just as strictly as would be the case with a railway authority or a local authority enjoying similar franchises.'[64] This general rule that the empowering statute must not simply sanction, but *order*, any expropriating action therefore applies, despite the affected statutes 'creat[ing] great administrative benefits for the public at large.'[65] However, given Jessel MR's facilitation of national security interests in *Hawley*, the rule in *Metropolitan Asylum* bore no relation to the judiciary's analysis of the purpose for which land was taken under the Defence Acts.

Interestingly, the appellants in *Metropolitan Asylum* did attempt to ride the coat-tails of *Hawley* in their search for a legal authority which would lead to the injunction being overturned. Drawing analogy to the Defence Act case, it was argued that 'the fears of mankind are not alone sufficient to warrant an injunction, especially in a case like this, where a great public benefit was intended to be, and would be, the consequence of the work done.'[66] Sir Farrer Herschell, likely eager to ring-fence the radical *Hawley* decision from judicial scrutiny, parried with the contention that the decision was irrelevant because, in contrast to the case at hand, 'the Master of the Rolls, in refusing the injunction, suggested a strong opinion that the Acts of Parliament relating to that matter "looked very much like authority" for doing what was complained of.'[67] So successful was this screening of *Hawley* that none of the Law Lords came to consider this central plank of the appellant's argument.

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[63] Baty & Morgan, *op. cit.* n.13, 61
[64] *ibid.*, 59-60
[65] Lucas, *op. cit.* n.43, 47
[66] *Hill (No.2)*, *op. cit.* n.60, 197, per Sir J. Holker QC
[67] *ibid.*, 198, per Sir F. Herschell S-G, quoting 6 Ch. D. 521, 527, per Sir George Jessel

This analysis suggests that, as early as the 1870s, a judiciary ordinarily at the forefront of the 'national passion'[68] for property was nevertheless willing to permit the usurpation of these interests where national security was at issue. The sophisticated decision in *Hawley* maintained all the trappings of *vires* review whilst minimising any corresponding inconvenience to the authorities by reading the powers under the Acts so broadly as to effectively exclude judicial oversight. In light of this success, the executive predictably advanced national security claims to attempt to influence the compensation awarded for expropriations under the Defence Acts.

Compensation for Expropriations under the Defence Acts

The closest that the hapless Tower Hamlets Rifle Volunteer Brigade came to seeing action was in legal action. Within a decade from the injunction on their use of their rifle range in *Raphael v. Wigram*,[69] and their subsequently securing a licence from Mr Raphael allowing them to continue training, the passage of the Gas Light and Coke Company's Act 1868 ordered that Raphael's land be expropriated for use as a private road. In their subsequent compensation claim for severance the Brigade did not invoke national security concerns, but the decision nonetheless serves to indicate the Victorian judiciary's approach to compensation in expropriation cases.

Despite the Brigade's licence over the land being revocable without notice, Cockburn CJ held that, 'the land which has been taken and that which has been left formed part of the rifle shooting range, and, as such, was useful and beneficial to the owners; and the simple fact is, that by taking the land which they have taken the company have rendered

[68] Harris, *Private Lives, Public Spirit: a Social History of Britain, 1870-1914*, (1993, Oxford), 100
[69] *Raphael, op. cit.* n.39

the possibility of using that which is left for the purpose of a rifle range impossible, and so have altogether depreciated the value of that which is left.'[70]

Numerous judicial opinions from the Victorian era point to a rule of construction whereby a judge would, 'not ... construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it.'[71] Indeed, expropriation was interpreted not merely as a 'legislative or administrative act, but a compulsory contract.'[72] The £2,800 awarded to the Volunteer Brigade was not therefore unusual, and as Rubin asserts;

> 'that the compensation for dispossessed landowners in the nineteenth century bordered on the lavish simply attested to the power and influence that the landed interest could still exert on contemporary parliaments, on the arbitrators or magistrates who fixed the amounts of compensation, even on the judiciary who tended to confirm liberal awards.'[73]

Nevertheless, where legislation did limit the categories of compensation available, for example, excluding from s.38 to s.50 compensation for the operation (as opposed to

[70] *Holt, op. cit.* n.39, 735
[71] *Attorney-General v. Horner* (1884-85) LR 14 QBD 245, 257, per Brett MR
[72] Mann, F., 'Outlines of a History of Expropriation,' (1959) *LQR* 188, 196
[73] Rubin, *op. cit.* n.15, 13

construction) of the public works for which the expropriation was required,[74] the judiciary accepted the legislature's reasoning,[75] albeit ordinarily 'very reluctantly.'[76]

As early as 1847 there were indications that the judiciary would not interpret compensation provisions in the Defence Act 1842 expansively. In *Re Laws* the claimant sought compensation for the expenses of surveying his land prior to selling it under the Defence Act. Pollock CB considered that the Defence Act made no provision for land-owners' costs or expenses incident to the ascertainment of the sufficiency of compensation where the land had not been compulsorily purchased.[77] Unsurprisingly, the judges did not dwell on the purpose of the Act being for defence,[78] but instead focused on the absence of such a compensation provision in the Defence Act by comparison to its specific inclusion in the Lands Clauses Act and Railway Clauses Act.[79]

Pollock CB also clarified, *obiter dicta*, that in compensating a claimant when land was taken compulsorily, account could be taken of, 'the value of the land, then the consequential injury, and, lastly, all the expense to which the party had been put in maintaining his action.'[80] This was accepted as settled law until the 1890s and the case of *R. (Moore) v. Abbot*, in which the applicant owner of mountain land in County Wicklow was served with notice of compulsory purchase under the Defence Act. An arbitrator was appointed to assess compensation, a practice that had been authorized under the Military

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[74] *Hammersmith & City Railway Co. v. Brand* (1869-70) LR 4 HL 171. It was not until the enactment of Part I of the Land Compensation Act 1973, introduced in an effort to correct the perceived defects of the existing law, that there was a right to compensation where the value of land is depreciated by 'physical factors' caused by the *use* of public works. See Law Commission CP 165, 'Towards a Compulsory Purchase Code: (1) Compensation,' (2002), para. 9.23-9.24.

[75] Lord Cranworth accepting this narrowed the scope of compensation because 'any other construction of the clause would open the door to claims of so wide and indefinite a nature;'[75] *Ricket v. The Metropolitan Railway Company* (1867) Law Rep. 2 H. L. 175, 198

[76] *Hammersmith Railway*, *op. cit.* n.74, 206, per Lord Chelmsford

[77] *Re Laws* (1847) 1 Exch 441, 446-447

[78] To have done so would certainly have been out of character for Pollock CB. See Chapter 3.

[79] *Re Laws*, *op. cit.* n.77, 452-453, per Alderson B

[80] *ibid.*, 447

Lands Act 1890,[81] as juries in compulsory purchase cases were, 'found to be extremely liberal; and, no doubt, in the case of the War Office, their liberality would tend even towards extravagance.'[82] This application challenged the validity of the appointment of the arbitrator, and whether he was correct to disregard *re Laws* in ruling that the only compensation available under the Defence Act was for the absolute purchase of the lands taken, and not for injury by severance or consequential injury.

In deciding upon this 'case of great importance,'[83] Lord O'Brien CJ was fully aware of its implications for future purchases of land for defence purposes. His judgment went beyond the technical ground for upholding the claim; that the arbitrator had erroneously been appointed under the Railways Act 1851, rather than under the Military Lands Act.[84] He also addressed the factors that should be taken into account in awarding compensation, and John Atkinson QC's[85] assertion that, 'the measure of compensation under the Act of 1842, and under the Lands Clauses Acts is entirely different, and the policy of these Acts different,'[86] with the Defence Act restricting compensation as payable 'for the purchase of the Land taken and for that alone.'[87]

This argument had been raised on the basis that a more limited scale of compensation was appropriate because of the defence purposes for which the land was taken. However, Lord O'Brien CJ held that 'the meaning of the expression, "compensation for the purchase of said lands," in the Act of 1842, means compensation for turning it into a rifle range, with all the injurious consequences resulting from it being turned to such use.'[88]

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[81] s.11 Military Lands Act 1890
[82] *R (Moore) v Abbot* [1897] 2 IR 362, 389, per Lord O'Brien CJ
[83] *ibid.*, 388, per Lord O'Brien CJ
[84] *ibid.*, 422, per Walker LJ
[85] Then Attorney-General for Ireland, but a future Law Lord, who would have a pronounced influence on First World War national security decisions such as *R v. Halliday, ex parte Zadig* [1917] A.C. 260.
[86] *R .(Moore) v Abbot* [1897] 2 IR 362, 386
[87] *ibid.*, 387
[88] *ibid.*, 391, per Lord O'Brien CJ

O'Brien J elaborated upon the Lord Chief Justice's opinion, holding that whilst 'the Defence Act and the Lands Clauses Act start from different points of policy – that the former concerns the security of the realm, and the other merely objects of commercial or public utility or convenience,'[89] their separation was not maintained due to distinctions in compensation, but because of 'the peremptory power of immediate possession which the Crown possessed under the Defence Act.'[90]

The icing was put on the cake when Gibson J concluded that 'no doubt the Defence Act is of national importance, and *salus populi, suprema lex*. But the safety of the state is best secured by a general average contribution, and not by making jettison of individual interests.'[91] The significance of this statement belied the brevity of Gibson J's judgment. Not only does it undermine Townshend's assumption that considers that within legal circles there was no reliance upon Cicero's maxim '*salus populi suprema lex*' until the twentieth century,[92] it would come back to haunt the executive during the First World War, when it was approved by the Court of Appeal in *Cannon Brewery Co.*[93] As Rubin notes, this was an affirmation 'that would have been exceedingly unpalatable to the parsimonious Treasury.'[94]

However, the decision in *Moore* would have more immediate consequences for the state, forming the basis for a string of challenges to compulsory purchases under the Defence Acts. These subsequent decisions need to be briefly considered, as they are highly significant not for any *obiter* statements regarding national security that they contain, but for the sophisticated way in which the judiciary approached the Defence Acts.

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[89] *ibid.*, 400, per O'Brien J
[90] *ibid.*, 401, per O'Brien J
[91] *ibid.*, 405, per Gibson J
[92] Townshend, *Making the Peace: Public Order and Public Security in Modern Britain*, (1993, Oxford), 4
[93] *Cannon Brewery Co. Ltd. v. Central Control Board (Liquor Traffic)* [1918] 2 Ch. 101, 110, per Younger J
[94] Rubin, *op. cit.* n.15, 104

In *Harvey v. Harkin* land in Donegal was expropriated under the Defence Act 1842 and the Lands Clauses Act 1845 for defence purposes. Harvey claimed non-payment of rent, asserting that the Crown had failed accurately to appraise him of the compensation he would attain for his land, but rather providing a gross sum including his compensation and that of his tenant.

O'Brien J emphasised the vintage of the Defence Act 1842 in asserting that later Acts, 'were passed when more attention had been paid to the difficulties incident to the compulsory acquisition of land by public authority.'[95] Nevertheless, he did not seek to impede the use of the Act, concluding that, 'though it is extremely difficult to put a reasonable construction on the Act, I have come to the conclusion that the Secretary of State for War has satisfied the necessary condition by offering one sum of money in this notice.'[96]

In *Hill v. Haire* a challenge was made to the enlargement of the Ebrington Barracks, Londonderry,[97] on the basis that the power of compulsory purchase under s.2(2) Military Lands Act 1892 had elapsed by the time notice was served for the purchase of the land, in February 1898.[98] Porter MR questioned whether the Military Lands Act, repealing 'seven Acts or parts of Acts, which are all permanent, can ... have been intended to substitute a law to last only three years, and never in fact renewed?'[99] He found that as there, 'is no undertaking till the lands are defined, and no promoter till the lands are wanted by the Secretary of State ... to be determined by the Special Act, and as none of these is or can be

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[95] *Harvey v. Harkin* [1898] 2 IR 65, 70
[96] *ibid.*, 73
[97] A military base since 1841, Ebrington Barracks was finally closed in December 2003 as a result of the normalisation policy in Northern Ireland in the wake of the paramilitary ceasefires.
[98] This ingenious argument was based upon the 1892 Act incorporating the Land Clauses Act, s.123 of which stated that compulsory purchase of land authorized by the 'Special Act' can only take place within three years of the passing of that Act. It was unclear whether the MLA was the 'Special Act,' or whether this referred to the subsequent private Act of Parliament that the MLA required.
[99] *Hill v. Haire* [1899] 1 IR 87, 93

defined by the Act of 1892 alone, it follows that the Act of 1892 cannot itself be the Special Act referred to in s.123 of the Lands Clauses Act.'[100]

In reaching his decision Porter MR conceded that this interpretation ran contrary to the literal wording of the 1892 Act. However, 'the literal construction of the language is simply impossible. The true construction must be that the statute when applied to a particular undertaking (and so made special) shall, together with the statute confirming the Provisional Order, be deemed to be the Special Act.'[101] His efforts to 'fill up an ellipsis' in this way were predicated upon 'the scope and framework of the Act;'[102] an assertion carrying the implication that the purpose of the Military Lands Act was at the forefront of the judge's mind. This vital decision ensured that the Military Lands Acts would remain in force as an expropriation measure through the First World War.[103]

The next case in this rapidly unfolding stream of jurisprudence, *R. (Secretary of State for War) v. Cork JJ*, saw the Cork Justices declining jurisdiction to validate expropriation claims or to assess the value of land that the state was seeking to expropriate near the strategic harbour at Berehaven in Bantry Bay,[104] and finding that such assessment was a matter for a jury. Fearing that crippling compensation claims would be imposed, the state sought a review of this decision.

