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Command as a Defense in Criminal Cases in Pennsylvania

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COMMAND AS A DEFENSE IN CRIMINAL CASES IN PENNSYLVANIA

It is the general rule that one is not excused or justified in committing an act which is otherwise criminal merely because it was done at the command, or under the direction or authority, of another.[1] The rule has been applied in cases involving: (1) an act of a servant done at the command or direction of his master; (2) an act of a child committed at the command or direction of his parent; (3) an act of a wife done at the command or direction of her husband; and (4) an act of a tenant done at the command or direction of his landlord. Exceptions to this rule have been made in cases involving: (1) an act of an individual done at the command or under the direction of a police officer; (2) an act done under a command of the law; and (3) an act done at the command or order of court. It has been modified in the case of a subordinate's act done at the command of his army or navy superior.

It is the purpose of this note to set forth the law in Pennsylvania in respect to command as a defense. Since some of the situations have not come before the courts of this state, a conclusion as to the law in Pennsylvania in respect thereto can only be reached from a view of the decisions of the courts in other jurisdictions, which, it is submitted, will be followed by our courts.

I. SITUATIONS IN WHICH THE GENERAL RULE HAS BEEN APPLIED

A servant is none the less guilty of a crime although he committed the criminal act at the command or direction of his master. It was so held by our Superior Court in the case of *Commonwealth v. Kolb*,[2] in which the owner of a store and his two clerks were convicted under an indictment charging them with selling oleomargarine under the name of pure butter. The clerks appealed to the Superior Court on the ground that the lower court erred in not charging the jury, as they requested, that if the jury believed that they were employed by the owner they could not be convicted. The Superior Court, in affirming the lower court, said, "It seems hardly necessary to add that a person who commits an unlawful act is not relieved from the penalty by reason of having been employed to do so by another." As it has been many times stated, a person should not be permitted to excuse the commission of a crime simply by his entering into a contract with another to do such act.

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[1]Com. v. Kolb, 13 Pa. Super. 347; Com. v. Peters, 2 Pa. Super. 1.
[2]13 Pa. Super. 347.

It has been held that merely because an infant is commanded or directed by his parent to do a criminal act does not for that reason relieve him of criminal responsibility for the doing of the act;[3] although the court in *Commonwealth v. Mead*[4] stated that where an infant was under fourteen that fact could be considered as having a tendency to show that the child did not have legal capacity to commit the crime. It was held in the case of *Kelley* v. *State*,[5] that before a child could excuse himself from criminal responsibility for criminal acts committed at the direction of his father, it must appear that the child was of immature years or mind, and entirely under the domination, direction and control of the father.[6] It is submitted that this is the proper rule to be applied in this instance, for if the child is of mature mind, he must be held to know the criminality of the act, and a mere command by his parent should not be sufficient to free him from criminal responsibility for its commission.

A wife is criminally responsible for the commission of a criminal act, even though she acts under a command or direction of her husband.[7] In *State v. Potter*,[8] a husband and his wife, charged with knowingly having in their possession certain burglarious implements, with intent to use them feloniously, asked the court to instruct the jury that if her possession was by direction of her husband, she would be *prima facie* innocent. This having been refused, an appeal was taken. The appellate court held that the request was unsound, saying, "Very clearly the wife was responsible for her possession during the husband's absence; and the fact that such possession was by the command of her husband, given before he left, would raise no presumption in her favor." It was said in *Commonwealth v. Lindsey*,[9] "Where she commits a crime in the absence of her husband, the law presumes that she did it volun-

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[3]Irby v. State, 32 Ga. 496; Kelley v. State, 79 Fla. 182, 83 So. 909; Cagle v. State, 6 So. 300, (Ala.); People v. Richmond, 29 Cal. 414. In Carlisle v. State, 37 Tex. Crim. 108, 38 S. W. 991, the defendant, a girl of sixteen, sought to set up as a defense the fact that she had poisoned her child on account of the request and persuasion of her mother; but the court held that in the absence of anything showing coercion on the part of defendant's mother, mere request, demand, or persuasion of her mother was no excuse.

[4]92 Mass. 398.

[5]79 Fla. 182, 83 So. 909.

[6]See note 3, *supra*.

[7]State v. Potter, 42 Vt. 495; Com. v. Lindsey, 2 Leg. Chron. (Pa.) 232; Sieler v. People, 77 N. Y. 411; Smith v. Com., 28 Ky. Law Rep. 1164, 48 S. W. 1081, (wife sold whisky as agent of husband who received the money); Com. v. Butler, 83 Mass. 5, ("If she, in his absence do a criminal act, even by his order or procurement, her coverture will be no defense."); Com. v. Finney, 95 Mass. 560.

[8]42 Vt. 495.

[9]2 Leg. Chron. (Pa.) 232,

tarily, and she is answerable." If then, a married woman does a criminal act in her husband's absence, though by his procurement or order, her coverture will be no defense. Mere command, without more, is not sufficient to save her from criminal responsibility for the commission of the criminal act.

