







THE
MILITARY LAW
OF
England,

(WITH ALL THE PRINCIPAL AUTHORITIES,)

ADAPTED TO

THE GENERAL USE OF THE ARMY,

IN ITS VARIOUS DUTIES AND RELATIONS,

AND THE

PRACTICE OF COURTS MARTIAL.

Misera est Serritus ubi Jus est vagum aut incognitum.

What can be more conducive to the deterring of men from committing crimes than making them properly acquainted with the laws by which they are to be governed, and the fatal consequences attending a breach of them?

COLE.

No rank or elevation in life, no uprightness of heart no prudence, or circumspection of conduct, should tempt a man to conclude that he may not, at some time or other, be deeply interested in these researches.

FOLIO.

Men in the field are not to be amused with argumentative discussions: quick in their decisions, they stand in need of general principles applicable to a variety of cases.

SULIVAN.

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as

HIS ROYAL HIGHNESS

ADOLPHUS FREDERIC,

Duke of Cambridge,

EARL of *Tipperary*, and BARON of *Culloden*,

General of His Majesty's Forces,

&c. &c. &c.

Sir,

DIRECTED to the contemplation of military subjects by the goodness of a nobleman equally conspicuous in the annals of civil and military science, it was impossible that my observation should not be immediately attracted to

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those great models of military glory, which have perpetuated the British name.

Throughout this observation, may it please your Royal Highness, it has been forcibly evident, that every theory upon which our military constitution is founded, including the sentiments of every great commander, is calculated to form a series of generals, with a soldiery equal to those of any age or country; and a code of military jurisprudence superior to that of any modern empire. There is no notice on the subject which does not, with a proper reference to human nature, extol the amenity of the general, appreciate the attachment of his troops, and consider the care of the soldier, and the *justice of the camp*, as the primary objects of every campaign. Yet, alas! Sir, the result of what has been taught has not

·DEDICATION.

always been such as to prove that these excellent theories have been rightly comprehended *throughout* the army, or that they have been *invariably* carried into execution.

This, may it please your Royal Highness, it is humbly conceived may be attributable, in no ordinary degree, to the complexity which the military law of England has naturally assumed, in the progress from its parental source to a system, and the consequent difficulty of its application to those principles of human nature, upon which every just law for its government must be founded, rather than to any failure in the characteristic generosity of the British character.

It is then, Sir, with proud exultation, that I may venture to declare, in the face

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of warlike and polished Europe, that your Royal Highness, while excelling in all the dignified graces of society, does not disdain to consider these things, that my Prince and General is capable of exclaiming:—

— Homo sum,

Et nil humanum me alienum puto :

and that I have, therefore, presumed to lay at the feet of your Royal Highness the present small attempt to render more clear and familiar the matter of the various authorities which compose the statutory and customary law of the army, aided by the result of practical consideration: with the hope of producing a more general comprehension of the judicial duties of the officer, at least in the junior ranks of the army; and, perhaps,

inducing generally an attention to some minutiae not hitherto considered.

To the sanction of these purposes, Sir, the intrinsic dignity of your Royal Highness's name will contribute more powerfully than the strongest reasoning conveyed through the most powerful eloquence.

I have the honour to be,

Sir,

Your Royal Highness's

Most dutiful,

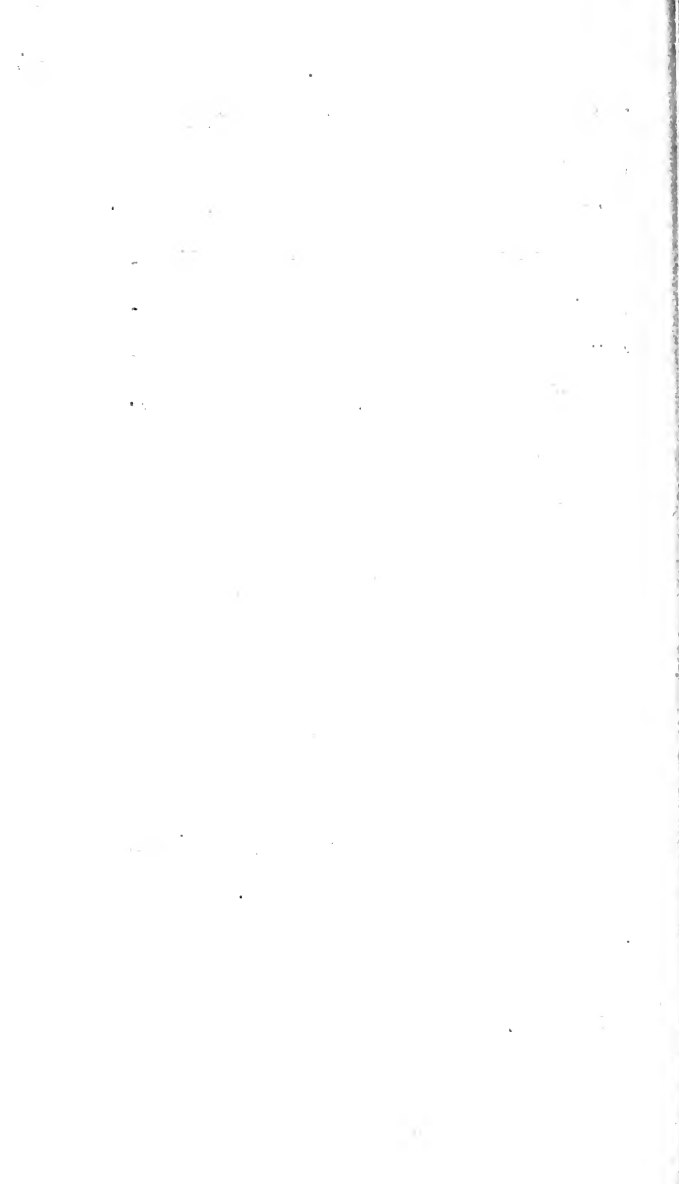
Most devoted, and

Most humble servant,

THE AUTHOR.

London,

June 1, 1810.



ADVERTISEMENT.

CIRCUMSTANCES, uninteresting to the Public, have delayed the appearance of the following pages ; unprofitably, unless in the opportunity afforded for including the amendments in the Mutiny Act of 1810. This has, at the same time, been attended with a small inconvenience, arising from all the other references having been made to the preceding Act of Parliament. It will, however, be easily remedied from the excellent

mode which has been adopted in the new act, of incorporating the amendments with the sections to which they relate, instead of creating new ones; so that, by adding one to the number of any section after the thirtieth, (where the only new one is added,) the references made to the Mutiny Act for 1809 will apply to that of 1810. The Articles of War remain the same. And, the work having been finished previously to any recent occasion for the important domestic employment of the army, it has not been deemed necessary to make any allusion to it.

That, in the execution of his plan, the writer will sometimes be found not to have fulfilled his intention, that many deficiencies will be discovered, under particular heads, there is no doubt, from various causes. It would have been extremely impertinent in him to have expected permission to make those official researches which are absolutely necessary, for a work in the progress of which its utility must be doubtful; it

was impossible for him to hope that he could, at once, make his arrangement so complete as to meet every possible case : but, should the public approve what has been done, he has no doubt, from the beneficent liberality and exalted intelligence of the Right Hon. the Secretary at War, and the general desire of other high public officers, for the due understanding of military law, that he shall be enabled to satisfy his own wishes in points which have become obvious to him since his work was committed to press, and to render it more worthy of approbation.

At the same time it is hoped, that something not quite unimportant has been done towards collecting and simplifying the materials which form the Military Law of England, and it may be presumed, at least, that the young officer will be directed to sources of information, (“not harsh and crabbed, as dull fools suppose,”) from which the highest benefit may be derived, both to himself and to his country.

ADVERTISEMENT.

It may not be amiss here to add, that there are incorporated with this work the Articles of War and General Regulations and Orders of His Majesty, the annual act of parliament, and other correlative statutes; with the Spirit of the best Treatises on the Practice of the Military Courts, as well as the opinions on disputed points of many authors, not generally accessible; which, in any other form, could not be collected without very considerable expense, consulted without much leisure and difficulty, nor retained, from their bulk, on service. Many of the forms and precedents that seemed most important have been selected from those already printed, on account of their decided authority; and the same may be said of numerous references which have been made when such confirmation was not absolutely necessary. For this reason, also, it was deemed better to rest the authority of the work on the powerful names of those to whose judgement and ex-

perience it has been so much indebted, rather than that of an individual, unadorned by the splendour of rank, unsheltered by academical honours,—

“Who nought can boast but his desire to be

“A Soldier.”—

Every man, of ordinary intelligence, who enters an army, in whatsoever species of force, must quickly be impressed, that military discipline, to become effective, must address the soldier as a moral agent ; and regard “ a proud submission,—that dignified obedience, that subordination of the heart,” which attaches him to the service, and enables him to support and overcome every difficulty and danger of war,—in preference to the operation of terror. This cannot be effected without the correct *execution* of those admirable regulations which have, from time to time, arisen out of the collective experience of the army,—without the due administration of military justice.

The military laws; however, improving and increasing with the state and numbers of the forces for whose government they are enacted ; originating in his Majesty's Articles on the one hand, and receiving the augmentation and sanction of parliament, in an annual act, on the other ; with a constant addition of regulations (exclusive of those which form as it were the bye-laws of office,) and customs, adapted to the various circumstances of service ; accu-

mulate and complicate to such a degree, that, though simple and perspicuous in their individual enactment, no more can ordinarily be brought into execution than may be retained by the memory—that frail and deceitful interpreter. For, as to reference, no less acumen of research and depth of consideration would be required than in any other class of English jurisprudence: and, as observed by Mr. Sullivan, “the soldier cannot be supposed to have the means or disposition of qualifying himself for a court of law.” Thoughts on Mart. Law, (2d edit.) p. 5.

To remedy this evil, several efforts have been made, highly honourable to their authors, and important to the army.

If we except the incidental observations of Hale and Coke, and an author named Davis (1619), of whom little is known, beside a citation on quarters in the military antiquities, the first of these efforts may be traced in the “Military Institutes, antient and modern,” of Bruce (1717); a work of which the intention is admirable, and the use considerable, but which is, of course, become almost obsolete. Hist. of Com. Law. c. 2. Commentar. on M. C. Grose’s Mil. Antiq. v. ii. 207.

Near forty years after, in the Commentaries, that beautiful outline of the laws, composed for the early instruction of his Majesty, in English jurisprudence, Sir William Blackstone found cause to regret the unsettled and arbitrary nature of military law, which he considered as retaining the characteristics of anti-ent servitude, concealed and precarious; and which had certainly not, until after his time, received the mild definition of which it is at present capable. There is, however, reason to fear that its practice, more than its principles, excited this disapprobation.

Nor was the opinion of that enlightened judge attempted to be disproved by Major Adye, the first military author who wrote, expressly, on the subject, with the most enlarged views and most generous sentiments. A considerable experience derived from active service, during which, also, this well-informed officer had filled the appointment of deputy judge-advocate abroad, enabled him to view all the points and bearings of military discipline; and, in consequence to his "Treatise on Martial

Law," he found it necessary to append an essay on military "rewards and punishments."

This work may, perhaps, be too general for application, but it is full of wisdom; it contains the sublimest lessons of a polished commander; and the author receives, while "he resigns to men of letters the prize of eloquence."

Treatise on
Martial Law,
&c. Advertise-
ment.

To it (1784) succeeded the "Thoughts on Martial Law, with a mode recommended for conducting the proceedings of General Courts Martial," of Richard Joseph Sullivan, Esq. which clearly shews the unsettled state of military forms to that period, and the laudable anxiety of military men on the subject; for, observes this author, with great ingenuousness, "had Mr. Adye, indeed, been more particular with respect to the *proceedings* of general courts martial, the present work would never have been obtruded on the world. But, as he is silent on points which may every day occur; and as the officers of the army have, invariably, expressed a desire to be informed decisively of the grounds on which they stand, an attempt to ascertain them may not be unwelcome or ill-timed." More than the single

To these have been finally added (1806) valuable facts and illustrations in "Principles and Practice of Naval and Military Courts Martial," by the useful work of Mr. M'Arthur, on these conjunct subjects.

That these writers, both separately and collectively, have powerfully, though not completely, remedied the evil, as far as relates to the fleeting regulations or customs of war; the forms, and rules of evidence derived from the civil courts, &c. cannot be doubted; but the Articles of War, and the Mutiny Act, with the accumulations of centuries, remain the same, mutually confusing each other; and, instead of the beautiful code exhibited in the eloquence of Lord Loughborough, representing a *mutilated* manuscript, venerable indeed from its antiquity, and respectable from its institutes, but of which, in several instances, literally, the *rubric* alone remains. And, what is of still more importance to the soldier, the quadripartite laws for which he was before in vain directed to the annual volume, that of regulations, and the orderly book of his regiment, are now only to be found by the ad-

Act for punishing Mutiny and Desertion, and better payment of the Army and their Quarters, &c. 1809—10.

ditional consultation of numerous tomes, and then scarcely to be considered complete.

That the act for punishing Mutiny and Desertion, &c. in common with many other acts of parliament, required periodically, should not be adapted to the facility of hasty reference, by those occupied in the discussion of its laws; is no impeachment, either of their talents or industry, when it is recollected that even Addison, while secretary of state, could not write a letter on business required in haste, and the British Socrates himself declares, that, "to comply with the mode of publishing periodically, he wrote some of his papers against the feelings of nature!"

Neither need it excite wonder that laws accumulate, when the twelve tables of the Romans,—the collective wisdom of the antients, preferred by Cicero to whole libraries of the philosophers,—gradually extended to two thousand volumes; and would have been *explained* into still greater obscurity, but for the labours of the emperor Justinian, who caused them to be reduced to four, similar to those of Blackstone, in the reign of George the Third.

De Oratore,
lib. 1.

English jurisprudence, however, is perhaps, not susceptible of such a diminution, and separate digests are therefore the only means of adapting it to ordinary use, or assisting the future inquiries of the legislature. Many able writers have employed themselves in this way on various parts; but none on that which forms the subject of the following pages. This may be accounted for,—firstly, by the repulsive nature of its antient definition by Judge Hale, that military or martial law is “in truth and reality no law, but something indulged rather than allowed as a law,” which has not yet been overturned; secondly, (as observed by Mr. Sullivan), that “the discipline of a camp, in every essential most widely different from that of a common court of law, may have made it unworthy of the attention of those whose abilities would have enabled them to have expatiated on the subject:” and, lastly, from the difficulty of reconciling the cold labour of legal disquisition with the spirit of martial enterprize; and the consequent danger of adopting theories, which, whatever

their excellence, could never be reduced to practice.

Yet, continues the author just quoted, (1784), "no less, perhaps, than a million of subjects, either in arms for their sovereign, or as retainers to his camps, are amenable to its coercion;" and "an unlimited power to create Blackstone. crimes, and annex punishments to them not extending to life and limb, is not unalienably confined to the sovereign himself, but is diffused by delegation to his different officers on service." Therefore, "at the same time that we Sullivan. concur in the banishment of all the subtilities of the law, we must as readily confess, that a general knowledge of its principles should be encouraged; lest those should prove *unequal to the task* who may be placed on the judgment seat of mercy."

Without examining whether the facility of prompt punishment may not also sometimes be preferred to the discrimination of rewards in the prevention of crimes, it is from this view and with a very peculiar experience of the necessity of some legal guide of easy reference

and sufficient authority, for officers, in the judiciary character with which they are constantly invested, that the present writer has attempted, from notes made for his private use with the best effect, and the result of investigation arising out of an inquiry with which he was honoured at the instance of his commanding officer,—to exhibit the military law of England, with all its principal authorities adapted to the ready comprehension of the army. To those who shall still imagine that an assimilation to legal precision, loads the officer with new restrictions and formalities incompatible with other duties, it may be observed that the case is diametrically opposite; military law already possesses the fictions of action and other exuberances of common law; and such is the variation of forms in practice, that scarcely two officers will be found to issue a warrant alike: So that some rule would seem necessary to preserve even its existence.

Simple Officer, it would ill become the writer to pretend to any new light, on a subject

which has so long eluded the vigilance of superior talents; yet by those whose judgement he has most to deprecate will readily be allowed that in proportion to the *activity* of his charge he was enabled, if not compelled, to perceive certain *desiderati* which he has thus, at least, temporarily endeavoured to supply. And it was not objected to Charles Guischard,—when, from the extremity of Holland, he rectified the romantic errors of his great master Folard, cleared the difficulties of Hirtius, and laid open the whole tactics of the antients—that he was only a subaltern in obscurity.

In the following pages, then, it is intended to submit to an arrangement not disagreeable to the natural order of military concerns, the *whole body of military law* as it exists in the various depositories before described, with its several relations; abridging, where it is expedient, the prolixity of law, but conveying at length those passages which require a full and lasting impression. And that nothing should appear to rest upon doubtful authority, every fact is powerfully corroborated by re-

ference; and every passage referred to is quoted in the words of its author; a method which, if it should sometimes lead too much into detail, may yet boast the suffrages of D'Espagnac, the friend and biographer of Marshal Saxe, in an *Essay on War*, celebrated throughout Europe. To these are added, for the convenience of the inexperienced judge-advocate on service, the most necessary forms and precedents, those "outworks of law," of which Blackstone and Mansfield did not disdain to enjoin the preservation.

Whatever the success which shall have accompanied this attempt, the author will have the satisfaction to have pointed out to the young officer those sources whence he may derive the best assistance to a deeper inquiry into subjects which can never be considered without advantage.

And, however humble his endeavour, he cannot help indulging himself with the idea that it will rank in the lowest class of the same order with those memoirs of experience in service, recommended by Lord Orrery to

be required of commanders; which Colonel Dalrymple, in the first military essay, addressed to his majesty, containing the foundation of every amended system of the present European armies,—approved; and which, *lastly*, General Andreossy advised to be encouraged by the military department (*Dépôt de la Guerre*) in Paris, as unfolding in the most useful, just, and pleasing, manner, the transactions of the war.

Mil. Ess. containing Reflections on raising, &c. British Infantry and Cavalry, with Prop. for Improvement, 1761.

Décade Philosophique 10me Ventose, an. 9, (1802.)

At least the present work will not be denied the merit of impressing in some degree, under the sanction of law, the authority of the greatest and most intelligent of commanders, and the experience of fact, that in the British army it is necessary to preserve to the principles and forms of justice the utmost attention compatible with military service; that the wisest system of military regulations must depend for its practical effect on those who are intrusted with its execution; and that, even if it were expedient to uphold power by its own terrors, a command in which the cultivation of the military virtues

and the affections is neglected, though it should produce a numerical force of external appearance, will never furnish an efficient body of troops, nor increase the annals of glory.

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THE
MILITARY LAW
OF
ENGLAND.

PART I.

GENERAL VIEW OF THE CHARACTER OF
MILITARY LAW.

OF LAW, that general rule of action, which, in various forms, regulates and preserves the universe, originating with the Almighty First Cause, and extended by wisdom almost divine to the various circumstances and relations of human society, the present subject forms a minute branch, differing from others in nothing but its adaption to the government of a *military force*.

Like those other subdivisions of English jurisprudence, ecclesiastical, maritime, academical, &c. military law deviates from their mutual parent, the *common law* of the land, Hale, Pl. Cor. as *its* application is to cases for which there is no other provision, and where brevity and

promptitude are indispensable; while its jurisdiction, always extensive, may occasionally be required to supersede every other. For, it extends not merely to the preservation of order and discipline in the army, "the better government of his majesty's forces," but, if unhappily martial power be required to support the due authority of government, sometimes temporarily assumes the place of that authority, under the character of *martial law*.

Tyler, Essay on Military Law, 184.

In proportion, then, to its brevity and promptitude of operation, every process of military law should be *minutely correct*; and, where power must sometimes be indiscriminately conferred, *prevention* should invariably be preferred to the punishment of crimes.

Coke, Inst.

The same circumstances require no less attention to be given to the *promulgation* of military law; for, although the care in this respect prescribed by the articles of war, which enjoins that they shall be read and published once in every two months at the head of every regiment, &c. and that order which directs that those as well as all orders and regulations shall be frequently read and explained both to officers and men, would seem sufficient to render every soldier intimately acquainted with the restrictions by which he is bound, yet, when the peculiar circumstances of the military character and its minute duties are considered, it will be found

§ 24. Art. 5.

Gen. Reg. and Ord. (1804.) 55.

that much more is required to that knowledge so indispensably necessary. *Ubi lex incerta ibi lex nulla*, said one of our greatest lawgivers; and punishment cannot be justly inflicted on him who is ignorant of his crime.

All laws are excellent, or the contrary, as they apply to human nature in such a manner, that, while they check its deviations from right by punishment, they also conciliate its prejudices and defects. How constantly, then, should this principle be recognised in military law, where error is doubly fatal, and where service in its best form is attended with evils that merit the highest consideration.

Hence arises, in the government of a military force, that system of rewards, scarcely known among the other classes of the community; which, prevailing throughout every age, is yet recognised in our own; so that, if the punishment of crimes be here more prompt and certain than under the civil power, not less so (while it retains its purity) is the reward of every military virtue.

It must also be recollected, that, whatever the obnoxious characteristics of military law, its summary proceedings and secret sentences, its jurisdiction (unless in the public exigencies before mentioned) extends in no respect beyond the military order of citizens; not even to those, who, having quitted its active duties,

13 Eliz. c. 3.

Chas. II.

24 Geo. II. c. 6.

Adye's Treatise

on Mil. Law,

262.

Deb. in Parliam.

1786.

are enjoying its remuneration, in the forms of half-pay or pension, whether officer or private soldier; nor even to the militia, as respects life or limb (except the staff), any longer than while embodied for service.*

Militia Acts, *
42 Geo. III.
c. 90. § 89, &c.
Mutiny Act,
§ 116, et seq.

Williamson, Mil.
Arrangements,
v. 2. (Notes) 67.

Military law has, in common with all others, its statutes, or written law (*lex scripta*); and customs which arising out of necessity have prevailed and become its common, or unwritten, law (*lex non scripta*).

§ 50. § 126.

Of these the first consists in the "Articles of War," and the annual "Act for punishing Mutiny and Desertion, and for the better Payment of the Army and their Quarters (into which all former Mutiny Acts resolve)," by which they are from time to time legitimated; and such orders and regulations as may be issued by his majesty, and are to be found either in specific publications under his royal authority or in the orderly books of every regiment, or both. The second is deduced from the general custom of war, the practice of courts martial, the standing orders

Tytler's Essay
on Mil. Law,
119.

* A very intelligent view of the rise and progress of the military law in England will be found in the first chapter of Tytler's Essay on Military Law, &c.; and much interesting matter on the same subject in the second volume of Grose's Military Antiquities.

adapted to the circumstances of every regiment, the collective experience of officers, the authority of various antient and modern writers on the subject, and finally the common law of the land.

I. ITS STATUTES, OR LEX SCRIPTA.

1. *Articles of War.*

The statutory law of the army, as regards the articles of war, is perhaps as antient as any other part of the constitution of England; and to the preservation of many of its antient ordinances, with the necessary emendations of modern times, is, probably, owing that irregular form which has rendered it, in the opinion of a high authority, "vague and disputable;" rather than its having been originally "passed in a hurry:" not that it is meant to dispute the propriety of Captain Grose's wish that it were better arranged and rendered more explicit, sufficient cause for which will be found under several heads in the following pages, as respecting the duty of judge-advocate, &c.

Adye's Treatise on Mil. Law.
Tytler's Essay on Mil. Law.
at sup.

Grose's Mil. Antiq. v. ii. 206.

2. *Mutiny Act.*

The best definition of the military statute

law, particularly as relates to the act of parliament for punishing mutiny and desertion, and the better payment of the army and its quarters, is that of the late Earl Rosslyn, while Lord Chief Justice of the Common Pleas, on the only case where military law was ever submitted to the extreme *niceties* of legal discussion. "It is one object of that act," said his lordship, "to provide for the army; but there is much greater cause for the existence of a mutiny act, and that is the preservation of the peace and the safety of the kingdom: for, there is nothing so dangerous to the civil establishment of a state as a licentious and undisciplined army." The same necessity for new attention to arrangement described in respect to the articles of war will be also found to apply no less to the mutiny act.

Proceedings of
Gen. C. M.
also Grant v.
Gould, Term.
Rep. 179:.

3. *General Regulations and Orders.*

In the publications under this title, which form an important part of the statutory law of the army, it possesses an advantage superior to any other law in all the characteristic promptitude of military acts. Since, upon the discovery of error or deficiency in any part of the law, it may be immediately amended or supplied, and promulgated to the army. And the minor laws of the forces are with facility adapted to every

occasion which may present itself; an object impossible to be effected in the ordinary routine of legislation.

II. ITS CUSTOMS, OR LEX NON SCRIPTA.

1. *Current Rules of Service.*

The custom of the army, in its general sense, in all those fleeting circumstances which cannot easily be reduced to rules, but which, from common agreement and the necessity of the thing, have become binding, as well as numerous orders which have never been collected into the general code, and the frequent correspondence with head-quarters from various parts of the world, on points in dispute, form a considerable body of intelligence.

Williamson's
Mil. Arrangements
v. ii. n. 67.

2. *The Practice of Courts Martial.*

The practice of courts martial, under various circumstances, constantly offer new rules for guidance, and new facts; to which, by his majesty's orders, are added the proceedings of all courts martial of importance, by a printed circulation of them, and their promulgation at the head of every regiment in the service. These altogether form an extensive and in-

teresting common (or unwritten) law for the army, which also, in cases purely military, very often takes the lead.

3. *The Common Law of the Country.*

In all cases, where neither the statutory nor common law of the army will suffice, the deficiency must naturally be supplied from the parental source, the common law of England; and most especially in its forms, from which indeed military courts ought never unnecessarily to deviate.

Over the whole, the "*courts of common law have superintendency*," as well as the other branches, ecclesiastical, maritime, &c. to the end that they may be kept within their jurisdictions; that it may be determined when they exceed them; to restrain and prohibit such excess, and, in case of contumacy, to punish the officer who executes, and, in some cases, the judge who enforces, the sentence so declared to be illegal.*

* They are subject moreover to the investigation of parliament, and to the prerogative of the king to dismiss any officer whose services may be no longer agreeable to his majesty, although delinquency may not have been proved against him: and even after trial and acquittal. Aoye, 120; Tytler, 352; M^rArthur, 1. 102. 1. 268.

Adye's Treatise
on Court Mart.
§ 10, 256. &c.
M^r Arthur's Pr.
& P. of C. M.
v. ii. 225.

Hale, Pl. C.

Lieut. Frye's
Case, apud
Tytler & M^rAr-
thur &c.

III. ITS RELATION WITH THE CIVIL CLASSES.

This division leads us to the relations which, exclusive of a reciprocal aid that will be found to exist between the military and common law, have been established between the army and the civil classes of the community. And first Art of War, § 17. art. 28. Ib. § 13. occurs that sweeping article, which, with a control elsewhere unknown, governs the very manners of an officer, and renders him accountable at every instant to a court of propriety. Whatever commanding officer (by his majesty's articles of war) shall be convicted before a general court martial of behaving in a scandalous infamous manner, such as is unbecoming the character of an officer and a gentleman, shall be discharged from the service. Provided, however, that, in every charge preferred against an officer for such scandalous or unbecoming behaviour, the fact or facts whereon the same is grounded shall be clearly specified.

By the mutiny act it is expressly declared M. A. § 14 art of War, § 11. Art. 1. that nothing in it shall be construed to exempt any officer or soldier from the ordinary course of law; and by it also, as well as by the articles of war, it is enjoined that every commanding officer deliver over to the civil power,

See *Christinaus*,
Dec. on Duke of
Alva's Edict,
apud Bruce,
315. Tit. 36.

upon application, any officer, non-commissioned officer, or private soldier, accused of any crime punishable by the known laws of the land, and aid the officers of justice in securing him. For wilfully neglecting or refusing so to do he shall, on conviction before a general court martial, be cashiered.*

Et supra.

And generally, said Earl Rosslyn, where soldiers are offenders against the civil peace, they are tried by the common law.

A. of W. ib.
art. 2.

No officer shall protect as military any unmilitary person; nor any soldier not doing all duties as such, continues the articles of war: nor soldiers any farther than warranted by the mutiny act. This at present only enjoins that no soldier shall be arrested but for just cause of action, criminal or civil, nor unless affidavit of debt of twenty pounds, exclusive of costs of suit, be previously made; (which must be indorsed on the back of the writ;) otherwise, on complaint of the soldier or any superior officer to any judge of the court out of which it issued, he may examine into and discharge it *with costs*. (No soldier arrested for debt, nor confined under conviction of any criminal of-

Act for punish-
ing Mutiny, &c.
49 Geo. III.
cap. 12. § 97.

ib. § 99, 100.

* This is not however to extend (the fourth article is found necessary to shew) "to Gibraltar, Malta, or any other place beyond sea, where there is no form of civil judicature in force."

fence, is entitled to pay from that period till Ib. § 98 his return).

At the same time, to favour the suit of honest creditors against persons inlisting, instead of an arrest, at once injurious to themselves and the service, any plaintiff, upon notice first given in writing of the cause of action to the person inlisted, left at his last place of residence before inlisting, may file a common appearance in any such action, so as to entitle him unexpensively to proceed to execution.

Any officer, who, without leave, shall kill Ib. § 71. game, on oath of one witness before a justice, forfeits five pounds for each offence, to be given to the poor; and, for every such offence committed by a private soldier, every officer commanding in chief shall forfeit twenty shillings. Either officer, neglecting to pay such fine for two days, forfeits his commission.

Commissioned officers forcibly entering Ib. § 94. house or outhouse, without the warrant of a justice, (which he is empowered to give,) on pretence of searching for deserters, to forfeit twenty pounds.

But, again, the civil power was long en- Ib. § 91. joined to assist in the apprehension of all military offenders; and, by rewards, is still encouraged to apprehend deserters: constables, &c. being warranted in taking before a magistrate any person suspected of desertion; and

Ib. § 93. magistrates, on conviction, in committing him to goal, and paying the reward.

Ib. § 62. And any person harbouring or concealing a deserter, knowing him to be such, forfeits, on conviction, by the oath of one witness, before a justice of peace, twenty pounds. And, in the same way, receiving, buying, or exchanging, the necessaries of soldiers, renders the parties liable to a fine of five pounds, imprisonment, or whipping.

Ib. § 43, et seq. The civil power provides quarters and provision for the army in its cantonments, and the means of transporting its baggage on the march. Magistrates may also extend furloughs to sick soldiers.

I. § 85. The march of an army, or its officers on duty, horses, carriages, &c. are free from all tolls, except those of canals, or where otherwise particularly excepted by law.

I. sup. Magistrates have also a *certain* power to call to their aid the military force in their vicinity, and a positive one, at all times, to call out the local militia. And the military force may be removed, in deference, from that vicinity, whenever it becomes the scene of election of members to parliament, or the administration of justice by the judges of assize.

43 Geo. III. c. 41. For purposes of remedy also the mutiny act, as far as relates to the civil classes, may at all times be altered and varied.

IV. SPECIFIC JURISDICTION.

The specific jurisdiction of military law includes "Any person who is, or shall be, commissioned, or in pay, * as an officer, or who is, or shall be, listed or in pay as a non-commissioned officer or soldier;" all serjeants and non-commissioned officers, and persons employed on the recruiting service, receiving any regular pay in respect of such service; and all sutlers and retainers to a camp; and all persons whatsoever serving with his majesty's armies in the field, though not inlisted soldiers: "Artillery, engineers, military surveyors, and draftsmen, military artificers and labourers, master gunners, and gunners under the ordnance:" also, "Troops in pay, raised or serving in any of his majesty's dominions, or place occupied by his majesty's subjects or forces while under the command of any officer having a commission immediately from his majesty:" in short, "All officers and soldiers of any troops, being mustered and in pay, which have been,

Art. of War, §
24. A. 3.
Mil. Act, § 111.

Ib. § 109.

Ib. § 110.

Ib. § 117.

* This includes brevet, (commissioned,) but not *half-pay*, officers, nor *of course* pensioned private soldiers *unemployed* in the service.

or are, or shall be, raised or serving as aforesaid, shall, at all times, and in all places, be liable to martial law and discipline, &c." Negroes also, purchased on account of his majesty's force, become free, and are to be considered as soldiers having voluntarily enlisted, (except as relates to the rewards of pension and limited periods of service.)

Ib. § 112.

Militia and fencibles, when embodied, and in actual service, are subject to the same regulations, restrictions, and penalties, as are imposed on the officers and soldiers of the rest of the army by this act.

Ib. § 116.

And so are yeomanry and volunteers, as far as compatible with the acts by which they are respectively governed.

Ib. § 115.

Also aliens exciting treason and rebellion, according to Lord Chief Justice Hale; but for this case there is no particular provision in military law.*

And, as to the actions and crimes of which military law is to take cognizance, after a full renumeration of such as can be specified, "All crimes, not capital, and all disorders and neglect, of which officers and soldiers may be guilty, to the prejudice of good order and military discipline, though not specified," are in-

Hale, Pl. Cor. c.
10. 15. Tytler
Essay on M. L.
128.

Art. of War.
§ 24. art. 2.
M. A. § 118.

* The incendiaries of the docks at Portsmouth were tried by commission.

cluded by a sweeping clause in the articles of war.

This jurisdiction is protected by various ^{Ib. § 119.} auxiliary regulations * derived from the civil power; thus, a false oath under it is “perjury to all intents and purposes.”

Persons sued for any act, matter, or thing, done under it, may, except in Scotland, plead the general issue, not guilty, and give such special matter in evidence, which, being pleaded, had been sufficient to have discharged the defendant; and, if a verdict be obtained for the defendant, or the plaintiff become nonsuit, or discontinue his action, the defendant shall have treble costs, recoverable in the usual way. ^{Ib. § 121.} The same advantage to be derived in Scotland, when the court shall see fit to assoilzie the defendant, or dismiss the complaint.

All suits are to be brought in some of the ^{Ib. § 120.} Courts of Record, at Westminster or in Dublin, or the Court of Session in Scotland.

Persons *inducing* or aiding in the military ^{Ib. § 122.} crime of desertion, in any way, forfeit one hundred pounds; or, if unequal to the forfeit, or such forfeit shall appear not to be a sufficient punishment, to be imprisoned for any time not exceeding twelve months, and to stand in the

* These extend still farther in favour of the naval laws.

pillory for one hour in the most public place in the vicinity, wherein the offence was committed. These penalties, when occurring in England, to be recoverable in any Court of Record, at Westminster; in Scotland, in his majesty's Court of Exchequer for Scotland; in Ireland, the Courts of Record in Dublin; in Guernsey and Jersey, in the respective royal courts of those islands; and, when in the isles of Alderney and Sark, in the royal court of Guernsey; in the Isle of Man, in any of its Courts of Record, or in any Court of Record at Westminster: and, in short, for any "such offences as shall be committed in *any of* the dominions of his majesty, the penalties may be sued for and be recoverable in any Court of Record of his majesty in the place where the offence shall have been committed."

Ib. § 123, 124.

All actions and prosecutions, however, in this last respect, are to be commenced within six months after the offence is committed.

Ib. § 125.

And "no person shall be liable to be tried and punished for *any* offence against any mutiny act or articles of war, which shall appear to have been committed more than three years before the issuing of the commission or warrant for such trial, unless the person, by absconding or some other impediment, shall not have been amenable to justice within that

Ib. § 127.

period, and then not exceeding two years after the impediment shall have ceased.

And no persons acquitted or convicted of any offence, by the civil magistrate, is liable to be punished by a court martial for the same, otherwise than by cashiering.

Witnesses summoned to attend upon military courts, (who are privileged from arrest, &c.) and neglecting, are liable to be attached in the court of King's Bench, in London or Dublin, or court of Session in Scotland, or college of law in the West Indies, on complaint respectively made to them.

Though the act for preventing mutiny and desertion, &c. from which the whole authority of military law is derived, expires annually on the 24th of March, in Great Britain and beyond sea, on the 31st of March in Ireland, and 30th of April in Jersey, &c. yet no procedure expires with it, since it is immediately succeeded by another, authorising the same articles of war, and with enactments, differing from the former only according to the circumstances or improvements of the time.

The privileges even of parliament do not exempt military persons from military law, though the courtesy of an intimation previous to arrest is used, and a prosecution may be brought in a court martial, at the suit of a person who is himself not subject to military

Ib. § 15.

Ib. § 23.

Ib. § 129.

Tytler, Essay
on Mil. Law,
137.Art. of War,
§ 126.McArthur's
Pr. and Pract.
of C. M. I. 217.

Tytler, *Essay
on Mil. Law,*
211.

jurisdiction, provided the offence be of a military nature, and committed by a person under military law.

V. ITS EXTENDED JURISDICTION, IN THE PROCLAMATION OF MARTIAL LAW.

Tytler, *Essay
on Mil. Law,*
p. 374.

Such (says the judge-advocate for Scotland) is the regular tenor of the operations of the civil and military law in times when the state enjoys its ordinary tranquillity. But there are extraordinary seasons, when the body politic, like the natural, is affected by disease, and when absolute necessity authorises the application of extraordinary remedies. So the common and statutory law, which, in ordinary times, is adequate to the coercion of all offences, may be found in times of extraordinary turbulence and alarm, utterly inadequate to the repression of the most dangerous crimes against the state. The slow and cautious procedure of the king's ordinary courts of justice keeps no pace with that daring celerity, which attends the operations of rebellion; nor are their regulated forms, and publicity of procedure, fitted to bring to light the dark designs of a conspiracy. In such seasons, therefore, the constitution possesses in itself that remedy which is necessary for its own preservation.

By the authority of King and Parliament, martial law, and the mode of summary trial by courts martial, is enacted for a limited time, either over a part or the whole of the kingdom where such rebellion may exist.

This apology, however, would, with difficulty, have been received by the people of Great Britain, fondly resting on the various trophies which decorate their temple of liberty, Magna Charta, the Bill of Rights, and Trial by Jury, if the effects of martial law continued to be such as they had experienced in the unsettled times of Britain; and, as it appears from those writers, whose works form the common law of the land. *Anglicæ jura in omni casu Libertati dant favorem.*

Fortescue de
laudibus, Leg.
Ang. c. 41.

But, says the Lord Chief Justice of the Common Pleas, martial law, such as it is described by Hale, and such also as it is marked by Sir William Blackstone, does not exist in England at all: and his lordship's assertion (however true Judge Blackstone's might also have been of his own time, thirty years before) is certainly capable of proof in the unhappy occurrences in Ireland a few years since, which occasioned this resource, it is even there found to be more mild than could have been experienced before.

Grant, v. Sir
C. Gould, Trin.
Term, 1792.

Proclam. of
Martial Law, 12
Feb. 1798.

Where martial law prevails, (continued Lord Loughborough, afterwards Earl Rosslyn,) the

authority under which it is exercised claims a jurisdiction over all military persons, in all circumstances; even their debts are subject to inquiry by a military authority. Every species of offence, committed by any person who appertain to the army, is tried, not by a civil judicature, but by the judicature of the regiment or corps to which he belongs, &c. His lordship then goes on to prove, from a variety of circumstances, that lately the civil power has been paramount in England.

U. b. Supr. 376.

The statute for the enactment of martial law (continues Mr. Tytler, and after him M'Arthur, &c.) ordinarily proceeds on a narrative of its inductive causes, in order that the subjects in general may be certified of the necessity of this strong measure; and that, while the full extent of its object is perceived, no unnecessary alarm may be excited in the minds of the innocent and well-affected part of the community. The right of the legislature to adopt this violent but necessary remedy, and to invest the crown with this extraordinary power of the sword is likewise pointedly asserted on constitutional principles, that all may perceive its entire legality. It is then declared, that it shall be lawful for his majesty, or for any chief governor, or commissioner, whom he shall appoint, during the continuance of the rebellion, and whether the ordinary

courts of justice shall or shall not be open, to issue his or their orders to all officers commanding his majesty's forces, and to all others whom he or they shall think fit to authorize, to take the most vigorous and effectual measures for suppressing the said rebellion in any part of the kingdom, which shall appear to be necessary for the public safety, &c. and to punish all persons acting, aiding, or assisting, in such rebellion, either by death or otherwise, as to them shall seem expedient. The statute likewise gives a power to arrest, or detain in custody, all suspected persons, and to cause them to be brought to trial in a summary manner, by courts martial, and to execute their sentences; and releases all who act under its authority from responsibility to the other courts,

PART II.

PRIMARY OBJECTS IN THE GOVERNMENT
OF THE MILITARY FORCE OF
GREAT BRITAIN.

I. RELIGIOUS INSTITUTES OF THE ARMY.

Art. of War,
§ 1. Art. 1.

TO preserve a due reverence for religion, no where more actively necessary than throughout every rank of the army, it is by one of the most ancient articles of war enjoined, that all officers and soldiers, not having just impediment, shall, diligently, frequent divine service and sermon, in their respective quarters, and behave decently and reverently, under the pain, on omission in either case, if a commissioned officer, of being reprimanded before a court martial, by the president; if a non-commissioned officer, or private soldier, of forfeiting twelvepence, out of his next pay, for the first offence; and, for every repetition, in addition to the same fine, to be laid in irons for twelve hours. The money to be applied to

the use of the sick soldiers of his troop or company: and for this article commanding officers are responsible. The same penalties are incurred by any unlawful oath or execration.

Gen. Reg. and
Ord. (1804) 53.
§ 1 and 2.

And any officer, non-commissioned officer, or soldier, speaking against any known article of the Christian faith, is ordered to be delivered over to the civil magistrate. This crime will, however, be easily perceived to be triable by court martial, under many sweeping clauses, as un-officer or un-soldier like conduct, &c.

Ib. § 1. A. 5.

Ib. § 24. A. 2.

And it is expressly ordered, that, for profanation or violence to any place of worship, or chaplain, they shall be liable to such punishment as by a general court martial shall be awarded.

Ib. § 1. A. 4

The religious service of the army is under the direction of a chaplain-general, who issues his regulations for its government, in the usual course of the war-office, appointing, or rather allowing to garrisons, regiments, &c. their respective chaplains, where necessary.

Ib. § 1. A. 5.

The duty of regimental chaplains is, of course, the ordinary ones of his profession. On service, he visits the hospital, and performs the funeral ceremonies.

No chaplain, who is commissioned to a regiment or garrison, is to absent himself, (except

in case of sickness, or leave of absence,) under pain of punishment, at the discretion of a court martial. Nor is he to be guilty of drunkenness, or other scandalous or vicious behaviour; on proof of which, before a court martial, he is to be dismissed from his office. These courts martial, though not so specified, are doubtless to be general.

Such are the simple, though comprehensive, institutes of the army, for the preservation of religion and its establishments; institutes which have, however, been extended by the example of the greatest generals, and politest gentlemen, of all ages, and the importance of a due attention to which must be manifest from the frequent necessity of applying the religious ceremony of the oath to an army. Uninstructed as are the very humble class of peasants, from which are often drawn the flower of our forces, what value would they attach to a pledge which disregard of the essential points of religion should render a nullity? Without supposing, with an old military writer, that "men who follow the war assume to themselves a greater liberty to sin than other mortals do, as if the entering themselves in a militia did let them loose from all civil bonds and ties of society;" a more marked attention to the religious establishments of the country may be safely urged in the army. Since, ex-

Alexand. ab.
Alexand. L. 3.

Sir James Turner's Pallas Armata.

clusive of the duty to support the constitution in church and state, (it has been well observed) that "every quality, which is enjoined by Christianity, as a virtue, is recommended, by politeness, as an accomplishment; gentleness, humility, deference, affability, and a readiness to assist and serve, on all occasions, are as necessary in the composition of a true Christian as in that of a well-bred man. Passion, moroseness, peevishness, and supercilious self-sufficiency, are equally repugnant to the characters of both."

II. MEDICAL INSTITUTES.

The health of the army is preserved by the regular appointment of surgeons, wherever they can be required, in numbers proportioned to the strength or importance of the care to which they are appointed, with the controul of a medical inspector-general, his deputies, &c.

Gen. Regulations and Orders, 1804.
Instructions to Reg. Surgeons, &c. 1806.

It is the duty of general, and even ordinary, officers of the day also to visit and report the state of regimental hospitals.

The extensive duties of regimental surgeons require, and will, no doubt, obtain some regulations, at least, as explicit as those which respect the conduct of chaplains, in addition to the present, which direct their peculiar duties. On

them depend the inlistment of a healthy force, and the preservation of its strength; and, perhaps, on the skill of a young junior assistant-surgeon in his report may depend the commission of a veteran officer in a doubtful illness; since, though the section on counterfeiting sickness has been omitted in the articles of war of latter years, its influence still remains in other forms. And it is yet even undetermined how far the regimental surgeon is to attend the sick officers of his corps.

See also Bruce's
Mil. Inst. 269.
Tit. 86, 5, &c.

In all these respects, however, (as well as in their capacity of officers,) surgeons are, of course, liable to the jurisdiction of military law, under the sweeping clauses of its statutes; and may moreover be prosecuted at the suit of a coroner, making an inquest even on a deceased private soldier.

Tytler's E. on
Mil. L. 211.
(Note.)
Case at Nor-
wich, 1799.

In all corporeal punishments, the regimental surgeon attending is, for the time, paramount to the commanding officer; in those of flagellation it is his duty to point out when the constitution of the sufferer will not permit farther punishment with safety. The instant, says Major James, that a military culprit receives a lash, the surgeon is responsible for his life.

Regimental
Comp. v. ii. p.
28.

The professional duties of regimental surgeons are detailed in particular "Instructions," issued from the Horse-Guards.

III. THE ADMINISTRATION OF JUSTICE.

In the following arrangement will be seen the laudable care which has been exercised to meet every end of justice in the army of Great Britain. Nothing remains but that, in the subordinate ranks of power, it should be executed with purity. Nor can any species of force be hoped to be efficient where this maxim does not invariably prevail:—*Fiat justitia ruat cælum.*

1. *Police of the Army.*

i. Preservation of the Peace and Prevention of Challenges.

While preserving the influence of that lively sentiment of honour, which must ever pervade the conduct of a military force, it is yet found necessary to prescribe bounds to the intemperance of youth, and the irascibility consequent upon injury, real or supposed, in those whose reasoning is necessarily directed on all occasions to an appeal to arms.

It is, therefore, most properly enjoined by Art. of War, § 7. Art. 1. the Articles of War (to the ancient cognizance

of which, like religion, it is left by the mutiny-act) that "No officer, non-commissioned officer, or soldier, shall use any reproachful or provoking speeches or gestures to another, upon pain, if an officer, of being put in arrest; or, if a non-commissioned officer or soldier, of being imprisoned, and asking pardon of the party offended in the presence of his commanding officer.

Ib. § 7. Art. 2. That none shall presume to give or send a challenge to fight a duel, under pain, if a commissioned officer, of being cashiered; if a non-commissioned officer or soldier, of suffering corporeal punishment, at the direction of a court martial.

Ib. § 7. Art. 3. If any commissioned or non-commissioned officer, commanding a guard, shall knowingly and willingly suffer any person whatsoever to go forth to fight a duel, he shall be punished as a challenger. And likewise all seconds, promoters, and carriers, of challenges.

Ib. § 7. Art. 4. All officers, of what condition soever, have power to quell all quarrels, frays, and disorders, though the person should belong to another regiment, troop, or company; and either to order officers into arrest, or non-commissioned officers and soldiers to prison, until their proper superior officer shall be acquainted therewith. And whoever shall refuse to obey such officer (though of inferior rank) or draw his

sword on him, shall be punished at the discretion of a general court martial.

The same punishment applies to any one who shall reproach another for refusing a challenge; "and," says the Articles of War, "We hereby acquit all officers and soldiers of any disgrace or opinion of disadvantage which might arise from their having refused to accept of challenges, as they will only have acted in obedience to our orders, as good soldiers, &c." Ib. § 7. Art. 5.

All this is law; and an officer who should shew himself addicted to quarreling, and challenging, on frivolous occasions, his brother-officers, or defending errors, or refusing to accede to a rational explanation, as such conduct would be inconsistent with the character of an officer and a gentleman, would not escape with impunity.

And be it remembered, that, whatever the feelings inherent in the military character on the subject, on such a conduct being practised towards any one in the civil classes of the community, who shall chuse to prefer to the ordinary civil courts an application to military law, the court martial, which must be ordered on application, must take that part of the third article of the seventh section of the Articles of War which extends to "any person whatsoever," to apply equally to the second article, Ib. § 7. Art. 2, 3.

and in consequence sentence the military offender to be—"Cashiered."

To the conflicts of private soldiers it need scarcely be added that this prescription extends in full force.

But, while such is decidedly the law of the case, paradoxical as it may appear, with all the denunciations against "the challenger" before his eyes, the officer who should permit the use of *opprobrious expressions* towards him, MUCH LESS A BLOW, or indeed any conduct from another that should degrade him, or in the smallest degree impeach his courage, would be liable to be arraigned before a court martial, for conduct unbecoming an officer and a gentleman; and at the least to a council of inquiry of his brother-officers, whose decision could not amount to less than the resignation of his commission.

In either case—that of the challenging quarreller, who destroys all the pleasures of society, or of the person whose meanness or indecision renders him a palpable butt to the stupid triumphs of wanton insolence—such representations never fail of being made to his majesty as induce him to dispense with services so little honourable to his cause.