Lord O'Brien CJ concluded that the Defence Act was applicable to this expropriation rather than the Land Clauses Act, and that the state could go to the justices to validate expropriation. This procedure was 'of great constitutional importance to preserve,

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[100] *ibid.*, 93
[101] *ibid.*, 93-94
[102] *ibid.*, 94
[103] Amazingly, the Military Lands Provisional Orders Confirmation Act 1898, confirming the Secretary of State's orders for the purchase of land for the purpose enlarging Ebrington Barracks (Londonderry (Ebrington) Barracks Enlargement Order 1898), remains on the statute books. It is, however, subject to an ongoing Law Commission consultation concerning its repeal (ending 5th May 2006). Law Commission Consultation Paper, 'Armed Forces Repeal Proposals,' (26th January 2006), 30-40
[104] Famously the scene of an abortive French invasion of Ireland in December 1796. Through these expropriations the area was extensively fortified and became a major Royal Navy base during the First World War.

and the Secretary of State for War was entitled to adopt it to get immediate possession.'[105] Gibson J further asserted that s.7 Defence Act 1860, 'enables all or any of the powers and provisions of the Act of 1845 given to the promoters to be used,' and that therefore 'the Secretary of State may, under these sweeping and comprehensive terms, use, if he sees fit, the provisions relating to the assessment of compensation, including those prescribing the tribunal.'[106] However, this did not mean that the Crown succeeded in lowering the scale of compensation applicable, for the court refused to regard a statutorily protected tenancy as a mere year to year interest.

The last of the Irish authorities upon the Defence Acts was *In re Ned's Point Battery*. Lands near Buncrana, Co. Donegal, were taken by compulsory purchase for use as a camp and artillery range.[107] This case marked another debate over compensation, land owners claiming as a result of trespass and illegal conduct that they apprehended would result from the establishment of the camp. However, Gibson J asserted that, 'whether compensation under the Defence Act is as extensive as under the Lands Clauses Act is doubtful. It is certainly not greater,'[108] and compensation would not extend to merely apprehended, unascertainable threats to the value of property.

Belatedly, English claimants recognised potential weaknesses in the Defence Acts with *Blundell v The King*. This petition of right was brought by the tenant for life in possession of an estate that lay upon the foreshores of the Mersey. In 1902 the Secretary of State for War notified him of plans to purchase certain portions of the estate in order to erect a fort, and it was agreed that compensation would be settled by arbitration. However, the Crown subsequently refused to pay the sum awarded for injurious affectation of

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[105] *R. (Secretary of State for War) v. Cork JJ* [1900] 2 IR 105, 123-124, per Lord O'Brien CJ
[106] *ibid.*, 126, per Gibson J
[107] The original structure, Ned's Point Fort, was built in 1812 as a costal defence against French invasion and has been restored and opened to the public.
[108] *in re Neds Point Battery* (1903) 2 IR 191, 198, per Gibson J

adjoining lands on the basis that such awards were not available under the Defence Act 1842.

Attempting to side-step the Irish decisions as merely persuasive, Attorney-General Finlay[109] considered that the difference between the measures of compensation available under the Defence Act and under the Lands Clauses Act could be attributed to 'the Legislature [being] influenced by the fact that land taken under the Defence Acts was required for purposes of urgent public importance.'[110]

Ridley J did not dismiss such contentions as clearly as his Irish counterparts, considering that, 'it might, indeed, be that a person whose lands were taken from him for the purpose of national defence should be awarded compensation on a lower scale and on a different basis than that allowed to persons whose land is taken for the encouragement and development of traffic, industry, and commerce.'[111] However, he could find no evidence of such legislative intent, and therefore, far from dissenting from the Irish cases, he was 'inclined to take the same view.'[112]

The sophisticated expositions of national security interests found in the above cases should dispel the myth that the pre-war judiciary were concerned with property interests above all else. In each of these cases, even in *Hill v. Haire* where the terms of the Military Lands Act 1892 appeared to place an insurmountable barrier in the place of the expropriation, the ability of the military to take the land in question was upheld. Yet these decisions are far from indicative of judicial passivity towards national security concerns. Whilst accepting that the judiciary could not ordinarily challenge the reasonableness of the military's decision as to the necessity of certain pieces of land for defence, the judges

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[109] Lloyd George's wartime Lord Chancellor regularly appeared in cases discussed in this study as junior counsel, prior to his appointment as Solicitor-General in Lord Salisbury's third administration.
[110] *Blundell v. The King* (1905) 1 KB 516, 519, per Sir Robert Finlay A-G
[111] *ibid.*, 521, per Ridley J
[112] *ibid.*, 524, per Ridley J

emphasised that the purpose for which the land was taken in no way influenced the terms of such seizures.

The Relationship between the Defence Acts and the Royal Prerogative

These pre-war authorities moreover set in motion the train of legal thought that concluded in *De Keyser's Royal Hotel*[113] and *Burmah Oil.*[114] In the latter case Lord Pearce gave the credit to the judges in *De Keyser*, asserting that they, 'decided that the plaintiffs were entitled to compensation in the manner provided by the Defence Act 1842, and that in the light of the statutory provisions the Crown could not by virtue of prerogative take without payment.'[115] However, twenty years before *De Keyser* the Defence Act case-law had established that, 'municipal law by a series of statutes, if not by common law, provides for compensation either in full or with some restrictions when the subject's property is taken for the defence of the realm.'[116] These judges established this jurisprudence in the teeth of the very real national security concerns in these cases, and the assertions of the relevance of these concerns to compensation by Attorneys-General Atkinson and Finlay.[117]

Once this principle was established in the sphere of defence expropriations, the writing was on the wall; 'to those who had to inspect the rusty weapons of the war prerogative in the summer of 1914 it must or should have appeared that some of them had become permanently unreliable.'[118] There could be no argument that English law should deny compensation in time of emergency when a series of judgments upon the relevant

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[113] *De Keyser's, op. cit.* n.28
[114] *Burmah Oil, op. cit.* n.12
[115] *ibid.*, 153, per Lord Pearce
[116] *Commercial and Estates Co. of Egypt v. Board of Trade* [1925] 1 K.B. 271, 296, per Atkin LJ
[117] The future Lord Atkinson would rule in favour of the claimant in the House of Lords in *De Keyser*, although predictably he declined the opportunity to relive his unsuccessful advocacy for a lesser measure of compensation attending to the Defence Acts in his judgment.
[118] *Burmah Oil, op. cit.* n.12, 122, Viscount Radcliffe

legislation established that simply because land was taken with defence purposes this did not affect compensation.

All that needed to be added to such decisions was a Diceyan distrust of prerogative powers. In reaction to such a blend of influences the post-war judiciary could but look askance at the Crown's arguments in *De Keyser.*[119] Nineteenth-century *obiter dicta* asserting the existence of a prerogative power to expropriate land in time of invasion, without reference to compensation,[120] were dismissed as off-the-cuff comments ignorant of the significance of the Defence Acts.[121] Moreover, the nineteenth-century authorities for the relationship between statute and prerogative[122] could be effectively dismissed as inaccurate opinions, out of step with the Diceyan hierarchy of norms.[123]

Conclusion

At its inception the Defence Act 1842 established a radical procedure, providing 'a standing code for the taking of land, in war or peace, and whether for occupation or for

[119] Even the wartime judiciary would not have supported expropriations without compensation under the prerogative, government having to withdraw its case before the House of Lords when it was acknowledged that this position was untenable, despite having been successful in the High Court and Court of Appeal; *In re A Petition of Right* [1915] 3 K.B. 649. See Rubin, 'The Royal Prerogative or a Statutory Code? The War Office and Contingency Legal Planning, 1885-1914,' in Eales, R. & Sullivan, D., *The Political Context of the Law*, (1987, London), n.28. Notably the lower courts had failed to consider the Defence Acts jurisprudence.

[120] For example, Willes J's assertion that, 'every man has a right to the enjoyment of his land; but, in the event of a foreign invasion, the Queen may take the land for the purpose of setting up defences thereon for the general good of the nation. In these and such like cases private convenience must yield to public necessity.' *Hole v. Barlow* [1858] 4 C. B. (N. S.) 334, 345

[121] Lord Parmoor dismissed this authority as simply stating 'the general proposition that every man has a right to the enjoyment of his land, and then, by way of illustration, limits the application of the power of the Royal Prerogative to the event of a foreign invasion.' *De Keyser's*, *op. cit.* n.28, 573.

[122] For example, Lindley LJ's assertion that prerogative powers are not undermined by statute unless the Legislature expressly intends such an effect. *Wheaton v. Maple* [1893] 3 Ch. 48, 64

[123] Dicey's view of the prerogative as merely 'the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown' (Dicey, *op. cit.* n.6, 424) is the elephant in the room in the House of Lord's decision in *De Keyser's*; unmentioned but underpinning the judicial reasoning. Dicey was cited in argument before the Court of Appeal. See [1919] 2 Ch. 197, 203, per Lawrence KC

title.'[124] As Rubin asserts, the Defence Acts, 'were the only general public as distinct from special or private statutes which permitted the compulsory purchase of land.'[125] Whilst they were supposedly limited in only permitting compulsory purchase of land to be used for training, ordnance practice or for other purposes in defence of the realm,[126] *Hawley v. Steele*[127] clearly indicates that, even in the property-obsessed Victorian era,[128] the judiciary would impose no meaningful restraints upon the use of land acquired under the Defence Acts.

Therefore, although the Defence Act 1842 was not included amongst Lord Atkin's famous list of Acts granting officers of the Crown powers that they must exercise reasonably,[129] Jessel MR's interpretation of the Defence Act stands contrary to his assertion that such reasonableness had always been construed objectively in English law.[130] Impressed by the weight of security concerns at issue in *Hawley*, Jessel MR required no evidence indicative of the reasonableness of establishing this rifle range in the interests of defence, and just as Viscount Maugham asserted that Mr. Liversidge would have to prove that the Home Secretary acted *mala fides* in detaining him in order for his detention to be invalid,[131] Jessel MR would require proof of subterfuge on the part of the military authorities before he would injunct activities on land taken subject to the Defence Acts.

Yet despite affording a broad expropriation power, over the period forming the subject of this study, the Defence Acts came to appear decidedly antiquated. Lord O'Brien CJ considered them to amount to, 'a very complicated code, [under which] it is surprising

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[124] *Burmah Oil, op. cit.* n.12, 122, per Viscount Radcliffe
[125] Rubin, *op. cit.* n.15, 12
[126] s.9 Defence Act 1842
[127] *Hawley, op. cit.* n.3
[128] Harris, *op. cit.* n.68, 116-117
[129] *Liversidge v. Anderson* [1942] AC 206, 229-230. In fairness to the noble Lord, his list did only detail offences involving the power of arrest on the basis of 'reasonable suspicion.'
[130] *ibid.*, 244
[131] *ibid.*, 225

that the War Department do not fall into more pitfalls than they do.'[132] Moreover, they failed to offer 'an immediate and flexible response on the basis of the [military authorities'] evaluation of the military situation.'[133]

In the years preceding the First World War the military could compare the Defence Acts procedure unfavourably with the control which bodies such as the Local Government Board could exert over private property owners under novel enactments of the Liberal government, such as the Housing, Town Planning, etc. Act 1909.[134] By comparison to the 'old-fashioned procedure'[135] established under the Lands Clauses Consolidation Act 1845, such legislation merely required the relevant government departments to make the necessary orders. The military, observing that such orders were, in prevailing legal thought 'conclusive of [their] own validity, and cannot be challenged for the most glaring irregularity,'[136] were eager to gain a similar measure of freedom in their expropriations.[137]

However, given that the Defence Acts remain in effect to this day, the debate that raged between the military and government law officers in the early years of the twentieth century can be viewed with the reticence possible with hindsight. What must be remembered is that it was the judicial interpretation of the Defence Acts that maintained the usefulness of these expropriation powers. However, this sophisticated, rather than supine, approach to such concerns doubtless spurred on the military's desire for a comprehensive defence code that would oust the purview of lawyers.

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[132] *Cork Justices*, *op. cit.* n.105, 123, per Lord O'Brien CJ
[133] Rubin, *op. cit.* n.15, 3
[134] See *Arlidge*, *op. cit.* n.55, for an example of the operation of these provisions.
[135] Ambrose, W., 'The New Judiciary,' (1910) 26 *LQR* 203, 208
[136] *ibid.*, 208
[137] See Rubin, *op. cit.* n.119, 147

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Troubles with Guns and Balloons

'The common law rights of the subject are not to be abridged by mere inference and conjecture.'

