Private Property, Government Requisition and the Constitution 1914 – 1927

G. R. RUBIN

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To Brenda
and Susanna Ruth

Introduction

The origins of this book can be traced back to a study which I published in 1987 and which examined government controls on labour during the First World War. It struck me then that a blueprint for legal controls, in the form of statutory provisions, offered no clear indication of how such controls might work out in practice. I decided to explore that theme further but, in respect to the present work, to focus not on wartime controls over labour but on controls over property. This study therefore investigates how the state sought to enrol land, buildings and other forms of property (though not capital in the narrow sense) into the gigantic war effort waged from 1914. It concerns itself with the conflicting claims of state and society to the application of private property for public purposes during wartime and to the question of compensation for private property owners whose properties had been requisitioned by the state for war purposes.

The structure of the book is to present in the early chapters an overview of the legal framework governing the requisitioning of private property in emergencies and of compensation issues arising therefrom. It also addresses, albeit briefly, the conceptual and philosophical issues raised in preparing for and enacting a code of regulations authorising state take-overs of private property. The book then proceeds by analysing individual case studies which constituted legal watersheds during the war years. Of these separate episodes, a number subsequently became legal *causes célèbres* and occupied lofty places in the pantheon of what lawyers like to call leading cases. The final chapters employ a more thematic approach, addressing how government departments sought to resolve more universal administrative problems; in particular, what general principles of compensation should apply in respect to property requisitioned for governmental purposes during the war.

In more detail, Chapter One examines the alternative conceptual approaches to emergency wartime legislation which government departments considered in the years prior to the outbreak of the First World War, when the War Office, in particular, was concerned with contingency emergency planning. Chapter Two raises some philosophical questions pertaining to state requisition of private property and to claims of entitlement to compensation for such acquisitions. It also offers a brief historical overview of the general doctrines applying thereto. Chapter Three looks in some detail at wartime Defence of the Realm Regulations which were widely employed by government departments to

assist the war effort; in particular, to facilitate munitions production and the provision of accommodation for multifarious war-related purposes. In this chapter, I will also explore one of the features of this study, the phenomenon of the lawless state, that is, the reliance by government departments on legal powers of doubtful validity and of the awareness by such departments of their vulnerability to legal challenge.

Chapter Four, the first case study examined, explores the legal and administrative history of the take-over of Shoreham Aerodrome in Sussex. Although the airfield was an insignificant base in military terms, the government's reliance on the royal prerogative power to justify its requisition stirred up a hornet's nest of legal dispute and intrigue forcing government departments, faced with the prospect of legal condemnation by the judges of the House of Lords, to rethink their requisitioning strategies. This aspect is analysed more fully in Chapter Five which explores the bluffs, threats and manipulations of the law to which government departments were obliged to resort in order to circumvent the legal obstacles now erected in the path of effortless requisitioning of private property for the war effort.

Chapter Six, the second case study, examines that jewel in the modern-day constitutional lawyer's crown, the requisitioning of De Keyser's Royal Hotel in London for use by the Royal Flying Corps. The importance of the case has been compared with the great constitutional struggles between the Crown and Parliament supported by the common lawyers in the seventeenth century. John Hampden's resistance to the imposition of Ship Money by Charles I is the parallel which some commentators during the war drew with the government's claim to requisition the hotel without a legal duty to pay full compensation. In Chapters Seven and Eight, two more *causes célèbres*, also familiar to modern students of constitutional law, represented further legal defeats for the government's strategy of relying on emergency legal powers in order to take over private property, respectively the Ordnance Arms in Woolwich, owned by the Cannon Brewery Co. Ltd and rum requisitioned for the Navy from the Newcastle Breweries Co. Ltd.

Chapter Nine examines how the government sought to overcome with rapidity one particular legal set-back in its control over the market in beans, peas and pulse, promoted as alternatives to wheat, then in short supply. A government order had been successfully challenged in the courts as interfering with the freedom of contract. As the government's dim view of this 'freedom' was a freedom to make speculative profits, an emergency bill was quickly drafted which, after some delay, passed onto the statute book the following year.

Chapter Ten considers some of the intricate legal difficulties, especially in respect to compensation, to which the requisitioning of ships during the war gave rise, prompting the drafting of remedial bills which did not in fact proceed, for a mixture of political and administrative reasons. Chapter Eleven, yet another one-property case study, looks at the public controversy surrounding government plans to sell off Turnhouse Aerodrome in Edinburgh after the war. The land upon which the aerodrome was built belonged to the

former Prime Minister, Lord Rosebery. His understandable outrage at what he saw as his property being sold behind his back offered newspaper readers of the day a delicious controversy to savour.

Chapter Twelve examines the institutional machinery set up by the government in early 1915 to offer *ex gratia* compensation to those whose properties had been requisitioned for the defence of the realm. But in the wake of the Shoreham Aerodrome and *De Keyser* rulings that compensation levels should in law have regard to a more generous market value, the government was forced, after the war, to a device which at the same time both questioned and endorsed parliamentary democracy. As further explained in Chapter Thirteen, it presented to Parliament an Indemnity Bill to confirm the principle of compensation basically only for direct loss and not for market value loss, for which its institutional machinery, the non-statutory Royal Commission on the Defence of the Realm (Losses), had made provision. The Indemnity Act 1920 now endorsed that principle in law and established the War Compensation Court, a division of the High Court, to adjudicate upon disputed claims.