Here is one of many instances in which every commander becomes answerable to God

and his country for a scrupulous exertion of cool and impartial judgement, of exact and discriminating decision.*

Yet, notwithstanding all that has been said, there are cases of opprobrium, in the unworthy, which even the delicacy of the military character does not require to be washed away by the blood of an innocent and honourable man; and which every principle of reason and propriety in fact demand to be cleared by the cool investigation of a general court martial. Such are those which specifically attack character, and which the sacrifice of a thousand lives could not disprove, when, perhaps, submitted to the laws of evidence, they sink into contempt, or fall with redoubled vengeance on the head of their "*ungentlemanly*" propagators.

Case of Lieut.
Kingston.
Trial of Colonel
Passingham.

* Since, however, it will be seen that there are cases in which, notwithstanding the explicit declarations of the written law, the custom of the service would seem to demand a reference to arms, although any regulations of an illegal act cannot be attributed to positive law, yet, where custom has established certain provisions, tending to lessen the breach of society, an attention to which also might tend to a great mitigation of the common law on the part of a survivor in the unhappy termination of a dispute, a brief sketch of them cannot at least be deemed impertinent.

Avoiding any observation on the law of ancient combat, it is properly observed, by an intelligent officer, who has formed

Gen. Bobs and
Instructions for
seconds in
duels, 1723.

Gen. Orders,
9th-Dec. 1809.
Proceedings G.
Court Mart. at
Ipswich, for
trial of Captains
Coakman,
Keeling, and
Alefounder.

Such, to go no farther back, would appear to be the case of Lieutenant Kingston, of the Hertfordshire regiment of militia, for the basest

the "General rules for seconds," that "Whenever a gentleman has the misfortune to be solicited in friendship to undertake upon himself this serious office, he ought to inform himself most minutely of every particular in dispute, and duly reflect upon the nature of it. He is then to try, and even rack, his invention, for any new and reasonable light that can be thrown upon it, in order to reconcile the party aggrieved.

If, however, it should so happen that the offence is of that magnitude as to preclude any explanation, he must then determine according to the right or wrong of the party that applies. If it be the former, he must readily attend him, but, if the latter, it should be done with the utmost reluctance, and only on this condition, that, having the odium of being the flagrant aggressor, he goes upon the ground to make a proper atonement, and nothing more; that he passes his word of honour to make no attempt upon the life of his adversary, and leaves him to his own satisfaction.

When young men are made captious by over drinking and the want of rest, they will take unreasonable offence at the most innocent things, demand immediate satisfaction, and stagger from the bottle to the field. The suffering them to fight in a state of drunkenness is preposterous, because no man's courage is the better established by any thing he does in such moments.

Supposing, however, that the seconds have used every honourable means of adjustment without avail, it is a fortunate circumstance that the sword is so much laid aside, and pistols made use of, from the inequality of skill, the number of wounds, and the difficulty of curing them from the deep-

calumniation, of whom *even to the charge of unnatural propensities*, three officers of the

ness of their extremities. For those who are so desperate as to chuse these weapons, the seconds are to observe, 1. That the swords are of equal length. 2. That the sod they stand on is clear, dry, and even. And, 3. above all, that the combatants be placed as far asunder as that they must advance to each other before they can come to the assault.

“For pistols the first thing is the choice of ground; highways or footpaths, or under walls, or hedges, or along the ridges of a field, are to be avoided; since, forming so many lines of direction, they unnecessarily endanger the parties; the ground should be in an open situation, and crossway of the ridges, if there are any.

The bloody distances of eight and seven yards are sometimes given by unskillful seconds; so that, when the parties come to present, the mouths of their pistols are no more than four or five distant, leaving no chance for their lives! Ten yards is the nearest distance that parties should be suffered to fight at; and the man who abides by his fate, at such a distance, makes an honourable expiation for any misdemeanour. In trivial disputes, twelve or fourteen yards may well be given, and all matters of this kind are wisely taken from the power of the principals. To prevent the distance being lessened, also, particular orders should be given for the advanced foot in presenting; for, if they step beyond, instead of to, the mark of distance, they clearly gain a yard upon each other. A good and sufficient mark must be placed, and orders given for no advance beyond it, when they come to fire. By stepping to fire, advancing the foot, and inclining in the act of presenting, the body will be sunk some inches, and many a head has been so saved.

The ridiculous custom of adjusting the mode of fighting,

same regiment, his superiors, were brought to trial by a general court martial, on the 27th of

by tossing up a piece of coin, to determine which of the principals is to have the first shot; and of alternate firing, to punish the party conceived to be wrong, by making him receive the first fire; are to be equally avoided, and the firings to take place by signal of the seconds, the voice not being always sufficient, and the signal prevents the eyes of the combatants from being fixed on the object of either aim.

A second must never deliver a pistol cocked; nor a fresh one without first using his utmost endeavours to reconcile the parties. For, though wrath and revenge may actuate the principals, the seconds are to feel nothing but humanity.

The seconds examine and load the pistols in presence of each other.

These modes are perfectly competent to every honourable purpose in the field, and are free from absurd and unnecessary danger.

If any clear and decided injury has been done by either of the parties to the other, he will only present, in order to interrupt the aim of his adversary; on receiving his fire he will instantly recover, and then submit himself to the generosity of his enemy, and the endeavours of the seconds, which cannot often be unavailing.

Most duels have their origin at play or the bottle; insulting language returned by worse produce them, instead of dignified explanation. Something like the following is recommended. "Sir, the company will remember your improper behaviour. I have too much respect for them to stay any longer. I shall hope to hear from you in the course of to-morrow; if not, you will be sure of hearing from me." This would give time for recollection, and prevent the parties to the quarrel from being augmented.

October, 1809; two of whom were dismissed, with a subaltern officer, whose testimony appeared to be given under all the influence of party. From the recital, as "general orders," (which the army owes to that most useful vigilance of military administration, exercised in the circulation of such judicial proceedings as may form precedents for the government of future courts,) it appears, that, without "the slightest imputation whatever on the honour and character of Lieutenant Kingston, of the purity of whose intention there does not exist in the mind of any member a doubt—whose character remains, in the estimation of every member of it, pure, untainted, and unblemished," officers of the rank of captain had not hesitated to descend into the common sewer of infamy for the creation of a charge, of crimes which the English law, declares *unfit to be named among christians, (peccatum illud horribile, inter christianos non nominandum)*; of which military law does not stain its annals by any recognizance, and which cannot even be mentioned with a name without injury.

All that a gentleman has a right to require for offensive words is to have them recanted, with a proper apology. This is not to be obtained by returning abuse, and a public uproar."

A *charge* of this kind is by common law punished with death, if but a guinea be extorted.

Another instance of this melancholy depravity occurs in the trial of Colonel Passingham.—*Ohe, jam satis!*

It must be recollected that any person is justified in apprehending, and taking before a civil magistrate, the whole of the parties concerned in a duel, and holding them all to find security for preserving the public peace.

ii. Apprehension of Offenders.

At the head of this division of the police of the army must be placed the provost martial general. His office, however, is little exercised except in the camp, the officers of every regiment forming, under its standing orders, a police of their own.

What officers of every rank are to the functions of the magistrate, non-commissioned officers and private soldiers are to the execution of the minor regulations of police. Hence the facility with which the necessary promptitude of all military affairs may be conducted in this respect;—crimes prevented, criminals apprehended, and *proved* perpetrations punished. And (notwithstanding the obnoxious character

which martial law has from circumstances assumed)— *the common law of the country protected.*

Is an officer guilty of any, the smallest, dereliction from duty or *character*, which are indeed the same, he is liable to be immediately put under arrest by the officer in command, even a single grade above him.

Is a private soldier obnoxious to complaint, either civil or military, a thousand hands are ready to secure his person; his immediate residence is instantly known, a prompt prison in any guard-room awaits him, and a strict form of justice at any hour ready, with every class of evidence in array.

“To the end that offenders may be brought to justice,” (say his majesty’s Articles of War) “we hereby direct, that, whenever any officer or soldier shall commit a crime deserving punishment, he shall by his commanding officer be put in arrest, if an officer, or if a non-commissioned officer or soldier be imprisoned until he shall be either tried by a court martial, or shall be lawfully discharged by a proper authority,” (the commanding officer.) “No officer or soldier,” however, “who shall be put in arrest, or imprisonment, shall continue in his imprisonment more than *eight days*, or until such time as a court martial can be conveniently assembled.”

Art. of War.
§7. Art. 22,

Ib. 23.

Ib. 24.

As to the manner of doing this, it is subsequently prescribed, that "No officer commanding a guard, or provost martial, shall refuse to receive or keep any prisoner committed to his charge by any officer belonging to our forces, which officer shall at the same time deliver an account in writing, signed by himself, of the crime with which the said prisoner is charged."

Ib. 25.

But then "No officer commanding a guard, or provost martial, shall presume to release any prisoner committed to his charge, without proper authority for so doing, nor shall suffer any prisoner to escape, on the penalty of being punished for it by the sentence of a court martial."

Ib. 26.

In pursuance of the best principles of policy, "Every officer or provost martial, to whose charge prisoners shall be committed, is hereby required, within twenty-four hours after such commitment, or as soon as he shall be relieved from his guard, to give, in writing, to the colonel or commanding officer of the regiment to which the prisoner belongs, (when the prisoner is confined upon the guard belonging to the said regiment, and his offence only relates to the neglect of duty in his corps,) or to the commander in chief, their names, their crimes, and the names of the officers who committed them, on the penalty of being punished

for his disobedience or neglect at the discretion of a court martial."

And, if any officer under arrest shall leave ib. 27. his confinement before he is set at liberty by the officer who confined him or by his superior in power, he shall, upon being convicted thereof before a general court martial, be cashiered.

And all crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not specified in the said rules and articles, are to be taken cognizance of by a general or regimental court martial, according to the nature and degree of the offence, and to be punished at their discretion.

When punishments take place, the whole is under the direction of the provost martial general, who has the command of firing parties, &c.

iii. Safety of the Camp.

The provost martial assumes a more general Bruce's Mil Inst. Tit. 10, and very important character, which he has § 19. also borne for no short period of time. In the beginning of the last century his power and trust was so great, that all officers and soldiers were prohibited to hinder him, his lieutenant,

or servants, in the execution of their offices, on pain of death, &c. There were then also regimental provosts marshal, whose fees were regulated by the court martial.

A. 1. Annæ.
Reg. 57.

Gen. Reg. &
Ord. 36. et seq.

On actual service the provost marshal, or his deputy, acting with the army, will frequently make the tour of the camp and its environs, and will have orders to seize such persons as are committing disorders.

Plundering and marauding, at all times highly disgraceful to soldiers, under the circumstances in which the army would take the field in any part of the united kingdom, and committed against the persons and properties of our own countrymen, whom it is our duty to protect, will become crimes of such enormity as to admit of no remission of the awful punishment which the military law awards. The provost marshal, in making his rounds, will be commanded to execute it immediately, and in its greatest rigour against all such as are detected in the fact.

Ib. 83.

All officers in the command of guards and detachments are enjoined to give assistance to the provost marshal in the execution of his duty, and any officer or soldier impeding him in the same, or offering him any insult, will receive the most exemplary punishment.

James's Reg.
Com. v. i. 259.

A subaltern and thirty cavalry to be always ready to go out with the provost's guard.

The grand provost to attend all foraging parties that are made by troops of different nations under one commander in chief, with a detachment of cavalry for the purpose of punishing with death all those that shall be found plundering or marauding in the country, &c. Those that do not belong to his regiment will be sent prisoners to their own.

All men guilty of capital crimes to be immediately sent to the provost. No man received except his crime be sent with him in writing.

When any man is executed, his crime is on a label to be affixed on his breast.

The provost to give in a list of his prisoners to the general of the day, at head quarters, by nine o'clock.

The provost to bury all dead horses and car-
rion.

The provost is to inspect the sutlers' weights and measures, &c. to inquire into the sutlers' servants, and endeavour to watch them, that, under pretence of going to neighbouring towns to market, they do not hold correspondence with the enemy or his spies.

Lists are to be delivered in to the provost marshal of the sutlers and butchers licensed in each corps, that they may have weights and measures of the same standard, and sell by no

others but those stamped by the provost, under pain of severe punishment.

2. *Judiciary Character of Officers of every Rank, in their respective Commands.*

If the importance of a military education in officers for the formation of an efficient military force, and to society, have not been already perceived, it must here be evident, since the junior officer of a regiment must in some form or other constantly be liable to command, and, whether in the inspection of a squad, or the command of a party or guard, becomes for the time a military magistrate, to whose hands the well-being of a part of the army is confided. Uninstructed, if even his heart possess the generous warmth of youth, he is likely to relax too much the bands of discipline; if, on the contrary, he be undeviatingly harsh, obdurate, and unfeeling, instead of preventing crimes, or arresting them in their progress, he chills the spirit that is fostered by discriminate approbation, drives the offender to desperation, and instead of the open manly character full of *esprit du corps* that should mark the soldier, produces cunning, meanness, desertion, and dismay. In the command of a body of men, however small, opportunities constantly offer

themselves for the delightful exercise of every virtue; but, to the mind not instructed by education nor informed by experience, all these opportunities are in vain.

To any officer commanding a company, any soldier may apply for redress of any wrong, or the settlement of any dispute, and he is bound to inquire into it, and afford the necessary redress. Indeed, when not on service, this is the most pleasing and most military duty of an officer, since it is by cares like these alone that those bonds, which are otherwise formed by mutual difficulties and dangers, can be created. It is here, by a readiness in all the minor attentions of the officer, that the soldier is taught to view the army as his family, and every comrade as his brother.

“ If any inferior officer, non-commissioned officer, or soldier,” say the Articles of War, Art. of War, § 12, Art. 2. “ shall think himself wronged by his captain, or other officer commanding the troop or company to which he belongs, he is to complain to the commanding officer of the regiment, who is hereby required, if necessary, to summon a regimental court martial, for the doing justice to the complainant; from which regimental court martial either party may, if he think himself *still* aggrieved, appeal to a general court martial. But if, upon a second hearing, the appeal shall appear to be vexatious and

groundless, the person so appealing shall be punished at the discretion of the said general court martial.

Ib. § 12. Art. 1. "If any officer," they continue, "shall think himself to be wronged by his colonel, or the commanding officer of the regiment, and shall, upon due application to him, be refused to be redressed, he may complain to the general commanding in chief our forces, in order to obtain justice, who is hereby required to examine into such complaint, and, either by himself or our secretary at war, to make his report to us thereupon, in order to receive our farther directions."

The most important part in the judiciary character is that sustained by the colonel or commanding officer of a regiment; and to the rank of field officer is therefore required much dignity of mind and deportment. To him may be said to be confided the last resort of justice, in respect both to officers and soldiers, since any farther appeal is necessarily attended with a trouble, exposure, and suspicion, very incompatible with the true spirit of military discipline. Hence arises a necessity for every commanding officer possessing a personal knowledge of the character, at least of every officer in his corps, and as far as may be of every private soldier, with a mind perfectly free from the little prejudices

of subordinate ranks, and of course from every motive of interest or caprice, or any sentiment but the good of the service, with which that of the soldier must always be identified. Innumerable are the precepts to be derived from the theory and practice of the great teachers of war in modern times, all tending to soften authority by honour and affection; and to incorporate, with the constituent feelings of the soul, those habits which are necessary to the perfection of the military character.

Turpin's Art of War, v. i.
Saxe's Commentaries, Re-
veries, &c.
Warnery,
Miscel.

“The colonel,” (says General Le Marq. de Quincy,) “in addition to the strongest concern for the propriety and martial air of his soldiers, should set the best example to his officers; he should not oblige them to be at any superfluous expense; he should take great care to have the regard of his officers, using with them a noble familiarity, marked with the greatest disinterestedness; living as respectably as his circumstances will permit, nor committing any injustice in the distribution of their employments.” “The soldiers will obey their colonel with pleasure, even on the most perilous occasions, if he evinces care that they suffer no injury (*aucun tort*), that they receive the full benefit of their pay, are attended to when sick or wounded, and experience his occasional

Art. de la Guer.
&c. v. ii. 33.

liberalities when they shall have distinguished themselves."

Blumenthal,
Life of Gen. de
Zieten, v. 2.

"The hussars of Zieten, whether officers or private soldiers, were ever anxious to emulate their commander; who, on his part, carried the confidence he had in them to such a degree as to imagine himself invincible at their head. Whenever it happened that he encamped in the midst of his regiment, he considered himself more secure than he could be in any other situation." After peace was made, his officers and soldiers flocked to Zieten as to their common father, &c." "Long live our good father, Zieten!" was their constant acclamation.

Mil. Essay, c.
iii. p. 44.

Speaking of the government of a British regiment, Colonel Dalrymple observes:—"It in a great measure depends on the disposition of the commanding officer." "The military laws have authority enough to invest him with all the severity of German discipline." Where a commanding officer is a man of sense and spirit, and will give himself the trouble, he will certainly succeed in forming his corps: he may manage so as to have little occasion to use severity. Avoiding all partialities, and exacting a strict attention to the duties of the regiment, and afterwards behaving always with an easy gentlemanlike familiarity, will be the best method of establishing harmony and

unanimity, without which the service can never be carried on cheerfully and well."

"In all institutions of authority," (says an intelligent writer,) "there must exist a certain portion of power, which it is impossible to limit by positive checks, and which must, of course, be intrusted to the individual by whom it is held. Wherever discretionary power exists, it will occasionally be abused by weakness, or prostituted to the gratification of passion. In armies, as in all other departments of political power, men are often either ignorant how to direct that authority with which they are intrusted, to its proper end, or they abuse and pervert it to purposes foreign to its nature and original design. Impelled by a mistaken zeal, or by their own evil dispositions, they indulge their passions in the infliction of unnecessary severities, or they render their power instrumental in procuring to themselves low and selfish indulgences, and in stifling the indignation and contempt which such meanness never fails to produce."

"The want of proper heads" (says Major Adye) "generally causes the ruin of corps."

"He" (a commanding officer) says M. Saxe, "ought to be mild in disposition, and free from all moroseness and ill-nature; to be a stranger to hatred; to punish without lenity, especially those who are dear to him, but never

Observations on the character and present state of the military force of Great Britain, 1804, p. 17.

Treat. on Mil. Law, &c. p. 271

Mil. Reveries, v. 2.

through passion; to shew a constant concern at being reduced to the necessity of executing, with vigour, the rules of military discipline, and to have always before his eyes the example of Manlius. He should persuade both himself and others, that severity is a term misapplied to the necessary administration of the martial laws. He will thus render himself beloved, feared, and, without doubt, obeyed." "He will thus have no occasion in action to embarrass or perplex himself; for, if he takes upon him to do the duty of the serjeant, and to be every where in person, he will resemble the fly in the fable." "I have seen colonels who were professed disciplinarians, and perfectly clever at the manœuvre of a body of troops in camp; but, if you took them from thence, to employ them against the enemy, they were absolutely unfit for the command of a thousand men; they would be confused to the last degree, and totally at a loss which way to turn themselves."

From the judiciary character of a commanding officer, Marshal Saxe naturally glances upon the ill effects of its mal-administration in the field.

This requires no illustration; for if, for instance, it could be supposed, that, in Great Britain, a corps, previous to its rendezvous for service, encampment, review, or even inspec-

tion, had been subjected to this anomaly, or rather solecism, in military ordination. That a commanding officer, for the sake of some selfish gratification of power or profit, had assembled around him the vicious refuse of the lowest orders of society, had communicated with his officers only, according to *their judgement*, and with his private soldiers only to countenance *their* extortions; that, in consequence, merit and respectability, in every rank, had been driven to despair. That the other field-officers also had separately adopted their courses, not indeed similar, excepting their anomalous character in military science. That with all this a shew of discipline was kept up, characteristic of the term only, in the exercise of unnecessary severity towards, perhaps, the most deserving individuals, including even the sick, and privates previously authorised to employ their labour usefully to the community. If either the whole or any part of such a system of domestic annoyance could be supposed to have existed, what, according to the view of Marshal Saxe, or any other celebrated warrior of modern times, must be the result in the field? Confusion, artifice, disorder, and shame! In vain the General expects to meet a species of force correct, decided, and animated by military prowess:— In vain he inquires the cause, that the least

Berenger, Ecole
du Soldat, &c.
575.

difficult process is performed with noisy re-
 crimination of neglect, tediousness, and dis-
 may, that the whole economy is, with difficulty,
 explained; and that, only with exhaustion of
 the utmost diligence, patience, and acumen,
 he is enabled to pass through the ranks, and
 submit for the consideration of his superiors
 and government a barely passable report.

Observations on
 the character,
 &c. 19.

“Every act of unnecessary severity, therefore,
 every capricious exercise of power, may be
 said, more or less, to injure discipline, and to
 deprive it of its surest supports.” “Men may
 be overawed by tyranny and oppression into
 an adherence to the strict letter of their
 duty; but it is impossible, amid threats and
 punishments, to preserve that “proud sub-
 mission, that dignified obedience, that subor-
 dination of the heart, which superadds to the
 cold obligations of duty the powerful influ-
 ence of voluntary zeal.”

Every officer, from the ensign up to the ge-
 neral, is placed solitarily in a sort of judicial
 situation, to judge of the law and the fact, and
 to punish or acquit at will.

3. *Council of Inquiry.*

Tyler, Ess.
 C. M. 349

This is the next form which the adminis-
 tration of regimental justice assumes in its ap-
 proach to a court martial, and in which the

officers, under the order of the colonel, assemble in the character of judge-jurors, to inquire into the measures necessary to be taken in consequence of the suspicion of some delinquency having been committed by an officer of the corps.

“A meeting of this kind, however,” says the Judge-Advocate for Scotland, “although they may collect material information from apparent or known facts, or written evidence, of which they may be possessed, are not authorised to examine witnesses or record their declaration.”

And, as such a meeting must, therefore, be proportionably dangerous to the individual who is its object, from the very slender footing on which the practice rests, it behoves every commanding officer to be cautious how he assembles his officers for such prompt and indecisive deliberations; and, at all events, that he has at least something approaching to positive evidence of a fact of delinquency; most of all that he violates not that principle of law which suffers not evidence to be heard against any one in his absence.

Among the private soldiers, this practice, with the acquiescence of the commanding officer, is in some regiments very prevalent and very useful. They examine into the circum-

stances of a comrade with great readiness, are prompt to punish one who occasions trouble to themselves, and is a disgrace to their company. It is supposed that the result is sometimes more severe, as well as more appropriate, than could perhaps have been administered. It is a relique of the Dutch and French custom of admitting to courts martial one or more privates, that the soldier might have a portion of the benefit of a trial by his peers.

See Dutch
Articles, 170.

4. *By Court of Inquiry.*

Tytler, 347.

This form approaches still nearer to a regular judicature. "In cases of much importance, and where the facts are various and complicated, or there appears ground for suspecting the just foundation of the charge of criminality, or where a crime has been committed, or much blame incurred, without any certainty on whom it ought chiefly to attach," Courts of Inquiry are appointed to "take the matters under their consideration, and determine on such evidence as can be brought before them, whether there is or is not sufficient cause for bringing particular persons to trial, for the offence or crime, before a general court martial." The power of appointing them, like courts martial, is vested in his majesty, or any

Tytler, ubi
supra.

commander to whom the right of appointing general courts martial is committed under the royal sign manual.

The opinion of such courts, being entirely Tytler, 350. of the nature of advice or council given to his majesty or his commanders, has no binding effect as a sentence against the person accused, who in general is no party to their procedure. In particular instances, however, it will be evident they must be both for the interests of a party accused and the ends of justice. Yet a person who should be examined, and afterwards be liable to trial by court martial, might plead his having been thus induced to commit himself. Sir John Mordaunt's Inquiry on Rochetort Expedition, and Tytler, McArthur, &c.

A Court of Inquiry is not in every case called upon, or warranted even, to give an opinion; but is confined solely to the examination of witnesses on certain points, on the result of which examination the person, by whose authority the Court of Inquiry is held, is to form his own opinion. Tytler, 351.

“There is one occasion on which they seem warrantable in delivering an opinion or judgment. When they sit as courts of arbitration, which either two contending parties have applied for, or the decision of which they have consented to abide by.” Williamson's Mil. Arrangem. vol. ii. 132.

“Although the report of a Court of Inquiry has in no case the positive effect of a sen- Tytler, ubi sup.

tence, it may, in some cases, be immediately followed by the punishment of the party, whose conduct has been the object of the inquiry." "This, however, may be regarded rather as the mark of his majesty's clemency, and love of justice and equity, as it is the prerogative of the crown to dismiss officers, or soldiers, or any other servants, from its service, without any form of trial. And, although no commander in chief, having authority to summon courts martial, has any power of inflicting a proper penal sentence, unless through the medium of a court martial, yet, in the case of an officer holding any particular employment or command, under the appointment and at the discretion of the commander in chief, there can be no doubt that, on the report of a Court of Inquiry, warranted to examine and give an opinion on his conduct, he might, without farther procedure, be instantly removed, or suspended in such command or employment, by the same power which conferred it.

On the principle of the common law, that no indicter or juror, who has found a true bill against a person accused, can be put upon the petty jury for the trial of that person, so neither can the members of a Court of Inquiry sit on a court martial, without being liable to a good challenge.

The members of a Court of Inquiry are not sworn, nor do the witnesses give their evidence on oath; neither can any person be legally obliged to furnish information, nor give his testimony. Yet this power would seem to be recognized in some Courts of Inquiry, which have been authorised in the person of the judge-advocate to summon them.

Tyler, 355.

Warrant for Inquiry on Rochefort Exped. 31 Geo. II.

These courts not being established by any law, but by precedent and custom, it is supposed that any officer or soldier may refuse to plead before them. This is, however, a privilege not likely to be often exercised; and it were to be wished, that, resembling, in some respects, the court of inquest under the civil courts of criminal jurisdiction, called a grand jury, they should confine themselves to a similar mode of giving a verdict, briefly and simply in the affirmative or negative.

Mr. Arthur, v. i. 99.
Mil. Arrangem. v. ii. 132.

Tyler, 346.

Mr. Arthur, v. i. 103.

Mil. Arrangem. ubi supra.

There is, however, a strong dissimilarity between the two courts, inasmuch as grand jurors examine only the evidence for the crown, whereas courts of inquiry examine evidence on both sides. Grand juries act in a judiciary capacity, by finding or rejecting a bill: Courts of Inquiry are, by every authority, understood but rarely to pronounce any judgement, or declare any opinion.

There are two instances in which a Court of Inquiry seems somewhat irregularly authorised

by the articles of war under a misnomer. That where an inferior *officer*, as well as the non-commissioned officer, on thinking himself wronged by his captain, &c. is subjected to a "*regimental court martial*:" and again, when an inventory of the effects of deceased officers is directed to be made before "the next regimental court martial." The trial of General Whitelocke was, however, conceived by the judge-advocate-general to be an inquiry into the conduct of that commander in chief.

Art. of War,
§ 12, art. 2.
§ 19, art. 1

5. *By Field, or Drum-Head, Courts Martial.*

This is the first, though it may, in a legal sense, be also conceived as the utmost stretch, of military courts of judicature. It applies chiefly, if not entirely, to the private soldier, and is, as its title designates, held in the field for the punishment of some offence that requires an immediate example, and seems to draw its authority entirely from that principle of the articles of war, (now long since omitted,) which expressed, in those of Queen Anne, that "all military offences are appointed to be *summarily* heard and determined at a court martial." "Which order," says the learned and respectable writer of that time, "takes place especially in case of crimes, when,

Williamson's
Mil. Arrangem.
v. ii. 106.

Rules and Art.
for the better
gov. of her
Maj. Forces in
the Nether-
lands, art. 51.

Bruce's Inst of
Mil. Law, Tit.
x. § 59, p. 314.

if one be taken in the very act, he is immediately to be sentenced, and the sentence straight-way put into execution."

It may consist of officers of one regiment, or be composed of those of different corps; the proceedings are not committed to writing, but, a circle being formed, the prisoner is arraigned; evidence is heard *viva voce*, the prisoner defends himself, the members communicate their opinions in a whisper. The president reports their sentence to the commanding officer, who, if he approves of it, orders it to be carried into immediate execution.

Mil. Arr. 2,
106.

Sometimes the accusation and sentence are written on the drum-head, whence such are called drum-head courts martial. They are commonly held when the offence is evident; such as in cases of mutiny or sedition, refusal to obey an order, or where a soldier is detected in marauding, with the goods upon him. A simple entry is made in the regimental book of these field drum-head courts martial.

In no case, however, it evidently appears, from every authority, should these summary proceedings, under a judicial form, take place but where the exigencies of time, circumstance, and locality, most absolutely require. No law of civil society could otherwise endure it; to say nothing of the invariable principle, that *the best* method of trial which

Sullivan's
Thoughts on
M. Law, 42.

the nature of the case affords, and no other, shall be admitted in courts of justice.

6. *Camp, or Line, Courts martial.*

Mil. Art. v. 3,
106.

Like the garrison court martial, this form differs very little from the regular judicature, to which we are approaching, only in the appointment of its members, and the command to which it is responsible. It is sometimes composed of the officers of different corps in camp, in the same manner as those in garrison. It is ordered and approved of by the commanding officer of the camp; the sentences are executed before the picquets of the line, which it is the business of the adjutant of the day to see properly inflicted, every corps sending a drummer. The drum-major of the regiment that gives the adjutant, and the surgeon of the corps which the prisoners, who receive corporal punishment, belong to, are also to attend.

7. *Garrison Court Martial.*

Art. of War,
§ 16, art. 1.

This is assembled by order of a governor of a garrison, fort, &c. or the commanding officer of different corps, or detachments, &c. in barracks, or elsewhere, "when there shall not be a sufficient number of officers of the

corps to which the person to be tried shall belong, or in which the matter shall have happened," for the purpose of adjusting disputes, or trying offences, wherein members of the same or of different regiments are concerned. Williamson's Mil. Arrangem: v. 2, 105. Their institution, power, and method of proceeding, are exactly the same with those of regimental courts martial, their sentence not being executed till confirmed by such governor or commanding officer.

8. *Regimental Court Martial.*

The order hitherto pursued, though in some respects retrograde, is now arrived at the inferior of those positive forms of courts established by law for the administration of military justice.

"The commissioned officers of every regi- § 16, art. 12.
ment," say the articles of war, "may, by the appointment of their colonel or commanding officer, without any special warrant from us, or other authority, than these our rules and articles of war, hold regimental courts martial, for inquiring into such disputes or criminal matters as may come before them, and for the inflicting corporal or other punishments for *small offences*, and shall give judgement by the majority of voices; but no sentence shall be executed until the commanding officer, not

being a member of the court martial, or the governor of the garrison, shall have confirmed the same," and the authority for this article is

M. A. § 11, 24. especially sanctioned by the Mutiny-Act.

From this literal statement of the law, under which regimental court martials are held, their power is evidently not limited to the trial of *non-commissioned* officers and soldiers; and from another article of war it appears, that any inferior OFFICER, *as well* as non-commissioned officer or soldier, *thinking* himself wronged by his captain, or other commanding officer of the troop or company, is, by complaining to the commanding officer of the regiment, submitted to a *regimental* court martial, with the ordinary right of appeal, under restrictions, to a general one.

Art. of War,
§ 12, art. 2.

Hence it would appear, that, as general courts martial are seldom occupied upon a *civil* process, or mere matter of litigation, and that to *it* is *specifically* given by the articles of war a right of appeal, even while the same right, in criminal process, is still to a certain degree involved in doubt, to a regimental court martial it was intended to assign those minor disputes, as well as *regimental offences*, which could so much more *serviceably* be heard within the cantonments of a regiment than when extended to a general district. And, if this appear to be giving to the regimental

Ubi supra.

court martial a more important character than it have usually acquired, it will be easily ascertained to be otherwise; since it has been justly said, with sufficient truth, "that, though instituted for the trial and punishment of minor offences, they had been extended by degrees to the consideration of high military crimes." "Thus," the military speaker observed, and is, of course, known to the whole army, "by a fiction, *desertion* had been deemed absence from duty, and *mutiny* unsoldier-like behaviour." And this was reiterated in argument, for enjoining the same solemnities on the regimental as on the general court martial,* including the oaths administered to president, members, and witnesses.

Deb. in Parl.
Mar. 12, 1805.

* Of the necessity of the solemnity of an oath none could doubt, who was ordinarily acquainted with this branch of military judicature.

Their Royal Highnesses the Dukes of Clarence and Cumberland, and the Marquis of Buckingham, were averse from the law which imposed the oath, arguing, from their own noble minds, that a court of military honour would be more considerate of the soldier, and could be more lenient to his errors, than when bound by the strict injunctions of law as to punishment; but it was not for these peers to conceive, that, throughout the various dispositions to be found among the numerous officers of an extensive military force, the same generous sentiments cannot be hoped to be invariably prevalent, and particularly in the minor species of that force, including militia.

All this must evidently tend to shew the necessity of a greater attention, both to the principles and forms of law, than can be always attributed to the judge-jurors of a regimental court martial. To the acquisition even of an ordinary acquaintance with the law by which every man is bound, a long preparatory study

Mr R. Wilson's
Ing. into pres.
St. Mil. F. of
British Emp.
Gen. Stewart
on Mil. F. of
Et. E.

Even *since* the period of the amendment in the Mutiny Bill there alluded to, more numerous instances than are necessary to be pointed out have occurred, of the proceedings of regimental courts martial, consisting of little more than the different heads or titles, the members of which had no other judiciary character than their oaths, having considered their assembly only as a form or preparatory step to punishment, similar to that of erecting the triangles! and rejected inquiry tending to disprove the crime, as delay incompatible with the service! While again, previous to the period in question, sentences have occurred in transportations for life, for a week's absence; five hundred lashes for missing, perhaps, a single parade; and imprisonment, two hundred lashes, and drumming out, in the person of one man, for sleeping a single night out of quarters! and this on no service, but in perfect security. Members have reflected the hasty opinions of each other, at different periods, and then called it the custom of war; while any attempt to note evidence, for the purposes of comparison and deduction, was ridiculed as supererogatory and ineffectual!

Let it be remembered, however, that *this is not described as general*; this attaches not to *the law* of courts martial, but to the want of a consideration on the subject in those whom no human institution can preclude, which it is the business of these pages to impress.

is necessary, with the advantage of a previous academical education; yet to the important office of a member of a court martial, who is to judge both of the law and the fact, and that under the powerful influence from which, in the narrow boundaries of a regiment, he cannot be entirely exempt, *three months* only is allowed for the preparation of *the youngest* officer; and that, with the chance of being able, perhaps, to witness the form but very seldom. Since, then, such is the paucity of intelligence to be derived from this necessarily short noviciate, it is indispensable that every person should, by some other means, acquaint himself as much as possible with the principles of jurisprudence.

Gen. Reg. and
Orders, 43.

And as "justice," even in the highest post, is recognized as to be "always tempered with mercy," so in a court, the original jurisdiction of which is evidently exceeded by the fiction which submits to its authority crimes otherwise beyond its power of punishment, for the purposes of expedient lenity, this sentiment should prevail with the most lively sense. And it is to a similar end, that that order, so full of wisdom and humanity, is included among the instructions issued by his majesty's command to general officers on reviews and inspections: that they will "examine the standing orders and regulations of the regiment, and

H. M. Comm.
Ord. 11.

Gen. Reg. and
Ord. 95.

the courts martial which have set since last review, that they may ascertain whether *the necessity of frequent punishments has been superseded by the adoption of wise measures for the prevention of crimes*; and by the zeal and assiduity of *all the officers*, in their different stations, to carry them into effect, and maintain the discipline of the regiment."

— apud
James, Reg.
Comp. v. 2, 22.

Process of as-
sembling Regi-
mental Court
Martial.

Such, then, being the important character of a regimental court martial, to which may be added its more frequent use from its superior facility of assembling to any other, every due attention to formality, *consistent with the service*, is to be given, and none dispensed with, when absolutely necessary: it is in no respect to be treated lightly in its appointment, nor any part of its law considered a dead letter.

A regimental order will announce, at least, a day or two before the regimental court martial, the prisoners to be tried, and the officers of whom the court is to be composed, the latter from a roster kept by the adjutant, with equal attention to succession with that for any other duty.

§ 16. art. 22.

The prisoner, (for any non-commissioned officer or soldier committing a crime is to become so, at the instance of his commanding officer, nor can any provost martial, or officer commanding, refuse to receive him,) will also, as early as possible, have a copy of the charge

delivered to him by the serjeant major, who will also explain to him the nature of his trial, and advise him as to the collection of any evidence in his favour. The execution of this task should partake of the principles already recommended.

No prisoner shall continue in confinement more than eight days, or until such time as a court martial can be conveniently assembled. The court, being assembled, will observe, that it is enjoined, that "No regimental court martial shall consist of less than five officers, excepting in cases where that number cannot be conveniently assembled, when three may be sufficient; who are likewise to determine upon the sentence by the majority of voices, which sentence is to be confirmed by the commanding officer, not being a member of the court martial, before it be carried into execution." No proceedings shall take place, but between the hours of eight in the morning and three in the afternoon, except in cases which require an immediate example.

"The usual practice is to appoint a captain, as president, and four subalterns, or two, if more cannot be conveniently assembled." Captain-lieut. has set as president.

In it, as "in all trials by any courts martial, other than general courts martial, the person appointed to be the president thereof shall

Articles of War,
§ 16, art. 23.
Ibid. art. 13.
Ibid. art. 18.
Tytler, Ess. Mil.
L. 181.
Art. of War.
§ 16, art. 10.

The minor courts observe the same forms with regimental courts.

administer to each of the other members the following oaths :

“ You shall well and truly try and determine, according to your evidence, the matter now before you.

SO HELP YOU GOD.”

“ I, ———, do swear, that I will duly administer justice according to the rules and articles for the better government of his majesty's forces ; and according to an act of Parliament, now in force, for the punishment of mutiny and desertion, and of other crimes therein mentioned, without partiality, favour, or affection ; and, if any doubt shall arise which is not explained by the said articles or act of parliament, according to my conscience, the best of my understanding, and the custom of war in the like cases.

SO HELP ME GOD.”

And, as soon as the said oaths shall have been administered by the president to the other members, any one of the members shall administer the said oaths to the president. It is usually done by the senior member.

Formule of Record of Proceedings.

The prisoner is now arraigned in the following manner: The court being seated, uncovered, according to the seniority of members, beginning on the right and left of the president, and the prisoner introduced by the

serjeant-major, guarded, (formerly by a regimental provost marshal). The commencement of the "proceedings" is read to the prisoner by the president, as follows:—

"Proceedings of a regimental court martial, held at head-quarters, on the —— day of —— 18 —— by order of —— commanding —— for the trial of —— charged with —— (*whatever the crime describes agreeably to the terms of the Articles of War, mentioning time, place, and circumstance*) whereof is appointed

President, Capt. ——

Members ——."

The president demands of the prisoner, "How say you, are you guilty of the crime laid to your charge or not?" To which, agreeably to the lenity of English law, the prisoner is advised to plead "Not guilty." For, however obvious the crime laid to his charge, this is the only mean by which any circumstance in mitigation of it can appear, or the court ascertain the quantum of punishment; since, should the prisoner plead guilty, confessing the charge, no farther proceeding is necessary than to sentence him to any infliction prescribed within the letter of the law.

For any of the rare deviations from this course, reference must be had to the pleas before GENERAL COURTS MARTIAL.

The prisoner, however, having no objection to the officers by whom he is to be tried, and, in the ordinary course, pleaded not guilty, the court proceeds to the examination of the evidence, in which the president leads, and, if desirous, the members follow. The first evidence necessary is to prove the jurisdiction of the court over the prisoner, "that he belongs to the army, receiving pay and clothing, and having had the Articles of War read to him;" which the serjeant-major is generally competent to prove, who is, also, in cases where there is no other, officially prosecutor.

Art. of War.
 § 16. Art. 19.
 Williamson's
 Mil. Arrangem.
 v. ii. n. 65.

All persons who give evidence before any court martial are to be examined on oath, this is as follows :

"You shall true and perfect answer make to all such questions as shall be put to you, touching the matter now before the court, between our sovereign lord, the king's majesty, and the prisoner to be tried; which shall be the truth, the whole truth, and nothing but the truth :

SO HELP YOU GOD.*

* It is not to be found, either in the Mutiny Act or the Articles of War, says Colonel Williamson, (Military Arrangements, v. ii. p. 65;) nor is it, probably from its generality, furnished to this day, (1810,) either there, or in many other books on the subject.

For the more perfect decorum of the proceedings, it is expressly enjoined, that "No person whatsoever shall use menacing words, signs, or gestures, in the presence of a court martial then sitting, *or shall cause any disorder or riot, so as to disturb their proceedings*, on the penalty of being punished at the discretion of the said court martial." This injunction is most particularly necessary to be observed on a regimental court martial, which, from the simplicity of form, the probable youth of its members, and place of meeting, must otherwise be extremely liable to interruption, at least from levity and inconsideration. It is scarcely necessary to observe, on the mere possibility of a member being accidentally ordered to this duty while in the smallest degree inebriated, that such a case would incur the highest censure, and be subject to great severity of punishment. A juror in the civil courts, at no great distance of time, received a public and severe reprimand from the judge on the bench, who afterwards fined him twenty pounds. The member of a regimental court martial is not only a juror, in the most delicate sense, but also judge, and very often party.

Art. of War.
§ 15, art. 2.

Lord Lough-
borough, Sum.
Assizes, Dur-
ham, 1787.

To assist in the evidence generally, and also, if necessary, to afford any requisite information, the adjutant of the regiment to which the prisoner belongs attends. This officer is

James's Reg.
Comp. v. ii. 17.

supposed to be, at least, perfectly acquainted with the proceedings of courts martial, and is on occasion expected to afford, at least, the minor qualifications of a judge-advocate; at all times to advocate the cause of the prisoner, and to explain the Articles of War. (with a copy of which, as well as pen, ink, and paper, &c. he has already supplied the court).

Rules and Art.
1686. Art. 49.
&c. &c.
Mil. Arrange.
v. i. 103.

The part of Register of the proceedings, formerly, and with more propriety, performed by a *sworn* clerk, is now generally allotted to the youngest member, who is to be scrupulously correct in committing to paper every matter of form, however apparently trivial (for they are, according to Blackstone, the outworks of law); and no less so, in giving the depositions of every witness as nearly as possible in the words in which they are delivered.*

Com. b. 3.

Formule.

To the title of the proceedings already quoted will be now added, that, "The pri-

* Nor is it of little importance that the proceedings be *fairly written*; since the writer recollects to have seen the remission of a sentence of three hundred lashes, after approval by a commanding officer, because "he could not read" the proceedings to his satisfaction. A *sworn clerk*, formerly, and not unnecessarily, took down the proceedings; as this is no longer the case, the *original register* should, at least, be filed, from the most obvious rule of evidence, and also as a powerful stimulus to correctness.

soner, having heard the charge alleged against him, pleaded—Not guilty; and that———being solemnly sworn, deposes, “I, &c.” Which evidence will by the president be kept as close to the question as possible, and nothing irrelevant be permitted.

Two witnesses will generally be sufficient to prove the case for the prosecution, (unless where minute circumstances attend it, or the prisoner has been in various custodies) which to a regimental court martial can be easily summoned; but, in cases where more cannot be had, even *one*, as in the common law, is enough to a single fact; and even *presumptive evidence* hath in secret cases been taken. But these are resources very rarely, and warily only, to be admitted. For, it is an invariable principle of the law of England, that the best evidence which the nature of the case affords, and no other, shall be admitted in courts of justice.*

Sullivan's
Thoughts on
Mil. L. 42.

* For the various peculiarities of pleas, oaths of witnesses of various religions and countries, the event of non-appearance of prosecutor or witnesses, the laws of evidence, admissibility of witnesses, of written evidence, peculiar circumstances of evidence, and the mode of judging or weighing it, the disabilities of punishment, character of principals and accessaries, &c. the reader is necessarily referred to Sect. 10. of the present chapter, in which a compendium of the best writers on

See GENERAL
COURTS MAR-
TIAL.

§ 10.

The evidence for the prosecution being closed, the prisoner having been instructed by the court to ask any necessary question of the witnesses, the president will inquire for the prisoner's "defence," and the member who performs the office of Register will insert it in the proceedings under that title. If he have nothing to offer, he will probably "beg to throw himself on the mercy of the court."

As every thing, however, must necessarily have been done to prove the charge *against* him, in all its force, in the first instance, so, for the due ends of justice, and the strict ascertainment of truth, it becomes now indispensably necessary to *assist* the prisoner in every way towards the best representation of any reasonable grounds of defence. And, as he may be ignorant of the palliative effect of circumstances which might be offered in his defence, or appalled by the situation in which he is so placed, so it is the duty of the whole court to elicit from him any fact tending to either of these particulars, and of the Register to insert the matter so furnished into the "de-

the subject will be found; and *no officer should, in common justice to a prisoner, or as regards common propriety in himself, sit on any court martial, till he has, in some form or other, at least, moderately acquainted himself with these subjects, and enabled himself to reason on them.*

fence" in the most perfect point of view.* After which, the prisoner being withdrawn, and the court no longer open, they will proceed to sentence.

The president, as occasion may serve, will probably recapitulate, in a brief manner, with such observations as are dictated by his judgement and experience, the evidence and defence, and he will then call upon the *junior* officer for his opinion as to the decision of innocence or guilt in the prisoner. If his innocence should have become apparent, little farther will be necessary; the natural order therefore proceeds to him who is found *guilty*, and on this subject is to be derived the best advice from the most powerful authorities, both military and civil.

"The members of a regimental court martial," (says Colonel Williamson) "should carefully attend, in giving sentence, to proportion the punishment to the *degree* and *nature* of the offence actually proved before the court. No *private information*, or *interior conviction* of the prisoner's guilt, from the knowledge of circumstances not introduced or established by evidence, should have the smallest influence

Mil. Arrange.
v. ii. 104.

* Who that is acquainted with human nature would trust *himself* with a decision founded on any other grounds?

on the vote of a member." Nor should a prisoner's good or bad character either diminish or increase the penalty. Favourable testimony as to a prisoner's former conduct may induce the court to recommend him to the clemency of the commanding officer, but should never prevent such a degree of punishment being allotted to him as may appear proportionate to his guilt."

*Treatise on Cts.
Murr. &c. 255.*

"In assigning punishment," says Major Adye, "not only the nature of the crime, or offence, but the motives which induced the person to commit and the circumstances attending the committing of it are to be considered; for, it may be committed either out of premeditated design, or in the heat of passion, or through imprudence; which may each be considered in its proper degree; thus in a transport of passion it is more culpable than when proceeding from imprudence, and through premeditated design more heinous than in a transport of passion. The violence of passion, or temptation, may sometimes alleviate a crime, as theft in case of hunger is far more worthy of compassion than when committed through avarice, or to supply one in luxurious excesses."

"The age, education, and character, of the offender; the repetition or otherwise of the offence; the time, the place, the company,

wherein it was committed; all these and a thousand other incidents may aggravate or extenuate the crime."

"But, more particularly," advises the Advocate Bruce, "there is absolutely required in those judges, a calm, sedate, and sincere, temper of mind, free of all partiality and passion."

*Institutions of
Mil. Law, An-
cient and Mod.
Tit. 10. § 30.
311.*

"If they expect to found a right sentence, they are resolutely, in judging, to lay aside all fear; for it is rare to see a man, who is overawed by the power or terrified by the threats of a great man, hit upon a right sentence."

Ib. § 31.

"Nor was it any great extenuation of Pilate's crime, that he was overawed into the unjust sentence that ever was pronounced by the impetuous fury of the barbarous and enraged multitude."

"I would recommend to young officers," says Captain Simes, "never to be biassed by any person, but to adhere strictly to justice, and rather of the two incline to mercy."

*Mil. Medley,
1768, p. 14.*

Such are the best opinions on forming a judgement on delinquencies amenable to a regimental court martial.

"Punish not," adds Major Adye, "a man in the same manner, for, perhaps, a few hours absence from his quarters, as if he had been a deserter from his country, and a violator of his sacred promise; for it is not the number of lashes, but the shame that must attend it, that

*Treatise on Cts.
Mart. 257.*

constitutes the punishment. To fix a lasting visible stigma upon an offender is contrary both to humanity and sound policy. The wretch, finding himself condemned to continual insult, becomes habituated to his disgrace, and loses all sense of shame."

It. "For small crimes find out a variety of punishments, such as confinement, fines, double duty, &c. and, by way of medium degradation, from one rank to another, or working at fortifications, or other public works.

"Corporal punishments, which are the next capital ones to death, should be sparingly made use of."

Mil. Antiq. v. ii.
199.

"Respecting corporal punishments," says Captain Grose, "it may be necessary to observe, that they were not so common in ancient armies as at present. Private soldiers in those days, having some property, were punished by forfeitures and fines."

Art. of War,
§ 13. Art. 3.

Mil. Antiq. v. ii.
201.

To those who may be led to conceive, that, on all occasions where corporal punishment is alluded to in the written law, it is necessary to award flagellation, it will be useful to point out that the Articles of War consider *imprisonment* as *corporal* punishment; and this is literally confirmed by Captain Grose, in his observation, that "imprisonment may in some measure be considered as a corporal punishment, and was formerly inflicted for different

crimes and misdemeanors, as may be seen in the different ordinances of war."

Two important axioms should be always kept in mind, first, that principle derived from the common law, that no prisoner nor witness is to be urged to answer any question tending to criminate or injure himself, nor are crimes which by fiction alone are brought before this minor court to be considered in their full magnitude, which would impugn its jurisdiction.

