MILITARY LAW
AND THE
SUPREMACY OF THE CIVIL COURTS.

O'SULLIVAN.

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MILITARY LAW

AND THE

SUPREMACY OF THE CIVIL COURTS

BEING THE JUDGMENT

OF

The Hon. Mr. JUSTICE McCARDIE

IN

HEDDON *v.* EVANS.

EDITED, WITH NOTES AND AN INTRODUCTION,

BY

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PREFACE.

THE main purpose of this little volume is to place at the disposal of those who are interested in English constitutional law and English military institutions the luminous judgment delivered by Mr. JUSTICE MCCARDIE in the great case of *Heddon* v. *Evans*.

The judgment which, through the courtesy of the learned judge, is printed in full in the pages that follow, dissolves all the doubts and uncertainties that previously surrounded the constitutional position of the soldier in English law. It defines the true nature and operation of military law and its relation to the general law and the Civil Courts. It demonstrates and establishes once for all the right of the soldier to seek—and the corresponding duty of the judges to afford—the protection of the Civil Courts against officers acting without or in excess of jurisdiction, whether as individuals or as members of a military tribunal.

In the Introduction an attempt is made to deal with the cognate matter of Martial Law and to indicate the constitutional position of the common citizen and the relations between civil and military courts exercising jurisdiction over ordinary citizens in times of rebellion and war within the realm.

RICHARD O'SULLIVAN.

2, Cloisters, Temple.
April, 1921.

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INTRODUCTION.

THE military law of modern times has its origin in the law that was administered in the middle ages in the Court of the Marshal and the Constable.

The Marshal and the Constable were the leaders of the King's army. As such they seem to have exercised jurisdiction over offences committed in the army, and especially when the army was on service overseas. The Court of the Constable and the Marshal through which their jurisdiction was exercised appears to have been in existence at least as early as the reign of Edward I. It is referred to in the records as the *curia militaris* or the Court of Chivalry.

The Court of the Constable and Marshal appears from the beginning to have exercised a civil and a criminal jurisdiction.

The civil jurisdiction of the Court of Chivalry was exercised in cases of words spoken in disparagement of men of honour, of heraldry, and of contracts relating to war made without the realm.

The ordinary criminal jurisdiction of the Court extended to appeals of treason or felony done by Englishmen outside the realm. In time of war this jurisdiction was enlarged and the Court acquired something of the character of a permanent court-martial, which followed the march of the army and punished in a summary manner military offences committed by persons subject to "marshal" law (*a*). Occasionally, as in the case of simul-

(*a*) Martial or marshal law is properly the law administered by the King's Marshal. The word "Marshal" is derived from *marescallus; mareschalk*, a stable servant. The Marshal was the Master of the Horse.

taneous military operations in different parts, several Constables and Marshals seem to hold office and exercise jurisdiction at one and the same time.

Trial appears to have been by witnesses, or failing witnesses by battle. A tract of the reign of Richard II., which is printed in the Black Book of the Admiralty and which is said to have been composed by or on behalf of Thomas Duke of Gloucester, Lord High Constable of England, gives an outline of the procedure:

"In first the quarrel and the bills of the appellant and the defendant shall be pleaded in the Court before the Constable and Marshal, and when they may not prove their cause by witnesses nor by any other manner but determine their quarrel by strength . . . the Constable hath power to join battle" (*b*).

The jurisdiction of the Constable and Marshal, it is conceived, was at all times limited to the person and the chattels of the offender. The Court had no power to pronounce sentence of outlawry or to levy distress on lands or tenements (*c*).

The earliest existing record of the Court of Chivalry consists of a roll of a military court attached to the army in Scotland in the 24th year of Edward I. (*d*). In the reign of Edward II., Roger Damory, a baron, was tried for high treason before the Court of the Marshal and the Constable. The act of treason alleged was levying war upon the King. Sentence of death was pronounced by the Constable, but the King directed a reprieve.

By the time of Richard II. the Court of Chivalry had begun to encroach on the jurisdiction of the criminal Courts and the Courts of common law. In 1379 the Commons petitioned against appeals of treason and felony *done in England* being brought by bill before the Constable and Marshal contrary to the

(*b*) *Monumenta juridica*, Rolls Series, 55, i. 301.
(*c*) Rot. Parl. iii. 473, 604—7.
(*d*) *Placita exercitus regis*, 24 Edw. 1.

law of the land and against the form of the Great Charter. By a statute of the 8th year of the reign of Richard II. (*e*) it was enacted that all pleas and suits touching the common law of the land "shall not hereafter be by any means drawn or holden before the Constable and Marshal, but that the Court of the said Constable and Marshal shall have what belongeth to the said Court." The civil jurisdiction of the Court was further defined and limited by a later statute of the same reign (*f*):

"To the Constable it pertaineth to have cognisance of contracts touching deeds of arms and war out of the realm and also of things that touch arms and war within the realm which cannot be determined nor discussed by the common law with other usages and customs to the same matters pertaining which the Constables have heretofore duly and reasonably used in their time, joining to the same that every plaintiff shall declare plainly his matter in the petition before that any man be sent for to answer thereunto. And if any will complain that any plea be commenced before the Constable and Marshal that might be tried by the common law of the land (*g*) the same shall have a privy seal of the King without difficulty, directing the said Constable and Marshal to surcease the plea in question until it be decided by the King's Council if that matter ought of right to pertain to that Court or otherwise to be tried by the common law of the realm."

(*e*) 8 Ric. 2, c. 5: "What suit shall be discussed before the Constable and Marshal of England." Cp. the statute 13 Ric. 2, c. 5: "What things the Admiral and his Deputy shall meddle."

(*f*) 13 Ric. 2, st. 1, c. 2. The preamble is as follows: "Because that the Commons do make a grievous complaint that the Court of the Constable and the Marshal hath encroached and daily doth encroach Contracts, Covenants, Trespasses, Debts and Detinue, and many other actions pleadable at the Common Law in great prejudice of the King and of his Courts and to the great grievance and oppression of the people."

(*g*) Cf. *Chambers* v. *Jennings* (1701), 7 Mod. 125.

Notwithstanding these protests and these statutes the activity of the Court of Chivalry continued to increase. By the use of the fiction that money was due *causa fidei lesionis pretense*, actions for debt were brought within its jurisdiction. By a similar device the Constable managed to maintain a certain control over appeals of treason and of felony. The 44th article of the indictment brought against Richard II. in 1399 contains an allegation against the King of the constant abuse of the criminal process of the Court (*h*).

In the first year of Henry IV. a statute (*i*) was passed ordaining "that all appeals to be made of things done within the realm shall be tried and determined by the good laws of the realm, made and used in the time of the King's most noble progenitors (*k*); and that all appeals to be made of things done out of the realm shall be tried and determined before the Constable and Marshall of England for the time being."

In one of the year books of Henry VI., the jurisdiction of the Constable and the Marshal is acknowledged by the King's Judges: "It appeareth that all the four justices agreed that the Constable and Marshal had a law by themselves whereof the common law doth take notice as well as it doth of the ecclesiastical law being a law of itself from the common" (*l*). And Hale's manuscript treatise on the prerogative contains a

(*h*) Characteristically enough, one of the first acts of Henry of Lancaster on his return to England to seize the Crown was to have Scrope, Earl of Wiltshire, tried and executed by a Court purporting to be a Court of the Lord High Constable. It was Henry of Lancaster who first made systematic use of the Court of Chivalry to purge the realm of his political enemies. By the end of the fifteenth century the Court of Chivalry is said to have become the recognised tribunal for procuring the judicial assassination of peers of the realm.

(*i*) 1 Hen. 4, c. 14.

(*k*) The statute of 13 Ric. 2, above referred to, was a law of the realm, but was not made by one of Henry's progenitors.

(*l*) 37 Hen. 6. Pasch. pl. 8; cited Hearne, Curious Discourses, ed. 1720, p. 259.

passage (*m*) which states that "in matters civil for which there is no remedy by the common law the military jurisdiction continues as well after the war as during the time of it; for that part of the jurisdiction of the Constable and the Marshal stands still: this is the proper jurisdiction of the Constable and Marshall, which though it be called *curia militaris* in respect of the subject matter, yet the jurisdiction is a formal settled jurisdiction and may be exercised as well in time of peace as war. This is that which is limited by the statute 13 Ric. II., *i.e.*, contracts touching deeds of arms and war without the realm and things that touch war within the realm which cannot be determined by the common law."

The Court of the Constable and Marshal continued to be active throughout the medieval period in England (*n*). On the attainder and execution of Buckingham, in 1521, the office of High Constable was forfeited to the Crown. Since that date no permanent appointment to the office of High Constable has been made, though the title has been revived from time to time on occasions of coronations and other like ceremonies.

After the disappearance of the Lord High Constable the criminal jurisdiction of the ancient Court came to be exercised by committees of officers who were empowered from time to time to enforce the body of rules by which the army was governed and discipline maintained. The old civil jurisdiction of the Court of Chivalry appears for a considerable period to

(*m*) Cited Knapp, 149—152.

(*n*) For an interesting account of the Court's activity, see Chapter XI. of Mr. L. W. Vernon Harcourt's delightful volume, "His Grace the Steward." And see 3 St. Tr. 483, for an account of proceedings in the Court of Chivalry on an appeal of high treason by Donald, Lord Rea, against Mr. David Ramsey, 7 Car. 1 (1631). In this case the note appears: "It seemeth that by the antient Common Law one accuser or witness was not sufficient to convict any person of High Treason, for in that case where is but one accuser it shall be tried before the Constable or Marshal by combat as by many records appeareth."

have been exercised by the Earl Marshal. About a century later, in the courts of common law, the absence of the Constable was taken as a pretext to challenge the jurisdiction which the Marshal thus continued to exercise in the ancient Court. The decision of the Lord Keeper and the Master of the Rolls and the Privy Council on that occasion was that the jurisdiction of the Marshal did not cease by reason of the non-existence of the Constable. A few years later, however, in 1640, the Court of the Marshal was voted a grievance by Parliament. And in a case in the reign of Anne (*o*) it was decided that in the absence of the Constable the Court was not properly constituted and was no longer a Court of Record; and that the jurisdiction of the Marshal sitting alone was in point of fact a mere encroachment. Soon after this decision the Court of the Marshal disappeared, though it seems never to have been formally abolished.

During the earlier period of activity of the Court of the Constable and Marshal, its jurisdiction extended in criminal matters (*p*) to "offences and miscarriages of soldiers contrary to the laws and rules of the army" (*q*). The Court of the Constable and Marshal was thus, in the language of Coke, "The fountain of marshal law" (*r*). "Always, preparatory to an actual war, the Kings of this realm by the advice of the Constable and Marshal were used to compose a book of rules and orders for the due order and discipline of their officers and soldiers, together with certain penalties upon the offenders, and this was called *martial law* (*s*); and we have extant in the Black

(*o*) *Chambers* v. *Jennings* (1701), 7 Mod. 125. The last case known to have been tried in the Court of the Marshal was *Sir H. Blount's Case* (1737), 1 Atk. 296; 3 Bl. Com. 1st ed. 103—106.

(*p*) *Vide* p. 1, *supra*.

(*q*) Hale, *History of the Common Law*, p. 42.

(*r*) In the modern sense of military law. The term marshal (or martial) law in Coke and Hale and other writers prior to Blackstone is commonly intended in this sense.

(*s*) In modern language, *military* law.

Book and elsewhere several examples of such military laws" (*t*). In his celebrated charge to the Grand Jury in *The Queen* v. *Nelson and Brand*, Cockburn, L.C.J., after referring to the constitutions issued by Richard I. and by John for the government of the army, next refers to the constitutions of Richard II., preserved in the Cottonian MSS. in the British Museum and entitled: "Statutes, Ordonnances, and Customs to be observed in the Army." These statutes are very remarkable:

"They form an elaborate code minute in its details to a degree that might serve as a model to anybody drawing up a code of criminal law. They follow the soldier into every department of military life and service. They point out his duties to his officers, his duties to the service, his duties to his comrades, his duties with regard to the unarmed population with whom he may come in contact. They show what would be infractions of these duties and attach specific penalties to every violation of the law so set forth" (*u*).

Statutes and ordinances of a substantially similar character were issued during the reigns of Henry V., Henry VII., Henry VIII., and Charles I., and are to be found among the records of their rule. Through this succession of ordinances (to borrow again from the charge of Cockburn, L.C.J., in *Reg.* v. *Nelson and Brand*): "The military law became tolerably fixed and settled and acquired, as all other law does by force of custom, the validity which custom gives." In the reign of James II. the old statutes and ordinances for the due order and discipline of the army appear under the new name of "Articles of War"; and are substantially embodied in the Articles of War which were published under statutory authority in the 17th, 18th, and 19th centuries, and which are now incorporated in the Army Act. "So far from being either framed without experience or unsanctioned by authority the modern military code is one

(*t*) Hale, *History*, p. 34.
(*u*) *Reg.* v. *Nelson and Brand*, Special Report, 89—90.

which in its main characteristics has governed the army for centuries" (*x*).

At common law (*y*) the criminal jurisdiction of the Constable could be exercised over the soldier abroad. Within the United Kingdom it could be exercised only in time of war. This limitation of the power of the "Court Marshal" over the soldier-citizen was reasserted in the Petition of Right (*z*) and admitted in the answer to the prayer. The Petition recites that: "Whereas by the Great Charter and other the laws and statutes of this your realm no man ought be adjudged to death but by the laws established in this your realm either by the customs of the same realm or by Acts of Parliament; and whereas no offender of what kind soever is exempted from the proceedings to be used and punishments to be inflicted by the laws and statutes of this your realm, nevertheless of late great companies of soldiers and mariners have been dispersed into divers counties of the realm and the inhabitants against their will have been compelled to receive them into their houses; that by statute 25 Edward III. and by Magna Carta 'no man shall be prejudged of life or limb against the form of the Great Charter and the law of the land' (*a*). Yet that divers commissioners have been appointed with power and authority to proceed *within the land* according to the justice of martial law against such soldiers or mariners or other dissolute persons joining with

(*x*) Clode, *Military and Martial Law*, p. 3.

(*y*) See pp. 4, 5, *supra*.

(*z*) See Magna Carta, c. 39: "Nullus liber homo capiatur vel imprisonetur aut dissaisiatur aut utlagetur aut exuletur aut aliquo modo destruatur, nec super eum ibimus nec super eum mittemus nisi per legale judicium parium suorum vel per legem terrae." The rule is reaffirmed in a succession of statutes: 9 Hen. 3, c. 29; 2 Edw. 3, c. 8; 5 Edw. 3, c. 9; 14 Edw. 3, st. 2, c. 14; 25 Edw. 3, st. 5, c. 4; 28 Edw. 3, c. 3; 42 Edw. 3, c. 3; 11 Ric. 2, c. 10; 4 Hen. 7, c. 12. See also Hale, Hist. Common Law, 53; 2 Hale, H. P. C. 156.

(*a*) These words are substantially repeated in the preamble to the first Mutiny Act, 1689.

them as should commit any murder, robbery, felony, mutiny, or other outrage or misdemeanour whatsoever, and by such summary course and order as is agreeable to martial law and as is used in armies in time of war to try and execute such offenders according to martial law; that offenders have escaped punishment upon pretence that the said offenders were punishable only by martial law"; and the Petition therefore prays "that Your Majesty would be pleased to remove the said soldiers and mariners and that the aforesaid commissions for proceeding by martial law may be revoked . . . . and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid lest by colour of them any of your Majesty's subjects be destroyed or put to death contrary to the laws and franchise of the land." To this prayer of the Lords and Commons the King answered *in pleno parliamento:* "Soit droit fait comme est desiré"; and the Petition of Right became a Statute of the Realm (*b*).

The effect of the Petition of Right appears to have been to forbid martial law within the realm, except perhaps in so far as might be necessary for the maintenance of order and discipline of the army in time of war. In 1672, accordingly, in promulgating a code of rules for the government of the troops (a code which formed the groundwork of the Articles of War, issued in 1878, and consolidated in the Army Act in the following year), the Crown was careful to state that its provisions would only be enforced abroad (*c*). And in 1685, after the suppression of

(*b*) 3 Car. 1, c. 1. It is to be noted that the words "*in time of peace*" do not appear in the Petition of Right, *pace* the curious statement to the contrary in the judgment delivered by the Privy Council in *Marais' Case,* (1902) A. C. 109. On the other hand, the learning of Mr. Edward Jenks has shown that a proposal made by the House of Lords that the words "*in time of peace*" should be inserted in the petition was rejected by the House of Commons for reasons there assigned.

(*c*) Cobbett's Parl. Hist. iv. 619. And see *R.* v. *Eyre,* Finlason's

Monmouth's rebellion, Kirke was directed to send soldiers guilty of more serious crimes to the ordinary Courts for trial as the Articles of War were in force only during the actual rebellion. The Bill of Rights (1688) (*d*) expressly stated that "the raising or keeping of a standing army within the kingdom in time of peace" is against law. In the next year, 1689, was passed the original Mutiny Act (*e*). The preamble to the Mutiny Act is full of constitutional and legal significance: "And whereas no man may be prejudged of life or limb or subjected to any kind of punishment by martial law (*f*), or in any other manner than by the judgment and according to the known and established laws of this realm; yet, nevertheless, it being requisite for retaining such forces as are or shall be raised during this exigence of affairs in their duty an exact discipline be observed. And that soldiers who shall mutiny, or stir up sedition, or shall desert their Majesties' service be brought to a more exemplary and speedy punishment than the usual forms of law shall allow: Be it therefore enacted": and so forth.

The modern system of military Courts, or Courts-martial, as they are called, was established by the Mutiny Act for the trial and punishment of offences committed by persons subject to military law. The Act authorised the Crown to maintain a standing army within the realm and to issue Articles of War

Report, *per* Blackburn, J., at p. 73: "I think it would be an exceedingly wrong presumption to say that the Petition of Right by not condemning martial law in time of war sanctioned it. Still it did not in terms condemn it." Compare Hale, *Pleas of the Crown*, i. 499.

(*d*) 1 Wm. & Mary, c. 2.

(*e*) For a statement of the circumstances which led up to the passing of the first Mutiny Act, see Manual of Military Law (1914), at pp. 10—11.

(*f*) In the Mutiny Act passed in the first year of the reign of Anne a curious alteration was made in the form of the preamble, which thereafter affirmed that "no man may be subjected *in time of peace* to any kind of punishment *within the realm* by martial law." The reason for the alteration is obscure: *R.* v. *Nelson and Brand*, p. 68, footnote.

providing for the better government of His Majesty's forces and inflicting penalties to be proceeded upon to sentence or judgment in these military Courts.

The duration of the first Mutiny Act was limited to seven months, from the 12th April, 1689, to the 10th November in the same year. On the 23rd December, 1689, a second Mutiny Act was passed; and afterwards, saving certain short intervals, a succession of annual Mutiny Acts were passed from the year 1690 to the year 1878. In 1702, the operation of the Act and of the Articles of War made under the Act was extended to Ireland, and in 1707 to Scotland, and at a later period to the British Dominions beyond the seas. In the well-known case of *Barwis* v. *Keppel* (*g*), in 1761, the Court of King's Bench decided that neither the Mutiny Act nor the Articles of War applied to the army when engaged in war abroad. Towards the close of the Peninsular War the Act and the Statutory Articles were applied to troops without as well as to those within the dominions of the Crown. The old prerogative power of making Articles for the better government of the army was thus merged in a statutory power (*h*). Military law then rested on a dual basis of Mutiny Act and Articles of War. The inconvenience of having a military code, contained partly in an Act of Parliament and partly in Articles made under that Act, led in 1879 to the consolidation of the Act and the Articles in one statute. Two years later the Army Discipline and Regulation Act of 1879 was repealed and re-enacted with amendments in the Army Act of 1881 (*i*), which is put into operation annually by the Army (Annual) Act. Thus is fulfilled the wish expressed by Mr. Justice Blackstone in his Commentaries: "That it might be thought worthy the wisdom of Parliament

(*g*) 2 Wils. Rep. 314. (*h*) 53 Geo. 3, c. 17, s. 146.

(*i*) Sect. 69 of the Army Act empowers the Crown to make further Articles of War provided the same do not contravene the provisions of the Army Act.

to ascertain the limits of military subjection and to enact express articles for the government of the army" (*k*). The Army Act and Rules of Procedure and King's Regulations made under the Army Act and Army Orders make up the modern military code.

The existence of a code of military law and a system of military Courts for its enforcement necessarily involves questions of supreme constitutional importance.

The first of these questions concerns the status of the soldier and the true nature and operation of military law and its relation to the general law and the civil Courts.

Prior to the illuminating judgment delivered by Mr. Justice McCardie in *Heddon* v. *Evans* (*l*) these matters had from time to time been considered in the Courts, but by reason of certain dicta in some of the earlier cases the law had been thrown into or had remained in a regrettable state of doubt and confusion. The pleadings and arguments in the case referred to reflect this confusion and uncertainty. The judgment which is printed below and which forms the main matter of this volume passes in review all the relevant cases and deals fully with all the points of law taken on the pleadings and argued at the trial, and seems finally to resolve all doubts and uncertainties and to set forth and establish the true principles of the law.

In the judgment in *Heddon* v. *Evans* the principle is reaffirmed that a man by becoming a soldier does not cease to be a citizen. In the law of England a soldier is an ordinary citizen armed and subject to discipline (*m*). Enlistment is a contract,

(*k*) Christian's Blackstone, i. 415.

(*l*) *Infra*. A summarised report is given in 35 Times Law Reports, 642. The principle of *Heddon* v. *Evans* was applied by Lord Reading, L.C.J., in *Andrews* v. *Clifford*, Times Newspaper, 18/20th December, 1920.

(*m*) See the opinion of the law officers, Sir Rufus Isaacs and Sir John Simon, dated 18th August, 1911, which is printed at p. 203 of the Manual of Military Law (1914). The first Mutiny Act (1 Wm. & Mary, c. 5, s. 6) declares: "Nothing in this Act contained shall

like marriage, involving a change of status which cannot be put off at the will of the soldier though he may violate the contract (*n*). But the status of soldier is superimposed, so to speak, on the status of the citizen. "Enlistment," says McCardie, J. (*o*), "imposes on the soldier special duties and special liabilities beyond the ordinary duties of an ordinary British subject." But these duties and liabilities, and the tribunals which can enforce them, are indicated by statutory enactment. "The compact or burden of a man who enters the army, whether voluntarily or not, is that he will submit to military law, not that he will submit to military illegality. He must accept the Army Act and Rules and Regulations and Orders and all that they involve. These (which may be called army legislation) define his status, they indicate his duties, they express his obligations, they announce his military rights" (*p*).

To the extent permitted by them his person and liberty may be affected and his property touched. Beyond these limits, both principle and authority assert that the liberty of a soldier should not be infringed, nor his person nor property invaded, save in so far as such infringement or invasion is permitted, either by the law military or the law civil.

Where, indeed, the right the soldier seeks to assert is conferred upon him, not by the common law, but only by the military law,

extend or be construed to exempt any officer or soldier whatsoever from the ordinary process of law." Hence, a soldier is subject to the same criminal liability as a civilian. (Cp. Army Act, ss. 41, 144, 162.) And see Clode, *Military Forces of the Crown*, i. p. 500; Dicey, *Law of the Constitution*, 7th ed. 297 *et seq.* It is particularly to be noted that in all conflicts of jurisdiction between a military and a civil Court the authority of the civil Court prevails. Thus, if a soldier is acquitted or convicted of an offence by a competent civil Court he cannot be tried for the same offence by a court-martial; but an acquittal or a conviction by a court-martial is no plea to an indictment for the same offence at assize (Army Act, s. 162).

(*n*) Cp. *Re Grimley*, 137 U. S. Supreme Court Reports, 147.

(*o*) *Infra*, p. 56. (*p*) *Infra*, p. 63.

the remedy is to be sought in the manner indicated by the military rules, on the principle that if a code at once provides the right and also the remedy, the code must be looked to alike to determine the limits of the privilege and the method of its enforcement (*q*).

If on the other hand the right which it is sought to assert is a right which is recognised and established at common law, such as immunity of person or liberty, then, save in so far as such right is curtailed or affected by the military code, it may be asserted in the ordinary Courts. The "great and protective" rule of law that a man who, without lawful authority, causes another to be arrested, imprisoned, or otherwise injured in his person or property, is liable to an action for damages in a civil suit, applies to acts of officers exercising jurisdiction individually or as members of military Courts. And in appropriate cases a writ of habeas corpus or certiorari or prohibition will issue in protection of the common law rights of a soldier against a military officer, or a military Court, acting without or in excess of jurisdiction. The principle is expressly stated by Lord Loughborough in delivering the judgment of the Court in the 18th century case of *Grant* v. *Gould* (*r*): "Naval Courts-martial, military Courts-martial, Courts of admiralty, and Courts of prize, are all liable to the controlling authority which the Courts of Westminster Hall have from time immemorial exercised for the purpose of preventing them from exceeding the jurisdiction given to them." The principle was re-affirmed by Cockburn, C.J., in a later case (*s*): "I quite agree that when the civil rights of a person in military service are affected by the judgment of a military tribunal in pronouncing which the tribunal has either acted without jurisdiction or has exceeded its jurisdiction, this Court ought to interfere to

(*q*) *Woods* v. *Lyttleton* (1909), 25 T. L. R. 662.
(*r*) (1792), 2 H. Blackstone, 69.
(*s*) *In re Mansergh* (1861), 1 B. & S. 400.

protect those civil rights, *e.g.*, where the rights of life, liberty, or property are involved"; and is re-stated by the Irish Lord Chief Justice in a very recent decision (*t*). "This Court (the Court of King's Bench) has always exercised jurisdiction over Courts-martial and over other inferior Courts, a power to prevent them acting without or in excess of jurisdiction. If a Court-martial acted without or in excess of jurisdiction the Court of King's Bench could exercise its controlling authority against the tribunal by writs of prohibition or certiorari and against the governor of the prison or whoever improperly detained a person by a writ of habeas corpus."