Mr Justice Kenny (1914)

Introduction

Conventional conceptions regard Victorian commercial law as a product of *laissez-faire* economic policy, with little state interference in business interests on the basis of national security concerns. As the previous analysis of the Foreign Enlistment Acts indicated, the presumptions generated by the mantra of free trade were so pervasive in legal thought that even the limited exceptions demanded by national security concerns were regarded with suspicion by the courts. Returning briefly to Pollock CB's vitriolic judgment in the *Alexandra* case, *laissez-faire* economics were trumpeted as immutable 'common sense,' sufficient to undermine the 'repugnant' proposition that, in the interests of national security, the Foreign Enlistment Act be interpreted as a strict restraint on ship-building for belligerents.[1]

Whilst governments sought to dissuade subjects from trading in contraband goods with belligerents through Royal Proclamations, these proclamations had no effect upon this trade.[2] There was little political support for extensive controls on the arms trade in this era, even during the Boer War. At the height of this conflict several German-flagged merchant vessels, supposedly bound for neutral ports, were detained

[1] *Attorney-General v. Sillem* (1864) 159 ER 178, 222. See Chapter 3, above, for an explanation of this decision.
[2] *Re Grazebrook, ex parte Chavasse* (1865) 46 ER 1072, 1074, per Lord Westbury

under suspicion of trading with Britain's enemies. Yet they were soon released in accordance with the demands of free trade. The government was unwilling to risk international outcry by seizing shipping in accordance with the broad interpretation of the 'continuous voyage' doctrine adopted by United States courts during the American Civil War.[3]

It is easily forgotten how short-lived this orthodoxy had been in the mid-Victorian era.[4] Not until the repeal of the Corn Laws in 1846 were the last vestiges of a much more interventionist commercial policy expunged from the statute books. This policy, historically caricatured as unsophisticated protectionism, smote by Peel in the interests of the nation,[5] was instead regarded by its advocates as a vital barrier against a hazardous dependency upon foreign supplies.[6] This policy's lineage reaches back into the seventeenth century, when authority can be found for a prerogative allowing the state to enter private land to excavate saltpetre (a compound required in the manufacture of gunpowder),[7] which has been interpreted as an embryonic right of the Crown to 'maintain a domestic armaments capability.'[8] Equally significant, the Navigation Acts 1651 and 1660, which required that British merchants use British ships to transport their goods, were imposed 'with a view to capturing [Dutch] trade, and of thus undermining their sea power.'[9]

Ever the legal historian, Holdsworth used his 1918 Rhodes lecture to vent his frustration at the contrast between these laws, sensibly imbued with these

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[3] See Henderson, R., 'Contraband Consigned to Neutral Ports,' (1900) 12 *Jurid. Rev.* 131, 131-133. This doctrine was actually derived from Lord Stowell's assertion that a vessel 'merely touching' a neutral port could not change the nature of its voyage if its cargo was ultimately destined for a belligerent. *The Maria*, 5 Ch. Rob. 368

[4] Holdsworth describing it as 'both a new and an insular phenomenon.' Holdsworth, W., 'The Relation between Commercial Legislation and National Defence Historically Considered,' (1918) 30 *Jurid. Rev.* 293, 294.

[5] Barnes, D., *A History of the English Corn Laws, from 1660-1846*, (1930, London), 272-284

[6] Hilton, B., *Corn, Cash, Commerce: The Economic Policies of the Tory Governments 1815-1830*, (1977, Oxford), 20-26

[7] *Re The King's Prerogative in Saltpetre* (1606) 12 Rep. 12

[8] Lustgarten, L. & Leigh, I., *In From the Cold: National Security and Parliamentary Democracy*, (1994), Oxford, 323

[9] Holdsworth, *op. cit.* n.4, 298

'considerations connected with national defence,'[10] and the pre-war dominance of Victorian commercial law. He considered that the United Kingdom's failure to match protectionism with protectionism had handed Germany an economic advantage in the prelude to the First World War,[11] and lamented that only after the outbreak of the conflict were 'such questions as the maintenance of the supply of shipping, of materials for the manufacture of munitions of war, of the food supply, and of amicable relations between employer and employed, [again] considered from the point of view of national defence.'[12]

With the nation's commercial law apparently so unprepared for war in 1914,[13] it might be presumed that the judiciary remained as stalwart in their defence of mid-Victorian liberal economics as their predecessors in the Court of Exchequer. Some judges, notably Kenny J, from whom this chapter takes its opening epigram,[14] would cling to economic liberalism until the eve of the First World War. Indeed, even Holdsworth concedes that it was not until placed under the test of a struggle for national survival that *laissez-faire* economics were 'found to be signally wanting.'[15]

However, as Porter notes, over the course of this study, factions within the political mainstream became increasingly willing to 'chip away' at liberal dogma in the face of security threats.[16] This chapter will focus upon cases relating to both the domestic production of armaments, and the import of weapons into the United Kingdom. These "armaments cases" involved issues as diverse as Crown exemption from patent, contracts in restraint of trade and legislation restricting the arms trade. Holdsworth would consider that, prior to the First World War, security requirements were

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[10] *ibid.*, 293
[11] *ibid.*, 295
[12] *ibid.*, 293-294
[13] Foxton provides a comprehensive explanation of the wartime alterations to commercial and corporate law; Foxton, D., 'Corporate Personality in the Great War,' (2002) 118 *LQR* 428
[14] *Hunter v. Coleman* (1914) 2 IR 372, 397, per Kenny J. It must, however, be noted that Kenny J's assertions likely had an ulterior motive tied to prevailing political conditions in Ireland.
[15] Holdsworth, *op. cit.* n.4, 294
[16] Porter, B., *Origins of the Vigilant State*, (1987, London), 21

inadequately protected in all of these areas of law. This chapter will assess whether, in these areas of law, elements of the judiciary were among the vanguard that Porter recognises as being willing to grasp the national security nettle.

A tale of Arms and a Man

The arms in question were 13,875 breech-loading Martini-Henry rifles. The weapon, newly introduced into British Army service, was a marriage of the Henry rifled barrel and von Martini's breech, which utilized an internal coiled-spring activated striker.[17] It improved upon its predecessors in every respect, and would remain the mainstay of the infantry for the next thirty years.[18] In the immediate aftermath of the Franco-Prussian War, with the European powers seemingly willing to go to war for the most improbable reasons after half a century of relative peace and the power balance having so unexpectedly shifted in favour of the unknown quantity of a reunified Germany, the military were understandably eager to provide this revolutionary weapon as standard issue. Production at the Royal Small Arms Factory at Enfield Lock commenced on 3rd June 1873, but this sole source of supply could not match the demands of the military.[19]

Therefore the War Office requested tenders for the provision of the rifles in question from private firms of gunsmiths within the United Kingdom. On 29th April 1872, the Secretary of State for War accepted the London Small Arms Company's

[17] See National Archives, SUPP 5/889 and SUPP 5/892, detailing the reports of the Special Committees (under General Russell) into the British Army's adoption of a breech-loading rifle.
[18] See 'The Future Weapon of the British Soldier' *Living Age*, May 1869. This article extols the virtues of the new breech-loading rifles in florid terms; 'We have advanced out of darkness and doubt into light and certainty, from some of the worst types of the system to an arm which, we believe, is superior to any other military breech-loader at present existing.'
[19] National Archives, Supp 5/892

tender. Production quickly commenced at the firm's ordnance factory, with the order to be fulfilled by 1st January 1874.[20]

The problem with this arrangement was Charles Kuhn Prioleau, holder of a patent permitting the exclusive manufacture and use of the Martini breech-action in small arms. Prioleau's shadow has long hung over this study, and from the clandestine nature of his dealings it has appeared appropriate until now to leave him in the background, masked behind his firm; Fraser, Trenholm & Company of Liverpool and Charleston, the company which bankrolled the *CSS Alabama* and *Florida* and the owners of the *Alexandra*.[21]

After the collapse of the Confederacy, Prioleau extricated himself from the bankruptcy of his company and remained in England.[22] Ever the opportunist, he realized that months after the Royal Small Arms Factory had commenced production of the Martini-Henry rifle, the unique Martini breech-action had yet to be patented within the United Kingdom. Through armaments industry contacts that only the foremost blockade runner in the bloodiest conflict in the history of the United States could amass he spent £25 acquiring a fourteen-year patent. These letters of patent were profitably assigned to Dixon, the managing director of the newly incorporated National Arms and Ammunition Company.[23] And having created this latest legal imbroglio, Prioleau again leaves the pages of this study, having done more than any other man to bring the national security implications of their decisions to the attention of the mid-Victorian judiciary.[24]

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[20] *Dixon v. London Small Arms Co.* (1875-76) LR 1 Q.B.D. 384, 386-387

[21] *Sillem, op. cit.* n.1

[22] During the late 1860s Prioleau was involved in various actions against the United States, which gained ownership of all Confederate property on the surrender of the secessionist states. *The Mary* LR (1867) 1 A & E 335 and LR (1868) 2 A & E 319. See also *Prioleau v. United States & Johnson* (1866) LR 2 Eq 659

[23] The record of incorporation can be found at the National Archives, BT 31/1681/5980

[24] Much of the personal, litigious and entrepreneurial life of Charles Prioleau can be pieced together from the Fraser Trenholm archive, at the Liverpool Maritime Museum. See particularly Box 6 (detailing legal actions) and Box 9/3 (detailing business dealings, 28th October 1871 to 2nd September 1872).

The difficulty facing Dixon's efforts to gain compensation for this breach of patent was that the Crown, as grantor of patents under s.6 Statute of Monopolies 1624, was not subject to their effects. As Cockburn CJ held in *Feather v. Reg.*, 'in granting a privilege, otherwise of universal application, the Crown will not be bound, unless it expressly declares its intention to that effect; and that grants of privilege, however general in their terms, can, in the absence of express words to bind the Crown, be taken only as conferring the privilege as against the subject, exclusive of the Crown.'[25]

With the accuracy of this statement of law forcefully affirmed by the Court of Appeal,[26] and thereafter not seriously questioned in the House of Lords, the case turned upon distinguishing the instant case from the rule established in *Feather*. Sir Vernon Harcourt QC,[27] argued on behalf of Dixon that the rule in *Feather* applied only to the Crown and its servants, and that the Crown's contract with the London Small Arms Co. was merely 'to provide and deliver.'[28] This arguably meant that London Small Arms Co. did not have to manufacture the weapons themselves to satisfy their contractual obligations. They 'were mere contractors who undertook to supply certain manufactured articles to the Crown.'[29]

To counter these arguments, the Crown placed its senior law officers at the disposal of London Small Arms, with the patent specialist, Sir John Holker A-G,[30] leading the case in the Court of Appeal. Seemingly in light of his expertise in the field, Sir John opted to play a straight bat, and did not set national security arguments before the court. He instead argued that 'there can be no distinction whether the Crown orders

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[25] *Feather v. Reg.* (1865) 6 B. & S. 257, 286
[26] *Dixon, op. cit.* n.20, 396, per Mellish LJ
[27] At this time making full use of his years in opposition, prior to undertaking the post of Home Secretary in Gladstone's second administration. Harcourt was to play a crucial role in the fight against Fenian terrorism in the 1880s and was instrumental in the foundation of the Police Special Branch. See Porter, *op. cit.* n.16, 35-50
[28] *Dixon v. London Small Arms Co.* (1876) 1 AC 632, 635
[29] *ibid.*, 635
[30] Hamilton, J., 'Holker, Sir John (1828–1882)', rev. Mooney, H., *Oxford DNB*, (2004, Oxford), [http://www.oxforddnb.com/view/article/13509, accessed 21st March 2006]

its own servants to manufacture, or gets its agent, an independent contractor, to do so; in either case the manufacture is by the Crown.'[31]

Sir John's omission proved to be of little consequence, for the Court of Appeal proved more than willing to supply national security arguments to cover the Crown's contracting-out for the supply of rifles in the instant case. The interests of public policy were achieved through fudging the facts of the case. Kelly CB considered that 'the Crown directly employed the company to manufacture 13,000 [*sic*] rifles,'[32] by-passing the contention that the contract did not require London Small Arms to manufacture the arms, but merely supply them (which it should have done legally).

