EXTRACTS

FROM

MANUAL OF MILITARY LAW

1929

REPRINTED FOR USE IN THE CANADIAN ARMY

1941

(Reprinted in Canada February, 1941, by the permission of the Controller, His Majesty's Stationery Office)

OTTAWA
EDMOND CLOUTIER
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1943

5M—5-43 (9947)
P.Q. 70-60-3

APPENDIX

Table showing corresponding K.R. (Army) and K.R. (Can.) references for use in conjunction with the Manual of Military Law (Extracts reprinted for use in the Canadian Army).

K.R. Army 1928	K.R. Can. 1939	K.R. Army 1928	K.R. Can. 1939	K.R. Army 1928	K.R. Can. 1939
74	40/149	294	364	384	—
100	73	295	361	385	—
170	202	296	365	386	—
171	—	297	365	387	—
172	201	298	365	388	—
173	—	299	362	389	—
174	—	300	368	390	—
175	—	301	—	391	382
176	—	302	366	392	376
177	—	303	367	393	—
178	—	338	392	394	—
179	210	339	371	395	—
180	209	340	—	396	—
181	207	341	—	397	—
182	215	342	—	398	—
183	216	343	371	399	—
184	—	344	—	400	383
185	—	345	392 & 371	401	384
186	—	346	371	402	385 & 387
187	220	347	381	403	390
188	—	348	—	404	385 & 387
189	266	349	392	405	388
190	—	350	371	406	388
191	—	351	392	407	389
192	—	352	374 & 371	408	390
222	—	353	—	409	—
223	—	354	—	410	—
224	—	355	—	416	—
225	—	356	—	417	—
226	—	357	—	418	—
227	301	358	—	419	—
228	—	359	—	430	—
229	—	360	—	432	—
230	—	361	—	440	—
231	—	362	—	447	—
232	—	363	—	457	—
233	301	364	379	459	—
234	—	365	—	487	—
235	—	366	—	488	—
236	—	367	—	489	—
237	—	368	—	494	—
238	—	369	—	508	417
239	—	370	372	516	427
240	—	371	—	517	430
241	—	372	—	521	434
242	—	373	—	522	433
243	—	374	—	526	439
244	—	375	—	529	442
245	—	376	375	533	
246	307	377	—	534	445
247	—	378	—	535	to
255	308	379	373	536	453
273	328	380	—	537	
274	329	381	—	538	
292	360	382	—	539	
293	363	383	—	540	453

80195—1½

K.R. Army 1928	K.R. Can. 1939	K.R. Army 1928	K.R. Can. 1939	K.R. Army 1928	K.R. Can. 1939
1240	to	1350	973	1621	1514
1241	867	1518	1133	1629	1517
1242		1519	—	1630	1518
1243	—	1598	1488	1631	1519
1244	—	App. XXV	1488	1632	1520
1245	—	1602	1491	1634	1523
1246	848	1615	1508	1637	1527
to	to	1618	1509		
1257	867	1620	1513		

CONTENTS

PART I

PART II

CHAPTER III

OFFENCES AND PUNISHMENTS

(i) Offences

Classification of offences

Classification of military offences.

1. Part I of the Army Act classifies under various heads the military offences for which persons subject to military law are, in their military capacity, punishable by court-martial. For the most part the military offences are laid down by the Army Act in the same, or nearly the same language as that of the former Mutiny Acts and Articles of War.

The offences punishable by court-martial are, with one exception,[1] contained in ss. 4 to 41 of the Army Act.

Principles of classification.

2. The principle adopted in the Act is to group together military offences of a similar character in a manner intended to impress the soldier with their relative military importance. In this chapter the various groups of offences are dealt with in order; some of these offences, because of their special importance or frequent occurrence, receive more detailed notice than others but all are explained, so far as is necessary, in the notes to the Act.

ss. 4-6. *Offences in respect of Military Service*

Offences in relation to the enemy.

3. Ss. 4 and 5 deal with offences committed in relation to the enemy. These offences fall into two categories, *viz.*, those in respect of which a sentence of death may be awarded, and those in respect of which penal servitude is the maximum sentence. Treacherously holding correspondence with the enemy and assisting the enemy with arms are examples of offences which fall within the former category, while the offence of spreading reports calculated to create unnecessary alarm or despondency falls within the latter.[2]

Offences punishable more severely on active service than at other times.

4. The offences mentioned in s. 6 (1) are punishable with death and those in s. 6 (2) with penal servitude if committed on active service; if not committed on active service, the maximum sentence which can be awarded is, to an officer one of cashiering and to a soldier one of two years' imprisonment with or without hard labour.

The miscellaneous offences mentioned in s. 6 (3) fall under the same category with regard to the sentence which may be awarded as offences under s. 6 (1) or 6 (2) when not committed on active service.

It is to be observed that offences by sentinels under s. 6 (2) (*e*) or (*h*) can only be committed by a soldier. All the remaining offences under ss. 4-6 may be committed by any person subject to military law.[3]

ss. 7-11. *Mutiny and Insubordination*

Mutiny.

5. The term "mutiny" implies collective insubordination, or a combination of two or more persons to resist or to induce others

[1] A.A. 155.
[2] See specimen charges Nos. 1–4, p. 715.
[3] See specimen charges Nos. 5–15, pp. 716–7.

Ch. III

to resist lawful military authority. A man cannot be charged generally with mutiny, or with an act of mutiny, but only with some one or more of the specific offences laid down in s. 7. If he has not brought himself within the terms of that section, his offence, however much it may tend towards mutiny, must be dealt with as insubordination, and the provisions of s. 8 or s. 9 will usually afford ample powers for the purpose. Thus, where there is an actual mutiny or a conspiracy to mutiny, all concerned in the mutiny or conspiracy can be tried under s. 7 for causing or conspiring to cause, or joining in the mutiny, as the case may be. If no mutiny or conspiracy exists, a man can only be tried under s. 7 if the charge is one of endeavouring to persuade some person in His Majesty's military, naval or air forces to join in an intended mutiny, or of failing to inform his commanding officer of an intended mutiny.[1] The offence of endeavouring to seduce any person in the military, naval or air forces from allegiance to His Majesty is an offence under s. 7 (2) when committed by a person subject to military law.

Framing charge of mutiny.

6. In framing a charge therefore under s. 7, the specific act or acts which constitute the offence must always be alleged; and the offence is so grave that a charge for it should only be brought on very clear evidence. Cases of insubordination, even on the part of two or more, should, unless there appears to be a combined design on their part to resist authority, be charged under s. 8 or s. 9, or, if these sections are inapplicable, under s. 40 as an act to the prejudice of good order and military discipline. Provocation by a superior, or the existence of grievances, is no justification for mutiny or insubordination, though such circumstances would be allowed due weight in considering the question of punishment.

Sedition.

7. Sedition, in s. 7 of the Act, is the same offence as in the ordinary criminal law, and consists in doing any act or publishing any words tending to bring into hatred or contempt, or to excite disaffection against, the Sovereign, or the government and constitution of the United Kingdom, or either House of Parliament, or the administration of justice; it is also seditious to incite His Majesty's subjects to attempt to procure otherwise than by lawful means the alteration of the law, or to incite any person to commit any crime in disturbance of the peace, or to raise discontent and disaffection among His Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects. A person is not guilty of sedition who acts in good faith, merely intending to point out errors or defects in the government or constitution or the administration of justice, or to promote alteration of the law by legal means, or to point out, with a view to their removal, matters which have a tendency to produce feelings of hatred between different classes of His Majesty's subjects. It is not, however, intended to imply that an officer or soldier is at liberty to enter on any such course of action or discussion, but simply to point out the legal meaning of the term "sedition."

A person subject to military law who is convicted of any of the offences mentioned in s. 7 may be sentenced to death or such less punishment as the Act provides.

---

[1] See specimen charges Nos. 16–18, pp. 717–8.

Violence and disobedience.

8. The offences of violence to superiors and of disobedience to lawful commands under s. 8 and s. 9 respectively vary much in degree of gravity according to the circumstances in which they are committed; all these offences in their gravest forms are punishable with penal servitude.

The necessary elements of the offences of striking or using or offering violence or of using threatening or insubordinate language to a superior officer are explained in the notes to s. 8 of the Act.[1]

Special findings in case of violence or insubordination.

9. An accused person charged with striking[1a] may be found guilty of using or offering violence; if charged with using violence may be found guilty of offering violence; or, if charged with using threatening language may be found guilty of using insubordinate language.

Various degrees of disobedience.

10. Disobedience may be of a trivial character, or may be an offence of the most serious description, amounting, if two or more persons join in it, to mutiny. Accordingly the object of s. 9 is to enable charges to be framed in such manner as to discriminate between different degrees of the offence.[2]

The essential ingredients of the first and graver offence under the section are that the disobedience should show a wilful defiance of authority, and should be disobedience of a lawful command given personally and given in the execution of his office by a superior officer; in fact, it would ordinarily be such an offence as would be mutiny if two or more persons joined in it. In order to convict a man it must be shown (1) that a lawful command was given by a superior officer[3]; (2) that it was given personally by such officer; (3) that it was given by such officer in the execution of his office[3]; (4) that the man disobeyed it, not from any misunderstanding or slowness, but so as to show a wilful defiance of his superior officer's authority. For example, a man who does not fall in for escort duty when ordered to do so by a non-commissioned officer, may have failed clearly to understand the order or may be slow in executing it; in such circumstances there would be no wilful defiance of authority. On the other hand, the refusal may be deliberate and obstinate, so as to show in the clearest manner an intention to defy and resist authority.

The second and less grave offence under s. 9 consists of disobedience to any lawful command given by a superior officer, which is not accompanied by the essential elements of the graver offence.

Essential ingredients of offence of disobedience.

11. To constitute any offence under s. 9 it is essential that the disobedience should be wilful and deliberate, as distinguished from disobedience arising from forgetfulness or misapprehension (which might, however, be punished under s. 40). The disobedience must have reference to the time at which the command is to be obeyed. If the command be a lawful command, and demands a prompt and immediate compliance, hesitation or unnecessary delay in obeying it may constitute disobedience fully as much as a positive refusal to obey, though mere omission or hesitation can seldom constitute

---

[1] See specimen charges Nos. 19–21, p. 718.
[1a] See however, note 1B to A.A. 56 on p. 484.
[2] See specimen charges Nos. 22 and 23, p. 719.
[3] As to the meaning of "superior officer" and "in the execution of his office" see notes 3 and 4 to A.A., 8.

Ch. III

the graver offence referred to in the preceding paragraph; but if the command is of a prospective nature, a man, before he can be guilty of disobedience, must have had an opportunity to obey the command even if he has said "I will not do it". For example, if the command is to turn out for parade in half an hour, then, until the expiration of that time, no offence of disobedience to a lawful command can be committed. If the soldier on receiving the command makes a reply implying an intention to refuse, and is put in the guard detention room before the end of the half hour, he may be charged under s. 8 with using insubordinate language, or under s. 40 with conduct to the prejudice of good order and military discipline in respect of the improper language, but not with the offence of disobedience to a lawful command.

Lawful command.

12. "Lawful command" means not only a command which is not contrary to the ordinary civil law, but one which is justified by military law; in other words, a lawful military command to do or not to do, or to desist from doing, a particular act. A superior officer has a right at any time to give a command, for the purpose of the maintenance of good order, or the suppression of a disturbance, or the execution of any military duty or regulation, or for any purpose connected with the amusements and welfare of a regiment or other generally accepted details of military life. But a superior officer has no right to take advantage of his military rank to give a command which does not relate to military duty or usages, or which has for its sole object the attainment of some private end. Such a command, though it may not be unlawful, is not such a lawful command as will make disobedience of it an offence under the Act. In other words, the command must be one relating to military duty, that is to say, the disobedience of it must tend to impede, delay or prevent a military proceeding.

Duty of obedience.

13. If the command were obviously illegal, the inferior would be justified in questioning, or even in refusing to execute it, as, for instance, if he were ordered to fire on a peaceable and unoffending bystander. But so long as the orders of the superior are not obviously and decidedly in opposition to the law of the land, the duty of the soldier is to obey and (if he thinks fit) to make a formal complaint afterwards.

Religious scruples.

14. Religious scruples, however *bona fide*, afford no justification for neglect or refusal to obey orders. An officer cannot (for example) plead conscientious scruples as justifying a refusal to go into the trenches on a Sunday, or to pay marks of respect enjoined by superior authority to a form of religion different from his own.

Other acts of violence, resisting escort, etc.

15. S. 10 of the Army Act makes provision in paras (1) and (2) for the punishment of acts of violence or insubordination where the offender is engaged in a quarrel, fray, etc., or is in custody. These offences as well as that of resisting an escort under para. (3) may be committed by any person subject to military law, but only officers should be charged under para. (1). The offence of breaking out of barracks, camp, or quarters, which can be committed by a soldier only, also falls under this section.[1]

[1] See specimen charges Nos. 24–27, p. 719.

16. Under s. 11 neglect to obey any general or garrison or written orders is constituted as an offence triable by court-martial.[1] This section does not apply to neglect to obey verbal orders. Neglect to obey general orders.

ss. 12-15. *Desertion, Fraudulent Enlistment and Absence without Leave*[2]

17. The criterion between desertion and absence without leave is intention. The offence of desertion or attempting to desert His Majesty's service implies an intention on the part of the offender either not to return to His Majesty's service at all, or to escape some particular important service as mentioned in para. 20; and a soldier must not be charged with desertion or attempted desertion unless it appears that some such intention existed. Further, even assuming that he is charged with desertion, the court that tries him should not find him guilty of desertion, unless fully satisfied on the evidence that he has been guilty of desertion as above defined. On the other hand, absence without leave may be described as such short absence, unaccompanied by disguise, concealment, or other suspicious circumstances, as occurs when a soldier does not return to his corps or duty at the proper time, but the circumstances are such as to show that he did not intend to quit the service or to evade the performance of some service so important as to render the offence desertion. Desertion and absence without leave.

18. It is obvious that the evidence of intention to quit the service altogether may be so strong as to be irresistible, as, for instance, if a soldier is found in plain clothes on board a steamer starting for America, or is found crossing a river to the enemy; while, on the other hand, the evidence is frequently such as to leave it extremely doubtful what the real intention of the man was. Mere length of absence is, by itself, inconclusive as a test, for a soldier who has been entrapped into bad company through drink or other causes may be absent some time without any thought of becoming a deserter; but in the example above given of a soldier found on board a steamer starting for America, there could be no doubt of the intention, though he might only have been absent a few hours. Evidence of intention not to return.

19. Nor can desertion invariably be judged by distance, for a soldier may absent himself without leave and depart to a very considerable distance, and yet the evidence of an intention to return may be clear; whereas he may scarcely quit the camp or barrack yard, and the evidence of intention not to return (by the assumption of a disguise, for example, and other circumstances) may be complete. Distance by itself not a criterion.

20. A man who absents himself in a deliberate or clandestine manner, with a view of shirking some important service, though he may intend to return when the evasion of the service is accomplished, is liable to be convicted of desertion just as if an intention never to return had been proved against him. Thus, if a man, on the eve of the embarkation of his regiment for service aboard, or when called Evasion of important service.

---

[1] See specimen charges Nos. 28 and 29, p. 720.
[2] See specimen charges Nos. 30-35, 37, 38, pp. 720-1.

out to aid the civil power, conceals himself in barracks, the court may be quite justified in presuming an intention to escape the important service on which he was ordered and in convicting him of desertion.[1]

Desertion when on furlough.

21. A man may be a deserter though his absence was in the first instance legal (*e.g.*, authorised by leave or furlough), the criterion being the same in all cases, namely, the intention of not returning. It is clearly shown by the King's Regulations, and by the explanation on the furlough form itself, that a soldier on furlough is still under orders, and that, if without leave he quits the place to which he has permission to go, or if he disguises or conceals himself so that orders cannot reach him, or goes on board a ship about to sail for a distant port, he is liable to be tried and convicted of desertion though on furlough at the time. A soldier stationed, for example, at Ipswich, who obtains a pass to Bristol, and during his leave is found at Liverpool in civilian costume on board a ship about to sail for New York, may be tried for desertion.

Attempted desertion.

22. If a soldier commits an act which is apparently a prelude to, or an attempt at, desertion, although no actual absence can be proved, *e.g.*, if he is caught in the act of slipping past a sentry, or climbing over a barrack wall in plain clothes, he may be charged with an attempt to desert.

Surrender by soldier.

23. The fact that a soldier surrenders is not proof by itself that he intended to return, even though he is in uniform at the time of surrender. It may not be possible to prove where the man has been during his absence, but evidence that the military patrols had searched carefully in the neighbourhood of the barracks without finding him, would show that he must have gone to a distance or concealed himself. From this and other circumstances the court may infer that he surrendered because he could not effect his contemplated escape.

General provisions as to desertion.

24. A soldier charged with desertion may be found guilty of attempting to desert or of being absent without leave; and on the other hand, a soldier charged with an attempt to desert may be found guilty of actual desertion or of being absent without leave.[2] In any case of doubt as to whether one or the other offence has been committed, the court should find the accused guilty of the less offence. A soldier guilty of desertion forfeits, if serving on his original engagement, the whole of his prior service, and, if serving on a re-engagement, all prior service rendered during the period of re-engagement, and is liable to serve for the term of his original enlistment, or re-engagement as the case may be, reckoned from the date of his conviction, or of the order dispensing with his trial.[3]

Persuading, etc., to desert.

25. In addition to the offences of desertion and attempted desertion, the offence of persuading, attempting to procure, etc., any person subject to military law to desert is punishable under s. 12. If these offences are committed on active service a sentence of penal servitude may be awarded; if not on active service, imprisonment

[1] See specimen charges Nos. 33 and 33A, p. 720.
[2] See A.A. 50 (3) (4).
[3] A.A. 79 and 84. As to court of inquiry in case of absence without leave for twenty-one days, see A.A. 72; and as to procedure in case of confession of desertion or fraudulent enlistment, see A.A. 73.

may be awarded for the first offence and penal servitude for the second or any subsequent offence. S. 14 makes it an offence to assist a person subject to military law to desert, or to neglect to take steps to prevent desertion or attempted desertion.[1]

Desertion and fraudulent enlistment.

26. As a general rule a soldier quitting his corps and enlisting in another should not be charged with desertion but with fraudulent enlistment[2] under s. 13, for the very act of enlisting in another corps (unless in an exceptional case) shows that he did not intend to leave His Majesty's service. On the other hand, if he does so for the purpose of avoiding a particular service—*e.g.*, service abroad—or if during his absence he conducts himself so as to show that when he quitted the service he did not intend to return to it but changed his mind, he might properly be tried for desertion. But, as already observed, it will suffice, except in very special cases, to prefer a charge of fraudulent enlistment alone.

Fraudulent enlistment.

27. Under s. 13 the offence of fraudulent enlistment applies to two classes of case, *viz.*, (1) the enlistment by a person belonging to the regular forces, or Territorial Army when embodied, into the regular forces or into any force raised in India, Burma, or a colony; and (2), the enlistment of a person belonging to the regular forces into the Territorial Army, the reserve forces or the Royal Air Force, or his entry into the Royal Navy.

The punishment for a first offence is imprisonment or less punishment; for a second or subsequent offence penal servitude may be awarded.

Absence from parade, quitting the ranks, etc.

28. In addition to the offence of absence without leave, other offences of a similar character are dealt with in s. 15, *e.g.*, failing to appear at an appointed place of parade. These are, so far as is necessary, referred to in the notes to the Act where are also explained certain technical requirements as to the proper proof of the offences.[3]

ss. 16-18. *Disgraceful Conduct*

Scandalous behaviour by officer.

29. Scandalous behaviour on the part of an officer is an offence under s. 16 and the only punishment that can be awarded is that of cashiering.[4] The circumstances in which a charge under this section can properly be preferred are explained in the notes to the Act.

Military and civil offences of stealing, etc.

30. Ss. 17 and 18 (4) deal with the military offences of stealing, embezzlement and fraudulent misapplication and (in the case of s. 18 (4)) with receiving stolen property.

Ordinary thefts from civilians may be dealt with by the civil courts or they may be tried by court-martial under s. 41 as civil offences; but to steal, embezzle or fraudulently misapply public or regimental property or property belonging to a person subject to military law or to various military institutions has, in accordance with long established practice, been singled out for punishment as a military offence.

Stealing, etc., under s. 17.

31. The military offences under s. 17 of stealing, embezzlement and fraudulent misapplication, or of being concerned in or conniv-

[1] See specimen charge No. 36, p. 721.
[2] See specimen charges Nos. 34 and 35, p. 721.
[3] See specimen charges Nos. 37–40, pp. 721–2.
[4] See specimen charges Nos. 41 and 42, p. 722.

ing at such stealing, etc., can only be committed by persons subject to military law who are charged with or concerned in the care or distribution of public, regimental or garrison property and the offences must be in respect of such property. The maximum sentence is penal servitude.

Stealing, etc., under s. 18 (4).

32. The military offences of stealing, embezzlement, and fraudulent misapplication under s. 18 (4) can be committed by any person subject to military law, but the offences must be in respect of public property or the property of a person subject to military law or of a regimental band, regimental or garrison mess, regimental or garrison institution or of the Navy, Army and Air Force Institutes. The maximum sentence is imprisonment.

Elements of offence of stealing under ss. 17 and 18 (4).

33. The elements necessary to constitute an offence of *stealing* under either of these sections are the same as in the case of the civil offence of stealing, that is to say, the property stolen must have been taken and carried away by the offender without the consent of the owner, fraudulently and without a claim of right made in good faith, with intent, at the time of such taking, permanently to deprive the owner thereof. But a person may be guilty of stealing notwithstanding that he has lawful possession of the thing stolen, if, being a bailee or part owner thereof, he fraudulently converts it to his own use or to the use of any person other than the owner.[1]

Elements of offence of embezzlement under ss. 17 and 18 (4).

34. The ordinary civil offence of embezzlement is committed by a person employed in the capacity of clerk or servant who fraudulently misappropriates property delivered to or received or taken into possession by him for or in the name or on the account of his master or employer. The military offence of *embezzlement* under ss. 17 and 18 (4) is of wider application, because, although the other elements of the offence are the same as in the civil offence of embezzlement, any person to whom ss. 17 and 18 (4) apply may be found guilty of embezzlement the specific form of property mentioned therein though he is neither a clerk nor servant. It should be remembered that the offence of embezzlement can only be committed in respect of property which the offender has received "for" but not "from" the person to whom it belongs.[2]

Elements of offence of fraudulent misapplication under ss. 17 and 18 (4).

35. The offence of *fraudulent misapplication* under ss. 17 and 18 (4) includes all cases where property, which is properly in the possession of the offender, is fraudulently misapplied by him either to his own use or to that of any other person. Stealing therefore, other than stealing as a bailee (see para. 33) would not be a fraudulent misapplication.[3]

Receiving under s. 18 (4).

36. The offence of *receiving* under s. 18 (4) is committed by a person subject to military law who receives any of the property mentioned in the paragraph knowing it to have been stolen.[4]

Stealing from a comrade.

37. Stealing from a person subject to military law who is a comrade is regarded as peculiarly disgraceful, seeing that in the daily routine of barrack life, soldiers must constantly leave exposed their arms, accoutrements, or kits as well as private property, such as money,

[1] See specimen charges Nos. 46, 53–55, pp. 723–5.
[2] See specimen charges Nos. 43 and 56, pp. 722 and 725.
[3] See specimen charges Nos. 44, 45, and 47, p. 723, and No. 108, p. 734.
[4] See specimen charge No. 55, p. 725.

watches, pipes, etc., trusting to the honour of their comrades. When missing articles are private property, and are found in the possession of another, there is a strong presumption that they were stolen, especially if the accused absented himself, and is discovered to have pawned or sold them. But it must be recollected that an intenton to steal is essential, and that the mere taking of an article without that intent is not criminal. So that if a soldier openly takes an article belonging to another, and returns it, or, though he absented himself, did not secrete the article or make any attempt to sell or pawn it, then the presumption is against his being guilty of stealing. It will often be desirable to obtain evidence as to any custom of borrowing which may have prevailed in a particular room, or as between the accused and the owner of the article or other comrades, and as to any other circumstance tending to show whether the accused might reasonably have supposed that his taking the articles would not be objected to. The restoration of an article does not, of course, by itself prove that the article was not stolen, but evidence of the above nature will often go far to show whether an article was in fact stolen or not. Again, the accused may show that he obtained the articles in a *bona fide* transaction, or that he found them apparently without an owner, and without any name or mark on them by which the owner could be found. The fact of lost articles being found in the valise, or in the bed of a soldier, is not by itself proof that he stole the articles. They might have been put there unknown to him, perhaps intentionally by the real thief. A soldier should not in such a case be tried for stealing unless there are other circumstances from which it might be inferred that the articles were in his valise or bed with his knowledge.[1] The improper possession by one soldier of a comrade's necessaries where there is no evidence of theft, is a different question; it is not an offence against the comrade, but is an offence against military rules, and may, irrespectively of any fraudulent intent, be punished under s. 40.

Supervision of persons in position of trust.

38. A subordinate is frequently tempted to commit the offence of stealing, embezzlement or fraudulent misapplication if he finds that his transactions are not regularly supervised, and that minor irregularities pass unnoticed. All officers, therefore, who have to do with the supervision of institutes or the accounts of pay sergeants or other non-commissioned officers, should be most careful to see that the forms and regulations of the service are strictly and invariably observed. Nothing can be more unjust and inexcusable than for an officer, through indolence or carelessness in doing his own duty, to expose a soldier to temptation which may prove his ruin.

Special powers of court in relation to offences of stealing, etc.

39. An accused person charged with stealing may be found guilty of embezzlement or fraudulent misapplication; if charged with embezzlement, he may be found guilty of stealing or fraudulent misapplication.[2]

Other offences of a fraudulent nature.

40. Offences of a fraudulent nature which are not particularly specified in any of the earlier provisions of the Act are dealt with in s. 18 (5). This paragraph applies to such forms of fraud as the

[1] See Ch. VI, paras. 21–27.
[2] A.A. 56 (1) (2).

Ch. III

adulteration of beer belonging to a mess or the obtaining of money or property by false pretences with intent to defraud.[1]

Other disgraceful offences.

41. It will be noticed that other disgraceful offences besides those relating to dishonest peculation fall under s. 18. Malingering; feigning or producing disease or infirmity; wilful maiming with intent to render unfit for service; wilful misconduct or disobedience producing or aggravating disease or infirmity or delaying its cure; and disgraceful conduct of a cruel, indecent or unnatural kind are all constituted as offences under the section.[2] The maximum sentence for each of these offences is two years' imprisonment, with or without hard labour.

s. 19. *Drunkenness*

Drunkenness.

42. S. 19 of the Army Act creates only one offence, *viz.*, drunkenness, and in all cases, whether the act was committed on duty or not on duty, the charge should be "drunkenness"[3]. If the offence was committed when on duty, or after the accused had been warned for duty, the fact that the offence was so committed and the nature of the duty should be specified in the particulars of the charge.

Drunkenness by N.C.Os.

Drunkenness includes intoxication from the effects of opium or any similar drug as well as from liquor. Under the Army Act, an officer should be tried for the specific offence of drunkenness whether on duty or not on duty, as the case may require; stead of being charged as formerly, in the case of drunkenness not on duty, with conduct unbecoming the character of an officer and a gentleman.

Drunkenness by private soldier.

43. A non-commissioned officer may be tried by a court-martial for even a single act of drunkenness, whether committed on duty or not on duty. The commanding officer has, however, complete discretion whether to send the offender for trial or not, as the obligation of dealing summarily with a private soldier charged with drunkenness otherwise than under aggravating circumstances, does not extend to the case of a non-commissioned officer.[4]

44. A private soldier can also be tried by court-martial under s. 19 for any act of drunkenness, whether on duty or not on duty; but the practical effect of this section is materially affected by s. 46, which declares that the commanding officer shall deal summarily with the case of a soldier charged with drunkenness, unless he has been guilty of drunkenness on not less than four occasions in the preceding 12 months, or unless the offence was committed on active service or on duty, or after the offender was warned for duty, or when the offender was by reason of drunkenness found unfit for duty. Although, therefore, under s. 19, courts-martial have complete jurisdiction to try and punish cases of drunkenness which are directed to be dealt with summarily under s. 46, and this jurisdiction is not limited by s. 46, yet a commanding officer will be guilty of a grave breach of duty and of the provisions of the Act, if he disregards the directions in s. 46 with respect to dealing summarily with such a case of drunkenness charged against a private soldier.[5]

---

[1] See specimen charges Nos. 57–59, p. 725.
[2] See specimen charges Nos. 48–52 and 60, pp. 723–5.
[3] See specimen charge No. 61, p. 726.
[4] A.A. 46, 183 (1). And see K.R. 559.
[5] See K.R. 574–580. The directions in A.A. 46 do not affect the right of the soldier to elect to be tried by a district court-martial (A.A. 46 (8)).

Drunkenness on duty.

45. From a military point of view, drunkenness on duty is considered in reference to the soldier being fit or not fit for duty. There cannot be any distinction between various degrees of drunkenness when on duty. Soldiers therefore are carefully inspected before being put on duty, so as to ascertain their fitness. If the superior, knowing a man to be drunk, out of good nature allowed him to proceed with the duty, or if, through carelessness, he passed a man as sober when he was not sober, then, as a rule, in awarding punishment, the man should not be treated as having been drunk on duty.

A soldier on the line of march is on duty from the beginning to the end of the march, and if drunk in his billet or halting place may be dealt with as having been drunk on duty.[1]

Soldier unexpectedly called on duty.

46. In ordinary routine circumstances, a soldier unexpectedly called on to perform some duty for which he has not been warned—as (for example) is summoned from a canteen or from some public sports—and found to be unfit for duty, should in practice be dealt with as for ordinary drunkenness.

Evidence as to circumstances of drunkenness.

47. In the offence of drunkenness the attendant circumstances affect the amount of punishment, and evidence should be given in all cases as to the circumstances. Evidence should also be given as to whether the drunken man was riotous or not, so that punishment may be apportioned accordingly. Nothing can justify a soldier striking or offering violence to a superior, and great care is therefore enjoined to be taken to avoid bringing drunken soldiers in contact with their superiors. Mere abusive and violent language used by a drunken man, as the result of being taken into custody, should not be used as a ground for framing a charge of using threatening or insubordinate language to a superior officer.[2] If a court-martial be required at all, discipline will generally be upheld by merely bringing the man to trial either for drunkenness (if he is liable to be tried) or for an offence under s. 40, treating the language as in the nature of riotous conduct only, and to that extent aggravating the offence. An offence of drunkenness committed when the offender is not on duty or has not been warned for duty is as a rule sufficiently dealt with by the imposition of a fine.[3]

Drunkenness considered in relation to other offences.

48. Drunkenness often has to be considered by courts-martial not as an offence itself, but in relation to greater offences, which it accompanies. It is a principle of English law that drunkenness is no excuse for crime.[4] But where intention is of the essence of the offence, drunkenness may justify a court-martial in awarding a less punishment than the offence would otherwise have deserved, or reduce the offence to one of a less serious character. Thus, if an ordinary steady respectful man commits himself when drunk by the use of insubordinate language, it may be clear that he did not really intend to be insubordinate; and though the offence cannot be passed over, yet a more lenient punishment will meet the justice of the case than

[1] See K.R. 576.

[2] Where, however, a soldier under the influence of drink strikes a superior officer or is guilty of any other offence, it is the duty of the convening officer to consider carefully according to the circumstances, whether it is necessary to charge the more serious offence.

[3] K.R. 577.

[4] See generally Ch. VII, para. 6 *et seq.*

Ch. III

if the same man had used the same language deliberately when sober. So, too, acts, which if done deliberately would show a wilful defiance of authority, may, if the man was drunk, be regarded as amounting only to the less offence of simple disobedience. So, too, if it should appear that a man absenting himself in circumstances which might ordinarily show an intention of not returning, was drunk, the court would be justified in treating the absence as a mere drunken frolic, and finding the man, though charged with desertion, guilty of absence without leave. So again, a man so drunk as to be incapable of attending parade should be charged with drunkenness rather than with an offence under s. 15 (2) of the Act.

ss. 20-22. *Offences in relation to Persons in Custody*

Offences in relation to persons in custody.

49. Under s. 20 a guard commander who releases, wilfully or otherwise, a person committed to his charge, or the commander or any member of an escort who wilfully, or without reasonable excuse, allows a person in his custody to escape, is liable to be sentenced to penal servitude if he acted wilfully, or to imprisonment if the offence was not wilful. S. 21 deals with various offences in connection with irregular arrest or confinement, whilst s. 22 makes it an offence for a person in arrest or confinement or prison or otherwise in lawful custody to escape or attempt to escape.[1] All the offences under these sections can be committed by any person subject to military law.

ss. 23-24. *Offences in relation to Property*

Offences in relation to property.

50. Corrupt dealings in respect of supplies to the forces render any person subject to military law liable, under s. 23, to imprisonment. S. 24 is concerned with deficiencies in, improper dealings with, and injury to, various forms of military or public property issued to a soldier for his use or entrusted to his care for military purposes. It is also an offence under this section for a soldier to make away with by pawning, selling, destruction or otherwise any military or air-force decoration granted to him; wilfully to injure the property of an officer or comrade, of a regimental band, regimental or garrison mess, regimental or garrison institution, or of the Navy, Army and Air Force Institutes, or any public property; or to ill-treat a horse or other animal used in the public service.[2] It will be noted that an officer cannot be charged under s. 24.

ss. 25-27. *Offences in relation to False Documents and Statements*

Falsifying official documents.

51. The offences comprised in s. 25 and especially those in the first two paragraphs of that section, dealing as they do with the falsification of official documents of a military nature, require particular notice.

Para. (1) of s. 25 deals with false or fraudulent statements or omissions with intent to defraud, knowingly made by a person in a return, pay-list, etc., or other document where the document is either made or signed by the person in question or there is a duty cast upon him of ascertaining its accuracy.[3] if, for example, a

[1] See specimen charges Nos. 62–67, pp. 720–7.
[2] See specimen charges No. 38, p. 721, and Nos. 68 and 69, p. 727.
[3] See specimen charges Nos. 70–73, pp. 727–8.

quartermaster-sergeant makes false entries as to payments made by him in a book which it is his duty to keep in his official capacity, he may be charged with knowingly making false statements under this paragraph or, if there is evidence to show that the effect of the false entries would be to defraud some person, he may be charged with knowingly making fraudulent statements. Similarly if he omits to make in the book entries of payments made by him, he may, if the evidence justifies such a course, be charged with knowingly making such omissions with intent to defraud.

Suppression, etc., of documents.

52. Para. (2) of s. 25 deals with the suppression, defacement, alteration of destruction of any document by a person who has a duty to preserve or produce it, where the suppression, etc., is carried out with an intent to defraud or injure some person.[1]

False accusations.

53. The making of false accusations or false statements of a particular character are the offences mentioned in s. 27. The first two paragraphs are applicable to officers and soldiers, the last two to soldiers only (including non-commissioned officers). To suppress knowingly and wilfully any material facts in connection with complaints for the redress of wrongs under ss. 42 and 43 of the Army Act is an offence under para. (2).[2]

ss. 28-29. *Offences in relation to Courts-martial*

Offences by witnesses.

54. S. 28 contains important provisions as to the failure of persons subject to military law to attend courts-martial as witnesses after being duly summoned or ordered to attend, and as to their refusal to be sworn as witnesses or to produce documents in their possession or to answer questions to which a court-martial may legally require an answer. None of these offences is triable by the court before which the offence was committed. Similar offences by civilian witnesses are dealt with under s. 126.

Contempt of court.

55. Contempt of a court-martial by the use of insulting or threatening language or by the interruption or disturbance of the proceedings of such court is an offence under s. 28 (5) is committed by a person subject to military law. This offence may either be tried before another court-martial, or the court before which the offence is committed may order the offender to be imprisoned, with or without hard labour or, if a soldier, to undergo detention for a period not exceeding twenty-one days. Such order does not require confirmation and may be carried into effect at once. S. 126 (3) deals with contempt of court by persons not subject to military law.

False evidence.

56. S. 29 deals with the wilful giving of false evidence by persons subject to military law when examined on oath or solemn declaration before a court-martial or any court or officer authorized under the Army Act to administer an oath[3]; upon conviction a sentence of imprisonment, with or without hard labour, may be awarded. As in the analogous civil offence of perjury, a person charged under this section is not liable to be convicted solely upon the evidence of one witness as to the falsity of any statement alleged to be false.

[1] See specimen charges Nos. 74 and 75, p. 728.
[2] See specimen charges Nos. 76 and 77, pp. 728–9.
[3] See specimen charge No. 78, p. 729.

ss. 30-31. *Offences in relation to Billeting and Impressment of Carriages, etc.*

Billeting, etc.

57. These sections do not require any special comment in this Chapter. Para. (2) of s. 30 applies to officers only.

ss. 32-34. *Offences in relation to Enlistment*

False answers, etc., on enlistment.

58. The offence of fraudulent enlistment which falls under s. 13 is dealt with in para. 27 above. The provisions of ss. 32 and 33 are applicable to persons who have "become subject to military law."

The former section makes it an offence for such person after he has been discharged with disgrace from the Army or Royal Air Force or dismissed with disgrace from the Royal Navy to enlist in the regular forces without declaring the circumstances of his discharge or dismissal. S. 33 applies to any wilfully false answer to a question in an attestation paper.[1] S. 34 (general offences in relation to enlistment) does not require any detailed consideration.

ss. 35-40. *Miscellaneous Military Offences*

Miscellaneous offences.

59. Ss. 35-39 do not call for special notice but it will be observed that only an officer or warrant officer or non-commissioned officer can commit the offence of striking or ill-treating a soldier and the other offences mentioned in s. 37.

Conduct, to the prejudice of order and discipline.

60. The offence of conduct, etc., to the prejudice of good order and military discipline is fully dealt with in the notes to s. 40 where examples are given of offences commonly charged under this section.[2] A person subject to military law is not to be charged under s. 40 for an offence which is a specific offence under any other provision of the Act, and is not a civil offence; although the conviction of a person so charged is not necessarily invalidated. Before, then, an offender is charged under this section, the convening officer must satisfy himself not only that the act, conduct, disorder, or neglect is to the prejudice of good order and military discipline, but also that it is not any one of the offences specifically punishable under the Act. If he fails to do so he will be responsible for contravening the Act, notwithstanding that the conviction is not invalidated. Attemps to commit military offences specified in the Army Act are not, with one or two exceptions, specifically made offences, and therefore can be tried under this section.

s. 41. *Offences punishable by ordinary Law*

Civil offences.

61. These offences are dealt with in Chapter VII.

(ii) PUNISHMENTS

Scale of punishments.

62. Having laid down the offences, the Act provides (s. 44) a scale of punishments which can be awarded by courts-martial to officers and soldiers respectively. With two exceptions, each particular offence under the Act has a *maximum* punishment assigned to it and by s. 44 provision is made enabling the court to award a less punishment. If, for example, the maximum punishment assigned to an offence is penal servitude, either imprisonment or a punishment

[1] See specimen charges Nos. 79-83, pp. 729-30.
[2] See also specimen charges Nos. 85-94, pp. 730-2.

lower in the scale for officers or soldiers (as the case may be) can be awarded in its place. A maximum punishment is not intended to be imposed unless the offence committed is the worst of its class, or is committed by a habitual offender, or in circumstances which require an example to be made, and of course will not always be imposed even in such cases.

The two exceptions mentioned above are the offence of behaving in a scandalous manner under s. 16 where the only punishment is cashiering, and the civil offence of murder under s. 41 (2) in which case death is the only punishment.

All punishments that can be awarded by courts-martial under the Army Act are included in s. 44 with the exception of certain sentences which are applicable to warrant officers only (s. 182), and a sentence of dismissal from His Majesty's service in the case of a non-commissioned officer or private of the volunteers or Territorial Army (s. 181 (6)).

Combined punishments.

63. Under s. 44, two or more punishments included in the scale of punishments applicable to officers and soldiers respectively may and, in one case, must, be awarded in combination. Thus an officer or non-commissioned officer sentenced to forfeiture of seniority of rank and an officer sentenced to forfeit service for the purpose of promotion may also be sentenced to be severely reprimanded or reprimanded; or a soldier sentenced to penal servitude or imprisonment may also be sentenced to be discharged with ignominy from His Majesty's service. Provisos (2), (3), (4), (6), (11) and (12) to s. 44 which deal with combined punishments must be referred to for their terms. Reference should also be made in this connection to ss. 182 and 183 dealing respectively with the punishment of a warrant officer and of a non-commissioned officer.

The case referred to above where combined punishments must be given is that of an officer who, before he is sentenced to penal servitude or imprisonment, must be sentenced to be cashiered.[1] A non-commissioned officer sentenced to penal servitude, field punishment, imprisonment or detention is deemed to be reduced to the ranks even if a sentence of reduction is not specifically awarded by the court.[2]

Detention.

64. The introduction, in 1906, of the punishment of detention into the scale of punishments applicable to soldiers (including non-commissioned officers) was effected with the object of saving soldiers convicted of offences against discipline under the Army Act and not discharged with ignominy, from being subjected to the stigma attaching to imprisonment. A court-martial ought not, therefore, to sentence to imprisonment a soldier convicted of a purely military offence; and if the court imposes imprisonment in contravention of this principle, the confirming officer should, except in very special circumstances, commute the sentence to a sentence of detention. If the sentence is imprisonment combined with discharge with ignominy, the confirming officer, when commuting to detention, must also remit the discharge with ignominy, as such discharge cannot accompany a sentence of detention.[3]

---

[1] A.A. 44 (proviso (2)).
[2] A.A. 183 (4).
[3] See generally K.R. 652.

Field punishment.

65. The Army Act does not allow the infliction of corporal punishment, but provides (s. 44, proviso (5)) that a court-martial may award for any offence committed by a soldier on active service such field punishment, other than flogging, or attachment to a fixed object, as may be directed by rules made by a Secretary of State. The rules made in pursuance of the above enactment must be referred to for further details on this subject.[1]

Articles of War

Articles of War.

66. In conclusion must be noticed the power of His Majesty, under s. 69, to make Articles of War for the better government of officers and soldiers. Such Articles may be made applicable to officers and soldiers at home or abroad, and must be judicially noticed by all judges, and in all courts. The penalty of death or penal servitude cannot be imposed by an Article of War, except for an offence expressly made liable to such punishment by the Act itself; nor can an Article of War render any offence punishable under the Act liable to be punished in a manner which does not accord with the provisions of the Act. The enumeration of offences in the Act is so complete, that the necessity for the exercise of the power of making Articles of War for the purpose of creating offences would appear unlikely to arise.

[1] The rules are printed on p. 787.

CHAPTER IV

ARREST: INVESTIGATION BY COMMANDING OFFICER: SUMMARY POWER OF COMMANDING OFFICER: SUMMARY AWARDS UNDER S. 47, ARMY ACT: PROVOST MARSHAL: DISCIPLINE OF TROOPS WHEN ATTACHED TO OR ACTING WITH NAVAL OR AIR FORCES OR WHEN PASSENGERS ON BOARD HIS MAJESTY'S SHIPS.

(i) *Arrest*

Military custody of person charged with offence.

1. Whenever any person subject to military law is charged with an offence, he may be taken into military custody, which means putting the offender under open arrest, or close arrest, or in confinement.[1]

Arrest of officer.

2. An officer is put under arrest either directly by the officer who orders it, or (more generally) by the adjutant or a field officer of a unit when the arrest is ordered by the commanding officer of that unit, and by a staff officer when the arrest is ordered by a superior officer, and not through the channel of the commanding officer. The order may be verbal or written, the latter method as more formal being preferable, except where the offence is committed, in the presence of the commanding or superior officer. On being put under arrest, an officer is deprived of his sword.

Arrest may be close or open.

3. The arrest may be either close or open, according to the direction of the officer who ordered it. An officer under close arrest is placed under the charge of an "escort" consisting of another officer of the same rank, if possible. The King's Regulations direct than an officer under close arrest shall not leave his quarters or tent except to take exercise under supervision; but an officer under open arrest may be permitted to take exercise at stated periods within certain limits, which are usually the precincts of the barracks or camp of his unit; he must not, however, appear out of uniform, or at mess, or at any place of amusement or public resort (such as a billiard room), nor must he wear sash, sword, belt, or spurs.[2] An officer placed under arrest should always be informed in writing of the nature of the arrest, which will be governed by the circumtances of the case; and any change in the nature of the arrest should be notified in writing to him. An officer may, if the circumstances of the case require it, be placed under the charge of a guard, piquet, patrol, or sentry, or, if abroad, in the custody of a provost marshal.[3] An officer under arrest may be ordered or permitted to attend as witness before a court-martial, or before a civil court.

Arrest usually preceded by investigation.

4. As a rule, a commanding officer will not place an officer under arrest without investigation of the complaint or the circumstances tending to criminate him; though cases may occur in which it would

[1] A.A. 45 (1), (2), K.R., 553–540.
[2] K.R. 538.
[3] K.R. 538 *(c)*. *See* also para. 40 of this chapter.

be necessary to do so. It is the duty of the commanding officer to report each case of arrest without unnecessary delay to the proper superior military authority.[1]

Arrest of senior by order of junior officer in certain circumstances.

5. It is expressly laid down by s. 45 (3) of the Army Act, that a junior officer may order the arrest of a senior (even of a different corps or branch of the service), if engaged in any quarrel, fray, or disorder. In the case of any glaring impropriety, such as drunkenness on parade, it may become the duty of a junior to take such an extreme measure.

Case of Lt.-Col. H. in 1819.

6. This was clearly shown by the order on a court-martial for the trial of Brevet Lieut.-Col. H. at Plymouth, in 1819. Lieut.-Col. H. appeared at a regimental parade in a state of intoxication, and was put under arrest by Captain E., one of his junior officers. He was tried "for being drunk on duty when under arms inspecting "the guards and piquet of the Regiment of Foot", and sentenced to be cashiered; the court observing that the occurrence of a commanding officer being put under arrest while in the actual command of a regimental parade was unprecedented in their experience; and that the circumstances detailed in evidence were not of that imperious urgency as to have called for the immediate adoption of so very strong a measure. The Prince Regent, however, in confirming the finding and sentence, took occasion to signify that he could not allow the observations of the court to go forth to the army without explaining "that the court are in error when they suppose that cir-"cumstances may not occur even upon a parade to justify a junior "officer in taking upon himself the strong responsibility of placing "his commander in arrest; such a measure must rest alone upon the "responsibility of the officer who adopts it, and there are cases wherein "the discipline and welfare of the service require that it should be "assumed. In the present instance the sentence of the court appears "to afford a full justification of Captain E's conduct in the placing of "Lieut.-Col. H. in arrest, though it would have been more regular "if that officer had continued to rest upon his own responsibility, "without calling a meeting of his brother officers to support it by "their opinions."

Officer has no right to claim court-martial.

7. Except in the circumstances mentioned in s. 47 (3) of the Army Act, an officer has no right to claim trial by court-martial.[2]

Release of officer.

8. The release of an officer under arrest may be ordered by the officer who imposed the arrest, or the superior to whom it may have been reported; but, as a rule, except in cases of obvious error, the release is not to be ordered without the sanction of the highest authority to whom the case may have been referred.[3] An officer released, unless such release is specifically without prejudice to re-arrest, will not again be arrested on the same charge, unless some new and special circumstances have arisen.

No privilege of Parliament from arrest.

9. Peers and Members of the House of Commons are not privileged from arrest; but the fact and cause of the arrest should always be communicated to the Lord Chancellor, or to the Speaker, as the case may be.

---

[1] K.R. 534 *(b)*, 538 *(a)*. See for summary of the provisions of the Act and rules for preventing unnecessary detention in arrest, A.A. 45, and note 1 thereto.
[2] K.R. 538 *(f)*.
[3] K.R. 538 *(e)*.

Arrest of warrant and non-commissioned officers.

10. The rules which govern the close and open arrest of officers apply also to warrant officers. Non-commissioned officers will, as a rule, when charged with a serious offence, be placed under arrest forthwith; but in case of doubt as to the commission of the offence, the arrest may be delayed; and if the offence is not serious, it may be disposed of without previous arrest.[1]

Confinement of private soldiers.

11. A private soldier taken into military custody on a charge of having committed an offence is placed either under close arrest or open arrest. Close arrest in the case of a private soldier means confinement under charge of a guard, piquet, patrol, sentry or provost marshal. He will not be placed under close arrest unless confinement is necessary for his safe custody or for the maintenance of discipline. For minor offences, such as absence from roll call, overstaying a pass, and other slight irregularities in quarters, soldiers are placed under open arrest. A private soldier under open arrest will not quit barracks (except on duty or with special permission) until his case has been disposed of, but he will attend parades and may be ordered to perform all duties.[2]

In permanent barracks soldiers under close arrest will usually be detained in a guard detention room.[3] They are never to be kept in irons, except when it is necessary for safe custody or to prevent violence. When troops are in billets or on the line of march, or accommodation for the confinement of offenders is otherwise not available, a soldier in military custody may be committed, by order of his commanding officer, for a period not exceeding seven days, to any civil prison or lock-up.[4]

While awaiting trial by court-martial or the promulgation of the finding and sentence of the court-martial which tried him, a soldier may be confined in a detention barrack, branch detention barrack, or barrack detention room. When so confined he should be kept apart from soldiers undergoing sentence.[5] When a soldier elects to be tried by district court-martial under s. 46 (8) of the Army Act, his commanding officer may, if he thinks the circumstances of the case warrant it, release him pending trial.[6] A soldier when confined can only be released by a competent authority, *e.g.*, if confined in a regimental guard room he can only be released by the authority of the commanding officer of the regiment, and if in a garrison guard room by the authority of the officer commanding the garrison.

Performance of duties while under close arrest.

12. Except on active service, an offender, while under close arrest, is not to be required to perform any duty other than personal routine duties and such as may be necessary to relieve him from the care of any cash, stores, etc., for which he is responsible, nor is he permitted to bear arms except in an emergency by order of his commanding officer, or on the line of march, or in a detention barrack for exercise or instruction. If, however, by error, he is ordered to perform any duty, he is not thereby absolved from liability to be proceeded against for the offence for which he is under arrest.[1] On board ship he may be

[1] See para. 3 above. K.R. 534, 538, 539 *(a)*.
[2] K.R. 534, 539, 540 *(c)*. As to the duties of N.C.Os. in relation to the confinement of private soldiers, see K.R. 534 *(g)*.
[3] K.R. 539 *(b)*. As to soldiers in a state of drunkenness, see *ib.* 535.
[4] K.R. 539 *(f)*. For form of order, see Form Q in App. III to R.P.
[5] K.R. 718, and see Form R in App. III to R.P.
[6] K.R. 552 *(a)*.

Ch. IV

employed on fatigue duties, although he should not be placed on guard.[2]

Breaking arrest.

13. The offence of escaping or attempting to escape from arrest or confinement renders an officer liable to be cashiered and a soldier liable to imprisonment.[3] An offender confined to quarters, and quitting them for any purpose whatever, however short the time of his absence, is strictly speaking guilty of breaking his arrest. The gravity of the offence will depend mainly on whether the circumstances do or do not disclose deliberation, and intentional defiance of authority.

Improper release and allowing escape.

14. The offences of releasing without proper authority a person in custody, and of allowing a person in custody to escape, vary in gravity according to whether the offender acts wilfully or not; in the former case he is liable to penal servitude.[4]

Receiving accused persons into custody.

15. An officer or non-commissioned officer commanding a guard, or a provost marshal, cannot refuse to receive or keep any person committed to his custody by an officer or non-commissioned officer; but the committing officer or non-commissioned officer must, at the time of committal, or within 24 hours after, deliver to the officer or other person into whose custody the offender is committed a written account (generally termed the "charge"), signed by himself, of the offence with which the person committed is charged. The commander of a guard, will upon the request of a person received into custody, inform him of the rank and name of the person preferring charges against him or ordering his arrest, and give to him a copy of the charge report as soon as he himself receives it.[5]

Account of offence.

16. The charge should contain, without any unnecessary detail, all the material points of the offence. If a charge states that the accused was drunk, or absented himself, and a witness subsequently adds before an investigating officer that the accused struck a non-commissioned officer, or used threatening language, the presumption is that the conduct of the accused was not at the time though sufficiently serious to amount to an offence, and to be entered in the charge. As a rule, the investigating officer would treat the fresh evidence merely as showing the nature and degree of the offence originally deposed to; but in some cases he may consider it advisable to make this new evidence the substance of a specific charge.

Omission to deliver charge.

17. The omission of the committing officer to deliver the charge will not justify the commander of the guard or provost marshal in refusing to receive a person into custody, much less in releasing such person. The proper course for a guard commander, in the event of such omission, is to take steps for procuring the charge, or to report to the officer to whom his guard report is furnished that no charge has been delivered. If the charge or evidence sufficient to justify the retention in custody of the person is not forthcoming within 48 hours after committal, the latter officer will order his release.[6]

---

[1] K.R. 540.
[2] Voyage Regs., 88.
[3] A.A. 22. As to escape, see notes 2 and 3 to that section.
[4] A.A. 20.
[5] A.A. 45 (4), and K.R. 536.
[6] K.R. 536.

Duty of commander of guard to report name and offence of accused.

18. It is the duty of the commander of the guard (immediately on the relief of the guard) to report in writing, to the officer to whom he is ordered to report, the name and offence of the accused, and the name and rank of the committing officer; and he should include the charge in his report, or, if it has not been delivered, should state that fact. If he fails to make this report within 24 hours after the accused was committed, or where he is relieved from his guard within that period, then immediately on being so relieved, he himself commits an offence. The report will, as a rule, be made to his commanding officer.[1]

(ii) *Investigation by Commanding Officer*

Investigation by commanding officer.

19. The object of the report referred to in para. 18 is to enable the commanding officer of the accused, without delay, to institute an investigation of the case. There is some difference in the procedure in the case of an officer and in that of a soldier.

In case of officer.

20. The case of an officer may be referred to a court of inquiry, and need not, unless the officer requires it, be formally investigated before his commanding officer[2]; but the commanding officer, in the case of an officer as well as of a soldier, is by s. 46 of the Army Act made responsible for dismissing the charge, if it ought not to be proceeded with; and, if it ought to be proceeded with, for taking the proper steps under that section.

In case of soldier.

21. A case of a warrant officer, non-commissioned officer or private soldier should, in the first instance, be investigated by the company, etc., commander. Where the accused is a private, this officer, if he decides that the case is a minor offence or a case of drunkenness, or of absence without leave, with which he can deal under the powers delegated to him under s. 46 (9) of the Army Act and the King's Regulations,[3] will either dispose of the case himself or leave it to his commanding officer to deal with. The case of a non-commissioned officer must always be left to be dealt with by the commanding officer, except where the company, etc., commander has power to admonish or reprimand (but not severely reprimand) a non-commissioned officer not above the rank of corporal.[4] A case left to be dealt with by a commanding officer must be investigated by the commanding officer himself. He can dismiss the charge; remand the case for trial by court-martial; refer it to superior military authority; or, in the case of a private soldier, award punishment summarily, subject to the right of the soldier, in any case where the award of finding involves forfeiture of pay, and in any other case where the commanding officer proposes to deal with the offence otherwise than by awarding a minor punishment, to elect to be tried by a district court-martial, and subject to the limitations imposed on the discretion of commanding officers by the King's Regulations.[5] A warrant officer cannot be summarily punished except as provided for in s. 47 of the Army Act (see (iv) below). A non-commissioned officer, though not legally exempt, is not allowed

[1] A.A. 21 (3), and K.R. 536. See for summary of the provisions of the Act, and rules for preventing unnecessary prolongation of confinement, A.A. 45 and note.
[2] R.P. 8 and note.
[3] K.R. 542, 565.
[4] K.R. 542 and 565.
[5] A.A., 46; R.P. 4; K.R. 542–553; paras. 24 and 26, below.

by the King's Regulations to be summarily punished except as specially laid down therein. A person subject to military law as a soldier but not belonging to His Majesty's forces cannot be summarily punished.[1]

Duty of officer conducting investigation.

22. The duty of investigation requires deliberation, and the exercise of temper and judgment, in the interest alike of discipline and of justice to the accused. The investigation usually takes place in the morning, and must be conducted in the presence of the accused;[2] but, in the case of drunkenness, an offender should never be brought up until he is sober.[3]

Examination of witnesses.

