THE
CANADIAN LAW TIMES.

MAY, 1898.

THE LAW AND THE SOLDIER (a).

THERE has always been a close alliance between the profession of the law and that of arms, and there are few practising lawyers who have not, at some time in their lives, had to have recourse to their learning in order to better understand the Army Discipline Act as it has affected themselves. In this Province the volunteer and his services have been recognized by lawyers in a tangible way, and it is within memory that the Benchers of the Law Society, influenced by a wholly meritorious sense of patriotism, presupposed in students who were under arms in the rebellion of 1885, sufficient scholastic attainment, and permitted them to be called to the bar without the harassing trials of an examination.

Before touching upon the main subject of the duty of the soldier to the civil power, it may not be uninteresting to refer to some privileges which the militiaman has with regard to his civil life, and as more particularly existing in the Province of Ontario.

The officers, non-commissioned officers and men of volunteers, while they continue such, are exempted from serving on juries when certified by the officer commanding such corps.

No non-commissioned officer or private of the volunteer force, certified by the officer commanding the company to

(a) Extracts from a paper read before The Canadian Military Institute, Toronto.

which the volunteer belongs or is attached as being an efficient volunteer, is assessable for statute labour and road work, or poll tax in lieu thereof.

The choice of the word "volunteer" by the draftsman of these statutes is unfortunate, but goes to show their antiquity.

The militiaman cannot be charged toll on any road, bridge, wharf or landing-place, when in proper staff or regimental uniform.

A commanding officer is not subject to an action of slander by a soldier under him. The messman of "A" Battery sued Captain (now Lt.-Col.) Cotton, then commanding that battery, for damages for having repeatedly called him a thief, a robber, and a liar. The commanding officer found in the scullery, under the care of the plaintiff, a preserving pan belonging to the commanding officer, and it was in reference to this that the language was used. Sir Wm. Meredith, C.J., followed Dawkins v. Lord Rokeby (*b*), where Willes, J., said, "with respect to persons who enter into the military state, who take Her Majesty's pay, and who are content to act under commission, although they do not cease to be citizens in respect of responsibility, yet they are by a compact which is intelligible, and requires only the statement to commend it to the consideration of any person of common sense, become subject to military rule and military discipline. 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." His Lordship said that although the difficulty in question was about a preserving pan, which savours rather of the kitchen than the camp, yet it is not the less true that for the carrying out of war cooking utensils are almost as necessary as defensive weapons; yet if keeping Col. Dawkins under arrest for eight days for a personal slight was "a military question," then the question as to the defendant addressing the plaintiff as he did ought also to be a military question (*c*).

(*b*) 4 F. & F. 831.

(*c*) Holbrow v. Cotton, 9 Q. L. R. 105.

The militiaman's band cannot be stopped or regulated by municipalities under their powers relating to music in the streets; and the militia officer's charger has been declared to be exempt from seizure by distress (*d*).

The soldier, by becoming such, although he may be held accountable for his conduct to his military chiefs, is not in any way absolved from obedience to the ordinary civil and criminal law. Sir James 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. It is necessary for the purpose of preventing mischief and for the execution of the laws; it is not only the right of soldiers, but it is the duty of soldiers to exert themselves in assisting in the execution of a legal process, or to prevent any crime or mischief from 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" (*e*).

These principles obtain to-day, and while public order requires the obedience of the soldier to the ordinary laws of the land, so does public safety require the assistance of the soldier for the suppression of lawlessness, when it takes the form of intimidation or the exercise of physical force.

The maintenance of public order ordinarily should, and very properly does, rest with the civil authorities. This is in accord with the genius of our institutions. While we are the most free people on earth, and are yearly becoming more trained in the science of self-government and self-restraint, and the suppression of unlawful public actions caused by strong political opinions, a sense of injustice or the frailty of human passions, and now seldom needing the assistance of armed military force; nevertheless, the sense of security from tumult must not lull the soldier into indiffer-

(*d*) Davey v. Cartwright, 20 C. P. 1.
(*e*) Burdett v. Abbott, 4 Taunt. 401.

ence or ignorance of his duty, should the constant war between capital and labour, the hunger and distress of the army of the unemployed, or the lamentable acerbity of religious and race faction occasionally afford an occasion for his interference.

