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THE TORT LIABILITY OF A SOLDIER OR SUBORDINATE OFFICER ACTING IN OBEDIENCE TO ORDERS

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"I, John Doe, do solemnly swear that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the President of the United States and the orders of the officers appointed over me, according to the rules and Articles of War. So help me God!"[1]

With these words many an American has stepped out of his quiet, unobtrusive life as a civilian into a strange, new world. He has become a part of a great organization—the armed forces of the United States.

Having taken the oath "to obey the President of the United States and the orders of the officers appointed over" him, and yet believing that what he is told to do would subject him to liability in the civil courts, what is to be his guide? How can he cope with the dilemma confronting him?

The English courts have stated that a soldier does not, by making himself a member of the regular forces, thereby cease to be a citizen, so as to deprive him of his rights or exempt him from his liabilities under the law.[2] He does, however, incur additional responsibilities—being at all times and under all circumstances subject to a code of military law contained in the Army Act, the King's Regulations, and Army Orders.[3] The rule is similar in the United States.

> The citizen on becoming a soldier does not merge his former character in the latter. He releases himself from none of his former duties and obligations. Instead of this he engages to perform other duties in addition to those with which he was formerly charged. He submits himself to a special code of laws, which does not supersede or abrogate that to which he was formerly subject, but which, on the contrary, binds him by a new tie to the very same authority, which, as a citizen he previously obeyed. With regard to the civil powers and authorities, he stands in precisely the same position he formerly

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1. The oath of a soldier upon being inducted into the Army of the United States.
2. Burdett v Abbot, 4 Taunt. 401, 128 Eng. Rep. (C.P.) 384 (1812.)
3. English Army Act, §§ 175 and 176; King's Regulations, pars. 512-629 (1935); but cf. English relationships between military and civil offenses tried by military courts; appeals; etc., English Army Act, § 41; Manual of Military Law, c. 8, par. 2; Crown Practice, Vol. IX, p. 701 ff.

occupied. There is no principle more thoroughly incorporated in our military as well as in our civil code, than that the soldier does not cease to be a citizen and cannot throw off his obligations and responsibilities as such.[4]

Although this is clearly the majority rule, it has been sharply criticized.

A man who becomes a judge or a legislator is likewise none the less a citizen, yet he enjoys immunity for certain wrongs done in the course of his official duties which are only lawful because the public service demands that there should be no legal responsibility in such instances.

Are not the demands of the public service great enough to entitle the soldier and militiaman to absolute immunity from civil and criminal responsibility for acts done in obedience to the orders of a superior officer? One court at least, appears to have thought so. To so protect the soldier would not leave the injured party without remedy, for, as has already been said, he may still have a right of action against the officer who gave the command, and, if that remedy is considered inadequate, provision may be made for a claim against the state which assumed the selection of the offending superior. To say that the military would usurp powers not intended for it if the soldier were given this absolute immunity is both unfair and unreasonable. Does the judiciary, because of its immunity for certain acts which may be injurious to the rights of others, wilfully proceed to commit those acts?

Thus far, however, the courts appear to have been over-zealous in their efforts to keep the military in strict subordination to the civil authority. Until this pronounced zeal for the supremacy of the civil authority over a most important executive of the government abates, and the harshness and inconsistency of the law on this question as it now stands, are properly appreciated, the soldier or militiaman in those states where the law has not been changed by legislative enactment must continue to act at his peril in obeying the orders of his erring superior, and trust to a possible indemnity from a benevolent legislature, or a pardon from a sympathetic pardoning power.[5]

Likewise another writer has argued that members of the armed forces should feel assured that the law will protect them in the proper discharge of their orders. Military officers, he suggests, should not be responsible for acts done in obedience to commands of superior officers of their government, unless such commands are manifestly illegal. This he calls the majority view, and says that there is a respectable minority which favors the "absolute non-liability of an

4. O'Brien, Military Law pp. 26 and 27.

5. Aclerly, Legal Responsibility of Obedient Soldier or Militiaman, (1916) 22 Case and Com. 739.

officer or soldier when he acts without oppression and without personal malice."[6]

A similar position is expressed in Bangar's *Law of Riot Duty,* wherein the author says:

> Order being relied upon, under the foregoing rule the only liability which the officer may incur, is in the *execution* of these orders. In such execution he is safe if he acts with intent to obey the order, and not from recklessness, or love of power, or to gratify any bad passion. Therefore, as a general rule, if an officer acts soley with intent to obey his orders he is not responsible for the consequences.
>
> When troops are called into the military service in time of war, by enlistment or by draft, they should clearly understand that obedience is their first duty. The first word is discipline, and there is no second. . . . Instill into the mind of a recruit a doubt with respect to his duty to obey his officers, and a long step has been taken toward destroying the morale of the organization.[7]

The argument goes a long way toward refuting the so-called general "American Rule."