As with the constitutional debate surrounding the case of *De Keyser's Royal Hotel Ltd*, with its overtones of outdated royal prerogative claims challenging the rights and liberties of the subject, the controversy over the Indemnity Act was couched in similar terms of high political principle.

Chapter Fourteen explores the transition from war to peace from the standpoint of the emergency wartime regulations and seeks to identify the legal difficulties faced by the government in attempting to secure as smooth a transition as possible. Given the continuing usefulness of a number of wartime regulations during the early years of peace, when shortages of essential commodities were still rife, a policy of retention was favoured by the authorities but disliked by politicians, for whom a command economy had no further justification in peacetime. Again, questions of principle, which some commentators saw as the choice between despotism and democracy, loomed large in the debates and, indeed, informed constitutional discourse into the 1930s. The chapter also looks at the possible linkage between land requisition during the war and post-war policies of land acquisition and valuation in order to create a 'land fit for heroes.' The optimistic hopes were not, of course, fulfilled and the lessons of the war in this sphere were quickly forgotten.

In order to glimpse a long-term legacy of the war experience, one would require to examine the Second World War practice of property requisition and compensation provision, to which brief allusion is made in the final chapter. In that chapter, the conclusion is drawn that the First World War experience in this sphere conformed to the efforts made elsewhere in a domestic economy grappling with new and daunting challenges. Lacking relevant pre-war experience, the state lurched from one expedient to another. As one door was shut by the judiciary, so another was jammed open by administrative subterfuge, fudge and hedge, failing which a pliant Parliament bowed to the wishes of an executive pleading the national urgency of its case and justifying rapid legislation thereby.

For those readers anticipating an extended discussion of property rights theory or of the history of property law in the early twentieth century, there will be disappointment. This writer professes no expertise in those areas but prefers to conceive of this book as a modest contribution to the history of constitutional law in this century, to the history of compensation and to the history of government administration during the First World War. No broader claims are made on its behalf.

Parts of Chapter One have appeared in Richard Eales and David Sullivan (eds), *The Political Context of Law* (The Hambledon Press, London 1987), Chapter Eleven, and parts of Chapter Five have appeared (in Spanish) in Carlos Petit (ed.), *Derecho Privado y Revolucion Burguesa* (Marcial Pons, Ediciones Juridicas, S.A., Madrid 1990). To thank one's secretaries for having undertaken the typing of one's book might occasionally seem like a ritual expression of gratitude. My gratitude to Hilary Joce, Rebecca Edwards and Kate Campbell is, I hope, anything but a ritual pronouncement. I would also like to use this opportunity to thank Professors Peter Fitzpatrick and A.W.B. Simpson for providing, unconsciously no doubt, those vital sparks of inspiration and support.

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Canterbury
April 1992

G. R. Rubin

Abbreviations

cif	cost, insurance, freight
DLB	Disposal and Liquidation Board
DORA	Defence of the Realm Acts
DRLC	Defence of the Realm Losses Commission
H.C.	House of Commons
HLRO	House of Lords Record Office
K.B.	King's Bench
LTCC	Defence of the Realm (Licensed Trade Claims) Commission
P.P.	Parliamentary Papers
PRO	Public Record Office
PRO, AIR	Public Record Office, Air Ministry
PRO, BT	Public Record Office, Board of Trade
PRO, CAB	Public Record Office, Cabinet
PRO, HO	Public Record Office, Home Office
PRO, LCO	Public Record Office, Lord Chancellor's Office
PRO, MAF	Public Record Office, Ministry of Food
PRO, MT	Public Record Office, Ministry of War Transport
PRO, T	Public Record Office, Treasury
PRO, TS	Public Record Office, Treasury Solicitor
PRO, WO	Public Record Office, War Office
RAF	Royal Air Force
RCC	Railway and Canal Commission
RFC	Royal Flying Corps
SRO	Scottish Record Office
SRO, AD	Scottish Record Office, Lord Advocate's Department
SRO, HH	Scottish Record Office, Scottish Home and Health Department
WCC	War Compensation Court

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Too Important to Leave to the Generals?

On 30 June 1914, just one month before the outbreak of the First World War, a sub-committee of the Committee of Imperial Defence (CID), which was the Prime Minister's standing advisory committee on defence matters, met to discuss what emergency powers, if any, would require to be enacted in the event of war being declared.[1] The War Office representative at the meeting, Colonel G. M. W. MacDonogh,[2] produced a list of powers which the army believed should be made available to it by statute for implementation in wartime, or during the 'precautionary period' prior to the actual outbreak. This, suggested MacDonogh, might cover a period of 'imminent national danger or great emergency', the phrase used in the Reserve Forces Act 1882. Such emergency powers, which were to be exercised against or in relation to the civilian population, covered the provision of supplies to garrisons, arrest powers, the taking possession of property, transport and communications controls, censorship, controls over 'warlike stores' and many other categories. Finally, legislative powers were sought in order to 'take all measures necessary for the public safety'.

At this point in the committee's discussion, the Attorney-General, Sir John Simon, expressed the view that the last-named requirement:

> covered all those that had preceded it, and was itself covered by the common law; for it was the duty of the military authorities in time of war to take such measures as might be necessary for the safety of the State.

His pointed remarks drew no response, as the committee members continued to discuss which novel powers ought to be enacted. The Attorney-General again intervened and insisted that:

1. Public Record Office, London [PRO], CAB 16/31/EP1, 'Sub-Committee of the Committee of Imperial Defence. Emergency Powers in War. Minutes of the 1st Meeting held on 30 June 1914'. Until indicated otherwise, subsequent quotations in the text are from this source. See also D. French, *British Economic and Strategic Planning, 1905–1915* (London, 1982), pp. 74–76.