Mellish LJ also considered that the issue at stake was if, 'admitting that the Crown is entitled to get the thing manufactured by its servants, is the Crown also entitled to get it manufactured by employing a contractor to manufacture it?'[33] He at least supported this conception of the position of London Small Arms, considering it to be 'plain [that] the Crown was to provide the steel tube and the stock for each rifle, and that then the contractor was to manufacture the steel tube and the stock into a perfect Martini-Henry rifle, which was to be inspected during the process of manufacture by the Crown's officers at the particular place where it was to be manufactured.'[34]

Whilst these judicial assertions singularly fail to deal with Sir Vernon Harcourt's argument, by accepting the contract as one to manufacture rather than supply, the Court of Appeal was able to fit this case within an extension of the *Feather* doctrine to allow contravention of patents on 'the express authority, for the use and for the benefit, of the Crown.'[35] Therefore, 'there was no difference in contemplation of law between the Queen manufacturing these rifles herself, that is, in the workshops belonging to the

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[31] *Dixon, op. cit.* n.20, 388, per Sir J. Holker A-G
[32] *ibid.*, 392-393
[33] *ibid.*, 397
[34] *ibid.*, 397. See also 403, per Grove J.
[35] *ibid.*, 395, per James LJ

government, or by an independent manufacturer or contractor.'[36] However, only one of the four judges explains why they were so eager to re-conceptualise the relationship between the Crown and London Small Arms and to extend the *Feather* doctrine. Kelly CB concluded that the Crown's power to grant patents (whilst not being governed by their effects):

> 'like all other branches of the prerogative, is for the benefit of the public. That power is of the very highest importance to the very first requirements of the nation. Supposing a war to break out, it may be of the greatest importance that 100,000 rifles should be supplied with the least possible delay to enable our armies to take the field, and without waiting until one patentee could supply one part and another patentee another part. It is, therefore, greatly for the benefit of the nation itself that the Crown should have the power to take into its own hands the entire manufacture, irrespective of the rights of patentees.'[37]

With no war prerogative relating to patents, Kelly CB recognised that limiting down the scope of Crown action under its exemption from the patents that it grants might endanger national security. With the support of his fellow judges, he regarded the necessity of dynamic Crown action under this prerogative as so significant that he was prepared to twist the facts of this case in order to ensure that the Crown could freely circumvent the intellectual property rights of individuals, both in wartime, as in the example concluding his judgment, and also where such action was simply desirable in the interests of defence, as in the instant case.

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[36] *ibid.*, 392-393, per Kelly CB
[37] *ibid.*, 394, per Kelly CB

The House of Lords unanimously recoiled from this heretical encouragement of state interventionism in commercial dealings. Interestingly, although London Small Arms was represented by the newly appointed Solicitor-General,[38] no national security issues were raised in his argument in support of the Court of Appeal decision. More interesting still, Lord Cairns LC led the House in judgment against the government. It might be speculated that only fifteen years after his famous triumph over the detention of the *Alexandra*, Lord Cairns continued to uphold Prioleau's interests. However, it maybe safer to suggest that this puritanical Ulsterman[39] continued to oppose state intervention in commerce, even to uphold the interests of national security, on the same basis as his eloquent pleadings in *Attorney-General v. Sillem.*[40]

Lord Cairns adopted a narrow interpretation of the relationship between the Crown and London Small Arms, finding no relationship of agency and no delegation of authority, but simply an 'ordinary case of a person who has undertaken to supply manufactured goods, who has not got the goods ready manufactured to be supplied, who has to make and produce the goods in order to execute the order which he has received.'[41] Therefore, on the facts of the instant case the Crown's ability to circumvent patent monopolies was not extended.

Indeed, the Lords glossed over the public interest raised in the Court of Appeal. Kelly CB's discussion of national security concerns was unmentioned in any of their five judgments. Lord Cairns certainly did not do the argument justice with his perfunctory assertion that this was a case 'of considerable general interest.'[42] Lord Hatherley gave more time to the issue, but only to state that, 'whilst building their ships in their naval arsenals, the Crown and its officers would be entitled to make use of the

[38] Sir Hardinge Giffard, the future Lord Halsbury LC, was appointed in 1875, and had yet to find a seat in the Commons when he acted in this case. See Heuston, R., *Lives of the Lord Chancellors, 1885-1940*, (1964, Oxford), 23-25
[39] Steele, D., 'Cairns, Hugh McCalmont, First Earl Cairns (1819–1885)', *Oxford DNB*, (2004, Oxford), [http:// www.oxforddnb.com/view/article/4346, accessed 21st March 2006]
[40] *op. cit.* n.1, 183-194
[41] *Dixon, op. cit.* n.28, 645
[42] *ibid.*, 639

very largely multiplied patent inventions which exist with reference to the construction of a ship.'[43] This evidently fails to weaken Kelly CB's concerns regarding periods when national security requires the Crown to turn to private suppliers.

The Court of Appeal's judgment in *Dixon* may be regarded as an aberration. Indeed, closer inspection of the career of Kelly CB would suggest that he was the ring-leader of this uprising against prevailing economic orthodoxy. Kelly CB was, by politics, an unreformed protectionist who as Solicitor-General had followed Disraeli and Bentinck in their rebellion against Peel's leadership of the Tories during the repeal of the Corn Laws.[44] But even if this decision might therefore be dismissed as the dying embers of an earlier mode of protectionism through state intervention in the market, it nonetheless remains a bright, if quickly extinguished, spark of judicial deference to national security burning even in the mid-Victorian era.

Contrastingly, bearing out Allen's appraisal that Kelly CB 'would judge on the merits of the case and was distinguished from some younger judges by his ability to look beyond decided cases to general principles,'[45] it must be remembered that the Lords failed to overrule Kelly CB's conclusion that the Crown's exemption from a patent monopoly could be extended. They merely dismissed the flawed attempt to do so in the instant case.[46] As Lord O'Hagan asserted, in language which presages the great dissenting judgments of the twentieth century, if the courts are to uphold, 'a Royal order, relied upon as authorizing injurious interference with profits which are solemnly secured to [the patent holder] by royal grant, [it] should be clear and unequivocal.'[47]

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[43] *ibid.*, 647

[44] Allen, C., 'Kelly, Sir Fitzroy Edward (1796–1880)', *Oxford DNB*, (Oxford, 2004) [http:// www.oxforddnb.com/view/article/15295, accessed 21st March 2006]

[45] *ibid.*

[46] In the long-run, this view of delegation of this exemption from the Crown (in writing) would be vindicated, through the intervention of statute. See s.55-58 Patents Act 1977

[47] *Dixon, op. cit.* n.28, 645; This statement also constituted a powerful support of the patent system, which had been under siege since the mid-nineteenth century. See Machlup, F. & Penrose, E., 'Patent Controversy in the Nineteenth Century,' (1950) 10 *JEH* 1

In a marked divergence between this rhetoric and reality, Dixon's National Arms and Ammunition Co., starved of the government work that the Martini patent was intended to exploit, fell victim to the vagaries of the gun-trade and was wound up in 1883.[48]

A Tale of Arms and Two Men

Nearly two decades after the House of Lords' decision in *Dixon* another novel weapon, and two extraordinary figures, would cause the appellate court once again to consider the national security implications of its decision in a commercial action. The first individual in question was Thorsten Nordenfelt, described by Lord Macnaghten as 'a Swedish gentleman of much intelligence ... and of great skill in certain branches of mechanical science.'[49] Nordenfelt was a gunsmith, and the inventor of one of the world's first rapid-fire infantry weapons. Although his weapon was clearly inferior to the famous Maxim gun, developed contemporaneously by his rival, Hiram Maxim, through the "proactive" marketing of the nefarious Basil Zaharoff,[50] Nordenfelt's company secured contracts to supply rapid-fire weapons to states across Europe.

Revolutionary though his machine-gun was, Maxim's trade would suffer without access to these profitable European markets. In 1888 he bought out Nordenfelt in a take-over, worth nearly £300,000, that was arranged by Zaharoff.[51] The sale agreement included a restraint of trade clause, providing that for twenty-five years from the date of the take-over Nordenfelt would not:

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[48] 'Economic and Social History: Industry and Trade, 1500-1880,' Stevens, W., *A History of the County of Warwick: Volume VII: The City of Birmingham* (1964, Oxford), 81-139

[49] *Thorsten Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.* [1894] AC 535, 559

[50] Zaharoff engineered 'the notorious *système Zaharoff*' by pitting countries against each other in order to generate demand for armaments. Davenport-Hines notes that, after selling one of the world's first submarines to Greece in 1885, he whipped up fear of this threat to enable him to sell two similar vessels to Turkey in 1886. Davenport-Hines, R., 'Zaharoff, Basil (1849–1936)', *Oxford DNB*, (2004, Oxford) [http://www.oxforddnb.com/view/article/38270, accessed 21st March 2006]

[51] *Nordenfelt*, *op. cit.* n.49, 539

> 'engage except on behalf of the company either directly or indirectly in the trade or business of a manufacturer of guns, gun mountings or carriages, gunpowder-explosives or ammunition, or in any business competing or liable to compete in any way with that for the time being carried on by the company.'[52]

Exceptions were provided for Nordenfelt's unrelated interests in submarines, explosives that were not gunpowder-based and metallurgy. Nevertheless, in September 1890, having acrimoniously resigned his post on the board of Maxim Nordenfelt Guns the previous January and with his fortune dwindling at an incredible rate,[53] Nordenfelt took employment with a Belgian machine-gun manufacturer. Maxim brought an action to injunct this employment on the basis of the partial restraint of trade clause.

In a decision still the basis for the law of restraint of trade, Bowen LJ, after a comprehensive review of existing case law, held that;

> 'general restraints, or, in other words, restraints wholly unlimited in area, are not, as a rule, permitted by the law, although the rule admits of exceptions. Partial restraints, or, in other words, restraints which involve only a limit of places at which, of persons with whom, or of modes in which, the trade is to be carried on, are valid when made

[52] *ibid.*, 538-539

[53] Having been represented by three barristers, two of them QCs, in the High Court and Court of Appeal, by the time the case was heard in the House of Lords Nordenfelt, then bankrupt, had to represent himself. Lord Macnaghten commented that 'Nordenfelt received over £200,000 for what he sold. He may have got rid of the money. I do not know how that is.' *ibid.*, 574

for a good consideration, and where they do not extend further than is necessary for the reasonable protection of the covenantee.'[54]

Exceptions to these two general rules could be made on the basis of public policy. In the instant case the restraint was of both a general and a partial nature; limited respect of the activities it covered and general in its global scope. Whilst both parties therefore raised public policy arguments, this study will focus upon the national security arguments raised by several judges to justify the opinion that the global restraint was valid. Such concerns were not universally raised. Indeed, Bowen LJ briskly dealt with the issue, asserting, 'that it would almost amount to legal pedantry if Courts of Law were to discover in Mr. Nordenfelt's covenant the elements of danger to the commonwealth.'[55] Other judges regarded the fact that, 'the covenant is part of a transaction for securing to an English company the inventions and business of a foreigner,'[56] as a sufficient public policy justification for the restraint of trade. Lindley LJ was quick to forget the principles of free trade between nations when he asserted that 'our predecessors, from whom we inherit this branch of the law, would never have thought it contrary to public policy to prevent a man from assisting foreigners to compete with an English trader who had bought his business.'[57]

Lord Macnaghten captured the national security concerns that he perceived to be missing from the Court of Appeal's reasoning in concluding that, 'it can hardly be injurious to the public, that is, the British public, to prevent a person from carrying on a trade in weapons of war abroad.'[58] Lord Watson similarly doubted, 'whether it be now, or ever has been, an essential part of the policy of England to encourage unfettered

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[54] *Maxim Nordenfelt Guns and Ammunition Company v. Nordenfelt* [1893] 1 Ch. 630, 662
[55] *ibid.*, 667
[56] *ibid.*, 650, per Lindley LJ
[57] *ibid.*, 651; This statement appears particularly dubious in light of the fact that Hiram Maxim did not become a naturalized British subject until 16th September 1899. See National Archives, HO 144/449/B30533
[58] *Nordenfelt*, *op. cit.* n.49, 574

competition in the sale of arms of precision to tribes who may become her antagonists in warfare.'[59]

Lest these opinions of the late-Victorian House of Lords be misconstrued as pacifist, the emphasis of their statements is heavily upon the nature of the company trading with foreign powers, rather than the destination of the arms. It was accepted that arms would be sold to governments of states, 'great and small, civilized and savage, who for purposes offensive or defensive desire to possess, and have the means of paying for, Nordenfelt guns with suitable ammunition.'[60] What mattered in the instant case were Lord Watson's doubts over whether in the context of such trade, 'at any period of time an English Court would have allowed a foreigner to break his contract with an English subject in order to foster such competition.'[61]

The *Nordenfelt* case calls into question judicial conceptions of national security. Bowen LJ may have had a reasoned national security justification for his concern that it may be illegal to restrain Nordenfelt from advising the British government,[62] but the same cannot be said for the unrealistic national security concerns raised in the House of Lords. The idea that there was a risk of Nordenfelt working for foreign powers was absurd when it is considered that Maxim Nordenfelt Guns had effectively cornered the global market in machine guns by the mid-1890s. Worse was the Victorian horror at the prospect of 'tribes'[63] gaining possession of automatic weapons. During the First World War it would be licensed derivatives of the Maxim gun, in the hands of European armies, which would extract a toll amongst British forces unimaginable to the late-Victorian judiciary.

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[59] *ibid.*, 552
[60] *ibid.*, 552, per Lord Watson
[61] *ibid.*, 554
[62] *Nordenfelt*, *op. cit.* n.54, 667
[63] There is little chance that, at the height of European imperialism, such a loaded term as 'tribe' would be used to describe other European nations. This is therefore an excellent indicator of what the judiciary perceived as threatening national security in the 1890s.