Bearing in mind, then, that there is a conflict of opinion as to the extent of the rule governing a soldier's civil liability, let us examine the three situations to which the rule is applicable.

I

In Combat or under Conditions of War

The common law recognized the authority of the military and naval forces to make such invasions of the interests of individual civilians as were reasonably necessary to prevent an invasion of the enemy; to successfully prosecute the war; or to prevent property of military value from falling into the hands of the enemy.[8]

In other words, the law is clear that on the field of battle or in the direct conduct of the war itself, a soldier can absolve himself from civil liability for his acts by showing that he was acting in obedience to the command of

6. Turney, Civil and Criminal Accountability of Member of the Army and Navy, (1917) 24 Case and Com. 297.
7. Bangar, Law of Riot Duty p. 254.
8. Ford v Surget, 97 U.S. 594, 24 L. ed. 1018 (1877); Koonce v Davis, 72 N.C. 218 (1875); Thomasson v Glisson, 4 Heisk (51 Tenn.) 615 (1871); Stafford v Mercer, 42 Ga. 556 (1871); Harper, The Law of Torts (1933) § 59, p. 317.

his superior officer.[9] In the case of *Trammell v. Bassett*[10] the defendants, Confederate soldiers, acted under the orders of their captain, seized property belonging to the plaintiff. A state of war existed at the time, and the seizure amounted to a legitimate military objective. The defendants plead as their defense the orders of their superior. The court said:

> We think it may be laid down, as a well settled proposition, that obedience is the first duty of a soldier. It is not for him to ask the reason for the order he receives, or the act he is to do, or to consider the consequences of the act. *** He must obey. To him the maxim of despotism, that "to hear is to obey" is more nearly applicable than to any other class of society. If such be the rule applicable to the private soldier, he should certainly be permitted to prove it in his justification.
>
> The defendants are not themselves responsible for their actions so performed, and the plaintiff must rely on his action against the officer giving the order. If it can be proved that said officer abused his discretion or acted in a manner which military necessity did not require, then he would be liable to the plaintiff in damages which grew out of such unwarranted exercise of authority.[11]

The doctrine of this case must be qualified, however, by *Mitchell v. Harmony*.[12] Mitchell, an army officer, was sued in an action of trespass by Harmony for seizing his property in the Mexican state of Chihuahua. The defendant contends that the United States was at war with Mexico, and that he was justified in taking the property by virtue of an order from his commanding officer. He also justifies the taking under his own authority as an officer. Concerning his suspicion that Harmony intended to engage in trading with the enemy, Mr. Chief Justice Haney, in holding for the plaintiff, said:

> Mere suspicions of an illegal intention will not justify a military officer to seize or detain the property of an American citizen. . . .

9. Birkhimer, Military Government p. 448.
10. 24 Ark. 499 (1866).
11. Accord, Bell v L. & N. R. Co., 1 Bush (Ky.) 404, 89 Am. Dec. 636 (1866), wherein the court held in favor of the defendant, Bell, saying that the destruction of a railroad locomotive and cars under orders of Confederate General, Morgan, was a lawful exercise of a belligerent right, because that road was used to a great extent in supplying the Union Army; Taylor v Jenkins, 24 Ark. 337 (1866); Ford v Surget, 97 U.S. 594 (1878); but cf. Christian County Ct. v Rankin and Tharp, 2 Duv. (Ky.) 502 (1866); Terril v Rankin, 2 Bush (Ky.) 453 (1867).

Where the owner has done nothing to forfeit his rights, every public officer is bound to respect them, whether he finds the property in foreign or hostile country or in his own.

The question here is, whether the law permits it (property) to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it.[13]

In accord with the moderate views of Chief Justice Taney, the Supreme Court of Tennessee decided the case of *Yost v. Stout,*[14] some sixteen years later. It involved an action to recover the value of a wagon and mules taken by Confederate soldiers from one Stout, who was a non-belligerent farmer.

In discussing the rights of a soldier during combat or impending combat to seize the property of civilians the court said:

"An officer has no right to impress private property unless forced by inevitable necessity; and an order by his superior officer, unless such necessity exists, is no protection to him.