2. George Mark Watson MacDonogh (1865–1942). Joined army 1884; Colonel 1912; Lieutenant-General 1919; General Staff Officer 1912; Adjutant-General 1916–18; Director of Military Intelligence 1916–18. Barrister (Lincoln's Inn) 1897; Vice-President and Member Executive Council, International Law Association; President, Federation of British Industries 1933–34. Photograph in J. H. Morgan, *Assize of Arms* (London, 1945).

> it was important to consider without prejudice the main question before the Committee. This was whether it was expedient to pass legislation of the nature proposed or to trust to an act of indemnity.

During the period from about 1885 to 1914, there existed conflicting legal viewpoints, on the part of senior military officers on the one hand and government legal advisers on the other, over the kind of law deemed appropriate for use in relation to the domestic civilian population in wartime. There were differing perspectives as to the appropriate conceptual structure of the legal proposals advanced to meet the contingencies of war, differences which could not simply be attributed to conflicts over interpretations of existing law. The approach of the military authorities was to some extent grounded (perhaps not surprisingly) in the military preoccupation with precise forward planning, so that the supposed certainty of statute law, rather than the somewhat open-ended flexibility of the common law, as preferred by the lawyers, appealed to military planners anticipating operational needs, both in wartime and when armed conflict appeared imminent. What is presented here is neither a history of the doctrinal development of the relevant law, such as the nineteenth-century Defence Acts, nor an exploration of the doctrinal accuracy of legal arguments advanced at the time, such as the proper scope of alleged prerogative powers to take over land or property in appropriate circumstances. My concern, rather, is with different perceptions of existing law, not with whether the ensuing military criticisms of the civilian lawyers were doctrinally sound in juridical terms.

A series of nineteenth-century statutes, known collectively as the Defence Acts 1842–73, made provision for the compulsory military take-over of land. Under section nine of the principal 1842 Act, power was granted to the Secretary of State for War to lease or purchase lands for buildings 'for the Ordnance or Barrack Services or the Defence of the Realm', while section 16 authorised the military to enter upon, survey or mark out lands 'for the service of the Ordnance Department or for the Defence of the Realm'. In such circumstances, they had power to treat and agree with the owners for the absolute purchase of the land or for the possession or use thereof during the exigencies of the public service. In default of agreement, section 19 provided that fourteen days after failure to treat, the Secretary of State could require two justices or three deputy lieutenants (one of whom had to be a magistrate) to put the Secretary of State or his nominee into immediate possession of the lands. Such compulsory powers were limited to acquisition for the Ordnance service or for the defence of the realm generally. Two warrants, one authorising the military authorities to take possession, the other requiring the sheriffs to summon a jury to assess compensation, were then to be issued by the justices.

Though exercised for the 'defence of the realm', such powers were assumed to be applicable in peacetime. This partly explains why military acquisition was hedged around with limited procedural safeguards for landowners. Yet such

peacetime powers were nonetheless considered sufficiently drastic to justify the Treasury Solicitor's observation that, 'the owner has really no voice in the matter at all'.[3] Even more draconian were the provisions in section 23. This granted power to the lord lieutenant or to two deputies or to the governor of the county or to two of his deputies to certify the necessity or expediency of a military take-over of land or buildings. A Treasury warrant authorising the take-over was also required. This procedure presumably would only occur in cases of emergency. Finally, section 23, not unexpectedly, dispensed with the need for a possession order under section 19 or a certificate under section 23 where the 'Enemy shall have actually invaded the United Kingdom'. The only circumstances in which a military officer could take immediate possession of land on his own initiative appeared to be once the enemy had landed. Otherwise, bureaucratic procedures, perhaps not conducive to defence preparations, were to be followed. Under the Military Lands Act 1892: 'It frequently takes over a year from the time when it is decided to take the land before the Secretary of State for War is in a position to serve Notice to Treat.'[4]

Though the Defence Acts were not as dilatory, none of the statutory codes met all the contingency needs of the military authorities. For what was most desired was, first, the ability to offer an immediate and flexible response on the basis of their evaluation of the military situation, whether or not war had been officially declared or whether or not an invasion had commenced. Secondly, the military wanted clear, statutory authority for such an instantaneous response. The varying procedural restrictions of the Defence Acts (apart from invasion) were an impediment to speedy military reaction to enemy threats.[5]

In 1885, for example, the Inspector-General of Fortifications had drawn attention to the fact that in the event of imminent danger of invasion, it would become necessary for the military to take certain defensive measures involving interference with private property. They might have to enter on lands, erect works, construct roads or demolish buildings. Given that the existing law, by which he presumably meant the Defence Acts, prescribed so many complicated formalities and imposed so many restrictions, he feared that the military authorities would, at a time of imminent danger, be seriously hampered

3. PRO, TS 27/62, 'Note on the Compulsory Procedures for taking land possessed by the Secretary of State for War, dated 1902'.

