

**THE
LAW AND
CUSTOMS
OF
RIOT DUTY**

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BARGAR

W. W. Buckley

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The
Law and Customs
of
Riot Duty

A Guide For National Guard Officers
and Civil Authorities
With
Commentaries on Federal Aid

By
BYRON L. BARGAR
Of the Columbus, Ohio, Bar
Lt. Col. Ohio National Guard, Retired

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*To
two officers of the civil war,
the grandfathers of my children,
this volume is
affectionately inscribed.*

PREFACE.

The term riot duty, used generically, does not specifically include all forms of domestic disturbance and rebellion in which the aid of troops may be required; but this term is chosen as a title for bibliological reasons, although the scope of the following pages might permit of a more comprehensive title.

It is probably true that riot service is the most distasteful duty which soldiers are called upon to perform. Furthermore it is unfortunate that the first military force called on for this duty is composed of what may be termed amateur soldiers. They have neither the *sang-froid* of the regular, which comes from familiarity with service, nor the independence of action, which comes from the fact that regulars do not take orders from civil officers. These cumulative disabilities have given citizens a dread of riot duty; and this fact is responsible for a part of the difficulty found in keeping the ranks of the national guard filled with good men.

The militiamen feel the responsibility of their position as a reserve power of the state. But they are not always taught how to discharge this responsibility. They acquire a distaste for riot duty because they become confused as to the legal requirements of that duty. They have not the slightest fear of a mob. They dread the *law*. They fear the law because they

are uncertain of its protection ; because to them it is vague, illy defined and, gathered hastily from many sources, is inconsistent and contradictory.

An attempt is made in the following pages to give to the guardsmen and civil authorities a convenient guide to the rules of law which govern riot duty. Recommendations are freely made as to administrative details necessary to keep organized militia in a proper state of preparedness ; as to forms of orders, proclamations and reports ; with suggestions as to tactical employment of troops.

The various details of riot duty are treated, where possible, in the order in which the work is performed, and the legal phase of each situation is stated in connection therewith, so that the student can readily determine his status at each stage of the service. Military terms are used where the context admits.

The principal danger in the application of legal rules to the duties required in riot and insurrection is that these rules may be applied, either by a civil or military officer, to the wrong conditions. Illustrations of this are occasionally furnished in the text. Bearing this in mind, and in order that rules could be concisely stated, this work is so arranged that each legal rule applies to the situation indicated by the chapter and section titles. In reading any rule, a glance at the chapter and section headings enables the reader to grasp an outline of the situation under which the rule applies.

Columbus, Ohio, May 1, 1907.

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CHAPTER ONE.

DEFINITIONS. SCOPE AND SOURCES OF MILITARY LAW.

1. ARMY AND MILITIA—LEGAL DIFFERENCE.

The Constitution of the United States makes a broad distinction between the militia and the armies referred to in it: the powers conferred upon Congress, and denied to the States, in reference to the one, being widely different from the powers conferred and denied in reference to the other. And, indeed, the two words could not properly have been used to convey the same idea. An army is a body of men whose business is war; the militia, a body of men composed of citizens occupied ordinarily in the pursuits of civil life, but organized for discipline and drill, and called into the field for temporary military service when the exigencies of the country require it. (1)

2. NATIONAL GUARD IS MILITIA. The terms national guard and militia, with reference to their official acts, may be treated as synonymous. The organized militia is commonly termed the national

(1) *Burroughs v. Peyton*, 16 Gratt. (Va.) 475; Pars. 1744, 2450 Dig. Opin. J. A. G., Edn. 1901.

guard, but perhaps all federal and state statutes provide for the use of the unorganized militia in emergencies. When it is so used it must be first organized, and it can then be properly termed a part of the national guard. (2)

3. MILITARY LAW. MARTIAL LAW. MILITARY GOVERNMENT. In the mind of the guardsmen three terms are often confused, namely: military law, martial law and military government. It is therefore well, at the outset, to point out the fact that these three terms have separate and distinct meanings. The briefest way to do this is to define each and show its relation to the others. Military law is the law that governs the soldier, at peace and in war, at home and abroad. Martial law is the law enforced by a military commander, over the civilians in his district, whenever the civil authorities are unable to maintain peace and order or enforce the laws. This district, however, must be a part of the same country to which the military commander owes allegiance. If the same military commander penetrates a foreign country, in time of war, and assumes jurisdiction over civil affairs, his control is then called military government, instead of martial law. In other words, martial law is exercised over territory of the state enforcing it; while military

(2) See Act of January 21, 1903, 32 U. S. Stat. 775; Pars. 1729-1731 Dig. Opin. J. A. G., Edn. 1901.

government is exercised only over enemy territory. An officer exercising military government is responsible only for breach of the laws and customs of war; but an officer enforcing martial law is liable for illegal acts, not only to his military superiors, but to persons who may seek redress by civil action as soon as the courts are again in working order, and to criminal actions instituted by civil officers under the general laws of his state. (3)

4. REGULATIONS. While all law is regulation in a greater or less degree, regulations proper, whether army regulations or other, are administrative rules or directions as contrasted with statutes. (4)

5. DISCIPLINE. Disciplinary punishments are those imposed at the will of military commanders without the intervention of courts-martial. (5) A recent military work defines discipline as: "That element in an army which insures prompt obedience to orders, regulations and the will of the commander." (6) Discipline therefore means controlled behavior.

(3) Birkhimer, Mil. Gov. and Mar. Law pp. 21, 22; Cooley's Constitutional Limitations, p. 379 *et seq.*

(4) Winthrop's Mil. Law and Prec., Edn. 1896, p. 17.

(5) Winthrop's Mil. Law and Prec., Edn. 1896, p. 678.

(6) Mil. and Naval Dictionary, Wisser and Gauss.

6. DUAL POWERS OF COMMANDER. A commander of troops on service will often be compelled to act in two distinct capacities. (a) He must govern his troops by the rules of military law. (b) He may be compelled to act as governor of the district he occupies and must then impose such laws or rules on the inhabitants as, in his opinion, are necessary to secure the safety of his army, and also the good government of the district which, by reason of the war, riot or rebellion, may for the time have been deprived of its ordinary rulers and the machinery for maintaining order. This latter control is called martial law; unless the troops are in a foreign country, where it becomes military government.

7. SCOPE OF COMMANDERS' POWERS. The orders issued by a commander of militia should at all times conform to law. He has no greater right to issue an unlawful order to a militiaman than to any other citizen. (7)

8. CONTROL OF CIVILIANS WHO ACCOMPANY TROOPS. Certain civilians who accompany a force in the field, in time of war, are also subject to military law, such as civilians serving with the force in an official capacity; persons accompanying the troops with special leave, such as newspaper correspondents and contractors; persons employed with

(7) Cooke v. Cole, Rap. Jud. Que. 22 C. S. 25.

the troops, such as teamsters and packers; other persons known as followers, who accompany the troops either as sutlers or on business or pleasure with the permission of the commander. (8)

9. PRIMARY SOURCE OF MILITARY LAW. The states, composing the United States of America, in ratifying the U. S. Constitution, thereby delegated to the federal government the power:

“To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers, and the authority of training the militia according to the

(8) 63 Art. of War. The accepted interpretation of this article is that it subjects (in time of war) the classes of persons specified not only to military discipline and government in general, but also to the jurisdiction of courts-martial (upon the theory, probably, that they are thus made, for the time being, a part of the army). Individuals, however, of the class termed “retainers to the camp,” or officers’ servants and the like, as well as camp followers generally, have rarely been subjected to trial in our service. For breaches of discipline committed by them the punishment has generally been expulsion from the limits of the camp and dismissal from employment. Dig. Opin. J. A. G., par. 161. The jurisdiction authorized by this article cannot be extended to civilians employed in connection with the army in time of peace. Ibid., par. 165.

discipline prescribed by Congress." (9)

For military law governing the militia the student should first look to the federal constitution and the laws of Congress. Here difficulty is encountered, because many acts of Congress, intended for the "armies" of the United States, have been tacitly adopted by some states as the "discipline prescribed by Congress" for the militia. Many of these same acts of Congress, notably the Articles of War, are deficient in direct application to militia in state service, and it is questionable whether the Articles of War were intended to so apply. This uncertainty arises because of the express congressional provision that:

"The *armies* of the United States shall be governed by the following rules and articles" (referring to the articles of war).
(10) Now if the word "armies" does not include militia in state service, then can it be said that the articles of war are a part of "the discipline prescribed by Congress" for the militia?

The act of January 21, 1903 (11) expressly provides that:

"The militia, when called into the ac-

(9) U. S. Const., Art. One, Sec. VIII, par. 16.

(10) Sec. 1342, U. S. R. S., being a preamble to A. W.

(11) Act of January 21, 1903, known as the Dick Law, 32 U. S. Stats., p. 775.

tual service of the United States, shall be subject to the same rules and articles of war as the regular troops of the United States."

This provision would not have been necessary if the militia was clearly a part, or one, of the "armies" of the United States. The provision just quoted is substantially a repetition of the sixty-fourth article of war, and is clearly superfluous.

Prior to January 21, 1903, Section 1637, U. S. R. S., provided that:

"The system of discipline and field exercise which is ordered to be observed in the different corps of infantry, artillery and riflemen of the regular army, shall also be observed in such corps, respectively, of the militia."

But this section was repealed in the passage of the Dick Act and it cannot now be relied on as prescribing that the articles of war shall govern the militia in state service. If it heretofore bore that badly strained construction, then it now seems that Congress has inadvertently failed to maintain the exercise of its right to prescribe rules of "discipline" for the militia. Section three of the Dick law does—provide, however, that the discipline of the militia shall be that of the army by January 21, 1908. This provision seems to furnish a reason for concluding

that Congress did not refer to the articles of war by the provisions of Section 1637, R. S.

This act of Congress of January 21, 1903, however, first gave the organized militia a legal right to exist, under the U. S. Constitution, as a state force. In addition to this right to exist, the act provided for the use of this same state force by the president; so that now it is possible to so interpret the word "armies," in the preamble to the articles of war, that it will include organized militia.

Many of the states have adopted, or attempted to adopt, the articles of war as a part of their respective military codes. The scope of this work does not permit of an extended treatment of this question; but the foregoing points will be valuable as route maps for further investigation.

10. OTHER SOURCES OF MILITARY LAW. In state service the constitution and statutes of the guardsman's own state are, next to the U. S. Constitution and militia statutes, the most authoritative sources of military law in that state. Next come the state orders,—general and special,—thence down through the organizations to the unit to which the officer or enlisted man belongs or is attached. Where these state orders are inadequate, most states direct that the U. S. orders and regulations shall govern. This is done in conformity to the Dick law, and is a well-considered attempt to secure

the greatest possible uniformity in state systems. Absolute uniformity and absolute conformity to federal statutes will be impossible until the federal government takes as full control of the militia as its constitution permits.

11. U. S. ORDERS AND REGULATIONS. When militia is mustered into U. S. service, the control of the state ceases and the U. S. orders and regulations take precedence over all state statutes and orders.

12. CUSTOMS OF THE SERVICE constitute the unwritten military law. A custom of the service, in order to become effective as a rule of conduct or action, must consist of a uniform known practice of long standing, which is also certain and reasonable, and is not in conflict with any constitutional provision, existing statute, or order. It must be so long continued and notorious that all persons concerned may be presumed to have knowledge of it. (12)

13. JUDICIAL DECISIONS. These have an important bearing on the conduct of the national guard when performing riot duty. Many courts have laid down rules for the guidance of the guards-

(12) Winthrop's Military Law and Precedents, Edn. 1896, p. 44; U. S. v. Duval, Gilpin 356; Collins v. Hope, 3 Washington, 149; U. S. v. Buchanan, 8 Howard, 102; 2 Greenleaf's Evidence, 251; Lawson on Usages and Customs, 2-15; Wadley v. Davis, 59 Barb., 503.

man. Probably the most important of these rules grow out of the provision in the state constitutions that the military shall be subordinate to the civil power. Where, as may sometime happen, the civil power in any district insists on a violation of law, it is apparent that the military should no longer be subordinate. But this prescribed subordination sometimes renders a soldier liable in either civil or criminal actions in the state courts, in cases where he has exceeded his authority or acted without any. These judicial decisions will be cited hereafter in connection with the duties to which they relate.

CHAPTER TWO.

PREPAREDNESS.

14. IMPORTANCE OF PREPARATION. When war was declared between France and Germany, in 1870, the German chief of the general staff simply pointed to a cabinet drawer. An aide took a few papers from it and the machinery of war was in motion so smoothly, perfectly and uncontrollably that the German armies rolled across France without a halt.

When troops are called for active service it is too late to prepare. It is time to go. This is especially true of militia called for riot duty. Celerity is then often of the highest importance. Lives and property may be destroyed while officers are making frantic efforts to repair their negligence in not preparing for the very emergency for which they were mustered.

15. SYSTEM. The national guard statutes of many of the states direct officers to notify their men for riot or state duty in a particular manner. Men so notified must instantly comply or they may be punished by both the military and civil courts. But the company commander must bear in mind that it requires proof to convict any accused person. In the excitement of calling men for riot duty, it is

essential that each man receive a notice which the man knows to be legally sufficient. He should also clearly understand the penalties for disobedience and the disgrace of refusing to respond. A record should be made showing positively that each man received a copy of the notice. These things sound like troublesome details, but on the contrary they are exceedingly simple. System is the *vade mecum*.

16. NOTIFYING MEN. One system of notification is to divide the men of a company into four (or more) sections, corresponding to the quarters or districts where they reside. Give each district to a sergeant and a corporal. These two men are then required to keep triplicate lists of the home address of every man living in their district; and the business address of every man employed in their district. Each non-com. must habitually carry one list, the third being kept in the company quarters. These triplicate lists must be constantly up to date. In this method a man may be on two lists—if he lives in one district and works in another—but that is unavoidable.

In addition to the address lists, each of the men who carry them must have a supply of the printed notices referred to in the next section. He can keep a supply at home and one at his place of business—both carefully secured.

When a call for duty comes the company com-

mander must reach one or both non-coms. in each district. He does this by phone or messenger or both. The non-coms. then at once notify the men. Each man serving notices will carry one notice on which is written: "Received copy of the within notice this day of 190..." The date will be filled in as the non-com. starts on his round. If both non-coms. are available, they can divide the district by a preconcerted arrangement. All men who can be reached by phone will be first ordered in. Every man served with a notice will sign the copy retained by the non-com.

During business hours the business addresses will be first used. It is more difficult to find men between seven and ten P. M. than at any other time. If a man to be notified is not at home, not at work and cannot be found, a member of his family should be required to sign the receipt for notice and a copy will then be left at the house with positive directions that the copy be served at once. The non-com. can check his list and later make report of method of service on men who do not report at armory.

If the list, receipt and notices are ready when the call for duty comes, an immense amount of worry and confusion will be avoided. No writing need be done except the signature of the men and the completion of date of the receipt.

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17. **FORM OF NOTICE.** The notice to be served, under a plan similar to the one outlined in section sixteen, should be entirely printed. It should be addressed: "To Any Enlisted Man of Co., ... Infantry, ... N. G.," As it commands the recipient to report forthwith at his armory, it needs no date. In states where statutes prescribe notices, the notice should conform to the statute.

Such printed notice should contain statements showing the importance of obeying it. The following form might be used, changed to suit the state law :

"NOTICE

(Under Section 3098, Revised Statutes of Ohio.)

Columbus, Ohio.

To Any Enlisted Man

of Co. I, 4th Inf'y., O. N. G.

You are ordered into active service of the State of Ohio, and will report at once to your company commander at the company armory:

By order Commanding Officer Co. I, 4th Inf'y.,
O. N. G.

HAROLD M. BUSH,
Capt. 4th Inf'y., O. N. G.

Commanding Co. I.

This notice to be used only when troops are called out in aid of civil authorities. It must then be handed to each man of the company in person; or

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if man cannot be found, it should be left at his usual place of residence and its importance explained to the persons found there, who should then at once take steps to notify the man addressed that such a notice has been served. Promptness is of the utmost importance.

Section 3099, R. S.—‘Every enlisted man who refuses or neglects to serve such notice, when duly ordered so to do, and every officer or enlisted man who, having been served with notice as provided in the preceding section, refuses or neglects to obey the same PROMPTLY, shall pay not less than ten nor more than one hundred dollars.’ ”

18. GENERAL NOTICES. In addition to lists suggested in section sixteen, each company commander should have posted in his armory, at all times, a full and complete roster of his organization. This roster should disclose the residence addresses, places of employment, whether day or night; nearest available telephone and places where men may be found when not at home or at work. Regimental and battalion commanders should keep the same kind of a roster for their officers. Arrangements should be made by commanding officers for riot signals to be sounded by fire alarm, court house or town hall bells, or by steam whistle. All officers and men should be taught to recognize these signals.

19. PREPARED PROCLAMATIONS. The statutes of the United States, relative to federal aid to states in domestic disturbances, provide specifically for a preliminary proclamation to the disorderly elements of a community which the civil power has proved inadequate to control. Officers of state troops, whose troops would be first employed in the same service, would doubtless do well to cause civil officers to use a similar proclamation, unless the laws or regulations of their state prescribe another form. It would be well to have a form of proclamation outlined in advance of an emergency which would require its use. This subject is treated, and forms are suggested, in chapter twelve.

