ROUTLEDGE REVIVALS

Espionage and Secrecy

The Official Secrets Acts 1911-1989 of the United Kingdom

Rosamund Thomas

Routledge Revivals

Espionage and Secrecy

The problems that arose in the 1970s and 1980s related to espionage and secrecy raised serious concern about whether these breaches of Official Secrecy are covered by criminal or civil law. First published in 1991, this book is concerned with the criminal law dealing with Official Secrecy. The author seeks to explain in detail the Official Secrets Acts, setting it in context of other related laws such as the Security Services Act of 1989. While contemporary recent cases are highlighted, such as that of Geoffrey Prime at GCHQ, the author also provides and theoretical and conceptual analysis of the Official Secrets Law from 1911 to 1989.

This page intentionally left blank

Espionage and Secrecy

The Official Secrets Acts 1911-1989 of the United Kingdom

Rosamund Thomas

Routledge
Taylor & Francis Group

First published in 1991
by Routledge

This edition first published in 2016 by Routledge
2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN
and by Routledge
711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

A Library of Congress record exists under LC control number: 9041095

ISBN 13: 978-1-138-68683-0 (hbk)
ISBN 13: 978-1-315-54251-5 (ebk)
ISBN 13: 978-1-138-68691-5 (pbk)

ESPIONAGE AND SECRECY

The Official Secrets Acts 1911–1989 of the United Kingdom

Rosamund M. Thomas
Ph.D., M.Soc.Sc., M.A. (Cantab.)

London and New York

Dedications

My dedications are to concepts and to institutions; the concepts of honour, truth, trust, loyalty, duty, service and education; and the institutions of Queen and country, college and university:

To Queen and Country

My first dedication is to Queen and country by reference to the quotation below, remembering that we *all* in the United Kingdom constitute 'our country' and should not leave its national security entirely to specific institutions created for that purpose, like the intelligence services, but *each* must fulfil his or her role as citizen with honour and service.

Breathes there the man, with soul so dead,
  Who never to himself hath said,
This is my own, my native land!
  Whose heart hath ne'er within him burned,
As home his footsteps he hath turned,
  From wandering on a foreign strand!
If such there breathe, go, mark him well . . .

From Sir Walter Scott, *The Lay of the Last Minstrel*, Canto Sixth, I.[1]

---

1 In the reporting of the United States' case *Philip Agee v. Edmund S. Muskie*, Secretary of State, Appellant, 629 2d. (1980) at 91, the above extract by Sir Walter Scott is footnoted to explain the meaning of the sentence, 'The State Department was well advised to "mark him well" '. The reference applies to Philip Agee, a United States' citizen and former employee of the Central Intelligence Agency (CIA), whose activities in countries outside the United States were considered by some to border on treason (See illustration 1).

To College and University

My second dedication is to Wolfson College within the University of Cambridge. Wolfson College,[2] a modern, mainly postgraduate institution of teaching, learning and research, served as the base for most of this research, by means of granting me a College Research Fellowship in the 1980s.

Wolfson College is celebrating its Silver Jubilee this year, 1990. The College President, Professor David G. T. Williams, is also the Rouse-Ball Professor of English Law in the University of Cambridge and, himself, a leading authority on the Official Secrets Acts 1911–1989 of the United Kingdom. Currently, Professor Williams is the Vice-Chancellor of the University of Cambridge, as well as President of Wolfson College. In these formal roles he, like others, continues to demonstrate daily a deep commitment to higher education.

I wish Wolfson College, its President, Fellows, Students and other members, a rewarding Twenty-Fifth Anniversary.

---

2 Wolfson College is for men and women and was founded as University College in 1965 by the University of Cambridge and recognized as an 'approved foundation'. In 1973 the name was changed to Wolfson College and in 1977 it was recognized as a college. Membership of the College is for graduate, mature, and affiliated students.

First published in 1991
by Routledge
11 New Fetter Lane, London EC4P 4EE

Simultaneously published in the USA and Canada
by Routledge
a division of Routledge, Chapman and Hall Inc.
29 West 35th Street, New York, NY 10001

Typeset in 10/12pt Garamond by Witwell Ltd, Southport
Printed in England by Clays Ltd, St Ives plc

British Library Cataloguing in Publication Data
Thomas, Rosamund M.
Espionage and secrecy: the Official Secrets Acts 1911-1989
of the United Kingdom.
1. Great Britain. Official secrets. Disclosure, history.
Legal aspects
I. Title
334.10523

Library of Congress Cataloging in Publication Data
Thomas, Rosamund M.
Espionage and secrecy: the Official Secrets Acts 1911-1989
of the United Kingdom/Rosamund M. Thomas
p. cm.
Includes bibliographical references.
1. Espionage-Great Britain-History. 2. Official secrets-Great
Britain-History. I. Title.
KD8024.T47 1991
345.42'0231-dc20
[344.205231] 90-41095

ISBN 0-415-04067-1

Contents

Illustrations

(between pages 160 and 161)

1 *Philip Agee*, a United States' former citizen and CIA agent, deported from Britain in November 1976 on the grounds that he sought to obtain for publication information harmful to the security of the United Kingdom.

2a *Geoffrey Arthur Prime*, after being remanded by a magistrate on 15 July 1982 at Hereford, accused of espionage offences under Section 1 of the Official Secrets Act 1911 (as amended).

2b *Geoffrey Prime's* 'Spying Kit' on display 11 November 1982 after he was sentenced.

3a *GCHQ*: the entrance to Oakley (GCHQ) at Cheltenham, England in July 1982, where Geoffrey Prime worked.

3b *Oakley (GCHQ)* premises are a 'prohibited place' under the Official Secrets Acts.

4a *Cyprus Seven Spy Trial: Cyprus*, showing its strategic importance as a listening post because of its proximity to the Middle East.

4b *Cyprus Seven Spy Trial: The Chiquito Night Club* in Larnaca, Cyprus where it was alleged many secret NATO documents were passed to foreign agents by British Servicemen.

5 *Josie Ignilan*, a Filipino cabaret singer, in London on 9 September 1985 to give evidence for the defence in the trial of the seven British Servicemen accused of passing secrets to the Russians.

6 *Ning Ning (Maynard)* in London on 2 September 1985 to give evidence for the defence in the above Cyprus Seven Spy Trial.

7 *Christopher Payne* (centre right) *and Geoffrey Jones* (right) in London on 28 October 1985 after being found not guilty by the jury of passing vital British secrets to the Russians.

8 *Sir Roger Hollis*, former Director-General of MI5 who died in 1973.

Foreword

A great deal has happened in the field of official secrets and espionage since Professor David Williams published his seminal work, *Not in the Public Interest*, in 1965. There has been a series of notorious cases which excited much public discussion, frequently heated and not always well informed. The issues have been extensively analysed and debated in legal and other learned journals. The time is ripe for an objective re-examination of the whole subject. Dr Rosamund Thomas has provided it in this book. She reveals an encyclopaedic knowledge of the cases and the literature. Her careful analysis of the cases against the background of the general principles of criminal law and evidence and her thoughtful commentary will be essential reading for all who are interested in the subject.