4. Ibid.

5. There were also criticisms of the limited scope of the Defence Acts even in respect to peacetime usage. For example, the inability of the military authorities to divert carriage roads led to suggestions in 1889 to widen the military's peacetime powers. The Secretary of State for War at the time, Edward Stanhope, was decidedly unenthusiastic. 'I cannot imagine', he minuted, 'any proposal more likely to provoke considerable opposition than this and I am inclined on the whole to leave the matter alone for the present.' See PRO, WO 32/9269, 'As to the compulsory powers of the Secretary of State for War, for acquiring land etc', minute of Secretary of State, 5 December 1889.

in the performance of their obvious duties.[6] International incidents, which might have given rise to mobilisation, had drawn the attention of military commanders to what they believed were deficiencies in their legal powers to deploy as they considered appropriate. Following the Fashoda Incident, when Britain was on the verge of war with France in 1898, Lieutenant-General Sir Frederick Stopford minuted that the want of information as to what the military authorities might or might not lawfully do on mobilisation had caused serious inconvenience. In one case, the General Officer Commanding (GOC) Home District had to enquire whether he was authorised to arrange for the quartering of troops for whom no government quarters or camp equipment existed. As Stopford lamented, it was, 'very unsatisfactory in reply to all these questions to have to state that no definite instructions can be given them, but that the question is under consideration'.[7]

In effect, military commanders were simply told to rely on their own discretion as to whether they ought to infringe private property rights once a mobilisation had been ordered. In 1911 all GOC's Home Command had been instructed that in the event of mobilisation, they

> should take all such steps as you consider necessary to occupy, or make use of, such land as may be required for camping, training, artillery practice, or musketry of the troops under your Command by arrangement with the owners, or otherwise, in anticipation of subsequent indemnity, either by the existing Defence Acts, or by emergency legislation.[8]

Of course, military commanders might reasonably doubt whether the Defence Acts provided any indemnity for illegal acts. They might also have preferred to see emergency legislation on the statute book, rather than being held out to them as an uncertain inducement. Yet the position was bound to be more obscure when a 'precautionary period', short of actual mobilisation, was in existence. Major R. E. H. James told the CID sub-committee in June 1914 that a precautionary period would be initiated by means of a warning telegram from the War Office to GOCs, 'but there were no specific instructions as to how far the military authorities would be justified on receipt of it in disregarding private rights'.[9]

How might this state of uncertainty be resolved? The military authorities throughout the last two decades of the nineteenth century made various attempts to obtain a statute conferring on them extensive powers to take steps necessary for the defence and security of the realm, both in the critical period pending a major conflict and after the outbreak of war. Such a bill was drafted

6. PRO, CAB 16/31/EP2, 'Memorandum by the General Staff of the Need for an Emergency Powers Bill', 1 May 1914, para. 1.
7. Ibid., para. 14.
8. PRO, WO 32/7112, R. H. Brade to all GOCs in C at Home and GOC London District, 9 November 1911.
9. PRO, CAB 16/31/EP1, p. 2

in 1888 on the suggestion of Colonel (later Major-General Sir John) Ardagh.[10] It included provisions for the immediate military take-over of land and roads. The bill was put aside on the understanding that it could be brought forward when the circumstances were ripe, the intention being that the bill would be passed rapidly through Parliament when the emergency existed.[11] This did not appear to satisfy the War Department. The War Office subsequently wrote to the Treasury that Stanhope, the Secretary of State for War, had,

> had it impressed upon him by his military advisers that, for the safety of the country, it is essential that Her Majesty should possess in a time of great national emergency, powers over lands, property, and persons of Her subjects which are far in excess of those which the common law confers. At the same [time], it is necessary, both for securing prompt obedience to the mandates of military necessity and for assuring military commanders against actions for things illegal done in the execution of their duty, that these extraordinary powers at an extraordinary crisis should be sanctioned by the law.[12]

It was at this point that the War Office came up against a powerful legal opponent in the shape of Mr (later Sir) Courteney Ilbert (1841–1924), the parliamentary draftsman.[13] Ilbert, before whom the measure was laid in 1891, intimated that he did not consider the Bill was necessary. The War Department remained undaunted, and despite the lack of support from Sir Henry Campbell-Bannerman, Secretary of State for War in 1895, it tried again. Ardagh redrafted his bill of 1888 and once more it went to Ilbert, again to receive the thumbs down. On this occasion, Ilbert submitted a lengthy memorandum on the subject, dated August 1896, the essence of which was that the Crown already possessed, under common law, the necessary powers. He pointed out that in the event of an invasion of the realm or an imminent risk of invasion, it was the duty of the military authorities to take all steps necessary, in their opinion, for the defence of the realm; and that it would be the duty of the civil authorities and of every subject to aid and support the military authorities, significantly adding that compensation would be payable to those suffering loss in such circumstances. Not only was this duty grounded in common law but

> any attempt to specify in detail and to express in statutory language the powers exerciseable by the civil and military authorities under such circumstances might throw doubt on the prerogative powers of the Crown, and would

10. PRO, CAB 16/31/EP2, para. 8.
11. PRO, WO 32/7112, 'Martial Law in the United Kingdom. Case for the Opinion of the Law Officers of the Crown', *c.* April 1913.
12. PRO, CAB 16/31/EP2, para. 9.
13. For details of Ilbert's career, see entry by G. R. Rubin in A. W. B. Simpson (ed.), *A Biographical Dictionary of the Common Law* (London, 1984), pp. 267–68. A photograph of Ilbert appears therein.

> probably involve the imposition of restrictions and limitations which would be inconvenient and misleading, and which in practice it would be necessary to disregard.[14]

Ilbert not only placed his faith on the generality of common law prerogative powers to act in cases of necessity. He also considered that a statute might be positively harmful if couched in specific terms, for it might then be construed as derogating from general powers under the 'ordinary' law, an unhelpful situation where 'difficulties arising in due course of war or of preparations for war cannot be foreseen'. He warned: 'In the event of invasion or of imminent risk of invasion, it might, and probably would, be necessary to take much stronger steps than would be authorised by the War Office draft.' No doubt, if the government insisted, he observed, a statute 'adequate to the necessities of the case' could be prepared within the hour and passed through Parliament in a single day. He dismissively concluded that 'the elaboration of a statutory "emergency code" would appear to be an academic exercise on which a government official would not be justified in spending his time unless he happened to be in the enjoyment of superabundant leisure'.

