Journal of Criminal Law and Criminology

Volume 8 | Issue 2 Article 4

1917

Military Orders as a Defense in Civil Courts

A. W. Brown

MILITARY ORDERS AS A DEFENSE IN CIVIL COURTS[1]

A. W. BROWN[2]

1. The purpose of this paper is to present a review of the decisions of courts and the views of certain text writers, which relate to the general subject of military orders as a defense in civil courts, to summarize them, and to venture roughly to indicate the *rătĭō dĕcĭdĕndī* that will probably be developed by the tribunals in their determination of certain cases that await an authoritative and final decision.

2. The subject for discussion was presented in the following form:

"The extent to which obedience to military orders would justify the commission of acts which would otherwise be punishable in a civil court."

3. The rule in tort actions seems to have been finally and fairly definitely established by a long line of decisions from that in the case of Captain Gambier of the British navy, which is referred to by Lord Mansfield in *Móstyn* v. *Fabrigas,* 1 Cowper 180, to that in *Franks* v. *Smith,* decided in 1911 and reported in 142 Kentucky, 232. Some of the more important cases are cited in the notes.[3]

---

[1]Read before the annual meeting of the American Society of Military Law, Chicago, September, 1916.

[2]Captain, Acting Judge Advocate, U. S. A.

[3]*Mostyn v. Fabrigas,* 1 Cowp. 180 (1774);
Little v. Barreme, 2 Cranch 176 (1804);
Ruan v. Perry, 3 Cains 120 (1805);
Wise v. Withers, 3 Cranch 331 (1806);
Brown v. Howard, 14 Johns 118 (1817);
Bell v. Tooley, 11 Ire. 605 (1850);
Mitchell v. Harmony, 13 Howard 115 (1851);
Despan v. Olney, 1 Curtis 306 (1852);
Fisher v. McGirr, 1 Gray 45 (1854);
Clay v. U. S., Devereux 25 (1855);
Skeen v. Monkheimer, 21 Ind. 4 (1863);
Barrow v. Page, 5 Haywood 98 (1863);
Trammell v. Bassett, 24 Ark. 499 (1866);
Keighly v. Bell, 4 Fost. and Fin. 790 (1866);
Christian County v. Rankin, 2 Duvall 502 (1866);
Wiggins v. U. S., 3 Court of Claims 412 (1867);
McCall v. McDowell, 1 Abbott, 212 (1867);
Johnson v. Jones, 44 Ill. 142 (1867);
Weatherspoon v. Woody, 5 Cold. 149 (1867);
Terrill v. Rankin, 2 Bush 53 (1867);
Sellards et al. v. Zomes, 5 Bush 90 (1868);
Hogue v. Penn, 3 Bush 663 (1868);
Wilson v. Franklin, 63 N. C. 259 (1869);
Dills v. Hatcher, 6 Bush 606 (1869);
Ferguson v. Loar, 5 Bush 689 (1869);
Teagarden v. Graham, 31 Ind. 422 (1869);
Bryan v. Walker, 64 N. C. 141 (1870);
Holmes v. Sheridan et al., 1 Dillon 351 (1870);

The rule established by the decisions seems to be this: An order emanating from a military superior, which in fact he is not legally authorized to give, is under no circumstances a defense in an action for damages against an inferior who executes it; or, as stated by Winthrop[4]:

"An order which is in fact illegal—which commands the doing of an act which is unlawful or legally unauthorized—can, however regular, proper, or just it may appear on its face, protect no one concerned in the performance; that the superior who gives it and causes its execution, and the inferior who actually executes it as ordered, will both, or either, be liable in damages for a trespass to any party aggrieved."

4. The decisions in a few cases and the dicta in many are somewhat at variance with the rule as above stated.

For instance, in *Tramwell* v. *Bassett,* 24 Arkansas 499, the court held a plea to an action of trespass good, which set up the existence of a civil war, that the defendants were soldiers in that war, and that the acts complained of were done by order of their commanding officer.

The court in this case made a distinction between the liability of enlisted men and officers in such cases, apparently on the untenable ground that orders to officers were less obligatory than orders to enlisted men.

Again, in the case of *Keighly* v. *Bell,* 4 Foster and Finlason, 790, Judge Willes is reported to have said:

"I believe that the better opinion is that an officer or soldier acting under the orders of his superior not being necessarily or manifestly illegal—would be justified by his orders."

So in the case of *McCall* v. *McDowell,* 1 Abbott, 212, the court said:

"Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law should excuse the military subordinate when acting in obedience to the orders of his commander."

"Between an order plainly illegal and one palpably otherwise—particularly in time of war—there is a wide middleground, where the ultimate legality and propriety of orders depends or may depend upon circumstances and con-

Milligan v. Hovey, 3 Bissell 13 (1871);
McLaughlin v. Green, 50 Miss. 453 (1874);
Koonce v. Davis, 72 N. C. 218 (1875);
Bates v. Clark, 95 U. S. 204 (1877);
Head v. Porter, 48 Fed. Rep. 481 (1891);
Stanley v. Schwalby, 85 Tex. 348 (1892);
In re Anderson, 94 Fed. Rep. 487 (1899);
Franks v. Smith, 142 Kentucky 232 (1911).

[4]Winthrops' Military Law and Precedents, 2d Ed., Vol. II, p. 1386.

ditions of which it cannot be expected that the inferior is informed or advised. In such cases justice to the subordinate demands, and the necessity and efficiency of the public service require, that the order of the superior should protect the inferior; leaving the responsibility to rest where it properly belongs—upon the officer who gave the command."