"There are without doubt occasions in which private property may be lawfully taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also when a military officer, charged with a particular duty, may impress private property into the public service, or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner, and the officer is not a trespasser. But we are clearly of the opinion that in all these cases the danger must be immediate and impending, or the necessity urgent for the public service, and such as will not admit of delay; and when the action of the civil authority would be too late in providing the means which the occasion called for.

"It is impossible to define the dangers or necessities in which this power may be lawfully exercised; every case must depend on its own circumstances; it is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.

An officer has no right to take the private property of any individual not in arms to insure the success of any enterprise against the public enemy, which he may deem it advisable to undertake, where the owner has done nothing to forfeit his rights."

12. 13 How. 115 (U.S. 1851).

13. Accord, Mostyn v Fabrigas, 1 Cowper 161, 98 Eng. Rep. (K.B.) 1021 (1774), wherein Lord Mansfield expresses the English views; Hough v Hoodless, 35 Ill. 166 (1864); Moran v Smell, 5 W. Va. 26 (1871); Farmer v Lewis, 1 Bush (Ky.) 66, 89 Am. Dec. 610 (1866); Bryan v Walker, 64 N.C. 141 (1870); Dills v Hatcher, 6 Bush (Ky.) 606 (1866); but cf 2 Hare, American Constitutional Law (1889) pp. 918 and 919.

14. 4 Coldwell (Tenn.) 205, 94 Am. Dec. 194 (1867).

This case is in accord with *Mitchell v. Harmony*; and, even though it was later overruled on another point, it contains a sound statement of the law.[15]

However, the rule that a soldier may not take the private property of a civilian merely to "insure the success of any enterprise against the public enemy" should be carefully scrutinized, for as the court said in *Taylor v. Nashville and C. R. R. Co.*:[16]

> "The necessity which justifies the taking (of private property by military officers and men)[17] in such a case is not that overpowering necessity which admits of no supposable alternative; but if the vast interests at stake may probably be promoted by the appropriation of the property, it is the right and duty of the officers, on whom rest the obligation, to omit no useful precaution—to take and appropriate it."

Bearing in mind the modern interpretation of "necessity," it seems fair to summarize the tort liability of a soldier of subordinate officer while in combat or on similar operations by saying that he may be absolved from liability for executing an order which it was illegal or perhaps even criminal to give.

The question really amounts to this: "Did the soldier have reasonable cause for believing that what he was commanded to do was a military necessity?" In determining this point, the soldier obviously must take into consideration that the person in command is better able to judge the situation and is better informed concerning the problem. If, after weighing these circumstances, he believes that the command is justifiable, he should not be held responsible for declining to decide that the order was wrong. He should not be held civilly liable for obeying the military command.

II

During Peacetime or During Non-Combat Operations

The greater portion of a soldier's military career, as we know, is spent in training, in conducting combat prob-

15. Accord, Jones v Commonwealth, 1 Bush (Ky.) 34, 89 Am. Dec. 605 (1866); Merritt v Mayor of Nashville, 5 Cold. 95 (1867); Bland v Adams Express, 1 Duv. (S.C.) 232, 85 Am. Dec. 623 (1864); Smith v Brazelton, 1 Heisk (S.C.) 44, 2 Am. Rep. 678 (1870); Price v Poynter, 1 Bush (Ky.) 387, 89 Am. Dec. 631 (1867).

16. 6 Coldwell (Tenn.) 646, 66 Am. Dec. 474 (1869).

17. Parentheses mine.

lems, in maneuvers, and in just living in and near an army camp. Under these circumstances his liability to civilians is quite different from his liability while in combat. Hs status is almost the same as that of a civilian.

In the leading case of *Bates v. Clark*,[18] Mr. Justice Miller said:

> Whatever may be the rule in time of war and in the presence of actual hostilities, military officers can no more protect themselves than civilians in time of peace by orders emanating from a source which is itself without authority.[19]

Similarly, in the recent case of *Armstrong v. Sengo*,[20] the California District Court of Appeals, said:

> In time of peace the military power is subordinate to civil law, (Article 1, section 12, Constitution of California), and in time of peace it is no defense to a suit for damages resulting from a wilful or negligent act that it was performed in obedience to the unlawful command of a superior officer of a company belonging to the National Guard, when that order is known to the militiaman, or, by the exercise of reasonable care, should have been known to him to be unlawful.[21]

In the case of Bishop v. Vandercook[22] the governor of Michigan, at the request of the authorities of Monroe County, ordered out a part of the state militia to assist said county's officials in preventing the transportation of liquor from Ohio into the county, 'though martial law was not declared.'