Military criticism of Ilbert's opinion seems to have been informed by two related factors. First, as Ilbert himself acknowledged, the exercise of general powers at the discretion of military officers was to run the risk of exposing the latter to a continual danger of legal proceedings, as the boundaries of lawful action might not be capable of delineation with pinpoint accuracy in the event of tumult or disorder or chaos. The fate of Pinney, the mayor of Bristol, tried for neglect of duty, and of Colonel Brereton who as commander of the troops during the Bristol Riots in 1831 was court-martialed; and the martial law controversy involving Governor Eyre's handling of the Jamaica rebellion in 1865, haunted the military authorities.[15] The CID sub-committee in 1914 were reminded of the remarks in 1887 of the Commander-in-Chief, Lord Wolseley.

> To rely on General Officers taking all the necessary responsibility in an emergency would be the height of madness. The manner in which Government treated Governor Eyre is too fresh in the memory of the Army to admit of any reliance being placed on officers to break the law in a dire emergency. Some, doubtless, would do so deliberately, preferring to be treated as Governor Eyre was, to exposing the country to risk; but many law-abiding gentlemen would

14. PRO, WO 32/7112, 'Emergency Powers. Memorandum by C. P. Ilbert, 5 August 1896', para. 2. Subsequent quotations in the text, until otherwise indicated, are from paras. 12, 11, 27(5) and 28, respectively, of this memorandum. See also Charles Townshend, 'Military Force and Civil Authority in the United Kingdom, 1914–1921', *Journal of British Studies*, 28 (1989), at pp. 262–79.

15. On these episodes, see Charles Townshend, 'Martial Law: Legal and Administrative Problems of Civil Emergency in Britain and the Empire, 1800–1940', *Historical Journal*, 25 (1982), pp. 167–95.

> not have the moral courage to do so. It is not fair deliberately to place an officer in such a dilemma.[16]

As MacDonogh had pointed out to his superior, Sir Henry Wilson, in 1911, the common law, as described in the *Manual of Military Law*, permitted the taking of 'exceptional measures in time of invasion as may be necessary' for the restoration of order. Such measures were limited by 'immediate necessity'. Therefore, he added:

> It does not seem that anything beyond this is allowed, and in addition to the fact that, human nature being what it is, many officers and others will in time of emergency either do the wrong thing or fail to do the right one, there is the further difficulty of dealing with the Civil Power as represented by the Courts. In the absence of an Act of Parliament it is too much to expect that the Courts will not hamper the military powers.[17]

Fears of exposure to legal proceedings might cause military officers to act indecisively, the consequences might be military disaster. Second, Ilbert's general approach was dubbed by the War Office as a policy of *laissez-faire* which was in direct conflict with that being pursued by the CID itself, with its preoccupation with contingency wartime planning. Legal preparations were as necessary, in the view of the military, as those concerned more directly with the fighting and security aspects. Since the law provided the framework for the latter activities, the law had to be got 'right'.

The difficulty was to persuade its political masters that the War Office's complaint of inadequate legal powers was real and not imaginary. During the first few years of the twentieth century the matter appeared to have been put to one side, perhaps because of the more immediate need to absorb the recruitment lessons of the Boer War. In particular, the political uproar caused by the revelations of the Interdepartmental Committee on Physical Deterioration in 1904 preoccupied the minds of the military authorities at the time. In 1911, however, attempts were made to interest the then Secretary of State, Lord Haldane, in the proposals. To no avail, for Haldane, the future Lord Chancellor, was content to place reliance on the flexible qualities of the common law. His successor at the War Office, Colonel Seely, agreed to refer the question to the Law Officers in 1913. MacDonogh busied himself with drafting a memorandum to this purpose, calling attention to the fact that English law, unlike its counterparts abroad, knew no concept of *l'état de siège*. This was an interim situation between normality and emergency, during which time precautionary powers might be exercised before an immediate necessity had arisen. The common law appeared to make no provision for such contingency. He ended by pouring scorn on Ilbert's advocacy of the

16. PRO, CAB 16/31/EP2, para. 22,
17. PRO, WO 32/7112, MacDonogh to Wilson, *c.* 27 May 1911.

sufficiency of prerogative powers, concluding that, 'the exercise of martial law [here meaning non-statutory emergency powers] being justified solely by necessity, which may have to be proved, the prerogative power is too doubtful to be relied on for practical service . . .'[18]

Yet again, the lawyers appeared to close ranks against the military. Once more the legal advisers came down on the side of the status quo; on this occasion, Rufus Isaacs, the Attorney-General, and Sir John Simon, Solicitor-General, expressing their agreement with the thrust of the Ilbert memorandum drafted seventeen years previously. Their concise 169 word opinion merely reiterated the malleability of the common law and the danger of enacting an exhaustive list of required powers. 'The great merit of the Common Law', they wrote, 'is that it will justify even an unprecedented course of action if it is fairly covered by the maxim *salus respublicae suprema lex*.'[19] For good measure, they added, a Bill of Indemnity could, if necessary, be passed. The apparent contradiction appeared to cause the law officers no problems of self-doubt (in that a Bill of Indemnity would appear to assume the strong possibility of an unlawful exercise of power).