In this case, however, the decision as to the subordinate was not based on the foregoing reasoning, but on the Act of May 11, 1866, which made the order of any military superior a defense to such an action.

4½. In *Herlihy* v. *Donohue,* et al., it appeared that two subordinate officers and certain enlisted men were ordered to destroy certain liquor, which they did, the situation being such that such an order might have been lawful. In a suit against the officer who gave the order and the two subordinates the Supreme Court of Montana held that only the former was liable. (161 Pac. Rep. 164.)

The court said:

"If the order is one which the superior might lawfully make, the inferior cannot refuse obedience until he shall have investigated the surrounding circumstances and determined for himself that they justify the order in the particular instance. If, on the other hand, the order is so palpably illegal or without authority that any reasonably prudent man ought to recognize the fact, obedience thereto furnishes no excuse for a wrongful act, even though disobedience may subject the offender to punishment at the hands of a military tribunal."

5. Certain objections to the rule of exemption contended for in the McCall case appear when we consider the application of such a rule to easily supposable cases, and examine the principal assumptions on which it is founded.

The rule proposes to exempt inferiors from liability for damages caused by them in carrying out orders in all cases except "where at first blush it is apparent and palpable to the commonest understanding that the order is illegal."

This seems to be an uncertain standard to go by. What is palpable to one is frequently far from being so to another, even among persons of uncommon understanding. How often do we see dissenting opinions animadverting on the majority holding as "palpably," "plainly," or "obviously" wrong.

Moreover, such a rule would work an injustice by exempting those inferiors whose understanding was above the commonest, and who in fact appreciated the illegality of their acts, and at the same time holding accountable those who, through automatic, unthinking, obedience to orders, or through dense ignorance were in fact oblivious of wrong doing.

The position of a plaintiff under such a rule might easily be peculiarly difficult.

He must find the particular officer among the military hierarchy who originated the illegal order, and to do this may have to resort to a succession of suits against the inferiors of that officer, each of whom reveals the identity of his next superior in exculpating himself; and, as a practical matter, it is not at all unlikely that, when finally located, the superior might succeed in escaping liability on the ground that his orders as given by him did not warrant the action taken by the person who executed them.

The assumptions of injustice to the subordinate and injury to the public service do not seem to be correct. In any case where the subordinate is really without fault and only technically liable, he would have an action for indemnity against the superior who gave the order,[5] and it would be difficult to show any appreciable injury to the public service resulting from the frequent application of the rule that holds the subordinate liable.

6. Whatever may be the actual merits of the opposing views, the rule in tort actions appears to have been definitely settled substantially as stated by Winthrop and has been applied in some extreme cases.

In *Milligan* v. *Hovey,* 3 Bissell 13, members of a military commission, acting as such under military orders in a case where the commission had no jurisdiction, were held liable in an action for wrongful arrest and imprisonment, although the want of jurisdiction was by no means apparent to men of uncommon understanding and required a decision of the Supreme Court to determine it.

In *Bates* v. *Clark,* 95 U. S. 204, an army officer obeying the orders of his superior was held liable for seizing certain whiskey, which, had it been located in Indian country he would have been authorized to seize. The officer believed in good faith and on reasonable grounds that it was Indian country, and it took a judicial demonstration of some length to show that it was not.

7. The only exemption in favor of the inferior who acts solely in bona fide obedience to illegal orders is from exemplary or punitive damages.[6]

As a practical matter, however, an inferior, who is in *fōrō cōn-*

[5]Cooley on Torts, 3d Ed., Vol. I, pp. 255, 256.

[6]*Johnson v. Jones,* 44 Ill. 142;
McLaughlin v. Green, 50 Miss. 453;
Milligan v. Hovey, 3 Bissell 13.

sciĕntiaĕ is excusable for the harm he has done, has little to fear from the operation of the rule that makes him liable.

To meet such cases arising in the civil war, general acts of indemnity were passed or adopted, and to meet particular cases Congress has occasionally relieved officers from the judgments against them, as was done in Colonel Mitchell's case. (Act March 11, 1852, 10 St. 727.)

8. The rules applicable to cases of military inferiors, who, in complying with illegal orders of their superiors, do acts which, did the military relation not exist, would be criminal, do not appear to be definitely settled.

The extreme penalty for disobedience of lawful military orders, and the resulting dilemma in which a well-meaning soldier may be placed, were the ordinary rules of criminal law held applicable, of being compelled at his peril, correctly and perhaps instantly to pass upon the legality of such orders, have led many to consider what modification might or should be made in the ordinary rules in order to rescue the soldier from the penal consequences of acting under a wrong guess.

9. As might be expected the views vary from that of the extremist on the military side who, impressed with the importance of instant, unthinking obedience, contend that any such act is justified which is not instantly perceived to be manifestly and clearly illegal, to that of Bishop and other civilians who view the matter as if the soldier proceeded self-moved.

And as might also be expected the true rule will probably be found somewhere in between these extremes, and which while not creating a new ground of justification in favor of a soldier who carries out orders in good faith will nevertheless make such orders available and useful to him in his attempt to escape liability.

10. The cases involving this question that have been found are cited in the notes,[7] and as they are not numerous a brief review of the

[7] *U. S. v. Bright,* Federal Cases 14, 647 (1809);
U. S. v. Jones, 3 Wash. C. C. 209 (1813);
Rex v. Thomas, 4 Maule & Selwyn 414 (1816);
U. S. v. Bevans, 24 Fed. Cases No. 14, 589 (1816);
Comm. v. Blodgett, 12 Met. 56 (1846);
State v. Sparks, 27 Texas 627 (1864);
Riggs v. State, 3 Cold. 85 (1864);
Jones v. Commonwealth, 34 Kentucky 34 (1866);
Reg. v. Stowe, 2 Nova Scotia Dec. 121 (1870);
U. S. v. Carr, 1 Woods 480 (1872);
Comm. v. Shortall, 206 Pa. St. 165 (1903);
Manley v. State, 137 S. W. 1137 (1911).

facts, decision, and reasoning in some of them will be made.