J. C. Smith, C.B.E., Q.C., LL.D., F.B.A.
Emeritus Professor of Law, University of Nottingham
September 1990

This page intentionally left blank

Preface

This book deals principally with espionage and related *criminal* offences under section 1 of the Official Secrets Act 1911, as amended. Apart from a few exceptions[1] this section has received little structured analysis, definition or clarification by means of illustrative cases. Hitherto, section 1 has been shrouded in obscurity and complexity. There has been a number of serious spying offences committed in recent years, like those by Geoffrey *Prime* then of the Government Communications Headquarters (GCHQ) at Cheltenham, as well as unproven allegations of espionage in Her Majesty's Armed Forces as in the cases of Paul *Davies* and other Servicemen then serving in Cyprus. Yet, section 1 of the 1911 Act, as amended, remains difficult to understand both as a section in its own right and in relation to the Official Secrets Acts 1911–1989 as a whole.

By contrast, the old section 2 of the Official Secrets Act 1911, which until recently dealt with unauthorized disclosures of official information other than espionage (that is, leakages) generated considerable attention and literature, and was the subject of numerous proposals for reform, such as those by the Franks Committee (1971–2).[2] None of the proposals was enacted until 1989, when the Conservative Government succeeded in reforming section 2 by the passage of the Official Secrets Act 1989. We shall examine the recent reform of section 2 in our final chapter.

The Official Secrets Act 1920 covers, in particular, criminal offences *ancillary* to espionage, as Chapter 1 will demonstrate. Espionage and related offences under section 1 of the 1911 Act, and the ancillary offences dealt with by the 1920 Act, are the main focus of this book. Small modifications enacted by the Official Secrets Act of 1939 are also covered. We do not attempt to

---

1 One of the few exceptions is the valuable work of Professor D. G. T. Williams, Rouse-Ball Professor of English Law in the University of Cambridge. In addition to his many articles, Wiliams' classic work *Not in the Public Interest* (London, Hutchinson 1965) covers espionage crimes. Indeed, that book was the first authoritative history of the Official Secrets Acts.

2 *Departmental Committee on Section 2 of the Official Secrets Act 1911* (Chairman: Lord Franks) Vols 1–4 (London, HMSO Cmnd. 5104 1972).

discuss in detail other serious offences against the State either at common law or under statute, such as treason, sedition, or incitement to disaffection and mutiny. Nor do we seek to explain other matters concerning national security, such as the interception of communications (that is, telephone tapping and mail interception) as such explanations are available elsewhere.[3] We concentrate in this book on the *criminal* law in terms of the Official Secrets Acts 1911–1989 of the United Kingdom and especially on espionage crimes. We do make occasional comparisons with other countries and comment, where relevant in later chapters, on the recent *civil* proceedings in this country and in Australia involving Mr Peter *Wright*, the former British Security Service (MI5) officer, and his now published memoirs, entitled *Spycatcher*. In contrast to criminal prosecutions under the Official Secrets Acts, these proceedings involved the *civil* law of breach of confidence and were brought in the 1980s in the Australian courts, and the English courts and elsewhere by the Attorney-General on behalf of Her Majesty's Government. These civil proceedings are included in this book because they shed further light on the subject of espionage. Furthermore, the consequences of these *civil* proceedings led in part to the reform of the *criminal* law by means of the Conservative Government's Official Secrets Bill of 1988 (enacted in 1989) which replaced section 2 of the Official Secrets Act 1911. This book contains 6 chapters.

Chapter 1 outlines from an historical perspective the key provisions of the Official Secrets Acts of 1911, 1920, and 1939 and traces their origins. Only brief reference is made in Chapter 1 to the new Act of 1989 for two reasons. Firstly, this book emphasises the *espionage* provisions of the Acts (whereas the 1989 Act has reformed only the old section 2 of the 1911 Act dealing with unauthorized disclosures of official information other than espionage). Secondly, the Official Secrets Act 1989 – being a new statutory reform – is reserved mainly for our conclusions in Chapter 6 when we discuss the relation of the espionage provisions to the Official Secrets Acts as a whole. The Official Secrets Acts of 1911, 1920, 1939 and 1989, together, are known as the Official Secrets Acts 1911–1989.

Chapter 2 defines in depth key terms within, and associated with, section 1 of the Official Secrets Act 1911, as amended, relating to espionage and related offences. Recent cases of spying are used to explain these definitions in respect of section 1.

Chapter 3 provides further definitions, illustrated by cases, of key terms which apply to the Official Secrets Acts 1911–1989 as a whole, rather than exclusively to the espionage provisions within section 1 of the 1911 Act, as amended.

---

3 For example, J. C. Smith and B. Hogan *Criminal Law* (London, Butterworths. First published 1965, sixth edition 1988) and Michael Supperstone *Brownlie's Law of Public Order and National Security* (London, Butterworths. Second edition 1981). See also Rosamund M. Thomas *Privacy and Data Protection in Britain* (Simon and Schuster/Harvester Press, forthcoming 1992).

Chapter 4 sets out the role of the Attorney-General and other Law Officers of the Crown both in general and in relation particularly to a prosecution under the Official Secrets Acts. The consent of the Attorney-General to a prosecution is a statutory requirement under the Official Secrets law and Chapter 4 looks specifically at how the Attorney-General's fiat operates, in practice, in espionage cases. Also, immunity from prosecution in respect of spies is discussed.

Chapter 5 deals with the law of evidence in general and in particular with sources of, and problems in obtaining, evidence in connection with espionage cases under section 1 of the Official Secrets Act 1911, as amended.

Chapter 6 draws together our conclusions about espionage and related offences under section 1 of the Official Secrets Act 1911, as amended, and about the Official Secrets Acts 1911–1989 as a whole. The new Official Secrets Act of 1989, which repealed section 2 of the 1911 Act, as amended, is analysed in this concluding chapter.

The law to which this book relates is up-to-date, wherever possible, to March 1990 when this book went to press. However, a few legal cases and other more recent information have been added during production from March 1990 to Spring 1991.

Rosamund M. Thomas
Cambridge, England
1990

Acknowledgments

Research on this book began in Cambridge, England in 1983. During the entire period from 1983 until the book went into production in March 1990 (and during production) the topic of *Espionage and Secrecy* was moving and developing constantly, with serious *crimes* of espionage being investigated and less serious cases of unauthorized disclosures of official information occurring, as well as the *Spycatcher* actions in the *civil* courts in several countries taking place. Then, as this book was reaching completion, the Security Service Act 1989 and the Official Secrets Act 1989 (the latter repealing section 2 of the Official Secrets Act 1911) were enacted, all of which required me to make revisions to this manuscript in order to accommodate these recent developments. At times it seemed as though the task of writing this book, stimulating though it has been, would be a 'life-long obligation' akin to the obligation of confidentiality placed upon public servants entrusted with State secrets!