The authorities thus clearly support the proposition which is put forward as one conclusion in the judgment (*u*) that "a military tribunal or officer will be liable to an action for damages if, when acting in excess of or without jurisdiction, they or he do or direct to be done to another military man, whether officer or private, that which amounts to assault, false imprisonment, or other common law wrong, even though the injury inflicted purport to be done in the course of actual military discipline."

But the law is not so clear in reference to the proposition which forms the second conclusion in the judgment, the proposition, namely, that "if the act causing the injury to person or liberty be within jurisdiction and in the course of military discipline, no action will lie upon the ground only that the act has been done maliciously and without reasonable and probable cause" (*x*). As the learned judge points out (*y*), the question whether or not in

(*t*) *Ex parte Joseph Murphy*, Freeman's Journal, 1 February, 1921. In this case the Court of King's Bench decided that no relief can be given against an erroneous decision on a point of law given by a court-martial on a matter *intra vires*. But if the error took the form of a refusal to hear the defence, *semble* a writ of prohibition would be granted: *R.* v. *Mahony*, (1910) 2 Ir. 742; *Cox* v. *Mayor of London* (1867), 2 H. L. at p. 276. Cf. *Ex parte Farnsworth*, 37 T. L. R. 310. Cp. also, *Allen's Case* (1921), 65 Sol. Jo. 358.

(*u*) *Infra*, p. 87. (*x*) *Infra*, p. 87. (*y*) *Infra*, p. 73.

such circumstances an action will lie, has been at issue for a century and more (*z*) and remains undecided. "That question," said Lord Finlay, then Lord Chancellor, "is still open, at all events in this House. It involves constitutional issues of the utmost gravity" (*a*).

That an action *ought* to lie against an officer who wickedly abuses his position to the hurt of another military man, appears to be the opinion of the trial judge, who says (*b*): "It seems ever to be an integral part of our common law that a person who maliciously and unwarrantably abuses his statutory or official position to the injury of another will be liable in damages for his conduct" (*c*).

The foregoing propositions illustrate in a general way the constitutional position of the soldier in his relation towards his military superiors, and indicate the circumstances in which the civil Courts will interfere and afford him protection against an officer exercising jurisdiction individually or as a member of a military Court.

The process by which the Courts of law supervise the acts of

(*z*) Ever since the point was raised in the great case of *Sutton* v. *Johnstone* (1786), 1 T. R. 493 and 544. See also *Dawkins* v. *Rokeby* (1866), 4 F. & F. 806. Both these cases are discussed and considered in the judgment, *infra*, p. 73 *et seq.* Cp. *Wright* v. *Fitzgerald*, 27 St. Tr. 759, where it was held that an ordinary Act of Indemnity does not afford a cover to acts of private malice done under the pretence of suppressing a rebellion.

(*a*) *Fraser* v. *Hamilton*, 87 L. J. K. B. 1116; 34 T. L. R. 502.

(*b*) Cp. Finlason's *Commentaries on Martial Law*, xviii.: "The protection afforded by the common law applies only to those acts which have been really done in carrying out martial law. The House of Lords has established the great principle that a man cannot set up an authority unless he has really acted upon it: *Lucas* v. *Nockells*, 10 Bing. 157."

(*c*) *Infra*, p. 72. See the law and ethics of the matter discussed in an article by Professor Holdsworth, entitled "The Case of *Sutton* v. *Johnstone*," Law Quarterly Review, XIX. p. 222. The article is referred to in the notes at p. 46, *infra*.

Courts-martial, and of officers may be criminal, or civil. Criminal proceedings take the form of an indictment for assault, false imprisonment, manslaughter, or even murder. Civil proceedings may be preventive, *i.e.*, to restrain the commission or continuance of an injury; or remedial, to afford a remedy for injury actually suffered. Broadly speaking, the civil jurisdiction of the Courts of law is exercised as against the tribunal of a Court-martial by writs of prohibition or certiorari; and as against individual officers by actions for damages. A writ of *habeas corpus* also may be directed to any officer, governor of a prison or other, who has in his custody any person alleged to be improperly detained under colour of military law (*d*).

The existence of a standing army and of a system of military Courts introduces a further question of even greater constitutional importance than that which concerns the relation of the soldier towards his military superiors and other members of the military force.

The question thus introduced concerns the relation of the soldier (or "person subject to military law") towards the civil population in time of riot and disorder, and in time of rebellion or war within the realm.

In cases of riot and civil disorder the position of the soldier is one of considerable difficulty. On the one hand he is bound to obey any lawful order he may receive from his superior officer. On the other hand, a soldier cannot, any more than a civilian, avoid responsibility for breach of the law by pleading that he broke the law in bonâ fide obedience to the orders of his military superior.

(*d*) M. M. L. chap. viii. s. 8. In the recent case of *R.* v. "*Daily Mail*" *Editor, Ex parte Farnsworth* (1921), 37 T. L. R. 310, it was held that a court-martial convened for the trial of a person subject to military law is an inferior Court to protect which the Court of King's Bench will interfere in a proper case by process of contempt. See also *R.* v. *Davies,* (1906) 1 K. B. 32; and cf. Army Act, 1881, s. 126 (3).

The duty of soldiers in times of civil disturbance is indicated in a passage from the Report of the Featherstone Commission, which has been called "an almost judicial statement of the law":

"By the law of this country everyone is bound to aid in the suppression of riotous assemblages. The degree of force, however, which may lawfully be used in their suppression depends on the nature of each riot, for the force used must always be moderated and proportioned to the circumstances of the case, and to the end to be attained. The taking of life can only be justified by the necessity for protecting persons or property against various forms of violent crime, or by the necessity of dispersing a riotous crowd which is dangerous unless dispersed, or in the case of persons whose conduct has become felonious through disobedience to the provisions of the Riot Act, and who resist the attempt to disperse or apprehend them.

"Officers and soldiers are under no special privileges and subject to no special responsibilities as regards this principle of law. A soldier for the purpose of establishing civil order is only a citizen armed in a particular manner. He cannot, because he is a soldier, excuse himself if, without necessity, he takes human life. The duty of magistrates and peace officers to summon or to abstain from summoning the assistance of the military depends in like manner on the necessities of the case. A soldier can only act by using his arms. The weapons he carries are deadly. They cannot be employed at all without danger to life or limb and, in these days of improved rifles and perfected ammunition, without some risk of injuring distant and possibly innocent bystanders. To call for assistance against rioters from those who can only interpose in such grave conditions ought, of course, to be the last expedient of the civil authorities. But when the call for help is made and a necessity for assistance from the military has arisen, to refuse such assistance is in law a misdemeanour.

"The whole action of the military when once called in ought, from first to last, to be based on the principle of doing, and doing without fear, that which is absolutely necessary to prevent serious crime and of exercising all care and skill with regard to what is done. No set of rules exists which governs every instance, or defines beforehand every contingency that may arise. One salutary practice is that a magistrate should accompany the troops. But, although the magistrate's presence is of the highest value and moment, his absence does not alter the duty of the soldier, nor ought it to paralyse his conduct, but only to render him doubly careful as to the proper steps to be taken. No officer is justified in English law in standing by and allowing felonious outrage to be committed merely because of a magistrate's absence

"The question whether on any occasion the moment has come for firing upon a mob of rioters depends on the necessities of the case. Such firing, to be lawful, must be necessary to stop or prevent serious or violent crime; and it must be conducted without recklessness or negligence. When the need is clear, the soldier's duty is to fire with all reasonable caution so as to produce no further injury than what is absolutely wanted for the purpose of protecting person and property. An order from the magistrate who is present is required by military regulations, and wisdom and discretion are entirely in favour of the observance of such a practice. But the order of the magistrate has at law no legal effect. Its absence does not excuse the officer for declining to fire when the necessity exists. Its presence does not justify the firing if the magistrate is wrong. The justification of the officer and his men must stand or fall entirely by the common law. Was what they did necessary, and no more than necessary, to put a stop to or prevent felonious crime? In doing it, did they exercise all ordinary skill and caution so as to do no more harm than can be reasonably avoided?"

"If these two conditions are made out, the fact that innocent people have suffered does not involve the troops in legal responsibility. A guilty ringleader who, under such conditions, is shot dead, dies by justifiable homicide. An innocent person killed under such conditions, where no negligence has occurred, dies by accidental death. The legal reason is not that the innocent person has to thank himself for what has happened, for it is conceivable (though not often likely) that he may have been unconscious of any danger and innocent of all imprudence. The reason is that the soldier who fired has done nothing except what was his strict legal duty" (*e*).

In any case in which the law is broken it seems that the common soldier cannot avoid responsibility by pleading that he acted in bonâ fide obedience to the order of his superior officer. Hence he may, as it has been said (*f*), be liable to be shot by a Court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it. The legal duty of a soldier who receives such an order has never been clearly determined by the Courts. The matter is dealt with by Mr. Justice Stephen in his History of the Criminal Law:

"I do not think that the question how far superior orders would justify soldiers or sailors in making an attack upon civilians has ever been brought before the Courts of law in such a manner as to be fully considered and determined. Probably upon such an argument it would be found that the order of a

(*e*) Report of the Committee appointed to inquire into the circumstances connected with the disturbance at Featherstone on the 7th September, 1893 (C. 7234). And see the opinion of Copley, cited in Forsyth's *Constitutional Law:* "The only rule that can be given is that the force (used to suppress a riot) to be legal and justifiable must in every instance, as far as the infirmity of human passion will admit, be governed by what the necessity of the particular occasion may require." For a statement by Lord Haldane on the employment of military in cases of disturbance, see *Parl. Paper*, 1908, H. C. 236, reprinted *Manual of Military Law*, 1914, at pp. 225 *et seq.*

(*f*) Dicey, *Law of the Constitution*, 7th ed. 299.

military superior would justify his inferiors in executing any orders for giving which they might fairly suppose their superior officer to have good reasons. Soldiers might reasonably think that their officer had good grounds for ordering them to fire into a disorderly crowd, which to them might not appear at that moment engaged in acts of dangerous violence, but soldiers could hardly suppose that their officer could have any good grounds for ordering them to fire a volley down a crowded street when no disturbance of any kind was either in progress or apprehended. The doctrine that a soldier is bound under all circumstances whatever to obey his superior officer would be fatal to military discipline itself, for it would justify the private in shooting the colonel by the orders of the captain, or in deserting to the enemy on the field of battle on the order of his immediate superior. I think it is not less monstrous to suppose that superior orders would justify a soldier in the massacre of unoffending civilians in time of peace or in the exercise of inhuman cruelties, such as the slaughter of women and children, during a rebellion. The only line that presents itself to my mind is that a soldier should be protected by orders for which he might reasonably believe his officer to have good grounds. The inconvenience of being subject to two jurisdictions, the sympathies of which are not unlikely to be opposed to each other, is an inevitable consequence of the double necessity of preserving on the one hand the supremacy of the law, and on the other the discipline of the army" (*g*). The hardship of the soldier's position is mitigated and a practical way of escape from these difficulties is provided by the power the Attorney-General has to enter a *nolle prosequi*, and by the power of the Crown to grant a pardon in a proper case.

Such in outline is the relation of the soldier towards his fellow-citizens in times of riot and civil disturbance.

(*g*) Stephen, *Hist. Crim. Law*, i. 205, 206.

It remains only to consider the relation of the army and its members towards the civil population in time of rebellion or war within the realm. What, in other words, is the true scope and meaning, in England, of that which is called "martial law" (*h*)?

On this topic, as on other topics of constitutional law, the most convincing statement is that of Professor Dicey (*i*): "Martial law," he says, "in the proper sense of that term in which it means the suspension of ordinary law and the temporary government of a country or parts of it by military tribunals, is unknown to the law of England (*k*). We have nothing equiva-

(*h*) In dealing with these topics one has always to bear in mind the *modern* distinction between military and martial law. "Military is distinct from martial law in that it applies only to persons in the military or naval service of the government; whereas martial law, when once established, applies alike to citizens and soldiers": *U. S.* v. *McDonald*, 265 F. 761, citing *Ex parte Milligan*, 4 Wall. 2. In the older authorities, *e.g.*, Hale, this distinction is not observed, and the term "martial law" is commonly used in the modern meaning of "military law." For this reason the statements of these older authorities on these topics require to be used with care.

(*i*) *Law of the Constitution*, 7th ed. ch. ix.; Appendix, note (*x*).

(*k*) Professor Dicey is careful, in a footnote, to limit the statement to *England*, to the exclusion of other parts of the British Empire. The statement is not true of India, for instance: *Bugga* v. *King-Emperor*, L. R. 47 Ind. App. 28; 36 T. L. R. 340; *Kali Nath* v. *King-Emperor*, 37 T. 162; and is probably not true of the Crown Colonies: *per* Cockburn, C. J., in *R.* v. *Nelson*. On the other hand, the statement in the text would seem to be true of the self-governing Dominions: Keith, Responsible Government in the Dominions, ed. 1912, vol. i. p. 269: "In no self-governing Colony is there any provision for martial law as part of the law of the land; and there is, therefore, no statutory basis on which the proclamation of such law can rest. Nor, again, can it be held that there is any common law right to proclaim martial law: it is no part of the prerogative to upset the established law of the land. On the other hand, there need not necessarily be any illegality in the issue of a proclamation of martial law. For, after all, the proclamation stripped of its phrascology merely means that, in the opinion of the Executive, there exists a state of matters in which the

lent to what is called in France the "Declaration of the State of Siege," under which the authority ordinarily vested in the civil power for the maintenance of order and police passes entirely to the army." The proclamation of martial law in this sense of the term is in effect the temporary and recognised government of a country or parts of it by military force. The legal aspect of such a condition of affairs is indicated by the provisions of the law which regulates the state of siege in France:

"7. Aussitot l'état de siège déclaré, les pouvoirs dont l'autorité civile était revêtue pour le maintien de l'ordre et de la police passent tout entiers à l'autorité militaire. L'autorité civile continue néanmoins á exercer ceux de ces pouvoirs dont l'autorité militaire ne l'a pas dessaisie.

"8. Les tribunaux militaires peuvent être saisis de la connaissance des crimes et délits contre la sûreté de la République, contre la constitution, contre l'ordre et la paix publique, quelle que soit la qualité des auteurs principaux et des complices.

suspension of the ordinary legal forms is necessary, and it operates as a warning to citizens that this is the case and that they should, therefore, be on their guard to maintain order." For an enumeration of instances in which martial law has been proclaimed in the Colonies, see Keith, *ibidem*, i. 276. In this matter of martial law, as in other matters, Ireland would appear to occupy a somewhat peculiar position. The Petition of Right is said to apply to the realm of England only, and not to Ireland: Finlason, *Commentaries*, Preface, p. 1. And an Act of the Irish Parliament (37 Geo. 3, c. 11) and 43 Geo. 3, c. 117 and the Irish Coercion Act of the United Kingdom Parliament (3 & 4 Will. 4, c. 4, s. 40) speak of the "undoubted prerogative" of the Crown to resort to the exercise of martial law. But though the existence of the prerogative is thus declared, its nature and extent are nowhere defined. And see the opinion of Edward James and Fitzjames Stephen (Forsyth, *Constitutional Law*, 555), where it is said: "It is impossible to suppose that such a declaration should operate as a repeal of the Petition of Right as regards Ireland. It must probably be construed to mean only that the Crown has an undoubted prerogative to attack an army of rebels by regular forces conducting themselves as armies in the field generally do."

"9. L'autorité militaire a le droit,—1° de faire des perquisitions, de jour et de nuit, dans le domicile des citoyens;—2° D'éloigner les repris de justice et les individus qui n'ont pas leur domicile dans les lieux, soumis à l'état de siège;—3° D'ordonner la remise des armes et munitions, et de procéder à leur recherche et à leur enlèvement;—4° D'interdire les publications et les réunions qu'elle juge de nature à exciter ou à entretenir le désordre" (*l*).

"Now this kind of martial law," Professor Dicey proceeds, "is in England utterly unknown to the constitution (*m*). Soldiers may suppress a riot as they may resist an invasion, they may fight rebels as they may fight foreign enemies, but they have no right under the law *to inflict punishment* for riot or rebellion. During the effort to restore peace, rebels may be lawfully killed, just as enemies may be lawfully slaughtered in

(*l*) Roger et Sorel, *Codes et Lois*, 436, 437, cited Dicey, 7th ed. 287, 288. "We may reasonably conjecture," adds Professor Dicey, "that the terms of the law give but a faint conception of the real condition of affairs when in consequence of tumult or insurrection a state of siege is declared or 'the constitutional guarantees are suspended.'"

(*m*) Compare, however, the proclamations of 10th December and 12th December, 1920, by which martial law was proclaimed in certain Irish counties. By the latter proclamation the Commander-in-Chief of the Forces in Ireland appointed a number of military governors for the administration of martial law in such counties and commanded all persons to render obedience to their order in all matters whatsoever. The proclamation declared that a state of armed insurrection existed in Ireland and created a number of new offences (some of which were made punishable with death), and empowered military Courts to try civilians for such offences and to inflict punishment of death or penal servitude. At the same time, the Commander-in-Chief directed and empowered the law Courts, corporations, councils and boards to continue to carry out their functions until otherwise ordered. In the recent case of *Allen*, the Court of King's Bench in Ireland stated it had no jurisdiction during the continuance of the rebellion to interfere with the acts of the military even though those acts be apparently unlawful. See *The King* v. *Allen* (1921), 65 Sol. Jo. 358.

battle or prisoners may be shot to prevent their escape, but any execution (independently of military law) inflicted by a Court-martial is illegal and technically murder" (*n*).

The meaning of martial law is thus confined by Professor Dicey to the common law right of the Crown and its servants to repel force by force in the case of invasion, insurrection, riot, or generally of any violent resistance to the law. Martial law in this sense means "the power, right, or duty of the Crown to maintain public order, or in technical language, the King's peace, at whatever cost of blood or property may in strictness be necessary for that purpose. Hence martial law comes into existence in times of invasion or insurrection when, where, and in so far as the King's peace cannot be maintained by ordinary means, and owes its existence to urgent and paramount necessity.

This power to maintain the peace by the exertion of any amount of force strictly necessary for the purpose is sometimes described as the prerogative of the Crown, but it may more correctly be considered, not only as a power necessarily possessed by the Crown, but also as "the power, right, or duty, possessed by every loyal citizen, of preserving or restoring the King's peace by the use of any amount of force whatever necessary to preserve or restore the peace" (*o*).

The legal effect of a proclamation of martial law is stated in the following terms in the Report of the Royal Commission (consisting of Sir John Simon, K.C., Chief Justice Molony,

(*n*) *Law of the Constitution*, 7th ed. 289. Compare Blackstone: "Martial law may be defined as the law (whatever it may be) which is imposed by the military power, and in its true sense has no place in the institutions of this country": Comm. II. 561.

(*o*) *Law of the Constitution*, 7th ed. Appendix X. 539. And see *Wright* v. *Fitzgerald*, 27 St. Tr. 765: "Every man, whether magistrate or not, was authorised to suppress rebellion and was to be justified by that law for his acts; it is required that he should not exceed the necessity which gave him the power." A different view of the nature of martial law is propounded in an attractive argument by Sir Frederick Pollock in Law Quarterly Review, xviii. 152; xix. 230.

and Mr. Denis Henry, K.C.), on the arrest and subsequent treatment of Mr. Sheehy-Skeffington, in 1916: "It is a delusion to suppose that a proclamation of martial law confers upon an officer any right to take human life in circumstances where this would have been unjustifiable without such a proclamation. Such a proclamation does not of itself confer upon officers or soldiers any new powers. It operates solely as a warning that the Government, acting through the military, is about to take such forcible and exceptional measures as may be necessary for the purpose of putting down insurrection and restoring order. As long as the measures are necessary they might equally be taken without any proclamation at all. The measures that are taken can only be justified by the circumstances then existing, and the practical necessities of the case." To the same effect writes Professor Holdsworth (*p*): "The proclamation (of martial law) in no way adds to the powers inherent in the Government of using force to suppress disorder. The proclamation must be regarded as the statement of an existing fact, rather than the legal creation of that fact." Of the like opinion is Professor Maitland: "A proclamation of martial law can have no other legal effect than this: it is a proclamation by the King, or by persons holding office under the King, announcing that a state of things exists in which it has become necessary that force shall be repelled and suppressed by force; it is a warning that the part of the common law which sanctions such repulsion and suppression has come into play. A Court of law, an ordinary Court of law, may afterwards have to judge whether really there was a legal justification for these

(*p*) In an article entitled "*Martial Law Historically Considered*," L. Q. R. xviii. 129. See also the statement of Lord Halsbury in *Tilonko's Case*, (1907) A. C. 93: "The notion that martial law exists by reason of the proclamation is an entire delusion. The right to administer force against force in actual war does not depend upon the proclamation of martial law at all. It depends upon the question whether there is war or not."

high-handed acts, which were done in the name of peace and order. But suppose one of the rebels captured, there is no Court that can *try* him save the ordinary Criminal Courts of the country" (*q*).

The opinions of these constitutionalists of our own time are in line with the statutes of the realm and all the great authorities on the common law. The rule that a civilian may not be tried or punished, except by the ordinary Courts, and for an offence known to the law, is at least as old as Magna Carta (*r*). A striking illustration of the rule is provided by the resolution pronounced by Parliament in the reign of Edward III., in the case of Thomas, the rebel Earl of Lancaster. In the year 1322 the Earls of Lancaster and Hereford rebelled against the authority of King Edward II. They fought the battle of Boroughbridge, in which they were defeated by the forces of the King. Hereford was slain in battle, and Lancaster, taken in arms, and amid the noise of battle, was tried by a Court-martial, presided over by the King, and sentenced to death and executed. When Edward III. came to the throne eight years later, on a formal petition presented to Parliament by Lancaster's son, the case was examined and a law enacted reversing the attainder of the rebel Earl, on the ground that at the

(*q*) Maitland, *Constitutional History*, 491, 492. "In 1780, when the followers of Lord George Gordon sought to destroy London, the military in acting without the civil power were so far supreme, but their supremacy ceased when the riots were put down and the prisoners were handed over to and tried by the civil tribunals": Clode, *Military and Martial Law*, 165.

(*r*) Art. 39: "Nullus liber homo capiatur vel imprisonetur aut dissaisiatur aut utlagetur aut exuletur aut aliquo modo destruatur nec super eum ibimus nec super eum mittimus nisi per legale judicium parium suorum vel per legem terrae." See also 9 Hen. 3, c. 29; 5 Edw. 3, c. 9; 25 Edw. 3, st. 5, c. 4; 28 Edw. 3, c. 3; 11 Ric. 2, c. 10; 3 Car. 1, c. 1 (Petition of Right); 16 Car. 1, c. 10. And see Hale, *History*, 53; 2 Hale, H. P. C. 156.

date of his trial and sentence the civil Courts were open, and declaring:

"1. That in time of peace no man ought to be adjudged to death for treason, or any other offence, without being arraigned and held to answer;

"2. That regularly when the King's Courts are open it is a time of peace in judgment of law.

"3. That no man ought to be sentenced to death by the record of the King without his legal trial *per pares*" (*s*).

To the same effect are the opinions of Coke, Noy, Banks, Rolle, and others, on which the Petition of Right was afterwards founded (*t*). "A rebel," says Coke, "may be slain in rebellion, but if he be taken he cannot be put to death by the martial law." And Rolle (afterwards Chief Justice): "The law of the Marshal is the King's law, and the common law takes notice of it. We acknowledge it to be so, but now the question is: when is it to be used? And upon whom? The common law is the highest for the subject. Every liege man inherits the law. It is the inheritance of the King. This is merely for necessity where the common law cannot take place.

If an enemy come into any part where the common law cannot be executed, there may the martial law be executed. If a

(*s*) Hale, *Pleas of the Crown*, 344, 499, 500. The same case is referred to in Rushworth, iii. Appendix, 78, and is cited in the argument in *Ex parte Milligan*, 4 Wall. 2. Reference was also made in the argument to the debate in Parliament in the case of *Missionary Smith* (1823), in which Brougham said: "No such thing as martial law is recognised in Great Britain and Courts founded on proclamations of martial law are wholly unknown." It shakes one's faith in democracy to know that Brougham and Sir James Macintosh, who spoke strongly on the same side, were in a minority of forty-six on a vote being taken in the House of Commons.

(*t*) See Rushworth's Collection, iii. Appendix, 76—81.

subject be taken in rebellion and be not slain at the time of his rebellion, he is to be tried after by the common law" (*u*).

The Petition of Right re-affirmed the principle of the Great Charter and other the laws and statutes of the realm: "That no man ought to be adjudged to death but by the laws established in this realm either by the customs of the realm or by Acts of Parliament; and that no offender of what kind soever is exempted from the proceedings to be used and punishments to be inflicted by the laws and statutes of the realm" and enacted "that no freeman shall be imprisoned or detained" otherwise than in due course of law; and "that no commissions for proceeding by martial law shall issue forth hereafter to any person or persons whatsoever lest by colour of them any of His Majesty's subjects be destroyed or put to death contrary to the laws and franchise of the land" (*x*).

Again, in the preamble to the first Mutiny Act (1689), the old rule is re-stated, and it is declared "that no man can be fore-

(*u*) The opinion of Rolle refers also to the case of John Montague, Earl of Salisbury, who was in rebellion against Henry IV. and was taken as a rebel and put to death. In the second year of the reign of Henry V. his son brought an Error and assigned that he was a day and a half in prison after his apprehension and was put to death without a trial at law contrary to Magna Carta.

(*x*) 3 Car. 1, c. 1; Statutes at Large, vii. 317. In *Ex parte Marais*, (1902) A. C. 109, at p. 115, Lord Halsbury, in delivering the judgment of the Privy Council, made the extraordinary statement that "the framers of the Petition of Right knew well what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure." The Petition of Right does *not* refer to "time of peace." Neither does it *expressly* refer to time of war. But, as Blackburn, J., said in *R.* v. *Eyre*, "it would be an exceedingly wrong presumption to say that the Petition of Right by not condemning martial law in time of war sanctioned it." The researches of Mr. Edward Jenks have since shown that the House of Lords did propose to limit the scope of the Petition to "time of peace," and that the House of Commons in a reasoned statement rejected the proposed amendment.

judged of life or limb or subjected to any kind of punishment by martial law or in any other manner than by the judgment of his peers and according to the known and established laws of this realm" (*y*).