"Regimental and garrison courts martial," says Mr. Tytler, "not having the aid of a judge-advocate to direct their proceedings, have on that account much responsibility; and, as the judgement of the court may come by appeal before a general court martial, they ought to be particularly careful that its proceedings be *strictly conformable to military law*, and the practice of the army, as well as to the *great principles of justice and equity*." And again, speaking of the proceedings being accurately taking down in writing, he very properly urges it, as "a farther incentive to extreme caution with regard to the regularity and equity of their proceedings that an *appeal lies from all their sentences* to a general court martial, and that *the members are liable to prosecution* for an iniquitous judgement."

Essay on Md
Law, 183.

Having thus shewn, as nearly as may be, in

their own words, the principles on which these important authorities either as military commanders or as persons occupied in the government of a military force, have directed the proceedings of regimental courts martial, it will be convenient, previous to the consideration of an appeal, to continue the formule of proceeding to the dissolution of the court.

Formule.

The junior officer having declared his opinion, it proceeds in succession up to the senior, and finally to the president, who declares the "opinion and sentence," to be subjoined to the proceedings. They will state that,—

"The court, having maturely considered the evidence for and against the prisoner, is of opinion that he is guilty of the crime laid to his charge, and does therefore sentence him to —————" (*whatever the punishment that may have been awarded*).

The proceedings, thus rendered complete, are now signed by the president, who also subscribes his rank; and are by him enclosed, under seal, to the commanding officer, by whose acceptance of them alone the court can be dissolved, and on whose confirmation only the sentence can be put into execution.

Mil. Arrange.
(Note.) 62.

Even should a prisoner be honourably acquitted, he is not capable of being immediately discharged by the court; for, after being put

in confinement, and the matter reported to the commanding officer, he can be released by no other authority.

As a copy of the proceedings of every general court martial is entered at the judge-advocate-general's office, so should every trial and process before a regimental courts martial be copied into a regimental book, kept for that purpose at head-quarters; and of course, at least equally accessible to that of the judge-advocate. If the original register the better.

If a new prisoner be to be tried the oath must General Orders,
15th Jan. 1810. be repeated.

Notwithstanding the progress and conclusion of the proceedings which have been described, there is another, which may have place during the one, and after the other; and which is indeed necessary to the chain of subordination in military law.

Appeal from the Minor Courts.

It has been said, in the language of Mr. Tytler, that, from the sentence of a regimental or garrison court, an appeal lies to a general court martial; and it is sufficiently shewn by that well-informed writer to be grounded both in equity and reason. The important and most necessary privilege is, nevertheless, so

seldom recognised, and has been disputed in so extraordinary a manner,* that it is necessary to render its existence as certain and obvious as

Mil. Mentor,
v. ii. 331. Note.

* In an agreeable compilation of modern date, professing to teach the various duties of an officer, and to accomplish the young soldier, in which it is not, however, considered necessary *even to mention* the law by which they are governed! the writer steps out of his way, by a false deduction, to support the doctrine that there is *no appeal* in general cases, and quotes the following instance *in confirmation*. "At Barham Downs, in 1796, a man was sentenced by a regimental court martial: his case appeared a very hard one, being connected with something personal between two officers of the regiment; and, when brought into the circle (for corporal punishment) and the proceedings read, he appealed to a general court martial. The colonel, however, told him he *must first receive this sentence*, and ordered him to strip. The man's captain now stepped out, and supported his appeal. But the colonel's answer was the same, and the punishment was inflicted. The captain brought the affair before Major General Norton, (commanding) who decided that the colonel's conduct had been right. This was thought very unjust in the regiment; but, on a *correct* reference to the Articles of War, &c." they were satisfied. "That the opinion of the colonel, however, had not been founded on any immediate recollection or knowledge of the *law* on the subject was evident from his saying, *after the punishment*, Now, Captain ———, you *MAY* have a general court martial for your man if you chuse."

It is, perhaps, to be regretted that this is not the only instance of such an unworthily-boastful conduct in a commanding officer of a regiment, preferring passion and pertinacity to reason and humanity.

possible, by the assemblage of whatever facts or corroborative circumstances have occurred in its consideration.

It will, perhaps, be sufficiently obvious on examination of the Articles of War and the Mutiny Act, by which they are governed, that originally, perhaps adapted to the exigencies of the moment, neither the one nor the other can be entirely free from the charge of being "vague and disputable;" and that at all events the various emendations, necessary adaptations to circumstances and times, and casual alterations, have left chasms and superfluities sufficient to confound, or at least employ, even the lawyers. It is thus, for instance, that the short section of the Article of War, which simply prescribes an "*Entry of commissions and leaves of absence*," appears to be occupied in a manner at least very unsuitable to its dignity; whereas by a recurrence to its origin it will be found to be intended precisely "for preventing and discovering such abuses" as a "plurality of posts:" "which," says Bruce, "was very consonant to reason and justice, such a management implying no less than peculate or theft from the public, since no man is able to be in two places at once." It is thus also that the Mutiny Act has to the present moment declared that no soldier shall be tried a second

Grose's Mil. Antiq. v. ii.

Art. of War, § 18.

Dutch Art. 70.
Art. Reg. Ann. 41.
Bruce's Mil. Institut. Tit. 86, 290.
Ub sup. Tit. 41. p. 254.
49 Geo III. c. 12. § 12.

time for the same offence, “*unless* in the case of *an appeal* from a regimental to a general court martial;” though it has long discontinued to re-echo from the Articles of War, or those articles to recite, the cases in which such an appeal was to be allowed. A single instance, indeed, is preserved, that of any soldier, &c. being *wronged* by the commanding officer of his troop or company, a case which in modern times it has been deemed necessary otherwise to distinguish, inasmuch as that the smallest detention of pay on complaint is now very properly visited upon “every officer,” with the utmost deprivation; which was formerly so much the reverse, that even any number of soldiers presuming to take counsel among themselves for demanding their pay were “to suffer death.”

Art. of War,
§ 12. A. 2.

Mut. Act, § 103.
&c.

Art. Ann. Reg.
14.

1686.
Art. 49.

This being premised, to go no farther than the rules and articles of James II. it is there stated, after due mention of the matters to be recognized by a regimental court martial, that “if, in any matter which shall be judged in *any* of the aforesaid regimental courts martial, either of the parties shall find himself aggrieved, he may appeal to the general court martial, who are to take care that, if the party appealing make not good his suggestion, recompense be made to the other for the trouble and charge of such an appeal.”

On the same principle as above remarked, and which will be found to be acted upon to this day, that of yielding to the common law all its rights, it is that Sir James Turner observes of the incompetency of a minor court to *final* judgement,—“to the decision of a general court of war belong all civil affairs and business, *though* they have been determined in the lower courts; for in these cases *appeals are permitted* to the higher court, neither can the sentence of the lower court be executed till the proper process be fully heard in the superior,* if the parties concerned have appealed to it.”

Art of War,
§ 11. Art. 2.
Mut. Act, § 14,
&c.

Pallas, Armata,
book 2. ch. 9.

“In civil causes,” says Bruce, “according to the British articles, a court martial can in no wise hear or determine, only there is an exception of such civil controversies between soldiers and their officers, or *between soldier and soldier*, as relates to their military capacities; and if in *that case* any of the contending parties may judge himself aggrieved by the regimental court, he is allowed to appeal to the general court martial, who, by the said articles, are enjoined to take care that, if the party appealing make not good his suggestion, recom-

Reg. Ann. Art.
51.

* This law does not appear to have governed the operations at Barham Downs, reported by the “Military Mentor,” nor is it to be feared others less excusable.

Art. 55. . . pense be made to the other for the trouble and charge of such an appeal.

Art. of War, § 12. Art. 2. This goes much farther than the present article, and leads us to the judicious observation of Colonel Williamson, that "disputes relative to pay and clothing are indeed the principal points on which a difference may happen between a soldier and his officer; but they are not the sole; and cannot by any means be a cause of dispute between *one soldier and another*. Yet in this latter case either party has the same right to appeal, for which all that can be urged is the *reason* of the thing itself, and the *antiquity* of the practice." And, there being nothing in the present article to abrogate it, it may be added, in the words of Bruce, on another occasion, that, "though now discontinued, it is not to be considered as a statute repealed, but is still in force."

Mil. Inst. 308.

Treatise on Cts Mart. p. 1. c. 5. Thus do we arrive at that point in the subject on which Major Adye, with his usual good sense, observes, still doubting of the *extent* of appeal: "to fix the proper bounds is a matter of a very delicate and interesting nature, as well with regard to the soldier as the service. Should it be understood that appeals are of right due in all cases, much inconvenience might ensue; as conscious offenders would be induced to appeal merely for the sake of delaying punishment, and would be most apt

to do so, when there was either an impracticability, or great difficulty of convening a general court martial; and yet, on the other hand, it may not be easy definitively to point out in what instances they ought to be allowed or refused."

Nothing is more true; yet, without the certain privilege of appeal, a link is wanting in that chain of subordination in the military judicature, which a small consideration of the service will shew to be indispensably necessary; which many appeals even from general courts martial to the common law will prove; which even the Earl Rosslyn in summing up the arguments for *prohibition* of the sentence of a court martial, by his mentioning as a preferable mode of procedure *an appeal*, allowed; and which, to conclude the whole, *a case in point* has at length CONFIRMED.

Trial of Grant.

This, it is hoped, notwithstanding some equivocal circumstances, by which the decision is characterised, may set at rest a question which ought never to have arisen. It is quoted from the text of Mr. M'Arthur, of whose work it forms one of many documents of the highest importance. "At the Cape of Good Hope, May, 1802, Serjeant Joseph Ginger, of the 34th regiment, was tried by a regimental court martial, for disobedience of orders, being out of his barracks after hours, and for unsoldier-like behaviour to Lieutenant Dawson; he was

Pr. and Pract.
Nav. and Mil.
of C. M. v. i.
145.

found guilty, and sentenced to be reduced to the ranks to serve as a private soldier, and also to receive five hundred lashes. The irregularity of the sentence was aggravated by Serjeant Ginger having, for the same offences, previous to the said trial, been degraded by the colonel of the regiment from the rank of serjeant-major to that of serjeant. A general court martial *was accordingly assembled* to try the appellant, and the court passed the following resolution: 'It having been clearly proved that the appellant was serjeant-major of the 34th regiment, and regularly mustered as such, and tried by the regimental court martial, from which he has appealed, as a serjeant; it therefore appears to the court that the proceedings of the regimental court martial were invalid, inasmuch as the appellant was not by any sufficient authority reduced from the rank and pay of a serjeant-major to that of a serjeant. The general court martial therefore rest their proceedings until this opinion be submitted to the commander-in-chief, and receive his orders as to any farther investigation.' The result, after farther investigation had taken place, was, that the commander-in-chief confirmed the opinion of the general court martial with respect to the irregularity of the regimental court, directed the proceedings to be cancelled accordingly, and ordered Serjeant-

Major Ginger to be released, and return to his duty as serjeant-major of his majesty's 34th regiment."

Here is the the full right of appeal completely admitted and acted upon; and, notwithstanding the disinclination so often expressed from the introduction to military affairs of niceties of legal objection, even the greatest weight is given to the circumstance of the colonel having reduced the prisoner only a *single grade*, instead of the full degradation "to private centinel."

It only then remains to shew the limitation of this right; which, according to the eloquent judge-advocate for Scotland, "arises from the constitution of all general courts martial. They are not subsisting courts of judicature, open at all times, and to all parties; but, being assembled by special warrant for a particular purpose, they are not embodied or created at all, unless it shall appear to the chief military authority that there is a just and reasonable cause for assembling them. No military person is therefore of absolute right to demand the assembling of a general court martial, either for the trial of himself or another party, unless in *one instance*, that of a dispute respecting pay and clothing. His request must come by petition or memorial, before the commander-in-chief, who will judge from all

Tytler, Essay on
Military Law,
338.

Art. of War,
§ 12. A. 2.
U. S. Supr.

circumstances whether the same is reasonable or otherwise, and either grant or refuse it as he shall think proper.

The reasoning for such control given by this elegant writer, tending only to lay at the feet of the commander the right of every opportunity for appeal to military justice, is not added; because, while there are, it is believed, very few instances in which when requested it has ever been withheld, still it is a principle no less repugnant to the *highest* British commander, than its tendency to an avowedly absolute control in the operations of military judicature, must ever be obnoxious to the character of a British people.

Essay on Mil.
Law, c. 8. 338.

“But,” continues Mr. Tytler, “as it is competent for the commanding officer of any corps to assemble regimental courts martial for the trial of the *lesser offences*, and for the punishment of non-commissioned officers and soldiers; and as such courts, of which the members are often few in number, and these frequently young and unexperienced officers, must necessarily from these circumstances be more subject to error in their proceeding and sentences than a more numerous and select tribunal of experienced men; it would be a material hardship and grievance, if those inferior courts were under no control. It is proper therefore that *they should ever act under a confirmed*

sense that their proceedings are subject to revision by a general court martial, to whose judicature the party conceiving himself to be aggrieved has it always in his power to appeal, through the medium of the commander-in-chief."

"The reason," again says Mr. Tytler, "why a power of appeal is declared to be competent of absolute right to inferior officers and soldiers complaining of being wronged by their superior or commanding officer is, that a regimental or garrison court martial have not the power of inflicting any punishment on commissioned officers; they can do no more than express their opinion that the complaint is just or the contrary, and restore the sufferer against any existing grievance; but the injury complained of, however flagrant, must therefore have remained unredressed, as far as punishment is concerned, if an appeal to a general court martial had not been declared to be a matter of right to the party aggrieved."

All this may be true; though it seems to refine too much upon it, and rather strikes at the competency of regimental courts martial to the investigation of such cases at all; since, if after this court has gone to the extent of its jurisdiction in satisfying the complainant, he has to go to a higher court to render that satisfaction complete, the former becomes nugatory,

or the latter little less than double punishment for the same offence, particularly in the appointment of detachment courts martial; and this idea is confirmed by the case laid down. Still the right of appeal remains untouched, or, if any thing, appears to gain new strength from the position.

Nothing remains on this subject but to state the procedure, of which also the form is established.

Tytler & M'Arthur, &c.

The court being appointed by proper authority, "the parties in the trial are summoned to attend together, with all the necessary evidence. The appellant sustains, in conjunction with the judge-advocate, the part of prosecutor; and the party in whose favour the inferior court has given its judgement is defendant in the cause; the charges on the original trial being the matter at issue, on the truth or falsehood of which the court of appeal is to decide." "The witnesses before the regimental court are again examined; and are entitled," says Mr. Tytler, "before giving evidence, to have their former testimony read over to them; which they may either confirm or vary agreeably to their conscience. They must likewise answer all pertinent interrogatories put either by the prosecutor and appellant, or the defendant, or by the court; and that either in the way of primary examination

or cross questioning. It is competent, moreover for either of the parties in the appeal to adduce additional evidence, either by the examination of new witnesses or the production of writings. The whole of the evidence is taken down in writing by the judge-advocate, as recorder (or register), and the court deliberate thereon, and pronounce their opinion and sentence in the same manner as in ordinary trials."

An appeal always implies the review by one court of judicature of the sentence to another.

Tytler's Essay
on Mil. Law,
815.

9. *Detachment Court Martial.*

The appellation of this court is a sufficient description of its general nature, exactly that of garrison courts martial, for which, perhaps, it is a misnomer in the recruiting regulations, except that the proceedings of courts martial, on recruiting parties, are to be approved by the inspecting field officer.

Reg. for Re-
cruiting, art. 7.

But it has a particular character. With the most minute accuracy, in the assurance of justice to every individual, his majesty constituted this new species of court, ranking, as it were, between regimental and general courts martial, for the trial of officers of a rank, which neither permits them to be tried by a

Art. of War,
§ 18. art. 15.

regimental court, nor authorises the dignity of a general court martial. These are *warrant officers*, or, according to the Articles of War, “not commissioned by us, or by any of our general officers, having authority from us to grant commissions, but appointed by warrant, under the signature of the colonels or commandants of the corps to which they belong.”

Ib.

It is appointed by the general commanding in the district where the corps is situated, if in Great Britain, Ireland, Jersey, Guernsey, Alderney, Sark, or Man; but if in the British dominions beyond the seas, or in foreign parts, by the general commanding in chief on the station. It is conducted in a similar manner to a regimental court martial, but cannot, in any case, consist of less than five commissioned officers, of whom not more than two shall be taken from the regiment in which the warrant officer to be tried is serving, not more than two under the rank of captain, nor the president under that of field officer; nor can its sentence be put into execution, if the trial shall have taken place in Great Britain, Jersey, Guernsey, Alderney, Sark, or Man, until (says his majesty's articles) a report shall have been made to us, and our directions shall have been signified thereupon, through the commander-in-chief of our forces, or, in his absence, through our secretary at war, or in

foreign parts, until such sentence shall have been confirmed by the general commanding in chief on the station, who is hereby authorised to cause such sentence to be put in execution, or to suspend, mitigate, or remit, the same, as he shall judge best and most conducive to the good of our service, without waiting for farther orders."

The detachment court martial, however, has no authority to award corporal punishment, nor has it, or any other, power to reduce to "an inferior situation" the warrant officer, *unless* he shall have been originally inlisted as a private soldier, and shall have continued in the service until his appointment to be a warrant officer.

10. *General Court Martial.*

This is the supreme *military* court of law, instituted for the purpose of "adjusting all disputes between individuals and corps, and of trying and punishing all offences that may be committed by officers or soldiers against martial law."

Williamson's
Mil. Arrangem.,
v. 2. 77.

To the local jurisdiction of general courts martial there are occasionally a kind of peculiar exceptions, which are necessary to be mentioned here, though chiefly sufficiently understood. A general, commanding in chief

Sullivan. 85.
Art. of War.
Williamson's
Mil. Arrangem.,
v. 2. 101.

abroad, could not be tried by a court martial there, because he must in general be "arrested by a superior," and there is no remedy against him but by an application at home to the secretary at war, in which case he might be recalled, in order to be tried and punished.*

Peculiar Ex-
ceptions to Ju-
risdiction.

Neither hath he, who orders a court martial, the power to cause an offender to be tried a second time for the same trespass; nor, after his conviction or acquittal by a court of judicature, to punish him otherwise than by cashiering; i. e. upon proof being brought of his conviction of a crime before the civil court, which renders him unworthy of the honourable profession of a soldier, he may, on that ground, be dismissed from his majesty's service by a court martial.†

To it is, however, conceded, in Gibraltar, and other garrisons abroad, the trial of all persons accused of felonies or misdemeanors, with power to punish with death or other pe-

Sullivan, 8.

* A colonel may, however, be arraigned before a tribunal, with a major at its head. An officer, under suspension, is liable to be tried: So may even an officer, *without military employ or commission*, he being WILLING.

Tr. of L. Geo.
Sackville.

† So, on the other hand, *after* being subjected to the conviction or acquittal of court martial, an offender is not to be punished again by the civil power, all judges, in *all courts*, being bound to take judicial notice of military law.

nalty, as the nature of the offences may require.

No officer or soldier, who shall be put in arrest or imprisonment, shall continue in his confinement more than eight days, or till such time as a court martial can be conveniently assembled.

Art. of War,
§ 16, 2, 23.
Mut. Act. § 11.

All general courts martial are assembled under authority of the king, either expressly signified by commission, or warrant under the royal sign manual, or by delegation of the royal authority to any general officer having the chief command of a body of forces.

Tytler's Essay
on Mil. Law,
134.

A general court martial shall not consist of less than nine commissioned officers, in Great Britain or Ireland; or in Gibraltar, or any other place beyond the seas, except in Africa or New South Wales, in which places it shall not consist of less than five. But, if held for the trial of a commissioned officer, it shall not consist of less than thirteen commissioned officers: And in no case shall the president be commander in chief, or governor of the garrison where the offender shall be tried; nor shall he be under the degree of a field-officer, except, when in Africa or New South Wales, a field-officer cannot be had, and then not under the rank of captain.

Art. of War,
§ 16, art. 12.
Mutiny Act,
§ 17, &c.

Although a less number than that prescribed under each of the above cases cannot consti-

See Court for
Trial of Powell,
&c. 1799.

Trial of Gen.
Whitelocke,
1808.

Mil. Arrangem.
Gen. Reg. and
Ord. 2, 3.

Art. of War,
§ 16, art. 10.
Mut. Act, § 17.

Sullivan's
Thoughts on
Martial Law,
and Mode of
Proceeding, &c.
10.

tute a court martial, yet a greater number may be assembled, as shall appear expedient; and, whenever the service will admit, a greater number should be ordered, (as in waiting for any other duty,) that, in case of sickness or other accidents, there may still be enough to form the court. And, when officers are put in order for this duty, they are especially to pass every other turn of duty till the court shall be dissolved, by order from the same authority which appointed it, unless in the interim between passing and declaring the sentence, from peculiar circumstances, it should be delayed.

It is now extremely rare, that any officer, under the rank of captain, is appointed to sit on a general court martial, yet it is in no way prohibited; on the contrary, it is found necessary to enjoin, that "no field-officer shall be tried by any person *under* the degree of a captain;" and that in no case members shall be "under the degree of a commissioned officer."

The power thus existing in the sovereign, and by appointment in his delegates, to direct courts martial to be held, and a general court martial being required, the person thus exercising the power issues a warrant to some officer as the president, and to other officers as the members of the court, which he finds it necessary to appoint. If at the head-quarters of the army in London, the whole takes place

through the judge-advocate general, who therein appears somewhat in the character of a law-secretary to the army. The place of sitting is appointed by the person by whom the court is ordered to assemble. It is often at the president's tent or quarters.

Mil. Arrangem.
79.

With the appointment or constitution of the court martial the royal authority ceases, till that court shall have pronounced its judgement; the king can no more interfere with the procedure of courts martial in the execution of their duty than he can with that of any of the fixed courts of justice. Nor can the all-powerful influence of parliament even affect it in any ordinary way; since the doubtful case, which formerly occurred, in consequence of the expiration of the Mutiny Act, without the sanction of which it could not exist, during the progress of a trial, has since, by parliament, been remedied by the ordinance, which directs that every warrant, for holding any court martial, under any act, shall remain in full force, notwithstanding the expiration of such act; and that all proceedings begun shall not be discontinued by the expiration, but it shall be lawful to proceed to judgement, and to carry such judgement into execution.

Stat. Mil. L.
134.

Tr. of Lord O
Sackville.

Mutiny Act,
§ 126.

In addition to the president and members of a court martial, thus temporarily appointed, there is by no means the least important officer

to be mentioned, who, according to his locality, sustains a most respectable gradation of character. This is the judge-advocate; at the head quarters of the British empire, in London, styled judge-advocate-general; in the other capitals of the empire described as deputy judge-advocate; and, on all other occasions, officially acting as judge-advocate.

The duty of a judge advocate, in either of the gradations, is to "inform the court, and prosecute," on behalf of the sovereign; for such is the original text and continued meaning of the imperfect article (vii.) of the 16th section of the Articles of War on this subject, which, in a manner before described, is injuriously altered, while the perfect rubric, or marginal note, remains.*

From every thing, however, it would appear, that the duty of the judge-advocate involved that of instructing or counselling the court, not only in matters of essential and necessary form, with which he must be presumed to be from practice most thoroughly acquainted, but in explaining to them such points of law as may occur in the course of their pro-

* The same circumstance occurred in § 114 of the Mutiny Act, where, by the marginal note, the reader is in vain directed to the billeting of troops from abroad, *cum multis aliis que nunc prescribere longum est.*

Art. of War.
Ann. Reg. art.
50.
Georgii III.
§ 16, a. 7.
Tytler's M. L.
357.

ceedings, and with respect to which the Articles of War and Mutiny Act may be silent. "For it is to be observed, that, in all matters touching the trial of crimes by court martial, wherever the military law is silent, the rules of the common law of the land, to the benefit of which all British subjects are entitled, for the protection of life and liberty, must of necessity be resorted to; and every material deviation from these rules, unless warranted by some express enactment of the military code, is, in fact, a punishable offence in the members of the court martial, who may be indicted for the same in the king's ordinary courts. Ib. § 360

So soon as the commission, or warrant, is issued for the assembling of a general court martial, the judge-advocate, being required to attend his duty, and furnished with the articles of accusation, or charge, on which he is to prosecute, is to inform each prisoner of the time and place appointed for his trial, and is to furnish him with a copy of the charge exhibited against him, in order that he may have time to prepare for his defence, the names of the witnesses, (as far as he is able,) by which it is to be proved, and a correct detail of the members of the court martial; he is then also to summons (*subpana*) the witnesses for the crown, and to require of the prisoner a list of such as he may wish to have called upon in the Mil. Arr. n. 80. Tyl. E. on M. L. 365. Ib. 310.

same manner, summoned either by direct intimation from himself to each of them or by an application to the commanding officers of the regiments or parties to which they belong, requesting that they may be warned to attend that duty. If any witnesses should be persons in a civil capacity, the party requiring their attendance applies, through the judge-advocate, to the proper civil magistrate, who grants a subpoena, compelling the attendance of witnesses in the usual manner.

Full. M. L. 13.

The general court martial being thus in orders to assemble, and the witnesses for and against the impending prosecution being summoned to attend, the court forms itself at the appointed place, agreeably to its commission, and it is immediately governed by the following rules :

Mil. Arr. 97.
A. of W. § 16,
art. 8.
Mil. Arr. 96.
A. of W. § 16,
art. 21.

The court is open to all persons, civil as well as military, except when any doubt as to a point of law arises, when it is closed to all but the president, members, and judge-advocate, that they may argue and decide upon it. All the members are to behave with decency; the proceedings are to be conducted throughout with solemnity; and no person whatever shall use any menacing words, signs, or gestures, there, or cause any disorder or riot, so as to disturb their proceedings, on the penalty of being punished, at the discretion of the said

court martial. This rule, Colonel Williamson thinks, supposes, that the party offending is "subject to its jurisdiction:" If not, the offence would be, as a breach of the peace, recognizable by the common law. Nor shall any proceedings or trials be carried on, excepting between the hours of eight in the morning and three in the afternoon, except in cases which require an immediate example.

When a trial is not finished at that hour, the court is adjourned to the next or a future day. In the interim it is the duty of the judge-advocate to make a fair copy of the proceedings, taking care to state the adjournment at the commencement of the proceedings of each succeeding day.

To return, however: the members being duly seated; the president at the head, and the other members on his right and left, according to their several ranks and standings in the army; the judge-advocate, on the right-hand of the president, calls over their names, beginning with the president; and then, having received from the president his warrant, he reads aloud the president's appointment, and, afterwards, the commission by which he officiates, as judge-advocate, himself. This being done, and the prisoner to be tried being brought before the court, the judge-advocate, in his capacity of recorder to the court and council for the king, demands, *if he has ex-*

Mil. Arr. 96.

Mr. Arthur, v. 2,
20.
Sull. M. L. 13.
Trial of Whitlocke.

Mil. Arr.

Sullivan.

*ceptions to any of the members present?** If he has not, the judge-advocate proceeds to

Sullivan, 15.

* No member, however, can be excepted against after the formation of the court; neither can an instance of his former character be pleaded against him, unless he shall have perpetrated some deeds or have been principally or accessarily concerned in the commission of some act subsequent to such formation, which shall be adduced as guilt against him, or unless the prisoner knew not of the cause of exception before.

Tyler, 236.

Mil. Arr. v. 2,
85, also n. 59.

The power of challenging (says Colonel Williamson) peremptorily, or without assigning causes, whether on the part of the king or the prisoner, is repugnant to the spirit of martial law, and to the administration of justice in an army, towards which, above all things, promptness is requisite. The number of peremptory challenges allowed, in the civil courts, is, in murder and other felonies, twenty; the number of challenges, *with cause*, in high and petit treason, thirty-five, (leaving the number of a general court martial indefinite); but out of forty-eight summoned, which they call the pannel, twelve must be found to try the prisoner; therefore, if many challenges, with cause, are produced, and thought sufficient, some of the peremptory challenges must (or may be) set aside. It is usual to assemble no (or but a few) more than are intended to form a court martial, (particularly on-board ship, or in distant garrison,) so that, if many members are challenged, the whole business must be at a stand, till a report can be made to the commander-in-chief, and fresh officers ordered to attend as members; in many cases the prisoner could not be tried at all, from the impossibility of finding sufficient officers at a station. However, (says Mr. Sullivan) it is not more than justice to a prisoner to admit them, in the same extent, at a military tribunal, more especially when it is considered, that members of a court martial sit not only as

Th. on M. L.
17, &c.

administer, first to the president and then to the several members, according to their respective ranks, as many at a time as can conveniently be sworn, upon the Holy Evangelists, the following oaths, first reading the preamble to them:—

“You shall well and truly try and determine, according to your evidence, the matter now before you.”

SO HELP YOU GOD.”

jurors, but ultimately as judges. On that principle of mercy, which pervades the whole system of the criminal law of England, the prisoner is not suffered to be tried even by one *whose countenance he shall dislike*. Officers, indeed, are not to be told, that relinquishing their seats, when excepted against unsatisfactorily, and when such relinquishment is practicable, is not only humane and delicate, but prudent and commendable.

Members of a Court of Inquiry in the same cause or same matter are liable to be excepted against as judges; any person having a claim to (or interest in) the forfeiture (or resignation) may be challenged as a juror.

A principal challenge is such, when the cause assigned carries with it, *prima-faciè*, evident marks of suspicion, either of malice or favour, as that a juror is of kin to either party, within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action between him and the party; that he has taken money for his verdict; that he is the party, master, servant, counsellor, steward, or attorney, or of the same corporation with him.

Finally, an officer in his judiciary capacity should be as far as possible UNEXCEPTIONABLE.

Art. of War,
§ 19, art. 7.

Preamble.

8 Henry IV.

State Trials,
v. 1. f. 502

Oath to President and Members.

“ I, _____, do swear, that I will duly administer justice, according to the Rules and Articles for the better government of his majesty's forces, and according to an Act of Parliament now in force, for the punishment of Mutiny and Desertion, and of other crimes therein mentioned, without partiality, favour, or affection; and if any doubt shall arise, which is not explained by the said articles or act of parliament, according to my conscience, the best of my understanding, and the custom of war in the like cases: And I do farther swear, that I will not divulge the sentence of the court, until it shall be approved of by his majesty, or by some person duly authorised by him; neither will I, upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the court martial, unless required to give evidence thereof as a witness by a court of justice, or a court martial, in a due course of law.

SO HELP ME GOD.”

Oath to Judge-Ad.

And as soon as the said oaths shall have been administered to the respective members, the president of the court shall administer to the judge-advocate, or person officiating as such, an oath, in the following words:

“ I, _____, do swear, that I will not, upon any account, at any time whatsoever, dis-

close or discover the vote or opinion of any particular member of the court martial, unless required to give evidence thereof, as a witness, by a court of justice, or a court martial, in a due course of law.

SO HELP ME GOD.*

Should the court martial be ordered for the trial of "such prisoners as may be brought before it," it must exhaust all the charges, and at every new one repeat the forms and oaths already prescribed.*

The court martial being regularly formed, in Sullivan, 87 the manner before-mentioned, and the witnesses in attendance, the judge-advocate begins upon the prosecution. Prepared with the charge, which must particularise *time* and *place*, as well as *circumstance*, with the full description of the parties, and the prisoner standing before the court, the *judge-advocate* asks him, upon reading to him his crime.—Araignment. Tytler, 214.
 "How say you, are you guilty of the crime laid to your charge, or not?"

If he should plead guilty, or refuse to plead, as in many instances is the case, the prosecution immediately closes, and judgement is Plea. Sullivan ubi supra, 12 Geo. III c. 20.

* Since the present work has been in preparation for the press, this institute has become a law, by the general orders of the 15th of January, 1810.

passed accordingly,* standing *mute ex visitatione Dei* † alone excepted: that act of God rendering him, from an inability to plead himself, most peculiarly intitled to a solemn and regular investigation of his conduct; or, if he urge some plea in abatement, or bar, of the charge; ‡ but, on the contrary, if he should

3 Edw. I. c. 12.

* The *passing judgement* in this case is one of the numerous amendments of the law, which have taken place in favour of humanity, within a short period of time; for, till the present reign, by statute, all persons remaining mute, from obstinacy, instead of pleading, suffered the punishment of being pressed to death by an immense weight of iron, (*peine forte et dure*).

Mutes.

† Where a person wanting the faculty of speech, either from natural impediment or some supervening disease, and is without the power of *expressing his meaning* by intelligible signs, (for in the latter case, as in that of ignorance of the language, a sworn interpreter might be employed,) he is said to stand *mute from the visitation of God*. In this case he must, without positive certainty of his intention to the contrary, be supposed to have pleaded not guilty; every thing must be done in his favour that the most scrupulous humanity, due regard being had to justice, can dictate, and it is conceived, that, after all, a judgement of death, cannot be given against such a person who has never pleaded, and can say nothing in arrest of judgement.

Tytler, 243.

Blackst. Comm. b. 4, c. 25.

Pleas in bar. Tytler, 241. Mil: Arr. v. 2, 67.

‡ A prisoner, instead of pleading, in the general manner, not guilty, may plead in abatement, or bar, of the trial, if he has been formerly tried for the same individual act or acts of crime, and can verify it by production of the record of the trial, or other sufficient evidence; if he has received

throw himself upon the decision of his peers, and consequently stand his trial, by pleading *not guilty*, the witnesses, on the part of the crown, (including, if necessary, the prosecutor,) are *viva voce** to be examined, and

pardon of the crime for which he is arraigned, or a promise of mercy on condition of becoming evidence against an accomplice in the same offence, or, if the offence with which he is charged has been committed more than three years Mut. Act, § 127. before the commission or warrant was issued for his trial, unless it be for desertion. A prisoner may, moreover, validly object to the jurisdiction of the court, if it appear that they have no proper authority for taking cognizance of the crime, as if it were (for instance debt) a crime only cognizable by the civil courts; if brought before a *regimental* court martial, for a capital offence; that the court did not consist of the requisite number of members; or that these were not of the requisite rank to sit on the trial of the prisoner.

* "Nevertheless," (says colonel Williamson,) "I have seen a witness *read* his whole deposition, having first requested, and obtained, permission of the court to do it. All witnesses are permitted to refer to notes." "Although" (says Mr. Tytler) "the witness is not allowed to read his evidence, it is not illegal or improper, in circumstantial cases, or in cases where dates are to be detailed, or matters of account, for the witness to make use of written notes, for the aid of his memory, and for the greater precision of his testimony." The principal necessity seems to be to guard against subornation of evidence, which is also done by the preliminary questions, "whether the witness has been instructed what to say? or received any reward, or promise of reward, for giving his testimony?"

As to the prisoner, it is always allowed him, both in civil

their depositions recorded by the judge-advocate. And here it should be remarked, that the plea of not guilty should at all times be encouraged; for, however conscious a prisoner may be himself of the unjustifiableness of his conduct, there may be circumstances appear to mitigate the atrociousness of a crime, and in some degree serve to entitle him to mercy.

Art. of War.
 § 16, art. 19.
 Tytler, 512.
 Sull. Mil. Arr.

“All persons, who give evidence before any general or other court martial, (including even peers of the realm,) are to be examined on oath.” The following are its terms:

“You shall true and perfect answer make to such questions as shall be put to you, touching the matter now before the court, between our sovereign lord, the king’s majesty, and the prisoner to be tried; which shall be the truth, the whole truth, and nothing but the truth:”

SO HELP YOU GOD.”

In cases where any party, whether member of the court, prosecutor, or prisoner, shall happen to be foreigners, totally unacquainted with the English language, the pro-

Omnes in ubi
 supra

and military courts, to deliver if he thinks proper his defence in writing.

creedings or depositions may be explained by a sworn interpreter.*

Foreigners and natives, including of course interpreters themselves, may be sworn according to the customs of their religion.†

2 Hale, P. C. 279.

McArthur, v. ii. 24.

* The oath in this case is described as follows :

“ You shall well and truly interpret and translate in all cases in which you shall be applied to in the course of the present trial; and you shall not communicate or discover to any person or persons any part of the proceedings until the sentence to be pronounced shall have been approved by his majesty, or the commander-in-chief.”

Modes of swearing prosecutors or witnesses of various religions and countries.

SO HELP YOU GOD.”

† Thus, even in the small deviation from the ceremony of the church of England of *covenanters* of the church of Scotland, it is permitted that they be sworn by the form of holding up instead of kissing the book, or even touching it, in terms as follows :

“ You swear, according to the custom of your country and the religion you profess, that the evidence you shall give, between our sovereign lord the king and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth.”

Catholics of the church of Rome are sworn on the Holy Evangelists, with a crucifix laid on them, which is kissed, while the book is held in the right hand. The oath verbally the same as that in the text.

Jews, on the contrary, are sworn the oath on the *Old* testament.

Quakers—by declaring

“ I do solemnly, sincerely, and truly, declare and affirm.”

Mil. Arrange.
89.

When, from sickness or any other unavoidable cause, an important witness is incapable of attending, the court may, on the incapacity being proved, adjourn to take the deposition of such evidence, if within ordinary accessibility. But it must be the *whole court*, and the prisoner must go along with it; as an accused person, by the English law, as well as every principle of justice, is always to be confronted with his accusers. Should the witness be inaccessible in any way, it must impede the progress of the trial.* This will, of course, be done by way of adjournment.

Sullivan, 33.

A *Turk* is sworn on the Koran, the common oath being interpreted to him. He places his right hand flat upon it, puts the other hand to his forehead, brings the top of his forehead down to the book, and strikes it with his head.

The *Chinese* wrings off the head of a cock, or breaks a saucer, then raises up his hands towards heaven, exclaiming

“*If I do otherwise than as I have said, do thou, O Tien, deal with me as I have dealt with this cock, &c.*”

Gentoos take the ordinary oath, touching the foot of a Bramin priest, it is then described to him, and he touches the hand of another Bramin priest.

Every man of every religion should be bound to that form which he himself thinks will bind his conscience most.

Absence of Evidence or of prosecutor.

* On account of the absence of material witnesses, the court may be moved to postpone a trial. But, in the affidavit of the necessity, (*of the propriety of which affidavit also the*

The prisoner, however, being put upon his trial, the judge-advocate, as prosecutor for the crown, if on any public account, or the prosecutor in person, if the court shall have been ordered at the instance of any individual, whether civil or military, * commences the evidence for the prosecution. This is taking for granted that at length the proceeding is perfect in the constitution of its several parts,

Trial at Norwich, 1799.
Trial of Powell, &c. 1792.

court is to judge,) it is to be shewn that the persons are material witnesses; that the party applying has not neglected to endeavour to procure their attendance; that there is reasonable expectation of his being able to procure their attendance at the time to which he prays delay; it may be the affidavit of a medical person that the witness is unable to attend in court, and the same with regard to the prosecutor or prisoner, affidavits also of the circulation of printed pamphlets or papers, or paragraphs in the newspapers, tending to influence the court to either side, may, if without the knowledge of the party applying, suffice.

Cas. Var. Term.
Rep. 4 Geo. III.
Burr. Black.
Mac Nally,
Rules of Evidence.
McArthur, &c.

* It was formerly determined by a board of general officers, on a charge brought against the colonel of the Westmoreland militia, by a medical man, a complainant not being a military person, had no right to prefer any charges in propria personæ, nor to demand the trial of any officer. He thereupon brought his complaints through the officers of the regiment. To remedy the disagreeable necessity for this legal circumlocution, probably it was that the decision was reversed, of which we have a remarkable instance in the case of the celebrated William Cobbett, who purposely dispossessed himself of the military character, to bring his officers to trial; and also the coroner who prosecuted the surgeon.

Mil. Arrange.
v. n. n. p. 65.

Proceedings of
Court Mart. on
Powell, et al.

and most particularly in the *presence* of the prosecutor. *

Whichever the prosecutor, he begins by a recital of the charges together with such detail of circumstances, (if the case be circumstantial and complicated) as he deems necessary; and proceeds with his proof of the prisoner's amenableness to a court martial, either as an officer or soldier, or in some other respect, down to the degrading fact, if necessary, of his receiving pay.

* This, however extraordinary, nevertheless is sometimes deficient. Two instances occur, the one accidental and the other pre-determined. The first is, that, in the naval court martial assembled to try Captain Powlett, afterwards Duke of Bolton, on charges of Vice-Admiral Griffiths, at which neither prosecutor nor witnesses appeared, but a letter was received from the admiral, inclosing an affidavit, which stated that he could not proceed that day on account of the absence of material witnesses. The court on this indefinite statement acquitted the prisoner. The court will not put off a trial unless there be circumstances to shew that the party applying cannot have substantial justice without the delay he applies for. The second instance is the case of Cobbett, already alluded to. The court was assembled and the witnesses ready, but, from political motives, the prosecutor did not appear. The court acquitted the prisoners; but, according to the opinions on a case submitted to the then attorney and solicitor general (afterwards Lords Eldon and Redesdale), they (the prisoners) might have maintained actions upon the case against him, (the prosecutor).

Minutes of Pro-
ceedings apud.
McArthur, v. ii.
279.

Political Reg.
June 17, 1809.
Case & Opin.
&c.

The prosecutor continues with his proof of the delinquency of the prisoner's conduct. For the issue is said to lie, and proof is always first required, upon that side which *affirms* the matter in question. To this end he examines and Sulliv. 34 cross-examines the several witnesses, calls upon every one who can adduce testimony in favour of the prosecution, and aims in every respect to establish the certainty of guilt. The court likewise as judges take part in the prosecution. They also examine and interrogate, (either collectively or individually as they think proper,) and, in concert with the judge-advocate, endeavour to arrive at a knowledge of the fact.* This is, however, for continuity,

* The same laws of evidence in general prevail at courts Mil. Arrangem. 90. n. 109. martial as in the ordinary courts of law. It is the custom at both to procure two or more witnesses, if they are to be had, to convict a prisoner; but, if more cannot be found, M^rArthur, 2, 44, &c. one good and credible witness, and on some occasions strong presumptive proof, have been deemed sufficient towards the condemnation of a criminal, though he absolutely deny the facts alledged against him. It is necessary in the civil courts Adye. to procure two witnesses, at least, to convict a prisoner of high treason; but there is no such military offence as treason; mutiny, which nearly corresponds to it, being considered and punished as felony.

It is therefore of essential consequence that the general Tytler, Essay. 262. doctrine of the law of evidence should be understood by all military persons.

supposing that the witnesses are unimpeached,*
and that the evidence they offer, or is required

C. B. Gilbert's
Law of Evid.
Mac Nally's R.
of Evid. &c.

Evidence is that which either proves and demonstrates, or renders highly probable and worthy of credit, to a court or jury, the facts or points in issue before them.

What has no tendency to establish these is no evidence, and ought not to be admitted. But, in circumstantial and presumptive evidence, circumstances which have not an immediate and direct tendency to prove the very facts in issue may have an indirect and consequential tendency to that effect, and are therefore not to be disallowed by a court, provided the party who uses them shall make their consequence apparent.

Evidence is of two kinds, *vice voce*, or parole,—given by witnesses in court; and written evidence, records, deeds, and other authentic and probative papers.

In all cases the best evidence of which the matter is capable shall be resorted to, provided it can be brought; if not, the best that can be had.

In the balancing of contrary evidence, the mind is to be guided by no other rule than this: That assent must be given to that testimony, of whatever nature it be, which produces the strongest belief; without regard to the numbers on either side.

A testimony which is precise and circumstantial must outweigh that which is less particular or minute, and goes only to a general fact; because the former implies more attentive observation, or more pointed recollection, and therefore creates a stronger belief.

Positive evidence must outweigh that which is negative, as attention is to inattention.

Much depends on the *manner* in which testimony is delivered. One influenced by his passions on either side, when

of them, is admissible, † or such as ought to be required.

giving evidence *on that side*, is of less importance than he who exhibits no such bias, and conversely when giving evidence *on the other*.

The countenance, look, and gesture, of a witness, characterise his testimony. “Hence all attempts to brow-beat, perplex, or irritate, a witness, in the delivery of his testimony are most reprehensible, and a court is not only deficient in a proper feeling of its own dignity but positively in its bounden duty, if it does not repress such conduct with exemplary severity; as all attempts of this kind affect the weight of the evidence, they are in fact nearly allied to the punishable crime of subornation of perjury.”

Lavater's Essay on Physiognomy. Tytler, 267.

The superiority of testimony on oath or written testimony depends entirely on the circumstances under which it is given.

* There are certain objections in the civil courts to the competency and to the credibility of witnesses, which exist, though not to the same extent, before a military tribunal. No officer who is to be called upon as an evidence should be ordered on the trial as a member; nevertheless, it does not appear that any member is incompetent to give evidence, if called upon, either on the part of the crown or the prisoner.

Mil. Arrangem. v. ii. p. 91.

The necessity of not appointing officers of the same regiment with a prisoner to try him has also been strongly urged to the writer, by an intelligent officer, from much observation while sitting on general courts martial, even at Chelsea.

The law positively excludes from giving testimony:— Tytler, 276

1. Those who have an interest in the matters at issue.
2. Those who stand in a certain relation to the parties in the cause.
3. Those who have committed crimes which destroy their credibility, or are stigmatised by law.
4. Those who want sufficient discernment and understanding.

Sullivan 54.
Whitlocke's
Trial.

The judge-advocate, however, should have concluded with the examination of a witness

Trial of Hon.
Gen. Murray.

1. The evidence for *himself* either of prosecutor or testimony is very doubtful; but, for the opposite party, the reverse. Nevertheless their evidence must be allowed, or many crimes would escape unpunished. In all cases the prosecutor may be called upon to give evidence *in favour* of the prisoner, or to produce records or papers of any kind which may be necessary for the prisoner's defence.

Bail cannot be witnesses for the principals. No persons who positively or negatively receive a reward, nor a person who has been threatened with vengeance of any kind, nor one who is a party in a similar cause.

In occult crimes, from necessity, the evidence of parties suffering robbery, ravishment, assault, &c. and accomplices, may be taken, but is not by itself sufficient.

When it is apparent that a statute-law could receive no execution, unless a party interested were to be admitted as a witness, there he must be allowed.

The confession of a party of the crime for which he is tried is conclusive evidence against him.

2. Husbands and wives can neither be witnesses for nor against each other, where either is a party in the action. In the same way the evidence of other relations will be suspiciously received, and that of the servant in respect to his master.

Counsel or attorneys, *acting in the cause*, cannot be compelled to furnish evidence from their professional communication.

3. Those cannot give testimony in a court who have committed felony or perjury (though pardoned); forgery or treason, (unless pardoned); conspiracy, barratry, or stirring up

before the interrogatories of the court are in general propounded. For, although such in-

of law-suits; in all cases of objection the record of conviction, or sufficient proof of it, must be advanced.

Persons excommunicated, (for heresy, simony, incontinence, or perjury, in ecclesiastical courts, including popish recusants,) quakers (in criminal suits), are variously debarred from giving evidence.

4. Those who want sufficient discernment and understanding are inadmissible; infants, idiots, persons constantly insane.

† Written evidence, any thing of the nature of public records may be received as proof, but to be allowed must be authenticated as copies of the originals, on oath of him who compared them; public or private books, the latter according to their probability, even of third persons; receipts, discharges, bills of parcels, gazettes or newspapers, notes of hand, bills of exchange, letters of correspondence, &c. The hand-writing of letters, and all similar writings, must be proved on oath; comparison, though of some weight, is not sufficient.

An informant's deposition in writing, taken before a justice of peace, is admissible, when it is proved that he is dead, unable to travel, or prevented from appearing by the prisoner; but then it must be proved that such paper contains the literal deposition of the informant. Mil. Arrangem. v. ii. 91.

A prisoner may be convicted on the testimony of his own hand-writing, when the identity is fully proved; but this should be admitted with caution; and, in the courts of law, it is not allowed to criminate, unless when found in possession of the person. Ib. v. ii. 95.

terrogatories may be pertinent and applicable, yet as the several members have in the end an

A prisoner's previous confession to a private person, cannot be admitted as sufficient evidence; but, if taken before a magistrate in writing, it may be read in court, but then the whole must be given, and not a part or extract; and this confession makes only against the prisoner himself, not against any accomplice or accessory.

Tytler, 303.

One credible witness may suffice towards conviction, or even on certain occasions strong presumptive, or circumstantial, proof.

Mil. Arrangem.
ubi sup.

It has frequently been the practice of courts martial to take the opinion of the witnesses in regard to any part of the prisoner's conduct; and in my idea, (says Colonel Williamson) no reasonable objection can be made to it; a witness being as much bound by his oath to give his real opinion as he is to state the matter of fact; of the capacity of the witness, as to the value of his opinion, the court must judge.

Hearsay evidence, being that of another who is not upon oath, is no evidence; yet a witness may swear to report, in support of a witness's testimony.

Case of Captain
Fraser and Ross
McNairy's
Rules of Evid.
56.

A person involved in the same criminal charge with others, but not affected by the evidence for the prosecution, may be immediately acquitted, and admitted as a witness in favour of the others. An unsettled difficulty, however, occurs in regard to the acquittal which must first take place to rid the unconvicted person of his connection with the other prisoners. In courts martial this would seem to require a completion of the proceedings as regard the individual, and waiting their confirmation by the proper authority, previous to continuing the trial of the remaining parties.

Case of M^r.
prat, apud.
M^r.Arthur, v. 1.
430.

Tytler, 293.

Witnesses may be called to support the credibility of wit-

opportunity of drawing forth answers to such questions as they may put; and, as an interrup-

nesses, by testimony of their characters, knowledge of the facts in issue, or to their having invariably related facts in the same manner.