Public disturbance which finds an outcome in acts calling for military interference, may warrant a reference to the grades in which it is manifested. The legal offences of an unlawful assembly, a riot and insurrection, and which are probably comprised in the terms "riot, disturbance of the peace or other emergency," of our Militia Act, presently to be referred to, are described thus: An unlawful assembly is an assembly of three or more persons, who, with intent to carry out any common purpose, or assemble in such a manner, or conduct themselves when assembled as to cause persons in the neighbourhood of such assembly to fear, on reasonable grounds, that the persons so assembled will disturb the peace tumultuously, or will by such assembly needlessly and without any reasonable occasion provoke other persons to disturb the peace tumultuously.

Persons lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in such a manner as would have made their assembly unlawful if they had assembled in that manner for that purpose. The reason for providing that an unlawful assembly is criminal, is that no one can see what may be the event of such an assembly (*f*).

A riot is an unlawful assembly which has begun to disturb the peace tumultuously.

"It is the duty of every sheriff, deputy sheriff, mayor, or other head officer, and justice of the peace, of any county, city, or town, who has notice that there are within his jurisdiction persons to the number of twelve or more unlawfully, riotously and tumultuously assembled together to the disturbance of the public peace, to resort to the place where such unlawful, riotous and tumultuous assembly is, and among the rioters, or as near to them as he can safely come, with a loud voice to command or cause to be commanded,

(*f*) Reg. v. Vincent, 9 C. & P. 95; Reg. v. Neale, 9 C. & P. 431.

silence, and after that, openly and with loud voice, to make or cause to be made a proclamation in these words, or to the like effect:—

'Our Sovereign Lady the Queen charges and commands all persons being assembled immediately and peaceably to depart to their habitations or to their lawful business, upon the pain of being guilty of an offence on conviction of which they may be sentenced to imprisonment for life.

GOD SAVE THE QUEEN.'

2. All persons are guilty of an indictable offence and liable to imprisonment for life who:

(*a*) With force and arms wilfully oppose, hinder or hurt any person who begins, or is about to make the said proclamation, whereby such proclamation is not made; or

(*b*) Continue together to the number of twelve for thirty minutes after such proclamation has been made, or if they know that its making was hindered as aforesaid, within thirty minutes after such hindrance."

"If the persons so unlawfully, riotously and tumultuously assembled together, or twelve or more of them, continue together, and do not disperse themselves, for the space of thirty minutes after the proclamation is made, or after such hindrance as aforesaid, it is the duty of every such sheriff, justice and other officer, and of all persons required by them to assist, to cause such persons to be apprehended and carried before a justice of the peace" (*g*).

The law also provides for the saving harmless of the law officers and those assisting them in the endeavour to apprehend or disperse a mob. The commission of an act of violence by any one or more of those assembled is not necessary to make the assembly unlawful if its character and circumstances are such as are calculated to alarm not only foolish or timid people, but persons of reasonable firmness and courage (*h*).

An insurrection differs from a riot in this, that while a riot has in view some enterprise of a private nature, an insur-

(*g*) Crim. Code, secs. 83 & 84.

(*h*) Reg. v. Vincent, 9 C. & P. 109.

rection savours of high treason, and contemplates some enterprise of a general and public nature (*i*).

The circumstances of a meeting of citizens should be carefully considered by the authorities before action is taken to break it up. The right of free speech is a cherished institution of our race, and the danger must be great indeed which will warrant its suppression. Indeed, a public meeting is often a safety valve for discontent.

"There is no doubt that the people of this country," said Alderson, B., in Reg. v. Vincent (*j*), "have a perfect right to meet for the purpose of stating what are or even what they consider to be their grievances; that right they always have had, and I trust always will have; but in order to transmit that right unimpaired to posterity, it is necessary that it should be regulated by law and restrained by reason." At the same time, prevention is better than punishment, and the law accordingly declares that an unlawful assembly may be dispersed although it has committed no act of violence; for it is better that individuals should be estopped before they proceed to outrage and violence; and a small amount of punishment in the first instance will probably save a great amount of crime afterwards. This proposition will probably not be quarrelled with: The interference of the militia should be practically confined to cases in which violent crimes are being or are likely to be committed, and to insurrections in which an intention is clearly apparent to execute some general political purpose.