20. AMMUNITION. A supply of at least two thousand rounds per company should always be kept ready for instant issue. Multiball cartridges, if available, should be issued for street service as the service bullet may penetrate the walls of private dwellings or wound some citizen a mile or so from the scene of trouble. If the company has its full complement of officers, one should be put in charge of the ammunition. This officer should pay close attention to any recruits who are called out before having fired the service rifle or are awkward in handling it. He should also look over all the rifles. Men sometimes take rifles into the field with the firing pins and strikers so gummed with hardened

oil that the rifles cannot be fired before careful cleaning. A rifle in this condition will pass inspection unless snapped.

21. EQUIPMENT. If each man's entire field equipment is issued and kept in an individual locker, the equipment question narrows down to the issuance of an order designating what is to be carried. This order should also indicate what clothing will be worn and how much ammunition will be issued. Everything should be ready for heavy marching order. If equipments are not issued and kept in individual lockers a carefully considered order should be constantly kept posted in the property room, designating, briefly, how the issue will be made when a call for duty comes.

22. BAGGAGE AND STORES. Orders as to baggage and subsistence may or may not be issued to the company commander. If order for service requires an immediate movement of the company, its commander must move first and arrange baggage and subsistence details afterward. In such an emergency he must do the best he can with reference to the probable character of the service. But in order to do this he must have everything ready to be carried with the company or sent to it. The range and cooking utensils should always be packed ready for shipment and always be clean enough to pass an inspection. Immediately after every tour of camp

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or other duty the company commander should not rest until everything is ready for the next trip. Then, with his conscience cleared by the prepared feeling, he can rest both mentally and physically. Tools, crated lanterns, oilcan, canvas and field desk should have the same attention as the range. An itemized grocery order, equal to a two days' ration return for the probable strength of the command, should be kept in the field desk. If the cook shop is carried and the regimental commissary fails, or the company is acting alone, this order will be very useful.

23. DRILLS. The U. S. Infantry drill regulations of 1904 omit the old formation known as street column, which is found in the preceding drill regulations. This formation was intended for use in riot duty and has been so used successfully. In marching down a street where a mob is likely to be encountered this column should be preceded by an advance guard and followed by a rear guard, both of peculiar formation. This subject will be treated in chapter sixteen.

Target work is an important part of the preparation because every man should have enough familiarity with the rifle to enable him to use it with effect on his opponents and without danger to himself and comrades.

The bayonet exercises are also omitted from the

1904 drill regulations, but will probably be incorporated in future editions. They are especially important in riot duty as they teach the proper use of the butt end of a rifle. The butt of a rifle on the toes of the front rank of a crowd is occasionally more effective and less injurious than bayonets presented at the owners of the toes.

Cavalry horses are useless in riot duty unless properly trained. They must not only be accustomed to the use of sabres and pistols, but also rendered fearless of fire crackers exploding about their feet. Fire crackers are a favorite resort of a mob against cavalry. Boys are employed to use them and, if cavalry is successfully dispersed thereby, the moral effect is bad for the guard. In instructing the cavalry horses it is necessary to control them with the reins, legs and spurs only; never speaking to or striking the horse. The horseman should accustom his mount to hear his voice in commands to individuals and to shouting generally. The horse should be taught to knock down and trot over a stuffed figure of a man and not to refuse low obstructions and bad ground. It is a psychological fact that a horse fears his ability to encounter a difficulty whenever the rider exhibits the same distrust. If the rider thinks that a horse can take a certain fence, or makes the horse believe that he thinks so, the horse will try the jump. But if the

man rides at a fence in a doubtful mood as to his mount's ability to clear it, the horse, by some mystic instinct, feels the same doubt and refuses the jump. This same principle applies to all details of training.

Machine guns will often be used in riot duty and other arms of the service should consider plans of effective co-operation. Suggestions are made in chapter sixteen which may serve to indicate the preparatory drill work for riot duty.

24. INSTRUCTION IN RIOT DUTY. The foregoing sections of this chapter indicate what preparation should be made for the performance of riot duty. The succeeding chapters will attempt to outline rules showing how and when the duties should be performed. But all men need practical instruction in the performance of new duties. If one wants his watch repaired he don't take it to a carpenter. If he did the carpenter would probably decline the job.

It should be apparent that the guardsman, in order to be prepared for riot duty, must know how and when to perform its very important details.

Schools of instruction are, therefore, an important part of the preparation necessary for the successful performance of the duties likely to be assigned. In these schools the various difficulties suggested may be studied, discussed and, in a great degree, overcome. A fence doesn't look nearly so high after

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you have commenced to climb it or tear it down.

The effect of these schools will be to overcome the dread of this most distateful of a guardsman's duties. By familiarity with the subject the nervous apprehension of a mistake disappears.

CHAPTER THREE.

WHEN TROOPS SHOULD BE CALLED.

25. CONSTITUTIONS AND STATUTES ORDINARILY GOVERN the question as to when state troops shall be called for state service. The constitutional and statutory provisions of the different states are so variant that students are necessarily referred to these provisions of their own state. It must be borne in mind that the statutes are subject to occasional change.

26. ENFORCEMENT OF UNCONSTITUTIONAL LAWS. The fact that a statute is unconstitutional does not disqualify the proper civil authorities from calling troops to enforce such a statute. (1) This question was decided in 1857 and there seem to be no adverse decisions. Indeed it would be beyond reason to ask militiamen to settle the constitutionality of laws which they are called under arms to enforce.

27. CONSTITUTIONALITY OF STATUTES GOVERNING CALLS. But where the constitution of a State goes so far as to prescribe that the militia shall not be called into service except in case of rebellion or

(1) *Ela. v. Smith*, 71 Mass. (5 Gray) 121, 66 Am. Dec., 356.

invasion and then only when the legislature shall declare that the public safety requires it; the statutes of that state may not prescribed other purposes for which the troops may be called. (2)

28. THE STATE CONSTITUTION is the highest law in the state. When the governor takes his oath of office he swears that all the powers vested in him by the constitution, either civil or military, will be exercised by him for the purpose of preserving the constitution and enforcing the law that is there written.

The plain provisions of a state constitution may be fearlessly carried out by the state's chief executive. (3) The courts cannot rightfully interfere with his exercise of constitutional powers. This is because the courts themselves derive all the powers they possess from the same constitution under which the governor acts. Furthermore, it is certain that when the constitution vests the governor with the power, and charges him with the duty, to suppress insurrection, it makes him the final judge as to whether a state of insurrection exists or not. (4)

(2) Green v. State, 83 Tenn. (15 Lea) 708.

(3) 6 A. & E. Ency. of Law (2nd Edn.) p. 928; Story on the Constitution (Vol. 1) Sec. 425; Luther v. Borden, 7 Howard 1, 43.

(4) Cooley's Constitutional Limitations (4th Edn.) p. 50; Appeal of Hartranft et al., 85 Pa. St. 433.

29. WHEN CHIEF EXECUTIVE IS SUPREME. When a state constitution does not say that the governor shall aid the local civil authorities with the militia forces to subdue or suppress insurrection; but does empower such governor to "suppress insurrection;" no statute can lawfully be passed which will constitutionally deprive the governor of the power to use the state forces in the suppression of insurrection, without aid or supervision by the other civil authorities of the state. The governor may, when such extreme emergencies arise, supplant the civil authorities of a district or county and establish a military district therein until law and order are restored. (5)

30. CIVIL OFFICIALS HAVE AUTHORITY TO DECIDE. It has been shown in section twenty-eight that the governor shall decide when the moment for calling troops has arrived, provided the constitution and statutes authorize him to make such call. It has also been decided that, where these same laws authorize other civil authorities to call out troops, the authorities so authorized have the power to determine when a call shall be made. For instance: The determination of the mayor of a city, that a

(5) Appeal of Hartranft et al., 85 Pa. St., 433; In re Moyer, 85 Pac., 190; In re Boyle, 57 Pac., 706, 707; Anderson v. Dunn, 6 Wheat. (U. S.), 204-206; Martin v. Mott, 12 Wheat., 31.

riot or mob is threatened, is conclusive that the exigency exists, under the statute which authorizes him to call out the militia to aid the civil authority in enforcing the laws. (6)

31. INTERPRETATION OF LAWS. In reading the laws which direct when state troops shall be called, it becomes important, before following their mandates, to determine the legal meaning of certain terms there used. Those most commonly used have been defined by the courts as follows:

32. REBELLION AND INSURRECTION. Rebellion "means such an insurrection against lawful authority as is void of all appearance of justice." (7) Rebellion and insurrection are synonymous except in the extent of the disturbance. (8)

Insurrection is the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government. It may be confined to mere armed resistance, or it may have greater ends in view. (9)

(6) *Ela v. Smith*, 71 Mass. (5 Gray) 121, 66 Am. Dec. 356.

(7) *Hubbard v. Harnden Express Co.*, 10 R. I., 244, 247.

(8) *State v. McDonald* (Ala.) 4 Port., 449, 455.

(9) *Anderson Law Dict.*; *Bouvier L. Dict.*; *Century Dict.*; *Standard Dict.*; *Lieber Instructions for Government of Armies of the United States in the Field* (1863), par. 149; *Field Service Regulations*, U. S. A. (1905) par. 809.

Insurrection closely resembles rebellion, of which in fact it is an incipient form, in that it is a movement directed against the existence of the government. It is distinguished from rebellion in that the movement is less extensive and its political or military organization is less highly developed. (10)

33. RIOT DEFINED. MOB. A riot is a tumultuous disturbance of the peace by three persons or more, assembling together at their own authority, with the intent mutually to assist one another against all who shall oppose them, and afterward putting the design into execution in a turbulent and violent manner, whether the object in question be lawful or otherwise. (11) What is meant by a

(10) Prize Cases, 2 Black (U. S.) 635; 17 L. ed. 459; The Ambrose Light, 25 Fed., 408; Lieber Instructions for Government Armies of the United States in the Field (1863), par., 157. The recognition of the insurgents by foreign powers, or by the government against which the insurrectionary movement is directed, gives to the undertaking the legal and political character of a rebellion. The Three Friends, 166 U. S. 1, 17 S. Ct. 495, 41 L. ed., 897; Page v. U. S., 11, Wall. (U. S.) 268, 20 L. ed., 135; Prize Cases, supra; Rose v. Himely, 4 Cranch (U. S.) 272, 2 L. ed., 608; The Ambrose Light, supra; Adlay's Wheaton 27b; Dana's Wheaton 23 note 15; Hall Int. L. 5; 22 Cyc., 1452; see Sec. 196.

(11) State v. Stalcup 23, N. C. 30, 31, 35 Am. Dec., 732; Marshall v. City of Buffalo, 64 N. Y. Supp. 411, 413; People v. Judson (N. Y.) 11 Daly 1, 83; State v. Russell, 45 N. H., 83, 84.

disturbance of the peace can usually be determined by the circumstances attending the assembly of the persons uniting in the tumult. Thus, if a dozen men assemble in a forest, and blow horns or shoot guns, it would not be a riot. But if the same party assembles at midnight in a city, and marches through the streets doing these things and yelling "fire" and other alarming words, few judges would hesitate to pronounce it a riot. (12) The term "riot" is practically synonymous with "mob." (13) Thus where the evidence authorized a finding that accused had been guilty of violence, but it did not appear that the act was committed in concert with any other person or as a result of conspiracy, a conviction for riot was unauthorized. (14)

34. **REBELLIOUS MOB.** The difference between a rebellious mob and a common mob is that the first is in treason and the latter a riot. The mob wants the universality of purpose to make it a rebellious mob or treason. (15)

35. **OCCASIONS CLASSIFIED.** There are commonly four general classes of emergencies in which state troops may or should be called for active serv-

(12) State v. Brazil (S. C.) Rice, 257, 260.

(13) Marshall v. City of Buffalo, 50 N. Y. App. Div., 149, 153.

(14) Turner v. State, 48 S. E., 312, 120 Ga., 350.

(15) Harris v. N. Y. Mutual Ins. Co., 50 Pa. (14 Wright) 341, 350.

ice by the proper authorities. These are in addition to the right which a state has under the federal constitution to repel invasion, which does not come within the scope of this work. (16) The four general classes are:

1. To prevent a threatened violation of law which the civil authorities of a city or county are inclined to permit.

2. To prevent a threatened violation of law and preserve order when the city or county authorities apprehend a disturbance with which they will be unable to successfully cope.

3. To enforce the laws and restore order when the civil authorities of any district are unable to do so.

4. To enforce the laws and restore civil government in a district in which the civil authorities have been acting in conjunction with others in producing the disturbances.

36. AN INSTANCE OF THE FIRST CLASS arises where a certain act, such as a prize fight, is prohibited by statute, but the local authorities have given permission for the fight to occur. In such a case, if the governor's constitutional rights are broad enough, he may plainly inform the civil authorities that he will use military force to prevent the arranged fight unless the local authorities withdraw

(16) U. S. Const. Art. 1, Sec. 10, par. 3.

their permission and prevent the fight without the governor's intervention.

In acting in this class of occasions the governor must be clearly within the rights prescribed by the state constitution and constitutional statutes. If he is authorized to act in this class of occasions he may exercise a supervision over civil officers, in various localities, which is often of great benefit to the state. He may prevent many disasters by forbidding the minor evils which, by teaching disregard for law and order, often lead to later disturbances.

37. AN INSTANCE OF THE SECOND CLASS occurs where certain turbulent and lawless elements in a community have been stirred up either by yellow journalism or other public means, to a point where they show disregard for the civil authorities and the law, and plainly intimate their intention to act, as a mob, to accomplish some specific purpose. All constitutions and laws should be broad enough to permit civil authorities to prevent, by military force, these threatening calamities. And when these laws so permit, it is the duty of the civil authorities, finding their civil powers inadequate, to take prompt measures for the use of military force in order to preserve the lives and property for which they are directly responsible.

38. AN INSTANCE OF THE THIRD CLASS arises when the mischief has already commenced and the

civil authorities, by actual conflict with the mob, have demonstrated their inability to maintain order. It is then incumbent upon such authorities to invoke the aid of the military arm as speedily as possible to avoid further loss, tumult and destruction.

39. AN INSTANCE OF THE FOURTH CLASS arises where the civil authorities have been acting with the mob or, more often, by reason of secret sympathy with the mob have suffered it to proceed without any attempt to restrain it. These instances amount to insurrection or rebellion. It usually becomes the duty of the governor to intervene with a mailed hand and again establish justice and order. If the courts, in the tumultuous district, show weakness, or sympathy with the lawless civil officers, it is sometimes necessary to establish absolute martial law in the district.

40. IMPORTANCE OF PROMPT DECISION. The foregoing classification is made for use in consulting the state laws. It is often of great importance to insure the safety of lives and property by suppressing a riot in its inception. Most state laws permit the use of a military force in a threatened disturbance. Where such permission is given by constitution or statute, a show of force will oft-times obviate the necessity for using force. Where property is destroyed by a mob, some state statutes require the municipalities to compensate the

owners for the property so destroyed. The United States Circuit Court of Appeals has recently held, with reference to one of these statutes, as follows:

a. A city may be held liable for the destruction or injury of property, in consequence of a mob or riot therein, where such liability is imposed by statute; and it is no defense to an action for its enforcement that the city exercised all its power to prevent the loss, or that the state and federal governments were also engaged in protecting the property.

b. In an action against a city to recover for property destroyed and injured in consequence of a mob or riot, a proclamation issued by the mayor calling for troops to suppress the riot, telegrams sent by him to the governor, and similar official acts are admissible in evidence to show the conditions existing at the time the property was destroyed.
(17)

41. USE OF FEDERAL MILITIA. The constitution of the United States guarantees to every state a republican form of government, protection against

(17) *City of Chicago v. Pennsylvania Co.*, 119 Fed., 497. See also as to similar statutes: *Marshall v. City of Buffalo*, 68 N. E., 1119, 176 N. Y., 545; *Clear Creek Water Works Co., v. Lake County*, 45 Cal. 90; *La. v. Mayor, etc.*, 109 U. S. 285, 3 Sup. Ct. Rep., 211; *Allegheny Co. v. Gibson*, 90 Pa. St., 397, 35 Am. Rep. 670; *Bd. of Comr's. etc., v. Church*, 62 Ohio St., 718, 78 Am. St. Rep., 718, 57 N. E. 50.

invasion and against domestic violence. The latter protection is afforded on application of the legislature or of the governor when the legislature cannot be convened. (18)

Under this constitutional provision Congress has stated when the federal government shall interpose in the affairs of any state. Both regular troops and the militia of other states may be used by the president in rendering federal aid to a state.

42. FEDERAL AID. The federal statutes relative to the use of militia in times of riot and insurrection, when state authorities are powerless or in rebellion, are here set forth because of their universal application. They are:

“Whenever insurrection, domestic violence, unlawful combinations, or conspiracies in any State so obstructs or hinders the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such State of any of the rights, privileges, or immunities, and the constituted authorities of such State are unable to protect, or, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are

(18) U. C. Const., Art. 4, Sec. 4.

entitled under the Constitution of the United States; and in all such cases, or whenever any such insurrection, violence, unlawful combinations or conspiracy, opposes or obstructs the laws of the United States, or the due execution thereof, or impedes or obstructs the due course of justice under the same, it shall be lawful for the President, and it shall be his duty, to take such measures, by the employment of the militia or the land and naval forces of the United States, or of either, or by other means, as he may deem necessary, for the suppression of such insurrection, domestic violence, or combinations." Sec. 5299, U. S. Rev. Stats.

"Whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the judgment of the President, to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any State or Territory, it shall be lawful for the President to call forth the militia of any or all the States, and to employ such parts of the land and naval

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forces of the United States as he may deem necessary to enforce the faithful execution of the laws of the United States, or to suppress such rebellion, in whatever State or Territory thereof the laws of the United States may be forcibly opposed, or the execution thereof forcibly obstructed." Sec. 5298, U. S. Rev. Stats.