In weighing evidence the mind should more easily give its faith to things which are probable than those repugnant to probability; and therefore fewer witnesses will serve on one side than the other. While any matter remains in doubt, the presumption is always to be in favour of innocence.

Positive proof is always to be required when it can possibly be had; next the proof a number of concurring circumstances which usually attend certain facts.

In judging of the credibility of a witness is to be considered general reputation, known principles, judgement, accuracy of memory, perfect indifference to the matter at issue, and freedom from prejudice and partiality.

An unwilling and reluctant witness, who speaks with caution, answering nothing but what is forced out of him by repeated and circuitous interrogation, is not equal to one who openly and fairly declares all that he knows upon the point; one who amplifies in his testimony, who seems gratified by the opportunity of furnishing evidence, or betrays passion and prejudice in the matter or delivery of his testimony, is to be suspected.

So is he who remembers with minuteness trifling circumstances long since passed; or avers his total want of recollection of material facts which recently happened in his presence.

If a witness cannot shew a cause for his knowledge, he is not to be believed at all.

Every thing, however remote, that tends to support the

tion of the judge-advocate may probably break in upon a chain of leading and necessary information, it were at all times to be wished that he were suffered to finish with his examination before the introduction of any new matter be admitted by the court. This, however, had not been observed at all in Colonel Williamson's time, who says, "The judge-advocate, the president and members, the informant and defendant, ask questions of the evidence under examination, without any restriction as to order or priority." Nor has the former rule been yet invariably observed.

Mil. Arrangem.
notes 65.

The examination in behalf of the crown being at an end, the prisoner cross-questions the witness if he pleases, or defers it till he is put upon his defence; a privilege indeed which is allowed him through every stage of the prosecution. But neither *he* nor the *judge-advocate* has a right to cross-examine his own witnesses, lest it should lead to answers concerted previous to the trial, for establishing of innocence on the one hand, or of guilt on the other. The judge-advocate is permitted to cross-examine the prisoner's witnesses, and the prisoner those

charges on one side, or invalidate them on the other, is admissible evidence.

for the crown, but neither of them the witnesses produced by themselves.

No witness is to be suffered to remain in court but during his own examination.

The examination of the crown-witnesses being brought to a conclusion, the prisoner is put upon his defence. If a soldier, he generally commences it without adjournment; if an officer, a time is usually begged for preparation, and his prayer is granted, if the period is not deemed to be unreasonable. Yet this indulgence can hardly be required when the prisoner has had sufficient notice of the trial, and when all the charges have been made known to him in time. But, if any of the charges have not been particularised, as may sometimes be the case,* till the moment of trial, it is then, no doubt, but fair and reasonable that he should be allowed a short interval to summon his evidence and to prepare his defence. "I see no reason, says Colonel Wil-

Sullivan.

Mil. Arrangem.
94.

* The present judge-advocate-general, (Sir Charles Gould,) having been lately questioned on this subject, gave it as his opinion, that additional charges, foreign to the original cause of a prisoner's arrest or confinement, are admissible, supposing they are *first reported to the person who has given orders for the process, and by him deemed proper to be investigated*; and supposing also that *the prisoner is served with sufficient notice, and allowed sufficient time to prepare for his DEFENCE.* Mil. Arrangem. note 66.

liamson, "why the same indulgence should not be granted to a soldier, or why any distinction should be observed between them in this particular."

Ib.

Essay on Mil.
Law, 383.

On the contrary one would conceive it every way most necessary for the soldier, who, as is well observed by Mr. Tytler in urging the aid of the judge-advocate to his defence, must stand greatly in need of advice in such trying circumstances as are sufficient often to overwhelm the acutest intellect, and embarrass or suspend the powers of the most cultivated understanding.*

Sullivan, 57.

Thus arrived at the most serious and important moment of his trial, the instant of clearing up his honour, or sinking under a load of infamy and guilt, what is there not required to enable him to act with judgement and deliberation? Probably uninformed of letters, a private sentinel or serjeant! Possibly a subaltern as yet in youth and unacquainted

Johnson, Lives
of Poets, v. ii.

* It was admirably observed by Lord Halifax "who from a poet became the friend of poets" when urging in the House of Commons the necessity of a law to grant the assistance of counsel in trials for high treason, he became confused and could not proceed—"How reasonable it was to allow counsel to men called as criminals before a court of justice, when it appeared how much the presence of that assembly could disconcert one of their own body."

with the strictness of discipline and order!— Unaided, perhaps, by counsel or by friends, left to the wild unconnected dictates of a bewildered fancy, how and in what manner is he to effect one salutary purpose? Unhappy being, distracted with fear, and sinking with apprehension, whither is he to turn to escape the threatening destruction? Fate hangs dreadful over his head! He hears nothing! He knows nothing! He implores for mercy,—he submits himself to heaven and the equity of his judges. —You, therefore, (says Mr. Sullivan) who are ordained to preside over and decide the destiny of your fellow-creatures, protect him with your counsels, lead him with a cautious hand through the mazes of his defence;—and as, in the hour of prosecution, you aimed to fix his guilt, so, in the moment of exculpation, assist him in the vindication of his innocence.

The judge-advocate officiates as counsel for the king, and in his defence he is allowed to restrain the delinquent from advancing any thing to criminate himself. This in some cases may be too circumscribed a power. But, however, as the court themselves have the privilege of trying every means to exculpate the prisoner from guilt, it is less to be regretted that the *law-officer* is not declaredly permitted to afford him that assistance which

Sullivan, 39.

Tytler.

he might stand in need of. Not that, indeed, it could be of any material service to him, except in those instances when counsel could not be procured.

M^r. Arthur, v. ii.
42.

For, it is the practice at courts martial to indulge the prisoner with counsel, under the character of friends of the court (*amici curiæ*), who may sit or stand near him, and instruct him what questions to ask the witnesses, with respect to matters of fact before the court; and they may commit to paper the necessary interrogatories as they arise, which the prisoner may give on separate slips to the judge-advocate, who reads them to the court, and if approved of, *i. e.* proper to be put, he inserts them literally in the minutes, with the witness's answer thereto.

The judge-advocate is, says Mr. Tytler, to advise and assist the prisoner as far as expedient, engrossing in the proceedings the circumstances in his favour, and taking no advantage of his want of intelligence.

Sullivan.

The prisoner being thus assisted by the aid of counsel, (as we can safely say he may be, under the sanction of such high authority,) and the examination of his witnesses being at an end, the judge-advocate is allowed to reply to his defence; not, however, upon any *new* subject-matter that shall appear, but strictly to that which shall relate to the original

Mirror of J.
apud Blackst.
Com. b. 4.
Trial of Ld. G.
Wickville.

charge; and, in like manner as the judge-advocate, the prisoner may be indulged in answering him in rejoinder. For, the law of England industriously endeavours to investigate truth at any rate. It varies its examination of facts according to the nature of the facts themselves. This being the one invariable principle pursued, that, as well as the best method of trial the best evidence upon the trial, which the nature of the case affords, and no other, shall be admitted in courts of justice.

From all analogous reasoning (respecting Mil. Arrangem
95. the common law) on this subject, remarks Colonel Williamson, it should appear that the prosecutor is *only* to be permitted in his reply to controvert any new matter introduced by the prisoner. For, a prisoner may, in his own exculpation, urge matter that may tend to criminate his accusers. Now it is repugnant to the principles of equity that any person should be liable to an aspersion, whether offered in a direct or an oblique manner, without having the means of answering it, and of defending himself from the imputation. This I take, though I do not pretend positively to assert it, to be the original and proper intention of a reply. The rejoinder is a concession to the prisoner, for which he is solely indebted to the generous principles of martial (or rather perhaps *military*) law, and to the indulgence of

the court. This Colonel Williamson also points out as forming a prominent title in the common law (*lex non scripta*) of the army, or *custom* of war, being equally *independent* of the usages of common law and the statute, or written, law (*lex scripta*) of the army.

Sulliv. 42.

The prisoner is, likewise, permitted to adduce the testimony of persons of reputation, in support of his character and the integrity of his life; for, if for mutiny, desertion, or any other crime, there shall be nothing but *presumptive* proof adduced, the evidence of his former good conduct will, indisputably, serve to influence a decision in his favour.

Ib. 67.

We now come to the last and most solemn act, the *fixing* of the *crime*, and the pronouncing of the *sentence* of the *law*: here, indeed, deliberation is required. The facts have hitherto appeared before us, in order to be arranged, scrutinised, and compared; but they are now to be decided upon agreeably to the laws of justice and of mercy. At a moment so awful as this, therefore, and when the fate of one in the same rank of being with ourselves is ultimately to be fixed; when the avenging power of Providence is thus entrusted in our hands, for the benefit of the community at large; how cautious should we be in our determination! how attentively should we investigate each open source, each latent prin-

ciple, of action ! Nothing should be forgotten. Coercion, in all its parts, should carefully be weighed ; the necessity of punishment should calmly be considered ; but, above all, *mercy* should be embraced as the benignest attribute of heaven. Before we proceed, then, on this most awful of all our duties, let us acquaint ourselves with the principles of guilt in general ; let us bear in mind, that the statute-law of England does very seldom, and the common law never, inflict any punishment extending to life or limb, unless upon the highest necessity ; and that the constitution is an utter stranger to any arbitrary power, of killing or maiming the subject without the express warrant of law. Let us teach ourselves to discriminate between them who are fit objects for the severity of the law, and those, who, from certain causes, are acknowledged to be intitled to its lenity * and forgiveness :

Infants, idiots,
or lunatics, not
punishable.

* Amongst the latter are those who are under a natural disability of distinguishing good from evil, as infants under the age of discretion, idiots, and lunatics, none of whom are punishable by any criminal process whatsoever ; neither is a person who has committed a capital crime, if he becomes *non-compos* before conviction, to be arraigned, nor after conviction to be executed.

Hawkins, Pleas
Cr. 61, c. 1.
Hales's Pleas
Cr. 10, 43, 65.

But, at the same time that the law is thus tender with respect to criminals who labour under a natural and inevitable deprivation of sense, it is equally as severe against those

the final cause of human punishments being a precaution against offences of the same kind,

Drunken Criminals, and those who incite madmen to crimes, punishable.

Coke upon Littleton.

Accessaries punishable nearly equally to principals.

Pl. Cr. 615, p. 16.

Hawkins, Pleas, 316.

who, by intemperance, reduce themselves to a temporary insanity. A man, therefore, guilty of a crime, through the effect of voluntary drunkenness, is to be punished for it as if he had been sober. Also, he who invites a madman to commit a crime is to be considered as a principal offender, and is to be punished as if he had perpetrated the deed himself. The law declaring that every man, in his sound mind and at the age of discretion, is to know the law, and consequently that he is punishable by it, if he transgresses the boundaries it hath established.

Besides principals, there are those concerned in some trespasses, who are called accessaries. An accessory is he who is not the chief actor in the offence, nor present at its performance; but is someway concerned therein, either before or after the fact committed. As to the point, who is accessory *before* the fact, Sir Matthew Hales defines him to be one, who, being absent at the time of the crime committed, doth yet procure, counsel, or command, another to commit it. Herein absence is necessary to make him an accessory; for, if such procurer, or the like, be *present*, he is guilty of the crime as principal. As to an accessory after the fact, he is a person, who, knowing a felony to have been committed, receives, relieves, comforts, or assists, the felon; and, generally, any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, maketh the *assister* an *accessary*. For, if a parent assist his child, or the child his parent,—if the brother receive the brother, or the master his servant, or even the husband relieve his wife, who have any of them committed a felony, the *receivers* become accessaries *ex post facto*. Accessaries, by the general rule of the antient law, are to suffer the same punishment as

and not an atonement or expiation for the crime committed.

The court being cleared, the judge-advocate reads the proceedings, or sums up the evidence, as may be most agreeable to the court,

the principals; but, though this law is still recognized, the distinction is necessary, as, by the legal fiction of benefit of clergy, at common law, a *small difference* is occasionally made between the punishment of principals and accessaries *before* the fact, and a greater difference more frequently between both and accessaries *after* the fact. And, perhaps, if a distinction (which certainly may be the case at a court martial) were *constantly* to be made between the punishment of principals and accessaries, even *before* the fact, the latter to be treated with a little less severity than the former, it might prevent the perpetration of many crimes, by increasing the difficulty of finding a person to execute the deed itself, as his danger would be greater than that of his accomplices, by reason of the difference of the punishment.

Blackstone's
Com. v. 4.
Stat. 3 Eliz.
18 Geo. II.
Hales's Pl. C.
615.

Beccaria on
Crimes and Punishments,
c. 37.

A man may be indicted as *accessary*, and acquitted, and yet be afterwards indicted as a *principal*; for, an acquittal of receiving or counselling a felony is no acquittal of the felony itself; but it is a matter of some doubt whether, if a man be acquitted as principal, he can be afterwards indicted as *accessary* before the fact, since those offences are frequently very nearly allied, and, therefore, an acquittal of the guilt of the one may be an acquittal of the other also. But it is clearly held, that one acquitted as principal may be indicted as an *accessary after* the fact, since that is always an offence of a different species of guilt, principally tending to evade the public justice, subsequent in its commencement to the other.

Principals acquitted as principals, or accessaries, capable of being indicted of either of the other charges.

Blackstone.
Hales's Pl. C.
625, &c.

Blackst. Com.
v. 4, &c.

Tytler, 316.

in each case elucidating such parts as may appear either to himself or to the different members worthy of their attention. In complicated cases, in circumstantial proofs, in cases where the evidence is contradictory, or in trials where a number of prisoners are jointly arraigned, as in charges of mutiny, or the like, it is expedient that the judge-advocate should arrange and methodize the body of the evidence, applying it distinctly to the facts of the charge, and bringing home to each prisoner, where there are more than one, the result of the proof against him, balanced with the evidence of exculpation or alleviation. That done, and all in readiness for judgement, he puts the following question to the respective members, beginning (as in the trial of a peer, before the House of Lords, which is the highest of all courts of honour) with the youngest.*

Sullivan, ub.
sup.See also Tytler
on M. L. 328.

* "But here," says Mr. Sullivan, "it is to be observed, that if, in the course of the prosecution, it shall appear the prisoner is innocent of the capital offence exhibited against him, he yet is liable to be found guilty in a less degree, as must be particularly specified in the verdict. As, instead of MURDER, *homicide or manslaughter*, &c. and, instead of DESERTION, being *absent without leave*. But, in all instances, his acquittal of the capital charge must be inserted; neither can he be convicted upon any extraneous matter."

Grant's Case.

"It is true," says Serjeant Marshall, "that a man charged

“From the evidence given for and against the prisoner, and from what he has said in his defence, are you of opinion that he is guilty or not guilty of the crime which is exhibited against him?” And, as they declare their sentiments, he writes them down, severally, on a slip of paper. Tytler, S17.

Where there are distinct and separate charges, or articles of accusation, the president and members of the court reason and deliberate, separately, on each charge; candidly discussing, in a free and open conversation, the import of the evidence, and allowing its full weight to every argument or presumption in favour of the prisoner.

Should the majority, on the casting up of the opinions, be found on the side of mercy, and their votes be—*not guilty*, the prisoner is accordingly *acquitted* (or rather, perhaps, acquires a sentence of acquittal, since he cannot be *set free* without an order, founded on this sentence, from the commanding officer by whose authority he was confined); but, should it be otherwise, his guilt is declared, and those who have condemned him are to pass sentence Adye T. on
M. L.

with a capital crime may be convicted of an offence of an inferior degree, but then it must be of the *same nature* with the offence charged.”

upon him,* subject to the mitigation of those who have not found him guilty, whose voices,

* Several ideas occur here relative to caution in the formation or arrangement of the sentence, some of which, as that concerning the dignity of conduct, &c. in the president, can only apply to regimental courts martial, and others in such various ways, that such as may will be better inserted in the subdivision of the tenth section. The following case, however, though trifling in itself, may be here mentioned, since it will shew the minute objects that can create deliberation, even in a regimental court martial; and was also a cause of the present attempt towards a digest of military law; it occurred in a court of which the writer was a member, to whom it was referred by his commanding officer.

“ On a regimental court martial, composed of the president and four members, A. awards the lowest number, 12 lashes;—B. 300;—C. 300;—D. 200;—the president 150. Can the president, by inclining to any number, (as the minimum,) establish its quantum as the sentence? Should he modify the whole by an equalizing calculation, which thus might produce a result of 190 lashes? Or what is the legal mode (each member being positive) of forming under such circumstances the sentence?

“ Auxiliary remarks: On a cursory reference to the books, a singular deficiency appears in all provisions for the duty and power of presidents. It is, nevertheless, evident, that a discretionary power is vested in that officer, in the case of a member or members awarding no corporal punishment, who are thence considered as having no voice in the quantum awarded by others. He then weighs the *decision of the silent members against the others*, and pronounces accordingly.

“ If this power may be exercised in ordinary cases, it is certainly most safe when leaning to the side of mercy; for, all

though overpowered by the majority in respect to the guilt of the prisoner, have yet equal weight, in the diminution of the punishment, in proportion to the number who thought him innocent.

Williamson's
M. A.
Tytler, §18.

The manner of passing sentence is thus: The judge-advocate, beginning with the junior of those members who have found the prisoner guilty, proceeds in these words:—

“Having declared it as your opinion that the prisoner is guilty of the crime of ———— what is the punishment you would have inflicted upon him?”

And, as the member adjudges* either to

press that judicious lenity which seeks to maintain a respectable subordination, rather than to punish, &c. &c.”

On the subject of the president's casting vote on *general courts martial*, the writer has since seen the following opinion of Colonel Williamson:—Five members may vote a prisoner not guilty; there are eight, whose opinion, with regard to the punishment, the judge-advocate is to take. Four of them may vote 100 and the other four 200 lashes, in this case, *which ever side the president chuses must prevail*. *Military Arrangements*, v. 2, n. 118, p. 69.

The matter is, however, set at rest by Bruce, on reference to whom it appears, that “if there happen to be an equality, the president is to have a casting vote.” *Institutes of Military Law*, Tit. 1, p. 308, which was also directed in the *Articles of War, Queen Anne*, (1713,) art. 52.

* The punishments, which it is in the power of a court martial to inflict, are various in their nature and degrees from Tytler, §50.

cashiering, suspension,* or reprimand; or to death,† corporal punishment,‡ or transporta-

the highest, which is death, down to those of the lightest nature, as a short confinement for a private soldier, or a reprimand for a commissioned officer. *See Gen. Remarks, p. 143.*

Mil. Arrangem.
v. ii. 119.

* The suspension, from rank and command, of a commissioned officer, (during which he is mulcted of his pay,) should be adjudged with great caution,—the period determinate, and not left to any other discretion, and not of any great length of time; as it may always be attended with inconvenience and detriment to the service, and, in consequence, produce an exercise of his majesty's prerogative, in dispensing with the services of an officer *entirely*, which would amount to a very great increase of the sentence awarded.

Lieut. Col.
Jephson Case.
Gen. Ord 8th
Feb. 1804.

A. of W. § 16,
art. 9.
Mut. Act, § 23.
Ib. § 32.

† No sentence of death shall be pronounced against any offender, unless nine of the members, when the court consists of thirteen, or two-thirds, where the number of the members is greater or less, shall concur in that sentence. No person is to be subjected to any punishment, extending to life or limb, under the Articles of War, or any other regulations, but as they accord with the Mutiny Act. Punishment in limb, indeed, exists only in the term, which, like many other relics, remains after its meaning is gone. It formerly consisted in amputation of the hand of a soldier who wounded a comrade;—the ear of a mutinous or other noisy follower of the camp, in particular, boys; the left arm was broken of every illicit woman, who persisted in haunting the camp.

Cruse, Mil. Ant.
v. 3, &c.

Futley's Essay
on Mil. Law,
341.

It is not customary to adjudge, or direct, the particular mode of the punishment, where it is a capital one, nor the time nor place of its execution; but only, in general terms, to adjudge the prisoner to suffer death; nor, indeed, do the Articles of War authorise any such particularization. Yet,

tion,|| &c. § the judge-advocate writes down the
and words, so on, till he finishes with the senior.

as there is a mode of inflicting it more ignominious than the ordinary military punishment of shooting, where such an infamy as hanging is intended to be attached to the crime, it should certainly be specified in the sentence. Since his majesty, or the General to whom the report is made, and who is to confirm the sentence, can take no share in the judgement; which would be an union of powers incompatible with the British constitution or with justice. When stealing, or such mean crimes, are punished by death, it is usually hanging.

The capital punishments inflicted by martial law are common to all ranks in the army, from a general officer down to a private soldier; no distinction whatever is made, but the same degree of delinquency calls for *the same judgement in one rank as another.*

‡ In adjudging corporal punishment, (if it must have place in an honourable service,) there are to be recollected the following circumstances:—That not in every instance, where “Corporal punishment” is ordained, as the penalty of a crime in the Articles of War, is the disgraceful punishment of flagellation intended; for they consider imprisonment as corporal punishment, sometimes declaring that the prisoner shall “suffer imprisonment, or other corporal punishment,” &c. which, as before-mentioned, (p. 76,) is confirmed in the Military Antiquities.”

And, in the extent of this dreadfully humiliating punishment,—the settling the number of lashes, reference should certainly be had to the previous condition of the prisoner, since a small number inflicted on a weak emaciated wretch, shivering from a lingering confinement in various prisons, with no other food than bread and water, probably with the additional exhaustion of a long and depressing march, is surely equal in

Mil. Arrangem.
v. i. 115, &c.

Sir C. Gould on
Court Mart. at
Chatham, Nov.
1802.

Also case of
Commis. Sir Is.
Coffin, 1783.

Williamson, ub.
supra, 116.

Art. of War,
§ 13, art.
Grose, ub.
supra.

This being done, the judge-advocate reads aloud the different opinions, sums up the respective

Timocr. 759.

its effects to a large number on an athletic form, which has experienced no cause of debility. Nor is this principle of much novelty; according to Demosthenes, the *lex talionis* was corrected on it in the person of a Locrian, who, having been threatened with having his *only* eye struck out by a person who had *two*, reasonably complained, that even the punishment of retaliation would not place his despoiler in *the same* condition.

A discrimination of character also ought, even after this resort, to be made; since the general use of this corporal punishment, a volume might be filled with instances of British soldiers, who have embraced death rather than submit to its infamy; and, surely, these were not formed of those *perverse* and *sullen* materials to which the infinite variety of rational correctives could not be applied; and to which, only, the *stimulus* of the scourge can, in any point of view, be applicable.

In the present French military code, this corporal punishment is not found.—(See also *General Remarks*, p. 143.)

|| Whenever his majesty shall intend any sentence of a court martial of transportation, or any conditional transportation, to be carried into execution, the sentence, together with his majesty's pleasure on the same, shall be notified, in writing, by the commander-in-chief, or, in his absence, the adjutant-general of the forces, to any justice of the King's Bench, Common Pleas, or Baron of the Exchequer of the degree of the Coif, who, thereupon, shall make an order for the transportation, and perform every other act necessary for the ordinary transportation of felons, which order is to be obeyed by sheriffs, gaolers, and all other persons having custody, &c.

judgements, declares on which side the decision has devolved, and then draws out the sen-

The justice or baron who shall make such order shall *Ib.* § 9. direct it, as well as the notification, to be filed in the crown-office of the King's Bench, and there kept of record for filing, of which 2s. 6d. shall be paid. At the same rate shall such clerk of the crown deliver, either on part of the king or the offender, a certificate, containing the names and offence of the offender, place where the court was held, before whom he was convicted, and of the terms and conditions on which his majesty's order for such transportation was given, which should be sufficient proof of the conviction, &c. in any court, &c.

A prisoner, under sentence of death, obtaining his majesty's conditional pardon, shall be subject to all the ordinary laws relative to the escape of felons, as well as those aiding or abetting.

§ Fines are yet, among the minor punishments, inflicted by military courts of judicature, for they are, in many cases, expressly enjoined by the act of parliament, though it has also been doubted if they were at the discretion of courts martial. Their utility, however, ought to set aside any doubt on the subject, as well as the variety of cases in military affairs analogous to those to which they are applied by the common law. *Mil. Arrange.*
v. ii. 119.

A case in point occurs in that of Major John Browne, of the 67th regiment, who was tried, in October, 1787, on a complaint exhibited against him, by the members of a court martial, at Antigua, of disrespect to them; and on a charge of cruelty to Thomas Edwards, a private soldier. With respect to this last charge, he was found guilty in part, not of cruelty, but oppression, and was sentenced to be suspended from pay and duty 309 days, the time during which he had

tence agreeably to the sentiments of the court. In the sentence, however, great consideration should be used previous to the insertion of the words "unanimously," in respect to the opinion of the court, "honourably" acquitted, &c. Not that these terms, so satisfactory to the persons to whose cases they are applied, are by any means prescribed; but that they have been, occasionally, held as violating the oath of the court, or censuring the authors

confined the soldier without trial; and he was also sentenced to pay the soldier forty pounds.

Pr. and Pract.
Nav. and Mil.
C. M. v. ii.

Mr. M'Arthur, who has doubts whether the court did not exceed its authority by imposing a fine of 40*l.* though he has none of *the injured party being entitled to a compensation* for his tedious confinement, thinks it should have been sought at common law. But this could not surely be necessary, while both parties retained the military character, and the offence was committed entirely within the military pale.

Mil. Antiq. v. ii.
199.

Fines were more common in our antient crimes; even "Private soldiers in those days," according to Capt. Grose, "having some property, were punished by forfeitures and "fines."

Imprisonment, however, as regards officers, which was formerly connected with it, and which is yet customary abroad, is now very rare on the same principle, from which suspension should be cautiously used.

The writer cannot resist an impulse arising from experience, to remark, that fines seem to offer a penalty well adapted to the enforcement of due attention in inconsiderate members of regimental courts martial.

of a prosecution, in which, perhaps, though the prisoner was innocent, his innocence could not, by any other means, have appeared.

Tytler.
Williamson,
notes, 129.

No irrelevant matter is of course to be admitted into a sentence, and, least of all, any remarks in favour or reprobation of any of the parties concerned in the prosecution and defence.

A court martial, on convicting a prisoner, is generally considered as in duty bound to sentence some punishment; though, on consideration of the prisoner's previous sufferings, it has failed to do so, and the sentence been nevertheless confirmed: And it may recommend the remission of the punishment sentenced. The punishment must be expressly ascertained, and not left to the discretion of the executive power, or person, whose business it is to confirm the sentence. In representing immediately to his majesty a prisoner, as a proper object of the royal clemency, it is right to mention the circumstances on which the representation is founded: if the court martial be held under the authority of a commander-in-chief, it is proper, on the same grounds, to request that he will (in his discretion) solicit his majesty's clemency.

Trial of
Mil. Arrangem.
v. i. 99, and
notes, 70.
James, Reg.
Comp. v. 2.

Tytler, 178.

Sullivan, 80.

The fair proceedings of the court being examined, and signed by the president and judge-advocate, (the latter himself always in-

serting the sentence or sentences,) and sent or delivered to the power by whose authority the court hath been assembled, the court then proceeds to the trial of other offenders. Previous to the arraignment of every new prisoner, for a different crime, the court is to be re-sworn, and, of course, witnesses, if the same should be called upon more than one trial. When there are no more prisoners, the members remain *in orders*, as a court, waiting the result of the opinion of that power by whom they have been constituted.

Gen. Orders
15th Jan. 1809.

General Orders. They, however, return to their ordinary duties in the mean time, notwithstanding the regulation apparently to the contrary; which is obviously necessary, when considerable time may elapse during postponement, or the interval between sentence and confirmation.

In courts martial, being held by the same authority as other courts of law, the person empowered to cause them to be held possesses the prerogative of *once* returning them their *sentences* for *revision* (when they may adhere to their original sentence), and of *pardoning* and *remitting* the punishment; but not of altering or adding to the judgement which shall have been given. It being a fundamental principle of the common law of England, of which the martial law is a branch, that a man cannot suffer *more* punishment than the law assigns,

Tytler.
Art. of War.
Mil. Arrangem.
v. 2, 100.

but that he may suffer *less*; that the laws cannot be strained, by partiality, to inflict a penalty beyond what the letter will warrant; but that, in cases *where the letter induces any apparent hardship*, the crown has the power to pardon.

To prevent interruption to the proceedings, till they should almost resolve themselves into the entire duties of the judge-advocate, it has hitherto been forborne to mention a privilege, (for which it is to be hoped he will very seldom have occasion,) should illegal measures be pursued in opposition to his opinion; and which, exonerating him, throws the burthen of the act upon the tenacity of those who may carry it into execution. In such a predicament, "and it is not uncommon," says Mr. Sullivan, "he should *protest*, not stop the proceedings of the court, but enter his objections, and, with reverence, submit them to the consideration of his sovereign, or the delegates of his power."

Thoughts on
Mil. L. 93.

"He may not," says Mr. Tytler, "enter his dissent in the *form* of a *protest* upon the record of the proceedings, for that implies a judicative voice, but engross therein the opinion delivered by him, for the government of him by whom the sentence is to be confirmed."

Ess. on M. L.
361.

No sentence of a general court martial (say Ib. § 16, art. 11. his majesty's Articles of War) shall be put in execution, till after a report shall have been

made of the whole proceedings to us, or to the officer commanding in chief, or some other person duly authorised by us, under our sign manual, to confirm the same, and our or his directions shall have been signified there-upon."

The sentence may now, however, be supposed to have received confirmation, and either to have been executed or remitted, in part or the whole: a few observations only remain.

Mil. Arr. n. 72, "Some commanders in chief," says Colonel Williamson, "have of late gone so far as to *reprimand* courts martial for the judgement they have given. They have certainly a right to make their observations, when declaring their approbation or otherwise; but, as a *reprimand*" (of course in any form) "implies guilt in the person on whom it is imposed, and is now among the punishments assigned to offenders for small offences, it may be conceived, by some, that a commander, in taking this upon him, goes a step beyond the bounds of his authority, by uniting the judiciary to the executive power; and besides acts improperly, not to say illegally, in awarding punishment without trial."

Mutiny Act,
§ 28.

The next procedure ordained is "that every judge-advocate, or person officiating as such, at any general court martial, do transmit, with as much expedition as the opportunity of time

and distance of place can admit, the original proceedings and sentence of such court martial, to the (office of the) judge-advocate-general, in London, unless such court martial shall have been appointed in Ireland, in which case they shall be transmitted to the judge-advocate-general of that part of the United Kingdom, in Dublin; and the said original proceedings and sentences are to be carefully kept and preserved in their respective offices, to the end that the persons entitled thereto may be enabled, upon application, to obtain copies thereof, without stamp-duty.

Ib. § 29.

Provided always, that the party tried by any general court martial, within Europe, (except Gibraltar,) shall be entitled to a copy of the sentence and proceedings of such court martial, upon demand thereof, made by himself, or by any other person or persons on his behalf, (he or they paying reasonably for the same,) at any time, not sooner than three months after such sentence; and, in case of trials at Gibraltar, at any time not sooner than six months after the sentence; and, in case of trials by any general court martial, in his majesty's other dominions beyond the seas, or in foreign parts, at any time not sooner than twelve months after the sentence given by such court martial, whether such sentences be approved or not.

Ib. § 27.

General Remarks on the Sentence,—its Executions,—Punishments,—and the preceding Sections.

There are some general remarks as well as as facts, in the consideration of a sentence and the execution of punishments, which, to prevent as much as possible confusion in the preceding pages of this section, have been thrown together here for a glance of the eye, previous to a general or regimental court martial.

The first observation that naturally occurs, on the present section and those immediately preceding, is that, notwithstanding the distinction so strenuously maintained between the summary proceedings of military courts and the formal process of the courts of law, the minutest forms of the latter will be found to have a parallel in the former; and that, without the credit attached to the various formalities of the civil courts, justice is here accessible by an infinitely greater variety of means. These means form the different grades which have been described, arising out of necessity, from the different circumstances of an army; as far, therefore, as, compatibly with the service, they can assimilate in regularity and *close reasoning* with the civil courts, whose forms are the result of calm wisdom, the better.

In no respect is this assimilation more necessary than in a *certain knowledge* of the degree of punishment prescribed by military law, and a full attention to impress by all the dignity of justice the example intended to be conveyed by the sentence; punishments being intended to deter by the terror of example, and not so much to *vindicate* as to *prevent* the commission of crimes.

Mil. Arrangem.
v. ii. 109.

The necessity of consistency, and consequently of consideration, in the sentences of courts martial, cannot be better demonstrated than by the following instance, at once interesting and ludicrous.

“ Orders by Lieutenant General Cornwallis, commanding at Gibraltar, March 17, 1764.

“ Lieutenant B—, of the 54th regiment, tried by a general court martial, and found guilty of leaving his guard, contrary to orders, is adjudged by the court to receive a public reprimand from the governor. The governor does, therefore, in this public manner, reprimand him, and orders him to be released from his arrest.

“ Corporal James, of the same regiment, commanding the signal house guard, was tried by a regimental court martial, the same day, for a like neglect of duty, and was ordered to be reduced, and to receive two hundred lashes. The governor pardons him, thinking a neg-

lect of duty in a commissioned officer more heinous than in a non-commissioned officer, who is not supposed to have the same education, and is of course more liable to err. Justice is the same in high rank as low. Lieutenant Bond gave him as good a character in his situation as Lieutenant Colonel Welsh did the lieutenant; therefore, to do strict justice to both, the governor reprimands in this public manner Corporal James."

These orders, in language so highly characteristic of the late noble Marquis Cornwallis, exhibit a very just discrimination; for, while the general is constrained to mark so gross an inconsistency, he did not subject Lieutenant B—— to the pain of a personal exhibition before the garrison, which he was warranted by the sentence in doing; so well did his lordship understand the real value of power,—*in possessing without using it.*

Plut. in Vit.
Solon.

The accessibility and promptitude of military justice would seem to preclude the possibility of any unjust exercise of military power over those within the jurisdiction of military law. When it is considered, however, that while rejecting all the *necessary fictions* of the common law, not only do the most dangerous sometimes obtain admission to the military procedure, but that there has occasionally arisen, in some few parts even of the military

force of Great Britain, a sort of *system*, called ANNOYANCE, which, under that avowed appellation, and by the abuse of military power, subverts every principle of justice; ARRAIGNS *without charge*, CONVICTS *without proof*, and PUNISHES *without judgement*; it behoves that every one intrusted should be cautious how he aids it, whether by participation or assent, and strenuously to support in his individual character every rule for the administration of justice. For if, as it has been very properly said, the hand of every commander should be strengthened by every possible means, and those in a subordinate capacity taught to look for any advantage solely through his approbation, it is pre-supposing that approbation to be directed only by justice, and is at least necessary that it should not be guided by caprice; or, instead of rendering command more efficient, it will be exhibiting only an unworthy power directed to public injury and private wrong, and producing a combination of jarring materials, incompetent to any military purpose. If, on one hand, such a pledge for the inviolability of military power be necessary, some guarantee is surely requisite *on the other*, that power necessarily so absolute should not be unjustly exerted.

The respectable judge-advocate for Scotland has fallen on a most sophistical definition of a soldier, "whose conduct and character,

Tytler, *Essay on Military Law*, 327, note.

taken in the *aggregate*, may be such as to render him *a most unfit* person for having any command; and yet it may be impossible to specify *any positive act* to the satisfaction of a court martial, &c." and thinks the distinguished honour and humanity of British officers merit the confidence of having the disposal of the rank of non-commissioned officers without trial; but unfortunately there are existing cases to prove that there have been striking exceptions to this well-known honour and humanity, against which the laws must provide; while the paradox of a guilty man without fault is not more inadmissible in law than irreconcilable with military experience:—military law recognising even "all disorders and *neglects* which *officers* and soldiers may be guilty of," though not specified in the Articles of War.

Essay on Mil.
Law, 360.

The eloquent writer just quoted declares that "every material deviation" from the rules of common law, "unless warranted by some express enactment of the military code, is in fact a *punishable offence* in the members of the court martial, who may be indicted for the same in the king's ordinary courts." In another place, Mr. Tytler has already declared that all attempts to brow-beat, perplex, or irritate, a witness in the delivery of his testimony (while a court is deficient in a proper feeling of its dignity, if it does not repress such conduct

with exemplary severity) are nearly allied to the punishable crime of subornation of perjury."

An irregularity particularly noticed by Colonel Williamson in courts martial is that in giving sentence they are apt to go beyond the bounds of their jurisdiction, and to pass their judgement on matters that are not submitted to it, of which he instances several cases, as that of Lord Keppel, which censured the prosecution; that of Colonel Cockburne, which declared the innocence of the evidence from the aspersions cast upon them by the prisoner; and another at Plymouth, which gave their opinion on the conduct of the commanding officer.

Mil. Arrangem.
v. ii. 76, notes

It can scarcely be necessary to urge here that the treatment of a prisoner, of whatever rank, on his trial, should be characterized by the highest consideration, and all the humanity of that politeness which belongs to the army.

"Some commanders-in-chief," remarks Colonel Williamson, (1784,) "have of late gone so far as to *reprimand* courts martial for the judgement they have given. They have certainly a right to make their observations when declaring their approbation or otherwise; but, as a *reprimand* implies guilt in the person on whom it is imposed, and is now among the

Ub. supr. 72

punishments assigned to officers for small offences, it may be conceived by some that a commander, in taking this upon him, goes a step beyond the bounds of his authority, by uniting the judiciary to the executive power; and besides acts improperly, not to say *illegally*, in awarding punishment without trial.

If this be the case, as respects a commander-in-chief, how much more so must it be in the commanding officer of a regiment or party, who should employ it wantonly. If the influence of honour on the mind of an officer be once destroyed, by the humiliation of public *reprimands*, the military spirit will vanish with it. Yet even *abusive* language would appear to have found its way in a few instances into the conduct of military affairs, not, however, for the credit of the army let it be understood, without *punishment*.

Gen. Orders,
8th Feb. 1804.

In the beginning of 1804, Lieutenant-Colonel W. Jephson, major of the 17th regiment of Light Dragoons, was tried and found guilty of having acted in an unwarrantable manner, highly unbecoming an officer, by *abusing* and ill-treating Assistant-Surgeon Samuel Tilt, of the same regiment, on the morning of the 30th October, and was adjudged to be suspended from rank and pay for the space of six calendar months. His majesty, however, adverting to the detriment which the service must ex-

perience from the suspension, *deemed it indispensable that Colonel Jephson should retire altogether*, permitting him, on account of a *service of twenty-three years*, to sell his regimental commission.

In October, 1771, Captain James Titchborne, of the Marines, was tried on board the Buckingham, for treating Lieutenant Fynmore (whom he had already brought to a court martial, which was adjudged malicious) with *frequent abuse* and unofficer-like conduct. The court found the charges proved, and he was *dismissed from his majesty's service*. His age and infirmities were recommended to the favour of the Lords of the Admiralty.

M^r Arthur,
Nav. & Mil.
Courts Mart.
v. ii. 267.

It certainly could not be endured that a punishment which must eventually destroy the energies of any cultivated mind or feeling heart, and is therefore wisely placed only in the power of a court martial, should be left at the disposal of any person whom chance might throw into command; with *true* military dignity it is incompatible.*

* While such is the case that the inferior officer shall not be treated unworthily, a due respect even in extra-military concerns is very properly assured to the superior officer. Thus the language of a letter is required to be of an equal tenor with the personal propriety exacted from one to the other.

EXECUTION.

That in the mode of executing a sentence no less attention is necessary than in passing it, must be obvious; since, however guilty the criminal, even if death, the *ultimum supplicium*, be awarded, there is no right to drag it into lingering sufferance; if a certain number of lashes, no power to inflict them wantonly; nor to increase the pain even of an ordinary imprisonment. The following case, in Colonel Williamson's words, will afford sufficient illustration. "When a soldier," says he, "condemned to suffer death is pardoned, it is nevertheless usual to go through all the preparatory formalities, by way of example. During the last war there was a marine shot at Plymouth, who had received his majesty's pardon, when it was only intended to frighten him in this manner. The major who attended to inspect the execution intended to carry on the ceremony to the fifth act, and only to exhibit the royal pardon just before the dropping of the curtain. However, by some oversight or mis-

Mil. Arrangem.
v. ii. 86, note
144.

Appendix to
M'Arthur, No.
56.

In 1784, Colonel Hugh Debbiege was tried at a general court martial for writing several disrespectful and injurious letters to the Duke of Richmond, as Master-general of the Ordnance, and found guilty. But in consideration of the high character of Colonel Debbiege as an officer, and his meritorious services, he was adjudged only to be reprimanded in open court.

take, the catastrophe happened before the *dé-nouement* took place, and the life of the unfortunate victim was sacrificed to the observance of military forms, or rather to the neglect or inattention of those who were appointed to conduct them."

There is however another matter relative to a sentence and its execution which the writer would submit with great deference to those in whom its control is invested. In sentencing to flagellation it is obvious that not a *quantum* of punishment is prescribed, but a *number* of lashes! now, even after all the consideration of which the subject is capable, it is not possible to ascertain whether the criminal can suffer the whole of a given number at one time, even with all the resuscitative arts of the drum-major, after *repeated temporary deaths*. If not, and the surgeon direct him to be taken down, he becomes a prisoner in the hospital, and often, as soon as reviving nature will permit, just without the extinction of life altogether, the patient is again brought forth to receive another portion, under the same circumstances, and so on till he has, in receiving the number of lashes to which he had been sentenced, received *repeated punishments*, each approaching *the nearest possible to death*, while the law in more than one instance expressly prescribes, on every principle of common justice, that no man shall

Mut. Act, § 12,
15, &c.

be punished twice for the same offence. There can be no doubt of the fact or of its injustice.

PUNISHMENT.

The tendency of sanguinary punishments to brutalize the species, and of course to render a soldiery any thing but military, is sufficiently known and acknowledged: it is hoped that at least an extention of them so absolutely *vindictive* will be done away. From the habitual exhibitions of sanguinary punishments it was that the revolutionary slaves of the Antilles became so inventive in cruelty towards the most austere of their fallen masters, while they protected the Galifets and Barrons, who had been considerate of them; and, what is worse, that the soldiers of Mauduit, not contented with their treason, refined upon barbarity, in the mutilation and exposure of the mangled corse of their commander!

Edwards's West
Indies, v. ii.
Rainsf. Hist.
Account of St.
Domingo, &c.

Pref. Ess. to
Gen. Latriille on
Modern War,
xiii.

It has been well observed, by Major Le Mesurier, that, where this system of punishment is disused, it may be concluded that "discipline is maintained by calling into action the noblest passions of the human heart." The same sensible officer mentions that "the promulgation of the edict of Louis XVI. enforcing for certain offences the punishment of blows with the flat of the sabre, occasioned the desertion of *thirty thousand* men! So obnoxious to the French soldiery was what in their esti-

mation tended to degrade their profession, &c." And again "the materials of which the corps in the French service are composed, are discordant and heterogeneous in the extreme; no army in Europe contains so large a proportion of foreigners; yet Poles, Italians, Dutch, Swiss, Germans, French, mingled without regard to nation or language, are governed by the same rules, and subjected to the same discipline, nor is the conduct of any such as to render necessary a departure from the general system. These foreigners, who are either forced into the ranks or seek in them a refuge from captivity, cannot be supposed to entertain much predilection for the service in which they engage, and it is clear that the devotion, bravery, and enterprise, which they subsequently evince, must arise out of the nature of the service itself."—"In the French military code *corporal punishment finds no place.*"

Perhaps in a few instances only of sullen, Kennet, R. A. Rom. Art of W. c. 15. 220. perverse, stupid, stubbornness, (cases, however, which rarely occur,) it might be retained on the same physical principle as the Roman punishment of letting blood,—with great caution, however, of legal prescription.

Punishments being intended to deter by the terror of example, and not so much to vindicate as to prevent the commission of crimes, it follows that they should be most pointed on Williamson's Mil. Acq. vol. ii. 109.

those for which the most opportunities and the most prevailing temptations offer, agreeably to the principle of civil law, which is most severe on those offences (such as those of sheep-stealing, &c.) which by the ease with which they are perpetrated might be most detrimental to society. Such crimes in the army are desertion, disobedience of orders, and sleeping on a post, which, however apparently venial, may cause the destruction of an army.

Art. of War,
 § 24, art. 2.
 Mut. Act. § 118.

A very great relief afforded to the common law, by a military judicature, is manifest, in there being few offences against the civil law of the realm, committed by soldiers, which may not be construed into military offences, as subversive of good order and military discipline. And an admirable characteristic of the discrimination of military law is that distinction which is invariably preserved in his majesty's Articles of War and Rules and Regulations between the penalties of crimes on foreign service and those committed in the United Kingdom; a distinction which extends even to cowardice or misbehaviour before the enemy, which, "when it is judged not to proceed from treachery but weakness, is more generally punished by an ignominious dismissal than by death." This also must certainly countenance other discriminations which have been proposed.

Mil. Arrangem.
 v. iii. 113.

The same principle is recognizable in the field of battle, *when only* any thing in the shape of an arbitrary punishment can be tolerated. Such as in actual mutiny, when officers and soldiers may be put to death, if the mutiny cannot otherwise be suppressed; running away in action, marauding, &c. "These arbitrary punishments are never indeed put in force but abroad on service, and even then they can be justified by nothing but the most urgent necessity." Williamson. ub. sup. 114.

Shooting and hanging are the capital punishments in the British service, and neither are pointed out by the Articles of War. They are common to officers and private soldiers.

When a criminal is to be executed in camp, it is usually done in front of the line, and in presence of the whole army, or if more convenient a detachment from each regiment, or even a man from each company if scattered in distant cantonments. When a soldier is sentenced to be hanged, the provost marshal is to provide the hangman. But, when a criminal is condemned to be shot, it is to be performed by soldiers of his own regiment, sometimes by his pardoned accomplices, or by others who have been convicted of similar offences. A serjeant is usually appointed to command the execution party, and to give the signal for the men to fire. A reserve is also provided in case

the first fire may have not taken the desired effect. The provost marshal also attends with a case of loaded pistols. The criminal is usually indulged to give the signal himself for the soldiers to *present*, but the signal to *fire* must be taken from the serjeant, or from the officer appointed to see the sentence executed. After the criminal is declared to be dead, by the surgeons who attend for that purpose, it is a custom to carry the mangled body three times round the parade or place of execution, in order to render the example more striking, and to impress the greater terror on the minds of the spectators. When many prisoners have been convicted, the warrant has, sometimes, only ordered to be executed a certain number, which, if crimes be equal, must be furnished by casting lots. In the East Indies military criminals have been blown from a mortar.

The ceremonies are of course varied according to circumstances, local, personal, &c.*

* In Great Britain a military sentence of death being approved by his majesty, the warrant is issued under the sign manual; on foreign stations the commander-in-chief issues his warrant to the second in command, and appoints the time and place for carrying the sentence of death into execution. The form is issued in orders from the adjutant-general's office, and the peculiar ceremonies are arranged in the public orders.

Of commissioned officers the most severe punishment is mostly cashiering, being either simply dismissed the service, or in addition rendered incapable of again serving, or dismissed with infamy. The latter is rarely inflicted but for flagrant acts of cowardice or treachery.

Commissioned
Officers.

Thus, in 1655, no less than an adjutant-general of the forces (Jackson), in the conjunct expedition against St. Domingo, under Penn and Venables, in which he led the advanced body of the British army, having precipitately retreated from the Spaniards, was tried for cowardice, and sentenced to be cashiered, to have his sword broken over his head, *and to do the duty of a swabber in keeping clean the hospital-ship of the fleet.* And, in 1745, a captain was broken in this ignominious manner, except in the latter article, for misbehaviour at the battle of Falkirk.

The criminal is brought forth at the head of his regiment or the corps in which his disgrace has originated; his charge, and the sentence by which he has been found guilty of it, are read to him aloud; after which his sword is broken over his head, his commission torn, his sash cut to pieces and thrown into his face, and, however scandalous and ludicrous it may appear, he is sent off with a kick from the drum-major.

Williamson's
Mil. Arrange-
v. ii. 118.

Dismissal, with a declared incapacity of serving afterwards in any military office, is also ignominious, and has been more recently practiced.

The principal of the inferior punishments are suspension for a limited time from rank and command, during which an officer is mulcted of his pay; fine and imprisonment; and reprimand,—even to “mild reprimand and gentle admonition.”

M. Arthur.

The mode in which a public reprimand is to be given is specified by the court martial. The most solemn and exemplary is at the head of the regiment, line, or garrison. Another is by the president before the court by which the delinquent has been found guilty; a third is in the public orders. These are of course *public reprimands*.

Williamson,
ubi sup.

Non-commissioned Officers.

The inferior punishments inflicted on non-commissioned officers are suspension and reduction, with any additional penalty usually imposed on soldiers, after reduction, for no non-commissioned officer can receive corporal punishment by flogging, till first stripped of his office and the symbols of it removed from his dress. A *court martial* is, however, authorised to degrade a serjeant to the rank of corporal, though it is not usual. If a non-commissioned officer be to be tried, as such he is ordinarily put under arrest.

It is unnecessary to describe the mode of ^{Private soldiers.} flogging by a cat of nine tails, at the halberds, or a representation of them in wood, rendered necessary by the contortions of the sufferer during a severe punishment, from its form called a triangle. The proceedings and sentence of the court martial are read aloud by the adjutant previous to the punishment. The moment a criminal receives a lash, the surgeon in attendance is responsible for his life.

James, Reg.
Comp. ub. sup.