In *U. S.* v. *Bright,* Federal Cases No. 14, 647, tried before Judge Washington in 1809, the facts in brief were as follows:

In January, 1803, a decree in favor of one Olmsted and against two women, the representatives of the deceased treasurer of the State of Pennsylvania, was entered in the United States District Court of Pennsylvania.

The State of Pennsylvania being a claimant for the subject matter of the suit, the Legislature of that State, acting under a belief in the invalidity of the decree of the District Court, passed an act in April, 1803, which among other things required Mrs. Sergeant and Mrs. Waters, the representatives of the deceased treasurer, to pay into the treasury of the State the money received by them without regard to the decree of the District Court, and directed the governor of the State to protect the persons and property of these two women from any process which might issue out of the Federal Court.

An execution having been awarded by the United States court to carry out its decree, General Michael Bright, commanding a brigade of state militia received orders from the governor of Pennsylvania immediately to have in readiness such a portion of the militia under his command, as might be necessary to execute the order, and to employ them to protect and defend the persons and property of the two women from and against any process founded on the decree of the United States District Court, and in virtue of which any officer under the direction of any court of the United States might attempt to attach their persons or property.

A guard was accordingly placed at the houses of the two women, and it was admitted that the defendants with full knowledge of the character of the marshal of the district, of his business, and of his commission, and the process which he had to execute having been read to them, opposed with muskets and bayonets the efforts of the marshal to serve the writ and by such resistance prevented him from serving it.

In an elaborate charge Judge Washington established the validity of the decree of the District Court, and that neither the governor nor the Legislature could legally authorize the defendant to resist the process founded thereon.

The judge continued:

"But it is contended that the defendants standing in the character of subordinate officers to the governor and commander-in-chief of the state was

bound implicitly to obey his orders, and that although the orders were unlawfull still the officer and those under his command were justified in obeying them.

"The argument is imposing but very unsound. In a state of open and public war where military law prevails and the peaceful voice of the municipal law is drowned in the din of arms, great indulgencies must necessarily be extended to the acts of subordinate officers done in obedience to the orders of their superiors.

"But even there the order of a superior officer to take the life of a citizen or to invade the sanctity of his house and to deprive him of his property would not shield the inferior against a charge of murder or trespass."

The court here cites *Little* v. *Barreme,* 2 Cranch, 176, in support of the foregoing and concludes:

"This is said to be a hard case upon the defendants because if they had refused obedience to the order of the governor, they would have been punished by the state. I acknowledge it is a hard case, but with this we have nothing to do if the law is against the defendants."

The defendants were convicted and sentenced to fine and imprisonment, but were immediately pardoned by the president.

The Jones case (*U. S.* v. *Jones,* 3 Wash. C. C. 209) was as follows:

Jones was first lieutenant of a privateer. He was indicted for piracy, and among other defenses urged was that of obedience to orders of his captain.

Judge Washington on this point said:

"The only remaining question of law has been raised in this case is that the prisoner ought to be presumed to have acted under the orders of his superior officer which it was his duty to obey. This doctrine equally alarming and unfounded underwent an examination and was decided by this court in the case of General Bright. It is repugnant to reason and general law of the land.

"No military or civil officer can command an inferior to violate the laws of his country nor will such command excuse much less justify the act. Can it for a moment be pretended that the general of an army or the commander of a ship of war can order one of his men to commit murder or felony? Certainly not.

"In relation to the Navy the 14th Article speaks cautiously of the lawful orders of superiors.

"Disobedience of an unlawful order must not of course be punishable, and a court-martial would in such a case be bound to acquit the person tried upon a charge of disobedience.

"We do not mean to go further than to say that the participation of the inferior officer in an act which he knows or ought to know to be illegal will not be excused by the order of his superior."

In *Rex* v. *Thomas,* 4 Maule & Selwyn 414, the defendant was a sentinel on board a man-of-war when she was paying off. He was

given orders to keep off all boats with certain exceptions, and was given a musket with blank and ball ammunition. The boats pressed, upon which he called repeatedly to them to keep off. One of them persisted and came close under the ship, whereupon he fired at a man who was in the boat and killed him. It was put to the jury to find whether the sentinel did not fire under the mistaken impression that it was his duty and they found that he did.

The judges were unanimous that it was nevertheless murder, but a proper case for a pardon.

In *United States* v. *Bevans,* 24 Federal Cases, No. 14, 589, a sentry indicted for murder attempted to justify the act under orders of a superior to run through the body any man who used abusive language.

Judge Story in charging the jury said:

It is argued by the counsel for the prisoner that it is indispensable for the discipline of the naval service that such orders should be given and should be instantly executed and that a power of unlimited and arbitrary discretion resides in the officer of the ship to compel obedience of all commands, at all times and under all circumstances, even by taking away life.

"I confess that it never occurred to me until this trial that any person in this country ever dreamed of the existence of such an abitrary power.

"This is emphatically a government of laws not of men.

"The military and naval forces are created by the laws and regulated by a code which ascertains their powers and enforces their duties. * * * The arbitrary power of life and death is not committed even to the president of the United States who is commander in chief of the army and navy, much less is it confided to the commander of a ship and least of all to a private sentry on duty.