However, the book has been completed now and my thanks and acknowledgments span over the whole period from 1983 to 1990. An initial contribution towards research funds for this work was made in 1984 by the Nuffield Foundation, for which grateful thanks are acknowledged. The Leverhulme Trust generously funded full-time over three years (1985–7 inclusive) a major research grant and Fellowship awarded to Wolfson College, Cambridge for my work to be conducted there. The Leverhulme Trust award was granted in respect of the related topic of Privacy but, since Secrecy and Privacy are interwoven concepts and practices, part of the Leverhulme research work undertaken by me relates to this book. A separate book on Privacy will be published later.

I have been grateful also to enjoy membership of the Faculty of Law of the University of Cambridge from 1983 and my acknowledgments are endorsed in the Dedications to this book to both College and University. From the outset of this research in Cambridge in 1983, I have benefited from discussions with Professor David G. T. Williams, Rouse-Ball Professor of Law in the University of Cambridge, who set a precedent of intellectual quality and attention to detail in the subject of Official Secrecy, being one of this country's foremost thinkers and writers on this topic. I am indebted also to Professor Brian Hogan, Head of the Faculty of Law at the University of Leeds, who read and made constructive comments on my completed draft chapters 1–3 (at that time being the only

ones completed), followed later by his partner in *Criminal Law*, Professor John C. Smith, who gave his valuable views on my completed manuscript in August 1990 and kindly wrote the Foreword to this book.

Over the years from 1983 to 1990, several students in the University of Cambridge, and elsewhere, in their vacations helped me to photocopy and collect some of the cases and literature on this subject. Other assistance was rendered to me by hardworking and skilled people, such as my computer operator, Chris Poulter, and my indexer, Alison Harrison, as well as staff at the Squire Law Library, University of Cambridge. Dr Jenny Swanson assisted me to file the extensive databank of materials now held by me on this subject. Finally, journalists on Press Fellowships, military personnel on Defence Fellowships, and serving Police Officers on the Wolfson Course, all at Wolfson College from 1983–7, along with other colleagues from this country and overseas, have contributed to the debates and issues expressed in this book which, I hope, has resulted in a scholarly balance between national security and the freedom of the individual, and of the press, being reflected in these research findings. To *all* who have given generously of their time, interest, or finance, whether or not mentioned by name, your service has been valued and my thanks and appreciation are attributed to you.

However, the ideas, research, writing and conclusions represent my own views, and many long hours spent by this author in deliberative thought in seeking to define, review and co-ordinate the many issues which come to bear on this complex subject.

We are grateful to the following for permission to reproduce copyright material: the authors and Weidenfeld & Nicolson Ltd for a diagram (Appendix 1) from T. C. Hartley and J. A. G. Griffith, *Government and Law* (Weidenfeld & Nicolson) and the Press Association in respect of all the Illustrations (1–8) in this book. We also thank Her Majesty's Stationery Office (HMSO) for Parliamentary copyright permission to reproduce the full texts of the Official Secrets Act 1989, and the Security Service Act 1989 (Appendices 4 and 5 respectively).

This page intentionally left blank

1

History of the Official Secrets Acts 1911–1989 of the United Kingdom

The Official Secrets Acts 1911–1989 still provide the main legal protection in Britain [1] against espionage.[2] A key to understanding the history and present state of this criminal law is to consider the meaning of espionage and the severity with which the offence is regarded.[3] Since olden times treason and espionage have been serious plots against one's country. The earliest statute in Britain dealing with the former is the Treason Act 1351 which, with amendments, remains in force and applies to crimes of high treason.[4] Treason has been defined traditionally as 'a betrayal (trahison) or breach of the faith and allegiance due to the

---

1 Britain means Great Britain (England, Wales and Scotland) and Northern Ireland. Its full title is the United Kingdom of Great Britain and Northern Ireland. Care needs to be taken when studying both law and administration to note whether references are to England and Wales (taken together for many purposes), to Scotland, or to Great Britain.

2 The Official Secrets Acts 1911–1989, although the most important, is not the sole law dealing with espionage. In addition, for example, by virtue of the Criminal Law Act 1977 which creates the statutory offence of conspiracy, it is an offence under this Act to *conspire* to commit an offence under the Official Secrets Acts 1911–1989. Another law relevant to espionage is the appropriate provisions of the Atomic Energy Act 1946, as amended.

3 Criminal offences were divided formerly into treason, felonies and misdemeanours. Most espionage offences ranked as felonies. In common and statute law in this country until 1967 'misdemeanour' was a class of indictable offences deemed less heinous than felonies. However, the Criminal Law Act 1967 was passed *inter alia* to amend the law of England and Wales by abolishing the old division between felonies and misdemeanours, including mode of trial, and to simplify the law in respect of matters associated with that division (i.e. the law and practice applying to misdemeanour was made applicable to all offences, that is, to felonies). Hence, the term 'felony' is obsolete and the term 'misdemeanour' is used only in isolated instances. The term 'indictable offences' is found in modern statutes. The separate category of treason is retained under section 12 (6) of the Criminal Law Act 1967 and the procedure on trials for treason or misprision of treason is the same as the procedure altered by the 1967 Act on trials for murder. See Criminal Law Act 1967 (Chapter 58). See also I. McLean and P. Morrish *Harris's Criminal Law* (London, Sweet and Maxwell. Twenty-second edition 1973) p. 11.

4 The law of treason, which carries the death penalty, is based on the Treason Acts 1351–1871. The Act of 1351 'was passed to clarify the uncertainty and arbitrariness of the common law which it supersedes. It declares that it is treason:

1) To "compass or imagine the death of our Lord the King or our lady his Queen or of their eldest son and heir".
2) To "violate the King's companion (wife) or the King's eldest daughter unmarried or the wife (of) the King's eldest son and heir".

(Footnote 4 ➡)

Sovereign.' [5] Espionage concerns spies and others who intend to help an enemy and deliberately harm the security of the nation. Both treason and espionage may involve the communication of information to an enemy and, indeed, it has been suggested that the law relating to treason could be applied successfully in peacetime to certain acts of espionage.[6] However, the extreme penalties for treason, even on the lesser charge of treason-felony,[7] mean that it is unlikely to be used today.[8] Rather the Official Secrets Acts are invoked in cases of suspected espionage.

---

3) To "levy war against our lord the King in his realm".
4) To "be adherent to the King's enemies in his realm giving to them aid and comfort in the realm, or elsewhere".
5) To "slay the chancellor, treasurer, or the King's justices . . . being in their places, doing their offices".
6) In addition it is treason by the Treason Act 1702, s. 3: By overt act to attempt to deprive or hinder the person next in succession to the Crown from succeeding'.

See J.C. Smith and B. Hogan *Criminal Law* (London, Butterworths. First published 1965, sixth edition 1988) pp. 827–88. Quotation p. 827.

