

MILITARY LAW AND PRECEDENTS (1895)

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CHAPTER IV. THE UNWRITTEN MILITARY LAW.

While the Military Law has derived from the Common Law certain of the principles and doctrines illustrated in its code, it has also a *lex non scripta* or unwritten common law of its own. This consists of certain established principles and usages peculiar or pertaining to the military status and service, and which, though unenacted, are recognized in the 84th article of war, under the designation of "the custom of war," as a means for the guiding of courts-martial in the administration of justice in doubtful cases. The same are also recognized by the courts and legal authorities as operative and conclusive as to questions in regard to which the written military law is silent.¹

This unwritten law may be said to include: 1. The "customs of the service," so called; 2. The unwritten laws and customs of war.

1. USAGES OR CUSTOMS OF THE SERVICE.

These, whether originating in tradition or in specific orders or rulings, are now, *as such*, not numerous, a large proportion, in obedience to a natural law, having changed their form by becoming merged in written regulations embraced in the General Regulations of the Army.² The regulations, for example, on such subjects as discipline, precedence, command, arrests, and the procedure of courts-martial, are in great part but the specific expression of usages of more or less early date, most of which have come to us from the British service.

As to the procedure of military courts. Here, however, *usage* still governs as to various important particulars. Thus a reference to usage as furnishing a guide for the judgement of the court upon the FINDING is not infrequently required to be made on military trials, and especially as apposite to the question whether the facts alleged or proved constitute the military offence charged. For example, –whether an order which the accused is charged to have disobeyed was a "lawful" order; whether the accused is to be considered as having been "on duty" at the time of his alleged offence; whether an officer charged to have been assaulted by a soldier was at the time "in the execution of his office;" whether certain acts amount to "conduct unbecoming an officer or a gentleman," or to "conduct to the prejudice of good order and military discipline;" in what acts consist of the offences of false muster, mutiny, misbehavior before the enemy, breach of arrest, or desertion; –as to such questions, the court in deliberating upon its judgment (as also the commander in passing upon the same), will constantly recur to the general usage of the service as understood and acted upon by military men.

Usage may also be authoritative in connection with the question of the punishment to be imposed by the SENTENCE. The Articles of war and the

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Regulations indeed specify nearly all the species of punishment to which an officer or soldier may be subjected; but to determine in some cases as to the kind and in others as to the *degree*, in amount or duration, of the proposed punishment; to decide whether the same is sanctioned by custom or is "unusual; as also in some instances to indicate or direct as to the form of the execution of the penalty – the court, (or the reviewing authority,) will not infrequently have occasion to take into consideration the unwritten law or practice of the service.³

2. LAWS OR CUSTOMS OF WAR.

These are the rules and principles, almost wholly unwritten, which regulate the intercourse and acts of individuals during the carrying on of war between hostile nations or peoples. While properly observed by military commanders in the field, they may often also enter into the question of the due administration of justice by military courts in cases of persons charged with offences growing out of the state of war. Such laws and customs would especially be taken into consideration by *military commissions* in passing upon offences in violation of the laws of war. But courts-martial also, in time of war, may have occasion to recur to the same, upon trials of military offences peculiar to a state of war and expressly made cognizable by such courts by the Articles of war – as, for instance, the offences of relieving an enemy (Art. 45), corresponding with or giving intelligence to an enemy (Art. 46), forcing a safeguard (Art. 57), and the offence of the spy.⁴ (Sec. 1343, Rev. St.) And so, upon trials involving the rights or obligations of prisoners of war. In such cases the unwritten laws and customs of war, as generally understood in our armies or as defined by writers of authority, will often properly be consulted as indicating whether certain acts are to be regarded as constituting the offences charged, or what measure of punishment will be just and adequate in the event of conviction. Certain of these laws and customs will hereafter be referred to in considering particular Articles of war. In the main, however, they pertain to the separate Title of the Laws of War.

ESSENTIALS OF A USAGE OR CUSTOM.

As to what constitutes a usage or custom in law, it is laid down by the authorities that it must consist of a uniform, known practice of long standing, which is also certain and reasonable,⁵ and is not in conflict with existing statute or constitutional provisions. A civil custom cannot set aside or modify the statute law,⁶ or subsist in regard to any matter regulated by such law.⁷ Moreover a prevailing usage is superseded when an enactment is made covering the subject: a usage can grow up or continue only in reference to a subject upon which the written law is silent or quite obscure. So, a usage or custom of war or of the military service, to be recognized and acted upon as such by a military court or commander, must have prevailed without variation for a long period, must be well defined, equitable, and uniform in its application, must not be prejudicial to military discipline, and must not only not be at variance with the statute or written law relating to the army but must pertain to a subject not provided for by such law.⁸ A ministerial officer (as it has been observed by a U.S. Court) cannot institute a usage, but the same must be built up out of a

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series of precedents; so, a custom of the service cannot be created by isolated or occasional instances, or by practice of a particular command or commander, but must be a usage of the army at large or of some separate or distinct branch of the military establishment, as, for example, the Military Academy and Post of West Point. An illegal or unauthorized practice, however frequent or long continued, cannot constitute a legal usage.