Bowen LJ rhetorically questioned whether 'a contract by which [a person] consents to the transfer of the business of making guns and ammunition for foreign lands to an English company, with whom he undertakes not to compete so long as the old trade is flourishing in their hands, is against the policy of English law?'[64] Had they enjoyed the benefit of hindsight and the vantage point of time from which the *Nordenfelt* case can now be considered, his fellow judges may have been more reticent, rather than answering with reasoning based upon specious conceptions of national security.

The case proved to be a turning point in the careers of both protagonists. Whilst Nordenfelt was forced to flee to Paris to escape his debts and passed into obscurity,[65] Maxim was knighted for his inventions in 1901. When he died in his old age in 1916, his weapons were already synonymous with industrialized warfare on an unprecedented scale.

Acceptable Restrictions on the Arms Trade?

This section of the chapter considers the judicial attitude to attempted restrictions upon the trade of arms to and from the United Kingdom where security concerns were at issue. It culminates in a consideration of the neglected case of *Hunter v. Coleman.*[66] However, it is necessary first to contextualise that decision, concerning an import ban upon armaments applying to Ireland, in the ongoing debates within this area of law. Even at the height of the Victorian embrace of free trade, governments appreciated the potential threat that trade posed to national security, particularly trade in armaments. Consequently, through a series of general and specific enactments

[64] *Nordenfelt, op. cit.* n.54, 667
[65] *In Re Nordenfelt, ex parte. Maxim-Nordenfelt Guns and Ammunition Co.* [1895] 1 Q.B. 151
[66] *Hunter, op. cit.* n.14

nineteenth-century governments augmented their ability to restrict either the import or the export of arms, depending upon the nature of the threat.

As late as 1845, the latest in a line of Customs Acts that stretched back to the Stuart era prevented the import of foreign arms and ammunition into the United Kingdom[67] and permitted the government to issue orders in council preventing the export of arms, ammunition, military stores or anything that could be converted to a military use.[68] However the opening up of Britain's ports to foreign imports led, in s.41 Customs Act 1853, to a position whereby, 'it shall be lawful to import into the United Kingdom any goods which are not by this Act or any law at the time of importation thereof prohibited.'[69] Relevant to this chapter's consideration of the armaments trade, s.45 provided that 'the importation of arms, ammunition, gunpowder or any other goods may be prohibited by proclamation or order in council.'[70] In essence, 'the Acts of 1853 and 1876 introduced a new policy by permitting importation unless it was prohibited, as a substitution for [a customs system working on the basis of] absolute prohibition unless there was permission.'[71]

The scope of these enactments was contested amongst Victorian jurists. Amid the attempts of Gladstone's first administration to tackle the Franco-Prussian War's implications, just days after taking office, questions were raised in the House of Lords as to whether government had the power to restrict the trade in arms with the belligerents. Lord Halifax, the Lord Privy Seal, responded that, 'there was no doubt the government had the power of prohibiting the export of munitions of war, or of any articles tending to increase the naval or military force of any other country; but it could only be exercised by a complete and entire prohibition, affecting all other countries indiscriminately – and this had never that he was aware been exercised, nor did the

[67] s.63 Customs Act 1845
[68] s.112 Customs Act 1845
[69] s.41 Customs Act 1853
[70] This provision was re-enacted as s.43 Customs Consolidation Act 1876 (CCA)
[71] *Hunter*, *op. cit.* n.14, 391, per Moriarty (Irish A-G)

Government think it expedient that the export of munitions of war to belligerents should be absolutely prohibited.'[72] Predictably, Lord Cairns disputed any conception of these powers that would prevent exportation to belligerents, asserting that their exercise was limited to, 'the purpose of keeping such munitions and stores in this country for the benefit of this country.' A power which 'must apply to all countries and places whatever ... could not be applied to the present emergency to prevent the supply of munitions to belligerent Powers.'[73]

Whilst maintaining the possibility of imposing such constraints upon trade in the interest of national security, Lord Halifax continued that the government did not at that time 'think it expedient that the export of munitions of war to belligerents should be absolutely prohibited.'[74] However, not tied to his client's interests as he had been in the great Foreign Enlistment Act cases of a decade before, and specific to the instant circumstances, Lord Cairns raised the issue that 'whether it was expedient now to give the Crown power to prohibit the export of munitions of war to either of the belligerents was a different question, on both sides of which much might be said; but it could hardly be discussed at this period of the session.'[75]

The immediate danger posed by the Franco-Prussian War passed with France's capitulation, without recourse to these powers or consequent judicial pronouncement as to their scope. Indeed, on the eve of the First World War it was noted how little use had been made of powers to prohibit the importation of arms into the United Kingdom by proclamation then seventy years old.[76]

However, Lord Cairns' appraisal of the CCA was seemingly affirmed through the enactment of the Exportation of Arms Act 1900, entitled 'an Act to amend the Law relating to the Exportation of Arms, Ammunition, and Military and Naval Stores.' This

[72] HL Deb, 3rd Series, vol. 203, col. 1677, 8th August 1870
[73] *ibid.*
[74] *Ibid.*
[75] *ibid.*
[76] *Hunter*, *op. cit.* n.14, 389, per Kenny J

legislative response to the siege of the foreign legations during the Boxer Rebellion in China was deemed necessary 'to prevent such arms, ammunition military or naval stores, being used against Her Majesty's subjects or forces, or against any forces engaged ... in military or naval operations in co-operation with Her Majesty's forces.'[77] A sizable British contingent was amongst the forces of the Eight-Nation Alliance that relieved the besieged legations.[78]

The Act was rushed through Parliament to replace a proclamation issued pursuant to the CCA, Attorney-General Sir Robert Finlay informing the House of the weakness of these existing provisions, for although 'there is power to prohibit exportation of arms ... there is no power of discriminating between countries.'[79] Similarly, as part of the government's response to agrarian unrest in Ireland,[80] the supposed limitations upon the CCA required the enactment of provisions within the Peace Preservation (Ireland) Act 1881 to give government complete control over the importation[81] or possession[82] of arms and ammunition into Ireland.

Ironically, in light of the difficulties that were to follow, this legislation was only allowed to lapse in 1906.[83] Within a decade, the progress of the Home Rule Bill through Parliament would produce an increasingly volatile situation in Ireland. Nationalist support for the Bill was so fervent, and unionist opposition so stalwart, that two private armies, the unionist Ulster Volunteer Force (UVF) and the nationalist Irish Volunteer Force (IVF), began recruiting and training. As long as both forces lacked arms, neither could pose a serious threat to British governance. Therefore, on 4th

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[77] s.1 Exportation of Arms Act 1900

[78] See Keown-Boyd, H., *The fists of righteous harmony: a history of the Boxer uprising in China in the year 1900*, (1991, London), 158

[79] HC Deb, 4th Series, vol. 87, col. 232, 31st July 1900

[80] See Haire, D., 'In aid of the civil power, 1868-90,' in Lyons, F. & Hawkins, R., *Ireland Under the Union*, (1980, Oxford), 115-148

[81] s.3 Peace Preservation (Ireland) Act 1881

[82] s.2 Peace Preservation (Ireland) Act 1881

[83] The 1881 Act was absent from the Expiring Laws Continuance Act 1906. The attitude of Asquith's Liberal administration was summed up by Augustine Birrell, who on taking office as Chief Secretary of Ireland in 1907, declared in a speech in Halifax that, 'Ireland is at this moment in a more peaceful condition than for the last six hundred years.' See, anon., *Is Ulster Right?* (1913, London), Chap. 13

December 1913, a proclamation was issued under s.43 Customs Consolidation Act 1876 prohibiting the importation of arms, ammunition (unless intended for sport) or explosives (unless they had an 'unwarlike purpose') into Ireland.[84]

The unenforceability of this proclamation was dramatically displayed by the UVF's Larne gun-running of 200,000 rifles in April 1914. It was further highlighted by blundering attempts by the authorities to seize weapons landed during the IVF's Howarth gun-running of July 1914.[85] However, this study is less concerned with these dramatic escalations in the "Ulster Crisis" and its domination of British politics in the prelude to the First World War, than with how the courts approached the proclamation amid these charged circumstances; a reaction tested by the case of *Hunter v Coleman.*[86]

Hunter & Co., gunsmiths with weapons en route from Hamburg when the proclamation was issued, sought damages for conversion after their property was seized by the defendant customs officer when it arrived at the port of Belfast and was subsequently destroyed by the police. This claim unsurprisingly succeeded before a Belfast jury, a decision which the government equally unsurprisingly appealed. The perception that the Court of Appeal's decision can be attributed to the divided loyalties of a largely Protestant senior judiciary in Ireland,[87] caught between a proclamation that they opposed politically and the need to uphold the rule of law so openly flaunted by the unionist leadership,[88] has likely contributed to the decision being largely forgotten, despite Kenny J's assertion that, 'it is scarcely possible to conceive of a case of greater constitutional importance than the present.'[89] However, regardless of such underlying motivations, the majority opinion resonates strongly with the 'passivist'[90] interpretation of statutes in light of national security concerns soon to be adopted in the wartime cases,

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[84] *Hunter, op. cit.* n.14, 372-373
[85] Stewart, A., *The Ulster Crisis*, (1967, London), 88-105
[86] *Hunter, op. cit.* n.14
[87] Kenny J in particular is cited in unionist literature of the era. See Carson, E., 'Introduction,' in Balfour, A., *et al., Against Home Rule*, (1912, London), 7
[88] The case was heard from 4th to 8th May 1914, less than two weeks after the Larne gun-running.
[89] *Hunter, op. cit.* n.14, 384
[90] Simpson, A., 'The Judges and the Vigilant State,' (1989) *Denning LJ* 145, 157

whilst Kenny J's dissent offers a tantalizing glimpse of how an openly "militant" judiciary might react to assertions of the requirements of national security.

The first point of significance is that, while the Crown did not even attempt to assert a prerogative power[91] to restrict the importation of armaments in time of emergency, comment from all three judges suggests that such an assertion would have succeeded.[92] However, the majority dismissed Hunter's claim of an 'inalienable common law right of the subject to import arms from abroad,' given that 'such a right, if it ever existed, had been expressly taken away by statute, in England, as far back as the matter has been traced.'[93]

Whilst a statutory right was granted in the Customs Consolidation Act 1876, the majority found this to be subject to the limitations upon such importation which could be imposed under of s.43 of this Act. Despite this provision being 'very brief and very vague in its terms,'[94] Dodd J was able to divine that, 'far from this being a trade section ... the words at the beginning sufficiently indicate that it was prima facie for matters other than those of trade, that is to say, for matters affecting the peace and safety of her people and her forces, that such an unqualified power was given.'[95] This lack of qualification was compounded by the refusal of the majority to examine why His Majesty apprehended a threat to His subjects or forces in Ireland or whether this threat was capable of justifying the imposition of such a proclamation.[96]

The majority further dismissed the contention that the King's ability to 'prohibit' the import of arms into the United Kingdom did not encompass the lesser power to restrict importation into Ireland alone. Lord Cherry CJ simply dismissed such an interpretation of the Act on the basis that it ran contrary to 'every argument of

[91] During the passage of the Exportation of Arms Act Sir Robert Finlay A-G had maintained that there remained a prerogative power over the arms trade, but 'we might have some interesting State trials through not having recourse to legislation.' HC Deb, 4th Series, vol. 87, col. 232, 31st July 1900
[92] *Hunter*, *op. cit.* n.14, 375, per Dodd J, 388, per Kenny J, 404, per Lord Cherry CJ
[93] *ibid.*, 380, per Dodd J
[94] *ibid.*, 401, per Lord Cherry CJ,
[95] *ibid.*, 381
[96] *ibid.*, 382, per Dodd J

convenience and common sense.'[97] However, in an evaluation of the *proportionality* of executive action under the CCA, Dodd J considered that 'if it is not necessary for the purpose the King has in view to *exclude* them [armaments] from Great Britain, then to *include* Great Britain would extend the proclamation further than was requisite, and would [constitute] an abuse of power.'[98] Quite how this embryonic proportionality test would ever constrain executive action is a mystery, as Dodd J considered that in the 1876 Act Parliament had granted the Crown complete discretion as 'the sole judge as to the danger, the emergency, and the need.'[99]

Kenny J's dissent defies analysis. Rather than a conceptually sound dismissal of the conception of s.43 CCA as an emergency power, the reader faces a diatribe. Impassioned attempts to refute each Crown argument with statements of individual freedom each more extravagant than the last produce a judgment where arguments sit uncomfortably together or tail off only to resume with a vengeance several pages later.