MacDonogh was nothing if not persistent. Following the rebuff in July 1913, he tried once more, with the support of Sir Henry Wilson and of Brigadier-General David Henderson, Director of Military Training, to bring about a fundamental change of thinking on the part of the government.[20] By November 1913 there was light at the end of the tunnel. The Prime Minister, Asquith, eventually agreed to refer the whole matter to the CID sub-committee whose deliberations provided the point of departure for this chapter. Though the sub-committee papers were prepared in March–April 1914, the actual meeting did not take place till 30 June. Two days earlier, the Archduke Franz Ferdinand had been assassinated, though the significance of this event had not yet been grasped. Perhaps this is one explanation why Sir John Simon, who was by now Attorney-General, continued to play a similar legal refrain before the sub-committee to that which had accompanied the previous enquiries into the nature and content of emergency powers. When the chairman of the sub-committee, the Home Secretary, Reginald McKenna, enquired whether in the event of a 'precautionary period' being declared, the common law would not protect officers entering private property for the erection of necessary defensive works, the Attorney-General answered in the affirmative.[21] Yet at least he now recognised a difficulty facing the military. He acknowledged that, 'what the War Office wanted was some way of convincing officers', that their actions would be lawful when war had not

18. Ibid., 'Martial Law . . .', *c.* April 1913, p. 5.

19. Ibid., 'Martial Law in the United Kingdom. Opinion of the Law Officers of the Crown', 17 July 1913. French, who cites the Opinion (which was reprinted in CAB 16/31/EP2, appendix 2 for the CID Sub-Committee), wrongly dates it to 1914. See French, *British Economic and Strategic Planning*, p. 83n.

20. Ibid., MacDonogh to Wilson, 13 November 1913.

21. PRO, CAB 16/31/EP1, pp. 3–4 for this and subsequent quotations.

yet broken out. A bill, he suggested, would merely discourage the executive from taking action while it was going through parliament. A proclamation, Simon considered, would be more suitable since it would merely embody the royal prerogative power to defend the realm. It would state that

> whereas certain conditions had arisen necessitating the adoption of precautionary measures for the defence of the country, the responsible authorities might be compelled to take certain steps which were justified by the common law . . . An advantage of the Proclamation would be that it would enlighten the public on the powers which it was lawful to exercise in time of emergency.

Simon thus maintained his consistent line that the common law was adequate to meet the necessity of the case. Inasmuch as the object was to 'reassure a timid General Officer', the War Office representative at the meeting, Major James, declared himself satisfied.

International events moved rapidly thereafter, especially from 24 July when Austria's ultimatum to Serbia was endorsed by Germany. A few days later, the British home fleet's orders to disperse after exercises were countermanded by Churchill, the First Lord of the Admiralty. So was there a proclamation forthcoming, indicating the common law powers which it was lawful for the military authorities to exercise in an emergency prior to the actual declaration of war? Since a 'precautionary period' was instituted less than a month after the CID meeting, such a proclamation might have been expected. Instead, Maurice Hankey, the secretary of the CID, recalled that:

> During the next few days I was extremely busy putting the finishing touches on the War Book – printing off copies of some belated instructions still in proof, working with MacDonogh and Parliamentary Counsel on the Defence of the Realm Regulations, and so forth.[22]

Within the space of five weeks, there took place a rapid about-turn in policy on the kind of legal framework required in wartime. The sub-committee had indeed been charged with considering what emergency legislation 'if any' was necessary or desirable during the precautionary period and in war. Actual discussions were, in the event, confined to a consideration of the legal framework only for the precautionary period. It appears that the War Office's shopping list of emergency powers for use during wartime itself managed to slip through the committee undebated and without challenge. A proclamation was published in the *London Gazette* for 14 August 1914, but it merely incorporated the defence regulations of 12 August issued under the authority of the first Defence of the Realm Act of 8 August, the statutory embodiment of that shopping list of emergency powers.

22. Lord Hankey, *The Supreme Command, 1914–1918*, 1 (London, 1961), pp. 153–54. The War Book contained all approved defensive preparations of the state including necessary orders-in-council, regulations, telegrams and other communications. See ibid., ch. xii.

The Defence of the Realm Act itself, Sir John Simon noted in his autobiography, had passed through all its stages in Parliament on the first day of the war, even before there was time to circulate it as a bill. Far from bemoaning the failure to resort to a proclamation outlining the military authorities' common law powers, as Simon had recommended a month previously, he now remarked that the statute 'and much else beside, had been carefully prepared beforehand'.[23] His own ambiguous role in respect of such a general purpose defence statute passed without comment.

23. Viscount Simon, *Retrospect* (London, 1952), pp. 103–4.

2

No Expropriation without Compensation

As has been seen, legal powers of property requisition for military use and for the defence of the realm were contained in a series of nineteenth-century statutes, the Defence Acts 1842–73 and the Military Lands Act 1892. In addition, the royal prerogative appeared to confer power on the Crown to requisition property in an apprehended emergency, though it might be inferred that the doctrine of necessity suggested that the right was not a legal power unique to the Crown but a power shared by and available to all subjects to combat the emergency.

It may be enlightening to pose a number of basic philosophical questions. First, could property be rightfully taken from an owner at all? Secondly, did the state, in the absence of parliamentary authority, possess a right to requisition private property or did such a right exist, if at all, only in circumstances of dire emergency? If such a taking of land or buildings or goods or chattels did occur, did the owner possess a legal right to compensation deniable only on the authority of Parliament? Or could the state take without paying compensation where Parliament remained silent on the question?