Col. Vandercook, one of the defendants, was put in command, and he ordered a log thrown across the road to stop all travelers who refused to stop upon orders of state troopers further up the road. Plaintiff, a cab driver, suffered personal injury and damage to his taxicab when his car was ditched as a result of his hitting the log. The Supreme Court of Michigan, in affirming a judgment in favor of the plaintiff, said:

> "The power of the military in time of peace has been fixed beyond cavil as being no more than an aid to civil authorities in

18. 95 U.S. 204 (1877).
19. Cf. McCall v McDowell, 1 Abb. 212 (U.S. 1867), 15 Fed. Cas. 1235, discussed infra, wherein the court, in a similar set of circumstances arising under martial law, held an illegal order to be an excuse.
20. 17 Calif. (2d) 300, 61 P. (2d) 1188 (1936).
21. Accord, Clay v United States, Dev. Ct. Cl. 25, Reports, Vol. 1 (1855-1856) 21 (1856).
22. 228 Mich. 299, 200 N.W. 278 (1924).

executing the law. It is so declared by the Constitution of this state, and was so fixed to ward off the evils of military rule so often recorded in early English history. . . . If the civil power, in order to successfully cope with lawlessness, needs the aid of military power, the need may be met and the aid extended; but it is at all times by way of aid to the civil power and cannot authorize the exercise of independent military power. . . .

"No sheriff should undertake to hold up travel over the public highway and halt travelers for inquisition and search and exact peril of life or limb for refusal to submit. No such power is vested in that office. If the power cannot be found in that office of sheriff, it certainly cannot exist in any aid called to his assistance."

Thus, during peacetime, or even during war in an area not at the time directly affected by conditions of battle, or under martial law, a soldier's liability to civilians is similar to that of a peace officer acting in a similar situation. He must confine his activities to those of a regular law-enforcing officer. If the order under which he acts and which he attempts to set up as a justification for his actions was issued without authority, or was illegal in any way, the soldier's liability is unquestionably the same as if he'd been "wearing the blue of the police force rather than the olive-drab of the army."

Although the extent of a soldier's tort liability for illegal acts done under orders while the army is conducting maneuvers has not been the subject of judicial decision, it would appear that civil courts would be unwilling to grant supremacy to the military unless such is absolutely necessary, and secondly, that, during maneuvers, conditions in the area are still those of a nation at peace. The army is merely indulging in a game—a serious game to be sure—but one which should not be allowed to deprive civilians of their customary and firmly established civil rights.

III

During Insurrection—Under Martial Law

There are times when a country is neither at war nor at peace; times when the land is in a state of insurrection, chaos, or mob rebellion; times when martial law must prevail.

Under the general rule which certainly must be qualified, any occurrence of hostilities during an insurrection or rebellion does not vary the position of a citizen, or deprive him of the protection of the common law. For any injury

or violence inflicted upon him under color of military authority, he may still seek redress from the civil tribunals:[23]

"The declaration of martial law by the chief executive of the state or nation does not alter the rules of civil liability except in so far as such declaration indicates the emergency and the necessity for the use of force to preserve order."[24]

The question of a soldier's civil liability, when acting during the existence of martial law, was extensively discussed in two articles dealing with "The Case of Private Wadsworth."[25] These articles were prompted by the anthracite coal strikes, and an accompanying declaration of martial law in Pennsylvania, which, in turn, produced the case of *Commonwealth ex rel Wadsworth v. Shortall.*[26] In summarizing the situation the author said:

"The civil cases, then, with one exception, lay down the rule that a soldier cannot justify an unlawful act by the plea that he committed it under orders. Two cases qualify this rule, the one by saying that if the orders are within the scope of the officer's authority they constitute a justification; the other by saying that unless the order is obviously and palpably illegal, it is a justification."

The rule needs further qualification. The American decisions tend to fall into three general classes.

In the case of *McCall v. McDowell*[27] the plaintiff sued General McDowell to recover damages for false imprisonment and injuries attendant thereto. After the assassination of President Lincoln, the Military Department in and around San Francisco was confronted with the problem of a minor insurrection. Sympathizers of Lincoln and the Union cause were destroying property of all known sympathizers of the Confederacy.

