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THE LAW APPPLICABLE TO THE MILITIA OF CANADA.

IT would seem to a casual reader that there runs through the Militia Act the idea that the Sovereign by virtue of the royal prerogative is the head of the military forces in Canada.

In that Act, R. S. C. c. 41, by s. 3, the command in chief of all military and naval forces of and in Canada, including the militia, is vested in the Sovereign to be exercised and administered personally or by the Governor-General as the Sovereign's representative. By various other sections the powers are expressed as being personal under the term "Her Majesty" or "The Queen." By the Interpretation Act, R. S. C. c. 1, s. 7, s.-s. 6, those terms mean "Her Majesty, her heirs and successors, Sovereigns of the United Kingdom of Great Britain and Ireland." The powers of the Sovereign would, therefore, seem to be in clear contrast to those of the Governor-General in Council and the Minister of Militia.

To the Governor-General in Council is confided, generally speaking, the fixing of the duties of the Minister of Militia, his deputy, and the officers of his department: ss. 4, 5; the acquisition, construction, care, and disposal of military public works, and the state aid for the care of arms: ss. 7, 58, 70, 71; the fixing and ascertaining the strength of the militia, except where provided for by statute; enlistment, uniform, and clothing, and the establishment and regulation of military schools: ss. 20, 23, 28, 41, 54, 73, 74,

88. It is the Governor-General in Council who calls out the militia for guard and sentry duties, and regulates their billeting and cantonment: s. 79, s.-ss. 4, 5; fixes the pay and determines the duties of the staff officers and officers of the militia generally: ss. 40, 41, 45, 88; and makes regulations relating to anything necessary to be done for carrying the Militia Act into effect: s. 116.

The pay and allowance of the officers and men and the strength and composition of the militia and periods of service are fixed by the Act itself: ss. 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 28, 59.

But it is in the Sovereign, or the Governor-General as representative, that by far the largest and more important powers are apparently vested.

These include the division of Canada into military districts and divisions: s. 16; the relative strength of each arm of the service and their adjuncts: ss. 22, 23, 28; the appointment of an officer of the regular army to command the militia, the selection of the Adjutant-General and Quarter-Master General, and of staff officers, and the commissioning of officers of the militia: ss. 37, 38, 39, 48; the calling out of the militia for annual drills, for active service, and for inspection: ss. 59, 60, 61, 67, 68, 79; the selection of persons to attend military schools: s. 72; the convening of courts of inquiry and courts martial, and the approving of the sentences of a general court martial: ss. 91, 93; and the promulgation of militia orders through the Adjutant-General: s. 119.

It will thus be seen that the personnel of the forces, their discipline and distribution, and the calling out of the militia, are, in words, intrusted to the Sovereign, and that the Governor-General in Council is charged with the constitution and composition of the militia department, the enrollment, care, and billeting of the troops, fixing the duties of the higher and lower officers, and the acquisition, maintenance, and disposal of military works and schools.

But here there is interposed a constitutional doctrine which renders this elaborate division useless, and puts into

the hands of the Minister of Militia all the carefully subdivided powers. This is the doctrine of ministerial responsibility.

The Imperial Parliament, of which the Sovereign is a constituent part, has by the B. N. A. Act, 1867, s. 15, given Canada the exclusive right to legislate on the subject of "Militia, Military, and Naval Service and Defence."

The 15th section referred to enacts that:—

"The command in chief of the land and naval militia and of all naval and military forces of and in Canada is vested in the Queen, and shall be exercised and administered by Her Majesty personally or by the Governor as her representative."

Referring to this provision, Todd in his work on Parliamentary Government in the Colonies, 2nd ed., p. 377, says:—

"This is the first clause in the Canada Militia Act of 1868 (31 V. c. 40), and it secures the exercise of all powers under that Act in a constitutional manner. Those matters which are of Imperial direction, and concern the Queen's regular army and navy, whilst serving in Canada, are subject to the control of the Imperial authorities; whilst those which concern the disposition and management of local forces are regulated by the Governor-General, with the advice and consent of his Privy Council or Cabinet."