Imprisonment takes place in a guard-room or black-hole; the latter of which, *if perfectly dry and frequently aired*, the confinement not of too long duration, and the health of the prisoner not previously impaired, is, with bread and water for food, certainly the best punishment that a court martial can inflict for minor offences; as is that of serving his majesty in some corps on a disagreeable service, for greater crimes; particularly if criminals were associated for a forlorn hope, on occasion; in which they might have the best opportunity of retrieving themselves, or offering the sacrifice of an unworthy life to their injured country. To imprisonment the restriction of *hand-cuffs* and even *chains* are added *if necessary*, but this of itself is a corporal punishment which should *never be unnecessarily* inflicted, and, if so, would be absolutely illegal.

When a soldier has by frequent enormities

become a disgrace to the service, he is dismissed with infamy, or as it is termed drummed out of the regiment: he is escorted, with a halter about his neck, by the drummers of the regiment, (sometimes after severe corporal punishment,) with a written label containing the particulars of his crime, through the streets of the camp or garrison, and is dismissed with a kick from the youngest drummer. His crime is also inserted in his discharge. Surely a sentence to a peculiar foreign service would be preferable; for such dismissal is now no punishment.

Relating to the preceding sections.

In regard to the preceding sections there yet remains to be observed, in the administration of military justice, that the jurisdiction of military law is likely to be more particularly recognised in the civil courts, from an enactment which directs their being furnished with its statute-book; a circumstance which it may reasonably be hoped will, on the other hand, induce a due recognizance in courts martial of the principles and practice of the common law.

Mut. Act,
50 Geo. III.
c. 10, § 74.
Anno 1810.

The practice of commanding officers on a foreign station sending home officers with accusations pending against them, without having been investigated, has been declared detrimental to the king's service and prohibited in all other than cases of the most urgent necessity.

Gen. Orders,
Feb. 1804.

The erroneous opinion, also, that an officer who has been put under an arrest has a right

to demand a court martial upon himself, and may persist in considering himself as still under restraint of such arrest, although released by the officer who imposed it, (if it could be long entertained,) is completely interdicted. An officer, however, conceiving himself to have been wrongfully put in arrest, or otherwise aggrieved, may, according to the same orders, of course have remedy by application to superiors in the ordinary mode prescribed by the Articles of War.

Art. of War,
§ 12, A. 1.

In charges that attach to an officer's character, if they have been known to the corps, and the officers have, nevertheless, associated with the prisoner, or, without remonstrance, mixed in duty with him, "I conceive," says Sir Charles Gould, p. 9, "this circumstance will and ought to diminish the weight of the accusation."

That the conduct of the president of a regimental court martial should be circumspect in the extreme, that it is his duty to inform those inferior to him, and above all to understand the principles of justice, need not be repeated.

Finally, let the restraint and qualifications, by which military law is bounded, between the constitution of Britain on one hand and the necessity of the case on the other, be remembered;—that the king is by virtue of his prerogative possessed of command over the army.

the *executive* power absolutely, but with the *legislative* power only as qualified and restrained by parliament. Courts martial therefore are the only assemblies possessed of judiciary power as being sanctioned by parliament. And the others, which have been hereinbefore described, deriving their power from the crown alone, have no power to judge of the crimes or differences of individuals;—that the power which his majesty does not possess cannot be delegated. It therefore behoves every one to be cautious how, in the exercise of controul only arising from expediency, they arrogate to themselves any of the powers of judicature.

11. *General Board.*

In passing from the consideration of those military courts positively judiciary to the cognizance of their proceedings, with the power of which the courts of record are invested, the assembly called a *Board of General Officers**

* The trifling circumstance of the appellation *council of war* (conseil de guerre,) being retained as applicable to a court martial, by the French, renders it just necessary to remark here that, in assembling it, no judiciary purpose is ever proposed in British military law; though in bare possibility it might be affected. Its object is simply a concentration of intelligence in the emergency of an army, from the principal commanding officers of the divisions and corps which compose it, of *whatever rank*; it is a privy council to a commander-in-chief, by which his operations are to be influenced; and completes the number of military assemblies.

may be said to intervene; its province being sometimes similar to the judges to whose opinions a case is referred in the ordinary courts.

This character is confirmed to it by the judge-advocate assisting, by whom also complicated cases of various natures are submitted to it. See Rep. of B. of Gen. Officers.

Assemblies of this kind are called together to decide a point of law, form estimates, or to deliver their opinion on any matter proposed to them. The result of their deliberations is laid before his majesty; and, when approved by him, what they have established is, with the restriction imposed by their non-judiciary character, passed into a law. But no officer or soldier is absolutely obliged in any particular instance to abide by their decision; of which, says Colonel Williamson, we have an example in the case of Sir Thomas Rich, who refused to conform to the opinion of a board assembled in this manner. His majesty, however, was so much displeased at what was thought an act of contumacy as to dismiss him from the service. Williamson's Mil. Arrangem. v. ii. p. 151.

12. *The Courts of Record.*

As it is too much not to suppose in the best constituted establishment the occasional abuse of power, and that this abuse may sometimes extend to the perversion of military justice, so the sentence even of a general court martial, like

that of every subordinate judicature, is subject to review, and may be appealed from by the party who conceives that he has suffered injustice.

Tyler, 167.
Mutiny Act,

The appeal from the sentences of courts martial lies to the supreme civil courts of law, as the courts of King's Bench and Common Pleas in England and Ireland, and the Court of Session in Scotland.

Hale, Pl. Cor.

For, courts of law, agreeably to the common law of the realm, have superintendency over the king's ecclesiastical, the king's military, the king's maritime, and the king's academical, laws, to the end that they may be kept within their jurisdictions.

The civil courts seem to be the only certain refuge for an officer suffering from hasty decisions of "*Councils of Inquiry.*"

The causes for which the sentence of a court martial may be brought under review of a superior judicature are the same which in the civil courts in England authorise either the granting of a new trial or an arrest of judgment; that is to say, if the sentence, or verdict, shall have been manifestly without, or contrary to, evidence, or if it shall have been contrary to, or unauthorised by, law; if the penal award be beyond measure exorbitant or severe; if the jury or judges have been corrupted, &c. But the superior court will not entertain the appeal, or authorise any review of the proceedings,

unless on the most pregnant or positive grounds for supposing that the merits have not been fairly discussed, and that the decision is not agreeably to the justice and truth of the case.

Blackstone's
Com. b. 3. c. 24.

The sentences of a court martial may likewise become the subject of prohibition, and be arrested in their execution by interference of the king's civil courts, on the ground of the military court having exceeded its jurisdiction and powers; as if, for example, a court martial shall have tried and condemned, for a military offence, a person not subject to the military law. This excess of jurisdiction appears to be the only legal ground on which a prohibition can be issued; for, it is no ground of *prohibition* that a court has decided wrong in a matter clearly within its jurisdiction, although such decision may be a just ground of *appeal*, or a sufficient foundation for a review of the sentence.

Trial of Serj.
Grant.

A striking demonstration of the power of the civil courts, in the exercise of their jurisdiction, is afforded in the case of Lieutenant Frye; which Mr. M^rArthur has preserved, as he says, "among *the many* instances of the judgements of courts martial which have been brought under their review."

Prin. & Practice
of Nav. & Mil.
Courts Martial,
v. ii. 229,

Lieutenant Frye, of the marines, serving on

board the Oxford man of war, was tried, at Port Royal, Jamaica, for disobedience to his captain's orders; namely, in refusing to assist another lieutenant in conducting an officer as a prisoner on-board the ship. Lieutenant Frye persisted to have a written order for this duty from the captain, which he peremptorily refused. On his being brought to trial for his offence, the evidence produced against him at the court martial consisted of the depositions of a parcel of illiterate people, reduced into writing several days before he was brought to trial, which persons were entirely unknown to him, he, to his knowledge, never having seen or heard of them before; and upon his objecting to the evidence he was brow-beaten and over-ruled. On the charge being thus proved, he was sentenced to fifteen years imprisonment, and rendered for ever incapable of serving his majesty.

He was brought home; and his case, after being laid before the privy council, appeared in so justifiable a light, that his late majesty was pleased to remit the punishment, and to order him to be released. Some time after he brought an action, in the court of Common Pleas, against Sir Chaloner Ogle, who had set as president at the court martial, and had a verdict in his favour of one thousand pounds da-

images, it having been proved that he had been kept fourteen months in close confinement, before he was brought to trial. The judge, moreover, informed him that he was at liberty to bring his action against any of the members of the said court martial he could meet with.

On his application afterwards, (May, 1746,) the Lord Chief Justice Willis issued his writ of *capias* against Rear Admiral Mayne and Captain Rentone, two of the members who had set at his court martial, and they were accordingly arrested, just as they broke up from a court martial assembled at Deptford, for the trial of Vice-Admiral Lestock. This was deemed a great insult, and highly resented by all the members composing the said court martial at Deptford, who drew up strong resolutions on the occasion, which they transmitted with remonstrances to the Lords Commissioners of the Admiralty. The Admiralty, through the medium of the secretary of state, laid these resolutions and remonstrances before his majesty. The lord chief justice, however, being apprized of the steps which the members of the court had taken, immediately and without waiting the result exercised the authority of his high office, and caused each individual member to be taken into custody; and was proceeding in legal measures to assert

and maintain the authority of his judicial power, when a stop was put to the process, by proper concessions, expressed in a submissive letter, (in which pardon was asked of his lordship and of his court,) signed by the president and all the other members of the court, and transmitted to the lord chief justice, which letter was ordered to be registered in the Remembrance Office:—“*A memorial,*” as the lord chief justice then observed, “*to the present and future ages, that whoever set themselves up in opposition to the laws, or think themselves above the law; will, in the end, find themselves mistaken.*”

Lond. Gazette,
15th Novemb.
1746.

13. *By the Parliament.*

There are, as it will readily appear to every reader, various modes in which, should the fallibility of human nature ever extend error so far as to follow a case through every link of the chain of military jurisdiction which has been described, it would reach the ear of parliament.

i. House of Peers.

From the judgement of the courts of King's Bench in England or Ireland, or the court of Session in Scotland, the ultimate appeal is

is competent to the House of Lords, and to this resource in the possible case above-mentioned application can only be made with any certainty of success.

The House of Lords, as the supereminent court of appeal, has the power of reviewing sentences of courts martial, as well as those of all other courts of judicature within the kingdom.

ii. House of Commons.

It has been conceived that the proceedings of courts martial are subject to review by the House of Commons, from its having been considered as included in the Mutiny Act, under the denomination of courts of justice, before whom there is an exception from the oath of secrecy in courts martial. There is, however, no example of such judicial power being exercised by the House of Commons, though proceedings of courts martial have been called for, and censured as *partial, arbitrary, and illegal*. And his majesty might certainly be addressed by the house on any occasion in which it was conceived that justice had not been satisfied.

Some of the relations between the civil and military courts, and the limits of investigation in the House of Commons, of trial by court martial, have been well defined by the Right

Deb. in Parl.

Tytler's E. on
Courts Mart.
169.

Deb. Ap. 50,
1745, &c.

Debates of Parl.
April 3, 1810.

Hon. Chancellor of the Exchequer, so recently as the case of the Hon. Captain Lake, for exposing one of his men upon the uninhabited island of Sombrero, arising out of a motion of Sir F. Burdett, for a committee to consider of the proceedings on his trial.

“The charge for which he was tried by the court martial, said Mr. Perceval, was similar to a most aggravated misdemeanor at common law, namely, an assault with intent to murder. On this point Captain Lake had been already tried, and had received the sentence of the court martial; and it therefore appeared to him that *he could not be tried a second time for the same offence,*” although “it was doubtful whether a court of law would not have inflicted a severer punishment.” However, “if there was any proof that the man was dead, he did not conceive that the sentence of the court martial could prevent his being now tried for murder.”

“If the man was, however, still living, a farther punishment might be inflicted on Captain Lake; for, the sailor would have a civil action for damages, in which case a jury would have to declare what damages ought to be given in a case of such extreme cruelty and atrocity.”

“If it could not be in the power of the committee to *direct any farther proceedings,* he saw no principal good in the appointment

of the committee."—"If the house were to *order an indictment* for murder, Captain Lake could not be convicted unless there was proof that the man was dead."—"He thought it was better to wait for some time to see whether by additional inquiries any farther information could be obtained, and then, if any such evidence was obtained as should prove the man to have died in consequence of his being left on the island, *a trial might be ordered.*"

14. *By the King.*

The sovereign is the fountain of honour and justice, and to his majesty, from whom (by that express investiture, which, with the consent of the whole community, placed in his hand the sword of justice) all laws may be said to emanate, so does their final execution return.

The most amiable prerogative of the crown, as an able writer has it, is the granting of pardon. Law cannot be framed on principles of compassion to guilt, yet *justice* by the constitution of England is bound to be *administered in mercy*. This is promised by the king in his coronation-oath, and it is that act of his government which is the most personal, and most entirely his own. The king himself condemns no man; that rugged task he

Law of Forfeitures, p. 99.

leaves to his courts of justice. The great operation of his sceptre is mercy. Whenever the nation sees him personally engaged, says Blackstone, it is only in works of legislature, magnificence, or compassion. It is therefore to the sovereign, holding a court of equity in his own breast, to soften the rigour of general law, in such criminal cases as merit an exemption from punishment,* that a final appeal may be made, in proper cases, by memorial or petition, from the *severest* sentence; it being, sometimes, even in extreme cases, (according to the best authority,) the intention of such a sentence "to *leave room for an application* for mercy to his majesty, from the goodness and clemency of whose disposition applications of this nature are always sure to be duly considered, and to have all the weight they can possibly deserve."

His majesty, in the exercise of his royal prerogative, frequently dismisses from his service prosecutors who may have failed in the first instance to substantiate heavy charges brought upon a general court martial. His justice has also been most laudably employed, where the sentence of a court martial, from tenderness to the rank of an individual, (as in

* This will probably include all cases where even the best of human laws may have been uncertainly defined, or incapable of adaptation.

Commentaries.

Ib. b. 4. c. 1.

Lord Loughborough,
Grant, v. Sir
C. Gould, Rep.
69.

Mr Arthur, v. ii.
68.

Gen. Orders,
8th Feb. 1804.

case of a field-officer abusing his subaltern,) had sentenced him only to a suspension of rank and pay. His majesty deemed his *retirement* indispensable.

IV. THE ADJUSTMENT OF RANK.

Where a strict subordination is so absolutely necessary as in the variety of a military force, where antient prejudices amidst the improvements of modern times still preserve their full spirit, and jealousies local and characteristical will occur, the adjustment of rank is an object every way desirable. On this subject the utmost pains has been taken in effecting a decisive settlement in the Articles of War, to which it is entirely resigned.

Thus the general subject of brevet rank, that honorary quality with which merit or dignity may be rewarded without interfering with regimental economy, or conferring pecuniary advantage, or anterior commissions in other regiments, which might otherwise create disputes, is arranged as follows:

“ Officers having brevets, or commissions of Brevet-Rank. a prior date to those of the regiment in which they now serve, may take place on courts martial, and on detachments, when composed

Art. of War,
§ 15. A. 1.

of *different corps*, according to the rank given them in their brevets, or *dates of their former commissions*; *but, in the regiment, troop, or company, to which such brevet-officers and those who have commissions of a prior date do belong, they shall do duty and take rank both in courts martial and on detachments, which shall be composed only of their own corps, according to the commission by they are mustered in those corps.*”

Gen. Reg. and
Ord. 6.

The Royal Artillery taking high precedence, being next to his majesty's life-guards, if horse, and before the foot-guards, it became necessary to direct that courts martial relating solely to their own corps *might* be composed of their own officers; “but, where a sufficient number could not be assembled, or in matters wherein other corps are interested, the officers of artillery shall sit in courts martial with the officers of other corps,” taking rank only according to the dates of their respective commissions.

Art. of War,
§ 20. Art. 2.

1b. § 15. Art. 2,
4, 5, 8.

All factitious distinctions in the forces, however necessary on parade, are destroyed as much as possible on duty; hence, when the life and foot guards each do duty alone, they are severally considered as one corps; on the life-guards and horse-guards doing duty together, the senior officer commands the whole, regard being had to the posts they

usually occupy, &c. And either on the whole, marching with, being encamped, or quartered, with any bodies or detachments of other troops, "the eldest officer, without respect to corps, shall take upon himself the command of the whole, &c."

As the importance of the different forces on their original formation gave rise to these adventitious distinctions, so the various degrees of efficiency in forces of modern constitution have unavoidably created some gradations: Thus officers of the regular forces take precedence of those of all militia forces, fencibles, yeomanry, and volunteers, the officers of which forces are to rank together. This is not, however to extend to fencible officers of commissions dated on or before the 25th day of July, 1798; who continue to rank with the regular forces, unless when brigaded with militia, to any officer of which a fencible officer may be junior, when he will be commanded by the officer of regulars whether senior or not.

General officers and colonels serving by commission from any of the governors, deputy-governors, or presidents of the council, for the time being, of the provinces and colonies in North America, shall, on all detachments, courts martial, or other duty with our regular forces, take rank next *after* all colonels serving by commission from us or by our general com-

manding in chief, although their commissions should be of elder date; and in like manner, lieutenant colonels, majors, captains, and other inferior officers.

Ib. § 22. A. 2.

Officers in the East India Company's service take rank also after the regulars, but, when on courts martial, the prisoner shall be tried by the Mutiny Act, &c. of the force in which he is serving.

45 Geo. III.
c. 90. § 77.

The following may be selected as a peculiar point of private militia rank. The lieutenant of any county, on the recommendation of the colonel or other commandant of any regiment, &c. may appoint the adjutant to serve with the rank of captain, provided he shall have served five years as adjutant, but he shall not rank above any other captain, nor receive any other pay than as adjutant: a second adjutant may have brevet rank of lieutenant.

The principal importance of explicit laws on this subject must arise from the responsibility which accompanies every seniority, in the due execution of the law.

PART III.

GENERAL MILITARY ECONOMY IN PROVISION, REGULATION, &c.

I. RECRUITING THE ARMY.

1. *Commissioning Officers.*

HIS majesty having judged it necessary, with the consent of parliament, to raise a body of forces, by his royal prerogative, proceeds to commission officers for their command, either immediately from himself or through those generals to whom he has delegated sufficient authority.

By those desirous to obtain commissions in the regular forces a stipulated price is paid, which, while it fulfils the antient end of inducing property to the army, furnishes also a fund directed to the most laudable purposes.

The regular procedure of those who desire to

James's Reg.
v. i. p. 28, &c.

enter the army will be found in numerous didactic treatises, and learned from every army-agent. In consequence, however, as stated in the preamble to a new section, of inconvenience arising *Mut. Act, § 107.* to his majesty's service from persons not authorized agents of regiments, troops, or companies, negotiating for the purchase and sale of commissions, and much larger sums than those allowed by his Majesty's Regulations being given and received for commissions, and great frauds committed, it is enacted, that every person, not an authorized agent of any regiment, &c. who shall negotiate or act as agent for, or in relation to, the purchase or sale of any commission in his majesty's forces; and also every authorized agent who shall take, accept, or receive, any commission, or sum of money, or reward for negotiating the purchase or sale of any such commission, or acting as an agent in relation thereto; shall forfeit, for every such offence, the sum of one hundred pounds, and treble the sum which shall be given or received for or in relation to any such commission, over and above the sum allowed by his Majesty's Regulations.

Bruce, Mil. Inst. Tit. 9, 290.

A. of W. § 18.

For preventing and discovering such abuses, "as plurality of posts," also, it is by his majesty's Articles of War directed, that "all commissions shall be entered in the books of our secretary

at war and commissary general, otherwise they will not be allowed of at the musters." And this entry is usually signified by a chief clerk of each office on the commission itself.

The commissioning of officers to new raised levies is governed by the various circumstances under which they are raised.

In recruiting the army, the militia now becomes too prominent not to be considered, since in fact it is a sort of grade in the regular force of the country, and to be efficient must continue so. In the present state of society in Britain, the favourite constitutional idea of personal service can have but little place, when every man either by himself or by association can with money procure a substitute.

The militia of the United Kingdom, under the guidance of intelligent and spirited commanding officers, may form an excellent school for both officers and men; but as, in this service, there is no room for the formation of those ties, or the operation of those sentiments, to which the heroic enterprise of a regular army gives birth, to form this school (which an intelligent and interesting author has considered but "little profitable to war") of ultimate utility, a resolute and invariable care to practise and instil all those dignified sentiments of justice and probity, and all the public virtues,

Caractère Mil.
des Armées Eu-
ropéennes.

which are confined to no rank or class, must be preserved by every superior officer of this peaceful command.

43 Geo. III.
c. 8. § 2. et seq.

The only difference necessary to be noticed here is in a few peculiarities in the law regulating the appointment of officers, which enables the lord-lieutenant to exercise the power vested in him, highly advantageously to the service.

If any person, having served as captain of militia, should cease to possess the required property in the county, necessary to qualification, he shall, nevertheless, on the recommendation of the lieutenant, be qualified to serve.

If a sufficient number of persons possessing qualifications in the county should not be found to accept commissions, within two months after the embodying of the militia, it shall be lawful for the lieutenant, deputy-lieutenants, &c. to appoint for that service (to all its vacancies) officers in the army or marines, or persons who have had *commissions* in any of his majesty's forces, or in the militia; *including such officers as are serving at the time as lieutenants in the regiment, &c.* in which any company is become vacant, or in any corps of provisional cavalry which may have been embodied, and have retired therefrom, to be approved by his majesty, *although*

not qualified, &c. None of these persons, however, to be of any higher commission in the militia than that of captain.

Persons having qualifications in any part of England may also on like terms be appointed.

It will be easily perceived how, by a small *factio juris*, these enactments may be rendered productive of the best effects.

Commissions of ensign in regiments of the line are granted to officers of militia, who volunteer in the proportion of one officer to fifty privates, and sometimes less, at the instance of a commanding officer. Gen. Reg.

2. *Inlisting of Private Soldiers.*

This is an object of the highest importance in military economy, too often considered of the least; it is the first act towards the formation of a military force, and that by which the individual relinquishes his character of citizen to assume a new order in society. On the mode in which it is transacted there is reason to believe much depends the rank and condition of both. Regulations for carrying on Recruiting Service.

As far as the legislative injunctions in respect to the detail of inlistment can operate, a better system has not existed since that which Mut. Act, § 74, &c.

gave to Rome those triumphant legions which poured forth her vengeance on every part of the world.

In the present state of general society, however, the perfect execution of the most wholesome laws is not to be expected; and it is now a century since it was found that we were not so scrupulous in admitting unfit persons to be soldiers as of old they were; for instance, says Bruce, “If all infamous persons, and such as have committed capital crimes, heretics, (nay atheists), those who are plainly strangers to the trade, and all dastardly and effeminate men; if all these, I say, were weeded out of the armies that are at present on foot in Europe, it is much to be feared that most of them would be reduced to a pretty moderate number.”

From the mixed qualities, therefore, which compose the military force of Great Britain, and the paucity of volunteers, anxious only for the heroic enterprize of war, (not that our ranks are entirely without them,) other powers are necessary in recruiting the army than the restraints of ardour, or the choice of selection.

Hence is derived the nature of the following prescriptions of the Mutiny Act, involving the short and insufficient section relating to this subject in the Articles of War.

Institutions of
Mil. Law, 105.

Art. of War,
§ 3.
M. A. § 72.

Every person who shall receive inlisting-money from any officer, non commissioned officer, or soldier, or any other person employed on the recruiting service, shall be deemed to be inlisted as a soldier in his majesty's service, with the benefits afterwards prescribed, however, for such as hastily inlist.

When any person shall be inlisted as a soldier in his majesty's land-service, he shall within four days, but not sooner than twenty-four hours, be taken by one of the party before a justice of the peace of the vicinity, *not being an officer of the army*, or, if in foreign parts, where recourse cannot be had to the civil magistrate, before the judge-advocate, and there be at liberty to dissent from such inlisting, and on returning the inlisting-money, with twenty shillings for the charges expended or laid out upon him, together with such full rate allowed by law for the subsistence, or diet, and small beer, furnished to such recruit, subsequent to the period of his having been inlisted, he shall be discharged in the *presence* of such justice: And the same, if the recruit shall not have been able to procure one of the party to go with him, or they shall have left the place, in which case the money is to be deposited with the magistrate, for the recruiting party when they shall

Ib. § 73.

A. of W. § 3.
art. 1.(Mutiny Act,
50 Geo. III. c.
10. § 74. Anno.
1810.)

demand it. But if such person refuse or neglect to pay the money within the space of four days, he shall be deemed equally inlisted as if he had given his assent.

If the person shall declare his having voluntarily inlisted, then such justice shall read over, or cause in his own presence to be read over, to him, the third and fourth articles of the second section, and the first article of the sixth section, of the Articles of War, against Mutiny and Desertion; as follow :

Art. of War,
§ 2.

Ibid. art. 3.

“ *Any officer, non-commissioned officer, or soldier, who shall begin, excite, cause, or join, in any mutiny or sedition, in the regiment, troop, or company, to which he belongs, or in any other regiment, troop, or company, either of our land or marine forces, or in any party, post, detachment, or guard, on any pretence whatsoever, shall suffer death, or such other punishment as by a general court martial shall be awarded. Any officer, non-commissioned officer, or soldier, who being present at any mutiny or sedition shall not use his utmost endeavour to suppress the same, or coming at the knowledge of any mutiny, or intended mutiny, shall not, without delay, give information thereof to his commanding officer, shall suffer death, or such other punishment as by a general court martial shall be awarded. All officers, non-commissioned*

Ib. § 6. Art 1.

officers, and soldiers, in our service, who shall be convicted of having deserted the same, shall suffer death, or such other punishment as by a general court martial shall be awarded; and every non-commissioned officer or soldier who shall enlist himself in any other regiment, troop, or company, without a regular discharge from the regiment, troop, or company, in which he last served, shall be reputed a deserter, and suffer accordingly."

Such justice shall also administer to the persons inlisting, respectively, the following oaths:

" I swear to be true to our sovereign lord Ib. § 3. Art. 1.
king George, and to serve him honestly and faithfully, in defence of his person, crown, and dignity, against all his enemies or opposers whatsoever: And to observe and obey his majesty's orders, and the orders of the generals and officers set Art. of War. Ann. Reg. A. 7.
over me by his majesty.

SO HELP ME GOD."

" I ——— do make oath that I am, ——— M. A. § 73.
 [or have been, as the case may be, — state the occupation, if any, or state if of no occupation] and to the best of my knowledge or belief was born in ——— [state county, parish, place, &c.] and that I am of the age of ——— years; that I do not belong to the militia, or to any other re-

If the person inlist without any limitation of period of service the oath will conclude here, with the addition only of the words, "until I shall be legally discharged." Schedule B. Mut. Act.

Mut. Act, § 75.

giment, or to his majesty's navy or marines, and that I will serve his majesty—[SEE THE MARGIN]—for the period of [seven years for infantry; ten years for cavalry, and twelve for artillery, if the person inlisting is of the age of eighteen years or upwards; but if under eighteen years then the difference between his age and eighteen to be added to such seven, ten, or twelve years,] — years, provided his majesty should for so long require my service; and also for such farther term, not exceeding six months, as shall be directed by the commanding officer on any foreign station; and not exceeding three years, as shall be directed by any proclamation of his majesty. Provided always that in the latter case the said additional period shall determine whenever six months of continued peace, to be reckoned from the ratification of any definitive treaty, shall have elapsed subsequent to the expiration of the said (seven, ten, or twelve,) — years."

The justice shall then certify, under his hand, the inlisting and swearing, together with the place of birth, age, and calling, if known, &c. &c. and shall give to the recruit a duplicate of the certificate.*

* If the recruit inlist as well for the East-India Company's service, a deviation in oath and certificate occurs, accord-

If any person so to be certified shall, wilfully, refuse to take the oath of fidelity, the officer from whom he has received the money is to detain or confine him till he does.

Every military officer acting contrary to these injunctions is considered to be guilty of a crime equal to that of making a *false and untrue* muster, and liable to the same penalty, &c.†

Every non-commissioned officer or private soldier, on inlisting a recruit, shall inquire his christian and surname, and place of abode, and take it down in writing, or give it to the non-commissioned officer commanding in the recruiting party to be taken down. (Mutiny Act, 50 Geo. III. c. 10. § 74. Anno 1810.)

Any one who shall receive inlisting-money, from any person employed in the recruiting service, (knowing it to be such,) and afterwards abscond, or refuse to go before a magistrate, and continue to do so four days, shall be deemed, to all intents and purposes, inlisted, and may be apprehended and punished as a Mat. Act, § 74.

ing to 39 Geo III. which will be found in the schedules to the Mutiny Act, but would be of little utility here.

† This appears to be at present, for the simple crime, cashiering, and being rendered unfit to serve: the present section alludes to a forfeiture applied to the other circumstances of a false muster.

(Mutiny Act,
50 Geo. III. c.
10. § 74, anno
1810.)

deserter, &c. And he shall not be intitled to his discharge from a magistrate, unless it can be proved to his satisfaction that the true name and residence of the person inlisted was disclosed to the recruiting party, and that no notice was given to the person inlisted, or left at his last usual place of abode, *of his having so inlisted.*

Mut. Act, § 75.

Persons concealing infirmities on inlisting may, if incapable of active service, be transferred from their regiment to garrison, veteran, or invalid, battalions, or the marines. Those

Ib. § 76.

making any false representations, for the purpose of obtaining inlisting money, bounty, or any other money, are to be considered as guilty of obtaining money under false pretences, and punishable under the *Act of 32 Geo. II.* Those delivering themselves up as pretended deserters will be made to serve in any of his majesty's forces, as if they had been inlisted.

Ib. § 77.

Apprentices inlisting will be liable to imprisonment and hard labour, in any gaol or house of correction, for two years; may be indicted for obtaining money under false pretences; and are liable to serve on the expiration of their apprenticeship; and, not then delivering themselves up, to be treated as deserters.

Ib. § 78.
Inlisting Ap-
prentices.

Ib. § 79.

No master shall be entitled to claim any ap-

prentice, unless bound for seven years, in England; in Ireland, five: nor unless he shall, within one calendar month after such apprenticeship shall have left his service, go before some justice of the peace, and make oath of the simple facts,* of which oath the magistrate is to furnish a certificate, reciting it in the same simple terms that it stated the master's description, date of indenture of apprenticeship, time of absconding, and supposed age of the apprentice. Mut. Act.

In Scotland, the master cannot claim unless bound for four years, and the contract, or indenture, ratified, in every respect, agreeably to the forms of law in Scotland, three months after execution, or after the passing of this act, and *prior to the period of enlistment*; nor unless the apprentice be under twenty-one years of age, when claimed. The oath and certificate as in the preceding cases. Ib. § 80.

A master, giving up the indenture of apprenticeship within one month after indictment of his apprentice, may claim whatever remained due to him of his bounty, after deducting two guineas for necessaries. Ib. § 81.

In England or Ireland, on the master claiming his apprentice, he must obtain for his apprentice. Ib. § 82.

* Form in the Mutiny Act, Schedule G.

(Mutiny Act,
50 Geo. III. c.
10. § 85. Anno.
1810.)

hension the warrant of any magistrate near the place wherever he may be, and give notice to the regiment, troop, or company, with which he may be serving, or to the recruiting party, or some officer or non-commissioned officer of it, of his being an apprentice, of the warrant so obtained, with a copy of the warrant; on proof on oath of the delivery of which, and on production of the indenture, such magistrate may immediately commit him to prison, until discharged in due course. He must then examine into the matter, on oath, retain in his custody the indenture, and bind over the master, or any other evidence, to the next general or quarter sessions of the peace, or session of Oyer and Terminer, or that succeeding; at which the trial is directed to be had, unless the court shall think fit to put off the trial on just cause; when the production of the indenture, with the certificate of the justice before whom it was proved, will be sufficient evidence of the apprenticeship.

Ib. § 84.

Ib. § 85.

Ib. § 86.

Every such offender, in Scotland, shall be tried by the judge-ordinary in such county, or stewartry, as any person for offence not incurring capital punishment.

Ib. § 87.

No person, except an apprentice, is to be arrested, on the warrant of any magistrate, for breach of contract to work for any master.

Hired servants enlisting are to be paid up Ib. § 88. to the time of inlistment, at the discretion of the magistrates, notwithstanding their contract is unfulfilled.

When any corps, beyond seas, shall be re- Ib. § 89. lieved, in order to return home, such of the men as chuse may be inlisted, and incorporated with those who remain, by any officer authorised by the commander-in-chief at the station: such men are deemed discharged from their former corps, and the occasion shall be recited in the inlisting certificate, a copy of which is to be delivered to the soldier for his protection.

Non-commissioned officers and soldiers, having been duly inlisted and sworn, shall not be dismissed our service without a dis- Ib. § 2. art. 2. charge, in writing, signed by a field-officer of the corps to which they belong; or if no field-officer be with the corps, by the commanding officer thereof; in respect to regiments serving abroad, the colonels of which are absent from Great Britain, by the adjutant-general of our forces, or by the inspector-general of our recruiting service.

Negroes, purchased and serving in the Ib. § 118. forces, become free; but derive no benefit from limitation of service, or the reward of pension.

Ib. § 3, art. 1.
Mutiny Act,
§ 73.

42 Geo. III. c.
90, § 41, 67,
93
47 Geo. III. c.
57, § 14, &c.
&c.

Mut. Act, § 115,
et seq.

With regard to the inlisting or enrolling for the militia, it will be clearly perceivable, that the prohibition of any officer from executing the duty of magistrate in the service, as regards his own corps, must apply more particularly to the militia, in which many officers must necessarily be magistrates in their county, and thereby offer such a peculiar facility in the union of the civil and military functions, as must be dangerous in a particular degree. Neither in the sections of the Militia Acts, relative to enrolment, administration of oath, nor billeting, nor volunteering into the regular forces, is *any exception* made to those of the Articles of War and Mutiny Act on this subject, which, *therefore*, of course, remain in full force here.

In the other few peculiarities, reference must be had to the Collection of Militia Laws, a mere abstract of which would swell this volume in a manner very disproportioned to its utility.

The transfer of volunteers from the Militia forces into the line is conducted by various minute regulations, adapted to various circumstances, which it would be useless to detail, under the several recent acts of parliament already quoted. The volunteer, whether officer or private, begins *de novo*, and experiences

again nearly all the official formalities of the recruit, as before described.

It need scarcely be added here, that any impediment to this important measure, for recruiting the regular army, (if such a thing be possible,) would, on proof, be severely visited upon a commanding officer. Over non-commissioned officers and drummers alone he has a controul.

Of the Oath.

It is presumed, however, that it will not be even extra-judiciary to make some few observations on the administration of the oaths of allegiance and enlistment. The juratory act may, in this instance, be become a mean of the best or worst of purposes, to impress on the recruit those principles which may render him a happy and honourable member of the order of society to which he is about to be admitted, or a burthen on the community, criminal, detested, and miserable. In Rome, the soldier and his oath were synonymous; nor was he suffered to use his weapon till he had been duly sworn.

It has been complained, by Major Adye, whose sentiments, replete with true military generosity and humanity, are fully equalled by his general intelligence, that, “on recruits

Adye's Treatise
on Court Mart.
Rewards, &c.
227, &c.

being inlisted, they are hurried away to a justice of peace, before whom they take an oath of fidelity ;” but that no one attends to point out the nature of an oath. He, at the same time, remarks, in shocking proof, that “a grenadier, shot at Plymouth, in the American war, suffered with fortitude, from having, as he said, done *nothing to offend his Saviour.*” It is sincerely to be hoped, that this grenadier was not inlisted within the pale of any of the numerous magistrates who are also clergymen; yet, from innumerable circumstances, there is reason to fear that many thousands have been sworn even by them, without being sufficiently informed of the nature of an oath. It is not intended to insinuate here any puritanical innovation incompatible with the service;* but—can we justly or *safely* punish a man for the breach of a bond of which he is ignorant? or can we expect a due attention to minute, though important, ceremonies in one whom, in his first military act, we have *made* to treat the sublimest and most important ceremonies with neglect? Can we assure fidelity to his

Peake Rep.
Case at Nisi
Pris., 11.

* In cases of doubt, as to the person produced to be sworn, the proper question to be asked by the court is, whether he believes in God, the obligation of an oath, and a future state of rewards and punishments?

king, in one who is thus offered an example of infidelity to his God?

With the usual consideration and propriety of all his majesty's regulations, recruiting parties are repeatedly instructed to practice no imposition or deception on recruits, but to explain to them the nature of their engagements; to the magistrate is left to administer the oath, which is to bind him to a new order of society, and with ties stronger than his life, yet of these by far the most frequently he remains ignorant. That this arises from any worse cause than the rapidity of business, it is not intended to be asserted; but no business should claim a priority to that of the state in so important an office; no facility should risk perjury, desertion, treason! Extraordinary haste is not often necessary to a recruiting party for the highest service, on no occasion to a stationary regiment of the line, certainly never to the Militia.

Among the regulations of the King of Prussia, Adye, ub. sup after the young soldier was prepared to be sworn to his colours, it was directed that the violation of an oath, and the divine vengeance which will infallibly attend it, must be explained to him, and he, himself, acknowledge that he understands every particular well, and voluntarily offers to conform thereto.

Much might be said on the principle of the

Regulations for Recruiting Service, art. 14, 15, 20, 21, &c.

military oath, among the antients always important, explicit, and inviolable; even to that exquisite one of the Athenian youth, preserved by Stobæus; but it is unnecessary. The oath of the British soldier has been more than a century the same, and conceived in general terms; yet no less binding in military duty.

Mil. Inst.
Tit. 2. § 12.
p. 7.
Plut. Probl. 38.

“This solemn swearing (on its application to his own time, says Bruce,) was thought so essential to the very being of a soldier, that Plutarch tells us no man was allowed, before he had taken the military oath, so much as to lift up a weapon to strike an enemy. Nay, it was looked upon as so sound a tie, that historians report that the Roman generals, by barely putting the soldiers in mind of it, have many times so raised their resolution, and inspired their courage, that those who were fleeing apace have been made to return to the battle, and atchieve a glorious victory.

L. Fabius, Op.
Liv. l. 2.

Above all, however, now that the oath is used in every judicial proceeding in military law, unless the recruit be *properly* (not tediously nor unnecessarily) impressed with its sacred importance, there is an end to all military justice, or its sources will be polluted; the innocent cannot be protected, nor the guilty punished; nor can the confidence, necessary to every warlike effort, be ever assured.

II. VARIOUS DUTIES ENJOINED TO SOLDIERS AND CRIMES PROHIBITED.

1. *In Quarters, including their Provision.*

As it must be an invariable principle, in every well-regulated force, that its power should be never apparent but to the enemy, so is peculiar caution, in this respect, most expedient, when mingling in the domestic intercourse of civil society. Often unavoidably incompatible with each other, on terms so unequal as those of the armed soldier and peaceful citizen, it is necessary that in quarters forbearance and conciliation should never cease to be impressed. And it is an important object, then, in these laws constantly to ascertain the mutual rights of both, and by no means less those of the commissioned officer than the private soldier.

By military law it is particularly enjoined, that all officers, non-commissioned officers, and soldiers, are to behave themselves orderly in quarters; and whoever shall (unless towards rebels) injure the property of any person, in any way, shall, besides such penalties as they are liable to by law, be punished, according to the nature and degree of the offence, by the judgement of a general or regimental court

Art. of War,
§ 14, art. 1.

martial. This, however must surely be construed to mean only when those penalties are not equivalent to the offence in a *military* point of view.

Ib. art. 3, 4. A false alarm, in quarters, is punishable at the discretion of a general court martial.*

Ib. art. 14. No officer, non-commissioned officer, or soldier, shall lie out of his quarters, without leave from his superior officer, but shall retire to his quarters at the beating of the retreat, upon pain of being punished, according to the circumstances and degree of his offence, by a general or a regimental court martial.

Ib. § 9. art. 3. The commanding officer of every regiment, troop, company, or detachment, shall, upon their first coming to any city, town, or village, where they are to remain in quarters, cause public proclamation to be made, that, if the landlord or other inhabitants suffer the non-commissioned officers or soldiers to contract debts beyond what their daily subsistence will answer, such debts will not be discharged. Any commanding officer refusing or neglecting

* It is necessary to that cultivation of the relations between the civil and military classes, which can never be too strongly urged, that not merely no false alarm of a military nature should be made in quarters, but that the civil state should not be violated by unnecessary marches through streets and high roads, or the military parade, so obnoxious to strict advocates for the constitution.

to do so shall be suspended for three months, and his pay be applied to the discharge of whatever debts they have incurred. If, after public proclamation, the inhabitants so trust, it will be at their own peril, and the commanding officer shall not be liable.

The Provision of Quarters in the United Kingdom.

After a full recognizance of the Act of 31 Cha. II. containing the pecuniary compromise for the privilege of quartering, which, in unhappy times, had become obnoxious, the Mutiny Act provides, that, during the existence of its present actual necessities, it shall and may be lawful for the constables, tything men, headboroughs, and other chief officers and magistrates of cities, towns, and villages, and other places, within England, Wales, and the town of Berwick-upon-Tweed, and, in their default or absence, for any one justice of the peace of the vicinity, and for no others, to quarter and billet the officers and soldiers in his majesty's service, and *persons receiving pay* in his majesty's army, in inns, livery-stables, alehouses, victualling-houses, and the houses of sellers of wine by retail, to be drunk in their own houses, or places thereunto belonging; other than and except canteens, held and occupied under the commissioners for the affairs of barracks; houses of free vintners of London, in right of

Mutiny Act,
§ 41.

(Mut. Act,
50 Geo. III. c.
10. § 42. Anno
1810)
Mut. Act, § 41.

patrimony or apprenticeship, keeping taverns, although with only victualling-licences; sellers of brandy, strong waters, cider, or metheglin, by retail, to be drunk in houses, not used for distilling brandy and strong waters; and the house of any shopkeeper, whose principal dealings shall be more in other merchandises than these, so long as tippling be not permitted in them; and all private houses whatever. And the owner of any private house will have his remedy at law against any one quartering an officer or soldier upon him.

Art. of War
§ 9, art. 1.

Persons having an undue number quartered on them must be relieved by the magistrate of the place, or he failing, by one of the vicinity.

No more billets shall, at any time, be ordered than there are effective soldiers present to be quartered.

Ib § 45.

All billets, when made out by magistrates or constables, shall be delivered into the hands of the commanding officer present.

Ib. § 41.

No justice of the peace having any military office or commission in England shall, directly or indirectly, be concerned in the quartering, billeting, or appointing, any quarters for any soldier in the regiment, troop, or company, under his immediate command; or all acts, matters, or things, so executed, will be void.

And if any military officer shall take upon

him to quarter soldiers otherwise, or offer any money or compulsion to any civil officer, such military officer, being convicted before any two justices, on the oath of two credible witnesses, be deemed, and taken to be, *ipso facto*, cashiered, and utterly disabled to hold any military employment in his majesty's service, provided the conviction be affirmed at the next quarter sessions, and a certificate thereof be transmitted to the judge-advocate in London, who is hereby obliged to certify the same to the next court martial.

Any military officer quartering wives, children, men and maid servants, of officers, shall, on complaint made to the commander-in-chief, or judge-advocate, be, *ipso facto*, cashiered: any civil officer being proved to have done so, before the next justice of peace, shall forfeit twenty shillings, for the use of the party injured, to be levied by distress if not paid. Ib. § 56.

If any (military) officer shall take, or cause or suffer to be taken, any money for excusing the quarters of officers or soldiers in any house, allowed by the Mutiny Act. such officer shall be cashiered, and incapable of serving in any military employment whatever. Ib. § 50.

If any high constable, constable, beadle, or other officer, or person who shall be employed in quartering or billeting any officers or soldiers, shall neglect or refuse to quarter or billet such Ib. § 51.

officers or soldiers, when thereunto required, provided sufficient notice be given before the arrival of such troops; or shall receive, demand, contract, or agree for, any reward, in order to excuse any person from quartering officers or soldiers; or if any victualler, or other person liable, shall refuse to receive or victual any officer or soldier, so quartered upon him or her, or to furnish the several things directed to be furnished to non-commissioned officers or soldiers, or shall neglect or refuse to furnish good and sufficient stables, hay, and straw, for each horse, at the rate herein-after-mentioned; on conviction, before one or more justices of the place, by his own confession, or the oath of one or more credible witnesses; every person so offending shall forfeit a sum not exceeding five pounds nor under forty shillings, at the discretion of the magistrates, to be levied, if necessary, by distress, and applied, after remunerating any expense incurred by the soldier, to the poor of the parish in which the offender shall dwell.

1b § 52.

And, for the prevention of abuses in quartering or billeting the soldiers, justices may, at any time, order the civil officer billeting to furnish an account of the number of officers and soldiers quartered, the names of the persons on whom quartered, the street in which they dwell, and the sign (if any) of their

houses, that easy reference may be had to the persons quartered, and their quarters.

Whenever any order shall issue for the quartering or billeting the officers or soldiers of his majesty's Foot-Guards, in Westminster and places adjacent, including Middlesex, Surrey, and the Borough of Southwark, (which of course except the City of London,) the high constables shall deliver out precepts to petty constables, headboroughs, &c. by which they shall be billeted, under the same limitations, as in other parts.

Ib. § 44.
Quarters of
Foot-Guards.

The list of quarters and quartered, however, in this case, are to be delivered in the respective places, at every quarter sessions, on oath; which lists are to remain with the respective clerks of the peace, that any one may inspect it without fee or reward, and receive copies at the rate of twopence per sheet, containing one hundred and fifty words; and, for neglect in delivering, or defect in the list, each petty constable, tything man, &c. forfeits five pounds, for the use of the poor, to be levied by distress, if necessary; and, failing in sufficient distress, the offender to be committed to the common gaol for any time, not exceeding three months, nor less than one, without bail or mainprize.

Ib. § 45.

The officers, men, and horses, belonging to horse or dragoons, and all bat and baggage

Ib. § 46.
Horse and Dra-
goons, &c.

horses, belonging to any of his majesty's other forces, and also the horses belonging to staff and field officers in his majesty's forces, when upon actual service, not exceeding, for each officer, the number for which forage is or shall be allowed by his majesty's regulations, shall and may be quartered and billeted in inns, livery-stables, alehouses, &c. as before described.

They shall be received and furnished by the owners or occupiers of such inns, victualling houses, &c. with diet and small beer, and with stables, hay, and straw, for such horses, paying for the same the rates hereinafter-mentioned, out of the subsistence-money.

Ib. § 47.

When horse or dragoons are billeted on those who have no stables, men and horses, or horses alone, may be removed, by order of justices, to be quartered on those who have; the person from whom removed paying a settled allowance to the person receiving them.

Ib. § 48.

Men and their horses, however, to be billeted together, or as near as possible to each other; in no case a horse without a man, and one man to every two horses.

Ib. § 49.

An even exchange may also be made in the quarters of men and horses, by the commanding officer, which the constable, &c. must billet accordingly.

Ib. § 53.

All officers and soldiers, so quartered and

billeted, shall be furnished with diet and small beer, as aforesaid, at the several rates, payable out of the subsistence-money for diet and small beer.

If innholders furnish the men quartered on them, (except on a march, or employed in recruiting, or men recruited, for the space of seven days) with candles, vinegar, and salt, gratis, and the use of fire, and the necessary utensils for providing their food, and shall give notice of his desire to do so, to the commanding officer, the officer who *receives* the pay and subsistence of such non-commissioned officers and soldiers shall pay to them the sums to be paid, out of the subsistence-money for diet and small beer, instead of the person on whom they are quartered, that they may provide themselves.

Ib. § 55.

Officers receiving the pay of a regiment, troop, or company, or otherwise, shall immediately, on receipt of every sum, on account of pay or subsistence, give public notice thereof to all persons by whom soldiers are quartered, that their accounts may be settled within four days at farthest, and before any part of the pay shall be distributed to the soldiers; provided the said accounts exceed not the following rates, for diet and small beer, per diem:

Art. of War,
§ 9, art. 2.

GENERAL MILITARY ECONOMY,—

To a commissioned officer (under a captain) of horse	£	s.	d.
	0	2	0
————— Dragoons	0	1	0
————— Foot	0	1	0
To one light-horseman	0	0	7
——— Dragoon	0	0	7
——— Foot-soldier	0	0	5

For each horse, for hay and straw, 6d.

Any officer not giving the prescribed notice, or not satisfying the accounts when produced, on complaint made thereof, on oath, by two witnesses, at the next quarter sessions, and a certificate of it, by the justices, shall be, *ipso facto*, cashiered; and the paymasters of guards, garrisons, and marines, are authorised to pay and satisfy the same out of the arrears due to the said officer, or, if none, out of the next subsistence-money due to the regiment, &c. under penalty of these paymasters forfeiting their respective places. If, by accident, in remission of money, or on the sudden march of a regiment, such a defalcation occur, every commanding officer, previous to quitting quarters, shall make up the accounts, and give a certificate of the settlement, which will be a sufficient voucher to the aforesaid paymasters, on which they are to pay them, under the former penalty.

In any place where a non-commissioned of-

ficer or private soldier shall be quartered, who has either wife, or child, or children, any two or more justices of the peace may cause him to be summoned before them, in order to make oath of the place of their last legal settlement; and such justices must give an attested copy to the non-commissioned officer, or private, swearing, which shall be, at any time, admitted in evidence as to such last legal settlement, and, on any other summons, he need only have a copy of his previous oath, if required.