In Hale's *History of the Common Law* (*z*) it is written: "Touching the business of martial law these things are to be observed:

"1. That in truth and reality it is not a law but something indulged rather than allowed as a law: the necessity of government, order and discipline in an army is that only which can give these laws countenance: *quod enim necessitas cogit defendit*.

"2. That this indulged law was only to extend to members of the army, or to those of the opposed army, and never was so much indulged as intended to be executed or exercised upon others, for others who had not listed under the army had no colour or reason to be bound by military constitutions applicable only to the army whereof they were not parts, but they were to be ordered and governed according to the laws to which they were subject, *though it were a time of war*.

"3. That the exercise of martial law whereby any person should lose his life, or member, or liberty, may not be permitted in time of peace when the King's Courts are open for all persons to receive justice according to the laws of the land. This is declared in the Petition of Right whereby such commissions and

(*y*) 1 Wm. & Mary, c. 5. The interpolation of the words "in time of peace" after "subjected" in the preamble to the first Mutiny Act passed in the reign of Anne does not, of course, alter the law and does not seem to possess any real constitutional significance: see *per* Cockburn, L. C. J., in *R.* v. *Nelson and Brand*, p. 68.

(*z*) Ed. 1820; Runnington, 42, 43. In this passage it is clear the historian is thinking of martial law as the law administered in the Court of the Marshal, and *primarily*, therefore, of what in modern times is called *military* law.

martial law were repealed and declared to be contrary to law."

And again: "In time of peace (*a*) the exercise of martial law in point of death is declared murder." So also Comyn: "Martial law cannot be used in England without authority of Parliament." And Blackstone: "Martial law in its true sense may be defined as the law (whatever it may be) which is imposed by the military power and has no place in the institutions of this country."

The principle that while the King's Courts are open martial law may not be exercised over a civilian was asserted with what Professor Dicey calls noble energy, by the Irish judges in *Wolfe Tone's* case (*b*). In 1798, Tone, an Irish rebel, took part in a French invasion of Ireland. The man-of-war in which he sailed was captured and Wolfe Tone was brought to trial in Dublin before a military Court. He was sentenced to be hanged. He held no commission as an English officer, his only commission being one from the French Republic. On the morning appointed for his execution Curran applied to the Irish King's Bench for a writ of *habeas corpus*. The ground of the application was that while the King's Courts were open Tone, not being a military person, was not subject to trial or punishment by a military Court, and that the officers comprising the Court by which he was sentenced were attempting illegally to enforce martial law. The Court of King's Bench immediately granted the writ. The officer in charge of the prison refused to obey the order of the Court to stay the execution on the ground that it was not an order from his military superiors. The Irish Chief Justice forthwith commanded the sheriff to take possession of the body of Wolfe Tone and to take the Provost-Marshal in custody into the bargain(*c*).

(*a*) That is, when the King's Courts are open: Hale, *Pleas of the Crown*, 499.

(*b*) 27 St. Tr. 614.

(*c*) 27 St. Tr. 614. The whole story is alive with dramatic interest.

The principle of *Wolfe Tone's* case and of the older statutes and authorities is re-affirmed in the opinions of modern jurists. "The right of resorting to such an extremity (as martial law) is a right arising from and limited by the necessity of the case: *quod enim necessitas cogit defendit*. For this reason we are of opinion that the prerogative does not extend beyond the case of persons taken in open resistance and with whom by reason of the suspension of the ordinary tribunals it is impossible to deal according to the regular course of justice. When the regular Courts are open so that criminals might be delivered over to them to be dealt with according to law there is not, as we conceive, any right in the Crown to adopt any other course of proceeding. Such power can only be conferred by the Legislature as was done by the Acts passed in consequence of the Irish Rebellion in 1798 and 1803, and the Irish Coercion Act, 1833" (*d*).

"The expression 'martial law' has survived and has been applied (we think inaccurately and improperly) to the common law right of the Crown and its representatives to repel force by force in the case of invasion or insurrection. The authorities appear to show that it is illegal for the Crown to resort to martial law as a special mode of punishing rebellion" (*e*).

And Cockburn, L.C.J., in his celebrated charge to the grand

On the morning appointed for his execution Tone cut his throat with a penknife as a protest against the decision to hang him as a criminal instead of allowing him to be shot as a soldier as he had asked. On being told that the wound was not likely to prove fatal, "I find then," said he, "I am but a bad anatomist." He died three days later. The French Republic, on the motion of Lucien Bonaparte, granted a pension for the support of his widow and children.

(*d*) Opinion of Law Officers (Campbell and Rolfe, afterwards Lord Cranworth), cited Forsyth, 198, 199. The object of the Act of 1803 was stated by Pitt to be "to enable the Lord Lieutenant when any persons shall be taken in rebellion to order them to be tried immediately by a court-martial." See Clode, Military and Martial Law, 174.

(*e*) Opinion of Law Officers (Edward James and Fitzjames Stephen), cited Forsyth, 555.

jury in *R.* v. *Nelson and Brand* (*f*), says: "So far as I have been able to discover, no such thing as martial law has ever been put into force in this country against civilians for the purpose of putting down rebellion."

In the great American case of *ex parte Milligan*, which arose out of the Civil War, the judgment of the Court affirmed that "the laws and usages of war can never be applied to citizens in states which have upheld the authority of the government and where the Courts are open and their process unobstructed." "If," said Davis, J., delivering the judgment of the Court, "in foreign invasion or civil war the Courts are actually closed and it is impossible to administer criminal justice according to law, then on the theatre of active military operations where war really prevails, there is a necessity to furnish a substitute for the civil authority thus overthrown to preserve the safety of the army and of society; and as no power is left but the military it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the Courts

(*f*) Special Report, 47. The statement of the law by Cockburn, L. C. J., in *R.* v. *Nelson and Brand*, is adversely criticised by Finlason, Commentaries on Martial Law. The contention of Finlason and others appears to be that the Crown retains a prerogative right to declare and exercise "martial law" in time of rebellion. To this contention there are at least two objections: (1) Assuming that such a prerogative existed, it was exercised through the Court of the Constable and Marshal. And the Court is no longer in existence. (2) There is no sufficient ground for saying that the jurisdiction of the Court of the Marshal and the Constable ever extended beyond persons actually combatant in rebellion to all citizens combatant or non-combatant. The argument in favour of such a prerogative is supported to some extent by certain proclamations of martial law in the time of the Tudors and Stuarts. But these proclamations appear to have been (a) illegal, (b) issued *in terrorem* only and not enforced. Even if such proclamations were lawful at the time they were issued, they would now be illegal by reason of the alteration of the law effected by the Petition of Right.

are reinstated, it is a gross usurpation of power. Martial rule can never exist where the Courts are open, and in the proper and unobstructed exercise of their jurisdiction" (*g*).

These authorities, it is conceived, fully establish the following propositions:

That martial law in the sense in which it means the suspension of ordinary law and the temporary government of a country, or parts of it, by military tribunals, is unknown to the law of England;

That martial law in England means no more than the common law right of the Crown and its servants to repel force by force in the case of invasion, insurrection, riot, or generally of any violent resistance to the law;

That necessity is the criterion by which the legality or illegality of any purported exercise of such right is to be tested;

That soldiers have no right under the law to inflict punishment for riot or rebellion; and

That acts done by military authorities and others during a state of insurrection are examinable in the ordinary Courts (*h*).

The proposition that the acts of the military authorities during a state of insurrection may be challenged in the civil Courts (if the civil Courts are sitting) is admittedly inconsistent with the principle which is supposed to have been established by the judgment of the Privy Council in *Marais' Case* (*i*),

(*g*) *Ex parte Milligan*, 4 Wall. 2, at p. 121. The headnote to this case states the following proposition: "12. A citizen not connected with the military service and resident in a state where the Courts are open and in the proper exercise of their jurisdiction cannot, even when the privilege of the writ of *habeas corpus* is suspended, be tried, convicted or sentenced otherwise than by the ordinary courts of law."

(*h*) See Clode, *Mil. Forces of the Crown*, i. 161: "The remedy, as in other cases of usurped power, is an appeal to the common law tribunals. In *Wolfe Tone's Case* the appeal was not made in vain; and the judgment of Mr. Justice Davis in *Ex parte Milligan* upheld the supremacy of the civil tribunals in all cases where they were open and in the unobstructed exercise of their jurisdiction."

(*i*) (1902) A. C. 109. See also *Tilonko's Case*, (1907) A. C. 93.

the principle, namely, that "where actual war is raging," no acts done by the military authorities (even though they be done maliciously, or without jurisdiction, or in excess of jurisdiction) are justiciable by the ordinary tribunals. This principle does *not* signify (what it has been sometimes taken to mean) that the acts of the military authorities are not examinable by the ordinary Courts *when the war is over*. It only means that *whilst war is actually raging* (*k*) the ordinary Courts will not entertain proceedings against military men for acts done in purported execution of martial law. Thus limited even, the decision of the Privy Council (it is hardly necessary to point out) is not binding on any English Court, and probably is not binding on the Privy Council itself on any future occasion (*l*).

The principle of *Ex parte Marais* was applied by the Court of King's Bench in Ireland in *Allen's Case* (*Freeman's Journal*, 25th February, 1921), 65 Sol. Jo. 358.

(*k*) The question whether there was a state of war at a given time and place is a question of fact (*Tilonko* v. *A.-G. of Natal*, (1907) A. C. at p. 95), of which, *semble*, the Courts may take judicial notice: *Marais' Case, ubi sup.* In *Allen's Case* the Crown filed an affidavit by the Commander-in-Chief alleging a state of war. The meaning of the terms "state of war" and "theatre of war" have been recently considered by the American Courts in *U. S.* v. *McDonald*, 265 F. 754. See, also, *U. S.* v. *Wolters* (1920), 268 Fed. 69, and a valuable note on this case in 34 Harvard Law Review, 659.

(*l*) *Per* Sir Frederick Pollock in L. Q. R. xviii. 158. And see *Ridsdale* v. *Clifton*, 2 P. D. 306, 307. It is submitted, further, that the rule stated in the headnote to the Report in *Marais' Case* is not supported by the authorities on which it is supposed to be founded. The only authorities referred to in the judgment are the earlier decision of the Judicial Committee in *Elphinstone* v. *Bedreechund* (1 Knapp, P. C. 316) and the Petition of Right. The reference to the Petition of Right is, as has been pointed out, a gross misstatement of the statute. And it is, perhaps, open to doubt whether the case of *Elphinstone* v. *Bedreechund* really decided what the judgment in *Marais' Case* assumed it to decide. The headnote in that case is as follows: "The members of the provisional government of a recently conquered country seized the property of a native of the conquered country who had been refused the benefit of the articles of capitu-

Moreover, the rule in *ex parte Marais* is, it is submitted, against the weight of authority in England. It is inconsistent with

lation of a fortress of which he was governor, but who had been permitted to reside under military surveillance in his own house in the city in which the seizure was made and which was at a distance from the scene of active hostilities. *Held*, that the seizure must be regarded in the light of a hostile seizure and that a municipal Court had no jurisdiction in the subject. *Semble*, the circumstance that at the time of the seizure the city where it was made had been for some months in the undisturbed possession of the provisional government and that Courts of justice under the authority of the provisional government were sitting for the administration of justice do not alter the character of the transaction." The argument of the Attorney-General was apparently twofold: first, that Narroba, the owner of the property seized, was at all material times an enemy alien and was, therefore, not entitled to sue for the conversion of the property (on the principle illustrated in *Buron* v. *Denman* (1848), 2 Ex. 167); and, second, that, even if Narroba were entitled to the rights of a British subject, no municipal Court could judge of the propriety or impropriety of a seizure of property taken by an officer under the supposition that it was the property of a hostile state or individual. The cases of *Le Caux* v. *Eden* (Douglas, 573) and *Lindo* v. *Rodney* (Douglas, 592), were cited in support of this proposition. The judgment of Lord Tenterden was given in one sentence: "We think the proper character of the transaction was that of a hostile seizure made if not *flagrante*, yet *nondum cessante bello*, regard being had both to the time, the place and the person, and, consequently, that the municipal Court had no jurisdiction to adjudge upon the subject, but that if anything were done amiss *recourse could only be had to the government for redress*. The case of *Elphinstone* v. *Bedreechund* would thus appear to be a decision on the special facts, and is not, it is submitted, an authority for the naked proposition that "where actual war is raging, acts done by the military authorities are not justiciable by the ordinary tribunals." Even if it were an authority for the principle asserted in *Ex parte Marais*, the case would be clearly distinguishable on the ground that there never had been any regular British jurisdiction in the territory in question in that case. These points appear to have been overlooked or, at any rate, do not seem to be expressly dealt with in the judgment of the Irish Court of King's Bench in *Allen's Case* (*Freeman's Journal*, 25th February, 1921). So also the principle established in *de Keyser's Case* ((1919) 2 Ch. 216): "Where Parliament has intervened and has provided by

the opinion of Lord Campbell and Lord Cranworth (*m*). It is inconsistent with the *action* of the Irish judges in *Wolfe Tone's Case*. It is inconsistent with the declaration of the law in the Petition of Right. It is inconsistent with the great principle of the common law, that for every legal right there shall be a legal remedy to enforce the right (*n*).

The view of martial law which is maintained in this volume appears to be confirmed by the practice of passing Acts of Indemnity after the determination of a period of disturbance or civil war. "An Act of Indemnity," says Professor Dicey, "is a statute the object of which is to make legal transactions which, when they took place, were illegal, or to free individuals to whom the statute applies from liability for having broken the law." "Such a statute," Professor Dicey continues (*o*), "has no application to conduct which, however severe, is strictly lawful. An officer who, under proper circumstances, orders his troops to fire on a mob, and thereby in dispersing the mob,

statute for powers previously within the prerogative being exercised in a particular manner and subject to the limitations and provisions contained in the statute, they can only be so exercised." And see the Restoration of Order (Ireland) Act, 1920, and the Firearms Act, 1920. Cp. also the Bill of Rights, 1 Wm. & Mary, sess. 2, c. 2 (1) and (2).

(*m*) Cited Forsyth, *Constitutional Law*, 199: "The question, how far martial law when in force supersedes the ordinary tribunals, can never arise. Martial law is stated by Hale to be in truth no law at all, but something rather indulged than allowed as a law, and it can only be tolerated because, by reason of open rebellion, the enforcing of any other law has become impossible. It cannot be said in strictness to *supersede* the ordinary tribunals inasmuch as it only exists by reason of those tribunals having already been practically superseded." Compare *Ex parte Milligan*, 4 Wall. 2. And see per Curran in *Wolfe Tone's Case, arguendo:* "Every law authority is with me while I stand on this sacred and immutable principle of the constitution—that *martial law and civil law are incompatible*: that the former must cease with the existence of the latter."

(*n*) *Ashby* v. *White*, 2 Ld. Raymond, 938; 3 *Id.* 320; 1 Sm. L. C. 12th ed. 266.

(*o*) Dicey, *Law of the Constitution*, 7th ed. 547, 554.

wounds or kills some of the crowd, does not require to be indemnified. But an officer on the other hand who, whether in time of war or peace, does without distinct legal justification any act which injures the property or interferes with the liberty of an Englishman, incurs the penalties to which every man is liable who commits a breach of the law."

An interesting instance of such an Act is furnished by the Act of Indemnity (*p*) which was passed after Wat Tyler's rebellion. The Act is intituled, "The King's Pardon to those that repressed or took revenge of his rebels," and proceeds: "Item, our Sovereign Lord the King, perceiving that many lords and gentlemen of his realm of England, and others with them, in the rumour and insurrection of villains and of other offenders, which now of late did traitorously rise by assemblies in outragious number, in divers parts of the realm, against God, good faith, and reason, and against the dignity of our Sovereign Lord the King and his Crown, and the laws of his lands, made divers punishments upon the said villains and other traitors *without due process of the law, and otherwise than the laws and usages of the realm required,* although they did it of no malice prepense, but only to appease and cease the apparent mischief, considering the great diligence and loyalty of the lords and gentlemen in this behalf, which were not learned of the said laws and usages, and though at that time they had been learned, a man might not, upon those punishments, have tarried the process of the law of their good discretions.

"And willing therefore to do them grace according as they have the same greatly deserved, of the assent aforesaid hath pardoned and released to the said lords and gentlemen, and all others being in their aid at the same deed, and to every of them, as much as to him thereof pertaineth, or to him and to his heirs may pertain, so that hereafter for whatsoever thing that is done by them upon the said punishments in resistance, they shall never be im-

(*p*) 5 Ric. 2. c. 5.

peached nor grieved in body, goods, nor their heritages and possessions, by any way by Our Sovereign Lord the King, his heirs or ministers, nor none other in time to come, but utterly shall be thereof quit for ever by this grant and statute without having thereof other special charter or pardon."

The terms of this statute of Richard II. illustrate the true character of an Act of Indemnity. "An Act of Indemnity is the legalisation of illegality, and is constantly intended to protect from legal penalties men who, though they have acted in the supposed or even real discharge of a political duty, have broken the law of the land (*q*). The Indemnity Acts, whatever their formal language, which for a century or so protected Nonconformists from penalties incurred year by year through the deliberate breach of the Test and Corporation Acts, the Acts of Indemnity passed after the rebellions of 1715 and 1745, the Act of Indemnity passed by the Irish Parliament after the rebellion of 1798, which was not wide enough to protect Mr. Judkin Fitzgerald (*r*) from actions for acts of cruelty done by him in the suppression of the rebellion, and the Act of the Legislature of Jamaica which was successfully pleaded by the

(*q*) For a different view of the nature of an Act of Indemnity, see *per* Sir Frederick Pollock, L. Q. R. xviii. 157: "An Act of Indemnity is a measure of prudence and grace. Its office is not to justify unlawful acts *ex post facto*, but to quiet doubts and to provide compensation for innocent persons in respect of damage inevitably caused by justifiable acts which would not have supported a legal claim."

(*r*) *Wright* v. *Fitzgerald*, 27 St. Tr. 759. The case decides that an act of private malice done under the pretence of suppressing a rebellion is not covered by an ordinary Act of Indemnity. So, in 1867, the Colonial Office declined to approve a New Zealand Act which was not limited to an indemnity for acts done in good faith in the suppression of the native rising in the colony, but covered all acts done in the suppression of the rebellion without qualification. Compare the terms of the Indemnity Act, 1920 (10 & 11 Geo. 5, s. (1)). And see *Andrews* v. *Clifford*, *Times* Newspaper, 18/20th December, 1920.

defendant in *Phillips* v. *Eyre* (*s*) were, it is submitted, all of them enactments intended to protect men from the consequences of a breach of the law" (*t*).

An Act of Indemnity, following a rebellion, is thus in its true meaning a legalisation of acts (which would otherwise be illegal) done bona fide in suppressing the rebellion beyond the strict necessities of the case. And the practice of passing such Acts of Indemnity after periods of rebellion or war within the realm points again to the conclusion, which is suggested by the statutes and the authorities on the common law; the conclusion, namely, that in such circumstances of war or insurrection, the forces of the Crown are entitled (*u*) to use such much force, even to the taking of life, as may be strictly necessary for their purpose; but no more. On this view of the authorities, that which is called "martial law" is merely another name for the common law right of the Crown and its servants to repel force by force in such emergencies. "Martial law," in the sense in which it means the suspension of the ordinary law and the temporary government of a country, or parts of it, by military tribunals, is in truth unknown to the law of England. The mere outbreak of war or of rebellion does not "suspend the constitutional guarantees" and expose every citizen to arrest, imprisonment, or execution, at the caprice of a military tribunal

(*s*) 4 Q. B. 225; 6 Q. B. 1.

(*t*) Dicey, *Law of the Constitution*, 7th ed. 554. In the judgment of the Irish King's Bench in *Allen's Case* it is stated: "When peace is restored, acts in excess of what necessity required may need the protection of indemnifying legislation. But while war is raging this Court has no jurisdiction to interfere." Not even, it seems, with acts of the military that were manifestly illegal and irremediable if allowed to be performed. It is submitted that the effect of such an attitude when applied to acts outside the sphere of actual military operations is to change the whole character of "martial law" as it has been hitherto known in these islands. It amounts to an abdication of their function by the civil Courts.

(*u*) And, indeed, may be bound: *R.* v. *Pinney*, 3 St. Tr. (N. S.) 11.

excited by the passions natural to war. So long as the Courts are open the common law prevails (*x*). And the private citizen, no less than the private soldier, is entitled to invoke the protection of the civil Courts (*y*) against unlawful invasion of his common law rights by military officers, acting either as individuals or as members of a military tribunal.

(*x*) Moreover, even the closing of the Civil Courts in time of war and the consequent suspension of the civil law do not involve the suspension of that part of the common law which is declaratory of the natural law and the principles of natural justice. It is conceived that the principles of natural justice control even the administration of "martial law" by military men if indeed the suspension of the Civil Courts in time of war confers upon soldiers any right to try and punish ordinary citizens.

(*y*) On this point see a valuable note in 34 Harvard Law Review (1921), page 659, where the relevant American and English authorities are collected and discussed.

HEDDON v. EVANS.

KING'S BENCH DIVISION (McCARDIE, J.).

4th June, 1919.

A MILITARY officer acting individually or as a member of a military tribunal is liable to an action for damages if when acting in excess of or without jurisdiction, he do or direct to be done to another military man that which amounts to assault, false imprisonment, or other common law wrong, even though the injury inflicted purport to be done in the course of actual military discipline.

As to whether an action will lie for an injury done maliciously and without reasonable and probable cause, if the act causing the injury to person or liberty be within jurisdiction and in the course of military discipline: *quære.*

Sutton v. *Johnstone* (1786), 1 T. R. 493 and 544; 1 Brown P. C. 76; *Dawkins* v. *Rokeby* (1866), 4 F. & F. 856; *Fraser* v. *Balfour*, 34 T. L. R. 503; 87 L. J. Q. B. 1116, discussed and considered.

In an action brought by a private soldier against his commanding officer to recover damages for alleged false imprisonment and other alleged malicious and causeless acts and conduct—

Held: That in doing the acts complained of the defendant was acting within his jurisdiction; and

That the plaintiff had failed to show that the defendant acted maliciously or without reasonable or probable cause; and

Therefore the action failed.

HEDDON *v.* EVANS.

Judgment of McCardie, J., June 4th, 1919.

[The notes in small print are solely the work of the Editor and form no part of the judgment.]

THIS is a case of grave complexion. The plaintiff, who is a solicitor by profession, enlisted as a private in the British Army in 1915. He brings this action against his commanding officer to recover damages for alleged false imprisonment and alleged malicious acts and conduct.

There is also a subordinate claim for slander.

The action raises questions of constitutional importance. It involves, moreover, many difficult points of military law. It presents a series of unusual facts.

The events relied on by the plaintiff took place between June and December, 1918, at York. The broad features are these:

On the 23rd of July, 1918, the defendant caused the plaintiff to be placed under close arrest in respect of two charges, viz.:—

(1) Making a frivolous complaint to his commanding officer.

(2) Conduct to the prejudice of good order and military discipline.

On the 24th of July the defendant convicted the plaintiff upon both charges and imposed a sentence of fourteen days' confinement to barracks. This sentence was duly enforced.

The plaintiff asserts that this conviction was beyond the jurisdiction of the defendant. Hence a claim for damages for false imprisonment.

Upon subsequent occasions the plaintiff was charged by the defendant with other offences, and was taken into military custody. He asserts that further illegality existed as to this custody, and hence makes an additional claim for false imprisonment against the defendant.

A further head of claim rests on the allegation that the defendant, even though he may have acted within the bounds of

his jurisdiction in the matters I shall refer to later, was guilty of maliciously and without reasonable and probable cause abusing his authority to the injury of the plaintiff.

I must state at once that the whole of the alleged injuries sprang directly and solely from the military relationship which existed between the plaintiff and the defendant.

They are exclusively associated with the purported administration of military discipline by the defendant. Hence the defendant submits that this action will not lie.

The learned district registrar at York dismissed the action. The plaintiff appealed. Sitting as a judge at Chambers I reversed the decision of the registrar and decided, in view of the decision of the House of Lords in *Fraser* v. *Balfour* (1918), 87 L. J. K. B. 1116, and 34 T. 503, and upon other grounds also, that the action should proceed to trial.

Hence the hearing of the case before me, and the presentation of a large body of intricate and detailed evidence.

Mr. Watson and Mr. Coddington appeared for the plaintiff.

Mr. Tindal Atkinson, K. C., Mr. Branson and Mr. Tebbs appeared for the defendant. The arguments were full and able. Many contentions were raised and an exceedingly large number of decisions were cited.

I am glad to feel that such an action as this against a military officer has been rare indeed in recent years. The rarity of such litigation is a tribute to the spirit of justice and propriety which usually marks the fulfilment of the responsible duties which fall upon the officers of His Majesty's Army.

But, although the present litigation is regrettable, it is my duty to deal fully with the weighty points of law involved, and to consider with scrupulous care the painful questions of fact which call for attention.

It will be convenient, ere dealing with the subordinate yet important points of military law and the questions of fact connected therewith, to consider the *vital preliminary contention* of the defendant that such an action as this will not lie.

It is difficult to appreciate the contentions and facts which I deal with later (interconnected as they are with the Army

Act, Rules of Procedure, King's Regulations and Army Orders) until a view has been formed as to the true nature and operation of military law and its relation to the general law and the civil courts.