As to the first question, F. A. Mann concludes:

> The answer is clear: all the available evidence goes to show that at all stages of history, the individual owner was liable to have his property taken from him. Never and nowhere was there any support for the proposition that that property could not in any circumstances be taken, that it was sacrosanct, inviolable. Nor is there any evidence that in reality this was ever doubted. On the contrary, the long struggle about the conditions of and the restrictions upon expropriation could not have occurred had the right of expropriation not been assumed and treated as superior to the right of property.[1]

Ownership, that is *dominium*, was not incompatible in other circumstances with expropriation and with loss of *dominium*. Property rights were always qualified, suggesting the immanence of a social theory of property even if ownership was the least qualified right of property identifiable in a legal

1. F. A. Mann, 'Outlines of a History of Expropriation', *Law Quarterly Review*, 75 (1959), pp. 188–219, at p. 189.

system. When the state expropriated property, it did so by virtue not of ownership, though this may have been the theoretical basis of expropriation by feudal lords, but of sovereignty. As Mann states:

> it cannot be, and for some centuries has not been, doubted that it is by virtue of its sovereignty, by public or constitutional law rather than by virtue of ownership that the supreme authority in the State has the power to take private property . . . It thus appears that it is not the existence or the source, but the exercise of the State's right to take private property which poses the real problems of legal significance.[2]

The problems to be tackled were therefore those concerned with the limitations imposed upon the exercise of the state's power of expropriation. Derived from the writings of the Dutch jurist, Grotius (1583–1645), and from ideas of natural law, the doctrine informing this power is reflected in American terminology today as 'eminent domain', the right which inheres in the Federal government, even in the absence of explicit provision in the written constitution: 'The right is the offspring of political necessity and it is inseparable from sovereignty, unless denied to it by its fundamental law.'[3] Eminent domain is a distinct doctrine to which there is no exact counterpart in English common law, though the extravagantly worded claims as to the scope of prerogative powers might overlap with it. According to one view, English law took no note of eminent domain because 'the power is included . . . in the absolutism of Parliament'.[4] Integral to the American doctrine was that there could be no expropriation without compensation. In its English statutory variant, land could not normally be acquired compulsorily by the state or for public utilities unless under the authority of a private Act of Parliament passed for that purpose. Private acts were passed to acquire land compulsorily for the construction of canals, ports, roads, for road-widening and for the railways in the nineteenth century, latterly incorporating the model provisions and compensation scheme set out in the Lands Clauses Consolidation Act 1845. It complemented the compulsory powers of the Defence Acts, with this difference: the Defence Acts were the only general public as distinct from special or private statutes which permitted the compulsory purchase of land for those purposes already noted – for ordnance or for training purposes or, more generally, for the defence of the realm.

That 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

2. Ibid., p. 192.
3. *Kohl* v. *United States* (1876) 91 U.S. 449, at p. 451, *per* Strong J., cited in ibid., p. 193.
4. Carman F. Randolph, 'The Eminent Domain', ibid., 3 (1887), pp. 314–25, at p. 323.

arbitrators or magistrates who fixed the amounts of compensation, even on the judiciary who tended to confirm liberal awards. These were based on notions of market value plus a *solatium* for the hurt feelings caused by compulsory divestment of one's property, an amount which was conventionally fixed as an additional 10 per cent.[5] Expropriation was, in this mould, not merely a 'legislative or administrative act but a compulsory contract'.[6]

If relevant English legislation was silent as to compensation, the right of the owner to obtain compensation could not be denied. This had been confirmed in numerous judicial dicta. For example, Lord Justice Bowen in *London & North-Western Railway Company* v. *Evans* declared that:

> The legislature cannot be fairly supposed to intend in the absence of clear words showing such intention, that one man's property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him. Parliament in its omnipotence can, of course, override or disregard this ordinary principle as it can override the former, if it sees fit to do so, but it is not likely that it will be found disregarding it without plain expressions of such a purpose.[7]

As Mann points out, this might be seen as a 'paramount principle of construction, though in truth [it is] a rule of constitutional law'.[8] No instances could be cited of English statutes authorising requisition without compensation or indeed requisition for purposes other than public ones. An intensive historical search undertaken among the dusty records of the Public Record Office for the Court of Appeal and for the House of Lords in the post-war 'Case of Requisition', *Attorney-General* v *De Keyser's Royal Hotel Ltd*, did not assist.[9] It failed to uncover cases where property had been taken without payment of compensation by the state under statutory authority even for military powers in the midst of war, such as the Napoleonic wars.[10] That was not to say that Parliament could not legislate accordingly, or even make

5. Juries asked to settle compensation disputes between landowners and railway companies tended to favour the latter. In 1845 a House of Lords select committee advocated an addition for *solatium* of at least 50 per cent. On these points, see W. R. Cornish and G. de N. Clark, *Law and Society in England, 1750–1950* (London, 1989), p. 153.

6. Mann, 'Outlines of a History', p. 196.

7. *London & North-Western Railway Co.* v. *Evans* [1893] 1 Ch. 16, at 28, and see the cases cited in Mann, 'Outlines of a History', p. 199n.

8. Ibid., p. 199.

9. *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* [1919] 2 Ch. 197 (C.A.); [1920] A.C.508 (H.L.). The case is discussed fully in chapter 6, below.

