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NOTES.

PRODUCTION OF DOCUMENTS UNDER R. S. OF U. S., SEC. 724—PRODUCTION BEFORE TRIAL—HOW FAR RIGHT IS DISCRETIONARY WITH COURT—THE RIGHT TO CUMULATIVE EVIDENCE.—This section of the revised statutes has frequently given rise to judicial interpretation. But the question generally presented has been whether production by virtue of this statute may be ordered before the trial at law or only at the trial at law. The various Circuit Courts flatly disagree at present on that question. Many of these conflicting rulings are collected in Vol. 56 (O. S.) Penna. Law Review, (American Law Register) pp. 400-402, wherein it is contended that the statute should, by analogy to an auxiliary bill in equity for the discovery of documents, afford production and inspection before trial.

A recent decision of the Circuit Court of the United States for the Western District of Missouri, Rosenberger v. Shubert, *et al.*, 182 Fed. 411, (1910), also holds that the Statute may afford production in advance of trial.

The principal case also decides another very important point, viz.:—that under the same Statute there must exist a necessity for the production of the document, "by reason of the mover's inability to secure the necessary information from any other source * * * for the preparation of the case for trial."

Is this a correct interpretation of the R. S., Sec. 724, Statute which authorizes the Court to order production of documents "which contain evidence pertinent to the issue in cases and under circumstances where they might be compelled to produce the same by ordinary rules of proceeding in Chancery"?

Merwin's Equity, p. 477, asserts exactly the contrary of the above case, the author remarking: "Discovery will not be refused because the same facts can be proved by other testimony, but discovery will be granted in order to confirm or even to dispense with such other proofs."

In Story's Equity Pleading, Sec. 324 (7th Ed.), it is said: "It is not necessary to allege in the bill that the plaintiff has no other witness or evidence to establish at law the facts of which the discovery is sought; for he is entitled to it, if it be merely cumulative evidence of material facts." Mr. Merwin points out that Judge Story was also a member of the Court which decided the case of Brown v. Swan.[1] It is on the supposed application of this Supreme Court decision that the principal case was decided. The true meaning of the case of Brown v. Swan will be considered later.

The principal case was an action at law on a *quantum meruit* for professional legal services. The plaintiff had acted as the defendant's counsel in a litigation which resulted in the acquisition by his clients of the Shubert Theatre in Kansas City, Missouri. The plaintiff moved for production before trial of two books of the defendants, (1) the "weekly statement book" alleged to contain the income and expenses of the said theatre and (2) the "pass-book" containing deposits by the defendants in a particular bank, these deposits having been derived only from the theatre's receipts.

"Plaintiff desires the information * * * for the purpose of showing the amount in controversy in the former action and the financial ability of the defendants to pay the fees sued for." (P. 412.)

The issue at law being, what is a reasonable fee for the plaintiff's services, there can be no doubt whatever that the evidence as to the value of the property gained for the defendant through the plaintiff's successful services was material evidence, pertinent to that issue.

The question presented is therefore plainly this, whether a bill in equity in aid of such an action would lie for the production of these papers in the absence of any averment in the bill that the papers were indispensable to prove the case at law of the plaintiff? In Chancery the test of a plaintiff's right to inspect the defendant's documents in such a case was not the indispensable nature of the

[1] 10 Peters, 497.

documents but whether the documents might have a tendency as relevant evidence to prove the case of the plaintiff. If relevancy existed, discovery was an absolute right. The Chancellor had no discretion.

Vice Chancellor Wigram said in Earl of Glengall v. Frazer, 2 Hare R. 99, "The plaintiff is in this court entitled to an answer from the defendant, not only in respect of facts which he cannot otherwise prove, but also as to facts the admission of which will relieve him from the necessity of advancing proof from other sources." See also Bureton v. Gamul, 2 Atk. 241 and Finch v. Finch, 2 Ves. 492, Lord Hardwicke lays down the chancery practice as being "that every plaintiff is entitled to have a discovery from defendants to enable him to ascertain facts material to the merits of his case either because he cannot prove or in aid of proof; for a man may be entitled to an answer of what he can prove to avoid expense."