" * * * Such an order would be illegal and void and not binding upon any person and the party who should give the order equally with the party who should execute it would be involved in the guilt of murder * * *. It is not to be imagined from this that officers in the navy or not in any case authorized to take away life in enforcing the duties of their stations. They stand in this particular upon the same grounds as civil officers. They have a right in case of necessity to enforce obedience to orders and a performance of duties by the punishment of death. But the necessity must be a clear and urgent one. The orders must be of a nature that require instant obedience, and the force employed must be such as the occasion indespensably requires

"If for instance as the case put at bar where the ship is on fire and the fire is advancing to the magazine the party refuses to assist, or to obey the lawful orders of his officers, the latter may enforce obedience at the point of the bayonet if it can not be otherwise compelled.

"In the present case it is the decided opinion of the court that if orders were given to the sentry to run a man through the body who should abuse the sentry by reproachful words only, these orders were unlawful and cannot justify or excuse the homicide."

In *Commonwealth* v. *Blodgett,* 12 Metcalf 56, the facts were these:

The defendants with about twenty other persons armed with military weapons, about the hour of one o'clock at night broke into and entered the house of Jeremiah Crooks, who kept a tavern in Billingham, Mass., and there seized and bound the four persons named in the indictment, kept them bound for some time and carried them bound into the State of Rhode Island. It appears from the bill of exceptions that an organized attempt was made to overthrow the existing government of the State of Rhode Island by force of arms, that the Legislature had declared martial law, that W. G. McNeill had been appointed major-general and commander-in-chief of the forces raised in the State to oppose the insurrection, that the insurgents organized and in military array were stationed in some force in Chepachet and Woonsocket villages, bordering the line of Massachusetts. It further appears that on the evening of the 27th of June the camps of insurgents at Chepachet and other persons there assembled were advised to disperse; * * * that various orders were given with a view of arresting the fugitives whether within the limits of the state or not, to the extent of fifty miles from Chepachet; that by order of Major Martin the defendant Blodgett, who was in the military service of the state, with the other defendant and about twenty men proceeded as before stated and arrested and bound the prisoners named in the indictment.

The court held that one State of the Union in time of insurrection and civil war in that State has no authority to give orders to her troops to pass over the lines and into the territory of another State to protect itself against insurgents and to capture her rebel citizens who have recently fled over those lines, and such orders cannot shield her citizens or soldiers from being criminally responsible in the courts of another State for their seizing such insurgents, though such citizens or soldiers, when acting under such orders, are subject to martial law in their own State; *unless* there be a necessity or probable cause of necessity for the defense or protection of the lives and property of the citizens of such other State or for the defense of the State itself, that the acts directed by such orders should be done. And of the necessity or probable cause of necessity the jury and not the authorities of such other State are the ultimate judges.

The court said through Chief Justice Shaw:

"The facts show that the proceeding of Blodgett and others in passing over the lines of Massachusetts and doing the acts which are the subject

of this prosecution though ordered by Major Martin, acting under the general authority of General McNeill, was not the act of the State of Rhode Island either by special authority or subsequent ratification. * * * The act of the defendants then being plainly a violation of the rights and laws of Massachusetts and of the legal rights of persons lawfully within its protection being denied and repudiated as an act of the State of Rhode Island, it follows as a necessary legal consequence that it was a lawless and unjustifiable act of violence on the part of the defendants subjecting them and all who assisted them to be punished for such violation of our laws."

With reference to the contention that men ought not to be held responsible for acts done in obedience to orders which they are compelled to obey under severe military discipline, the court said:

"But this is not the true principle and it would be dangerous in the extreme to carry it out into its consequences.

"The more general and familiar rule is that he who does acts injurious to the rights of others can excuse himself as against the party injured by pleading the lawful commands only of a superior whom he is bound to obey. A man may be often so placed in civil life and especially in military life as to be obliged to execute unlawful commands on pain of severe penal consequences. As against the party giving such command he will be justified; in fōrō cŏnsciĕntiaē he may be excusable, but towards the party injured the act is done at his own peril and he must stand responsible."

In the case of Major General Hutchinson, 9 Cox Criminal Cases, 555, an indictment was preferred against him for the death of a man resulting from artillery practice at Plymouth, negligence being imputed to the accused.

In charging the jury Justice Byles said: "If in using the place for firing, although it might be too low for safety, he was simply obeying the military orders of his superior, in my opinion he would not be guilty of manslaughter."

In *State* v. *Sparks,* 27 Texas 627, Major Sparks claiming to act under the orders of General Magruder, both being officers of the Confederate service, seized certain persons held by the sheriff under orders of the Supreme Court pending hearing on writ of habeas corpus. He was attached for the contempt and case tried before the Supreme Court.

The court held as follows:

"An illegal act cannot be justified by an order from superior authority no matter how high the source from which such order emanates. Military officers are bound to obey all legal orders of their commanders, but there is nothing better settled, as well by the military as the civil law that neither officers nor soldiers are bound to obey any legal order of their superior officers. On the contrary their duty is to disobey such orders.

"The orders of a military commander to his subordinates furnish to the

latter no justification for his forcible interference with the jurisdiction and disregard of the lawful authority of a civil court.

"But although a subordinate military officer must not obey an unlawful order of his superior in command, yet, as he acts at his peril in disobeying such order it should be held greatly to extenuate the offense committed by the subordinate in the execution of it.

"Under such circumstances, the superior officer becomes the principal offender, and will it seems be required to purge himself of the contempt."