Since treason is an 'arrestable offence' under the Criminal Law Act 1967, a person assisting after the treason has been carried out could be convicted of an offence under section 4 of the 1967 Act. The Police and Criminal Evidence Act 1984 (Chapter 60) *inter alia* amends the law 'relating to the powers of the police in the investigation of crime and to evidence in criminal proceedings' including some amendments to the Criminal Law Act 1967 and to other Acts. The term 'arrestable offence' is redefined by clause 24 of this Act. Furthermore, for the purposes of the Police and Criminal Evidence Act 1984, treason and espionage qualify as 'arrestable offences' of a *serious* kind, see section 116 and Schedule 5 Part I.

5 Treason is still described in feudal language, but the nature of the crime today is 'disloyalty to the State as a political entity rather than to the Sovereign as a person'. Arguments have been advanced to reform the present law of treason on numerous grounds, including dissatisfaction with the concept of 'allegiance' which bears little relation to the modern concept of nationality. See O. Hood Phillips and P. Jackson *Constitutional and Administrative Law* (London, Sweet and Maxwell. First published 1952, seventh edition 1987). Quotation p. 472 and the Law Commission Working Paper No. 72 *Codification of the Criminal Law: Treason, Sedition and Allied Offences* (London, HMSO 1977). See also Law Reform Commission of Canada Working Paper No. 49 *Criminal Law: Crimes Against the State* (Ottawa, Canada 1986) for proposals to revise the crimes of treason and others in Canada.

6 S. Prevezer 'Peacetime Espionage and the Law' *Current Legal Problems* Vol. 6 p. 85.

7 The Treason Felony Act of 1848 is an alternative remedy in certain cases but stipulates a maximum penalty of imprisonment for life. It was enacted partly to apply to Ireland and partly to encourage juries to convict which they had been reluctant to do in some treason trials punishable by death. In other words, the 1848 statute allowed some conduct to be treated as felony, although it might also be treasonous under the 1351 Act. The last case of high treason in Britain concerned William Joyce. He was convicted and his appeals to the Court of Criminal Appeal and House of Lords were dismissed, see *Joyce v. Director of Public Prosecutions* [1946] A.C. 347 H.L.(E.) The common law misdemeanour of 'misprision of treason' (i.e. failure to inform the public authorities that another person is known, or is believed, to have committed treason) remains in force even though, as stated in footnote 3, it is also a statutory offence under the Criminal Law Act 1967.

8 Nevertheless, recent debates have raised the subject of using the *capital* offence of treason as a legal remedy for *terrorism*. Outrage about the bombing of the Grand Hotel, Brighton caused Lord Denning to suggest that high treason should be invoked, see *The Times* 8 October 1984. Again, in 1986 the then Lord Chancellor, Lord Hailsham of St. Marylebone, asked in a speech why, if the Treason Acts remain in force, they are not preferred in terrorism cases such as the Knightsbridge bomb case. Lord Havers, then Attorney-General, explained to Members of Parliament in the House of Commons that, while treason charges cannot strictly be ruled out, there is the difficulty in bringing a case under the 1351 Treason Act (e.g. the language is archaic), see *The Times* 20 May 1986.

Espionage relates to another distinct but overlapping problem: that of the unauthorized leakage of official information. Harm may befall the country from information getting into the wrong hands, whether by espionage or leakage. A crucial distinction between the two is that damage to the State is *intentional* in the case of espionage, whereas leaks may involve persons having no such purpose. During the late nineteenth and early twentieth centuries Britain experienced outbreaks of both unauthorized disclosures and espionage, which led to the passing of the first Official Secrets Act in 1889. The history of the Official Secrets Acts has been well documented by D. G. T. Williams (1965)[9] and more recently by others and therefore only the salient points of law relating to the principal Act of 1911 and the Amending Act of 1920 will be examined in this chapter. The single Bill of 1889, introduced into the House of Commons by the then Attorney-General, contained numerous provisions covering both espionage and leakage[10] but it was cumbersome. The 1911 legislation repealed the Act of 1889[11] which had soon shown weaknesses.[12] The espionage provisions of 1889 imposed a difficult burden of proof on the prosecution and lacked adequate powers of enforcement. The Official Secrets Bill 1911 was seen by the Liberal Government then in power as replacement legislation to make the 1889 Act more effective and was believed to contain few new provisions – even though section 2 on leakage had been widened to include not only Crown servants as previously, but also the press and others who *receive* information. The leakage provisions incorporated aspects of a failed Bill of 1908 which had sought to prohibit the publication of naval and military secrets but, at that time, faced strong opposition from the press.[13]

By 1909 alarm had arisen in Britain about German spies[14] and a

---

9 See D. G. T. Williams *Not in the Public Interest* (London, Hutchinson 1965). Another work is by K.G. Robertson *Public Secrets* (London, Macmillan 1982).

10 (52 & 53 Vict. Chapter 52).

11 (1 & 2 Geo. 5 Chapter 28).

12 D. G. T. Williams *Not in the Public Interest* Chapter 1.

13 See *Departmental Committee on Section 2 of the Official Secrets Act 1911* (Chairman Lord Franks) Vol. 1. *Report* (London, HMSO Cmnd. 5104 1972) p. 24. By the 1970s the Franks Committee had proposed the reform of section 2 of the 1911 Act , including the annulment of the criminal offence of 'mere *receipt*' since it had seldom been used, see *Report* p. 86). However, this is a debatable point. The Franks Committee proposals have not been enacted in their pure form, although the Government's White Paper of June 1988 (Cm. 408) and the subsequent Official Secrets Act of 1989 incorporate certain other aspects of the Franks Report.

14 Fictional spy stories were being written at this time, partly to awaken the government and the public to the inadequacies of the British counter-intelligence system. For example, the archetypal spy story was Erskine Childers' *The Riddle of the Sands* (London, Sidgwick and Jackson first published 1903). Then, William Le Queux in 1906 serialized in the *Daily Mail* his book describing what would happen if a great war came, entitled *The Invasion of 1910* (London, Eveleigh Nash

(Footnote 14 ➡)

sub-committee of the Committee on Imperial Defence, under the chairmanship of Richard B. Haldane, then Secretary of State for War,[15] was established to examine the problem. The sub-committee recommended a four-fold campaign[16] against foreign spies including the creation of a regular national intelligence service to operate both at home and abroad, which resulted in the setting up that year of the British Secret Intelligence Bureau (later to divide into MI5 and MI6). Another recommendation urged the strengthening of the espionage provisions of the 1889 Act on the lines of two earlier abortive Bills, including that of 1908.[17] The sub-committee proposed also that the new Bill should be introduced by the Secretary of State for War as a 'national defence' precaution rather than by the Home Office[18] or, as in the case of the original Official Secrets Act of 1889, by the Attorney-General. Viscount Haldane, as War Minister and a renowned expert in law, moved the second reading of the Official Secrets Bill in the House of Lords on 25 July 1911. He pointed out that it emanated from the extensive, deliberative proceedings of the Defence Committee in consultation with the naval and military authorities and the legal advisers of the Crown.[19] The following

---

➡ 1906). However, Le Queux claimed that as early as 1905 he had discovered through a friend in Berlin, who was under-director of the Kaiser's spy bureau, a *genuine* network of German espionage spread through the United Kingdom. To warn Britain, Le Queux published a series of articles in *The Weekly News* called *Spies of the Kaiser*, published in 1909 in book form. From 1910 to 1913 Le Queux wrote *novels* about spies, fearing prosecution after the passage of the 1911 Official Secrets Act if he said 'there were spies in real life'. His constant theme was that parts of Britain were 'swarming with German spies disguised as waiters, barbers, and tourists'. D. French argues that these fictional stories became confused with the *real* evidence about German spies, see 'Spy Fever in Britain, 1900–1915' *The Historical Journal* Vol. 21 No. 2 1978. See also William Le Queux *Things I Knew* (London, Eveleigh Nash and Grayson 1923) Chapters XVI and XVII.