Hill, D. J.,[2] most nearly strikes the proceedings in chancery when using the following language "The motion should describe the books or papers with as much certainty as may be and should further state, that, according to the mover's knowledge or information and belief, the books or papers called for will tend to prove the issue in favor of the mover."

In many cases, no doubt, the moving party has alleged a necessity for the production of the papers but the averment went beyond the pleading required.[3]

Judge Wallace, said: "It is a rule of the English Courts that a party may maintain a bill of discovery in equity not only when he is destitute of other evidence than the oath of the adverse party, to establish his case, but also to aid such evidence or render it unnecessary." [4]

Wigram, V. C., said: "He must show that it is or may be evidence which may prove or lead to or assist in proving his case at the hearing of the suit." [5]

Obviously the attempt to exercise discretion where relevancy is admitted introduces this absurdity, that the Chancellor must undertake to predict in advance of trial how convincing the plaintiff's evidence will be to a jury without the corroboration of the documents sought.

The fundamental principle which justifies the production of documents in a bill for documentary discovery, is that the defendant admits by his answer that he has documents in his possession which relate to the plaintiff's case. Unless this admission can be obtained

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[2] Lowenstein v. Carey, 12 Fed. 943 (1882, N. D. Miss.).

[3] United States v. Young, 10 Benedict (1879, So. D. N. Y.), under Section 724; United States v. Hutton, 10 *Idem*, 268 (1897); Bloede v. Bancroft, 98 Fed. 175 (1899).

[4] Colgate v. Compaigne Francaise Co., 23 Blatchf. 84 (1885).

[5] Atty. General v. Thompson, 8 Hare, 106 (1849).

from the defendant's answer no production was ordered.. Hence no injustice could be done.

This equitable doctrine of documentary discovery is based upon the principle that trials are thereby made more expeditious and justice cheaper if the plaintiff can obtain from the defendant the proof of facts which otherwise the plaintiff could prove, but could prove only at perhaps a greater expense than by the bill for discovery.

Judge Story clearly explains the true meaning of Brown v. Swan in his Equity Pleading, *supra.*

"It would be otherwise if the bill should not only ask discovery but should ask relief in equity, for in the latter case the bill would seek to withdraw the whole jurisdiction from the proper court of law and to give it to the Court of Equity."

G. P. A.

CIVIL LIABILITY OF SOLDIERS OBEYING COMMANDS OF SUPERIOR OFFICERS.—The question which this note is intended to raise is this: Can a solider absolve himself from civil liability for his acts by showing that he was acting in obedience to the command of his superior officer. It is beyond doubt a good defence for acts done in time of war on the field of battle or in the direct conduct of the war itself.[1] Equally true it is not a defence in times of absolute peace and quiet when no disturbance threatens the peace of the community. In war the will of the commanding officer is the law, and the civil law, is suspended for the time being The existence of a system of law implies power to compel obedience, and as the courts of civil law cannot enforce their decrees in time of war, the civil law, as law, must of necessity cease to be the law of the land at that time. But martial law is a law of necessity,[2] and when the necessity for it ceases the civil law becomes again the supreme law of the land. In ordinary times of peace the civil is always above the military law.[3] Any other rule would exempt the militia from obedience to the will of the people as expressed by their legislature, and render the civil rights of all citizens open to the despotic control of the commanding officer of the district.

The question arises, is there not some intermediate state when the country is not at war, in the proper sense, and yet is not in a state of peace and quiet? There are frequent periods in all states when the civil authorities are powerless to quell disturbances, and the strong hand of the military must be called upon to re-establish order. It is just at this point that the conflict arises in the cases; some holding that peace still reigns and that where there is peace

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[1] Birkhimer Military Government, 448.