The former Solicitor-General for Ireland drew attention to the rights that the proclamation claimed to abridge, 'trading rights established by the great Charter and [the] equality of treatment that the Act of Union secured to the people of Ireland,' noted that it was possible 'that such a power of repeal might by statute be reposed in the King,' but concluded that 'grave considerations' militated against the CCA 1876 being interpreted as encompassing such a power.[100]

Kenny J first considered the Proclamation's purpose, finding that despite the Attorney-General's description of s.43 as 'an emergency provision,' the Proclamation did not contain 'anything in the nature of a recital or statement to the effect that a state of war or any threatened danger to any part of the realm existed, or, in fact, that any

[97] *ibid.*, 402
[98] *ibid.*, 381
[99] *ibid.*, 381
[100] *ibid.*, 385

emergency had arisen to provoke the exercise of those extreme powers.'[101] Despite Attorney-General John Moriarty pleading that 'people cannot shut their eyes to what is going on,' Kenny J persisted in his surreal attempt to divorce the Proclamation from the reality of events in Ireland, maintaining that 'a very difficult and, I think, ambiguous section of a statute is not to be aided in its interpretation by circumstances which, however much the subject of popular report, were not cognizable by the Court on the present argument.'[102] In what amounted to a blinkered, Diceyan pronouncement that the law took no cognisance of a state of emergency short of war,[103] Kenny J considered that the validity of the Proclamation must be interpreted on the basis that 'the United Kingdom was in a condition of absolute peace and tranquillity.'[104]

However, even if Kenny J had accepted the existence of an emergency, he wound still have found the Proclamation invalid. Opposing division of the CCA provisions restricting importation into those that raised revenue (such as the restrictions on silk) and those concerned with defence of the realm, Kenny J found 'nothing to suggest that arms and munitions of war should be referred to a principle or category different from that of other commodities,'[105] and concluded that the Customs Acts 'do not purport to do more than encourage and protect trade and commerce and secure the levy of Customs duties.'[106] He therefore accepted that 'if the proclamation had prohibited importation of arms into any part of the United Kingdom, no exception could possibly be taken to it, for the legislature has unmistakably conferred on the King the power of general prohibition.'[107] So exercised, 'this tremendous power of closing *uno flatu* all the ports of the United Kingdom ... would not ... necessarily favour any one

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[101] *ibid.*, 386
[102] *ibid.*, 386
[103] Dicey, A., *Introduction to the Study of the Law of the Constitution*, (1960, 10th Ed., London), 230-31. See Chapter 2.
[104] *Hunter*, *op. cit.* n.14, 386
[105] *ibid.*, 390
[106] *ibid.*, 390-91. In a ham-fisted attempt to make the law fit his argument Kenny J justified this conception of s.43 CCA as a trade provision by refusing to read 'any other goods' as *ejusdem generis* to arms, ammunition and gunpowder.
[107] *ibid.*, 388

part of the realm to the detriment of another.'[108] However, 'as the Customs Acts deal with and are enacted in the interests of trade and commerce ... it would be opposed to those interests and to the principle of trade equality if the power of differentiation existed.'[109]

Speed Limits and National Security

The last brief case study in this chapter concerns production of military balloons at a Crown factory at Aldershot. In 1905 this might be assumed to be a less than security-charged context. However that was to change when a War Office engine driver was officiously charged and convicted of breaking speed limits of 2 m.p.h., imposed through bye-laws in the town of Aldershot, [110] in a truck transporting a load of coal supposedly urgently required for production at the factory.

Hearing an appeal of this magnitude, the Lord Chief Justice, clearly receptive to the security-centred arguments raised by the Attorney-General, pronounced 'that, in a case solely with reference to the use of a Crown locomotive by a Crown servant in the performance of military duties, we ought to hold that the section does not prohibit that act, and does not bind the Crown in that sense.'[111] Wills J[112] went even further in upholding the appeal, considering that forcing the military to obey speed limits in peacetime might bring about the end of the British Army; 'An army cannot exist, at least it cannot exist for any useful purpose, without there being opportunities for

[108] *ibid.*, 395
[109] *ibid.*, 397
[110] Under s.4 Locomotives Act 1865
[111] *Cooper v. Hawkins* (1904) 2 KB 164, 171, per Lord Alverstone CJ
[112] Wills J read s.11 FEA 1870 broadly in the light of security concerns in *R. v. Sandoval* (1887) 56 LT 526. See Chapter 4.

manoeuvring and practising, which could not be carried out on any large scale if regulations of this kind were to be enforced.'[113]

Conclusion

Even in an era where the 'larger principle' governing commercial law was 'that English industry and trade ought to be left free,'[114] the judiciary were able to find a role for what might be considered the "lesser principle" that even the interests of commerce must bow to the requirements of national security. *Dixon v. London Small Arms Co.*[115] may indicate that in the mid-Victorian era few judges would voice such concerns aloud, but as the Franco-Prussian War-era Parliamentary debates concerning the national security provisions of the CCA 1853 show, even Lord Cairns was willing to conceive that circumstances may require government to take on "emergency" powers to constrain the threat posed by the trade with the belligerents undertaken by figures like Prioleau. By contrast, *Cooper v. Hawkins* suggests that by the Edwardian era the judiciary were falling over themselves to facilitate security concerns in otherwise innocuous circumstances.

In the later years covered by this study, the judicial position may well have shifted along those lines suggested by Lord Watson in *Nordenfelt*. He asserted that, 'the general policy of the law is opposed to all restraints upon liberty of individual action which are injurious to the interests of the State or community.'[116] In accordance with this statement's corollary, the House of Lords in *Nordenfelt* showed itself willing to permit exceptional restraints where the actions of an individual potentially endangered security. So pervasive was this evolved judicial perception of how threats to security

[113] *Cooper*, *op. cit.* n.111, 173, per Wills J
[114] *Nordenfelt*, *op. cit.* n.54, 665, per Bowen LJ
[115] *Dixon*, *op. cit.* n.20
[116] *Nordenfelt*, *op. cit.* n.49, 552, per Lord Watson

played into the relationship between personal liberty and community interests, that by 1914 Kenny J was obliged to convolute circumstances and ordinary principles of interpretation in order to conclude that *Hunter v. Coleman* was not a case affected by such concerns.[117] Before the First World War, for the majority of judges, to acknowledge such concerns was to concede to them.

[117] *Hunter*, *op. cit.* n.14, 386

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The Greatest Service a Judge can Provide

Is to lay down the Law for his Country

'The great merit of the Common Law is that it will justify even an unprecedented course of action if it is fairly covered by the maxim salus respublicæ suprema lex.'

Sir Rufus Isaacs & Sir John Simon (1913)

Bringing Order out of Chaos

Over the period covered by this study, judicial approaches to national security concerns might seem mired in confusion. Yet, amid this confusion the talismanic maxim *salus populi suprema lex* emerged, bestriding the pre-war "old world" and the new "Age of the Emergency Code"[1] which the United Kingdom entered in 1914. So pervasive was the theory that, in the excerpt from the Law Officers' opinion opening this chapter, parts of the executive clearly conceived that *salus populi* could, of itself, stand as a justification for executive action.[2]

With this development, the theory of a period of transition in judicial attitude appears, *prima facie* at least, to be borne out in the jurisprudence re-evaluated in the above chapters. It is, for example, possible to perceive the pre-war judiciary's inexorable progress towards the supine interpretive position traditionally associated with the wartime

[1] See Chapter 1

[2] National Archives, WO 32/7112, 'Martial Law in the United Kingdom. Opinion of the Law Officers of the Crown, 17th July 1913.'

jurisprudence. Pollock CB's hostility towards government arguments predicated upon security concerns in the early 1860s[3] seems far removed from Lord Watson's efforts in the mid-1890s to invent national security concerns.[4] Similarly, the judiciary's careful appraisal of what national security required (and significantly what it did not) in the Defence Act cases[5] from the 1890s onwards, appears irreconcilable with the reticence shown towards such issues in the House of Lords decision in *Dixon*, just three decades earlier.[6]

However, a convincing analysis of the judiciary's emerging national security consciousness before the First World War must avoid merely charting the hitherto neglected jurisprudence of a bygone era. This conclusion will reunite the disparate strands of jurisprudence considered in the body of this study, drawing together these milestones and dead-ends through an explanation of the evolution of interpretive approaches to security concerns. Fulfilling this task requires a detailed analysis of the nature of the jurisprudential shifts over the course of the half-century preceding the First World War, and should serve to affirm or dispel the possibility, raised in this study's introduction, of the mid-Victorian judiciary obeying common law interpretive principles in the face of executive assertions of security concerns. Judging by the common-law world's deification of Lords Shaw[7] and Atkin[8] for their mere lone dissents in this regard, such an era of robust scrutiny of executive action would seemingly amount to many a constitutional jurist's "paradise lost."

In the course of this study's investigation of developing national security jurisprudence it has uncovered an evolving cast of subterfuges and smokescreens in which distinguished judges have engaged to 'enable them to suppress the apparent contradiction

[3] *Attorney-General v. Sillem* (1864) 159 ER 178
[4] *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.* [1894] AC 535
[5] *R (Moore) v. Abbot* [1897] 2 IR 362
[6] *Dixon v. London Small Arms Co.* (1876) 1 AC 632
[7] *R. v. Halliday, ex parte Zadig* [1917] AC 260
[8] *Liversidge v. Anderson* [1942] AC 206

between the rule of law and the executive's predominance in this field.'[9] During the period studied, ever more elaborate ploys were developed to this end, each worth examining as their legacy lives on long after the cases in which they were developed have faded into obscurity.

This conclusion must further evaluate how the pre-war judicial conception of *salus populi* fed into these discussions between government and the military as to the degree to which statutory authority would be necessary to acquire the powers required to sustain the war effort. Finally, in the light of these conclusions, it is necessary to re-evaluate the relationship between this hitherto forgotten case-law and the First World War jurisprudence, and briefly to consider the enduring influence of these decisions.

A Golden Age or an Eldorado?

This study began as a quest; an expedition through the yellowing pages of forgotten law reports in search of a halcyon age of judicial robustness in the face of security concerns. If any period of modern legal history could support such jurisprudence, logic dictates that the confident mid-Victorian era would be the strongest candidate. Indeed, those academics who have paused to consider the period have concluded that thereafter 'one can detect a gradual, but steady, decline' in judicial liberalism.[10] This research has therefore analysed the development of national security case-law in the fifty years prior to the First World War – the hitherto acknowledged dawn of modern security jurisprudence. And yet this study has found no activist period, no Camelot, no golden age, but rather a

[9] Lustgarten L. & Leigh, I., *In From the Cold: National Security and Parliamentary Democracy*, (1994, Oxford), 330

[10] Ingraham, B., *Political Crime in Europe: A Comparative Study of France, Germany and England*, (1979, Berkeley), 209

mirage, shimmering tantalisingly throughout the mid-Victorian era and on closer inspection vanishing, insubstantial. In its stead, unexpectedly modern jurisprudence is found.

This is not to say that the judicial conception of national security did not evolve in the pre-war era. Despite the case-law considered in this study demonstrating a degree of consistency in how *salus populi* was applied as an interpretive tool, these decisions do evidence that over the course of this study the judiciary were prepared to acknowledge national security concerns and turn to this maxim in ever broader circumstances. In order to demonstrate this dichotomy at work, it is necessary to analyse the pre-war judiciary's willingness to recognise that national security concerns were in play, as distinct from the judicial attitude towards such concerns where they are found to be at issue.

It is scarcely surprising that the mid-Victorian judiciary displayed a healthy scepticism of national security concerns, especially in the maritime context in which Pollock CB encountered them in *Attorney-General v. Sillem*. It is possible that he did not appreciate the degree of threat that Confederate shipbuilding posed to the security of the United Kingdom, and might well have been blinded by concerns that such seizures were undertaken for no other purpose than to appease the Federal government, when he stridently asserted that 'we have nothing to do with the political consequences of our decision.'[11]

With the furore in the aftermath of *Sillem*, the judiciary became more accepting of the security interests at stake during the American Civil War. This is evident in Cockburn CJ's jury direction in *Jones* which accepted that the Foreign Enlistment Act constituted, 'a very important Act of Parliament, without which the neutrality of this country could not be maintained, or would at least be seriously jeopardized.'[12]

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[11] *Sillem*, *op. cit.* n.3, 214
[12] *R v. Jones* (1864) 4 F & F 25, 37

However, this did not mean that the mid-Victorian judiciary would apply such Acts blindly. In his judgment in the *Gauntlet*, Phillimore J may have emphasised the importance of the FEA,[13] and that the security purposes behind the Act would ordinarily need to be balanced against the interests of commerce,[14] but he rejected the charge that the laying of the telegraphy cable was other than a commercial enterprise.[15] He refused to recognise that there were interests at stake that could call the *salus populi* maxim into effect.