23. After the nature of the offence charged has been made known to the accused, the witnesses present on the spot who depose to the facts for which he has been placed under arrest are examined. In every case where the commanding officer has power to deal with the case summarily, the accused has a right to demand that the witnesses against him be sworn; and he will also have full liberty of cross-examination.[4]

Decision of commanding officer.

24. The commanding officer, after hearing what is urged against the accused, will, if he is of opinion that no military offence at all, or no offence requiring notice, has been made out, at once dismiss the charge.[5] Otherwise, he must ask the accused what he has to say in his defence, and whether he has any witnesses to call, and will give him full opportunity both of making a statement and of supporting it by evidence, including the evidence of the accused himself and that of his wife.[6] The commanding officer will then consider whether to dismiss the case or to deal summarily with it himself, or to adjourn it for the purpose of having the evidence reduced to writing, with a view to having the case tried by court-martial or, when the accused is an officer below the rank of field officer or is a warrant officer, disposed of under s. 47 of the Army Act.[7] First and less serious offences of the class which he has authority under the King's Regulations to dispose of summarily, without reference to superior authority, should, as a rule, be so dealt with, subject to the soldier's right to elect before the award to be tried by a district court-martial. If the offence does not belong to the above class, and the commanding officer desires to dispose of it summarily, he must refer to superior authority by letter stating briefly the circumstances, and accompanied by the conduct sheets of the accused. A charge for any offence, of whatever class, may, if the commanding officer thinks fit, be referred to superior authority, with an application for a district court-martial.[8]

Caution as to expressing opinion.

25. During the investigation, the officer conducting it must be careful not to let fall, before he disposes of the case, any expression of opinion as to the guilt of the accused, or one which might prejudice

---

[1] A.A. 182 (1), 184 (2); K.R., 558, 559; and as to summary punishments, see below, para. 31, *et seq.*
[2] R.P. 3 (A).
[3] See K.R. 535 (c), which suggests the lapse of 24 hours before he is brought up.
[4] A.A. 46 (6); R.P. 3 (A), (B) and note; *q.v.* also as to the evidence of the accused himself, and of his wife.
[5] R.P. 4 (A).
[6] R.P. 3 (A) and note.
[7] R.P. 4 (B).
[8] R.P. 4; K.R., 547–550.

him at a subsequent trial.[1] It frequently happens that officers who have been present at the investigation are detailed as members of the court convened in consequence of it; therefore, nothing should be said or done which might, though unconsciously, bias their judgment beforehand. Conduct sheets should be examined by the commanding officer when, and not before, he has satisfied himself as to the guilt of the accused.

Right of soldier to claim court-martial.

26. If the commanding officer proposes to deal with the case summarily, otherwise than by awarding a minor punishment, he must ask the soldier whether he desires to be dealt with summarily, or to be tried by a district court-martial; and the soldier may, if he chooses, thereupon elect to be tried by a district court-martial. Save as aforesaid, a soldier has no right to claim a court-martial.[2]

As stated above, a commanding officer has power to award minor punishments without restriction, but should it happen, for example, in a case of absence without leave in excess of six hours, that a commanding officer proposes to deal with the offence by awarding a minor punishment, it will result that the decision constitutes a finding of "guilty" in respect of the offence with resultant forfeiture of pay. Consequently in such case, before final disposal, the soldier must be afforded an opportunity of electing trial by district court-martial. The principle does not apply in the case of deprivation by a commanding officer of acting or lance rank, since, although the deprivation might result in a reduction in the rate of pay, the loss would not amount to a forfeiture of pay within the meaning of s. 138 of the Army Act.

Adjournment for taking a summary of evidence.

27. Where a commanding officer adjourns the case for the purpose of having the evidence reduced to writing, the evidence given by any witnesses before him must be taken down in writing in the presence of the accused;[3] the accused must be allowed to cross-examine within reasonable limits, especially if there is any variance between the evidence as taken down and that given on the prior investigation. When all the evidence for the prosecution has been taken, the accused, before he makes any statement, *must* be formally cautioned in the prescribed words. This is most important, for any statement made by him *at the taking of the summary* will be inadmissible at his trial unless he has first been duly cautioned. Any statement or evidence of the accused will be taken down, but he will not be cross-examined upon it.[4]

Mode of taking summary.

28. The evidence and statement, if any (called the summary of evidence), must be taken down in the presence of the commanding officer himself, or of some officer deputed by him.[5] If the commanding officer so directs, or if the accused so demands, the evidence will be taken on oath.[6] Great care is necessary in the performance of this duty; the words used by the witness or accused should as nearly

---

[1] K.R., 542 *(a)*.
[2] A.A. 46 (8); see also K.R. 566 and para. 21 above.
[3] The accused and his wife, even if they have given evidence before the commanding officer, cannot be compelled to repeat their evidence.
[4] R.P. 4 (E).
[5] R.P. 4 (C).
[6] A.A. 70 (6), and R.P. 4 (F).

as possible be taken down, and the summary should be free from any expression of opinion or conjectures, and from matter not bearing on the case. The difference not infrequently observable between the statements recorded in the summary of evidence and the evidence given before the court-martial may often be traced to the hasty or careless preparation of the summary, rather than to any prevarication or desire to mislead on the part of the witnesses.

Remand of accused for trial by court-martial.

29. When the summary of evidence has been taken, the commanding officer must consider it and determine whether or not to remand the accused for trial by court-martial. It may be that on reading the evidence the commanding officer will come to the conclusion that the case is one which ought to be disposed of summarily. In such a case, unless the accused has himself elected to be tried by district court-martial, the commanding officer will either rehear the case and dispose of it summarily, or, if he is not competent to do so without leave from superior military authority, will refer it to the proper authority. In any other case he will remand the accused for trial by court-martial,[1] and send to superior authority an application for a district or general court-martial[2] accompanied by the summary of evidence, the charges on which he proposes the accused person should be tried, and other documents; and in his letter of application he will state his reasons for desiring the particular description of court for which he applies. If a court-martial is ordered or applied for, the accused can be kept in arrest or confinement until the charge is disposed of. It is the duty of the commanding officer on reading the summary of evidence to note whether or not the evidence taken down in the summary corresponds with the evidence given at the inquiry before him.

At home stations, in all cases of indecency, fraud and theft, the charge and summary of evidence must be submitted to the Judge-Advocate-General before trial is ordered.[3]

Use of summary of evidence.

30. The summary of evidence, like the depositions before justices, may be used for certain limited purposes at the trial,[4] and also for the purpose of giving the accused notice of the charge he will have to meet, and the convening officer and president of the court notice of the case to be tried. Either the summary itself or a true copy must be laid before the court-martial before whom the accused is tried.

(iii) *Summary power of Commanding Officer*

Power of commanding officer to deal with non-commissioned officer or soldier.

31. The power of the commanding officer to punish summarily a soldier is twofold: first, the power under s. 46 (2) (*a*)-(*d*), Army Act, to award detention, deduction from ordinary pay, and in the case of drunkenness a fine not exceeding two pounds, and, in case of offences committed on active service, field punishment and forfeiture of pay for not more than 28 days[5]; and, secondly, the power under s. 46 (2)

---

[1] R.P. 5 (A).
[2] R.P. 5 (B).
[3] K.R. 630.
[4] R.P. 17 (E) and note 6.
[5] A.A. 46, 138; K.R. 560 (*a*), 579.

(*e*), Army Act, and the King's Regulations to award the minor punishments of confinement to barracks, extra guards or piquets, or admonition, subject and according to the provisions of para. 560 (*b*), King's Regulations, to which reference must be made. The detention must in no case exceed twenty-eight days.[1] Under the terms of the Army Act (s. 46 (2) (*d*)) a non-commissioned officer cannot be awarded field punishment or forfeiture of pay by his commanding officer, and under the King's Regulations he is not to be subjected to summary or minor punishments by his commanding officer, save the summary punishment of deduction from pay under s. 138 (4) of the Army Act (subject to the right to claim trial by court-martial), and the minor punishments of severe reprimand, reprimand or admonition. A non-commissioned officer may be ordered to revert from an acting or lance rank to his permanent grade,[2] or may be removed from an appointment and reverted to his permanent grade, but this power of removal, if the non-commissioned officer's permanent rank is higher than that of corporal, is not to be exercised without reference to superior authority.[3] A commanding officer has no power to punish an officer or warrant officer.

Drunkenness.

32. Drunkenness and absence without leave are the two offences which require to be most frequently dealt with by the commanding officer; indeed, the case of drunkenness of a soldier, apart from exceptional cases, as described in Chapter III, *must* be so dealt with.[4] This obligation does not apply to a non-commissioned officer charged with drunkenness.[5]

Absence without leave.

33. In dealing summarily with cases of absence without leave, the commanding officer will have regard to the place of the soldier's surrender or apprehension and all the circumstances of the case. If the period of absence does not amount to six hours or upwards no pay is forfeited, except when the absence prevents the absentee from fulfilling some military duty which was thereby thrown on some other person, in which case the absentee will forfeit a day's pay no matter how short his absence might be. If the period of absence amounts to six hours, reckoned consecutively, but not to twenty-four hours, one day's pay is forfeited. If the period of absence exceeds twenty-four hours, the number of days' pay forfeited would be the period in hours divided by twenty-four, any fraction over being counted as an additional day.[6]

Forfeiture of pay.

34. Under s. 138 of the Army Act a soldier may be ordered to forfeit all pay for every day of absence either on desertion, or without leave or as a prisoner of war; also for every day of penal servitude, imprisonment, detention, or field punishment, under sentence, or in custody under any charge resulting in conviction by a court-martial or civil court, or under a charge of absence without leave resulting in an award of detention or field punishment by his commanding officer; also for every day in hospital on account of sickness, certified to have been caused by an offence committed by him. The Pay Warrant orders

[1] A.A. 46 (2) (*a*); R.P. 6, and note.
[2] K.R., 559.
[3] A.A. 183 proviso (*c*); K.R., 273.
[4] See Ch. III, para. 44.
[5] A.A. 183 (1).
[6] A.A. 140 (2), and note 4 to s. 138; P.W. 880, 881; K.R. 566, 567. As to notifying in regimental orders the names of men absent without leave, see K.R. 583.

Ch. IV

the forfeiture of pay to be made in the above cases with the following exceptions:—(*a*) a soldier does not forfeit pay while under sentence of field punishment except for the days during which he is in custody, unless there has been an award of forfeiture of pay in addition to the sentence of field punishment[1]; (*b*) pay is forfeited for the period of arrest before conviction only if the soldier is in custody under close arrest (including hospital), or is confined in a civil prison or police cell; (*c*) a soldier is allowed pay while a prisoner of war unless a court of inquiry finds that he was taken prisoner through his own fault or misconduct.[2] In the case of absence without leave, as the pay is forfeited automatically, the officer dealing with the case should make no award but only inform the soldier of the number of days' pay forfeited.[3]

The commanding officer may, where a soldier is not tried by court-martial, order stoppage of his pay to make compensation for any expenses caused by him or for any loss of or damage or destruction done by him to any arms, equipment, regimental necessaries, and so forth, or by his injuring any buildings or property[4]; and may likewise order the stoppage of the amount of any fine awarded by himself.[5]

Right of soldier to demand district court-martial.

35. There is no appeal from the award of the commanding officer, but, as has been already mentioned, the soldier may, in certain cases, instead of submitting to the jurisdiction of his commanding officer, elect to be tried by a district court-martial.[6]

No trial after punishment by commanding officer.

36. When once an offender has been punished or the charge otherwise disposed of by his commanding officer he cannot be tried by a court-martial for the same offence; and similarly he cannot be punished by his commanding officer or subjected by him to any stoppage of pay for any offence of which he has been acquitted or convicted by a court-martial or by a competent civil court.[7] When a commanding officer has once awarded punishment for an offence, he cannot afterwards increase it.[8] It is considered that his award is complete when the man has left his presence.

Delegation of power by commanding officer.

37. A commanding officer may (subject to certain limitations) delegate to company, etc., commanders the powers of awarding fines for drunkenness and certain minor punishments for any offences which he himself may deal with.[9]

Commanding officer of detachment.

38. The commanding officer of a detachment, if of field rank, has, unless restricted by superior authority, the same power of awarding summary punishment as the commanding officer of a corps.[10]

---

[1] A.A. 138, note 9.
[2] P.W. 879 *(c)*, 885, and K.R. 743.
[3] K.R., 566 *(a)*.
[4] A.A. 138 (4).
[5] A.A. 138 (7).
[6] A.A. 46 (8); para. 26, above.
[7] A.A. 46 (7).
[8] R.P. 6 (B). As to the power to cancel an award, or reduce the punishment, see R.P. 10.
[9] A.A. 46 (9); K.R., 542 *(d)*, 565.
[10] K.R., 526, 563, and see 564.

(iv) *Summary awards under s. 47, Army Act.*[1]

Summary awards in the case of certain officers, and of warrant officers.

39. Officers below the rank of field officer, and warrant officers, may be summarily dealt with by the authorities specified in s. 47 of the Army Act.

Such officers may be subjected to one or more of the following punishments—forfeiture of seniority of rank, forfeiture of service for promotion (in the case of those whose promotion depends upon length of service)[2] and severe reprimand or reprimand.

Warrant officers may be subjected to one or more of the following punishments—forfeiture of seniority of rank, severe reprimand or reprimand, or a deduction authorized by the Army Act to be made from ordinary pay.

In proceedings under this section the specified authority may dismiss the charge with or without hearing the evidence; if he thinks that it ought to be proceeded with and decides not to send it for trial by court-martial, he will hear the evidence given orally unless the accused consents in writing to the mere reading of the summary or abstract of evidence.

The accused has a right to elect trial by court-martial if the specified authority proposes to award a sentence other than severe reprimand or reprimand; he has also a right to demand that the evidence be taken on oath.

Dismissal of a charge under this section is a bar to trial by court-martial.[3]

Certain offences should not be dealt with under this section of the Army Act. The only offences which should be so dealt with are those specified in K.R. 546.

(v) *Provost Marshal*

Provost marshal.

40. In the case of offences committed abroad, whether on active service or not, arrests will often be made by the provost marshal or his assistants, who may be appointed by a general officer commanding a body of forces abroad. A provost marshal cannot, as was formerly the case, inflict any punishment on his own authority.[4] He can only arrest and detail for trial persons subject to military law committing offences, and carry into execution punishments to be inflicted in pursuance of a court-martial. A provost marshal and his assistants have also as respects a soldier in his or their custody undergoing field punishment, the same powers as the governor of a military prison.[5]

Section 74 of the Army Act permits of the appointment of a provost marshal and assistant provost marshals by general officers commanding

[1] See also R.P. 9.
[2] See K.R. 555.
[3] R.P. 36 (A) (i).
[4] The provost marshal was, until 1929, appointed by the general, and exercised his powers without any statutory authority, and the appointment could only be justified legally as being made under the Sovereign's prerogative to govern the army in time of war in places out of his dominions. There must have been considerable doubt as to the existence of the power, and consequently as to the legality of the provost marshal's acts, and a correspondence took place between the Duke of Wellington and the Government on the subject during the Peninsular War. (See Clode, Mil. Forces, ii, p. 662.) In 1829 the Article of War respecting the provost marshal was inserted, and gave legal recognition and—if it was within the powers of the Articles—legal sanction to the appointment and powers of the provost marshal. (See Clode, Military and Martial Law, pp. 181–3.) The above powers were curtailed in 1879 by the Act of that year.
[5] A.A. 74. As to garrison and regimental provost-sergeants, see K.R. 729, 731, 732.

Ch. IV

bodies of forces serving abroad. The provost marshal will always be a commissioned officer; his assistants may be either officers or non-commissioned officers. At home, a provost marshal (who is also commandant of the Corps of Military Police) and assistant provost marshals are appointed by the King. During manœuvres officers are detailed to act as assistant provost marshals with divisions in order that they may acquire a knowledge of their duties. On mobilization, a provost marshal and such assistant provost marshals as may be necessary are appointed.

(iv) *Discipline of troops when attached to or acting with H.M.'s naval or air forces or when passengers on board H.M.'s ships.*

Discipline of officers and soldiers attached to the air force.

41. Officers and soldiers temporarily attached to the air force under regulations made by the Army Council and Air Council pursuant to s. 179A of the Army Act and s. 179A of the Air Force Act are, with certain modifications, made subject to the Air Force Act whilst so attached.[1] Conversely, officers and airmen of the regular air force temporarily attached to a military force, are, with certain modifications subject to the Army Act whilst so attached.[2] The regulations relating to attachments are set out at pp. 810-813.

Relations between military and naval and air forces acting together.

42. When bodies of the navy and army are acting together or attached, or when bodies of the army and air force are acting together, under conditions prescribed by regulations made by the Admiralty and Army Council or by the Army Council and Air Council respectively, the officers and petty officers of the naval contingent, or the officers and non-commissioned officers of the air force, as the case may be, have the same powers of command and discipline (other than powers of punishment) over military officers and men as they would have if they, themselves, were military officers and non-commissioned officers of ranks corresponding to their own. Conversely, military officers and non-commissioned officers have similar powers over air-force personnel, and military officers and non-commissioned officers not below the rank of sergeant have similar powers over naval personnel.[3] The purpose of the regulations is the mutual exercise of the powers of command and discipline without subjection to the law of the force with which the naval, military or air forces may be acting, but, on active service only, air-force personnel acting with the military forces may be made subject to military law as though they were attached to the army, and, similarly, military personnel acting with the air force may be made subject to air force law as though they were attached to the last-named force.[4]

The "prescribed conditions" at present in force are set out at pp. 809-810, and 813-817.

Discipline on board H.M.'s ships.

43. The discipline of troops embarked as passengers on board any of His Majesty's ships is regulated by Orders in Council made under the Naval Discipline Act.[5]

---

[1] A.F.A. 17⅝ (1A) and 176 (1A).
[2] A.A. 175 (1A) and 176 (1A).
[3] Naval Discipline Act, 90A; A.A. 184A; A.F.A. 184A.
[4] See proviso to A.A. and A.F.A. 184A (1A).
[5] See A.A. 186, and the Orders in Council printed at pp. 818-824.

CHAPTER V

COURTS-MARTIAL

(i) *Descriptions of Courts-Martial and how convened*

Description of courts-martial.

1. A person subject to military law[1] who is to be tried by court-martial may be brought before a district court-martial or a general court-martial.

In certain circumstances trial may be by field general court-martial.[2]

Distinction between district and general courts-martial.

2. The difference between a district and a general court-martial consists mainly in their composition and in the extent of punishment which each tribunal can award. A district court-martial cannot try officers,[3] or persons subject to military law as officers.[4]

Order convening the court.

3. Every court-martial depends for its jurisdiction upon the order which calls it into being, namely, the convening order issued by a person authorized under the Army Act to convene it.

Convening of district court-martial.

4. A district court-martial may be convened by an officer authorized to convene a general court-martial or by an officer who has received from such officer a warrant authorizing him to convene district courts-martial.[5]

Convening of general court-martial.

5. A general court-martial can be convened by His Majesty or by an officer authorized by His Majesty to convene such courts, or by an officer holding a warrant to convene such courts from some officer authorized to delegate the power of convening them.[6]

Warrants to convene at home.

6. At home, warrants giving officers power to convene general courts-martial are usually issued by the King to the general officers commanding-in-chief a command, to the general officers commanding the London and Northern Ireland districts and to the general officers commanding in Guernsey and Jersey.

Warrants to convene abroad.

7. A warrant giving power to convene and to confirm the findings and sentences of general courts-martial is usually issued, in India, to the commander-in-chief in India, and, else where out of the United Kingdom, to the general or other officer in chief command. Governors of colonies have in certain cases been granted such warrants.[7]

Form of Warrant.

8. Any such warrant, and also any warrant of delegation given by the officer so authorized, may contain any reservations or special provisions, and may be addressed to an officer by name or by the designation of his office; and may give authority to a person performing the duties of an office named or to the successors in command of an officer; and may be wholly or partly revoked by a fresh warrant.[8]

---

[1] A.A. 175, 176. See also Introductory Observations to A.A. Part V.
[2] As to field general courts-martial, see below, para. 111.
[3] A.A. 48 (6).
[4] A.A. 175.
[5] A.A. 48 (2), 123.
[6] A.A. 48 (1), 122.
[7] See notes to A.A. 122.
[8] A.A. 122 (3) (4), 123 (3) (4). For forms of warrants see pp. 788–793.

Ch. IV

Convening court-martial for trial of marine.

9. A general court-martial for the trial of an officer or man in the Royal Marines can only be convened by an officer duly authorized by a warrant from the Admiralty, except in certain cases where such officer or man is serving out of the United Kingdom. A district court-martial for the trial of a man in the Royal Marines can be convened by an officer who has authority to convene a district court-martial for the trial of a soldier of any other portion of the regular forces.[1]

(ii) *Jurisdiction*

Jurisdiction of district court-martial.

10. A district court-martial cannot try an officer or a person subject to military law as an officer[2]. It can try a warrant officer, but its powers of punishing him are limited.[3] It has complete jurisdiction to try any military offence (except such as can only be committed by an officer), and, subject to certain restrictions in the case of treason, murder, manslaughter, treason-felony and rape, any offence which, if committed in England, is punishable by the law of England, *i.e.*, a civil offence.[4]

A district court-martial cannot award a sentence higher than two years' imprisonment, with or without hard labour[5]; it cannot therefore try a case of murder, where the only punishment which can be awarded is death.[6]

Jurisdiction of general court-martial.

11. A general court-martial can try any person who is subject to military law whether as an officer or as a soldier. It has complete jurisdiction to try any military or civil offence though the same restrictions are placed by s. 41 of the Army Act upon its powers to try cases of treason, murder, manslaughter, treason-felony and rape as are imposed upon a district court-martial.

A general court-martial can award the punishments of death and penal servitude as well as such punishments as a district court-martial can award.

Trial of persons no longer subject to military law.

12. A court-martial has jurisdiction to try and punish a person who, since the time at which an offence is alleged to have been committed by him, has ceased to be subject to military law; but, except in the case of mutiny, desertion or fraudulent enlistment he can only be tried within three months after he has ceased to be so subject; the three months in question will not be deemed to have expired if the trial has commenced within that period.[7]

Reservists, etc.

Reservists and members of the Territorial Army can, in the case of certain offences, be tried within two months after their apprehension.[8]

No power to try persons already convicted, acquitted, etc.

13. A court-martial cannot try or punish a person for any offence of which he has been already acquitted or convicted by a court-martial[9] or by a competent civil court [10]; or where the charge against him has been dismissed or the offence dealt with summarily by his commanding officer[11]; or where a charge against an officer below field rank or

[1] A.A. 179 (1) (2).
[2] A.A. 48 (6).
[3] A.A. 182.
[4] A.A. 41.
[5] A.A. 48 (6).
[6] A.A. 41 (2).
[7] A.A. 158 (1).
[8] Reserve Forces Act, 1882, s. 26; T.R.F. Act, 1907, s. 25 (2). See T.A. Regs. 311-322.
[9] A.A. 157; R.P. 36 (A) (i).
[10] A.A. 162 (6); R.P. 36 (A) (i).
[11] A.A. 46 (7); R.P. 36 (A) (i).

a warrant-officer has been dismissed or the offence dealt with summarily by the authority authorized for the purpose under s. 47 of the Army Act.[1]

This prohibition does not apply where there has been no valid trial resulting in an acquittal or conviction, or, in the case of a conviction by court-martial, where the finding and sentence have not been confirmed.[2]

Pardon or condonation by competent military authority, if held to be proved, will operate to prevent a person from being tried by court-martial.[3]

Time limit for trial.

14. An offence, other than mutiny, desertion or fraudulent enlistment, cannot be tried by court-martial if three years have elapsed since the date of its commission[4] but, as stated in para. 12, a partial exception from this is made in the case of reservists and members of the Territorial Army.

In certain cases a soldier cannot be tried even for desertion (other than desertion on active service) or for fraudulent enlistment, if three years have elapsed from the date of the commission of the offence.[5]

In trying a civil offence a court-martial is bound in relation to the commencement of its proceedings by any time-limit prescribed by law in respect of that offence which is less than three years.[6]

Place of trial.

15. An offence, wherever committed, may be tried and punished at any place (either within or without His Majesty's dominions) which is within the jurisdiction of an officer authorized to convene general courts-martial and in which the alleged offender may be for the time being, and the trial will take place as if the offender were under the command of such officer.[7]

Trial on board ship.

Offences committed on board ship can be tried on board before reaching the port of disembarkation, as if committed on land at the place where the offender embarked.[8]

Removal of offender for trial.

Offenders are not to be sent home from stations abroad with charges pending against them, except in cases of necessity. But for the sake of convenience a person charged may be removed for trial from the place where he is serving, so long as he is not prejudiced in his defence by the change.[9]

(iii) *Composition*

Composition of district courts-martial.

16. A district court-martial must be composed of at least three officers, each of whom must have held a commission for not less than two years[10] and must be subject to military law.[11]

The members of the court must, so far as is practicable, belong to different corps, and can only belong to the same regiment of cavalry,

---

[1] A.A. 47 (5); R.P. 36 (A) (i).
[2] R.P. 66 (B); A.A. 53 (4), 54 (6).
[3] R.P. 36 (A) (ii).
[4] A.A. 161; R.P. 36 (A) (iii).
[5] A.A. 161.
[6] R.P. 36 (A) (iii).
[7] A.A. 159, 160.
[8] A.A. 188. As to discipline of troops on board H.M.'s ships, see Ch. IV, para. 43.
[9] K.R. 633, 636.
[10] A.A. 48 (4); see also R.P. 18 and notes; for number of members to be detailed in ordinary or complicated cases and as to waiting members, see K.R. 643.
[11] See, however, A.A. 48 (10) under which Air Force officers may in some circumstances serve as members of courts-martial.

Ch. V

or brigade of artillery, or battalion of infantry if, in the opinion of the convening officer (which must be inserted in the convening order), other officers are not available.[1]

The president (who must be named in the convening order)[2] should not be below the rank of field officer; but a captain may preside if a field officer is not available, or a subaltern may preside if neither field officer nor captain is available and if the accused is not a warrant officer.[3] The opinion of the convening officer as to the non-availability of a field officer or captain must be inserted in the convening order.

The members of the court (other than the president) may be mentioned by name in the convening order, or their rank and the unit to which they belong may alone be stated.[4]

Where, as will normally be the case, a district court-martial is composed of three officers, not more than one member should be a subaltern.[5]

Composition of general courts-martial.

17. The provisions as to the composition of a district court-martial referred to in the preceding paragraph apply also to a general court-martial except that (i) the legal minimum of members required to serve on a general court-martial is five instead of three[6]; (ii) the members must have held a commission for three instead of two years[7]; (iii) the president should always be a general officer or colonel (if available)[7]; (iv) a subaltern cannot in any circumstances act as president.[8]

In addition, four of the members must be of a rank not below that of captain[9]; an officer below that rank cannot be a member of the court for the trial of a field officer[10]; and no officer junior in rank to an accused officer can serve as a member if officers of equal or superior rank are available.[11]

For the trial of a commanding officer of a unit, as many members as possible must hold or have held commands equivalent to that held by the accused.[12]

Trial of members of reserve or auxiliary forces.

18. In the case of the trial by court-martial of an offender belonging to the reserve or auxiliary forces, one member of the court must, if practicable, belong to the same branch of those forces as that to which the accused belongs.[13]

Disqualifications of officers.

19. Officers who are eligible through the length of their commissioned service to act as members of courts-martial[14] may nevertheless be disqualified from serving on a particular court-martial. The following persons are disqualified in the case of a district or general court-martial: (i) the convening officer; (ii) the prosecutor; (iii) a witness for the prosecution; (iv) the commanding officer of the accused or the officer who investigated the charges before trial or took down

---

[1] R.P. 20 (A) and note.
[2] A.A. 48; K.R. 644
[3] A.A. 48 (9), 182 (4); K.R. 635.
[4] K.R. 644.
[5] K.R. 643.
[6] A.A. 48 (3).
[7] A.A. 48 (9); K.R. 642.
[8] A.A. 48 (9).
[9] A.A. 48 (3); R.P. 21 (A).
[10] A.A. 48 (7); R.P. 21 (B).
[11] R.P. 21 (B).
[12] K.R. 642 (*b*).
[13] R.P. 20 (B) and note. See Ch. XI, para. 65.
[14] See paras. 16 and 17 above.

the summary of evidence; (v) the company, etc., commander who made preliminary enquiry into the case; (vi) an officer who was a member of a court of inquiry into the matters on which charges against the accused are founded; (vii) where the accused has been previously tried for the same offence, but the proceedings have not been confirmed, any officer who was a member of the court-martial by which the offence was tried; (viii) an officer who has a personal interest in the case.[1]

(iv) *Duties of convening officer*

Consideration of proposed charges and evidence.

20. An application for a court-martial should usually be disposed of at once; but if the convening officer detects matter showing culpable neglect or improper conduct on the part of the superiors of the accused, he may delay assembling a court for the purpose of making enquiry.

Before acceding to an application for a court-martial submitted by a commanding officer the convening officer must consider the nature of the case, the statutory provisions and regulations applicable to it and, subject thereto, must use his discretion as to the mode of disposing of the application. He must satisfy himself that the charge submitted by the commanding officer discloses an offence under the Army Act and is properly framed in accordance with the Rules of Procedure and King's Regulations. He must also be satisfied that evidence sufficient to justify trial is disclosed in the summary or abstract of evidence which accompanied the commanding officer's application; if he thinks that it does not, he should order the accused to be released; if he is in doubt it is within his discretion to order the release of the accused or to refer the matter to superior authority.[2] In any case he may direct the commanding officer to alter the form of the proposed charge in view of the evidence submitted; he may give directions that further evidence should be obtained; in a suitable case he may direct that the accused should be released without prejudice to his re-arrest when further evidence is forthcoming.[3]

When an accused person is to be arraigned on a serious charge, other charges in respect of minor offences may be dropped.[4]

If the convening officer considers that a case should be disposed of summarily instead of by court-martial, and it can legally be so disposed of, he should take steps to effect this.

At home stations, in all cases of indecency, fraud and theft the charge and summary of evidence are to be submitted to the Judge-Advocate-General before trial is ordered.[5]

Decision to try by court-martial.

21. If the convening officer is of opinion that the case should be tried by court-martial, he will, if the terms of the warrant granted to him permit, convene either a district or a general court-martial; if he holds no warrant to convene a general court-martial, he will refer the case to proper superior authority holding such warrant.

---

[1] A.A. 50 (2) (3), and notes; R.P. 19 (B) and notes.
[2] R.P. 17 (A); K.R. 631.
[3] K.R. 551.
[4] K.R. 632.
[5] K.R. 630.

Ch. V

Type of court-martial to be convened.

22. In forming his decision as to whether the case shall be tried by district or general court-martial (where the circumstances permit trial by either one or the other of these tribunals) the convening officer will have regard to various considerations, including the prevalence of the particular offence charged, the general state of discipline in the corps or district, the character of the accused and, in some cases, the sentence which the court ought to be in a position to award if the facts alleged should be proved.

The powers of district courts-martial are sufficient to deal with all ordinary offences committed by non-commissioned officers and soldiers. In the case of aggravated offences, however, a general court-martial may properly be convened.[1]

A case should not, as a rule, be sent for trial unless there is reasonable probability that the accused person will be convicted. At the same time there may be cases where disgraceful charges have been preferred and where a court-martial affords the only means to the accused of clearing his character.

Order for trial by court-martial.

23. The convening officer having settled or approved the charges on which the accused is to be tried, will insert upon the charge-sheet an order that they are to be tried by the description of court-martial which he has decided to convene. It is within his power to direct charges to be inserted in different charge-sheets upon each of which the accused will be separately tried as far as and including the finding[2]; if there are separate charge-sheets the convening officer may direct that upon conviction upon any one of them the accused need not be tried upon the others.[3]

Every charge-sheet must be signed by the commanding officer of the accused and bear upon the face of it the convening officer's directions for trial.[4]

(v) *Preparation of Defence by accused*

Full information to be given to accused.

24. As soon as practicable after an accused has been remanded for trial by court-martial, and at least twenty-four hours before he is brought up for trial, an officer must give to him a copy of the summary, or (if he is an officer, and there is no summary of evidence) the abstract, of evidence, and apprise him of his rights in connection with the preparation of his defence.[5]

As soon as trial has been ordered, proper opportunity to prepare his defence must be afforded to the accused, who must be permitted to have free communication with any witnesses whom he may desire to call, and with any 'friend,' defending officer or legal adviser whom he may wish to consult if they are available.[6]

As soon as practicable, and at least twenty-four hours before the accused is arraigned for trial, an officer must hand to him a copy of the charge-sheet, and, if necessary, explain the charge-sheet and charges to him. The officer in question must also inform him of his rights in connection with the securing of witnesses on his behalf.[7]

---

[1] K.R. 634.
[2] R.P. 62 (A).
[3] R.P. 62 (D).
[4] See note 1 to R.P. 11; R.P. 17; Illustration of charge-sheet in R.P. App. I on p. 714.
[5] R.P. 14 (B).
[6] R.P. 14 (A).
[7] R.P. 15 (A) (B). As to summons to witnesses, see R.P. 78, and form on p. 761. As to expenses of witnesses, see Allowance Regulations, 322–4, 372.

The accused, if charged jointly with any person whom he claims as a material witness for his defence, may apply to be tried separately from that person, and the convening officer may grant a separate trial if the nature of the charge permits.[1]

The accused is entitled to have, if he desires it, a list of the officers who will form the court as soon as they have been detailed[2]; he is not bound to give the prosecutor a list of his own witnesses.[3]

Securing legal aid for defence and prosecution.

25. The accused may himself arrange for the services of counsel to represent him at his trial. If he intends to be represented by counsel, he must give notice to that effect, so that the convening officer, may if he considers it desirable, obtain the services of counsel on behalf of the prosecutor. If the accused does not intend to be so represented, but counsel has been obtained on behalf of the prosecutor, the convening officer must take steps to inform the accused to that effect not less than seven days before the trial, so that the accused may himself obtain counsel for his defence, if he so desires.[4]

Similar notice should be given to the accused in cases where the convening officer intends to appoint or apply for the services of an officer holding legal qualifications to act as prosecutor at the trial.

Qualifications, duties, etc., of counsel and defending officer.

26. The qualifications of counsel (*i.e.*, barristers-at-law, advocates, solicitors, law agents, etc.,) are set out in the Rules of Procedure, as are also their functions, rights and duties.[5]

A defending officer has the same functions, rights and duties as counsel. The 'friend' of the accused can only act in an adivsory capacity.[6]

Assignment of defending officer for accused.

27. In order to ensure that an accused person is represented at his trial if he so desire, it is the duty of the officer referred to in para. 24 above, at the time he hands the summary of evidence to the accused, to ask him to state in writing if he wishes to have a defending officer assigned to him by the convening officer; if he does so wish, the convening officer must use his best endeavours to secure the services of a suitable officer.[7]

(vi) *Assembly of Court*

Assembly of court.

28. When a court-martial assembles at the time and place named in the convening order the members will take their seats according to their army rank.[8] If a judge-advocate has been appointed, he must be present as should also be any waiting members detailed in the convening order to serve as members of the court if required.

The order convening the court, the charge-sheet and the summary (or abstract) of evidence will then be produced by the officer appointed as president[9] to whom they will have been forwarded previously by the convening officer[10]

Inquiry as to composition of court.

29. The court will examine the convening order for the purpose of ascertaining whether the president and members who have taken their seats, the judge-advocate (if any), and any waiting members

[1] R.P. 16.
[2] R.P. 15 (C).
[3] R.P. 77.
[4] R.P. 89 (A) (B).
[5] R.P. 88–93.
[6] R.P. 87.
[7] R.P. 14 (B), 87 (B).
[8] R.P. 58.
[9] R.P. 22 (A).
[10] R.P. 17 (E).

Ch. V

present who may have been detailed are those mentioned in the order. If the members present (other than the president) are not actually named in the order they must be of the actual ranks and belong to the actual units stated therein.

If the convening order appears on the face of it to be proper and to have been duly signed, the court will have fulfilled their first duty, namely, that of satisfying themselves that the court has been convened in accordance with the Army Act and Rules of Procedure.[1]

Inquiry as to legal minimum of members.

30. The court will next ascertain whether the legal minimum of members required by the Army for a district or general court-martial (as the case may be) has been detailed and is present.[2] If such legal minimum is not present, the court must adjourn; but if the legal minimum of officers was detailed in the convening order, waiting members, if there are any, and if eligible and qualified, may take the place of absentee members.

If the number of members detailed in the convening order exceeds the legal minimum, but some of them are absent at the assembly of the court, the court should ordinarily adjourn unless sufficient waiting members are available to serve in place of the absentee members; but the court, in the interests of justice and for the good of the service may proceed with the trial provided that the legal minimum is present.[3]

Inquiry as to eligibility and qualifications of members.

31. The court will then satisfy themselves that the president is of the required rank[4] and that all the members are eligible and not disqualified under the Army Act and Rules of Procedure. The eligibility of an officer depends on his status as an officer, that is, on his being subject to military law[4a] or otherwise qualified to serve under the provisions of the Army Act and having held a commission for the required period. Disqualification is a personal question, and depends on his being or having been, a party to the case. The grounds of ineligibility and disqualification are set out in paras. 16-19 above.

If the trial is by general court-martial the court must be satisfied that the members are of the required rank.[5]

Judge-advocate.

32. Where a judge-advocate has been appointed the court should ascertain if he has been duly appointed and is not disqualified.[6] In the United Kingdom the Judge-Advocate-General appoints the judge-advocate; elsewhere the convening officer makes the appointment. A judge-advocate must be appointed for every general court-martial.[7]

Powers of adjournment of court.

33. The court have wide discretionary power of adjournment if not satisfied on any of the above matters,[8] and circumstances may arise which render an adjournment compulsory—*e.g.*, if the president is ineligible or disqualified,[9] or the court is finally reduced below the legal minimum. Any adjournment and the reason therefor must be reported to the convening officer.[10]

---

[1] R.P. 22.
[2] A.A. 48 (3) (4); and see paras. 16 and 17 above.
[3] R.P. 18.
[4] A.A. 48 (9), 182 (4); and see paras. 16 and 17 above; R.P. 22 (A) (iv).
[4a] See, however, R.P. 134A and note thereto.
[5] A.A. 48 (3) (7); R.P. 21; see also para. 17 above; R.P. 22 (A) (v).
[6] A.A. 50 (3); R.P. 22 (B), 101 (B).
[7] R.P. 101 and note 1 thereto.
[8] R.P. 22 (C).
[9] A.A. 51 (3).
[10] R.P. 22 (C).

34. Having ascertained the validity of their constitution the court will next consider whether the accused is amenable to their jurisdiction.[1] The subject of the jurisdiction of district and general courts-martial is dealt with in paras. 10-15 above. Amenability to jurisdiction.

35. Finally the court must be satisfied that each charge discloses an offence under the Army Act and is properly framed in accordance with the Rules of Procedure; and is so explicit as to enable the accused readily to understand what he has to answer.[2] Inquiry as to validity of charge.

If not satisfied on the above matters, the court should report their opinion to the convening authority and may adjourn for the purpose.[3]

(vii) *Opening of the Court*

36. At the conclusion of the above preliminary proceedings the accused will be brought before the court; if he is an officer, he will be in the custody of an officer; if he is an non-commissioned officer, in the custody of a non-commissioned officer; if he as a private soldier, in the custody of an escort, If necessary, an escort may be employed in any case. Appearance of accused, prosecutor, counsel, etc.

The prosecutor, who must be a person subject to military law,[3a] will take his place in court, and accommodation will be afforded for the defending officer, counsel or 'friend' of the accused.

It is customary, though not obligatory, for the witnesses to be present in court from the time when the accused is brought in until after the members have been sworn; they must then withdraw and should not, as a rule, be allowed to be in the court when not under examination.

37. The court is now open, and the public, whether military or otherwise (including the press), may be admitted so far as accommodation permits. It may be closed at any time to enable the members to deliberate in private.[4] Opening of court.

A court-martial is an open court like other courts of justice, but it has inherent powers to sit *in camera* if such course is necessary for the administration of justice.[5]

38. The convening order will next be read in full by the president or judge-advocate (if any), and the members will answer to their names.[6] The accused will be asked whether he objects to be tried by the president or any of the officers whose names have been read. Objections by accused to members of court.

The Army Act and Rules of Procedure contain elaborate provisions as to the mode of enquiring into and disposing of objections by or on behalf of the accused. A successful objection to the president will necessitate the adjournment of the court and a reference to the convening officer in order that a new president may be appointed or a new court convened. If, upon a successful objection to a member, no waiting member who is eligible and qualified is available to fill the vacancy, the court should normally adjourn, but may proceed with the trial in certain circumstances, provided that there is a legal minimum of members present.[7]

---

[1] R.P. 23 (A) (i).
[2] R.P. 23 (A) (ii).
[3] R.P. 23 (B).
[3a] See, however, R.P. 134A and note thereto.
[4] A.A. 53 (5); R.P. 63.
[5] *R. v. Lewes Prison (Governor)* L.R. [1917], 2 K.B. 254.
[6] R.P. 25 (A).
[7] A.A. 51; R.P. 25, 18.

Where, upon a successful objection to a member of the court, an adjournment is necessary, the convening officer can, if he pleases, convene a new court, as the trial of the accused is not considered to begin until the court are sworn.[1]

Swearing of court, judge-advocate, etc.

39. As soon as the court is finally constituted, the president, members and judge-advocate (if any) will be sworn, all present in court standing. Officers attending under instruction, shorthand writer and interpreter (if any) will also be sworn at this stage though a shorthand writer or interpreter may be sworn at any time during the trial[2]. The accused has a right of objection to a shorthand writer or interpreter[3] but not to the judge-advocate[4] or officers under instruction.

The court may be sworn at one time to try several accused persons in succession provided that such persons are present when the oath is taken and have been given an opportunity of objecting to members.[5]

Oaths and declarations.

40. The form of oath and the manner of taking it by all persons required to be sworn, and the persons who are to amdinister it are prescribed in the Army Act and Rules of Procedure. Provision is also made whereby instead of taking the prescribed form of oath a person may make a solemn declaration; or the oath may be taken in the Scottish fashion or in such form and with such ceremonies as the person to be sworn declares to be binding on his conscience.[6]

Absence of members during trial.

41. A member of a court who has been absent during any part of the evidence ceases to be a member, and an officer cannot be added to a court-martial after the accused has been arraigned.[7]

(viii) *Arraingment of accused*

Reading of charges.

42. As soon as the members, judge-advocate (if any) and others have been sworn, the accused will be arraigned. Arraingment consists in the reading of each charge upon a charge-sheet separately to the accused and asking him whether he is guilty or not guilty of it.[8] The judge-advocate (if any), or in his absence, the president, conducts the arraignment.

If there are several charges on one charge-sheet, the accused may claim separate trial on each or any charge on the ground that, unless so tried, he will be embarrased in his defence.[9]

If there are alternative charges upon one charge-sheet, and the accused pleads guilty to the first of such alternatives, the prosecutor may withdraw the other alternative charges before the accused is arraigned upon them; otherwise the accused will be arraigned upon all the charges whether they are alternative or not.[10]

If there is more than one charge-sheet, the court must not arraign the accused upon any subsequent charge-sheet until their finding upon the first charge-sheet has been arrived at.[11]

---

[1] R.P. 18 (B).
[2] A.A. 52 (1) (2); R.P. 26, 27, 72.
[3] R.P. 72 (C).
[4] R.P. 25 (B).
[5] R.P. 71.
[6] A.A. 52, 190 (28); R.P. 26–30 and App. II (3), pp. 762–3.
[7] R.P. 68.
[8] R.P. 31.
[9] R.P. 62 (E).
[10] R.P. 35 (A) (C).
[11] R.P. 62 (A).

The accused, if charged jointly with any person whom he claims as a material witness for his defence, may apply, if he has not already done so[1], to be tried separately from that person, and the court may grant separate trial if the nature of the charge permits.[2]

Objection to charge.

43. Before pleading to any charge, the accused may object to the charge as not disclosing an offence under the Army Act or as not being in accordance with the Rules of Procedure. If the court disallow the objection, the trial will proceed; if they allow it, they will, or, if in doubt, they may, adjourn to consult the convening officer who may amend the charge and direct that the trial be proceeded with.[3]

The court may always themselves amend a mistake in the charge-sheet so far as it relates to the name and description of the accused but not otherwise.[4]

Apart from any objection by the accused, the court has power, before any witnesses are examined, to report their opinion as to any charge which appears to them to be faulty to the convening officer, who may either amend the charge or direct a new trial to be commenced.[5]

Plea to the jurisdiction.

44. The accused, before pleading to any charge, may offer a plea to the general jurisdiction of the court and give evidence in support of that plea. The court will decide this question of jurisdiction in the same manner as any other question. If the plea be overruled, the court will proceed with the trial; if it be allowed, the court must record their decision and the reason therefor, report to the convening officer and adjourn; if in doubt, the court may either refer to the convening officer or record a special decision and proceed with the trial.[6]

A plea to the jurisdiction is a plea to the right to try the accused on any charge as distinct from a plea which relates to a particular charge. The grounds for such a plea are shown in paras. 10-15 above.

Recording of plea; refusal to plead; insanity, etc.

45. The objection and plea referred to in the two preceding paragraphs having been disposed of (if raised), the accused's plea to the charges upon which he has been arraigned will be recorded; this will normally be 'guilty' or 'not guilty.' But the accused may refuse to plead or plead unintelligibly, in which case a plea of 'not guilty' must be recorded[7]; or it may be urged that the accused is unfit to plead by reason of insanity, for which event the Army Act and Rules of Procedure make provision.[8]

Plea in bar of trial.

46. In addition to pleading 'guilty' or 'not guilty' the accused may offer a plea in bar of trial, setting up that he has been previously acquitted or convicted of the offence now charged, or that such offence has been pardoned or condoned by competent military authority (*see* para. 13 above), or that trial is barred by lapse of time (*see* para. 14 above). Upon the hearing of this plea, evidence may be offered both by the accused and prosecutor, and addresses may be made. If

[1] See para. 24 above.
[2] R.P. 16.
[3] R.P. 32.
[4] R.P. 33 (A).
[5] R.P. 33 (B).
[6] R.P. 34.
[7] R.P. 35 (A).
[8] A.A. 130; R.P. 57.

Ch. V

the court find the plea not proven, they will proceed with the trial; if they find it proven, they will notify their finding to the confirming authority and adjourn, though they may proceed with any other charge not affected by the plea. In either case their finding on the plea requires confirmation.[1]

Plea of guilty.

47. If the accused pleads 'guilty' to a charge, the president or judge-advocate (if any) must, before recording the plea, carefully explain to him the nature of the charge and the effect of his plea. It should also be pointed out to him that on a plea of 'guilty' there will be no regular trial but merely a consideration by the court of the sentence to be awarded; that he is entitled to make a statement in mitigation of punishment and call witnesses as to his character.[2] He should also be informed that if he wishes to prove provocation or extenuating circumstances having direct relation to the offence, he should plead 'not guilty.'

The court must not accept a plea of 'guilty' in a case where the accused is liable, if convicted to be sentenced to death; in such a case a plea of 'not guilty' will be recorded.[3]

Mixed plea.

48. If the accused adheres to his plea of 'guilty,' the court will then proceed to try the accused upon any other charge upon the same charge-sheet to which he has pleaded 'not guilty' and reach their finding thereon before proceeding further with the plea of 'guilty.'[4] The Rules of Procedure make special provisions in the case where the accused pleads guilty to the first of two or more alternative charges.[5]

Procedure on plea of guilty.

49. When the court proceeds with a plea of 'guilty,' the summary (or abstract) of evidence will be read and sufficient evidence will be recorded to cover any deficiencies in the summary (or abstract). The accused or his counsel or defending officer may make a statement in reference to the charge and in mitigation of punishment, and witnesses as to character may be called.[6]

If from the statement of the accused, or from the summary (or abstract) of evidence, or otherwise, it appears to the court that the accused did not understand the effect of his plea, the court must enter a plea of 'not guilty' and proceed with the trial.[7]

The procedure in connection with the giving in evidence of the character and particulars of service of the accused and with the consideration and award of sentence is dealt with in paras. 75-86 below.

Duties of president.

50. It should be stated here that the president is responsible for the proper conduct of every trial whether the accused pleads 'guilty' or 'not guilty.' He must ensure that the accused does not suffer any disadvantage by reason of the fact that he is being tried, or because of his ignorance or incapacity to make clear either his defence to the charge or the grounds upon which he relies in mitigation of any punishment which may be awarded.[8]

---

[1] R.P. 36.
[2] R.P. 35 (B).
[3] R.P. 35 (D).
[4] R.P. 37 (A).
[5] R.P. 35 (C).
[6] R.P. 37 (B) (C).
[7] R.P. 37 (D).
[8] R.P. 59.

(ix) *Trial on plea of 'not guilty'*

Plea of not guilty.

51. Before proceeding with a trial on a plea of 'not guilty,' the court must ask the accused whether he wishes to apply for an adjournment on the ground that he has been prejudiced by non-compliance with any of the rules relating to procedure before trial or has had insufficient opportunity to prepare his defence. The court may hear evidence upon any such application and may adjourn if they consider it proper to do so.[1]

Duties of prosecutor.

52. The prosecutor should always make an opening address if the case is a complicated one, and the court may require such address to be made. He should explain the substance of the charge and outline the evidence to be called in support of it.[2]

The prosecutor is not a partisan but an officer of justice whose duty it is by laying all relevant facts in evidence before the court to assist the court in ascertaining the truth. He must act with scrupulous candour, fairness and moderation towards the accused, the witnesses and the court.[3]

Witnesses for prosecution.

53. The witnessses for the prosecution will now be called. Each witness will take the necessary oath or make the required declaration[4] and his examination will be conducted by the prosecutor, who must be careful to refrain from asking leading or suggestive questions. After giving his evidence "in chief" or "in direct examination" a witness may be cross-examined by or on behalf of the accused and re-examined by the prosecutor on matters raised by the cross-examination.[5] The president, judge-advocate (if any) and with permission of the court, any member of the court may question a witness at any time before he withdraws, but such questions should not be put until after the re-examination by the prosecutor.[6]

Recording the evidence.

54. As a witness gives his evidence it must be taken down in narrative form, as nearly as possible in the words used; occasionally it may be material or desirable to take down question and answer *verbatim*. The judge-advocate or, if there is none, the president must record the evidence or cause it to be recorded, and is responsible for its accuracy and for the proceedings as a whole.[7] The form in which the record is to be made is provided in Appendix II of the Rules of Procedure.

Special provision is made for the case where a shorthand writer is employed.[8]

Interpreters.

55. Where an interpreter is employed, great caution should be exercised to ensure accurate translation and to guard against misconception of the true meaning of any expression, from either the incompetence of possible bias of the interpreter.[9]

In India a qualified military officer is usually appointed; in the overseas possessions courts-martial usually have the assistance of

[1] R.P. 39 (A).
[2] R.P. 39 (B).
[3] R.P. 60 (A) (B).
[4] A.A. 52 (3) (4); R.P. 82, App. II (3), pp. 762–3.
[5] R.P. 83 (A), 84 (A).
[6] R.P. 85.
[7] R.P. 94, 95 (A).
[8] R.P. 83 (C).
[9] R.P. 95, note 1.

interpreters employed by the civil courts. A member of a court-martial is not disqualified from acting as an interpreter, but this is inconvenient where the trial is likely to be prolonged.

Reading over the evidence.

56. Before a witness withdraws, the whole of his evidence as recorded must be read to him to ensure its accuracy; he may then make further explanations or corrections. This procedure may be dispensed with where a shorthand writer is employed.[1]

Opening of defence.

57. After all the evidence for the prosecution has been given, the accused must be told that he may, if he wishes, give evidence on oath as a witness, and that if he does so, he will subject himself to cross-examination and to being questioned by the court; he must also be told that he need not give sworn evidence, but can make a statement not upon oath in his defence, if he wishes to do so. He should be informed that the evidence upon oath will naturally carry more weight with the court than a statement not upon oath.[2]

Procedure on case for defence.

58. The answer of the accused to the question as to whether he wishes to give evidence himself having been recorded, he will then be asked if he wishes to call witnesses in his defence either as to the facts or as to character; his answer will be recorded. The correct procedure to be followed hereafter will depend upon the answers which he has given, and in order to determine the proper sequence in which, in varying circumstances, the evidence for the defence is to be taken and the addresses on behalf of the prosecution and defence are to be made, the court will consult Rules of Procedure 40 and 41, wherein every possible variation and contingency is provided for.

Addresses for defence and reply.

59. Where an opening address by or on behalf of the accused is permitted, the terms of such address should be directed mainly towards outlining the evidence to be called for the defence. The prosecutor in his final address or reply may comment on the evidence (if any) of the accused and of the witnesses for the defence, but he may not at any time comment on the fact that the accused has refrained from giving evidence as a witness.[3]

In no case may the prosecutor, counsel or defending officer, in the course of an address, state as a fact any matter which has not been proved or which it is not intended to prove in evidence; nor may they state what is their opinion as to any matter of fact which the court has to decide.[4]

Accused as a witness.

60. If the accused is the only witness as to the facts of the case called by the defence, he must give evidence immediately after the close of the case for the prosecution[5]; if other witnesses as to the facts are called, the accused should, but need not, give his evidence before theirs is given. The accused must, unless otherwise ordered by the court, give his evidence from the witness box or place from which the other witnesses have given their evidence.[6] He will be examined by his counsel or defending officer or, if not represented, will tell his story, being assisted by the court, if necessary, to present it in proper form and sequence. He may be cross-examined by the prose-

[1] R.P. 83 (B) (C).
[2] R.P. 40 (A) (B).
[3] R.P. 80 (B).
[4] R.P. 92 (C) (D), 87 (C).
[5] R.P. 80 (F).
[6] R.P. 80 (C).

cutor, re-examined, and questioned by the court.[1] The cross-examination of the accused must be conducted with fairness and moderation and with the sole object of arriving at the truth.

Latitude to accused in defence.

61. The accused must be allowed great lattitude in making his defence, and will not, within reasonable limits, be stopped by the court merely for making irrelevant observations, whether in his sworn evidence or in a statement not upon oath.[2]

If the accused elects to make a statement in his defence without being sworn, he cannot be cross-examined by the prosecutor or questioned by the court or any other person.[3]

Witnesses for defence.

62. The witnesses for the defence will be examined by the accused or his counsel or defending officer, cross-examined by the prosecutor, and re-examined; they may also be questioned by the court.[4]

Recalling of witnesses.

63. At the request of the prosecutor or accused, and by leave of the court, a witness may be recalled for the purpose of having further questions put to him through the president or judge-advocate (if any). The court may also allow the prosecutor to call or recall a witness to rebut any material evidence on any unforeseen matter which may have arisen or, as a reply to the witnesses of character called for the defence, to prove previous convictions against the accused. In all these cases the additional evidence must be given before the closing address by or on behalf of the accused. The court may, of their own motion, call or recall any material witness if it is necessary to do so in the interests of justice; such witness may be called or recalled at any time before the finding of the court is arrived at.[5]

Withdrawal of plea of 'not guilty.'

64. An accused person is at liberty at any time to withdraw a plea of 'not guilty' and plead 'guilty.'[6]

Summing-up by judge-advocate.

65. When all evidence has been given and addresses made, the judge-advocate (if any) will sum up, unless both he and the court consider a summing-up to be unnecessary. He should always do so where the facts are difficult or complicated, and in particular where special legal directions are required to be given. The summing-up must be impartial, but the judge-advocate may, at his discretion, comment on the failure of the accused to give evidence.[7]

(x) *Consideration of finding.*

Finding in closed court.

66. The finding must be considered in closed court,[8] the members, judge-advocate (if any), and officers under instruction alone being present. The court must make a finding on every charge upon which the accused was arraigned, including any alternative charge.[9]

---

[1] R.P. 84 (A), 85; for cross-examination as to character, see R.P. 80 (D).
[2] R.P. 60 (C).
[3] R.P. 40 (D) (ii) *(a)*; 41 (B) (ii) *(a)*.
[4] R.P. 84 (A).
[5] R.P. 96 (D).
[6] R.P. 38.
[7] R.P. 42, 103.
[8] R.P. 43 (A).
[9] R.P. 44 (A).