In *Riggs* v. *State,* 3 Coldwater 85, Riggs, a soldier, received an order from his superior officer to go with a certain scouting party. While on the scout certain members of the party murdered one Captain Thornill; but there was no proof other than the fact of his presence that the defendant aided or abetted the unlawful act. On appeal the conviction was reversed, the court holding as follows:

"A soldier is not bound to obey an order clearly illegal. A soldier is bound to obey the *lawful* orders of his superiors, or officers over him, and his acts in obedience to these orders will constitute no offense as to him. But an order illegal in itself and not justified by the rules and usages of war so that a man of ordinary sense and understanding would know when he heard it read or given that the order was illegal would afford the private no protection for a crime under such orders.

"If the order is not clearly illegal he must obey. An order given by an officer to his privates which does not expressly and clearly show on its face or in the body thereof its own illegality the soldier would be bound to obey and such order would be a protection to him."

In the course of the opinion the court said:

"The soldier in this case was detailed to go with the party and it did not appear that any further order was given him or whether he knew what the purpose was. He had no right to inquire whether that purpose was lawful and if he was present under that order he would not be liable unless he assisted in the killing."

In *Queen* v. *Stowe,* 2 Nova Scotia Decisions, 121, the defendant, a corporal of the 16th regiment, was tried for the murder of James White, a private of the regiment, and convicted of manslaughter. It appears from the evidence that White having been placed in confinement while in a state of intoxication the defendant with two men were ordered by Stevens, a sergeant of the regiment, to have the deceased tied, so that he could not make a noise by striking and kicking. The order was not executed in such a manner as to put an end to the noise entirely and a second order was given to tie up White so that he could not shout. In carrying out the latter order Stowe caused White to be placed on the floor face downward with his hands cuffed behind his back, a rope was fastened to his feet which were drawn up

behind his back and the rope passed over his shoulders and across his mouth and back again to his feet.

White died while so tied up, his death being caused or accelerated by such tying.

It was held in reply to two questions reserved at the trial, that whether the illegality consisted in the order of the sergeant or in the manner in which it was carried out, Stowe might properly be convicted.

The court said:

"The first question which suggests itself is whether the order of Sergeant Stevens, necessarily called for the cruel treatment which the deceased experienced at the hands of Stowe. If so, it was an illegal order and being such, Stowe would be liable to punishment for obeying it. If on the other hand the order might have been obeyed without the risk of injury to the deceased then the order would have been legal and the illegality would have consisted in the mode in which it was obeyed. In the former case the guilt would have been shared by the sergeant and his subordinate, in the latter the subordinate alone must bear it.

"A soldier is bound to obey implicitly the commands of his officers but they must be legal commands, for a soldier who does an illegal act cannot plead the commands of his superior officer as a legal defense in a court of justice.

"It may be difficult sometimes for a soldier to decide when the orders of a superior and the laws of the land conflict. In time of war and as against an enemy such a conflict can hardly be imagined, but in time of peace the soldier must take care not to violate the law which is equally binding upon him as on other citizens for, as observed by Lord Mansfield, men by becoming soldiers do not cease to be citizens and a soldier is gifted with all the rights and is bound to all the duties of citizens."

In *United States* v. *Carr,* 1 Woods, 480, there was an indictment for murder.

The facts were these:

Both the prisoner and the deceased were soldiers. On the 13th of July, 1872, the prisoner was sergeant of the guard at Fort Pulaski. About 7 p. m. a drunken quarrel occurred between some of the soldiers at the fort. Sergeant Beel, attempting to suppress the disorder, was taking Corporal McKinley to the guard house when he was set upon by other soldiers and knocked down and left insensible on the ground. A call was then made for the sergeant of the guard. The prisoner and three men of the guard at once crossed the parade to the scene of the disorder. The prisoner gave Sergeant Shires, who was one of the disorderly soldiers, in charge of two men of the guard to convey him to the guard house. Shires had lost his cap and when he asked leave to get it, the prisoner struck him with the butt of his musket

and knocked him down. At this point the deceased approached the prisoner and said to him: "You are a damned mean man to knock a man down in that way." The prisoner then made an attempt to run his bayonet into deceased, who avoided the thrust and turned and commenced running towards his quarters. Prisoner raised his piece to fire. It was a half cock. He brought it down, cocked it, raised it again and fired at deceased who was at the time running from prisoner towards the quarters. The ball entered the back of the deceased near the spine. At the time he was shot the deceased was eight or ten yards from prisoner. He died in about ten minutes.

It is disputed whether the deceased was trying to suppress the disorder among the soldiers at the time the prisoner came up. There was also some evidence tending to show that the musket of the prisoner was accidentally discharged, and also that the prisoner acted under orders of the ranking sergeant of the fort.

Judge Woods charged the jury as follows:

"Nor will any order of a superior officer to an inferior in rank justify the willful killing of a person under the peace and protection of the law. A soldier is bound to obey only the lawful orders of his superiors.

"If he receives an order to do an unlawful act he is bound neither by his duty nor his oath to do it. So far from such order being a justification, it makes the party giving the order an accomplice in the crime. For instance. an order from an officer to a soldier to shoot another for disrespectful words merely would, if obeyed, be murder both in the officer and soldier."

In *Commonwealth, ex rel. Wadsworth* v. *Shortall,* 206 Penn. St., 165, the facts were as follows:

The governor of the commonwealth issued a general order calling out a division of the militia for the purpose of preserving the public peace in certain counties in which a strike of miners was taking place and in which tumults, riots and mobs prevailed.

The militia was called out and the general in command placed a corporal's guard at a house that had been attacked by dynamite and directed the members of the guard if any attempt was made upon the house or any person approached the house and failed to halt when directed, to shoot to kill. One of the sentries near midnight discovered a man approaching the house and he called upon him four times to halt. The man disobeyed the order and the sentry shot and killed him.

These facts were not disputed.