In *Scotland*,* officers and soldiers are to be quartered agreeably to the directions of the laws in force before the union. No officer shall be obliged to pay for his lodging, where he shall be regularly billeted, except in the suburbs of Edinburgh.

Ib. § 65.
Quarters, &c. in
Scotland.

In *Ireland*, the same rule is observed; but it has been found necessary, from circumstances, to add, in a particular manner, in the act governing these regulations, that persons refusing to receive or victual the officer or soldier in the manner prescribed, are yet liable to the penalties in force before the union.

Ib. § 68.
Quarters, &c. in
Ireland.

Mut. Act, § 68.

It has also been found necessary to declare,

* There seems to be an extraordinary hiatus in the provisions respecting Scotland and Ireland in the Mutiny Act.

that, in addition to the ordinary force of the country, to which quarters are to be furnished in the manner already described, officers and persons serving in the Royal Artillery, the several Trains of Artillery, the corps of Royal Engineers, corps of Royal Military Surveyors and Draftsmen, corps of Royal Military Artificers and Labourers, and all master gunners, and gunners under the ordnance, shall be quartered and billeted, together with the horses employed for the service of the said corps, in the same manner, and under the same restrictions and penalties.

Mut. Act.
Rubric to § 114.
Ib. *Inder*, tit.
“Quartering.”

“Officers and soldiers of troops, raised in places possessed by his majesty’s subjects, sent over to Great Britain,” are also “to be quartered as British forces.”

Ib. § 114.

And, lastly, wherever it may be necessary, it is enjoined by the Mutiny Act, that “All such houses as are liable, by this act, to receive the officers and soldiers of his majesty’s other forces, in the same manner,” are “to receive and provide for” all “officers and soldiers of the said troops, who, having been taken prisoners, shall be “sent over to Great Britain in a distressed condition.” There can be no doubt that this section, however expressed, is intended to be understood in its most extensive meaning; and that, if its *letter* should not be found to enjoin all that is neces-

sary, its *spirit* will never fail to influence British humanity.

There has always been (as is alluded to by Captain Grose) much difficulty, in respect to the accommodation to be afforded in the quarters of an officer. There is no doubt that proper selection can be made, and that it is the duty of the civil officer to do so, whose billets must be changed at the instance of the commanding officer. In a proper house, proper accommodation will be afforded, and the right to the second best bed, in the house exists, at least, in an opinion of two hundred years standing.

Mil. Antiq.
v. 2.

Edward Davis,
1619, apud
Grose.

While such are the accommodations necessarily to be afforded to every description of his majesty's forces, in almost every variety of circumstance; and it is the indispensable duty of the soldier, in this as in all other relations with the civil classes of the community, to comport himself with the strictest propriety, not to say forbearance or submission; so, for the preservation of good understanding between them, and the mutual assurance of their interests, every commanding officer is held responsible. It is strictly enjoined that every officer commanding in quarters shall keep good order, and to the utmost of his power redress all such abuses or disorders as may be committed by any officer or soldier under his

Art. of War.
§ 9, art. 5.

command. If upon complaint made to him of officers, non-commissioned officers, or soldiers, beating or otherwise ill-treating their landlords, or extorting more from them than they are obliged to furnish by law, or disturbing fairs or markets, or committing any kind of riots, such commanding officer shall refuse or omit to see justice done on the offender or offenders, and reparation made to the party or parties injured, as far as part of the offender's pay (not exceeding the half thereof) shall enable him to make such reparation; he shall, upon due proof thereof before a general court martial, be deemed culpable in the same degree as if he himself had committed the crimes and disorders complained of, and shall be punished accordingly, at its discretion.

2. *In Garrison (including Suttling).*

Ib. § 14 art. 3.

Of the duties prescribed in garrison, only the most prominent can be *general*. No officer, non-commissioned officer, or soldier, may lie out of garrison without leave from his superior officer on pain of being punished according to the nature and degree of his offence by the sentence of a *general or regimental court martial*.*

* This not being the first instance where an officer *appears* to be subjected to a *regimental court martial*, which *can have*

. A false alarm in garrison is punishable at the discretion of a general court martial. Ib. § 14, art. 14.

Whatsoever officer, non-commissioned officer, or soldier, shall shamefully abandon, or deliver up, or compel, or induce, the governor or commanding officer to abandon or deliver up any garrison or fortress committed to his or their charge, or which he or they shall be commanded to defend, shall suffer death, or such other punishment as by a general court martial shall be awarded. Ib. art. 20, 21.

Every officer commanding in garrisons shall keep good order, and to the utmost of his power redress all such abuses and disorders as shall be committed by any officer or soldier under his command, or he will be punishable by a general court martial, as if he himself had committed them. Ib. § 9, art. 5.

no judiciary power over him; and in which the proceedings as before observed would be nugatory; the writer cannot help suggesting that it would be preferable to consider it, however irregular, as a grammatical ellipsis, rather than an anomaly in law; and that wherever the crimes of officers and soldiers *so* occur, a *general* court martial will try the *former*, or a *regimental* court martial the latter. Indeed any other principle *cannot* be acted on. The second section of the Articles of War, art. 1, will also countenance this idea, no ellipses being used.

Suttling.

Military Act,
§ 42.

Any two magistrates within their respective jurisdiction may grant or transfer any licence for selling ale by retail, or cider, or perry, to be drank or consumed in any house or premises held as a canteen; or any licence to sell spirituous liquors or strong waters, wine, or liquor, by retail to any person applying for it, who shall hold any canteen under authority from the commissioners for the affairs of barracks without regard to the time of year, or any other forms required by previous acts of parliament. And the commissioners of excise in England and Scotland, their collectors, supervisors, &c. are required to grant licences under those of the magistrates. And the persons holding such canteen may sell therein, and in the premises thereto belonging, and not elsewhere, victuals and exciseable liquor under such licences, without penalty or forfeiture.

A. of W. § 3,
art. 1.

No suttler shall be permitted to sell any kind of liquors or victuals, or keep their houses or shops open for the entertainments of soldiers after nine at night, or before beating of the reveillé, or on Sundays during divine service or sermon, on penalty of being dismissed from suttling.

All officers, non-commissioned officers, soldiers, and suttlers, shall have full liberty to bring, into any fort or garrison, any quantity or species of provisions, eatable or drinkable, except where any contract exists, which is the only exception. Ib. art. 2.

All governors, lieutenant-governors, officers commanding in our forts, barracks, or garrisons, are required to see that the persons permitted to suttle supply the soldiers with good and wholesome provisions, at the market price, for which those officers are held responsible. Ib. art. 3.

No governors or officers commanding in any garrison shall either themselves exact exorbitant prices for houses or stalls let out to suttlers, or shall connive at the like exactions in others; nor by their own authority and for their private advantage shall they lay any duty or imposition upon, or be interested in, the sale of any victuals, liquors, or other necessaries of life, or merchandizes, brought into the garrison, fort, or barracks under their command, for the use of the soldiers, or connive at it in others, on pain, upon conviction thereof before a general court martial, of being dismissed from our service and suffering, besides such penalty as they may be liable to by law. Ib. art. 4.

3. *In the Field, (including the Camp and Foreign Service).*

Ib. § 14, art. 5. No officer, non-commissioned officer, or soldier, shall fail to repair at the time fixed to the place of parade of exercise, or other rendezvous appointed by the commanding officer, if not prevented by sickness, or some other evident necessity, nor shall go from the said place of rendezvous, *nor from his GUARD*, without leave from his commanding officer, before he shall be regularly dismissed, or relieved, on the penalty of being punished according to the circumstances and degree of his offence, by the judgement of a general or regimental court martial.

Ib. art. 8. Any officer, non-commissioned officer, or soldier, who shall, without urgent necessity, or without leave of his superior officer, quit his platoon or division, shall be punished according to the circumstances and degree of his offence, by the judgement of a general or regimental court martial.

Ib. art. 6. No soldier shall be excused from duty, but in case of sickness, disability, or leave of absence; nor shall any soldier hire another to do his duty, or both himself and the soldier hired will be punished at the discretion of a regi-

mental court martial. A non-commissioned officer Ib. art. 7. conniving at the hiring of duty will be reduced for it. A commissioned officer knowing and allowing of such practices, will be punished according to the judgement of a general court martial.

The Camp.

No officer, non-commissioned officer, or soldier, shall lie out of his camp without leave Ib. art. 3. from his superior officer, upon pain of being punished according to the circumstances and degree of his offence by the sentence of a general or regimental court martial. Art. of War, § 14, art. 4. Under the same penalty the non-commissioned officers and soldiers are to return to their tents at the beating of the retreat. Mut. Act, § 10.

The same penalty also applies to non-commissioned officers or soldiers who shall be found one mile from the camp, without leave in writing from their commanding officer. Ib. art. 2.

Any person belonging to the forces who shall occasion false alarm in camp, within the United Kingdoms, Jersey, Guernsey, Alderney, Sark; or Man, shall be punished at the discretion of a general court martial. Ib. art. 14.

Whoever shall be convicted of holding correspondence with, or giving advice or intelligence to, any rebel or enemy, either by letters, Ib. art. 15, 16.

messages, signs, or tokens, or any way either directly or indirectly; or shall relieve an enemy with money, victuals, or ammunition, or shall knowingly harbour or protect an enemy, or shall treat or enter into any terms with such rebel or enemy, without his majesty's licence, or that of the general, or commander in-chief, shall suffer death, or such other punishment as by a general court martial shall be awarded.

Ib. art. 13.

Any person belonging to any of our forces making known the watchword or parole to any person not entitled to receive it, or giving a different one, shall be punished at the discretion of a general court martial.

Ib. art. 19.

Casting away arms or ammunition (at home) to be punished at the discretion of a general court martial.

Ib. art. 9.

Whatever commissioned officer shall be found drunk on his guard, party, or other duty, under arms, shall, upon being convicted thereof before a general court martial, be cashiered for it; any non-commissioned officer or soldier so offending shall suffer such corporal punishment as by a general or regimental court martial shall be awarded.

Ib. art. 10.

Whatever sentinel shall be found sleeping on his post, or shall leave it before he shall be regularly relieved, shall suffer death, or such other punishment as by a general court martial shall be awarded.

All public stores taken in the enemies camps, towns, forts, or magazines, whether of artillery, ammunition, clothing, forage, or provisions, are to be secured for his majesty's service, for which the commanders in chief are responsible. Ib. art. 17.

If any officer, non-commissioned officer, or soldier, shall leave his commanding officer, or his post, or colours, to go in search of plunder, he shall upon being convicted thereof suffer death, or such other punishment as by a general court martial shall be awarded. Ib. art. 18

Whatsoever officer, non-commissioned officer, or soldier, shall misbehave himself before the enemy, or shall shamefully abandon or deliver up any garrison, fortress, post, or guard, committed to his charge, or which he shall be commanded to defend, or shall compel or induce any other to do so, shall suffer death, or such other punishment as by a general court martial shall be awarded. Ib. art. 20, 21.

On Foreign Service (“employed in any of his majesty's dominions beyond seas, or in foreign parts”). Ib. art. 14.

The preceding paragraphs will be readily perceived mostly to apply to general service.—The following are all specified under this head.

Whatsoever officer, non-commissioned officer, or soldier, shall do violence to any person who brings provisions or other necessaries Ib. art. 11.

to the camp, garrison, or quarters, of our forces, employed in foreign parts and shall be convicted thereof by a general court martial, shall suffer death.

Ib. art. 12.

Whosoever of his majesty's forces shall force a safeguard, on conviction by a general court martial, shall suffer death.

Ib. art. 13.

Any person belonging to his majesty's forces who shall make known the watch-word to any person not intitled to receive it, according to the rules and discipline of war, or shall presume to give a parole or watch-word different from what he received, shall suffer death, or such other punishment as by a general court martial shall be awarded.

Ib. art. 14.

Any person belonging to his majesty's forces, who by discharging fire arms, drawing of swords, beating of drums, or by any other means whatever, shall occasion false alarms in camp, garrison, or quarters, shall suffer death, or such other punishment, as by a general court martial shall be awarded.

Ib. art. 19.

Any person who shall cast away his arms or ammunition, shall suffer death, or such other punishment as by a general court martial shall be awarded.

4. *On the March.*

All officers, non-commissioned officers, and soldiers, are to behave themselves orderly on

their march; and whoever shall commit any waste or spoil, either in walks of trees, parks, warrens, fish ponds, houses or gardens, corn fields, inclosures or meadows, or shall maliciously destroy any property whatsoever belonging to his majesty's subjects, unless by order of the then commander-in-chief of the forces, to annoy rebels, or other enemies, in arms against us, he or they that shall be found guilty of offending herein, shall, besides such penalties as they shall be liable to by law, be punished according to the nature and degree of the offence, by the judgement of a general or regimental court martial.

No officer, or non-commissioned officer, shall demand billets for quartering more than his effective men; nor shall he quarter any wives, children, men or maid servants, in the houses assigned for the quartering of officers or soldiers, without the consent of the owners, (nor of course act in any manner, unauthorised by the Mutiny Act, as already abstracted under the section relative to quarters,) upon pain of a commissioned officer being cashiered; if a non-commissioned officer, of being reduced to a private sentinel, and suffering corporal punishment, at the discretion of a general or a regimental court martial.

Art. of War,
§ 9. art. 1.

Every officer commanding a regiment, troop, Art. 2.
or company, on a march, shall take care that

his own quarters, as also that the quarters of every officer and soldier under his command be regularly cleared; and if, on marching, no money shall arrive in sufficient time, that he shall give to each landlord a certificate of the sum due to him, and transmit duplicates to the paymaster general, on pain of being cashiered, on conviction, before a general court martial.

Art. of War,
§ 10.

Mutiny Act,
§ 60.

The commanding officer of every regiment, troop, company, or detachment, which shall be ordered to march, is to apply to the proper magistrates for the necessary carriages, and is to pay for them as is directed by the Mutiny Act, taking care himself not to beat or abuse, nor to suffer any person, under his command, to beat or abuse the waggoners, or other persons attending such carriages, (nor, of course, the cattle by which they are drawn,) nor to suffer more than thirty hundred weight to be loaded on any wain or waggon so furnished, or in proportion on carts or cars; nor to permit soldiers, except such as are sick or lame, or women, to ride upon the said carriages, unless in the cases of emergency mentioned in the Mutiny Act. Whatsoever officer shall offend herein, or in case of failure of money, shall refuse to grant certificates, specifying the sums due for the use of such carriages, and the name of the regiment, foot, or company, in whose service they were employed, shall be

cashiered, or otherwise punished, according to the degree of his offence, by a general court martial.

Such are the injunctions of the Articles of War; those of the Mutiny Act, to which they refer, furnish the detail.

“ For the better and more regular provision ^{Ib. § 58.} of carriages, say they, for his majesty's forces in their marches, or for their arms, clothes, or accoutrements, in England, Wales, and the town of Berwick-upon-Tweed, all justices of the peace. &c. being duly required thereunto by an order from his majesty, or person duly authorised in that behalf, upon sight of such order from the quarter-master, adjutant, or other officer, or non-commissioned officer, of the regiment, detachment, troop, or company, ordered to march, are to issue their warrants to the constables of the division, riding, city, liberty, hundred, and precinct, from, through, near, or to, which such regiment, detachment, troop, or company, shall be ordered to march, requiring them to make such provision of carriages and horses, or oxen, with able men to drive the same, as is mentioned in the said warrant, allowing them sufficient time to do the same, that the neighbouring parts may not always bear the burthen, and specifying in the warrant the place to which the said carriages shall be required to travel, which

shall not exceed the day's march of the troops, unless in case of pressing emergency or necessity, and in no case whatever twenty-five miles from the place at which the march shall commence.

In case the place itself cannot furnish sufficient, the magistrates must issue their warrant to the vicinity; and the officer, who demands the carriages, is, at the same time, to pay down in hand to the constable, for the use of the person who shall provide the carriages and men, for every mile they are to travel, *s. d.*

For a waggon with four or more horses 1 0

Wain, with six oxen, or four oxen with two horses - - - - - 1 0

Waggon, with narrow wheels, or cart with four horses, carrying 15 cwt. - - 0 9

Every cart or other carriage, with less than four horses, and *not* carrying 15 cwt. 0 6

And the farther sum of 4*d.* in the first instance, 3*d.* in the next, and 2*d.* in the last, according as the same shall be fixed at the sessions, with regard to the price of hay and oats at the time of fixing such additional rates; for these sums the constable is to give an unstamped receipt.

The owner chusing to carry greater weight, or to superadd any additional number of horses, will not be subject to the turnpike laws. But, if the commanding officer shall

constrain any carriage to travel beyond the distance specified, or not suffer it to return home in the same day, or suffer any soldier or servant, except such as are sick, or any woman, to ride in any carriage, or force or menace any constable to provide saddle-horses for himself or servants, or shall force horses by themselves, servants, or soldiers, every such officer shall forfeit five pounds, on proof before two of his majesty's justices, who shall certify the same to the paymaster general, who is to pay it to the order of the justices, and deduct it out of the officer's pay.

Where the day's march of the troops shall exceed fifteen miles, (so that they cannot return on the same day,) such farther compensation shall be made to the owners of the carriages as shall be deemed reasonable by the magistrate granting the warrant, not exceeding the usual rate, who, in ordering it, shall specify the period for which it shall be in force, which shall not exceed ten days beyond the next general sessions. A copy of the order is to be transmitted, within three days, to the secretary at war, or it will become invalid. Rubric.

In cases of emergency, the secretary at war, Ib. § 59. by order of his majesty, may authorize a general or field officer, or the commissary of stores and provisions, to require justices to issue warrants for providing saddle-horses, and

four-wheel carriages, let to hire, and also vessels used in canals and navigable rivers; on which requisition the justices shall issue warrants for their provision, specifying the distance they are to go. The officers demanding them are to pay for their hire such sums as the justices shall direct, not exceeding the usual rates, but making no allowance for post-office duty or tolls. The constable to give an unstamped receipt.

By these military officers may convey clothes, accoutrements, baggage, equipage, officers, soldiers, servants, women, children, and other persons, &c. But if any such officer shall force and constrain any horse, carriage, or vessel, to travel beyond the distance specified in the warrant, without licence of the magistrate, which is to be given at his discretion, the officer for every such offence shall forfeit five pounds, in the manner before described.

1b. § 61.

If any constable shall refuse or neglect to execute the warrant of the magistrates, or shall demand more than the rates ordered, or if any of the persons appointed to furnish the different conveyances shall refuse or neglect to do so, or any other person shall wilfully frustrate or hinder them, every such constable or other person shall, for every such offence, forfeit any sum not exceeding five pounds, nor less than forty shillings, to the use of the poor

in the vicinity, at the discretion of the nearest justice, to be levied, if necessary, by distress.

All his majesty's officers and soldiers, and ^{Ib. § 62.} their horses, on duty or on their march; and all carriages and horses belonging to his majesty, or employed in his service, and returning therefrom, &c. &c. are exempted from payment of toll, (unless where, by some peculiar act, they are rendered liable with others.) But this does not extend to the tolls on navigable canals, &c.

Where the constables shall be at greater ^{Ib. § 63.} charges than the amount ordered to be paid by commanding officers, they are to be paid by the treasurer of the county, &c. without fee or reward, according to rates fixed by the magistrates, having regard to the season of the year, length and condition of the ways, &c. To remunerate this expenditure to the public stock of the county, &c. if necessary, the ^{Ib. § 64.} justices have power to raise money as they do for county gaols and bridges.

In Scotland, the provision and payment of ^{Ib. § 66.} carriages, for his majesty's forces, is conducted as was directed by the laws in force in Scotland at the time of its union with England.

In passing regular ferries, however, it is ^{Ib. § 67.} optional to the commanding officer either to engage the boat for himself and party, (taking a priority to all other passengers,) or to pass

over himself and men, as ordinary passengers; in either case, he only pays one half of the ordinary rate. Where there are no regular ferries, they must be paid for as other persons.

In Ireland, the provision of carriages is directed by the laws in force before the union.

The lord-lieutenant may sign routes by deputy.

Ib. § 69.

Ib. § 70.

5. *On Board Ships of War.*

“Whenever any of our forces,” say the Articles of War, “shall be embarked on board our ships of war, or any other ships which may have been regularly commissioned by us, and which may be employed in the transportation of our troops, our will and pleasure is, that the officers and soldiers of such forces, from the time of embarkation on-board any ship, as above-described, shall strictly conform themselves to the laws and regulations established for the government and discipline of the said ship; and shall consider themselves, for these necessary purposes, as under the command of the senior officer of the particular ship, as well as of the superior officer of the fleet, if any, to which such ship belongs.”

Art. of War,
§ 23.

Protest of Lieut.
Fitzgerald, 11th
Foot, 1795.

Col. Browning's
Letter to Gen.
Pigott, 1800.
Apud M. Arthur,
app. No. 47.

Officers and soldiers are subject to the naval administration of justice; nor can the military officer *punish* those under his command by any other means.

6. *On Domestic Service.*

i. The Protection of National Establishments as Guards, and in Cases of Conflagration,

A military guard, under whatever circumstances, must, in its military character, be governed by the general principles, already detailed in the section, on the duties enjoined, and crimes prohibited, in the field, &c. but, as there is necessarily a wide distinction made by the Articles of War in the punishment of the same crimes when committed at home, and beyond seas, or in foreign parts, so some difference seems naturally established, and must be observed between a guard mounted, perhaps, on a civil establishment, in the precincts of a populous capital, or in a camp of parade, and in that of a garrison, for the protection of the coast, or a post of danger. And, except as relates to their own military government, the sentries of a guard, for the protection of national establishments, must not consider their functions in any other light than those of an armed police, posted for the more speedy and certain apprehension and conveyance of offenders to the justice of the *civil* power. For, in fact, any force that should be used

Ib. § 14, art. 5,
et seq.
Mut. Act, § 1.

Gen. Reg. and
Orders, 44.

with fire-arms, or any detention, would, by the civil classes, be conceived as nothing less than military execution, and the exercise of martial law.

Rules and Orders, &c. for guards. Woolwich, Deptford, &c.

Even in the various arsenals, &c. of the kingdom, offenders are detained no longer by the guard than the commissioner arrives, who, in his magisterial capacity, may examine them, or they can be transferred to the civil power.

Trial of John

The incendiaries who attempted to set fire to the docks, at Portsmouth, were tried by the common law.

From that jealousy of a military power, which is inseparable from the civil classes of the British community, it is most necessary that every guard mounted over any civil establishment, indeed every one liable to communication with the populace, and particularly where it may have intrenched on any supposed rights, or be otherwise obnoxious, or even considered as obtrusive, should have a distinct detail of positive orders, as to what is required of it, if not absolute directions, for every possible case that can occur.

And that the constant existence of such directions is supposed, at the posting of every military guard, must be evident, from the highly useful regulation of his majesty, which directs that, "The standing orders of the guard are to be distinctly read, and carefully

explained to the men, as soon as the guard is mounted, and again after the sentries first posted return to the guard," * who would not otherwise hear them.

Another matter, of considerable importance, is the detachment of any part of the force of a guard in aid of the civil power, as to protect property during the tumult of conflagration, or any other occasion. This must, at present, rest with the judgement of the officer com-

* An instance of the necessity here described presents itself, in regard to the first establishment of the kind in Europe, — the West-India Docks and Warehouses in the Isle of Dogs.

No distinct orders have to this hour been given to strong guards of militia posted there. A few random orders remain by tradition, since the first appointment, one of which directed, that the grand entry from the Commercial Road should be guarded from frequent danger, by the sentry requiring every carman to enter carefully at his horse's head. In this duty an athletic fellow attacked a sentry, struck him, and, with the aid of a fleet and strong team of horses, defied his power. The officer protected his sentry by a guard, and proceeded to arrest the carman, who excited a considerable tumult, in which the company's servants joined, and which, but for the most prudent caution, would have ended in a severe conflict. It was only after having obtained an apology from the offender, that the officer was accidentally informed that the order was no longer necessary, and ought not to have been in force longer than the entrance afforded safe passage to those on foot. Of course, any life lost in the affray would have been murder, and the tumultuous servants of the company its evidence.

Rep. W. I.
Dock Guard,
1808.

manding the guard, as, though he should by no means weaken the force considered necessary for the protection of the post to which he is sent, yet a tumult in the vicinity, above the strength of the civil power, might, if unchecked, proceed, with accumulated force, to threaten even the post itself, which a small detachment, shewing itself actively, might prevent. An officer is, however, by no means warranted to such a step, and, upon the discretion with which it was conducted would, no doubt, depend even his safety.

In this, as in many other respects, is also seen the excellence of that regulation which withholds the command of a guard from an officer, “till he is perfectly acquainted with his duty;” and directs that, “for the purpose of instruction, young officers may be put on duty as supernumeraries with senior officers, from whose advice and example they may be expected to obtain a knowledge of their duty.”

Gen. Reg. and
Ord ub. sup.

ii. The Suppression of Tumults.

That this is the most disagreeable service in which troops can be employed need not be told, or that such an application of the military force of the county has been a constant source of jealousy since the English constitution has been recognized in its present admi-

able form. Yet, what power less than that of a regular military force can subdue the organized terrors of a depraved mob, like that of the London riots in 1780, or could have convinced many associations of misguided peasantry or artizans, assembled to controul the laws in their favour, that such attempts must be in vain. The Militia, indeed, which is identified with the constitution, *when embodied*, and that part of it which is local, whether embodied or not, may be called out; but the first class of this force is now assimilated to the regular army, and the other cannot fail in a comparative approximation, the only mark in these times of efficiency.

Mil. Act,
42 Geo. III.
c. 90. Preamb.
Local Mil. Act,
48 Geo. III.
c. 2. § 41.

The propriety of military aid in the execution of the laws is not, however, the present question, but the laws by which the military, when so employed, are to be governed; a matter yet never specifically ascertained.

Without unnecessarily emerging into the remote recesses of the common law, or intruding on the ordinances of the civil power, it will be seen, from the earliest writers, that, at the time when, under the feudal tenures, almost every man must consider himself a soldier,* and the

Hume, &c. History of Eng.
Edw. III.

* "It is commanded, that every man have in his house harnais, (*armour, arms,*) for to keep the peace," &c.

Disobedience in attending the summons to the royal standard was punished by depriving the vassal of his land.

Stat. of Winchester, A. D. 1285, c. 6.
Maddox's Hist. of Exchequer, v. 1. p. 662.

king could assemble a powerful army of his subjects without expense, the persons of whom that army was composed were ordained, “that every one, of the age of fourteen years and above, should prepare him (*se aprestat*) to kill mortal offenders in their notorious crimes, or to follow them from town to town.” And, again, that “the sheriff (*visct.*) or the bailiff, take with him the power of his county, or of his bailiwick, and shall endeavour to make a replevin of cattle from him that has taken them,” and driven them into any *castle or strong hold*, &c.

Mirror of Justice, c. 1. § 3.

Westm. Primer, c. 17.

Bract. de Leg. Ang. lib. 4. c. 4. c. 1. III.

“To him who justly possesses,” says Bracton, “it shall be lawful, *with arms*, to repel him who cometh to expel with arms against the peace, that, by arms of defence and peace, which are of justice, he may repel injury and unjust violence, and arms of injustice, &c.”

Doct. et Stud. c. 5.

“It is lawful,” declares the author of Doctor and Student, “to repel force with force, for the defence of the body, *due circumstances being observed.*” *

Hen. V. c. 8.

The statute inflicteth both fine and imprison-

1. Maria Reg. anno 1563.

* It is curious that one of the last acts of the unhappy Mary, of Scotland, enacted, “That all citizens, who assembled to suppress any riot, in the town of Edinburgh, without authority from the provost, incurred the punishment of death.”

ment upon such as shall not aid the sheriff, they being thereunto required.

“The justices of the peace, sheriff, or under sheriff,” observes Lambard, “ought to have the aid and attendance of all the knights, gentlemen, yeomen, &c. &c. above the age of fifteen years, &c. &c.” Eirenarcha, b. 3. p. 316.

“Every man,” remarks Sir Edward Coke, 2 Inst. p. 193. “is bound by the common law, to assist, not only the sheriff in his office, for the execution of the kingly writs, (which are the commandments of the king,) according to law, but also his baily that hath the sheriff’s warrant, &c.”

“Also,” says Hawkins, 1 Hawks. c. 65, § 21. “it hath been holden, that those who attend the justices, in order to suppress a riot, may take with them such weapons as shall be necessary, to enable them effectually to do it; and that they may justify the beating, wounding, and even the killing, of such rioters as shall resist, or refuse to surrender themselves.”

These precepts, which had evidently continued the law for 600 years, were frequently put in force, and in some instances of a very celebrated nature. Thus, when Wat Tyler held his tumultuous meeting with Richard II. in Smithfield, the Lord Mayor did not hesitate to put the leader to death, and the most daring of his followers, immediately after, fell in the same way at the feet of the king, Riots of Wat Tyler, 1382. Hume. See also Stat. 15, Rich. II.

Dalton, Offic.
Vicecomit.
488.

And in the third year of the reign of Henry VII. the sheriff's bailiff, to execute a replevy, took with him 300 men, armed (*modo guer-rino*) sc. with brigandines, jackes, and guns and it was holden lawful; for the sheriff's officer hath power to take assistance as well as the sheriff himself.

Oxford Dispute
at Whitehall,
687.

So also when, in the contention before the ecclesiastical commissioners, at Whitehall, relative to the mandate of James II. for appointing a president to Magdalen College, Oxford, the contumacy of the vice-president and fellows received an indecorous applause from the scholars, the lord chief justice of the King's Bench did not hesitate to declare, that, "if the civil power could not keep them in order, the *military* should:" In this application of his power, (of whatever nature,) he was certainly warranted by law.

Life of Sir
George Jeffe-
ries.
Biographia.

3 Cha. II.
Stat. 1. § 5.

M. A. 49 Geo.
II. c. 12.
Preamble.

Bill of Rights,

Hence it would appear, that there is no difficulty in the circumstances of an officer or private soldier assisting, with his arms, to keep the peace, the principal person of his county, the sheriff, (*vice-comes*,) &c. or any other, having legal authority; particularly when, notwithstanding the legal admission of every Mutiny Act, that a standing army, without parliamentary sanction, is against law, from the Bill of Rights, it can be but little different from that force of which "many were bound,

by tenure, to follow their lords to the wars, and many were volunteers."

Still, however, while every one, with every kind of arms, is understood as bound by law to aid in suppressing tumults, either at the command of a magistrate, his peace-officer, or even in his own person, it is in a *civil* capacity only that this aid is required, nor is there any mode prescribed for their suppression, but what is entirely under the government either of the statute or common law of the land. In no statute is the smallest allusion to the strengthening, by the command of any regular military force, the arm of the law, nor is it once mentioned in the repositories of the common law. Even the Mutiny Act, which gives law to the army, (to which also it is confined, any extension of it requiring to be authorised by a separate act of parliament,) describes its purpose to be "the safety of the united kingdom, the defence of the possessions of his majesty's crown, &c." but includes not the suppression of tumults; and the act for establishing a Local Militia in vain authorises magistrates to call it out for this purpose, in the same or an adjoining county, without some previous explanation of the law on the subject, since, indiscriminative as it is, this would be a service of great danger and irregularity, or, what is much more likely, not effective at all.

N. Bacon, Hist. Diss. Unit. E. Gov. p. 1, p. 64.

2 Ed. III. c. 3.
34 Ed. III. c. 1.
15 Rich. II.
17 Rich. II. c. 8.
13 Hen. IV. c. 7.
2 Hen. V. c. 8.
19 Hen. VII. c. 13.
13 Cha. II. S. 1, § 5.
1 Geo. I.

49 Geo. III. c. 12, § 1.
Preamble.
1 Hawkins, c. 65.
49 Geo. III. c. 11, § 41.

Riots for Kidnapping, in Holborn. 170.

Life of Lord
C. J. Holt.
Raym. Rep.

This equivocal or indeterminate state of the subject is capable of more illustration than this work will admit; and first, in the following extraordinary fact, in the conduct of Sir John Holt, chief justice of the King's Bench, in the reigns of William III. and Anne, whose integrity and uprightness are celebrated by Capt.

Fatler, No. 14. Sir R. Steele, under the character of Verus, the magistrate.

There happened a riot in Holborn, occasioned by the practice of decoying young people to the plantations; the persons so decoyed were kept prisoners in a house there, till they could be shipped off; which practice being discovered, the enraged populace were going to pull down the house. Notice of this being sent to Whitehall, a party of guards were commanded to march to the place; an officer was also sent to the lord chief justice, to desire him to send some of his people to attend the soldiers. The officer having delivered his message, the lord chief justice said to him, "Suppose the populace should not disperse at your appearance, what are you to do then?"

"Sir," answered the officer, "we have orders to fire upon them."

"Have you, Sir," replied his lordship, "then take notice of what I say; *if there be one man killed, and you are tried before me,*

I will take care that you, and every soldier of your party, shall be hanged."

"Sir," added he, "go back to those who sent you, and acquaint them that no officer of mine shall attend soldiers; and let them know, at the same time, that *the laws of the kingdom are not to be executed by the sword*: these matters belong to the civil power, and *you have nothing to do with them.*"

Upon this his lordship (says the Biographia) ordering his tipstaves, with a few constables, to attend him, went in person to the tumult, expostulated with the mob, assured them that justice should be done upon the persons who were the objects of their indignation, and they all dispersed quietly.

In the notorious affair of the riots, at Edinburgh, for the execution of Captain Porteous, found guilty in a similar case, and reprieved, which so long occupied the British parliament of 1737, Major Moyle, who commanded in the garrison of Edinburgh, unwillingly even drew out his troops, but would not serve under any other authority than that of a written order from the lord justice clerk, though the lord-provost sent a verbal message by Mr. Lindsay, a member of parliament. His conduct was thus justified in the House of Commons, by the commander-in-chief of the forces in Scotland, General Wade. "He might, indeed,

Riots and Death
of Porteous, at
Edinburgh,
1736.

Gent. Mag
1736,—7.

Deb. in Parl.
1737.

have prevented the riot, had he, upon the lame warrant he had to take such a step, broken down, or as he owned, upon examination, he would have done, blown up with powder, the city gate; but then he must have risked his own life, even though he had succeeded. The aversion of the people of that country to the gentlemen of the army is very great, and Mr. Moyle undoubtedly acted the wisest part; for there is no room to suppose he would have met with much favour from the witnesses, had his conduct been brought to trial in a civil court." Yet this case is described as one in which not only murder was committed; but, when the chief magistrate approached the mob, unarmed, to calm it, "several of his company were wounded with stones, and *even fire-arms* were levelled at them."

The counsel for a bill of censure, on the lord-provost and the city, also defended the conduct of General Moyle.

The matter of young Allen, the ostensible victim of the mobs created by the extraordinary fervour of the patriotism of Wilkes,* is too

Riots of St. George's Fields, and Death of Young Allen, &c. 1768.

Life of Wilkes, by Almon.

Letters of John Wilkes, 4 vol.

* The popular tumult, excited by the artifices of Wilkes, must ever be a memento against the weight of public opinion, as collected from the conduct of *clamorous and destructive* rabble. This depraved though accomplished, most unprincipled yet intelligent, man, as it has since appeared in

recent to require minute description. He was, as sworn, accidentally shot in his father's out-

various ways, and under his own hand, led after him, through the streets, an idle, undistinguishing, mob, vociferating indefinitely the liberties of the people, in the morning; and, in the evening, entreated government to receive his services, in any way that could place him in employment, even at Constantinople! In a thousand forms did he offer, to government, to sell himself and his mob; and, at length, sank peaceful into the chamberlain's chair of the city, solacing himself with the collection of obscene trials and indecent occurrences, for the information of his only legitimate daughter.

If any thing were wanting, in addition to the pseudo patriotism of Wilkes, to shew the irregular judgement of an impassioned mob, the anecdote related by the lord-advocate for Scotland, on the commitment of the bill respecting the riot, on the death of Porteous, will amply suffice. Gent. Mag. 1757.

One Green, a master of a vessel, having been forced, by stress of weather, into the harbour of Leith, a report was spread, that he was a pirate who had murdered one Drummond, and seized his ship. Upon very irregular evidence of two of his crew, he and his officers were tried, found guilty, and condemned to be hanged. The mob, however, heated by some proceedings against the natives of Scotland, which they supposed harsh and unjust, conceived that the prisoners, being English, would be reprieved. They, therefore, attacked the lord-chancellor, beat his chair in pieces, and made him fly for his life; then assailed the privy-council, and bawling for the blood of these men, intimidated it into an immediate order for their execution. I was so struck (said Mr. Forbes) with the horror of the fact, that I put myself in deep mourning, and, with the danger of my life, attended the unfortunate men to the scaffold, where they died with the most affecting protestations of their innocence. I did not

Annual Reg.
1768,—1771.

house, by one of a detachment of guards, sent to assist the magistrates of Surrey, in keeping the peace, which had been grossly violated by a mob expecting to see Mr. Wilkes go from the King's Bench prison to the House of Commons, on the 10th of May, 1768.* In the House of Commons, Mr. Allen was represented as having been noticed in preceding tumults. His neighbours, respectable in character and number, vouched that they had never heard it.

The following approbation is described as having been given to the military on the occasion.

Ann. Reg.

Orders.—Parole is Wandsworth.

The field-officer, in waiting, of the Foot-Guards, received yesterday the following letter:

stop here, for I carried the head of Captain Green to the grave; and, in a few months after, letters came from the captain for whose murder, and from that very ship for whose capture, the unfortunate persons suffered, informing their friends that they were all safe!

Many are the lamentable instances of this kind, probably of more extensive consequences, that can be collected from the ordinary reading of any man; and, perhaps, among the numerous collections formed, that would not be least useful, which should exhibit the sentences subsequently proved to have been unjustly obtained.

* The party by whom Redburn, a weaver, was killed, on the same day, was justified by repeated assaults of the people, after frequent cautions, during which the magistrate was violently struck by a stone.

SIR, — Office, May 11, 1768.

Having this day had the honour of mentioning the behaviour of the detachments from the several battalions of Foot-Guards, which have been lately employed in assisting the civil magistrates, and preserving the public peace, I have great pleasure in informing you that his ——— highly approved of the conduct of both the officers and men; and means that his ———'s approbation should be communicated to them through you. Employing the troops on so disagreeable a service always gives me pain; but the circumstances of the times make it necessary. I am persuaded they see that necessity, and will continue as they have done to perform their duty with alacrity. I beg you will be pleased to assure them that every possible regard shall be shewn to them; their zeal and good behaviour upon this occasion deserve it; and, in case any disagreeable circumstance should happen in the execution of their duty, they shall have every defence and protection that the law can authorise, and this office can give.

I have the honour to be, Sir,

Your most obedient and most humble servant,

B——.

Field-officer in staff waiting,

for the three regiments of Foot-Guards.

Yet Lieutenant Murray, who commanded the detachment, and three of his men, were apprehended by the civil power, and charged with murder. The officer was indeed soon admitted to bail, and afterwards the two men who were supposed not to have fired. But the soldier who did fire seems to have escaped the very highest infliction of the law only through an error in the proceedings.

With the supposed enormity of this sacrifice to the public peace and its infringement of the civil power the whole country was caused to resound, and the best records of the times were filled; and, that no means should be omitted to hand it down to posterity, the decency of sepulture is violated by a long detail of political party, in a monumental inscription, in which the deceased is considered as “murdered,” and made to exclaim, “O earth cover not my blood!”

Annual Regist.
at that time
conducted by
Edmund Burke.

Monum. in St.
Mary's, New-
ington.

Ann. Reg.
1769.

It is a little remarkable that, in the justly-celebrated charge of Sir John Fielding to the grand jury, at the quarter sessions of the succeeding year, in which this intelligent magistrate most ably defines the character of the rioter of his times, and instructs both grand and common juries in their duties with regard to them, the aid of a military force is never once mentioned.

On the 16th of April, 1771, a number of tumultuous persons assembled in Bethnal-green, and literally stoned to death one Green, who had been evidence against two men, recently executed there. Of these persons two were convicted, and ordered for execution on the same spot on the 8th of July following.

Riot and murder of Green, on Bethnal-green, 1771.

On this occasion a detachment of Guards of 100 rank and file, under the command of Sir David Lindsay, attended near the house of Mr. Justice Wilmott, in that neighbourhood. Upon hearing of their attendance the sheriffs, Baker and Martin, despatched the high constable to the commanding officer, to acquaint him that the sheriffs were coming to execute the sentence of the law, and were resolved at all events to execute it without the assistance of any military force whatever; and, therefore, as his assistance on that account was unnecessary, to desire him immediately to quit the spot with all his soldiers. The answer received, say the sheriffs, in a letter afterwards published, was such as might well be expected from one who joins to the politeness of a gentleman and the discipline of his profession a just sense of his duty as a citizen. Sir David said, they were there, by order of his majesty and the secretary of state, to protect the house of the justice; and assured him that they should not on any

account stir from their post but upon the positive demand of the sheriffs, or some of the civil officers.

The letter quoted goes on to state, perhaps alluding to Lord Weymouth's (secretary of state) letter to the magistrates of Surrey, that "the vain directions of an official letter, dictated by fear or the intemperance of its author, can never define the occasion when the military force of the country ought to interpose, &c."

Riots of London, 1780.

In the riots which, availing themselves of a protestant association, disgraced London, in 1780, and threatened to extend themselves to every provincial capital, amounting almost to rebellion, the king himself ordered out his guards, and, perhaps but for their appearance might have beheld the capital of the British Empire in ruins. Of these guards, as alderman, John Wilkes was *now* anxious to make use—the same John Wilkes who had fermented the same rioters under another form, but a few years before; and who during his sheriffalty issued a turgid proclamation that he would not suffer any part of the army to interfere, or *even to attend*, as on many former occasions, on the pretence of aiding or assisting the civil magistrates. And this, with his colleague, he declared "to the public and to administration to prevent the sending of any detachment on

Dr. Johnson,
letter to Thrals,
&c.

such service." Still on this occasion, a writer, whose loyalty was indubitable, observes, that "the employment of the military, without being called by the civil magistrate, was certainly not a desirable measure, but at that time absolutely necessary." And thousands, whose lives and properties had been saved by the measure, regretted it as a violation of their rights.

Another intelligent writer also, while he finds it impossible to deny the utility of the troops on such an occasion, proposes other species of military force, and observes, that even those must be cautious, and "not unnecessarily march through streets or high roads, or make any the least military parade, but consider themselves entirely as a part of the civil state."

From the preceding facts it will appear, that while to the preservation of the peace every subject is liable to be called, and a soldiery in whatever form among the rest, (for, so far from being disenfranchised as citizens, it is the laudable care of parliament to confer on them as quickly as possible peculiar privileges in that character,) still the circumstances under which the aid is to be given, are uncertain and consequently their proceedings unsafe.

For instance, in the repository of the whole

Bisset, Life of
Burke, v. ii. p.
74.

Inquiry into the
legal mode of
suppressing
riots.

24 Geo. III.
c. 6.

Hawkins, c. 65.
s. 11. common law on the subject, it is stated, notwithstanding all the premises, as to the duty of the sheriff and all below him to suppress a riot, even to a private person, and that at the beginning of a riot, or in the interruption of those about to join in one, and even with the use of arms, that “it seems no way safe for them to go so far in common cases, *lest under the pretence of keeping the peace they make a more enormous breach of it*; and therefore such violent methods seem only proper against such riots as savour of rebellion, for the suppressing whereof no remedies can be too sharp or severe.”

From the conduct of Lord Chief Justice Holt in Holborn, it would appear, that, in the opinion of the civil power in the suppression of an ordinary riot, the military had no right to interfere; the riots at Edinburgh evince that general officers acquiesced *nearly* in the same opinion. The case of young Allen, while it shews the necessity, shews also the danger of military interference; the affair of Bethnal-green evinces the power of the civil magistrate to refuse the aid of a regular force as part of the power of the county (*posse comitatis*); and the last most disgraceful tumult that ever stigmatized this or any other nation, that of 1780, is a powerful proof of the utility of some determinate regula-

tion on the subject, since the necessity and the censure of the employment of the military were equally prominent.

Hence then, being liable, without any definite rule of law, to be called upon a service the most obnoxious, frequently necessary but always disagreeable, at the option of the civil magistrate, whose own authority is to be judiciously exercised, and only under the strictest guidance of law, it is indispensably necessary to the safety both of the public and the individual, to the dignity of justice and the honour of the military character, that every officer and non-commissioned officer in particular, and it had almost been said every private soldier, liable to such service, should be well acquainted with the legal boundaries of of their duty; that, in a country, the patriotism of whose king and the freedom of whose constitution are its greatest boast, they be not unwittingly led against an ordinary mob of idle and inconsiderate persons assembled riotously or routously, as people in open rebellion against the state, since in the case of rebellion they would receive the specific orders of his majesty through his generals; as again, in a still higher exigency, recourse would be had to the proclamation of martial law.

-For this purpose it may, even in the present work, be necessary to glance at those laws by

which the civil magistrate himself is governed.

Debates of Parl.
Feb. 18, 1737.

It was once observed in parliament, by Mr. Pelham, that, “where a magistrate has a guard of regular troops to trust to, he is apt to neglect humouring the people; he despises, and even sometimes oppresses, them,—a little gentle usage and calm reasoning will generally prevent any mischief, and prevail with the people to return to their duty; but a magistrate with an army at his back will seldom take this method, for few men will be at the pains to persuade when they know they can compel.” It will, however, be seen that such is the bounden duty of the magistrate upon every occasion.

1 Hawk. c. 65.
§ 1. et seq.

To constitute a riot there must be a tumultuous disturbance of the peace, by three persons or more assembling together of their own authority, whether the purpose be lawful or unlawful, with circumstances of awe and terror; there can be no riot when there are no more than two persons; nor is an assembly of a man's friends in his own house, for the defence of his person against those who threaten to beat him therein, deemed a riot. Nor a quarrel arising at a fair, market, or wake, unless confederacies be formed to break the peace. Nor assemblies at festivals for common sports, as bull-baiting, wrestling, &c. Nor can even the sheriff or his officers raise a force

for the execution of the king's writ, until resistance has been found. And justices seem to be punishable for alarming the county without cause.

The riots thus defined being in existence;— though the interference of private persons and the use of arms is warranted by the common law, still they are described as “only proper against such riots as savour of *rebellion* ;” and not the smallest allusion in any case is made to an armed soldiery. 34 Edw III.
c. 1.

Justices of the peace have power to restrain, chastise, imprison, and punish, rioters, &c. they may also authorise others to arrest them by a bare parole command, which will hold good in their absence. But a single justice arresting an innocent person would be liable to action of trespass. As soon as the sheriffs and other the king's ministers shall hear of a riot, rout, or other assembly against the peace, they, with the power of the county where such case shall happen, shall *disturb such malice with all their power, &c.*—the lords and other liege people shall attend, &c. 1 Hawk. c. 65.
§. 16.

It is not to the present purpose to pursue the statute, or common, law through the regulations and distinctions found necessary in unsettled times, the bond to keep the peace, imposition of fine, &c. The statute by which the magistrate is now chiefly directed, suffi- 1 Geo I. c. 5.

ciently known as the riot act, enjoined to be read at every quarter sessions and leet, prescribes as follows :

If any persons, to the number of twelve or more, being unlawfully, riotously, and tumultuously, assembled together, to disturb the public peace, and being required or commanded by any justice of the peace, sheriff of the county, or under-sheriff, mayor, bailiff, or other head officer, of any city or town corporate, where such assembly shall be, by proclamation made, &c. to disperse, &c. shall, notwithstanding, continue together by the space of one hour, it shall be felony without benefit of clergy; *i. e.* death, without any hope arising from a humane and discriminating fiction of law, in favour of learning and religion.

In delivering this proclamation, the justice of peace, or persons aforesaid, shall, among the rioters, or as near them as he can safely come, with a loud voice command, or cause to be commanded, silence, while proclamation is making, and in the same manner promulgate, *as nearly as possible*, the following words :

Proclamation of
riot, &c.

“ Our sovereign lord the king chargeth and commandeth all persons being assembled immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act, made in the first year of King

George, for preventing tumults and riotous assemblies.”

Every justice, sheriff, or other head officer, on notice of such unlawful assembly, is to resort to the place, and make the proclamation.

If such persons after all do not disperse themselves within one hour, it shall be lawful for every justice, &c. who are empowered to command all his majesty's subjects of age and ability, to be assisting to seize such persons, and carry them before a justice of peace; and, if such persons shall be killed or hurt *by reason of their resisting the persons so dispersing or seizing them*, such justice and PERSONS aiding them shall be indemnified.

iii. On the Coast, for the Protection of the Revenue, &c.

This duty is mentioned rather from the importance it assumes than from any complexity of legal arrangement for its conduct.

On any occasion revenue-officers apply “to the officer commanding at the nearest post,” the officer is bound to attend it; and, “where the posts are not too remote from each other, the several commanding officers shall have directions to co-operate to the utmost of their abilities for effecting the intended seizure.”

Gen. Reg. and
Ord. 78. et seq.

The money arising to the troops from seizures is to be divided (the usual proportion of rank being attended to) amongst the subaltern officers, assistant-surgeons, quarter-masters, non-commissioned officers, and private men, of the regiment generally, and not to be confined to those only who are personally concerned in making the seizure.

The claims of the troops or account of seizures are to be delivered to the Board of Customs and Excise, on or before the first day of December, in each year.

There are doubtless other minute regulations, both local and fortuitous, which cannot be here detailed; and, as to the regulations for distribution and furnishing of parties, they are already, by his majesty's order, in every officer's possession.