It is submitted that such should be the rule even where the wife commits the act in the presence of her husband. It is difficult to see why a difference in rules should exist in reference to a child and a wife. The reasons back of the rule that where a wife commits a criminal act in the presence of her husband she is presumed to have acted under his coercion, no longer exist. "A married woman is now rendered, in reference to civil matters, practically independent of her husband; and it is naturally felt that as she has the privilege of dealing with her own property in whatever way she likes, so she should be responsible personally for her acts, and should not be enabled to shield herself from blame under the pretext of a non-existent authority of her husband."[10]

The fact that a tenant who committed a criminal act did so at the command or inducement of his landlord, is not a defense. The case of *Rex v. McGrowther*[11] is illustrative of this proposition. There, the defendant was charged with having taken part in a rebellion, and he set up as a defense that he had been forced to do so by the command of his landlord. The evidence showed that the landlord had ordered the defendant to join his rebel forces; that upon the defendant's refusal, the landlord declared that he would force him to go; that ropes were brought to bind the defendant; and that then the defendant consented to go. The court said that the only force which would excuse a man was actual force, and that there is not, nor never was, any tenure which obliged a tenant to follow or carry out the commands of his landlord to commit a crime. This, it is seen, is in keeping with the general rule announced above; and it is submitted that it is a just result, because the mere relationship of landlord and tenant should not be sufficient to relieve the tenant from criminal liability.

II. SITUATIONS TO WHICH THE GENERAL RULE IS NOT APPLIED

Where one does a criminal act upon the order or direction of a police officer to assist such officer, he is not criminally liable for acts done in assisting the officer; and this is true even though the officer is proceeding without authority.[12] In the case cited, the defendant was convicted in the lower court

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[10]Cherry, Criminal Law, page 24.

[11]Foster C. L. 13, 168 Eng. Reprint 8.

[12]Com. v. Sadowsky, 80 Pa. Super. 496.

on both counts of an indictment charging assault and battery and aggravated assault and battery. During the period of a strike, a deputy sheriff asked the defendant to accompany him to a house on a coal company's premises where a number of men were congregated. The defendant went with the officer, who displayed his badge and asked the men why they were on the premises. After some discussion, one of the men started to run away and the officer directed the defendant to apprehend him. The defendant did so, a tussle ensued, and a second officer appeared and subdued the man. In reversing the lower court, the Superior Court said, "The power of a sheriff, deputy sheriff or other known public officer to raise the *posse comitatus* or power of the county, that is, such a number of men as are necessary for his assistance in making arrests or preserving the peace, is well settled in this state: *Comfort et al. v. Commonwealth, 5 Wharton 437.* * * * The eighth section of our Criminal Code of 1860, P. L. 386, makes it a misdemeanor for any person to neglect or refuse to assist a sheriff, coroner, constable or any other officer of the Commonwealth in the execution of his office in any criminal case, or in the preservation of the peace or in apprehending and securing any person for a breach of the peace. It would be a strange legal anomaly to punish a citizen for obeying the command of an officer invested with legal authority to command him and at the same time subject him to punishment if he refuses or neglects to obey."[13] If the individual acts in response to the call of an officer and uses only such force as is reasonably necessary in obeying the order of such officer, he is not criminally responsible, even though the officer himself might be.

One who commits an act which otherwise would be unlawful, under a command of the law, is excused by reason of such command. A crime is an act "prohibited" by law; and if we were to say that even though a person was ordered by law to commit or refrain from doing the act he would none the less be criminally responsible, an unwarranted and inexcusable hardship would be placed upon those zealous enough to obey the law as made for them. An

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[13]The court cited with approval 2 R. C. L. 491, to the effect that, "According to the better considered authorities private persons may respond to the call of a known officer without waiting for information as to the offense which the criminal has committed and without pausing to inquire into the regularity of the process; and whoever, in good faith, renders assistance and obeys the orders and directions of a known public officer in response to a call for assistance is protected in making an arrest, although the officer may be acting wrongfully and may be personally liable for a false arrest. This protection is due to the necessity of immediate action, since if all those summoned were required to examine and judge the legality of the warrant and then act upon their responsibility, the power of police officers would be to a great degree paralyzed."

illustration of this is not found in our reports, but the case of *Chesapeake & O. R. Co. v. Commonwealth*,[14] is illustrative of the point, and is, in the writer's belief, so in accord with justice that the Pennsylvania courts would adopt a like rule. The defendant in that case was under a statutory duty to provide on its trains separate coaches for colored people. It was also required by statute to run its train, and, as the court states, "It was and is a common carrier, entrusted by the Federal Government with the duty of carrying the mails without unreasonable delay." The defendant was prosecuted for failure to furnish separate coaches, and alleged and proved that such failure was caused by an accident preventing the attachment of a separate coach to the train. If the defendant had waited until such time as it could procure a separate coach, it would have violated the law. Thus the court held that if a person must violate one law in order to obey another, he is not guilty of a crime in conforming to the latter. A person should not be placed in a position where he is criminally responsible in obeying the law and similarly responsible if he does not. It has been held that one who has committed an act under the authority of a statute once declared constitutional, but later declared unconstitutional, by the Supreme Court, is not criminally responsible.[15] In keeping with this, it is submitted that one who commits an act under a command, rather than authority, of a statute, once declared constitutional but later pronounced unconstitutional by the Supreme Court, should, likewise, not be criminally responsible. Further, it would seem that even before any pronouncement by the courts concerning the constitutionality of a statute, one who commits an act under the command of a statute should not be criminally responsible if the statute is later declared to be unconstitutional.[16]