To cope with this situation General McDowell—commanding general of the Department of the Pacific—issued an order in which he called such people who rejoiced in Lincoln's assassination "accessories after the fact" and ordered their arrest by the Provost Marshal. In accord with this order, Captain Douglas arrested McCall, who had been

23. Tyler v Pomeroy, 8 Allen (Mass.) 480 (1864).
24. Harper, The Law of Torts (1933) § 59, p. 136.
25. See The Case of Private Wadsworth (1905) 51 Am. L. Reg. (42 N.S.) 161.
26. 206 Pa. 165, 55 A. 952 (1903).
27. 1 Abb. 212 (U.S. 1867), Dir. Ct., Dist. of Calif., 15 Fed. Cas. 1235.

known to say harsh, unpleasant things about the martyred President.

The court, while holding McDowell liable because he was not authorized or commanded to issue such an order, and had abused his discretionary power, said by way of dicta:

> Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law should excuse the military subordinate when acting in obedience to the orders of his commander. Otherwise he is placed in the dangerous dilemma of being liable in damages to third persons for obedience to an order, or to the loss of his commission and disgrace for disobedience thereto. *** The first duty of a soldier is obedience; and without this there can be neither discipline nor efficiency in an army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and obey them or not, as they may consider them valid or invalid, the camp would be turned into a debating school, where the precious moment for action would be wasted in wordy conflicts between the advocates of conflicting opinions. . . . Nor is it necessary to the ends of justice that the subordinate or soldier should be responsible for obedience to the illegal order of a superior. . . . The certain vexation and annoyance together with the risk of professional disgrace and punishment which usually attend the disobedience of orders by an inferior, may safely be deemed sufficient to constrain his judgment and action, and to excuse him for yielding obedience to those upon whom the law has devolved both the duty and responsibility of controlling his conduct in the premises. *** To so protect the soldier would not leave the injured individual without remedy, for he would still have his right of action against the officer who gave the illegal order; and if such remedy was inadequate, provision might be made for a claim against the state, which assumed the selection of the offending superior. Such a rule would put the responsibility where it rightfully belongs.

In *Commonwealth ex rel Wadsworth v. Shortall*[28] the Supreme Court of Pennsylvania expressed a similar view. The court said:

> The effect of martial law is to put into operation the powers and methods vested in the commanding officer by military law. *** The situation of troops in a riotous and insurrectionary district approximates that of troops in a enemy's country, and in proportion to the extent and violence of the overt acts of hostility shown, is the degree of severity justified in the means of repression. The requirements of the situation in either case, therefore, shift with the

28. 206 Pa. 165, 55 A. 952 (1903).

circumstances, and the same standard of justification must apply to both.[29]

In *Franks v. Smith*[30] the defendant was ordered by his commanding officer to stop all people passing along the highway in groups of more than two and search them and if they were found carrying weapons, to arrest them. Franks arrested Smith, who brings this action to recover damages for his false arrest. All of the defendant's actions were carried out under orders, and it appears that he did not in any material way abuse the authority given him. The court, in holding for the plaintiff said:

> Conduct like this is such an intolerable invasion of private rights, and so at war with the principles set forth in the Bill of Rights, that "the people shall be secure in their person, houses, papers, and possessions from unreasonable search and seizure" (Section 10), that we cannot consent that all military orders, however reasonable they may appear, will afford protection in the civil or criminal courts of the state. *** Any military order, whether it be given by the governor of the state, or an officer of the militia, or a civil officer of a city or county, that attempts to invest either officer or private with authority in excess of that which may be exercised by peace officers of the state, is unreasonable and unlawful; . . . The only difference between our ruling and that obtaining in the authorities cited is that we define more precisely than they do what orders a soldier is justified in executing, and hold as a matter of law that these orders are confined to such as a peace officer, in the discharge of his duty, might execute. *** the soldier has the same measure of protection and is subject to the same liability, whether he is acting under the orders of a military officer, independent of the local civil authorities, or is acting under immediate direction of these authorities.

These are the two extremes. On one hand is the view favoring the soldier; on the other the view favoring the civilian. It seems impossible to reconcile these two positions. What can the soldier do to save himself from punishment for refusing to obey the command of his superior officer? Or, should he choose to obey, what can he do to save himself from liability in civil proceedings brought by the person aggrieved?

This embarassing dilemma is well put by Dicey:[31]

29. Accord, Stoughton v Dimick, 3 Blatchf., 356, Cir. Ct., Dist. of Vt., 23 Fed. Cas. 177 (1855); but cf. the opinion of Mr. Chief Justice Taney, in Luther v Borden, 7 How. 1 (U.S. 1849).