15 R. B. Haldane (created First Viscount of Cloan 1911) held two Cabinet appointments under the *Liberal* Government. From 1905 to 1912, he was Secretary of State for War and from 1912 to 1915, he held the post of Lord Chancellor. However, he became *Labour*'s first Lord Chancellor in 1924. See Rosamund M. Thomas *The British Philosophy of Administration* (First published London, Longman 1978 second edition Cambridge, Centre for Business and Public Sector Ethics 1989) pp. 244–5.

16 The other two main recommendations made by the sub-committee were that: (i) a scheme for the defence of vulnerable points should be prepared to prevent sabotage and (ii) a system should be devised to monitor and limit the freedom of movement of aliens. In fact, the Aliens Restriction Act was not passed until 1914 when it was rushed through the Commons, based on measures which the Committee on Imperial Defence had recommended in 1909. This statute was used shortly after its enactment to intern members of a German spy-ring. See D. French 'Spy Fever in Britain, 1900–1915' pp. 358–69 and D. G. T. Williams *Not in the Public Interest* p. 32. The Aliens Restriction (Amendment) Act 1919 was enacted to continue and extend the provisions of the 1914 Act. However, the whole of the Aliens Restriction Act 1914 was repealed by the Immigration Act 1971, which also repealed certain sections only of the Aliens Restriction (Amendment) Act 1919.

17 For details of the abortive Bills of 1896 and 1908, see *Departmental Committee on Section 2 of the Official Secrets Act 1911, Report* pp.122–3. See also historical accounts of the Official Secrets Acts cited under this chapter, footnote 9.

18 K. G. Robertson *Public Secrets* p. 65.

19 *Hansard* House of Lords 25 July 1911 cc. 641–7.

month the task fell on Colonel Seely, the Under-Secretary of State for War, to guide the Bill through its second and third readings in the House of Commons, which was accomplished in one afternoon.[20] The Official Secrets Bill received the Royal Assent a few days later on 22 August 1911, having received no detailed scrutiny in the Commons and only minimal debate in both Chambers.[21] The brief Parliamentary debates leave the impression that this was crisis legislation passed without due consideration at a time when there was fear of a German invasion – and, moreover, when the country was beset by a constitutional emergency over the Parliament Bill and by the Agadir problem (a German gunboat had entered the harbour of Agadir, Morocco, thus threatening the interests of the French and, consequently, of the British). After making a close study of official sources, the Franks Committee (1971–2) concluded, to the contrary, that both the espionage and leakage provisions of the Official Secrets Bill had been given considered thought and preparation over a number of years and had been wanted by governments for a long time.[22]

1.1 THE OFFICIAL SECRETS ACT 1911

The 1911 Act contains thirteen sections: the most important being section 1 dealing with espionage and section 2 covering unauthorized disclosures. Section 2 has been reformed recently by the Official Secrets Act of 1989 (see Chapter 6). This chapter concentrates mainly on section 1 because it requires explanation and analysis. Neither the word 'espionage' nor 'spying' feature in the body of the text of section 1, although Viscount Haldane used the term 'espionage' when introducing the Official Secrets Bill in the House of Lords. The sidenote to section 1 of the 1911 act reads 'Penalties for Spying' and the words 'espionage' and 'spying' tend to have been used interchangeably in the Parliamentary debates. Under the 1911 Official Secrets Act all crimes of espionage under section 1 ranked as felonies whereas leaks of information under section 2 were classified less severely as misdemeanours.[23] This clear distinction between espionage as a felony and leakage as a misdemeanour became blurred by the

---

20 18 August 1911.

21 See D. G. T. Williams *Not in the Public Interest* pp. 25–6 and *Departmental Committee on Section 2 of the Official Secrets Act 1911, Report* p. 24.

22 *Departmental Committee on Section 2 of the Official Secrets Act 1911, Report* pp. 24–25. K. G. Robertson *Public Secrets* p.58 draws a similar conclusion.

23 See this chapter, footnote 3.

amendments of 1920 (enacted without repealing the 1911 Act) and what constitutes a crime of espionage will be seen to have undergone a series of transformations from 1889 onwards.

The alterations to the espionage provisions made by the 1911 Act should be noted not only because it remains the basic law today but also because they have relevance for more recent arguments about section 1 to be discussed in later chapters of this book. These changes to the espionage provisions, although significant, were explained by Haldane in 1911 as being *procedural* ones. Under the 1889 Act, to convict anyone, it was necessary to prove 'a purpose of *wrongfully* obtaining information'. In practice, such proof had been hard for the prosecution to obtain and often prosecutions of suspected spies were not instituted. The main objective of the new 1911 statute was to alter the criminal purpose in all instances of espionage to 'any purpose prejudicial to the safety or interests of the State' in order to overcome the extreme difficulties experienced in instituting prosecutions.[24] The three sets of espionage activities which, if carried out with the prescribed purpose, became felony are listed in subsection 1 of section 1 of the 1911 Act as:

a) approaching, being in the neighbourhood of, or entering any prohibited place within the meaning of the Act; or
b) making a sketch,[25] plan, model, or note which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy; or
c) obtaining[26] or communicating to any other person any sketch, plan, model, article, or note, or other document or information which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy.

Note Small changes were enacted to this subsection in 1920, see Appendix 2.

Thus, an offence under section 1 must involve either a prohibited place or material intended or calculated to be, or which might be, of use to an enemy. Subsection (2) of section 1 was designed to shift the legal burden of proof in espionage cases from the prosecution to the accused. Consequently, a person found in a place where *prima facie* his presence is prejudicial to the safety or interests of the State has to convince the jury that his purpose was an *innocent* one (that is, the onus of proof was transferred on

---

24 *Hansard* House of Lords 25 July 1911 cc. 642 and 646. The italics are ours.
25 'Sketch' includes any photograph or other method of representing a place or thing, see section 12 Official Secrets Act 1911 (1 & 2 Geo. 5 Chapter 28).
26 'Obtaining' any sketch, etc. includes its copying, Ibid.

to the accused to justify himself rather than remaining on the prosecution, as in the 1889 Act, to prove that the alleged offender was in a place for the purpose of wrongfully obtaining information).[27] In other words, the jury is permitted by virtue of subsection (2) of section 1 to draw from the circumstances of the case, or from the conduct or known character of the accused, a conclusion of prejudicial purpose – without the offender having been found guilty of any particular act having that tendency.[28] Similarly, if information relating to a prohibited place has been made, obtained,[29] or communicated to a person other than one acting on lawful authority, 'the onus of disproving a purpose prejudicial to the safety or interests of the State falls upon the accused' [30] (see Appendix 2).