The preliminary contention of the defendant is based on the well-known passage in the judgment of Kelly, C. B., in delivering the views of ten judges, in *Dawkins* v. *Rokeby* (1873), L. R. 8 Q. B. 255. At pp. 271 and 272 he there said: "With reference therefore to such questions which are purely of a military character the reasons of Lord Mansfield and the other judges in *Sutton* v. *Johnstone* (1786), 1 T. R. 493, and 544 Ex. Ch. and 1 Brown, P. C. 76, and the cases *In re Mansergh* (1861), 1 B. & S. 400, and *Grant* v. *Gould* (1792), 2 H. Bl. 69; *Barwis* v. *Keppel* (1766), 2 Wils. K. B. 314; *Keighley* v. *Bell* (1866), 4 F. & F. 763; *Dawkins* v. *Lord Rokeby* (1866), 4 F. & F. 856; and *Dawkins* v. *Lord Paulet* (1869), L. R. 5 Q. B. 94, are all authorities to show that cases involving questions of military discipline and military duty alone are cognisable only by a military tribunal and not by a court of law."[1]

[1] In the leading case of *Sutton* v. *Johnstone* (1786), 1 T. R. 493, the facts were as follows: In 1781 Sutton was the captain of His Majesty's ship *Isis*, and Johnstone was the commander of the squadron. In the April of that year there was an engagement between the French and English fleets in which the *Isis* was damaged. The French sailed away, and Johnstone ordered the English ships to slip their cables and pursue. Sutton, owing to the condition of his ship, did not obey these orders. Johnstone in consequence put Sutton under arrest for disobedience to orders and sent him to England for trial by a court-martial. He then brought an action for malicious prosecution against Johnstone. The defendant pleaded the general issue. The jury found for the plaintiff. The defendant then moved in arrest of judgment in the Court of Exchequer on the ground that no action for a malicious prosecution would lie for a subordinate officer against the commander of a squadron for improper conduct while under his command. Eyre, C. B., and the whole Court refused to arrest judgment. This decision was reversed in the Exchequer Chamber and the House of Lords, not upon the broad ground that no such action would lie, but upon the narrow ground that an action

for malicious prosecution did not lie in the present case because there was reasonable and probable cause for the prosecution. Lord Mansfield and Lord Loughboro', however, expressed themselves very strongly in favour of the broad proposition contended for by the defendant. This proposition goes the length of saying that a member of the army or navy "forfeits or voluntarily surrenders all the civil rights belonging to other subjects when the injury proceeds from a superior officer under colour of discipline; even although the act done be admitted to have been done in opposition to discipline, in violation of moral duty, maliciously and without cause." In expressing this opinion Lords Mansfield and Loughborough were careful to add that the case was one of first impression, that it was doubtful, and that it remained open for decision. Compare the language of Lord Finlay, L. C., in the recent case of *Fraser* v. *Hamilton* (1917), 34 T. L. R. 502; 87 L. J. K. B. 1116: "That question (*i.e.*, whether wrongs inflicted on military men through a malicious exercise of authority are cognisable in a Court of law) is still open, at all events, in this House. It involves constitutional questions of the utmost gravity."

The case of *Sutton* v. *Johnstone* is the subject of a learned article by Dr. W. S. Holdsworth in L. Q. R. xix. p. 222, from which the summary of facts given above is taken. The opinion is suggested in the article that in such cases a right of action "existing only when malicious intent can be proved would not be detrimental to discipline and would be in harmony with the principles of the common law." "I cannot," said Cockburn, C. J., "bring myself to believe that officers in command would hesitate to give orders which a sense of duty required . . . from any idle apprehension of being harassed by vexatious actions. Men worthy to command would do their duty and would trust to the firmness of judges and the honesty and good sense of juries to protect them in respect of acts, honestly, though possibly erroneously done under a sense of duty."

Dr. Holdsworth proceeds: "Human nature, whether military or civilian, is much the same. A technical atmosphere and professional traditions sometimes, all unconsciously, produce moral blindness. Nothing wrong can be seen in the trade custom till the Court of law boldly terms it a fraud. It may be that a possibility—even a remote possibility—that it will be necessary to explain and justify acts before a tribunal not composed of men with the same professional sympathies as our own may exercise a check not the less salutary because it is impalpable. If the dicta in *Sutton* v. *Johnstone* are ever overruled it will probably be on some such grounds as these. In the meantime it must be admitted that the question is in (1920) as it was in 1786 a doubtful question and 'fit to be settled by the highest authority.'"

I feel called upon to fully consider this passage, to test it by legal principle and to ascertain its true meaning and effect. If the words of Kelly, C. B., bear the meaning which has often been assumed and which is relied on by the present defendant, they have created a principle the importance of which cannot be overstated, and the limits of which can scarcely be fixed.

At p. 272 the learned Chief Baron said this: "We think, with the majority of the judges in *Dawkins* v. *Lord Paulet* (1869), L. R. 5 Q. B. 94, that the motives as well as the *duty* of a military officer, acting in a military capacity, are questions for a military tribunal alone, and not for a Court of Law to determine."

These words will also call for consideration.

In order to examine the contention of the defendant it is, I think, essential to distinguish clearly between military law on the one hand and martial law on the other hand.[2] The latter is quite foreign to the point at issue.[3]

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[2] "It is necessary," said Sir D. Dundas, Judge-Advocate-General, in 1850, "to distinguish between military and martial law. Military law is to be found in the Mutiny Act and Articles of War. These and these alone it is which are properly called the Military Code and by which the Land Forces of His Majesty are regulated. Military law has to do only with the Land Forces mentioned in the Mutiny Act. Martial law comprises all persons, whether civil or military."

The Mutiny Act and Articles of War are now replaced by the Army Act and Rules of Procedure and King's Regulations made under the Army Act and Army Orders. The body of provisions comprised in the Army Act and in these Rules and Regulations and Orders constitute the military code or military law. And this military code is limited in its application to those persons who are subject to military law, that is to say, to officers and men of the military forces of the Crown and sutlers and camp followers. (See Army Act, ss. 175, 176 and 184.)

The term "martial law," on the other hand, refers "to the exceptional measures adopted, whether by the military or the civil authorities in time of war or domestic disturbance for the preservation of order and the maintenance of public authority. To the operation of martial law all the inhabitants of the country or of the disturbed district aliens

as well as citizens are subject" (*a*). "Military is distinct from martial law in that it applies only to persons in the military or naval service of the government; whereas martial law, when once established, applies alike to citizens and soldiers" (*b*). "Martial law," says Professor Dicey, "is nothing more nor less than a name for the common law right of the Crown and its servants to repel force by force in the case of invasion, insurrection, riot, or generally of any violent resistance to the law." (*Law of the Constitution*, 7th ed. chap. viii. p. 284.)

But though the distinction between "military" and "martial" law is in modern times thus clearly established, it is necessary in reading the older authorities perpetually to bear in mind that the distinction now drawn has not always been recognised. Thus, when Coke and Hale, and even Blackstone, speak of "martial law" it is plain they are speaking of the law applicable to the soldier which in modern language is called military law. Thus, in a classical passage of his History of the Common Law, Hale writes, "touching the business of martial law," that in truth and in reality "it is not a law, but something indulged rather than allowed as a law, the necessity of government, order and discipline in an army being that only which can give those laws countenance; and that this indulged law was only to extend to members of the army or to those of the opposed army, and never was so much indulged as intended to be executed or exercised upon others, *for others who had not listed under the army had no colour or reason to be bound by military constitutions applicable only to the army whereof they were not parts, but they were to be ordered and governed according to the laws to which they were subject though it were a time of war*" (*c*).

This confusion in the old authorities is due to the circumstance that the rules that make up the "military" law and the "martial" law of the present day have a common historical origin in the law that was administered in medieval England in the Court of the Marshal and the

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(*a*) Moore, *Int. Law Digest*, II. 186, cited Willoughby, *The (American) Constitution*, Edition 1910, II. 1234. See also Dicey, *Law of the Constitution*, Chap. VIII., and Appendix, note xii. For the growth of the distinction between *military* and *martial* law, see Clode, *Military and Martial Law*, pp. 20—22.

(*b*) *U. S.* v. *McDonald* (1920), 265 F. 754 at p. 761, citing *Ex parte Milligan*, 4 Wall. 2.

(*c*) Hale, Edition 1820, Runnington, pp. 42, 43. See also the preamble to the first Mutiny Act, 1689.

Constable (*d*). This law was called indifferently the Law Marshall or martial law (*e*). The Court of the Marshal disappeared in the course of the eighteenth century, though it seems never to have been formally abolished (*f*).

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[3] It is, perhaps, noteworthy that at the trial no reliance should have been put by counsel for the defence on and no reference should have been made to the case of *Ex parte Marais* ((1902) A. C. 109). In that case the Judicial Committee of the Privy Council appear to have decided that "where actual war is raging acts done by the military authorities are not justiciable by the ordinary tribunals" (*g*).

The acts complained of in *Heddon* v. *Evans* were done in England in 1918 during the course of the Great War. The plaintiff and the defendant were at all material times members of His Majesty's Forces on active service (*h*). At the date of the trial of the action the state of war continued.

In these circumstances it would scarcely have been surprising if counsel for the defence had sought to rely upon the decision or the supposed decision of the Privy Council in *Ex parte Marais* (*ubi sup.*), and contended that as war was raging in England at the date of the acts complained of and at the date of the trial these acts were not justiciable by the ordinary Courts and that the action, therefore, would not lie.

To such a contention the plaintiff might conceivably have made a twofold answer:—(1) That, even assuming that *Marais' Case* established any general principle of law, the decision of the Privy Council was not binding on any English Court. (2) That actual war was not raging in England in 1918 in the sense in which it was raging in South Africa at the time and place of the arrest of the petitioner in *Marais' Case*.

As to (1), it is, of course, true that the decisions of the Privy

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(*d*) See a valuable essay on *Martial Law Historically Considered*, by Dr. Holdsworth, in the Law Quarterly Review, xviii. 117.

(*e*) Maitland, Constitutional History, 266.

(*f*) In *Chambers* v. *Jennings* (1701), 7 Mod. 125, it was pronounced by Holt, C.J., to be no longer a court of record.

(*g*) See also *Van Reenen's case*, (1904) A. C. 114, and *Tilonko's case*, (1907) A. C. 93; and compare *Edmondson* v. *Rundle* (1903), 19 T. L. R. 356. For a symposium of opinions on the case of *Marais* and on martial law, see Law Quarterly Review, Vol. xviii. pp. 117—158.

(*h*) See Army Act, s. 189, and Army Order 314 of 1914, by which all embodied troops *at home and abroad* were placed during the war on active service. And see *Edmondson* v. *Rundle*, note (*g*), *supra*.

Council are not binding on any English Court (*i*); though it goes without saying that such decisions are treated with the greatest respect by the English judges and are habitually cited by counsel in argument. In the circumstances it is, perhaps, a little curious that the decision in *Marais' Case* should not only not have been followed by any English Court in any reported case, but should not even have been relied upon by the defence in the case under review or (so far as the writer is aware) in any case where the acts of the military authorities during war-time in England have been challenged in the English Courts. But now see *Allen's Case*, *Freeman's Journal*, 25th February, 1921, in which the Court of King's Bench in Ireland applied the principle of *Marais' Case*. And see note (*l*) at p. 35, *ante*.

As to (2), the meaning of the expression "where actual war is raging" is nowhere authoritatively set forth. In the judgment of the Privy Council in *Tilonko's Case* it is suggested (*k*) that the existence of a state of actual war may be a matter of fact which the Court will, if necessary, determine. It is instructive, however, to note that in *Ex parte Marais* (*ubi sup.*) the principal respondent was the General Officer Commanding *the Lines of Communication* in South Africa, and the arrest complained of by the petitioner was effected in August, 1901, at a place about thirty-five miles only from Cape Town, and at a distance, therefore, of 150 miles or more from the area of actual hostilities.

The extension of the meaning of the expression "where actual war is raging" so as to include acts done at such a distance from the area of actual hostilities and in a region, moreover, in which the ordinary Courts continued to exercise uninterrupted jurisdiction appears to have the weighty support of so eminent a jurist as Sir Frederick Pollock: "In the eighteenth century the only acts which could have direct effect on military operations were those confined to the locality of fighting. The area of martial law was, therefore, *de facto* confined to that locality. Nowadays, telegraphic communication has given an extreme importance to acts so far from the seat of war that, while they might have a great effect on military operations, the place where they were committed might yet enjoy perfect peace and the Courts there remain open. The prevention of these acts which cannot be secured by the course of legal procedure is exactly

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(*i*) *Leask* v. *Scott*, 2 Q. B. D. 376 at p. 380, per C. P. And see *Law Quarterly Review*, xviii. at p. 158, per Sir Frederick Pollock, *apropos* the *Case of Marais*.

(*k*) (1907) A. C. 93, at p. 95.

the purpose of martial law. The necessity in such cases is, in fact, as immediate, in the strict sense of the word, as if it arose from acts committed at the seat of war, for all that the person or persons causing the necessity by their acts may be remote in space from the site of the hostile operations procured or assisted by them which it is the end of martial law to prevent. If, then, martial law is to be effective at all it must be held to cover such cases, and take cognisance of acts which, though committed far from the seat of war, may, nevertheless, have an immediate effect on warlike operations" (*l*).

A substantially similar view was taken by the American Courts in the recent case of *United States* v. *McDonald* (*m*). "In this great world war through which we have just passed, the field of operations which existed after the United States entered the war, and, especially in regard to naval operations, brought the port of New York within the field of active operations. With the progress made in obtaining ways and means for devastation and destruction, the territory of the United States was certainly within the field of active operations. Great numbers of troops were being sent abroad, and in larger numbers sailing from the port of New York. Vessels loaded with ammunition and supplies for the army were daily leaving this port. German submarines were landing unheralded and unaware in our ports before the United States entered the war; ships were being destroyed within easy distance of the Atlantic coast; there was the constant threat of and fear for airships above the harbor and the city of New York on missions of destruction. A spy of the enemy might well have aided these hostile operations. One of the lessons taught by this war is that the ocean is no longer a barrier for safety or an insurance for America's being involved in European wars. She cannot now become an asylum of safety for spies. This war was not carried out by naval and military forces only. Intrigues played a large part. New and useful methods of communication with the enemy were devised and in existence which did not exist in other wars. Wireless telegraphy, signalling by light, the successful use of carrier pigeons, were found to be useful instruments of warfare by the Germans. These methods of operation and assistance created a greater danger flowing from the activities of spies. Their existence in our midst helped propaganda for unrest, suspicion, created doubts of victory, and made it possible to place bombs on ships sailing from

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(*l*) *Law Quarterly Review*, xix. p. 231, in a criticism of Professor Dicey's Theory of Martial Law, contained in *Law of the Constitution*, 7th ed., Appendix, note x.

(*m*) (1920), 265 Fed. Rep. 754 at p. 763.

port. They were also handy in the distribution of moneys to the innocent or guilty who participated with them in their work of destruction. They were dangerous agencies of war, and it is proper that the naval authorities deal with them as the Act of Congress provides the courts-martial might."

It is well observed by Prof. Dicey in his Law of the Constitution, 8th ed. at p. 283, that "martial law in the proper sense of that term, in which it means the suspension of ordinary law and the temporary government of a country or parts of it by military tribunals, is unknown to the law of England.[4] We have nothing equivalent to what is called in France the 'Declaration of a State of Siege,' under which the authority ordinarily vested in the civil power for the maintenance of order and police passes entirely to the army ('autorité militaire'). This is unmistakeable proof of the permanent supremacy of the law under our constitution."

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[4] Though it be true, as Prof. Dicey says, that martial law in the proper sense of that term in which it means the suspension of ordinary law and the temporary government of a country or parts of it by military tribunals is unknown to the law of England, it is, of course, within the power of Parliament at a period of crisis, or, indeed, at any time, by statute to authorise the suspension of the ordinary law and the civil Courts, and to subject the country or parts of it to government by military tribunals and martial law.

By proclamations, dated the 10th and the 12th December, 1920, and made by Viscount French, Lord Lieutenant, and General Macready, Commander-in-Chief of the Forces in Ireland, respectively, a large part of Ireland was put under martial law and the temporary rule of the army.

Such proclamations were doubtless made and issued pursuant to some statute authorising the introduction of martial law (in the strict sense) in Ireland (*n*).

In delivering the judgment of the Privy Council in *Tilonko's Case* (*o*), Lord Halsbury seemed to suggest that in a time of war or

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(*n*) Cf. the Restoration of Order (Ireland) Act, 1920 (10 & 11 Geo. 5, c. 31, s. 1 (2)). But see now *R.* v. *Allen* (1921), 65 Sol. Jo. 358, from which it appears that these proclamations were made in the exercise of a supposed prerogative.

(*o*) (1907) A. C. 93 at p. 94; cf. *Ex parte Marais*, (1902) A. C. 109, and note (*l*) at p. 35, *supra*.

insurrection military courts or courts-martial may have jurisdiction (apart from statute) to try and punish civilians by martial law. But the passage which carries this suggestion is *obiter*, and, moreover, may not be intended to convey this meaning. If, however, such a meaning is intended, then it is respectfully submitted that such a view is against the weight of authority in England. And in any event the judgment of the Privy Council is not binding on any English Court; nor, it appears, on the Privy Council itself in any subsequent case (*p*).

Excluding then martial law as not bearing on the question before me, it becomes essential to consider the nature of military law proper. This law is to be found in the Army Act, and the Rules of Procedure and King's Regulations made under the Army Act and Army Orders. This body of provisions constitutes the military code alike in peace and in war.

It is well to remember the historical origin of the existing Army Act. Prior to 1689 military law existed only in times of actual war, when articles of war were framed and announced under the prerogative of the Crown.

But military law, in the true sense of that word, and applicable alike in peace as in war, was first created by the Mutiny Act of 1689 (1 Wm. & Mary, c. 5).

That Act created a statutory military code. It was passed at a time when the rights of personal freedom had been successfully reasserted in the country. No more cogent weapons for enforcing such rights then existed or can now exist than the Writ of *Habeas Corpus* (see the Habeas Corpus Act, 1679 (31 Car. 2, c. 2), and the Habeas Corpus Act, 1816 (56 Geo. 3, c. 100)), and the actions for false imprisonment and assault.

The preamble of this first military Act is significant.[5]

[5] The terms of the first Mutiny Act and the events and circumstances which led up to its passing in 1689 possess a certain historical interest and a deep constitutional significance.

On the 1st March, 1689, in a debate in the House of Commons on a message from William and Mary suggesting the suspension of the Habeas Corpus Act, the necessity was urged for a measure for the regulation of the army, and on the 13th March leave was given to

(*p*) *Ridsdale* v. *Clifton*, 2 P. D. 306, 307.

bring in a Bill to punish mutineers and deserters from the army for a limited time, and a committee was appointed to prepare it. Almost at the same time 800 men enlisted by James II., who had been ordered by William to embark for Holland, mutinied at Ipswich and marched northward, declaring that James was their king, and that they would live and die by him; and this danger, which was reported to both Houses on the 15th March, doubtless facilitated the passing of the Bill which was introduced into the House of Commons on the 18th, and having passed through all its stages by the 28th March, was passed by the House of Lords on the same day, and received the Royal Assent on the 3rd April, 1689. The Bill was prefaced by a preamble declaring the necessity for and the objects of the Act in terms which were repeated without substantial alteration in each subsequent Mutiny Act until the year 1878, and have now been transferred to the preamble of the Annual Act bringing the Army Act into force.

This preamble expressly states that the raising or keeping a standard army within the United Kingdom *in time of peace*, unless it be with consent of Parliament, is against law; and further, that no man can be prejudged of life or limb or subjected (*q*) to any kind of punishment by martial law or in any other manner than by the judgment of his peers and according to the known and established laws of the realm.

The Act gave power to Their Majesties or the general of their army to grant commissions for summoning courts-martial for the trial and punishment of the offences of mutiny and desertion when committed by persons in Their Majesties' service in the army. It was further provided that the Act should not extend to the militia and should not exempt any officer or soldier from the ordinary process of law. The duration of the Act was limited to seven months, from the 12th April, 1689, to the 10th November in the same year.

On the 19th October, 1689, Parliament reassembled, and a second Mutiny Act (1 Wm. & Mary, sess. 2, c. 4) was passed during the session and received the Royal Assent on the 23rd December, 1689. This Act was ordered to come into force on the 20th December, 1689, so that an interval of more than a month occurred between the lapse of the first and the coming into operation of the second Act.

Successive Mutiny Acts, with the exception of certain short

(*q*) The words "in time of peace" were here interpolated in the first of the Mutiny Acts passed in the reign of Anne, and repeated in each succeeding Mutiny Act. The manner in which these words came to be introduced is not known; it is suggested their appearance is due to oversight of the draftsman: *R.* v. *Nelson and Brand*, p. 68. In the circumstances the alteration would appear to possess little constitutional significance.

intervals, were subsequently passed annually from the year 1690 to the year 1878 (*r*).

"And whereas no man may be forejudged of life or limb, or subjected to any kind of punishment by martial law" (*i.e.*, military law), "or in any other manner than by the judgment and according to the known and established Laws of this Realm. Yet, nevertheless, it being requisite for retaining such forces as are or shall be raised during this exigence of affairs in their duty an exact discipline be observed. And that soldiers who shall mutiny or stir up sedition or shall desert their Majesties' service be brought to a more exemplary and speedy punishment than the usual forms of law shall allow: Be it therefore enacted," etc.

A preamble in substantially similar terms appears in every subsequent Mutiny Act and in every one of the Army Acts from 1879[6] to the present time.

[6] The Army Discipline and Regulation Act, 1879.

The Mutiny Acts enabled the Crown to issue Articles of War. Inconvenience arose by reason of the fact that the military code was partly in an Act of Parliament and partly in *Articles of War*, and hence the provisions of the Mutiny Act and Articles of War were consolidated into one statute in 1879. Two years later the Army Act of 1881 repealed and amended the Act of 1879.

The Army Act, of course, is of no validity in itself. Its legal effect depends entirely on the passing each year of an Army Annual Act.[7] If this Act, as Prof. Dicey points out, were not in force a soldier would not be bound by military law. Desertion would be at most but a breach of contract, and striking an officer would be no more than an assault.

[7] See, *e.g.*, the Army and Air Force (Annual) Act, 1920 (10 Geo. 5, c. 7).

(*r*) For a history of the principal changes which were made in the Mutiny Acts from time to time during this period, see *Manual of Military Law*, Edition 1914, p. 11 *et seq.*, and the authorities there referred to.

Thus the prerogative of the Crown with respect to the army has merged into and is limited by the statute law and the subordinate provisions pursuant thereto.[8]

Under sect. 69 the King has power to make further Articles of War provided such Articles are not in contravention of the Act. No such Articles have in fact been made.

Under sect. 70 the King has power to make rules of procedure provided that they are consistent with the provisions of the Act. Under sect. 71 the King has power to make regulations as to the persons to be invested as officers with command over His Majesty's Forces, and as to the mode in which such command is to be exercised.

The limitation of prerogative by statutory enactment is cogently dealt with by the Master of the Rolls in the *De Keyser Hotel Case* (1919), (1919) 2 Ch. 197, at p. 216; 120 L. T. (N. S.) 396, at p. 399, in a passage expressly adopted in the Lords (see (1920) A. C. 508, at pp. 526, 528 and 538).[8]

[8] See also the judgments delivered in the House of Lords in *A.-G.* v. *de Keyser's Hotel*, (1920) A. C. 508. The case forms the subject-matter of a separate volume entitled *The Case of Requisitions*.

The result of this legislation is that a man who enters the army must submit to the code of punishments sanctioned by Parliament and to the tribunals who are authorised to administer the code. Enlistment is perhaps in the nature of a contract between the person enlisting and the Crown. (See Lord Haldane's article in Halsbury's Laws of England, vol. 25, p. 39; and see, too, *Re Grimley* (1890), 137 U. S. Supreme Court Reports, 147.)[9] It changes his status. It imposes upon him special duties and special liabilities beyond the ordinary duties of an ordinary British subject.

[9] In *Re Grimley* (1890), 137 U. S. Supreme Court Reports, 147, it was held that an enlistment "is a contract between the soldier and the Government, which involves, like marriage, a change in his status which cannot be thrown off by him at his will although he may violate the contract." The principle is reaffirmed in substantially similar

terms in the recent Australian case of *Lindsay* v. *Lovell* (*s*), where Hood, J., said: "A man by becoming a soldier does not cease to be a citizen. He changes his status as he does on marriage and thereby assumes new liabilities."

In the case of *Leaman* v. *The King*, (1920) 3 K. B. 663; 36 T. L. R. 835, on proceedings by Petition of Right brought by a private soldier to recover arrears of pay alleged to be due to him, the nature of the contract which a private soldier on enlistment enters into with the Sovereign was discussed and considered, and it was decided that the so-called contract of enlistment does not entitle the soldier by way of Petition of Right or other proceeding in a Court of law to recover payment of sums which he claims in respect of his services.

But the duties and liabilities and the tribunals which can enforce them are indicated by statutory enactment.

The power of trial and sentence is given to courts-martial and to certain officers. The punitive jurisdiction of officers and their powers as to sentences are indicated (so far as relevant to this case) by sect. 46 of the Army Act and by King's Regulations, No. 487 *et seq.*

The plaintiff in this action contends that if a court-martial or an officer acts without jurisdiction as to trial or inflicts a sentence on a soldier which they or he possess no power to impose, and whereby the soldier suffers in his person or his liberty, an action for false imprisonment or assault will lie on proof of the appropriate facts, although the acts complained of arose in the course of military discipline.

Now it is a settled principle of English law that a man who, without lawful authority, causes another to be arrested, imprisoned, or otherwise injured in his person or property is liable to an action for damages. (See *e.g.*, *Leary* v. *Patrick* (1850), 15 Q. B. 266, and *Polley* v. *Fordham* (1904), 91 L. T. 525.)

Relevant decisions are referred to in Addison on Torts, 8th ed. p. 944 *et seq.*; Clerk & Lindsell on Torts, 6th ed. pp. 809 *et seq.*, and in the notes to *Crepps* v. *Durden*, 1 Smith's Leading Cases, 650, 11th ed.

(*s*) (1917), V. L. R. 734 at p. 746. The headnote in this case illustrates the uncertainty in the law relating to the soldier.

Does this great and protective rule of law apply to the acts of military tribunals?

Upon principle I can myself see no good reason for exempting military officials from the operation of this rule.

Prof. Dicey puts it thus: "If a court-martial exceeds its jurisdiction, or an officer, whether acting as a member of a court-martial or not, does any act not authorised by law the action of the court or of the officer is subject to the supervision of the court." (See The Law of the Constitution, p. 304 of the 8th ed.)