Onus of proof; reasonable doubt; corroboration.

67. At the outset of their deliberations the court must remember that it is the principle of English law that the accused is presumed to be innocent until he is proved to be guilty, and that the burden of proof rests upon the prosecution. Unless, therefore, the guilt of the accused has been established beyond reasonable doubt, the accused must be acquitted, as the prosecution has failed to sustain adequately the burden of proving his guilt.

Generally speaking, it is legally open to a court to convict an accused person upon the evidence of one credible witness. But in some cases corroboration of such witness is required by law; in others it is required by practice almost amounting to a rule of law. In some instances it is desirable that corroboration should be looked for though not actually required by law or practice.[1]

Extraneous considerations.

68. The court, in considering their decision, must not be influenced by the consideration of any supposed intention of the convening officer in sending the accused for trial by a particular kind of court-martial. In many cases the convening officer will have decided no more than that *a prima facie* case against the accused is shown upon the summary of evidence, and he will have formed no opinion as to the guilt of the accused. An acquittal, therefore, is not in itself a reflection upon the convening officer. Even if it were, it would afford no reason whatever for a court to convict, unless the evidence established the charge.

Proof of facts charged; special finding on the charge.

69. The court must decide whether the facts alleged in the particulars of each charge have been proved in evidence, and, if proved, whether they disclose the offence stated in the charge itself or some other offence of which they may, pursuant to their powers under s. 56 of the Army Act, find the accused guilty. Thus, on a charge of desertion they may find the particulars as to the period of absence proved, but not the intent to leave His Majesty's service altogether, or to avoid some particular important service—a necessary ingredient of the charge. In such a case they may return a finding of not guilty of desertion, but guilty of absence without leave.[2]

Special finding as to the particulars of a charge.

70. Where the court find that the facts proved in evidence differ materially from the facts alleged in the particulars of a charge, but are nevertheless sufficient to prove the offence charged, and that the difference is not so material as to have prejudiced the accused in his defence, they may record a special finding as to the particulars. Thus, on a charge of desertion, if the court are satisfied that the charge as laid is proved, but the period of absence was shorter than that alleged in the particulars, they may make a special finding to that effect.[3]

Insubordinate, etc., language.

71. Military offences frequently consist in the use of threatening, insubordinate or obscene language. Great care should be taken to discriminate mere angry or irritable expressions, and words indicating a deliberate intention to be insubordinate or to resist lawful authority. A soldier in an outburst of momentary irritation or excitement often uses violent language without intending to be insubordinate. Again, allowance must be made for the coarse expressions which a man of

[1] As to evidence generally, see Ch. VI., and particularly (as to corroboration) para. 45.
[2] A.A. 56 (3); see R.P. App. II (1), p. 753.
[3] R.P. 44 (D) (E); see R.P. App. II (1), p. 753.

inferior education will often use as mere expletives. Such expressions may be insubordinate if used to a commissioned officer but not so when used to a non-commissioned officer, or when used in one set of circumstances but not in another. Language, therefore, should be construed with due regard to all surrounding circumstances; and the intention of the user of it should be carefully considered before it is held to constitute the grave offence of using threatening or insubordinate language to a superior officer.

Reference to confirming authority before finding.

72. The court having arrived at a decision as to the facts of a case, have power, in cases of doubt as to the legal effect of such a decision upon the charges preferred, to refer to the confirming authority for an opinion upon the matter, before recording their finding.[1]

Voting on the finding.

73. Every member must give, by word of mouth, his opinion as to the finding which should be made on each charge separately.[2] The opinions must be taken in succession, beginning with the junior in rank.[3] If the votes given are equal, the accused will be deemed to be acquitted.[4] The president has no second or casting vote upon the finding. A majority of votes will decide the issue and the finding of the majority will be recorded as the finding of the court.[5]

Acquittal.

74. A finding of acquittal, whether upon all or any one or more of the charges in a charge-sheet, must be announced upon the reopening of the court. If the accused has been acquitted on all the charges in a charge-sheet and there are no further charges to be tried, he must be released.[6]

A finding of acquittal is final; it cannot be revised, nor does it require confirmation by superior authority.[7]

An accused person may be 'honourably acquitted,' if his honour was affected by the charges preferred.[8]

The record of the proceedings in the case of an acquittal must be authenticated by the signature of the president and judge-advocate (if any) and forwarded to the officer who would have confirmed them if a conviction had resulted.[9]

(xi) *Proceedings on conviction*

Evidence of character on conviction.

75. If the finding upon any charge is 'guilty' (whether or not the accused has pleaded guilty thereto), and the trial of all charges and charge-sheets has been completed, the court for the purpose of determining their sentence, must, whenever possible, take and record evidence as to the character, age, service, etc., of the accused. This evidence must be given by a witness on oath, usually by the prosecutor, who will produce extracts from the regimental books relating to the accused in accordance with the Rules of Procedure and King's regulations. The accused or his representative may then cross-examine this witness. Verbal evidence of bad character cannot be given for the prosecution.

---

[1] R.P. 44 (C) (G).
[2] R.P. 43 (B), 69 (A).
[3] R.P. 69 (C).
[4] A.A. 53 (8).
[5] R.P. 69 (B); see however A.A. 48 (8).
[6] A.A. 54 (3); R.P. 45 (A) (C).
[7] A.A. 54 (3).
[8] R.P. 44 (A).
[9] R.P. 45 (A) (B).

Ch. V

The accused may call evidence as to his good character at this stage as well as during the hearing of the case for the defence, and the prosecutor has a right of cross-examination to test the veracity of such evidence, even if he thereby brings out evidence of the accused's bad character.

After all evidence as to character has been given, the accused, or his counsel or defending officer may address the court thereon, and in mitigation of punishment.[1]

The court will then be closed for consideration of sentence.

(xii) *Award of sentence*

Legality and form of sentence.

76. The punishment awarded must be one of those allowed by the Army Act[2]; in some cases a combination of punishments is permitted by the Act.[3]

One sentence only must be awarded in respect of all the offences of which an accused person has been found guilty, even if the trial has proceeded on different charge-sheets; and where an accused person has been found guilty upon several charges, a sentence which can legally be awarded in respect of one of them will be valid notwithstanding that it could not legally have been awarded in respect of the others.[4]

The sentence should follow the prescribed forms set out in Appendix II to the Rules of Procedure; or, if no form is exactly applicable, it should follow as nearly as possible the words of the Army Act.

Discretion as to sentence.

77. A court-martial has (except in the case of an officer charged under s. 16 of the Army Act with scandalous conduct, and in the case of a conviction for murder under s. 41 (2)) an absolute discretion as to its sentence. It may award the maximum punishment allowable for the particular offence charged, or such less punishment as is laid down in s. 44 of the Army Act, which sets out a graduated scale of the punishments which a court-martial may award.

Maintenance of discipline the object.

78. In deliberating on their sentence a court-martial should remember that the object of awarding punishment is the maintenance of discipline, and should bear in mind the considerations to which their attention is directed by the King's Regulations.[5]

The proper amount of punishment to be inflicted is the least amount by which discipline can efficiently be maintained. Occasionally the exigencies of discipline, apart from the circumstances of a particular case, may render a severe sentence necessary; but in all cases the whole force should be in a position to realize that the punishment awarded to any individual is not more than is necessary in the interests of the force itself and for the maintenance of that discipline without which all bodies of troops become irresponsible mobs and unless for the purpose for which they exist. It must be the object of all concerned to aim at that high state of discipline which springs from a military system administered with judgment and impartially, and to induce

---

[1] R.P. 46.
[2] See A.A. 44; as to Indian officers A.A. 180 (2); as to warrant officers A.A. 182; as to N.C.Os. A.A. 183. As to punishments generally, see K.R. 652.
[3] *E.g.*, A.A. 44 (2) (3) (4) (6) (11) (12); A.A. 180 (2) *(e)*; A.A. 182 (2); A.A. 183 (3).
[4] R.P. 48.
[5] K.R. 652.

in all ranks a feeling of confidence that, while no offence will be passed over, no offender will in any circumstances suffer injustice.

Other consideration; degrees of criminality, etc.

79. If the accused has elected to be tried by a district court-martial, instead of submitting to the jurisdiction of his commanding officer, his punishment should not, in ordinary circumstances, exceed that which the commanding officer had power to award.

A non-commissioned officer should, as a rule, be more severely punished than a private soldier concerned with him in the commission of the same offence, while the instigator of an offence should receive a more severe sentence than the person who was instigated to commit it. Where several offenders are found guilty of the same offence, it may often be proper to award different amounts of punishment and, in order that the respective degrees of criminality of several offenders charged in respect of the same transaction but tried separately may be more accurately determined, a court-martial has power to postpone the awarding of any sentence until all the offenders have been tried.[1]

Premeditation and provocation.

80. The court must pay special regard to the question whether the offences of which the accused has been found guilty were committed with or without premeditation and with or without provocation. It is obvious that a theft committed after long preparation deserves more severe punishment than a theft committed on the spur of the moment. Similarly, a court would be justified in awarding a more lenient sentence to a soldier who has been provoked into striking his superior officer than to one who had deliberately struck his superior officer without provocation. As a general rule the improper use of words should not be treated with the same severity as offences against discipline involving physical acts.

Previous convictions.

81. Again, due regard should be paid by the court to previous convictions. A habitual offender deserves far more severe punishment than an infrequent offender, and a first offender should always, if possible, be treated leniently.

Prevalence of offences.

82. Military offences must sometimes be considered in reference to circumstances other than those connected with the individual offender. When there is a general prevalence of offences or of offences of some particular kind, an example may be necessary,[2] and on that account a severe punishment may properly be awarded for an offence which would otherwise receive a more lenient punishment. In such cases the punishment must be regarded more from the point of view of the effect which it will produce on the force to which the offender belongs than from that of the offender himself.

Punishment to be just and proper.

83. Finally the court, having due regard to the foregoing considerations, must always award such punishment as they themselves consider to be just and proper in the circumstances of the particular case. They must not presume that the convening officer, in sending the case for trial, took a more serious view of the facts than they themselves take.

---

[1] R.P. 71 (D).
[2] See K.R. 652 (footnote).

Recommendation to mercy.

84. In view of the discretion of the court[1] in the matter of awarding sentence, a recommendation to mercy will be exceptional. If such recommendation is made, it must form part of the proceedings and the reason for it must be recorded.[2] It will usually be made only when the court, though unwilling to pass a lenient sentence lest the offence should be considered a venial one, think that owing to the offender's character or other exceptional circumstances, he should not suffer the full penalty which the offence would ordinarily demand. As a rule the court will be able to adjust the sentence according to what, in their judgment, the offender should suffer having regard to the attendant circumstances. It is indisputable that offences are more effectually prevented by certainty than by severity of punishment.

A court may recommend the restoration of service forfeited under s. 79 of the Army Act.[3]

Any expression of opinion as to anything occurring before the court, and any matter which the court may desire to report, must be stated in a separate document for the information of the confirming authority.[4]

Voting on the sentence.

85. Every member of the court must give his opinion as to the sentence to be awarded, even if he had voted for an acquittal upon the finding. The officer junior in rank must first give his opinion. In the case of an equality of votes, the president has a second or casting vote. An absolute majority of the opinions of the members must be secured,[5] but sentence of death may not be passed without the concurrence of a least two-thirds of the members.[6]

Signature and forwarding of proceedings.

86. When the sentence has been decided upon, it must be recorded upon the proceedings, which will then be signed by the president and judge-advocate (if any). The judge-advocate or if there is none the president, must then forward the proceedings as soon as possible to the confirming authority or the person directed in the convening order to receive them.[7]

(xiii) *Confirmation and revision*

Conviction not valid till confirmation.

87. A finding of guilty and the sentence consequent thereon are not valid until confirmed by superior authority.[8] Until promulgation the accused will be in ignorance of the sentence awarded; but special provision is made whereby he is to be informed prior to confirmation if a sentence of death has been passed.[9]

Confirmation of district court-martial.

88. The finding and sentence of a district court-martial are to be confirmed by an officer authorized to convene general courts-martial, or deriving authority to confirm from an officer authorized to convene general courts-martial.[10]

---

[1] See para. 77 above.
[2] A.A. 53 (9); R.P. 49.
[3] R.P. 49 (B).
[4] R.P. 95 (D).
[5] A.A. 53 (8); R.P. 69 and notes.
[6] A.A. 48 (8). See A.A. 49 (2) as to field general court-martial.
[7] R.P. 50.
[8] A.A. 54 (6).
[9] R.P. App. II note *(b)* on p. 762.
[10] A.A. 54 (1) *(c)*, 123.

Confirmation of general court-martial.

89. The finding and sentence of a general court-martial are to be confirmed by His Majesty, or by an officer deriving authority to confirm either immediately or mediately from His Majesty.[1]

Reservation of powers.

90. This authority, where given by the King, is given by the warrant respecting courts-martial mentioned in paras. 4-8 above. Any warrant whether issued by the King or by an officer, may reserve any of the powers which would otherwise be conferred by it.[2]

Warrant to confirm in United Kingdom.

91. The warrant issued to an officer in the United Kingdom excludes power to confirm a sentence of death, penal servitude, cashiering of dismissed in the case of a commissioned officer, and a sentence of death or penal servitude in the case of a soldier, which consequently require confirmation by the King.

Warrant to confirm abroad.

92. The warrant issued to an officer commanding abroad usually gives authority to confirm the findings and sentences of general courts-martial and to delegate that power. Where the officer is the commander-in-chief in India and sometimes where he is commander-in-chief on active service, the power of confirmation is given without any reservation, except at the option of the officer. In other cases, besides the optional reservation, the warrant reserves for confirmation by the King the finding and sentence when a commissioned officer is sentenced to death, penal servitude, cashiering or dismissal.[3] An officer commanding a force on active service serving in India, or proceeding from India, usually holds his warrant from the commander-in-chief in India; but if he comes under the command of an officer holding a warrant from the King, he can only exercise the confirming power by delegation from that officer.

Delegation as to district courts-martial.

93. Every officer empowered to convene general courts-martial has, by virtue of the Army Act authority to confirm the findings and sentences of district courts-martial, and to delegate the power.[4]

Revision of finding and sentence.

94. Upon receipt of proceedings which require to be confirmed, the confirming authority, before confirming, may direct the reassembly of the court for the purpose of revising their finding and sentence or either of them. Only one revision can be ordered or made; the proceedings on revision, must be in closed court, and no additional evidence can be taken.

If the finding is sent back for revision and the court do not adhere to it, they must revoke it and record a new finding. If the finding is revoked they must also revoke the sentence, and, if the new finding involves a sentence (*i.e.*, is not an acquittal), must pass a new sentence, which must not be more severe than the original sentence.

If the sentence only is sent back for revision, the court may not revise the finding nor pass a more severe sentence than that originally awarded.

---

[1] A.A. 54 (1) (b), 122.

[2] A.A. 122, 123.

[3] This does not apply to a native commissioned officer in a colony, the finding and sentence on whom may, in all cases, be confirmed by the general officer commanding the forces in such colony, or at his option, reserved for confirmation by the King.

[4] A.A. 123 (1) *(c)*.

In practice, revision of a sentence only is seldom necessary in view of the powers of the confirming authority.[1]

Non-confirmation and re-trial.

95. As a conviction and sentence are not valid until confirmed,[2] a refusal of confirmation, duly entered upon the proceedings, operates to annul the whole trial. In such a case the accused has not been convicted and may legally be tried again; but re-trials should rarely be resorted to, and only when the needs of discipline and justice demand that an offender shall not escape punishment on account of a legal technicality. It must be remembered that if an accused at the first trial has disclosed his defence, that defence at a second trial may thereby be prejudiced. In cases requiring confirmation by His Majesty and where such has been withheld, a re-trial is not to be ordered unless directions by His Majesty for such re-trial have been issued; in other cases in the United Kingdom where confirmation has been withheld, re-trial should not be ordered until the Judge-Advocate-General has first been consulted.

If the confirming officer considers that the proceedings of a court-martial are illegal, or involve substantial injustice to an accused person, he will withhold his confirmation.[3]

It is open to the confirming officer to withhold confirmation either wholly or in part, and then refer the proceedings to a superior authority competent to confirm them.[4]

Powers of confirming authority over findings.

96. The confirming authority has no power to alter or amend the finding, whether original or revised, of a court-martial. After one revision,[5] or if he does not order a revision, he can only confirm it or refuse confirmation, and any superior authority to whom he may refer the proceedings for confirmation is in the same position.

Similarly the confirming authority cannot alter the finding of a court on a plea in bar of trial or on a finding of insanity, both of which require confirmation to support their validity.

Powers of confirming authority over findings.

97. The following are the powers of the confirming authority with relation to the sentences of court-martial whether or not they have been revised:—

(*a*) *mitigation* of a punishment to a less amount of the same punishment.[6]

(*b*) *remission* of the whole or part of a sentence.[6]

(*c*) *commutation* of the punishment to a different form of punishment[7] lower in the scale of punishments authorized in s. 44 of the Army Act.[8]

(*d*) *variation* of a sentence informally expressed or which is in excess as regards its duration of the punishment allowed by law.[8]

(*e*) *suspension* of the *execution* of a sentence (which will, however, be in force during the suspension).[9]

---

[1] A.A. 54 (2) (3); R.P. 51, 52.
[2] A.A. 54 (6), 157 and note thereto.
[3] K.R. 665.
[4] A.A. 54 (5); R.P. 51 (B) (ii).
[5] A.A. 54 (2).
[6] A.A. 57 (1) (3) (4) (5). As to the principles upon which the power of mitigation, etc., is to be exercised see K.R. 652, 661–665.
[7] The punishment awarded by the court can be commuted into any two or more punishments lower in the scale which can legally be awarded and which the court could have awarded in conjunction; but see A.A. 57, note 6.
[8] R.P. 55.
[9] A.A. 57 (1).

(*f*) *suspension* of the *operation* or *commencement* of a sentence. This power can only be exercised by the confirming officer if he is a "superior military authority" within the meaning of s. 57A (9) of the Army Act, and only where the sentence awarded is one of penal servitude, imprisonment or detention. If the confirming officer is not a "superior military authority," the sentence can only be suspended by such authority upon reference from the confirming authority.[1]

Approval of sentence in India or colony.

98. Sentence of death in a colony requires not only confirmation by the military authority, but also approval by the governor of the colony (save when passed in respect of an offence committed on active service). In India or Burma such approval is only required where the offence charged is treason or murder; but in India, Burma and a colony a sentence of penal servitude for any offence tried as a civil offence under s. 41 of the Army Act requires the approval of the governor. In India the approval is required to be given by the Governor-General.[2]

(xiv) *Promulgation*

Promulgation of finding, etc.

99. The charge, finding and sentence and any recommendation to mercy must be promulgated to the accused as well as the confirmation or non-confirmation of the proceedings. Promulgation must be carried out in such manner as the confirming authority may direct or, if no direction is given, according to the custom of the service.[3]

As confirmation is not complete until promulgation, the confirming officer may always alter his minute of confirmation or non-confirmation before the proceedings have been promulgated.[4]

Setting aside conviction.

100. Even after promulgation, the authority who confirmed the finding and sentence may direct the record of the conviction to be erased and the accused to be relieved from the consequences of his trial if he thinks that the proceedings are illegal, or that circumstances have arisen which show that the accused could not have been guilty, or that the conviction involves substantial injustice to the accused.[5]

Substitution of valid for invalid sentence.

101. If after promulgation a sentence is found to be invalid, the authority who would have had power to commute, it if it had been valid (in normal circumstances the confirming officer) may pass a valid sentence which will have effect as a valid sentence passed by the court, provided that such substituted sentence is not higher in the scale of punishments than the punishment awarded by the invalid sentence, or, in the opinion of the authority awarding such substituted sentence, in excess of the invalid sentence.[6]

Mitigation, etc., after confirmation.

102. After confirmation the punishment awarded can only be mitigated, remitted or commuted by the King, the Army Council or the officer specified in the Army Act or prescribed by the Rules

---

[1] A.A. 57A.
[2] A.A. 54 (4) (7) (8) (9).
[3] A.A. 53 (9); R.P. 53.
[4] R.P. 53.
[5] K.R. 665.
[6] R.P. 54 (C).

Ch. V

of Procedure for that purpose.[1] But as this power cannot be exercised by an officer inferior to the authority who confirmed the sentence, an officer in the United Kingdom has no power to mitigate, remit or commute a sentence passed by a general court-martial in the United Kingdom except as regards sentences less than dismissal in the case of an officer and less than penal servitude in the case of a soldier. In the case of a court-martial held elsewhere, he can only do so if his command is not inferior to that of the officer who confirmed the sentence, unless in either case he acts under orders from superior authority.[2]

After confirmation a sentence of penal servitude, imprisonment or detention can, in appropriate cases, be suspended by a superior military authority under s. 57A of the Army Act.

(xv) *Execution and operation of sentence*

Directions for execution of sentence.

103. An officer who confirms a sentence is responsible for seeing that the sentence is carried into effect, and for this purpose he will, where necessary, obtain the approval required for a sentence of death as stated in para. 98, and in all cases will give the necessary directions for the execution of the sentence. If the sentence is approved by the King, these directions will be given by the Army Council.

Execution of sentence of penal servitude.

104. Sentences of penal servitude, wherever passed, are (except in the cases where para. 107 applies) required to be executed in the United Kingdom. Provision is made for bringing a military convict from any place out of the United Kingdom to a prison in the United Kingdom, and, when once he is there, he comes under the authority of the Secretary of State for the Home Department, but the military authorities may at any time remit any portion of the sentence.[3]

Execution of sentence of imprisonment.

105. Sentences of imprisonment exceeding one year, wherever passed, are also (except where para. 107 applies) to be executed in the United Kingdom. A prisoner has to undergo his imprisonment either in a military prison or detention barrack or in other military custody or in a civil prison, or partly in one way and partly in another. He can, however, be temporarily confined in any other prison.[4]

Execution of sentence of detention.

106. Sentences of detention exceeding one year must (except where para. 107 applies) also be executed in the United Kingdom. Detention has to be undergone either in military custody or in a detention barrack, but a soldier sentenced to detention cannot be confined in a prison. In the United Kingdom sentences of detention may be undergone in a branch detention barrack or barrack detention rooms; but where they exceed 168 hours, should be carried out in a detention barrack.[5]

Further provision as to sentences.

107. An offender sentenced to penal servitude for an offence committed on active service may be ordered to undergo part of the sentence, not exceeding two years, in a military prison.[6]

---

[1] A.A. 57 (2); R.P. 126 (B).
[2] A.A. 57 (2) proviso. See also para. 91 above.
[3] A.A. 58–62; K.R. 676–679.
[4] A.A. 63–67. K.R. 680–715; and see for the mode in which a term of imprisonment is to be awarded, K.R. 654, and generally as to the disposal of military convicts, military prisoners and soldiers undergoing detention K.R. 674–714.
[5] A.A. 63; K.R. 680.
[6] A.A. 58 (proviso).

An offender sentenced to penal servitude, imprisonment or detention, need not be brought to the United Kingdom if he belongs to a class of persons with respect to whom the Secretary of State has declared that by reason of climate, or place of birth or of enlistment, it is not beneficial to the offender to transfer him to the United Kingdom; or if he enlisted in a colony, and belongs to a class of persons so enlisted with respect to whom the Secretary of State has arranged with the governor of that colony that they may, if so sentenced, be transferred to or kept in the colony and there undergo sentence.

An offender sentenced to imprisonment or detention need not be brought to the United Kingdom if the court or other prescribed authority for special reasons otherwise orders.[1]

Date from which sentence operates.

108. A sentence of penal servitude, imprisonment or detention must be reckoned to commence on the day on which the original sentence (even if it was subsequently revised) was signed by the president of the court.[2] If, therefore, a sentence is ultimately confirmed and promulgated, it will probably have been running for several days although not yet put into actual execution. This would not, however, be the case if the operation of the sentence were suspended in accordance with s. 57A of the Army Act.

Custody of courts-martial proceedings.

109. After promulgation, court-martial proceedings must be forwarded for safe custody to the office of the Judge-Advocate-General in London, or of the Judge-Advocate-General in India (if the trial was in India), or, in the case of trials of men of the Royal Marines, to the Admiralty, where they must be preserved for not less than seven years in the case of a general court-martial or three years in the case of a district court-martial. The proceedings of a trial which has ended in an acquittal of the accused will be forwarded to the same authority.[3]

A copy of the proceedings must be supplied upon payment to any person tried by court-martial if he demands it.[4]

Petition.

110. An officer or soldier who considers himself aggrieved by the finding or sentence of a court-martial may forward a petition to the confirming or any reviewing authority through the usual channels. If such petition raises any question of law it should, in the United Kingdom, be referred to the Judge-Advocate-General.[5]

(xvi) *Field General Courts-Martial*

Field general courts-martial, how and when convened.

111. The foregoing remarks have left out a notice of court-martial of an exceptional kind, termed a field general court-martial. This may be convened, without any warrant giving power to convene, by:

(*a*) any officer commanding a detachment or portion of troops out of the United Kingdom; or

(*b*) the commanding officer of any corps or portion of a corps on active service; or

(*c*) any officer in immediate command of a body of forces on active service.

---

[1] A.A. 59 and note 3; A.A. 64 (4) and note 9.
[2] A.A. 68 (1).
[3] R.P. 98.
[4] A.A. 124; R.P. 99.
[5] K.R. 666.

Ch. V

If troops are not on active service, the power of convening a field general court-martial is limited to cases of offences committed out of the United Kingdom by persons under the command of the convening officer and of offences against the person or property of some inhabitant of, or resident in, the country where the offence is alleged to have been committed.[1]

Powers and composition.

112. A field general court-martial has the same power as a general court-martial, provided that the court is composed of at least three officers. If, in the opinion of the convening officer, three officers are not available two officers are legally sufficient, but a court consisting of two officers cannot award a sentence in excess of imprisonment.[2]

Every member of a field general court-martial should have held a commission for not less than one year[3]; the president may be of any rank, but, if practicable, must not be below the rank of captain.[4]

A sentence of death requires the concurrence of all the members.[5]

An officer can be tried by a field general court-martial.

The provost-martial, an assistant provost-martial, the prosecutor or a witness for the prosecution must not be appointed as a member of the court.[6] In certain circumstances the convening officer may appoint himself president.[7]

The convening officer may appoint a judge-advocate.[8]

Rules of procedure.

113. A field general court-martial is subject to exceptional rules under which the procedure is or can be of a more summary character than that of an ordinary court-martial.[9] But provision is made whereby a large number of the rules which are applicable to district or general courts-martial should be applied to a field general court-martial so far as is practicable having regard to the public service.[10]

---

[1] A.A. 49; R.P. 105. A field general court-martial cannot be convened to try the offences of treason, murder, manslaughter, treason-felony or rape committed in the United Kingdom even when troops are on active service (A.A. 41 proviso, and see note 1 to A.A. 49).
[2] A.A. 49 (1), *(b)*, *(d)*; R.P. 107 (A).
[3] R.P. 106 (C).
[4] A.A. 49 (1), *(c)*.
[5] A.A. 49 (2).
[6] R.P. 106 (D).
[7] A.A. 49 (1), *(c)*. R.P. 106 (B).
[8] R.P. 106 (E).
[9] See A.A. 49; R.P. 105-123.
[10] R.P. 121.

CHAPTER VI

EVIDENCE

Introductory

Meaning of "Rules of Evidence."

1. The rules of evidence are the rules which regulate the mode in which questions of fact may be determined for judicial purposes. The object of every criminal trial is, or may be, to determine two classes of questions—questions of fact and questions of law. If the accused person pleads guilty, there is no question of fact involved in the trial; but if he does not, he raises two questions or issues: first, whether the facts charged against him happened; and next, if they did happen, what is their legal consequence.

English rules of evidence primarily applicable to trial by jury.

2. In trial by jury, these two questions are answered by different persons. The jury, under the guidance of the judge, find the facts. The judge lays down the law. It was with reference to trial by jury that the English rules of evidence were originally framed, and it is to this mode of trial that they are still primarily applicable. They are, in fact, the rules in accordance with which a judge guides a jury. In trials before courts-martial, the members of the courts both find the facts and lay down the law, and thus perform the functions of both jury and judge. It therefore becomes their duty, when applying their minds to questions of fact, in the capacity of jurymen, to consider themselves bound by the rules which, in the case of an ordinary trial by jury, are laid down by the judge, and it is provided in s. 128 of the Army Act, that the rules of evidence to be adopted in proceedings before courts-martial shall be the same as those followed in civil courts in England. In deciding questions of law a court-martial should be guided by the advice of the judge-advocate (if a judge-advocate has been appointed) and should not disregard it except for very weighty reasons.[1]

Nature of evidence.

3. A juryman is supposed to bring with him to the consideration of the questions which he has to try, common sense and a general knowledge of human nature and of the ways of the world. But he is not supposed to bring with him any special knowledge enabling him to answer the particular questions of fact raised in the trial. His knowledge of these matters is derived from what is proved to him at the hearing. The means of proof, or evidence, usually consists of statements made by witnesses under examination, or of documents produced for inspection, and is therefore commonly classified as being either oral evidence or documentary evidence. But the jury, or in the case of trial by court-martial the members of the court, may supplement by direct information the knowledge derived from these sources. Thus they may inspect for themselves anything sufficiently identified by evidence, and produced in court as material to their decision; or they may go to view any place the sight of which may help them to understand the evidence.[2]

---

[1] R.P. 103 *(f)*.
[2] A.A. 53 (7); R.P. 63 (B), 119 (D).

Difference between judicial and extra-judicial inquiries.

4. There is no difference in principle between the method of inquiry in judicial and in extra-judicial proceedings. In either case a person who wishes to find out whether a particular event did or did not happen tries, in the first place, to obtain information from persons who were present and saw what happened (*direct* evidence), and failing that, to obtain information from persons who can tell him about facts from which he can draw an inference as to whether the event did or did not happen (*indirect* evidence). But in judicial inquiries the information given must be on oath, and be liable to be tested by cross-examination, and there are certain rules of law which exclude from the consideration of a jury particular classes of indirect evidence which an ordinary inquirer would naturally take into consideration. Statements or documents so excluded are said to be "not admissible as evidence" or "not evidence."[1] And if a member of a court-martial is in doubt whether a statement or document which it is proposed to put before him is, or is not, admissible as evidence, the most useful advice that can be given to him is, first to use his common sense as to whether the matter proposed to be proved has any practical bearing on the question which he has to try, and, if he thinks that it has, then to consider whether it falls within any one of the negative or exclusive rules of law to which reference has been made above and which are more fully dealt with in para. 15 *et seq.*

Reasons for excluding certain classes of evidence in judicial inquiries.

5. The answer to the question why particular statements, verbal or written, should be excluded from evidence in judicial inquiries is that their exclusion has been found by practical experience useful on various grounds, and notably on the following:—

1. It assists the jury.
2. It secures fair play to the accused.
3. It protects absent persons.
4. It prevents waste of time.

It assists the jury by concentrating their attention on the questions immediately before them, and preventing them from being distracted or bewildered by facts which either have no bearing on the questions before them, and have so remote a bearing on those questions as to be practically useless as guides to the truth, and from being misled by statements or documents, the effect of which, through the prejudice which they excite, is out of all proportion to their true weight. It secures fair play to the accused, because he comes to the trial prepared to meet a specific charge, and ought not to be suddenly confronted by statements which he had no reason to expect would be made against him. It protects absent persons against statements affecting their characters. And, lastly, it prevents the infinite waste of time which would ensue if the discussion of a question of fact in a court were allowed to branch out into all the subjects with which that fact is more or less remotely connected.

Evidence in courts-martial to be governed by English law.

6. As stated in para. 2 above, the rules of evidence to be followed by courts-martial are to be those adopted in courts of ordinary criminal jurisdiction in England.[2] These rules are to be found in the ordinary text books on the subject, such as Taylor on Evidence, Roscoe's

[1] The two phrases illustrate the wider and narrower sense of the term "evidence." In its narrower sense it means that kind of evidence which is recognized by courts of law.

[2] A.A., 127 and 128; R.P. 73.

Digest of the Law of Evidence in Criminal Cases, Stephen's Digest of the Law of Evidence, Wills' Theory and Practice of the Law of Evidence, and Phipson's Law of Evidence; but as only a limited number of these rules are from the nature of the case applicable to proceedings before courts-martial, it is thought that it may be useful to state and illustrate shortly the most important of those which are so applicable.

Matters with which rules of evidence are concerned.

7. The principal matters with which the rules of evidence are concerned may, for the purpose of this chapter, be classified as follows:—

(i) *What must be proved.*

(ii) *What facts are assumed to be known* (judicial notice).

(iii) *By which side proof must be given* (burden of proof).

(iv) *What statements are admissible as evidence* (admissibility of evidence).

(v) *Admissions and confessions,* (when admissions or confessions may be admitted as evidence).

(vi) *Who may give evidence* (competency of witnesses).

(vii) *Privilege of witnesses* (what questions need not be answered and what documents need not be produced).

(viii) *How evidence is to be given.*

(i) *What must be proved*

Charge brought must be proved.

8. What must be proved, in order to obtain a conviction, is the particular charge brought. As a general rule, every charge alleges, or ought to allege, a specific offence constituting a breach of a specific enactment[1]; and, subject to certain exceptions, it is of this offence, and of this offence alone, that the person charged can be convicted. The reason for the rule is the unfairness of requiring a person to meet a charge for which he is not prepared. And the exceptions will be found not to conflict with this reason, since they relate either to cases where the distinction between two offences is mainly technical, or a matter of correct legal description; or to cases where the distinction is one of degree, but not of kind, and the accused, having been charged with the more serious, is allowed to be convicted of the less serious offence.[2] The former class of cases is illustrated by the enactments providing that a person charged with felony may, in certain cases, be convicted of a misdemeanour; and that a person charged with stealing may be convicted of embezzlement, and *vice versa*. The second class is illustrated by the statutory enactment that on an indictment for wounding with intent to murder, if the prosecutor fails in proving the intent to murder, the accused may be convicted of unlawful wounding; and by the provisions contained in s. 56 (3), (4A), (4B), (4C), (5) of the Army Act.

Substance only of charge need be proved.

9. It is the substance only of the charge that need to proved. Allegations which are not essential to consitute the offence and which may be omitted without affecting the validity of the charge, do not require proof, and may be rejected as surplusage.[3] In some cases, as in charges

[1] See R.P. 11–13 and 23.

[2] A.A. 56 (4), which allows a person charged with attempting to desert to be found guilty of desertion, cannot be placed under either of these heads of exceptions, but is in a class by itself.

[3] See R.P. 11–13 and 23, and as to particulars of time and place in the charge, see Note as to use of Forms of Charges (18)–(22), at the beginning of Appendix I to the Rules of Procedure.

Ch. VI

against a sentinel for misbehaviour on his post[1], the time or place of the offence is material; but in many cases it is not so. Where the court think that the facts proved differ materially from the facts alleged in the statement of the particulars, but prove the same charge, they are empowered by Rule of Prodceure 44 (D) to record a special finding, instead of a finding of "Not guilty."[2]

(ii) *What facts are assumed to be known*

Judicial notice.

10. The court are said to take judicial notice, in other words not to require evidence, of any facts which are so generally known as not to require special proof.

Matters of which judicial notice will be taken.

11. By Rule of Procedure 74 the court are expressly authorized to take judicial notice of all matters of notoriety, including all matters within their general military knowledge. Thus, evidence need not be given as to the relative rank of officers, as to the general duties, authorities, and obligations of different members of the service, or generally as to any matters which an officer, as such, may reasonably be expected to know.[3] Again, it would not be necessary to prove that an important battle was fought on the 18th June, 1815. Among the matters of which it is the duty of all judges to take judicial notice may be mentioned:—Acts of Parliament: the general course of proceedings and privileges of Parliament, the date and place of the sittings of each House, but not transactions in their journals; the course of proceedings and rules of practice in the Supreme Court of Judicature; the accession of the King, the existence and title of every State and Sovereign recognized by the King, the Great Seal, the Privy Seal, the Seals of the Superior Courts of Justice; the seal of any notary-public in the British dominions, and various other seals; the extent of the territories under the dominion of the Crown, and the territorial and political divisions of the different parts of the United Kingdom; the ordinary course of nature, natural and artificial divisions of time, and the meaning of English words; and all other matters which they are directed by any statute to notice. Judicial notice will also be taken of the fact that the country is at war.

(iii) *By which side proof must be given*

Burden of proof.

12. In considering the question of "the burden of proof" (or *onus probandi*) regard must be had to two rules: *first*, that every man is presumed to be innocent until he is proved to be guilty; and, *second*, that he who alleges a fact must prove it, whether the allegation is couched in affirmative or negative terms.[4] It follows that it is incumbent on the prosecution to give evidence showing the commission of the offence, and connecting the accused therewith.

---

[1] See A.A. 6 (2) *(e)* and *(h)*.

[2] See especially note 6 to R.P. 44.

[3] See A.A. 6 (3) *(c)*, 8, 10 (3), 17 and 25 (1), as illustrations of matters which would be presumed to be within the general military knowledge of an officer.

[4] Except when a statute provides expressly that proof of an exception, etc., must be given by the accused (see para. 13).

"Shifting" of the burden.

13. When the prosecution have thus proved a *prima facie* case, it is not infrequently said that the burden of proof "shifts" on to the accused. This expression, however, is very misleading. There are certain statutes which expressly provide that the proof of lawful excuse, or authority, or the absence of fraudulent intent, shall lie on the person charged (although by the terms in which the offence is defined they are made elements of the offence), as, for eaxmple, in the statute making it a criminal offence to be found by night in the possession of housebreaking implements without lawful excuse, "the proof whereof shall lie on such person."[1] In such cases it is correct to say that after proof of the possession is once given, the burden "shifts": in other words, a judge would direct a jury that they *ought* to convict unless the accused proves to their satisfaction that he has lawful excuse.

On the other hand, where the evidence raises a strong presumption of guilt, but such presumption is one "of fact," it is not, strictly speaking, correct to say that the burden "shifts." For instance, A is accused of stealing a purse, and the prosecution prove that immediately after its loss it was found in A's possession. There is obviously a strong presumption that he stole it, and, as a matter of common sense, not one jury in a thousand would acquit him, if he offered no explanation (or no reasonable explanation). And the law recognizes this by saying that upon proof of "recent possession" of stolen goods a jury *may* convict if no satisfactory explanation is offered. Still, in law, the burden remains on the prosecution to the end, and it would be improper to direct a jury that they *ought* to convict.[2]

There are certain cases where the subject matter of some allegation made by the prosecution is peculiarly within the knowledge of the accused, *e.g.*, in charges for leaving a post without orders, releasing a person without authority, absence without leave, etc. In such cases "the court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively."[3] Such evidence as the prosecution may be in a position to give—including inferences from the conduct of the accused—may be accepted as justifying a conviction in the absence of explanation by the accused.

Proof of intent.

14. Intention is not capable of positive proof; it can only be inferred from overt acts.

As a general rule a person is presumed in law to have intended the natural and probable consequences of his act.

(iv) *What statements are admissible as evidence*

Rules as to admissibility of evidence.

15. It has been remarked above that there are certain rules which exclude from consideration on judicial inquiries classes of evidence

---

[1] Larceny Act, 1916, s. 28 (2).
[2] *R.* v. *Badash* [1917] 18 Cr. App. Rep. 17. *R.* v. *Brain* [1918] 13 Cr. App. Rep. 197.
[3] Steph., Dig. Ev. art. 96; Phipson 6th Ed. p. 36.

Ch. VI

which would be taken into consideration on ordinary inquiries. The most important of these negative or exclusive rules may, with reference to criminal proceedings, be stated as follows:—

Rule of relevancy.

I. Nothing shall be admitted as evidence which does not tend immediately to prove or disprove the charge.

Rule of best evidence.

II. The evidence produced must be the best obtainable under the circumstances.

To these may be added, subject to important qualifications:—

Hearsay.

III. Hearsay is not evidence.

Opinion.

IV. Opinion is not evidence.

I. Rule of relevancy.

16. The form in which the first rule is expressed shows the vagueness and, it may be added, the necessary vagueness, of its character. What classes of facts "tend immediately" to prove or disprove a charge. Or, to use a more technical expression[1], what facts are "relevant"? To this question no direct answer can be given. No precise line can be drawn between "relevant" and "irrelevant" facts. All that can be done is to state certain subordinate rules illustrating the kind of line which experience has induced courts to draw with respect to particular classes of facts. Common sense must supply the rest.

Character not evidence for prosecution.

17. In the first place the character or general reputation of the accused person is not admissible as evidence of his guilt. This rule is most important to prevent the injustice which might arise from prejudice or unpopularity. "Give a dog a bad name and hang him" represents the popular instinct. "A man shall not be convicted because he has a bad name," says the law. For this reason the prosecutor may not (before conviction) give evidence of bad character, except to rebut evidence to a contrary effect given on behalf of the accused.[2]

Character admissible as evidence for defence.

18. On the other hand, the accused may call witnesses to speak generally as to his character. The evidence, however, of such witnesses should be confined to the reputation of the accused for good character generally or for his good character in special respects— *e.g.*, for honesty, bravery, etc., evidence of particular cases of praiseworthy conduct in the accused is not properly admissible. This general reputation for good character may be evidenced by showing that the record of the accused in the conduct book is good, or that his superior officers have publicly approved of the way in which he has conducted himself while in the service.

Effect of evidence as to character.

19. Evidence of general good character cannot avail the accused against evidence of the fact, but where some reasonable doubt exists as to his guilt, it may tend to strengthen a presumption of innocence, and proved good character should be taken into consideration with all the other facts and circumstances "not as positive evidence contradicting any that has been brought on the other side, but as testimony, probably, to induce the court to doubt whether the other evidence is correct and not to discard that evidence if the court thinks that it is so."[3]

---

[1] See R.P. 73 (A).
[2] See R.P. 86 (C). The court may, after conviction, for their guidance in determining the sentence, take evidence as to the character of the accused (R.P. 46).
[3] *R.* v. *Bliss Hill* [1918], 13 Cr. App. Rep. 125.

On a charge of murder, where malice is the essence of the crime, expressions of goodwill and acts of kindness by the accused towards the deceased are always considered important evidence, as showing what was his general disposition towards the deceased, and leading to the conclusion that his intention could not have been that imputed to him. On a charge of stealing, character for honesty may be entitled to great weight. So also on a charge implicating the courage of a soldier, character for bravery and resolution might be of vast importance. But it would be manifestly absurd on a charge of stealing, to allow character for bravery to weigh in the scale of proof, or on a charge of cowardice, to be biased by a character for honesty. General character, unconnected with the charge, though it may not weigh with the court, except in awarding punishment in discretionary cases, may essentially serve the accused, by influencing the superior with whom it rests to mitigate or remit the sentence.

Evidence of similar acts. When not admissible.

20. It is not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those included in the charge against him for the purpose of leading to the conclusion that he is a person likely from his conduct or character or disposition to have committed the offences for which he is being tried. Thus, on a charge of murder, the prosecutor cannot give evidence of the conduct of the accused in respect of other persons for the purpose of proving a blood-thirsty and murderous disposition. So, on a charge against a sentry of having been asleep on his post on a particular occasion, evidence that he had been found asleep on his post on other occasions would not be admissible for the purpose of showing that he would be likely to commit the offence; and on a charge of insubordination, evidence of insubordinate conduct on other occasions would not be admissible for the purpose of showing a tendency to insubordinate conduct.[1]

When admissible.

21. The mere fact that evidence adduced tends to show the commission of other criminal acts (whether prior or subsequent to the act charged) does not render it inadmissible if it is relevant to an issue before the court, and it may be so relevant if it bears on the question whether the acts alleged to constitute the offence charged were designed or accidental, or to rebut a defence which would otherwise be open to the accused.[2] In such cases the evidence of other transactions being in some way relevant to the issue is admissable, not because it tends to show that other offenses have been committed by the accused, but notwithstanding that it may happen to do so.[3]

It is impossible to give anything like a detailed catalogue of circumstances in which evidence of the kind may be relevant to some issue before the court, and cases upon the point are constantly arising in criminal courts. A few of the leading decisions are referred to in the following paragraphs. It may be laid down as a rule of prudence that such evidence should only be admitted where no serious doubt is felt as to its admissibility, for if it be held to have been wrongly admitted a resulting conviction will usually be quashed: further, where it is

---

[1] See, however, below, para. 96.
[2] *Makin* v. *A.G. for New South Wales*, L.R. [1894] A.C. 57.
[3] *R.* v. *Ollis*, L.R. [1900], 2 Q.B. 758.

Ch. VI

intended to "rebut a defence"—*e.g.*, accident, absence of malice, absence of guilty knowledge, etc.,—it should not be tendered, or even "opened" to the court, until the defence in question is definitely put forward by the accused.[1]

Where several offences connected, evidence of one admissible as proof of another.

22. Where several offences are so connected with each other as to form part of one entire transaction, evidence of one is admissible as proof of another. On a charge of stealing, for example, though it is not material in general to inquire into any other taking of goods besides that specified in the charge, yet for the purpose of ascertaining the identity of the thief, it may be very relevant and therefore admissible to show that other goods which had been upon the same premises and were stolen on the same night were afterwards found in the possession of the accused. This is strong evidence of the accused having been near the owner's house on the night of the robbery. So, too, on a charge of arson, it may be shown that property which had been taken out of the house at the time of the firing was afterwards found secreted in the possession of the accused.

To prove design, and negative accident, etc.

23. The following are instances of cases where evidence of similar acts has been admitted to prove design, or intention, or a systematic course of conduct, or to negative ignorance of accident, etc. On charges of murder or of maliciously wounding, former menaces or attacks or expressions of vindictive feeling against the same person are admissible as disproving accident. Again, where women or children have been murdered, to rebut the defence of accident or to prove design, evidence has been admitted to prove that other women or children living with the accused have died under similar suspicious circumstances or have suffered from similar symptons.[2]

On charges of embezzlement effected by falsifying accounts, evidence of other incorrect entries in the prisoner's accounts has been admitted to show that particular errors covered by the actual charge were not made accidentally.[3]

On charges of "receiving", evidence may by statute[4] be given that other property stolen during the preceding 12 months was found in the possession of the accused, to prove his guilty knowledge. Upon charges of uttering forged notes or counterfeit coin evidence has been admitted to prove the uttering on other occasions of notes or coins which were not genuine, or the possession thereof.[5]

Where the gist of an alleged attempt is fraud, evidence of similar[6] offences is admissible to prove the intent. Thus on a charge of obtaining cash by falsely representing that the cheque given in exchange was good, in order to prove intent or knowledge, evidence was admitted as to another cheque (dishonoured on presentation) having been given to a third person.[7]

---

[1] *R.* v. *Bond*, L.R. [1906], 2 K.B. 389. Under R.P. 86 (B) the court can allow rebutting evidence to be called after the witnesses for the accused.

[2] *R.* v. *Geering* [1849] 18 L.J. (M.C.) 215, several cases of arsenic poisoning in a house. *Makin* v. *A.G. for New South Wales* L.R. [1894] A.C. 57; previous deaths of other nurse children. *R.* v. *Smith* [1915] 11 Cr. App. Rep. 229, three "wives" dying in succession in the same way.

[3] *R.* v. *Richardson* [1860] 8 Cox Crim. Ca. 448; *R.* v. *Proud* [1861] 31 L.J. (M.C.), 71.

[4] Larceny Act, 1916; s. 43 (1) *(a)*.

[5] Archbold, Crim. Ev., 27th Ed., 366.

[6] But the frauds must be of a similar nature, *cf. R.* v. *Fisher* L.R. [1910] 1 K.B.

[7] *R.* v. *Ollis* *L.R.* [1900] 2 Q.B., 758.

Again, on a charge of obtaining credit (for food and lodgings) by fraud, evidence was admitted to show that the accused had previously obtained accommodation at other houses and had left without making payment, either to prove a systematic course of conduct, or as negativing any mistake or honest motive.[1]

On a charge of arson where the object suggested was to defraud an insurance company, the prosecution was allowed to prove, as negativing an accidental cause for the fire, that the two houses previously occupied by the prisoner were burnt, and that claims in respect of them had been paid by other companies.[2] Similarly, to prove malice or intent, or to negative accident, where men have been charged with maliciously wounding or arson, evidence has been admitted to show that on previous occasion the accused had shot at the same person or tried to set fire to the same object.[3]

Other instances.

24. On a charge of gross indecency, where the defence was mistaken identification and an *alibi*, the prosecution were allowed to prove that indecent photographs and articles suggestive of a tendency to commit such offences were found on the prisoner when arrested, and in his house. The ground for this decision was that the person who committed the offence was a person of abnormal propensities, and that the evidence corroborated the identification by showing that the person picked out had those propensities.[4] In a similar case where the defence was not in the nature of *alibi* it was held that evidence of possession of indecent photographs was admissible on the same principle as evidence of possession of tools in cases of housebreaking.[5] On charges of incest and of carnal knowledge of young girls evidence of former similar acts between the same parties has been admitted.[6]

Again, on a charge of indecent exposure, evidence of a previous act towards the same person was admitted as relevant on the question of identification and on the question of intent to insult.[7]

Facts showing intention (further illustration).

25. In support of a charge of insubordinate language addressed by word of mouth, or written to, or used of, a superior officer at a stated time, or in a particular letter, after having proved the words in the charge, the prosecutor, to show the spirit and intention of the accused, may prove also that he spoke or wrote either disrespectful or malicious words on the same subject, either before or afterwards, or that he published or disseminated copies of the letter set forth as disrespectful in the charge. This evidence is admissible, not in aggravation of the offence charged, but for the purpose of proving deliberate malice or disrespect imputed in the charge.

Facts showing intention (further illustration).

26. Where the charge is of a nature which makes the intention a principal issue, as where a person is charged with treason, or with a design to undermine the influence of the commanding officer, an inquiry may be allowed into the conduct and sentiments of the accused on particular occasions, but with reference only to the overt act laid

---

[1] *R.* v. *Wyatt* L.R. [1904] 1 K.B., 188; *R.* v. *Walford* [1907] 71 J.P., 215. See also *R.* v. *Bond* L.R. [1906] 2 K.B., 389 as to "course of conduct."
[2] *R.* v. *Gray* [1866] 4 F. & F., 1102.
[3] *R.* v. *Dossett* [1846] 2 C. & K., 306. Archbold, Crim. Ev., 27th Ed., 366.
[4] *R.* v. *Thompson L.R.* [1918] 2 K.B., 853.
[5] *R.* v. *Twiss* L.R. [1918] 2 K.B., 853.
[6] *R.* v. *Ball* L.R. [1911] A.C. 47; *R.* v. *Shellaker* L.R. [1914] 1 K.B. 414.
[7] *Perkins* v. *Jeffery* L.R. [1915] 2 K.B. 702.

Ch. VI

or specified in the charge, and to the transactions proved against him. The intention of one particular act may be best evinced by other contemporaneous actions, but great caution is needed to prevent injustice to the accused by extending the inquiry to matters wholly unconnected with the charge. It would be the height of injustice to allow such an attack upon him as might involve the necessity of his entering unprepared and at once on the defence of every action of his life.

Evidence as to motive, preparation, subsequent conduct, or consequences admissible.

27. Again, where there is a question whether a person committed an offence, evidence may be given of any fact supplying a motive or constituting preparation for the offence, of any subsequent conduct of the person accused, which is apparently influenced by the commission of the offence, and of any act done by him, or by his authority, in consequence of the offence. Thus, evidence may be given that, after the commission of the alleged offence, the accused absconded, or was in possession of the property, or the proceeds of property, acquired by the offence, or that he attempted to conceal things which were or might have been used in committing the offence, or as to the manner in which he conducted himself when statements were made in his presence and hearing.

Acts of conspirators.

28. In cases of conspiracy, after *prima facie* evidence has been given of the existence of the plot, and of the connection of the accused therewith, the charge against one conspirator may be supported by evidence of anything done, written, or said, not only by him, but by any other of the conspirators, in furtherance of the common purpose. Thus, on the consideration of a charge of mutiny, evidence of this kind may, after such *prima facie* proof, be received against a particular one of the accused.

Statements not forming part of conspiracy inadmissible.

29. Statements of the class above described are admissible as evidence, if they are made in execution of the common purpose, because they form part of the transaction to which the inquiry relates.[1] But a statement made by one conspirator, not in execution of the common purpose, but in narration of some event forming part of the conspiracy, falls witin the rule of hearsay, to which reference will be made hereafter, and is not admissible as evidence against another conspirator, unless made in his presence.[2] In consequence of this distinction, the admissibility of writings often depends on the time when they are proved to be in the possession of fellow conspirators, whether it was before or after the apprehension of the accused or whether or not the accused had joined the conspiracy at the date referred to.

Acts and declarations of accused; when evidence for him in conspiracy cases.

30. As, in trials for conspiracies, whatever the accused may have done or said at any meeting alleged to have been held in pursuance of the conspiracy may be given in evidence against him on the part of the prosecution, so, on the other hand, any other part of his conduct at the same meeting will be allowed to be proved in his behalf; for his intention and design at a particular time are best explained by a complete view of every part of his conduct at that time, and not merely from the proof of a single isolated act or declaration.

---

[1] See below, paras. 51, 52.

[2] See *R.* v. *Blake* [1844] L.R., 6 Q.B., 126; Steph. Dig. Ev., pp. 6 and 7; Wills p.116 *et seq.*

II. Rule as to best evidence.

31. The meaning of the rule that the evidence produced must be the best obtainable in the circumstances, is this:—No evidence which leads to the supposition that other and better evidence remains behind can have any weight, as the production of such inferior evidence suggests that there is some secret or sinister motive for withholding the better and more satisfactory evidence.

Rule chiefly applicable to documents. Primary and secondary evidence.

32. The rule in question is more strictly enforced with regard to documentary evidence than with regard to oral evidence, and is usually applied in the form of the two well-known sub-rules: (1) That a verbal account of the contents of a document can never be received if the document itself is obtainable; (2) That, subject to certain exceptions, a copy of a document is not admissible when the original document can be produced. In these cases the document itself is said to be primary, whilst the verbal account, or the copy, is called secondary evidence.

Primary evidence of document.

33. Primary evidence of the contents of a document is given by producing the document for the inspection of the court.

Attested and unattested documents.

If the document is of a kind which is required by law to be attested, but not otherwise,[1] it is also necessary to call an attesting witness to prove its due execution. But this rule is subject to the following exceptions:—

(*a*) If it is proved that there is no attesting witness alive, and capable of giving evidence, then it is sufficient to prove that the attestation of at least one attesting witness is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

(*b*) If the document is proved, or purports to be, more than thirty years old, and is produced from what the court consider to be its proper custody, an attesting witness need not be called, and it will be presumed without evidence that the instrument was duly executed and attested.

Distinction between private and public documents.

34. The rule as to the inadmissibility of a copy of a document is applied much more strictly to private than to public or official documents.

Secondary evidence of private documents, when admissible.

35. Secondary evidence may be given of the contents of a private document in the following cases:—

(*a*) Where the original is shown or appears to be in the possession of the adverse party, and he, after having been served with reasonable notice to produce it, does not do so.

(*b*) Where the original is shown or appears to be in the possession or power of a stranger not legally bound to produce it, and he, after having been served with a writ of *subpœna duces tecum*, or after having been sworn as a witness and asked for the document, and having admitted that it is in court, refuses to produce it.

(*c*) Where it is shown that proper search has been made for the original, and there is reason for believing that it is destroyed or lost.

---

[1] Evidence Act, 1865, ss. 1, 7.

(*d*) Where the original is of such a nature as not to be easily movable,[1] or is in a country from which it is not permitted to be removed.

(*e*) Where the original is a document for the proof of which special provision is made by any Act of Parliament, or any law in force for the time being.[2]

(*f*) Where the document is an entry in a banker's book, provable according to the special provisions of the Bankers' Books Evidence Act, 1879.

Secondary evidence of private documents, how given.

Secondary evidence of a private document is usually given either by producing a copy and calling a witness who can prove the copy to be correct, or when there is no copy obtainable, by calling a witness who has seen the document, and can give an account of its contents.

Letters: proof of receipt.

36. Where there is no relevant statutory provision applicable to the particular case[3] a letter proved to have been properly addressed, stamped and posted (and not returned by the P.O.), is presumed to have been delivered in due course. The presumption may be rebutted; and if receipt is denied, it is for the court to decide whether to accept the denial.

Public documents, what deemed to be.