The court held that the order of the governor was a declaration of qualified martial law, that within its necessary field and for the accomplishment of its intended purpose it is martial law with all its

powers; that while the military are in active service in the suppression of disorder and violence their rights and obligations as soldiers must be judged by the standard of active war; that a soldier is bound to obey an order given by his superior officer which does not expressly and clearly show on its face or in the body thereof its own illegality, and such order will be a protection to the soldier, and that a homicide by a member of the militia called out to suppress disorder, committed without malice in the performance of a supposed duty as a soldier, and under the order of an officer, is excusable unless it is manifestly beyond the scope of the militiaman's authority or is such that a man of ordinary understanding would know is illegal.

The court cited Hare's Constitutional Law, 920; *U. S.* v. *Clark; McCall* v. *McDowell; United States* v. *Carr;* and *Riggs* v. *State,* and then continued:

"Applying these principles to the act of the relator it is clear that he was not guilty of any crime. The situation as already shown was one of martial law, in which the commanding general was authorized to use as forcible military means for the suppression of violence as his judgment dictated to be necessary.

"The house had been dynamited at night and threatened again. With an agent so destructive, in hands so lawless, the duty of precaution was correspondingly great. There was no ground for doubt as to the legality of the order to shoot.

"The relator was a private soldier and his first duty was obedience. His orders were clear and specific and the evidence does not show that he went beyond them in his action. There was no malice for it appears affirmatively that he did not know the deceased and acted only on his orders when the situation appeared to call for action under them."

In *Manley* v. *State,* 137 Southwestern, 1137, a member of the National Guard was indicted for murder committed in carrying out orders to prevent people from entering a certain enclosure during a celebration.

On appeal it was urged as error that the court below excluded evidence that the defendant's superior officer had directed him to keep the people out of the enclosure at all hazards.

The court said:

"The witness, as an officer superior in rank, should have been permitted to state that he had given the appellant instructions to keep the people out of the enclosure; but even if he commanded at all hazards, this would not authorize appellant to kill a person or violate the law in order to do so. Appellant under such instructions would be authorized to use only such means as were necessary to accomplish this without taking life or committing an assault."

11. The opinions in some of the foregoing cases support the

view that a military order not manifestly illegal is a justification, but on examination it will be found that the decisions in these cases do not depend upon any such doctrine.

In the Hutchinson case, Justice Byles certainly did not mean that a military order would be a defense in every case of manslaughter through negligence, however gross such negligence might be.

Probably all he meant was that such orders were in general relevant to the question of negligence, and that, in view of the facts shown in this particular case, the order to use the place for artillery practice in his opinion settled the question in favor of the defendant.

Riggs v. *State* is a case often cited in support of the doctrine that an order not plainly illegal is a defense. But outside of the dicta in the opinion the case furnishes no support whatever to that doctrine.

The order to go with the scouting party was plainly legal and was none the less so because others in the party may have had orders to do an illegal act.

The legal order to go with the party furnished the defendant with the means of establishing the innocence of his presence at the time of the shooting, and thereby disconnecting himself from the acts of the others.

Commonwealth v. *Shortall* is a similar case. The court expressly decided that the order of the sentry was legal and that his acts were in strict conformity to his orders. This alone sufficed to relieve the sentry from any criminal liability and left no occasion to resort to the broader rule of exemption asserted in the opinion of the court.

12. The views of most of the military text writers are, of course, in accord with the broader rule; and the more restricted doctrine of some of the cases is vigorously assailed as involving the grossest injustice to the individual and the most disastrous consequences to the discipline of the army.

O'Brien says:[8]

"The general rule of justice and natural equity is that a subordinate should be justified for the performance of any act in obedience to orders, which was not manifestly and clearly illegal."

Clode says:[9]

"Such are the grounds upon which the officer would be justified in giving the order; and the justification of the soldier in obeying it would be, first, under the rule of the Common Law, that an Inferior, in an ordinary criminal case, might be held justified in obeying the directions—not obviously improper or contrary to law—of a Superior Officer, that is, if the Inferior acted honestly

[8]American Military Law and Courts-Martial, 1846, p. 83.
[9]Military Forces of the Crown, Vol. II, p. 151, Sec. 68.

upon what he might not unreasonably deem to be the effect of the orders of his Superior."

The non-military text writers in general follow the actual decisions of the courts in making the liability depend on the illegality of the order irrespective of whether it was or was not plainly so.

Hare says that the general rule is that the command of a superior will not justify the commission of an act which he cannot legally authorize the subordinate to perform.[10]

Bishop states the rule as follows:[11]

"The command of a superior—as of a military officer to a subordinate—will not justify a criminal act done in pursuance of it. * * * In all these cases the person doing the wrongful thing is guilty the same as though he had proceeded self-moved.

Dicey states that where a soldier is put on trial of a charge of crime obedience to superior orders is not of itself a defense.[12]

14. To adopt a new rule of substantive law making obedience to military orders not palpably illegal a distinct ground of justification for criminal acts is believed to be objectionable.

Such a rule is too indefinite to be susceptible of anything like a uniform application; and in any case likely to arise under it the soldier who receives the order would very likely be as much at a loss to determine whether the required degree of illegality existed as to determine the fact of illegality itself.

Moreover, the fact that military orders are frequently communicated orally and in general terms and thus easily misunderstood and not easily proved in their exact terms, together with the prohibitions against self-incrimination and against conviction in the face of a reasonable doubt, would in the practical administration of justice under such a rule operate to give immunity in many cases to all concerned in the criminal act an immunity which could not fail to induce in many military persons a lack of caution with respect to the very objects for which soldiers are maintained.