The matter is put with equal plainness by Lord Haldane in his article on the Royal Forces, at p. 91 in vol. 25 of the Laws of England. He there says: "Members of courts-martial and naval and military authorities generally are responsible as individuals to any person injured by reason of their having acted either without or in excess of their jurisdiction."

The same view is expressed in para. 40 of the Manual of Military Law itself, 1914 ed. p. 129, where the further statement is made: "The same rule is applied to officers in the exercise of individual authority; so soon as they transgress the bounds of their lawful authority they expose themselves to an action, though they may have acted with entire *bona fides*." I observe, however, that no attempt is made in the Manual to reconcile p. 129 of that volume with p. 138, where the effect of the judgment in *Dawkins* v. *Rokeby* (1873), L. R. 8 Q. B. 255, is emphatically stated to be that cases involving questions of military discipline and military duty alone are cognisable only by a military tribunal and not by a Court of Law.

If the acts of military tribunals or officers with respect to military discipline be insusceptible of supervision by the Civil Courts then the gravest consequences might ensue. It can scarcely be that military men are alone the interpreters of military law.[10] If so, they become above the civil law, and to so hold would be to exclude the Courts from one of their most important and beneficent functions. The judges are the interpreters of the law. The military law, I conceive, is a part of

the Law of the Realm. It rests on a statutory basis. A soldier is a person subject to two sets of law—the military law and the civil law. As Professor Dicey puts it: "A soldier by his contract of enlistment undertakes many obligations in addition to the duties incumbent upon a civilian. But he does not escape from any of the duties of an ordinary British citizen."

It seems to me as a matter of principle that the liberty of a soldier should not be infringed nor should his person be invaded save in so far as that infringement or invasion is justified by either the law military or the law civil. The question of justification should ultimately be determined by the ordinary Courts of Law. It is for those Courts to determine the extent of the military jurisdiction given to military tribunals and officers by the enactments of Parliament.

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[10] This passage of the judgment and the argument with which it deals inevitably recall the somewhat analogous argument and answer in the great case of *Stockdale* v. *Hansard* (1839), 9 A. & E. 1, in which the defendants were directed by the House of Commons to plead (merely for the purpose of informing the Court) that the libel complained of was published pursuant to an order of the House and in the exercise of its authority and in the legitimate use of its privileges; and that the Courts of law are subordinate to the Houses of Parliament and incompetent to decide questions of parliamentary privilege.

Of this case, *Cockburn*, C. J., in his judgment in *Wason* v. *Walter* (L. R. 4 Q. B. 86), spoke as follows: "From the doctrines involved in this defence, namely, that the House of Commons could by their order authorise the violation of private rights and, by declaring the power thus exercised to be matter of privilege, preclude a Court of law from inquiring into the existence of the privilege—doctrines which would have placed the rights and liberties of the subject at the mercy of a single branch of the legislature—Lord Denman and his colleagues in a series of masterly judgments, which will secure to the judges who pronounced them admiration and reverence so long as the law of England and a regard for the rights and liberties of the subject shall endure, vindicated at once the majesty of the law and the rights which it is the purpose of the law to uphold. To the decision of this Court in that memorable case we give our unhesitating and unqualified adhesion."

The submission of the defendant in this case is, in substance, that the Courts cannot inquire at all into the exercise of military discipline.

This submission appears to be based upon what may be called the "doctrine of compact." [11]

[11] In an old case of *Warden* v. *Bailey* (*t*) it was urged in argument that "the general purview of the military code shows that a soldier gives himself up wholly to his superior officer in religion, politics, civil relations, loyalty, internal and external behaviour." The argument was rejected on that occasion. It is not difficult, however, to imagine why the term "compact" should have come to be used by Mr. Justice Willes in *Dawkins* v. *Rokeby*. The date (1866) supplies the clue. It was the heyday of liberal individualism. Mill had just published his book on Liberty, and Maine his volume on Ancient Law. The current political philosophy conceived society and men's relations in society as a system of contracts. Citizenship was a matter of contract; marriage was a matter of contract. "The movement of the progressive societies," said Maine, "has hitherto been a movement *from status to contract*" (*u*).

This word compact was first employed, I think, by Mr. Justice Willes in the case of *Dawkins* v. *Lord Rokeby* (1866), 4 F. & F. p. 806.

At p. 831 he said this: "But with respect to persons who enter into the military state, who take His Majesty's pay, and who are content to act under his commission, although they do not cease to be citizens in respect of responsibility, yet they do by a *compact* which is intelligible and which requires only the statement of it to recommend it to the consideration of any one of common sense, become subject to military rule and discipline."

At p. 832 he said: "In a subsequent case in the last century of *Grant* v. *Gould* (1792), 2 Henry Blackstone Rep. 69, it was laid down that a man by becoming a soldier and receiving the Queen's pay does agree and consent that he shall be subject

(*t*) (1811), 4 Taunt. 80, cited Clode, *Military and Martial Law*, p. 14.
(*u*) Ancient Law, ed. 1909, p. 174. And see note (*l*) by Sir Frederick Pollock. Cf. the judgment of Younger, L.J., in *Attwood* v. *Lamont*, (1920) 3 K. B. at p. 581.

to the military discipline, and he cannot appeal to the Civil Courts to rescue him from his own *compact*."

But I think that the distinguished judge was referring only to military discipline administered according to law.

For at p. 831 he used the following words:—

"It is clear that with respect to matters placed within the *jurisdiction* of the military forces, so far as soldiers are concerned, military men must determine them."

Again at p. 832 he states his view of *Sutton* v. *Johnstone* (1786), 1 T. Rep. 493 and 544, and 1 Brown's Parl. Cases, 78, to be that "military matters properly brought within the *true limits of military jurisdiction* are not to be called in question in a Civil Court."

I shall refer to *Dawkins* v. *Lord Rokeby* in 4 F. & F. 806 again.

If the doctrine of compact means that any act in the purported administration of military law or discipline is beyond the challenge of the Civil Courts, whether within or without the actual jurisdiction entrusted to military tribunals and officers, it would constitute, as I have already said, a doctrine of the gravest constitutional significance.

It would apply not only to the army, but also to the navy, which is governed by the Navy Discipline Acts, and to the Air Forces, which are governed by the Air Forces Act, 1917 (7 & 8 Geo. 5, c. 51).

I may point out that whatever basis may have existed for "compact," in the case of a voluntary army, I can see no satisfactory juristic basis for it with respect to those who are in the army only by virtue of the compulsory provisions of the Military Service Acts passed since the outbreak of war.

It would, however, be strange indeed if the forces were to be divided into two great sections, viz., those who have voluntarily enlisted on the one hand, and those who are compulsorily under service on the other hand.

I further venture to point out that no Army Act or Military Act has contained any provision to the effect that common law

wrongs, such as false imprisonment or the like, suffered by officer or private shall afford no civil remedy if arising in the course of military administration.

On the contrary, sect. 170 of the Army Act points in the opposite direction.[12]

[12] The section provides as follows:—

"Sect. 170.—(1) Any action, prosecution, or proceeding against any person for any act done in pursuance or execution or intended execution of this Act, or in respect of any alleged neglect or default in the execution of this Act, shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof.

"(2) In any such action tender of amends before the action was commenced may, in lieu of or in addition to any other plea, be pleaded. If the action was commenced after such tender, or is proceeded with after payment into court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered or paid, he shall not recover any costs incurred after such tender or payment, and the defendants shall be entitled to costs, to be taxed as between solicitor and client, as from the time of such tender or payment; but this provision shall not affect costs on any injunction in the action.

"(3) Every such action, and also every action against a member or minister of a court-martial in respect of a sentence of such court, or of anything done by virtue or in pursuance of such sentence, shall be brought in one of His Majesty's superior courts in the United Kingdom (which courts shall have jurisdiction to try the same wherever the matter complained of occurred) or in a supreme court in India, or in any Colonial court of superior jurisdiction, provided the matter complained of occurred within the jurisdiction of such Indian or Colonial court respectively, and in no other court whatsoever."

And sects. 69[13] and 70 (2) are not without significance.

[13] The section is as follows:—

"69. It shall be lawful for His Majesty to make Articles of War for the better government of officers and soldiers, and such articles shall be judicially taken notice of by all judges and in all courts whatsoever: Provided that no person shall by such Articles of War be subject to suffer any punishment extending to life or limb or to be kept in penal servitude except for crimes which are by this Act

expressly made liable to such punishment as aforesaid or be subject with reference to any crimes made punishable by this Act to be punished in any manner which does not accord with the provisions of this Act."

The only basis of the doctrine of compact must be implied rather than express contract. Is the doctrine juristically sound? To what extent does it actually go?

I think that the answer to this question depends entirely on the true meaning of the doctrine. If it means that once a man becomes a soldier he loses any right whatever to appeal to the Civil Courts in respect of any wrongs arising from purported military discipline, then I conceive that it goes too far.

If it means only that with respect to matters placed *within the jurisdiction* of military courts or officers, and in which those courts or officers are merely exercising powers given to them by the military law, the courts will not interfere, then the doctrine may be sound subject to the question as to whether an action will lie for a malicious and groundless abuse of authority causing damage to the soldier or officer complaining.

It cannot be, I think, that no matter how grave and unwarranted be the infringement of a man's person or liberty, no matter how obvious the illegality may be, no matter how contrary to the actual provisions of the Army Act, no matter how serious or prolonged the physical consequences of the illegality may be, a soldier is wholly devoid of remedy in the Civil Courts.

I conceive that the compact or burden of a man who enters the army, whether voluntarily or not, is that he will submit to military law and not that he will submit to military illegality. He must accept the Army Act and Rules and Regulations and Orders, and all that they involve. These (which I may call army legislation) define his status, indicate his duties, express his obligations, and announce his military rights. To the extent permitted by them his person and liberty may be affected and his property touched.

But save to that extent I conceive that, upon principle, neither his liberty, person or property can be lawfully infringed.

Where, indeed, the actual rights he seeks to assert are given not by the common law but *only by military law*, then it may well be that in military law alone can he seek his remedy. For if a code at once provides the right and also the remedy it may rightly be said that he must look to the code alike for the privilege and its method of enforcement. (See, *e.g.*, *Woods* v. *Lyttleton* (1909), 25 Times L. R. 662.)

If, however, the right he seeks to assert be fundamental common law rights, such as immunity of person or liberty, save in so far as taken away by military law, then I conceive that such common law right may be asserted in the ordinary courts.

Strange results might follow if it were otherwise. A man, it has rightly been pointed out, who becomes a soldier does not cease to be a citizen. (See Halsbury's Laws of England, vol. 25, p. 41 and p. 42 (*per* Lord Haldane); *per* Mansfield,[14] C. J., in *Burdett* v. *Abbott* (1812), 4 Taunton, 401, at p. 449.)

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[14] In *Burdett* v. *Abbott* (*x*), Mansfield, C. J., said: "Since much has been said about soldiers, I will correct a strange mistaken notion which has got abroad that because men are soldiers they cease to be citizens. A soldier is gifted with all the rights of other citizens, and he is as much bound to prevent a breach of the peace or a felony as any other citizen. . . . If it is necessary for the purpose of preventing mischief or for the execution of the laws, it is not only the right of soldiers but it is their duty to exert themselves in the assisting the execution of legal process or to prevent any crime or mischief being committed. It is, therefore, highly important that the mistake should be corrected which supposes that an Englishman by taking upon him the additional character of a soldier puts off any of the rights or duties of an Englishman."

Thus, if an officer or soldier commits an offence against the ordinary criminal law, he can be tried and punished as if he were a civilian, and serious liabilities are incurred by any officer who refuses to deliver him up to the civil magistrate on application (*y*).

(*x*) (1802), 4 Taunt. 401. See Clode, Mil. Forces, i. 144; ii. 143. And see *Lindsay* v. *Lovell* (1917), V. L. R. 734.

(*y*) Army Act, s. 145.

On the other hand, his civil rights and liabilities are necessarily subject to some limitation for the purpose of enabling him to fulfil his engagement to serve the Crown (*z*). Thus, he cannot, while in the service, change his domicil or the parish of his settlement (*a*). He cannot be arrested or compelled to appear before a Court on account of any debt, damages, or sum of money under 30*l*. (*b*). He may when on actual military service, and even though not of full age, dispose of his real and personal estate by an informal or nuncupative will (*c*). He is exempt from jury service (*d*).

If this be so, let me take the case, as an extreme illustration, of a wholly unoffending soldier, who, without pretence of trial or suggestion of offence, is subjected to immediate physical punishment at the order of a commanding officer in an English garrison town. Such conduct, although it might purport to be in the course of military discipline, would be beyond jurisdiction and wholly illegal

I conceive it to be clear that an action for assault would lie on the facts so stated.

In such a case the military code provides no real remedy to the private. Sect. 43, it is true, provides that a private may appeal to the prescribed general officer if wronged by his commanding officer. But of what value is the right of appeal in the case I put? The whole wrong would have been done ere the appeal could reach the general officer.

I see nothing in the wording of sect. 43 to exclude a right of civil action where the wrong done is not, *e.g.*, a merely erroneous exercise of a discretionary power within the conferred jurisdiction, but is one which amounts to a common law injury wholly unjustified by the law, whether military or civil.

It may be said that if the rules I suggest be adopted the discipline of the army might suffer. I cannot think so.

(*z*) For a detailed statement of such limitations, see Manual of Military Law, Chap. XII. pp. 213—5.

(*a*) Clode, Mil. Forces, ii. 37, 38, and cases there cited.

(*b*) Army Act, s. 144.

(*c*) 7 Will. 4 & 1 Vict. c. 26, s. 11; 7 & 8 Geo. 5, c. 58, s. 1 (3).

(*d*) Manual of Military Law, p. 214, and authorities there cited.

I agree that discipline is the soul of an army. It is the basis of all military efficiency. The dignity and self-respect of officer and private alike are based upon it. The officer who does not enforce it will lose the respect of his men. The private who does not cheerfully yield to it is unworthy of our high military traditions.

National safety depends upon the armed forces of the people. The power of those forces rests on the maintenance of discipline. The plainest instincts of patriotism call for its enforcement on the one hand, and a ready submission to its requirements on the other.

But I cannot believe that discipline will be the less readily exerted or the less loyally accepted if it be subject at all times to the limitations created by the military law itself.

I yield my respectful assent to the cogent and eloquent words spoken on this point by Cockburn, C. J., in his dissenting judgment in *Dawkins* v. *Paulet* (1869), L. R. 5 Q. B. 94, at p. 108.

Hitherto I have only incidentally referred to some of the decided cases on the point that illegal acts without or in excess of military jurisdiction may, in appropriate cases, form the subject of a civil action.

How do the decisions stand on the matter? In them I find no real conflict with the rule I have stated.

The older cases do not seem to be destroyed by modern decisions or dicta. *Frye* v. *Ogle* (1745), noted in McArthur on Courts-martial, vol. 1, 4th ed. pp. 268 *et seq.*, has often been cited but never, I believe, disapproved.[15] There the plaintiff, a naval officer, was sentenced to fifteen years' imprisonment by a naval court-martial. The maximum sentence under the then existing naval code was two years' imprisonment. He brought an action against the defendant (who had been president of the court-martial) and recovered damages for false imprisonment at the trial before Willes, C. J., and a jury in the Common Pleas. (See the observations of Lawrence, J., in *Warden* v. *Bailey* (1811), 4 Taunton, 67, at p. 76.)

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[15] The facts relating to the case of *Frye* v. *Ogle* (and the sequel

to it) are set out at some length in the Manual of Military Law (*e*), where they occupy the best part of two pages of close print.

It is with a certain sense of surprise, therefore, that one reads in the report of a New Zealand case (*f*) the statement made by Sir John Salmond (Attorney-General) *arguendo* that "*Frye* v. *Ogle* belongs to the mythology of the law."

Sir John Salmond was soon afterwards made a judge of the Supreme Court of New Zealand.

In *Grant* v. *Shard* (1784), cited in *Warden* v. *Bailey* (1811), 4 Taunton, p. 85, the plaintiff (an officer) brought an action for assault against the defendant (also an officer). The plaintiff was directed to give a military order. He sent two persons to carry out the direction, but they failed. The defendant then said, "What a stupid person you are," and twice struck him. Although the facts occurred at Gibraltar and in the actual execution of military service it was held that the action lay. The plaintiff got 20*l*. damages, and a new trial was refused.

In *Moore* v. *Bastard* (1804), noted in McArthur on Courts-martial, 4th ed. vol. 2, at pp. 195 *et seq.*, and cited in *Warden* v. *Bailey* (1811), 4 Taunton, 67, at p. 70, the plaintiff brought an action for false imprisonment. He had given evidence before a military court-martial. In the course of the hearing the defendant (president of the court-martial), acting without jurisdiction, committed the plaintiff to custody on a charge of subornation of perjury. Upon the trial before Sir Jas. Mansfield, C. J., the plaintiff recovered damages.

In *Wall* v. *Macnamara* (1779),[16] cited in *Johnstone* v. *Sutton* (1786), 1 Term Rep. 493, at p. 536, the plaintiff recovered damages against his superior officer for false imprisonment. The defendant appears to have been acting in the purported course of military discipline, but was held, as I read the case, to have acted beyond his jurisdiction.

[16] With this case may usefully be compared the recent Australian case of *Lindsay* v. *Lovell* (*g*), the headnote in which is as follows:—

(*e*) Pp. 129, 130.

(*f*) *Fitzgerald* v. *Macdonald* (1918), N. Z. L. R. 769 at p. 779.

(*g*) (1917), V. L. R. 734.

"*Semble*—(1) *Per* Hodges, J. The civil Courts would have no jurisdiction to try an action brought by a soldier on service against military policemen in respect of an act which the defendants were authorised by military authority to do, even though the defendants used unnecessary violence or acted maliciously.

"(2) *Per* Hood, J. The civil Courts will not interfere so far as the obligations of a soldier on service are concerned, these being dealt with by military law, though even then redress may be had if cruelty, malice, or oppression, or want of jurisdiction appear.

"(3) *Per* Cussen, J. The civil Courts will not interfere in relation to a mere incident showing some excess in the enforcement of military discipline."

At the trial of an action for assault brought by a soldier on service against two military policemen who had arrested him, it appeared that the defendants did not proceed in accordance with the military administration order under which they purported to act and that unnecessary violence was used. *Held*, on the facts, that the County Court had jurisdiction to try the action, and that the verdict of the jury for the plaintiff should stand.

In *Tonyn's Case* (cited in *Warden* v. *Bailey* (1811), 4 Taunton, 67, at p. 71, and noted in Prendergast's Laws of the Navy, 2nd ed. p. 185), a seaman recovered damages against Captain Tonyn (a naval captain) for directing a punishment to be inflicted in excess of that permitted by the custom of the navy.

See also the further cases cited in *Warden* v. *Bailey*, 4 Taunton, at pp. 70 and 71, and the case of *Swinton* v. *Molloy* (1783) (before Lord Mansfield), cited in *Johnstone* v. *Sutton* (1786), 1 Term Reports, 493, at p. 537.

In *Warden* v. *Bailey* (1811), 4 Taunton, 67, the plaintiff (a sergeant) recovered damages for false imprisonment against his superior officer, who had acted beyond the scope of his authority.

It is true that upon the second trial (see 4 Maule & Selwyn, 400) the defendant succeeded, but the grounds of the decision do not impair the rule that an officer who exceeds his jurisdiction may become liable in damages for false imprisonment or assault. (See *per* Cockburn, C. J., in *Dawkins* v. *Paulet* (1869), L. R. 5 Q. B. 94, at p. 106.)

I confess, with deep respect, to a doubt as to whether Kelly,

C. B., correctly distinguished *Warden* v. *Bailey* in his observations in *Dawkins* v. *Lord Rokeby* (1873), L. R. 8 Q. B. 255, at p. 272.

In *Hannaford* v. *Bunn* (1825), 2 C. & P. 148, the master of a man-of-war vessel recovered damages against his captain for false imprisonment. This case was tried by Abbott, C. J., and is cited in the interesting judgment of Nelson, C. J., in the American case of *Wilson* v. *Mackenzie* (1845), 42 American Decisions, 51. An exhaustive note is appended to the report of this New York case.

Finally, in *Allen* v. *Boyle,* Times, March 4th, 1861, Lt. Allen recovered damages for false imprisonment against the governor of a military prison upon the ground that the lieutenant, though legally sentenced, was confined in a place to which he was not legally committed.

This decision is now, however, met by the insertion of sect. 172 (4) in recent Army Acts.

The above decisions seem to support the rule that an action for damages will lie for imprisonment effected or assault committed without jurisdiction, even though such imprisonment or assault may arise in the course of purported and *bonâ fide* military discipline.

But I do not find that any of such decisions (save *Warden* v. *Bailey*) are dealt with in the judgment of Kelly, C. B., in *Dawkins* v. *Lord Rokeby* (1873), L. R. 8 Q. B. 255. The passage I have cited from that judgment must, I feel, be read in the light of the older and unreversed decisions.

It must also, I feel, be read in the light of various decisions which deal with *habeas corpus,* prohibition, and *certiorari*.[17] If so read the dictum will, I conceive, be further limited in its effect.

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[17] Cp. the interesting case of *Chambers* v. *Jennings* (*h*), where it was held that a prohibition lies to the Court of the Constable and Marshal on a libel found there for saying to a knight: "You are a scandal to the name of gentleman and to the order of knighthood."

(*h*) (1701), 7 Mod. 125.

Cp. also *Wolfe Tone's Case*, the dramatic circumstances of which are detailed in 27 St. Tr. 625.

And see *Ex parte Farnsworth*, where a Divisional Court, consisting of Lush and McCardie, JJ., on an *ex parte* motion granted a rule *nisi* directed to the editor of the *Daily Mail* to show cause why he should not be attached for contempt of Court on the ground that he had published a report of a court-martial before the findings of the Court had been duly promulgated. The editor was subsequently fined £200 and costs (*i*).

For if a soldier be held in custody without warrant of military law I presume that a writ of *habeas corpus* may be issued to his commanding officer. Such writs were actually issued in *Blake's Case* (1814), 2 M. & S. 1814, and *R.* v. *Allen* (1860), 3 E. & E. 338.

In *R.* v. *Cumming* (1887), 19 Q. B. D. 13, no point was raised that the Civil Court could not interfere with matters of military custody.

The writ of *habeas corpus*, it has been well said, is "of such a sovereign and transcendent authority that no privilege or person can stand against it." (See Wilmot's Notes of Opinions, p. 88.)

The power of the Court to issue the writ even in cases of military custody is strongly indicated in Halsbury's Laws of England, vol. 10, pp. 49—50, and vol. 25, p. 90, and the authorities there cited. (See also Short & Mellor on Crown Office Practice, 2nd ed. p. 317, and the Manual of Military Law, 1914 ed. at pp. 125 *et seq.*)

It would be a serious thing indeed if an officer or soldier did not possess the right in appropriate cases of applying for a writ of *habeas corpus*.

With respect to writs of prohibition it seems clear that they may be granted with respect to military proceedings. (See Halsbury's Laws of England, vol. 25, p. 90, and cases cited; the Manual of Military Law, pp. 121—23, and cases cited; and Short & Mellor on Crown Office Practice, 2nd ed. p. 263.)

In the dictum of Kelly, C. B., already quoted by me, he

(*i*) 37 T. L. R. 310.

cites *Grant* v. *Gould* (1792), 2 H. Blackstone, 69, in support. In that case it is true that a prohibition was refused. But the refusal proceeded on special grounds, and Lord Loughborough, in delivering the judgment of the Court, expressly said (p. 100): "Naval courts-martial, military courts-martial, courts of admiralty, and courts of prize are all liable to the controlling authority which the Courts of Westminster Hall have from time immemorial exercised for the purpose of preventing them from exceeding the jurisdiction given to them.

In *Re Poe* (1833), 5 B. & Ad. 681, the writ of prohibition was only refused upon the ground that the sentence was *fully* carried into execution before the writ was applied for. That a writ of *certiorari* may be issued to *military* authority in appropriate cases seems also to be clear on principle. (See the passages from Halsbury's Laws of England already cited, and the Manual of Military Law, pp. 123 *et seq.*; Short & Mellor's Crown Office Practice, 2nd ed. p. 82.) But it will not issue where the only matter in question is one of military *status*. (See *Re Mansergh* (1861), 1 B. & S. 400, *per* Cockburn, C. J., Wightman, Crompton, and Blackburn, JJ.)

This is clear from the judgment of Cockburn, C. J., who said (p. 406): "I quite agree that when the civil rights of a person in military service are affected by the judgment of a military tribunal, in pronouncing which the tribunal has either acted without jurisdiction or has exceeded its jurisdiction, this Court ought to interfere to protect those civil rights, *e.g.*, where the rights of life, liberty or property are involved. . . . Here, however, there is nothing of the sort—the only matter involved was the *military status* of the applicant—a thing which depends entirely on the Crown, seeing that every person who enters into military service engages to be entirely at the will and pleasure of the Sovereign."

If, then, an excess of military jurisdiction may be dealt with by the courts I have mentioned, and may also in appropriate cases be the subject of an action for damages, should liberty or property be unlawfully affected, the question directly and

acutely arises as to the true meaning of the famous words of Kelly, C. B., in *Dawkins* v. *Lord Rokeby* (1873), L. R. 8 Q. B. 255, at p. 271. I cannot think that those words were intended to bear the meaning which has so often been placed upon them.

It will be observed that the first decision cited in the dictum by Kelly, C. B., is *Sutton* v. *Johnstone* (1786), 1 Term Rep. 493 (Ex.) and 544 (Ex. Chamber). This decision leads me to again point out the vast distinction between an act done in excess of jurisdiction and an act done within jurisdiction. In the former case illegality may give rise to the recognised forms of action such as false imprisonment and the like. In the latter case an action can only be brought (if at all) upon the allegation that there has been a malicious *abuse of authority* causing injury to the plaintiff.

The distinction between the two classes of act is, I think, vital. The failure to recognise such a distinction has perhaps led to the present grave and regrettable confusion with respect to causes of action which arise out of military discipline.

Sutton v. *Johnstone* (*sup.*) has been the fountain of unceasing ambiguity.