[2] *In re* Ezeta, 62 Fed. 972; Diekelman v. U. S., 92 U. S. 520; Com. v. Shortall, 206 Pa. 165.

[3] Com. v. Small, 26 Pa. 31.

the commands of a superior officer are no excuse; others holding that a condition so like war exists that martial law prevails until peace and security is restored.

The three divisions of military jurisdiction under the constitution were stated by Chief Justice Chase.[4]

The first is a jurisdiction under military law. This exists both in times of peace and times of war, and is founded on express statutory enactment prescribing regulations and rules for the internal government and regulation of the land and naval forces of a country. This does not suspend or supersede in any way, the civil law. The soldier still retains the duties and liabilities of a civilian and may be tried for any offence of which the civil courts have jurisdiction.[5] The civil law has a concurrent jurisdiction which is supreme to military law even on the military reservations. Thus the mere fact that a person killing another was sergeant of the guard at a fort and the person killed was a private soldier, does not of itself make the killing a lawful homicide, nor give to a military tribunal an exclusive jurisdiction of the case.[6] So also if a sentinel stationed at the gate of a fort should wantonly shoot a civilian endeavoring to enter in the daytime; or an officer should wilfully slay a soldier for misconduct, the civil law court would have a complete jurisdiction over the offences. The mere fact that the parties were soldiers would not give them immunity from civil proceedings for so gross an outrage.[7]

The second class of military jurisdiction consists in a military government in the seat of war without the boundaries of the United States, and applies only to cases of actual war.

The third is martial law proper and is to be exercised within the limits of the United States in time of invasion or insurrection or during rebellion within the limits of the States maintaining adhesion to the National Government, when the public danger requires its exercise, and within districts or localities where ordinary law no longer adequately secures public safety and public rights. It would seem from this that Chase thought that martial law would exist even in times of general peace when public safety and security made its exercise necessary. Nothing can be found in the opinion of the majority in *ex parte* Milligan [5] that is *contra* to this. The decision was based on the fact that there was no necessity for the exercise of martial law in Indiana at that time, there being no rioting, and the courts of the civil law being open for the just trial of criminals and redress of grievances.

The author of an interesting article on the case of Private Wadsworth,[8] states that *ex parte* Milligan ought to estabilsh the

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[4] *Ex parte* Milligan, 4 Wall. 2, dissenting.

[5] Franks v. Smith, 134 S. W. 484.

[6] United States v. Carr, Fed. Cas. 14,732.

[7] United States v. Clarke, 31 Fed. 710.

[8] 51 Univ. of Penna. Law Review 87, Owen J. Roberts, Esq.

proposition that martial law is not possible under the Constitution, but it is very difficult to see how he reaches this conclusion. The case seems plainly to rest only on a matter of fact, the lack of necessity for the existence of martial law in Indiana at that time.

In Pennsylvania, at least, it is clear that in times of riot, when the civil authorities no longer can control the situation, martial law may exist.[9]

The national guard were called into service by the Governor to quell rioting in the coal regions. A private militia-man, acting fully within the orders of his commanding officer, shot and killed a civilian whom, it afterwards appeared, was innocent of unlawful intent but who was acting, at the time, under circumstances making a contrary belief reasonable. Upon a petition for the writ of *habeas corpus,* after arrest by the authorities, the Supreme Court said: "It is not unfrequently said that the community must be either in a state of war or of peace, as there is no intermediate state. But from the point of view now under consideration this is an error. There may be peace for all ordinary purposes of life and yet a state of disorder, violence and danger in special directions, which though not technically war, has in its limited field the same effect, and if important enough to call for martial law for suppression, is not distinguishable, so far as the powers of the commanding officers are concerned, from actual war. It was pointed out that many authorities hold that martial law exists wherever the military arm of the government is called into service to suppress disorder and restore the public peace. The sheriff, as the highest executive officer of the country, may retain the command, and if he does so, ordinarily the military must act in subordination to him. But if the situation goes beyond county control, and requires the full power of the state, the Governor intervenes as the supreme executive and he or his military representative becomes the superior and commanding officer.