On principle and authority it is believed that obedience to military orders is not *of itself* a justification.

15. But this does not mean that the fact that a soldier acted in obedience to a superior's orders is unavailable to him in his defense as a stepping stone to a recognized ground of justification.

And it is believed that a mistake is made in attempting to engraft upon the substantive criminal law a new rule of justification in favor

[10]American Constitutional Law, 1889, p. 914.
[11]New Criminal Law, 8th Ed., Vol. I, Sec. 355.
[12]Law of the Constitution, 1908, p. 298.

of soldiers who obey orders, instead of the much easier and equally effective method of contending for a rule of evidence which will accomplish the same results; thus availing ourselves of an expedient by which the judges have indirectly but in effect molded and developed the law while disclaiming any right to do so directly. (See Thayer's Cases on Evidence, Chapter I, Section II, note.)

A soldier who obeys an illegal order with full knowledge of the facts should not be allowed to justify his violation of the criminal law under such order any more than a civilian.

The general and necessary rule that ignorance of law is no excuse operates with extreme harshness in many cases, and a soldier to claim exemption from punishment for acts done under orders ought therefore to rest his claim on some other ground than injustice to himself.

The argument ordinarily advanced is that discipline—the *sīnĕ qua nŏn* of an army—would be unattainable were well-meaning soldiers compelled to choose between alternative courses under penalty for a mistake.

To dispose of this argument it seems sufficient to say that actual experience does not warrant the assumption made therein, inasmuch as discipline has been maintained in the face of adverse rulings by the courts.

But mistake of fact seems to be a defense that can and should be peculiarly available to a soldier acting under orders.

With regard to this defense in general, Bishop says:[13]

"What is absolute truth no man ordinarily knows, all act from what appears, not what is. If persons were to delay their steps until made sure, beyond every possibility of mistake, that they were right, earthly affairs would cease to move; and stagnation, death, and universal decay would follow. All, therefore, must and constantly do, perform what else they would not, through mistake of facts. If their minds are pure; if they carefully inquire after the truth, but are misled, no just law will punish them, however criminal their acts would have been if prompted by an evil motive, and executed with the real facts in view."

A soldier of subordinate grade is usually in the dark as to many facts pertinent to the question of the legality of his orders; and where, as will frequently be the case, it is imperative that he should not delay or impracticable for him to inquire into the facts, he should not be required to do either.

Therefore, where an order is given him by a superior, whom he is entitled to regard as better informed than himself and whom he

[13]New Criminal Law, 8th Ed., Vol. I, Sec. 303.

must under military law presume to be acting legally unless something to the contrary appears, such order should be given great evidential value toward establishing such a state of belief or ignorance on the soldier's part as would exculpate him were such believed condition of affairs actual.

Some such views are advanced by Hare and by Stephens.

Hare says:[14]

"A subordinate stands as regard to these principles in a different position from the superior whom he obeys and may be absolved from liability for executing an order which it was criminal to give.

The question is, as we have seen, had the accused reasonable cause for believing in the necessity of the act which is impugned? and in determining this point, a soldier or a member of the posse comitatus may obviously take the orders of the person in command into view as proceeding from one who is better able to judge and well informed; and if the circumstances are such that the command may be justifiable, he should not be held guilty for declining to decide that it is wrong with the responsibility incident to disobedience unless the case is so plain as not to admit of reasonable doubt."

Stephens says:[15]

"In all cases in which force is used against the person of another, both the person who orders such force to be used and the person using that force is responsible for its use and neither of them is justified by the circumstance that he acts in obedience to orders given him by a civil or military superior, but the fact that he did so act and the fact that the order was apparently lawful, are in all cases relevant to the question whether he believed in good faith and on reasonable grounds in the existence of a state of facts which would have justified what he did apart from such orders."

This rule, broadened so as to apply where the order, under the circumstances known to the soldier, could be legal, and strengthened so as to make such facts not only relevant but effective to raise an affirmative presumption is believed to be the rule that should be adopted by the civil and military courts in all criminal cases, except that the rule should be modified so as to provide for cases where the facts as believed by the soldier would justify him in acting under orders, but not without.

To illustrate:

A sentry over prisoners of war is present at an altercation between one of them and his superior officer, who directs the sentinel to take the prisoner out and shoot him.

On such a showing alone, without proof of the legality of the order, it would not even be relevant in his defense; conversely were the order in fact legal (as it would be where the officer carrying out

[14]American Constitutional Law, Vol. II, p. 920.
[15]Digest of the Criminal Law, Sec. 202.

sentence of a military commission) the sentry could not be convicted by a military court of disobedience of orders.

A soldier in time of war is ordered to seize private property of a citizen, there being nothing in the circumstances as known to the soldier negativing a necessity for such seizure.

The order in such a case raises a presumption that the soldier believed in good faith and on reasonable grounds in the existence of a state of affairs justifying the order and his acts under it; and should he disobey the order he would have to show its illegality.

Such a rule would go very far toward eliminating the present differences in the military and civil views of this matter and would enable each forum to dispose of such cases without any injustice that can be recognized as such.

16. In conclusion it may be stated that the sense of military persons founded on actual experience confirms the view that the hardship in such cases whatever rule may be adopted is "more apparent than real."

After a war, general acts relieving soldiers from prosecution for acts done in bona-fide obedience to orders such as were enacted after the civil war may be looked for; and, in ordinary times such cases are not often prosecuted.

Where they are prosecuted by a state the proceeding may sometimes be stopped through habeas corpus by a federal court, and in the rare event of an unjust conviction, a final resort may be had to the pardoning power, as was done in the case of General Bright and his co-defendants.