37. No general definition of "public documents" is possible, but the rules of evidence applicable to public documents are expressly applied by statute to many classes of documents. Primary evidence of any public document may be given by producing the document from proper custody, and by a witness identifying it as being what it professes to be. Public documents may always be proved by secondary evidence, but the particular kind of secondary evidence required is in many cases defined by statute. Where a document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom is admissible as proof of its contents, if it is proved to be an examined copy or extract, or purports to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted.[4]

Primary and secondary evidence of public documents.

Certified copies.

38. It is provided by many statutes that various certificates, official and public documents, documents and proceedings of corporations and of joint stock and other companies, and certified copies of documents, by-laws, entries in registers and other books, shall be receivable as evidence of certain particulars in courts of justice, if they are authenticated in the manner prescribed by the statutes. Whenever, by virtue of any such provision, any such certificate or certified copy is receivable as proof of any particular in any court of justice, it is admissible as evidence, if it purports to be authenticated in the manner prescribed by law, without calling any witness to prove any stamp, seal, or signature required for its authentication, or to prove the official character of the person who appears to have signed it.[5]

---

[1] *E.g.*, a placard posted on a wall, or a tombstone.

[2] These are practically treated on the same footing as public documents. See A.A. 168.

[3] *E.g.*, Reserve Forces Act, 1882, s. 24 (2).

[4] Evidence Act, 1851, s. 14; Law of Property Act, 1922, s. 144.

[5] Evidence Act, 1845, preamble, and s. 1, and Steph., Dig. Ev., art. 79. A certificate, etc., so receivable is merely handed in to the court by the party producing it.

Provisions of Documentary Evidence Act as to certain documents.

39. Under s. 2 of the Documentary Evidence Act, 1868, *prima facie* evidence of any proclamation, order, or regulation issued by His Majesty or by the Privy Council, also of any proclamation, order, or regulation issued by or under the authority of any such department of the Government or officer as is mentioned in the first column of the schedule to the Act,[1] may be given in all courts of justice, and in all legal proceedings, whatsoever, in all or any of the following modes:—(1) By the production of a copy of the *Gazette*, purporting to contain the proclamation, order, or regulation; (2) By the production of a copy of the proclamation, order, or regulation purporting to be printed by the Government printer,[2] or, where the question arises in a court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of that colony or possession; (3) By the production, in the case of any proclamation, order, or regulation issued (i) by His Majesty, or the Provy Council, or (ii) by any of the departments specified in the schedule, of a copy or extract purporting to be certified as true either (*a*) by the clerk of any Lord of the Privy Council, or (*b*) by the proper certifying officer specified in the second column of the schedule.

Any copy or extract made in pursuance of the Act may be in print or in writing, or partly in print and partly in writing; and no proof is required of the handwriting or official position of any person certifying in pursuance of the Act, to the truth of any copy of or extract from any proclamation, order, or regulation.

Special provisions of Army Act as to documents provable by copies.

40. Special provision is made by the Army Act for proving, by means of copies, attestation papers on enlistment, King's Regulations, Royal Warrants, and rules, warrants, and orders made in pursuance of the Act, records in regimental books, and proceedings of courts-martial.[3]

Rules to be best evidence not applicable to distinction between direct and indirect evidence.

41. In connection with the rule as to best evidence, reference may be made to the distinction between direct and indirect evidence. By direct evidence is meant the statement of a person who saw, or otherwise observed with his senses, the fact in question. By indirect, or, as it is often called, circumstantial evidence, is meant evidence of facts, from which the fact in question may be inferred or presumed. The rule as to best evidence has no application to the difference between direct and indirect evidence. Direct evidence is not better than indirect or circumstantial evidence, the difference between them being one not of *degree* but of *kind*.

Nature and strength of circumstantial evidence.

42. From the circumstances in which crimes are ordinarily committed, it follows that direct evidence of their commission is not always obtainable, and that in very many cases reliance must be placed on circumstantial evidence. Such evidence is in no way inferior to direct evidence, and is in some respects superior to it; for it has become a proverb that "facts cannot lie," whilst witnesses may. On the other hand, it must always be borne in mind that if facts cannot "lie," they may, and often do, deceive; in other words, that the interpretation which they appear to suggest is not that which ought to be placed

[1] This schedule has by the Documentary Evidence Act, 1895, and subsequent enactments been extended so as to include practically all Government departments.
[2] Under the Documentary Evidence Act, 1882, this expression includes His Majesty's Stationery Office.
[3] A.A., 163, 165.

Ch. VI

upon them. Therefore, before the court finds an accused person guilty on circumstantial evidence, it must be satisfied not only that the circumstances are consistent with the accused having committed the act, but that they are inconsistent with any other rational conclusion than that the accused was the guilty person.[1]

Illustrations of difference between good and bad circumstantial evidence.

43. The writer of a series of papers on the value and danger of circumstantial evidence, which appeared in 1879 in a legal paper[2], states one of the leading rules with respect to this class of evidence as follows:—"*The facts on which it is sought to found the inference of "guilt must be visibly and evidently connected with the crime,*"—and illustrates the rule by contrasting two groups of facts, of which the first would not, whilst the second would, constitute convincing circumstantial evidence of a crime. The characteristic difference between good and bad circumstantial evidence cannot be better explained than by quoting the passage which contains this illustration:—

"In one of the works on evidence there is an admirable example of "a series of circumstances such as are intended to be excluded by "this rule, which we take the liberty of epitomising:—

"1. The accused was a man of bad general character.

"2. He belonged to a nation characteristically regardless of human "life.

"3. He narrowly escaped conviction on a charge of murder some "years before.

"4. There is a strong ill-feeling between his nation and that of "the deceased.

"5. He was heard to make exclamations in his sleep indicating a "consciousness of having committed some terrible deed.

"6. The deceased was robbed, and the accused is proved to be "notoriously greedy about money.

"It is scarcely necessary to say that, if a series of such circumstances "were indefinitely accumulated, it would fail to produce in a sane "mind a conviction that the accused was guilty. There is no visible "*ligamen* between these facts and the facts sought to be established "that the accused committed the murder, as all the facts are perfectly "consistent with his innocence. Contrast such circumstances with "such as ordinarily present themselves in strong cases of circumstantial "evidence. Let us take, for instance, the following series of facts:—

"1. The deceased was found apparently murdered by a pistol "bullet, which penetrated the skull.

"2. On the ground near the body was found a small fragment of "a newspaper, which smelled strongly of burnt powder, and led to "the supposition that it had been used in separating the powder from "the ball; and on the accused being arrested there was found another "piece of newspaper, which corresponded minutely at the point where "it was torn with that found near the body of the deceased.

"3. In a pond near the scene of the murder was found a pistol, "which had evidently been only recently thrown into the water, and "into which the bullet fitted.

---

[1] *Hodge's case* [1838], 2 Lewin, C.C., 227.
[2] Law Journal, Oct. 11, 1879.

"4. The pistol was proved to have belonged to a gentleman in "the neighbourhood; but it also appeared that the prisoner was a "servant in his employment, and that the pistol was missed the day "before the murder from among several fowling pieces, pistols, powder "flasks, and other articles connected with the paraphernalia of the "sportsman which were arranged in a small room in the gentleman's "house devoted to the purposes of sport. It was a part of the prisoner's "duty to keep this room and its contents in order.

"5. When asked whether he ever saw the pistol, he denied it.

"On the prisoner were found two bank notes, which were proved "to have been given to the deceased in part payment for a horse "sold by him to a neighbour.

"The first of these facts at once suggests suspicion against the "accused. As the second and subsequent circumstances are dis- "closed, the suspicion becomes intensified; and, as the narrative goes "on, the strong apparent connection between the facts and the crime "rapidly culminates, until, even before the last of them is reached, "the climax of moral certainty is attained, and the mind is forced to "accept the conclusion that the accused was the perpetrator of the "crime."

Best evidence does not mean strongest possible assurance.

44. The rule which requires production of the best obtainable evidence does not require the strongest possible assurance; in other words, does not require the fullest proof of which the case will admit, nor the repetition of evidence beyond that which is sufficient to establish the fact. For instance, it is not necessary, in order to prove handwriting, to call the writer himself; nor, if a whole regiment should be present at some overt act of mutiny or insubordination, as the striking of a commanding officer in front of his regiment, would the law require the production of all the persons present; for if one witness only were produced, and if, from his situation at the moment of the occurrence, he had as favourable an opportunity of observing what took place as any person present, his evidence would be complete, and not inferior in kind to any that could be produced.

Number of witnesses requisite.

45. On the same principle the law admits as sufficient the uncorroborated testimony of one credible witness, subject to statutory exceptions in the case, *e.g.*, of treason, procuration of women and girls,[1] and in certain cases where a child of tender years is allowed to give evidence without being sworn;[2] and to the further exception that in a trial for perjury one witness alone is not sufficient, without some material and independent corroborative evidence in proof of the statement as to which the perjury is charged.[3] Apart from any such statutory requirement the evidence even of an accomplice is in strict law sufficient, if the jury consider him credible; but it is now held to be the duty of the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated evidence of an accomplice and, in his discretion, advise them not to do so, though at the same time pointing out that it is within their legal province to convict upon it if they choose. In a trial by court-martial, where the court performs the functions of both judge and jury, they should very carefully consider

[1] Criminal Law Amendment Act, 1885, ss. 2 and 3.
[2] Children Act, 1908, s. 30 as amended by the Criminal Justice Administration Act, 1914, s. 28 (2). See also para. 90 *post*.
[3] Perjury Act, 1911, s. 13.

Ch. VI

the danger before convicting on the uncorroborated testimony of an accomplice; and, if there is a judge-advocate, it is essential that he should direct their attention to the point. Except where a statute makes provision as to the nature of the evidence necessary, the corroboration required is independent testimony which confirms in some material particular not only the evidence that the crime has been committed, but also that the accused committed it.[1]

III. Rule as to hearsay.

46. The rule as to best evidence says that second-best evidence shall not be produced if better evidence can be found. The rule as to hearsay goes a step further, and says that certain classes of second-best evidence shall not be produced in any circumstances. The term "hearsay" is primarily applicable to what a witness has heard another person say with respect to facts in dispute. But it is extended to all statements, whether reduced to writing or not, which are brought before the court, not by the authors of the statements, but by persons to whose knowledge the statements have been brought. The reasons for excluding such statements are, first, that they are not made on oath; and, secondly, that the person to be affected by the statement has no opportunity of cross-examining its author. The rule has been often criticized on the ground that it sometimes excludes the only means of proof obtainable in the circumstances; but its utility in excluding irresponsible proof is obvious.[2] It is subject to various limitations or exceptions, the most important of which will be noticed below:

Its terms and exceptions.

47. The rule as to hearsay in its narrower sense may be stated as follows:—"No statements with reference to a person charged with an offence, relative to the charge, made in his absence can be received in evidence against him." This rule is subject to several exceptions: first, the admissibility of so-called "dying declarations"; secondly, the admissibility of statements forming part of what is known by the name of the "*res gestæ*"—that is to say, of the fact, or set of facts, or transaction forming the subject of judicial inquiry; thirdly, the admissibility of statements made by a deceased person against his pecuniary or proprietary interest; and, fourthly, the admissibility of statements made by a deceased person in the strict course of duty.

Statement made in presence of accused.

48. It will be observed that the rule does not exclude evidence as to statements made in the presence of the accused. A statement made in a man's presence and hearing accusing him expressly or impliedly of having committed a crime is evidence against him of the truth of the allegation or suggestion so far, but only so far, as by words or demeanour (including his silence if the occasion calls for reply[3]) he accepts the statement so as to make it his own. In strict law the prosecution may put such statement before the jury, together with evidence of the accused's behaviour on hearing it—even if such behaviour was a plain denial—and leave them to judge whether he accepted it; but in practice, judges do not allow such a statement to

---

[1] *R.* v. *Baskerville* L.R. [1916] 2 K.B. 658.

[2] "Hearsay evidence, as a general rule, is not admissible, and it is not admissible because one knows to what extent people will be and are disposed to speak untruly, even without any motive whatever, and one knows what little importance can be attached to any rumour or anything stated as a mere hearsay."—James, L. J., in *Polini* v. *Gray* [1879], L.R., 12 Ch. Div. at p. 425.

[3] *R.* v. *Norton* L.R. [1910], 2 K.B. 496; *R.* v. *Feigenbaum* L.R. [1919], 1 K.B. 431.

be proved unless they see some evidence that the accused did accept it. In a trial by court-martial, if the accused when he heard the statement made merely denied it, or said or did nothing which could reasonably be construed as an acceptance of it, the court should reject the whole of the statement, and pay no attention to it.[1]

Dying declarations.

49. The first of the exceptions above referred to is that relating to dying declarations, which are admissible only in trials for murder or manslaughter. In such trials a declaration made by the person killed as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, is admissible as evidence, if it is proved that the declarant, at the time of making the declaration, had abandoned all hope of living and was expecting to die within a very short time though not necessarily immediately. "Dying declarations ought to be admitted with scrupulous, I had almost said with superstitious, care. They have not necessarily the sanction of an oath; they are made in the absence of the prisoner; the person making them is not subject to cross-examination, and is in no peril of prosecution for perjury. There is also great danger of omission and of misrepresentations, both by the declarant and the witness. To make a dying declaration admissible, there must be an expectation of impending and almost immediate death from the causes then operating. The authorities show that there must be no hope whatever."[2]

Dying declarations are only admissible in evidence where the death of the deceased is the subject of the charge and the cause of the death is the subject of the dying declaration.

Dying declarations, illustration of rule.

50. The circumstances in which, at trials for murder, statements by the person alleged to have been murdered as to the cause of his death are and are not admissible as evidence against the accused, may be illustrated by the following cases:—

(*a*) At time of making the statement the deceased had no hope of recovery, though his doctor had, and he lived ten days after making the statement. The statement was admitted as evidence.[3]

(*b*) The deceased, at the time of making the statement, which was written down, said something which was taken down thus: "I make the above statement with the fear of death before me, and with no hope of recovery." On the statement being read over, she corrected this to "with no hope *at present* of my recovery." She died thirteen hours afterwards. The statement was not admitted as evidence.[2]

Statement forming part of *res gestæ*.

51. Passing to the second of the exceptions referred to in para. 47 above, the rule is, that where a statement is part of the *res gestæ* or transaction constituting the offence, then, whether it is or is not made in the presence of the accused, it is admissible as evidence against

---

[1] *R.* v. *Christie* L.R. [1914], A.C. 545. See also para. 83 *post* as to a confession made by an accomplice in the presence of the accused, and also para. 78 as to the duty of police officers in such cases.

[2] *R.* v. *Jenkins* [1869], L. R. 1 C. C. R. at p. 193, *per* Byles, J.

[3] *R.* v. *Mosley* [1825], 1 Moo C.C. 97.

Ch. VI

him. Words uttered during the continuance of the main action, whether by the active or by the passive party, though they cannot amount to acts for which the accused can be held responsible, yet may so qualify or explain the acts which they accompany, that they become essential for the due appreciation of them. Even where the accused is no longer present, if the words are the immediate and natural effect and consequence of continuing action on his part, they may well be considered as part of the transaction though uttered out of his hearing.

Principle on which admitted.

52. There is no difficulty in understanding the general principle on which such statements are admitted, but there is sometimes great practical difficulty in determining how long the "transaction" ought to be considered as continuing, and what ought to be treated as "the immediate and natural effect of continuing action." Speaking generally a statement cannot be admissible in evidence as part of the *res gestæ* unless it was made while the offence was being committed or so immediately thereafter that the person making it had no time to devise anything for his own advantage.[1]

Special rule in case of trials for rape and kindred offences.

53. In trials for rape, and kindred offences against women and girls, evidence is allowed to be given of the fact that, shortly after the commission of the offence, the person against whom the offence was committed made a complaint about it, and of the particular terms of the complaint so far as they relate to the charge. This is admissible, not as being evidence of the facts complained of, but for the purpose of showing that the conduct of the person against whom the offence was committed was consistent with the story told by her in the witness box.[2]

The rule as to the admissibility in evidence of such a complaint and of its terms has been held to apply where the charge was one of indecent offences with male persons.[3]

Statements as to bodily or mental feeling admissible.

54. When it is intended to prove the state of health of a person at a particular time, evidence may be given of expressions indicative of that state used by him at that time.[4] Thus, in the Rugeley poisoning case, statements made by the deceased before his illness as to his state of health, and during his illness as to his symptoms, were admitted as evidence against the accused.

Declaration of deceased person against interest.

55. As regards the third exception referred to in para. 47, a declaration, written or oral, made by a person since deceased against his pecuniary or proprietary interest is admissible.[5] If it is admitted, the whole of the statement of which it forms part becomes admissible. The expressions "pecuniary or proprietary" must be strictly construed, and a declaration is not "against interest" within the meaning of the rule because, *e.g.*, it would have tended to show that he had committed a crime.

Statements made in course of business by persons since deceased.

56. As regards the fourth exception, a statement, written or oral, or an entry, which it is the duty of a person to make in the ordinary course of his business or professional employment, is admissible as

[1] *R.* v. *Christie* L.R. [1914], A.C. 545. *Thompson* v. *Trevanion* [1693], Skin. 402.
[2] *R.* v. *Lillyman* L.R. [1896], 2 Q.B. 167; *R.* v. *Osborne* L.R. [1905], 1 K.B. 551.
[3] *R.* v. *Camelleri* L.R. [1922], 2 K.B. 122; *R.* v. *Wannell* [1922], 17 Cr. App. Rep. 53.
[4] Steph., Dig. Ev., art. 11.
[5] Steph., Dig. Ev., art. 28.

evidence after his death, provided it is made contemporaneously with the act to which it relates. But it is only admissible to prove those facts which it was the duty of the person making the statement or entry to include in it, and of which he had personal knowledge. Thus, where on a trial for murder it appeared that the deceased, a constable, in the course of his duty and shortly before his death, had made a verbal statement to his superior officer as to where he was going, and what he was going to do, it was held that this statement, which was to the effect that the deceased was going to watch the accused, was admissible.[1]

Admissibility of deposition.

57. It may sometimes happen that a material witness, who has given evidence at the preliminary inquiry, cannot attend at the trial. In proceedings before a civil court for indictable offences, provision is made for such cases by a statute[2], which enacts that the deposition may be read as evidence on proof that the witness is dead or insane or so ill as not to be able to travel or is kept out of the way by means of the procurement of the accused or on his behalf; that the deposition was taken in the presence of the accused person; that the accused then had a full opportunity of cross-examining the deponent; and further, that the deposition purports to be signed by the justice by or before whom it purports to be taken.

Summary of evidence, how far admissible.

58. In the case, however, of trial by court-martial, there is no similar provision making the summary of evidence taken before a commanding officer, when an accused person is remanded for trial, admissible in evidence in the same circumstances as depositions taken before a magistrate when a prisoner is committed for trial by a jury. Accordingly, the summary, except so far as it contains admissions by the accused himself, made after proper caution,[3] cannot be admitted as evidence of the facts recorded in it unless the accused has pleaded guilty.[4] But where a statement recorded in the summary is put in issue before a court-martial, as, for example, where a discrepancy is alleged between that statement and the evidence given before the court, or where the alleged wilful falsehood of such a statement is made the subject of a charge, the summary, if purporting to give the *verbatim* signed statement of the witness, may be given in evidence as confirmatory of the statement having been made.

Application of hearsay rule to documentary evidence.

59. The rule excluding hearsay evidence is, as has been seen, applicable to written or documentary, as well as to oral evidence. The statement of a person who is not called as a witness is none the less "hearsay" because it has been reduced to writing, and is offered in that form to the court. But in its application to documents of a public of official character, the rule is subject to very important qualifications. In the case of many such documents, the statements which they contain are, either under the general law, or under express statutory provisions, admissible as evidence of the matters, to which they relate.

Recitals of public facts or statements, proclamations, etc.

60. Thus, by the general law, a statement of any fact of a public nature, if made in any recital in a public Act of Parliament, or in any Royal proclamation, or speech in opening Parliament, or in any

[1] See Steph., Dig. Ev., art. 27.
[2] Criminal Justice Act, 1925, s. 13 (3).
[3] See R.P. 4 (E).
[4] See R.P. 37.

address to the Crown of either House of Parliament, is admissible as evidence of that fact.

Entry in public record made in performance of duty.

61. So also an entry in any record, official book, or register, whether British or foreign, made at the proper time for public information or reference by any person in the discharge of any duty imposed on him by law, is admissible as evidence of the facts to which it relates.

Special provisions of Army Act.

62. And, under the special provisions of the Army Act, attestation papers, letters, returns, and documents respecting service, army lists, gazettes, warrants, and orders made in pursuance of the Act, records in regimental books, descriptive returns, and certificates of conviction or acquittal, are made evidence of the facts stated by them.[1]

IV. Rule as to opinion.

63. The general rule is that the opinion or belief of a witness is not evidence. A witness must depose to the particular facts which he has seen, heard, or otherwise observed, and it is for the court to draw the necessary inference from these facts. Thus a witness may not on a trial for desertion characterise the absence of the accused as "desertion." This is a matter of inference, and is the point which it rests with the court to determine according to the evidence. The examination of the witness should be confined to the fact of the accused absenting himself, and to such other facts relevant to the charge as may be within the knowledge of the witness.

Exception in case of experts.

64. The chief exception to this rule relates to the evidence of experts. The opinion of an expert, that is to say, a person specially skilled in any science or art, is admissible as evidence on any point within the range of his special knowledge.

Medical experts.

65. Thus, in a poisoning case, a doctor may be asked as an expert whether, in his opinion, a particular poison produces particular symptoms. And, where unsoundness of mind is set up as a defence, an expert may be asked whether, in his opinion, the symptoms proved to be exhibited by the accused person commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of their acts, or of knowing that what they do is either wrong or contrary to law.[2]

Experts in military science.

66. An officer may be asked, as an expert, to give his opinion on a point within his special military knowledge, but to make his opinion admissible his knowledge must be of a kind not possessed by the court generally. Thus, in a trial before a court-martial, it is not proper to ask a witness for an opinion on matters with which all officers should be familiar, but it may be perfectly proper to put questions involving opinion to an engineer as to the progress of a

[1] See A.A. 163–165. Note the distinction between the provision making the copy evidence of the original, as an exception from the rule as to best evidence (*e.g.*, s. 163 (1) *(c)*, as to copies of the King's Regulations, Royal Warrants, &c.), and the provisions which make the document, as an exception from the rule as to hearsay, evidence of the facts to which it relates; also the distinction between a document being evidence of certain facts and (as a letter or record) evidence of the statement of those facts by some person.

The statements in the text, particularly in para. 59, as to the admission of documents, do not exclude the admission in evidence of documents which are part of the *res gestæ*. If, *e.g.*, a person is charged with embezzlement, the books which it was his duty to keep are admissible in evidence as part of the transaction under investigation, and the entries made by him or under his authority in those books will be evidence against him, as part of his conduct in relation to that transaction, and as raising presumptions which appear to require explanation.

[2] See Steph., Dig. Ev., art. 49, and cases there cited as illustrations.

sap, or to an artillery officer as to the probable effect of his arm, if directed as assumed; since these matters, though having reference to military science, are not of such a nature as presumably to be known to each member of court-martial.

Experts in handwriting.

67. With respect to handwriting, it is specially provided by statute[1] that comparison of a disputed handwriting with any writing, proved to the satisfaction of the court to be genuine, is permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute. The comparison may be made either by a person acquainted with the handwriting, or by an expert in handwriting,[2] or by the court itself. A witness may be required to read writing or to write in the presence of the court. But it must be borne in mind that writing made for the special purpose of comparison is not unlikely to be disguised. The importance of an expert's evidence in such cases lies not so much in the opinion which he expresses as in the fact that he draws the attention of the court to similarities and dissimilarities which they might not notice without his assistance, but the value of which (when pointed out) they can fully appraise for themselves. Where a question of forgery is to be decided by comparison of handwriting only, the assistance of an expert is most desirable.[3]

Rule excluding opinion does not exclude evidence as to belief.

68. The rule which requires a witness to state what he knows, and not what he thinks, does not require him to depose to facts with an expression of certainty that excludes all doubt in his mind. For example, it is the constant practice to receive in evidence a witness's belief as to the indentity of a person or thing, or as to the fact of a certain handwriting being the handwriting of a particular person, though he will not swear positively to those facts. A witness who falsely swears that he "believes" a thing to be so-and-so is as much guilty of perjury as one who falsely swears that "it is" so-and-so.

Opinion as to conduct, how far admissible.

69. In cases affecting the conduct of the accused, either as to deportment or language, it is not only proper, but often necessary to require a witness to declare his opinion, because that opinion may be an impression derived from a combination of circumstances, occurring at the time referred to, which it would be difficult, if not impossible, fully to impart to the court. But it would be improper to draw the attention of a witness to facts, whether stated by himself or by another witness, and to ask his opinion as to their accordance with military discipline or usage, because the court, being in possession of facts are the only proper judges of their tendency. If the witness is asked a question inviting him to express his opinion as to the general conduct of the person accused, or to give his judgment on the whole matter of the charge, he may, and should, decline to answer it.

Refreshing memory.

70. A witness may not read his evidence of refer to notes of evidence already given by him, but he may while under examination refresh his memory by referring to any writing made by himself at the time of

[1] Criminal Procedure Act, 1865, s. 8.

[2] Provided the witness is *in fact* skilled in the comparison of handwriting, it is immaterial that he is not a professional expert and immaterial how he acquired his skill. *R.* v. *Silverlock* L.R. [1894], 2 Q.B. 766.

[3] *R.* v. *Rickard* [1918], 13 Cr. App. Rep. 140.

Ch. VI

the transaction concerning which he is questioned, or so soon afterwards that the court consider it likely that the transaction was at that time fresh in his memory. He may also refer to any such writing made by any other person, and read by the witness within the time aforesaid if, when he read it, he knew it to be correct. Any writing so referred to must be produced and shown to the adverse party if he requires it, and that party may, if he pleases, cross-examine the witness upon it.

Notes referred to not evidence of themselves.

71. But a witness who refreshes his memory by reference to a writing must always swear positively as to the fact, or that he has a perfect recollection that the fact was truly stated in the memorandum or entry at the time it was written. If on referring to a memorandum not made by himself he can neither recollect the fact nor recall his conviction as to the truth of the account or writing when the facts were fresh in his memory, so that he cannot speak as to the fact further than as finding it noted in a written entry, his testimony is objectionable, as being hearsay.

(v) *Admissions and confessions*

Rule as to admissions.

72. In civil actions for damages, etc., admissions are often made before trial by both parties to save the expense of calling witnesses as to facts not really in dispute. This practice is not permissible in criminal cases; but it would seem that at the actual trial the accused or his counsel can admit facts without formal proof, at any rate in the case of offences not amounting to felonies.[1] It is the practice of courts-martial to receive admissions so made in open court as to collateral or comparatively unimportant facts, which are not in dispute, but must be proved on the part either of the prosecution or of the defence. Thus, it is the practice to allow either party the option of admitting the authenticity of orders or letters, or the signature of a document, or the truth of a copy, but in by the other party, in cases where such writings are receivable when proved; or that certain details in an enumeration of stores, or in an account, are correctly stated; or that a promise or permission to a certain effect was actually given, or that a certain letter was sent or received on a given day; and so in similar cases where admissions may expedite the proceedings and do not go to the merits of the matter before the court.

Of course the rule that criminal cases are not to be tried upon admissions designedly made out of court does not preclude the prosecutor from proving statements made by the accused either verbally or in writing, which either amount to confessions (see succeeding paragraphs) or form part of the *res gestæ* or transaction alleged against him, such as, for example, entries in his account books, etc.

Meaning of "confession."

73. In the following paragraphs the word "confession" means not merely a full confession of a person's guilt, but any statement, verbal or written (including the giving of a specimen of his handwriting) which may tend to show that he is guilty.

Confession must be voluntary.

74. The rule as to confessions is that before a confession can be received in evidence, it must be proved affirmatively by the prosecution that is was free and voluntary.

---

[1] *R.* v. *Thornhill* [1838] 8 C. & P. 575.

Confession when not deemed voluntary.

75. For this purpose a confession is deemed not to be free and voluntary if it appears to have been caused by any inducement, threat, or promise proceeding from a magistrate[1] or other person in authority or concerned in the charge (*e.g.*, the prosecutor or the person having the custody of the accused), and having reference to the charge against the accused person, whether addressed to him directly or brought to his knowledge indirectly; and if, in the opinion of the court, the inducement, threat, or promise gave the accused person reasonable grounds for supposing that by making a confession he would gain some advantage, or avoid some evil in reference to the proceedings against him.[2] Thus, on the trial of A for murdering B, a handbill issued by the Secretary of State, promising a reward and pardon to any accomplice who would confess, was brought to the knowledge of A, who under the influence of a hope of pardon, made a confession. It was held that the confession was not voluntary.[3]

Confession when deemed voluntary.

76. A confession does not cease to be voluntary merely because it appears to have been caused by the exhortations of a person in authority to make it as a matter of religious duty, or by an inducement collateral to the proceedings, or by inducements held out by a person having nothing to do with the apprehension, prosecution, or examination of the accused. Thus, A being charged with the murder of B, the chaplain of the gaol read the Commination Service to A, and exhorted him on religious grounds to confess his sins. A in consequence made a confession, and it was held that this confession was voluntary and admissible in evidence, inasmuch as the inducement amounted to a mere moral exhortation and did not refer to any temporal benefit to be derived by A.[4]

Confession made after removal of impression produced by threat, etc., deemed voluntary.

77. A confession is deemed to be voluntary if, in the opinion of the court, it is shown to have been made after the complete removal of the impression produced by any inducement, threat, or promise which would otherwise take away its voluntary character. Thus, A is accused of the murder of B, and C, a magistrate, tries to induce A to confess by promising to try to get him a pardon if he does so. The Secretary of State informs C that no pardon can be granted and this is communicated to A. After this A makes a statement. This is a voluntary confession.[5]

Question by, and statement to, police officers.

78. There are numerous reported cases in which the admissibility of confessions made to, or elicited by, police officers has been discussed; and it cannot be said that the law upon the point is even yet absolutely settled.

The Judges of the King's Bench Division have issued the following rules for the guidance of the police, and they are of course equally applicable to persons concerned with the arrest or custody of military offenders:—

"(1) When a police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in

[1] A C.O. investigating a charge, or an officer taking a summary of evidence, may be regarded as in the same position for this purpose as a magistrate.

[2] "No statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale." —*Ibrahim* v. *R.* L.R. [1914], A.C. 599.

[3] *R.* v. *Boswell* [1842] Car. & Marsh. 584, cited as an illustration by Steph., Dig. Ev., art. 22; *R.* v. *Thompson* L.R. [1893], 2 Q.B. 12.

[4] *R.* v. *Gilham* [1828], 1 Moo. C. C., 186, cited by Steph., Dig. Ev., art. 22.

[5] Steph., Dig. Ev., art. 22; *R.* v. *Clewes* [1830], 4 C. & P., 221.

respect thereof to any person or persons whether suspected or not, from whom he thinks that useful information can be obtained.

(2) Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking any questions or any further questions, as the case may be.

(3) Persons in custody should not be questioned without the usual caution being first administered.

(4) If the prisoner wishes to volunteer any statement, the usual caution should be administered.

It is desirable that the last two words of the usual caution should be omitted, and that caution should end with the words "be given in evidence."

(5) The caution to be administered to a prisoner, when he is *formally* charged, should therefore be in the following words: "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence."

Care should be taken to avoid any suggestion that his answers can only be used in evidence against him, as this may prevent an innocent person making a statement which might assist to clear him of the charge.

(6) A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely by reason of no caution having been given, but in such a case he should be cautioned as soon as possible.

(7) A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

(8) When two or more persons are charged with the same offence and statements are taken separately from the persons charged the police should not read these statements to the other persons charged, but each of such persons should be furnished by the police with a copy of such statements and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply, the usual caution should be administered.

(9) Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish."

Provided that such rules are observed there can be no question as to the admissibility of the statement. Whether non-observance

of them renders a statement inadmissible is perhaps doubtful; but the better view appears to be that a statement is in law admissible notwithstanding that it was obtained by a person in authority, and notwithstanding non-observance of the rules, if the prosecution satisfy the court that it was not in fact induced by any fear of prejudice or hope of advantage as explained in the preceding paragraphs.

Statements obtained unfairly.

79. At the same time it is contrary to the elementary principles of English law to endeavour to trap a man into incriminating himself. Though a confession obtained by fraud or deception, or under a promise of secrecy, or from a drunken man, or by unfair questioning, may be legally admissible, yet the person obtaining it will expose himself to judicial censure, and the judge may even consider himself justified in excluding the statement, if the confession was an unguarded answer made in circumstances that rendered it unreliable, or for some other reason unfair to be allowed in evidence against the prisoner.

Facts discovered through involuntary confession admissible.

80. Facts discovered in consequence of a confession improperly obtained, and so much of the confession as distinctly relates to those facts may be proved. Thus A, accused of burglary, make a confession to a policeman under an inducement which prevents it from being voluntary. Part of it is that A had thrown a lantern into a certain pond. The fact that he said so, and that the lantern was found in the pond in consequence, may be proved.[1]

Whole of confession must be given.

81. If a confession is given in evidence, the whole of it (subject as stated in para. 80) must be given, and not merely the parts disadvantageous to the accused person.

Confession made on oath or in previous proceedings.

82. A confession may be used as such against the person who makes it though it was given on oath, and though the proceeding in which it was given had reference to the same subject-matter as the proceeding in which it is to be used, and though the witness amy have refused to answer the questions put to him; but if, after refusing to answer such questions, the witness is improperly compelled to answer, his answers are not voluntary.[2] Thus A was charged with maliciously wounding B. Before the magistrates A had appeared as a witness for C, who was charged with the same offence. A's deposition was allowed to be used against him on his own trial.[3]

Statements made by a man when charged before his commanding officer, or at the taking of a summary evidence are admissible before a court-martial, if he was cautioned (see R.P. 4 (E)); but the proceedings of a court of inquiry, or any confession or statement made at a court of inquiry, cannot be used as evidence against an officer or soldier before a court-martial, unless the court-martial is one for the trial of an officer or soldier for wilfully giving false evidence before the court of inquiry.[4]

Against whom confession admissible.

83. The general rule is that a confession is not admissible as evidence against any one except the person who makes it.

---

[1] Steph., Dig. Ev., art. 22; *R.* v. *Gould* [1840], 9 C. & P., 364.
[2] Steph., Dig. Ev., art. 23.
[3] *R.* v. *Chidley and Cummins* [1860], 8 Cox, Crim. Ca., 365.
[4] R.P. 125A (G). The privilege under this R.P. does not extend to civil proceedings; see note 3 thereto.

Ch. VI

Rule (8) in para. 78 shows how such a statement may properly be brought to the notice of another person implicated in the offence who does not hear it made.

Where one prisoner in the hearing of another makes a confession implicating that other, it would appear to be admissible against that other to exactly the same extent as a statement made in his hearing by any other person—as to which see para. 48 *ante*.

(vi) *Who may give evidence*

General rule as to competency of witnesses.

84. As a general rule, every person is a competent witness. Formerly persons were disqualified by crime or interest, or by being parties to the proceedings, but these disqualifications have now been removed by statute,[1] and the circumstances which formerly created them do not affect the competency, though they may often affect the credibility, of a witness.

Competency of persons charged.

85. Under the general law as it stood before the Criminal Evidence Act, 1898, came into force, a person charged with an offence was not competent to give evidence on his own behalf, but many exceptions had been made to this rule by legislation, and the rule itself was finally abolished by that Act. Under the present law a person charged is a competent witness for the defence if he wishes to give evidence.

So, too, under the law as it stood before 1898, persons jointly charged and being tried together were not competent to give evidence either for or against each other. Under the present law a person charged jointly with another is a competent witness for the defence, but he cannot be called against his will by his co-defendant. If, therefore, an accused thinks that the evidence of a person whom it is proposed to try with him is material to his defence, but will not be given voluntarily, he should claim a separate trial.[2]

An accused person who gives evidence for the defence may be cross-examined by his co-defendants, and also by the prosecution with a view to establishing either his own guilt or that of his co-defendants.[3]

If the prosecution find it necessary to call one suspected participator in a crime as a witness against the others, the proper course is not to arraign him with them, or (if he has been so arraigned) to offer no evidence and take a verdict of acquittal. He can also be called if and when he has himself pleaded guilty.

Evidence of accomplices.

86. The evidence of an accomplice is admissible against his principal, and *vice versa*, subject, if they are tried together, to what has been stated in the preceding paragraph. As has been stated in para. 45 the evidence of an accomplice should always be received with great caution.

---

[1] Evidence Acts, 1843 and 1851; Criminal Evidence Act, 1898. The provisions of the last-mentioned Act were, in accordance with s. 6 of the Act, applied to courts-martial by R.P. 73 (B).

[2] See R.P. 16.

[3] *R.* v. *Macdonell or Macdonald* [1909], 2 Cr. App. Rep. 322; *R.* v. *Hadwen* L.R. [1902], 1 K.B. 882; *R.* v. *Paul* L.R. [1920], 2 K.B., 183.

Competency of wife.

87. The wife of a person charged is now a competent witness, but, except in certain special cases[1]—

(i) She can only give evidence for the defence; and,

(ii) She can only give evidence if her husband applies that she should do so.

These restrictions apply only to lawful wives.

Incompetency from idiocy, etc.

88. A witness is incompetent if, in the opinion of the court, he does not appear to have sufficient discretion. Thus an idiot cannot give evidence, but if a person of unsound mind is tendered as a witness, he may be sworn and give evidence, provided that the court consider that he is of competent understanding and is aware of the nature and obligation of an oath.[2]

Deaf and dumb persons not incompetent.

89. A witness unable to speak or hear is not incompetent, but may give his evidence by writing or by signs, or in any other manner in which he can make it intelligible, but such writing must be written and such signs made in open court. Evidence so given is deemed to be oral evidence.[3]

Evidence not intelligible to an accused must be translated to him if he is not defended by counsel: if he is so defended, then, with the approval of the judge, this requirement may be waived.

Children's evidence.

90. An infant may be sworn as a witness in any criminal case provided that such infant understands the nature and moral obligation of an oath. But where a child of tender years who is put forward as witness does not, in the opinion of the court, understand the nature of an oath, his or her evidence may be received though not given on oath, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; such evidence, however, requires to be corroborated (see para. 45 *ante*).[3]

Religious belief immaterial as to competency.

91. The particular form of the religious belief of a witness or his want of religious belief, does not affect his competency. If he takes an oath he may take it with such ceremonies and in such manner as makes it binding on his conscience.[4] If he objects to take an oath on the ground that he has no religious belief, or that taking an oath is contrary to his religious belief, he may make a solemn affirmation or declaration.[5]

Competency of member of court to give evidence.

92. A member of a court-martial is a competent witness in favour of the accused, and might, as such, be sworn to give evidence at any stage of the proceedings; but the Army Act and Rules of Procedure direct that a witness for the prosecution shall not sit on a court-martial for the trial of any person against whom he is a witness.[6]

---

[1] The special cases in which a wife can be called as a witness either for the prosecution or for the defence, and without the consent of the person charged, are where the accused is charged with an offence under the following enactments:— ss. 48–55 of the Offences against the Person Act, 1861; ss. 12 and 16 of the Married Women's Property Act, 1882; the Criminal Law Amendment Act, 1885; the Vagrancy Act, 1898; the Immoral Traffic (Scotland) Act, 1902; the Children Act, 1908 (Part II); the Criminal Law Amendment Act, 1912, s. 7; the Vagrancy Act, 1824, s. 3; the Punishment of Incest Act, 1908; Mental Deficiency Act, 1913, s. 56; Criminal Justice Administration Act, 1914, s. 28. The same rule applies in cases in which the wife is by common law a competent witness against her husband, *i.e.*, where the proceeding is against the husband for bodily injury or violence inflicted on his wife.

[2] Steph., Dig. Ev., art. 107.

[3] Children Act, 1908, s. 30 as amended by the Criminal Justice Administration Act, 1914; s. 28 (2); see also Criminal Law Amendment Act, 1885, s. 4.

[4] R.P. 30; and see Oaths Act, 1838.

[5] Oaths Act, 1888, s. 1; A.A. 52 (4); R.P. 82. See also Oaths Act, 1909.

[6] A.A. 50 (3); R.P. 19 (B) (ii) and 106 (D).

Distinction between competency and credibility.

93. It will be seen that the effect of the successive enactments which have gradually removed the disqualifications attaching to various classes of witnesses has been to draw a distinction between the *competency* of a witness and his *credibility*. No person is disqualified on moral or religious grounds, but his character may be such as to throw grave doubts on the value of his evidence. No relationship, except to a limited extent that of husband and wife, excludes from giving evidence. The parents may be examined on the trial of the child, the child on that of the parent, master for or against servant, and servant for or against master. The relationship of the witness to the person preferring the charge or the accused in such cases may affect the credibility of the witness, but does not exclude his evidence.

(vii) *Privilege of witnesses*

Person *competent* not always *compellable* to give evidence.

94. It by no means follows that, because a person is *competent* to give evidence, he is therefore *compellable* to do so. There are many cases in which a witness before a civil court may decline to answer a question or produce a document, and the like privileges are expressly extended by statute to witnesses before court-martial.[1]

Witness not to be compelled to criminate himself.

95. A witness (other than the accused himself when giving evidence on his own application, and as to the offence wherewith he is charged), cannot be compelled to answer a question if the answer would, in the opinion of the court, have a tendency to expose him to any criminal charge, penalty, or forfeiture, or to any military punishment. In practice the court should warn a witness that he cannot be compelled to answer any question tending to incriminate him; but a witness himself is not the sole judge whether his evidence will bring him into danger; the court must be satisfied that there really is reasonable ground to apprehend any such danger, and any doubt upon the matter will be solved in favour of the witness.

Rule as to accused giving evidence.

96. Where the accused offers himself as a witness he may be asked any question in cross-examination, nothwithstanding that it would tend to incriminate him as to the offence charged. But he may not be asked, and if he is asked must not be required to answer, any question tending to show that he has committed, or been convicted of, or been charged with, any offence other than that wherewith he is then charged, or is of bad character, unless—

(i) The proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence with which he is then charged; or,

(ii) He has personally or by his advocate asked questions of the witnesses for the prosecution, with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the witnesses for the prosecution; or,

(iii) He has given evidence against any other person charged with the same offence.[2]

---

[1] See A.A. 128, and R.P. 73 (B).
[2] See R.P. 80.

He may not be asked questions tending to criminate his wife.

Evidence tending to show that the accused has been guilty of criminal acts other than those covered by the charge is only admissible in the circumstances mentioned in para. 21 *et seq* above.

Privilege does not extend to answers showing civil liability.

97. The privilege as to incriminating answers does not cover answers merely tending to establish a civil liability. No one is excused from answering a question or producing a document only because the answer or document may establish or tend to establish that he owes a debt, or is otherwise liable to any civil suit, either at the instance of the Crown or of any other person.[1]

When privilege may be waived by witness.

98. The privilege of not answering for the above reasons is the privilege of the witness, and therefore he may waive it, but the privilege mentioned in the following paragraph is for the protection of other parties, and cannot be waived except with their consent.

Evidence as to affairs of State.

99. No one can be compelled to give evidence relating to any affairs of State, or as to official communications between public officers upon public affairs, except with the permission of the officer at the head of the department concerned. This class of privilege is based on considerations of public policy.

On this principle, a confidential report, or letter, or official information of a confidential character, although it may refer to matters which a court-martial may have decided to be relevant to the inquiry before it, cannot be produced or disclosed except by consent of the superior authority; and this consent is refused if the production or disclosure is considered detrimental to the public service. Proof of the refusal should be laid before the court by the examination of a witness, or by a written communication, read in open court, and attached to the proceedings.

Privilege as to proceedings of court of inquiry.

100. So also, the proceedings of a court of inquiry cannot be called for by courts-martial, nor witnesses examined as to their contents; nor is any confession or statement made at a court of inquiry admissible against an officer or soldier before a court-martial. The only exception to this rule is in the case of a court-martial held for the trial of an officer or soldier for wilfully giving false evidence before the court of inquiry.[2]

Information as to commission of offences.

101. Again, in cases in which the Government is immediately concerned, no witness can be compelled to answer any question the answer to which would tend to discover the names of persons by or to whom information was given as to the commission of offences. It is, as a rule, for the court to decide whether the permitting of any such question would or would not, in the circumstances of the particular case, be injurious to the administration of justice.[3]

Communications during marriage.

102. A husband is not compellable to disclose any communication made to him by his wife during the marriage; and a wife is not compellable to disclose any communication made to her by her husband during the marriage.[4]

Professional communications.

103. A legal adviser is not permitted, whether during or after the termination of his employment as such, unless with his client's express consent, to disclose any communication, oral or documentary, made

[1] 46 Geo. III, c. 37.
[2] See also para. 82 above, and R.P. 125A (G).
[3] Steph., Dig. Ev., art. 113.
[4] Criminal Evidence Act, 1898; and R.P. 80 (E).

Ch. VI

to him *as such legal adviser*, by or on behalf of his client, during, in the course of, and for the purpose of his employment, or to disclose any advice given by him to his client, during, in the course of, and for the purpose of such employment. But this protection does not extend to:—

(1) Any such communication if made in furtherance of any criminal purpose;

(2) Any fact with which the legal adviser became acquainted otherwise than in his character as such.

The expression "legal adviser" includes barristers and solicitors, their clerks, and interpreters between them and their clients, and the person representing or assisting the accused during trial before a court-martial.[1]

Doctors and clergymen not privileged.

104. Medical men and clergymen are not privileged from the disclosure of communications made to them in professional confidence, but it is not usual to press for the disclosure of communications so made to clergymen.

Questions to be entered on proceedings whether answered or not.

105. The questions, whether answered or not, should be entered on the proceedings. When the witness claims the privilege of not answering, it is for the court to decide whether the question is within any of the exceptions. Courts-martial, like other courts, should in practice interpose by informing a witness, at the time when a question is put to him, that he is not bound to answer. Any such interposition, and any claim of privilege by the witness, and the fact whether the witness is required to answer or not, should be noted on the proceedings.

(viii) *How evidence is to be given*

Mode of giving evidence dealt with by Rules.

106. The mode in which evidence is to be given before courts-martial is fully dealt with in the Rules of Procedure, to which the following paragraphs must be taken as supplemental.

Points requiring attention of court.

107. It will be the duty of the court in every case to see that the rules of evidence are strictly conformed to. The following points will require special attention in relation to any evidence that may be tendered:—

(*a*) That it is relevant to the issue.

(*b*) That it is the best evidence procurable.

(*c*) That it is not within the rule rejecting hearsay evidence.

(*d*) That (except in the case of experts) it is not a mere expression of opinion.

(*e*) That if it is a confession or admission, it is legally admissible.

(*f*) That if it is a document, it is legally admissible and properly put in evidence.[2]

(*g*) That no document or other thing which has not been properly put in is used for the purposes of the trial.[3]

---

[1] Steph., Dig. Ev., art. 115.

[2] A document is said to be "put in" when it is produced to the court, and, unless verification by a witness is unnecessary (para. 38), properly verified. It should be noted that a document which is used by a witness merely for the purpose of refreshing his memory is not produced to the court or "put in."

[3] This must, however, be taken subject to the qualification that for purposes of *identification*, etc., any document or thing may be shown to a witness before it has been formally proved and put in. See para. 112.

(*h*) That any witnesses called are legally competent to give evidence.

(*i*) That any document with which a witness proposes to refresh his memory can legally be used by him for the purpose.

(*k*) That the examination of witnesses is fairly and properly conducted.

Examination of witnesses.

108. This last point requires a little more detailed notice. The examination of a witness by the person who calls him is called his examination, or direct examination, or examination-in-chief; and on this examination the questions must be relevant to the issue, that is to say, must relate to the matters in issue at the trial. The court must see that a witness is not compelled to answer any question in respect of which he is entitled to claim privilege; and must also see that, as far as possible, a witness is so dealt with that his honest belief is obtained from him.

Leading questions.

109. Accordingly, a witness must not be asked in examination-in-chief leading questions, that is to say, questions suggesting the answer which the person putting the question wishes or expects to receive, or suggesting disputed facts, as to which the witness is to testify. For instance, a witness must not be asked, "Did the accused then go into the barrack-room?" but "What did the accused do next?" If it were not for this rule a favourable and dishonest witness might be made to give any evidence that is desired. It would be mere waste of time to enforce the rule where the questions asked are simply introductory and form no part of the real substance of the inquiry, or where they relate to matters which, though material, are not disputed. But where a question relates to a contested point, which is either directly conclusive of the matter in issue, or directly and proximately connected with it, the rule should be strictly enforced, and no question should be allowed in a form which directly or indirectly suggests to the witness the answer desired, or which, embodying a material fact, admits of a conclusive answer by a simple "Yes" or "No."

Test of what are leading questions.

110. Care must, however, be taken in enforcing this rule not to exclude questions which do not really suggest an answer, but merely direct the attention of the witness to the subject as to which he is questioned. It is often, indeed, extremely difficult in practice to determine whether or not a question is in a leading form, and in all such cases the real test should be whether or not the examination is being conducted fairly and with the object of eliciting the honest belief of the witness.

Examples of fair and unfair questions.

111. The following may be taken as examples of fair and unfair examination of a witness. Suppose a man to be charged with the murder of another by stabbing, the body having been found at the upper end of a certain street, and a witness to be called to speak to the circumstances in which the blow was struck. There would be no objection to asking the witness—

If he remembered the 12th August, and—

If he was in North Street about noon on that day.

These questions, though in a leading form, are merely introductory. If the defence of the accused was that he had struck the blow, but

Ch. VI

that he had done it in self-defence, there would be no objection to going a little further and asking—

Whether he saw the deceased and the accused there.

But from this point all leading questions should be avoided, and the examination should be continued in some such form as this:

In what part of the street were the accused and deceased when you first saw them?

How far were you from the accused and the deceased?

Tell us in your own words exactly what passed.

To ask, instead of the first question—

Were you at the upper end of the street when you first saw them?

would be highly improper, as it might be very important in considering whether or not there had been a long quarrel or scuffle, to know whether they had moved far from the place where the witness first saw them to the place where the body was found. It would obviously be still more improper to ask,

Did you see the accused go up stealthily behind the deceased and strike him a blow with a knife?

or any question of that character.

If, on the other hand, the defence set up were an *alibi*, it would be improper to ask directly after the introductory questions—

Whether the witness saw the deceased and the accused there.

The questions in that event should rather be—

Whether he saw anyone there.

Whether he could identify them.

Whether he can identify anyone in court as having been present, though, finally, if an answer could not be got in any other way, the attention of the witness might be called to the accused, and he might be distinctly asked,

Whether he saw that person there.

But this should not be done until the witness had said that he saw some person there, and that he would know them again.

Rule as to directing attention to particular persons and things.

112. The rule in these cases is, that the attention of a witness who has alluded to any person or thing, may be called to a particular person or thing for the purpose of identification, and that the witness may be asked directly whether that is the person or thing to which he alluded; but in practice this should only be done after examination in the ordinary way has failed to elicit any distinct replies. When any article, such as a stick, belt, or document, is produced in court for the purpose of identification, the witness may be asked such questions as:—Whether he recognizes it, and whether he saw anything done with it, or to it; but such a question as:—Whether he saw A strike B with the stick or belt, or whether he saw A make an alteration in the document, should not be admitted.

Exceptions in case of hostile witness.

113. Of course, if a person calls a witness and the witness appears to be directly hostile to him, or interested on the other side, or unwilling to give evidence, the reason of the rule fails, and the court should allow the person calling the witness not only to ask him leading questions, but to cross-examine him, and to treat him in every respect as though he were a witness called by the other

side except that (as he had been put forward as worthy of credit by the person calling him) that person must not be permitted, either by cross-examination or by direct evidence, to impeach his credit by general evidence of bad character.[1]

Rules as to cross-examination.

114. When the examination-in-chief is finished the opposite party cross-examines the witness. In cross-examination leading questions and questions not directly bearing on the issue may be put, and must be answered, as the cross-examining party is entitled to test the examination-in-chief by every means in his power; and questions are often put in cross-examination for the sole purpose of putting a witness who is supposed to have learnt up the story, off his guard. Questions also may be put in cross-examination which tend either to test the accuracy or credibility of the witness or to shake his credit by impeaching his motives or injuring his character, though such questions cannot be put on the examination-in-chief or re-examination.

Further observations on cross-examination.

115. Questions which assume that facts have been proved which have not been proved, or that answers have been given contrary to the fact, are improper and should not be allowed even in cross-examination. Again, though questions not directly bearing on the issue may be asked, a witness should not be pressed in cross-examination as to any facts, which, if admitted, would not affect the matter at issue or his credibility. If the person cross-examining intends to adduce evidence contradicting the evidence given by the witness, he should be required to put to the witness in cross-examination the substance of the evidence which he proposes to adduce, in order to give him an opportunity of retracting or explaining.

A witness under cross-examination may be asked any questions which tend to test his accuracy, veracity, or credibility, or (except in the case of a witness originally called by the person cross-examining him) to shake his credit by injuring his character. But a witness may of course decline to answer a question as to which he is entitled to claim privilege, and the right of asking questions tending merely to discredit, a right which has sometimes been seriously abused in civil courts, is qualified in the case of trials before courts-martial by Rule 92 of the Rules of Procedure.

Exclusion of evidence to contradict answers as to questions testing veracity.

116. Evidence cannot be given to contradict the answer of any witness to a question which only tends to shake his credit by injuring his character, except:—

(i) Where the witness is asked whether he has ever been convicted of any felony or misdemeanour and denies or refuses to answer[2];

(ii) Where he is asked a question tending to show that he is biased or partial;

(iii) Where he has previously made inconsistent statements;

(iv) Where he can be shown to be a notorious liar.

In the first two cases proof may be given of the truth of the facts suggested. The other two cases are dealt with in the following paragraphs.

Cross examination as to previous statements.

117. A witness may be asked whether he has, on a previous occasion, made a statement relative to the issue and inconsistent with his present

[1] Criminal Procedure Act, 1865, s. 3.

[2] Criminal Procedure Act, 1865, s. 6. Such questions could not be put to an accused person giving evidence except in the cases mentioned in para. 96.

testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and if he does not admit that he made such a statement, proof may be given that he did in fact make it. The summary of evidence may be used to prove any statement which the witness made, and which it is proposed to contradict, and evidence may be called to prove that the evidence of a witness, though consistent with the summary, is not consistent with the evidence given by him at the investigation before the commanding officer. Such a question may be put, even though the statement may have been in writing (notwithstanding the rules as to documentary evidence), and even without the writing being shown to him or proved in the first instance; though it should be shown to him afterwards, and his attention called to those parts of the writing which are to be used to contradict him, as otherwise the contradictory proof cannot be given.[1]

Impeaching credit of witnesses.

118. The credit of any witness may be impeached by the adverse party by the evidence of persons who swear that they, from their knowledge of the witness, believe him to be unworthy of credit on his oath. Such persons may not, on their examination-in-chief, give reasons for their belief, but they may be asked their reasons in cross-examination, and their answers cannot be contradicted. When the credit of a witness is so impeached, the party who called the witness may give evidence in reply to show that the witness is worthy of credit.

Rule as to re-examination.

119. At the conclusion of the cross-examination the person who called the witness may, if he pleases, re-examine him; but the re-examination must be directed exclusively to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the court, introduced in re-examination, the other side may further cross-examine upon it.

Question by court.

120. After the re-examination of a witness is closed, the court often ask him questions to clear up some point which they regard as material.

Frequently, too, the court recall a witness, or allow him to be recalled for further examination; and sometimes they even call and examine a witness who has not been called by either party.[2] In any of these cases the party affected by the answers should be allowed to suggest further questions, or to cross-examine (as the case may require).

If a witness is so called or recalled after the case for the accused is closed, the accused should also be allowed to give further evidence in rebuttal, and to comment upon the fresh evidence if he has already made his address.[3]

---

[1] Criminal Procedure Act, 1865, ss. 4, 5.
[2] See *R.* v. *Jackson* [1919] 14 Cr. App. Rep. 41; *R.* v. *Dora Harris* L.R. [1927] 2 K.B. 587.
[3] See R.P. 85, 86.

CHAPTER VII

OFFENCES PUNISHABLE BY ORDINARY LAW

Introductory

Liability of soldier to civil as well as military law.