But how much force should be used to effect dispersion? That is the grave question that can only be answered by saying, that different cases must depend on their own circumstances; and if only that force is used which occurs to a reasonable man in the fair and honest execution of his duty, the officer is exonerated, or, at most, the law will treat him with leniency, in case an indictment for assault or manslaughter or an action for damages follows. However, the excitement and loss of full reasoning power, which are usually incident to tumultuous times, make it inexpedient to put down riotous meetings by arms, except as a last resort; and it

(*i*) 21 State Tr. 644; Reg. v. Vincent, 9 C. & P. 94.
(*j*) 9 C. & P. 65.

is for this reason that the half hour's notice is given by the Riot Act. A writer observes: "The principles underlying this rule are sound, for, suppose the soldier was obliged to obey every command of his officer, an instance might then occur in which an officer, either through ignorance or cruelty, might give orders to fire upon a multitude whose conduct did not justify the attack; hundreds might be butchered within a few minutes, and the whole evil attributed to the error of a single individual. A soldier would always be justified in shedding blood, provided his commander gave the command, and the person in authority would be a giant of a hundred hands for the execution of evil. Such principles are abhorrent, not merely from the condition of free citizens, but also from the laws of humanity. Soldiers would become the objects of general apprehension; for every citizen would remember that in all institutions, however well regulated, and however much approved by experience, some members will always be found destitute of principle or wholly incapable of regulating their passions, who, to gratify their feelings of revenge, or in perfect recklessness of the miseries they are producing, may apply their formidable strength in opposing or destroying their fellow subjects" (*k*).

It is therefore for us to consider what is the position of the militiaman when he is compelled by law to go to the assistance of the civilian magistrate.

The provisions relating to this will be found in the Militia Act (*l*). It is to be noted that troops can be called out for prevention as well as suppression of an actual or anticipated riot or disturbance. No judicial interpretation has been given of the expression "disturbance," used in the Act, and it is probable that the Legislature meant it to cover the lesser offence of an unlawful assembly. The expression "other emergency" is added, so as, apparently, to provide for every possible emeute.

The officer in command is only to call out his forces upon the requisition in writing of three justices of the peace, and the requisition must state the actual occurrence of the riot, disturbance or emergency, or its anticipation. This is the

(*k*) 9 Law Mag. 66.
(*l*) R. S. C. cap. 41.

officer's warrant for turning out. The facts in the case of Crewe-Read v. County of Cape Breton, were that in March, 1883, a difficulty arose among the miners of Lingan, which ended in a riot. Captain Hill, No. 5 Company, "Argyle Highlanders," on the requisition of the warden and three justices of the peace, ordered out his company and proceeded with it in aid of the civil power. The requisition, which cannot be commended for grammatical elegance, read as follows: "Sir, we, it having been represented to us that a disturbance having occurred and is still anticipated at Lingan beyond the power of the civil power to suppress, you are therefore hereby ordered to proceed with your military company immediately to Lingan with their arms and ammunition, and to aid the civil power in protecting life and property and restoring peace and order, and to remain until further instructed."

Sir Wm. Ritchie, C.J., in concurring with a majority of the Court allowing an appeal from the Supreme Court of Nova Scotia, which had held that the order of the magistrates was irregular in not expressing on its face the actual occurrence of the riot, said, "I do not think it is necessary either that the justices should have a personal knowledge of the riot or of the anticipation thereof, or that they should hold a judicial investigation to determine its existence, to require which, in many cases, would practically render the law entirely abortive. It must be assumed that the justices believed, and had reason to believe that these representations were well founded. Could it ever have been contemplated by the Legislature that the officer to whom the order was transmitted was to obey or disobey as he might think it technically right, or the men to obey or disobey it if, in their opinion, the requisition was not strictly right, and in the meantime was the riot to go on and the civic force be overpowered while the commanding officer and his men were either disobeying the order or settling this knotty technical question?"

But while it is necessary that three magistrates must bring him out, he is to obey but one magistrate when actually in the field. The object of this enactment is obvious. But if there are several magistrates present on the scene, it will be

(*m*) 14 S. C. R. 8.

well for the officer to insist upon their deciding which of them is to give him his orders. "He shall obey such instructions as are lawfully given to him." Here comes in the risk to the soldier. An arraignment for manslaughter is not an agreeable prospect, but if the instructions to fire are not lawfully given and death ensues, then it would not be improbable that with the inflamed prejudice of the attacked faction, making them greedy for any revenge, an indictment would follow. No matter what an officer with his special training may consider the necessity for firing, yet he would incur great responsibility by firing without orders, or, on the other hand, refusing to fire in pursuance of his orders. The magistrate should have the opinion of the officer in military matters. If the magistrate is a man of discretion, intelligence and courage, and is content to act in concert with the officer, all would be well. But our magistrates are not always men having these good qualities. In view, therefore, of the danger, even if the occasion be rare, of acting upon illegal orders and unwise commands, Parliament would do well to consider whether the Act should not be amended so as to put the entire command in the hands of the officer. In his consideration he would probably bring to bear as much of the feelings of a citizen as the magistrate, and in him the final determination to fire upon his misguided fellow citizens would be attended with as much sorrow as would be felt by a civil official.