10. For plentiful examples of statutes, commissions, proceedings, memoranda, instructions, warrants, letters patent and War Office records going back to 1512, but from which no examples of requisitioning without payment of compensation by the state could be found, see Leslie Scott and Alfred Hildesley, *The Case of Requisition: De Keyser's Royal Hotel Limited v. The King* (Oxford, 1920), pp. 220–304. See below for further reference to Leslie Scott.

provision for confiscatory levels of compensation; only that in order to do so, the statutory wording would require to be unequivocally precise.[11]

What if Parliament had not legislated? In English law, the Crown claimed a power under the royal prerogative, that collection of residual powers recognised at common law as inhering in the King, and latterly in his ministers on his behalf (or as A. V. Dicey inaccurately though familiarly defined it, that discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown),[12] to requisition property. Authority for this claim has always been shrouded in uncertainty, leaving aside the added difficulty that property itself is an imprecise concept. What was freely acknowledged within legal authority was the right of the state under the royal prerogative to take those steps deemed necessary for the defence of the realm. Even this proposition could convey a misleading impression on two counts. First, the taking of steps to defend the realm might be limited to matters concerning the deployment of the armed forces, so that the taking of property by the state for this purpose could be unlawful as not falling within the scope of the royal prerogative. Yet the state, early in the war, relied on prerogative powers for this purpose; and during the crucial years was successful in deflecting legal efforts to declare such a procedure unlawful. The courts never authoritatively declared the purported exercise of such powers unlawful when faced with a case in which there was an absence of circumstances pointing to an immediate emergency. On the other hand, the House of Lords did not feel compelled to give its stamp of approval to reliance on the prerogative for purposes short of immediate necessity for the defence of the realm.

If, for the sake of argument, there was no doubt as to the existence of a prerogative power to requisition all manner of property, the equally critical matter of whether compensation for such a requisition by the state was legally due to the owner needed next to be addressed. This question was an unavoidable adjunct to the administrative arrangements made by the state during the war in respect to the requisitioning of properties taken over for military purposes, whether the take-over was under prerogative power assumed to be lawful or under statutory authority which might be silent or parsimonious as to compensation entitlement. If compensation for a prerogative taking was due *ex*

11. Cf. the decision of the European Court of Human Rights on the claim of United Kingdom shipbuilding and dock companies that the nationalisation of their firms, and the low levels of compensation offered, were in breach of the principle of no expropriation without adequate compensation and of the fundamental right to property enshrined in the European Convention on Human Rights, Article One of the Protocol to the Convention. See *Lithgow et al.* v. *United Kingdom* (1986) 8 E.H.R.R. 329. For the epochal influence of that *annus mirabilis*, 1789, see Mann, 'Outlines of a History', pp. 207–8. For England, the Civil War and the bloodless Revolution of 1689 have assumed significance for the rights of private property, a significance perhaps bordering on the extravagant. As J. W. Gough observed, 'Englishmen did not need Locke to tell them that the chief reason why civil government was established was to protect property'. See J. W. Gough, *Fundamental Law in English Constitutional History* (Oxford, 1955), p. 54, cited in Mann, 'Outlines of a History', p. 197.

12. A. V. Dicey, *Law of the Constitution* (8th edn, London, 1915), p. 420.

lege, then the quantum to be paid was outside the influence of the government. If no obligation to pay existed in law and if any payments were *ex gratia*, the amount was wholly within the discretion of the government, which could result in considerable savings to the Exchequer. The House of Lords was not required to rule on an application for compensation where the exercise of prerogative powers had been allegedly undertaken. In the *De Keyser* case, the matter of compensation had been settled on statutory authority. Consequently, judicial remarks on compensation entitlements under the prerogative were invariably obiter. In the leading cases, some of them dating from the sixteenth century, which declared support for a prerogative right to take over land, a legal obligation on the part of the Crown to pay compensation was nowhere admitted.[13] In the midst of the war, Lord Parker of Waddington declared in a House of Lords decision: 'The municipal law of this country does not give compensation to a subject whose land or goods are requisitioned by the Crown.'[14] By 1920, in the *De Keyser* case, the House of Lords judges seemed to express conflicting observations. One of the judges, Lord Dunedin, stated that the historical evidence as to compensation payments for requisitioning under the prerogative was, in his view, consistent either with *ex lege* or *ex gratia* payments.[15] Lord Moulton declared:

> Nor have I any doubt that in those days the subjects who had suffered in this way in war would not have been held to have any claim against the Crown for compensation in respect of the damage they had there suffered. The limited and necessary interference with the property of the subjects, of which I have spoken, would have been looked upon as part of the damage done by the war which had fallen to their lot to bear, and there is no reason to think that anyone would have thought that he had a claim against the Crown in respect of it.[16]

This proposition seemed to doubt payment of compensation *ex lege*. By contrast, Lord Sumner said of the historical searches at the Public Record Office:

> Many documents are forthcoming which relate to the taking of land for such purposes by agreement and on payment of compensation. None can be found relating to taking land as of right without any compensation at all, even in time of war.[17]

13. That is, *R* v. *Hampden* (1637) 3 How. St. Tr. 825, at 1195 (the *Ship-Money* case); *The King's Prerogative in Saltpetre* (1606) 12 Co. Rep. 12; and *Hole* v. *Barlow* (1858) 4 C.B. (n.s.) 334, among others.

14. *The Zamora* [1916] 2 A.C. 77, at p. 100.

15. [1920] A.C. 508, at p. 525.

16. Ibid., p. 552. As well as being a judicial member of the House of Lords, Moulton was a Fellow of the Royal Society and Director-General of Explosives Supply at the Ministry of Munitions.

17. Ibid., p. 563.