30. 142 Ky. 232, 134 S.W. 484 (1911).

31. A.V. Dicey, The Law of the Constitution (3rd ed. 1889) p. 281.

A soldier is bound to obey any lawful order which he receives from his military superior. But a soldier cannot any more than any civilian avoid responsibility for breach of the law by pleading that he broke the law in bona fide obedience to orders of the commander in chief. Hence, the position of a soldier may be both in theory and in practice a difficult one. He may, as it has been said, be liable to be shot by a court martial for disobedience of order, or to be hanged by a judge and jury if he obeys it. . . . What is, from a legal point of view, the duty of a soldier? The matter is one which has never been absolutely decided. The following answer given by Mr. Justice Stephen is, it may be fairly assumed, as nearly correct a reply as the state of the authorities make it possible to provide: "The only line that presents itself to my mind is that a soldier should be protected by orders for which he might reasonably believe his officer to have good grounds for giving. The inconvenience of being subject to two jurisdictions, the sympathies of which are not unlikely to be opposed to each other, is an inevitable consequence of a double necessity of preserving on the one hand, the supremacy of the law, and, on the other, the discipline of the army."

The Supreme Court of Montana in *Herlihy v. Donohue et al.*[32] has gone far to resolve the conflict. A Major Donohue, commander of the organized militia, acting under a declaration of martial law, issued an order closing all saloons between the hours 7 p.m. and 8 a.m. The plaintiff violated this order and Donohue and his subordinate officers destroyed his stock of liquor. The court said:

An army without discipline is a mob. The highest duty of a soldier is to obey, for upon obedience all discipline must depend. Necessity is the foundation for organized military forces, and to the extent that necessity requires it, obedience to orders is demanded. But necessity can never require obedience to an order manifestly illegal or beyond the authority of the superior to give, and therefore reason and common sense seem to justify the rule that the inferior military officer may defend his act against civil liability by reference to the order of his superior, unless such order bears upon its face the marks of its own invalidity or want of authority. If the order is one which the superior might lawfully make, the inferior cannot refuse obedience until he shall have investigated the surrounding circumstances and determined for himself that they justify the order in the particular instance. If, on the other hand, the order is so palpably illegal or without authority that any reasonably prudent man ought to recognize the fact, obedience thereto furnishes no excuse for a wrongful act, even though disobedience may subject the offender to punishment at the hands of a military tribusal.

This opinion steers a middle course between the tyrannical rule of the McCall case, the rule Chief Justice Taney

32. 52 Mont. 601, 161 P. 164 (1916).

feared when he wrote *Luther v. Borden*,[33] and the unworkable rule of *Franks v. Smith*. By modifying one clause in the Montana opinion, namely, "If the order is one which the superior might lawfully make," so that it would read, " . . . which a reasonably prudent inferior in the light of the circumstances might believe the superior could lawfully make," the rule would achieve results as fair as could be expected under the circumstances. Such a modification would insure that the soldier would continue to be mindful of the fact that his superior might be issuing an unlawful order, but would still relieve him of legal responsibility for acting under orders which, though they appeared lawful, actually were illegal.

In all situations, however, the soldier may not use more force than is necessary to achieve the purpose for which he was ordered to act. All the rules, including that in the Montana case, presuppose this fact, and, should he exercise the power given him for the purpose of oppression, or if any injury is wilfully done by him, he will inevitably be answerable therefor.[34] Likewise, in determining a soldier's tort liability in any situation, it is essential to consider the statutes. Several of the states as well as Congress have exempted members of the armed forces from certain types of civil liability.[35] But even with these protections, the conflict between military discipline and civil responsibility will still leave the soldier's lot "not a happy one."

33. 7 How. 1 (U.S. 1849).

34. Allen v Gardner, 182 N.C. 425, 109 S.E. 260 (1921).

35. See, Mo. Const. § 4 (1865); Drehman v Stifle, 8 Wall. 595 (U.S. 1869), wherein a Mo. Const. exemption was upheld; People of N.Y. ex rel. Gaston v Campbell, 40 N.Y. 133, wherein a N.Y. statutory exemption provided in N.Y. Laws, c. 80, 1, 14 Stat. 46, was approved; Freeland v Williams, 131 U.S. 405 (1889); Louisiana v Mayor of New Orleans, 109 U.S. 285 (1883).