"In case of an insurrection in any State against the government thereof, it shall be lawful for the President, on application of the legislature of such State, or of the executive, when the legislature can not be convened, to call forth such number of the militia of any other State or States which may be applied for, as he deems sufficient to suppress such insurrection; or, on like application, to employ, for the same purposes, such part of the land or naval forces of the United States as he deems necessary." Sec. 5297, U. S. Rev. Stats.

"Whenever, in the judgment of the President, it becomes necessary to use the military forces under this title, the President shall forthwith, by proclamation, command the insurgents to disperse and retire peaceably to their respective abodes,

within a limited time." Sec. 5300, U. S. Rev. Stats. (19)

43. APPLICATION FOR FEDERAL AID must be made by the State legislature when it is in session or can be convened. If it cannot be convened, for lack of time or other reason, the governor should apply personally to the president. In such application he must state that the legislature cannot be convened and that the civil and military powers of the state are inadequate for the emergency.

(19) For a history of the exercise of these powers see: "Federal Aid in Domestic Disturbance," W. D. 1903, Senate Document 209, 57th Congress; Birkhimer, Mil. Govt. and Mar. Law.

CHAPTER FOUR.

ASSEMBLY BEFORE RECEIPT OF ORDERS

44. ADVISABILITY. It is sometimes important for guard officers to have their men in their armories, ready for work, when the orders therefor are received. At other times this is impossible. At still other times such assembly is improper. Existing conditions must determine these questions. There are occasions when the sight of guardsmen hurrying to their quarters, in or out of uniform, may have a quieting effect upon a threatened disturbance. There are other occasions when such action causes additional excitement and irritation.

45. REGULATIONS. The regulations of some states prescribe that, when guard officers are advised of an impending disturbance, these officers shall quietly warn their men that a call is imminent or probable and shall proceed quietly to prepare their troops for action in anticipation of an order therefor. In states where such regulations obtain, guard officers should act as directed by the regulations. On failure to do so they may become amenable to a court-martial for their neglect of duty.

46. WHERE NO REGULATIONS EXIST requiring

the troops to prepare or assemble before a call for duty, company commanders may use their discretion as to warning the men for duty. If, in their judgment, the assembly of men would occasion greater disorders, by reason of the antagonism that might be excited, a public assembly might tend to precipitate trouble. In such case the assembly should be made secretly and only when a call seems imminent. On the other hand, where the disturbance is not in the vicinity where the troops are stationed, their assembly can rarely do harm in a community where the assembly is made. In this last instance, unless there is danger of precipitating immediate action by the insurgents in the troubled district, news that troops are assembling at a nearby station causes the more cautious men of the mob to hesitate; and he who hesitates is lost to the mob, as a rule.

47. CARE OF PUBLIC PROPERTY. When a tumult near troop quarters is expected, the public property may be considered in danger. This is especially true of the arms and ammunition. The company commander must not wait for orders before taking means to protect this property. If he deems the emergency sufficient he may order a suitable guard to care for the property. This guard is ordinarily treated as a Cossack post. If only three men are used they may relieve one another as sen-

tinel, in the usual way, and all may be required to remain under arms. In this case one of the men should be a non-commissioned officer or experienced soldier.

48. CAUTIONARY ORDERS. It often happens that a company, battalion, or regimental commander receives orders to hold his troops in readiness for riot duty. Such an order, if from a lawful source, is an order of the governor and is in many instances tantamount to an order for service, although the men may not subsequently leave their quarters. If such an order is sufficiently specific the company commander should spend his spare time, after assembly, in perfecting the details for the anticipated duty and he must not forget to make out his morning reports, and send same forward, showing the number of men assembled for duty. In such an emergency it is commonly the custom to contract for meals for the men at a nearby restaurant unless the character of the order received indicates that time will be afforded for the establishment of a regular commissariat.

49. CONDUCT OF OFFICERS. The behavior of the officers at all times during riot duty is a matter of great importance. No officer should take a drink no matter how badly he thinks he needs it. The reasons for this will be explained in chapter seven.

It is noticeable that officers, no matter how competent and courageous, often get their nerves jangled up during the preparation for active service and betray a nervousness of manner which is readily communicated to the men and is the cause of unnecessary shouting and excitement. It sometimes produces a bad effect upon recruits or the younger members of the organization. This state of nervousness quickly leads to dangerous mistakes. Therefore the officers should constantly maintain calmness of demeanor, should give their orders quietly and without betraying any excitement, should avoid the appearance of hurry, even while doing things quickly and above all should keep at work. They must keep at work because it is the surest way of allaying their own nervousness and is what they are there for. The officer must keep the men employed for the same reasons.

50. CONDUCT OF MEN. While men are awaiting orders or preparing for riot duty they must be kept under rigid supervision and control. Any tendency to nervousness and excitement must be combated by means most available to the commanders. The men must not be allowed to enter saloons or carry intoxicants in their canteens, baggage, or on their persons. Everything they do should be done quietly. If the men are kept constantly employed they will be much more easily controlled and their

nervousness will disappear by requiring them to concentrate their attention. Upon assembly for duty some of the younger men sometimes make a display of private weapons. They should not be permitted to handle cheap grades of revolvers about the armory and should be warned against keeping such weapons loaded in quarters. The company commander may use his discretion as to whether or not the men should carry these private weapons. He may permit them in some instances and forbid them in others, or prohibit them altogether, as he sees fit. If time permits he should inspect those which he permits the men to carry.

51. SUBSISTING MEN BEFORE ORDERS RECEIVED. If the company commander apprehends that a call will be forthcoming, and orders his men to assemble to await such call, the question of paying for subsistence arises unless the call be immediately received. Unless the commander's company funds are in shape to stand the strain, and even if they are, the commander may, at this time, use a long distance telephone to advantage and secure the cautionary order mention in section forty-eight. Under such an order he can make contracts in the name of the state and avoid company and individual responsibility for expenditures. The pay of the men could be arranged for in the same way. If the company commander can not secure authority to

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make contracts for subsistence, he may relieve his men for meals by sections; but should make them understand that they are under orders and must return to quarters or become guilty of violations of military law.

CHAPTER FIVE.

WHO MAY CALL OUT TROOPS.

52. STATE CONSTITUTIONS AND STATUTES. It is again necessary to refer the student to the constitutional and statutory provisions of his own state in order to determine which of the civil authorities are authorized to call out troops. The same provisions which state when troops are to be called out, referred to in section twenty-five, are to be consulted in order to learn who may make the call. In the absence of any constitutional or statutory directions the governor of a state has the right to invoke the aid of the state troops in extreme emergencies. This right necessarily follows the institution of a republican form of government with its triune division of governmental functions: executive, legislative and judicial. The Supreme Court of the United States has held:

“Unquestionably a state may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. Power is essential to the existence of every government, essential to the preservation of order and free insti-

tutions and is as necessary to the States of this Union as any other government. The State itself must determine the degree of force the crisis demands." (1)

The power to do the things indicated in the above quotation is, in the states of the American Union, almost universally vested in the chief executive. In England, because of the profligacy and irresponsibility of certain monarchs, this power was gradually taken from them and retained by the legislative branch of its government. Our federal constitution has, in some degree, divided the war power between the president and congress. This was done because of the experiences of our English forbears. Notwithstanding this attempted division of the war power by the federal constitution, the legal authority of the president, when ordinary civil methods have failed to control affairs, is much greater than that of the king of England. This is true, even in a higher degree, of the governors of the various states. The only exceptions in the case of the governor are where the constitution of his state gives to the legislative branch of the state the power to act in insurrection and domestic disturbances and where the constitution forbids these powers to the governor.

53. THE PRESIDENT OF THE UNITED STATES.

(1) Luther v. Borden, 7 How., 45-6.

under the federal constitution and laws, may, and often has, taken a hand in restoring order in a state even when not directly called upon to do so. In such case he may use the regular army and the militia of other states. (2)

54. THE GOVERNOR is almost invariably clothed with constitutional and statutory powers relative to the use of state forces, he being the highest civil authority in the executive department of the state. (3) He should be at once informed of any disturbance, within the state, which will probably be of a serious character and may get beyond the control of the civil authorities of the city or county. By communicating with the governor when serious disorders are apprehended, civil authorities give the military department of the state an opportunity to act effectively in preventing disturbances. These civil authorities also place a part of the responsibility for subsequent destruction of lives and property, if any, upon the chief executive. But this is only so when they have conscientiously and diligently used their civil powers to the utmost in attempting thereby to preserve the peace.

55. OTHER CIVIL AUTHORITIES. The laws of many states provide that certain civil authorities may call the militia to their aid in quelling a dis-

(2) See Sec. 42 and note.

(3) See cases cited under Sec. 55.

turbance. These statutes usually provide that a sheriff, a mayor, or a judge of a certain court may issue his call to the commanding officer of any regiment, or other unit, to report his troops at a certain place to aid the civil authorities. An officer called under such a statutory provision should at once report, by telephone or telegram, to the governor, giving the substance of the call. He thereafter obeys the civil authorities in their general directions except in cases where the governor issues conflicting instructions. In such cases the orders of the governor are supreme and the officer may safely disregard orders conflicting therewith. This is because the governor is the highest civil authority in the state and is the chief of the executive branch of the government. To permit the orders of a judge to control troops, as against definite orders of the governor, would be permitting the judicial branch of the government to usurp the functions of the executive branch of the same government. (4)

56. JURISDICTION OF MINOR CIVIL AUTHORITIES. The statutes referred to in the preceding

(4) Appeal of Hartranft et al., 85 Pa. St. 433; State ex rel v. Warmouth, Governor, et al., 22 La. Ann. Rep. 1; Maura, Adj't. Gen'l. v. Smith, Governor, 8 R. I. Rep., 192; The People ex rel v. Bissell, Governor, 19 Ills., 229; State ex rel v. Towns, Governor, 8 Ga., 360; Hawkins v. Governor, 1 Ark., 570; Mott et al. v. Penna. Co. et al., 6 Casey, 33.

sections are sometimes so drawn that the mayor of a city, in reading these provisions, conceives that he has the right to order any and all state troops to his aid. These statutory provisions also indicate that the sheriff of a county has the same right. But this construction is erroneous. (5) The mayor of a city may address his call to only such troops as are stationed within the city. The sheriff of a county may address his call only to such troops as are stationed within the county. The judge of a district may only call out troops within his district. No one but the governor, or the legislature in specified cases, may issue a general call. If this were not true a regimental commander might receive imperative orders to hasten his forces to a hundred different places at the same time.

In cases where civil authorities require the aid of troops, and no troops are stationed within their district, county or city; such civil authorities must appeal to the governor directly. This appeal should be a telegram in order that a record may be preserved of it. It should state sufficient facts to enable the governor to determine the advisability of sending troops.

57. **APPEAL TO GOVERNOR.** Where civil authorities are authorized by law to call out troops, it is nearly always advisable for such authorities to re-

(5) So held by Governor Nash, of Ohio, an able lawyer; and by his attorney general.

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quest the governor to issue the order. Such a course avoids subsequent embarrassment as to subsistence of troops, pay of troops and many other matters. This course is best because it gives the governor and the other civil authorities a common responsibility and avoids unnecessary friction. For instance: A mayor orders out a battalion of militia in his city and the commanding officer reports to the governor. If this is the first intimation that the governor has that a call has been made, he requires information from the mayor. A misunderstanding occasionally arises because the mayor may at first assume the position that his orders are of equal force with those of the governor. The mayor may not realize that both military law and civil law require the commanding officer to implicitly obey the orders of the governor. No commanding officer can successfully serve two masters unless these masters are in harmony and act together.

58. **CONFLICTING ORDERS FOR SERVICE.** In 1904 the Kentucky court of appeals decided that, where militia were called out by the legal governor and, while on duty, received conflicting orders (from the followers of two aspirants for gubernatorial honors) to disband and also to remain on duty: the militia might remain on duty until the commanding officer received an order on which he could

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rely. (6) This sounds like a case for federal intervention; but the matter was adjusted *inter sese* after the murder of one of the rivals. In this instance the militia officers were placed in a delicate position. They were afraid of being charged with desertion if they obeyed the order to disband; but they so conducted matters as to maintain the good will of all law-abiding citizens.

(6) *Sweeney v. Commonwealth*, 82 S. W., 639, 26 Ky. Law Rep., 877.

CHAPTER SIX.

ORDERS AND REPORTS.

59. WRITTEN ORDERS. Orders relative to riot duty should always be in writing. If a commanding officer of troops receives a verbal or telephone order from a civil officer ordering troops on duty, he should request that it be put in writing at once. (1) The commanding officer may act upon the verbal order until the written order is received, but he should not fail to secure it as soon as possible. Such commanding officer should endorse on the written order the exact time of its receipt by him, for future reference. Other and succeeding orders should be treated in the same way.

60. AN ORDER FOR TROOPS is properly addressed to the commanding officer of the troops required. This order varies in form according to the circumstances.

1. If the occasion comes within the first class mentioned in section thirty-five the order would probably require the commanding officer to assemble his troops and await further orders. Thereafter a

(1) "When a statute directs notice to be given the rule is that it is to be given in writing, in which respect it differs from the common law." *Court in Church v. Co. of Phila.*, 4 Pa. Law J., 184 (153).

succeeding order from the governor, through his adjutant general, might be received requiring the troops to be moved to a certain point and specifically pointing out services to be there rendered.

2. If the occasion comes within the second class mentioned in section thirty-five, the order by the proper civil authority would be directed to the commanding officer of the troops required, commanding him to assemble his troops and report to a certain civil officer at a certain place, either forthwith or at a certain time, in aid of the civil authorities.

3. In occasions of the third class, mentioned in section thirty-five, the order would be practically the same as that for the second class.

4. In occasions of the fourth class, mentioned in section thirty-five, the order would come, in almost every instance, from the governor and would direct the commanding officer, of the troops required, to assemble such troops, proceed to the scene of disturbance and establish whatever degree of martial law was necessary to restore civil government. (2) In this class of cases many succeeding orders would naturally be received by commanding officers. These should not be telephoned except where no other means of rapid communication were at hand. When telephoned they should

(2) See full text of an order by the governor of Pennsylvania, at Sec. 211.

be taken down in writing and read back to the superior. One small pocketbook containing the commanding officer's orders should be his most important possession at this time. The best form for such book is the ordinary telegraph blank book, with alternate ruled and blank pages, and a sheet of carbon paper.

61. FORM OF ORDER FOR TROOPS. Orders from general headquarters of a state, if issued by the adjutant general, should bear the statement, "By command of Governor ————." It has been held that an order issued "By direction of the Secretary of War" cannot be regarded as the order of the president. (3) Therefore an order by direction of the adjutant general might not afterwards be held to be the order of the governor. An interesting form of order, which applies to the second and third classes mentioned in the preceding section, is set out in full in an old Massachusetts statute which specifies who may call out troops in certain emergencies; it provides that such call, if issued by a court, shall be in substance as follows:

"....., SS.

COMMONWEALTH OF MASSACHUSETTS

I.. S. To A. B.

(Insert the officer's title)

Commanding

(Insert his command)

(3) *Truitt v. U. S.*, 38 Ct. Cl., 398.

ORDERS AND REPORTS.

Whereas, it has been made to appear to our justices of our, now holden at
., within and for the county of,
that

(here insert description of tumult in such terms as to show that
officer signing hereunder has legal right to call for troops)

in our county of
., and that military force is necessary to
aid the civil authority in suppressing the same:
now, therefore, we command you that you cause,

.
(here state the number and kind of troops required)

armed, equipped and with ammunition, as the law
directs, and with proper officers, either attached to
the troops or detailed by you, to parade at
., on, then and there to
obey such orders as may be given them, according
to law. Hereof fail not, at your peril, and have you
there this writ with your doings returned thereon.

Witness, ...L. S., Esquire, at,
on the day of, in the year.

C. D. CLERK."

While this form is unnecessarily long, it is here inserted as a guide which may be varied to suit the circumstances. It has one defect i. e., it does not specify *to whom* the commanding officer shall report. Under many statutes this order by a civil authority could read as follows:

“To Colonel C. S. Ammel,
Commanding 4th Infantry,
Ohio National Guard.

Sir:—A mob has assembled at Jones' Garden, South High street and city line. It threatens to destroy Alaska Steel Company's plant and has defeated my posse. Assemble Companies A, B, C, and I, 4th Infantry, O. N. G., and report forthwith to me at County Jail.

GEORGE KARB,
Sheriff of Franklin County, Ohio.
Columbus, Ohio, January 30, 1906. 11 P. M.”

62. ACKNOWLEDGING RECEIPT OF ORDERS. One of the first things the commanding officer must do, after receiving his call for duty, is to report receipt of the order and designate exactly where he can be found from that time until he shall again report. This is very important because the governor or other civil authority calling out troops, if in ignorance as to the fate of his order, is absolutely at sea as to further procedure. If the order for troops has not come from the governor the officer should forward its substance to the governor at once, as previously mentioned. (4) Receipt of all subsequent orders should also be acknowledged when their importance is such as to indicate that any anxiety may be felt by the officer's superior.

(4) See Sec. 55.

63. THE FIRST ORDERS OF THE COMMANDING OFFICER, so called upon to assemble his troops, should issue at once to his subordinates. The time of issuance of these orders should be noted in the officer's pocketbook. If these orders are issued by a company commander their execution is of course seen to personally. If issued by a regimental commander he must require reports as to how the troops are assembling and when they will be ready for the services required. In this last case the company commander should keep in constant touch with the headquarters office. Orders among officers of a national guard organization, when called into service, should be sufficiently definite to enable the interested officers to recall their character and the time when given. If every commanding officer makes a memorandum in his pocketbook of the issue, substance and receipt of each order, difficulty may be avoided. The information thus noted is necessary in making up reports of the tour of duty.