These remarks are the more applicable from the fact that in our Dominion the military force which would in most cases be called upon would be the ordinary militiaman, or citizen soldier, and not the regular force. Not that it should be implied that the regular soldier is less amply endowed with the more sympathetic qualities of man, but it can hardly be denied that his training must make him look upon extreme measures with less disfavour than his friend the volunteer. Following this theme, it cannot be denied also, that it is undesirable that our regular forces should take on the character of policemen or gendarmerie except as a last resource. Our people should be brought up with the idea that our regular forces (apart from their instructional value) are only for defence against a foreign foe. Tommy Atkins should be

popularized as much as possible if recruiting from the best classes of men is to be successful, and it is well known that nothing infuriates a mob so much as the appearance to oppose them of the regular soldier, and it is well known also that no mob springs into existence without the covert help and sympathy of large numbers of the community who secretly wish it a measure of success. How much this sympathy will be detached from the movement when it is realized that relatives and friends in the militia must move out from their homes to be execrated and assaulted, in comparison with the feeling of indifference which surrounds the movement of a solid body of troops, to whom such is the business of life, will be easily discernible. As the minimizing of sympathy with a mob means lessening the difficulty of suppression, it is argued, therefore, that it is the volunteer militiaman to whom work of this kind should be assigned.

It is labour difficulties that afford the most probable causes for the help of the soldier. The soldier is not, as a rule, persona grata with the workingman, and the eyes of labour are turned askance at the company of non-producers whose only "walking boss" is a sergeant-major. This should not be so, because only with the tranquility of a country can the labourer's lot be happy. But it is only when labourer joins hands with anarchist that he need mistrust the soldier, for, in that case, the soldier, regardless of sympathy or individual opinion, must be inexorably allied to the side of capital and do his duty, although the result may give regret which will last him a lifetime.

There has been some digression here from the main discussion as to the conduct of soldiers with the mob. When the actual collision takes place, then the soldier must bring to his assistance a commingling of common sense, patience and intrepidity. The dual responsibilities of the soldier here commence. He must obey orders, and in obeying them he may break the law. He must tread the exact line between excess and failure of duty. Obedience to the illegal orders of a superior officer affords no protection. Mr. Justice Willes once said, "I believe the better opinion to be that an officer, or a soldier acting under the orders of his superior, not being plainly illegal, is justified, but if they be plainly illegal he is

not justified" (*n*). Another authority says that the soldier "must act honestly upon what he deems not unreasonably to be the effect of the orders."

Sir Charles Napier said of the proposition that an order not plainly illegal does not justify—"If such is law the army must become a deliberative body, and ought to be comprised of attorneys, and the Lord Chancellor should be commander-in-chief." An American Judge says: "The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in an army. If every subordinate officer and soldier were at liberty to question the legality of the order of the commander, and obey them or not as they may consider them valid or invalid, the camp would be turned into a debating school, where the precious moment for action would be lost in wordy conflicts between the advocates of conflicting opinions" (*o*). The habit of discipline and obedience in a soldier is more essential to the well-being of the state than the possibility of his now and then executing an illegal order is injurious to it.

On the whole, then, it may be safe to declare the law to be that the inferior need not go behind the order of his superior to see if it is warranted, and if the order is not palpably illegal he is protected in obeying it. The soldier is not so well protected in Canada or Britain as in the country to the south of us, where his acts are almost unquestionable, but, as our empire is freer than that republic, soldiers will not grumble if greater safeguards have been raised against the taking of the lives of those who are often the victims of despair or fanaticism.

In assisting the quelling of civil disturbances, the soldier must be forbearing and patient, but he must know when to strike effectively if any wavering would be dangerous, and above all, he must be absolutely courageous, as small instances of valour and intrepidity have often been known to be more effective in overawing an untrained though powerful opponent than the actual display of force.

H. M. MOWAT.

(*n*) Keighly v. Ball, 4 F. & F. 763.
(*o*) McCall v. McDowell, 3 Cald. 85.