Other changes in the law in 1911 included the widening of the definition of places barred from public access. The 1889 Act had specified only a few places, such as a government dockyard or office, or a military camp, but some twenty-two years later certain other places were deemed necessary for inclusion. For example, not only was a government dockyard considered a place to be barred but also a private dockyard in which a government warship was being built. Accordingly, the definition of 'prohibited place' was extended under section 3 of the 1911 Act and the Secretary of State was empowered, in an emergency, to

---

27 Viscount Haldane stated in the Lords in July 1911 that, following the passage of the 1889 Act, suspected spies claimed, for example, to be in a prohibited place by accident and 'because the burden of proving that there was a purpose of wrongfully obtaining information lay upon us [the prosecution] we could not prosecute with any hope of success, though in most cases we were convinced that there were good grounds to prosecute. Now under this Bill what has to be shown is that there was a purpose prejudicial to the safety or interests of the State, and if your Lordships will look at Clause, 1 subsection (2), you will see that . . . he [the accused] has the opportunity of clearing his character in the fullest way, but the circumstances are such as to throw the burden of proof on him. This is the main provision of the Bill'. Haldane pointed out that the precedent established in the Prevention of Crimes Act 1871 was being adopted in the Official Secrets Act 1911 (section 1 (2)) of creating a statutory exception to the general law whereby the burden of proving guilt lies upon the prosecution. See *Hansard* House of Lords 25 July 1911 cc. 642-3.

28 Developments in the law since 1911 have lessened the impact of section 1 (2) by establishing that, where the burden of proof is shifted to a defendant, the onus on him is the balance of probabilities, not proof beyond reasonable doubt. Moreover, 'the jury should be directed that the burden of proof on the accused is less than that required at the hands of the prosecution'. *R. v. Carr-Briant* [1943] 1 K.B. 607 C.C.A. See also the late Sir Rupert Cross and Colin Tapper *Cross on Evidence* (London, Butterworths 1985) p. 125 and pp. 130-2.

Recent attempts to codify general principles applicable to the criminal law (including the burden of proof) are contained in the Law Commission Report *Criminal Law: Codification of the Criminal Law* (London, HMSO H.C. 270 28 March 1985) pp. 52-4. See also the later Law Commission Report *Criminal Law: A Criminal Code for England and Wales* which integrates comments on the earlier Report and contains the Law Commission's own conclusions (London, HMSO H.C. 299 Ordered to be printed 17 April 1989).

29 By virtue of the 1920 Official Secrets Act, the words 'collected, recorded, published' were inserted after 'obtained', see (10 & 11 Geo. 5 Chapter 75 First Schedule of Minor Amendments).

30 A. Mathews *The Darker Reaches of Government* (USA: Berkeley, University of California Press 1978) p. 103.

prescribe other places.[31] By enlarging the range of prohibited places, section 3 in effect broadened the concept of espionage.

The powers of enforcement of the Official Secrets legislation were strengthened in 1911 by the sections on arrest and search. The provision of the 1889 Act that a prosecution could not be brought without the assent of the Attorney-General had been interpreted to mean an arrest could not be made without the fiat of the Attorney-General. As a result, some foreign spies were alleged to have escaped before any warrant for their arrest could be secured.[32] Section 6 of the 1911 Act sought to rectify this situation by providing a power to arrest without warrant and without the permission of the Attorney-General, although the latter's consent is required for any prosecution.[33] The power to arrest,[34] like that of search, applies to any offence committed, or reasonably suspected of being, or about to be, committed under the Act and is not restricted to espionage.

Finally, the right of search was seen as necessary to give the police increased powers against spies: section 9 of the 1911 Act

---

31 The main components of the definition of 'prohibited place' are that 'it is any place related to defence and any place which affects the supply of materials and supplies of energy, as well as any place so declared by the Secretary of State'. See K. G. Robertson *Public Secrets* p. 68. See also this text Chapter 2, p. 38. This is an expanding definition, as orders under this power have designated new 'prohibited places'; for example, the Official Secrets (Prohibited Places) Order 1975, Statutory Instrument 1975 No. 182.

32 See *Hansard* House of Lords 25 July 1911 c. 643 and K. G. Robertson *Public Secrets* p. 58.

33 Section 8 of the Official Secrets Act 1911 provides that 'A prosecution for an offence under this Act shall not be instituted except by the consent of the Attorney-General.' Section 8 remains in force, but a proviso to this section was repealed by the Criminal Jurisdiction Act 1975 sections 12 and 14 (5) and Schedule 6 Part I. The term 'Attorney-General' means for England Attorney- or Solicitor-General; for Scotland the Lord Advocate; and the Attorney-General for Northern Ireland. See also this book Chapter 4.

34 It should be noted that the power to arrest (section 6) and the power to search (section 9) of the Official Secrets Act 1911 to be invoked require only that a person is 'reasonably *suspected*' of having committed, or being about to commit, an offence under the Act (not reasonably *believed* to have committed, or being about to commit an offence). At common law, subject to a few exceptions, only a felon or suspected felon could be arrested without a warrant. The powers of arrest without warrant (i.e. known as 'summary arrest') on the ground of 'reasonable suspicion' were extended more widely by the Criminal Law Act 1967, section 2, which created a new category of offences: 'arrestable offences'. The power to arrest under section 6 of the Official Secrets Act 1911, which applied to felonies *and* misdemeanours, was retained since it was enacted under the Criminal Law Act 1967 that section 2 'shall not prejudice any powers of arrest conferred by law apart from this section'. However, part of section 6 of the 1911 Act was repealed to remove the references to 'felony', since the Criminal Law Act 1967 replaced the terms 'felony' and 'misdemeanour' by 'indictable offences'. See this chapter, footnote 3. The Police and Criminal Evidence Act 1984, section 24, replaces section 2 of the Criminal Law Act 1967 and, in some respects, extends it. 'Arrestable offence' is defined now by section 24 (1) of the 1984 Act as applying (a) 'to offences for which the sentence is fixed by law'; (b) 'to offences for which a person of 21 years of age or over (not previously convicted) may be sentenced to imprisonment for a term of five years (or might be so sentenced but for restrictions imposed by section 33 of the Magistrates Court Act 1980)'; and (c) 'to the offences to which subsection (2) below applies'. Subsection (2) of section 24 includes 'offences under the Official Secrets Act 1911 and 1920 that are not arrestable offences by virtue of the term of imprisonment for which a person may be sentenced in respect of them'.