64. COMMUNICATION WITH THE GOVERNOR should be kept constantly open by the commanding officer of troops on riot duty. Frequent reports should be made to the governor as to the progress of the troops in quelling the disturbance. The commanding officer must remember that the governor is probably waiting at his office, in great distress of mind and anxiety relative to the situation. He

should also remember that time drags very slowly to the governor under such conditions and that five minutes of anxious waiting may often seem like an hour to him.

65. SUBSEQUENT ORDERS FROM CIVIL AUTHORITIES. When troops are acting in aid of civil authorities the commanding officer may require all orders from such civil authorities to be in writing whenever possible. Another matter of importance is to secure the actual attendance of the county sheriff, mayor, or other proper civil authorities while quelling the disturbance. For instance: the troops are acting under the general order of the sheriff. It becomes necessary, for the first time, to order the troops to fire and precipitate a general conflict. At such a moment it is of the utmost importance to have the sheriff by the elbow. Require him to give the order. Then give the command to fire. If the sheriff is absent when such a command is given, (still assuming that troops are acting in aid of the civil authorities) he might disavow any responsibility for the ensuing loss of life and place the commanding officer in jeopardy.

66. ORDERS AND REPORTS IN GENERAL. When the mob has been dispersed and property is being guarded, special orders to sentries may be issued in the form of standing orders. Where it is advisable to make these orders public they may be given

publicity in any convenient way. Many of these orders necessarily affect the citizens and in such cases they should be made acquainted with the character of the orders.

Civil officers at the scene of disturbance will of course be advised as to the time of arrival of troops sent to their aid. Meanwhile such civil officers may be required to report, to the commanding officer, the progress of the disturbance and any changes in its character. Details of this subject are mentioned in section eighty.

Orders relating exclusively to the troops should not be embodied in orders which relate to the conduct of citizens. Remember that the former are under military law, the latter under civil law or martial law.

67. **CONFLICTING ORDERS.** In case of a conflict of orders, the commanding officer of troops ordered on riot duty should refer the matter to the governor of his state. If the governor decides the question, the officer should consider the decision final and act in accordance with it. (5) With reference to this question, the Supreme Court of Pennsylvania has said:

(5) Whenever, in this volume, the statement is made that the governor has supreme powers, it is assumed that the situation is one where state troops are acting in the service of their own state.

"It follows, if the governor, as supreme executive, and as commander-in-chief of the army of the commonwealth, is charged with the duty of suppressing domestic insurrections, he must be the judge of the necessity requiring the exercise of the powers with which he is clothed, and his subordinates, who are employed to render these powers efficient; and to produce the legitimate results of their exercise, can be accountable to none but him." (6)

68. PROTECTION AFFORDED BY ORDERS. A soldier is bound to obey the orders of his superior officer where such orders do not clearly show their own illegality, and such orders will be a protection to the soldier. (7)

69. INTERPRETATION OF ORDERS. A footnote to a rule or regulation is not less authoritative than the principal text, where the language of the footnote and the general character of the principal text point to a single authorship, and an intention that the footnote shall command respect and obedience in like manner as the body of the rule or regulation. (8)

(6) Appeal of Hartranft et al., 85 Pa. St., 433, 444-5.

(7) Commonwealth v. Shortall, 55 A. 952, 206 Pa., 165. And see Sec. 67.

(8) In re Brodie, 128 F. 665, 63 C. C. A., 419; In re Coffey Id., In re Henshaw, Id.; In re Morris, Id.

70. MINORS. A father has no power to exonerate or withhold his son, over 18 and within 21 years of age, from the performance of militia duty.

(9)

(9) Stevens v. Foss, 18 Me. (6 Shep.), 19.

CHAPTER SEVEN.

CONDUCT OF OFFICERS.

71. IN PREPARATION. The conduct of officers in preparation for riot duty has been referred to in section forty-nine. It may be further said that, in communication and conference with the civil authorities, it is essential for officers to preserve good humor and cheeriness of demeanor. Civil officers, anticipating trouble, nearly always ask for advice of the guard officers. Such advice must be given guardedly. Whenever a guard officer is reasonably certain on any proposition he may frankly give his opinion. If he is uncertain he should, just as frankly, say that he don't know. Otherwise the civil officer may be misled and a haphazard opinion may lead to a serious mistake. If the mayor of a city inquires about his legal authority to take certain measures he should be referred to his city solicitor unless the guard officer is reasonably certain of the proper answer.

72. THE DECISION OF LEGAL QUESTIONS, by both military and civil officers should be deliberate. Conclusions should not be jumped at hurriedly. Law is not a mathematical science. Legal decisions are

reached by the application of legal principles, in a logical way, to varying sets of facts. Invariably, the application which a court has made, to a certain set of facts, of the principles of law governing such facts, results in a decision which has been rendered deliberately. This decision establishes a rule for future conduct. But this rule can be safely followed only under circumstances where the facts and the law are similar. It is often the case, when a civil and military officer are discussing the advisability of calling troops, that neither they nor their nearest advisers are familiar with the legal questions presented. In such an emergency the city solicitor or county prosecutor could be called in and the constitution of the state, with those few sections of the statutes which relate to riot duty, should be consulted. If the guard officer has made any preparatory study for the duty he can furnish complete references to these constitutional and statutory provisions and no time will be lost in finding them. To these few paragraphs of written law, the officer could add any regulations or authorities he has upon the subject and a proper start may be made.

73. **LIABILITY OF MUNICIPALITY.** There are, as set forth in section forty, many states where statutes require the municipality to pay for property destroyed by mobs. An officer in such state, in discussing a call for troops with a civil officer, would

do well to call the attention of the civil officer to such statute in order to apprise him of a responsibility of which he may be ignorant. No such liability exists except under a statute.

74. CONDUCT TOWARD CIVIL OFFICERS. All officers on riot duty, will consult their own comfort and interests best by uniform consideration for all civil officers who are attempting to properly discharge their duties. In this connection matters of some delicacy frequently arise because civil officers, with an eye to maintaining the support of all factions of the community in future political contests, are prone to play politics. As long as they do so without interference with the proper discharge of their official duties and refrain from interference with the official duties of other civil and military officers; the civil and military officers may jointly operate in bringing the tumult to a successful conclusion. But if the military officer permits a politician to override his judgment, as to what is right in dealing with a mob, he at once gets onto thin ice that may not carry him over the danger spots. Notwithstanding disputes that may arise, the officer must not forget the sixty-first Article of War.

75. CONDUCT TOWARD TROOPS. Troops on riot duty are subjected to many necessary hardships. They usually spend all of the first night in traveling, fighting or guard duty. Quarters for the second

night are not usually comfortable. The work is exhausting under favorable conditions, but the strain is not noticed for the first forty-eight hours. After that the men begin to complain of unnecessary hardships. If, in the inception of a disturbance, the staff departments of the regiment and companies get to work energetically and intelligently they can do a great deal toward alleviating the discomforts of their comrades. If the commissary, cooks and assistants and the quartermaster and his staff are started out in their respective duties as soon as possible, time is gained in the end for the whole force. A machine can not continue to do thorough work while some of its parts are out of adjustment. Rigid discipline will, necessarily, be constantly enforced.

76. CONDUCT TOWARD CITIZENS. by all soldiers engaged in riot duty, should be uniformly courteous except where a citizen shows a tendency toward affiliating with the mob. In almost every disturbed district there are citizens who will heartily co-operate with the troops in preserving the peace. These citizens are friends. If properly treated, they will give valuable information to officers and men and will aid the troops in many ways. Their sentiments will gain favor with citizens who are wavering toward the insurrection. If the latter are properly encouraged public sentiment itself will soon make for the restoration of order.

Private property must be invariably respected and protected where necessary and possible.

77. CONDUCT TOWARD THE MOB varies greatly with the character of the tumult. It may be necessary to act with extreme firmness and, in some cases, harshness. If an insurrection comprises the entire community it is necessary to resort to some of the individual members to aid in obtaining information. Under such circumstances it may be assumed that the persons inquired of will lie. Under these conditions the following plan has been used with considerable success. Catch four or five of the apparent leaders of the mob and separate and isolate these men by confining them in non-communicating cells of the city prison or county jail. Make out a list of questions covering the information wanted, one question to a page. Bring out each man separately and get his answers to these questions without his having had any chance to communicate with the other captives. It is wonderful what a difference there will be in the answers. Each man knows the truth, but each man tells a different lie in order to conceal it. Then proceed to administer punishment for the lies told. Confront each man with the indisputable evidence of his falsehoods. Then ask the same questions over again. The answers will again vary, but some of the men will have weakened and told the truth in some instances. Some of the an-

swers to the various questions will be found to corroborate others and thus the true answer may be deduced. If not proceed as before. Punishment and re-examination and the truth will eventually come out. During this procedure the captives should not be given the slightest chance to communicate with one another.

78. QUALIFIED MARTIAL LAW. It has been well said by some of the best courts of this country that the moment troops in the field are ordered by the governor to perform any service independently of civil authorities, or to control civil affairs, a state of at least qualified martial law exists. Military and civil officers, when troops are so acting, should amicably agree as to what degree of martial law is to be exercised. In case of a dispute, consult the governor. This subject is discussed in chapter seventeen.

79. PERSONAL CONDUCT. As heretofore stated no officer, on duty during riot, especially during the first stage, should either take a drink, or enter a saloon. The weather may be such as to render a stimulant beneficial, the exhausted condition of the officer may demand a quick recuperative, but the consequences of taking: "One little drink" or even entering a saloon have been, under such circumstances, extremely grave. Once upon a time a colonel of the national guard walked quietly into a sa-

loon and took a drink. He really needed it as he had been on his feet for practically twenty-four hours. Unfortunately, within two hours, a mob charged the court house which was being guarded by this officer's regiment. After repeated warnings, he gave the command to fire, and several of the mob were killed and wounded. This commanding officer was afterwards indicted by the grand jury which next sat in that court house, for manslaughter. The defendant, thus indicted, was compelled to employ the best legal talent available, secure a change of venue to an adjoining county and sit six weeks as defendant in the trial of a murder case. During the production of the testimony it developed that the friends of those who had been killed and wounded in the court house fight had persistently circulated the story that the officer who gave the command to fire was drunk at the time. The defense of this case was so expensive as to nearly ruin the officer in spite of the fact that the state afterwards reimbursed him in the sum of about twenty-five hundred dollars. Meanwhile, damage suits with claims aggregating seventy or eighty thousand dollars were prepared by the friends of those killed and injured in the riot. In all of these suits the same commanding officer would have been defendant had he not gone to considerable trouble to escape service and otherwise avoid having the cases tried in the county

where the troops had operated. Thus the fact that this officer was seen to publicly take one drink in a saloon was seized upon by a score or more of malicious persons and, as the story was bruted about, the one drink increased in number like the three black cats. An infinite amount of trouble was caused an unfortunate commander who had, in fact, conducted himself throughout the riot with perfect propriety and bravery. This is not a fable. The story is true in every detail.

CHAPTER EIGHT.

MOVEMENT OF TROOPS.

80. **SCOUTS.** The commanding officer moving troops to the scene of a riot ought to know in advance just what conditions he will encounter. In order to obtain this information he may detail trustworthy enlisted men to proceed to the scene of disturbance in advance of the troops. These men go, almost invariably, in civilian dress. After their first report it is sometimes advisable to continue to employ them in civilian dress. Certain citizens may also be permitted to affiliate with the mob. To reduce the risk they must have secret means of communication with the commanding officer. There are many ways of quietly securing information, which may be devised by a little study; but it is not advisable to publish them. By using these means proof may be secured against certain turbulent men which can afterwards be used to advantage by the proper authorities.

81. **CIVIL AUTHORITIES SHOULD MEET TROOPS.** In cases where troops are called to their aid, the civil officer who is to have the general direction of the troops should, by preconcerted arrangement,

meet them at some point near the disturbance. This meeting point should possess some tactical advantage. It ought to be near enough to the disturbance to enable the troops to act promptly. It should not be so close to a mob that a conflict might occur before the civil officer and the military officer have time to concert a plan of action. It is advantageous to come upon the mob with troops fully prepared for all ordinary emergencies and these preparations cannot safely be made in full view of the mob.

82. DETRAINING, in the immediate presence of a mob has, on some occasions in the past, resulted in the complete dispersal of the militia. On one occasion in Ohio, a disturbance in a mining district occasioned a call for troops. The disturbance was in a small mining town, located in a narrow valley in the midst of which stood the railway station. Shortly after the call a train drew up at this station with one company of infantry on board. The train was surrounded by the mob. The men began to emerge one by one from the passenger coaches. They were received and disarmed one by one by the mob. Some of them were told to go home. Others were more roughly treated. It is unnecessary to state the moral effect that this victory had on the mob.

Unless a commanding officer wishes to run the risk of a similar experience, he must, when neces-

sary, take command of the train upon which his troops are transported. This train is in state service and the military officer may give any necessary orders to the railway crew; but the commanding officer must give these orders at the proper time. He must remember that trains are controlled by block signals and train dispatchers and he must not so interfere with the running of the train as to endanger the lives of his men or of railway employes or passengers on other trains.

83. DISCIPLINE ENROUTE. As the officers and men are on a delicate mission, their conduct, enroute to the scene of disturbance, will have a material effect upon the public sentiment for or against them. It is to be hoped that the old days of robbing pie counters are over without exception. In the mind of the old time militiaman there may have been some idea of justice in taking refreshments or necessities without paying therefor. He was sent out upon a public duty often without any chance of pay for many months to come, frequently without a cent in his pocket and commonly without any staff officer to furnish to him the necessary subsistence. Under such conditions the militiaman often gained public condemnation by what seemed to him a necessary foraging trip. The militiaman was wrong, in fact he was a thief, but the government who placed him

in such a predicament was equally censurable from a moral point of view.

Such acts of vandalism must never be permitted. If certain men of any regiment take or destroy property unlawfully, the names of the offenders should be immediately ascertained and these men required to make full reparation. This can be done by assigning their pay accounts to the injured persons and having the company commander accept the order.

Some instances may arise where property is taken, injured or destroyed by members of a certain company and the names of these men cannot be ascertained because neither men nor officers of the organization use proper means to secure their divulgence. In such a case the commanding officer will deduct from the pay of the entire organization a sum sufficient to defray the damages these men have occasioned, to the persons injured. Such action by the commanding officer is in the interest of justice, tends to promote respect for the national guard and is fully authorized by the fifty-fourth Article of War. Furthermore, men who have been required to make such payments have received very healthful lessons which will promote a better state of discipline in the future.

84. MARCHES are often required to reach the point of disturbance. These marches may be made

through what could hardly be classed as enemy country; but nevertheless through country where the inhabitants may be secretly hostile. Under such circumstances it may be assumed that news of the character and strength of the command is preceding it. As it is important that this news should create the impression desired by the commanding officer, he has certain means at his disposal to effect this end. He is justified in sending forth false information, where necessary, and in concealing the strength of his command; misrepresenting the line of march and also the time of the march.

85. TRANSPORTATION will be suited more to the emergency of the occasion than to the comfort of the troops. The commanding officers, personally or through members of their staffs, will make their contracts or seize the necessary transportation according to the need for haste. A freight engine and gravel train has heretofore been used when better rolling stock could not be obtained. Before seizing transportation, when it seems necessary to do so, the officer ought to be assured of the gravity of the situation and the urgency of the occasion. An order from the governor should be secured except in extremely rare instances.

The best available means of transportation is that which fills the speed requirement. For distances under thirty miles, interurban cars are successfully

used for small bodies of infantry. When transporting machine guns, the crews should not be separated from the guns except on long journeys. The same recommendation may be made as to artillery.

86. SEPARATE UNITS. It is assumed that the commanding officer is thoroughly familiar with the transportation facilities of his various stations and that he will not use one means where another is speedier. A regimental commander, receiving orders to proceed with his regiment to a certain point, may send certain companies in advance under proper conditions. For instance: a colonel has twelve companies stationed in twelve villages. A disturbance occurs ten miles from the station of Company E. If the mayor at the disturbed district can use one company effectively, it may be ordered to report to the mayor near the scene of disturbance, without waiting for the mobilization of the entire regiment; but if two companies can be sent as readily as one such course should be adopted. In ordering troops forward in this way there is sometimes danger of precipitating a conflict and this danger, if apparent, ought to be avoided. It must also be borne in mind that the first troops to reach the scene of disturbance should be in command of an officer of experience. Under some circumstances a field officer may be detailed.

87. TRAVEL RATIONS will be prepared if the commissary department has the necessary time at its disposal. Even where the distance to the post of duty is short the travel ration will be appreciated by the men. In the hurry of preparation they usually neglect to eat. During a railway journey the men want rest and the food which they may not be able to get for some time after arrival at the scene of trouble. If the cooks carry their large coffee cans some embarrassment may be avoided by wiring to certain stations to have a certain number of gallons of hot coffee ready on arrival. It will then be taken on board in company utensils without any delay. Remember that fighting on an empty stomach is bad for the nerves.