It would be difficult to understand why the Militia Act confers the personal power of command upon the Sovereign or on the Governor-General as representative, were it not for the section above quoted, which, so far as the question under consideration is concerned, is the constitutional authority for its passage. The Act reproduces faithfully the old idea of royal prerogative, quite unconscious of the advance of democratic government in Canada. The Government of Canada have always asserted that the Governor-General, as the representative of the Sovereign, must exercise his functions by and with the advice of his responsible Ministers, and this is so even when the Governor-General's office is mentioned in apparent contrast to the

Governor-General in Council. This constitutional doctrine was laid down by Sir John Macdonald in 1878, who said:—

"Whether in any case power is given to the Governor-General to act individually, or with the advice of his Council, the act, as one within the scope of the Canadian Constitution, must be on the advice of a constitutional Minister. The distinction drawn in the statute between the act of the Governor and an act of the Governor in Council, is a technical one, and arose from the fact that in Canada, for a long period before Confederation, certain acts of administration were required by law to be done under the sanction of an Order in Council, while others did not require that formality. In both cases, however, since responsible government has been conceded, such acts have been always performed under the advice of a responsible Ministry or Minister:" Can. Sess. Papers, 1878-79, vol. V., p. 153.

This doctrine was afterwards reiterated by Mr. Edward Blake, and is recognized by Todd in his works. See Todd's Constitutional Government in the Colonies, 2nd ed., p. 377.

In England the doctrine that in exercising the royal prerogative with respect to the army the Sovereign must exercise the same constitutionally and under the advice of a responsible Minister is clearly laid down.

Clode, in his Military Forces of the Crown, vol. I., says:—

"The problem which presented itself to the statesmen of the period of the Bill of Rights was how, without risking a divided allegiance, the army could be placed equally between the Crown and Parliament, that the interest of one should not so prevail as to disturb the influence of the other."

At p. 84 he goes on to say:—

"Now this object was to be attained not by destroying but by strengthening the existing departments or powers of the *Crown*, but at the same time by adding to the legitimate functions of *Parliament*. These ends were brought about so far as need be referred to here by three separate measures. 1. By laying down certain fundamental principles in relation to the army by the Bill of Rights and Act of Settlement.

2. By placing the pay of the army under the control of Parliament or more especially of the House of Commons. 3. By granting *to the Crown* statutory powers for the government and *discipline* of the army. Other statutory guarantees against the encroachments of the power of the Crown and of the standing army were added . . . but the greatest security was and still is to be found in the constitutional doctrine developed at the Revolution which made every Minister personally responsible to Parliament for his own conduct, and for the acts of the Crown taken upon his advice. This agency of governing the kingdom by responsible Ministers applies to the army as well as to the civil government, although for many years some few politicians and many soldiers were ready to contend that the Crown, without the intervention of *any* responsible Minister, might use the army for *any* purpose, and govern and command it in *any* manner that the will of the Sovereign for the time being should direct. There is no good foundation, as will be seen, for any such theory. The army, as part, or rather as the instrument, of the State, must be under the ordinary rule of law, whether as applied to the prerogatives of the Crown or obedience to the civil magistrates."

On the same subject Todd in his work on Parliamentary Government in England, vol. I., p. 527, speaking of the relinquishment by George III., in 1806, of the royal prerogative of the control of the army (see vol. I., p. 121), says:—

"We have already seen that the control of the army and navy was the last of the prerogatives to be surrendered into the custody of responsible ministers. Even of late years there have been those who have contended that the administration of the military and naval forces of the kingdom should remain altogether in the hands of the executive, without any interference by either House of Parliament. But sound doctrine forbids a distinction to be drawn between the exercise of the royal authority over the army and navy and over other branches of the public service . . . and there can be nothing done in any department of state for

which some Minister of the Crown is not accountable to Parliament. The complete responsibility of Ministers for the control of the military force having been established beyond dispute, it follows that they must be held accountable to Parliament for their proceedings in this as in other matters."

Again, in the Manual of Military Law issued by the War Office, 1899, at p. 205, we read:—

"The power to govern the army is annually given by Parliament, but when given is exercised, as in the naval and civil service, by the Crown alone. The manner in which that power is exercised is constitutionally subject, like the exercise of other prerogatives, to the advice of Ministers of the Crown, of whom the one particularly responsible for the army is one of the principal Secretaries of State."