7. *On Leave of Absence, or Furlough.*

i. Absent Officers.

His majesty's leave is granted, by courtesy of the commander-in-chief, to officers to be absent from their corps, in all cases arising out of their private affairs, whenever it can be done without injury to the service; a "general leave" is also confided to the justice of

commanding officers of corps during the winter months; to the sick, of course, absence is permitted, without the ordinary limitations. Leave for short absences from regimental parades may also be granted by commanding officers.

Many limitations, however, have arisen from the frailty of human nature, the necessity of which will be sufficiently obvious. Thus, to prevent, as before observed, a plurality of posts, or other regimental inefficiencies, which might be facilitated by a prodigality of leave in a commanding officer, it is ordered by his majesty's articles that "all leaves of absence granted by us, or by any of our generals, shall be entered in the books of our secretary at war, and commissary general, &c." Without considering in this place the details of office, in the regulations, it is there ordered that all applications be regularly made, through the regimental commanding officer, to the general of brigade, thence to the general of the district, "by whom (in all instances in which the general officers are not themselves competent to decide) they will be transmitted to the adjutant-general for the purpose of being submitted to the commander-in-chief." "No officer (except for the purpose of joining his regiment, or on especial duty) is on any account to quit the kingdom, without the king's

Art. of War,
§ 18.

Gen. Reg. and
Ord. 32.

No Ib. 35.

leave of absence for that purpose having been previously obtained." "No leave of absence, granted by general or other officers commanding on foreign stations, to be considered as valid for more than six months, except in India and New South Wales, when it will continue to twelve months; nor can such leave be renewed by any other authority than that of his majesty."

In respect to the "general leave," it is ordered that all leaves of absence are to terminate on the 10th of March in South Britain, and the 10th of April in North Britain. It is withheld from corps which are inefficient, and from individuals as a punishment, which latter must not therefore be hastily done.

Officers in Great Britain, prevented from joining their regiments by ill health, are in due time to transmit to the commanding officers of their regiments certificates of the same, signed by a military medical officer, and, if in any of the capitals, the medical board. This certificate will be obtained from the inspector of hospitals, or deputy of the district, or, if not, runs thus, according to the printed form, with an addition for farther application.

Form from Medical-Board Office.

*" I do hereby certify that I have examined
 _____ of the _____ regiment of _____,
 and find that he is affected with _____ in such*

degree as to render him incapable of military duty. And I farther declare my belief that an extended leave of absence for —— will be necessary before he can resume his military duties.

Dated at ——

this —— day of ——

Signature and rank of the
medical officer.

I have the honour to forward the above certificate of my ill state of health, which renders me at present incapable of performing my regimental duty, and to state that I have already been absent from my regiment, with leave, from the —— day of ——

Viz.

From the —— day of —— to the —— day of —— by permission of ——

From the —— day of —— to the —— day of —— by permission of ——

From the —— day of —— to the —— day of —— by permission of ——

Signature and rank
of the regimental
or other officer.

Although, of course, no entry takes place of temporary leave from parade, granted by a commanding officer, yet no less justice is to

be assured in the proportion to individuals, or propriety in the occasions, for which it is granted.

ii. Furlough of Non-commissioned Officers and Soldiers.

A. of W. § 4,
art. 5.

Every colonel, or other field-officer, commanding a regiment, troop, or company, and actually residing with it, may give furloughs to non-commissioned officers and soldiers, in such numbers, and for so long a time, as he shall judge to be most consistent with the good of the service; but no non-commissioned officer or soldier shall, by leave of his captain or other inferior officer commanding the troop or company, (his field-officer not being present,) be absent above twenty days in six months, nor shall more than two private men be absent, at the same time, from their troop or company, unless some extraordinary occasion shall require it, of which occasion the field-officer present with and commanding the regiment is to judge.

ib. §

iii. Extension of Furlough by the Magistrate.

Mut. Act, § 95,
*7.

Any justice of the peace is authorised to grant, in writing, under his hand, an extension

of furlough to any non-commissioned officer or soldier applying for the same, on account of any sickness, or other casualty, which to such justice shall on due inquiry appear to render such extension necessary. And such justice shall make an order in writing, under his hand, upon the churchwardens and overseers of the poor of the parish, township, or place, where such non-commissioned officer or soldier shall reside, requiring them to advance to him any sum of money, not exceeding the amount of his pay, for the period to which his furlough shall have been extended, out of the money for the relief of the poor; which sums shall be allowed to him by the collectors of Excise, on presentation of this order.

If the justice shall not think fit to make such order, he shall state his reasons for such refusal, in writing, *at the back of the furlough*.

The non-commissioned officer or soldier obtaining such extension (which, of course, will be also indorsed on his furlough) will not be liable to molestation on account of such absence from his regiment. This exemption, however, does not extend to any case where it is obtained by false representation, or where there shall have been in the application any thing subversive of good order and military discipline.

III. DISMISSAL OF OFFICERS AND SOLDIERS, INCLUDING REWARDS.

James, R. C.
v. 1, 53.

The Dismissal of Officers and Soldiers, in disbanding their Corps, must be regulated by Circumstances.

1. *Resignation of Officers.*

No officer can sell out of the army without his majesty's permission: every officer, however, who has purchased his different commissions, is intitled to sell, unless he be dismissed the service by sentence of a general court martial, or by the king's order. Those officers who have obtained their situations by favour can only look to the king for permission to retire from the service by disposing of their appointments.

Deb. of Parl.
Mar. 1766.

His majesty's ministers, in the upper house, being asked, on a discussion of the Mutiny Act, whether an officer, on actual service, might give up his commission, whenever he pleased? Lord Loughborough answered, that such a resignation was subject to his majesty's acceptance, in which the chancellor concurred; but added, that no minister would advise his majesty not to accept such a resignation.

In the Militia commissions are resigned to

the lieutenant of the county, but generally through the officer commanding the regiment. It is, however, equally liable to his majesty's acceptance, as is also that of the lieutenant.

Letter of S. C. Morgan, J. A. G. 13th June, 1799, apud James

The Royal Hospital, at Chelsea, and its out-pensions, are instituted for the support of the soldier worn out in the service; and its necessary offices furnish excellent resources for unfortunate officers. There are also a few other institutions, of a highly creditable nature. And by statute, though dormant, unrepealed, a weekly allowance is to be raised in every county, for the relief of soldiers that are sick, hurt, and maimed.

Gross, Mil. Ant. vol. 2,

43 Eliz. c. 3.

The Royal Military College, established at Great Marlow, Buckinghamshire, in March, 1802, at the instance of his Royal Highness Field-Marshal the Duke of York, offers a grand asylum to thirty sons of officers who have died, or been maimed, in his majesty's service, who are to receive education, board, and clothing, free from expense, and be afterward eligible to commissions; and to twenty more, at very moderate expense.

Reg. R. Mil. Col.

Honourary rewards are various, as general medals, honourary titles, distinctions, &c.*

Reg. Royal Mil. Col. &c.

Adjutants of Militia have experienced advantages peculiar to themselves on retiring.

* Besides the public rewards of the army here spoken of,

2. Discharge of Private Soldiers.

Reg. Sec. at
War.

The discharge of private soldiers, in every regiment, must be periodically announced by returns to the war-office, which are regulated according to the directions issued from that establishment.

Collect. of Mi-
litia Statutes.

Regiments of Militia have, in addition to these returns, to make others to the sub-division clerks of the lieutenancy.

Such are the excellent precautions used by the various authorities to preserve the post of honour free from those defections to which the infirmities of human nature might otherwise render it liable.

Mutiny Act,
§ 190.

Every soldier entitled to his discharge under any orders or regulations made by his majesty, or upon the expiration of any period for which he shall have engaged to serve, shall, if then serving abroad, be sent to Great Britain or Ireland, free of expense, and, on his return, be intitled to, and receive, marching-money

Adye on Re-
wards &c. 2^d
Manningh. L.
Reg.

there have been many instituted by commanding officers of regiments, in their own corps, which have been highly advantageous. Such were those of Earl Percy in the 5th Foot, General Manningham in the 95th, not to mention many unwritten exertions, like those of the brave and well-informed Col. Pack, of the 71st, &c. &c. &c.

from the place of his being landed to the parish or place in which he shall have been originally inlisted, at the rate per diem fixed for victualling soldiers on the march, reckoning ten miles for each day's march; and, if serving at home, he is to receive the same allowance from the place of discharge to that of inlisting.

Officers and soldiers that have been in the king's service are at liberty to use any trade or occupation they are fit for, in any town of the kingdom, (except the two universities,) notwithstanding any statute, custom, or charter, to the contrary. It need not be added that the Militia is included.

21 Geo. III
c. 6, &c.

42 Geo. III.
c. 90.

Non-commissioned officers and soldiers, having been duly inlisted and sworn, shall not be dismissed the service without a discharge, in writing, signed by a field-officer of the corps to which they belong; or, if no field-officer be with the corps, by the commanding officer thereof; or, in respect to regiments serving abroad, the colonels of which are absent from Great Britain, by the adjutant-general of our forces, or by the inspector-general of our recruiting service.

Art. of War,
§ 3, art. 2.

These discharges may be, and often are, vehicles of praise or censure.

Having thus concluded the crimes, of which a soldier can ordinarily be guilty, (for, in the

§ 24, art. 2.

commission of those which follow, he forfeits that character,) it may be necessary to add the general clause in his majesty's Articles of War, which prevents the escape of offenders, whose crimes have not been recited. All crimes, not capital, all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not specified in the said rules and articles, are to be taken recognizance of, by a general or regimental court martial, according to the nature and degree of the offence, and to be punished at their discretion.

IV, CONCERNING MUTINY AND DESERTION.

These are crimes that require to be considered by themselves, and come not properly under any head among those committed by the soldier; since, by the one, he exchanges his character for that of TRAITOR in the basest acceptance of the term, and, by the other, he throws off every military claim, except that of the severest punishment.

1. *Penalties of Mutiny in Principals and Accessories.*

The acts and penalties of Mutiny are thus described in the Mutiny Act and Articles of

War. Any Person, who is or shall be com-
 missioned or in pay as an officer, or listed
 or in pay as a non-commissioned officer or
 soldier, who shall presume to use traitorous or
 disrespectful words against our royal person, or
 any of our royal family, if a commissioned
 officer, shall, upon conviction thereof, before
 a general court martial, be cashiered; if a non-
 commissioned officer or soldier, he shall suffer
 such punishment as by the sentence of a ge-
 neral or regimental court martial shall be
 awarded.

Any officer, non-commissioned officer, or
 soldier, who shall behave himself with con-
 tempt or disrespect towards the general, or
 other commander-in-chief of our forces, or
 shall speak words tending to his hurt or dis-
 honour, shall be punished according to the
 nature of his offence, by the judgement of a
 general court martial.

Any officer, non-commissioned officer, or
 soldier, who shall begin, excite, cause, or join
 in, any mutiny or sedition in the regiment,
 troop, or company, to which he belongs, or in
 any other, either of our land or marine forces,
 or in any party, post, detachment, or guard,
 on any pretence whatever, shall suffer death, or
 such other punishment as by a general court
 martial shall be awarded.

Any officer, non-commissioned officer, or

soldier, who, being present at any mutiny or sedition, shall not use his utmost endeavour to suppress the same, or, coming to the knowledge of any mutiny or intended mutiny, shall not, without delay, give information thereof to his commanding officer, shall suffer death, or such other punishment as by a general court martial shall be awarded.

Art. 5.

Any officer, non-commissioned officer, or soldier, who shall strike his superior officer, or shall draw, or offer to draw, or lift up, any weapon, or offer any violence against him, *being in the execution of his office*, on any pretence whatsoever, or shall disobey any lawful command of his superior officer, shall suffer death, or such other punishment as by a general court martial shall be awarded.

2. *Penalties of Desertion, and civil Auxiliaries for the Apprehension of Deserters.*

Mut. Act, § 1.
Art. of War,
c 6, art. 1.

Desertion is thus characterized and denounced in the same prescriptions. All officers, non-commissioned officers, and soldiers, in our service, who shall be convicted of having deserted the same, shall suffer death, or such other punishment as by a general court martial shall be awarded. And every non-commissioned officer or soldier who shall enlist himself in any other regiment, troop, or com-

pany, without a regular discharge from that in which he last served, shall be reputed a deserter, and suffer accordingly death, or other punishment, at the discretion of a court martial. Mat. Act, § 2.

Any officer who shall receive such non-commissioned officer or soldier belonging to another corps, or shall not, after his being discovered to be a deserter, immediately confine him, and give notice thereof to the corps in which he last served, if in Great Britain or Ireland, or, if abroad, to our secretary at war, shall, on conviction, be cashiered. Art. of War, § 6, art. 2.

Non-commissioned officers and soldiers who shall desert from, or commit any offence against military discipline in, any regiment, troop, or company, in which they shall have inlisted or received pay, although of right belonging to, and liable to be claimed by, another corps, in which they have inlisted or received pay, may be tried by court martial, and punished for such desertion or other offence, as if they had originally and rightfully inlisted in such regiment, &c. Art. 3.

Or if such a non-commissioned officer or soldier shall be claimed by the corps in which he first inlisted, and be proceeded against as a deserter therefrom, his subsequent desertion from any one or more corps may be given Mat. Act. § 3.

in evidence against him, as an aggravation of his crime, previous notice being given to the prisoner.

Art. of War,
§ 6, art. 4.

Any non-commissioned officer or soldier who shall, without leave from his commanding officer, absent himself from his troop or company, or from any detachment with which he shall be commanded, shall, upon being convicted thereof, be punished, according to the nature of his offence, at the discretion of a general or regimental court martial.

Art. 5.

Whatsoever officer, non-commissioned officer, or soldier, shall be convicted of having advised or persuaded another officer or soldier to desert, shall suffer punishment at the discretion of a general court martial.

Mut. Act, § 19.

A general court martial may sentence any non-commissioned officer or soldier, convicted of desertion, to service, in such country abroad, and in any regiment or corps, as his majesty shall please to direct, or for life, as a soldier, or for any term of years beyond the period for which he shall have enlisted; and to a forfeiture of all or any part of the benefit, as to increase of pay, premium, or discharge, which might otherwise have accrued from the length or nature of his service.

Ib. § 4.

A court martial may also adjudge the offender to be transported as a felon, for life, or a

term of years ; and also to be, at the expiration of such term, at the disposal of his majesty as a soldier for life.

His majesty may also remit a capital punishment, awarded by a court martial, on condition of transportation, as a felon, for life, or for a term of years. ib. § 5.

In either of these cases, the felon returning into or being found at large, before the expiration of such period, without leave from his majesty, or the governor or commanding officer of the place to which he shall have been transported, will, on ordinary conviction, suffer death, without benefit of clergy.

A court may, on a *second* conviction of desertion, direct, in addition to any other punishment, that such deserter be marked on the left side, two inches below the armpit, with the letter D. Such letter not to be less than half an inch long, and to be marked upon the skin with some ink, or gunpowder, or other preparation, so as to be visible and conspicuous, and not liable to be obliterated. This is a custom as antient as the Roman army. Vegetius de Re Mil. p. 1, c. 8, &c.

For the better apprehending of deserters, as has already been observed, the civil power joins its aid ; to which purpose, it is enacted, that, wherever any person, who may reasonably be suspected to be a deserter, may be found, the constable, headborough, or tything man, Mut. Act § 91. et seq.

or any officer or soldier in his Majesty's service, may apprehend him, and take him before any justice of the peace, who hath power to examine him; and if, by his confession, or the testimony of one witness, upon oath, or by the knowledge of such justice, it shall be found that such suspected person is a listed soldier, and ought to be with the troop or company to which he belongs, such justice of the peace shall send him to the county gaol, house of correction, or other public prison of the place; or to the Savoy, if in London, Westminster, or the places adjacent; or to the provost martial, if in Dublin, or the places adjacent; and transmit an account thereof to the secretary at war for the time being, in London, or, if in Ireland, to the chief secretary of the chief governor, to the end that such person may be removed, by an order from the office of the secretary at war, or chief governor, and proceeded against according to law. And the keeper of every prison shall receive such subsistence for the maintenance of such deserter, during the time that he shall continue in his custody, as by his majesty's regulations shall be directed in his behalf, and shall be entitled to one shilling for every twenty-four hours imprisonment of every deserter. And every keeper of a prison, in every place in which the party or person con-

veying any deserter shall pass, shall receive and confine every deserter delivered into his charge, by any non-commissioned officer or soldier, without other authority than the production of the warrant from the justice on which the deserter was first taken, or some order from the war office, in Great Britain, or secretary in Ireland, and receive one shilling per day as aforesaid.

As a reward, the magistrate committing a deserter must also give his warrant to the collectors of land-tax in Great Britain, or revenue in Ireland, to pay to the person apprehending, for each deserter, twenty shillings, which will be allowed in the collector's account. Ib. § 92.

It has already been shewn how the military advising or persuading desertion are to be punished; on the part of the military or civil classes, if any person shall harbour, conceal, or assist, any deserter from his majesty's service, knowing him to be such, he shall forfeit twenty pounds for every offence, upon conviction, by the oath of one witness, before any justice of the peace; to be levied by distress and sale of the goods or chattels of the offender, one half to be paid to the informer, and the other to the officer to whom the deserter belonged. Art. of W, § 6, s. 5. Mut. Act, § 93.

If the offender have not goods and chattels to the amount, and shall not pay within four days

of conviction, such justice shall, by warrant, under his hand and seal, commit him to the common gaol, for six months, without bail or main-prize.

Ib. § 122.

And farther, if any person or persons shall, in any part of his majesty's dominions, directly or indirectly, persuade or procure any soldier to desert his majesty's service, he or they, on lawful conviction, shall, for every offence, forfeit to the king, or any person who shall sue for the same, (in any court of record,) one hundred pounds; and, if the offender lack goods and chattels, lands, or tenements, to pay the same, or if his crime deserve more punishment, he may be committed to prison for twelve months, and also to stand in the pillory, for the space of one hour, in the same or some market-town, next adjoining to the place where the offence was committed, in open market there.

Ib. § 124.

The penalties are to be sued for in the courts of record in Great Britain, court of exchequer in Scotland, court of record in Dublin, or any court of record elsewhere; in the royal courts of Jersey or Guernsey, (in which latter are included the islands of Alderney and Sark,) and in any court of record in the Isle of Man, or any court of record at Westminster.

Ib. § 125.

All actions, however, to be brought within six months after commission of the offence.

The penalty of persons receiving or obtaining, in any way, from deserters of horse or foot, their regimentals or necessaries of any kind, the same with that in regard to all other soldiers, is five pounds, imprisonment, and, perhaps, whipping. See "*Care of Stores, &c.*" No commissioned officer shall, however, break open a house without warrant from a magistrate, under a penalty of twenty pounds.

PART IV.

MINOR MILITARY ECONOMY.

I. ACCOMPTS, (INCLUDING THE PAYMENT
OF THE ARMY.)

Art. of War,
§ 17.

THE accompts of all regiments, troops, or companies, in our service, (say his majesty's Articles of War,) other than our corps of Life-Guards, Horse-Guards, and Foot-Guards, shall be made up and transmitted at such times, and in such manner, as we have been pleased to direct by our late regulations, touching regimental and district paymasters, and the mode of mustering, paying, and settling the accompts of, our army, or according to such regulations as we may think fit to establish in relation thereto.

Reg. &c. Pub-
lished by
Egerton.

The regulations here mentioned regard the minutes of office, and are comprised in a large octavo volume.

Mutiny Act,
§ 106.

And, that a true accompt may be kept and rendered by the agents of the several regi-

ments and independent troops and companies, they are required to observe such orders and directions as shall, from time to time, be given by his majesty, under his sign-manual, chief governor or governors of Ireland, or the lord-treasurer or commissioners of the treasury, for the time being: and, if any agent shall refuse or neglect to observe such orders and directions, he shall be discharged from his office, and be utterly disabled to hold any such office in his majesty's service.

No paymaster-general, or paymaster of the Ib. § 103. army, paymaster of the marines, secretary at war, commissary, muster-master, paymaster of a corps or district, or any other officer whatsoever, or their under officers, shall receive any fees, or make any deductions whatsoever, out of the pay of any officer or soldier in his majesty's army, or from their agents, other than those allowed by his majesty's regulations, and Ib. § 103. such other necessary deductions as shall, from time to time, be directed under his majesty's sign-manual.

If any paymaster, agent, or clerk, of any garrison, troop, or company, shall, unlawfully, detain or withhold, by the space of one month, the pay of any officer or soldier, (clothes and all other just allowances being deducted,) after such pay shall be by him or them received; or if any officers, having received their soldiers'

pay, shall refuse to pay each non-commissioned officer and soldier their respective pay, when it shall become due, according to the several rates established by his majesty's orders, upon proof thereof before a court-martial, to be for that purpose duly holden and summoned; every such paymaster, agent, clerk, or officer, so offending, shall be discharged from his employment, and shall forfeit to the informer, upon conviction before the said court, one hundred pounds, to be levied by seizure of goods and chattels, or these failing, the person of the offender to be imprisoned for six months, unless sooner paid, in addition to any other punishment. And the informer, if a soldier, (if he demand it,) shall be, and he is hereby (the Mut. Act), discharged from any farther service.

Detention of
Pay.

Art. of War,
§ 13, art. 4.

Embezzlement
of Moneys by
Commanding
Officer.

If any commissioned officer shall embezzle or misapply any moneys with which he may have been entrusted for the payment of the soldiers under his command, or for inlisting men into our service, or for any regimental purpose, and shall be thereof convicted by a general court martial, he shall be dismissed the service, and shall forfeit the arrears due to him upon account of his pay, or so much thereof as may be sufficient to make good the deficiency occasioned by such embezzlement or misapplication.

If any warrant-officer be convicted of such offence, by general or detachment court martial, he shall suffer the same; but, if he shall have been originally inlisted as a private soldier, and shall have continued in the service until his appointment to be an officer by warrant, he shall be liable, at the discretion of such court martial, to be dismissed, or reduced to serve either in the capacity of a non-commissioned officer or private soldier, and to be put under stoppages until the money embezzled or misapplied by him shall have been made good.

Every non-commissioned officer, who shall be convicted at a general or regimental court martial of having embezzled or misapplied any money with which he may have been intrusted, for the payment of the men under his command, or for inlisting men into our service, or for any regimental purpose, shall be reduced to serve in the ranks as a private soldier, be put under stoppages till the money be made good, and suffer such corporal punishment as the court martial shall think fit.

For the encouragement of the due clothing of the troops, the treasury may, if it be deemed convenient, at the end of every two months, issue the money due for the clothing of the forces, notwithstanding the muster-rolls have not been duly returned. And paymasters are

By Warrant-
Officer.

By Non-com-
missioned Of-
ficer.
Art. of War,
§ 13, art. 5.
Mutiny Act,
§ 102.

Mut. Act, § 104

to make deductions of all off-reckonings, and pay to such persons only as have a regular assignment for clothes delivered, and their receipt taken for the same. And, when no assignment appears, the off-reckonings to remain in the hands of the said paymaster respectively, until a new contract for clothing, &c. is made.

1b. § 100.

All commissaries, upon making up their accounts, and also upon returning from any foreign service, shall take the following oath :

“ I ——— do hereby make oath that I have not applied any money, or stores, or supplies, under my care or distribution, to my own use, or to the private use of any other person, by way of loan to such person or otherwise, or in any manner applied them, or knowingly permitted them to be applied, to any other than public purposes, and according to the duty of my office.

Sworn before me, &c.

This oath, if in any part of the United Kingdom, shall be taken before some justice of the peace or magistrate; and, if taken on foreign service, before the commander-in-chief, or the second in command, or the quarter-master, or deputy quarter-master-general, or any assistant quarter-master-general, of the army to which he shall be attached, who shall respectively have power to administer the same.

No officer nor soldier, having been convicted Ib. § 16. of any criminal offence, shall, while under confinement in consequence thereof, be entitled to any part of his pay, from the day on which such conviction shall have taken place, till the day of his return to the regiment, troop, or company, to which he belongs.

Nor shall any soldier, arrested or confined Ib. § 29. for debt in any prison, be intitled to any part of his pay, until the day of his return to the regiment, &c.

II. MUSTERS AND RETURNS, AND ENTRIES.

1. *Musters.*

Musters shall be made, had, or taken, of Ib. § 34. every regiment, troop, or company, in his Art. of War, § 4. art. 1. majesty's service, twice at the least in every year, at such times as shall be appointed, and in such manner as directed by regimental and Reg. &c. for Pay ascer. district paymasters, &c.

If any person do make or give, or procure Mut. Act. § 36 to be made or given, any false certificate to Art. of War, § 4. art. 2. excuse any soldier for his absence from any muster, or any other service which he ought to attend or perform, upon pretence of being employed on some other duty of the regiment, or of sickness, being in prison or on furlough,

every such person shall for every such offence forfeit the sum of fifty pounds, be forthwith cashiered and displaced from his office, and be thereby utterly disabled to have or hold any military office or employment within this realm, or in his majesty's service. And no certificate shall excuse the absence of any soldier but for some one of the reasons above mentioned.

Mut. Act, § 37,
38.

Art. of War,
§ 4, art. 3, 4.

Every officer that shall make any false muster of man or horse, or muster any person by a wrong name, and every commissary, muster-master, or other officer, who shall wittingly or willingly allow or sign the muster-roll wherein such false muster is contained, or any duplicate thereof; and also every commissary, muster-master, or other officer, who shall, directly or indirectly, take or cause to be taken money, or any other gratuity, on or for the mustering of any regiment, troop, or company, or on or for the signing of any muster-rolls, or any duplicate; on proof thereof upon oath of two witnesses, before a general court martial to be thereupon called, shall for such offence be forthwith cashiered and displaced from his office, and disabled from holding any civil or military employment within the United Kingdom, or in his majesty's service.

Mut. Act, § 39.

If any person shall be falsely mustered, or offer himself for that purpose, upon proof on oath by two witnesses as before the next jus-

tice of peace for the county where it is made, upon certificate thereof, under the hand of the commissary of the musters, &c. the said justice is to commit such offender to the house of correction for ten days.

And if any person shall wittingly or willingly lead a horse to be mustered, which shall not belong to the trooper or troop so mustered, the horse shall be forfeited to the informer, if it belong to the person furnishing it, if not, the person furnishing, on oath of two witnesses before the next justice, shall forfeit twenty pounds, to be levied by warrant, by distress and sale of goods and chattels of the offender, or on deficiency of them, and non-payment for four days after the conviction, the offender to be committed to the common gaol for three months, or to be publicly whipped, at the discretion of the justice. The forfeiture to be given to the person that shall give information thereof, and, if in the service, a right to be discharged forthwith.

In Great Britain the deputy of the commis- Ib. § 40.
sary-general of the musters shall upon every half-yearly muster, at any place ten miles distant from London, close the muster-rolls of the regiment, troop, or company, within twenty-four hours, and return the rolls so taken, by the post, or other safe conveyance, within seven days, to the office of the COMMISSARY-GENE-

RAL OF MUSTERS, who is to transmit sets of them to the *Secretary at war*, *paymaster-general of his majesty's land-forces*, and the *comptroller of the accompts of the army*, on or before the 1st day of May and 29th of September following each such half-yearly muster. No alterations or indorsements shall be made on the muster-rolls, other than in the case of orders of leave, or dates of commissions, involuntary errors, or literal mistakes in writing or transcribing, on pain of forfeiting their respective employments, and the sum of twenty pounds for every offence, to any person that will sue for it.

Ib. § 55.

No commissary (of musters) shall muster any regiment, troop, or company, within the city of Westminster and borough of Southwark, and liberties thereof, but in the presence of two or more justices of the peace; *not being officers of the army*, under the penalty of fifty pounds, and of being discharged from his office; unless such justices, upon forty-eight hours notice being given to six justices residing within the said liberties respectively, shall neglect to attend such muster; and then only provided oath be made of this fact before any of his majesty's justices. The justices attending are to sign the muster-rolls, take cognizance thereof, and examine their truth, before they sign them.

2. *Returns.*

Returns are minor musters: every officer who shall knowingly make a false return to his majesty, to the commander-in chief of the forces, or to any of his superior officers, authorised to call for such returns, of the state of the regiment, troop, or company, or garrison, under his command; or of arms, ammunition, clothing, or other stores, thereunto belonging; shall, on conviction before a general court martial, be cashiered. Articles of War, § 5, art. 1.

The commanding officer of every regiment, troop, or independent company, or garrison, in South Britain, shall on the 25th of every month transmit to the commander-in-chief of the forces, and secretary at war, an exact return of its state; and, specifying the names of the officers not then residing at their posts, the reason for and the time of their absence. Whoever shall be convicted of having designedly or through neglect omitted the sending such returns shall be punished according to the judgement of a general court martial. Ib. art. 2.

Returns in like manner shall be made to the lord-lieutenant in Ireland, and to the commander-in-chief of our forces there; and to the commander-in-chief in North Britain, to be Ib. art. 3

transmitted to his majesty as expedient for the service.

Ib. art. 4.

The same will be made of the garrison at Gibraltar, and the regiments, garrisons, and independent companies, stationed abroad; and transmitted by all convenient opportunities to the secretary at war.

3. *Entry of commissions and leaves of absence.*

Under this short head in his majesty's articles of war is comprised very much of the justice of the army, as relates to officers, yet it must admit of certain modifications, according to circumstances.

DeRe Milit.&c.
Mijl. Inst. Tit. 9.
§ 41.

Plurality of posts in an army, nay even a soldier's (voluntarily) listing in two different legions, was antiently expressly prohibited, upon a severe pecuniary mulct; which (says Bruce) was very consonant to reason and justice, such a management implying no less than peculate or theft from the public, since no man is able to be in two places at once.

Ib. § 86.

Dutch Act. 70.

Plurality of posts, whether in the same or different regiments, is in the Netherlands punished at discretion; which takes place also among the British forces beyond sea; and, *for preventing and discovering such abuses*, it is appointed by her late majesty's articles, "that all

Art. Annæ
Reg. 41.

commissions to officers in pay shall be brought to the commissary of the musters and secretary at war, who are to receive and enter the same in a book fairly written, with certification that no commission officers without such entry shall be allowed in muster."

An undue extension of leave of absence was also attended with respite of pay; "and" (say Queen Anne's articles,) "*to prevent collusion,* all papers and licenses for being absent are ordained to be brought to the muster-master, who is required to enter the same in a book fairly written."

Both these purposes are united in the present section, which like some others has been disrobed of its preamble. It simply directs that "all commissions and leaves of absence, granted by us or by any of our generals having authority from us, shall be entered in the books of our secretary at war and commissary general, otherwise they will not be allowed of at the musters."

Art. of War,
§ 18.

III. CARE OF STORES, AMMUNITION, &C. (INCLUDING THE COMMISSARIAT, AND ILLEGAL USE OF STORES, &C.)

The necessity for the whole of the laws comprized in this division must be obvious to

Rep. Commiss.
Public Ac-
counts.

every one. And a committee of the House of Commons, as well as the commissioners subsequently appointed by it, for the purpose of inquiry, seem, by a prominent resolution, to have conceived something farther to be equally necessary, an opinion which has been confirmed by more than one military writer. It was by the commissioners unanimously recommended as necessary, "*That no military officer should himself have a property or interest in any article which his duty obliged him to provide for the public service.*"

Mut. Act, § 101.
Art. of War
§ 13, art. 1.

Every commission officer, storekeeper, or commissary, or deputy, or assistant commissary, or other person employed in the commissariat department, or in any manner in the care or distribution of any money, provisions, forage, or stores, belonging to his majesty's forces, or for their use, that shall embezzle or fraudulently misapply, or cause, or knowingly permit, any money, provision, forage, arms, clothing, ammunition, or other military stores, to be embezzled or fraudulently misapplied, or spoiled, or damaged, may be tried by a general court martial, and adjudged, while in service out of the United Kingdom, to be transported as a felon, for life, or for any certain term of years; or to suffer such punishment of pillory, fine, imprisonment, dismissal from his majesty's service, and incapacity from serving

his majesty in any office, civil or military, as such court shall think fit, according to the nature and degree of the offence. Or that such person shall forfeit two hundred pounds, and, in addition to any other punishment, make good at his own expense the loss and damage thereby sustained, to be ascertained by such court martial, which shall have power to seize the goods and chattels of the person so offending and sell them for the payment of the said two hundred pounds, and such damage. And, in defect of these, the person offending shall be committed to prison or the common gaol, there to remain, in addition to any punishment or imprisonment, for six months, and until he shall pay such deficiency; and after the sum is recovered it shall be applied as his majesty shall direct.

* [See also the oath required to be taken by commissaries returning from foreign service or making up their *accounts*, under that head, Part IV. Chap. I. p. 278.]

Every captain of a troop or company is charged with the arms, accoutrements, ammunition, clothing, or other warlike stores, belonging to the troop or company under his command, for which he is to be accountable to his colonel in case of their being lost, spoiled, or damaged, not by unavoidable accident, or on actual service. Id. § 13. A. a.

Art. 2.

Whatsoever non-commissioned officer or soldier shall be convicted, at a general or regimental court martial, of having sold, or designedly or through neglect wasted, the ammunition delivered out to him to be employed in the service, shall suffer corporal punishment, at the discretion of such court martial. If a non-commissioned officer to be also reduced to a private sentinel.

Art. 3.

Every non-commissioned officer or soldier, who shall be convicted at a general or regimental court martial of having sold, lost, or designedly or through neglect spoiled, his horse, arms, clothes, accoutrements, or regimental necessaries, shall undergo such weekly stoppages (not exceeding the half of his pay) as such court martial shall judge sufficient for repairing the loss or damage, and shall besides suffer imprisonment, or *other* corporal punishment, at its discretion.

Mut. Act, § 93.

And, with a proper motive to prevent the facility of commission of such a crime, it is provided by the Mutiny Act, “that, if any person shall knowingly detain, buy, or exchange, or otherwise receive, from any soldier or deserter, or any other person, upon any account or pretence whatsoever, any arms, clothes, cap, or other furniture, belonging to the king, or any meat, drink, beer, or other provisions, provided under any regulations

relating thereto, or any such articles belonging to any soldier or deserter as are generally deemed regimental necessaries, according to the custom of the army, being provided for the soldier, and paid for by deductions out of his pay, or cause the colour of any such clothes to be changed, the person so offending shall forfeit for every offence five pounds.

Or if any person shall buy or receive any oats, hay, straw, or other forage for horses belonging to his majesty's service, from any dragoon or other soldier, knowing him to be such; or shall move, procure, counsel, solicit, or entice him, or other soldier, to sell or otherwise dispose of any such forage, the person so offending shall forfeit for every offence five pounds.

And upon conviction by the oath of one or more credible witness or witnesses, before any of his majesty's justices of the peace, the respective penalties shall be levied by warrant of distress, one half to the informer, and the other to the officer to whom any such deserter or soldier did belong. And in failure of goods and chattels in the offender, and non-payment in four days after conviction, such justice may, by warrant, commit such offender to the common gaol for three months, or cause to be inflicted public or private whipping at discretion.

IV. CARE OF EFFECTS OF DECEASED OFFICERS AND SOLDIERS.

Blackst. Com.
b. 1. c. 13.

Soldiers on military service may make nuncupative wills, and dispose of their goods, wages, and other personal chattels, without those forms, solemnities, and expenses, which the law requires in other cases.

Art. of War,
§ 19, art 1.

When any commissioned officer shall happen to die or be killed in the service, the major of the regiments or the officer doing the major's duty in his absence, shall immediately secure all his effects or equipage then in camp or quarters; and shall, before the next regimental court martial, make an inventory thereof, and forthwith transmit the same to the office of the secretary at war, to the end that after payment of such officer's regimental debts and quarters and interment, the overplus, if any, may be paid over to his legal representatives.

Art. 2.

When any non-commissioned officer or private soldier shall happen to die or be killed in our service, the then commanding officer of the troop or company shall, in the presence of two other commissioned officers, take an account of whatever effects he dies possessed of, besides his regimental clothing, arms, and accoutrements, and of his credits; and shall

take care that the same be applied in the first instance to the liquidation of his regimental debts; the remainder, or balance, shall then be placed in the hands of the regimental paymaster, and shall be duly paid over by him to the representative of such non-commissioned officer or private, if claimed within the periods limited by our regulation on this head. If not claimed within such limited period, it is to be paid to the regimental agent.

The effects and credits of deserters shall be Ib. art. 3. applied in like manner to the liquidation of their regimental debts, and the remainder, if any, brought to the credit of the public.

Every present and future paymaster, agent, Mut. Act, § 108. or clerk, of any garrison, regiment, troop, or company, who is, or shall be liable to account with any of the executors and administrators of every officer or soldier, for any of the pay by him or them received, shall, on reasonable demand made by such executor or administrator, deliver a just and true account of such moneys received, he paying for the same, and shall account with him for it. Every such paymaster, agent, or clerk, offending herein shall be dismissed the service, and forfeit so much of his arrears as shall make due remuneration.

CONCLUSION.

THUS has it been attempted to sketch something towards the outline of a digest of those admirable laws which have been formed for the military force of Great Britain; in which the dignity of the service, the rights of the individual, and their various relations, would seem to be equally assured.

In the first part it has been endeavoured to afford a general view of military law, in its separate capacity; secondly, to examine its various modes of application; thirdly, to regard its operation in the various circumstances of an army, from its formation, through its duties, to its dissolution; and, fourthly, to shew its minor economy, or what relates to its business, its trusts, and accompts.

Pratique de
M. le C. de G.
apud Berenger.

In the consideration of these several particulars it will be immediately evident, that as bravery is not the only requisite of soldiers, but that they should be men of probity also,

so should officers possess a variety of knowledge which appears but little compatible with the vulgar idea of an army:—Hence the necessity of a military education, or rather an education including the various knowledge so necessary to the military character.* It will also be evident that law as here applied is not that mere art of quibbling to which unhappily it has been sometimes degraded, but a rule of action, on a strict and voluntary adherence to which depends the order and happiness of every community.

The excellence of military law, when its *execution* shall be guaranteed by a perseverance in the watchful care which has of late years manifested itself, will exhibit a proud pre-eminence over the improvement of its correlative branches from the common law of England; and prove to the satisfaction of every soldier that courts of inquiry are not secret assemblages to stifle investigation, but to search after the truth; and courts martial not hidden seats of prejudice to punish the weak and maintain the strong, but courts of law and

* It may not be unsatisfactory to mention that an elementary work to this effect, and consequently on a new plan, has been announced to the public.

justice, additionally bound to their administration by all those solemn ties which must ever characterise the honour of a soldier and a gentleman.

APPENDIX.

PRECEDENTS AND FORMS OF MILITARY
LAW.

I. FORMS.

THE necessity of *forms* to the promptitude with which all military *business* ought to be transacted, renders them, in the opinion of the writer, sufficiently important to form a conspicuous division of his work. In the *leisure* of the common law an high authority has declared that “Technical forms ought not to be departed from;” and a writer more useful and equally dignified has asserted of forms, that—

“If once those outworks were demolished, there would be an inlet to all manner of innovation on the body of the law itself.”

Lord Mansfield
on reversion of
Wilkes's out-
lawry.

Blackst. Com.

That these remarks will apply with additional force, derived from their expedience, to military law, will be easily seen from the

constant use of prescribed forms in every department of military government. These, however, which may be had in every office to which they relate, it is scarcely requisite to observe, are not included here. Those only which are necessary to the *acting* judge-advocate, with the exception, perhaps, of one or two for the civil magistrate, who is not *always* provided with the principal statutory law of the army, even in its most compendious form, are inserted, unless, indeed, a precedent or two, as that relating to execution, may be liable to that charge.

They shall be commenced with a deference due to the civil power, by the form of conviction by the civil magistrate.

1. *Form of Conviction, under the Act for Punishing Mutiny and Desertion, and the better Payment of the Army and their Quarters.*

Mut. Act,
49 Geo. III.
c. 12. § 12B.

County of _____ Be it remembered that,
on the _____ day of _____ in the
year of our lord _____ at _____ in the coun-
ty aforesaid, _____ came before me, (*or us*)
one (*or two*) of his majesty's justices of the
peace in and for the said county, and informed
me (*or us*) upon oath, that _____ of _____ on

the ——— day of ——— now last past, at ——— in the same county, did (*here set forth the fact.*) Whereupon the said ———, after being duly summoned to answer the said charge, appeared before me, (*or us*) the said justice, (*or justices*) on the ——— day of ——— at ——— in the said county, and having heard the charge contained in the said information, declared that he was not guilty of the said offence; but the same being fully proved, on the oath of ———, a credible witness, it manifestly appears to me, (*or us*) the said justice, (*or justices*) that he, the said ———, is guilty of the said offence charged upon him in the said information. It is therefore considered and adjudged by me, (*or us*) the said justice, (*or justices*) that he, the said ———, be convicted. And I (*or we*) do hereby convict him of the offence aforesaid. And I (*or we*) do hereby declare and adjudge that the said ——— hath forfeited the sum of ——— for the offence aforesaid, to be distributed as the law directs, according to the statute in that case made and provided.

Given, &c.

Warrant for
holding Court
of Inquiry.

2. *Warrant for holding a Court of Inquiry, issued by his late Majesty George II. in 1757.*

GEORGE R.

Whereas we were pleased, in August last, to send a number of our troops on an expedition against France, with orders and instructions to attempt, as far as should be found practicable, a descent upon the French coast, at or near Rochefort, in order to attack, if practicable, and by a vigorous impression force that place; and to burn and destroy, to the utmost of their power, all docks, magazines, or arsenals, and shipping, that should be found there, and to exert such other efforts as should be judged most proper for annoying the enemy, as by our several instructions to the commander of the said forces does more fully appear: *And whereas* the troops sent for these purposes have returned to Great Britain, no attempt having been made to land on the coast of France; concerning the cause of which failure we think it necessary that inquiry should be made by the general officers hereafter mentioned, in order that they may report those causes to us, for our better information: *Our will and pleasure* therefore is, and we do here-

by nominate and appoint our right trusty and right entirely beloved cousin and counsellor Charles Duke of Marlborough, lieutenant-general; and our trusty and well-beloved George Sackville, commonly called Lord George Sackville, and John Waldegrave, major-generals of our forces, to examine and inquire touching the matters aforesaid: *And* you are to give notice to the said general officers, when and where they are to meet for the said examination: *And* the said general officers are hereby directed to cause you to summon such persons, (whether the generals or other officers employed on the expedition, or others), as are necessary to give information touching the said matters, or as shall be desired by those who were employed on the expedition: *And* the said general officers are hereby farther directed to hear such persons as shall give them information touching the same; and they are authorised, empowered, and required, strictly to examine into the matters before mentioned, and to report a state thereof, as it shall appear to them, together with their opinion thereon. All which you are to transmit to our secretary at war, to be by him laid before us, for our consideration; and for so doing, this shall be, as well to you as to our said general officers, and all others concerned, a sufficient warrant.

Given at our Court, at Kensington, this
1st day of November 1757, in the 31st
year of our reign.

BARRINGTON.

To our trusty and well-beloved
Thomas Morgan, Esq. judge-
advocate-general of our forces,
or his deputy.

Warrant for ap-
pointing Gene-
ral Court Mar-
tial.

3. *Warrant of the King appointing General
Court Martial.*

GEORGE R.

Whereas it has been most humbly repre-
sented unto us, that the following charge has
been exhibited against _____
viz. _____ which charge
we think fit should be inquired into by a ge-
neral court martial, our will and pleasure there-
fore is, that a general court martial be forth-
with held upon this occasion, which is to
consist of _____ whom we ap-
point president thereof, and of a sufficient
number of other officers, of competent rank
and quality, who can be conveniently sum-
moned to attend the same, and you are to
order the provost marshal general of our forces,
or his deputy, to give notice to the said presi-
dent and officers, and all others whom it may

concern, when and where the said court martial is to be held, and to summon such witnesses as may be able to give testimony touching the charge aforesaid, the said provost marshal general and his deputy, being hereby required to obey your orders, and give their attendance where it shall be requisite, and we do hereby authorise and empower the said general court martial, to hear and examine into all such matters and informations as shall be brought before them, touching the charge against the said

as aforesaid, and to proceed in the trial, and in giving sentence according to the rules of military discipline. And for so doing, this shall be, as well to you as to the said general court martial, and all others whom it may concern, a sufficient warrant.

Given at our court, at St. James's, this
day of in the
year of our reign.

By his majesty's command.

[Secretary of State's signature.]

To
Our right trusty and well-beloved councillor, judge-advocate general of our forces, or his deputy.

Warrant for ap-
pointing New
Members to
Court Martial.

4. *Warrant of the King appointing New Mem-
bers to a Court Martial.*

GEORGE R.

Sign Manual.

Whereas we were pleased, by our commis-
sion, dated on the 31st day of October 1758,
to appoint George Sackville, Esq. commonly
called Lord George Sackville, then a lieute-
nant general in our service, to be commander-
in-chief of all our British forces, as well horse
as foot, then serving on the Lower Rhine, in
our army assembled or to be assembled there,
under the command of our good cousin Prince
Ferdinand of Brunswick, commander-in-chief
of our said army, enjoining and requiring him,
the said Lord George Sackville, to obey such
orders and directions as should be given him
by the said Prince Ferdinand, or such other
person as might hereafter be commander-in-
chief of our said army, according to the Rules
of War: *And whereas* we were pleased, by
our instructions, under our sign manual, bear-
ing date the same 31st day of October, 1758,
to direct the said Lord George Sackville con-
stantly to put in execution such orders as he
might receive from our said good cousin Prince

Ferdinand of Brunswick, or such other person as might hereafter be commander-in-chief of our said army, according to the Rules of War, with regard to marching, counter-marching, attacking the enemy, and all operations whatsoever to be undertaking by our said troops: *And whereas* we were informed that the said Lord George Sackville hath disobeyed the orders of the said Prince Ferdinand; which charge we thinking fit should be inquired into by a general court martial, did, by our warrant, bearing date the 26th day of January last, order that a general court martial should be forthwith held upon that occasion, which was to consist of our trusty and well-beloved Richard Onslow, lieutenant-general of our forces, whom we did appoint to be president thereof, and of our trusty and well-beloved Henry Pulteney, Sir Charles Howard, Knight of the Bath, John Huske, John Campbell, our right trusty and well-beloved counsellor John Lord De Lawarr, our trusty and well-beloved James Cholmondeley, James Stuart, our right trusty and well-beloved cousin William Earl of Panmure, our trusty and well-beloved William Kerr, commonly called Earl of Ancram, our right trusty and well-beloved cousin William Earl of Harrington, our trusty and well-beloved James Abercromby, our right trusty

and well-beloved cousin George Earl of Albemarle, our trusty and well-beloved Francis Leighton, lieutenant-generals;—our trusty and well-beloved Edward Carr, our right trusty and well-beloved cousin Thomas Earl of Effingham, our trusty and well-beloved Robert Rich, and William Belford, major-generals of our forces;—all of whom, or the said president, together with any twelve or more of the said officers, might constitute the said general court martial; which said general court martial hath met, but hath not yet examined any witnesses:

And whereas it hath been since represented, that the said president, Lieutenant-General Richard Onslow, hath been taken suddenly ill, and is unable to attend: *And whereas*, if others of the said members should by unavoidable accidents be prevented from attending, there may not be a sufficient number to compose a general court martial, *Our will and pleasure is*, and *we* do hereby direct, that the general court martial for the trial of the said Lord George Sackville, do consist of our trusty and well-beloved Sir Charles Howard, Knight of the Bath, whom we do hereby appoint to be president thereof; and of our trusty and well-beloved John Huske, John Campbell, our right trusty and well-beloved counsellor John

Lord De Lawarr, our trusty and well-beloved James Cholmondeley, James Stuart, our right trusty and well-beloved cousin William Earl of Panmure, our trusty and well-beloved William Kerr, commonly called Earl of Ancram, our right trusty and well-beloved cousin William Earl of Harrington, our trusty and well-beloved James Abercromby, our right trusty and well-beloved cousin George Earl of Albemarle, our trusty and well-beloved Francis Leighton, Robert Manners, Esq. commonly called Lord Robert Manners, lieutenant-generals;—our trusty and well-beloved Edward Carr, our right trusty and well-beloved cousin Thomas Earl of Effingham, our trusty and well-beloved Robert Bertie, Esq. commonly called Lord Robert Bertie, and Julius Cæsar, major-generals of our forces;—all of whom, or the said lieutenant-general Sir Charles Howard, president, together with any twelve or more of the said last-mentioned officers, may constitute the said general court martial: *And* you are to order the provost marshal general, or his deputy, to give notice to the said president and officers, and all others whom it may concern, when and where the said court martial, hereby appointed, is to be held, and to summon such witnesses as shall be able to give testimony in this matter; the said provost marshal general, and his deputy, being hereby

Warrant appointing new members to court martial,

Warrant ap-
pointing new
members to
court martial

directed to obey your orders, and give attendance where it shall be requisite. *And we* do farther authorise and empower the said court martial, hereby appointed, to hear and examine all such matters and informations as shall be brought before them, touching the charge aforesaid, and proceed in the trial of the said Lord George Sackville, and in giving of sentence, according to the rules of military discipline; which said sentence you are to return to our secretary at war, to be laid before us for our consideration: *And* for so doing this shall be, as well to you as to the said court martial hereby appointed, and all others concerned, a sufficient warrant.

Given at our court, at St. James's, this 6th day of March, 1760, in the 33d year of our reign.