88. BAGGAGE. Some militia organizations go into camp with packing boxes that are utterly beyond reason both as to size and weight. The U. S. Manual for Quartermasters Department (1904) provides that packing boxes should be of dimensions as follows:

1. For escort wagon transportation, 38 inches by 19 inches by 15 inches (outside measurements).
2. For escort wagon and pack transportation, 30 inches by 19 inches by 15 inches (outside measurements). That these boxes should be constructed of one-inch pine lumber, dressed on one side and to be bound properly with hoop iron. That sacking

MOVEMENT OF TROOPS.

or baling should be substituted wherever practicable. That all supplies intended for field service, when practicable, should be packed in boxes of the dimensions given above; weight not to exceed 150 pounds gross.

The reasons for these regulations are too obvious to require recital.

89. U. S. SERVICE. When called out by the president, militia will usually have time to mobilize by regiments and complete camp equipage will probably be carried. The U. S. Quartermaster's Manual and U. S. Manual for the Subsistence Department will furnish the rules for the regimental staff officers. Blank forms for securing subsistence and transportation may be procured, in advance, by correspondence with the staff officers of the U. S. military department in which the troops are stationed. This correspondence, under the usual rules, would go through the office of the state adjutant general.

CHAPTER NINE.

AID OF CIVIL AUTHORITIES.

90. **LIABILITY TO ARREST WHILE PERFORMING MILITARY SERVICE.** During the time troops are in service, suppressing a tumult, riot, or insurrection, officers and enlisted men cannot be arrested or compelled to answer process of the civil courts because of any act done on such service. This immunity extends to the officers and men on such service so long as it is necessary for the military to remain in the field for the purpose of enforcing the constitution and laws. During the time of the service, the members of the military organization cannot be called to account by the civil authorities. If they could be compelled to answer to the courts after they had been in the field ten days, or thirty days, they might be compelled to appear in the courts on the first day. Such requirement is absolutely inconsistent with the performance of military duty in active service.

91. **EXCEPTION TO FOREGOING RULE.** An exception to the foregoing rule may arise under conditions indicated hereafter in section two hundred and twenty. It will be there shown that where a

leader of a riot or mob, or a member thereof, is held by military authorities and a writ of habeas corpus has been sued out, whereby a court requires the military officer to produce the body of such captive; it is the duty of such officer to answer to the writ and state the facts that caused the confinement, and to produce the prisoner, so that the court may make proper orders in the matter.

The writ of habeas corpus is not suspended while troops are acting under general orders of the minor civil authorities.

92. **ANOTHER EXCEPTION.** The fifty-ninth Article of War provides that when any officer or soldier is accused of a capital crime, or of any offense against the person and property of any citizen in the United States, which is punishable by the laws of the land, the commanding officer of the organization to which the person so accused belongs, is required, excepting in time of war, upon application by or in behalf of the party injured, to deliver the accused to the civil magistrates for trial. This United States statutory provision, in states where the articles of war are held to apply to the militia in state service, must be followed except in time of war. A state of war does not exist while troops are acting strictly in aid of civil authorities. Therefore, when an officer's command is so acting and a member of the command, acting wholly outside the

scope of his military duties, commits an offense mentioned in the above article of war, he may be turned over to the civil authorities for confinement and trial. In such case the succeeding morning report of the offender's company will indicate that he is in the hands of the civil authorities accused of a certain offense. But the commanding officer must not turn the man over to the civil authorities until, after proper application received, he has made a full investigation of the matter and is convinced that the application is made in good faith and in the interests of law and justice. The commanding officer may require such an application to be sworn to and to be full and explicit. The application, or accompanying evidence, must identify the accused to the satisfaction of the officer receiving the application. (1)

93. WHEN ACCOUNTABILITY TO CIVIL AUTHORITIES BEGINS. After conclusion of the tour of duty, however, officers and men may be compelled to account to the courts for their actions. This accounting is limited to an inquiry into acts in which the troops appear to have exceeded their authority. If the inquiry demonstrates that the action was taken in pursuance of constitutional authority and that the act or acts were not malicious-

(1) Dig. Opin. J. A. G., par. 95.

ly or unreasonably done, the action is shown to have been justified.

94. **AUTHORITY OF MILITARY OFFICERS.** The enforcement of law by the military arm of the government is necessarily arbitrary and harsh, but it is the only means when civil authorities have failed. When civil authorities have called out the military, and the military are acting in their aid, neither civil nor military officers can create new offenses, or new penalties for old offenses. The lawlessness required to be suppressed is the violation of existing statutes. Therefore it is the duty of the civil authorities, from the governor down, to direct the military officers by pointing out in general terms what duties the military arm shall perform. And so long as the military act in aid of the civil authorities, the military arm is, for practical purposes, acting as an armed police. It is the duty which the police is unable to perform, but would have performed, if able to do so. The details of this power, and its limitations, will be indicated in the succeeding sections.

There is a dearth of judicial decisions on the question as to how far the civil authorities control a military officer while the military is acting in the aid of civil power. The reason for this paucity of judicial precedents is complimentary to both civil and military officers. The scarcity of court opinions

on the point shows that comparatively few conflicts of authority have occurred. It indicates that the civil authorities have, as a rule, appreciated the aid they receive from the military and the relations between the two powers have continued to be friendly, throughout and succeeding governmental troubles. From the few existing decisions it is difficult to formulate detailed rules as to how far a military officer may go in suppressing a tumult while the civil authorities are nominally in control and have sought, not the intervention of the military power, but the aid of the military power. In determining the full scope of a militiaman's duties and authority under this situation, recourse must be had to general rules of law and to the constitutional rights of the civil officers themselves; namely, the right of self-defense, the right that a civil officer has to take life under certain circumstances and to make arrests without warrants from a magistrate.

95. ACT UNDER ORDER OF CIVIL AUTHORITY. But the military must not exercise the powers of policemen, or of a sheriff's posse, without orders from the civil authorities. In a *nisi prius* court, where this point was raised, it was decided that :

“Military authorities cannot exercise the functions of civil power, nor supersede or take its place. As an independent force, such authorities cannot undertake

to execute or enforce observance of civil laws, nor can they undertake preservation of public peace, the dispersion of unlawful assemblies or the prevention of riots, except under the orders of the civil authorities, and in aid thereof."

"Military officers called to aid authorities have no power to act independently of civil authority, or to usurp its functions or take its place. They are to act simply as armed police, subject to the absolute and exclusive control of magistrates and other civil authorities." (2)

96. SELF-DEFENSE. Homicide is justifiable on the ground of self-defense, where the slayer, in the careful and proper use of his faculties, bona fide believes, *and has reasonable ground to believe*, that he is in imminent danger of death or great bodily harm, and that his only means of escape from such danger will be by taking the life of his assailant, although in *fact* he is mistaken as to the existence or imminence of the danger. (3)

On the trial of one charged with homicide, where the defense is that the killing was done in resisting an attack from a mob, the cries of the mob from the time it formed, though made before the deceased

(2) State v. Coit, 8 Ohio Dec., 62.

(3) Marts v. State, 26 O. S., 162.

joined it, are competent evidence to prove its spirit and purposes, and as reflecting upon its attitude at the time the alleged attack was made. (4)

The two rules just recited were laid down by the Supreme Court of Ohio in cases where private citizens were on trial. They would doubtless have greater force if the accused was a militiaman who was, at the time of taking life, acting in the line of duty, even where his orders did not protect him. These principles would apply to a body of troops as well as to an individual.

97. MINISTERIAL DUTIES. Military officers aiding civil authorities perform ministerial duties only. The sheriff, mayor, or governor who calls out the troops, performs a judicial duty in doing so. This judicial power is conferred upon these civil officers by the state constitution and statutes. As soon as one or more of these civil officers have determined the necessity for calling troops, then their ministerial duties under such call require them to direct the troops. Their judicial powers are *functus officii*. Officers below the governor have no discretion as to means that may be pursued, but after the troops are in the field the civil authorities are guided by the same general rules of law under which they directed their civil forces. The military officers are, under these circumstances, ministerial officers also,

(4) Goins v. The State, 46 O. St., 457.

and their duties then require them to enforce the laws under the direction of the civil officers. Both military and civil officers are bound to use only such force as is reasonably necessary and proper under the circumstances to execute the duty in hand. (5) In other words, while acting strictly in aid of civil authorities, the military officers have only the same powers that these civil authorities have, and they only have these powers when the civil officer directs their exercise by the military.

98. FELONIES AND MISDEMEANORS. In determining the duties of civil authorities, in making arrests, it is often necessary to know whether a certain act is a felony or misdemeanor. On this question, under the common law from which ours is derived, depended, in olden times, either a defendant's life or lands. For the word felony then meant either a capital crime or an act by which a vassal lost or forfeited his fee. (6) As a general rule, all crimes not amounting to felonies are still called

(5) *State v. Coit*, 8 Ohio Dec., 62-65; *Com. v. Shortall*, 206 Pa. St., 165.

(6) 12 Cyc., 132. 4 Bl. Comm., 94 et seq. And see *Bouvier L. Dict.*; *Burrill L. Dict.*; *Coke Litt.*, 391; 1 *Hawkins P. C. C.*, 37; 1 *Russell Crimes*, 42; *Adams v. Barrett*, 5 Ga., 404; *Com. v. Schall*, 12 Pa. Co. Ct., 554; *State v. Murphy*, 17 R. I., 698, 24 Atl. 473, 16 L. R. A., 550.

misdemeanors. (7) It is recorded that at one time seventy-two felonies were punishable by the death of the defendant convicted therefor. The progress of education has mitigated nearly all of these penalties. Forfeiture has been abolished and the death penalty only occasionally administered. The word felony has been retained with a gradually changing meaning. It is now generally employed to designate those offenses which are punishable by imprisonment in a penitentiary or state's prison. (8) Where a jail sentence only is imposed; yet if the court could have imposed a penitentiary sentence, still the crime is a felony. (9)

A general rule for distinguishing between felonies and misdemeanors may be evolved from the fact that nearly all citizens know what crimes are punishable by imprisonment in a penitentiary or state's prison. Such crimes may usually be called felonies.

(7) See 4 Bl. Comm. 1, 5; *Adams v. Barrett*, 5 Ga., 404, 411; *Com. v. Callaghan*, 2 Va. Cas., 460; *State v. Grove*, 77 Wis., 448.

(8) This is the rule in Alabama, Arkansas, California, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Missouri, New York, North Carolina, Ohio, Rhode Island, Tennessee, Texas, Vermont, West Virginia, Virginia, and in the United States courts.

(9) *People v. Hughes*, 137 N. Y. 29, 32 N. E., 1105; *Benton v. Com.* 89 Va., 570, 16 S. E., 725.

Crimes which are not so punished may generally be termed misdemeanors.

99. **PEACE-OFFICERS.** At common law peace-officers were authorized to arrest in certain cases without warrants. As a general rule justices of the peace, sheriffs, coroners, constables and watchmen and all who come to their aid and assistance, including deputies, are peace-officers. (10) In many states other peace-officers have been created by statute. United States' marshals and their deputies may act as peace-officers under the laws of the state in which they act. (11) Police officers in cities are nearly always clothed with the same powers, as peace-officers, as are the state officers. Railway policemen, under general laws, are also peace-officers, as a rule.

100. **ARREST FOR FELONY OR ATTEMPTED FELONY.** It is a general rule throughout the United States that a peace-officer may arrest, without a warrant, the following persons:

- a. One whom he finds attempting to commit a felony. (12)
- b. One who commits a felony within view of

(10) 4 Bl. Comm., 292; 2 Hale P. C., 85, 86.

(11) U. S. Revised Statutes, (1872), Sec. 788.

(12) 3 Cyc., 878; U. S. v. Fuellhart, 106 Fed., 911; McMahon v. People, 189 Ills., 222, 59 N. E., 584.

the officer. This arrest may be made after the time of committing the crime. (13)

c. One whom he has reasonable or probable grounds to suspect of having committed a felony, even though the person suspected is innocent. (14)

101. FORCE PROPERLY USED THEREFOR. In making an arrest it is the duty of the arresting officer to summon sufficient assistance to enable him to effect his purpose. (15) An officer has no right to break an outer door or window of a residence for the purpose of entering and arresting under civil process when the person to be arrested is a lawful occupant of the house. If the person to be arrested has no legal domicile in the house where he is concealed, an outer door or window may be broken to gain admission. (16) But after having gained entrance at the outer door of a house an officer may

(13) 3 Cyc., 878; *Firestone v. Rice*, 71 Mich., 377, 38 N. W., 885, 15 Am. St. Rep., 266; *Willis v. Warren*, 1 Hilt. (N. Y.) 590; *Corbett v. Sullivan*, 54 Vt., 619; *Muscoe v. Com.*, 86 Va., 443; *Kurtz v. Moffitt*, 115 U. S., 487.

(14) 3 Cyc., 879; *Williams v. State*, 44 Ala., 41; *Doering v. State*, 49 Ind. 56, 19 Am. Rep., 669; *Filer v. Smith*, 96 Mich., 347; *Diers v. Mallon*, 46 Nebr., 121; *Burns v. Erben*, 40 N. Y., 463; *State v. West*, 3 O. St., 509.

(15) *Comfort v. Com.*, 5 Whart. (Pa.), 437.

(16) *Oystead v. Shed*, 13 Mass., 520; *Gordon v. Clifford*, 28 N. H., 402.

break inner doors to make an arrest even though the person he seeks is not within. Before breaking these inner doors, the officer should first state his purpose and be refused admission. (17)

As a general rule, an officer or a private person, when he is authorized to make an arrest, may lawfully use the necessary force to effect the arrest, to maintain the arrest and to prevent an escape; but he will be deemed guilty of an offense if, in doing either, he uses more than necessary force. Peace-officers are not justified in using deadly weapons on a mere suspicion that a felony has been committed.

A public officer or private citizen may take the life of a felon if it is absolutely necessary to do so in order to prevent his escape or to make the arrest. As where a robber is running from the scene of a highway robbery; or a burglar is fleeing from the house at night. Such killing must be necessary, and it behooves the officer to be careful of the conditions under which such a killing takes place, so that the necessity may not be questioned. (18)

If such felon has been arrested and others attempt to rescue the prisoner, the officer may also be justified in killing those who attempt the rescue. (19)

(17) *Ratcliff v. Burton*, 3 B. & P., 223.

(18) 21 Cyc., 796, and cases there cited.

(19) *State v. Bland*, 97 N. C., 438.

A homicide is justifiable when committed by necessity and in good faith in order to prevent a felony attempted by force or surprise, such as murder or robbery. But it may be necessary to defend such action and to show that the person killed had done certain things which plainly indicated the intention of committing the murder or the robbery. Furthermore, the killing must be done during the attempt and not after the would-be felon has desisted from the attempt. (20)

102. ARREST AFTER ESCAPE. A person properly arrested with or without a warrant may, if he escapes from custody, be rearrested without a warrant. But his escape does not always create an additional offense. Therefore, generally, no more force should be used for the last arrest than for the first. (21)

103. ARREST FOR MISDEMEANOR. No peace-officer may arrest any person who has committed a misdemeanor without first securing a warrant. But there are three exceptions to this rule, and under any one of them no warrant is needed. The exceptions are where the officer is within view when the

(20) 21 Cyc., 799, and cases there cited.

(21) 3 Cyc., 898; Cahill v. People, 106 Ill., 621; Com. v. McGahey, 11 Gray (Mass.) 194; Harft v. McDonald, 1 N. Y., City Ct., 181; Allen v. Martin, 10 Wend. (N. Y.) 300, 25 Am. Dec., 564; Rischer v. Mehan, 11 O. C. C., 403.

misdemeanor is committed or is attempted. Furthermore, it is the right of the peace-officer to arrest, without a warrant, one who assaults him, or otherwise interferes with him, while he is discharging his duty as a public peace-officer. (22)

104. FORCE PROPERLY USED THEREFOR. Except in self-defense, a civil officer may not shed blood in arresting, or preventing the escape of one whom he has arrested, for an offense less than felony, even though the offender cannot be taken otherwise. (23)

105. CIVIL OFFICERS SHOULD CONFER FULL POWERS. If troops are to successfully act in the aid of civil authorities, it is indispensable that such civil authorities should give the military officer full power to use his force as peace-officers, by specific orders, and to do anything further that may be necessary to prevent affrays and breaches of the peace. It must be remembered that a civil officer cannot delegate his powers to the military officer. He must order the military officer to do certain specific things. (24) If the minor civil authorities have

(22) 3 Cyc., 881-883.

(23) This is the rule in Alabama, Arkansas, Kentucky, Mississippi, New York, Ohio, Tennessee, and is the United States rule. In Missouri and some other jurisdictions all the force necessary to overcome resistance may be used. See Sections 107, 108, 109.

(24) A regular and general deputy sheriff may

not sufficient powers, they may join with the military commanding officer in procuring from the governor a telegram outlining the further powers necessary in the emergency. Such telegram should be in

perform all the ministerial duties that a sheriff may perform; but a special deputy may only perform the particular acts ordered by the sheriff. 25 A. & E. Ency. Law, 2nd Edn., p. 675. A sheriff has power to appoint a person to do a particular act, as, to serve a certain writ, (for arrest) although such person may not be a general deputy or act under the oath required of such deputy by statute. *Procter v. Walker*, 12 Ind. 660. Chief Justice Kent, of the Supreme Court of New York, *held* with reference to a sheriff's powers: "The sheriff had come to the place to execute the process, and meeting with resistance from the house, which he had not strength to subdue, he went back to Goshen for assistance, and directed the plaintiff and others to aid and assist, in preventing, in the meantime, the escape of the rioters. He must be deemed, in this case, to have been constructively present, so as to justify an arrest of the rioters, during his temporary absence, provided he was absent on that business. The sheriff may take the power of the county, if necessary, after resistance, to execute process. Every man is bound to be aiding and assisting, upon order or summons, in preserving the peace and apprehending offenders, and is punishable if he refuses. (2 Hale's H. P. C., 86.) The sheriff is present by his authority, if he be actually engaged in efforts to resist and has commanded and is continuing to command and procure assistance. When he is calling

the form of an order to the military commander. A governor will not send troops to quell a mob or riot unless civil authority is exhausted and protection of life and property demand it. (25)

106. PREVENTION OF CRIME is absolutely necessary to secure restoration of peace and order. If the orders of the military commander are as full as necessary, his forces may be used in a general round-up of the disorderly elements of the community.