1. Sections 4 to 40 of the Army Act specify the various military offences of which a person subject to military law may be guilty. The sections embrace not only offences against discipline, but also offences against the persons and property of persons subject to military law. Nearly all the offences of which a soldier can be guilty as a soldier and as against another soldier are included in these sections.

A soldier, however, is not only a soldier but a citizen also, and as such is subject to the civil as well as to the military law. An act which constitutes an offence if committed by a civilian is none the less an offence if committed by a soldier, and a soldier not less than a civilian can be tried and punished for such an offence by the civil courts.[1]

Jurisdiction of military courts over civil offences.

2. In order to give military courts complete jurisdiction over soldiers, courts-martial are authorized to try and punish soldiers for civil offences, namely, offences which, if committed in England, are punishable by the law of England.

They are not allowed to try the most serious offences[2]—treason, murder, manslaughter, treason-felony, or rape—if those offences can, with reasonable convenience, be tried by a civil court. They are, therefore, prohibited from trying any such offence if it is committed in the United Kingdom, or if it is committed anywhere else in the King's dominions, except Gibraltar, within a hundred miles from a place where the offender can be tried by a civil court, unless indeed the offence is committed on active service.

Subject to the above exceptions, a court-martial can try all civil offences of a soldier wherever committed.

Principles on which jurisdiction should be exercised.

3. But though this wide power of trial is given, it is not as a rule expedient to exercise the power universally.

Where troops are stationed at places having no available civil courts under British judges within a reasonable distance, or are stationed in a foreign country, and the only law to which the troops are subject is administered by military tribunals, it is necessary to try all offences committed by soldiers by courts-martial.

But in the United Kingdom, in the Dominions, and in most of the colonies, where there are regular civil courts close by, it is, as a general rule, desirable to try by a civil court a civil offence committed by a person subject to military law if the offence is one which relates to the property or person of a civilian, or if the civil authorities intimate a desire to bring the case before a civil court.

This general rule is, however, subject to qualifications. The line dividing the military from the civil offence may be narrow. The offence may have been committed within the barracks or military

[1] A.A. 41 (A), 162 (2), and Ch. VIII.
[2] A.A. 41.

Ch. VII

lines. There may be a doubt whether the person affected by the offence is or is not a civilian. The soldier may be one of a body of troops about to sail abroad. There may be reasons making the prompt infliction of punishment expedient. In any such case it may be desirable to try the offence by court-martial.

There may be also considerations arising out of the importance of maintaining discipline. If offences of a particular kind, or offences generally, are rife in a corps or at a station, it may be necessary, for the sake of discipline, to try every offence, whether civil or military, by court-martial, so that the punishment may be prompt and in accordance with the requirements of discipline.

The heinousness of an offence is also an element for consideration. A trifling offence, such as would, if tried before a civil court, be properly punishable by a small fine, may well be punished by the military tribunal immediately, especially if the case is one in which stoppages may be ordered to make good damage occasioned by the offence.[1] On the other hand, a very serious offence, especially one which would ordinarily be tried by a jury, had better be relegated to the civil court, as should also any case where intricate questions of law are likely to arise.

Object of the chapter.

4. The object of this chapter is to give some description of the civil offences which may come before courts-martial. The list is not exhaustive, as no scientific classification of offences has been attempted, but the more common offences have been treated in greater detail than those which experience shows rarely, if ever, to come within the cognizance of courts-martial.[2]

Before proceeding to a description of the various offences it will be convenient to discuss, first, the punishments which may be awarded, and, secondly, the general principles as to criminal responsibility, principles, it must be remembered, which are applicable to military not less than to civil offences.

(i) *Punishments*

Punishments.

5. Section 41 of the Army Act specifies the punishments which may be awarded for the most serious offences, *i.e.*, treason, murder, manslaughter, treason-felony and rape. With regard to every other civil offence, the effect of the section is to empower courts-martial to award as a maximum punishment either, in the case of an officer cashiering, or in the case of a soldier two years' imprisonment, with or without hard labour, or the punishment which under the civil law may be awarded for the offence. This rule is, of course, subject to the general limitation on the powers of punishment by district courts-martial[3] and to the general prohibition applicable to all courts-martial against awarding a period of imprisonment exceeding two years or penal servitude for a term less than three years.[1] In the table at the

[1] A.A. 138 (3).

[2] To those who wish for a more detailed knowledge of the criminal law of England the following authorities are recommended:— Russell on Crimes and Misdemeanours, Archbold's Pleadings and Evidence in Criminal Cases, Kenny's Outlines of Criminal Law, Stephen's Digest of Criminal Law, Stephen's General View of the Criminal Law, the Report of the Criminal Code Bill Commission, 1879, and the Article on Criminal Law and Procedure in Halsbury's "Laws of England." A convention summary of the law relating to each particular offence will be found in the Encyclopædia of the Laws of England (edited by Mr. A. W. Renton), under the proper heading.

[3] A.A. 48 (6). Under this provision a district court-martial may award any punishment except death or penal servitude, but cannot try an officer.

end of this chapter will be found the punishments which a civil court can award in respect of each of the offences described in the chapter. A comparison of the various punishments will be a guide to the court as the the heinousness of each offence inthe eye of the law. It must be remembered that each punishment specified in the table is a maximum and that, except in the case of murder, any less punishment may be awarded by a court-martial for a civil offence even if such punishment is not one which a civil court could have awarded, *e.g.*, discharge with ignominy from His Majesty's service. In awarding punishment for civil offence a court-martial should be guided by exactly the same principles as those which guide them in punishing military offences.[2]

(ii) *Responsibility for Crime*

Criminal responsibility.

6. The general rule is that a person is responsible for the natural consequences of his acts. But there are cases in which it would be obviously unfair to make a person criminally responsible for doing a particular act, though in ordinary circumstances such an act would be an offence.

Children.

7. A child is considered to be incapable of committing an offence before the age of eight years[2a]; and any act of a child between the ages of eight and fourteen can only be held to be an offence if it is shown affirmatively that the child had sufficient capacity to know the nature and consequences of his act, and to appreciate that he was doing wrong.

Insane persons.

8. A person cannot be convicted on a criminal charge in respect of an act done or omission made by him if it is proved that at the time when he did the act or made the omission he was labouring under such defect of reason through disease of the mind as made him incapable of knowing the nature and quality of the act he was doing, or, if he did know it, that such an act was wrong.[3] Thus, if a man kills another under the insane delusion that he is breaking a jar, he will not be criminally responsible.

Every person is, however, presumed to be sane and to be responsible for his acts until the contrary is proved, and it must, therefore, be clearly established by the defence that the accused is brought within the terms of the exception as above laid down before he can have the benefit of it. Unless a person is brought strictly within the terms of the exception it is no excuse whatever to show that his mind is affected by disease. For instance, the fact that a person is under the delusion that his nose is made of glass will not in any way excuse him if he commits an offence, unless he can prove that the delusion had a connection with the offence.

It is immaterial whether the unsoundness of mind is permanent or only temporary, whether it is due to natural imbecility or produced by disease, or whether the disease itself is due to the sufferer's own dissipation, as, for instance, in the case of *delirium tremens*.

---

[1] A.A. 44, *(b)* and *(j)* and proviso (1B).
[2] See Ch. V, paras. 76–80.
[2a] Children and Young Persons Act, 1933, s. 50.
[3] When on the trial by court-martial of a person charged with an offence it appears that such person did the act or made the omission with which he is charged but that he was insane at the time when he did or made the same, the court must find specially the fact of his insanity—A.A. 130 (2).

Temporary intoxication.

9. Temporary intoxication (from liquor or drugs)—as distinct from mental disease, which alcoholism, etc., may bring on—is not (if voluntary) in itself an excuse for crime; but evidence of drunkenness which rendered the accused incapable of forming the specific intent essential to constitute the crime must be taken into consideration together with the other facts proved in order to determine whether or not he had that intent.

Evidence of drunkenness falling short of a proved incapacity in the accused to form the essential intent, and establishing merely that his mind was affected by drink so that he more readily gave way to some violent passion does not rebut the ordinary presumption that a man intends the natural consequences of his acts.[1]

Compulsion.

10. An act may also be excused if committed by a person acting in subjection to the power of others, provided that he is compelled to act as he does by threats of death or serious physical injury, continued during the whole time that he so acts, and that the part taken by him in the unlawful act or acts is throughout strictly a subordinate part.

Necessity.

11. In extreme cases an act may sometimes be justified on the plea of necessity, if it is done by a person in order to avoid inevitable and irreparable evil to himself or those whom he is bound to protect, though, or course, the act must not be disproportionate to the end to be attained, nor must more be done than is absolute necessary to attain that end.[2] Thus, if the captain of a steamer, without any fault on his part, finds himself in such a position that he must either change his course or run down a boat with twenty people in it, he is justified in changing his course, although by so doing he runs a risk of swamping a boat with two people in it.

Ignorance of law.

12. Ignorance of *law* is no defence to a criminal charge. Thus, if A, a foreigner unacquainted with the law of England, kills B in a duel fought in England, A's act is murder, although he may have supposed it to be lawful. But ignorance of law may properly be taken into consideration in determining the amount of punishment to be awarded.

Ignorance of fact.

13. Ignorance or mistake of *fact* may, in some cases, be an excuse; thus, an honest and reasonable belief in the existence of facts which, if true, would make the act with which a person is charged an innocent act, would generally provide a good defence. But this excuse will not avail a person if his ignorance proceeds from wilfulness or negligence. In some few cases[3], even an honest and reasonable belief will not protect a man, if he is actually mistaken, and a man therefore does the act at his peril.

Parties to offence.

14. The responsibility of a person for the natural consequences of his acts is not limited to the simple case where he is present, and actually commits an offence with his own hand. Thus, if a soldier by design or through criminal (*i.e.*, culpable) negligence mixes a ball cartridge with blank cartridges, he will be criminally responsible if injury results, even in his absence.

---

[1] *Director of Pub. Pros.* v. *Beard*, L. R. [1920] A.C. 479.
[2] See para. 30 *(post)* as to self-defence.
[3] See para. 38.

Innocent agent.

15. Again, where a person commits an offence through the medium of an innocent agent, he is criminally responsible even though absent when the offence is committed. Thus, if a soldier, knowing a note to be forged, induces a comrade, who does not know it to be forged, to get it changed, or, knowing that a pair of boots does not belong to him, induces a comrade to steal them by representing that they were his own property and not the property of the actual possessor, in both these cases the soldier, but not his comrade, is criminally responsible.

Assisting offence.

16. If a person is present at the commission of an offence and aids and abets its commission by another person, he is responsible as though he had committed it himself. But it is not necessary that he should be actually present as an eye-witness or ear-witness of the transaction; he is, in law, present aiding and abetting if, with the intention of giving assistance, he is near enough to afford it should occasion arise; thus, if two or three men go out together to commit a burglary, and one waits at the corner of the street to keep watch while the others commit the burglary, the watcher will be guilty of burglary equally with the others. On the other hand, if the offence charged involves some special intent, it must be shown that the assistant was cognizant of the intentions of the person whom he assisted; thus, on a charge of wounding with intent to murder, it must be shown that an assistant not only assisted the principal offender in what he did, but also knew what his intention was, before the former can be convicted on the full charge.

Common intent.

17. If several persons combine together for an unlawful purpose or for a lawful purpose to be effected by unlawful means, each is responsible for every offence committed by any one of them in furtherance of that purpose, but not for any offence committed by another member of the party which is unconnected with the common purpose, unless he personally instigates or assists in its commission. Thus, if a police officer goes with an assistant to arrest A in a house and all the occupants of this house combine to resist the arrest, and in the struggle the assistant is killed, the occupants are responsible. But if two persons go out to commit theft and one unknown to the other puts a pistol in his pocket and shoots a man the other is not responsible.

Instigating an offence.

18. A person is in all cases fully responsible for any offence which is committed by another at his instigation, even though the offence may be committed in a different way from the one that he suggested; as, for instance, if a person were to instigate another to murder a man by shooting him, and the murderer stabbed the man instead, the instigator would still be responsible. Further, he is responsible for any other offence which may, and was likely to result from such instigation. But a person will not be responsible for an offence which he may have instigated another to commit, if he countermanded its execution, and notice of the countermand was received by the person instigated before the commission of the offence[1]: nor where he instigates one offence will he be responsible for the commission of another unconnected therewith.

---

[1] Of course, though the execution of the crime was countermanded, the instigator would still be liable to be prosecuted for the misdemeanour of inciting to commit an offence, though not for the offence itself.

Knowledge of intended offence.

19. Mere knowledge that a person is about to commit an offence, and even conduct influenced by such knowledge, will not make a person responsible for that offence unless he does something actively to encourage its commission; for instance, if a man knows that two others are going to fight a prize-fight, and acts as stake-holder, but takes no part in the circumstances attending the fight, at which he is not present, and one of the prize-fighters is killed, the stake-holder will not be responsible for his death.

Accessory before the fact.

20. When a person is responsible for an offence under paras. 16, 17 and 18, he is equally responsible and liable to the same punishment as the principal offender; he may be tried before the principal offender has been tried and may be convicted even if the principal offender has been acquitted. Such a person if not present either actually or constructively at the actual commission of the offence is called an accessory before the fact, if the offence is a felony.

Accessory after the fact.

21. A person may in some cases incur criminal responsibility, even after an offence has been committed, if the offence is a *felony*,[1] and he becomes what is called an accessory after the fact, *i.e.*, if he assists the felon to evade justice (knowing that he has committed a felony) either by comforting, hiding, or otherwise actively assisting him, or by opposing his apprehension, or rescuing him from arrest, or by voluntarily permitting the felon to escape from his custody where the accessory is himself the custodian. Merely allowing a felon to escape, without giving him active assistance, will not make a person not being his custodian an accessory after the fact. All persons who, in felonies, would be accessories after the fact, are, in misdemeanours,[1] principals and may be charged and punished as such.

Attempt to commit offence.

22. An attempt to commit or to procure the commission of an offence is in itself an offence and renders a person criminally responsible even though th cattempt is unsuccessful.[2]

A mere intention to commit an offence unaccompanied by acts will not amount to an actual "attempt," nor will acts themselves if they are merely preparatory to the commission of the offence. For instance, if a man goes to Birmingham to buy dies to make bad money, the mere going there is not an attempt to make bad money. Some act must be done which is more than an intention or preparation, and which is a real step towards the commission of the offence; thus, if the man had not only gone to Birmingham, but had actually bought the dies, he would have been guilty of an attempt to make bad money.

It is no defence to a charge of attempting to commit a crime that it was legally or physically impossible for the offender to have committed the full offence.

Where a person is charged with committing a felony or misdemeanour but the evidence shows merely an attempt to commit that offence, a jury may convict him of the attempt to commit the offence charged. A court-martial has the same power as a jury in this respect.[3]

---

[1] As to what offences are felonies or misdemeanours, see table at end of chapter.
[2] As to attempts to murder, see para. 48; and as to what amounts to an attempt to shoot, see para. 35 (footnote 3).
[3] See A.A. 56 (6).

Intention.

23. In some cases the intention—that is to say, the immediate intention as distinguished from the motive—with which an act is committed becomes essential and must be proved. Intention is not, however, capable of positive proof; it can only be implied from overt acts, and, where this is the case, the intention may either be proved by independent evidence, as, for instance, by words proved to have been used by the offender or by a previous course of conduct,[1] or may be presumed from the act itself, according to the maxim that a man intends the natural consequences of his own act. In other words, the mode of discovering a man's intention is to consider what were at the time of his act the natural consequences of that act. Thus, if A sets fire to B's mill, the intent of A to injure B is inferred as being a natural consequence of the act of A in setting fire to the mill.

If a man bound by law to perform any duty does an act which necessarily causes, or most probably will cause, a failure in the performance of that duty, he will be held in law to have intended to fail, and therefore to have wilfully failed, to perform that duty.

Thus, for example, if one soldier in charge of another who is in military custody leaves him in a public-house, and goes away to visit a friend elsewhere, and the soldier in custody escapes, the soldier in charge of him must be considered to have wilfully permitted him to escape, because the escape was the natural result of the act; but if there was no evidence of any deliberate act of the soldier contrary to his duty, or if the escape was due to mere ordinary carelessness in the course of the performance of the soldier's duty, then he could not be held wilfully to have permitted the escape.

Motive.

24. The motive for which a crime is committed is not an essential ingredient of that crime, but it may often serve as a clue to and explain the immediate intention.

Consent.

25. Generally speaking, a person will not be criminally responsible for an act affecting the person or property of another if done with that other's consent. This does not apply to cases of killing or maiming, except when the killing or maiming results from a surgical or some similar operation reasonably and properly performed for the sufferer.[2] Thus, if one soldier with the consent or even at the request of another cuts off that other's forefinger with a view to enable him to obtain his discharge, the consent or request does not relieve the former of responsibility. The consent must be free and must not be extorted by fear of injury or given under a misapprehension of fact. Such a consent, or the consent of a person of unsound mind, of a child, or of a person in a state of intoxication, will not relieve the person who does the act of responsibility if the act apart from the consent would constitute an offence.

Accident.

26. A person is not criminally responsible for the result of a pure accident which is not to be attributed in any way to any carelessness or negligence, or to an unlawful act on his part.

Thus, if a woodcutter is lawfully cutting down a tree and the head of his axe flies off, or if a man is lawfully riding down a road and his

---

[1] See Ch. VI, paras. 23–26 and 96.

[2] In cases of this kind the consent of the sufferer will be presumed if he is unable to give it (*e.g.*, if he is unconscious from the loss of blood).

horse is whipped by another person, and caused to start off, of if man is lawfully shooting at game or any other object, and in any these cases there result to a bystander injuries which cannot be attributed to negligence on the part of the woodcutter, rider, or shoote as the case may be, he will not be responsible for the injuries caused.

On the other hand, if a person points a gun at another in sport a pulls the trigger without having good grounds for believing, or havi taken any proper precautions to ascertain, that the gun was unloade he will be responsible if death or injury results, as the accident mig clearly have been prevented if he had not been culpably negligent.

In each of the above illustrations it will be noticed that it is assume that the act from which the injuries resulted was not in itself an u lawful act. For if the act was in itself unlawful, as if the woodcutt was doing an unlawful and malicious injury to the property of anothe if the rider was a horse thief riding away with a stolen horse or if t shooter was a poacher, the offender would in each case be criminal responsible for the injuries caused. This qualification is, howeve confined to the cases of acts which are in themselves *unlawful*, and n mere breaches of excise laws or similar regulations; for instance, if t shooter, instead of being a poacher, was merely shooting without gun licence, this would not of itself render him criminally responsibl

Negligence.

27. If a person fails to take proper precautions when doing anythi which is in its nature dangerous, he will be responsible though he h not the least intention of bringing about the consequences of his ac For instance, if a soldier fires his rifle without taking the precautio proper under the particular circumstances and the bullet kills a ma the soldier will be criminally responsible for his death.

(ii) *Responsibility for the Use of Force*

Use of force.

28. The general rule is that a person is criminally responsible f the use of force, but there are cases where the use of force is justifiabl The amount of force which may be so used and the circumstanc under which it may be used vary widely.

Amount of force to be used.

29. In some cases any amount of force may be used, even if it e tails bodily injury or even death; in other cases any amount of for may be used provided that it is not used in a manner intended likely to cause death or grievous bodily harm.

The general principle applicable to all cases is that *no more for* may be used in any case than the person using it believes, and h reasonable grounds for believing, to be necessary to effect the obje in respect of which he is entitled to use force. So long as this princip is observed, a person is not responsible for the consequences whic may result in any particular case from the use of any force which not in excess of that allowed in the class of cases to which it belong Nor will a person be responsible if death accidentally results from th legitimate use of force.

---

[1] See also para. 31.

30. The most important cases in which the use of force is justifiable are cases relating to administration of justice, prevention of crime, self-defence, the defence of property, the preservation of discipline, and the defence of the realm. Cases in which use of force is justifiable.

A person acting as a ministerial officer in execution of the orders of some superior authority, and any person lawfully assisting him, may use force in obedience to the orders of the superior authority, if that authority when giving the order is acting as a court; that is to say, acting in a judicial capacity, in the exercise of some jurisdiction conferred by law.

The general rule in such cases is that any duly authorized person is justified in using whatever force may be necessary in order to execute the lawful order of a court of competent authority, and in overcoming any violent resistance which may be made to the lawful use of such force, as, for instance, a police officer in executing a warrant of arrest. But such a person must not use such force as is either likely or intended to cause death or grievous bodily harm (unless he is violently resisted), except where he is specially required to do so by the order itself, or where the order is a warrant of arrest for treason, felony,[1] or piracy, in which cases he may at once use whatever amount of force may be necessary. Should a person be unable to justify himself under the rule above stated, it will in general be no excuse for him to show that he acted under the orders of some superior civil or military authority. His justification will, in such cases, depend upon the same considerations as though he had acted entirely on his own responsibility; and the fact of his having received the orders will merely be of importance as a fact in the case which may throw light upon the state of his mind, as to reasonable belief, intent, or otherwise.

If a person believes on reasonable grounds that another is about to commit any treason or violent crime he is justified in using any amount of force in preventing its commission. Similarly, any amount of force may be used by an officer of justice to execute a warrant of arrest for treason or felony, provided in either case that the object for which force is used cannot be otherwise accomplished.

If a person is lawfully called upon to assist a police officer in the execution of his duty, he is bound to go to the officer's assistance, and will be justified in using force to the same extent as the officer himself.

The law respecting the use of force for the suppression of riots and breaches of the peace is dealt with in another part of this work.[2]

A person may in all cases use any amount of force which is reasonably necessary for the defence of himself or his property, if he is not himself in the wrong.[3]

A person who is in peaceable possession of property of any description is entitled to defend it against trespassers, and to use force for the purpose of removing them from his land, or of retaining or re-taking his goods from them; but he must not intentionally strike or hurt

[1] As to what offences are felonies, see table at the end of the chapter.
[2] See Ch. XIII.
[3] For an illustration of this, see Ch. VIII, para. 59.

Ch. VII

an ordinary trespasser unless he is resisted, in which case he ma; use such force as is reasonably necessary to overcome such resistance though even in this case, unless himself assaulted and in danger, h must not intentionally inflict death or grievous bodily harm. If however, the trespass is a serious one, as where a trespasser endeavour forcibly to break and enter a dwelling-house with the intention o committing an indictable offence therein, any amount of force may b used to prevent him; and if it is night, such force may be used eve though the trespasser has really no such intention, if the person usin the force reasonably believes that he has such an intention.

The law also permits force to be used for correction or for the main tenance of discipline. Thus a parent or schoolmaster may forcibl correct any child or pupil under his care. In all such cases the forc used must be reasonable and not excessive,[1] otherwise the perso using the force will be fully responsible for the consequences.

Finally, the law permits the use of force against the enemies of th realm in the actual heat and exercise of war.

(iv) *Responsibility for Acts of Omission*

Acts of omission.

31. A person is not ordinarily considered to cause injury to anothe by the mere omission to do an act; thus, if a man sees another drowning and is able to save him by holding out his hand, but omits to do so even *in the hope* that the other may be drowned, still he is not criminall responsible.

On the other hand, where the law imposes upon a person the dut of performing some particular act, he is held responsible if he omit to do it. For example, every person who has charge of another *e.g.*, a child, a person of unsound mind, an invalid, or a prisoner, i bound to provide him with necessaries if he is so helpless as to b unable to provide himself; and if death results from a neglect of such duty, the person in charge will be responsible unless he can show some good excuse.

So, in the case of an animal known to be dangerous, the perso in charge is bound to take such precautions as will safeguard the publi from danger.

Omission to perform duty.

32. Similarly, if a person undertakes to do any act the omissio of which may endanger human life (as, for instance, warning person from a range whilst firing is going on), and without lawful excuse omit to discharge that duty, he is responsible for the consequences. Again if a person undertakes to administer surgical or medical treatment, o to do any other act which may be dangerous to human life, he is respon sible if death results from a want of reasonable care and skill on hi part. For instance, if a soldier were to undertake to cut off the trigger finger of another soldier and mortification set in, he would b responsible for the consequences of his act.

Neglect of servants.

33. If a person, legally liable as a master to provide necessary food, clothing or lodging for a servant, wilfully and without lawfu excuse refuses or neglects to do so, so that the life of the servant is endangered, or his health is or is likely to be permanently injured, he is guilty of an offence.

[1] See case of Governor Wall, Ch. VIII, para. 54.

Assault.

34. An "assault" is a movement which attempts or threatens the unlawful application of force to another person without his consent; if force is actually applied it constitutes a "battery" which is included in the term "assault."[1]

The use of force, however slight, is sufficient to justify a conviction for assault, if exercised with the intention to cause, or with the knowledge that it is likely to cause injury, fear, or annoyance to the other person.

The consent of the other person, in order to be an excuse, must be *bona fide* consent and not mere acquiescence.[2]

Not only the actual use of such force, but any act or gesture which causes the other person to, apprehend that force will be used, is sufficient to constitute the offence of assault. Thus, shaking a fist in a man's face or pointing a pistol at him may be assaults.

A common assault, such as has been described above, is not generally a very serious offence, though a sentence of one year's imprisonment, with or without hard labour, may be imposed. But if the assault is attended with aggravating circumstances it becomes far more serious, and, if death results from the assault, it becomes homicide.

Aggravated assaults.

35. The following are examples of aggravated assaults:—

(1) Assault with intent to commit a felony.
(2) Assault with intent to resist the lawful arrest or detention of a person.
(3) Assault on a police officer in the execution of his duty.
(4) Assault with intent to commit sodomy.
(5) Unlawful wounding; assault occasioning actual bodily harm.
(6) Wounding with intent to murder; wounding or shooting or attempting to shoot[3] with intent to maim or do grievous bodily harm[4] or prevent apprehension.
(7) Indecent assault on male or female.

Indecent assaults.

36. In the case of an indecent assault upon a male or female person, consent provides no defence if the person upon whom the offence is committed is under the age of sixteen.

Rape.

37. Rape is the act of a man having carnal knowledge without her consent of a female who is not his wife.[5]

Penetration is considered to constitute carnal knowledge; it must therefore be proved that there was actual penetration of the female organ by some part of the male organ. The slightest penetration will be sufficient; it is not necessary to prove that there was such penetration as would be sufficient to rupture the hymen. Whether there was an emission of semen or not is immaterial.

---

[1] See specimen charge, No. 102, p. 733.
[2] See also para. 25.
[3] A man attempts to shoot, if he does any act (such as pulling out a loaded pistol, pointing it at a person, or fumbling with the trigger) from which it might be inferred that he intended to discharge it. See also para. 22.
[4] See specimen charge No. 101, p. 733.
[5] Though a husband cannot himself commit rape on his wife, he may be convicted of rape if he assists another person to commit rape on her.

Ch. VII

It is not an excuse that the woman was a common prostitute, or the concubine of the ravisher, if the offence was committed by force or against her will; though proof of such facts is admissible, and is of course important in considering whether or not she is likely to have consented.

Consent, to be an excuse, must be actual consent, and not mere submission, and it must be voluntary, and not extorted by force or duress or fear of immediate bodily harm.[1] Thus, if an idiot submits to a man having connection with her without actually permitting it, this is no consent, but if she actually permits the act, though from mere sexual instinct, and without really understanding its nature, this is a sufficient consent, and therefore the man is not guilty of rape.[2] A man who induces a woman to permit to have connection with her by personating her husband is guilty of rape.

A boy under the age of fourteen is conclusively presumed to be incapable of having carnal knowledge, and evidence cannot be received to show that he is capable in point of fact. He cannot therefore be convicted, as a principal in the first degree, of rape; but he may, as in the case of other felonies, be convicted as a principal in the second degree if he aids and assists in the commission of the offence. For the same reason a woman may be convicted as a principal in the second degree of rape. A boy under the age of fourteen may be convicted of an indecent assault.

Carnal knowledge of a child.

38. Carnal knowledge[3] or attempted carnal knowledge of a girl under the age of sixteen is an offence even though the girl consents.[4]

Before 1922, if the girl was over thirteen it was a sufficient defence to show that the accused had reasonable cause to believe that she was over sixteen. By the Criminal Law Amendment Act, 1922,[5] this defence was abolished except in cases where the accused is under twenty-four and has not previously been charged with this offence. The prosecution for the offence must be commenced within twelve months[5a] from the date of the commission of the offence.

If the girl is under thirteen, it is no excuse, whether the offence has been committed or only attempted, that the offender believed that the girl was above the specified age, if she was really below it.

If the girl upon whom the offence was committed or any other child of tender years tendered as a witness does not understand the nature of an oath, her evidence may be received though not on oath if the court is of opinion that the girl or child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth, but no person may be convicted in any such case unless with unsworn evidence is corroborated by some other material evidence in support of it implicating the accused; and the witness will be liable to be punished for perjury for giving false evidence exactly as if he or she had been sworn.[6]

---

[1] See also para. 25.
[2] Though not guilty of rape, he is guilty of an offence punishable with two years' imprisonment, if at the time he knew she was an idiot or imbecile.
[3] For definition see para. 37.
[4] Of course, if the girl does not consent the offence becomes rape.
[5] 12 & 13, Geo. V, c. 56, s. 2.
[5a] Criminal Law Amendment Act, 1928, s. 1.
[6] See Ch. VI, para. 90.

Sodomy.

39. The offence of sodomy is committed when a male has carnal knowledge of an animal or of a human being "per anum." Penetration is required, as in the case of rape, to constitute carnal knowledge. But it is not necessary to prove that the offence was committed against the consent of the person upon whom it was perpetrated; both agent and patient (if consenting) are equally guilty. If the evidence upon this charge is insufficient to justify conviction for the full offence, the accused person may be found guilty of an attempt to commit it.

Acts of indecency.

40. It is an offence for a male person, either in public or private, to commit, or to be a party to the commission of, any act of gross indecency with another male person; or to procure the commission of any such act.

It is also an offence to do any grossly indecent act in a public place in the presence of two or more persons, or to publicly expose the person, or exhibit any disgusting object.

Disgraceful conduct.

41. Inasmuch as disgraceful conduct of an indecent or unnatural kind is, in itself, an offence under section 18 (5) of the Army Act, most of the charges of indecency which are brought before courts-martial will be laid under that section and not charged as civil offences.

(vi) *Homicide*

Homicide.

42. If the death of a human being results from any voluntary action of any person, that person is said to have committed homicide.

The circumstances in which a person is criminally responsible[1] for homicide are dealt with in the following paragraphs:—

Death must result, either directly or indirectly, from the act. Whether it does so or not must depend on the circumstances of the case, but if the death occurs more than a year and a day after the act, the law presumes that death did not result from the act but from some other cause.

Further, a person is not responsible for causing death unless death naturally results from his act or negligence. For instance, if a person wounds another dangerously, and that other dies, whether from neglect of proper treatment, or from improper treatment applied in good faith for the purpose of effecting a cure, the person causing the injury is legally responsible for the death; on the other hand, if the wound is not dangerous in itself, but is rendered so by improper treatment, he is not responsible.

The death caused must be that of a human being. A child is considered to become a human being as soon as it has wholly proceeded in a living state from the body of its mother, and has an independent circulation, whether it has breathed or not, and whether the umbilical cord has or has not been severed; and a person is responsible for killing such a child, though the injuries of which it dies were inflicted by him or her before or during birth.

A person is guilty of causing death even if he merely accelerated the other's death, and it is no excuse that the person killed must have died very shortly from some other cause.

---

[1] As to when the use of force resulting, or possibly resulting, in death is justifiable, see para. 30.

Ch. VII

The fact that the blame is shared by another will not relieve from responsibility a person contributing to the death. Thus, if two drivers are illegally racing their cars along a high road, and one or both of the cars run over a man and kill him, each driver is responsible for having caused the death.

Justifiable and excusable homicide.

43. Homicide is justifiable (i) where the proper officer executes a criminal in strict conformity with his sentence; (ii) where an officer of justice, or other person acting in his aid, in the legal exercise of a particular duty, kills a person who resists or prevents him from executing it; and (iii) where the homicide is committed in prevention of a forcible and atrocious crime.

Homicide is excusable (i) where a man doing a *lawful* act, without any intention of hurt, by accident kills another; and (ii) where a man kills upon a sudden encounter, merely in his own defence, or in defence of his wife, child, parent, or servant, and not from any vindictive feeling.

44. To establish the offence of murder it is incumbent on the prosecution to prove that death occurred as the result of the voluntary act of the accused and to prove malice, express or implied, on the part of the accused. The accused is entitled to show by evidence, or by examination of the evidence adduced by the prosecution, that the homicide was without malice, being either accidental or unintentional or provoked. If the tribunal are either satisfied with his explanation or, on a review of all the evidence, left in reasonable doubt whether, even if his explanation be not accepted, the act was accidental or unintentional or provoked, the accused is entitled to be acquitted of murder.[2]

If a person has unlawfully caused death by conduct which was intended to cause death or grievous bodily harm to *some* person, or even by an act, unlawful in itself, attended with probable serious danger and done with a mischievous intention to hurt people although no mischief is intended to any particular individual, he is guilty of murder.

The offence of murder is not confined to cases where the offender has deliberately intended to kill the particular person whom he has killed, though this is the most usual form of the crime. The law provides that many cases of homicide where there has been no premediated desire to kill a particular person, or, indeed, any person at all, must be brought under the definition of murder if the offender is actuated by a form of guilty mind sufficiently wicked to constitute murderous malice. Thus, if A shoots at B intending to kill him but accidently kills C instead, A commits murder. Or if a person intends to kill and does kill the next person whom he chances to meet without selecting any particular person, he is guilty of murder. So also, if a person intends to commit a felony upon or do grievous bodily harm to another by means of an act which is likely to kill.—*e.g.*, by beating him with an iron bar— and death results therefrom, it is murder.[1]

It is immaterial what may be the particular form of death, whether from poisoning, striking, starving, drowning or any other cause.

---

[1] See specimen charge No. 95, p. 732.

[2] *Woolmington* v. *Director of Public Prosecutions* [1935] 25 Cr. App. Rep., p. 72.

A person is guilty of murder if he unlawfully resists and kills any person who is lawfully endeavouring to execute the duties of an officer of justice, or the orders of some civil or military authority, provided that the offender has sufficient notice of the capacity in which the person killed is acting.

Letters threatening to murder.

45. Sending a letter threatening to murder, and even the delivery of such a letter, knowing its contents, is an offence.

Man-slaughter.

46. It may be taken generally that in all cases where a killing, though not with malice, is nevertheless incapable of justification or excuse, it is manslaughter.[1]

[1] See specimen charge No. 95, p. 732.

If a person does an unlawful act of such a kind that a reasonable man would not have known that it was likely to cause death or serious injury, that person is guilty, if death results, of manslaughter and not of murder.

Where death results from negligence it must be shown, in order to justify a conviction for manslaughter, that the negligence was so gross and culpable and showed such disregard for the life and safety of others as to amount to a crime against the State and to conduct deserving punishment.

The offence is manslaughter if the act from which death results was committed under the influence of passion arising from extreme provocation by the victim.

No person is considered to give provocation to an offender merely by doing that which he has a legal right to do, or which the offender has incited him to do with the express purpose of providing himself with an excuse.

The provocation must be great, that is to say, such as might reasonably be expected to put an ordinary person not of an exceptionally passionate disposition into such a passion that he would lose his power of self-control.

Gestures, injuries to property, breaches of contract, or slight blows unaccompanied by special insult, are not considered a sufficient provocation.

Mere words of abuse are not considered to afford sufficient provocation, except, perhaps, in some extreme cases. Where, however, words are accompanied by a blow, though a slight one, the two may be taken into account together in estimating whether the provocation is sufficient.

Test of sufficiency of provocation.

47. It must be clearly established in all cases where provocation is put forward as an excuse, that *at the time* when the crime was committed the offender was actually so completely under the influence of passion arising from the provocation, that he was *at that moment* deprived of the power of self-control; and with this view it will be necessary to consider carefully the manner in which the crime was committed, the nature of the weapon used, the length of the interval between the provocation and the killing, the conduct of the offender during that interval, and all other circumstances tending to show his state of mind.

Attempt to murder.

48. Attempts to murder[2] are only one degree less criminal than murder itself, and any person doing or attempting to do any act with intent to commit murder is guilty of an offence.

The act or attempt alleged, for instance, a wounding or stabbing, an attempt to fire a pistol[3] which does not go off, or any similar act or attempt, must be laid in the charge and proved as laid.

It must also be proved that the accused intended thereby to commit murder, which intent may be gathered from the nature of the act itself, or may be proved by other evidence, as for instance, by threats and words proved to have been used by the accused.[4]

---

[2] As to what amounts to an attempt, see para. 22.

[3] As to what amounts to an attempt to fire a pistol, see note to para. 35.

[4] Attempts to commit suicide do not amount to attempts to commit murder; such attempts should be dealt with under A.A. 38 (2).

Conspiracy to murder.

49. It is an offence to conspire with or endeavour to persuade or propose to any other person to murder a third party, whether a subject of the King or not, and this even though no overt act is done or attempted.

(vii) *Theft and the Cognate Offences*[1]

Theft or larceny.

50. A person steals[2] who, without the consent of the owner, fraudulently and without a claim of right made in good faith, "takes" and "carries away" anything "capable of being stolen"[3] with intent, at the time of such taking, permanently to deprive the owner thereof.

For the purposes of this definition, the expression "takes" includes obtaining possession (i) by any trick; (ii) by intimidation; (iii) under a mistake on the part of the owner, with knowledge[4] on the part of the taker that possession has been so obtained; (iv) by finding, where at the time of finding the finder believes that the owner can be discovered by taking reasonable steps. The expression "carries away" includes any removal of anything from the place which it occupies, but in the case of a thing attached, only if it has been completely detached. And the expression "owner" includes any part owner, or person having possession or control of, or a special property[5] in anything capable of being stolen.

Explanation of definition.

51. No attempt can be made here to deal fully with these definitions, but the following notes may be useful.

If the "owner" (the person in possession or control, etc.) consents to the taking, there is no theft; but consent obtained by force or fraud will be no defence. In this connection, however, it is important to distinguish between a transfer of "possession" only, and a transfer of "property" in the goods taken[6]. If A by false pretences induces B to give him possession only of an article, and then without B's consent appropriates it to himself, this is "theft"; but if he so induces B to transfer to him not only the possession of, but also the property in, the article, this is "obtaining by false pretences" (see para. 57 *post*).

The article must be taken fraudulently and without any colour of right. If it is taken under the supposition, honestly enter-

---

[1] See also Ch. III, paras. 30–40.

[2] Larceny Act, 1916, s. 1. This was the first statutory definition of "larceny"; it reproduced the effect of numerous judicial decisions as to what constituted larceny by the common law of England. The expression 'steals' in the Army Act has the same meaning; see A.A., s. 190 (33A).

[3] Everything which has value and is the property of any person (and if adhering to the "realty" then after severance therefrom) is "capable of being stolen," subject to two qualifications, viz.: (i) that things attached to or forming part of the "realty" cannot be stolen by the person who severs them, unless after severance he has abandoned possession thereof; and (ii) that the carcase of a wild beast or bird (not reduced into possession while living) cannot be stolen by the killer, unless after killing he has abandoned possession thereof. (Larceny Act, s. 1.) "Realty" means, speaking broadly, the land and any permanent structure thereon. The new definition reproduces the old common law rule that things attached to the realty could not be the subject of "larceny" until after severance and abandonment. A man who steals or who with intent to steal severs, cuts, roots up, etc., fixtures, trees, plants, crops, etc., is punishable under a later section (s. 8) of the Act. See specimen charge of stealing, No. 103, p. 733.

[4] i.e., knowledge at the time; see next paragraph.

[5] "*Special property*"; see next note.

[6] The "property" in goods is obtained if the person obtaining them becomes the owner. Thus, if A sells goods, the property in them passes to the purchaser; if he pawns them, the pawn broker obtains possession of them (and a "special" or temporary property in them), but the permanent property in them does not pass to him.

tained, that the taker has an immediate[1] right to possession, the taking is not fraudulent and there is no theft. The fraudulent intention must exist at the time when the owner is deprived of possession without his consent. If the original taking is innocent, a subsequent fraudulent misappropriation will not retrospectively convert the taking into theft.

Stealing by a trick.—Examples of this are the forms of cheating known as "ringing the changes," and "ring dropping."

Stealing under mistake on the part of the owner.—A familiar instance of this is where A meaning to give B a penny in fact hands to him a half-crown, and B knowing at the time of receiving it that a mistake has been made, keeps the coin without saying anything.

Stealing by finding.—No one can steal an "abandoned" article. If a person finds an article and appropriates it, he is not guilty of stealing it if the former owner had really abandoned it, or if the taker honestly believed that he had abandoned it, or if the taker honestly believed that he could not find the owner by taking reasonable steps. The belief referred to is his belief at the time of the finding.

"Carries away."—The smallest amount of moving, so long as there is a severance of the property from the possession of the person from whom it is taken, is sufficient. Thus, taking goods out of a box and laying them on the floor is sufficient to constitute theft if the other elements of theft exists. The line between what is and what is not a sufficient taking is extremely fine, and if there is any doubt as to whether the taking is sufficient, a jury, and under section 56 (6) of the Army Act a court-martial, may convict of an attempt to steal only.

The property must be taken with the intention of permanently depriving the possessor of it. Whether such an intention existed is a question of fact to be decided in the light of all circumstances of the case.

Theft by "bailees."

52. As "deprivation of possession" is an essential element of the offence, a person cannot, in general, steal anything which is already in his possession. There is, however, a statutory provision to meet the cases of a "bailee" and a part owner by which a person may be guilty of stealing a thing, notwithstanding that he has lawful possession thereof, if being a bailee or part owner thereof, he fraudulently converts the same to his own use or to the use of any person other than the owner.[2] Speaking generally, a person is a "bailee" of an article when it is delivered to him for the purpose of ultimately re-delivering it,[3] or delivering it to some other person. Thus, if a man hires a bicycle for a day he becomes "bailee" of it; if he sells it, then although he had at the time lawful possession of it, his act is theft. This, however, applies only where the obligation is to re-deliver or deliver the specific article. For instance, if A is entrusted with a sum of money, his obligation would ordinarily[4] be, not to return the identical

[1] A person who has pawned his watch has no immediate right to possession of it (i.e., until he "redeems" it); he may therefore be guilty of "stealing" it, if he takes it from the pawnbroker without repaying the loan.
[2] Larceny Act, 1916, s. 1.
[3] *e.g.*, after doing repairs to it, or after using it.
[4] It might be otherwise if the coins were deposited with him in a sealed package.

Ch. VII

coins, but only an equivalent sum; and he would not be guilty of "stealing" if he wrongfully appropriated it to his own purposes. He would, however, be guilty of "fraudulent conversion," another offence dealt with by the Larceny Act.[1]

Embezzlement.

53. Special reference must be made to the doctrine as to "possession" in the case of clerks or servants. Possession by a servant of anything on behalf of his master is considered to be the possession of the master or the possession of the servant according to the circumstances in which the servant originally received it. If, for instance, a servant is given the custody of anything by his master, or by a fellow servant to whom the master has given the custody, the servant will have no real possession of the thing, the possession remaining in the master. In this case, misappropriation of the thing by the servant will be theft. If, however, a servant receives anything from a stranger on his master's account, the servant will have possession of the thing, and the master will have no possession until the servant does some act by which the possession is transferred from him to the master. In this case misappropriation by the servant (before such transfer) is called "embezzlement".[2] The two offences of "theft by a servant" and "embezzlement by a servant" are dealt with in the same section of the Act, and the legal distinction between them is of comparatively little practical importance, because if on a charge of theft the evidence proves embezzlement, the jury[3] can convict of embezzlement; and *vice versa* on a charge of embezzlement can convict of theft.

Evidence of embezzlement.

54. By "clerk" or "servant" is meant a person who is acting under and bound to carry out the instructions of his master or employer not merely as to what to do, but also as to how and when to do it. The employment may be either general, or for a specified time, or for the performance of a single act.

On a charge of embezzlement, the fraudulent misappropriation of the property may be inferred either from the fact that the accused person has not handed it over in the ordinary course, or from the fact of his having falsely accounted for it, or from the fact of his having absconded, or in any similar way. It must, however, be remembered that none of these facts in itself constitutes the offence of embezzlement; each is *evidence* only of the fraudulent misappropriation.

Embezzlement by persons in public service.

55. A somewhat similar offence is committed where a person who is employed in the public service steals any chattel, money, or valuable security belonging to His Majesty, or entrusted to him by virtue of his employment, or embezzles or fraudulently disposes of any such chattel, etc., for any purpose other than the public service.

Fraudulent conversion.

56. The offence of "fraudulent conversion"[4] to which reference is made in paragraph 52 is committed by every person who (i) being

---

[1] s. 20 (iv); and see para. 56 (below).

[2] *i.e.*, the fraudulent misappropriation of the whole or any part of any property delivered to, or received, or taken into possession by him for or in the name or on account of his master or employer; Larceny Act, 1916, s. 17. Embezzlement in the narrow sense is confined to acts of misappropriation committed by persons in the position of clerks and servants; but as pointed out in para. 34 of Chapter III it is used in a wider sense in connection with military offences under the Army Act, *i.e.*, those dealt with by ss. 17, 18 (4).

[3] Larceny Act, 1916, s. 44 (2); so too, can a court-martial, A.A. 56 (1) (2).

[4] See specimen charge No. 104, p. 733.

entrusted either solely or jointly with any other person with any property in order that he may retain in safe custody or apply, pay, or deliver, for any purpose or to any person, the property or any part thereof or any proceeds thereof, or (ii) having either solely or jointly with any other person received any property for or on account of any other person, fraudulently converts to his own use or benefit, or the use or benefit of any other person, the property or any part thereof or any proceeds thereof.

Many offences of fraudulent conversion as above defined would, in the case of persons subject to military law, amount to the military offence of fraudulent misapplication under s. 17 or s. 18 (4) of the Army Act.

Obtaining by false pretences.

57. As has been said (para. 51), when a person obtains not only the possession of, but also the property in, goods by fraud, the offence is not theft but obtaining goods by false pretences.[1] The elements constituting the offence of obtaining goods by false pretences are very similar to those constituting theft.

Any chattel, money, or valuable security may be the subject of the offence of "obtaining by false pretences" except such things as are not the subject of theft at common law.[2]

There must have been an intention of depriving the owner permanently of the thing obtained, and the intention must have been fraudulent, though it is not necessary to allege an intention to defraud any particular person.

The goods must have been obtained either directly or indirectly by the pretence, that is to say, they would not have been obtained but for the pretence. If the person from whom the goods are obtained is not deceived by the pretence, but knows it to be false, the goods are not obtained by false pretences, but in such a case the person making the false statement may be convicted of attempting to obtain the goods by false pretences.

The false pretence must be a false representation, express or implied, as to the past or present existence of some fact; a mere promise as to future conduct, or representations as to future expectations are not sufficient. For instance, the giving of a cheque in exchange for goods is a representation that the drawer has an account at the bank on which the cheque is drawn, and that that account is in such condition that in the ordinary course of events the cheque will be met. If the drawer knows that these conditions do not exist the giving of the cheque is in law a false pretence. But representations of future expectations, as distinct from representations of existing facts, do not constitute a false pretence.

The false pretence may be made in any way, either by words, by writing, or by conduct; for instance, if a person, not being an officer, represents himself to be so by wearing an officer's uniform, and thus obtains goods from a tradesman, this is a false pretence by conduct.

[1] See specimen charge No. 105, p. 733.

[2] The following classes of things are not the subject of theft at *common law*:—
(1) Things abandoned by the owner.
(2) Land, and things permanently attached to land.
(3) Title deeds, bonds, etc.
(4) Wild animals (including game).
(5) Base animals, such as dogs, ferrets, etc.

But the stealing of plants and shrubs growing in gardens, etc., title deeds, and all animals which are usually kept in confinement, including dogs, has been made punishable *by statute*.

Ch. VII

It may be made direct to the person to be defrauded or to his agent; but a pretence made to a stranger in the hope that it will be repeated to, and acted on by, the intended victim is insufficient.

It is no excuse to say that a person of common prudence could easily have found out that the pretence was untrue, or to say that the existence of the alleged fact, was impossible, or that it was intended to make compensation for the goods in the future.

Conviction of theft on charge of obtaining by false pretences.

58. If a person is charged with obtaining goods by false pretences, and it appears that he obtained them under circumstances which in law amount to stealing, the jury may nevertheless convict him of the offence actually charged. If he is charged with simple stealing and the evidence proves "obtaining by false presences," they may convict him of the latter offence. A court-martial has the same power under s. 56 (6) of the Army Act.

Robbery.

59. "Robbery" is an aggravated form of stealing from the person accompanied by violence or threats of injury to the person robbed or to his property.[1] If the robber is armed with an offensive weapon or has one or more companions (even if all are unarmed) operating with him at the time of the robbery, he is liable, upon conviction, to be sentenced to penal servitude for life. The same punishment may be awarded if at the time of, or immediately before, or immediately after, the robbery the offender uses personal violence to the person robbed. The maximum punishment for robbery, if not aggravated by the circumstances mentioned above, is fourteen years' penal servitude.

The violence or threats must be intentionally used for the purpose of overcoming or preventing resistance, or of extorting the thing stolen. Violence used merely for the purpose of obtaining possession of the thing, such as snatching a watch out of a pocket, is not sufficient to constitute robbery.

A person charged with robbery with violence may be found guilty of robbery (without aggravation) or of an assault with an intent to rob or of stealing from the person or of simple stealing.

Demanding with menaces; extortion.

60. It is an offence to demand from any person with menaces or by force any property capable of being stolen, with intent to steal it. "Menaces" include threats of injury to persons or property, and threats which would involve injury to a third person intended to be injured, such as would induce a person to whom the menaces are addressed to part with money or valuable property. The menaces may be by words or gestures.

There are various other offences of a similar kind such as accusing or threatening to accuse a person (whether living or dead) of crimes of a particular kind with intent to extort any property or valuable thing; or, with a like intent, publishing or threatening to publish a libel upon any person or threatening to publish any matter touching any other person (whether living or dead).

Burglary.

61. Offences closely allied to thefts and robbery are those of burglary, housebreaking and stealing in a dwelling-house. Burglary can only be committed during the night, *i.e.*, between 9 p.m. and 6 p.m., and

[1] See specimen charge No. 100, p. 733.

it can only be committed in respect of a dwelling-house.[1] It must be proved that the offender broke and entered the dwelling-house of a person with intent to commit a felony therein or broke out of such dwelling-house having either entered it with intent to commit a felony[2] or after actually committing a felony. The maximum punishment for burglary is penal servitude for life.

A person is considered to "enter" a house as soon as he introduces into the house any part of his body or any instrument held in his hand for the purpose of intimidating any one in the house or of removing any goods; the introduction into the house of a housebreaking tool is not sufficient if it be merely part of the act of breaking into the house.

A person is considered to "break" a house—

(1) if he breaks any part, internal or external of the building itself, or

(2) if he opens by any means whatever[3] any *closed* door, window, or other thing intended to cover openings to the house, or leading from one part of it to another, or

(3) if he gets down the chimney, or

(4) if he gains entrance to the house by threats, artifice, or collusion.

Housebreaking.

62. The offence of housebreaking[4] falls under two heads:—

(*a*) *Housebreaking and committing felony.*[2]

This consists in breaking and entering a dwelling-house or various other buildings (*e.g.*, shop, office, garage, or building belonging to His Majesty) and committing any felony therein; or breaking out of such house or buildings after committing a felony therein. This offence can be committed at any time of the day or night.

(*b*) *Housebreaking with intent to commit felony.*[2]

This consists in entering (breaking is not necessary) any dwelling-house between 9 p.m. and 6 a.m., with intent to commit a felony therein; or, with a like intent, breaking and entering, at any time of the day or night, any dwelling-house or building of the kind mentioned in (*a*).

Stealing in a dwelling-house.

63. It is an offence, to which a maximum punishment of fourteen years' penal servitude is attached, to steal in any dwelling-house any chattel, money or valuable security if the value of the property stolen amounts to five pounds; or if the offender by any menace or threat puts any person in the dwelling-house in bodily fear, whatever be the value of the property stolen.

Other offences.

64. It is also an offence—

(1) to be found by night[5] in possession of housebreaking tools unless a lawful excuse for such possession can be given;

---

[1] A dwelling-house is any permanent building or separate part thereof in which the owner or tenant, or any one with their consent, habitually sleeps at night. See specimen charge of burglary No. 97, p. 732.

[2] As to what offences are felonies, see table at the end of the chapter.

[3] This includes opening a shut window or door, but not pushing an open window or door further open.

[4] See specimen charges 98, 99, p. 732.

[5] Night means the interval between nine at night and six in the morning.

Ch. VII

(2) to be found by night[1] armed with an offensive weapon with the intention of breaking into a building and committing felony therein;
(3) to be disguised at night[1] with the intention of committing felony;
(4) to be found by night[1] in any building with the intention of committing felony therein.

Receiving stolen goods, etc.

65. A person who receives goods with knowledge that they have been stolen or obtained by another[2] in any way whatsoever under circumstances which amount to felony or misdemeanour commits the offence of "receiving."[3]

The guilty knowledge of the receiver must be established; it is not enough to prove that he merely suspected the goods to have a tainted origin. And the knowledge must have existed at the moment of receiving; if he took them innocently no subsequent guilty knowledge will suffice. The fact that he bought them much below their value, or that he falsely denied his possession of them would be *evidence* of guilty knowledge.

A person is considered to receive the goods as soon as he obtains control over them. But actual manual possession is not necessary; it is sufficient if the goods are in the actual possession of a person over whom the receiver has a control so that they would be forthcoming if he ordered it.

The doctrine of recent possession.

66. If a person is found in possession of goods recently stolen, there is a strong presumption that he stole them or received them with knowledge that they were stolen.[2] The *onus* of proving guilty knowledge always remains upon the prosecution, and upon the prosecution establishing that the accused was in possession of goods recently stolen, a jury or a court-martial may, in the absence of any explanation by the accused of the way in which the goods came into his possession, which might reasonably be true, find him guilty; but if an explanation is given which the jury or a court-martial think might reasonably be true, and which is consistent with innocence, although they were not convinced of its truth, the accused is entitled to be acquitted, inasmuch as the prosecution has failed to discharge the duty cast upon it of satisfying the court beyond reasonable doubt of the guilt of the accused.

Cheating, etc.

67. The following are offences somewhat similar to theft, embezzlement, and obtaining money by false pretences:—

(1) Obtaining money by cheating at cards, etc.;
(2) Fraudulently obtaining the execution of a valuable security, or affixing a name on any paper with a view to its being subsequently dealt with as a valuable security;
(3) Cheating, by a deceitful practice affecting the public, *e.g.*, selling by false weights;
(4) Conspiring to cheat and defraud; that is, an agreement by two or more persons to do an act with the intention of de-

---

[1] Night means the interval between nine at night and six in the morning.
[2] Where it is clear that an accused is either the thief or a receiver, it is wrong to convict him of receiving unless there is something in the evidence to suggest that he was not the actual thief. *R.* v. *Evans* [1916] 12 Cr. App. Rep. 8.
[3] See specimen charge No. 103 p. 733.

frauding the public or any person or class of persons, or to extort money or goods from any person;

(5) Fraudulently obliterating any mark denoting the property of His Majesty in any stores.

(viia) *Road Traffic Offences*

67A. It has been noted in para. 50 above that an intent permanently to deprive the owner is an essential element in stealing. In the case of a motor vehicle, the mere taking and driving of it away without the owner's consent or other lawful authority is a statutory offence[1] of which a person charged with the theft of the vehicle, if the charge is laid under s. 41 of the Army Act, may be convicted.[2] It is however provided by the statute[3] that, if a court is satisfied that the accused reasonably believed that he had lawful authority or that the owner would have given his consent, the accused is entitled to be acquitted.

Other offences relating to motor vehicles, to be found in the Road Traffic Acts, 1930 and 1934, are, in view of their technical nature and of the special penalties provided for them (endorsement and suspension of licence, which cannot be imposed by a court-martial), more appropriately tried by the civil courts. A list of the more common offences will be found under the heading "Motor vehicle" in the Table of Offences and Punishments at the end of this chapter.