"The effect of martial law is to put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order and security of life and property are concerned there is no limit but the necessities and exigencies of the situation. And in this respect there is no difference between a public war and a domestic insurrection. What has been called the paramount law of self defence, common to all countries, has established the rule that whatever force is necessary is also lawful." [9] "This law, (*i. e.,* the law of self defence) applied nationally, is the martial law, which is an offshoot of the common law, and, although ordinarily dormant in peace, may be called forth by insurrection and in invasion." [10]

It is argued against the existence of martial law that it would make an end of free government, and make life, liberty, and property subject to the will of the commanding officer. Civil liberty and

[9] Com., *ex rel.,* Wadsworth v. Shortall, 206 Pa. 165.

[10] Hale Am. Const. Law, 924.

martial law cannot endure together, and in the conflict one or the other must perish.[11]. Martial law destroys every guarantee of the Constitution, and effectually renders the military independent of and superior to the civil power. The answer is that martial law is a law of necessity [12] and no more deprives a citizen of a constitutional right than the dynamiting of buildings in a burning city to save the unburned portions from total destruction. If the officers act in excess of the necessity they are liable civilly and criminally for such excess.[13] The safeguards against martial law are not found in the denial of its protection, but in the amenability of the president to impeachment, of military officers to the civil and criminal laws and to military law; in the frequent change of public officers, and the dependence of the army on the pleasure of the legislature.[14]

The ultimate determination of the validity of the defence of command of a superior officer depends whether the jurisdiction in which it is pleaded, recognizes the existence of martial law in times of riot and disturbance, when the soldiers are called into active service to re-establish order. The recent case of Frank v. Smith [15] distinctly repudiates the theory that martial law can exist except when actual war is being waged, and holds that the orders which a soldier may obey with impunity from civil liability are confined to such as a peace officer in this discharge of his duty might execute. This court recognized the difficult position of a soldier who may be liable to be shot for disobedience of orders, or be hanged by a judge and a jury if he obeys them, and suggests that the soldier's embarrassing position will be ameliorated by holding that his liability is that of a peace officer. But unfortunately the soldier's position remains almost equally serious, for he is still liable to be shot for disobedience to orders, while to give him the rights of a civil officer will not meet the range his superior's commands may take..

A better rule, giving protection to the soldier and to the civilian alike, is laid down in a number of cases: "Unless the act were manifestly beyond the scope of the soldier's authority, or were such that a man of ordinary sense and understanding would know that it was illegal and it would be a protection to him if he acted in good faith and without malice." "In such cases justice to the subordinate demands, and the necessities and efficiency of the public service require, that the orders of the superior should protect the inferior, leaving the responsibility to rest where it properly belongs, upon the officer who gave the command."

To the same effect is the case of U. S. v. Carr,[16] and in Riggs v.

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[11] *In re* Egan, 5 Blatchf. 319; Franks v. Smith, *supra.*

[12] *In re* Ezeta, *supra;* Diekelman v. U. S., 11 Ct. Claims, 417; Carver v. U. S., 16 Ct. Claims, 361; Birkhimer, Mil. Govt. 9.

[13] Birkhimer, Mil. Govt. 314.

[14] Idem. 306.

[15] 134 S. W. 484 (Ky. 1911).

[16] McCall v. McDowell, 1 Abb. (U. S.) 22.

State,[17] it was stated that any order given by an officer to his private which does not expressly and clearly show on its face, or in the body thereof, its own legality, the soldier would be bound to obey, and such orders would be a protection to him. "A soldier, consequently, runs little risk in obeying any order which a man of common sense so placed would regard as warranted by the circumstances.[18]

G. H. C.

[17] 4 Cold. 85.
[18] Hare. Const. Law, 920.