

LAW
RELATING
TO
OFFICERS
IN THE
ARMY



G. N. LIEBER,

Judge Advocate General

U. S. Army.



War Dept.





THE LAW

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G. Norman Lieber

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BY

HARRIS PRENDERGAST,

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PREFACE TO FIRST EDITION.

THE preparation of the following Work was suggested by my brother, Lieutenant William Grant Prendergast, of the 8th Bengal Cavalry*, Persian Interpreter on the Staff of Lord Gough, Commander-in-chief in India; and from the same quarter much valuable assistance was originally derived, both as to the selection of topics, and the mode of treating them. Without the help of such military guidance, a mere civilian would have laboured under great disadvantages; and the merit, if any, of the Work, is therefore attributable to my coadjutor alone. For the composition, however, I am alone responsible.

Officers in the Army are subject to a variety of special laws and legal principles, which deeply affect their professional and private rights; and it is hoped that a Work, which endeavours to develop these subjects in a connected and untechnical form, will not be deemed a superfluous contribution to military literature.

With this view, the following pages are by no means so much addressed to lawyers, as to a class of readers whose opportunities of access to legal publications are necessarily very limited; and care has been taken, in all cases of importance, to set

* Now Brevet-Major, and Acting Brigadier on the frontier of the Punjab.

forth the exact words and expressions employed by the learned Judges in propounding the law, and, on other occasions, to give quotations at length from books of authority.

It is conceived that no apology can be necessary for this humble attempt to define the civil rights, duties, and liabilities of an honourable profession. "It has been," says Mr. Justice Blackstone, "the peculiar lot of the English system of laws to be neglected, and even unknown, by all but one practical profession," "I think," says the same eminent writer, "that a competent knowledge of the laws of that society in which we live, is the proper accomplishment of every gentleman and scholar—a highly useful, I had almost said essential, part of liberal and polite education.*"

"No rank, no elevation in life, and let me add," says Mr. Justice Foster, "no conduct, how circumspet soever, ought to tempt a reasonable man to conclude that these enquiries do not, nor possibly can, concern him. A moment's cool reflection on the utter instability of human affairs, and the numberless unforeseen events which a day may bring forth, will be sufficient to guard any man, conscious of his own infirmities, against a delusion of this kind.†"

LINCOLN'S INN,
21st May, 1849.

* 1 Blackstone's *Commentaries*, pp. 5, 6.

† Preface to Foster's *Crown Law*.

PREFACE TO SECOND EDITION.

FOR the purpose of the present Edition, this Work has been carefully revised; and many new decisions on important points have been added.

LINCOLN'S INN,
December 1854.

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| 43 ————— c. 96 . . . | 49 | | 3 & 4 ————— c. 65 . . . 114, 118 |
| 44 ————— c. 75 . . . | 31 | | 5 & 6 ————— c. 12 . . . 43 |
| 45 ————— c. 58 . . . | 84 | | 10 & 11 ————— c. 12 |
| 46 ————— c. 23 . . . | 31 | | 39, 59, 138 |
| 48 ————— c. 15 . . . | 58, 59 | | 10 & 11 ————— c. 21 . . . 16 |
| 48 ————— c. 96 . . . | 3 | | 10 & 11 ————— c. 37 . . . 42, 43 |
| 49 ————— c. 126 | | | 10 & 11 ————— c. 63 . . . 42 |
| 59, 60, 61, 65, 70 | | | 12 & 13 ————— c. 43 |
| 53 ————— c. 155 . . . | 80, 239 | | 13, 15, 21, 22, 209 |
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THE LAW

RELATING TO

OFFICERS IN THE ARMY.

CHAPTER I.

ON THE LEGAL CONSTITUTION OF THE ARMY.

A **STANDING ARMY** is contrary to the common law of England; and is an institution of comparatively modern creation.

The only army which the law recognized before the Revolution of 1688 was the militia; and of this force the King was, by the ancient constitution of the realm, the sole and undoubted Captain-General.

In early times, the greater part of the land of the kingdom was held by the barons, knights, and other retainers of the Crown, under the tenure of military service; so that the King's tenants alone constituted a self-supporting body of troops, prepared to take the field at his summons against foreign or domestic foes. With this feudal array, assisted occasionally by mercenary troops serving for pay alone, the Crown was enabled to obtain a series of splendid victories abroad, and to defend itself for centuries against the rising spirit of English liberty. But this system was destined to have an end.

The military independence of the Crown formed one great cause of the rupture between King Charles I. and his Parliament; and though the latter gained a temporary advantage, the contest on this subject was not finally adjusted until the Revolution of 1688. On the Restoration in 1660, an Act (13 and 14 Charles II.) was passed, the preamble of which declared that "within all His Majesty's realms and dominions the sole and supreme power, government, command, and disposition of the

“ militia, and of all forces, by sea and land, and of all
 “ forts and places of strength is, and by the laws of
 “ England ever was, the undoubted right of His Majesty and
 “ his royal predecessors, Kings and Queens of England.”