(viii) *Forgery; Perjury; Personation*

68. Forgery[4] is the making of a false document in order that it may be used as genuine. A document is false if it or any material part of it purports to be made by or on behalf of a person who did not make it or authorize its making, and in particular, if any material alteration by addition, insertion or obliteration has been made in it; or if the whole or some material part of it purports to have been made by or on behalf of a fictitious or deceased person. A document is also considered to be false, though made by a person in his own name, if it is so made with the intention that it should pass as being made by someone else. These definitions must not be taken to be exhaustive. Forgery.

For forgery to constitute an offence there must be in intent to defraud or deceive; in the case of some documents an intent to defraud is essential; in the case of others an intent either to defraud or to deceive must be charged and proved.

To forge wills, deeds and banknotes, and such documents as valuable securities, cheques, receipts or requests for the payment of money, and insurance policies is a felony punishable in the case of the three first mentioned documents with penal servitude for life, and in the case of the other documents with penal servitude for a term not exceeding fourteen years; in all these cases an intent to defraud is essential.

---

[1] Road Traffic Act, 1930, s. 28 (1). *See* specimen charge No. 105A on page 733.
[2] Road Traffic Act, 1930, s. 28 (2). *See* A.A. 56; note 3 on page 484.
[3] Road Traffic Act, 1930, s. 28 (2).
[4] See the Forgery Act, 1913, and specimen charge No. 106, p. 734.

Forgery of a large number of specific documents of an official nature such as birth or death certificates, court registers, etc., is also a felony, the maximum sentence for which is penal servitude for either fourteen or seven years according to the nature of the document forged. In these cases an intent to defraud or to deceive is essential.

The forging of various documents where such forgery does not amount to a felony in a misdemeanour, punishable with imprisonment; in this case an intent to defraud is essential, except in the case of public documents when an intent either to defraud or to deceive must be charged and proved.

A false signature to a genuine document or a genuine signature to a false document amount equally to forgery if the necessary intent is present.

It is not essential, in order to constitute the offence of forgery, that the false document should be completed, or that it should be in such a form as would be binding in law; though if a person is charged with the forgery of any particular instrument, it must be shown that the document has such a resemblance to it as would be likely to deceive an ordinary person.

Ch. VII

The fraudulent intention may be inferred from the document itself or proved by external evidence. The intention must be that either—

(*a*) the document should be used or acted on as genuine; or

(*b*) the actions of some person should be influenced by the belief that it is genuine.

Uttering forged documents.

69. A person is said to "utter" a forged document if he, knowing it to be forged delivers or diposes of it, or tenders it in payment or exchange, etc.[1] If the document is one the forging of which is a felony, the uttering of it is also a felony; if the forging of it is a misdemeanour, the uttering of it is also a misdemeanour.

The intent to defraud or to deceive (as the case may be) which is an essential element of the offence of forging a particular document is also an essential element in the offence of uttering it.

The same punishment may be awarded for the uttering as for the forgery of any particular document.

Possession of forged notes, etc.

70. The mere purchase or possession of forged banknotes, and some similar documents (whether complete or not) with the knowledge that they are forged, is in itself an offence.

It is an offence to make, use, or knowingly be in possession of any banknote paper or any instruments or contrivances for making banknotes and similar documents.

It is also an offence to demand, receive or obtain any property or money upon or by virtue of any forged instrument knowing the same to be forged.

Abettors, etc., in forgery, etc.

71. Persons who aid or abet the commission of an offence mentioned in paras. 68-70 are liable to be tried and punished as principals.

Perjury.

72. Perjury may shortly be defined as the wilful (*i.e.*, intentional) giving of evidence which he knows to be false or does not believe to be true by a witness or interpreter in a judicial proceeding.[2] The term "judicial proceeding" includes a proceeding before any court, tribunal, or person having, by law, power to hear, receive and examine evidence on oath.

The witness must have been duly sworn by the court or officer, *i.e.*, he must either have taken the oath or made an affirmation or declaration.

The false evidence must be an assertion as to some matter of fact, opinion, belief, or knowledge, which the witness does not believe to be true, or as to the truth of which *he knows* that he is ignorant.

The assertion must be as to some point which is material, *i.e.*, it must be as to some point which affects, directly or indirectly, the probability of some question which is to be determined by the proceeding in the course of which it is given, or the credit of some witness giving evidence in the course of the proceeding.

The parts of the evidence alleged to be false should be set out in the particulars of the charge, and in order to prove a charge of perjury it is not sufficient to call one witness only, but the evidence of such a witness must be corroborated either by the evidence of another witness, or by the proof of material and relevant facts confirming it.

---

[1] See specimen charge, No. 107, p. 734.

[2] See the Perjury Act, 1911.

The civil offence of perjury, as such, will rarely come before courts-martial, inasmuch as the giving of false evidence before a court-martial or any court or officer authorized by the Army Act to administer an oath is made a military offence when committed by a person subject to military law.[1]

S. 126 of the Army Act provides for the offence of perjury when committed before a court-martial by a person not subject to military law.

The making of a false declaration in the cases specified in s. 142 of the Army Act is declared to be perjury, and subject to the same penalties.

Personation.

73. Under the False Personation Act, 1874, the false and deceitful personation of any person with the intention of fraudulently obtaining any property whatever is an offence.

By s. 142 of the Army Act a person is deemed guilty of personation who falsely represents himself to any military, naval, air force, or civil authority to belong to, or to be a particular man in, or who has been in, the regular, reserve, or auxiliary forces.[2]

(ix) *Malicious Damage to Property*

Malicious injury to property.

74. Numerous offences come under the category of malicious injuries to property.

The essence of the offence is injury to the property of another; it is immaterial whether the offender is himself benefited by the act or not.

Such acts are offences if done unlawfully and maliciously.

A person is considered to cause an injury unlawfully and maliciously if he wilfully causes it without any lawful excuse; *i.e.*, if he causes it by an act which he must know will probably cause it, or is reckless whether he causes it or not, and if he has not either a legal right to act as he does, or a *bona fide* and reasonable belief that he has such a right. Generally speaking, the act itself justifies a presumption of malice until the contrary is shown, *e.g.*, that it was due to negligence or accident. For instance, a deliberate trespass on land whereby substantial injury is caused to crops amounts to malicious injury to property. But the charge must allege that the injury was caused maliciously. Unless the evidence clearly shows that the damage was caused maliciously, a charge of malicious injury should not be laid.

Arson.

75. Of the various instances of malicious injury the most important is arson which consists in unlawfully and maliciously setting fire to buildings or to certain peculiarly inflammable kinds of property. To set fire to one of His Majesty's dockyards or to any ship or war therein is still a felony punishable with death. The offences of setting fire to a church, railway-station, public building, stack of corn, ship or coal-mine are punishable with penal servitude for life; the same punishment may be awarded to a person who sets fire to a dwelling-house when any person is therein, or, with intent to injure or defraud, to any house, office, shop, shed, etc., whether in the possession of the offender or any other person. To set fire to or to attempt to set fire to other

[1] See A.A., 29. See also A.A. 46 (6), 47 (4), 70 (5) (6), 72 (1), R.P., 125 (D), 125A (C).

[2] As to the punishment for this offence, see the section and note thereto.

Ch. VII

building or their contents or to growing crops is an offence punishable with penal servitude for fourteen years.

It is not a necessary element of the crime of arson that malice should have been shown against the person in respect of whose property the offence was committed. "Maliciously" means that the offender intended that the building should be set on fire or that he acted with recklessness, not caring whether or not it took fire though he realized that such a consequence was almost inevitable.

The sending of a letter threatening to commit arson is an offence.

Other examples of malicious damage.

76. Amongst other offences mentioned in the Malicious Damage Act 1861, are the following:—

(i) Destruction of buildings with explosives;
(ii) Riotous or tumultuous demolition of or damage to houses;
(iii) Destruction of or damage to machinery or ships;
(iv) Destruction of bridges, telegraphs, etc.;
(v) Obstruction of railways;
(vi) Killing or maiming of certain animals.

(x) *Miscellaneous Offences*

Bigamy.

77. Bigamy is committed by a person who, being already married to one person, goes through the form of marriage with another person during the life of the former husband or wife whether the second marriage has taken place in England or Ireland or (except in the case of a person who is not a British subject) elsewhere.

It is a good defence to a charge of bigamy that the wife or husband of the accused has been continually absent from such person for seven years then last past, and has not been known by that person to be living within that time; the burden of proving such knowledge is upon the prosecutor when the fact that the parties have been continually absent for seven years has been proved. It is also a good defence if the accused can show that even though the seven years have not elapsed before the second marriage, he or she had reasonable grounds for believing that his or her wife or husband was dead at the time of the second marriage. Proof that the accused was divorced from the bond of his first marriage or that the first marriage was null and void provides a complete defence to a charge of bigamy.

A person who, being unmarried, goes through the form of marriage with another person, knowing that person to be married to someone else, may be charged with and convicted of aiding and abetting the felony of bigamy.

Treason.

78. The only forms of treason which need here be mentioned are—

(1) Levying war against the Sovereign in any of His dominions.
(2) Aiding the enemies of the Sovereign.

Certain other acts of treason (namely, compassing to levy war against the King, and compassing to move any foreigner to invade the King's dominions) can, under an Act of 1848, be also treated as felonies; these acts are commonly known as "treason-felonies," and are so described in s. 41 of the Army Act.

Conspiracy.

79. Conspiracy consists in the agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means. The

mere intention to do such an act is not a conspiracy. An agreement to carry out a crime, even if the crime is not afterwards committed, is a conspiracy. Unless two persons, at least, are found to have combined there can be no convictions, but a person may be charged with conspiracy with persons unknown or persons who cannot be brought before the court or who are dead.

The main forms of conspiracy are:—

(i) To commit an offence punishable by law;

(ii) To cheat and defraud;

(iii) To prevent or obstruct the course of justice.

Offences relating to the obstruction of justice.

80. It is an offence:—

(a) To try to dissuade witnesses from giving evidence, in order to obstruct the course of justice;

(b) To obstruct the execution of any legal process;

(c) To conceal or procure the concealment or a felony[1];

(d) To enter into an agreement for valuable consideration to refrain from prosecuting a person for a felony[1], or to show favour to the accused in any such prosecution.

Escape.

81. Offences relating to escape from civil custody would probably never be tried by court-martial, and it seems only requisite to observe here that—

if a person assists any alien enemy who is a prisoner of war within His Majesty's dominions, whether in confinement or on parole, to effect his escape; or

if a person (being a British subject) on the high seas assists any such prisoner of war who has escaped from His Majesty's dominions in his escape towards any other country;

he is, in either case, guilty of an offence.

[1] As to what offences are felonies, see table at end of chapter.

TABLE OF OFFENCES AND PUNISHMENTS

NOTE.— (i) Only such offences as are dealt with in Chapter VII are included in this Table.
(ii) The second column states in the case of each offence the maximum "punishment assigned for such offence by the law of England" (see A.A. 41 (5). Courts-martial cannot (A.A. 44, proviso (1B)) award a longer term of imprisonment than two years. It may be observed that in a few cases a heavier punishment than that stated in this column can be inflicted by sentencing the offender to "such punishment as might be awarded to him" for an offence under A.A. 40. (See A.A. 41 (5).) In all cases in the second column imprisonment may be with or without hard labour.
(iii) The minimum term of penal servitude which can be awarded is three years. Where penal servitude may be awarded, the court may, as an alternative, award imprisonment up to two years.
(iv) The third column shows the other offences of which an accused may be found guilty by civil court or court-martial under A.A. 56 (6).
(v) On a charge of felony or misdemeanour, the accused may be found guilty of an attempt to commit the offence charged.
F=Felony. M=Misdemeanour. P.S.=Penal Servitude. Imp.=Imprisonment.

Offence.	Maximum Penalty.	Other offences of which accused may be found guilty.	Paragraph in which described.
Arson—			
Buildings generally	F. P.S. 14 years		75
Church, coal mine, public building, station, etc.	F. P.S. life		75
Crops	F. P.S. 14 years		75
Dockyard, arsenal, H.M. Ships	F. Death		75
Dwelling-house with person therein	F. P.S. life		75
Goods in building	F. P.S. 14 years		75
Stack	F. P.S. life		75
Attempted, buildings generally, coal mine, ship	F. P.S. 14 years		75
Attempted, stack	F. P.S. 17 years		75
Assault—			
Common	M. Imp. 1 year		34
Indecent. See "Indecent Assault."			
Occasioning actual bodily harm	M. P.S. 5 years	Common assault	35
On police officer in execution of his duty	M. Imp. 2 years		35
With intent to commit felony	M. Imp. 2 years		35
With intent to commit sodomy	M. P.S. 10 years		35
With intent to resist lawful arrest, etc.	M. Imp. 2 years		35
See also "Robbery."			
Attempt—			
To commit crime generally	M. Imp. 2 years		22
To commit murder	F. P.S. Life		48
To commit sodomy	M. P.S. 10 years		39
See also "Arson," "Carnal Knowledge."			

Bigamy	F.	P.S. 7 years		77
Buggery See "Sodomy."				
Burglary	F.	P.S. life	(1) Entering dwelling-house in the night with intent to commit felony. (2) Housebreaking. (3) Stealing in dwelling-house (if stealing alleged and property stolen is of value £5). (4) Simple stealing (if stealing alleged).	61
Carnal Knowledge—				
Of girl under 13	F.	P.S. life	(1) Procuring unlawful carnal connection by threats, fraud or drugs. (2) Carnal knowledge of idiot or imbecile. (3) Indecent assault.	38
Attempted, of girl under 13	M.	Imp. 2 years		38
Of girl 13–16, or attempted	M.	Imp. 2 years		38
Cheating—				
At cards, games, etc.	M.	P.S. 5 years		67
Fraudulently obliterating marks on public stores	F.	P.S. 7 years		67
Fraudulently obtaining execution of a valuable security	M.	P.S. 5 years		67
The public	M.	Imp. 2 years		67
Conspiracy to cheat and defraud. See "Conspiracy."				
Conspiracy—				
Generally	M.	Imp. 2 years		79
To cheat and defraud	M.	Imp. 2 years		67
To murder	M.	P.S. 14 years		49
Embezzlement—				
By clerk or servant	F.	P.S. 14 years	Stealing	53
By person employed in the public service	F.	P.S. 14 years		55
Extortion. See "Menaces, Demanding with."				
False Pretences—				
Fraudulently obtaining execution of a valuable security. See "Cheating."				
Obtaining chattel, money, valuable security, etc., by	M.	P.S. 5 years	Not entitled to be acquitted if stealing is proved. (See Ch. VII, para. 58).	57, 58
Obtaining credit by	M.	Imp. 1 year		57

Offence.	Maximum Penalty.	Other offences of which accused may be found guilty.	Paragraph in which described.
Forgery—			
Of official documents	F. P.S. 7 years		68
Of registers of births, marriages, deaths, etc	F. P.S. 14 years		68
Of valuable security, cheque, receipt, etc	F. P.S. 14 years		68
Of will, bond, deed, banknote, etc	F. P.S. life		68
Where crime is not made a felony by statute	M. Imp. 2 years		68
Uttering forged document	F. or M. As if guilty of forging.		69
Demanding, etc., money on forged instrument	F. P.S. 14 years		70
Making or possession of paper or instruments for forgery	F. P.S. 7 years		70
Purchase or possession of forged banknotes, etc	F. P.S. 14 years		70
Fraudulent Conversion of Property—			
In general	M. P.S. 7 years		56
High Treason. See "Treason".			
Housebreaking, etc.—			
And felony committed, by day or night	F. P.S. 14 years	(1) Stealing in dwelling-house (if stealing alleged and property stolen is of value £5). (2) Simple stealing (if stealing alleged).	62
With intent to commit felony entering dwelling-house at night.	F. P.S. 7 years		62
With intent to commit felony breaking and entering building by day or night.	F. P.S. 7 years		62
Being found by night in building with intent to commit felony.	M. P.S. 5 years or for second offence P.S. 10 years		64
Being disguised at night with intent to commit felony	M.		64
Being in possession of housebreaking tools by night	M.		64
Being in possession of offensive weapons with intent to break and enter.	M.		64
See also "Burglary".			
Indecency, Gross. See "Indecent Assault".			
Inciting to Commit Crime	M. Imp. 2 years		18
Indecent Assault, etc.—			
On females	M. Imp. 2 years	Common assault	35, 36
On males	M. P.S. 10 years	Common assault	35, 36
Gross indecency with male person	M. Imp. 2 years		40
Indecent exposure of person	M. Imp. 2 years		40

Justice, Conspiracy to obstruct the course of	M. Imp. 2 years	79, 80
Malicious Damage—		
To agricultural and certain other machinery	F. P.S. 7 years	76
To animals other than cattle	M. Imp. 6 months (1 year for second offence).	76
To bridges	F. P.S. life	76
To cattle	F. P.S. 14 years	76
To electric lines, works, etc	F. P.S. 5 years	76
To machinery	F. P.S. life	76
To mines	F. P.S. 7 years	76
To property, real or personal	M. Imp. 2 years (P.S. 5 years if at night).	76
To railways, etc	F. P.S. life.	76
To ships	F. P.S. life	76
Causing explosion likely to endanger life or injure property	F. P.S. life	76
Destroying, etc., by explosives, dwelling-house, any person being therein.	F. P.S. life	76
Possession of explosives for purpose of committing an offence.	M. Imp. 2 years	76
Putting explosives near buildings with intent to destroy	F. P.S. 14 years	76
Obstructing railways	M. Imp. 2 years	76
Manslaughter	F. P.S. life	46
Menaces, etc.—		
Demanding money by, with intent to extort, defraud, or injure.	F. P.S. life	60
Demanding money, by, with intent to steal	F. P.S. 5 years	60
Threatening to accuse of crime with intent to extort	F. P.S. life	60
Threatening to publish with intent to extort or induce favour	M. Imp. 2 years	60
Motor Vehicle—		
Reckless or dangerous driving	Imp. 2 years and/or fine	
Careless driving	First offence—fine £20 Second offence—fine £50 or Imp. 3 months	
Driving when under the influence of drink or drugs	Imp. 6 months and/or fine	
Driving when disqualified	Imp. 6 months and/or fine £50	
Driving without licence	First offence—fine £20 Second offence—fine £50 or Imp. 3 months	

80195—94

Offence.	Maximum Penalty.	Other offences of which accused may be found guilty.	Paragraph in which described.
Driving without insurance	Imp. 3 months and/or fine £50		
Taking without owner's consent	M. Imp. 12 months and/or fine £100		
Murder	F. Death	(1) Manslaughter. (2) Concealment of birth (where murder of infant charged).	44
Attempt to. See "Attempt". Conspiracy to. See "Conspiracy". Sending letter threatening to Wounding with intent to. See "Wounding".	F. P.S. 10 years		45
Perjury	M. P.S. 7 years (except in a few cases)		72
Personation— False, in order to obtain property, etc	F. P.S. life		73

Offence.	Maximum Penalty.	Other offences of which accused may be found guilty.	Paragraph in which described.
Prisoners of War—			
Assisting escape of	F. P.S. life		81
Rape	F. P.S. life	(1) Carnal or attempted carnal knowledge of girl, imbecile or idiot. (2) Indecent assault. (3) Incest.	37
Receiving	F. or M. P.S. 14 years if stealing is F. P.S. 5 years if stealing is M.		65
Robbery—			
Armed	F. P.S. life		59
With violence	F. P.S. life	(1) Robbery. (2) Assault with intent to rob. (3) Stealing from the person. (4) Simple stealing.	59
Not aggravated as above	F. P.S. 14 years	Assault with intent to rob	59
Assault with intent to rob	F. P.S. 5 years		59
Assault with intent to rob if armed	F. P.S. life		59
Sodomy (or **Buggery**)	F. P.S. life		39
Assault with intent to commit. See "Assault."			
Attempt to commit. See "Attempt."			
Stealing (Larceny)—			
Simple (including stealing by bailee)	F. P.S. 5 years (After previous conviction for felony, P.S. 10 years).	(1) Embezzlement. (2) False pretences	50–52
From the person	F. P.S. 14 years		59
In dwelling-house	F. P.S. 14 years		63
Mail-bag, letters, etc., in course of transmission by post	F. P.S. life		50–52
Treason, High	Treason. Death.		78
Treason-felony	F. P.S. life		78
Wounding—			
Unlawful	M. P.S. 5 years	Common assault	35
With intent to maim or do grievous bodily harm	F. P.S. life	Unlawful wounding	35
With intent to murder	F. P.S. life	Unlawful wounding	35
Uttering Forged Document. See "Forgery."			

CHAPTER VIII

THE COURTS OF LAW IN RELATION TO OFFICERS AND COURTS-MARTIAL

No appeal from courts-martial.

1. A right of "appeal" in the ordinary sense of that term exists only where it is expressly conferred by statute; and no such right of appeal to any court[1] (whether civil or military) is given against the decision of a court-martial or against the award or order of an officer.

Control of superior courts over courts-martial.

2. Notwithstanding the absence of a right of appeal, military tribunals are to a great extent subject to the control and supervision of the superior civil courts. The proceedings by which such control and supervision are exercised may be either criminal or civil. Criminal proceedings might take the form of a prosecution for assault, manslaughter or even murder; civil proceedings may be either preventive, *i.e.*, to restrain the commission or continuance of an injury, or remedial, *i.e.*, to afford a remedy for an injury actually suffered. Broadly speaking, the civil jurisdiction of the courts of law is exercised against a court-martial as a tribunal in applications for "prerogative" writs[2], and against individual officers in actions for damages.

Grounds for invoking aid of civil courts.

3. Until recently considerable doubt existed as to the right of a person subject to military law to invoke the aid of the civil courts to redress grievances arising out of his service as an officer or soldier, or out of the authority exercised over him by his superiors. From a line of decisions starting in 1786 with the famous case of *Sutton* v. *Johnstone*[3] the deduction had been drawn that a civil court would not inquire at all into the exercise of military discipline. In 1919, however, these decisions were re-examined in the case of *Heddon* v. *Evans*[4] and the following principles were laid down:—(1) If the rights which an officer or soldier is seeking to enforce are given to him not by the common law, but only by military law—if, for example, they concern only his rank, promotion or emoluments—it may well be that he can seek his remedy in the military code alone; (2) if such rights are fundamental common law rights—such as immunity of person or liberty—then, save in so far as they are taken away by military law, they may be asserted in the ordinary courts; (3) in the case of such fundamental rights, distinction is to be drawn between acts done in excess of, or without, jurisdiction, and acts done within jurisdiction but maliciously: "First, a military tribunal or officer will be liable to

---

[1] It is open to any Officer or soldier who considers himself aggrieved by the finding or sentence of a court-martial to forward a petition to the confirming or any reviewing authority through the usual channels (K.R. 666). Independently of any such petition, the proceedings of all general and district courts-martial before being filed in the office of the Judge-Advocate-General are carefully reviewed there as a matter of course with a view to detecting any illegality or miscarriage of justice. In the case of illegal or excessive punishments awarded by a commanding officer or by an authority dealing summarily with a charge under s. 47 of the Army Act, R.P. 10 provides for their cancellation, variation or remission by superior military authority.

[2] i.e., the writs of *Mandamus, Prohibition, Certiorari and Habeas Corpus.*

[3] See para. 40, *post.*

[4] See para. 45, *post.*

an action for damages, if when acting in excess of or without jurisdiction, it or he does, or directs to be done, to a military man, whether officer or private, an act which amount to assault, false imprisonment or other common law wrong, even though the injury purports to be done in the course of actual military discipline. Secondly, 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 such act has been done maliciously and without reasonable and probable cause."

Jurisdiction, limits of.

4. The jurisdiction of any tribunal may be limited by conditions as to its constitution, as to the persons whom or the offences which it is competent to try, and as to the sentences which it is empowered to award, or by other conditions which the law makes essential to the validity of its proceedings and judgments. If it fails to observe these essential conditions, it acts without jurisdiction or in excess of jurisdiction, as the case may be.

The jurisdiction of an army officer or court-martial to try and punish offenders is strictly limited by the military code of law which confers it, and to which an individual impliedly undertakes to submit when he joins the army. If they disregard the provisions and limitations of such code, they act without or in excess of their jurisdiction.

Thus, a commanding officer or a court-martial will act without jurisdiction if they deal with a person not amenable to military law as if he were so amenable; so, too, will a commanding officer who punishes a warrant officer, or a junior officer who assumes to himself the punitive powers of a commanding officer. A court-martial will act without jurisdiction if it is not properly convened, or is not properly constituted; if for instance the number of members is below the legal *minimum*, if the members are not duly qualified to act, or if the president is not of the proper rank, or has not been properly appointed.[1] An officer or court-martial will act without jurisdiction if they convict a man of an offence which is not an offence under the Army Act, or (save as provided by s. 56) of an offence different from that with which he is charged. An officer who confirms the proceedings of a court without having authority to do so acts without jurisdiction; and an officer who (with authority) confirms proceedings is equally responsible with the members, if they have acted without, or in excess of, jurisdiction.[2]

A court which awards a heavier punishment than it has authority to award exceeds its jurisdiction. There is old authority[3] also for the proposition that jurisdiction is exceeded if it be exercised with cruelty or oppression amounting to an abuse of it; but it may be doubted whether such abuse of jurisdiction can really be distinguished from malicious exercise of jurisdiction.

It has been said that "in testing the legality of sentences passed under the provisions of the Army Act, a civil court ought not to apply the rigorous tests sometimes applied in questioning the

---

[1] Accordingly, for the protection of members themselves, the Rules of Procedure require that the convening order shall be read at the commencement of the proceedings and that the court shall ascertain that it is properly constituted.

[2] See *Comyn* v. *Sabine*, para. 31, *post*.

[3] *Wall* v. *Macnamara*, par. 37, post.

acts of a civil court of summary jurisdiction. . . A reasonable latitude should be allowed, and mere mistakes of procedure, if actual jurisdiction existed, ought not to receive undue weight."[1]

Dismissal or discharge of officer or soldier.

5. An officer holds his commission at the pleasure of the Sovereign, who can at any time dismiss him without assigning a reason[2]; no contract to the contrary unless sanctioned by statute has any legal effect[3]. So, too, a soldier can be discharged at any time,[4] and in his case the form of his attestation undertaking recognizes this rule for it binds him to serve for a definite period if his services are so long required. In practice, of course, the prerogative power to dismiss or discharge is not exercised arbitrarily.

An officer cannot claim as a matter of right to resign his commission whenever he pleases.[5]

An officer or soldier cannot recover pay (or half-pay) alleged to be due to him by action or petition of right against the Sovereign in the civil courts.[6]

(i) *Writ of Mandamus*

Mandamus when it issues.

6. The writ of *mandamus* is a command issuing from the High Court of Justice directing some person or inferior court to do some particular act which is in the nature of a public duty. There must be a specific legal right to have the act performed, and there must be no other equally convenient and effectual remedy available.

There is no record of an application for a *mandamus* to a court-martial; but the following cases illustrate the principles governing the issue of such a writ.

Example.

7. An officer considering himself aggrieved in respect of his emoluments applied for a *mandamus* to the Secretary of State for War, directing him to carry out the terms of the Royal Warrant as to the pay and pensions of officers; it was refused on the ground that neither common law nor statute imposed on the Secretary of State any legal duty in respect of officers and their remuneration.[7]

An officer whose conduct had been investigated by a military court of inquiry, and who had been subsequently placed on half-pay, considered that the Rules of Procedure had not been properly complied with, and that he had not had full opportunity of being present throughout the inquiry. He asked for a *mandamus* directing the Army Council to cause the court to reassemble and hear his case according to law. The application was refused on four grounds:—(1) That the court would not interfere in matters relating to military law, prescribing rules for the guidance of officers; (2) that another equally appropriate remedy was open to the officer under s. 42 of the Army Act; (3) that it was in every case a matter for the discretion of the Council whether to assemble a court of inquiry or not, and

[1] *Heddon* v. *Evans*, para. 45, *post*.
[2] *Grant* v. *Sec. of State for India* [1877], L.R. 2 C.P.D. 445; *re Mansergh*, para. 16, *post*; *re Tufnell*, p. 142, note 1, *post*; *Dunn* v. *R.*, L.R. [1896], 1 Q.B. 116.
[3] *Hales* v. *R.* [1918] 34 T.L.R. 589.
[4] *Leaman* v. *R.*, L.R. [1920] 3 K.B. 663.
[5] *Hearson* v. *Churchill*, L.R. [1892], 2 Q.B. 144 and older cases there cited.
[6] *Leaman* v. *R.*, *supra*: no engagement between the Crown and an officer in respect of services either present, past or future can be enforced by civil action; *Mitchell* v. *R.*, L.R. [1896], 1 Q.B. 121, note.
[7] *R.* v. *Secretary of State for War*, L.R. [1891], 2 Q.B., 326.

Ch. VIII

that the court never ordered an authority to exercise its discretion in a particular way; (4) that under the circumstances a *mandamus* would be ineffectual, because the Council could act upon any information which reached them and were not confined to a report from a formal court of inquiry.[1]

(ii) *Writ of Prohibition*

Prohibition; when it issues.

8. The writ of prohobition issues out of the High Court of Justice to any inferior court which concerns itself with any matter not within its jurisdiction, or transgresses the bounds prescribed to it by law. It forbids the inferior court to proceed further in the matter, or to exceed the bounds of its jurisdiction; and if want of jurisdiction in the inferior court be once shown, any person aggrieved by the usurpation of jurisdiction is entitled to the writ as a matter of right.

The writ will not be granted for irregularity in the proceedings or wrong decision of the merits; or when it can be of no use, as, for example, after a sentence has been carried into execution.

Examples.

Grant v. *Gould.*

9. Applications for a prohibition to restrain courts-martial have hitherto been few and uniformly unsuccessful. The earliest reported is that of *Grant* v. *Gould*[2] in which Lord Loughborough affirmed the general principle that courts-martial are subject to the control of the superior courts, and can be prohibited if they exceed their jurisdiction; but that on the other hand mere error in matters within their jurisdiction is no ground for a prohibition. The plaintiff, Sergeant Grant, was tried by court-martial on a charge of having persuaded two drummers of the Guards to desert and enlist in the service of the East India Company. He was convicted and sentenced to be reduced to the ranks, and to receive one thousand lashes. Grant moved for a prohibition to prevent the execution of this sentence on the grounds (i) that he was not a soldier and therefore a court-martial had no jurisdiction to try him, (ii) that evidence was improperly admitted and rejected, (iii) that he was convicted of a crime not properly alleged in the charge, and (iv) that such crime was not an offence under the Mutiny Act. The court agreed that the first ground was material, as it affected the jurisdiction of the court-martial[3]; but after examining the facts they were satisfied that Grant was in fact subject to military law; the other grounds they considered as unsubstantial—at the most, errors in procedure; and accordingly they refused prohibition, leaving the sentence to the King's clemency.

Poe's case.

10. The next case[4] illustrates the rule that a prohibition will not be granted when it is too late for it to effect any remedy.

---

[1] *R.* v. *Army Council ex parte Ravenscourt*, L.R. [1917], 2 K.B., 504.

[2] (1792) 2 Bl., H., 69.

[3] In this case the court reviewed the evidence on which the court-martial had acted; but Lawrence J., when referring to it in *Warden* v. *Bailey*, 4 Taunt. at p. 77, remarked that whether Grant was or was not a soldier was one of the questions which the court-martial "had before them to try," as if their decision on the point was conclusive. The rule now appears to be that where the jurisdiction of the inferior tribunal depends upon a question of law, or of law and of fact mixed, the High Court will review its decision, but not when it depends upon a question of pure fact as to which there was conflicting evidence.

[4] *Re Poe* (1832) 5 Barn. & Adol., 681; see also *re Clifford & O'Sullivan* L.R. [1921] 2 A.C. 570 (referred to in para. 14 *post*).

Lieutenant Poe, being a passenger on board ship, was accused of stealing money and clothes from his servant's trunks, which were kept in his (Poe's) cabin. On investigation of the charge by the captain of the ship and other officers on board, Poe was expelled by the officers and passengers from their table and society. He took no measures to vindicate his honour; and being tried for conduct to the prejudice of good order and military discipline, was found guilty, and sentenced to be dismissed the service. The sentence was confirmed by the King and carried into execution. An application on behalf of Poe that a prohibition might issue "to the Judge-Martial and Advocate-General of His Majesty's forces" to restrain the execution of the sentence was refused, Denman, C. J., observing that even supposing the case of *Grant* v. *Gould* to furnish some argument that a writ of this nature might be directed to the Judge-Advocate before execution of the sentence, it was impossible to discover what he could be required to abstain from after execution.

M'Carthy's case.

11. Sergeant M'Carthy[1] was tried in 1866 by a general court-martial on a charge of "coming to the knowledge of an intended mutiny, and not revealing such knowledge to his superior officers." The evidence given implicated him in the Fenian conspiracy, and showed endeavours on his part to induce soldiers to become members of that conspiracy, and various other acts amounting to overt acts of treason. After the close of the prosecution the court-martial was adjourned in order to permit the prisoner to apply for a writ of prohibition on the ground that the evidence establishing the military offence of mutiny disclosed also that the prisoner was guilty of treason, which a court-martial would have no jurisdiction to try. The Irish Court of Queen's Bench held that the military offence did not merge in the greater offence, and declined to accede to the application.

S.A. Labour Corps case.

12. In 1917 some members of the South African Native Labour Contingent mutinied on the voyage to South Africa, to which country they were being repatriated in accordance with the conditions of their enlistment-contract after the termination of their service in France. After their arraignment before a field general court-martial at Cape Town, the Supreme Court of South Africa was asked to prohibit the president of the court from proceeding further with the case on the ground that the accused were amenable only to a civil tribunal. The court considered the terms of enlistment, and held that recruits to the contingent submitted themselves to military discipline knowing that they were joining a military organization to be officered by regular officers under War Office orders: they held that s. 176 (3) (9) (10) applied and rendered the accused subject to the Army Act and military tribunals, and consequently refused prohibition.[2]

Writ of prohibition to a court-martial.

13. In *ex-parte Webster* the Supreme Court of New South Wales issued a writ of prohibition to a court-martial restraining the members of the court from proceeding further with the trial on the ground that the court had not been legally convened.[3]

---

[1] *Re M'Carthy* (1866) 14 W.R., 918.
[2] *Makubedi* v. *Gutsche* [1917] S.A. Supreme Court Reports 632. Incidentally the court said that the respondent ought strictly to have been the G.O.C.-in-C. and not the president.
[3] 10 New South Wales Rep. (1889), p. 79.

To officer.

The question whether a writ of prohibition would issue to an officer exercising individual authority does not seem ever to have been raised.

To court of inquiry.

In a recent case[1] it was said that, "In a matter affecting the discipline of the Army this Court cannot interfere by *mandamus*, prohibition or *certiorari*, at the suit of an officer or soldier, with the proceedings of a military court of inquiry or with any action that may thereupon be taken by the Army Council."

Re Clifford and O'Sullivan.

14. On May 3rd, 1921, Patrick Clifford and Michael O'Sullivan, civilians, were tried by a military court held under a martial law proclamation applicable to County Cork and were convicted and sentenced to death for an offence committed in the martial law area and made capital under the proclamation.

They thereupon applied in the Chancery Division in Ireland for a writ of prohibition against the military court, the Commander-in-Chief in Ireland and the General Officer Commanding in Cork to prohibit them from proceeding further with the trial or from pronouncing or confirming any judgment upon the prisoners as a result of the trial or from carrying into execution any such judgment on the ground that the military court was illegal and had no jurisdiction. Powell, J., following the decision in *R.* v. *Allen*,[2] refused the application. An appeal was brought to the Court of Appeal in Ireland who held that they had no jurisdiction to entertain the appeal and dismissed it. A further appeal was then taken to the House of Lords and it was there held that, as proceedings before a military court were not in any sense criminal proceedings, an appeal would lie; but, on the merits of the application itself, it was decided that prohibition did not lie, first, because the officers constituting the military court did not claim to act as a judicial tribunal in any legal sense, and, secondly, following the decision in *R.* v. Poe, that they were *functi officio*. In the course of his judgment Viscount Cave, L.C., said: "A further difficulty is caused to the appellants (the original applicants) by the fact that the officers constituting the so-called military court have long since completed their investigation and reported to the commanding officer, so that nothing remains to be done by them and a writ of prohibition directed to them would be of no avail. What the appellants really desire is an order restraining General Macready and Major-General Strickland from confirming and carrying out the sentence; and it is clear that as against these officers, who are in no sense the officers or agents of the military court, prohibition could not be granted.

(iii) *Writ of Certiorari*

Certiorari when it issues.

15. *Certiorari* is a writ issuing to the judges or officers of inferior courts, and commanding them to certify and return the record of a matter, *e.g.*, a conviction or order, depending before them, to the end that more sure and speedy justice may be done. If the conviction or order of the inferior court is found to be bad in law, it will be quashed.

---

[1] *R.* v. *Army Council, ex parte Ravenscroft*, L.R. [1917], 2 K.B., 504.
[2] See para. 29, *post*.
[3] *Re Clifford and O'Sullivan*, L.R. [1921], 2 A.C., 570.

In the case of inferior civil courts, if absence or excess of jurisdiction is shown, the writ is issued on the application of the person aggrieved almost as a matter of course, unless he has by his conduct precluded himself from taking an objection.[1] As the law is at present understood, in the case of a court-martial sentence, it will issue only when the rights affected by the judgment of the court are civil rights, and not when they are dependent on military status and military regulations.[2]

Examples, *Mansergh's case.*

16. In January, 1858, Captain Mansergh was on duty with his regiment, the 6th Foot, at Calcutta, under the command of Colonel Barnes. In February, 1858, he was gazetted to a majority in the 15th Foot, at that time stationed in England. Notice of this appointment was transmitted to India and notified in orders in the usual way, after which notification Major Mansergh ceased, according to the rules of the army, to belong to the 6th Foot. The latter regiment was about to start on active service, when Colonel Barnes informed Major Mansergh of his promotion and desired him to hand over his company to another officer, which he did accordingly.

Subsequently Major Mansergh, conceiving that the notification of his appointment to the 15th Foot had been obtained by Colonel Barnes for the purpose of excluding him from active service, wrote to the Colonel expressing that view in strong language. For this he was placed under arrest, and subsequently tried by court-martial on a charge of having addressed to his superior officer a letter containing offensive and insulting language. He was found guilty and sentenced to be dismissed; and the proceedings having been confirmed, were sent to England and deposited with the Judge-Advocate-General. Major Mansergh then applied to the Court of Queen's Bench for a rule calling on the Judge-Advocate-General to show cause why *certiorari* should not issue to bring up the record of his conviction in order that it might be quashed, on the ground that after his promotion he ceased to be within the command of the Commander-in-Chief in India, and that consequently the court-martial had no jurisdiction to try him.

The Court refused the application[3]—Cockburn, C. J., observing: "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 these civil rights, *e.g.*, where the rights of life, liberty, or property are involved, although I do not know whether the latter case could occur. Here, however, there was 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.[4] Then there is this additional fact that these proceedings originated abroad in a country the tribunals of which are not subjected to our jurisdiction. It is contended that because we have the record of the proceedings in

---

[1] *R.* v. *Surrey* jj. [1870] L.R., 5 Q.B., 466.
[2] See paras. 3 *ante* and 16, 17, *infra*.
[3] *Re Mansergh* (1858) 1 Best and Smith, 400.
[4] See para. 5, *ante*.

Ch. VIII

the country we have jurisdiction over it. Assuming that for a moment, yet when we look at the particular nature of the case before us, we see that the military status of the applicant alone is affected, and consequently if he had just cause of exception to the act of the tribunal by which he was sentenced, he might have appealed to the Queen to reconsider the matter with the advice of her Judge-Advocate. For these reasons I am of opinion that in this case we have no jurisdiction to grant a *certiorari*; besides which, *certiorari* being a discretionary writ, we most certainly ought not in the exercise of our discretion to grant it if we had the jurisdiction."

Roberts' case.

17. A similar application in 1879 by Captain Roberts was equally unsuccessful. He founded his application on the ground that the sentence of the court-martial dismissing him from the service was invalid, in that it simply sentenced him to be dismissed without stating the cause of dismissal.

It was attempted to distinguish this case from that of Mansergh, on the ground that here civil rights were indirectly affected, as Mr. Roberts would lose his rights to pension or retiring allowance, and would lose the sum he had paid for purchase. But it was pointed out by the Judges that the rights referred to were purely military in their nature and dependent on military status and military regulations, and *Mansergh's case* was considered decisive against granting the application.[1]

Fogan's case.

18. In a recent Canadian case[2] it was recognized that, where a court-martial has acted within its jurisdiction, neither the merits of the conviction nor the propriety of the sentence can be reviewed by the Supreme Court upon an application for either *certiorari* or *habeas corpus*.

(iv) *Writ of Habeas Corpus*

Habeas Corpus; when it issues.

19. Any person who is detained in what he conceives to be illegal custody by order of a court-martial or other military authority can apply for a writ of *habeas corpus ad subjiciendum*. This writ is the most celebrated writ in English law, being the constitutional remedy for a person wrongfully deprived of his liberty. It is addressed to the person who detains another in custody, and commands him to produce and "have the body" of the prisoner before the court to "undergo and receive" whatever the court considers proper. It issues out of the High Court of Justice, and into all parts of the King's dominions, except that by 25 & 26 Vict., c. 20, no writ of *habeas corpus* shall issue out of any of the courts in England into any colony or foreign dominion of the Crown where His Majesty has a lawfully established court of justice having authority to issue this writ and to ensure its due execution. The person to whom it is addressed must make a "return" to the writ stating why he holds the prisoner in custody; and upon

---

[1] *Re Roberts*, "*Times*", June 11, 1879. In *Re Tufnell* (1876) L.R., 3 Ch. Div., 164, a petition of right was presented by an army surgeon, who had been compulsorily retired on half-pay, for the injury thereby sustained by him. A demurrer by the Attorney-General to the petition was allowed, the Vice-Chancellor stating the law to be that "every officer in the Army is subject to the will of the Crown and can be removed and put on half-pay, or dealt with as the Crown, with a view to the public convenience, thinks best."

[2] *Ex parte Fogan* (1920) Can. Crim. Cases, Vol. 32, p. 41; see also *R.* v. *Murphy* (1921) 2 L.R. 190 (referred to in para. 28 *post*).

consideration of such return the prisoner is either discharged, or, if the return shows sufficient cause for the detention in custody, is remanded to custody, or is admitted to bail.

No retrial.

20. The court upon *habeas corpus* proceedings do not retry the case, for they do not sit as a Court of Appeal to consider whether an inferior court has decided rightly or wrongly upon some point, the decision of which has been entrusted to them.[1] Broadly speaking the question is whether the document under which the custodian justifies his act is a valid one.[2] In illustration of this the case of Gunner Suddis[3] may be referred to. He was sentenced at Gibraltar by a general court-martial to fourteen years' transportation for having received articles stolen from a warehouse. A writ of *habeas corpus* was directed to the Governor of Portsmouth Prison to bring him up from custody. It was held a sufficient return to the writ that the defendant was in custody under the sentence of a court of competent jurisdiction to inquire into the offence and to pass such a sentence, without setting forth the particular circumstances to warrant the sentence. Lord Kenyon, C.J., said, "We are not now sitting as a Court of Error to review the regularity of these proceedings; nor are we to hunt after possible objections." And Grose, J., said "It is enough that we find such a sentence pronounced by a court of competent jurisdiction to inquire into the offence, and with the power to inflict such a sentence; as to the rest we must presume *omnia rite acta.*"

Suddis' case.

Technical objections disregarded.

21. Neither will the court give effect to technical objections to the form of a commitment warrant. It will go behind the commitment and see whether there is a valid conviction[4]; if so, a flaw in the commitment is immaterial; and the Army Act[5] contains an express provision which practically precludes a prisoner from obtaining his release by *habeas corpus* on the ground of errors and informalities so long as there is a valid conviction and sentence against him. Nor again will effect be given to technical errors in the return itself, which can be amended so as to show the real facts. At the present date, therefore, such decisions as those in *Douglas' case*[6] and *Allen's case*[7] are no longer of importance.

Re Porrett.

22. Where, however, the proceedings of a court-martial were confirmed by an officer who had not the necessary authority to do so, the prisoner was discharged from custody[8]; and the same result would no doubt follow if it were shown that unqualified officers sat on a court-martial.

---

[1] See *ex parte Fogan*, para. 18, *ante*.

[2] See *R.* v. *Chiswick (Police Superintendent)* L.R. [1918], 1 K.B. 578, as to the court's power to go behind an order of the executive, which upon its face is valid, if it is found to be "practically a sham" intended to cover an illegality.

[3] (1801) 1 East, 306.

[4] *R.* v. *Lewes Prison (Governor)* L.R., [1917] 2 K.B. 254.

[5] A.A. 172 (2) (4).

[6] (1842) L.R., 3 Q.B. 825. Douglas was released because the return stated merely that he was detained as a deserter and did not allege that he was a soldier and ought to be with his corps.

[7] (1860) 30 L.J.Q.B. 38. Lieut. Allen was sentenced in India to four years' imprisonment. After confirmation he was removed in military custody to England, and was imprisoned in several gaols. No proper written authority for his imprisonment after arrival had been sent to England, and the court felt compelled to release him. He actually recovered £50 damages from the governor of one of the prisons. (*Allen* v. *Boyle*, "*Times*," March 4, 1861.)

[8] *Re Porrett* (1844) Perry's Oriental Cases 414.

Re Moore.

23. In a Canadian case,[1] a storekeeper who had been convicted by court-martial on a charge of "embezzling *or* fraudulently misapplying," and imprisoned, obtained his release by *habeas corpus* from the Court of Queen's Bench at Montreal. The court adjudged the commitment to be void by reason of the form of charge and finding, and ordered the prisoner to be discharged, "because the charge and conviction were in the alternative without any certainty as to any or either of the two charges in the disjunctive, and this is matter of substance."

High Court will examine regularity of proceedings only.

24. As a general rule the High Court will look to see whether the inferior tribunal had jurisdiction, and whether its proceedings are upon their face regular and according to law; but it will not consider whether that tribunal has correctly decided some question of law or of fact which it was its duty to decide[2]—unless perhaps there was before it no evidence at all to support its decision.[3]

Blake's case.

25. Proceedings by *habeas corpus* are not, of course, restricted to cases where there has been a conviction. For instance, the writ may issue where a man is detained for an unreasonable time without being brought to trial. Thus in 1814 a writ was asked for on behalf of Lieutenant Blake, to be addressed to the commanding officer of the infantry barracks at Windsor. The affidavit in support stated that Blake, being on leave and hearing that there were certain charges alleged against him, voluntarily surrendered himself to take his trial, that on September 21 he was placed under arrest and in close confinement, and that until the latter end of October he was not permitted to quit his room, but afterwards was allowed to take exercise. On November 1, not having been furnished with any copy of the charges against him, he presented a memorial to the Commander-in-Chief, but did not receive any answer. On November 16 he was officially informed that a warrant had been signed for holding a court-martial, and was furnished with a copy of the charges, which consisted among others of certain offences stated to have been committed at Windsor towards an officer of the same regiment. On November 22nd his regiment was ordered on foreign service, and shortly afterwards sailed for Holland. The affidavit then stated that all or many of the witnesses who might be called for the prosecution or defence had sailed with the regiment, that the laws of this realm would not permit him to be sent to a foreign country for trial, and therefore he could not be brought to trial before the return of the regiment. It further alleged that, as a matter of fact, a sufficient number of officers might at any time have been conveniently assembled for the purpose of constituting a court-martial; and therefore there had been ample opportunity for conveniently assembling one between the arrest and the signing of the warrant, and also between the signing of the warrant and the sailing of the regiment.

The court inquired if there was any instance of a *habeas corpus* to take a military subject out of military arrest, and were referred to the case of Sergeant Wade[4] where a rule *nisi* (*i.e.*, a rule calling

---

[1] *Re Moore* (1867) Simmons, p. 165.
[2] *R.* v. *Nora Hill Camp (Commandant)* L.R. [1917], 1 K.B. 176.
[3] *R.* v. *Brixton Prison (Governor)* L.R. [1914], 1 K.B. 77.
[4] 2 M. & S., 429 n.

on the other side to argue the question and show why the writ should not issue) had been granted. The court hesitated about granting a rule *nisi*, because, upon the question whether a court-martial could be conveniently assembled, if the return should be that a court-martial could not be conveniently assembled, the court would be precluded. A rule *nisi* was, however, granted, and on its coming on to be argued, an affidavit from the Judge-Advocate-General was produced, stating that proceedings were instituted for bringing Blake to trial as soon after his arrest as could conveniently be done; and that he believed Blake would have been tried before, had not the trial been postponed partly on account of the absence in the West Indies of persons alleged by Blake to be material for his defence, and partly on account of the embarkation of the regiment. Thereupon the court refused the writ, Lord Ellenborough, C. J., observing, "Up to November 16 the applicant seems to have thought it a fair time, and the delay since has been satisfactorily explained; it is not a wanton or oppressive delay, but arising out of the circumstances of the country. We cannot lay down any general rule, but must in a very great degree give credence to people in high situations when they depose that all has been done which could conveniently and according to the course of office be done, and unless something be shown to the contrary."[1]

Re Gavin.

26. Where a writ of *habeas corpus* was issued to an officer to produce a recruit who was detained as a deserter, and the officer by direction of the Horse Guards discharged the prisoner, and made no return, the court were of opinion that he ought to have returned the fact of the discharge, but would not grant an attachment for contempt.[2]

No *habeas corpus* for prisoner of war.

27. A prisoner of war (including an alien internee) cannot sue out a writ of *habeas corpus*.[3]

Cases arising out of recent Irish troubles.

28. The Irish troubles of 1920-21 gave rise to a series of cases in which the jurisdiction both of statutory courts-martial and of military courts held under martial law was challenged in the superior courts of law.

Joseph Murphy's case.

On December 15th, 1920, Joseph Murphy, a civilian subject to military law by virtue of the special provisions of the Defence of the Realm Consolidation Act, 1914, and the Restoration of Order in Ireland Act, 1920, was tried and convicted by general court-martial of the murder of a soldier on duty and was sentenced to death. Before the sentence was executed, application was made to the Court of King's Bench in Ireland for a writ of *habeas corpus* directed to the governor of the prison in which the condemned man was interned and for a writ of *certiorari* directed to the General Officer Commanding-in-Chief in Ireland, and, to the Major-General who had convened the court-martial, to bring up the record, findings, etc., of the court in order that they might be quashed on the ground that there had been an abuse of the jurisdiction of the court and a disregard of the essentials of justice and the conditions regulating the functions and duty of the court. It was alleged and not disputed that admissible evidence had been wrongly excluded by the court-martial.

---

[1] *Ex parte Blake* (1814) 2 M. & S., 428.
[2] *Re Gavin* (1850) 15 Jur., 329 n.
[3] *Schaffenius* v. *Goldberg*, L.R. [1916], 1 K.B. 284.

The Court of King's Bench held that the court-martial in the exercise of the jurisdiction which it possessed was called upon to decide questions, not only of fact, but of law, including the admissibility of evidence; that its jurisdiction was not ousted because it happened to give an erroneous decision; and that a court-martial cannot be deemed to exceed or abuse its jurisdiction merely because it misconstrues a statute or admits illegal evidence or rejects legal evidence. The applications for writs of *habeas corpus* and *certiorari* were therefore refused and the court further held that the reasons upon which the decision was based would be applicable also to a writ of prohibition.[1]

John Allen's case.

29. On February 7th, 1921, John Allen, a civilian, was tried by a military court convened in accordance with a proclamation of martial law, and was sentenced to death for an offence which was made a capital offence under the proclamation though not punishable capitally under the ordinary law. Application was therefore made for a writ of prohibition directed to the General Officer Commanding-in-Chief in Ireland, for a writ of *habeas corpus* directed to the governor of the military detention camp where the condemned man was interned and for a writ of *certiorari* to quash the proceedings on the ground that they were illegal and in excess of jurisdiction and that the military courts had no authority to sentence Allen to death for the offence for which he was tried.

The Court of King's Bench in Ireland decided that there was a state of war existing which jutsified the application of martial law; that a government is bound when dealing with an armed insurrection to repel force by force and to put down such insurrection and restore public order, even if this involves a death sentence for an offence otherwise not punishable capitally; that while the state of war exists the superior courts have no jurisdiction to question the acts of the military authorities when martial law is imposed and the necessity for it exists; and that a military court under martial law can in some circumstances (following *ex parte Marais*[2]) act even if courts of justice in the martial law area are open. For these reasons the applications for the various writs mentioned were refused.[3]

Garde and Ronayne's cases.

The case of *R.* v. *Allen* was followed in two similar cases which came before the Court of King's Bench in Ireland; in both cases it was held that if a state of war is shown to exist in an area placed by proclamation under martial law, the civil courts have no jurisdiction *durante bello* to interfere with the decision of a military court sitting in the martial law area.[4]

Egan v. *Macready.*

On July 26th, 1921, the Master of the Rolls sitting in the Chancery Division in Ireland declined to follow the decision of the Court of King's Bench in *R.* v. *Allen* holding that as a state of war was in existence at the date of the passing of the Restoration of Order in Ireland Act, 1920, the executive powers of the military authorities

---

[1] *R.* v. *Murphy* [1921] 2 I.R. 190.
[2] L.R. [1902], A.C. 109.
[3] *R.* v. *John Allen* [1921] 2 I.R. 241.
[4] *R. (Garde)* v. *Strickland* (1921) 2 I.R. 317; *R. (Ronayne and Mulcahy)* v. *Strickland* (1921) 2 I.R. 333.

were limited by that Act and that accordingly the accused could be tried by no other military tribunal than a court-martial properly convened and held in accordance with the statute. A conditional order for a writ of *habeas corpus* was made absolute and in accordance with the practice of the court made returnable for July 29th, but on that day the Crown did not produce the prisoner in view of the decision of the House of Lords in the case of *Clifford and O'Sullivan*[1] on July 28th, but subsequently released him pending the hearing of an appeal from the decision of the Master of the Rolls. No appeal was in fact made.[2]

(v) *Actions for Damages*

Actions against members of courts-martial and individual officers.

30. It is a general rule of law that magistrates and others, who, acting without jurisdiction, or in excess of their jurisdiction, violate the personal rights of any person by causing his arrest, imprisonment, or otherwise, are liable to an action for damages.[3] It is now recognised[4] that the same general rule applies to officers where a person's common law rights are infringed. Members of a court-martial who try a person not subject to military law, or for an act which is not an offence cognisable by them or who pass a sentence which they have no power to pass, and the officer who confirms the proceedings, are all liable to an action at the suit of the person so aggrieved; so, too, are individual officers who transgress the bounds of their lawful authority.

No liability for mere errors of judgment.

For mere errors of judgment in deciding points upon which it is their duty to adjudicate, members of a court-martial cannot be made responsible any more than civil judges and magistrates. "Even inferior justices and those not of record cannot be called in question for an error of judgment so long as they act within the bounds of their jurisdiction. In the imperfection of human nature it is better even that an individual should occasionally suffer a wrong than that the general course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it. Corruption is quite another matter, so also are neglect of duty and misconduct in it. For these, I trust, there is, and always will be, some due course of punishment by public prosecution.[5]" The same rule doubtless applies to individual officers exercising judicial functions.[6]

On the other hand, if an act is in itself unlawful—as being done without, or in excess of, jurisdiction—*bona fides* and honesty of purpose are no excuse.

Actions by civilians; *Comyn* v. *Sabine*.

31. The plaintiff in *Comyn* v. *Sabine*[7] was a master carpenter of the office of ordnance at Gibraltar, and he brought an action against Governor-General Sabine for having confirmed the sentence of a court-martial which awarded him the punishment of 500 lashes. It was shown that the carpenters of the office of ordnance were not subject to military law, and the jury found the Governor to be liable, as

[1] See para. 14, *ante*.
[2] *Egan* v. *Macready* (1921) 1 I.R. 265.
[3] *Crepps* v. *Durden* [1777], 1 Smith, Lead. Ca., 651.
[4] See para. 3, *ante*.
[5] *Garnett* v. *Ferrand* (1827) 2 Barn. & Cr. 611; *per* Lord Tenterden, C.J.
[6] *Hedden* v. *Evans*, para. 45, *post*.
[7] (1738) cited in *Mostyn* v. *Fabrigas*, para 32, *infra*.

Ch. VIII

having had a share in the sentence, and gave 500*l.* damages. Lord Mansfield, citing the case in *Mostyn* v. *Fabrigas*[1] said, "The Governor was very ably defended, but nobody thought the action would not lie."