CUSTOM OF THE SERVICE AS A DEFENSE.

It will be apparent from the foregoing that an alleged military usage cannot avail an officer or soldier charged with a military offence, to vindicate his act, except where its existence and its lawfulness are susceptible of exact proof. "Custom of the service" – it is remarked in a General Order – "is a treacherous tribunal, and it is a hazardous thing for an officer to appeal to it to justify failure to obey orders or a departure from strict compliance with the articles of war." The existence in a command of an unauthorized practice, sanctioned by a commanding or superior officer, may sometimes extenuate the act of a subordinate who adopts it, but, unlike a legal custom, it cannot serve as a *defence*.⁹

Footnotes:

¹ "The general usage of the military service, or what may not unfitly be called the customary military law." Story, J., in *Martin v. Mott*, 12 Wheaton, 35. And see *Barwis v. Keppel*, 2 Wilson, 314; *U.S. v. Macdaniel*, 7 Peters, 14; *U.S. v. Webster Daveis*, (2 Ware,) 42, 43, 56; 1 Opins. At. Gen., 699; 2 Id., 461; 1 Bishop, C. L., § 50; Cooley, Prins. Const. Law, 137; Prendergast, 53; Simmons, § 80; Clode, M. L., 128; O'Brien, 223; De Hart, 20; Kautz, Customs of the Service. For an *express statutory* recognition of "the usages and customs of armies," and "the custom and usage of the sea service," see c. 27 s. 8, and c. 24, s. 11, Acts of March 2, 1799.

² Compare *U.S. v. Webster, Daveis*, (2 Ware,) 56; O'Brien, 223.

³ Less frequently now indeed, in view of the enactment of the statute of Sept. 27, 1890, c. 998, authorizing the President to prescribe maximum punishments since prescribed by him in G. O. 21 of 1891, (amended by G. O. 16 of 1895.)

⁴ The original Article of War of 1806, in regard to spies, provided that, on conviction they should "suffer death according to the law and usages of nations."

⁵ *U.S. v. Duval*, Gilpin, 356; *Collings v. Hope*, 3 Washington, 149; *U.S. v. Buchanan*, 8 Howard, 102; *Knights of Pythias' Case*, 3 Brewst., 452; *Minis. v. Nelson*, 43 Fed., 777; 2 Greenl. Ev., § 251; 2 Parsons, Con, 48; Lawson on Usages and Customs, 2-15. It must be so long-continued and notorious that all persons concerned may be presumed to have knowledge of it. *Wadley v. Davis*, 59 Barb., 503; *Saint v. Smith*, 1 Cold., 51.

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⁶ 6 Opins. At. Gen., 73. But though usage cannot alter the statute law, it may be evidence of the construction given to it. U.S. v. Gilmore, 8 Wallace, 330; 2 Opins. At. Gen., 460; 3 Id., 5. This is especially true of the usages of the executive departments of the government. U.S. v. Gilmore; U.S. v. Lytle, 5 McLean, 17; U.S. v. Maurice, 2 Brock, 100.

⁷ “Generally, a statutory enactment controls all prior usages and laws, and establishes the rule which governs the subject-matter.” U.S. v. Collier, 3 Blatchford, 332.

⁸ “In order to apply it” (the custom of war) “to any particular case, it must be certain and well defined, and clearly not opposed to any law or regulation.” De Hart, 20. There can be “no excuse for a practice which, with whatever good intentions, is forbid by law.” G.O. 1, War Dept., 1861. “Customs of service can only be taken as precedents to follow, when intrinsically proper of themselves, and supplementary to the written law and regulations, on points on which the latter are silent, and when not in direct opposition to these.” G.O. 2, Dept. of Texas, 1874. (Gen. Augur.) “The evidence of a custom to disobey a General Order was rightly rejected by the court. A custom, to be a good one, must not be contrary to law, or the law governing troops, but must be a general custom, a well-known custom to all the command.” G.C.M.O. 2, Dept. of Va. & No. Ca., 1865. (Gen. Butler.) And see Hough, C.M., 372, 620; G.O. 4, Dept. of La., 1866; Do. 15, First Mil. Dist., 1870. That a custom of the service be *uniform* is held by the court in U.S. v. Buchanan, Crabbe, 578, where, referring to an alleged usage in regard to the emoluments of pursers in the navy, it is said: “A usage to circumstances.” In 4 Opins., 18, Atty. Gen. Legare, in allusion to a supposed usage of courts-martial in regard to adjournments, says “This I understand to be the uniform practice; and uniform practice is good law in such cases when it is not unreasonable and works no wrong.”

⁹ In G.C.M.O. 1, Dept. of the Mo., 1885, the court, in connection with its sentence observes: “The court is of opinion that the following of an unauthorized and pernicious custom constitutes no good defense for any neglect on the part of the accused.” [For “custom” the term should, strictly, have been practice: custom proper cannot, of course, fitly be described as “unauthorized.”] And see Do. 22, Id., 1887.

Source:

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