Again, on p. 267, the author says:

"Whether the officials engaged in the administration and discipline of the army are civil or military, the Secretary of State for War, a member of the House of Parliament and a Cabinet Minister, is responsible for the acts of all of them, and is the constitutional and responsible adviser of the Crown in all questions connected with the army."

Anson, in his work on the Law and Custom of the Constitution, Part II., p. 371, says:—

"The Secretary of State is responsible for the exercise of the royal prerogative in respect of the army, and everything that is done in the army is done subject to his approval. For the use of these powers he is responsible to Parliament. He must answer to Parliament for the discipline of the army and its relations to the civil members of the community, as well as for its distinction, efficiency, and cost. . . . Especially is the Secretary of State bound to maintain the discretionary prerogatives of the Crown in the appointment and dismissal of officers, their promotion or reward, or the acceptance of their resignation."

It follows from this that in Canada all branches of military administration must come under the supreme control of the Minister of the day. Those functions prescribed for

the Governor-General in Council only mean that the Cabinet shall formally approve of the recommendations of the Minister of Militia, and those powers which are conferred upon the Sovereign and the Governor-General, shall in effect be exercised agreeably to the Minister of the day and with his concurrence.

It is no doubt true that the power to appoint a military officer is an exercise of the royal prerogative: Grant v. Secretary of State for India, 2 C. P. D. 453; and it may be also true that the Governor-General in the exercise of matters of pure prerogative acts of his own motion, independently of, or even against the advice of the Privy Council. So stated by Cameron, J., in Regina v. Bennett, 1 O. R. 462.

But prerogative has never sprung from a statute, though it has often been curtailed by one, and the powers vested in the Sovereign or the Governor-General under the Militia Act are statutory powers. And though the language used is quite definite, the doctrine above stated cuts it down and controls its action just as effectually as if all powers had been vested in the Minister of Militia by name.

The idea, now obsolete (though recently upheld by a general officer of the highest rank), of putting the military command and discipline in the hands of a professional soldier free from the control, in its every day life, of the supreme civil government, runs through all legislation affecting the army and militia.

As practised in England, the commander in chief has intrusted to him the discipline of the army, with the hope that he will so administer it as not to need interference from the war office. So long as he does his duty in this respect he is left alone, but, as all appointments and promotions must go through the Secretary for War, he cannot be said ever to have an entirely free hand. The idea of ministerial control and responsibility is so deeply rooted in constitutional government, that the military administration is always treated as acting under the actual or potential supervision of the civil power.

Bearing this in mind, all difficulties occasioned by the strange phraseology of our Militia Act may be discarded.

This is done by the simple process of regarding all acts, whether to be done by the Governor-General, the general officer commanding, or any staff officer, as done by and through the militia department.

A case in point is that of the officer in His Majesty's regular army who is charged with the military command and discipline of the militia. The idea that he is an Imperial officer, responsible to the Horse Guards, is incompatible with the view above set forth, and no matter how often politics may reduce the best laid plans of a military officer to naught, the principle of civil supremacy is too keenly prized to be set aside. It is quite possible that the efficiency of the militia would be increased by the resolute refusal of the Minister to interfere with purely military command or discipline, but of that the constitution does not take account and we must accept, at all events from the standpoint of the law, things as we find them.

Speaking of the appointment of an Imperial officer to the command of the militia of Canada, Todd, in his Parliamentary Government in the Colonies, 2nd ed., p. 378, says:—

"The duties of this officer are analogous to those performed in England by the commander in chief of the British army, and he is, in like manner, subordinate to the civil power, and subject to the discretion of the Governor-General, through the Minister of Militia and Defence."

English army officers who have been appointed to the command of the Canadian militia have naturally failed to grasp this constitutional doctrine. They are generally imbued with the idea that military administration is a professional matter, and they firmly believe, often with reason, that the highest development of our system of defence suffers from the political denial of that opinion. To collect and systematize the information necessary for the best distribution of our forces, to arrange for their prompt mobilization at the proper strategic points, to provide reserves of ammunition, arms, guns, transport, and medical stores, and to invigorate the troops with the *esprit du corps*, essential to intelligent and active realization of the duty required of them, needs the zeal and trained responsibility of the professional soldier.