And, where a conviction is invalid, the governor of a prison who detains the person may be liable to an action.[2]

Sutherland v. *Murray.*

Sutherland v. *Murray*[3] was an action brought by Mr. Sutherland, a judge in Minorca, against General Murray for improperly suspending him from his office. The General had professed himself ready to restore the judge on his making a particular apology; and on reference to the home authorities the King approved of the suspension unless the Governor's terms were complied with. It was admitted that General Murray had power to suspend the judge for proper cause, yet on the proof that he had acted unreasonably and maliciously, and had misrepresented the facts in his report, the jury gave 5,000*l.* damages against him.

Goodes v. *Wheatly.*

In *Goodes* v. *Lieutenant-Colonel Wheatly,*[4] the plaintiff was doing duty as constable at St. James's Palace, and had occasion to desire Lieutenant-Colonel Wheatley, of the Guards, who was not in uniform, to walk on, whereupon Colonel Wheatley marched Goodes off to the guard-room by a file of grenadiers, and confined him there several hours. The plaintiff was non-suitel, but, it would appear, solely in consequence of a failure to prove formally his appointment as constable.

Boyce v. *Bayliffe.*

In another case the captain of an East Indiaman, on two strange sails being described, mustered all hands and passengers, and assigned them stations for the defence of the ship. The plaintiff, one of the passengers, refused to go to this station, and thereupon was, by order of the captain, carried there and kept in irons all night. It was held by Lord Ellenborough, that though the captain might well have been justified originally in confining the plaintiff for his refusal to obey orders, yet he had exceeded his authority in keeping him in irons all night; and the jury gave 80*l.* damages.[5]

Glynn v. *Houston.*

In *Glynn* v. *Houston,*[6] Mr. Glynn, a British merchant residing at Gibraltar, recovered 50*l.* damages from General Sir William Houston, the acting governor, for having caused Mr. Glynn's premises to be surrounded with a detachment of troops, while a house immediately adjoining was searched for the person of a Spanish general, and for having prevented Mr. Glynn from leaving his house during the search (which was unsuccessful) by placing a sentinel with fixed bayonet at the door.

Actions by foreigners; *Mostyn* v. *Fabrigas.*

32. Foreigners will be protected by our courts in the same way as Englishmen. Thus, in the well-known case of *Mostyn* v. *Fabrigas,*[7] a native of Minorca brought an action against General Mostyn, governor of that island, for having, without trial, imprisoned and banished him from the island, and recovered 3,000*l.* damages. On a bill of exceptions, the point that, where the cause of action arises

---

[1] See para. 32, *infra.*
[2] See *Allen* v. *Boyle,* p. 143, note 7, *ante.*
[3] See (1783) 1 T.R., 538.
[4] (1808) 1 Campbell 231.
[5] *Boyce* v. *Bayliffe* (1807) 1 Campbell 58.
[6] (1841) 2 Man. & Gr. 337.
[7] (1774) 1 Smith, Lead. Ca., 591.

abroad, the courts of this country have no jurisdiction, was elaborately argued; but Lord Mansfield, delivering the judgment of the court, emphatically laid down that actions of this description may be brought in England, though the matter arises in foreign parts. He also, with no less emphasis, rejected the argument that the defendant was entitled to protection from an action by reason of his character as governor. In the course of the case he referred to two earlier decisions of a somewhat similar character. In the first of these it appeared that Captain Gambier, by order of Admiral Boscawen, pulled down the houses of some sutlers on the coast of Nova Scotia, who supplied the sailors frequenting them with spirituous liquors, whereby their health was injured. One of the sutlers (whom the captain incautiously conveyed to England upon his ship) brought an action against him and recovered 1,000*l.* damages. The second case, in which Admiral Palliser was sued for destroying some fishing huts erected by Canadians on the Labrador coast, was disposed of by an arbitrator's award.

Madrazo v. Willes.

So, too, in a later case it was held that an English naval officer was liable in damages to a Spaniard for seizing his cargo of slaves on board a Spanish ship.[1]

Acts authorized by the Government.

33. A British subject, however, is not liable to actions by foreigners in respect of hostile acts done by him in the name of the Government, provided those acts are either authorized by an actual command or ratified by a subsequent approval of the Government. To such acts the maxim *respondeat superior* appears to apply; and, if the Government refuses redress, there is no remedy but an appeal to arms.[2] Nor, where war is actually raging, are acts of the military authorities cognizable by the ordinary courts.[3]

Alien enemies.

Further, in time of war, an alien enemy cannot sue in our courts unless he is within the realm by licence of the Sovereign.[4]

Excessive corporal punishment; damages for.

34. There are several old cases where juries gave heavy damages in respect of the unathorized infliction of corporal punishment. Thus a seaman recovered damages against Captain Tonyn, R.N., for the infliction of several dozen lashes without a court-martial, the custom of the Navy only permitting a commanding officer to inflict summarily one dozen lashes.[5]

A similar action was brought against Colonel Bailey, of the Middlesex Militia, for improperly flogging a private, and 600*l.* damages were awarded. And in an action tried in 1793 against officers of the Devon Militia for inflicting 1,000 lashes on the plaintiff, who had been found guilty of a charge of mutiny, though the only act proved against him was that he had written to the colonel a letter telling him that the men were discontented, which was not communicated to anyone else, the plaintiff recovered 500*l.* or 600*l.* damages.[6]

---

1 [1] *Madrazo* v. *Willes* (1820) 3 Barn. & Ald. 353, slavery being then lawful by Spanish law; but as to an English slave owner's rights, see *Forbes* v. *Cochrane* (1824) 2 Barn. & Cr. 448.

[2] See cases cited in 1 Smith, Lead. Ca., 648.

[3] *Ex parte Marais* L.R. [1902], A.C. 109.

[4] *Porter* v. *Freudenberg*, L.R. [1915], 1 K.B. 857.

[5] 4 Taunt., 71.

[6] (1763) 4 Taunt., 70.

Illegal sentence: damages for. *Frye* v. *Ogle*.

35. A well-known case as to the liability of members of a court-martial is *Frye* v. *Ogle*. Lieutenant Frye was brought to a court-martial at Port Royal by his captain for disobedience in refusing to assist another lieutenant in carrying an officer prisoner on board ship without a written order from the captain. Part of the evidence produced against him at the court-martial consisted of depositions made by illiterate natives, whom he had never seen or heard of, and reduced into writing several days before he was brought to trial; and upon his objecting to the evidence he was brow-beaten and overruled. Lieutenant Frye was sentenced to 15 years' imprisonment, and declared for ever incapable of serving His Majesty. It is doubtful whether the act charged against him amounted to an offence[1]; but in any case the court had only power to award two years' imprisonment. On his arrival in England, his case was laid before the Privy Council and the punishment remitted by His Majesty.

Some time afterwards he brought an action in the Court of Common Pleas against Sir Chaloner Ogle, the president of the court-martial, and obtained a verdict in his favour of 1,000*l*. damages.[2]

Barwis v. *Keppel*.

36. In *Barwis* v. *Keppel*,[3] the plaintiff, a discharged serjeant of the Guards, obtained a verdict with 70*l*. damages against Major Keppel, as acting commander of his regiment, for maliciously and without any reasonable cause reducing him to the rank of private for neglect of duty during active service abroad. After an argument as to the powers of a commanding officer under the Articles of War, the court intimated their view that the verdict could not stand, saying:—"By the Act of Parliament to punish mutiny and desertion the King's power to make Articles of War is confined to his own dominions; when his army is out of his dominions, he acts by virtue of his prerogative and without the statute or Articles of War; and therefore you cannot argue upon either of them, for they are both to be laid out of this case, and *flagrante bello* the common law has never interfered with the army; *inter arma silent leges*." At this date an army abroad in time of war was governed by "prerogative" Articles.[4] Apparently the court considered that as between soldiers, grievances arising out of disciplinary action in time of war could only be entertained by military tribunals or authorities.

Abuse of powers. *Wall* v. *Macnamara*.

37. In *Wall* v. *Macnamara*,[5] the plaintiff, a captain in the African Corps, brought an action against the Lieutenant-Governor of Senegambia for imprisoning him for nine months at Gambia. The defence was a justification of the imprisonment under the Mutiny Act for disobedience or orders. At the trial it appeared that the imprisonment of Captain Wall, which was at first legal—namely, for leaving his post without leave from his commanding officer, though in a bad state of health—had been aggravated with many circumstances of cruelty. Lord Mansfield, in summing up, said, "In trying the legality of acts done

---

[1] Lawrence, J., in *Warden* v. *Bailey*, *infra*, thought that it did not, and that Frye's arrest was therefore illegal at the outset.

[2] (1743) McArthur on Courts-Martial, vol. i, p. 406.

[3] (1766) 2 Wilson's Rep. 314.

[4] See Chap. II, para. 28.

[5] (1779) 1 T.R., 536. The plaintiff in this case was hanged 20 years later for a "judicial murder" in Africa; see para. 54, *post*.

by military officers in the execution of their duty, particularly beyond the seas, where cases may occur without the possibility of application for proper advice, great latitude ought to be allowed, and they ought not to suffer for a slip of form, if their intention appears by the evidence to have been upright. . . . Thus the principal inquiry to be made by a court of justice is, *how the heart stood;* and if there appears to be nothing wrong there great latitude will be allowed for misapprehension or mistake. But, on the other hand, if the heart is wrong, if cruelty, malice, and oppression appear to have occasioned or aggravated the inprisonment or other injury complained of, they shall not cover themselves with the thin veil of legal forms, nor escape under cover of a justification, the most technically regular, from that punishment which it is your province and your duty to inflict on so scandalous an abuse of public trust. It is admitted that the plaintiff was to blame in leaving his post, but there was no enemy, no mutiny, no danger, his health was declining, and he trusted to the benevolence of the defendant to consider the circumstances under which he acted. But supposing it to have been the defendant's duty to call him to a military account for his misconduct, what apology is there for denying him the use of the common air, in a sultry climate, and shutting him up in a gloomy prison, where there was no possibility of bring him to trial for several months, there not being a sufficient number of officers to form a court-martial? These circumstances, independent of the direct evidence of malice, as sworn to by one of the witnesses, are sufficient for you to presume a bad, malignant motive in the defendant, which would destroy his justification, had it even been within the powers delegated to the defendant by the commission." The jury found a verdict for Captain Wall, with 1,000*l.* damages.

This case suggests[1] that if military authority is exercised within legal limits, but yet with excessive severity or cruelty, the abuse of the jurisdiction may amount to "excess" of jurisdiction.

Assault. *Grant* v. *Shard.*

38. In *Grant* v. *Shard*[2] violent language and striking a subordinate officer on duty were held actionable. Grant was directed to give a military order, and it appeared that he sent two persons who failed. Shard thereupon said to Grant, "What a stupid person you are," and twice struck him. Although the circumstances occurred in the actual execution of military service, it was held that the action was maintainable, and a verdict was found for the plaintiff, with 20*l.* damages. An application was afterwards made to the Court of King's Bench to set aside the verdict, but the court, after argument, refused to disturb it, though Lord Mansfield was desirous to grant a new trial.

Illegal confinement. *Swinton* v. *Molloy.*

39. Captain Molloy, of H.M.S. "Trident," kept his purser, Swinton, in confinement for three days without inquiring into the charge against him, and then, on hearing his defence, released him. The purser brought an action against Captain Molloy, and on the evidence Lord Mansfield said that such conduct on the part of the captain did not

[1] But see para. 4, *ante*, and 40, *post*.
[2] (1784) 4 Taunt., 85.

appear to have been a proper discharge of his duty, and, therefore, that his justification under the discipline of the Navy had failed him. It does not appear what the verdict was.[1]

Malicious prosecution. *Sutton* v. *Johnstone.*

40. We now come to the famous case of *Sutton* v. *Johnstone*, already referred to as the origin of the doctrine that as between soldiers grievances arising out of military discipline will not be remedied by the civil courts.[2] The plaintiff was captain of H.M.S. "Isis," which formed part of a squadron under the command of the defendant. On the 16th April, 1781, Johnstone ordered the squadron to pursue the French fleet, and signalled to Sutton to slip his cable in order to engage the enemy. Sutton failed to slip his cable, Johnstone caused him to be brought to a court-martial on the ground of having "delayed and discouraged the public service on which he was ordered," and for disobedience of orders in not slipping his cable and putting to sea. The court-martial found that Sutton was justified in not immediately slipping his cable owing to the state in which his ship was, and that he did not delay the public service, and adjudged him to be honourably acquitted. Upon this he brought an action against Johnstone for having maliciously and without probable cause charged him with the crime of disobedience of orders and the delay of the public service.

The case was twice tried and the plaintiff recovered 5,000*l.* damages on the first trial and 6,000*l.* on the second. A motion was then made in arrest of judgment, and upon this two points were raised; first, whether the action would lie; secondly, whether, it if did lie, the plaintiff was entitled to keep his verdict. On the first point it was urged for the defendant that an inferior officer cannot maintain an action against his superior for acts "done in the course of discipline and under powers incident to his situation." The court held that an action would lie; with certain exceptions, as in the case of judges and jurymen, "all men hold their situations in this country upon the terms of submitting to have their conduct examined and measured by that standard which the law has established." *Wall* v. *Macnamara* and *Mostyn* v. *Fabrigas* were quoted as authorities for this, and the court had clearly no doubt: "If it be meant that a commander-in-chief has a privilege to bring a subordinate officer to a court-martial for an offence he knows him to be innocent of under colour of his powers, or of the duty of his situation to bring forward inquiries into the conduct of his officers, the proposition is too montrous to be debated." On the second point also (absence of probable cause) the court were in favour of the plaintiff, and directed the verdict to stand.

On a further appeal, the Court of Exchequer Chamber[3] decided that in any case the defendant had probable cause for his action, and that therefore the plaintiff must fail. They went on, however, to express an opinion on other points not necessary for the decision of the case. First they dealt thus with the duty of a subordinate officer: "He must not judge of the danger, propriety, expediency or consequence of the order which he receives; he must obey; nothing can

---

[1] *Swinton* v. *Molloy* (1783) 1 T.R., 537.
[2] See para. 3, *ante*.
[3] (1786) 1 T.R., 493, 784.

excuse him but a physical impossibility".[1] Secondly, they said that the undue delay (if any) in bringing Sutton to trial was "a mere military offence. It is the abuse of a military discretionary power, and the defendant has not been tried for it by court-martial."[2] Lastly (but as to this they felt very doubtful) they thought that even in the absence of probable cause the action would not lie on the ground that if superior officers abused their powers the persons aggrieved had their proper remedy under military law before military tribunals. On a further appeal the House of Lords affirmed this decision,[3] apparently on the ground that Johnstone had in fact reasonable cause for his action; indeed it has been stated[4] that they did not agree with the view that an action could not be sustained even in the absence of probable cause. It may be noted that Lord Mansfield (who was of opinion that Sutton could in no case succeed) was the judge who tried *Wall* v. *Macnamara* (para. 37, *ante*). It is difficult to see the distinction between cruelty in exercising jurisdiction and malice in exercising it. Possibly the fact that Macnamara acted "in cold blood," but Johnstone in the heat of battle weighed with the court in the later case. Lord Mansfield also tried *Swinton* v. *Molloy* (*para.* 39, *ante*), and *More* v. *Bastard* (*infra*).

More v. *Bastard.*

41. In 1804, Colonel More appeared as prosecutor at a court-martial, whereof Colonel Bastard was president. Some contradiction between the evidence of two witnesses led the court to conclude that wilful perjury had been committed; and the president ordered Colonel More into arrest, either for having suborned one of the witnesses or for not openly disavowing him. In an action for false imprisonment, Lord Mansfield said that there was no defence; and the jury awarded 300*l.* damages.[5]

Warden v. *Bailey.*

42. *Warden* v. *Bailey* is an important and somewhat complicated case. The plaintiff was a militia sergeant, and his colonel ordered all non-commissioned officers of the regiment (i) to attend an evening school, and (ii) to contribute 8*d.* a week towards the expenses thereof. Both orders were probably unlawful. The plaintiff with others was reprimanded for refusal to obey, and promised to do so in future; but on the same evening indulged in mutinous language upon the subject to other non-commissioned officers. On the following day the defendant, the adjutant, had him arrested and conveyed to gaol; subsequently he was brought up before the colonel, who remanded him in custody for trial by court-martial on a charge of using mutinous language. After acquittal, he sued the defendant for the imprisonment. The defendant was prepared to base his defence on the ground that the arrest was for using mutinous language (*not* for refusal to obey orders), and that he had reasonable ground for believing that such language had been used; but, before he gave any evidence on the point, the judge non-suited the plaintiff on the ground that *Sutton* v. *Johnstone* had decided that an

---

[1] But, of course, they were considering, at any rate primarily, orders given in actual fighting.

[2] This seems opposed to *Swinton* v. *Molloy*, para. 39, *ante*.

[3] 1 Bro. P.C., 100.

[4] *Per Lawrence* J., at 4 Taunt., 75.

[5] *More* v. *Bastard* (1804) 4 Taunt., 70; McArthur, vol. ii, p. 195. In an action brought at Calcutta in 1841, a reporter recovered nominal damages against the president of a court-martial for having ordered the forcible seizure of his notes, which he had persisted in taking after being ordered to desist; *Ricketts* v. *Walker*, Hough, Mil. Prec. 718.

Ch. VIII

inferior officer cannot maintain an action against a superior for imprisonment inflicted in consequence of any command whatever issued by the superior, or for anything done under colour of military authority. On appeal, the court ordered a new trial to decide on what ground the plaintiff had really been arrested, and whether the defendant had probable cause for his action. They pointed out that the only point actually decided in *Sutton* v. *Johnstone* was that the defendant there had probable cause; further, that the imprisonment there was for disobedience in action, where instant obedience is necessary, and that therefore the inference sought to be drawn from the case was a "very wide" one.[1] On the new trial it was held that insubordinate discussion of even an illegal order was a breach of discipline, and that there was probable cause for detaining the defendant in custody for trial by court-martial on a charge of using mutinous language. The action therefore failed.[2] The court in sending the case back for a new trial to ascertain why the plaintiff was arrested appear to have ruled in effect that the soldier's duty of obedience did not require him to obey an obviously illegal order, though by obeying it he would not injure any other person.

Development of the *Sutton* v. *Johnstone* doctrine.

43. The doctrine enunciated in *Sutton* v. *Johnstone* that the civil courts could not be invoked to redress grievances between persons both subject to military law (who had a prescribed method of obtaining redress for such grievances) was recognized in *re Mansergh* and *re Roberts* (paras. 16, 17, *ante*), by Lush, J., in *Dawkins* v. *Paulet*[3] and in *Dawkins* v. *Rokeby*[3] by ten judges, whose unanimous opinion it was that a case involving questions of military discipline and military duty alone was cognizable only by a military tribunal, and not by a court of law.

Dawkins v. *Rokeby.*

Marks v. *Frogley.*

It was also recognized in *Marks* v. *Frogley*[4] by the Court of Appeal. In that case it appeared that a Volunteer battalion to which the parties belonged had been in camp with regular soldiers for a week, and during such training they were subject to the Army Act. On the morning of the day on which the battalion was to return home, plaintiff was accused of theft from a comrade; thereupon the adjutant put him under arrest, and later in the day on arrival at their home railway station, ordered the three defendants to march him to the nearest police station and hand him over to the police on a charge of larceny. Having been acquitted, he sued the defendants for false imprisonment, alleging that he and they had ceased to be subject to military law on leaving the camp, and that therefore the Army Act did not justify their obedience to the order given to them. It was held by the Court of Appeal that they were at all material times subject to military law, and that (apart from any defence under the *Sutton* v. *Johnstone* doctrine) the Army Act justified the acts complained of.

---

[1] (1811) 4 Taunt., 67.
[2] (1815) 4 M. & S., 400.
[3] As to these cases, see paras. 50, 51, *post*.; see also *Keighly* v. *Bell* (1866), 4 F. & F. 763.
[4] L.R. [1898], 1 Q.B. 396, 888; and again in *R.* v. *Army Council*, para. 7, *ante*.

44. In *Fraser* v. *Balfour*,[1] a naval officer who had been compulsorily retired sued the First Lord of the Admiralty alleging (i) false imprisonment (*viz.*, his detention in hospital "under observation for insanity"), and (ii) malice in causing him to be retired. In the courts below it was held that the action was not maintainable in view of the decision referred to in the preceding paragraph. The House of Lords pointed out that their decision in *Dawkins* v. *Rokeby* proceeded solely on the question of the privilege of witnesses, and did not affirm the wider proposition laid down in the Exchequer Chamber. They agreed that the claim for false imprisonment was misconceived; but ruled that the claim for maliciously causing the plaintiff's retirement raised a question which was still open to argument in the House of Lords, and that it must be allowed to proceed if the plaintiff put his pleadings in proper order.[2]

Present position. *Fraser* v. *Balfour*.

45. In the recent case of *Heddon* v. *Evans*[3] the cases from *Sutton* v. *Johnstone* onwards were re-examined, and the Judge came to the conclusion that the doctrine therein approved was not intended to extend to infringements of fundamental common law rights where the defendant had acted without, or in excess of, jurisdiction. Acting upon this view, he laid down two important principles: (1) that an officer is liable in an action for damages if without jurisdiction or in excess of his jurisdiction he commits an act which amounts to false imprisonment or other common law wrong, even though he purports to act in the course of military discipline; but (2) that, if his act is within his jurisdiction and is done in the course of military discipline, no action will lie on the ground only that the act was done maliciously and without reasonable and probable cause. This latter proposition was in the opinion of the Judge open to review in the House of Lords (*see Fraser* v. *Balfour*, *supra*), but in no lower tribunal. Incidentally, several minor points of military law were decided, or discussed in the case.

Heddon v. *Evans*.

The plaintiff, a private soldier, was put under arrest and charged before his commanding officer with (i) making a frivolous complaint, and (ii) conduct to the prejudice, etc., in writing a certain letter to the commanding officer. He was convicted on both charged and awarded 14 days' confinement to barracks, in respect of which he claimed damages against the commanding officer for false imprisonment. The Judge ruled that the absence of a charge-sheet (required by s. 45 of the Army Act) did not invalidate the arrest and custody; that, though the first charge was invalid as disclosing no offence, the conviction on the second charge, if valid, would support the sentence; that the letter complained of was in law capable of being construed as a breach of discipline, and that it was open to the commanding officer to find that it did amount to such a breach; and that the commanding officer was not bound to give the accused the option of having the case tried by district court-martial because the loss of "corps pay" involved in the sentence of confinement to barracks was not forfeiture of "pay."

---

[1] *Fraser* v. *Balfour* (1918) 34 T.L.R. 502; see also *Fraser* v. *Hamilton* (1917) 33 T.L.R. 431.
[2] The action did not proceed further.
[3] (1919 35 T.L.R. 642.

Ch. VIII

Consequently, he held that the commanding officer had acted within his jurisdiction, and could not be liable, even if confinement to barracks amounted to sufficient deprivation of liberty to support a claim for false imprisonment—a point which he did not decide. At a later date the commanding officer had again placed the plaintiff under arrest on a charge arising out of a letter to the General Officer Commanding, and had remanded him for trial by district court-martial. The plaintiff claimed that the remand to, and confinement in, a detention barrack was illegal and without jurisdiction on the ground that there was no committal warrant, but the Judge held that, though a committal warrant should have been made out and signed, the custody could be justified under s. 45 of the Army Act. The plaintiff also founded a claim for damages on the ground that the commanding officer in arresting and remanding him had acted maliciously and without reasonable and probable cause. The Judge, whilst finding these allegations not proved, held that even had they been proved the action could not succeed.

Servants of the Crown, and tortious acts.

46. The failure of the first claim in *Fraser* v. *Balfour* (*supra*) illustrates the rule of law that public officers and servants of the Crown, though liable in respect of wrongful acts committed by them personally in their official capacity, are not liable in respect of wrongful acts committed by their subordinates, unless they have specifically ordered or ratified the particular act so as to make it substantially their own. The ordinary rule of *respondant superior*, under which a master is held liable for acts of his servant done within the scope of his employment, does not apply, because both senior and junior are servants of one master, the Sovereign, and their relationship to each other is not that of master and servant. In the particular case the First Lord had given no orders for the detention of the plaintiff, and indeed knew nothing of it till long afterwards; assuming the detention to be unlawful, the only persons liable would be those who actually detained the plaintiff and such superiors as specifically ordered (or ratified) the detention.[1]

Further, though all officers are in the employ of the Sovereign, no action in respect of their wrongful acts will lie either against the Sovereign or against the Department of State under which they work, so as to reach the public revenues.[2]

The above-mentioned rules apply, of course (*inter alia*), to injuries caused through the mishandling of service vehicles. If an officer or soldier driving such a vehicle by his recklessness or negligence injures a civilian, the driver may be sued, and is personally responsible for such damages as a jury may award. If the driver is a person whose duty it is, according to the rules of the service, to drive the vehicle, his superior, though riding in it at the time, is not responsible for the

---

[1] As to whether the subordinate can escape liability to a civilian by proving that he acted under orders which were not necessarily or manifestly illegal, there is no clear authority; but the better opinion would seem to be that he cannot; see *per* Willes, J., in *Dawkins* v. *Rokeby* (1865) 4 F. & F., at p. 831, and *per* Kennedy, J., in *Marks* v. *Frogley*, *L.R.* [1898], 1 Q.B. at p. 404. As to the position where the person injured is another soldier, see *ibid*, and *per* Willes, J., in *Keighly* v. *Bell* (1866) 4 F. & F., at pp. 790, 805.

[2] See generally as to actions of tort against public officials, &c., *Raleigh* v. *Goschen*, L.R. (1898), 1 Ch. 73; *Bainbridge* v. *P.M.G.*, L.R. [1906], 1 K.B. 178; *Roper* v. *Public Works Commissioners*, L.R. [1915], 1 K.B. 45.

negligent driving, unless indeed he has made such negligence his own, *e.g.*, by ordering an excessive speed to be maintained, or by not checking a speed which he must have known to be dangerous, in which case he would presumably be liable. On the other hand, if an officer entrusted with the use or control of a vehicle employs to drive it some subordinate not authorized to do so according to the rules of the service, it would appear that (apart from any defence on the ground of urgency) he employs such subordinate as his servant, and would be personally liable for his negligence.

In cases of accident where no negligence can be imputed, an injured person can only appeal for compensation *ex gratia* to the department concerned, and frequently, even where negligence is admitted, this must be the only effective remedy if the driver is a "man of straw."

Servants of the Crown and contracts.

47. Public officers and servants of the Crown are not liable personally upon contracts entered into by them in their official capacity,[1] the remedy being (as a rule)[2] by petition of right against the Crown; but an officer may enter into a contract in such circumstances as to raise the inference that he is pledging his own credit, as in *Samuel Bros., Ltd.*, v. *Whetherly*, where a Volunteer colonel was held personally responsible for uniforms supplied to the Corps.[3]

In *Lascelles* v. *Rathbun*[4] it was held that the commanding officer of a brigade was not personally responsible for the price of provisions, etc., supplied to the officers' mess upon the orders of the mess committee.

Libel and slander.

48. The following group of cases illustrates certain aspects of the law of defamation. In the first place it must be remembered that if a statement is in fact true no civil[5] action for damages will lie in respect of its publication, however injurious to the plaintiff. Thus, to record truly in a newspaper that a named officer has been dismissed the service by sentence of general court-martial for a named offence is not actionable.[6]

Documents privileged from disclosure.

49. Secondly, certain documents are by reason of their nature "privileged from production," *i.e.*, the officer who holds them for some Department of State cannot be compelled—and indeed ought not to be allowed—to produce them in court. In *Home* v. *Bentinck*[7] the plaintiff brought an action against the president of a court of inquiry for libel in publishing the court's report by communicating it to the commander-in-chief. It was held that the officer subpœnaed to produce at the trial the report and proceedings of the court was not at liberty to disclose them—as being State documents; and further, that office copies of them which the plaintiff held must not be admitted. In *Dickson* v. *Wilton*[8] the action was brought by an officer against his colonel in respect of letters written to the latter's superior and reflecting

---

[1] *Hosier Bros.* v. *Derby (Lord), Secretary of State for War*, L.R. [1918], 2 K.B. 671.
[2] But see *Graham* v. *Public Works Commissioners*, L.R. [1901], 2 K.B. 781.
[3] L.R. [1907], 1 K.B. 709. L.R. [1908], 1 K.B. 184; *c.f. National Bank of Scotland* v. *Shaw* [1913] S.C. 133.
[4] (1919) 35 T.L.R. 347.
[5] In the case of a criminal prosecution for publishing a libel, the truth of the statement is not a defence unless it was for the public benefit that it should be published.
[6] *C. F. Oliver* v. *Bentinck* (1811) 3 Taunt. 456.
[7] (1820) 2 Broderip & Bingham 130.
[8] (1859) 1 F. & F. 419.

upon the plaintiff. The plaintiff in fact succeeded; but in *Dawkins* v. *Lord Rokeby*[1] the court said distinctly that the Judge in *Dickson's case* was wrong in compelling, or even allowing, the Secretary for War to produce the letters in question; and in the case then before them they reaffirmed the principle that the proceedings of a court of inquiry ought not to be produced.[2]

Clearly, if a plaintiff cannot put before the court the document of which he complains, or even a copy (if he has one), he cannot succeed.[3]

Privileged communications.

"Absolute" privilege.

50. Thirdly, the defence of "privilege" must be considered. In the case of some statements the law regards the occasion on which they are made as "privileged," either absolutely, or to a qualified extent. If the privilege is "absolute," no action will lie even if the statement is not only false but also made maliciously. It is a recognized rule of law that "whatever is said, however false or injurious to the character or interests of a complainant, by judges upon the bench . . . , by counsel at the bar in pleading causes, by witnesses giving evidence is absolutely privileged."[4] In *Jekyll* v. *Moore*[5] it was held that a rider appended by a court-martial to their judgment of acquittal, and reflecting on the prosecutor's conduct, would not support an action. The plaintiff brought an action for libel against the president of a court-martial which had "most fully and honourably" acquitted a Colonel Stewart, and had appended to their finding the following remarks:—"The court cannot pass without observation the malicious and groundless accusations that have been produced by Captain Jekyll against an officer whose character has, during a long period of service, been so irreproachable as Colonel Stewart's, and the court do unanimously declare that the conduct of Captain Jekyll in endeavouring falsely to calumniate the character of his commanding officer is most highly injurious to the good of the service." The court decided that no action could be maintained, the Chief Justice observing, "If it appear that the charges are absolutely without foundation, is the president of the court-martial to remain perfectly silent on the conduct of the prosecutor, or can it be any offence for him to state that the charge is groundless and malicious? It seems to me the words complained of in the case form part of the judgment of acquittal, and consequently no action can be maintained upon it." In *Dawkins* v. *Lord Rokeby*[6] it was definitely laid down by the House of Lords that a duly constituted military court of inquiry must for these purposes be regarded as being upon the same footing as a court of law, and that oral and written statements made by an officer in the course of a

Dawkins v. *Rokeby.*

---

[1] (1873) L.R. 8 Q.B. 255; as to the principle upon which such privelege is based, see *Asiatic Petroleum Co., Ltd.*, v. *Anglo-Persian Oil Co. Ltd.*, L.R. [1916], 1 K.B. 822. In *Anthony* v. *Anthony* [1919] 35 T.L.R. 559 privilege was claimed for medical history sheets. See also K.R. 572.

[2] See also *Chatterton* v. *Secretary of State for India*, L.R. [1895], Q.B. 189.

[3] See *e.g.*, *Hovell* v. *Holland*, "*Times*," May 6, 1920, an action by an officer against the president of a military court of inquiry for libel alleged to be contained in the report of such court. The plaintiff abandoned the action upon a statement being made vindicating his chatacter; but it was admitted that the action must have failed since the report could not be admitted in evidence.

[4] *Munster* v. *Lamb* (1883), L.R., 11 Q.B.D. 588, 606.

[5] (1806) 2 Bos. & P., 341.

[6] (1873) L.R. 8 Q.B. 255; (1875) L.R. 7 H.L., 744.

military inquiry in relation to the conduct of an officer and with reference to the subject of that inquiry, enjoy "absolute" privilege. The same principle will *a fortiori* apply to courts-martial.

Qualified privilege.

51. If a false and defamatory statement is made on an occasion to which only "qualified" privilege attaches the plaintiff may possibly succeed, but in order to succeed he must prove that the statement was made maliciously and without reasonable and probable cause. As regards civilians, this is undoubtedly the position; but in the case of soldiers it would appear that, in cases arising out of the exercise and performance of military authority and duty, a subordinate officer has no legal redress (except perhaps in the House of Lords)[1] against his superior, notwithstanding that the latter's statements are made maliciously and without reasonable and probable cause. In *Dickson* v. *Wilton*[2] the lieutenant-colonel actually commanding a militia regiment sued the colonel of the regiment in respect of letters written to his immediate superior (Viscount Combermere) containing charges against the plaintiff, and also in respect of a conversation with a Member of Parliament as to a question to be put in the House with reference to such charges and to the plaintiff's dismissal. Lord Campbell directed the jury that *prima facie* the occasions were privileged, but that the privilege would be lost if the defendant had acted from other motives than a sense of duty; and the jury found a verdict for the plaintiff with damages. In *Dickson* v. *Combermere*[3] an action by the same plaintiff, and arising out of the same facts, not however for libel but for conspiring to procure the plaintiff's dismissal by false charges, Cockburn, C. J., told the jury to find for the plantiff, if in their opinion the charges were made maliciously and without probable cause. They found, however, for the defendant.

Dawkins v. *Paulet.*

The direction to the jury in *Dickson* v. *Wilton*, *supra*, was dissented from in *Dawkins* v. *Paulet.*[4] In that case an action for libel was brought in respect of a report made to the adjutant-general by the plantitff's superior officer. It was held (before any evidence was given) that the plaintiff must fail even if he proved malice, for that no action would lie by one officer against another for an act done in the ordinary course of his duty as such officer, even if done maliciously and without reasonable and probable cause. Cockburn, C. J., however, took the opposite view. Reference may here be made incidentally to another action brought by the same Colonel Dawkins, in which he sued three officers for conspiring to make false statements to the commander-in-chief. It appeared that the defendants had formed a military court of inquiry to consider the plaintiff's professional conduct, and that the statement complained of was their report. Upon the admitted facts, it was held that the plaintiff must fail; but the court seemed to think that the

---

[1] See *Fraser* v. *Balfour*, para. 44, *ante*.

[2] (1859) 1 F. & F., 419. In *Mitchell* v. *Kerr*, Rowe 537, decided by the Court of King's Bench in Ireland in 1801, the defendant had written two libellous letters to the commanding officer of a regiment which the plaintiff was about to enter. At the trial the jury were directed that, if they thought the letters were written merely for the purpose of bringing the plaintiff to a court-martial, the action would not lie, and they found a verdict for the defendant, which the Court of King's Bench refused to disturb.

[3] (1863) 3 F. & F. 527.

[4] (1869) L.R. 5 Q.B. 94; see also the first case of *Dawkins* v. *Rokeby* (1865) 4 F. & F. 841.

defendants would have been liable if there had been any conspiracy or confederation between them beforehand to present an unfavourable report irrespective of the evidence.[1]

Fairman v. *Ives.*

52. The distinction between cases where there is "qualified privilege" and cases where there is no privilege is illustrated by the two following decisions. In *Fairman* v. *Ives*[2] a civilian to whom an officer owed money wrote his version of the matter to the Secretary of State for War in order to try to get payment. Although the Secretary had no real authority to order payment it was held that the communication was privileged; and that, even if the statements were false, the officer could only recover damages on proof that they were made maliciously and without probable cause. On the other hand, where a naval officer acting as Government agent on board a hired transport wrote to Lloyd's imputing incapacity to the master of the transport, it was held that he ought to have written any complaints to his own employers, the Admiralty, and not to Lloyd's, and that therefore his letter enjoyed no privilege; and the jury finding his statements to be untrue awarded damages against him.[3]

Adam v. *Ward.*

The plaintiff, an army officer, having been placed on half-pay, made in a speech in Parliament accusations against his former brigadier, charging him with having reported unfairly upon officers under his command. The brigadier having referred these charges to the Army Council, the defendant as secretary to and by directions of the Council, wrote to the brigadier vindicating his character and reflecting upon the plaintiff; further, in accordance with his instructions he sent copies of the letter to the press. In an action for libel by the plaintiff, it was held that the occasion of the publication was privileged; that there was no evidence of malice; and that, having regard to the public way in which the plaintiff made his charges, no undue publicity had been given to the reply.[4]

(vi) *Liability to Criminal Proceedings*

Liability to criminal proceedings for murder.

53. There are several authorities which show that where the death of a person is caused by some act of an officer done without jurisdiction, the officer is criminally responsible. Thus on the Devon Militia case[5] being cited in *Warden* v. *Bailey*,[6] Heath, J., expressed his opinion that, if the plaintiff in that action had died under the punishment inflicted by order of the court-martial, all the members of the court would have been liable to be hanged for murder.

Case of *Governor Wall*, 1802.

54. In the well-known case of *Governor Wall*[7] (plaintiff in the action already noticed of *Wall* v. *Macnamara*), the penalty of death was actually inflicted on the governor for a crime resembling in its nature and circumstances the conduct towards himself in respect of which he recovered damages.[8] This crime was murder of Sergeant Arm-

---

[1] *Dawkins* v. *Saxe Weimar* (1876) L.R., 1 Q.B.D., 499.
[2] *Fairman* v. *Ives* (1822) 5 Barn. & Ald., 642; but this decision has been criticized; see *Hebditch* v. *McIlwaine* L.R. [1894], 2 Q.B. 54.
[3] *Harwood* v. *Green* (1827) 3 C & P. 141.
[4] *Adam* v. *Ward* L.R. [1917], A.C. 309.
[5] Para. 34, *ante.*
[6] 4 Taunt. at p. 77.
[7] *R.* v. *Wall* (1802) 28 State Trials 51.
[8] See para. 37, *ante.*

strong, of the African Corps, in 1782, by inflicting on him 800 lashes with such cruelty as to cause his death.

The governor appears to have been arrested on the charge shortly after his return to England, but to have absconded, and kept out of the way for nearly 20 years, as he was not tried till 1802. The circumstances out of which the charge arose were as follows:—In July, 1782, the accused was in command of the garrison at Goree, an island on the coast of Africa, and about to leave for home. The men of the garrison had some pecuniary compensation due to them in respect of their having been put on reduced rations, and the paymaster responsible for meeting their demands was to leave with the governor. On the day before their departure, a number of men, headed by Armstrong, twice proceeded to the house of the paymaster to obtain a settlement of their accounts. According to the evidence for the prosecution, there was no appearance of any mutiny, and no disrespectful or disorderly conduct on the part of the men, who returned to barracks when ordered to do so by Wall. In the afternoon Wall ordered a parade, and by his order 800 lashes were inflicted on Armstrong by black men, not with the ordinary cat, but with a species of rope. It was stated that the accused stood by urging the black men to increased severity. Armstrong died shortly afterwards in hospital. For the defence some evidence was given that the behaviour of the men, and in particular of Armstrong, had been mutinous, and that a sort of drum-head court-martial had been held which ordered the punishment; and that the death of Armstrong was accelerated by drinking spirits in hospital.

Chief Baron Macdonald directed the jury that if there was no mutiny and no court-martial, and the punishment of 800 lashes with such an unusual instrument was ordered by the prisoner, there was certainly ground to infer malice; and pointed out that the governor in his report on his return made no mention of the existence of any mutinous spirit in the garrison. The jury found the prisoner guilty, and he was hanged at Tyburn.

Case of *Sir Thomas Picton*, 1806.

55. General Sir Thomas Picton was tried in 1806 for having, while Governor of Trinidad, ordered the infliction of torture on a female from whom it was desired to obtain evidence in support of a prosecution for a robbery committed in her master's house. The general's defence was that the occurrence took place in the ordinary course of judicial proceedings, over which he presided as governor, and that torture was allowed in such cases by the law of the island. The case was tried twice, and was again elaborately argued on the special verdict found at the second trial, but judgment was never prayed. It appears, however, to have been thought at the time that had the opinion of the court been delivered, judgment would have been given against General Picton, though the jury found that by the law of Spain torture existed in Trinidad at the time of the cession of the island to Great Britain, and that no malice existed in the mind of the defendant, save so far as might be inferred from the acts complained of, if found to be illegal.[1]

[1] *R.* v. *Picton* (1812) 30 State Trials 226, 995 (note).

Case of *Governor Eyre*, 1868.

56. During some disturbances in Jamaica in 1865, the Governor, Mr. Eyre, proclaimed martial law in certain parts of the island. A man named Gordon, having been arrested in a locality excepted from the proclamation, was removed by the governor's order to a place where martial law prevailed and handed over to Colonel Nelson, the military commander, with instructions to consider the evidence with a view to a court-martial. Gordon was convicted and sentenced to death for treason and complicity with persons engaged in rebellion in the proclaimed district, but on a date prior to the proclamation. Nelson confirmed the proceedings, the governor concurred, and Gordon was executed. On their return to England both Eyre and Nelson were charged with murder, but in each case the grand jury threw out the bill.[1]

Criminal liability for offences committed out of the realm.

57. With respect to criminal liability for oppression and similar offences committed out of the realm it was enacted by 11 Will. III, c. 12, that any governor or commander-in-chief of any colony beyond the seas guilty of oppression to any of His Majesty's subjects, or of any other crime within their respective governments or commands, might be tried and punished by the Court of King's Bench in England, or by special commissioners. And the statute 42 Geo. III, c. 85, makes a similar provision for the trial and punishment of persons employed in the public service out of Great Britain in any similar military office or capacity.[2] It was under this Act that General Picton and Governor Eyre were charged.

Case of *Ensign Maxwell*, 1807.

58. A mistaken impression of duty will not excuse an officer if he, without being justified by other circumstances, orders his men to fire, and some one is thereby killed, as is shown by the following case. In 1807, Ensign Maxwell, of the Lanarkshire Militia, was tried before the High Court of Justiciary in Scotland for the murder of Cottier, a French prisoner of war at Greenlaw, by improperly ordering a sentinel to fire into the room where Cottier and other prisoners were confined. Ensign Maxwell had the military charge of over 300 prisoners, confined in a building of no great strength. The prisoners were of a turbulent character, and to prevent their escape an order was given that all lights in the prison should be put out at 9 o'clock, and that if this was not done at the second call the guard was to fire upon the prisoners, who were often warned of this order. Ensign Maxwell having observed one night, on which there had been some disorder among the prisoners, a light burning beyond the appointed hour, twice ordered it to be put out, and, not being obeyed, directed the sentry to fire, but the musket merely snapped. Ensign Maxwell repeated the order, the sentry fired again, and Cottier received his mortal wound. At this time there was no symptom of disorder in the prison, and the prisoners were all in bed.

The general instructions issued from the adjutant-general's office for the conduct of the troops guarding the prison contained no such order as that upon which Ensign Maxwell had acted; and it appeared to be a mere verbal one which had from time to time in hearing of

---

[1] *R.* v. *Eyre* (1868) Finlason's Report.

[2] There are also statutes providing for the trial in England of persons guilty of extortion, &c., in India; *c.f.* A.A. 170 (3).

the officers been repeated by the corporal to the sentries on mounting guard, and had never been countermanded by those officers, who were also senior to Ensign Maxwell. The Lord Justice Clerk laid it down that Ensign Maxwell could only defend himself by proving specific orders, which he was bound to obey without discretion, and which called upon him to do what he did; and the jury found him guilty of the minor offence of culpable homicide, with a recommendation to mercy. He was sentenced to nine months' imprisonment.[1]

R. v. *Thomas*.

59. In *R.* v. *Thomas*[2] the prisoner, a sentinel on board H.M.S. *Achille*, had been told by the man whom he relieved to keep off all boats unless they carried officers in uniform, or unless the officer on deck allowed them to approach; and he received a musket, three blank cartridges, and three ball cartridges. The boats pressed, upon which he repeatedly called to them to keep off; but one of them persisted and came close under the ship, and he then fired at a man in the boat and killed him. The jury found that he fired under the mistaken impression that it was his duty, but the judges were unanimous that it was murder, although they thought it a proper case for a pardon. Further, they were of opinion that if the act had been necessary for the preservation of the ship, as if the deceased had been stirring up a mutiny, the sentinel would have been justified.

How far specific commands can excuse subordinate.

60. In the two preceding cases the prisoner had not in fact received specific orders to act as he did. How far a subordinate could plead the specific commands of a superior officer—such commands being not obviously improper or contrary to law—as justifying an injury inflicted on a civilian, is somewhat doubtful. In most cases the fact of the orders having been given would no doubt prove the innocent intent of the subordinate, and lead in practice to his acquittal on a criminal charge.[3]

Execution of sentences, etc.

61. With respect to the question how far defect in the jurisdiction or procedure of the court by whom a sentence is given, or want of authority, irregularity, or excess in the person by whom the sentence is executed, may render the court or person executing the sentence criminally responsible, there is but little to be found in the books. There appears, however, to be authority for the following propositions:—

(i) If, first, the court which passed the sentence had no colour of jurisdiction in the matter, all its proceedings are a mere nullity, and both the court and the officer who executed the sentence are mere wrong-doers; and in the case of an execution the officer may perhaps in strictness of law be guilty of murder as a principal, and the members of the court may be guilty of a misdemeanour, and also as accessories to the murder.[4]

(ii) If, secondly, the court had no jurisdiction, but it acted under colour of a writ or commission, such as might lawfully be issued, then although the writ or commission be irregular and

---

[1] *R.* v. *Maxwell* (1809) Buchanan, Part II, p. 3.
[2] (1815) Russell on "Crimes", 8th Ed., p. 774.
[3] See *R.* v. *Tranmer* (1864) 4 F. & F. 305; *Keighly* v. *Bell* (1866) 4 F. & F. 763; *Dawkins* v. *Rokeby* (1865) 4 F. & F. 806.
[4] Hale, Pleas of the Crown, i. 497, 501. Steph. Dig. Crim. Law (6th Ed.), Art. 218.

so the sentence erroneous and voidable, it seems that it is not a nullity, and that neither the court nor the officers who execute the sentence can be treated as mere wrong-doers, though the court may be guilty of a misprision.[1] If, again, the court had jurisdiction, but passed an erroneous sentence, neither the judge nor an officer who innocently executes the sentence is criminally liable.[2]

(iii) The sentence must be executed by the proper officer, and if any person who is not duly authorized executes it he is a wrong-doer.[3]

(iv) The execution must pursue the judgment, subject to any lawful alteration by the Crown, for if a man is beheaded who ought to have been hanged, the officer is a wrong-doer.[4]

There appears to be no authority for applying the doctrine of trespass *ab initio* to the case of irregular execution of a sentence, and it would seem that the officer would be liable only for so much of his acts as is in excess of his authority. Malice (in the popular sense of the word) in the officer appears to be wholly immaterial, so long as he keeps within the limits of his authority, for he is bound to execute the sentence; but if he grossly exceeds the measure of the sentence which he is authorized to inflict, and if he so barbarously flog a man sentenced to flogging as by plain excess to cause his death, he will be a wrong-doer as to the excess.[5]

(vii) *Protection of Persons Acting under the Army Act and other Acts*

Protection of persons acting under statute.

62. It remains only to notice that officers are to a certain extent protected against actions by s. 170 of the Army Act, and by the Public Authorities Protection Act, 1893. The general effect of these enactments is that where legal proceedings are brought against an officer for any act done in pursuance, or execution, or intended execution of his duties, or for any alleged neglect or default in the execution thereof, then—

(i) the proceedings must be begun within six months;

(ii) judgment for the defendant carries "solicitor and client" costs;

(iii) there are special provisions as to tendering amends and payment into court, which affect the question of costs;

(iv) the proceedings must be brought in a "superior" court.

---

[1] Hale, i. 497–509; Hawkins, Bk. i. ch. 28, s. 6.
[2] Hale, i. 501.
[3] Hale i, 501; Coke, Inst. i, 128.
[4] Coke, Inst. iii, 52, 211; Hale i, 501.
[5] Hawkins, Bk. i. ch. 29, s. 5; and see *Governor Wall's case, supra.*

CHAPTER X

ENLISTMENT

Object of chapter.

1. A summary of the history of enlistment has been given in Chapter IX: it is proposed in this chapter to sketch the system in operation under existing Acts, and under the Recruiting Regulations, which give general instructions as to the appointment and duties of recruiting agents, the qualification of recruits, the mode of recruiting, and other matters.

Term of original enlistment.

2. A recruit is not to engage for more than 12 years, and may engage to serve the whole time with the colours, or part of the time with the colours and part in the Army Reserve.[1] The Army Council, however, are empowered to direct that where a boy is enlisted before attaining the age of eighteen, the period of 12 years shall be reckoned from the day on which he attains the age of eighteen years.[2] Enlistment for a term less than 12 years would, however, be legal, if a less period were fixed by His Majesty, and any part of such term might be for service in the reserve.[3]

Change of conditions of service.

3. The Army Council, however, may allow a soldier, if he so wishes, to go into the reserve at once, or to extend his service with the colours for any time up to the whole term of his original enlistment, or to extend the term of his original enlistment up to 12 years or any shorter period.[4]

Re-engagement.

4. The old term of 21 years is still retained in the Army Act; as, subject to any regulations made by the Army Council, a soldier whilst serving with the colours may, after the expiration of 9 years from the date of his original enlistment and with the approval of the competent military authority[5], re-engage to serve for such a further period of service with the colours as will make up a total of 21 years' continuous service.[6]

Continuance in service after 21 years.

5. Subject also to such regulations, a soldier who so re-engages may, at the end of the 21 years, with the approval of the competent military authority, continue to serve, with a right to his discharge 3 months after he claims it.[7] If, however, at the time when he is entitled to be discharged, he is serving abroad, or a state of war exists, or the Army Reserve is called out on permanent service, he is liable to serve for an additional year.[8]

Regulations as to extension of service.

6. The ordinary period of colour service at present varies from 2 to 12 years in the different arms of the service. Men enlisted for less than 12 years' colour service, if efficient soldiers of good character and fit for service at home and abroad, and if vacancies exist in the number of extensions permitted, are allowed under certain conditions to extend their service so as to complete 12 years with the colours.[1]

---

[1] A.A., 76, 77.
[2] A.A. 76 (proviso).
[3] A.A., 76–78, and Reserve Forces Act, 1882.
[4] A.A., 76–78, and Reserve Forces Act, 1882.
[5] For definition of the competent military authority, see A.A., 101 (1), 190 (32), and R.P, 128; see also K.R. 231.
[6] A.A., 84. As to the conditions under which approval is authorized to be given, see K.R., 231–234. In the case of a soldier who enlisted as a boy under A.A. 76 (proviso), the period of time or service is reckoned as from the date on which he attained the age of 18 years.
[7] A.A. 85.
[8] A.A., 87 (1), and para. 8 *infra*.

In a few instances enlistments for 1, 2, 3 or 4 years with the colours only are permitted.

Regulations as to re-engagements, etc.

7. Under the present regulations, the re-engagement of soldiers of and above the rank of serjeant may be approved after the completion of 9 years' service on their current engagement, but in the case of soldiers below the rank of serjeant (other than those enlisted under Section 77A of the Army Act) re-engagement cannot be approved until after the completion of 11 years' service on their current engagement, and then only if efficient, well behaved, and medically fit for service at home and abroad.[2]

Under the same regulations warrant officers, staff-serjeants and serjeants, after completing 9 years' service, have the right[3] to re-engage, subject only to the veto of the General Officer Commanding-in-Chief. Other non-commissioned officers are in the same position as regards re-engagement as private soldiers. All soldiers enlisted for 12 years with the colours under Section 77A of the Army Act have the right, at their option, to re-engage to complete 21 years' service, as provided in that section.

Warrant officers, non-commissioned officers and men may, with the approval of the officer in charge of records, continue their service after 21 years, but have not the right to do so.[4]

Power in certain circumstances to detain soldier after expiration of his term.

8. A soldier is liable to be detained in service for 12 months beyond the time at which he would otherwise be transferred to the reserve, or discharged, if a state of war exists, or if he is out of the United Kingdom, or if the Army Reserve is called out. A soldier who would otherwise be discharged may also agree with the competent military authority, while a state of war exists, to continue as a soldier during the war, or until the end of 3 months after he claims his discharge.[5] The power of the Crown to discharge a soldier is noticed below.

In case of imminent national danger or great emergency, when the Army Reserve can be called out for permanent service by the King's proclamation, a like proclamation can require men who would otherwise be transferred to the reserve to continue serving with the colours; these men are then in the same position as if they had been transferred to the reserve and called out on permanent service.[6]

Forfeiture of service under former Acts.

9. Acts passed before 1870 adopted, in reckoning the years of a soldier's service, the principle of omitting those periods during which he had not given the service which he had agreed upon enlistment to give, *e.g.*, by having been in prison, or by reason of desertion or absence without leave. After 1870 the effect of applying this principle to men liable under their enlistment to enter the reserve was to protract the time before a soldier's entry into the reserve, but not the term of his liability to service in the reserve. It kept with the colours inferior men whose places might otherwise have been filled by good recruits.

---

[1] K.R., 225–228.
[2] There are certain exceptions to this. See K.R. 231–234 for details. See also footnote 6 on p. 211.
[3] There are certain exceptions to this. See K.R. 231–232.
[4] See A.A., 86; K.R., 236–245 for details.
[5] A.A., 87, 88, also 77.
[6] A.A., 88. See Reserve Forces Act, 1882, ss. 12, 14.

Provisions of Army Act as to forfeiture of service.

10. The Army Act, therefore, abandons this principle, and does not, because a man is a bad soldier and constantly under sentence, require him to serve longer, but allows him to be discharged or sent into the reserve at the usual time. On the other hand, it provides that a soldier guilty of desertion or fraudulent enlistment shall, if serving on his original engagement, forfeit, not only the time of his absence, but all his service prior to his conviction, and

be liable to serve as if he had been attested at the date of his conviction, or of the order dispensing with his trial in the case of confession. If serving on a re-engagement, a soldier convicted by court-martial of desertion, or fraudulent enlistment, or whose trial has been dispensed with, forfeits all previous service rendered during the period of such re-engagement, *i.e.*, from the day following that on which he completed 12 years' service[1]; the term of any imprisonment or detention to which he is sentenced will reckon as part of his service after the date of the sentence. The Army Council, however, have power to restore all or any part of any service forfeited.[2]

Effect of provisions.

11. This forfeiture, coupled with the provision referred to in para. 19 as to the liability of a soldier convicted of the above offences to general service, will enable a man who has committed them to be sent to serve abroad, or in some other sphere where, by reason of greater activity or otherwise, he will be removed from the class of temptation under which he may have committed the offence. For, however serious the above offences are in a military sense, they are often committed, not from any want of moral character or any reluctance to serve, but from some discontent, or from association with bad companions, or from some sudden or special temptation inducing the man to absent himself.

Enlistment for general service and appointment to corps.

12. Since 1870, under the Recruiting Regulations, a man may be engaged for service in any particular corps, but otherwise he is enlisted for general service or general service (infantry), and, if enlisted for general service, or general service (infantry), he is, under the present law, to be appointed, as soon as practicable, to some corps, or some corps of that arm of the service, but may be transferred, within three months of his attestation, to any other corps of the same arm or branch of the service.[3] In 1923 an amendment to the Army Act provided that a boy enlisted for general service before attaining the age of eighteen years need not be appointed to a particular corps until he attains that age.[4]

Power to transfer under former Acts.

13. The power to transfer used formerly to be exercised in such a manner as to make it oppressive and much dreaded by the soldier. The Mutiny Act in 1765 expressly authorized courts-martial to sentence deserters to be transferred for service in foreign parts.

Provisions of Army Act as to transfer.

14. At present, when once a soldier is appointed to a corps for which he enlisted (or, if he enlisted for general service, has served for three months in a corps to which he has been appointed), he may make it his home so long as he serves with the colours, provided he conducts himself fairly well, and is qualified to serve in the place in which his corps is ordered to serve. He may, however, as indicated below, be transferred to another corps with his own consent of compulsorily.

---

[1] A.A., 84 (2).
[2] A.A., 73, 79. See further as to restoration of service, K.R., 246.
[3] A.A., 83 (1). In the case of a boy enlisted under A.A. 76 (proviso), the three months within which he may be transferred under this provision are reckoned from the date of his appointment to a corps.
[4] A.A., 82 (2).