I propose to briefly examine that case, and then to examine as concisely as possible the decisions directly or indirectly arising upon it both before or after *Dawkins* v. *Lord Rokeby* (1873), L. R. 8 Q. B. 255.

Now it seems ever to be an integral part of our common law that a person who maliciously and unwarrantably abuses his statutory or official position to the injury of another will be liable to damages for his conduct. He must not wickedly abuse his position to the hurt of another.[18]

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[18] Cf. *Lucas* v. *Nockells*, 10 Bing. 157, in which the House of Lords established the great principle that a man cannot set up an authority unless he has *really acted* upon it. This case, in the opinion of Finlason (*k*), is authority for the proposition that "the protection

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(*k*) Commentaries on Martial Law, xviii.

afforded by the common law applies only to those acts which have been really done in carrying out martial law."

Cp. also the Irish case of *Wright* v. *Fitzgerald* (*l*), which shows that an act of private malice done under the pretence of suppressing a rebellion is not covered by an ordinary act of indemnity. In the course of his summing-up in this case, Chamberlain, J., said that the jury "were not to imagine that the legislature by enabling magistrates to justify under the Indemnity Bill had released them from feelings of humanity or permitted them wantonly to exercise power even though it were to put down rebellion." The jury found a verdict for the plaintiff and gave damages 500*l*.

With a certain grim humour the volume of the State Trials goes on to add (27 St. Tr. 820) that Mr. Judkin Fitzgerald, the defendant, "afterwards received a considerable pension for his active services in quelling the rebellion and was also created a baronet of the United Kingdom."

Time will not permit me to enumerate the decisions. Many are collected in Addison on Torts, 8th ed. pp. 945 *et seq.*; Clerk & Lindsell on Torts, 6th ed. 814—816; Halsbury's Laws of England, vol. 25, p. 92; and the notes to *Crepps* v. *Durden* (1745), 1 Smith, L. C. 11th ed. pp. 651 *et seq.*

The principle I have stated seems to be assumed as sound by the House of Lords (Lord Birkenhead, L. C., and Lords Finlay, Atkinson, and Shaw) in the most recent case of *Newell* v. *Starkie* (1919), 83 Justice of the Peace Reports, 113.

The great question which has been at issue for more than 130 years is whether or not the above stated common law principle is applicable to acts done by a military or naval official within the limits of admitted jurisdiction.

Sutton v. *Johnstone* (1786), 1 T. R. 493 and 544, was, in substance, an action for malicious prosecution.[19] The defendant (an admiral) had brought the plaintiff to a naval court-martial for alleged disobedience to orders. The plaintiff was acquitted and brought his action for damages. He asserted that the plaintiff had acted with malice and without reasonable cause. He recovered damages at the trial. An application in arrest

(*l*) 27 St. Tr. 759.

of judgment was made to the Court of Exchequer. They decided first, that the action would lie, and second, that there was evidence to support a finding of malice and the absence of probable cause. The judgment in the Court of Exchequer is remarkable for the powerful and acute observations of Baron Eyre.

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[19] See note (1), *supra*, p. 45.

The defendant then appealed to the Exchequer Chamber. The appeal was heard by Lord Mansfield and Lord Loughborough.

In the course of their judgment they said this:—

"An action for *trespass* is for the defendant's having done that which, upon the stating of it, is *manifestly illegal*. This kind of action is for a prosecution, which upon the stating of it, is manifestly legal."

They allowed the appeal upon the ground that probable cause existed for the prosecution. I conceive that they recognised that trespass to the person committed without justification might give ground for a claim to damages.

But they further expressed the view that it was doubtful whether such an action for malicious conduct without probable cause would in any event lie. This point, however, was not actually decided by them. The case then went to the House of Lords. (See 1 Brown's Parl. Cases, 78.) The House of Lords dismissed the appeal.

But they dismissed it on the ground that probable cause existed. They did not apparently sanction the doubts expressed by Lords Mansfield and Loughborough as to whether such an action was maintainable. (See *per* Lawrence, J., in *Warden* v. *Bailey* (1811), 4 Taunton, 67, at p. 75.)

The doubts expressed by Lords Mansfield and Loughborough in the Exchequer Chamber seem, however, to have carried much weight thereafter, and to have produced a prolonged and remarkable series of dicta and decisions.

I have already referred to the next important case, viz.,

Warden v. *Bailey* (1811), 4 Taunton, 67, and I have pointed out that the claim there was for false imprisonment and not for malicious prosecution.

In *Keighley* v. *Bell* (1866), 4 F. & F. 763, the plaintiff, a captain, claimed damages against Major-General Bell for maliciously and without probable cause procuring the plaintiff to be arrested and prosecuted. The act of the defendant was clearly within his jurisdiction, and the keynote of the case is, I think, indicated at p. 785, where the following appears: "Willes, J., observed that assuming the arrest to have been lawful—that is, by lawful military authority—he did not see how the mere manner of it, if according to military usage and authority, could be the subject of inquiry here." Willes, J., appeared to think that it was doubtful if such an action would lie, but he pointed out that in any event *two* elements were required, viz., "dishonesty or malice, *i.e.*, bad motive for the proceedings: and the absence of probable cause for the proceedings." (P. 799.)

He decided the case on the ground that there was no evidence of malice or the absence of probable cause. (See p. 805.)

Incidentally he observed (p. 800) that "a malicious act cannot be said to have been done in pursuance of a statute."

In the same year (1866) the important case of *Dawkins* v. *Lord Rokeby*, 4 F. & F. 806, came before the same judge (Mr. Justice Willes). There the plaintiff, a lieutenant-col., brought an action for damages against Lord Rokeby, his commanding officer. The defendant formed the view that the plaintiff had insulted him. Thereupon he directed the plaintiff to be kept under arrest. In my view the action in substance was for the malicious abuse of authority without probable cause. (See p. 825.) The act of the defendant was, I think, within his jurisdiction. I conceive that the observations of Willes, J., in this case must be considered upon this footing.

But that distinguished judge undoubtedly used phrases of considerable breadth, and his opinion had obviously advanced since his judgment in *Keighley* v. *Bell*. He asserted the doctrine of "compact" already referred to. He made the

observations cited in an earlier part of this judgment, and in particular used the following words (p. 831):—

"It is clear that with respect to those matters placed within the jurisdiction of the military forces, so far as soldiers are concerned, military men must determine them."

I think that the effect of the decision is that, in the view of that judge, an action will not lie in the Civil Courts by one military man against another military man for a malicious and causeless abuse of authority.

I cannot, however, refrain from pointing out that the passage on p. 833 of the Report seems to indicate a misconception on the part of the learned judge as to the case of *Johnstone* v. *Sutton*. For, as I have previously remarked, Lord Mansfield and Lord Loughborough did *not* in *Johnstone* v. *Sutton* actually hold that the action for the malicious abuse of authority without probable cause would not lie, nor did the House of Lords in that case give any such decision. Mr. Justice Willes appears to have overlooked this point.

The next case to be mentioned is the unsatisfactory one of *Dawkins* v. *Paulet* (1869), L. R. 5 Q. B. 97.[20] There the plaintiff, Col. Dawkins, sued his superior officer for libel. The libel arose in connection with military matters, but not in connection with any court-martial or Court of Inquiry. This case contains a striking dissenting judgment by Cockburn, C. J. It also contains important dicta by the majority, viz., Mellor, Hayes, and Lush, JJ. The plaintiff failed on the ground apparently, as stated in the headnote, "that no action would lie against a military officer for an act done in the ordinary course of his duty as such officer even if done maliciously and without reasonable and probable cause." No trial took place. *The arguments arose on the pleadings alone.*

[20] With this case may be compared the recent case of *Adam* v. *Ward*, (1917) A. C. 309. In this case the plaintiff, who was a member of Parliament, in the course of a speech in the House of Commons attacked an officer of the army in his character as such, and the Army Council, having investigated the matter, found that the attack was

wholly unjustifiable. Thereupon the defendant, who was at the time Permanent Under-Secretary for War, published, under the instructions of his superiors in the War Office, an official communiqué including a letter to the officer who had been attacked by the plaintiff. This letter the plaintiff alleged to mean that he (the plaintiff) had been guilty of dishonourable conduct and had in consequence thereof been removed from his regiment. In these circumstances it was unanimously held by the House of Lords and the Court of Appeal, reversing a verdict and judgment for the plaintiff for 2,000*l.* damages, that the letter was published on a privileged occasion.

In his judgment in this case in the Court of Appeal (*m*), Buckley, L. J. (now Lord Wrenbury), said: "The following proposition, I think, is true: that if the matter is matter of public interest, and the party who publishes it owes a duty to communicate it to the public, the publication is privileged, and in this sense duty means not a duty as a matter of law, but, to quote Lord Justice Lindley's words in *Stuart* v. *Bell* (*n*), 'a duty recognised by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings whether civil or criminal.'"

In the House of Lords, Lord Dunedin stated (*o*) that the reasons given by Buckley, L. J., for his judgment in the Court of Appeal were entirely satisfactory to his mind.

It is, in my view, *vital* to remember the basis on which the majority of the Court proceeded. This is stated at p. 113, where Mellor, J., says: "It is to be observed that the replication admits the facts stated in the plea, namely, that the letters in question were written and published by the defendant in the ordinary course of his duty as *commanding officer to the Adjutant-General for the information* of the Commander-in-Chief and *as an act of military duty* and not *otherwise or for any other reason*, yet seeks to avoid the effect of that admission by the allegation that they were written and published of actual malice." . . . .

Later the learned judge says (p. 113):—

"I do not see how it makes the defendant's conduct actionable because he did what it was his *duty* to do, *maliciously* and not *bonâ fide*, in the discharge of his duty."

(*m*) (1915), 31 T. L. R. 299. (*n*) (1891) 2 Q. B. 350, C. A.
(*o*) (1917) A. C. at p. 322.

Again, at p. 114, Mellor, J., says:—

"I apprehend that the motives under which a man acts in doing a *duty*, which it is *incumbent* on him to do, cannot make the doing of that duty actionable, however malicious they may be. I think that the law regards the doing of that duty and not the motives from which it is done."

I make one final citation from Mellor, J. (p. 118):—

"I think that these considerations tend strongly to show that the legislature in providing special means of redress for officers feeling themselves aggrieved by any exercise of *ordinary military authority* or duty, by establishing special tribunals for the purpose by the articles of war *did* intend to preclude such officers from appealing to the ordinary tribunals in respect of such matters."

Of *Dawkins* v. *Paulet* (*supra*) I need only say this:—

(1) That I think the majority of the Court were only dealing with matters which were *within* the jurisdiction of a military defendant.

(2) That the doctrine laid down by them is, if sound, of the gravest and most far-reaching nature; and

(3) That, if I were free to do so, I should yield a willing assent to the pointed and cogent *dissenting* judgment of Cockburn, C. J., as applied to the facts in that case.

The next decision to be mentioned is *Dawkins* v. *Rokeby* (1873), L. R. 8 Q. B. D. 255. It is essential to recall the salient facts of that case. It was an action by Col. Dawkins against Lord Rokeby *for libel and slander*. The libel and slander were published, and published only, by the defendant in the course of his evidence before a *Military Court of Inquiry*.

The Court of Exchequer Chamber held that a Court of Inquiry had all the qualities and incidents of an ordinary Court of Justice. They therefore held that the words complained of were *absolutely privileged*, and that malice and the absence of reasonable and probable cause became immaterial. It was upon *this* ground, and this ground *only*, that the House of Lords (see L. R. 7 H. of L. 744) upheld the decision of

the Exchequer Chamber (see *per* Lord Finlay in *Fraser* v. *Balfour* (1918), 87 L. J. K. B. 1116, and 34 T. 502).

But in the course of his judgment (which was concurred in by no less than ten judges), Kelly, C. B., delivered the famous passage which I cited in the earlier part of this case, and which was relied on so strongly by the present defendant.

That dictum received no actual approval whatever from the House of Lords. If they had yielded approbation to it it would have been easy to so state. I feel at liberty to observe, with the deepest respect, that the dictum is stated with a breadth which appears to ignore many of the decisions mentioned and the principles indicated in this judgment. I feel also at liberty to say, with equally deep respect, that several of the decisions mentioned by the Chief Baron Kelly in the dictum impair rather than support the proposition he asserted.

I take the first four decisions cited by the learned Chief Baron.

I point out that *Sutton* v. *Johnstone* (*supra*) had *not* in fact decided what he deemed it to decide.[21]

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[21] See note (1) on *Sutton* v. *Johnstone, supra;* and see also the learned article on that case by *Prof. Holdsworth* in Law Quarterly Review, xix. pp. 222—229.

In *Re Mansergh* (1861), 1 B. & S. 400, Cockburn, C. J., had *expressly* stated that where a military tribunal had either acted without jurisdiction or had exceeded its jurisdiction the Courts would interfere provided that life or liberty were involved, although they would not interfere where military status *only* was concerned.

The like view seems to have been taken by the other judges—Wightman, Crompton, and Blackburn, JJ.

Wightman, J. (p. 409), expressly stated that "when a person is improperly imprisoned, as in *Lieut. Allen's Case*, 7 Jurist, N. S. 234, we have a right to inquire into the cause of the imprisonment."

In *Grant* v. *Gould* (1792), 2 Hy. Black. 69, as I have already pointed out, *Lord Loughborough* expressly *stated* (p. 100) that the Civil Courts *would* interfere if military tribunals assumed a power to act in matters not within their cognisance.

In *Barwis* v. *Keppel* (1766), 2 Wilson, K. B. 314, the plaintiff, a sergeant in the Guards, had, whilst on active service in *Germany*, been reduced by the defendant to the rank of an ordinary private. The Court gave judgment for the defendant upon the ground that the matters complained of took place *out of the King's dominions*,[22] and (apparently also) on the ground that the matter was one of *military status* only. In any event, I think that the dictum cannot apply where a military tribunal has, when acting without jurisdiction or in excess of jurisdiction, wrongfully infringed upon liberty, person, or property.

[22] In 1803, by 43 Geo. 3, c. 20, the great change was made of extending the Mutiny Act and the statutory Articles of War to the army whether within or without the dominions of the Crown. This alteration was made on the occasion of a peace—the Peace of Amiens—and was made, as appears from the preamble to the Act, in order to provide for the government of the troops engaged in the late war who had not yet been brought home and who could no longer be governed by prerogative articles, the power of making such articles having been suspended on the conclusion of peace.

On the resumption of hostilities, the Act and statutory Articles might have been again restricted in their operation to the dominions of the Crown and the troops engaged in foreign war might have been left to be governed as before by prerogative Articles. This course, however, was not adopted, but the Act and statutory Articles were applied in 1813, towards the close of the Peninsular War, to the troops without as well as to those within the dominions of the Crown (*p*), and the prerogative power of making Articles of War in time of war was thus superseded by a statutory power. The law as then settled has been continued ever since, and the army, both in peace and war, was governed by the Mutiny Act and statutory Articles until the year 1879, when the Act and the Articles were consolidated in the Army Discipline and Regulation Act, which was in turn repealed and re-enacted in the Army Act of 1881.

(*p*) 53 Geo. 3, c. 17, s. 146.

The next case in order of date is *Marks* v. *Frogley*, (1898) 1 Q. B. 888. There the plaintiff was a member of a volunteer corps. He brought an action for assault and false imprisonment. Whilst training with the regular forces at Shorncliffe Camp he was charged with larceny from a comrade and placed under arrest. Later he was given into the custody of the civil police. He was acquitted when tried at Quarter Sessions.

The real question at issue was whether or not he was subject to military law at the time of his arrest. The Court of Appeal held that he clearly was so subject. Hence the action failed. For if he was subject to that law then the proceedings were in order. Jurisdiction to deal with the offence charged existed under sect. 41 of the Army Act, 1881. The plaintiff could, when charged with the offence, be taken into military custody under sect. 45 of the Act, and the rest of the steps taken were justified by various other provisions of such Act. This, I think, was the actual basis of decision in the case. But the Court of Appeal (consisting of A. L. Smith, and Chitty and Collins, L. JJ.) seem to have added as another ground of their decision that the plaintiff was precluded from recovering by reason of a rule of law to the effect that grievances arising out of military discipline and administration, even though such grievances might consist of assault and false imprisonment committed upon a soldier in the absence of jurisdiction by those who directed or effected them, could not be the subject of an action for damages in the Civil Courts.

A. L. Smith, L. J., *e.g.*, cited with approval the judgment of Lush, J., in *Dawkins* v. *Lord Paulet* (1869), L. R. 5 Q. B. 94, at pp. 121—2, in the course of which that learned judge said: "The same code creates both the right and the remedy and this Court cannot add to the one or the other." The Lord Justice also referred to *Keighley* v. *Bell*, 4 F. & F. 763; and *Dawkins* v. *Lord Rokeby*, 4 F. & F. 806.

Chitty, L. J., said: "The grievances of which the plaintiff complains are grievances suffered by him when subject to military law at the hands of persons also subject to military law in execution of their military duty. To these grievances

the 43rd section of the Army Act, 1881, applies,[23] and for them the plaintiff must seek redress in accordance with the section. The Court cannot add to the remedy which is thus provided. It is the plaintiff's only mode of seeking redress."

[23] Sect. 43 of the Army Act, 1881, provides as follows:—

"If any soldier thinks himself wronged in any matter by any officer other than his captain, or by any soldier, he may complain thereof to his captain, and if he thinks himself wronged by his captain, either in respect of his complaint not being redressed or in respect of any other matter, he may complain thereof to his commanding officer, and if he thinks himself wronged by his commanding officer, either in respect of his complaint not being redressed or in respect of any other matter, he may complain thereof to the prescribed general officer, or in the case of a soldier serving in India to such officer as the Commander-in-Chief of the Forces in India with the approval of the Governor-General of India in Council may appoint; and every officer to whom a complaint is made in pursuance of this section shall cause such complaint to be inquired into, and shall, if on inquiry he is satisfied of the justice of the complaint so made, take such steps as may be necessary for giving full redress to the complainant in respect of the matter complained of."

These observations of the Lords Justices cause one the greatest difficulty. I most respectfully point out that they appear to overlook the vital and supreme distinction between acts done without any jurisdiction at all and acts done within jurisdiction, but maliciously and without probable cause.

As to the former class of acts I confess my inability to discover the ground upon which a soldier is disabled from bringing an action where injury to person or deprivation of liberty has been inflicted without any warrant or authority at all from either the military or the civil law.

But as to the latter class of acts I agree that a weighty body of decisions existed in 1898 that an action would not lie where the act done by one military man to another was *within jurisdiction*, although malicious and without probable cause.

The observations of A. L. Smith and Chitty, L. JJ., illustrate the need for keeping in mind the exact cause of action in each case and the actual grounds in each decision.

With the utmost diffidence I find myself unable, upon the whole, to think that the Lords Justices really intended to ignore or exercise the body of authorities which indicate that an action will lie if a common law wrong has been inflicted without jurisdiction. Such authorities were not quoted in the course of the argument.

On the other hand, the words of the Lords Justices powerfully support the view theretofore judicially asserted that no action will lie by one military man against another for the malicious discharge of duties within his jurisdiction.

It is to be observed, again, that it is not the Army Code which creates the rights of *personal security and freedom*. They are given by the common law, and they can, I conceive, be restricted or destroyed only so far as is permitted by the law military or the law civil. But, on the other hand, military status, as I have already pointed out, is given by military law alone, and for injury to that status recourse must be had to the remedies afforded by the law which creates the status.

This view is illustrated by *Woods* v. *Lyttleton*, 25 T. 665; (1909) C.A., already cited. There the plaintiff, an officer, brought an action against the members of the Army Council for wrongfully causing his dismissal from the army. The action failed. It will be seen that there was no claim whatever for false imprisonment or the like. It was a mere question of military *status*. Fletcher Moulton, L. J., was careful to point out, moreover (see p. 672), that there was *no excess of jurisdiction*.

The same remark may be made of *R.* v. *The Army Council*, May 16/17, (1917) 2 K. B. 504. There the applicant, an officer, sought a mandamus to compel the Army Council to cause a certain Court of Inquiry to reassemble and to rehear the plaintiff's case. The mandamus was refused. The Court (consisting of Viscount Reading, C. J., and Ridley and Avory, JJ.) applied the observation of Willes, J., in *Dawkins* v. *Lord Rokeby* (1866), 4 F. & F. 806, to the effect that military grievances must be decided by military men. In *R.*

v. *Army Council* (*supra*) there was, however, no question of infringement of common law rights. I agree, however, that the dicta in that case are broadly worded.

It is worthy of note, nevertheless, that in the course of his judgment Viscount Reading said this (p. 511): "I do not, however, wish to be taken as deciding that in no circumstances could this Court issue a writ of mandamus to the Army Council on proof of a breach of duty which the applicant had a right to enforce. Upon so important and far-reaching a proposition of law I desire to reserve my opinion."

I now come to the three recent and important decisions. On June 11th, 1917, the case of *Fraser* v. *Hamilton*, 33 Times L. R. 431, came before the Court of Appeal. The plaintiff was a commander in the navy. The defendant was an admiral, and the Second Sea Lord of the Admiralty. The action was (in substance) for damages (a) for false imprisonment, and (b) for maliciously and without reasonable and probable cause procuring the plaintiff to be retired from the navy.

This latter part of the statement of claim had been struck out by a learned judge at Chambers on the ground that it disclosed no reasonable cause of action. The Court of Appeal (Cozens-Hardy, M. R., and Scrutton, L. J.) affirmed this decision and dismissed the appeal. In the Times Law Reports I find the following words reported as part of the judgment of Lord Cozens-Hardy: "When a man becomes a member of the navy or the army he subjected himself to a code of law which ousted the jurisdiction of the ordinary Courts and provided redress for any grievances."

But I have read the shorthand notes of the full judgments of the then Master of the Rolls and Scrutton, L. J.

They afford a most important aid to an appreciation of the actual opinions delivered. Lord Cozens-Hardy used the following words: "Now the acts which the admiral is said to have done with reference to Commander Fraser were clearly acts *within his jurisdiction*. He was a naval officer and the commander was subject to the jurisdiction of the naval autho-

rities, and beyond all doubt there was jurisdiction as between the officer and the commander to deal with a matter of this kind and to do what seemed right in the matter."

Scrutton, L. J., after referring to acts done within the scope of jurisdiction, even though done maliciously and without reasonable and probable cause, said this: "It is different if they do acts outside the scope of their duty. There are a series of cases in which actions have lain against officers of the army and navy who have inflicted corporal punishment when they had no right to do so. There they are doing an act outside the scope of their duty, and for that reason in a case which was brought before the Court last week we declined to stay an action which alleged that a colonel in the army not only had imprisoned a person, but had done such acts as spitting at him, which is quite inconsistent with any military duty."

In this case of *Fraser* v. *Hamilton* both members of the Court referred to *Dawkins* v. *Rokeby* (1873), L. R. 8 Q. B. 255, and *Marks* v. *Frogley,* (1898) 1 Q. B. 889, and it seems clear that they did not regard either case as establishing that an action would not lie if the act complained of was without jurisdiction and created a common law wrong. But they *did* consider it to be an established proposition that an act of military discipline, if done within jurisdiction, was not actionable upon the ground that it was malicious and without reasonable and probable cause.

Scrutton, L. J., inadvertently overlooked the fact that the House of Lords in *Dawkins* v. *Rokeby*, L. R. 7 H. L. 744, had only affirmed the Exchequer Chamber upon the ground that the defamation complained of took place in the actual course of legal proceedings, and was therefore *absolutely* privileged.

Shortly after *Fraser* v. *Hamilton* was decided Admiral Hamilton died. The action therefore abated. Thereupon Commander Fraser issued a writ against Mr. Balfour as the First Lord of the Admiralty. The statement of claim was (*mutatis mutandis*) substantially the same as in *Fraser* v. *Hamilton*.

The judge at Chambers struck out the statement of claim and dismissed the action upon the ground that it would not lie.

The Court of Appeal on December 10th, 1917 (see 34 T. 134), affirmed this decision. The Court consisted of Swinfen Eady, Warrington, and Scrutton, L. JJ. The failure of the claim for false imprisonment turned on a special fact, viz., that Mr. Balfour was not personally connected therewith. The claim for malicious exercise of authority was struck out upon the ground that the point was covered by the earlier decision of the Court of Appeal in *Fraser* v. *Hamilton*, 33 T. 431.

From this decision the plaintiff appealed to the House of Lords on June 20, 1918. The opinion of the House of Lords is reported in 87 L. J. K. B. 1116, and 34 T. 502. The respondent contended that the appellant's only remedy for the wrongs (if any) alleged by the statement of claim lay to the properly constituted naval authorities in accordance with the King's Regulations.

This interlocutory appeal failed in part and succeeded in part. The claim for false imprisonment failed on the ground that the plaintiff admittedly could not prove any personal participation of the defendant in the false imprisonment. But the appeal as to the malicious exercise of authority succeeded on the ground that the matter was one *which should be argued at a trial*, and that the facts should be ascertained before a decision could be given by an appellate tribunal.

Lord Finlay, L. C., in giving the opinion of the House (consisting of Lord Finlay, Viscount Haldane, Lord Atkinson, Lord Sumner, and Lord Parmoor), pointed out that the House of Lords in *Dawkins* v. *Rokeby*, L. R. 7 H. L. 744, only affirmed the decision of the Exchequer Chamber (L. R. 8 Q. B. 255) on the ground of privilege of witnesses, and did *not* affirm the other and wider proposition that military wrongs arising from a malicious exercise of authority are not cognisable in a Court of Law. "That question (said Lord Finlay) is still open, at all events, in this House. It involves constitutional questions of the *utmost gravity*."

So stand the authorities. Their confusion is regrettable.

The law should be clear on points of such grave importance. The questions argued before me are indeed of constitutional magnitude. They touch the discipline of all the armed forces of the Crown. They involve the true significance of military and naval law.

Upon the decisions as they stand, my conclusions on the matter are these:

Firstly, that the rule I have already stated as a matter of principle is sound, viz., a military tribunal or officer will be liable to an action for damages if, when acting in excess of or without jurisdiction, they or he do or direct that to be done to another military man, whether officer or private, which amounts to assault, false imprisonment, or other common law wrong, even though the injury inflicted purport to be done in the course of actual military discipline.