As where one commits an act under a command by the law, so too, one who is commanded by a court to do or refrain from doing an act should be excused from criminal liability in obeying such command. The court in *State v. Chicago, M. & St. P. Ry. Co.*,[17] held that a temporary injunction issued by a federal court restraining a person from complying with the provisions of a statute during the period covered by the injunction is a complete defense to a criminal prosecution for not complying with the statute. The court said that the orderly administration of the law should not cause a person to be punished for complying with an order of court acting within its jurisdiction and authority. On the other hand, it was held in *State v. Wadhams Oil Co.*,[18] that a tempor-

[14]119 Ky. 519, 84 S. W. 566.
[15]See: State v. O'Neill, 147 Iowa 513, 126 N. W. 454; Ingersoll v. State, 11 Ind. 464.
[16]See: State v. Godwin, 123 N. C. 697, 31 S. E. 221.
[17]130 Minn. 144, 153 N. W. 320, L. R. A. 1916 B 764.
[18]149 Wis. 58, 134 N. W. 1121, 40 L. N. S. 607.

ary injunction against the enforcement of the oil inspection law, as against a certain company during the pendency of proceedings attacking the constitutionality of the law, merely postponed its enforcement as to such company, and, after the law had been sustained, was no defense to a criminal prosecution for illegally selling petroleum during the time the injunction was in force. It is submitted that the better view is that expressed in the case of *State v. Chicago, M. & St. P. Ry. Co., supra*, as otherwise the person affected, in some cases, will be put into a position of uncertainty from which he cannot remove himself without violating the law. In the words of the above case, "The administration of the law should not result in or lead to a conflict or confusion of that sort."

III. SITUATION IN WHICH THE RULE IS MODIFIED

The general rule is modified somewhat when applied to the acts of an inferior done at the command of a superior in the army or navy. Thus, in *Commonwealth ex rel. Wadsworth v. Shorthall*,[19] the Supreme Court, citing the case of *McCall v. McDowell*,[20] adopted the language of that court to the effect that, "Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law will excuse a military subordinate, when acting in obedience to the order of his commander, otherwise he is placed in a dangerous dilemma of being liable to damages to third persons, for obedience to the order, or for the loss of his commission and disgrace for disobedience thereto. * * * * Between an order plainly legal and one palpably otherwise there is a wide middle ground where the ultimate legality and propriety of orders depends or may depend upon circumstances and conditions, of which it cannot be expected that the inferior is informed or advised. In such cases justice to the subordinate demands, and the necessities and efficiency of the public service require that the order of the superior should pro-

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[19]206 Pa. 165, 55 A. 952, 65 L. R. A. 193. The facts of this case were: The Governor issued a general order calling out the militia to preserve the public peace in certain counties in which a strike of miners was taking place, and in which riots and mobs prevailed. The general in command of the militia placed a guard at a house which had been dynamited, and directed the members of the guard, if any attempt was made upon the house or anyone approached the house, and did not halt when directed, to shoot, and shoot to kill. One of the sentries discovered a man coming towards the house at night, and ordered him to halt. The man disobeyed the order, and the guard shot and killed him. It was shown that the act was not done with malice, and that the guard did not go beyond his orders.

[20]1 Abb. (U. S.) 212.

tect the inferior, leaving the responsibility to rest where it properly belongs, upon the officer who gave the command." The rule, then, is that a command of a superior to an inferior in a military organization is a complete defense, unless the order was so palpably illegal that one of ordinary sense and understanding would know that it was illegal, and unless reasonable discretion was not exercised.

IV. CONCLUSION

I. The general rule is that mere command is not a defense to a crime.

- A. A servant is criminally responsible for a criminal act even though committed at the command of the master.
- B. An infant is criminally responsible for a criminal act although such act was done at the command of the parent.
- C. A wife is criminally responsible for the commission of a criminal act, although she acts under a command from her husband.
- D. A tenant is criminally responsible for the doing of a criminal act, although such act was done at the command of his landlord.

II. There are certain exceptions to the general rule.

- A. An individual is not criminally responsible for a criminal act committed at the command of a police officer to assist such officer, even though the officer is proceeding without authority.
- B. One who commits a criminal act under a command of the law, is excused by reason of such command.
- C. One who commits a criminal act under a command of a court is excused from criminal liability in obeying such command.

III. There is a modification of the general rule in one instance:

An inferior who commits a criminal act under the command of a superior in the army or navy is not criminally responsible unless the order was so palpably illegal that one of ordinary sense and understanding would know that it was illegal, if reasonable discretion was used.

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