Whether it is an English or a Canadian army officer who takes command, is not of importance, provided he be competent, and no one, generally, is more conscious than the civilian Minister himself, that ability and enthusiasm cannot supply the necessary knowledge for such a task. But our system is such as we have made it, and it has many drawbacks. We have an officer charged with the command and discipline of the militia, but we have nothing corresponding to the semi-independent office of Commander-in-Chief, nor is there any provision for a staff corps. No powers other than those given above are by statute conferred upon the General Officer Commanding, nor are any duties prescribed for him, nor for the Adjutant-General or Quarter-Master General. The Governor-General in Council has the right to prescribe these, and, as we have seen, this leaves it entirely in the hands of the Minister of Militia.

The Canadian militia army comprises active and reserve, land and marine forces—the latter yet on paper. The male population is divided into classes, the largest being doubtless the first to serve, namely, those from 18 to 30, who are unmarried or are widowers without children. The active forces may be raised by voluntary enlistment or by ballot, or partly in both ways. The officers are appointed by commission, which runs during pleasure, and the power of dismissing an officer is one that is inherent in the Crown: Grant v. Secretary of State for India, 2 C. P. D. 453; Re Tufnell, 3 Ch. D. 173. No officer has any vested right to his rank or position, nor to the privilege of half pay: *ib.* 174, 175.

The men are enlisted or enrolled by the Captain of each company division, and conscription by ballot is only resorted to in case a sufficient number do not volunteer: Militia Act, s. 30.

Enrollment renders the men liable to serve under the provisions of the Militia Act: s. 20, s.-s. 3. The period of enrollment is three years: s. 13; and no officer or man can retire in time of peace without giving his commanding officer six months' notice: s. 15. Under the Army Act an officer can only resign his commission by consent of the

Crown: Clode's Military Forces, II., 96, and cases there cited; and see Regina v. Cumming, 19 Q. B. D. 13; nor can an enrolled man leave Canada without a written discharge from the Captain of his company: s. 56. Members of the volunteer militia are *ipso facto* discharged by the expiration of their term of engagement, and a court martial is without jurisdiction to try a man for acts done subsequent to such expiration, and a conviction under such circumstances will be quashed on certiorari: Ex p. Samuel Thompson, 5 Q. L. R. 200 (S. C., 1876). When called out for active service the period is one year or such longer time as the Crown appoints: s. 79. In time of war no man can be required to serve in the field continuously for longer than one year, except in cases of unavoidable necessity, and then only for a period not exceeding six months, but those who volunteer for the war or for any longer period than a year may be compelled to fulfil their engagements: s. 80.

The Crown may disband any corps: ss. 25, 27: but no man who has been enrolled, and consequently become subject to military law, can be punished or dismissed from the service unless in accordance with the Militia Act and the regulations adopted by it, or made in pursuance thereof. He may be discharged by the Sovereign, or by the sentence of a court martial, or, under the Army Act, by the order of a competent military authority. The courts of law will not interfere with the proceedings of a properly constituted and conducted military court, nor with its sentence. It is stated by a high military authority that no writ of prohibition has ever been issued to a court martial, but that in a proper case one might issue, as, for example, if a court martial were proceeding to try a person not subject to military law or had passed a sentence which it had no power whatever to pass (see Manual of Military Law issued by the War Office, 1894, p. 180). A writ of certiorari will not issue except when the rights affected are civil rights, and the court is acting without jurisdiction. It will not issue when the rights affected are dependent on military status and military regulations: Re Mansergh, 1 B. & S. 400; Re Roberts, Times, 11th June, 1879; and see Ex p. Samuel Thompson, supra.

The Canadian militia may be called out in any military district, upon any sudden emergency, by the officer commanding in that district, and marched to any place within the district until the pleasure of the Crown is known: s. 78; and the Crown may call out the militia, or any part of it, for active service either within or without Canada in case of war, invasion, or insurrection, or danger of any of them: s. 79.