authorizes search warrants to be granted to the police to enable them to enter premises, by force if necessary, and to search persons within them as well as to seize materials.[35] Furthermore, in emergencies, the requirement of a formal warrant issued by a Justice of the Peace is waived. The harbouring of spies and others also became a criminal offence under section 7 of this Act.[36] Two short protests on the ground of civil liberties were raised during the Commons debate on the Official Secrets Bill in 1911: one queried the police powers of search without a formal warrant in emergencies, while the other suggested that the shift in the burden of proof from the prosecution to the accused infringed ancient civil liberties set out in the Magna Carta.[37] Placing the onus of proof on the accused, however, was not a new procedure in English law but had been taken from a provision of the Prevention of Crimes Act 1871.[38]

Despite the strengthening of the law in 1911, weaknesses became apparent. Experience gained during the First World War revealed that some activities prejudicial to the State were not covered by the 1911 Official Secrets statute. For example, although the Act provided restrictions on the activity of spies, it did not give any power to deal with persons who are in communication with spies – namely, their accomplices. During the War, defects in the Official Secrets Act were overcome by supplementing it by special powers under the Emergency Legislation – the Defence of the Realm Act (and related legislation) and

---

35 Section 9 (1) of the 1911 Official Secrets Act laid down that a search warrant granted by a Justice of the Peace to a police constable, authorizing him to enter and search premises, should *name* the constable. The words 'named therein' were repealed in relation to England and Wales by the Police and Criminal Evidence Act 1984, section 119 (2) and Schedule 7 Part I.

In February 1984 the London home of free-lance journalist, Duncan Campbell, was searched by police by warrant issued under section 9 of the Official Secrets Act 1911 and papers seized. A report on the case was considered by the Director of Public Prosecutions but no action was taken on that occasion. See *Hansard* House of Commons 5 March 1984 c. 396. In 1987 the extent of the powers of search (section 9) were questioned, particularly by the media, in connection with another incident involving Duncan Campbell and the banned film he had prepared for BBC2 Television on the TOP SECRET British spy satellite, Zircon. Several warrants were obtained by the police and searches made of Campbell's London home, the BBC headquarters in Glasgow, Scotland, and a Glasgow flat where Campbell stayed. Large amounts of materials were seized, including the Zircon film and copies of it. See *The Times* 26 January 1987; 2 and 3 February 1987. Again, no prosecution of Campbell was instituted following these searches and seizures, although he had been prosecuted in 1978 under the Official Secrets Acts and found guilty on some counts. See Chapter 2, pp. 38–9. Eventually, the Zircon film was cleared legally for transmission in July 1988 and a recorded version was shown on BBC2 on 30 September 1988.

36 Although the sidenote of the 1911 Act reads 'Penalty for harbouring spies', section 7 of the 1911 Act is *not* restricted to offences under section 1.

37 See *Hansard* House of Commons 18 August 1911 c. 2251 and c. 2260. These objections were raised by Mr Frederick H. Booth and Sir William Byles respectively.

38 *Hansard* House of Lords 25 July 1911 c. 642. The 'loitering with intent' section of the Prevention of Crimes Act 1871.

the Regulations issued under it – which dealt with the safety and interests of the State. At the end of the War, proposals were put forward to extend and strengthen the provisions of the Official Secrets Act on a *permanent* basis by combining them with relevant Defence of the Realm Regulations believed still to be necessary for securing the safety of the State in peacetime. This proposed new post-War legislation, known as the National Security Bill, was intended to repeal the 1911 Official Secrets Act. The National Security Bill, pioneered by the War Office, was drawn up in 1918 by a departmental committee (the War Office Emergency Legislation Committee),[39] assisted by the Directorate of Special Intelligence. However, on 2 October 1918, the Home Affairs Committee of the War Cabinet concluded that substantial Parliamentary opposition to the new Bill was likely and so, instead of repealing the 1911 Official Secrets Act, it was agreed to amend it. Accordingly, another committee was set up – this time an inter-departmental one – having on it a representative from the then Admiralty, Air Ministry, War Office, Foreign Office, and Home Office, as well as Parliamentary Counsel. This inter-departmental committee had as its terms of reference 'to redraft the National Security Bill (or the most important clauses thereof) as an Amending Bill to the Official Secrets Act, 1911'. The inter-departmental committee on the National Security Bill reported on 12 May 1919, having modified several times a draft amending Bill prepared for it by Parliamentary Counsel. The inter-departmental committee recommended that its revised draft Bill should be introduced into Parliament at the earliest possible date and certainly before the *temporary* DORA Regulations[40] were due to expire in August 1920. The Home Affairs Committee of the War Cabinet approved the Bill (by then termed the Official Secrets Bill) on 28 May 1919, but it did not become law until December 1920.

---

39 This War Office departmental committee was responsible, among other matters, for considering what portions of the Emergency Legislation needed to be retained after the First World War and, accordingly, drafted the National Security Bill of 1918.

40 The Defence of the Realm (Consolidation) Regulations 1914 were made under the Defence of the Realm Consolidation Act, but many Regulations were amended during the course of the War. The Regulations considered relevant to be retained in peacetime, and integrated into the Official Secrets Bill 1920, were: 18A; 22B; 41; 43; 44; 45; 48; and 53. Public Records Office file WO32/13733. It is interesting that in Canada the War Measures Act 1914, based on the DORA legislation passed in Britain, was not repealed after the First World War and, with amendments, continued until its repeal in 1988. The Canadian War Measures Act has been replaced by a new and more liberal statute which 'will make emergency measures adopted by the Government subject to the Canadian Charter of Rights and Freedoms'. See Bill C-77 'An Act to Authorize the Taking of Special Temporary Measures to ensure safety and security during National Emergencies and to Amend Other Acts in consequence thereof'. As passed by the House of Commons of Canada 27 April, 1988 (C-77 2nd session 33rd Parliament 35-36-37 Elizabeth 2nd 1986-1987-1988). See also

1.2 THE AMENDING ACT OF 1920 (THAT IS, THE OFFICIAL SECRETS ACT 1920)

The Amending Act of 1920 carried into *permanent* legislation those wartime provisions deemed necessary to make the Official Secrets law effective in peacetime. Some nine years years after the passage of the Official Secrets Act 1911 the ingenuity of spies, and the elaboration of their systems and methods of espionage, called for amendments to cover omissions in the principal Act. In addition, hostilities by foreign powers in Britain during the 1914–18 War had led to a greater awareness in this country of the workings of foreign agents here. The Home Affairs Committee of the War Cabinet considered it unrealistic to believe that foreign powers would stop using agents to collect information in peacetime. Accordingly, the Official Secrets Act 1920, which amended the 1911 statute, had been drafted with two main aims: firstly, to check the employment by foreign powers of agents in Britain and, secondly, to remedy the provisions of the 1911 Act which had become inoperative in practice because of more modern methods of spying. Other minor amendments sought to ensure that full and speedy information of offences under this law were reported.