When the jails are full of these people, lawlessness will begin to disappear. But in order that the military commander may gain and maintain control of the situation, the violaters of law, when arrested, must be tried without fear or favor by the proper courts. If these courts are prompt to act, they may render material aid in preventing loss of life and property.

107. AFFRAYS. An affray is of similar nature upon the power of the county, to enable him to overcome resistance, he cannot be actually present in every place where the power may be needed. The law does not require him to be an eye witness or ear witness of what occurs. If so, he could not use the power of the county. He is constructively present so long as he is in the county and is *bona fide* and strictly engaged in the business in which the power is engaged." *Coyles v. Hurtin*, 10 Johns., 85, 88. As to sheriff's civil power to quell riot, see note to Sec. 116.

(25) *Nat. Guard v. Strikers*, 26 C. C. (Penna.), 585.

to a riot. It consists in the fighting together of two or more persons, either by mutual consent or otherwise, in some public place, to the terror of the people. The suppression of affrays is dependent, in a great measure, on the right to arrest without a warrant, outlined in sections one hundred and one hundred and three.

When there is a quarrel between persons who have come to blows, or a riot, or other public breach of the peace, the duty is imposed on every one not an officer, especially therefore on every officer, to interfere in a proper manner, and separate the combatants or suppress the disturbance. A mere private person thus interfering, may even justify the killing of a rioter if it was inevitable. After the affray is ended, arrests may not be made without a warrant unless a felony has been committed. (26)

108. A BREACH OF THE PEACE may consist of a criminal act of the sort which disturbs the public repose, or of acts of public turbulence in violation of the public peace, such as a public prize fight; or an invasion of the citizens' right of personal securi-

(26) Bishop Crim. Law, 6th Edn., Sec. 534, 654; *Pond v. People*, 8 Mich., 150; 2 Cyc., 49-50. If rioters and other like offenders stand their ground, and only by killing them can the disorder be suppressed, they who do it are justified. Bishop Crim. Law, Secs. 14, 648, 655; 1 Hawk P. C. Curw, ed., p. 81.

ty; or of acts such as tend to excite violent resentment. Actual personal violence is not always necessary to create the offense, but, when not necessary, the conduct and language of the wrong doers must be of such a character as to induce terror or fear of personal violence. (27)

109. WHAT CONSTITUTES PRESENCE OR VIEW. An offense is committed in the presence or view of an officer in several ways, namely: within eyesight of the officer, within hearing of the officer and when the officer comes within actual view before the affair is over. (28)

110. MILITARY OFFICERS' DISCRETIONARY POWERS. While military officers must perform only such aid as is required by civil authorities, they have a discretion, which they may freely use, as to the best methods to be employed to carry out an order received from civil authorities. (29)

When the mayor of a city, properly authorized by

(27) State v. Hanley, 47 Vt., 290; State v. Warner, 34 Conn., 276, 5 Cyc., 1024; Reg. v. Brown, Car. & M., 314; Bishop Crim. Law, Sec. 260, 536; State v. Lunn, 49 Mo., 90.

(28) 3 Cyc., 887; Jones v. Seward, 40 Barb., 563. When an arrest, requiring a warrant, has been made, it is presumed that the officer had a warrant, or arrested on view. Davis v. Pac. Phone Co., 127 Cal., 312.

(29) State v. Coit, 8 Ohio Dec., 62.

law, calls out troops, on the ground that a riot or mob is threatened, the military commander may, before such riot has actually taken place, be ordered by the mayor to repair to a particular place, and there perform any specific duty, such as clearing the streets, which in his judgment is necessary to prevent the threatened mob or riot. (30)

Officers of the militia, called out by a civil magistrate, under proper statutes, to aid the civil authority in enforcing the laws, cannot be entrusted with discretionary power as to the measures to be adopted, but can only direct the details of the mode of executing specific orders received from the civil magistrate. (31)

The foregoing rules were laid down by courts where civil officers were attempting to control the situation by the aid of troops. In exercising discretion as to quelling a disturbance, or carrying out other orders of the civil authorities, consultation may be had with the civil authorities, where possible, and officers will act along lines of the least resistance. They may request civil authorities to make oral proclamations at proper times. The question of resorting to rifle fire will be discussed in the next two sections. Methods of procedure are indicated in chapter sixteen.

(30) *Ela v. Smith*, 71 Mass. (5 Gray) 121; 66 Am. Dec., 356. (1857.)

(31) *Ib.*

111. RESISTING ATTACKS OF MOB. If militiamen are acting lawfully in the line of their duty in suppressing a riot and the mob, or a member thereof, makes an attack upon them which endangers the life of one or more of such militiamen, rifle fire may be resorted to in resisting the attack and defending the lives of the men of the command. The rule of law that would apply in such a case is the same rule, hereafter quoted, that justifies a citizen in taking the life of a burglar as he enters the citizen's house, and protects a traveller in shooting the highway robber who demands his money. (32) Generally, in resisting such attacks, whatever force is requisite, is lawful. (33) In resisting attacks, however, it is well to bear in mind the distinction between a felony and a misdemeanor where the attack is more mischievous than serious. It should be remembered that the force requisite in resisting an attempted felony may not be safely employed in resisting an attempted misdemeanor. Verbal abuse by a mob does not of itself justify a military officer in using severe means of repression. To prevent this loud talk and oral bravery from working the mob up to overt acts, the taking of a few prisoners is sometimes advisable. Such action is really a means of defense, because an offensive defense is tactically the best de-

(32) Com. v. Shortall, 206 Pa. St., 165.

(33) Hare's Am. Const. Law, 906.

fense. If such prisoners cannot be taken without exciting the mob to some overt act of hostility, then the military officer should require from the civil authorities an order to clear the streets.

112. **FIRING ON MOB.** An order to disperse, then the bayonet, where practicable, will be first used. It is a general rule of the common law that, where rioters stand their ground and the riot cannot be suppressed, or the mob cannot be dispersed, without killing one or more persons, such homicide will be justified. (34)

This general rule would invariably protect a militia officer who fired on a mob under proper orders from the civil authorities, provided the mob was in the commission of a felony or attempting, by force, to commit one, and could not be restrained by milder means. But, before firing, the commanding officer should bear in mind that he may afterward be re-

(34) 21 Cyc., 798. Bishop Crim. Law, Secs. 653-5; *State v. Rhodes*, Houst. Cr. Cas. (Del.) 476; *Bassett v. State*, 44 Fla. 12, 33 So., 262; *Mitchell v. State*, 43 Fla., 188, 30 So., 803; *Richard v. State*, 42 Fla., 528, 29 So., 413; *Pond v. People*, 8 Mich., 150; *Com. v. Daley*, 4 Pa. L. J., 150. See *Lynn v. People*, 170 Ill., 527, 48 N. E., 964. Before any offensive move against a body of rioters it is advisable to make bystanders disperse or declare their character, as indicated in Sec. 123. See state statutes referred to in Sec. 116.

quired to prove these conditions existed. He should see that the proof exists and will be available.

Where a soldier receives what he reasonably believes to be a lawful order, from his superior officer, and kills another in the execution of such order, his action is justifiable. (35)

The general rule above stated is worded in a quotation by the Supreme Court of Pennsylvania as follows:

“When a riot assumes such proportions that it cannot be quelled by ordinary means, and threatens irreparable injury to life and property, the sheriff may call forth the *posse comitatus* and exercise an authority as their chief which can hardly be distinguished from that of a general engaged in repelling a foreign enemy or subduing a revolt. Arms may be used as in battle to bear down resistance; and if loss of life ensues, the circumstances will be a justification. The measure does not, however, cease to be civil, or fall beyond the rules which apply when a house is entered in the night by burglars, or a traveller shoots a highwayman who demands his money. Nor will it change its character because the military are called in and the

(35) See authorities cited in chapter twenty-one.

sheriff delegates his authority to the commanding officer." (36)

An officer should not make a speech to the mob in which he threatens it with rifle fire if some of its members commit a misdemeanor; nor should he make such threat conditioned upon their breaking the door of a public building. If the destruction of the door was all the officer had to fear, he should not wait until the door was destroyed in order to protect the public property. Moreover, such threats are in the nature of a dare and, for that reason, sometimes have an effect contrary to the one intended. (37)

When a threat is made to the mob, by the military officer, it should be conditioned upon some act of the mob, which will fully authorize a commanding officer to give an order to fire. Threats of this nature are usually made when the military force is small in comparison with the size of the mob. Under such circumstances they may be the only means of procedure, and in these cases the threat should be based upon a warning to the mob not to attempt to commit an act which amounts to a felony. Offensive measures are undoubtedly better where the size of

(36) Hare's American Const. Law Lect., 14, p. 906; Com. v. Shortall, 206 Pa. St., 165, 55 Atl., 952, 98 Am. St. Rep., 759, 65 L. R. A., 193.

(37) State v. Coit, 8 Ohio Dec., 62.

the military force warrants their adoption. The reason for this is that if a mob is permitted to make bluffs, it becomes more lawless and outrageous. If the military officer bluffs the mob, under proper control, the consciousness of wrong doing will assist the fears of the mob in causing its dispersal.

In dispersing the mob, care must be taken not to lose control of the troops. If rioters are followed and needlessly cut down after they have dispersed, it is murder. (38)

113. JUSTIFIABLE HOMICIDE BY CITIZENS. Two decisions to the effect that citizens may act independently in aid of civil authorities, where necessary, are as follows:

“Citizens may, on their own authority, lawfully endeavor to suppress a riot when it assumes a dangerous form, and may for that purpose arm themselves; and whatever is honestly done by them in execution of the object will be supported and justified by the common law, though it is more discreet for every one in such a case to be assistant to the justices and sheriff in doing so.” (39)

“Private persons may forcibly interfere

(38) Hare's Am. Const. Law, 922.

(39) Commonwealth v. Hare, 2 Clark, 467, 4 Pa. Law J., 257.

to suppress a riot or resist rioters; and they may justify homicide in so doing, if they cannot otherwise resist them, or defend themselves, their families or their property." (40)

It would seem from this that where a militia company was on duty and a riot occurred in its immediate vicinity, it might, where the emergency was great and the necessity apparent, act independently in suppressing a riot. But extreme caution must be exercised in an act of this nature because, under many of the state constitutions, it is provided that the military shall always be subject to the civil power, and this provision would require the civil power to act first.

114. HOMICIDE WHEN RIOTERS RESIST ARREST. A decision of the State of Pennsylvania lays down this rule:

(1844) "In the suppression of dangerous rioters the sheriff and his assistants may arrest, detain and imprison rioters; and, if they resist and continue their riotous actions, killing them becomes justifiable." (41)

But in the general application of the rule just

(40) Pond v. People, 8 Mich., 150.

(41) Com. v. Daley, 2 Clark, 361, 4 Pa. Law J., 150.

stated, it is well to bear in mind the provisions of section one hundred and one and the distinction between felony and misdemeanor. (42)

115. PROTECTING PRISONER. It is the duty of a military officer, in command of a military organization, called to protect a person under arrest from a mob, to use only such force as is necessary to protect the prisoner, and the public property.

And such officer cannot legally take human life, in accomplishing those ends, until he has ascertained, by such careful, prudent and reasonable exercise of his faculties as circumstances permit, that it is necessary to accomplish the purpose in hand. (43)

116. STATE STATUTES CONTROL RIOT DUTY. When state troops are aiding minor civil authorities of the same state, the statutory provisions of that state, relative to quelling riots, may be followed. (44)

(42) And see Sec. 116.

(43) *State v. Coit*, 8 Ohio Dec., 62.

(44) 22 Cyc. page 1452; *Orr v. New York*, 64 Barb. (N. Y.) 106; *Greer v. New York*, 3 Rob., (N. Y.) 406; *St. Micheal's Church v. Philadelphia county*, Brightly (Pa.), 121. "One reason why there have been so few prosecutions in our state courts on account of the consequences of firing upon rioters, probably is that the statutes of a considerable number of the states, in recognition indeed of a common law principle, expressly disclaim the holding liable of officials and others concerned in such firings." *Winthrop's Mil. Law & Prec.*, p. 1397.

Statutes of many of the states expressly declare that a homicide is justifiable in the suppression of a riot. (45)

117. TERRITORIAL LIMITS. The Supreme Court of New York, in a case growing out of the destruction of the American steamer *Caroline*, in waters of the United States, by Canadian militia (Dec. 30, 1837), lays down this *dicta*:

“A soldier, in time of war between us and England, might be compelled by an order from our government to enter Canada and fight against and kill her soldiers. But should Congress pass a statute compelling him to do so on any imaginable exigency, or under any penalty, in time of peace; if he should obey and kill a man, he would be guilty of murder.” (46)

(45) Such statutes have been enacted in California, Idaho, Indiana, Massachusetts, Missouri, New Hampshire, New Jersey, Ohio, Oregon, Vermont, Virginia, West Virginia, Wisconsin and other states. Their provisions usually indicate the powers of the civil officers.

(46) *The People v. McLeod*, 1 Hill (N. Y.) 377, 426; “A sovereign cannot compel a man to go into a neighboring country, whether in peace or war, and do a deed of infamy. This is exemplified in the case of spies. A sovereign may solicit and bribe; but he cannot command. A thousand commands would not save the neck of a spy, should he be caught in the camp of the enemy.” (Vattel, B. 3, ch. 10, Sec. 179.)

AID OF CIVIL AUTHORITIES.

As it is impossible, under the U. S. Constitution, for one state of our nation to declare war against another, or against a foreign power, it follows that state troops, on duty in state service, must absolutely confine their operations within the boundaries of the state they serve.

When acting under call of, and by direction of, a minor civil authority, it may be necessary to secure the order of the governor before extending operations beyond the city, district or county over which the civil commander has jurisdiction.

CHAPTER TEN.

CO-OPERATION WITH CIVIL AUTHORITIES.

118. DISPUTES BETWEEN CIVIL OFFICERS may sometimes arise during the progress of a riot or tumult. To illustrate: A mob is threatening lawless operations at a factory near the boundary line of a city. The mayor and the county sheriff are both authorized by law to call for troops. These officers have different views as to the character of the emergency, and as to the necessity for and the manner of using troops. The military commander is thus placed in a delicate situation because the two civil officers may have concurrent jurisdiction over him. The military officer, having no judicial duties to perform as long as the civil officers are in control, cannot decide as to which civil officer is giving the proper directions. But, under these circumstances, the military officer may be able to make a shrewd guess as to which civil officer is right. Under these circumstances the military officer must truthfully report the facts to the governor and secure a decision which will protect him in future operations. In securing this decision he may ask for

directions as to which civil officer he shall serve. He may even be required to arrest a civil officer who is wrongfully using his authority and thereafter act under another civil authority, who had concurrent jurisdiction with the one arrested; but who is, in the opinion of the governor, acting rightfully in attempting to subdue the disturbance. The governor has the power to make this decision. (1)

119. QUALIFIED MARTIAL LAW. Under some of the circumstances, indicated in the preceding section, it may be necessary to resort to a partial degree of martial law, namely: where by the decision of the governor a military officer is required to act under the orders of the sheriff and to supersede the mayor in his control of affairs within the city, or conversely where the sheriff is superseded and the mayor is upheld. Under these difficult circumstances the orders from the governor will doubtless require the military officer to co-operate with that civil authority whom the governor decides to be rightfully performing his duties. If the military commander, under these or similar conditions, is required to take full control of the civil affairs of a certain part of any community, such control may require the exercise of full martial law powers and

(1) *Luther v. Borden*. 7 How. (U. S.) 40; Sec. 120.

may be designated as co-operative martial law. (2)

120. DEGREE OF CO-OPERATION. Where, under circumstances indicated in the last preceding section, the military commander is required to co-operate with one authority and supersede another, the question is simpler if the military officer is ordered to adhere to the plan adopted by the sheriff whose jurisdiction as a peace-officer includes the city as well as the county. Under such circumstances, the orders of the sheriff would have force in any part of the county, and it would, in most instances, be proper for the governor to direct the sheriff to assume control of the preservation of the peace in the city until a new mayor could be properly inducted into office or the old one brought to see the right.

But where the sheriff is superseded, the mayor, having no jurisdiction outside the city, could not direct affairs beyond the city limits, and in these outside districts the military commander might be ordered to assume supreme control and carry out the will of the governor until order was restored. Under the circumstances last recited, the military commander would act under the mayor within the city (subject, of course, to orders of the governor), but would act solely under the governor's order in the remainder of the county.

(2) See Sec. 193.

121. PRISONERS. In the foregoing situation, where the mayor had been superseded, the military officer would have, under control of the sheriff, jurisdiction over the city prison and probably of the police force. Where the sheriff was superseded, the county jail would probably be under the jurisdiction of the military officer, and would be, for the time being, a military prison. The state prisoners there incarcerated under the orders of the civil authorities would be under the orders of the governor.