At the same time the militia was remodeled. Every man who possessed £500 a year derived from land, or £6000 of personal estate, was bound to provide, equip, and pay, at his own charge, one horseman. Every man who had £50 a year derived from land, or £600 of personal estate, was charged in like manner with one pikeman or musketeer. Smaller proprietors were joined together, and required to furnish, according to their collective means, a horse-soldier or a foot-soldier. The whole number of cavalry and infantry thus maintained was popularly estimated at 130,000 men*. Of this force the lords-lieutenants and their deputies held the command under the King, and appointed meetings for drilling and inspection. The time occupied by such meetings, however, was not to exceed fourteen days in one year: and justices of the peace were authorized to inflict slight penalties for breaches of discipline†.

King Charles II., however, notwithstanding the illegality of the proceeding, set on foot, a few months after his Restoration, a force of 5000 men, which he maintained by his own authority, and out of his own revenue, for guards and garrisons: and the little army thus formed (says Macaulay) “ was the germ of that great and renowned
 “ army which has, in the present century, marched triumphant into Madrid and Paris, into Canton and Candahar‡.”

The force thus established was increased by King James II. to 30,000 men, all paid out of his own civil list. But as the maintenance of a standing military force was not the purpose for which Parliament voted a revenue to the Crown, one of the articles of the famous Bill of Rights, passed at the Revolution in 1688§, expressly declares, that the raising or keeping a standing army in time of peace, unless it be with consent of Parliament, is against law||. It was felt, however, as the exigencies of the times

* Macaulay's *England*, Vol. I. 290.

† Ibid. Stat. 13 & 14 Charles II.

‡ Macaulay's *England*, Vol. I. 294.

§ Stat. 1 Wm. & Mary; Stat. 2, c. 2.

|| Blackstone's *Commentaries*, 44.

rendered the existence of a regular standing army indispensable, that, for the efficiency of the service, the paramount military authority of the Crown should remain untouched. But the Parliament, full of uneasy recollections of the military domination of the Commonwealth, was reluctant to deprive itself of every check upon the exercise of so momentous a trust. To meet the difficulty, therefore, it was arranged that a Bill should pass, authorizing the Crown to raise and maintain a given number of troops for a specified time, leaving them *during that time* at the entire disposal of the Crown; and thus, in the quaint language of Whitelocke, "though the King would have the power of the sword, the Parliament would have that of the purse; so that they must both agree to draw the sword, or else leave it in the scabbard, which is the best place for it*."

This was the constitutional origin of the first Mutiny Act, which was passed in 1689, for a term of six months only, and, with very few intermissions, has been annually renewed ever since†: so that the establishment of the army, as a national institution, is thus annually subjected to the consideration and control of Parliament‡.

This constitutional arrangement, however, by no means affects "the ancient and undoubted prerogative of the Crown to require the military service of all its subjects in case of an *invasion of the realm* by a foreign enemy§."

But the Mutiny Act is not a mere Parliamentary license to the Crown to maintain a body of troops: it also enables the Crown to try offenders against military discipline by court martial. When war was actually raging in the kingdom, a mutineer or a deserter might unquestionably be tried by a military tribunal, and executed by the pro-

* *Law Magazine*, Vol. XIV. 5. † *Ibid.*, and see the dates of these intermissions, Simmons on *Courts-Martial*, 90.

‡ The immediate occasion of this Act is said to have been a Mutiny, stirred up by the emissaries of James II. in a body of English and Scotch troops, on their being ordered to Holland, to replace some of the Dutch troops which King William III. had brought over with him and intended to keep in England. The King immediately communicated the event to Parliament, which readily gave its sanction for the punishment of the insurgents; and on the 3rd April, 1689, the first Mutiny Bill was passed, as above mentioned.—Dalrymple's *Memoirs of Great Britain and Ireland*, I. 246, &c.

§ Preamble to Stat. 48, Geo. III. c. 96.

vost martial: but the common law of England knew nothing of courts martial. It sprung up in an age when all men bore arms occasionally, and none constantly. It recognized no distinction in time of peace between a soldier and any other subject; and the temper of the nation was such, that, until the Revolution, no government would venture to apply to Parliament for authority to punish military offences by military law in time of peace*. A soldier and his officers were, in the eye of the law, on a perfect level. If he knocked down his colonel, he incurred only the ordinary penalties of assault and battery. If he swore at his commanding officer, he might be fined by a magistrate for the oath: but, by refusing to obey orders, by sleeping on guard, or returning to his native village when tired of the camp or the barracks, he incurred no legal penalty at all†.

In Sir Thomas Jones's Reports‡, a case is mentioned where an action for assault and false imprisonment was brought against the lieutenant-governor of the Isle of Scilly by a private soldier, whom he had punished for disobedience by imprisonment. The lieutenant-governor alleged in his defence that, by the ancient custom of the castle, any soldier refusing obedience to the commander was liable to imprisonment for a reasonable time, and that, by virtue of this custom, the plaintiff was punished for disobedience. By resting his defence on a special custom, the governor obviously sought to evade the question, whether the maintenance of discipline by such means was justifiable in point of law as a *general* right. But the court gave judgment in favour of the soldier, and thus negated the power claimed by the governor.