The active militia are subject to the Queen's regulations and orders for the army, and from the time of being called out for active service, or annual drill or training, and during any drill or parade of his corps, whether he is present in the ranks or as a spectator, and also when going to or from the place of drill or parade of his corps, and at any other time when in the uniform of his corps, every officer or man is subject to the Imperial Army Act and all other laws then applicable to her Majesty's troops in Canada, not inconsistent with the Canadian Militia Act: s. 82. No corps of the active militia and no non-commissioned officer or man is permitted at any time to appear in uniform or armed or accoutred except when actually on duty or at parade or drill or at target practice or at reviews or on field days or inspection or by order of the commanding officer: s. 57. In England the Army Act of 1881 does not contain the words of the Canadian Militia Act, s. 82—"And also when going to or from the place of drill or parade of his corps and at any other time when in the uniform of his corps." An action for assault and false imprisonment was brought by a volunteer against a sergeant and two privates of his corps who, by command of their captain, had taken the plaintiff in charge, and, after the dismissal of the corps at Boxmoor Station, had marched him to Hemel Hempstead and handed him over to the civil power there on a charge of theft. It was argued for the plaintiff that when the corps was dismissed the plaintiff and his guard became civilians and not subject to military law, the period of training having expired. The Court of Appeal held that the plaintiff and his guard were subject to military law until the duty of the guard was ended and the plaintiff handed over to the police: Marks v.

Frogley, [1898] 1 Q. B. 888, reversing the judgment of Kennedy, J., *ib.* 396.

The Imperial Army Act, 1881, has been held not to apply in Canada with respect to persons not connected with the active militia: see Holmes v. Temple, 8 Q. L. R. 351.

MacMahon, J., has in a recent case held that a friendly society has no right to penalize a bandsman belonging to the 48th Highlanders for playing in uniform at a non-military concert in Massey Hall under the direction of the regimental bandmaster. Under ss. 57 and 82 of the Militia Act he was subject to military law and bound to play with the band, though some members of it did not belong to the society: Parker v. Toronto Musical Protective Association, 21 Occ. N. 31, 32 O. R. 305.

A question sometimes arises as to who is actually subject to military law. A canteen steward appointed by the commanding officer of the district, acting under a committee of three officers, and having no interest in the profits of the canteen, but receiving such pay or allowance as the committee might think fit to award him, and being liable to dismissal at the pleasure of the committee, though performing no military duty, wearing no uniform, bearing no arms, and having free ingress and egress at his pleasure to and from the barracks, was held subject to military law as "employed in military service under the orders of an officer of the regimental forces within s. 176, s.-s. 4, of the Army Act of 1881: In re Flint, 15 Q. B. D. 488. Informality in the enlistment of a soldier of the active militia cannot be invoked by him as relieving him from military discipline while voluntarily serving with his corps, although such informality might be a good defence to proceedings to force him to remain a soldier: Holbrow v. Cotton, 9 Q. L. R. 105.

Courts of inquiry and courts martial may be convened under the Militia Act. The former may investigate and report on any matter connected with the government or discipline of the militia and with the conduct of any officer or man of the force. The latter may be constituted and convened by the Crown or by any authority to which power to do so may be delegated, and their findings and the pen-

alties inflicted may be confirmed, mitigated, or remitted by the Crown or by the authority to which has been delegated such power, but no officer of the Imperial Army may sit on any Canadian court martial: s. 91.

The composition, procedure, and powers of these courts are the same as of courts constituted under the Army Act. There is no power to commit a witness, who is not a member of the active militia, for contempt. Proceedings to punish for such acts must be taken in the civil courts, to which the military court certifies the default: s. 92. The Court may, however, under the Imperial Army Act, commit for contempt a person subject to military law. The military court cannot sentence to death except for mutiny, desertion to the enemy, or traitorous correspondence, or delivery of a garrison or post, and every sentence must be confirmed by the Crown: s. 93.