122. WHERE A GOVERNOR ACTS INDEPENDENTLY OF CIVIL AUTHORITIES. The governor may dispense with certain statutory formalities where the emergency requires it and the state constitution permits him to do so. Under a statute of the State of Washington, the governor in suppressing riots was required to first :

“Request the local authorities to suppress such riot, * * * and, if they fail, neglect, or are unable to do so, he shall issue his proclamation commanding such persons to disperse, * * * and if thereafter such imminent danger still continues, the governor shall proceed to suppress the same by calling into action all the force necessary to accomplish that purpose.”

But under the constitution of that state the governor was given power to call forth the militia to

execute the laws of the state. And it was held by the Supreme Court that the course of action prescribed by the statute was not binding on the governor when, in his judgment, the danger of riot was so imminent as not to permit of the delay necessary to so many formalities. (3)

Where the governor proceeds to act directly, without specific reference to the civil authorities, the military commander will nevertheless co-operate with such of the authorities as are in accord with the governor's plans and will permit them to exercise their usual functions as fully as is consistent with the orders of the governor. Under these conditions, the machinery of civil government would be disturbed only where it was necessary to do so in order to carry out the orders received by the military commander from the highest civil authority of the state.

123. SEPARATING RIOTERS FROM CITIZENS. It has been held that, in riotous and tumultuous assemblies, all who are present and not actually assistant in their suppression are, in the presumption of law, participants; and the obligation is cast upon a person so circumstanced to prove, in his defense, his actual non-interference. Where, however, the sheriff, or any known conservator of the public

(3) Chapin v. Ferry, 3 Wash. St., 386, 28 Pac. 754, 15 L. R. A., 116.

peace, commands the dispersion of an unlawful or riotous assembly, there can be no neutrals, and a passive looker on, who remains on the spot, refusing to take part in aid of the suppression of the riot, is a principal in the riot.

Under this rule of law a civil officer acting under lawful orders is able to ascertain the character of the assembled crowd. He may by this means brand, in rare instances, even civil authorities as rioters; but could only do so when acting by the direction of other civil authorities or the governor. Where civil authorities have elected to share the lot of the rioters the disturbance amounts to an incipient insurrection, and more drastic measures are necessary than in the case of a riot. Some degree of martial law will be necessary and the governor must be kept advised of the turn of affairs so that he may be able to issue the necessary orders.

- 124. CONCURRENT MARTIAL AND CIVIL LAW. After martial law is declared an officer may lawfully arrest one whom he has reasonable grounds to believe is engaged in the insurrection, or may order the forcible entry of a house. But no more force can be used than is necessary to accomplish the object; and if the power is used for the purpose of oppression, or if any injury is willfully done to person or property, the person by whom or by whose

order it is committed will be answerable. (4)

Where the military commander and certain civil authorities are co-operating to suppress a riot or insurrection, martial law may be employed to supply those branches of the existing civil government which are absent and as a substitute for those functions which the civil authorities have ceased to exercise. In this way martial law only supplements the civil law; it upholds those authorities who are exercising their proper civil powers and rounds out the government by furnishing those powers which are absent or inert. In cases of this nature the military commander must, as at all other times, remember that he is only temporarily in command and that his actions are subject to review as soon as civil government can be re-established. It may be repeated here that when a military commander is exercising military government in a foreign territory he is responsible only to God and his superior officers; but while exercising martial law in his home country he is responsible, not only morally and to military law, for any misconduct, but he may afterwards be held responsible to the people and the state. It is nevertheless the duty of the military commander to obey the lawful orders of the governor and, if such orders are specific, he may obey them without fear of the consequences.

(4) *Luther v. Borden*, 7 How. (U. S.) 1.

125. **HABEAS CORPUS.** It is a general rule that the President of the United States may not suspend the writ of habeas corpus, throughout the whole of the United States, without the aid of legislative authority. But it is now generally conceded that the president, notwithstanding the provisions of the federal constitution, may suspend the writ within any territory affected by an existing state of insurrection. (5) The essence of martial law is the suspension of the writ of habeas corpus and a declaration of martial law would be useless unless accompanied by suspension of the privileges of such writ. (6) It would therefore seem that in the situations indicated in sections one hundred and eighteen and one hundred and nineteen, and in similar situations, the military commander, in districts where the civil peace officers had been superceded, might detain prisoners on his own authority and confine them, for the public good, until all violence had subsided and civil power was re-established. But this power should only be exercised where the military commander had secured specific orders to that effect from the governor.

126. **RIVAL CIVIL AUTHORITIES.** Until the adoption of the constitution of 1843, Rhode Island

(5) *Ex parte Milligan*, 4 Wall. (U. S.) 142; *Griffin v. Wilcox*, 21 Ind., 370, 386. See Secs. 201, 217.

(6) *Luther v. Borden*, 7 How. (U. S.) page 1.

drew its fundamental law from a charter issued by Charles II in 1663. During all this time its so-called charter government existed. About the close of this period a Mr. Dorr headed a reform party which adopted what was styled a new state constitution and elected state officers under it. This was done against the protest of the existing charter government. Both factions claimed to represent a majority of the citizens of the state. An armed insurrection, under Dorr, was organized for the purpose of overthrowing the charter government. The charter government appealed to the president who finally instituted measures for its protection against Dorr's forces, then in arms. At the time of the president's decision a battle seemed imminent; but the action of the federal government, in deciding for the charter government, almost instantly caused the dispersal of Dorr's forces and the restoration of peace.

The supreme court of the United States, in a case involving some of the foregoing facts held that it, as a court, had no power to decide which of the rival governments of Rhode Island was the lawful one. That this power resided in the political branch of the government and that congress, by general laws under Article 4, Section 4, of the federal constitution, had given the president the power, and imposed on him the duty, to guarantee each state a republican form of government. And that part of the

president's duties in this behalf consisted in his exercise of the right to decide whether or not the Rhode Island charter government was lawful, or had been displaced. When the president so decided, the courts were bound to take notice of the decision and act under the direction of the recognized government. On this point the court conclude by saying:

“And if a state court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try.” (7)

The foregoing facts and opinion are set out in full because the principle involved is one of manifestly great importance. Applied to a certain locality in any state this principle declares that the courts must uphold the other branches of the government and must not interfere with their exercise of constitutional powers. Where the constitutional laws of a state direct the governor to execute the laws, the courts can not interfere with his discretionary acts. Moreover, if, under these same laws, the gov-

(7) *Luther v. Borden*, 7 How. (U. S.) 40.

ernor is compelled to decide which of two rival candidates for civil office is the rightful one, such decision is an exercise of the political power which is not vested in the courts and the courts cannot disturb the decision unless it is in plain violation of the governor's constitutional powers. To illustrate: If two rival candidates are both claiming the office of mayor of a city, and the public peace is disturbed by the factions following these rivals, it is the duty of the governor to maintain the peace thus disturbed. In addition to this duty and under proper constitutional provisions it may be the duty of the governor to decide which of the rivals is, in fact, entitled to act as mayor. After this last decision has been made it will probably be the duty of the military commander, on duty at the scene of disturbance, to either co-operate with the declared mayor, or act under his direction.

The questions indicated in this section are too complex to permit of a full discussion here and what has been said may be considered solely as a guide to a fuller investigation of the points that may arise.

CHAPTER ELEVEN.

OUSTING AND REPLACING CIVIL AUTHORITIES.

127. GOVERNOR DECIDES WHEN CIVIL AUTHORITIES SHOULD BE REPLACED. Mr. John M. Waldron, of the Colorado bar, in a brilliant argument in the supreme court of that state, said:

“The Constitution of this state makes the governor the commander-in-chief. It imposes upon him the duty of suppressing insurrection by armed force. He can not shirk that duty; he can not delegate it to anybody else except under his own supervision and control. It is a constitutional grant of authority. Does it say that when the governor arrives on the scene of action with his troops he ceases to be commander-in-chief, and that some local officer who, up to the moment of the arrival of the military, might possibly have been afraid to show his head without the confines of his own hearthstone, shall control the military forces of the state? Does it say that the governor must abdicate his functions to the sheriff and the sheriff be the commander-in-chief of the military forces? Not a word, not a syllable, in the Constitution declares anything of

the sort. Something may be tortured out of the statutes of this state by which the governor, when he arrives on the scene of action, should allow the local authorities, if there are any, to assume charge of the military forces, but any statute that undertakes to strip the governor of this state of his constitutional powers and duties is void. He is the commander-in-chief. The militia, when they are on the ground, are not civil forces; they are military forces. For the time being, by virtue of the exigencies of the situation, they are the paramount power, because all civil law is dormant—it does not exist.”

The foregoing statements were, in effect, held to be good law by the court. The decision, however, was based on the fact that an entire county, in the mining region, was in a tumult of lawlessness which amounted to insurrection. (1)

As has been heretofore shown in section twenty-eight it is an unquestioned rule of law that where the governor's constitutional powers permit him to call out troops to suppress domestic disturbances, his decision that an emergency has arisen which requires such call, is final and cannot be questioned. This power is not abridged by the provision found in so many state constitutions that: “The military shall always be in strict subordination to the civil

(1) In re Moyer, 85 Pac., 190.

power." Such a provision is found in the constitution of New Jersey, but the supreme court of that state held that:

"It is true that whole cities or districts may, on great emergencies, from the necessity of the thing, be declared to be under martial law, and be subjected to all the rules of war by a military commander; and in that case the power of the civil courts is wholly superseded." (2)

The highest courts of Pennsylvania and other states declare the same doctrine. (3) Were this right denied the chief executives of the states, it would be necessary for the federal government to constantly interfere with the executive functions of the various state governments.

There are rare instances, however, where the state legislature is constitutionally endowed with certain functions which properly belong to the governor. As these instances are but exceptions to the general rule, and can be easily determined by a short study of the student's own state constitution, they will not be discussed in this work.

128. GOVERNOR MAY ACT SUMMARILY. With reference to the governor's powers, in preserving the

(2) Kirkpatrick, C. J., in *State v. Davis*, 4 N. J. L. (1 Southard), 311, 312.

(3) *Appeal of Hartranft et al.*, 85 Pa. St., 433; *Chapin v. Ferry*, 3 Wash., 386, 28 Pac., 754; *In re Moyer*, 85 Pac., 190.

peace and executing the lawfully declared will of the people, the supreme court of Pennsylvania, say :

“What, then, are the duties, powers and privileges of the governor? In the language of the Constitution, article 4 section 2, ‘The supreme executive power shall be vested in the governor who shall take care that the laws be faithfully executed.’ Also same article, section 7, ‘The governor shall be commander-in-chief of the army and navy of the commonwealth, and of the militia, except when they shall be called into the actual service of the United States.’ He is, also, invested with the appointing and pardoning powers; the power to convene the legislature in cases of emergency, and to approve, or veto, bills submitted to him by the general assembly. It is scarcely conceivable that a man could be more completely invested with the supreme power and dignity of a free people. Observe, *the supreme executive power* is vested in the governor, and he is *charged with the faithful execution of the laws*, and for the accomplishment of this purpose he is made commander-in-chief of the army, navy and militia of the state. Who, then, shall assume the power of the people and call this magistrate to an account for that which he has done in discharge of his constitutional duties? If he is not the judge of *when* and *how* these duties are to be performed, who is? Where does the Court of Quarter Sessions, or any

other court, get the power to call this man before it, and compel him to answer for the manner in which he has discharged his constitutional functions as executor of the laws and commander-in-chief of the militia of the commonwealth? * * * We had better, at the outstart, recognize the fact that the executive department is a co-ordinate branch of the government, with power to judge what *should* or *should not be done, within its own department*, * * * and that within the exercise of these constitutional powers, the courts have no more right to interfere than has the executive, under like conditions, to interfere with the courts." (4)

On the same point a recent declaration of the supreme court of Idaho is, in part, as follows:

"It is no argument to say that the executive was not applied to by any county officer of Shoshone county to proclaim said county to be in a state of insurrection, and for this reason the proclamation was without authority. The recitals in the proclamation show the existence of one of two conditions, viz.: That the county officers of said county, whose duty it was to make said application, were either in league with the insurrectionists, or else, through fear of the latter, said officers refrained from doing their duty. Under the circumstances, it was the

(4) Appeal of Hartranft et al., 85 Pa. St., 433, 444-5.

duty of the executive to act without any application from any county officer of Shoshone county." (5)

The constitutional provisions under which these two declarations of law were made are those commonly found throughout the union, and the rules so enunciated are not affected by the additional constitutional provision, often found, prescribing that the military shall be in strict subordination to the civil power. Therefore it is a general rule that the governors of the states, in seeking to maintain order within their respective states, have greater powers than has the king of England within the British Isles. The governor, when his duty requires him to act, is accountable to no man for the performance of that duty. He is accountable to no man for the reasonable exercise of his discretion. Therefore, as a general rule, he may use any necessary force to prevent a threatened violation of the law of his state and, when the governor acts under proper constitutional authority, neither the legislative nor the judicial branch of the government may prescribe rules which restrict him in the performance of his duties. Neither of these co-ordinate branches of the government should seek to restrict the executive branch, for it is their duty to aid, in every way possible, in enforcing the laws which they proclaim. If this were not true, then we would have the mon-

(5) In re Boyle, 57 Pac., 706-7.

strous condition of a law-abiding citizen being punished for obeying the very law which was laid down by the authority which afterwards administered the punishment.

129. DELEGATION OF POWERS TO MILITARY COMMANDERS. When the chief executive of the state has decided to oust civil authorities, or replace them, or act independently of them, he issues specific orders whereby a military officer is required to take charge of the situation and use the necessary force to put down the insurrection. These orders, received from time to time from the governor, constitute all the authority which the military commander has in the premises. He will therefore confine himself to a strict adherence to his orders and when any doubt arises will request further directions.

130. PROCLAIMING MARTIAL LAW. Experience has shown that a proclamation is, in some instances, of great benefit in subduing domestic disturbances. The president of the United States can not act, under the laws set out in section forty-two, without first issuing the proclamation there prescribed. The statutes of some of the newer states have followed the federal plan and prescribed that the governor shall issue a proclamation before using force to subdue an insurrection. But it has been shown that in extreme emergencies the governor may dispense

with this formality. (6) The matter of issuing a proclamation is probably within the discretion of the governor and he may cause one to be issued whenever he determines that good will result therefrom.

When such proclamation is issued by the governor it is, in effect, the establishment of at least qualified martial law in all cases where the governor is not acting strictly in aid of the minor civil authorities. Such proclamations will be discussed in the next chapter.

131. ESTABLISHING MARTIAL LAW WITHOUT PROCLAMATION. It has heretofore been shown that the governor may establish a certain degree of martial law without the issuance of a preliminary proclamation. (7) The governor's order requiring troops to act independently of civil authorities in enforcing the laws, alone establishes martial law; but as all acts of this nature are subsequently reviewed and discussed, often by persons ignorant of the facts, it is usually advisable to publish, by proclamation, the facts which have required the use of troops and martial law. Such publication will, in certain instances, save future adverse criticism of the governor's actions and prevent the creation of political thunder by adverse factions. Any import-

(6) See Sec. 122.

(7) See Sec. 122.

ant action by a governor, if taken secretly, is likely to result in future discussions which are sometimes in bad taste and may cause embarrassment. Such discussions put the governor on the defensive and, while no chief executive can be required to defend his lawful actions, these discussions furnish a disagreeable incident which is subversive of that cordial co-operation which should always exist between a governor and the people. There are times when a proclamation is not possible, there are other times when it is not advisable; but, generally, it may be employed to advantage.

132. **OUSTER BY ARREST.** To oust means, legally, to put out; to turn out or eject; to dispossess.
(8)

When proof is certain that a civil officer has cast his lot with insurgents, or has been guilty of riot, in violation of law, the military commander may be ordered to put such delinquent in arrest. (9)

A rioter has been legally defined as one who inflames people's minds, and induces them by violent means to accomplish an illegal object, and it is not necessary that he should take any part in the riot, but it is sufficient if he sets in motion the physical

(8) 3 Bl. Com., 167-173, 201, 202; Burrill's Law Dict.

(9) 3 Cyc., 874; 43 Cent. Dig., cc. 3913-3916.

power, of another, which results in a riot. (10)
If these same acts were performed in furtherance of an insurrection, the delinquent would be an insurgent.

As, however, a civil officer apparently trying to properly perform his duty cannot be arrested, the occasions when it will be necessary to arrest him in order to oust will be extremely rare and on these occasions the governor might simply treat the civil officer as a lawless private person. He will then remove him and may at once appoint a successor. (11)

133. OUSTER BY INDEPENDENT ACTION. The plan commonly adopted by a governor in suppressing insurrection is, either with or without public proclamation, to issue specific orders to a military commander to restore order and enforce the laws in a described district. Thereafter the military commander establishes a military district which territorially covers the one described in the governor's order. Either the governor or military commander then issues whatever orders or proclamations are necessary to establish and maintain the requisite degree of martial law. (12)

(10) 1 Spies v. People, 12 N. E., 865, 961; 122 Ill., 1; 3 Am. St. Rep., 320.

(11) Birkhimer, Mil. Govt. & Mar. Law, 496.

(12) See succeeding chapters.

134. **DISARMING AUTHORITIES.** Immediately upon assuming control the military commander may, if the emergency requires, issue an order requiring all fire arms to be deposited with the military at a certain place. He may also issue an order forbidding the sale or importation of fire arms and deadly weapons. The orders relative to fire arms will necessarily be proclamations because of their public character. In these orders the military commander may specify that all civil officers, constables, sheriffs, marshals, and other peace-officers shall deposit their arms until they obtain permits for their use. These permits will then be issued in the discretion of the military commander.