The 1911 Official Secrets Act was strengthened in 1920 in respect of communications with foreign agents particularly those outside the United Kingdom. The inter-departmental committee on the National Security Bill, aware that modern espionage methods make it extremely difficult to get hard evidence to prove that a person has committed an offence under section 1 of the principal Act, took the view that if a person is associating, or communicating, with a foreign agent, it is *prima facie* evidence[41] that he is doing so for some wrongful purpose. Accordingly, the fact of communication or attempted communication with a foreign agent, within or without the United Kingdom, was introduced into the new provisions of 1920 as being evidence that the accused 'had obtained' or was 'attempting to obtain' information useful to an enemy. If the accused is innocent (that is, he did not know that the person with whom he was associating or communicating was a foreign agent), the committee considered that he would have little problem in rebutting the presumption.

The Times 18 July 1988. The Canadian Charter of Rights and Freedoms guarantees specific rights and freedoms to the Canadian people and forms Part I of Schedule B (the Constitution Act 1982), under the Canada Act 1982 Chapter 11 (a Westminster statute enacted 29 March 1982 at the request of the Senate and House of Commons of Canada).

41 For a definition of *prima facie* evidence, see this text Chapter 5, p. 168.

However, this form of proof was somewhat controversial and, after lengthy discussion, the committee restricted it to apply *only* to proceedings against a person for an offence under section 1 of the principal Act. Even then, it was regarded as a 'pis aller', or a last resource. In other words, the fact of communication or attempted communication with a foreign agent would be unlikely to be the sole proof of espionage. Thus, both the principal Act of 1911 (in respect of the 'purpose prejudicial' test) and the Amending Act of 1920 (in respect of the 'useful to an enemy' test) sought to assist the prosecution by placing the burden of proof on the accused to prove his innocence. In Chapter 5 we discuss in detail the law of evidence and, in particular, some problems of obtaining evidence of espionage activities.

The details of the Amending Act of 1920 are now reviewed. The Official Secrets Act 1920 both extended existing sections in the 1911 Act and introduced a number of new *ancillary* crimes concerned with espionage. In order to understand the amendments of 1920, it was necessary at that time (and still is), to read them in conjunction with, and in relation to, the principal Act of 1911. Considerably more Parliamentary debate, and opposition to the new provisions, took place in 1920 than in 1911, but it is evident from the repeated explanations given in the House of Commons by the Attorney-General, then Sir Gordon Hewart,[42] that some Members of Parliament had *not* read the earlier Act and therefore found the subject highly complex.[43] Even the Attorney-General misconstrued aspects of the legislation.[44] Another reason for the confusion was that the 1920 amendments contain eleven main sections, the numbering of which bore no relation to the thirteen existing sections of the principal Act. Moreover, there was little attempt by the draftsmen to tie the text of the amendments closely to the relevant sections of the 1911 Act. The result was an awkward piece of legislation, reflecting its emergence from an inter-departmental committee. From a legal perspective, a better solution would have been to

---

42 Later to become the Rt. Hon. Lord Hewart of Bury, Lord Chief Justice of England. In 1911 the Official Secrets Bill was introduced by Viscount Haldane, as Secretary of State for War, but Mr Winston Churchill, Secretary of State for War and Air in 1919, considered the proposed amending Bill of 1920, to be 'rather outside his province' and asked Sir Gordon Hewart, as Attorney-General, to 'take charge of it in the House'. See Public Records Office file WO32/13733.

43 See *Hansard* House of Lords 25 June 1920 cc. 894–900 and 30 June 1920 cc. 1041–52 (second and third readings respectively of the amendments to the Official Secrets Act 1911) and *Hansard* House of Commons 2 December 1920 cc. 1537–83 and 16 December 1920 cc. 938–79 (second reading and committee stage respectively). The amendments received the Royal Assent on 23 December 1920 under the title 'Official Secrets Act 1920'.

44 See K. G. Robertson *Public Secrets* p. 71.

repeal the 1911 Act and reorganize the existing and new provisions into a clearer and more logical framework. However, as mentioned earlier, Parliamentary opposition was feared to this solution and, in any event, the original draft of the National Security Bill of 1918 prepared by the War Office Emergency Legislation Committee, which would have repealed the 1911 Act, hardly meets these criteria of clarity and logic. It was an unwieldy document of eighteen principal clauses which simply interwove key Defence of the Realm Regulations with the re-enactment and extension of the 1911 Official Secrets Act.

Although the distinction between 'felony' and 'misdemeanour' was removed by the Criminal Law Act 1967 and the expression 'indictable offences' is used in modern statutes,[45] the old distinction is significant in the development of the Official Secrets law. The Amending Act of 1920 established a series of lesser crimes associated with espionage. These crimes ranked mainly as misdemeanours in contrast to the major espionage activities set out under section 1 of the 1911 Act, which constituted felonies. The clearcut division of the 1911 Act between espionage as a felony and unauthorized disclosures as a misdemeanour was obscured in 1920 by the addition of the ancillary espionage crimes, ranking as misdemeanours, which complicated further the structure and understanding of the Official Secrets law. Furthermore, a few summary, as distinct from indictable, offences were introduced in 1920: for example, summary offences under section 4 of the 1920 Act in connection with the requirement to produce private telegrams and under section 5 in respect of regulations applying to persons in the business of receiving letters or other postal packets for delivery.[46] The ancillary espionage crimes relate

---

45 See this chapter, footnote 3.

46 Section 4 of the 1920 Act was repealed by the Interception of Communications Act 1985, see this chapter, footnote 59. The punishment for the summary offences under section 5 of the 1920 Act is imprisonment for a term not exceeding one month, or a fine originally not exceeding £10, or both. The maximum fine under section 5 (4) was raised to £25 by the Criminal Law Act 1977, section 31 (6) Vol. 47 p. 714 and a reference to level 1 on the standard scale is replaced by the reference to £25 by the Criminal Justice Act 1982, section 46 Vol. 52 p. 1021, as to the standard scale, see ibid. section 37 Vol. 52 p. 1014.

Summary offences developed in the sixteenth century as another class of criminal offence (in addition to treason, felony, and misdemeanour) 'consisting of petty offences created by penal statutes which provided that they should be heard and determined by Justices of the Peace out of quarter sessions in a summary manner and without the intervention of a jury'. A criminal offence may be indictable either by statute, or at common law, but 'no matter is cognisable by a Magistrates' court unless expressly or impliedly made so by statute'. Thus, criminal offences, subject to rare exceptions, are tried either on indictment (i.e. by a jury at the Crown Court since the Courts Act 1971, which replaced assizes and quarter sessions by a single Crown court) or summarily in a Magistrates court. However, some indictable offences can be tried summarily and likewise, some summary offences can be tried on indictment. See I. McLean and P. Morrish

(Footnote 46 ➡)