A court martial can only try an offender when he is subject to military law, and only a general court martial can try an officer or award the punishment of penal servitude or death. A court martial cannot try an offender if he has been acquitted or convicted for the same offence by a competent civil court. A prisoner may now be defended by counsel, who has all the rights and privileges accorded in the civil courts. Every member of the court is bound to give his opinion. Acquittal by a court martial is final, but a conviction and sentence are not valid until confirmed by superior authority. The proceedings of a court martial, and those of a court of inquiry instituted by the Commander in Chief to inquire into a complaint made by an officer of the army, though not a court of record nor a court of law, nor coming within the ordinary definition of a court of justice, are privileged: Dawkins v. Lord Rokeby, 1 F. & F. 806, L. R. 8 Q. B. 255, L. R. 7 H. L. 744. When that case was before the House of Lords, Kelly, C.B., Mellor, Brett, and Grove, JJ., and Pollock, B., were summoned to give their opinions. The Judges (Kelly, C.B., who in the Exchequer Chamber had expressed the hope that the whole question of privilege of a witness under the circumstances in that case would be reviewed by the House, being their spokesman)

gave their decision in favour of affirming the Exchequer Chamber. The House then decided unanimously in favour of the privilege claimed. See also in Canada, Holbrow v. Cotton, 9 Q. L. R. 105.

The question as to whether a military officer is protected from an action for an act done in the ordinary course of his duty as such officer, even if done maliciously and without reasonable or probable cause, is yet open to final decision by the court of last resort. In Dawkins v. Lord Paulet, L. R. 5 Q. B. 94, it was argued that, even if the military officer made the report, as was admitted, as an act of duty, he was not privileged if he acted maliciously and without reasonable and probable cause. The answer given to that plea was very strong. It was well expressed by Mellor, J., in the case just cited: "The promotion of an incompetent man may cause the greatest disaster, and yet, if the person who has to make his report as to the fitness or unfitness of such officer, is to do it under the idea that the opinion he expresses may be overruled by a jury ignorant of such matters, how can he be expected to do it freely?" (p. 115.) The opposite view was ably set forth by Cockburn, C.J., when he pointed out that a man's reputation may be blasted by a malicious report, and yet, that he was to be told "that the Queen's Courts, in a country whose boast it is that there is no wrong without redress, are shut to his just complaint:" pp. 108 and 109. See the remarks on this dissenting judgment by the Court of Exchequer Chamber in Dawkins v. Lord Rokeby, L. R. 8 Q. B. at pp. 272 and 273, and of Lord Penzance in the same case, L. R. 7 H. L. at pp. 755 and 756.

It may be safely said that the result of the authorities, as they at present stand, is not to support without qualification the position taken by Mellor, J., and his brother Judges. That case was standing for argument in the Exchequer Chamber when the defendant's death prevented the plaintiff proceeding with it, and, though that Court afterwards expressed, in the case of Dawkins v. Lord Rokeby (*ante*) their agreement with the opinion of Mellor, J., the House of Lords confined their judgment to the question of the privilege of a witness before a court martial.

In Dawkins v. Lord Paulet the demurrer upon which the case was decided admitted that the statements made, though in the course of military duty, were made maliciously and without reasonable and probable cause, and the Judges who decided it went far enough to give the defendant absolute immunity. But if the case had come up in a less technical form, and had there been facts which convinced the Court that the defendant knew that his statements were false and made them maliciously, it is quite probable that the reasoning of Cockburn, C.J., would have been more persuasive. His judgment appears to have commended itself to the profession and even to military writers, and while great weight must be given to the judgment of the Exchequer Chamber, other views will undoubtedly have to be combated by any one relying upon the plea of absolute privilege. See Stephen on Malicious Prosecution, p. 86, who thinks it "probable" that no action will lie: Stephen's Digest of the Criminal Law, p. 191, note 6, where he doubts if the privilege will be extended beyond the case of military duty; *per* Lord Campbell, C.J., in Dickson v. Earl of Wilton, 1 F. & F. 419; Folkard on Libel and Slander, 6th ed., p. 360; Manual of Military law issued by the War Office, 1894, pp. 200-202; Sutton v. Johnstone, 1 T. R. 493, 784; 1 Bro. Parl. Ca. 78; Warden v. Bailey, 4 Taunt. at pp. 74, 89.

The list of offences for which officers and men may be summarily convicted before a magistrate is a long one, and includes, generally speaking, offences arising in connection with enrollment, drill, the pay therefor, returns, arms, and accoutrements. Refusing to aid the civil power, and violating any of the provisions of the Militia Act, are included among them, as well as desertion, now an offence under the Criminal Code: ss. 73, 74, 75.