By consent.

15. Such cases may occur as that of a man who is appointed to the cavalry and who might be transferred to the infantry if he is unable to learn to ride; or of a man transferred to another corps for the purpose of serving with a brother. Cases such as these would be with the man's consent.

Compulsory transfer.

15A. A soldier enlisted for 12 years with the colours under Section 77A of the Army Act, with such a right of re-engagement as is indicated in that section, is liable at any time to be transferred to any corps.[1]

[1] A.A., 83 (9).

From regiment ordered abroad from home, or *vice versa*.

16. When a soldier has been invalided from abroad, or his battalion is ordered abroad, and he is unfit to serve abroad, or will, within two years, go into the reserve, or be discharged, he can, if he does not go into the reserve at once, be transferred compulsorily to a corps of the same branch of the service in the United Kingdom or to the reserve. Similarly, when a regiment or battalion abroad is ordered home or to another station, a soldier who has (in addition to his reserve service) two years' colour service to run under his original enlistment, may, for the purpose of serving abroad the residue of his colour service, be transferred compulsorily to another corps of the same branch.

When Army Reserve has been called out.

17. A soldier of the regular forces enlisted for general service may be transferred to any corps of the same arm of branch of the service at any time whilst a proclamation ordering the Army Reserve to be called out on permanent service is in force. (This does not apply to men enlisted before 4th August, 1914.)

Re-transfer to former or to another corps.

18. A soldier transferred to a corps, other than cavalry, artillery, infantry or engineers, may be compulsorily re-transferred to any corps serving in the United Kingdom, or to the corps in which he served immediately prior to his transfer, and when serving out of the United Kingdom to any corps at the station at which he is serving at the time of his removal.

As a punishment.

19. A soldier who has been guilty of desertion or fraudulent enlistment, or has been sentenced by a court-martial to not less than three months' detention, may have his punishment wholly or partly commuted into a liability to general service, and he may then be transferred from time to time to any corps. This power may well be exercised in cases where a soldier gets into trouble at a home station and there is a prospect of his being converted into a good soldier by being sent abroad[1]. A soldier committed as a deserter by a civil magistrate in any part of His Majesty's dominions may be transferred compulsorily to any corps near the place where he is committed, or to any other corps if the competent military authority direct, but this power need not often be exercised.[2]

When corps are amalgamated, etc.

20. Where a corps is amalgamated with one or more other corps, or its constitution is altered, or a unit is transferred from one corps to another, a soldier serving in such corps at the date of amalgamation, etc., is liable to serve in the new corps as if it were the corps in which he was previously serving, but he is not liable without his consent to serve in any unit in the new corps in which he could not, without his consent, have been required to serve if no such amalgamation, etc., had been effected.

Conditions of enlistment not varied without consent of soldier.

21. The enlistment of the soldier is a species of contract between the Sovereign and the soldier, and under the ordinary principles of law cannot be altered without the consent of both parties. The result is that the conditions laid down in the Act under which a man was enlisted cannot be varied without his consent.

---

[1] See above, para. 11, and A.A., 83 (7).

[2] As to transfer generally, see A.A., 83; K.R., 292–302; and as to competent military authority, A.A., 101 (1), and R.P. 128.

Attestation before civil authority required since 1694.

22. Since 1694[1] a soldier has been required to be attested before some civil authority[2] as a mode of protecting him against being entrapped, without understanding the nature of it, into a contract, which, even though not a contract for life, is one of a very serious nature. Attestation was also adopted as a protection from impressment.[3] The practice which exists in many parts of the country of concluding a bargain by giving some earnest of it, was adopted in the case of enlistment by the giving of the shilling, and formerly the acceptance of the shilling rendered the man for some purposes a soldier.[4]

Provisions of Army Act as to attestation.

23. Under the Army Act, the acceptance of the shilling has no such effect. A man offering to enlist receives a notice informing him of the general conditions of service in the Army, and of the requirements of attestation, and directing his appearance before a justice.[5] If he fails to appear he has merely broken his bargain; he cannot be arrested as a criminal; and on appearing before the justice he may object to enlist, and if so cannot be required to pay any smart money. If he appears before the justice and takes the oath, he becomes an attested soldier, but he will still be able to procure his discharge within three months by paying a sum which is not to exceed, and is at present fixed at, twenty pounds. The attestation consists in appearing before the justice, answering certain questions, which are recorded, and making and signing a declaration as to the truth of those answers, and taking the oath of allegiance.[6] Thereupon he becomes for all purposes a soldier, and any invalidity in the attestion can only be taken advantage of within three months afterwards. Any immaterial error in the attestations paper can be amended at any subsequent time by a justice.[7] Officers are empowered to act as justices for the purpose of attesting recruits for the regular force, if authorized by the regulations of the Army Council. The persons who in India, Burma, the Dominions, the colonies, and foreign countries have authority to attest recruits, are enumerated in s. 94 of the Army Act.

Evidence of attestation.

24. The attestation paper is signed in duplicate, so that the original may be kept at home and the duplicate follow the man wherever serving.[8] This procedure renders more practicable the provisions of the Army Act (s. 163) for proof of enlistment by a certified copy of the attestation paper, which prevents a prosecution for desertion or fraudulent enlistment abroad from failing by reason of the attestation paper being at home. The same section makes an attestation paper

[1] 5 & 6 Will. & Mar., c. 15, s. 2, quoted in Clode, Mil Forces, ii, p. 7.

[2] See, however, as to attestation before officers, para. 23 *(ad fin.)*

[3] The Secretary of War used to discharge soldiers improperly enlisted. See Clode, Mil. Forces, ii, p. 8. The King's Bench discharged soldiers improperly impressed, *R.* v. *Kessel* (1758) 1 Burr. 687. See Clode, Mil. Forces, ii, p. 587.

[4] The acceptance of the shilling was treated as an agreement by the man to enlist, and either to complete his enlistment by attestation before a justice, or, in default, to pay smart money, which latterly amounted to 20s. Enactments were made for giving him notice of what he was about to agree to, and for the lapse of a certain time between his receipt of the shilling and notice, and his final attestation before the justice. On the other hand, if he absconded between his acceptance of the shilling and his appearance before the justice, he was liable to be apprehended as a vagabond, and punished accordingly, and also to be compulsorily attested as a soldier.

[5] For persons included in the term "justice" for the purpose of enlistment, see A.A., 94.

[6] As to the form of oath and the validity of enlistment without it, see Clode, Mil. Forces, ii, p. 21.

[7] A.A., 80, 81, 100.

[8] K.R., 1615.

evidence of the soldier having given the answers set out in it, a provision useful in case of a prosecution for making a false answer; in which case an attestation paper alone, and not a copy, is evidence.

Acceptance of pay renders a soldier subject to military law, though not attested.

25. Notwithstanding the provisions for protecting persons from being entrapped into being soldiers, it has always been the law that a man in pay as a soldier is subject to military law, though not attested. This law is still maintained, because if a man chooses to serve and take pay as a soldier, he must be considered to have accepted the conditions under which he is paid and treated as a soldier, and therefore to be subject to military law. Even an alien who enlists by making a false answer would apparently come under the same rule. The Act, however, provides that a man in such a position may claim his discharge at any time, and the commanding officer is to forward the claim to the competent military authority for submission to the Army Council; but the man, until discharged, has no right to absent himself, and is liable in all respects to be treated as a soldier. This provision as to discharge will not apply to a soldier who has gone through the form of attestation, but whose attestation is illegal, because after three months no advantage can be taken of any invalidity in the attestation.[1]

Enlistment of apprentices.

26. If an apprentice in the United Kingdom, who was bound when under sixteen by a regular indenture for at least four years, enlists while still under twenty-one, he can be claimed by his master through a proceeding before justices, but not otherwise. An apprentice who is so claimed is not liable afterwards to serve under his enlistment. The claim must be made within one month after the apprentice left his master's service. The apprentice is liable to, and on demand of his commanding officer must, be tried by the justice before whom the proceeding is taken for the offence of making a false statement on his attestation. With the above exception, and a similar one for indentured labourers in the colonies, a master cannot claim his servant who has enlisted.[2]

Of minors.

27. An enlistment is a valid contract, although entered into by a person under twenty-one, who by the ordinary rules of law, except where modified by statute, cannot, as a general rule, contract any engagement.[3]

Of aliens. Act of Settlement.

28. Though the Act of Settlement[4] which prohibits aliens holding any office, civil or military, does not in terms apply to soldiers, and though there was no statutory prohibition of the enlistment of foreigners, it seems to have been considered that the Crown had no authority either to enlist aliens for service in the United Kingdom, and consequently to punish them for desertion, or to billet them when in this country.[5]

Limited power to enlist aliens.

29. Statutory power was therefore taken in 1757, and again in 1782, to quarter foreign troops in this kingdom,[6] and in 1794 and in subsequent years statutory power was taken by the Crown to

---

[1] A.A., 100.
[2] A.A., 96, 97. See also K.R. 370 (iv)1
[3] See cases cited in Clode, Mil. Forces, ii, p. 34; *R.* v. *Rotherfield Greys* (1823), 1 Barn. & Cr., 345. See also *R.* v. *Hardwick* (1821), 5 Barn. & Ald. 176.
[4] 12 & 13 Will. III, c. 2, s. 3. An officer does, but a private does not, hold an office.
[5] Clode, Mil. Forces, i, pp. 89, 90, 487; ii, pp. 35, 431–435. Foreign troops seem to have been received in or brought into the kingdom in the time of Anne and Geo. I. Report on recruiting, 1867, Parl. P., 215.
[6] See 30, Geo. II, c. 2; 22 Geo. III, c. 26.

enlist aliens, even though they were to serve abroad.[1] This was subject to the conditions that they were not to be brought into the United Kingdom, except with a view to operations abroad; that if so brought they were not to go more than five miles from the sea coast, and that there were never to be more than 5,000 men in the kingdom. A similar provision was made in 1800[2] and during the Crimean War in 1854,[3] but in the latter case the only restrictions were that the number of men brought into the United Kingdom was not to exceed 10,000, and that they were not to be billeted. The illegality of the enlistment of aliens has also been recognized in other Acts,[4] till at last, in 1837, it was enacted that, with the permission of the Crown (given in each case), an alien might be enlisted, but the number of aliens in any corps was not to exceed the proportion of one to every fifty natural-born subjects, and this provision has been re-enacted in the Army Act.[5] An alien so enlisted is by the Army Act made incapable of becoming an officer. A relaxation in favour of negroes and persons of colour was originally made in consequence of negroes captured in slavers being taken into the service of the Crown, and was continued to legalize the recruiting of natives on the West Coast of Africa for service in the West India Regiments (now disbanded) and of Lascars in the East; and the relaxation has been extended to inhabitants of British protectorates in order to enable troops raised in the East and West African protectorates to serve outside their boundaries.[6] It must also be recollected that under the British Nationality and Status of Aliens Acts a naturalized alien has the same privileges as a British subject, and therefore is capable of being enlisted to serve His Majesty.

Discharge, Power of Crown to discharge soldier.

30. The terms of the enlistment of a soldier, since he has been enlisted directly by the Crown, have always been to serve the Sovereign so long as his services are required, within the period for which he agrees to serve; consequently the Sovereign has always had power to discharge soldiers. But a soldier cannot be discharged except by order of the Sovereign or under some statutory power, such as the sentence of a court-martial, to which is added in the Army Act an "order of the competent military authority."[7]

Certificate of service.

31. A soldier on his transfer to the Army Reserve or discharge is entitled to receive a certificate of service. This certificate combines in one form a "certificate of character," "certificate of transfer to the Army Reserve," "discharge certificate," together with other details relating to the soldier's service. The soldier is provided with a certificate of service to show that he has been properly transferred to the Army Reserve or discharged, and that he is not a deserter.[8] Until he is duly discharged he remains subject to military law. Discharge

---

[1] See 34 Geo. III, c. 43. The Act 29 Geo. II, c. 5 recited the enlistment of foreigners in America, and gave powers to commission them, but not to enlist. This was given by the amending Act, 38 Geo. III, c. 13.

[2] 39 & 40 Geo. III, c. 100.

[3] 18 & 19 Vict., c. 2.

[4] See 44 Geo. III, c. 75; and 46 Geo. III, c. 23, continued by 55, Geo. III, c. 35. See also the provisions on the amalgamation of the Indian Army, 24 & 25 Vict., c. 74, s. 2.

[5] 7 Will. IV & 1 Vict., c. 29; A.A., 95 (1).

[6] A.A., 95.

[7] A.A., 92. For definition of the competent military authority, see A.A., 101 (1), 190 (32), also R.P. 128. For regulations as to discharge, see K.R. 338–410.

[8] See K.R. 392–410.

has been at different times regarded as a reward or as a punishment.[1] When the service was for life, discharge was in many cases the highest object of a soldier's desires, and even now it may be a material advantage to him. There is no reference in the present law to discharge as a reward, but a soldier may be transferred to the reserve or prematurely discharged within a limited period of the termination of his normal colour service, to enable him to take up civil employment which cannot be held open.[2] On the other hand, discharge with ignominy, or discharge towards the end of a man's service shortly before he becomes entitled to receive pension, cannot but have the effect of a punishment.

Conveyance home of soldiers on discharge.

32. A soldier enlisted in the United Kingdom is entitled, if on the completion of his service he is abroad, to be sent to the United Kingdom free of expense for his discharge; and a soldier enlisted in the United Kingdom, and discharged there on termination of his engagement, is entitled to be sent free of expense from the place where he is discharged to the place where he was attested, or to his residence, if his conveyance there costs no more.[3] In no other case has a soldier any *statutory* right to be sent free of expense to any place on discharge, though, in some cases, he may be allowed a free conveyance as a matter of favour.[4]

Disposal of soldiers of unsound mind.

33. If a soldier is of unsound mind, the Army Council or an officer deputed by them may, on his discharge, send him, and also his wife and child, to the poor law institution of the area to which he is chargeable, and if he is a dangerous patient may send him to the mental hospital for persons of unsound mind chargeable to that area.[5]

Transfer to reserve.

34. The only power, except with the soldier's consent, of sending him into the reserve before the stipulated time is on occasion of his being unfit to serve abroad, or of his regiment being ordered abroad shortly before the expiration of the time of his service with the colours.[6] A soldier who is transferred to the Army Reserve is entitled, on transfer, to free conveyance to his place of attestation or selected place of residence (if not involving greater cost) in the United Kingdom, but has no claim to free conveyance to any place on final discharge from the Army after completing his service in the reserve.[7]

Offences in relation to enlistment.

35. Offences in relation to enlistment, when committed by persons who are at the time or thereafter become subject to military law, are punishable by military law under ss. 13, 32-34 of the Army Act. A man renders himself liable to punishment not exceeding imprisonment who, after being discharged from any part of His Majesty's military or air forces with ignominy, or for misconduct, or on account of conviction for felony or a sentence of penal servitude, or dismissed with disgrace from the Navy, enlists without disclosing the circumstances of his discharge or dismissal.

---

[1] See Clode, Mil. Forces, ii, pp. 43–47.
[2] See K.R. 369 (ii) *(a)* & *(b)* and 370 (ix) *(b)*.
[3] A.A., 90.
[4] See Allowance Regulations, sec. 7, subsection 6, for the present practice.
[5] A.A., 91. See also K.R. 388–391.
[6] A.A., 89.
[7] A.A., 90. For the further benefits in this respect now enjoyed by reservists, see Allowance Regulations, sec. 7, subsection 6.

A recruiter who enlists any man whom he has reason to believe to have been so discharged or dismissed, also renders himself liable to imprisonment.

The making of a false answer to any question on attestation renders the offender liable to imprisonment on the sentence either of a civil court of summary jurisdiction for the place where the offence was committed, or where the offender may happen to be, or of a court-martial[1]; and any person who uses, or gives for use, for the purposes of enlistment a false statement as to character or previous employment is liable on summary conviction to a fine not exceeding twenty pounds.[2]

No one may enlist soldiers unless duly authorized, and any person who does so is liable to a fine not exceeding twenty pounds.[3]

A man who, while belonging to one corps, enlists in the same or any other corps, is guilty of fraudulent enlistment, and can be punished for it; but as he has made two engagements he can be held to either engagement, and is thus liable to serve, as the military authorities direct, either in accordance with the terms of his original attestation, or with those of his new attestation, and (unless he has enlisted in the corps to which he already belongs) in either of the corps to which he has been appointed to serve.[4]

---

[1] A.A., 99, 33, and notes.
[2] Seamen's and Soldiers' False Characters Act, 1906, (6 Edw. 7, c. 5), s. 2.
[3] A.A., 98. Under the Mutiny Act, authority was in terms granted to consuls and other persons abroad to enlist soldiers; but the present Act makes it clear that those officers have only power, like the justices at home, to attest, and have no power to act otherwise in recruiting unless specially authorized to do so. See A.A. 94.
[4] For details see K.R., 599.

CHAPTER XII

RELATION OF OFFICERS AND SOLDIERS TO CIVIL LIFE

Legal status of officers and soldiers.

1. The English law on this subject differs from that of some foreign countries. A man who joins the Army—whether as an officer or as a private—does not cease to be a citizen. His official character is superimposed upon his civil character, and does not obliterate it.[1] At the same time it has been found necessary, or desirable, to modify in certain minor respects his status as a civilian, in some cases by imposing restrictions and in others by conferring immunities and privileges.

Under the criminal law.

2. So far as the criminal law is concerned, the position of an officer or soldier is the same as that of a civilian. If he commits an offence against the ordinary criminal law he can be tried and punished by the civil courts as if he were a civilian; and various liabilities are incurred by an officer who, on due application being made, refuses to hand over a man under his command to the civil authorities, or to assist in his apprehension.[2]

In civil matters.

3. In the case of civil rights, duties and liabilities, there is a difference between the position of a soldier and that of an ordinary citizen. The former cannot whilst in the service change his domicile,[3] or acquire by residence a status of irremovability from, or a settlement in, some parish other than his own.[4] Again, he cannot be punished for deserting or neglecting to maintain his wife and family, or leaving them chargeable to any area or place. Although his legal liability to maintain them and any bastard children remains, it cannot be enforced against his person, pay, or equipment, but provision has been made for deducting limited sums from his pay for the maintenance of such dependants.[5] A soldier can without any official approval contract a legal and valid marriage; but claims to "marriage allowance" or "married quarters" are governed by regulations.[6]

Restrictions on creditors.

4. Certain restrictions have also been imposed on the creditors of a soldier, so as to prevent the Crown losing his services. He cannot, under s. 144 of the Army Act, be arrested or compelled to appear before a court on account of any debt, damages, or sum of money under £30; but the exemption applies to his person, not to his property; and a creditor may sue and have execution, so long as he does not touch the person, pay, or equipment of the soldier. A soldier cannot be placed under stoppages for his private debts, and persons who suffer soldiers to contract such debts do so at their own risk. An officer or soldier is unable, legally, to charge or assign his pay or pension.[7]

---

[1] See *Burdett* v. *Abbott* (1812) 4 Taunt. 401 *per* Mansfield, C.J.; *Heddon* v. *Evans* (1919), 35 T.L.R. 642.

[2] A.A. 39, 41, 41A, 162. Under the Jurisdiction in Homicides Act, 1862, provision is made whereby a person subject to military law who is charged with the murder or manslaughter of any other person subject thereto, committed in England or Wales, may, in certain circumstances and by order of a judge be tried at the Central Criminal Court in London.

[3] *Ex parte Cunningham* (1884) L.R. 13 Q.B.D. 418; *In re Macreight* (1885), L.R. 30 Ch. Div. 165.

[4] Clode, Mil. Forces, ii. 38. Poor Removal Act, 1846, s. 1.

[5] A.A. 145. It will be noted that this section does not apply to an officer.

[6] See K.R. 306–314; Allowance Regs., sec. 6.

[7] A.A. 141. As to the appropriation of a portion of the pay or pension of a bankrupt officer to his creditors, see the notes to that section.

Ch. XII

5. Officers and soldiers have, while actually "*in expeditione*," certain privileges in regard to making wills.[1]

Wills.

By s. 11 of the Wills Act, 1837, a soldier (which term includes an officer), "being in actual military service," may dispose of his personal[2] estate by a so-called "soldier's will," although under the age of 21.

With regard to real estate the Wills (Soldiers and Sailors) Act, 1918, provides in effect that—(i) a "soldier's will" disposing of real estate in England or Ireland[3] shall be valid if the testator was of such age and the disposition is made in such manner and form that it would have been valid if it was a disposition of personality by a person domiciled in England or Ireland; and (ii) that such a will disposing of heritable property in Scotland shall not in future be invalid by reason only that the testator is under 21, provided he is of such an age that he could if domiciled in Scotland have made a valid testamentary disposition of movable property.

For the above purposes a man is "in actual military service" (*in expeditione*) when a state of war exists and he has taken some step towards joining the field forces, *e.g.*, from the time when he or the unit to which he belongs receives embarkation or mobilization orders for active service,[4] down to the final conclusion of operations[5]; and the term "soldier" has been held to include an army nursing sister *en route* for the front.[6]

A "soldier's will" may consist of a document not attested (as a civilian's will must be), *e.g.*, a private letter to the person intended to benefit under it, or to some one else, stating his wishes; also, a mere verbal statement of his wishes is sufficient if such statement can be proved to the satisfaction of the court.[7]

To establish the validity of such a will it is not necessary to prove that he knew that he was making a will, or had power to make one in that manner; but it must be shown that he intended to express deliberately his wishes as to the disposal of his property in the event of his death.[8] Such a will is revoked (like any other will) by his subsequent marriage.[9] It continues in force until revoked or superseded, unless its language shows an intention that it should only take effect if the testator died during the particular expedition.[10]

A minor can by a "soldier's will" validly exercise a general power of appointment exercisable by will[11]; and a "soldier's will" can validly

---

[1] It is not possible to deal fully with this subject in the present work. The information here given, together with that in the Soldiers' Service and Pay Book (A.B. 64), should be sufficient to enable an officer to make, or help a soldier to make a valid disposition of his property upon emergency; but except where small amounts of personal property alone are concerned it is most unwise to rely upon the expedient of a "soldier's will" made without legal advice.

[2] See *Godman* v. *Godman*, L.R. (1920), P. 261.

[3] Now applicable only to Northern Ireland.

[4] *In the goods of Hiscock*, L.R. (1901), P. 78; *Gatteward* v. *Knee*, L. R. (1902), P. 99; *In the goods of Gordon* (1905), 21 T.L.R. 653; *In re Kitchen* (1919) 35 T.L.R. 612.

[5] *In re Limond* L.R. (1915), 2 Ch., 240.

[6] *In the estate of Stanley* L.R. (1916), P. 192.

[7] See, *e.g.*, *In the goods of Scott* L.R. (1903), P. 243; *In the estate of Pawle* (1918) 34 T.L.R., 437; *In the goods of Tweedale* (1875), L.R., 3 P. & D. 204; *In the goods of Gordon* (1905) 21 T.L.R., 653; *In the goods of Coleman* (1920) 2 I.R. 332.

[8] *In re Stable* L.R. (1919), P. 7; *Godman* v. *Godman* L.R. (1920), P. 261.

[9] *In the estate of Wardrop* L.R. (1917), P. 54.

[10] *In the estate of Pawle* (1918) 34 T.L.R., 437; *in the goods of Coleman*, *supra*.

[11] *In re Wernher* L.R. (1918), 2 Ch., 82.

appoint a guardian of his infant children (even though it disposes of no property).[1]

A person who (although attestation is unnecessary) does in fact attest such a will, is not thereby precluded from taking a benefit thereunder.[2]

Death duties, etc.

6. It is not necessary to take out probate or letters of administration in respect of small sums due to deceased officers and soldiers in respect of pay, pensions or prize money.[3] Estate duty is not payable on the property of soldiers under the rank of sergeant who are killed or die while in the service.[4] Where a person dies from wounds inflicted, accident occurring or disease contracted, within three years before death, while on active service against an enemy or on service which is of a warlike nature, and was at the time subject to military law as an officer or soldier, a total or partial remission of death duties may be granted.[5] Special provision has been made for collecting and realizing the effects of a deceased officer or soldier, and paying certain regimental debts thereout.[6] Wound and disability pensions are exempt from income tax.[7]

Exemption from licence duty.

7. Officers are entitled to an exemption from licence duty for any servant who is a soldier and is employed by the officer in accordance with the regulations of the service.[8]

Exemptions from rates and tolls.

8. Officers and soldiers have no personal exemption from rates; but where an officer occupies property in respect of his office, the occupation is treated as occupation by the Crown, and he is not liable to be rated in respect of that property, inasmuch as the Crown is exempt from rates. If the occupation is for this own personal benefit, and not not for the benefit of the Crown an officer will be liable to be rated like any other individual. Similarly, officers and soldiers of the regular forces, when on duty, are exempt from tolls,[9] but are not so exempt when travelling[10] for their own purposes only.

Public or municipal offices, jury service, etc.

9. An officer of the regular forces on the active list is disqualified for the office of sheriff of any county or borough.[11] Officers of the Territorial Army are not so disqualified.[12]

Officers of the regular forces while on full pay,[13] soldiers of the regular forces,[14] militiamen (supplementary reservists) when called out on

---

[1] Wills Act, 1918, s. 4.

[2] *In re Limond* L.R. (1915), 3 Ch., 240.

[3] Pensions and Yeomanry Pay Act, 1884, s. 4 (personalty not exceeding £100); Army Pensions Act, 1830; Army Prize Money Act, 1832.

[4] Stamp Act, 1815, Sched., Part III, and Finance Act, 1894, s. 8 (1).

[5] Finance Act, 1900, s. 14; Death Duties (Killed in War) Act, 1914; Finance Act, 1918, s. 44; Finance Act, 1919, s. 31; Finance Act, 1924, s. 38.

[6] Regimental Debts Act, 1893, in Part III, *post*.

[7] Finance Act, 1919, s. 16; see s. 17 as to war gratuities.

[8] 32 & 33 Vict., c. 14, s. 19 (5). As to firearms used for military purposes, see the Gun Licence Act, 1870, s. 7, as amended by subsequent enactments; see also the Firearms Act, 1920, s. 1 (8).

[9] A.A. 143, and notes thereto.

[10] See *Jenkyns* v. *Southampton, etc., Co.* (1919) 35 T.L.R. 435, as to what is "personal luggage" in the case of an officer.

[11] A.A. 146.

[12] A.A. 181 (5).

[13] Juries Act, 1870, s. 9, sched.; Jurors (Scotland) Act, 1825, s. 2; Jury Laws Amendment Act (Northern Ireland), 1926, s. 3, sched. 3.

[14] A.A. 147.

permanent service or otherwise subject to military law,[1] and officers and men of the Territorial Army[2] are exempt from jury service.[3]

Officers on full or half pay and officers and men of the Territorial Army are exempt from compulsion to undertake any municipal or parochial office.[4]

An officer on full pay or soldier may not voluntarily accept any office in any municipal corporation or other local government council, or allow himself to be nominated for election to any such office, without the sanction of the Army Council.[4a]

In time of war, provision is sometimes made relieving members of local authorities from the disqualification which would otherwise result from their absence on service.[5]

Other restrictions.

10. Officers on full pay and soldiers are prohibited by the King's Regulations from joining the directorate of any public or other company without permission. They are also prohibited from acting either directly or indirectly as agents for any company, firm, or individual engaged in trade,[6] and are subject to restrictions as to communications to the press, publication of books and articles, etc.[7]

Parliamentary candidature, etc.

11. An officer or soldier is prohibited from taking any active part in political meetings, or becoming a candidate or prospective candidate for Parliament until he has retired, resigned, or been discharged, or in the case of a field marshal, until he has given up any appointment which he may be holding.[8] This prohibition does not apply to an officer or man of the reserve forces (including officers in any reserve of officers) or the Territorial Army as such, except when embodied or called out on permanent or active service, or when holding a full time paid appointment, *e.g.*, adjutant.[9]

Right to vote at Parliamentary election.

12. An officer or soldier has the same right as a civilian to vote at an election for members of Parliament.

The Representation of the People Act, 1918,[10] gives to an officer or soldier certain privileges in respect of registration and of voting. He is entitled, on attaining the age of 21 years, to be registered as an elector for any constituency for which he would have had a qualification but for his service. He is also entitled to be placed upon the list of absent voters and can then, if serving in the United Kingdom, record his vote by post in the prescribed manner, or, if serving outside the United Kingdom, he can appoint a proxy in the prescribed manner to vote on his behalf.[11]

---

[1] A.A. 190 (8), 178, 147.
[2] T.R.F. Act, 1907, s. 23 (4).
[3] In the case of Scotland and Northern Ireland the exemption is absolute, but in the case of England and Wales it is conditional upon the person taking steps to keep his name off the jury list. (Juries Act, 1870, s. 12.)
[4] Municipal Corporations Act, 1882, s. 253; in the case of parochial offices there is no express provision, but the principle appears to be generally recognized. As to reservists, see Reserve Forces Act, 1882, s. 7.
[4a] K.R. 1935, 530A.
[5] Local Authorities Relief Acts, 1900, 1914.
[6] K.R. 516.
[7] K.R. 522.
[8] K.R. 517. See also O. in C., dated 25th July, 1927, and Army Order 321 of 1927.
[9] T.A. Regs. 273.
[10] As amended by subsequent Acts.
[11] See K.R., App. IX.

An officer or soldier, if in the United Kingdom, ought to be allowed, if he wishes to go to the place of election and record his vote, unless military exigencies render it impossible, but where he is registered on the absent voters' list he can record his vote only by post.

Miscellaneous enactments.

13. In conclusion reference may be made to certain miscellaneous enactments such as those which deal with marriages of soldiers abroad,[1] the registration of marriages and births abroad[2], the keeping of service canteens without full compliance with the law of licensing,[3] and the acting of plays in service recreation rooms without a stage play (or theatre) licence.[4]

---

[1] Foreign Marriage Act, 1892, ss. 12, 22.
[2] Registration, etc., (Army) Act, 1879.
[3] A.A. 174; Licensing Consolidation Act, 1910, s. 111 (2); Licensing (Scotland) Act, 1903, s. 50.
[4] A.A. 174A.

CHAPTER XIII

EMPLOYMENT OF TROOPS IN AID OF THE CIVIL POWER

Object of the chapter.

1. The object of this chapter is to give an explanation of the law relating to the duty of the soldier in case of riot and other disturbances of the peace.

Two main obligations under the common law.

2. The common law, which governs soldiers and other citizens alike, imposes two main obligations in such cases, which are, firstly, that every citizen is bound to come to the aid of the civil power when the civil power requires his assistance to enforce law and order, and, secondly, that to enforce law and order no one is allowed to use more force than is necessary.

These obligations apply to everyone in every type of disturbance.

Legal position regarding soldiers.

3. When called to the aid of the civil power soldiers in no way differ in the eyes of the law from other citizens, although, by reason of their organization and equipment, there is always a danger that their employment in aid of the civil power may in itself constitute more force than is necessary.

The law is clear that a soldier must come to the assistance of the civil authority where it is necessary for him to do so, but not otherwise. No excess of force or display must be used, and a soldier is guilty of an offence if he uses that excess, even under the direction of the civil authority, provided he has no such excuse as that he is bound in the particular circumstances of the case to take the facts, as distinguished from the law, from the civil authority.[1]

Though there is no legal difference between soldiers and other citizens in respect of the duty to respond to the call of the civil authority, there is, in cases of disturbance where the civil authority has not asked for help, a duty to take action laid upon military commanders by the King's Regulations which is not laid upon other citizens, except magistrates and peace officers (K.R. 1256), and even though the civil authority should give directions to the contrary the commander of the troops, if it is really necessary, is bound to take such action as the circumstances demand.

Requisition for intervention by troops.

4. The primary obligation for the preservation of order and for the suppression of disturbance rests with the civil authority. The civil authority[2] should only requisition troops when satisfied that it is or will be impossible to deal with the situation which has developed, or is immediately apprehended, by means of all the resources of the civil power, that is to say, the local police, supplemented by any additional police that can be procured from elsewhere or by any police reserves or special constabulary that may be available.

A military commander who receives a requisition for troops from a distance is bound to comply if he is not in full possession of the facts. If, on arrival, the magistrate demands immediate intervention before the commander has had time to investigate, for himself, he must

---

[1] See the appendices to this chapter.
[2] For definition of "civil authority" for this purpose, see K.R. 1239.

intervene and he would be protected by the law. If, on arrival, a commander has time to investigate, he must do so, and acquaint himself with the facts and judge for himself before he intervenes. A commander on the spot, while attaching great weight to the opinion of the magistrate, must himself decide whether military intervention is necessary to deal with the circumstances in which he has been requisitioned.

Responsibility between civil and military authority.

5. There remains to be considered on whom, after a decision to take action has been made, the responsibility rests in the case of the employment of troops in the suppression of disturbances. As stated in para. 4, the primary duty of preserving public order rests with the civil authority. A commander, therefore, in all cases where it is practicable, should place himself under the direction of a magistrate.

The duties of a magistrate do not, however, impose upon him a knowledge of the weapons at the disposal of the troops, or of the effect of those weapons; he may not be, therefore, the best judge as to the degree of force to be employed by the soldiers in the particular circumstances for which he desires and requests their intervention. A magistrate therefore, if he acts with discretion, will necessarily defer to the opinion of the commander on military matters, particularly as to the degree of force to be used. The primary responsibility, however, remains with the magistrate, and if he is on the spot, it is his duty to request the commander "to take action"[1] when the civil resources at his disposal are insufficient to deal with the circumstances which present themselves.

On the other hand, a commander will not perform his duty if, from fear of responsibility, he takes no action and allows outrages to be committed which it is in his power to check, merely on the ground that there is no magistrate to direct him to take action.

If the magistrate and the commander are acting together, the obligation lies on the magistrate to request the commander to take action, but the action to be taken, *i.e.*, the degree of force required in the circumstances, must be judged by the officer; the latter would incur considerable responsibility if he were to fire without a request to take action from the magistrate, or if he were to refuse to fire when requested to do so, but circumstances which he sees before him might justify a commander in firing, or not firing, notwithstanding the request which he receives from the magistrate. The commander must judge of the degrees of force to be employed, and it is his duty to fire if he cannot otherwise stop the violence which is being committed before him. He must decide whether it is necessary to fire or not, and is responsible for his action.

Types of disturbance.

6. The types of disturbance in which troops may be called upon to intervene matter little, and the principles set forth in the preceding paragraphs apply to each and every type, but an explanation of the law relating to disturbances may be useful to military commanders.

Laws affecting various types of disturbance.

7. The law makes provision for the following situations, which are those in which troops may find themselves when called to the assistance of the civil authority:—

(1) A National Emergency (Emergency Powers Act, 1920).

[1] K.R. 1238–1257.

Ch. XIII

(2) Intimidation of Workers (Conspiracy and Protection of Property Act, 1875).
(3) Unlawful picketing (Trade Disputes Act, 1906, and Trade Disputes and Trade Unions Act, 1927).
(4) Unlawful assembly.
(5) Riot (Riot Act, 1715).
(6) Insurrection.

In each of the above situations, troops may be called upon to intervene. The first three are generally connected with trade disputes and industrial unrest. The merits or demerits of such disputes or unrest are of no concern whatsoever to soldiers, who are solely concerned with the duty and obligation common to all citizens of assisting the civil authority in the maintenance of law and order, and in those situations their principal duty will be the protection of persons and property.

Emergency Powers Act, 1920.

8. The Emergency Powers Act, 1920,[1] enacts that if at any time it appears that any action has been taken or is immediately threatened by any persons or body of persons of such a nature and on so extensive a scale as to be calculated, by interfering with the supply and distribution of food, water, fuel or light, or the means of locomotion, to deprive the community, or any substantial portion of the community of the essentials of life, His Majesty may, by proclamation, declare that a state of emergency exists.

So long as such a proclamation remains in force, it is lawful for His Majesty in Council, by order, to make regulations for securing the essentials of life to the community, and those regulations may confer or impose on a Secretary of State, or other Government Department, or on any other persons in His Majesty's service, or acting on His Majesty's behalf, such powers and duties as His Majesty may deem necessary for the preservation of peace, for securing and regulating the supply and distribution of food, water, fuel, light, and other necessities, for maintaining the means of transport or locomotion, and for any other purposes essential to the public safety and the life of the community.

Under such regulations soldiers may be called upon to perform duties, not otherwise regarded as military duties, in order to secure the necessities of life to the community, although no actual breach of the peace has occurred, and it follows that they are entitled to use such force, and no more, as may be necessary to enable them to carry out the duties entrusted to them.

Conspiracy and Protection of Property Act, 1875.

9. Under the Conspiracy and Protection of Property Act, 1875, s. 7, an offence is committed by any person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or to abstain from doing, wrongfully and without legal authority:—

(1) Uses violence to or intimidates such other person or his wife or children, or injures his property; or
(2) Persistently follows such other person about from place to place; or
(3) Hides any tools, clothes or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or

[1] See page 906.

(4) Watches or besets the house or other place where such other person resides, or works, or carries on his business, or happens to be, or the approach to such house or place; or

(5) Follows such other person with two or more other persons in a disorderly manner in or through any street or road.

Trade Disputes Act, 1906, and Trade Disputes and Trade Unions Act, 1927.

10. The Trade Disputes Act, 1906, modified the Conspiracy and Protection of Property Act, 1875, to the extent that it made it lawful for one or more persons, acting on their own behalf, or on behalf of a trade union, or of an individual employer or firm in contemplation or furthernace of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working.

It is to be observed that the above-mentioned Acts did not legalize any action which went beyond the purposes defined in the last paragraph. Intimidation therefore remained illegal even though committed by persons attending nominally for the purposes of giving or obtaining information or persuading others. The Trade Disputes and Trade Unions Act, 1927, s. 3 (1), made this quite clear by declaring that it is unlawful for one or more persons to attend at or near a house or place where a person resides, etc., for the lawful purposes mentioned in the Act of 1906, if they so attend in such numbers or otherwise in such mannner as to be calculated to intimidate any person in that house or place. The Act of 1927, however, extended the meaning of "intimidation" (as hitherto interpreted in the courts) by defining the expression "to intimidate" as meaning "to cause in the mind of a person a reasonable apprehension of injury to him or to any member of his family or to any of his dependents or of violence or damage to any person or property." The expression "injury" in this definition includes injury to a person in respect of his business, occupation, employment or other source of income, and includes any actionable wrong.

The Act of 1927 further makes it unlawful for a person or persons to watch or beset a house or place where a person resides, or the approach to such a house or place, for the purpose of inducing any person to work or to abstain from working.

Unlawful assembly.

11. An unlawful assembly is an assembly of three or more persons with intent either to commit a crime by open force or to carry out any common purpose (lawful or unlawful) in such a manner as to give firm and courageous persons in the neighbourhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it.[1]

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 to be calculated to alarm, not only foolish or timid people, but persons of reasonable firmness and courage.[2] If the assembly is for a lawful purpose and with no intention of carrying out that purpose in an unlawful manner, the

[1] Laws of England, vol. ix, p. 469; Digest of Criminal Law, p. 55.
[2] *R.* v. *Vincent*, 9 C. & P., 95.

assembly is not an unlawful assembly, even though the persons assembling know that the assembly is likely to be resisted by others.[1]

Example of what is and what is not an unlawful assembly.

12. Accordingly, in the case of the Chartist Meeting at Newport in 1839, an assembly was held to be unlawful in which from 300 to 1,000 persons were gathered together, and in respect of which evidence was given that the speakers endeavoured to incite the people to disaffection and the use of physical force. No actual outrage was perpetrated, but numbers of persons armed with sticks were proved to have marched in procession, and several witnesses swore that they apprehended danger both to life and property.[2] On the other hand, a peaceful meeting of the Salvation Army is not an unlawful assembly and cannot be made so by the knowledge that the assembly will be resisted and a breach of the peace ensue.[3]

Suppression of unlawful assemblies.

13. The law would fall far short of what is needed for the preservation of society if it did not allow all necessary measures to be taken for dispersing or otherwise putting an end to unlawful assemblies, riots, and insurrection. 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 stopped 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.[4]

Definition of "riot".

14. A riot is a tumultuous disturbance of the peace by three or more persons assembling together without lawful authority[5] with an intent mutually to assist one another against any who oppose them, in the execution of some enterprise of a private nature, and who afterwards actually begin to execute the same in a violent and turbulent manner to the terror of the people. It is immaterial whether the act done be unlawful or not, but there must be an act.[6] Doing the act in a manner calculated to inspire people with terror is punishable, whether it is lawful or unlawful; but where the object of the assembly is lawful, it requires far stronger evidence of terror caused by the means used to induce a jury to return a verdict of guilty.

Examples of riot.

15. For example, persons assembling together on a race course with the intent mentioned in para. 14 and tumultuously pulling down a booth are guilty of a riot. Again, a number of persons assembling for a lawful object, such as pulling down an inclosure which has been illegally put up, will be guilty of a riot if their assembling is accompanied with circumstances of actual force or violence calculated to inspire people with terror.

Riot Act.

16. The first section of the Riot Act enacts that, "If any persons, to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace . . . and being required or commanded by any . . .

[1] *Beatty* v. *Gillbanks*, L.R., 9 *Q.B.D.* 308. The principle established by this case does not appear to be affected by the later decision in *Wise* v. *Dunning*, L.R., (1902) 1 K.B., 167; see Dicey, Law of the Constitution (6th Edn.) App. Note V., p. 448.

[2] *R.* v. *Vincent*, *ante*; and see *R.* v. *Neale*, 9 C. & P. 431 in which the law is similarly laid down by Mr. Justice Littledale.

[3] See note 1 above.

[4] Baron Alderson in *R.* v. *Vincent*, 9 C. & P., 94.

[5] A lawful gathering may become a riot if a proposal to do collectively some act of violence is agreed to and executed.

[6] Hawkins, Bk. 1, ch. lxv., sec. 1; and see *R.* v. *Graham* 16 Cox Crim. Ca. 22.

justice, ... by proclamation to be made in the King's name, in the form hereinafter directed, to disperse themselves, and peaceably to depart . . . , shall, to the number of twelve or more . . . . unlawfully, riotously, and tumultuously remain or continue together by the space of one hour after such command or request made by proclamation," they shall be adjudged felons.

Form of proclamation.

17. The form of the proclamation and the mode of making it direct the justice among the rioters, or as near them as he can safely come, to command silence, and then with a loud voice to make proclamation in the following words:—

> "Our Sovereign Lord the King chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitations or to their lawful business, upon the pains contained in the Act made in the first year of King George the First, for preventing tumults and riotous assemblies. God save the King".

Effect of remaining for an hour after proclamation.

18. Further, the Act provides that, if the persons so riotously and tumultuously assembled, or twelve or more of them, remain together for one hour after the proclamation, they may be seized and apprehended by any justice or person assisting him; and that if any of the persons so unlawfully assembled happen to be killed, maimed, or hurt in the dispersing, seizing, or apprehending, or endeavouring to disperse, seize, or apprehend them, by reason of their resisting, then the justices, constables, and persons assisting such justices and constables shall be fully indemnified for any such killing, maiming or hurting. Person hindering the reading of the proclamation, and if the proclamation be hindered, persons having knowledge of such hindrance and not dispersing within an hour after the hindrance, are liable to the same punishment as persons who remain together for an hour after the reading of the proclamation.

Suppression of riots.

19. Every magistrate, sheriff, constable, and other peace officer is required to do all that in him lies for the suppression of a riot, and each has authority to command all other subjects of the King to assist him in that undertaking. Every man is bound, when so called upon, to yield a ready and implicit obedience, and to do his utmost to assist in suppressing any tumultuous assembly.[1]

A riot may be dispersed before the proclamation is read.

20. It is important to realize that the passing of the Riot Act in no way limited such powers as the civil authorities already possessed, or rendered it illegal for them to interfere, should circumstances require it, before the proclamation has been read and an hour has elapsed.[2] At the same time the action of the legislature in passing the Act suggests strongly that, as a general rule, it would be extremely imprudent to use an armed force against a mob until the proclamation has been made and an hour has elapsed, except in circumstances where either the proclamation cannot be read owing to the violence of the mob, or the

---

[1] Charge of Chief Justice Tindal to the Grand Jury in 1832, quoted in *R.* v. *Pinney*, 5 C. & P. 262 note.

[2] See appendices I & II to this chapter.

Ch. XIII

mob, before the expiration of an hour, perpetrate or are evidently about to perpetrate some outrage amounting to felony.[1]

Apprehension of rioters.

21. There is no doubt that a person lawfully engaged in trying to apprehend a rioter is justified in using any degree of force to protect himself, or to overcome resistance. It is, however, sometimes impracticable to attempt the apprehension of individuals without using means calculated to occasion bloodshed and the firing on a mob can only be excused by the necessity of self-protection, or by the circumstance of the force at the disposal of the authorities being so small that the commission of some felonious outrage—such as the burning of a building, or the breaking open of a prison, or the attacking of a barrack,—cannot be otherwise prevented.[2]

Definition of "insurrection".

22. An insurrection differs from a riot in this—that a riot has in view some enterprise of a private nature, while an insurrection savours of high treason, and contemplates some enterprise of a general and public nature.[3] An insurrection, in short, involves an intention to "levy war against the King," as it is technically called, or otherwise to act in general defiance of the government of the country.

Examples of insurrection.

23. For example, a determined mob assembling to pull down or burn a building belonging to their civil employers with whom they have a dispute, are engaged in a riot as soon as they have actually commenced to execute their purpose. If the object were to attack a barrack or seize a store of bombs with a view to arming themselves and making war against the government, they would be in a state of insurrection.

Suppression of insurrection.

24. The observations made above with respect to the duty of suppressing riots apply still more strongly to insurrections, or "riots which savour of rebellion." In such cases the use of arms may be resorted to as soon as the intention of the insurgents to carry their purpose by force of arms is shown by open acts of violence, and it becomes apparent that immediate action by the use of arms is necessary.

Distinction between unlawful assembly, riot and insurrection.

25. The distinction between these three kinds of gathering may be thus expressed briefly:—An unlawful assembly is an assembly which may reasonably be apprehended to cause danger to the public peace through the action of the persons constituting the assembly. As soon as an act of violence is perpetrated it may become a riot (see para. 14 above); while if the act of violence be one of a

---

[1] "The civil magistrates are left in possession of those powers which the law had given them before. If the mob collectively, or a part of it, or any individual within or before the expiration of that hour attempts or begins to perpetrate an outrage amounting to felony, to pull down a house, or by any other act to violate the law, it is the duty of all present, of whatever description they may be, to endeavour to stop the mischief and apprehend the offender"; *per* Lord Loughborough C.J., in the "Gordon Riots" Trial (1781), 21 Howell's State Trials, 493.

[2] In the Six Mile Bridge case of riots in the County Clare election in 1852, an escort of two officers, two sergeants, and forty rank and file, employed to protect voters going to poll, were attacked and stoned by the mob. The soldiers fired without orders from their officers, but, as was subsequently sworn by the commanding officers, *in defence of their own lives*, and killed two or three of the mob. Indictments were preferred against those who fired, or were supposed to have fired, but the Bills were thrown out by the Grand Jury. The charge of Mr. Justice Perrin to the Grand Jury in the case appears virtually to ignore the riotous character and unlawful object of this mob, and the fact that the unprovoked attack on the soldiers.

[3] *R.* v. *Vincent*, *ante*. See also Lord Mansfield's charge on the trial of Lord George Gordon in 1781, 21 Howell's State Trials, 644. Lord George Gordon was indicted for high treason, but acquitted on the ground that his acts, in the opinion of the jury, did not amount to constructive levying of war against the Crown.

public nature, and with the intention of carrying into effect any general political purpose, it becomes an insurrection or rebellion.[1]

Additional crimes usually incident to riots and insurrection.

26. The offence of taking part in a riot, or an insurrection, is independent of any additional crime which the persons assembled may either themselves commit, or of which they may be held to be guilty as principals, by reason of their forming part of the mob which commits such a crime. For example, a riot seldom takes place without the rioters breaking into houses or otherwise destroying property. An insurrection almost always involves murder or attempts to murder. All persons present at the commission of such crimes are equally principals in the breaking into houses, destroying property, murder, or attempts to murder, although at the time some of them take no actual part in the transaction at all; but practically the extreme measure of punishment is usually awarded only to the leaders.[2]

Circumstances which may guide authorities in the use of force.

27. Undoubtedly the decision as to the use of force is a difficult one, but many circumstances suggest themselves which may serve as a guide to justices and military commanders called on to act in cases of sudden tumult. The first question they will ask themselves is "for what purpose has the mob come together?" A knowledge of its purpose usually furnishes the best clue to a determination of the time for, and mode of forcible interference. For example, a mob assembles for the purpose of pulling down an obstacle to a footpath which has been obstructed illegally or with doubtful legality. Their proceedings may be disorderly, but their purpose may be legal, and certainly is not felonious. The probability is that as soon as they have effected their object they will disperse. In such a case the best course is to use no force, but merely to take means to identify some of the parties concerned with a view to subsequent proceedings, if necessary.

Again, a meeting or procession assembles for, say, the furtherance of parliamentary reform, the abolition of an obnoxious tax, or some other political object not involving rebellion against established authority, or any intention to enforce by violence the object which they have in view. It is, of course, quite possible that excitement may prompt them to outrage, but such a meeting, so long as it commits no act of violence, should be interfered with as little as possible and no exhibition of force should take place until some violent crime has been or is about to be committed.

Further illustration.

28. Quite different considerations apply where a mob avowedly set out to destroy the factory or property of, say, an unpopular owner,

[1] Baron Alderson in his charge to the Grand Jury, delivered at the Monmouth Assizes in 1839 (9 C. & P. 94 n.) cited the following observations of Mr. Justice Bayley:— "If the persons who assemble together say 'We will have what we want, "whether it be according to law or not,' a meeting for such a purpose, however it "may be masked, if it be really for a purpose of that kind, is illegal. If a meeting, "from its general appearance, and from all the accompanying circumstances, is "calculated to excite terror, alarm, and consternation, it is generally criminal and "unlawful." Baron Alderson continued, "These are, as I take it, the clear principles "of law, an unlawful assembly differing in this respect from a riot, that a riot "must go forward to the perpetration of some act which the unlawful assembly "is calculated to originate and inspire. Something must be executed in a turbulent "manner to constitute a riot, but in these cases it must be some enterprise of a "private nature, because if the enterprise be of a general and public nature, it "savours of high treason, and there is no doubt that if you find these persons "assembled together by delegates dispersed from any central jurisdiction in this "kingdom, and those persons so meeting together in consequence of a delegation "from a central body commit any act of violence for the purpose of carrying into "effect any general political purpose, they run the risk of being charged with high "treason."

[2] See *R.* v. *Howell*, 9 C. & P., 437.

arming themselves with weapons to break the doors, and showing a settled intention to carry their object into effect. In such a case their intent is felonious. They should be warned of the danger they will incur in attempting such an outrage, and the proclamation in the Riot Act should, if time allow, be read; but whether it has been read or not, and whether the hour has or has not expired, the apprehension of the ringleaders or any other repressive measures which may be necessary to prevent the actual commission of an outrage, should be effected, if possible. Troops may be summoned in case the civil authority is in danger of being overpowered, but they should not be called into action until the necessity arises for protecting life and property by armed force.

In this connection it is important to bear in mind two facts, firstly, that (although it may well be prudent to make timely provision for troops to be ready, within easy distance) an actual display of armed force may, under certain circumstances, provoke a mob and thus do more harm than good; and secondly, that troops (at any rate unmounted troops) can in practice seldom intervene except by using long-range fire-arms, the effect of which may be to kill and wound a number of innocent or comparatively innocent persons.

Further illustration.

29. An insurrection is, of course, a more serious matter than any riot. A mob which declares openly that it proposes to attack the constituted authorities, and which consists wholly or partially of armed men, or attempts like that of the Fenians at Chester in 1867 to seize an arsenal for the purpose of obtaining arms, cannot be too quickly dealt with, and force should repel force, care being taken to avoid any unnecessary bloodshed or injury.

Summary of law.

30. The conclusions deducible from the foregoing pages appear to be as follows:—

The law which demands the suppression of unlawful assemblies, riots and insurrections necessarily justifies the civil power in using the necessary degree of force for their suppression. The difficulty is to ascertain what is this necessary degree of force, and the danger of making a mistake in the matter is serious, as any excess in the use of force constitutes a crime.

In the case of unlawful assembly.

31. Beginning with an unlawful assembly, the civil authority has power to command those present to go away, to arrest them if they do not go, and to stop others whom they see joining them.[1] If the parties interfered with resist, such force may be used as will compel obedience; but it would be extremely inadvisable to use any such force as would maim or injure the person resisting, unless he himself made an attack inflicting, or at all events calculated to inflict, grievous personal injury on his captor.

In the case of riot.

32. Proceeding to the case of a riot, before the proclamation required by the Riot Act is read, the same observations regarding the degree of force to be used apply as in the case of an unlawful assembly. After the proclamation has been read and an hour has elapsed, considerable force may, if necessary, be used for the purpose of dispersing the mob. If the mob is committing or evidently about to commit, some outrage calculated to endanger life or property, then, even before the expiration of the hour after the reading of the proclamation,

[1] Hawkins, Bk. 1, ch. lxv, sec. 11.

or even without reading the proclamation at all, force may equally be used. But even then deadly weapons ought not to be employed against the rioters, unless they are armed, or in a position to inflict grievous injury on the persons endeavouring to disperse them, or are committing, or on the point of committing, some felonious outrage, which can only be stopped by armed force.[1]

In the case of insurrection.

33. The existence of an armed insurrection would justify the use of any degree of force necessary effectually to meet and cope with the insurrection.

Conclusion.

34. Sir Charles Napier complained in his Remarks of Military Law of the hardship of imposing on an officer the obligation of deciding whether he is or is not justified in ordering his men to act. He contended that an officer ought not to be liable to trial by the ordinary courts of justice for anything he may do in executing the duty imposed upon him by the civil magistrate, *viz.*: to quell the riot.[2]

It can be answered that an officer has no greater responsibility than a civilian. Mr. Justice Littledale, in the case of *R.* v. *Pinney*, says:—

"Now a person, whether a magistrate or a peace officer, who has the duty of suppressing a riot, is placed in a very difficult situation, for if by his acts he causes death, he is liable to be indicted for murder or manslaughter; and if he does not act he is liable to an indictment or an information for neglect; he is therefore bound to hit the precise line of his duty, and how difficult it is to hit that precise line will be a matter for your consideration; but that, difficult as it may be, he is bound to do. Whether a man has sought a public situation, as is often the case of mayors and magistrates, or whether as a peace officer he has been compelled to take the office that he holds, the same rule applies, and if persons were not compelled to act according to law, there would be an end of society."

A practical answer to the complaint is also to be found in the fact that the last word so far as civil pains and penalties are concerned rests with a jury, who may be relied upon to make liberal allowances for the difficulties of persons so circumstanced, and to err, if they do err, on the side of leniency when it appears that an official, even if his action has proved excessive, acted honestly to the best of his judgment.

At the same time the following brief summary of conclusions may be useful to a military commander:—

He will find that the King's Regulations (paras. 1238 to 1257) lay down certain rules as to "Duties in Aid of the Civil Power." With regard to these he must remember that, although they define his duties to superior authority so far as such duties are not incompatible with the common law, yet they do not profess, and are indeed unable, to alter the duty laid upon him by that law. There are usually two stages at which he has to exercise his judgment; first, when he is called upon to bring out his men; and secondly, when the question of firing arises.

---

[1] See the appendices to this chapter.
[2] Quoted by Clode, Mil. Forces, ii, p. 153.

With regard to the first, he must act on his own judgment if he is in possession of the facts. If it is not possible in the special circumstances for him to ascertain the facts, he must deal with the facts as represented by the civil authority.

Secondly, when his men are on the spot, and the need for action is imminent, he is probably in as good a position as the civil authority to form a cool level-headed opinion as to the trend of events; the fact that a request to take action has or has not been made must have all due weight given to it, but the receipt or non-receipt of a request cannot absolve him from his legal duty, which is to use such force and so much only as is necessary for the restoration of order and the checking of violence, but yet, at his peril, to use no excessive amount of force. Further, the force which he uses must only be the amount which is necessary to effect the immediate object before him, and he must on no account use force with a view to its deterrent effect elsewhere or in the future.