The practical result, under any rule, is as stated by Hare that a soldier "runs little risk in obeying any orders which a man of common sense so placed would regard as warranted by the circumstances."

17. Below is an alphabetical list of all sources used in the preparation of this paper, except those that have already been cited either in the footnotes or in the body of the paper.[16]

[16]American Decisions, Vol. 89, p. 616; Vol. 42, p. 54; Vol. 96, p. 274;
American Law Register, January, 1866;
Bacon's Abridgement, Vol. 6, p. 583;
Beck v. Ingraham, I Bush 355;
Bell v. Louisville, etc., R. R., 1 Bush 404;
Bramer v. Felkner, 1 Heisk 228;
Brown v. Huger, 21 Howard 305;
Bowles v. Lewis, 48 Mo. 32;
Burdett v. Abbott, 4 Taunt. 449;
Clode, Military Forces of the Crown, Vol. II, pp. 151-152; Vol. I, p. 155-156;
Commonwealth v. Palmer, 2 Bush 570;
Cobbett v. Grey, 4 Ex. Cases 735;

(Since the foregoing was written, legislation of some importance in connection with the questions discussed in this paper has been enacted. Section 1342 of the Revised Statutes, which includes the Articles of War for the government of the armies of the United States, was amended by an Act of Congress, approved August 29, 1916 [39 Stat. 650, et. seq.].

Article 117 provides:

"When any civil or criminal prosecution is commenced in any court of a State against any officer, soldier, or other person in the military service of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the military forces thereof, or under the law of war, such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States in the district where the same is pending in the manner prescribed in section thirty-three of the Act entitled 'An act to codify, revise, and amend the laws relating to the judiciary,' approved March third, nineteen hundred and eleven, and the cause shall thereupon be entered on the docket of said district court and shall proceed therein as if the cause had been originally commenced in said district court and the same proceedings had been taken in such suit or prosecution in said district court as shall have been had therein in said State court prior to its removal, and said district court shall have full power to hear and determine said case.")

Cooley on Torts, Vol. II, p. 631;
Cumming v. Diggs, 1 Heisk. 67;
Cunningham v. R. R. Co., 109 U. S. 446;
Darling v. Bowen, 10 Vermont 148;
Davidson v. Manlove, 2 Cold. 346;
Dicey, Law of the Constitution, p. 281;
Dinsman v. Wilkes, 7 Howard 89;
Dow v. Johnson, 100 U. S. 158;
Dynes v. Hoover, 20 Howard 65;
Eifort v. Bevins, 1 Bush 460;
Fair, In re, 100 Fed. Rep. 149;
Farmer v. Lewis, 1 Bush 166;
Ford v. Surget, 46 Miss. 130; S. C. 97 U. S. 594;
Foster's State Trials, Vol. 14, p. 391;
Griffin v. Wilcox, 27 Ind. 391;
Grisar v. McDowell, 6 Wall. 363;
Grimley, In re, 137 U. S. 153;
Hare's Constitutional Law, p. 906, et seq.;
Hatfield v. Graham, 81 S. E. 533;
Hawley v. Butler, 54 Barb. 490;
Henry v. Gardner, 10 Heisk. 420;
Hess v. Johnson, 3 W. Va. 645;
Hickey v. Huse, 56 Me. 493;
Hough v. Hoodless, 35 Ill. 166;
Ide v. U. S., 25 Ct. Cl. 407;
Ilott v. Wilkin, 3 B, and Ald. 315;
Indemnity Acts. U. S. Statutes at Large, passim; Constitution of Missouri;
Ives Military Law, pp. 106-108;

Kendall v. U. S., 12 Peters 524;
Lewis, In re, 83 Fed. Rep. 159;
Lewis v. McGuire, 3 Bush 202;
Martin v. Mott, 12 Wheat. 30;
McKrell v. Metcalf, 2 Duvall, 533;
Meigs v. McClung, 9 Cranch 11;
Merritt v. Nashville, 5 Cold. 95;
O'Brien, Military Law, pp. 82-84;
Ogden v. Lund, 11 Texas 688;
Opinions of the Atty. Gen., Vol. 2, p. 713;
People v. McLeod, 1 Hill 426;
Pollard v. Baldwin, 22 Ia. 328;
Pomeroy's Constitutional Law, Sec. 254-255;
Price v. Poynter, 1 Bush 387;
Richardson v. Crandall, 47 Barb. 335;
Short v. Wilson, 1 Bush 350;
Simmons on Courts-Martial, Sec. 594-595;
Smith v. Brazleton, 1 Heisk. 44;
Stafford v. Mercer, 42 Ga. 556;
Sutton v. Johnstone, 1 Term. 546;
Sutton v. Tiller, 6 Mo. 593;
Strange, 646;
Taylor v. Jenkins, 24 Ark. 337;
Tyler v. Pomeroy, 8 Allen 480;
U. S. v. Buchanan, 8 Howard 105;
U. S. v. Greiner, 4 Phila. 396;
U. S. v. Lee, 106 U. S. 196;
U. S. v. Lewis, 129 Fed. Rep. 823;
U. S. v. Lipsett, 156 Fed. Rep. 65;
University of Pennsylvania Law Register, Vol. 59, p. 646;
Waite, In re, 81 Fed. Rep. 359; S. C. 88 Fed. Rep. 107;
Walkins, Ex parte, 3 Pet. 208;
Waller v. Parker, 5 Cold. 476;
White v. McBride, 4 Bibb. 62;
Willman v. Wickeman, 44 Mo. 484;
Winthrop's Military Law and Precedents, pp. 445; 881-890;
Yost v. Stout, 4 Cold. 205.