Proceedings, however, cannot be taken for a penalty under the Militia Act except by the military authorities, and a limit of six months is imposed except for offences relating to arms and accoutrements or for desertion: s. 112. Officers and persons proceeded against under the Act have the right to notice of action: s. 115.

The regulations for the militia, which it is in the power of the Governor in Council to make, under the various sec-

tions of the Militia Act (26, 32, 40, 48, 58, 66, 67, 70, 72, 74, 75, 76, 77, 79, 81, 82, 88, 91, 116), are to be published in the Canada Gazette, when they have the force of law: s. 117. Notice is presumed when they are so published: s. 119: and they are to be laid before Parliament at the ensuing session: s. 126.

Provision is also made that any order or notice under the Act need not be in writing in order to bind any person affected by it, if it is in fact communicated to him: s. 118: and orders of commanding officers are sufficiently notified by insertion in a newspaper published in the regimental division or (in case no newspaper is published there) by posting it upon the door of every place of public worship, or of some other public place in each company division. This tribute to the religious tendencies of the militia is found in s. 120.

When the civil power requires the aid of the militia, each officer must obey the orders of his commanding officer; they act as a military body, and are individually liable to obey the orders of their military commanding officer: Regina v. Glamorgan County Council, [1890] 2 Q. B. at p. 31. But except that in that way they act as a properly disciplined military unit, they are not a military force; but see the remarks of A. L. Smith, L.J., in Regina v. Glamorgan County Council, at p. 542. They are required to turn out when the senior officer of the active militia calls upon them, but he acts upon the written requisition of the chairman of the sessions or of three justices of the peace, of whom the warden, mayor, or other head of the municipality *may* be one, and the military officer is bound to obey the instructions which are lawfully given to him *by any justice of the peace* in regard to the suppression of an actual or anticipated riot or disturbance.

Before the militia are required to turn out, the requisition must be properly signed, and must on its face express the actual or anticipated emergency, but it is not necessary that the justices should be judicially satisfied: McKay v. Mayor of Montreal, 20 L. C. Jur. 221 (S. C., 1876); Fraser and McEachren v. City of Montreal, 2 L. N. 49 (S. C., 1879.) It is sufficient if they are satisfied in any reasonable way: Crewe Read v. Cape Breton, 14 S. C. R. at p. 12.

The municipality is bound to pay the corps, and is bound to provide accommodation, and the commanding officer may sue for the cost and recover for it in his own name: ss. 34, 35, 36: and see Fraser and McEachren v. City of Montreal, supra. If the commanding officer dies, his personal representative may continue the action and recover: Crewe Read v. Cape Breton, supra.

In England there is no provision for the payment by either the county or the particular municipality of these expenses, and the Court declined to find a common law right, though urged to do so by the Solicitor-General, Sir Robert Findlay, in Regina v. Glamorgan County Council, supra.

A soldier, by English law, does not cease to be a citizen. If he commits an offence against the ordinary common law, he can be tried and published 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: Clode, Military Forces, I., 206. But his civil rights and duties are necessarily subject to some limitations for the purpose of enabling him to fulfil his engagement to the Crown. He has certain privileges, one of which was that while on service he might send letters for two cents' postage, and he is entitled to receive letters redirected to him free from any postage, foreign or other: The Post Office Act, R. S. C. c. 35, ss. 22, 23. He is exempt from tolls when on duty and in uniform: R. S. O. c. 238, s. 1.

He is also exempt, when on full pay, from serving on juries: R. S. O. c. 61, s. 21: or in any municipal office (but not in Ontario): but he may sit in Parliament, if not in receipt of a permanent military salary: R. S. C. c. 11, s. 17 (c); R. S. O. c. 12, s. 8, s.-s. 4; see Clode, I., pp. 192 and 193; though in England, acceptance of a first commission vacates his seat.