Secondly, that if the act causing the injury to person or liberty be within jurisdiction and in the course of military discipline, no action will lie upon the ground only that the act has been done maliciously and without reasonable and probable cause.

The first conclusion seems, I think, to be reasonably clear from the authorities I have cited in this judgment, as well as upon principle. The second conclusion seems to be fully established by *Dawkins* v. *Paulet*, L. R. 5 Q. B. 94; *Dawkins* v. *Lord Rokeby*, L. R. 8 Q. B. 255; *Marks* v. *Frogley*, (1898) 1 Q. B. 888; *Fraser* v. *Hamilton*, 33 T. 431; and *Fraser* v. *Balfour*, 34 T. 503.

These five decisions represent a vast weight of judicial authority. The dissenting and brilliant judgment of Cockburn, C. J., in *Dawkins* v. *Paulet* has been completely overborne. The two latter of the five decisions were given in the Court of Appeal. When *Fraser* v. *Balfour* (87 L. J. Q. B. 1116; 34 T. 503) was before the House of Lords that tribunal did not actually reverse the views expressed in the famous passage of Kelly, C. B., in *Dawkins* v. *Rokeby*, L. R. 8 Q. B., pp. 271—2. Finlay, L. C., said: "The question is still open, at all events, in this House."

In my opinion, however, the question is *not* open to me as a judge of first instance; nor is it, I conceive, open to the Court of Appeal.

One tribunal only, the House of Lords, is free to hold that an action will lie for the malicious abuse of military authority, without reasonable and probable cause.

It is my duty to follow the existing vast preponderance of authority upon this point, whatever my own opinion might otherwise have been on the matter.

It follows that I am free to inquire whether the defendant in the present action acted without jurisdiction, and whether he falsely imprisoned the plaintiff. If so, I can, should the facts establish the cause of action alleged, award damages to the plaintiff.

But I am not free to award damages to the plaintiff for malicious and groundless abuse of authority, even if I should be satisfied that the plaintiff proved that serious assertion. I shall, however, state my conclusions of fact on the point after I have dealt with the main circumstances with regard thereto.

I proceed to state the main facts of the case and to deal with the points of military law involved.

At the outbreak of war the plaintiff practised as a solicitor in Yorkshire. In June, 1915, he enlisted as a private in the Army Service Corps, and was sent to France. He remained there for three years. Nothing is proved against him with respect to his military duties during that period.

In June, 1918, he was sent back to England on compassionate grounds, and at a reduced rate of pay. At the end of June he was posted to York. His company was No. 612 of the Motor Transport A.S.C. The defendant, Major Evans, was his commanding officer. Lt. Haydon was one of the officers in the unit. The camp was at Hull Road, outside York. On the day of his arrival the plaintiff's kit was inspected. It was short of a cotton holdall, worth a few pence. He told the corporal that he had not had one in France, and added (most unwisely) that if he possessed one he would probably lose it. The corporal told Lt. Haydon of the plaintiff's

words, and the plaintiff was thereupon asked by Lt. Haydon if he had said that he would probably lose it. The plaintiff replied, "Yes. I did say that to the corporal." Lt. Haydon thereupon placed the plaintiff under open arrest, and told him to parade before the defendant.

On the 30th of June the plaintiff was charged before the defendant with threatening to make away with Government property. Lt. Haydon stated that the plaintiff had so threatened. But other witnesses gave evidence as to the actual words employed by the plaintiff. The plaintiff told the defendant that he had *not* made the threat alleged. The defendant asked Lt. Haydon if he was sure that the plaintiff had made the threat alleged. The Lt. answered: Yes.

The defendant, however, in view of the conflict of evidence, dismissed the charge.

The above episode was the source and origin of the painful series of facts which I was called upon to investigate for many days in Court.

It is clear to me that the plaintiff felt that Lt. Haydon had given untrue evidence against him. I form the view that the plaintiff had merely indicated that if he did possess a holdall it would probably be lost. He was referring to inadvertence and not to wilful design. But his words were most unwise. I may point out that Lt. Haydon was not called for the defence at the trial before me. It was stated that he was suffering from illness.

On July 1st, 1918, the plaintiff paraded before the defendant, and lodged a complaint against Lt. Haydon. He stated to the defendant that Lt. Haydon had given untrue evidence against him the day before. The plaintiff described it as perjury. This was a serious assertion to make. The defendant said, "If Lt. Haydon has committed perjury you can go to a police officer and take out a summons." This suggestion was inaccurate—the evidence of Lt. Haydon had not been given on oath. Nor did the Army Act and Regulations require that it should be in the absence of a demand by the person charged (sect. 46 (6) of the Act). Later in the day the

plaintiff again went before the defendant and stated that the word perjury had been wrongly employed by him, and he expressed his regret for using it.

The circumstances I have just narrated obviously gave rise to acute feeling between the plaintiff and Lt. Haydon. I entertain no doubt that the defendant informed Lt. Haydon of what the plaintiff had said. Hence arose a further cause of the regrettable incidents in this case.

On July 20th, 1918, the plaintiff had received leave to go to Scarborough. But ere he went the sergeant-major placed him under open arrest, and he was told to parade at 9.30 a.m. He paraded, and was then told by the sergeant that he was not wanted, and that no charge would be made against him. But as a result of these events he was unable to make his proposed visit to Scarborough. On July 21st the sergeant told him that Lt. Haydon had directed that the plaintiff would have to sweep the workshop. This was outside the plaintiff's ordinary duty, and it is a class of work which is *sometimes*, though not necessarily, given as a minor punishment for failure in duty or discipline. The plaintiff was in the drivers' section of his unit. On July 22nd, at 7 a.m., the plaintiff was ordered to actually sweep out the workshop. He did so. The plaintiff keenly resented the work to which he was thus put. He regarded it as an unjust punishment. The plaintiff seems to me, I may observe, a man of strong feelings and impulsive temperament.

At 9.30 on the same day the plaintiff saw the defendant, and told him that Lt. Haydon had put him to a defaulter's job. The defendant replied that he would look into the matter.

I may point out that up to the present there is not nor could there be any suggestion that the defendant had behaved otherwise than with justice to the plaintiff.

On July 22nd, 1918, the plaintiff sent a very serious letter to the defendant. It was a grave complaint against Lt. Haydon. It charged him—

(1) With giving untrue evidence on the 30th of June.

(2) With adopting a course of malice and persecution towards the plaintiff.

(3) With habitually using language to his inferiors which was unbecoming an officer and a gentleman.

The last paragraph of the letter was as follows:—

"I am compelled to lay these facts before you for my own protection, and also for the protection of *all* the men under your command, *and I may say that I have their unanimous and unsought support.*"

The defendant considered the letter. He decided to charge the plaintiff under two heads. On July 23rd the plaintiff was therefore placed under close arrest by the defendant's order. He was taken to the guard tent by a police corporal and a private.

On July 24th he was taken, still under custody, before the defendant. The defendant told him that he was charged—

(1) *With making a frivolous complaint to his commanding officer.*

(2) *With conduct to the prejudice of good order and military discipline.*

The plaintiff admitted that he wrote the letter. The defendant said: This is a serious offence. Have you anything to say?

The plaintiff replied: I have said in my letter all I want to say, and I have nothing to add to it.

What took place at the hearing beyond the above is in dispute. The defendant convicted the plaintiff, and it is admitted that he convicted him on *both* charges. The punishment awarded was fourteen days' confinement to barracks. No other penalty was inflicted.

This sentence was carried out. For the period named the plaintiff was confined to barracks.

This is the matter which gives rise to the first claim for damages for false imprisonment.

The plaintiff asserts that the defendant in convicting and giving the above sentence acted beyond his jurisdiction, and

he further asserts that his confinement to barracks by the defendant's orders amounts to false imprisonment.

The questions raised by these assertions are curiously intricate and singularly important. The arguments upon them have been able, subtle, and prolonged.

To deal with them in full detail would occupy an extended and undue space of time. They, however, touch so many vital points of army discipline and military law that it is essential for me to deal concisely with each material point.

It is necessary to state, in the first place, that the arrest of the plaintiff on the 23rd of July was clearly within the jurisdiction of the defendant as commanding officer.

Sect. 45 of the Army Act, 1881, provides that every person subject to military law when charged with an offence under the Act may be taken into military custody; and it further provides (*inter alia*) that any officer may order into military custody an officer of military rank or any soldier.

It is true that no written account of the offences with which the plaintiff was charged was delivered by the defendant to those into whose custody the plaintiff was taken. Apparently such an account should have been delivered in pursuance of sects. 45 (4) and 21 (2), and King's Regulations 463.

But I think that such omission, although regrettable, does not invalidate the custody. The provisions I have referred to are, I think, directory. Their observance is not essential to the legality of custody. They ought, however, to be followed.

In the second place I yield my full concurrence to the view expressed by General Sir John Maxwell that in having regard to the serious contents of the plaintiff's letter of July 22nd, any proceedings upon that letter might and could have been, in any event, more appropriately dealt with by court-martial rather than by the exercise of summary jurisdiction.

Sir John Maxwell announced a clear view upon the point, and I desire to express my full appreciation of the clear and weighty evidence given by that distinguished soldier. He was

subpœnaed by the plaintiff as a witness. He gave his testimony with unswerving impartiality.

But the question before me is not whether a court-martial was more appropriate than a summary hearing by the defendant. The question is a technical one, viz., whether the defendant had jurisdiction to act as he did.

Now the first charge on which the defendant, as he frankly admits, convicted the plaintiff was that "of making a frivolous complaint to his commanding officer."

No such offence is known to the military law. I am glad indeed that this is so. The right of complaint is one of the most vital privileges possessed by the soldier. If it be fully and freely recognised then the soldier may at all times announce his grievances and ask for redress. If it be unduly restrained he may be destitute of any remedy in matters which urgently call for attention.

Sect. 43 of the Army Act gives the amplest power of complaint to any soldier.

But it is clear to me that the right of complaint may be abused. A continued repetition of baseless complaints (particularly if made for indirect purposes) might, I conceive, amount to conduct against good order and discipline.

The *complaint*, moreover, whether verbal or written, may be so *worded* as to constitute a military offence. This was, I am satisfied, the view taken by the defendant. The language used may be insulting. The words, moreover, may be so framed as to be indicative of insubordination, threat, or other illegitimate object or method. The importance of this will be apparent when I further consider the conviction.

But in so saying I desire to express the emphatic opinion that the amplest recognition should be given to the full privilege of complaint if it be honestly made and worded legitimately, and with reasonable propriety.

It was argued by Mr. Watson that the conviction for making a frivolous complaint could be treated as an independent thing, and that the sentence given could be treated for the purpose of

a claim for false imprisonment as being referable in respect of it.

I am unable to assent to this argument. The two charges were not for separate acts. They arose out of precisely the same thing. The letter, and the letter only, was the basis of *both* charges. The defendant regarded the letter as in itself constituting two offences. The one supposed offence was non-existent. But if the letter would support a conviction by the defendant for the other offence then I think that the act of the defendant can be justified. I am satisfied that the sentence would have been exactly the same if the charge of a frivolous complaint had never been made.

Now the first question is, Was there anything before the defendant upon which he could find that an offence against good order and military discipline had been committed?

The second question is this, Had the defendant jurisdiction to deal with such offence and to inflict the sentence he did?

A third question may be this, Did the confinement to barracks of the plaintiff amount to a technical imprisonment?

Each of these difficult questions has been argued with fulness.

(1) Was there any evidence before the defendant upon which he could find that an offence against good order and discipline had been committed?

It is important to observe that the plaintiff was not charged with an offence under sect. 27 of the Army Act. That section, so far as material, provides as follows:—

Every person subject to military law who commits any of the following offences, that is to say—

(1) Being an officer or soldier makes a false accusation against any other officer or soldier knowing such accusation to be false; or

(2) Being an officer or soldier in making a complaint where he thinks himself wronged knowingly makes any false statement affecting the character of an officer or soldier, or knowingly *and* wilfully suppresses any material facts . . . .

shall on conviction by court-martial be liable to suffer imprisonment or such less punishment as is in this Act provided.

The defendant did not purport to act under this section, and it is clear that on July 24th no evidence was taken or suggested appropriate to a charge under sect. 27. He purported to act under sect. 40. ✓

It is essential to read that section in full, inasmuch as it gives rise to several points of importance beyond the one immediately in question. It is as follows:—

Sect. 40. Every person subject to military law who commits any of the following offences, that is to say:—

Is guilty of any *act, conduct, disorder, or neglect to the prejudice of good order and military discipline.*

shall on conviction by *court-martial* be liable, if an officer, to be cashiered or to suffer such less punishment as is in this Act mentioned, and if a soldier to suffer imprisonment or such less punishment as in this Act mentioned.

Provided that no person shall be charged under this section in respect of any offence for which *special provision is made in any other part* of the Act and which is not a civil offence.

Nevertheless, the conviction of the person so charged *shall not be invalid by reason only of the charge being in contravention of this proviso, unless* it appears that injustice has been done to the person charged by reason of such contravention: but the responsibility of any officer for that contravention shall *not* be removed by the validity of the conviction.

Upon this section the question arises as to whether the last paragraph of the plaintiff's letter of July 22nd, 1918, can constitute an offence within sect. 40. I read that paragraph again:

"I am compelled to lay these facts before you for my own protection, and also for the protection of all the men under your command, and *I may say that I have their unanimous and unsought support.*"

These, as Sir John Maxwell said, are serious words. It was quite unnecessary for the plaintiff to tell the defendant that he (the plaintiff) had the unanimous though unsought support of all the men under the defendant's command.

I need not point out the possible consequences which might follow if such words are permissible in a complaint under sect. 43.

Could they, under the circumstances, fairly be said to constitute a military offence? In my opinion the true conclusion is that the whole circumstances must be considered in each case, and that such or similar words may in fact in military law constitute a military offence. I agree with the views expressed by the Judge Advocate-General and Brigadier-General Atkinson on the matter.

The point, I regret, was not put to General Sir John Maxwell when in the witness-box.

Now, if such words may constitute a military offence the further question arises as to the section of the Act which creates such offence. Mr. Watson forcibly argued that the offence (if any) fell within one of the earlier sections of the Act, and that the proviso of sect. 40 therefore applied, viz., that "no *person shall be charged under this section in respect of any offence for which special provision* is made in any other part of the Act, and which is not a civil offence."

I have already pointed out that the plaintiff was not charged under sect. 27 with making a *false accusation* or *false statement*.

The only other sections which are relevant (apart from sect. 40) are sects. 7 and 8.

Sect. 7 makes it a serious offence (*inter alia*) to cause or conspire with any other persons to cause any mutiny or sedition in any forces belonging to His Majesty.

But in the present case it is obvious that there was no possible ground for such a suggestion against the plaintiff.

Sect. 8 makes it (*inter alia*) a serious offence if any person subject to military law strikes or uses any violence to his superior officer or uses threatening or *insubordinate* language to his superior officer.

It might be argued that the last paragraph of the letter falls within this section. But the primary, though perhaps not the only, purpose of sect. 8 is to deal with something more

than language, which though susceptible of being interpreted as threatening or insubordinate is not so intended.

Language may be used of such a nature, I think, as to constitute a breach of good order and military discipline, although it may fall outside sect. 8. Military discipline is a grave and delicate thing. An offensive or vulgar remark, *e.g.*, though neither threatening nor insubordinate, may be a breach of good order and discipline. So, too, may language which, though neither offensive, vulgar, threatening, or insubordinate, is yet of such a character as to be improper and unpermissible, and injurious to discipline.

In my view the last paragraph of the letter was of such a character.

Sect. 40, it will be noted, is worded in the broadest possible way. It covers many things which are not susceptible of clear definition or exhaustive enumeration. It may include numerous acts of omission or commission which are not within either the spirit or the letter of the large number of preceding sections which create specific military offences. As Lord Loughborough said in *Grant* v. *Gould* (1792), 2 H. Bl. 69, at p. 101: "In some cases it is impossible more strictly to mark the crime than to call it a neglect of discipline."

I am satisfied of two things—(1) that the last paragraph of the letter did not fall within any of the earlier sections of the Army Act, (2) that the defendant was entitled to regard it, under the circumstances, as an offence against sect. 40. But I am also satisfied that the plaintiff did not, in fact, intend when he wrote the letter to indulge any spirit of threat or insubordination.

Now, at this point of the case a serious conflict of evidence arose between the plaintiff and the defendant, viz., as to whether the last paragraph of the letter was in fact in the mind of the defendant on July 24th as constituting an offence against sect. 40, and as to whether the attention of the plaintiff was called to such paragraph. A man cannot well be convicted of a charge not present to the mind of either the judge or the person charged.

The plaintiff stated in evidence that the last paragraph of the letter was *not* even referred to on July 24th.

On the other hand, Major Evans told me that he relied on the last paragraph as *constituting conduct against good order and military discipline*, that he pointed out to the plaintiff the character of the paragraph, expressly asked him if it was written with a consciousness of its seriousness, and that the plaintiff informed him that he had not written it with such consciousness.

In deciding upon this issue of fact between the parties I have the advantage of the testimony of Sergeant-Major Richmond. Although not clear as to the precise language used by the defendant he told me that something was said by the defendant to the plaintiff to the effect that it was a serious matter to state that he had the support of the other men in the company.

Now Sergeant-Major Richmond was an extremely fair witness, and his testimony on some points was quite in favour of the plaintiff. Upon the whole, therefore, I come to the conclusion of fact that the evidence of the defendant on *this* point is substantially correct, and that the plaintiff's recollection on the point (although I fully recognise his *bona fides*, and his wish to tell the full truth) is not so accurate as that of the defendant.

The position before the defendant, therefore, was on July 24th, first, that he regarded the plaintiff as having committed an offence under sect. 40 by reason of the last paragraph of the letter, but that, secondly, he was satisfied that the plaintiff had not acted with any mutinous or insubordinate intent. I am unable to differ from the views of the defendant on the first point, and I am certainly in agreement with him on the second point.

Now, as I have said, I fully feel that it would have been better, in any event, if the defendant had, in view of the whole contents of the letter, taken steps to bring the matter before a court-martial.

But he decided to deal with the matter summarily. Upon

the question of his object in so doing I am willing to accept his evidence. When asked at the trial why he had not preferred a more serious charge, upon which the plaintiff would inevitably have gone to a court-martial, the defendant said:—

"I did it because I did not want to put the private up to a court-martial. He was a new man. I thought if I gave him a chance he would probably become a decent soldier. I have done it hundreds of times before, and it has always been appreciated except in this case."

This answer gives rise to two great and conflicting considerations: On the one hand, it may well be undesirable for an officer to make a less serious charge against a soldier in order that he may himself exert a disciplinary power which ought more properly to be dealt with by a court-martial. It is obvious, indeed, that if this be done imprudently or improperly the result may well be that conduct which in fact amounts to one of the more serious offences under the earlier sections of the Army Act will be treated, in order to gain jurisdiction, as the less serious offence of conduct to the prejudice of good order and discipline under sect. 40.

On the other hand, it may well be in the interests of the private, and of justice and mercy alike, that the circumstances of a case should be considered in order to determine whether a more serious charge should be made (to be dealt with only by a court-martial) or a less serious charge which can be dealt with by an officer summarily.

If the facts and circumstances make it reasonably clear that a soldier, if guilty of anything, is guilty of one of the serious offences named in the sections of the Act prior to sect. 40 then no officer should seek to take jurisdiction to himself by electing to make a charge under sect. 40 only.

But if there be doubt as to whether any of the more serious offences have been committed, and the officer thinks that the circumstances of the case justly permit of a less serious offence (*e.g.*, under sect. 40) being charged he may, I think, properly elect so to do.

As Brigadier-General Atkinson pointed out, the matter must depend upon the *peculiar circumstances* of each *individual* case.

Now, had the defendant actual jurisdiction to deal summarily with the charge before him on July 24th?

Sect. 46 (1) of the Army Act provides (*inter alia*):—

"The commanding officer shall upon an investigation being had of a charge made against a person subject to military law under his command of having committed an offence under this Act, dismiss the charge if he in his discretion thinks that it ought not to be proceeded with, but where he thinks that the charge ought to be proceeded with, he may take steps for bringing the offender to a court-martial, or in the case of a soldier may deal with the case *summarily*."

The only other parts of the section I need at present refer to are—

Sub-sect. (6), which provides that in every case where the commanding officer has power to deal with the case summarily the accused person *may* demand that the evidence against him shall be taken on oath.

Here I may point out incidentally that the plaintiff did not on the 24th of July demand that any evidence against him should be taken on oath.

Sub-sect. (8). Where a commanding officer has power to deal with a case summarily under this section, and after hearing the evidence considers that he may so deal with the case, he shall, in every case where the award or finding involves a *forfeiture* of *pay*, and in every other case unless he awards one of the minor punishments referred to in this section, ask the soldier charged whether he desires to be dealt with summarily or to be tried by a district court-martial, and if the soldier elects to be tried by a district court-martial, the commanding officer shall take steps for bringing him to trial by a district court-martial, but otherwise shall proceed to deal with the case summarily.

Sub-sect. (9). Nothing in this section shall prejudice the power of a commanding officer to award such minor punish-

ments as he is for the time being authorised to award. So, however, that a minor punishment shall *not* be awarded for any offence for which detention exceeding seven days is awarded.

In conjunction with sect. 46 must be read King's Regulation 487, which is made under sect. 71 of the Act.

That Regulation provides as follows:—

A commanding officer may without reference to superior authority dispose summarily of or try by regimental court-martial a soldier charged with an offence under the following sections of the Army Act:—

Sect. 6 (except on active service).

Sect. 8 (2) (threatening or insubordinate language only) except on active service.

Sect. 9 (2) (except on active service).

Sect. 10 (except sub-sect. (1)).

Sects. 11, 14, 15, 18 (1) and (3).

Sect. 19.

Sect. 20 (except where the act is wilful).

Sects. 21, 22, 24, 27 (4).

Sect. 33 (except cases of enlisting from the Army Reserve).

Sect. 34.

Sect. 40.

Here the plaintiff was, in my opinion, on active service, and I understand that this is not disputed.

But it will be observed that a commanding officer may dispose summarily of offences under sect. 40, *whether the soldier be on active service or not*.

The Regulation then proceeds as follows:—

"First and less serious offences under the above sections, and minor neglects or omissions not resulting from *deliberate disregard* of authority or not *associated with grave offences*, should, as a rule, be dealt with summarily. A charge for any other offence, which the officer desires to dispose of summarily, will be referred to superior authority in a letter stating the cir-

cumstances of the case, accompanied by the soldier's conduct sheets. The commanding officer may refer a charge for any offence to superior authority with an application for a district court-martial."

It follows, therefore, that *primâ facie* the defendant had authority to deal under sect. 46 and King's Regulation 487 with the offence against good order and military discipline charged against the plaintiff under sect. 40.

The sentence of fourteen days' confinement to barracks was in fact a minor punishment which the defendant had power to impose. (See King's Regulation 493, sub-head 4.)

The plaintiff's counsel, however, in their most able, elaborate, and detailed arguments for the plaintiff challenge the defendant's exercise of jurisdiction on two main grounds.

First, as I have already indicated, they say that the plaintiff's offence (if any existed) was covered by one of the earlier sections of the Act, and, therefore, that the plaintiff could not be charged under sect. 40, inasmuch as that section by its proviso says that no person shall be charged thereunder in respect of any offence for which special provision is made in any other part of the Act.

Even if the views I have previously expressed be incorrect, yet this point is fully met by the succeeding words, which say that, nevertheless, the conviction of a person so charged shall not be invalid by reason only of the charge being in *contravention* of this proviso unless it appears that injustice has been done to the person charged by reason of such contravention. I can understand this provision. For it may well be (as is exemplified by the present case) that it is frequently doubtful whether or not the facts and circumstances proved constitute one of the offences named in the earlier sections of the Act or an offence only under sect. 40.

Upon an anxious consideration of the whole matter I have come to the conclusion, in view of the last paragraph of the letter of July 22nd, that injustice was not done to the plaintiff in view of the supreme requirements of military discipline,

and even though the fullest possible effect be given to the important right of complaint under sect. 43.

It is true that the closing words of sect. 40 are these: "The responsibility of any officer for that contravention shall not be removed by the validity of the conviction." But these words refer only, in my opinion, to the military responsibility of an officer to his superior officers for any breach of military duty he may have committed.

Secondly, it was forcibly argued by counsel for the plaintiff that the conviction of the plaintiff was void and of no effect, because—

(a) The award or finding involved "a *forfeiture of pay*," and

(b) The defendant did not ask the plaintiff whether he desired to be dealt with summarily or to be tried by a court-martial.

Now it is admitted that the defendant did not so ask the plaintiff. If, therefore, the award or finding involved a forfeiture of the plaintiff's pay it follows that the defendant did *not* do what he ought to have done.

Upon the question of whether or not the award or finding in this case involved a *forfeiture* of pay I listened for several hours to the acute and intricate arguments of counsel on both sides.

In particular Mr. Tebbs and Mr. Coddington respectively dealt with the full details of the matter and the historical development of sub-sect. 8 of sect. 46. Space will not permit me to review or discuss their arguments in detail. I will only state a few facts and then indicate my conclusion. It is now clear that the daily pay of the plaintiff on July 24th, 1918, was 2*s*. 2*d*. per day. Of this sum 1*s*. 2*d*. was his ordinary pay as a soldier. The balance of 1*s*. was what is called "corps pay." The plaintiff, as I previously pointed out, was a private in the Army Service Corps. He got this 1*s*. daily corps pay by reason of the special skill or qualification which is recognised as belonging to those who serve in such a corps. It is given to other corps, *e.g.*, the Royal Engineers and the Army Ordnance.

This 1*s.* is wholly *distinct* from ordinary pay.

Corps pay is, of course, governed by the Royal Warrant for Pay of the Army. This warrant is issued under the prerogative of the Crown. The most relevant of the rules in that warrant is *Rule No.* 844. That provides that engineer pay and corps pay shall *not* be *issued* to any non-commissioned officer, man or boy, for any day on which *pay* is *forfeited*, or on which (*inter alia*) he is confined to barracks or camp, even though employed on corps duty or at his trade whilst so confined or under close arrest charged with an offence of which he is afterwards found guilty.