As late as the mid-1870s, and the judgment of the House of Lords in *Dixon*, the judicial reluctance to contemplate security concerns is evident.[16] Yet by the 1890s this reticence towards *salus populi* was replaced by judicial efforts to uncover national security concerns where none had been argued. Judgments within this trend include Lord Macnaughten's efforts to apply national security as a public policy reason in favour of a contract preventing a person from trading in weapons abroad.[17] However, Lord Alverston emerges as one of the most serious offenders, in *Cooper v. Hawkins*, with his engineering of hypothetical security concerns that might be jeopardised if War Office drivers were not exempted from speed limits in the most everyday of circumstances.[18]

Such judicial inventiveness pre-dates similar examples, in both World Wars, of the courts taking it upon themselves to fill in 'absent facts like the missing pieces of a jigsaw puzzle'[19] when supposed security issues were raised. In the First World War case of *ex parte Leibmann* this inventiveness is clear from the insistence that, as spying was 'the hall-mark of German *kultur*,' there would be a general danger of rumour mongering, signalling with lights or using radios and the ongoing 'employment on a scale hitherto unknown of

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[13] *'The International'* (1871) 3 A&E 321, 332
[14] *ibid.*, 332
[15] *Ibid.*, 338
[16] *Dixon*, *op. cit.* n.6
[17] *Nordenfelt*, *op. cit.* n.4, 574
[18] *Cooper v. Hawkins* (1904) 2 KB 164, 171
[19] Lustgarten & Leigh, *op. cit.* n.9, 331

carrier pigeons,' if a population of people of German origin or with German associations were left at large.[20] Moreover, in *Shaw v. Lincoln Wagon,* no less a judge than Atkin J decided, contrary to the advice of the Minister of Munitions, who appeared as a third party, that the manufacture of railway wagons constituted 'munitions work'[21] because it involved the production of items which might be 'adapted for use in war.'[22]

In *Liversidge v. Anderson,* Lord Wright sought to outdo his predecessors, asserting that 'all the circumstances of national safety to which this House adverted in *R. v. Halliday*[23] are present in this war, only with vastly increased urgency and gravity, because German methods for effecting the poisonous infiltration among British or allied subjects of their purposes and schemes have been immensely more subtle and ingenious than in the last war. Even a judge may be allowed to take notice of the import of words like Fifth Columnists and Quislings and the like.'[24] Thus, judicial acceptance of, and even invention of, *salus populi* issues in some of the twentieth century's most significant security cases marked the flowering of an approach conceived by generations of judges prior to the First World War.

It is unsurprising that, given the developing threats to the United Kingdom in the late-Victorian era, the resultant 'growing sense of the fragility of civilization'[25] would filter into the judiciary's amenableness to security arguments. Yet even prior to this sea-change, where the judiciary did accept that security concerns were at issue, this study has shown that they would interpret the law to facilitate the public interest embodied in the *salus populi* maxim. It should be remembered that despite this maxim not being rejuvenated

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[20] *R. v. Superintendent of Vine Street Police Station, ex parte Liebmann* (1916) 1 KB 268, 275, per Bailhache J
[21] s.9 Munitions of War Act 1916
[22] *Shaw v. Lincoln Wagon and Engine Company* (1916) 32 TLR 470, 472
[23] *Halliday, op. cit.* n.7
[24] *Liversidge, op. cit.* n.8, 265
[25] Townshend, *Making the Peace: Public Order and Public Security in Modern Britain,* (1993, Oxford), 38

until Phillimore J's judgment in the *International*,[26] this does not mean that the term's substance was not already alive in the law.

Such facilitation is evidenced as early as attempts by the dissenting judges in *Attorney-General v. Sillem* to read s.7 FEA sufficiently broadly to encompass the building of the *Alexandra*, as can be seen in Pigott B's assertion that 'any act of equipping, furnishing or fitting out done to the hull or vessel, of whatever nature or character the act may be, if done with the prohibited intent, is expressly within the plain language and also within the evident spirit of the enactment.'[27]

This approach is also clearly displayed in the level of 'good faith' review set by Jessel MR in *Hawley v. Steele*, affirming that the judiciary would not become involved in more than a cursory analysis of whether the government had employed expropriated land for the purposes established in the Defence Act 1842.[28] Moreover, once Kelly CB had accepted that there was a defence purpose at issue in the purchase of Martini-Henri rifles in *Dixon*, he was prepared to extend the principle by which the Crown is exempted from patent rules in order to cover such a contracting-out of production.[29] Similarly, *salus populi* is clearly facilitated by Porter MR's acceptance of the Crown's contention that the expropriation provisions of the Military Lands Act 1892 amounted to a permanent statute in *Hill v. Haire*, in spite of his recognition that this conclusion ran contrary to the literal meaning of that enactment.[30]

Together, these decisions confirm that even in the Victorian era the judiciary were willing to adopt a purposive interpretation of statutes providing the government with security powers. The finest example of such functionalism in the security sphere is

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[26] *'The International,' op. cit.* n.13
[27] *Sillem, op. cit.* n.3, 240, per Pigott B
[28] *Hawley v. Steele* (1877) LR 6 Ch. D. 521, 528
[29] *Dixon v. London Small Arms Co.* (1875-76) LR 1 Q.B.D. 384, 394
[30] *Hill v. Haire* [1899] 1 IR 87, 93-94

provided by the majority in *Hunter v. Coleman*. Lord Cherry CJ and Dodd J adopted an interpretation of the Customs Act, contrary to prevailing comment as to its limitations, in order to assist the requirements of national security in a situation of emergency. They did so without paying heed to the claimant's assertions of the scope for executive abuse of these powers, considering that this position could be reassessed if such abuse came to fruition.[31]

Within the United Kingdom, certainly from the mid-Victorian period onwards, a majority of judges have followed a functionalist approach to legal problems involving security concerns. Judicial functionalism, by which interpretive techniques were adapted to accommodate *salus populi* where necessary, therefore transcends the period of the First World War. The wartime jurisprudence may have gravitated towards the banner that Scrutton LJ hoisted with his pithy assertion that 'the war cannot be waged on the principles of the Sermon on the Mount. By the same token it cannot be waged according to the Magna Carta.'[32] But this statement of interpretive principle did not mark a new departure, it affirmed this established judicial approach to national security, to the point where it became ingrained within the common law. As Lord Reading asserted, the difference between the wartime jurisprudence and earlier interpretive approaches in light of *salus populi* lay in the degree to which state action could be accommodated, and not in the principle; 'in time of war that which it might well be an exaggeration in time of peace to describe as dangerous to the safety of the realm, [could be so construed] and action might be justified which could not be justified in time of peace.'[33]

In line with this assertion, pre-war judicial functionalism did not necessarily equate to acquiescence to the demands of the executive. The Defence Act cases denote careful

[31] *Hunter v. Coleman* (1914) 2 IR 372, 403, per Lord Cherry CJ
[32] *Ronnfeldt v. Phillips* (1918) 82 JP Jo. 480, 482
[33] *R. v. Governor of Brixton Prison, ex parte Sarno* (1916) 32 TLR 717, 720

judicial consideration of those elements of the legislation which required interpretation in light of *salus populi*, and the attempts of a string of Law Officers to expand this favourable mode of interpretation into parts of the Acts, notably the mechanisms for compensation, where security concerns did not apply. Describing such jurisprudence as displaying "robust-functionalism" may appear to constitute an oxymoron, but it serves to convey the sophistication of the pre-war judiciary's conception of *salus populi* as an interpretive device, when Gibson J was able to assert that, 'no doubt the Defence Act is of national importance, and *salus populi, suprema lex*. But the safety of the state is best secured by a general average contribution, and not by making jettison of individual interests.'[34] The decision in *Abbot* was certainly functionalist, Gibson J and his fellow judges accepting the national security concerns at stake where land was expropriated for defence purposes. But this excerpt displays the care taken to divide the issues in this case; ruling an expropriation as *ultra vires* may have adversely impacted upon national security, but permitting the state to default on compensation could garner no such benefits. Such careful judicial consideration of whether national security was really at issue would not survive the early twentieth century arms race, let alone the First World War.

Of course, this overview does not pretend to enter the mind of every judge in the pre-war era and explain how thy perceived or reacted to security issues, but it instead attempts to aggregate the judiciary's approach. As Oliver Wendell Holmes once asserted, the personality of the judge remains the 'inarticulate major premise in judicial logic.'[35]

Having argued above that the *ratio* of Pollock CB's judgment in the *Sillem* case indicates that he did not accept the relevance of national security concerns, his assertion that 'in the present enlightened state of the civilised world, it may turn out that the doctrine

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[34] *Abbot, op. cit.* n.5, 405
[35] *Lochner v. New York* (1905) 198, US 45, 76

and those principles are to be preferred which would make us prosperous in peace rather than those that would make us successful in war,'[36] may place him amongst the small cadre of judges willing to challenge not simply the existence of national security concerns but their interpretive value. He certainly endured, albeit posthumously, the back-biting from government that goes with this territory. [37]

However, if one sparrow does not make a summer, then Pollock CB alone cannot change the common law consensus with regard to national security.[38] *Attorney-General v. Sillem* should be regarded as an exception to the common law's interpretive approach to *salus populi*, born of specific circumstances, and not as evidence of a mid-Victorian positivist or normative guiding rule, if for no other reason than that for the next two decades the judiciary busily endeavoured to free themselves from the burdens of the *Alexandra* debacle.

The Secret Identities of *Salus Populi*

In some decisions, such as the majority position in *Hunter*,[39] this functionalist character of judicial interpretation is overt. However, it is rarely easy so to uncover judicial approaches to national security concerns. Those judges who are less open about, or less comfortable with, this common interpretive position in relation to security concerns, have not been so brazen in professing its functionalist nature. Interestingly, the lasting evolution in judicial thinking that did occur over the period examined within this study did not concern the approach to security issues, but the manner in which such members of the

[36] *Sillem, op. cit.* n.3, 221
[37] HC Deb, 3rd Series, vol. 203, col. 1366, 1st August 1870, per Sir Robert Collier (A.G.)
[38] Although if he carries with him Bramwell B in tow, then, as has been shown, he can spectacularly, if temporarily, affect a particular stream of security jurisprudence.
[39] *Hunter, op. cit.* n.31

judiciary masked their functionalist role. Three techniques, evident throughout twentieth-century jurisprudence, took on their modern guise during the pre-war period.

The most prominent subterfuge, popular amongst judges long before the period of this study, was to engage in linguistic machinations, or quite simply 'humbugging;'[40] packaging their judgments in a manner that suggests a relationship less subservient to the requirements of national security than their judgment warrants. The best known historic example of this practice came in the celebrated Georgian case of *R. v. John Wilkes*, where the radical dissident was declared an outlaw after he failed to appear on charges of seditious libel. Lord Mansfield opened his judgment with the assertion that '[judges] must not regard political consequences; how formidable soever they might be: if rebellion was the certain consequence, we are bound to say *fiat justitia, ruat coelum.*'[41] This 'resounding rhetoric,'[42] capped by the positivist credo that justice should be done even if the heavens fall as a result, constituted a dramatic deception. As Lord Denning explained, 'Lord Mansfield had his tongue in his cheek. He did have regard to political consequences. He did not want to make John Wilkes a martyr. So he found a technicality by which he set him free.'[43]

Such positivist reasoning became a more prominent feature of English jurisprudence after Bentham's critique[44] of the normativist conception of the judicial role in Blackstone's *Commentaries.*[45] By the 1860s it provided the public conception of the judicial role in developing the common law. It is therefore all the more obvious that such reasoning is deployed to divert attention from Channell B's functionalist interpretations of security requirements in his judgment in *Attorney-General v. Sillem*;

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[40] Simpson, A., *In the Highest Degree Odious: Detention Without Trial in Wartime Britain*, (1992, Oxford), 30. Foxton similarly refers to the divergence of judicial rhetoric and reality. Foxton, D., '*R. v. Halliday, ex parte Zadig* in Retrospect,' (2003) 119 *LQR* 455, 494

[41] *R. v. John Wilkes* (1770) 4 Burr 2527, 2562 [Let justice be done, though the sky may fall as a result]

[42] Denning, *Landmarks in the Law*, (1984, London), 274

[43] *ibid.*, 275

[44] Bentham, J., *A Comment on the Commentaries*, (1977, London), 194-198

[45] Blackstone, W., *Commentaries on the Laws of England*, (1977, Chicago), Vol. I, 69-70

> 'In days long past judges, I think, often invaded what we now consider the sole province of the legislature. They interpreted statutes to include cases which they assumed to think ought to have been included; thus not merely constituting themselves as legislators, but also as legislators *ex post facto*. That I think will never be done again ... If it is in the interest of the nation that the law shall be other than we interpret it, if our construction of this Act of Parliament may endanger the peace of the nation, then I say that it be the duty of Parliament to enact a new law; but it is not our duty to look elsewhere than at the present statute for an interpretation of it.'[46]

It would surprise anyone unfamiliar with the intervening one hundred and forty years of national security jurisprudence that such a denial of the influence of national security concerns on judicial reasoning is to be found in an opinion that ultimately supports the legislative interpretation sought by the government.[47]

However use of positivist ruses declined from the late-Victorian period onwards. As judicial egos rapidly swelled to fulfil to the role of the courts as the 'guardians of liberty' under the Diceyan conception of the rule of law,[48] the language of deception altered accordingly. By the First World War, the concept of a normative effort to balance between the rights of the individual and the public interest was loudly asserted by a judiciary that, in reality, baulked at the thought of undertaking any such analysis. Perhaps the best known

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[46] *Sillem, op. cit.* n.3,, 237

[47] Paradoxically, what will surprise those familiar with the development of national security jurisprudence in the twentieth century, is that this ploy is found in a dissenting opinion.