135. **REINSTATING CIVIL AUTHORITIES.** As the insurrection is gradually suppressed, orders may be issued from time to time reducing the first degree of martial law established, and gradually reinstating the civil officers, or their successors, to the full exercise of their proper functions. When order is completely restored a proclamation to that effect will sometimes be advantageous. This proclamation may be in the form of a military general order requiring the military commander to turn the government over to the proper civil officers.

136. **ESTABLISHMENT OF MILITARY COMMISSIONS.** The authority to appoint martial law courts and approve their sentences, during the civil war,

rested only with the commanding general. (13) This power might be exercised by military commanders of districts, in state service during insurrection, but the better plan would be to create such commission by order of the commander-in-chief. No such commission will act or be created, unless the civil courts have ceased to properly perform their functions. As the rules governing the procedure of courts-martial are nearly always adopted for the procedure of military commissions, a general court-martial may be ordered and this same general court (or certain of its members) (14) may, by order, be given authority to act as a military commission. In this way it would apply the well known rules of military law in the trial of accused members of the military forces and camp followers. It would also, in the trial of all other persons, apply the laws of the land, or, failing these, the custom of war in like cases. Where any of the civil courts can be induced to act, a system of co-operation will be arranged.

137. JURISDICTION OF MILITARY COMMISSIONS. As to the jurisdiction exercised by military commissions it has been said that :

(13) Birkhimer, *Mil. Gov. & Mar. Law*, 527; 4 Wallace, p. 13.

(14) Custom has fixed the minimum number, composing a military commission, at three. Davis *Mil. Law*, p. 309.

“Military commissions, as a rule, should be resorted to for cases which cannot be tried by courts-martial or by the proper civil tribunal. They are, in other words, tribunals of necessity, organized for the investigation and punishment of offences which would otherwise go unpunished.”
(15)

As to the validity of the decisions of this commission, the general sentiment seems to be as follows:

“Nor is there perceived any ground upon which can be based a well-founded claim that the decisions of martial-law tribunals, proceeding within the sphere of their jurisdiction, are less determinate in character than are those of the ordinary courts-martial.” (16)

The decisions of these commissions have been upheld by the supreme court of the United States where the commission had been properly established. (17) Where a governor declares a cer-

(15) Birkhimer, *Mil. Gov. & Mar. Law*, 528; *R. S. I.*, Vol. 8, p. 822.

(16) *Ib.*, 529.

(17) *Mechs. & Traders Bank v. Union Bk.*, 22 Wallace, 276; *Texas v. White*, 7 Wallace, 400; *Handlin v. Wickliffe*, 12 *Id.*, 173; *Rutledge v. Fogg*, 3 Cold., 554.

tain district in insurrection and establishes absolute martial law, and military commissions under it, and civil courts cannot enforce their process because of the disturbance; it would, afterward, be very unreasonable for these same civil courts to declare that, because their powers were dormant, no other lawful powers had been exercised.

138. INVOKING FEDERAL AID. When the chief executive of the state finds that an insurrection, therein, is beyond his control and beyond the control of his state military forces, it is his duty, under Section 5297 of the United States Revised Statutes, which is set forth in section forty-two of this work, to apply to the president of the United States for federal aid. The manner of making this application is indicated in section forty-three.

139. CONTROL OF FEDERAL TROOPS. The federal statutes set out in section forty-two authorize the president of the United States to use troops for two distinct purposes, namely:

First. He may use troops without request, even against the protest of the state authorities, in order to carry out the guarantees of the federal constitution.

Second. He may use troops, when requested by the legislature or governor of a state, in co-operation with the civil authorities of that state in suppressing insurrections.

As to the first of these uses, the president's control is absolute. It has been defined as follows:

“When the President proceeds to use the military power of the nation for the objects mentioned, he does it independently of state authorities. When necessary, he moves the troops to the threatened district. It may be against the protests of the state authorities. He uses the requisite force to sustain the law, suppress rebellion, or to repel invasion. The law intrusts to his judgment the determination of the question how much force the occasion demands. He is expected to meet the crisis. He takes his measures accordingly, and if the condition of affairs be such as to justify the enforcement of martial law, it will be his duty to enforce it.” (18)

As to the second of these uses the practice has been, where the governor has invoked federal aid, for federal troops to co-operate with either the state civil authorities or state troops or both; but the same thing can be said of this situation as of the situations indicated in chapter nine, namely:

Where the governor is aiding civil authorities he is the chief civil authority, as well as the com-

(18) Birkhimer Mil. Gov. & Mar. Law, p. 460; 7 Howard, p. 1; 4 Wallace, p. 2; 21 Indiana, p. 370.

mander-in-chief, and his orders are superior to all others. Where the president is co-operating with civil authorities he is the chief civil authority as well as commander-in-chief of the federal forces. Therefore the president's orders are superior to all others. If the president chooses to order his military officer to co-operate with state troops in executing the will of the governor; then there is but one head to the force which is engaged in suppressing a state insurrection. If the federal military officer is directed to act independently of the state forces: then there may be two heads to the forces which are working for law and order and, while the situation may become delicate, there is no necessity for actual friction where co-operation is executed with judgment and courtesy. In the Idaho disturbances of 1892, the governor invoked federal aid and the president issued his proclamation. Meanwhile both federal and state troops had been moved to the scene of action. The commander of the latter represented the governor in the field. He exercised martial law powers fully, removing the sheriff and appointing a successor. No formal proclamation instituting martial law was made other than the preliminary one of the governor, but martial law was fully exercised until peace and order were restored. The exercise of martial law was by state not federal authorities.

The federal forces upheld the state authorities by their presence and co-operation. (19)

(19) Fed. Aid in Dom. Dis., W. D., 223. On this occasion President Harrison ordered the secretary of war to: "At once send to the scene of disorder an adequate force of troops from the nearest station, under an officer of rank and discretion, with orders to co-operate with the civil authorities in preserving the peace and protecting life and property." Federal troops can not be directed to act under the orders of any civil officer. A. R., 1904, par. 487.

CHAPTER TWELVE.

PROCLAMATIONS.

140. STATUTORY REQUIREMENTS. The federal statutes, shown in section forty-two, are mandatory, and probably require the president to issue a proclamation before using federal troops, either in co-operation with civil authorities or acting independently in suppressing insurrection. Similar statutes, which exist in some of the states relative to preliminary proclamations, need not be followed by the state executive where adherence to such statute would cause dangerous delays. (1) But if the constitutional authority under which the governor acts indicates that a proclamation should be issued before using force, such constitutional requirement is mandatory and cannot be ignored.

141. FORM OF FEDERAL PROCLAMATION. A federal proclamation used by President Grant in 1874 was immediately effective in removing the imminent danger of a civil war in Arkansas. The difficulties arose, as in the Dorr rebellion, out of a contest between two persons for the governorship of that state. When it had been demonstrated to

(1) See Secs. 122, 130.

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the president that intervention by him was absolutely necessary, he recognized Baxter as the governor in the following proclamation:

“BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas, certain turbulent and disorderly persons, pretending that Elisha Baxter, the present executive of Arkansas, was not elected, have combined together with force and arms to resist his authority as such executive and other authorities of said State; and

Whereas, said Elisha Baxter has been declared duly elected by the general assembly of said State as provided in the Constitution thereof, and has for a long period been exercising the functions of said office, into which he was inducted according to the constitution and laws of said State, and ought by its citizens to be considered as the lawful executive thereof, and

Whereas, it is provided in the Constitution of the United States that the United States shall protect every State in the Union, on application of the legislature, or of the executive when the legislature

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can not be convened, against domestic violence; and

Whereas, said Elisha Baxter, under Section 4 of Article IV of the Constitution of the United States and the laws passed in pursuance thereof, has heretofore made application to me to protect said State and the citizens thereof against domestic violence; and

Whereas, the general assembly of said State was convened in extra session at the capital thereof on the 11th instant, pursuant to a call made by said Elisha Baxter, and both houses thereof have passed a joint resolution also applying to me to protect the State against domestic violence; and"

(Here followed quotations from the provisions of the statutes set out in section forty-two of this work.)

"Now, therefore, I, Ulysses S. Grant, President of the United States, do hereby make proclamation and command all turbulent and disorderly persons to disperse and retire peaceably to their respective abodes within ten days from this date, and hereafter to submit themselves to the lawful authority of said executive and the

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other constituted authorities of said State; and I invoke the aid and co-operation of all good citizens thereof to uphold law and preserve public peace.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington, this 15th day of May, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-eighth.

(SEAL.)

U. S. GRANT.

By the President:

HAMILTON FISH, Secretary of State." (2)

The foregoing proclamation was necessarily long for the reason that the president was compelled to decide which of two state governments was the legal one. If this requirement had not existed, the preliminary statement of facts could have been drawn in a single paragraph, as was done by President Hayes in 1877, as follows:

"And whereas, the governor of the State of Pennsylvania has represented that domestic violence exists in said State which the authorities of said State are unable to suppress." (3)

(2) Fed. Aid in Dom. Dis. War Dept., p. 176.

(3) Ib., p. 196.

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The foregoing forms of federal proclamations are here inserted to indicate the course that a chief executive of the federal government usually takes in these emergencies.

142. FORM OF A STATE PROCLAMATION. The governor of Colorado recently issued the following proclamation:

"State of Colorado,
Executive Chamber, Denver.

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Whereas, There exists in Las Animas county, State of Colorado, a certain class of individuals who are fully armed and are acting together, resisting the laws of this State and offering violence to citizens and property located in said Las Animas county; and

Whereas, At divers and sundry times various crimes have been committed in Las Animas county by said individuals, or by and with the aid and under the direction of said vicious and lawless persons; and

Whereas, From time to time attempts have been made to destroy property in said county by the use of dynamite or other explosives, which would have resulted in the destruction of a vast amount

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of property and considerable loss of life;
and

Whereas, Threats, intimidations and violence are daily **threatened** and frequently resorted to by said lawless class of individuals; and

Whereas, The civil authorities of said Las Animas county have notified me that there is a great body of unemployed men in said Las Animas county, who are arming themselves with deadly weapons in apparent anticipation of an open and violent conflict, without any respect for our government or its Constitution and laws; and

Whereas, it is estimated by the sheriff of said Las Animas county that not less than fifteen hundred men are fully equipped with shot guns, rifles, pistols and deadly weapons, thoroughly instructed in their use, and ready for prompt action; and

Whereas, such outbreak of violence, in opposition to the Constitution and laws of this State is imminent, which would involve serious destruction of property and the loss of life to many innocent citizens; and

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Whereas, by reason of such lawlessness, acts of violence and disturbances, the civil authorities are unable to cope with the situation;

Now, therefore, I, James H. Peabody, governor and commander-in-chief of the military forces, by virtue of the power and authority in me vested, do hereby proclaim and declare the said county of Las Animas, in the State of Colorado, to be in a state of insurrection and rebellion.

In testimony whereof, I have hereunto set my hand and caused to be affixed the great seal of the State, in the city of Denver, the State capital, this twenty-second day of March, A. D. one thousand nine hundred and four.

(SEAL) (Signed) JAMES H. PEABODY.

By the Governor, Attest:

(Signed) JAMES COWIE,
Secretary of State." (4)

The foregoing proclamation does not follow the federal plan in warning the insurgents to disperse by a given time. It was probably the governor's understanding that such a warning would not be heeded; but where such warning may be of benefit

(4) Biennial Report, Adjutant General of Colorado, 1903-4, p. 17.

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it is advisable to incorporate it in the proclamation. The use of the word "rebellion" is possibly open to objection.

143. RECITALS IN PROCLAMATIONS. The recital of facts in a proclamation shows the conditions which caused it to be issued. These facts should be ascertained as carefully as time permits. The officer believes the conditions exist and the discretion he thereupon exercises cannot be questioned. With reference to this principle the supreme court of Idaho said:

"The truth of recitals of alleged facts in a proclamation issued by the governor, proclaiming a certain county in the State to be in a state of insurrection and rebellion, will not be inquired into or reviewed on application for a writ of habeas corpus." (5)

144. MILITARY DISTRICT PROCLAMATION. Where a certain portion of the state is in insurrection, as indicated in section one hundred and thirty-three, a proclamation may be issued after the military force is on the ground, from the military headquarters of the district. A form for such a proclamation is submitted:

HEADQUARTERS.

—————County Military District

(5) In re Boyle (Sup. Ct. Idaho, 1899), 57 Pac., 706.

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—————, Ohio, February 11, 1906.

1. This county is now in possession of the military forces of the State of Ohio, who have come to restore peace and order and to enforce the laws of the State, under authority and by command of the governor. The colonel commanding said military forces therefore makes known and proclaims the objects and purposes of the State in thus taking possession of the ————— county military district, and the rules and regulations by which the laws of the United States and the State of Ohio will be for the present, and during a state of insurrection, maintained; for the guidance of all good citizens, as well as others who may have been in insurrection against its authority.

2. There exists in (here state conditions showing insurrection). The Military District Commander, therefore, will cause the county to be governed, until the restoration of civil authority and his further orders, by military authority. This measure is deemed necessary because of the facts previously recited, and other facts.

3. (Provision for surrender of arms, see section 134).

4. The persons and property of all well disposed citizens will be protected and safeguards will be furnished wherever necessary and possible.

5. All persons who have heretofore engaged in

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or supported the insurrection, or given the insurgents aid and comfort, who shall return to peaceful occupations and preserve quiet and order, holding no further communications of any kind with a lawless person or persons, will not be disturbed in person or property by the military forces except where the exigencies of the public service may render it necessary. All rights of property of whatever kind will be held inviolate, subject to law. All persons in the district are required to pursue their usual vocations. All shops and places of business (except those hereinafter mentioned) are to be kept open in the usual manner, as in times of peace.

6. All saloons and places where intoxicating liquors are sold at retail as a beverage will be closed and kept closed until further order.

7. Violations of state and federal law, disorders and disturbances of the peace, and interferences with the military forces, will be referred to a proper authority for trial and punishment. Misdemeanors will be subject to the civil authority, if it chooses to act. Civil causes will await the ordinary tribunals.

8. No publication, either by newspaper, pamphlet or handbill, reflecting in any way upon the United States, or the State of Ohio, or their officers, or tending to influence the public mind against them, will be tolerated. Comments upon the action of the

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military forces, or of the insurgents, will not be permitted.

9. All good citizens will render aid in restoring civil government, etc.

10. All assemblages of persons in streets or highways, either by day or night, tend to disorder, and are forbidden.

11. Vagrancy will not be tolerated.

12. It is hoped that martial law, hereby established, will be mild and gentle in its enforcement; but it will be vigorously exercised when occasion demands.

By order of

.....

.....

.....

.....

Adjutant of the District.

The foregoing outline is partly taken from a recent Colorado proclamation. (6) Some of the suggestions are of value only where no co-operation of the civil authorities can be relied on.

145. SHERIFF'S PROCLAMATION. In the United States there is probably no statute of which the ancient English riot act is an exact prototype. It pro-

(6) Biennial Report Adjutant General of Colorado, 1903-4, p. 114, 115.

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vided that a riotous assembling of twelve persons or more, not dispersing upon proclamation, constitutes high treason under a statute of Edward the VI. This statute was many times changed by the English parliament, but it generally provided for a proclamation by a justice of the peace, sheriff, under sheriff, or major. (7)

The purpose of "reading the riot act" was to compel the members of the mob to disperse or declare themselves rioters by persisting in riotous acts after the proclamation was read.

A sheriff's proclamation of the present day may follow the old English practice which consisted in reading the statutory proclamation commanding the assembled mob to disperse. Such a proclamation should follow the statutory provisions, relative to riot, of the state in which it is read. The laws of many states require the Riot Act to be read to a mob before overt proceedings against it. (8)

146. SPECIAL PROCLAMATIONS. When troops are acting in the aid of civil authorities all proclamations will be issued by the civil authorities.

Where martial law has been established, special proclamations may be issued by the governor or by the commander of a military district. All special

(7) 4 Bl. Com., 143.

(8) Davis Mil. Law, p. 327, note; but see Secs. 122, 140.

proclamations are supplemental to the first general one and may refer to it or repeal part of it.

Special proclamations may be necessary from time to time and are often advisable in directing the restoration of peace and order. They may be used for any purpose which requires the publication of a general notice to civilians: such as defining certain offenses, reinstating civil courts and civil officers, etc.

147. **FORFEITURE OF ESTATE.** Under the old English common law there were many instances where crimes caused forfeitures of the estates of the offenders. Most law writers in this country disclaim any such liability at the present day; but there is a roundabout method of forfeiture in some of the states at the present time. To illustrate: there are statutes which permit persons whose property is destroyed by a mob to recover from the county or city in which the civil government was lax enough to permit the destruction. There are other statutes which provide for a similar recovery when a prisoner is injured or killed by the direct attack of a mob. In most of these statutes the county or municipality which pays these damages may recover against any of the parties composing such mob. Therefore, by this circuitous method, a person may pay a heavy penalty because of his presence with a mob which does violence to persons or property.

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It follows therefore that, in those states where such liability exists, where a mob is partly composed of persons of property, a proclamation warning them of their liability may sometimes prove efficacious.

148. FINAL PROCLAMATION. When the necessity for martial law no longer exists, a proclamation by the governor or military district commander may be issued stating that the conditions theretofore existing have changed, that peace and good order are restored and that the civil authorities are able and willing to control the situation, perform their legal functions and enforce the law. With these premises this final proclamation might conclude with the statement that further application of military authority, under the general martial law proclamation, is suspended and that the troops still in service will thereafter act in support of, and in subordination to, the legally constituted civil authorities of the district; and that certain troops will remain on duty, to enable the civil authorities to enforce obedience to law and to protect life and property, until further orders. Such proclamation should conclude by a statement of the exact time upon which it becomes operative.