The exemption from tolls, however, has been strictly construed both in Canada and England. In 1862 Mr. Wentworth Dawes, who was adjutant of a military train and in uniform, refused to pay toll on Blackfriars Road, near London, Ontario. He was convicted and fined. He was

driving in a private carriage with his wife and servant, and contented himself with stating his official rank and that he was in uniform. No evidence was given that he was on duty. The Court of Queen's Bench held that his private carriage was not exempt either under the Imperial Mutiny Act (25 V. c. 25, s. 72), or under the Provincial Act (C. S. U. C. c. 49, s. 91): Regina v. Dawes, 22 U. C. R. 333. The present Army Act, however, exempts officers and soldiers when on duty or on the march and their horses and baggage and carriages and horses belonging to her Majesty or employed on military service: Army Act, s. 143. The Provincial Act likewise exempts officers and men in proper uniform and their horses, but not when passing in private carriages unless when on duty or proceeding to or from the same: R. S. O. c. 238, s. 1. In England the Queen's Bench Division held that the words "employed on military service" did not include vehicles merely used by an officer in the military service of the Crown, that is, his private carriage made use of by him for convenience of travel: Gray v. Nicholas, [1900] 2 Q. B. 444.

Anyone subject to military law is bound to seek redress in the method provided by the Army Act and Regulations. He cannot sue for damages in the civil courts, being bound, by analogy to the rules relating to all voluntary associations, to exhaust the remedies which are provided by the rules to which he has submitted himself: see Johnstone v. Sutton, 1 T. R. 544; Dawkins v. Lord Paulet, L. R. 5 Q. B. 94; Dawkins v. Lord Rokeby, L. R. 8 Q. B. 255, L. R. 7 H. L. 744. But this is necessarily subject to the qualification that the act complained of must be done in the course of military duty and within the jurisdiction exercised by the superior officer. If the actual jurisdiction be exceeded, or if it be exercised so as to become an abuse of jurisdiction, damages may be recovered as for an illegal arrest: Warden v. Bailey, 4 Taunt. 76; Sutton v. Johnstone, 1 T. R. 537; and also when the person damnified is not subject to military law: Mostyn v. Fabrigas, 1 Sm. L. C., 7th ed., 670, 679; Glyn v. Housten, 2 M. & Gr. 337; Goods v. Wheatley, 1 Camp. 231.

In the case of Holbrow v. Cotton, supra, which was an action of slander brought by a solidier of the active militia against his commanding officer, the Court decided that the question as to whether an officer is justified in unimadverting upon the conduct of a soldier under his command is a question of a military character, to Goods v. Wheatley, 1 Camp. 231. In the case of Holbrow v. Cotton, supra, which was an action of slander brought by a soldier of the active militia against his commanding officer, the Court decided that the question as to whether an officer is justified in animadverting upon the conduct of a soldier under his command is a question of a military character, to be decided by the military authorities, and one in relation to which the Courts of law ought not to interfere. That all matters of complaints of a purely military character are to be confined to the military authorities, and that military discipline and duty are cognizable only by a military tribunal, and not by a Court of law.

The expiration of the term of engagement of a volunteer under the Militia Act puts an end to his obligations as a soldier, and the fact that he has continued to receive pay after the expiration of his engagement, though it prevents him complaining of his detention in the corps, does not take away his right to claim damages for violence and ill-treatment: Thompson v. Strange, 5 Q. L. R. 205 (S. C., 1879.)

The Canadian Courts of law have also decided the following points, which are of interest to and affect militiamen:

The captain of a company of volunteers is not the personal debtor of a private in his company for the payment of the amount allowed such private for his annual drill, in such wise as to entitle the private to sue him for the amount: Williams v. Scale, 7 L. N. 224 (C. C., 1878).

A Lieutenant-Colonel of militia was held not to be liable for the price of clothing ordered for his men, he being merely a servant of the Government: McIlderry v. Baldwin, 6 O. S. 31.

The officers of a regimental mess are not liable for debts

contracted by their messman without their authority: Sutherland v. Sparks, 6 O. S. 103.

In an action for replevin for certain instruments used by the band of a militia battalion, bought by the commanding officer, which said instruments had been purchased with moneys subscribed by the officers and by private donations, it was held that the instruments became the property of the commanding officer, who might maintain replevin for them: Lewis v. Teale and McDonald, 32 U. C. R. 108.

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