By his majesty's command,

HOLDERNESSE.

To our trusty and well-beloved
Thomas Morgan, Esq. judge-
advocate general of our forces,
or his deputy.

4. *Warrant of the King, empowering the Commander-in-chief to appoint Courts Martial, &c.*

Whereas an act was made and passed in the

last session of parliament, intituled an act for punishing mutiny and desertion, and for the better payment of the army and their quarters; and whereas we have been pleased to establish articles of war for the better government of all our forces, which act of parliament and articles of war are hereunto annexed; we, for the more effectually carrying the purposes of the said act and articles of war into execution within the limits of your command, have thought fit to direct, and we do hereby authorise and empower you from time to time, as occasion may require, to convene, or cause to be assembled, general courts martial for the trial and punishment of mutiny and desertion, or any other offence committed against the rules of military discipline by any officer or soldier of our forces under your command.

His majesty's
warrant empow-
ering com-
mander in-chief
to appoint courts
martial.

And we do hereby farther empower you to direct your warrant to any officer, not under the degree of a field-officer, having the command of a body of our forces there, authorising him to convene courts martial for the trial of offences committed by any officer or soldier under his command, every of which courts martial shall consist of a president and of a competent number of other officers who can be conveniently summoned to attend the same, regard being always had, as well in the appointment of such president as in the rule and qua-

His majesty's
warrant em-
powering com-
mander-in-chief
to appoint courts
martial.

lity of the other officers composing such courts martial, to the rules prescribed by the said act of parliament and articles of war. And we do hereby authorise and empower such court martial to hear and examine all such matters and informations as shall be brought before them, touching the misbehaviour of any commissioned officer, non-commissioned officer, or soldier, by mutiny, desertion, or otherwise, as aforesaid; and to proceed in the trial of such charges, and in giving of sentence and awarding punishment according to the powers and directions contained in the said act of parliament and articles of war.

And whereas it is necessary to have military discipline kept up amongst our said troops under command, in as great exactness as possible, and as nothing can contribute more to retain the soldiers in due obedience to their officers, and to make them diligent in discharging the duty incumbent on them, than the bringing delinquents to speedy justice; our will and pleasure therefore is, and we do hereby farther authorise and empower you, when and as often as any sentence shall be given and passed by a general court martial, legally constituted and appointed as aforesaid, to cause such sentence to be put into execution, or to mitigate or remit the same as you shall judge best and most convenient for the good

of our service, without waiting for our farther orders, except in the case of commissioned officers convicted of capital crimes, or adjudged to be cashiered, in which case, as in other instances wherein you shall think it proper to suspend the execution of any sentence, the proceedings of a court martial upon such trial are to be transmitted to our judge-advocate-general in Great Britain, in order to their being laid before us for consideration. And, that there may not in any case be a failure of justice from the want of a proper person authorised to act as judge-advocate, we do hereby farther empower you, in default of a person appointed by us, or deputed by the judge-advocate-general of our forces, or during illness or occasional absence of the person so appointed or deputed, to nominate and appoint a fit person from time to time for executing the office of judge-advocate at any such court martial, for the more orderly proceedings of the same.

His majesty's warrant empowering commander-in-chief to appoint courts martial.

And, for enforcing the adjudication or sentence of any such court martial, we do also give you authority to appoint a provost marshal, to use and exercise that office, as is usually practiced in the law martial.

And, for exercising the several powers, matters, and things, herein expressed, these shall be, as well to you, as to the said courts mar-

His majesty's
warrant em-
powering com-
mander-in-chief
to appoint courts
martial.

tial, and all others whom it may concern, a sufficient warrant and authority.

Given at our court, of St. James's, this 9th day of October, 1793, in the thirty-fourth year of our reign.

By his majesty's command.

(Signed) HENRY DUNDAS.

To our trusty and well-beloved David Dundas, major-general, and commander-in-chief of our forces at _____ or to the officer commanding-in-chief our said forces for the time being.

5. *Warrant of a Commander-in-chief to a Brigadier-general, empowering him to convene Courts Martial and appoint acting Judge-advocate.*

By his Excellency Lieutenant-General Thomas Trigge, Commander-in-chief of his majesty's forces in the West Indies, &c. &c. &c.

By virtue of a warrant under his majesty's sign manual, bearing date the 25th day of March, 1800, authorising me to empower any officer (not under the rank and degree of a field-officer), having the command of a body of his majesty's forces, to convene or cause to be assembled general courts martial, for the

trial and punishment of mutiny and desertion, or any other offence committed against the rules of military discipline by any officer or soldier under his command, every of which court martial shall consist of a president and competent number of other officers, who can be conveniently assembled to attend the same, regard being always had, as well in the appointment of such president as in the rank and quality of other officers composing such courts martial, to the rules prescribed by an act of parliament, intituled "An Act for the Punishment of Mutiny and Desertion, and Articles of War; you are hereby authorised to convene general courts martial for the aforesaid purposes, according to the rules and regulations prescribed. And all such courts martial are empowered to hear and examine all such matters and informations as shall be brought before them, touching the misbehaviour of any commissioned officer, non-commissioned officer, or soldier, by mutiny, desertion, or otherwise, as aforesaid; and to proceed in the trial of such charges, and giving sentence, and awarding punishment, according to the powers and directions contained in the said Act of Parliament and Articles of War.

Warrant of commander-in-chief empowering brigadier gen. to convene courts martial.

And whereas it is necessary to have a military discipline kept up amongst the troops under your command in as great exactness as

Warrant of commander-in-chief empowering brigadier-gen. to convene courts martial.

possible, and as nothing can contribute more to retain the soldiers in due obedience to their officers, and to make them diligent in discharging the duty incumbent on them, than bringing delinquents to speedy justice, you are hereby directed, when and as often as the proceedings are closed of any such court martial, legally constituted as aforesaid, to cause the said proceedings to be transmitted for my consideration. And, that there may not be a failure of justice, in any case, from the want of a proper person authorised to act as judge-advocate, you are hereby farther empowered to nominate and appoint a fit person, from time to time, for executing the office of judge-advocate at any such court martial, for the more orderly proceedings of the same.

Given under my hand, at head-quarters,
Martinique, this 31st day of July,
1800.

THOMAS TRIGGE,
Lieutenant-General.

By his Excellency's command,
R. A. DARLING,
Military Secretary.

To his Excellency the Hon. A. C.
Johnstone, brigadier-general, com-
manding his majesty's troops in the
Island of Dominique.

6. *Warrant by a Commander-in-chief, appointing President of a General Court Martial.*

By the Honourable Charles Stuart, Lieutenant-General and Commander-in-chief of his Britannic Majesty's Forces in the Kingdom of Corsica, &c.

Whereas powers and authority are vested in me to convene general courts martial for the trial and punishment of mutiny and desertion, or any other offence committed against the rules of military discipline by any officer or soldier of the forces under my command; I do hereby authorise and appoint you to be president at the general court martial, ordered to be holden on Wednesday, the 26th instant.

Warrant of commander-in-chief appointing president of a general court martial.

For which this shall be your sufficient warrant.

Given under my hand and seal, at Bastia, this 25th day of November, 1794.

(Signed) CHARLES STUART,
Lieutenant-General.

By order of the Commander-in-chief.

(Signed) JOHN DRINKWATER,
Secretary.

To Robert Brereton, Esq. Major
of the 30th, or Cambridgeshire
Regiment of Foot.

7. *Warrant of a Commander-in-chief to President to assemble Court Martial.*

By Francis Dundas, Esq. Lieutenant-General, and commanding his Majesty's Troops at the Cape of Good Hope, and Dependencies thereof.

To Colonel John Hamilton, of his Majesty's 81st Regiment of Foot.

Warrant to president to assemble court martial.

By virtue of the power and authority given and granted to me by his majesty, I do hereby constitute and appoint you to be president of a general court martial to be held at Wynberg camp, on Monday next, the 6th of December instant, at ten o'clock. And the said court martial is hereby authorised and required to hear and examine all such matters and information as shall be brought before them, touching the misbehaviour of any commissioned officer, non-commissioned officer, or soldier, by mutiny, desertion, or any other offence committed against the rules of military discipline. And to proceed to the trial of such charges, and in giving of sentence, and awarding punishment, according to the powers and

directions contained in an act of parliament now in force, intituled “ An Act for Punishing Mutiny and Desertion, and for the better Payment of the Army and their Quarters,” and the Articles of War. And for so doing, this shall be, to you and all concerned, a sufficient warrant and authority.

Warrant to president to assemble courts martial.

Given under my hand and seal, at headquarters, Wittle Boom, this 3d day of December, 1802.

(Signed) FRANCIS DUNDAS,
Lieutenant-General.

(Signed) P. ABERCROMBY,
Major of Brigade.

8. *Warrant of a Commander-in-chief appointing Military Judge-Advocate.*

By his Honour Lieutenant-General Francis Dundas, Colonel of his Majesty's Scotch Brigade, Governor of Carrick Fergus, in Ireland, Lieutenant-Governor, acting Governor, and Commander-in-chief, of his Majesty's Town and Settlement of the Cape of Good Hope, in South Africa, and of the

Territories and Dependencies thereof, and Ordinary and Vice-Admiral of the same.

To Captain Robert M'Nab, of his Majesty's
91st Regiment.

Warrant of com-
mander-in-chief
appointing
judge-advocate.

By virtue of the power and authority to me given by his majesty, I do hereby constitute and appoint you, Captain Robert M'Nab, of the 91st regiment, to be deputy judge-advocate at the Cape of Good Hope, and as such to perform all the duties of that avocation to the best of your abilities and understanding, carefully following and obeying all such instructions and directions as you may from time to time receive from me, or from any other person commanding his majesty's forces in this colony. And for so doing this shall be, unto you and to all concerned, a full and sufficient warrant and authority.

Given under my hand and seal, at the
Castle of Good Hope, this 14th day of
May, 1802.

FRANCIS DUNDAS,
Lieutenant-General.

By his Honour's command,
T. C. SMYTH, Adjutant,
Acting Military Secretary.

9. *Warrant of a Commander-in-chief appointing Acting Judge-Advocate.*

By Charles O'Hara, Esq. Major-General of his Majesty's Forces, Colonel of the 22d, or Cheshire, Regiment of Foot, Commander-in-chief of the Town and Garrison of Gibraltar.

To John Drinkwater, Esq. Captain in the 2d Battalion of his Majesty's 1st, or Royal, Regiment of Foot.

By virtue of the power and authority vested in me by his majesty, I do hereby appoint you, the said John Drinkwater, to act as deputy judge-advocate during the indisposition of John Morrison, Esq. at all such general courts martial as shall be held for the trial of any person or persons who do or shall belong to any of his majesty's forces serving within the town and garrison of Gibraltar, pursuant to an act of parliament now in force, *viz.* an act, intituled "An Act for Punishing Mutiny and Desertion, and for the better Payment of the Army and their Quarters," and to such Articles of War as shall be established by his majesty, during the continuance of the power

Warrant of commander-in-chief appointing acting judge-advocate.

Warrant of commander-in-chief appointing acting judge-advocate. and authority hereby given you to act as aforesaid.

Given under my hand and seal at Gibraltar, the 2d day of October, 1787, and in the twenty-seventh year of his majesty's reign.

By order of the Commander-in-chief,
CHARLES O'HARA.

10. *Warrant of a Commander-in-chief jointly appointing Court Martial, its President, and Judge-Advocate.*

By his Excellency the Honourable Andrew Cochrane Johnstone, Governor of the Island of Dominica, Brigadier-General, commanding his Majesty's Troops in the said Island, &c. &c.

By virtue of a warrant, under his Excellency the commander-in-chief's sign manual, bearing date at head-quarters, Martinique, the 31st day of July, 1800, empowering me to convene general courts martial for the trial and punishment of mutiny and desertion, or any other offence committed against the rules of military discipline by any officer or soldier under my command, I do hereby order a general court

martial to be assembled on the 19th day of August, 1800, at Fort Young, in the island of Dominica, at nine o'clock in the morning, for the trial of such prisoners as may be brought before it, whereof Lieutenant-colonel Guard of the 45th regiment is to be president.

Warrant appointing president and judge-advocate.

And whereas I have been further authorized to nominate a fit person, from time to time, for executing the office of judge-advocate at any such court martial, for the more orderly proceeding of the same, I do, therefore, hereby appoint Gilbert Salton, Esq. to officiate as judge-advocate at the general court martial hereby ordered to be assembled, and for so doing these shall be, as well to the said Lieutenant-colonel Guard and Gilbert Salton as to all others whom it may concern, a full and sufficient authority for executing the several matters and things herein expressed.

Given under my hand and seal at arms,
at the Government-house, Dominica,
this 18th day of August, 1800.

ANDREW COCHRANE JOHNSTONE.

To Lieutenant-Colonel Guard, 45th Regiment, and Gilbert Salton, Esq. the former appointed President, and the latter to officiate as Judge-advocate, at a general court martial, to be convened at Fort Young.

11. *Warrant of a Commander-in-chief for executing Sentence of Death.*

By the Right Hon. the Earl of Cavan, Major-General of his Majesty's Forces, and Commanding-in-chief in Egypt, &c. &c. &c.

To Major-General Baird, Colonel of his Majesty's 54th Regiment, &c. &c. &c.

Warrant for executing sentence of death.

Whereas by an act passed in the 41st year of the reign our Sovereign Lord George the Third, intituled, "An Act for Punishing Mutiny and Desertion, and for the better Payment of the Army and their Quarters," it is enacted, that his majesty may grant his warrant to the persons commanding-in-chief his majesty's forces, for convening or authorising any officer not under the degree of a field-officer to convene, general courts martial, for the trial of offences committed by any of the forces under their command :

And whereas by a general court martial, legally assembled in the town of Alexandria, on the 23d day of April last, by virtue of a warrant, authorising me to convene the same as aforesaid, Cochran Hamlam, private soldier in his majesty's 88th regiment, has been found

guilty of the crime of desertion, and has been sentenced to be shot to death :*

Warrant for executing sentence of death.

And whereas I have found it expedient, for the good of his majesty's service, to approve of the judgement of death, thus given against this prisoner, and to direct that the same shall be carried into execution.

I do therefore hereby require that you, major-general Baird, do on Wednesday next, the 5th day of May, between the hours of five and twelve o'clock in the morning, carry the said sentence into execution, by causing the said prisoner, Cochran Hamlam, to be shot dead ;* and for so doing this shall be to you, and to all others concerned, sufficient warrant and authority.

Given under my hand and seal, at head quarters, Alexandria, this 4th day of May, in the year of our Lord 1802.

(Signed) CAVAN,

Major-General, Commanding-in-chief.

By his Lordship's command.

(Signed) S. J. POPHAM,
Captain, Secretary.

* If to be hanged,—“ to be hanged until he is dead,” are the terms to be substituted.

II. PRECEDENTS.

1. *Notification of Judge-Advocate on a General Court Martial to the President.*

Horse-Guards, 23d Feb. 1792.

SIR,—I take the earliest opportunity of acquainting you, that his majesty has signed a warrant, by which you are appointed president of a general court martial, which is proposed to be holden at Portsmouth, for the trial of three officers of the 54th regiment of foot, upon sundry articles of charge which have been exhibited against them. I shall take care that you have convenient notice, when a day can be fixed for the meeting of the court martial, and will also send you a copy of the respective charges. The present intimation is intended only to apprise you of the intention, that you may not, from want of knowing it, remove to a distance from Portsmouth less convenient than Chichester.

Can you have the goodness to recommend a proper person to assist as judge-advocate upon the occasion, and who may be acceptable to you?

I have the honour to be, sir,

Your most obedient and most humble servant,

CHARLES GOULD.

Major-General Crosbie. at Chichester.

2. *Notification of Judge-Advocate to President,
individually to attend.*

Judge-Advocate-General's Office,
7th October, 1809.

His majesty having been pleased to sign two special warrants, in which you are named president, directing that a general court martial be holden for the trial of John Watts and Solomon Everill, private soldiers, in the King's Own Staffordshire Regiment of Militia, I have to acquaint you that the same is appointed at the Royal Hospital at Chelsea, on Thursday next, and to desire that you will be pleased to meet the other officers there, who are appointed for that duty, at ten o'clock in the morning.

I have the honour to be, &c. &c.

R. RIDER.

Colonel B——.

3. *Notification of Judge-Advocate on a General
Court Martial to the Prosecutor.*

Horse-Guards, 23d Feb. 1792.

SIR,—Having received his majesty's warrant for convening a general court martial, for the

trials of Captain Richard Powell, and Lieutenants Christopher Seton and John Hall, of the 54th regiment of foot, upon several charges, which I am given to understand have been preferred by you against those officers respectively, as specified in the paper hereunto annexed, I am to desire you will inform me whether there are any witnesses necessary to prove those charges, whom you wish to be officially summoned.

When I shall have received your answer, and the answers of the officers to be tried to the like question, I shall be enabled to form a judgment of the probable time of the court's meeting, which is proposed to be holden at Portsmouth or at Hulsea barracks.

I am, sir, your humble servant,

CHARLES GOULD,

Judge-Advocate General.

Mr. William Cobbett, late Sergeant-Major of the 54th Regiment of Foot, No. —, Felix-Street, Lambeth.

4. *Notification of Judge-Advocate on a General Court Martial to the Prisoner.*

Horse-Guards, 23d Feb. 1792.

SIR,—Having received his majesty's warrant for convening a court martial for your trial,

and also for the trials of Captain Powell and Lieutenant Seton, of the 54th regiment of foot, upon charges exhibited against you and them respectively, I take the earliest opportunity of sending you a copy of those charges which respect you; and am to desire if there are any witnesses whom you wish to be officially summoned as material for your defence, that you will transmit their names and address.

I am, sir,

Your most obedient and most humble servant,

CHARLES GOULD.*

Lieutenant John Hall, of the
54th Regiment of Foot.

5. *Notification of Judge-Advocate to the Commanding Officer of a Regiment to produce Witnesses and Regimental Books.*

Horse-Guards, 15th March, 1792.

MY LORD,—I believe your lordship was informed that his majesty had deemed it necessary, all circumstances considered, that the intended court martial, for the trial of Captain Powell, Lieutenant Seton, and Lieutenant Hall, of the 54th regiment, upon the charges ex-

* If the etiquette of a letter be subtracted, the same form must serve for a private soldier.

Notification of
judge-advocate
for the produc-
tion of regi-
mental docu-
ments.

hibited against them respectively by Mr. William Cobbett, should be held in London, which, so far as respects myself personally, I had abundant reason to wish might have been assembled at Portsmouth.

Having reason to suppose that all the witnesses necessary, for supporting or repelling the charges, can be had upon a short notice, I now propose to convene a general court martial, the latter end of next week, Friday the 23d, or Saturday the 24th, at the latest.

And in consequence of a formal application made to me in writing by the prosecutor, the said William Cobbett, stating those several papers and books to be necessary documents, I am to request that your lordship will give such orders as may insure their production at the trial, under the direction of the court martial, of "all the regimental and company books, containing accounts from the 1st Sept. 1787, to the 1st Oct. 1791."—By the regimental books the prosecutor explained, "that he means the review-book, the description-book, the register of appointed and reduced, &c. non-commissioned officers, the monthly return-book, the orderly-book, the distribution and annual account book, the abstract-book, the two monthly state books, and the quarter-master's books:" by companies' books, he means the books of every company in the

regiment, where the particular accounts of the non-commissioned officers, and men, are kept.

Notification of judge-advocate for the production of regimental documents.

I have the honour to be, My Lord,

Your Lordship's most faithful

and most obedient Servant,

CHARLES GOULD.

Major Lord Edward Fitzgerald,
of the 54th Regiment of Foot.

6. *Summons of Judge-Advocate to Witnesses.*

Judge-Advocate's Office, Horse-Guards,

17th March, 1792.

A general court martial being appointed to be held here on Saturday next, the 24th inst. at ten o'clock in the morning, for the trial of three officers of the 54th regiment of foot, upon several charges respectively preferred against them by Mr. William Cobbett, late serjeant-major of the said regiment; and your testimony having been represented by him as material upon the said trial, I am therefore to desire you, and you are hereby summoned to give your attendance, in order to your being examined as a witness.

CHARLES GOULD,

Judge-Advocate General.

Mr. Jacob Margas.

7. *Minutes of Proceedings, including a written Address of a Soldier, stating his Cause of Appeal from Regimental to General Court Martial.*

Castle of Good Hope, 17th May, 1802.

This day assembled, agreeably to the general orders of Lieutenant-general Dundas, the general court martial, consisting of Brigadier-general J. P. Vandaleur, president.

MEMBERS.

Lieutenant-colonel James Catlin Craufurd,	91st.
Major William Parr,	— — 22d.
— Robert Gordon,	— — 34th.
Captain J. H. Fitzsimmons,	— — 65th.
— B. Fenwick,	— — R. A.
— John Culton	— — do.
— A. Campbell,	— — Cape R. R.
Major George Dodsworth,	— — 34th.
— William Kersleman,	— — R. E.
— Richard Stewart,	— — 65th.
Captain J. B. Garstin,	— — do.
— Stephen R. Chapman,	— — R. E.
— Edward,	— — 81st.
Captain Robert M'Nab, 91st Regiment,	Deputy Judge-advocate.

APPENDIX.

Major Glegg, 91st regiment, being, from sickness, unable to attend his duty as a member, the court proceed with the remaining fourteen members, having previously given the parties concerned notice, in public court, that, when the opinions of the members are to be collected, the junior officer will not vote, provided at that time the court should continue fourteen members.*

The president, members, and judge-advocate, respectively sworn.

The prisoner before the court being Serjeant Joseph Ginger, of the 34th regiment, who appeals from the sentence of a regimental court martial; and which court assembled on the 26th of April last, at Stellenbosch, consisting of

Captain W. Fenwick, 34th regiment, president.

MEMBERS.

Lieutenant Dickens	—	34th reg.
———— Johnson,	—	ditto.

* A variation in the form naturally suggests itself in this place, namely, the commanding officer's orders for assembling the general court martial should be read and inserted in the preamble of the minutes; and it would not be amiss to insert also the appellant's petition or memorial to the commander in chief, in the same manner as letters of accusation are done in the minutes of naval and military courts martial.

Lieutenant Terriwest,	—	34th reg.
————— 'Tew,	— —	ditto.

Charges upon which the appellant was tried before the said regimental court martial :

“ Serjeant Ginger, 34th regiment, confined by order of Colonel Dickens, commanding 34th regiment, for disobedience of orders, being out of his barracks after hours, and unsoldier-like behaviour to Lieutenant Dawson, on the night of the 18th April.”

Sentence pronounced by that Court Martial.

“ The court are of opinion, that the prisoner, Serjeant Ginger, is guilty of the crimes laid to his charge (being a breach of the Articles of War), do therefore sentence the prisoner to be reduced to the ranks to serve as a private soldier, and also receive five hundred lashes, in the usual manner, at such time and place as the commanding officer may think proper.

(Signed)

W. FENWICK,

President, and Captain 34th Regiment.”

“ Approved and ordered to be put into Execution at the Castle of Good Hope, upon Wednesday, the 28th April, 1802.

(Signed)

R. M. Dickens,

Colonel, commanding 34th Regiment.”

Colonel R. M. Dickens, commanding the 34th regiment, duly sworn, acknowledges that the regimental court martial holden on Serjeant Ginger, and now before the court, assembled by his order, and the sentence approved of by him, as docketed on the proceedings of the court.

The prisoner being asked by the judge-advocate, in open court, if he was the person who appealed from the sentence of the regimental court martial; he answered, yes; and pleaded not guilty to the charge on which he was tried, and now before the court.

Appellant's Address.

“Mr. President, and Gentlemen of this most honourable Court.

“I am extremely sorry to be under the necessity of giving you so much trouble.

“Nothing but the fullest conviction of my having been extremely ill-used and degraded, which, I trust, I shall prove by my conduct never to have merited, being conscious of having at all times, and in every situation I have been placed in, supported a character free from reproach; my anxiety to clear it from the stain it has received, and rescue it from the further ignominy that must be attached to it, by submitting to the sentence of the court martial at

Stellenbosch, could have induced me to appeal to this most honourable court.

“To say nothing of the abuse I received from Mr. Dawson, which was adjusted by a court of inquiry, on the day following that transaction.

“I cannot but observe, that a man of the worst conduct and character, and charged with committing the most atrocious crime, could not have been escorted to Stellenbosch in a more ignominious manner.

“And, I conceive, both in the formation and proceeding of that court martial, it will appear somewhat singular; in the formation, by placing, as one of the members, an officer, who was, at that time, on other duty, and in the proceedings by my being debarred of having the principal evidences necessary to enable me to support my defence.

“And, I also consider, that the charges exhibited against me were not substantiated by any evidence that could warrant the severe sentence awarded against me.

“On reviewing minutely my conduct, during the whole of this affair, I feel myself to have been most unworthily treated: and, it appeared to me, that no other means presented itself of obtaining any redress than by laying my grievances before a general court martial.

“ Mr. President, and Gentlemen of this honourable Court, I have now stated an imperfect outline of the motives that influenced me to appear before you ; and, confident, that you will have the goodness to make every allowance for a man in my situation, I commit myself into your hands, fully persuaded that your decision will be guided by the principles of honour and justice.

(Signed) “ JOSEPH GINGER.”

Resolution of the Court.

The court proceed to examine the several witnesses who had given their testimony before the regimental court martial, and called in the same order.

Lieutenant and Adjutant Dawson, 34th re-^{Witness.}giment, duly sworn ; and, the following evidence given before the the regimental court martial being read over to him, he confirms it.

Evidence by Mr. Dawson.

Lieutenant and Adjutant Dawson informs the court, that, about eleven o'clock of the night of the 18th instant, he met the prisoner out of his quarters on the works of the castle ; that he ordered him twice or thrice home, and

that the prisoner did not appear willing to obey the orders, but entered into a conversation of a very irritating nature, and at last said he would go when he got his hat, upon which the evidence ordered him home without it; the prisoner attempted going for his hat, when the evidence took him by the collar to prevent him. Serjeant Ginger then said, he would not suffer such usage from any man, and immediately struck the evidence on the face; a scuffle ensued, when several blows passed on both sides. The above circumstance happening near the quarters of the drum-major and Serjeant Quintin, the noise brought them out.

Question by the
appellant.

Was the business of the night of the 18th April brought before a court of inquiry by order of the commanding officer?

Answer.

It was the next morning.

Question by the
appellant.

After that court was closed, did you apologize to me for the treatment I had received from you on the preceding night, in presence of some serjeants, and from that time did you consider the matter to have been finally settled?

Answer.

After the court of inquiry I saw the prisoner, and from his misconduct of the night before, which caused me to strike him, his face was a good deal hurt; I sent for the

three serjeants who were present at part of the business, and mentioned before them to the prisoner, that, in consequence of my striking him as I had done, I would forgive him; but desired him to notice, that, if I had brought the matter forward and had not struck him, the serious situation he would be in; which he admitted. I added, that I was sorry I had used him so, but that his misconduct had occasioned it, as he was a person I had a respect for.

In the conversation you had with me in the orderly-room, after the departure of the serjeants, do you recollect that I observed to you, that my epaulettes were lost and my trowsers spoiled? Question by the appellant.

I do. And ordered him a new pair of trowsers, adding I should pay for them as well as his epaulettes if he could not find them. Answer.

The court adjourned till to-morrow at eleven o'clock.

Castle of Good Hope, 18th May, 1802.

Lieutenant Dawson, Adjutant of the 34th regiment, duly sworn.

Was I serjeant-major of the regiment on the night of the 18th April, and mustered regularly in the regiment as such on the 24th of the preceding month? Question by the appellant.

He was, and mustered as such.

Answer.

Question by the
court.

Was he reduced by the sentence of any court martial from the situation of serjeant-major, until the regimental court martial assembled at Stellenbosch on the 26th April last?

Answer.

He was not tried, but Colonel Dickins ordered him to be reduced from serjeant-major to serjeant.

Colonel Dickens in the court acknowledges that the prisoner was mustered as serjeant-major and reduced by him from that situation to serjeant, by his regimental order, issued the 24th April, a copy of which here follows:

*Copy, Regimental Orders by Colonel Dickens,
24th April, 1802.*

“ Serjeant-major Ginger is no longer to be considered as serjeant-major of the 34th regiment, or to be obeyed as such. He is transferred to the grenadier-company, and to be sent over immediately to Stellenbosch in handcuffs, under the charge of one serjeant, one corporal, and twelve privates. Lieutenant and Adjutant Dawson, Serjeant Quintin, Neale, and Baker, are also to repair to Stellenbosch immediately on receipt of this order.”

Resolution of the Court.

It having been clearly proved to the court, that the appellant was serjeant-major of the 34th regiment, and regularly mustered as such, and tried by the court-martial from which he has appealed as a serjeant: it therefore appears to the court, that the proceedings of the regimental court martial are invalid, inasmuch as that the appellant was not, by any sufficient authority, reduced from the rank and pay of serjeant-major to that of a serjeant. The general court martial, therefore, rest their proceedings, until this opinion be submitted to the commander-in-chief, and receive his orders as to any farther investigation.

(Signed) J. P. VANDELEUR,
Brigadier-general and President.

(Signed) ROBERT M'NAB.
Deputy Judge-advocate.

The court adjourned till to-morrow at eleven o'clock.

Castle of Good Hope, 19th May, 1802.

The court assembled, and the following letter received from Lieutenant-general Dundas, read:

Government-House, 19th May, 1802.

SIR,

I have had the honour to receive an extract from the proceedings of the general court martial of which you are president, submitting to my consideration a difficulty which has arisen in the progress of the appeal made from a regimental court martial by the serjeant-major of the 34th regiment, arising from his previous reduction from the rank and pay of serjeant-major to that of serjeant, which appears to the court to have been done without sufficient authority; and I have to signify my concurrence in opinion with the court, that as there is not any competent regimental authority by which a non-commissioned officer can be degraded, unless by the sentence of a court martial, I have to request that the general court martial, of which you are president, will not proceed in the investigation of the appeal at present before them, until the court have inquired, in the first instance, and reported to me the particulars which may have occasioned the degradation of Serjeant-major Ginger to the rank of Serjeant, together with such other circumstances as may have occurred in his subsequent trial by a regimental court martial, in order to enable me to judge how far the pro-

ceedings in this case have been regular and agreeable to the rules of his majesty's service.

I have the honour to be your most obedient and most humble servant,

(Signed) FRANCIS DUNDAS,
Lieutenant-general.

To Brigadier-general Vandeleur,
President of a General Court
Martial.

In consequence of the foregoing letter the court desired Colonel Dickens, who was duly sworn, to state the particulars accordingly.

Statement by Colonel Dickens.

Statement of the circumstances which induced Colonel Dickens to reduce Serjeant Ginger from serjeant-major to serjeant.

When Lieutenant-general Dundas visited Stellenbosch in the latter end of April, I heard, from a report brought by Lieutenant Baker, his aid-de-camp, that a very serious breach of discipline had taken place in the 34th regiment; that Sergeant-major Ginger had struck Lieutenant and Adjutant Dawson, and behaved in a most mutinous and unsoldier-like manner. In consequence of this report, I

wrote to Major Dodsworth, expressing my surprise that such a circumstance should have occurred without its being reported to me. I received an answer from Major Dodsworth, inclosing me the proceedings of a court of inquiry which had been held on the business; and I was so forcibly struck with the impropriety of Serjeant Ginger's conduct, from what he himself urged in his justification, that I issued a regimental order that he was no longer to be obeyed as serjeant-major; but transferred him as serjeant to the grenadier company, and ordered a regimental court martial, which tried and found him guilty. The sentence of that court martial he had appealed against.

My letter to Major Dodsworth, as well as the regimental order, which I beg to read, will shew that my opinion, from the first, was decidedly that Serjeant Ginger should have been tried by a general court martial in the first instance. But the steps which had been taken before the matter came to my knowledge having rendered that measure ineligible, I was under the necessity of marking my disapprobation as strongly as I could of such mutinous and unsoldier-like conduct.

*Copy of the Regimental Orders referred to in
the foregoing Statement.*

27th April, 1802.

R. O.

The regimental court martial of which Captain Fenwick is president, and by which Serjeant Ginger was tried for disobedience of orders, being out of his barracks after hours, and unsoldier-like behaviour to Lieutenant and Adjutant Dawson, on the night of the 18th instant, having found the prisoner guilty of the crimes laid to his charge, have sentenced him to be reduced to serve in the ranks as a private soldier, and to receive five hundred lashes in the usual manner, at such time and place as the commanding officer shall think proper.

Colonel Dickens approves of the above sentence, and directs that it be carried into execution on Wednesday, the 28th instant, at such time as Major Dodsworth shall appoint.

Colonel Dickens cannot, consistently with his duty, omit, on this occasion, to observe, that had not particular circumstances prevented it, he would most assuredly have brought this matter to a much more serious issue, which the good of his majesty's service; and the dis-

cipline of the 34th regiment especially, appear to him to have demanded.

(A true Copy.)

(Signed) WILLIAM DAWSON,
Adjutant 34th Regiment.

Report of the Court in Obedience to the foregoing Letter.

The court having, in obedience to the directions of Lieutenant-general Dundas, called upon Colonel Dickens to state the circumstances that occasioned the degradation of Sergeant-major Ginger :

The court beg leave to refer the lieutenant-general to Colonel Dickens' statement, given on oath, No. 1, with the regimental orders of the 24th and 27th of April, issued by him.

The court have to state that Colonel Dickens commanded a detachment of the troops at Stellenbosch, and ordered the prisoner to be sent to that post, where he was tried by officers of the 34th flank companies on that detachment. And it appears that previous thereto, the officer commanding the 34th regiment in the castle, (at which place the offence is stated to have been committed,) had, after inquiry into the circumstances which happened on the night of the 18th April, permitted the

prisoner to return to his duty, and continue at it until the receipt of the order issued by Colonel Dickens. The court have farther to add, that the two field-officers and senior captain, on the spot, having made every possible inquiry, conceived it the best for both parties, and the credit of the service, that the matter should be made up privately ; more particularly as they had strong grounds for supposing that the adjutant was much in liquor, and had acted with unbecoming violence.

(Signed) J. P. VANDELEUR,
Brigadier-general and President.

(Signed) ROBERT M'NAB,
Deputy Judge-advocate.

Castle of Good Hope, 19th May, 1802.

The court adjourned till to-morrow at eleven o'clock.

Castle of Good Hope, 20th May, 1802.

The court assembled and adjourned till to-morrow.

Castle of Good Hope, 21st May, 1802.

The court assembled this day, and the following letter from Lieutenant-general Dundas, addressed to the president, together with the whole proceedings and letters, as duly recorded, were publicly read in court, and in the presence

of Colonel Dickens, commanding the 34th regiment, and the appellant, Serjeant-major Ginger, of the same regiment,

Copy of Lieutenant-general Dundas's Letter to the President.

Government-House, 21st May, 1802.

SIR,

I have the honour to acknowledge the receipt of your letter of the day before yesterday, stating, in compliance with my wishes, as expressed in my letter of the 19th instant, the circumstances which have occasioned some irregularities in the trial of Serjeant-major Ginger, of the 34th regiment, by a regimental court martial, the proceedings of which are now in appeal before the general court martial of which you are president; and having duly considered all the particulars of the case, as stated by you in the aforesaid report, I have to inform you, that the proceedings of the regimental court martial, held on Serjeant-major Ginger, 34th regiment, having been irregular, must therefore be cancelled accordingly. And I have to desire you will signify to the general court martial of which you are president, that the proceedings of the 34th regimental court martial having thus become

invalid, the appeal from the sentence is consequently no longer a matter to be submitted to the consideration of the general court martial, it being my intention to order Serjeant-major Ginger to be released, and return to his duty as serjeant-major of his majesty's 34th regiment.

I have the honour to be your most obedient and most humble servant,

(Signed) FRANCIS DUNDAS,
Lieutenant-General.

Brigadier-general Vandeleur, &c. &c.

(Signed) ROBERT M'NAB,
Deputy Judge-advocate.

8. *General Orders, including Line Orders, for an Execution.*

GENERAL ORDERS.

Adjutant-general's Office,
Alexandria, Egypt, May 4, 1802.

The Artillery, Engineers, 26th Dragoons dismounted, and the whole of the Infantry, will parade at half-after-five o'clock to-morrow morning, on the low ground in rear of the regiment of Dillon, instead of the garrison parade, as directed in the general orders of the 28th ult. for the purpose of witnessing the ex-

Gen. orders for
an execution.

execution of the prisoners now under sentence of death.

The general commanding expects that regiments and corps will, on this occasion, parade as strong as possible.

Five execution parties, consisting of a serjeant and twelve rank and file each, will parade at a quarter before five o'clock to-morrow morning, at the provost-martial's guard.

Four of these parties will be given by the 88th, and the fifth by the 61st Infantry.

The provost-martial will take the immediate command of these parties, at their arrival at his guard, and will communicate their orders to them.

All the guards of the garrison and advanced posts, with the exception of the quarantine guard, those of forts Cretin, Caffarelli, Turk, and Cleopatra's redoubt, will leave their sentries at their respective posts, and repair themselves to the provost-martial's guard, at a quarter before five o'clock, for the purpose of escorting the prisoner to the place of execution.

All these guards, as well as the execution parties, under the immediate direction of the provost-martial, will be commanded by the field-officer of the day, coming on duty, and will receive such further directions from him as may be necessary.

Gen. orders, &c.
for an execu-
tion.

LINE-ORDERS, by Major-general Baird.

The several corps of the line will parade tomorrow morning, at the appointed hour and place, three deep, but be prepared to form two or four deep, as may be necessary, and they will draw up, so as to form the three sides of a square. The Artillery, Engineers, the Dragoons dismounted, 10th Infantry, and the right wing of the 61st regiment, forming the first or right face; the left wing of the 61st, the guards of the day, and the 88th regiment, the second or rear face; and the regiments of Roll, Dillon, Watevilles, and Chasseurs Britanniques, the third or left face.

The execution parties in divisions, preceded by a band of music, and a corps of drummers, with the provost-martial on horseback at their head, will march, in ordinary time, in front of the prisoners, the music playing the dead march in Saul.

The Guards, formed in divisions also, will march in rear of the prisoners. The captain of the day will command the main guard, which will lead, and the other guards will follow in succession, according to the rank of their respective regiments.

Gen. orders, &c.
for an execu-
tion.

The procession will come into the square from the rear, by the right of the Artillery, and the music and drums, of each corps, will beat to the slow march in Saul, as the procession passes along its front.

The execution parties are to march along the front of the whole line, and as far as the centre coffin, where the three first divisions will halt, and wheel back on their right pivots in line. The fourth and fifth divisions will continue to advance, until they can form opposite to the three first, by wheeling back into line on their left pivots.

The music will then cease.

The guards will march along the right face only of the square, and will form between the left wing of the 61st and 88th regiments, by dressing on their left pivots on the latter corps, and wheeling backwards on their left into line.

The officers commanding the guards, must be cautious to preserve an interval sufficient for the division preceding them.

The band and corps of drums will be furnished by Dillon's regiment.

9. *Act of Parliament for the Proclamation of* Proclamation
of Martial Law.
Martial Law.

Statute passed in Ireland, anno 1798, for the Enactment of Martial Law, entitled, “An Act for the suppression of the Rebellion which still unhappily exists within this Kingdom, (Ireland,) and for the Protection of the Persons and Properties of his Majesty’s faithful Subjects within the same.”

Whereas a traitorous conspiracy, for the subversion of the authority of his majesty and the parliament, and for the destruction of the established constitution and government, hath unfortunately existed within this kingdom for a considerable time, and hath broken out in acts of the most daring and open rebellion :

And whereas his Excellency Earl Camden, then Lord-Lieutenant General and General Governor of Ireland, did on the 30th of March, 1798, by and with the advice of the privy council of this kingdom, issue his most direct and positive orders to the officers commanding his majesty’s forces, to employ them with the utmost vigour and decision, for the immediate suppression of the said rebellion, and did, by

Proclamation
of Martial Law.

his proclamation of the same date, by and with the advice of the privy council, notify the same :

And, whereas, notwithstanding the said orders, so issued as aforesaid, the said rebellion did very considerably extend itself, inso-much that large bodies of armed traitors did, openly, array themselves, and make the most daring and violent attacks upon his majesty's forces, and committed the most horrid excesses and cruelties on the properties and persons of his majesty's loyal subjects :

And whereas, for the more effectual suppression of the said daring and unprovoked rebellion, his Excellency the said Earl Camden did, on the 24th of May, 1798, by and with the advice of the privy council, issue his orders to all general officers commanding his majesty's forces, to punish all persons acting, aiding, or in any manner assisting in the said rebellion, according to martial law, either by death or otherwise, as to them should seem expedient, for the punishment and suppression of all rebels in their several districts, and did, by his proclamation of the same date, by and with the advice of the privy council, notify the same :

And whereas his Excellency the said Earl Camden did, by message, duly communicate his said orders and proclamations, notifying

the same respectively to the Lords Spiritual and Temporal, and Commons then in Parliament assembled, who did, by their addresses to his Excellency, express their cordial acknowledgements for his said messages, and their entire approbation of the decisive measures so taken by his Excellency, by and with the advice of the privy council, however deeply they lamented the necessity by which they were dictated; and the said Lords Spiritual and Temporal, and Commons, did, by their addresses, pledge their full engagement of support of every measure of firmness and vigour, which might be necessary for the speedy and effectual suppression of the said rebellion:

And whereas by the wise and salutary exercise of his majesty's undoubted prerogative in executing martial law, for defeating and dispersing such armed and rebellious force, and in bringing divers rebels and traitors to punishment in the most speedy and summary manner, the peace of this kingdom has been so far restored as to permit the course of the common law partially to take place, but the said rebellion still continues to rage in very considerable parts of this kingdom, and to desolate and lay waste the country by the most savage and wanton violence, excess, and outrage, and has utterly set at defiance the civil power, and

Proclamation
of Martial Law.

Proclamation
of Martial Law.

stopped the ordinary course of justice and of the common law therein :

And whereas many persons who have been guilty of the most daring and horrid acts of cruelty and outrage, in furtherance and prosecution of the said rebellion, and who have been taken by his majesty's forces employed for the suppression of the same, have availed themselves of such partial restoration of the ordinary course of the common law, to evade the punishment of their crimes, whereby it has become necessary for parliament to interpose :

Be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present parliament assembled, and by the authority of the same, That, from and after the passing of this act, it shall and may be lawful to and for the lord-lieutenant or other chief governor or governors of this kingdom, from time to time, during the continuance of the said rebellion, whether the ordinary courts of justice shall or shall not, at such time, be open, to issue his or their orders to all officers commanding his majesty's forces, and to all others whom he or they shall think fit to authorise in that behalf, to take the most vigorous and effectual measures for suppressing the said rebellion in any part of this kingdom,

which shall appear to be necessary for the public safety, and for the safety and protection of the persons and properties of his majesty's peaceable and loyal subjects, and to punish all persons acting, aiding, or, in any manner, assisting in the said rebellion, or maliciously attacking or injuring the persons or properties of his majesty's loyal subjects in furtherance of the same, according to martial law, either by death or otherwise, as to them shall seem expedient, for the punishment and suppression of all rebels in their several districts, and to arrest and detain in custody all persons engaged in such rebellion, or suspected thereof, and to cause all persons so arrested and detained in custody to be brought to trial in a summary manner by courts martial, to be assembled under such authority, and to be constituted in such manner, and of such description of persons, as the said lord-lieutenant or other chief governor or governors shall, from time to time, direct, for all offences committed in furtherance of the said rebellion, whether such persons shall have been taken in open arms against his majesty or shall have been otherwise concerned in the said rebellion, or in aiding, or any manner assisting, the same, and to execute the sentences of all such courts martial, whether of death or otherwise, and to do all other acts necessary for such several purposes.

And be it enacted, That no act which shall be done in pursuance of any order which shall be so issued, as aforesaid, shall be questioned in his majesty's court of King's Bench, or in any other court of common law. And, in order to prevent any doubt which might arise, whether any act alleged to have been done in conformity to any orders so to be issued, as aforesaid, was so done, it shall and may be lawful to and for the said lord-lieutenant or other chief governor or governors to declare such acts to have been done in conformity to such orders; and such declaration, signified by any writing under the hand of such lord-lieutenant or other chief governor or governors shall be a sufficient discharge and indemnity to all persons concerned in any such acts, and shall, in all cases, be conclusive evidence, that such acts were done in conformity to such orders.

And be it further enacted, That all officers, non-commissioned officers, and soldiers, who shall act under any such orders, as aforesaid, shall be responsible for all things which shall be done under such orders to such courts martial only, by which they shall be liable to be tried for any offence against the Articles of War, under any act then in force for such purposes; and such courts martial shall have full and exclusive cognizance of all matters and things

which shall be objected against such officers, non-commissioned officers, and soldiers, respectively, and all proceedings shall be had thereon in the same manner as for offences against the Articles of War, and not otherwise; and the court of King's Bench, or any other court of justice, civil or criminal, shall not take cognizance of any act, matter, or thing, which shall be done by any such officer, non-commissioned officer, or soldier, in pursuance of this act; and if any proceeding shall be had in any such court against any such officer, non-commissioned officer, or soldier, for any such act, matter, or thing, by indictment, action, or otherwise, all such proceedings shall be stayed by summary order, on application to the court wherein they shall be had.

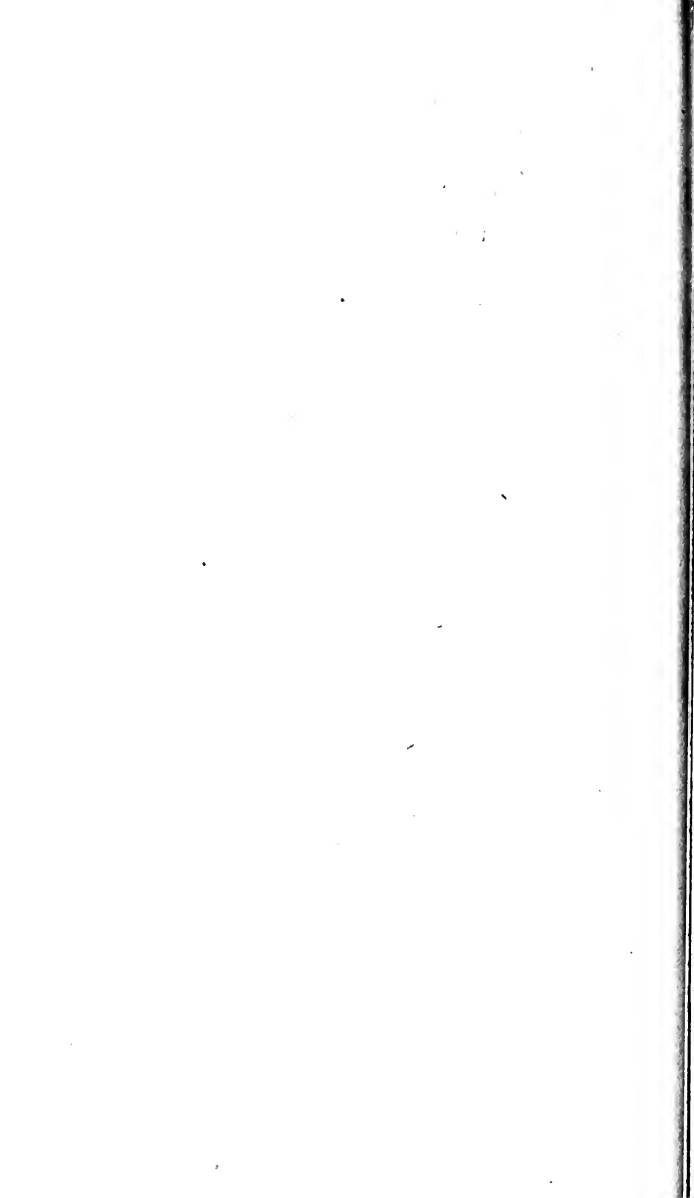
And be it enacted, That, if any person who shall be detained in custody, under the powers created by this act, shall sue forth a writ of Habeas Corpus, it shall be good and sufficient return to such writ, that the party suing forth the same is detained by virtue of a warrant, under the hand and seal of some officer, or other person, duly authorised by the chief governor or chief governors for the time being, to issue such warrant under the authority of this act.

Provided nevertheless, That the name of such

officer or other person so authorised, as aforesaid, to issue such warrant, shall have been *previously notified by the chief governor or governors, or his or their chief secretary, to the court of King's Bench, by writing, signed by the said chief governor or chief governors, or his or their chief secretary, and signifying to the said court that such person or persons was, or were, so authorised, as aforesaid, to exercise the powers specified by this act; and, when such return shall be made, it shall not be necessary to bring up the body of the person who is so detained.*

Provided always, and be it declared and enacted, That nothing in this act contained shall be construed to take away, abridge, or diminish, the acknowledged prerogative of his majesty for the public safety, to resort to the exercise of martial law against open enemies or traitors, or any powers by law vested in the said lord-lieutenant, or chief governor or governors, of this kingdom, with or without the advice of his majesty's privy council, or of any other person or persons whomsoever, to suppress treason and rebellion, and to do any act warranted by law for that purpose, in the same manner as if this act had never been made, or in any manner to call in question any acts heretofore done for the like purposes.

And be it enacted, That this act shall continue, and be of force, until the first day of the next session of parliament, and for two months after the said day, and no longer: And that it shall and may be lawful to repeal, amend, or alter, this act during this session of parliament.



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