Now, during the fourteen days in which the plaintiff was confined to barracks he did not get his corps pay of 1*s.* This resulted from Rule 844. It is therefore said for the plaintiff that the award or finding of the defendant on July 24th involved a *forfeiture of pay*. I emphasise the word *forfeiture*.

On the other hand, it is contended for the defendant that the word "pay" in sect. 46 (8) means ordinary pay, and it is conceded that the mere sentence of fourteen days' confinement to barracks did not in any way affect the ordinary pay of the plaintiff. (See Article 977 of the Royal Pay Warrant.) He continued to receive it

I have considered the numerous and intricate matters referred to by Mr. Tebbs and Mr. Coddington, and I have further considered sects. 136, 137 and 138 of the Army Act and Rule 848 of the Pay Warrant, and upon the whole I have come to the conclusion, though with some doubt, that the word "pay" in sect. 46 (8) refers to ordinary pay, and is used in the same sense as the actual words "ordinary pay" employed in sub-sect. 2 of that section.

I am confirmed in my opinion by the fact that a similar view is taken not only by the present but also by former Advocates-General. I am further confirmed in my opinion by the circumstance that if it were otherwise curious and regrettable results would follow. A confinement to barracks for a few days cannot be regarded as other than a slight punish-

ment, although it may involve a loss of corps pay. If an officer commanding men with corps pay could not give such a sentence it would deprive him to a large extent of the salutary and often the merciful exercise of summary jurisdiction.

In my view the award or finding of the defendant here did not involve a *forfeiture* of pay within sect. 46 (8).

But even if, contrary to the view I have stated, the award or finding of the defendant did involve "a forfeiture of pay" within sect. 46 (8), I am still of opinion that the omission of the defendant to ask the plaintiff whether he desired a court-martial would not invalidate the conviction. For I think that the point is expressly met and dealt with by No. 7 of the Rules of Procedure made under sect. 70 of the Act. That rule is as follows:—

7.—(a) If a soldier is dealt with summarily by his commanding officer and the award or finding involves a forfeiture of pay or, though such forfeiture is not involved, the award is not an award of a minor punishment, and his commanding officer has omitted *to ask* him whether he desires to be *dealt with summarily or to be tried by* a district court-martial the soldier may *at any time on the same day before* the hour fixed for the commitment and release of soldiers under sentence *claim his right to be tried* by a district court-martial.

(b) Except as mentioned in sub-sect. (8) of sect. 46 of the Army Act, and in this rule, a soldier *has no right to claim a trial by court-martial.*

The contention of the plaintiff that the conviction was invalid and void by reason of the defendant's omission to ask the plaintiff if he desired a trial by court-martial *therefore fails.*

Thus it becomes unnecessary to consider whether a sentence of confinement to barracks, passed without jurisdiction, may, if carried into effect, amount to a false imprisonment.

I will conclude my remarks on this part of the case by saying that in testing the legality of sentences passed under the provisions of the Army Act a Civil Court ought not to apply those rigorous tests sometimes applied in questioning the acts of a Civil Court of summary jurisdiction.

An officer is not a trained lawyer. Frequently he may be without legal advice. A reasonable latitude should be allowed and mere irregularities of procedure, if actual jurisdiction exists, ought not to receive undue weight. An iron enforcement of every non-vital collateral regulation may render the maintenance of discipline in the army unduly difficult. I may respectfully refer to the observations of the Court in *Re Poe* (1833), 5 B. & Ad. 681, where Denman, C. J., said (p. 688): "We agree with Lord Loughborough's remark in *Grant* v. *Gould* that it would be extremely absurd to expect the same precision in a charge brought before a court-martial as is required to support a conviction by a justice of the peace."

I must now proceed to summarise the main points in the great body of detailed facts which followed after the conviction of the plaintiff on July 24th. On July 25th, 1918, the plaintiff appealed, under sect. 43, from the defendant's decision to the Prescribed General Officer of the Northern Command at York.

His letter of appeal is emphatic. He asserted his full belief in the truth of the allegations he had made in the letter of July 22nd, and stated that he was prepared to prove them.

I have no doubt that the plaintiff fully believed in the truth of the charges he made. Whether they be true or not in fact is not for me to determine. The plaintiff was not charged, as I have said, under sect. 27 (1) with making a false accusation against an officer knowing such accusation to be false. He may well have believed, however, that such was the main substance of the case against him.

If the charge had been under sect. 27, I fully agree with the plaintiff's counsel that the trial before the defendant on July 24th was unsatisfactory, inasmuch as no evidence was given either to show that the accusations against Lieutenant Haydon were false, or that the plaintiff knew them to be false.

It is clear that at the commencement of this action before me in York the plaintiff believed that his appeal of July 25th had not been forwarded in due course to the prescribed general officer by the defendant.

But it is now plain that the defendant did forward the letter

in the proper way. It did not come before General Maxwell. But it came before Brigadier-General Atkinson, who was authorised to deal with it. He at once ordered two investigations, one by Col. Sayers, the Officer Commanding, A.S.C., and one by Major Lupton.

Each of those officers made an investigation. In neither case was the investigation such as a Court of Law would deem to be fully sufficient. For this, however, the defendant was not responsible. Major Lupton reported on July 31st. But Col. Sayers did not report until August 12th. Each report was adverse to the plaintiff.

After receiving the two reports Brigadier-General Atkinson considered the matter, and decided that the plaintiff's complaint could not succeed. The plaintiff, at a date which I cannot precisely fix, was informed of the adverse decision. Apparently it was about August the 20th or 22nd.

Unfortunately the report of Major Lupton contained the following paragraph:—

"I am of opinion that the second charge, *i.e.*, conduct to the prejudice, &c., &c. (sect. 40, Army Act), should not have been preferred against the man, but rather that he should have been charged under sect. 27 of the Army Act, 1881, *i.e.*, making a false accusation against an officer. I recommend, therefore, that authority be given for the conduct sheets to be altered accordingly."

The report of Col. Sayers contained the following paragraph (*inter alia*):—

"I concur generally in the opinion given by the Officer Commanding Troops, York (*i.e.*, Major Lupton), and recommend that charge (1), viz., 'making a frivolous complaint to his commanding officer,' should be deleted, and that the 2nd charge should be read 'making a false accusation against an officer.'"

I am satisfied that both Major Lupton and Col. Sayers acted with good faith and with no indirect motive in recommending this alteration of the conduct sheet. They appear to have

misconceived in some way the wording and effect of King's Regulations 507 and 1919.

But I cannot too strongly express my regret that any such suggestion was made. The danger and impropriety of such a course are obvious and grave.

This is fully recognised both by General Sir John Maxwell and by Brigadier-General Atkinson.

Sir John Maxwell rightly said that if the recommendation as to the alteration of the record had come before him he would not have assented to it for a moment.

Unhappily the suggestions that the record should be altered were acted upon at a later stage of the case. On December 12th, 1918, an order came to the defendant from an officer at Headquarters to alter the conduct sheet. He did so. He struck out the charge of making a frivolous complaint, and then substituted the charge "making a false accusation against an officer" for the charge "conduct to the prejudice of good order and military discipline."

The officer who directed this alteration gave evidence before me at the trial. I fully accept his statement that he acted in good faith and with the belief that he was entitled by military law to direct the alteration to be made.

But again I must express my regret that the conduct sheet in this case was altered at all.

I must however state with clearness that, upon the evidence before me, I am satisfied that the defendant, Major Evans, did not suggest that the conduct sheet should be altered, and it is clear that the alteration, although made in his own hand, was only effected by him on the *express direction* of officers at Headquarters.

From the date of his conviction on July 24th onward the plaintiff felt acutely that he had suffered an injustice. I entertain no doubt that he believed himself to be wronged.

On the other hand, the defendant had undoubtedly formed the view that the plaintiff was of an insubordinate disposition and indisposed to submit to discipline.

The consequences of this state of things on both sides were unfortunate.

The next heard of the plaintiff's case consists in the allegation that the defendant wrongfully and unreasonably and continually refused him leave of absence when he applied for it. The plaintiff relies on this as evidence of malice. This is a part of the case which has caused me much anxiety. It is a painful aspect of the dispute between the parties.

The plaintiff had a young wife, and was the father of a baby about one year old. Towards the end of July, 1918, she was seized with influenza and ensuing pneumonia. She was gravely ill. She was unconscious for a long time. Three nurses attended her. She was then in Sussex. Towards the end of August the plaintiff got five days' leave of absence. He went to Sussex. He brought his wife (just convalescent) and his child to Harrogate. His wife appeared to get better. But I am satisfied that she was always in a precarious state of health. She never regained her strength. She died on February 10th, 1919, from a kidney trouble, which had afflicted her for a long time.

Under these circumstances the plaintiff was naturally anxious to see his wife and his child as often as he could. He applied for leave week after week, but it was not granted by the defendant. The defendant knew that the plaintiff desired leave for the purpose of seeing his wife.

There are many circumstances connected with the failure of the defendant to get leave, which I regret. They appear in the plaintiff's evidence. But it is *essential* to remember that the defendant, as commanding officer, had formed the view that the plaintiff's conduct was not such as to call for a grant of leave. Leave of absence, it must be remembered, is a privilege, and a commanding officer is naturally reluctant to grant it where he has formed an adverse view of the applicant's merits.

It is clear from the evidence of Col. Courtney that the defendant was anxious as to the plaintiff's conduct. I am also satisfied that the defendant in refusing to grant leave

was acting with the approval even if not under the express direction of Col. Courtney.

On September 6th, 1918 (a specific and important date), the plaintiff applied for leave on the ground of his wife's illness. The defendant made inquiries from the police at Harrogate. They sent the following telegram:

"Mrs. Heddon not seriously ill. Heddon's presence not required."

Thereupon the defendant refused leave. Shortly afterwards, acting on the instructions of Col. Courtney, the defendant went to Harrogate himself. He was unable to see Mrs. Heddon herself, but he made full inquiries, and I am satisfied that he formed the view that Mrs. Heddon, though not well, could not be described as ill. The defendant's inquiries were perfectly fair, and his report, dated September 19th, 1918, to Col. Courtney indicates the result of them. He also received a letter from the plaintiff's wife, which I need not further refer to. I feel no doubt, however, that Mrs. Heddon was in a worse state of health than the defendant believed. I am satisfied, moreover, that the plaintiff and his wife were on terms of mutual affection. The result of the defendant's report was that Col. Courtney informed the defendant that no leave was to be granted to the plaintiff *without* his authority.

But although no leave was granted to the plaintiff, yet between the end of August and the 26th of October he actually went to Harrogate some six times without any permission at all. This fact lessens seriously the feeling of sympathy which I might otherwise feel for the plaintiff by reason of the denial of leave. These secret visits were quite unsuspected by the officers of the plaintiff's unit.

Although I think that it would have been better, under the circumstances, if leave had actually been granted by the defendant to the plaintiff, yet, in view of the evidence of Col. Courtney and of the *bonâ fide* view formed by the defendant upon his visit of investigation to Harrogate, I am unable to say that the defendant acted in such a way as to indicate

malice. An erroneous view as to the needs of military discipline is a wholly different thing to an evil motive.

The feelings of the plaintiff at this stage of the matter were so strong that on October 4th, 1918, he issued a writ in the Yorkshire District Registry, claiming damages for malicious prosecution and damages for wrongful imprisonment. Then on October 7th the plaintiff paraded before the defendant. He told the defendant that he wished to see him privately. The plaintiff was marched into the room where the defendant was in the presence of several officers and soldiers.

The plaintiff asked the defendant for the name of his solicitor to accept service of the writ.

The defendant said, "What! a writ?"

The plaintiff replied, "Yes, sir."

The defendant said, "Have you got it with you?"

The plaintiff replied, "Yes, sir," and served the defendant with a copy.

The defendant read it and then said, "I always knew you were a rogue and now I know that you are a damned fool."

This formed the basis of a claim for slander by the plaintiff.

The plaintiff was then marched from the room.

This issue and service of the writ further accentuated the unhappy position already existing.

The plaintiff honestly believed that he was exercising his legal rights, as he, in fact, was doing.

The defendant believed that the issue and service of the writ constituted a serious matter from the point of view of military discipline.

Hence a further unhappy series of incidents subsequently took place. Events moved on. Still the plaintiff got no leave. Other men in the unit were freely getting leave.

On October 24th he served his first statement of claim.

On October 26th another unfortunate event occurred. The plaintiff applied for leave. He was told that it was not granted. Thereupon he said that he was going whether leave was granted or not. He left the barracks and caught the train to Harrogate, and did not return till 28th. Now, in

fact, the defendant had on October 25th been to Headquarters, had seen Col. Courtney, and had received from him a sanction for the grant of leave to the plaintiff. The pass would have been issued to the plaintiff had he waited longer on the 26th.

I greatly regret that the plaintiff was not informed at once on the 26th (when he went for his pass) that it would be granted to him. He clearly was under the impression that it was refused, and the strength of his feelings and anxiety to see his wife and child led him to the unwise step of leaving without permission.

As a result he was charged on the 29th by the defendant with absence without leave. He clearly had committed a military offence under sect. 15 of the Army Act.

The plaintiff says he told the defendant that he ought to have had a pass. The defendant says that the plaintiff told him that a pass had in fact been granted to him. I accept the defendant's version of this particular conversation. It was true that a pass had been prepared for the plaintiff, but it had not been in fact issued to him. There was clearly a misunderstanding between the parties. The defendant thereupon said, "Can you never speak the truth?" These words form the basis of a further claim for slander by the plaintiff.

The plaintiff on the same day was put at first under open and then under close arrest. This course was clearly within the defendant's jurisdiction.

On October 30th, 1918, the plaintiff was convicted by the adjutant (Lieut. Richardson) of the offence committed on October 26th, 1918, to three days' C.B. and two days' pay stopped.

He makes no complaint of this conviction and sentence.

On October 31st, 1918, the plaintiff addressed a further and strongly-worded complaint (under sect. 43 of the Army Act) to the General Officer Commanding.

It shows the deep feeling, and also the belief, of the plaintiff, which I am satisfied was *bonâ fide*, but it also contains some strong and I think in any event exaggerated statements against the defendant. This letter did not come before General

Maxwell. But it was received and considered by General Atkinson.

On November 1st, 1918, the defendant's solicitors took out a summons before the District Registrar to strike out the statement of claim and dismiss the action.

On November 6th the District Registrar made an order as asked by the summons. The plaintiff argued the matter personally.

Upon his return from the argument the plaintiff was at once taken into custody and placed in close confinement. He was charged with two things: (1) with issuing a writ against his commanding officer, and (2) with making a false accusation against his commanding officer in the letter of October 31st.

I regret that any charge was made against the plaintiff for issuing the writ. To adopt such a course involves that a soldier is wholly deprived of a right to invoke the aid of a Civil Court to remedy a grievance which he may *bonâ fide* believe to amount to a common law wrong. To issue such a writ was not an offence. It is right, however, to say that the arrest of the plaintiff appears to have been mainly due to the view formed at Headquarters that the statements in the letter of October 31st, 1918, against the defendant were such as to require a court-martial. Headquarters did not apparently know that the plaintiff was charged when arrested with issuing a writ against his commanding officer.

The charge actually formulated against the plaintiff for the court-martial was a charge under sect. 40 for conduct to the prejudice of good order and military discipline. It was based on certain statements in the said letter of October 31, which were alleged to constitute a false charge against an officer. The arrest of the plaintiff on the 7th of November was, I am satisfied, ordered by the defendant upon the direction of Headquarters.

Proceedings were duly taken to prepare a summary of evidence in accordance with military practice.

On November 9th the plaintiff's arrest was changed from close to open.

On the 16th of November, 1918, the plaintiff, by a letter of that date, made a complaint against the conduct of Lt. Haydon in connection with some financial dealings of that officer with or through a Private Tolfrey—a soldier in the same unit. Thereupon the plaintiff was further charged with making a false accusation against an officer.

This charge was afterwards abandoned. The charge of issuing a writ against his commanding officer had previously been withdrawn.

I do not feel called upon to express any final view with respect to the assertions of the plaintiff against Lt. Haydon in the letter of November 16th. It will suffice to state (1) that those assertions represented the honest belief of the plaintiff; (2) that the written statements of Lt. Haydon and Private Tolfrey do not evoke my commendation; (3) that the letter of the plaintiff shows his strong view as to Lt. Haydon; and (4) that the plaintiff in writing the letter was lapsing into the position of a private citizen rather than exerting a right of complaint as a soldier.

The plaintiff desired to appeal from the decision of the District Registrar at York. He wished to see a solicitor. He was permitted to do so.

With some difficulty the plaintiff (through the courteous aid of the Treasury solicitor) obtained leave to go to London to argue his appeal.

On November 22nd, 1918, he appeared before me sitting as a judge at Chambers. I allowed the appeal by reason (*inter alia*) of the views expressed by the House of Lords in *Fraser* v. *Balfour* (1918), 87 L. J. K. B. 1116; 34 T. 502.

I also gave the plaintiff leave to deliver an amended statement of claim. The plaintiff, I may say, has acted on this permission. His amended statement of claim contains claims arising down to the 3rd of December. These claims first arose, therefore, after the issue of the writ. But it has been agreed that I shall deal with the case on the footing that the plaintiff had issued a further writ after the last alleged cause of action, and that the two actions had then been consolidated.

The amended statement of claim was delivered on the 3rd of December, 1918. The statement of claim is not very artistically drawn by the plaintiff. He did not seek the aid of counsel. But I have deemed it my duty to inquire into the substance of the matter, and not to be governed by mere technicalities of pleading.

On November 25th the plaintiff was again arrested, *i.e.*, within three days after his appeal had been allowed by me. He was marched to the Fulford Detention Barracks by a corporal and two policemen.

He was kept in confinement at these barracks, in the detention cell, for eighteen days.

He was not informed at the time of the reason for his removal to the detention barracks. Several times he was allowed to leave the barracks. On one occasion he was permitted to go to his office, in charge of two policemen, to get some papers.

On another occasion, viz., on December 3rd, he was allowed to go to the office of the defendant's solicitor in order to deliver his amended statement of claim. He was marched through the streets of York by an armed guard for the purpose of the visit.

On a third occasion he was conducted before the court-martial which assembled on December 5th. The charge against him was that of conduct to the prejudice of good order and discipline under sect. 40. It was based, as I have already said, on the letter of October 31st, and alleged that the plaintiff had made false statements against an officer in that letter.

At the hearing before the court-martial the plaintiff applied for an adjournment upon the ground that the decision of the court-martial might prejudice the trial of this present action.

The Court granted the request. The plaintiff then applied for his release. The President of the Court suggested that the plaintiff should apply to the defendant.

On the same day the plaintiff accordingly paraded before the defendant and applied for his release.

The defendant then made the unfortunate observation that

he could *not* release the plaintiff, but that the time which the plaintiff had spent in the detention barracks would be taken off his sentence. This was a most regrettable thing to say, for it assumed what the defendant ought *not* to have assumed, viz., that the plaintiff would have been found guilty by the court-martial of the offence charged.

During his detention at Fulford the plaintiff wrote several emphatic letters of protest against his continued confinement.

On December 12th, 1918, the plaintiff was released from custody.

The plaintiff contends that his confinement to Fulford Barracks from November 25th to December 12th was (1) illegal, and (2) was due to the conduct of the defendant acting maliciously and without reasonable and probable cause.

As to the first ground the plaintiff asserts that no proper warrant existed for his detention at those barracks.

A warrant was in fact signed by the defendant. It was in Form Q. (See the Manual, p. 718, and King's Regulation 476.) This was a wholly erroneous form. The warrant should apparently have been in Form R. (See the Manual, p. 718, and Regulation 648.) The point, however, is obscure and doubtful.

The plaintiff saw a copy of the warrant signed by the defendant. But such warrant was not produced at the trial. It appears that shortly after it was signed the defendant asked an officer at Fulford Detention Barracks if the warrant was correct. That officer informed him that the warrant was in wrong form, and that in reality no warrant was required.

Thereupon the warrant was, I think, destroyed.

I think that it would have been in accordance with proper military practice if the defendant had signed a warrant in the form which appears to have been applicable.

But I am unable to say that the plaintiff has established any case of illegal commitment against the defendant.

I think that jurisdiction existed in the defendant to order the plaintiff unto and to keep him in military custody by virtue of sect. 45 of the Army Act, and I cannot say that the

defendant exceeded his powers by directing and causing the plaintiff to be confined at Fulford Detention Barracks, although I regret that a stricter observance of military procedure was not followed.

As to the second ground I am satisfied that the defendant in sending the plaintiff to the Fulford Barracks was acting under the instructions of the Northern Command. Before receiving those instructions he had informed the Northern Command (through Major Piggott) that in his view it was essential for the discipline of the unit that the plaintiff should be placed under close arrest. He suspected that the plaintiff was creating discontent amongst the men. Upon this information the Northern Command directed the arrest of the plaintiff as it was in fact carried out. I cannot say that the defendant did not *bonâ fide* believe that the removal of the plaintiff to Fulford was essential to discipline. The defendant was in a responsible position. He was clearly most anxious about the plaintiff. I do not feel justified in holding that the plaintiff was *in fact creating or seeking* to create discontent or insubordination. But that the defendant was not devoid of some ground for his suspicion seems clear from the cross-examination of the plaintiff when recalled. He stated that prior to November 25th, 1918, various men in the unit were speaking to him about his case, and asking him how he was getting on, and that some of the men were saying that the plaintiff had been treated in a shameful manner.

I therefore think that this second contention fails.

I need mention but three further facts.

Soon after December 12th the plaintiff was transferred from York to Salisbury Plain. He therefore ceased to be under the jurisdiction of the defendant.

Towards the end of December the court-martial which had sat on December 5th, 1918, was dissolved.

On January 24th of this year the plaintiff left the army.

My conclusions on the whole matter are these: The claim for slander in respect of the words spoken by the defendant on the 7th of October, 1918, and the 29th October, 1918, fails. For

I am satisfied that the words were not in fact spoken or understood to be spoken of him in the way of his profession as a solicitor, nor was any special damage caused by their publication. (See *Jones* v. *Jones,* (1916) 2 App. Cas. 481.)

I am unable to find that the defendant acted beyond his jurisdiction with respect to the several matters complained of by the plaintiff.

I have come to the conclusion that the plaintiff has not established that the defendant acted maliciously or without reasonable and probable cause as alleged by the statement of claim.

I desire to add a few words more.

The case has been one of singular difficulty. It has caused me the most anxious consideration. Upon several points I have felt the greatest doubt.

I have stated the main facts only of this case. I have not referred to certain episodes at all.

I greatly wish that those episodes had never taken place in any form.

I could wish, moreover, that in the series of proceedings against the plaintiff there had been a fuller observance of every one of those technical requirements which, though not vital, are yet useful, and should have been followed throughout. The feelings of the plaintiff which led him to commence and to continue this litigation were deep and genuine.

But some parts of his conduct were wrong, some were unwise, and some were over impulsive.

He failed, I think, to bear in mind that although he had left France he was still in the army and owed the high and constant duty of obedience.

I cannot overlook the occasions on which he ignored authority and was absent without leave. He thereby committed military offences which were none the less grave because undiscovered save once.

On the one hand, he committed faults; on the other hand, I think that he suffered hardships.

A greater measure of tact and a different method of treat-

ment on the part of more than one officer would, I think, have prevented the occurrence of much of this unhappy history.

The discipline of the army must be firmly maintained.

But the enforcement of that discipline may well be assisted by a recognition of the fact that a soldier, whatever his position may have been in civilian life, is appreciative to the full of just and sympathetic consideration.

There must be judgment for the defendant.

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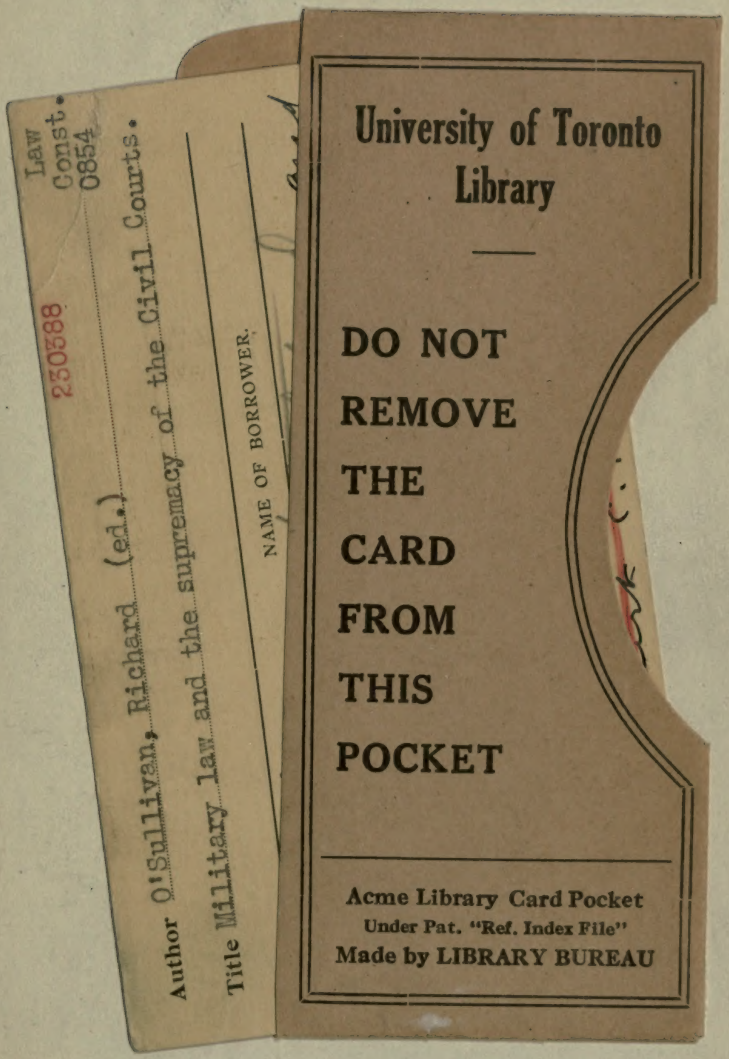
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