[48] Dicey, A., *The Law of the Constitution*, (1960, 10th Ed., London), 137

example of an assertion of this ilk was Lord Atkinson's claim that, 'however precious the personal liberty of the subject may be there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war or escape from national plunder or enslavement.'[49]

This shift to normative assertions pre-dated the First World War, being evident, for example, in Lord Watson's judgment in *Nordenfelt.* Here the public policy concerns inherent in preventing 'unfettered competition in the sale of arms of precision to tribes who may become ... antagonists in warfare,'[50] were affirmed as out-weighing Nordenfelt's interest in not being prevented from carrying on his trade after a spurious balancing exercise.

However, it must be remembered that the dynamic that Dicey established between the rule of law and parliamentary sovereignty can mean all things to all men, if only because 'it was ultimately impossible to reconcile his emphasis on the rule of law with the unlimited sovereignty of Parliament.'[51] This inconsistency allowed many judges to adapt their previously positivist ruse to draw attention away from the abdication of their interpretive functions in the security context. Positivist smokescreens are still implemented where judges wash their hands of a matter by declaring that their hands are tied by the actions of Parliament. Such statements would be widely employed by the wartime judiciary, and can be traced back to common ancestors, most prominently Channell B's judgment in *Sillem.*

For example, in 1918 Scrutton LJ defended the judiciary's 'failure to interfere' with official action on the basis that 'Parliament has allowed certain action and has laid down

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[49] *Halliday, op. cit.* n.7, 271. This untruth was considered sufficiently comforting to the judiciary to warrant repetition in *Liversidge, op. cit.* n.8, 257, per Lord MacMillan
[50] *Nordenfelt, op. cit.* n.4, 552, per Lord Watson
[51] Allan, T., *Law, Liberty and Justice: Legal Foundations of British Constitutionalism,* (1993), Oxford, 16

certain rules in statutes. The only duty of the judge is to enforce and administer those statutes.'[52] One war later and the same formula was still relied upon, Lord Wright asserting in *Liversidge* that 'Parliament excludes the jurisdiction of the courts and substitutes in the one case a specially constituted administrative body, in a case like the present, the Secretary of State. In no case are ordinary legal rights to be affected unless and then only to the extent that Parliament has enacted to the contrary.'[53] Into the 1970s Lord Denning adopted the same well-worn excuse; 'our history shows that, when the state itself is endangered our cherished rights may have to take second place ... time after time Parliament has so enacted and the courts have loyally followed.'[54]

The third ploy within the judicial arsenal requires less skill to effect, but carries the complication that, if misguidedly employed, it can result in a judgment seemingly out of touch with reality. Essentially, the judge can embellish the threat raised by the state to the point where it can be considered to trump competing interests. Charges of exaggerating threats have long been levelled against the executive, Simpson asserting that, where a government is mindful of public opinion and therefore unwilling to shoulder even potential security risks because of the possible repercussions, the blackest interpretation of threats to the *salus populi* will often win through.[55]

In the context of the pre-war judiciary, Wills J pursued a particularly embellished argument in his judgment in *Cooper v. Hawkins*, where he contended that enforcing the speed limit against the War Office driver in the instant case was but the thin end of a wedge

[52] Scrutton, T., 'The Law and the War,' (1918) 34 *LQR* 116, 119. He went on to assert that 'the judges do not consider it their duty to run the war, and they take the view that the responsibility for infringements on the previous liberties of British citizens is with Parliament, who authorized these infringements, and with the executive, who exercise the powers conferred by Parliament,' 130.
[53] *Liversidge, op. cit.* n.8, 264
[54] *R. v. Secretary of State for Home Affairs, ex parte Hosenball* [1977] 1 WLR 766, 778
[55] Simpson, *op. cit.* n.40, 13

that would end in disbandment of the British Army because of its supposedly restricted capacity for conducting manœuvres or training.[56]

A similar exaggeration is perpetrated by Lord Alverstone in *Brailsford*, a case as yet unconsidered in this study, but in which this point is well illustrated. In affirming convictions for causing a public mischief against two defendants who had forged passports to Russia, the Lord Chief Justice adapted Crown assertions that such actions might cause harm to relations between states, by inventing the danger of Britain becoming involved in war with Russia to protect these subjects.[57]

The Pre-War Jurisprudence and the Wartime Decisions

The employment of these judicial subterfuges, together with the historic military paranoia engendered through incidents such as the attempts to bring Governor Eyre to trial for his abuse of martial law powers during the Morant Bay uprising in Jamaica,[58] served to protect respect for the judicial position in national security cases until the First World War. However, partly as a result of fears of judicial activism produced by these deceptions, 'the military had come to favour a code which would spell out precisely what powers they had if war came.'[59]

This conclusion will not detail the tortured birth of the United Kingdom's first emergency code, for this process has been well documented by Rubin.[60] It suffices to note that the delegation of this unprecedented degree of power to the executive through the various incarnations of DORA was conceived from the outset as much as a check on

[56] *Cooper, op. cit.* n.18, 173
[57] *R. v. Brailsford and Another* (1905) 2 KB 730, 745
[58] Townshend, *op. cit.* n.25, 47
[59] Simpson, A., *Human Rights and the End of Empire*, (2001, Oxford), 80
[60] Rubin, G., 'The Royal Prerogative or a Statutory Code? The War Office and Contingency Legal Planning, 1885–1914,' in Eales, R. & Sullivan, D., eds., *The Political Context of the Law*, (1987, London)

judicial scrutiny of the government's 'vexatious orderings,'[61] as it was 'a legal technique for minimising parliamentary control,'[62] or a platform 'to facilitate advance planning and to encourage clear judgment among officers on the ground.'[63]

However it was conceived, DORA produced 'the harnessing by the state, on an unprecedented scale, of the power and resources of the nation towards the war effort.'[64] Against such a backdrop, this study does not constitute a supercilious effort to undermine the significance of the First World War jurisprudence, but an attempt to redress the lack of consideration given to the interpretive approach to national security concerns espoused by previous generations of judges and to re-evaluate the wartime case-law as a development of this approach.

Even with the bloody stalemate of the First World War at its most intractable, the implications of the wartime legislation were evident to Bowman. Writing, as Townshend asserts, from the safe distance of the *Michigan Law Review*,[65] Bowman asserts that 'the outlines of this legislation ... stand out sharp against the past. A precedent has been established. And such precedents are not unlikely to be followed.'[66] What might be said of DORA may equally be said of its interpretation. But to expect similar deference to the executive during the Second World War is not to expect the precedent to be twisted to the degree that it applies to peacetime or to lesser emergencies; 'wartime and immediate post-war decisions ought not to be treated with reverence.'[67]

Prior to the Civil War, the Stuart judiciary supported for the application of the royal prerogative 'through the narrow pedantry with which they bent before precedents, without

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[61] Clarke, S., 'The Rule of DORA,' (1919) 1 *JCLIL (3rd series)* 36, 36
[62] Simpson, *op. cit.* n.59, 80
[63] Lustgarten & Leigh, *op. cit.* n.9, 325
[64] Loughlin, M., *Public Law and Political Theory*, (1992, Oxford), 162
[65] Townshend, *op. cit.* n.25, 57
[66] Bowman, H., 'Martial Law and the English Constitution,' (1916-17) 15 *Mich.L.Rev.* 93, 125
[67] De Smith, S., *Judicial Review of Administrative Action*, (1973, London), 290

admitting any distinction between precedents drawn from a time of freedom and precedents drawn from the worst times of tyranny.'[68] Similarly, Ewing and Gearty recognise that whilst judicial 'deference to the executive in war time is perhaps understandable and perhaps even appropriate, ... it was to lead the judges down an unfortunate path which not only made a mockery of Dicey's faith in the self-correcting mechanisms of the British constitution but also led to a total abdication by them of their role.'[69]

However, it is unjust to heap blame upon the wartime or post-war judiciary without acknowledging that common law rules of interpretation of security legislation were settled long before the First World War. Ironically, Lord Atkin best summarises this situation in his assertion that 'in this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace.'[70] Amongst the wartime judiciary there was indeed an acceptance that the law performed an enhanced version of the function established in peacetime. The existence of national security concerns barely warranted consideration, they were accepted as self-evident. All that remained was to employ the historic method of interpretation in such circumstances, and adopt most benign the construction of the relevant statutes and secondary legislation to enable the executive to tackle the threat. Well might Coke have concluded that 'the surest construction of a statute is by the rule and reason of the common law,'[71] but constitutional lawyers must acknowledge that these rules have to date enjoyed an at best cursory relationship with interpretation techniques where national security concerns are at issue.

In conclusion, the blameworthiness of the wartime judiciary is greatly diminished upon reconsideration of Campbell's conclusion that DORA produced a 'threefold

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[68] Green, *A Short History of the English People*, (1877-80) Vol. 2, Chap. 8, Sect. 2
[69] Ewing, K. & Gearty, C., *The Struggle for Civil Liberties*, (2000, Oxford), 87
[70] *Liversidge v. Anderson* [1942] AC 206, 244
[71] Quoted in Dyzenhaus, D., *Hard Cases in Wicked Legal Systems; South African Law in the Perspective of Legal Philosophy*, (1991, Oxford), 5

diminution of the judicial role.'[72] Firstly, he conceived of 'a great attenuation, and in some cases the virtual extinction of, the doctrine of *ultra vires*.'[73] However, as this study has shown, in relation to the Defence Acts to take just one example, judges were willing to attenuate the principles of *vires* review in the national security sphere long before the First World War.[74]

Similarly, Campbell considered 'the particular "judge-proof" manner in which the powers under the DORR were generally structured.'[75] Yet even prior to the turn of the twentieth century efforts at judge-proofing were common, as seen in relation to the FEA 1870, and such efforts were certainly not confined to the national security sphere.[76]

Finally, the grant of 'quasi-judicial powers' to the executive was certainly not a novel development at the outbreak of the First World War. Lord Wright accepted, in *Liversidge*, that 'in ordinary administrative measures, the legislative practice of substituting for the jurisdiction of the court that of a specially constituted tribunal is well established.'[77] In support of this proposition he cited with approval Lord Haldane LC's judgment in the pre-First World War *Arlidge* case, that under the Housing and Town Planning Act 1909 'jurisdiction, both as regards original applications and as regards appeals, was in England transferred from courts of justice to the local authority and the Local Government Board, both of them administrative bodies.'[78]

Admittedly, the system established under DORA did "throw" a judiciary historically conditioned to expect a suspension of *habeas corpus* in order to tackle individuals who posed a threat in such circumstances, for *Halliday* found Lord Finlay LC

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[72] Campbell, C. *Emergency Law in Ireland, 1918-25*, (1994, Oxford), 116
[73] *ibid.*, 116
[74] *Hawley, op. cit.* n.28
[75] Campbell, *op. cit.* n.72, 116
[76] Ambrose, W., 'The New Judiciary,' (1910) 26 *LQR* 203, 207
[77] *Liversidge, op. cit.* n.8, 264
[78] *Local Government Board v. Arlidge* [1915] A. C. 120, 132

marvelling at the fact that 'the Legislature has selected another way of achieving the same purposes, probably milder as well as more effectual than those adopted on the occasion of previous wars,'[79] whereas the more astute Lord Shaw lamented how Regulation 14B paid;

> 'formal respect to the procedure of remedy, but [operated] to deny the remedy itself by inferring the repeal of those very fundamental rights which the remedy was meant to secure. This is to allow the subjects of the King by law to enter the fortress of their liberties only after that fortress has been by law destroyed.'[80]

More by accident than by design, the executive had developed a mechanism for administering the wartime state that threw the inadequacies of judicial interpretive methods in this field into sharp relief. Therefore, it is necessary to add to Campbell's list the serious diminution of judicial power occasioned when the executive realised the interpretive position adopted by the judiciary in relation to national security concerns, and thereby discovered its ability to act with virtual impunity in this sphere. This neutralisation of the judicial smokescreens with which the pre-war judiciary had cloaked their weakness produced by far the greatest diminution of judicial power.

The military's false fear of the judiciary left only contempt when the First World War exposed them, not as 'lions under the throne,'[81] but as paper tigers. But during the Irish War of Independence, General Macready, having lost the celebrated *habeas corpus* action of *Egan v. Macready*,[82] would threaten to arrest even the Master of the Rolls, if he

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[79] *Halliday, op. cit.* n.7,, 270
[80] *ibid.*, 294
[81] Gardiner, 'History of England' vol. iii (1883), 2
[82] *Egan v. Macready* [1921] 1 IR 265

sought to serve writs for the claimant's release.[83] By the 1970s, after another half century of compliant jurisprudence, the judiciary could scarcely be considered to be even 'mice'[84] in the pocket of the Home Secretary when security concerns were at issue. Rather, the standard British Army handbook on low intensity conflict[85] approached 'law and the legal system merely as weapons in the armoury of the government, and view[ed] the legal system and its officers in a highly manipulative light.'[86]

[83] Ewing & Gearty, *op. cit.* n.69, 365-367
[84] *R. v. Home Secretary, ex p Budd* (1941) 2 All ER 70, per Lord Atkin
[85] Kitson, F., *Low Intensity Operations: Subversion, Insurgency, Peacekeeping* (1971, London)
[86] Lowry, D., 'Terrorism and Human Rights: Counter-Insurgency and Necessity at Common Law,' (1977-78) 53 *Notre Dame Lawyer* 49, 76

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