tend to bring on a renewal of the trouble, they should answer the second issue as to probable cause in favor of the defendant. The court charged the jury that under the circumstances the defendant's conduct should not be weighed in golden scales, and if he acted in good faith and under good reasons the jury should answer the issue in his favor."

The quotation from *Franks v. Smith* in the above, as well as that from R.C.L., is dicta, as those points are not the points involved. The latter part quoting what the Judge charged the jury is following a different line of thought from that set out in *Franks v. Smith*. So, it seems to me that our decision does not go much further than the case involved, which unfortunately was tried on a motion to non-suit, after the introduction of the plaintiff's evidence. The Kentucky case is likewise not satisfactory, because in the facts presented to the court in the case, the powers of a peace officer would have been eminently sufficient to have handled the situation confronting the military detail involved. There is this advantage in the Kentucky ruling, it gives a definite rule of action. The trouble, however, is with the application of the rule. It is trying to apply methods of peace to acts of war, to apply methods of peace when force has been called for. A strict enforcement of that ruling would nullify the efforts of the military authority, for the military power is created as a war power, armed for war, trained for war, and such a force can't be used in any other way than that for which it was created without hampering and rendering it inefficient. This has been recognized by our own Supreme Court in the disorders growing out of the situation in Alamance and adjoining counties in 1870. There the Governor declared martial law and instructed the Commanding Officer, Colonel Kirk, not to make returns to writs of habeas corpus. Kirk obeyed his Commanding Officer and the Court said "There was sufficient excuse for refusing to return the writ." *Ex Parte Moore*, 64 N. C. 677. Thus, it has been held in North Carolina that an inferior is justified in obeying the order of a superior officer, even though that order violates the Constitution of the State of North Carolina, for at the time mentioned, as now the Constitution, Article 1, Section 21, provided "the privilege of the writ of habeas corpus shall not be suspended." However, how far this would go after the termination of the emergency is another question, because as General Andrew Jackson found out the court could fine him for contempt of court long afterwards.

[NOTE: Eminent authorities doubt if the court would now sustain the holding in *Ex Parte Moore*.]

Perhaps the leading case and one that is generally recognized as such, on the points involved, is the case *Pa. v. Shortall*, 206 Pa., 165, 65 L.R.A. 193—98 Am. St. Rep. 759 This case recognizes that when troops are ordered out on strike duty or other emergencies, less than martial law, that a condition exists which is described as "qualified martial law" and "the rule of force under military methods is substituted to whatever extent may be necessary in the discretion of the military commander," and the Court quotes and approves that great writer, Hare, in his work on Constitutional law in lecture 41, page 917. "It will be enough if the circumstances induce and justify the belief that an imminent peril exists, and cannot be averted without transcending the usual rules of conduct. For when the exigency does not admit of delay, and there is a reasonable and probable cause for believing that a particular method is the only one that can avert the danger, it will be morally necessary even if the event shows that a different and less extreme course might have been pursued with safety."

The latter holding is that of reason, for to lay down the broad rule that the military forces have no more powers than so many peace officers is admittedly unsatisfactory, because this then is the situation. The civil law administered by peace officers has failed, including the power of the sheriff to summons and arm every able bodied man in the county to serve as a deputy. Theoretically and possibly he has done so to a large extent. All this force, with the powers of peace officers, has failed. The call then goes to the Governor for troops, and the sheriff of the county says that he with all of his broad powers is unable to cope with the situation. Soldiers, likely numerically inferior to the peace officers present, are sent. They are trained as soldiers, and not as peace officers. They are trained to instant obedience, even unto death. Their discipline, the backbone of their efficiency, demands automatic response to their officers. They are armed for war, they are the instruments of war —and war only. Yet, the Kentucky court would say that these men, under such circumstances, are limited by the powers that have failed. The people do not expect it. Common sense does not dictate it. The military is ever subordinate to the civil government, but when the Governor sends troops, he does it as the State. It is not the normal but the unusual occurrence. It is the last arm of a State to restore order, to protect itself. It is an Act of Self Defense. No law can limit what a sovereign state can do in self defense, and that degree of force that is necessary to accomplish the re-establishment of law and order must be used by the military forces, and it seems to me that the true rule for the Commanding Officer is, *did the officer have reasonable grounds for believing, in view of those circumstances then existing, that his action was necessary?*

As to the subordinate officers and enlisted men a very different situation exists. The first duty of the subordinate is obedience; he is justified in disobeying an order from a lawful superior only when it is such that any reasonable person would know it to be illegal and unjustifiable. Bellows on Riot Duty, page 192; *U. S. v. Clark*, 31 Fed. 710; *McCall v. McDowell*, 1 Abb. (U. S.) 212, Fed. case No. 8, 673; *U. S. v. Carr*, 1 Woods 480, Fed. case No. 14, 732; *Riggs v. State*, 91 Am. Dec., 272.

From the foregoing, it is readily seen that it is very important, in the event of a soldier's action being reviewed later by the civil authorities, that his justification be presented to the court. If an officer has given an order on his own responsibility, the necessity for the same should be shown. If a subordinate is executing an order, that order and the fact that it came from a superior officer should be clearly set forth to the court. The whole situation seems theoretically to be more difficult than the practical application of the same, if the officer acts without malice and within the bounds of reason. Inasmuch as the courts and the public are familiar with the powers of peace officers, and as our people are a liberty loving people, inately resenting the use of the armed forces, it is a part of wisdom for the soldier in all internal disorders to act, if possible, within the limitations prescribed and established for a peace officer. Not because, as has been set forth, that is the rule of action, but because the powers of peace officers are known, recognized, and the use of those powers are not resented. For this reason, let us see for the purpose of instruction what powers a peace officer has.

1st. *When can an arrest be made?*

(a) In the execution of a legal warrant.

(b) Without a warrant when the officer shall know or have reasonable grounds to believe that any felony has