While the King's military force consisted only of a few household regiments on high pay, desertion was scarcely to be apprehended, and military offences were sufficiently punished by dismissal from the service. It is quite clear, however, that military punishments were inflicted during the reign of Charles II., though this was done very sparingly, and in such a manner as not to attract public notice, or produce an appeal to Westminster Hall§.

James II., also, very soon found it impossible to govern

* Macaulay's *England*, Vol. I. 296; Vol. II. 274.

† Ibid.; Lord Campbell's *Chief Justices*, II. 91.

‡ 47.

§ Macaulay's *England*, Vol. I. 297.

without the assistance of martial law, the numerous army which he had collected at Hounslow, for the purpose of enforcing his designs against the liberties of England; and he contended that without any Act of Parliament he was at all times entitled by virtue of his prerogative to put martial law in force against military men, although it could only be put in force against civilians when war or rebellion was raging in the kingdom. The question first arose at the Old Bailey, before Sir John Holt, afterwards so famous as Lord Chief Justice of England, but then Recorder of London; and he decided against the Crown, as might have been expected. The matter was then brought before the Lord Chief Justice Herbert, a judge of ultra-tory politics: but, "to the utter amazement of the King and the Courtiers, this honourable, although shallow, magistrate declared, that without an Act of Parliament all laws were equally applicable to all His Majesty's subjects, whether wearing red coats or grey*." The Chief Justice was displaced; and the King, after packing the courts of law with servile judges and timid juries, brought several deserters openly to trial for quitting the camp at Hounslow for the purpose of aiding his designs against the liberties of England. "They were convicted in the face of the letter and the spirit of the law. Some received sentence of death at the bar of the King's Bench; some at the Old Bailey; and they were hanged in sight of the regiments to which they belonged†."

The discipline, however, of a standing army cannot be maintained, without the means of punishing military offences with more promptitude than by a resort to the slow process of ordinary legal tribunals. When, therefore, a standing army had been legalized by Parliament, the creation of Courts Martial unavoidably followed: and the Mutiny Act, by conferring upon the Crown the necessary powers for this purpose, completes the legal constitution of the army. "The army (says the Chief Justice Lord Loughborough) being established by the authority of the Legislature, it is an indispensable requisite of that establishment that there should be order and discipline kept up in it, and that the persons who compose the army, should, for all offences in their military capacity,

* Lord Campbell's *Lives of the Chief Justices*, II. 91.

† Macaulay's *England*, Vol. II. 276.

“ be subject to a trial by their officers. That has induced “ the absolute necessity of a Mutiny Act accompanying “ the army*.” By the Mutiny Act, military offences, and the penalties attached to them, are specified, and the Crown is empowered to make articles or rules for the better government of the forces; and the articles so made and issued are commonly called the Articles of War. Their operation, however, is wholly commensurate with that of the Act, by the authority of which they are issued; and when the Mutiny Act expires, it is presumed that the Articles of War, made under its authority, expire also; though this point is not known to have come under judicial cognizance. But to prevent impunity for military offences, each successive Mutiny Act contains a clause authorizing the punishment of offences against former Mutiny Acts and Articles of War.

In the early Mutiny Acts, until the 7th or 8th year of Queen Anne, the words descriptive of officers were these,— “ Every person being in H. M. Service in the army and “ being mustered, AND in pay as an officer;” by which words a gentleman of fortune serving without pay could not be brought within the Mutiny Act, nor tried by Court Martial in England in time of peace. But to provide against this defect, and to make all persons subject to military law, whether they received pay or not, the word *or* was substituted for *and**. From the ancient form of the Mutiny Acts, as so worded, it was once argued that half-pay officers were meant to be included. But this was fallacious, there being none such at the time when the alteration was made†.

Previous to the year 1715 the punishments authorized by the Mutiny Acts were on several occasions restricted, so as not to extend to life or limb, even in cases of mutiny or desertion. But from that time forward the Mutiny Acts have uninterruptedly continued enabling Courts Martial to punish with death the crimes of mutiny and desertion; though in 1718 the clause was carried by a very slender majority in both Houses of Parliament‡. It was even contended in debate by Lord Harcourt, an ex-chancellor, that a Bill constituting military tribunals without

* 2 H. Blackstone's *Reports*, 99.

† Lord Lonsdale's Speech, *Parliamentary History for 1749*, 482.

‡ *Parliamentary History*, VII. 536; Hallam's *England*, III. 347.

appeal was an invasion of the rights of the peerage, whose prerogative it was to be the supreme and ultimate court of judicature in all cases, civil and criminal*.

The marines are in law part of the naval forces of the realm†; but as they are frequently quartered on shore, where the naval articles of war have no operation, and are also equally liable with the regular troops of the line to be brought into collision with the people in time of tumult, the Act for authorizing the employment of the marines as a national force is passed annually, like the Mutiny Act for the army, and the Admiralty is empowered to make Articles of War for the marines. The marines, therefore, stand on the same constitutional footing as the army. But when marines are serving, or borne as supernumeraries, on board ships of war, the officers and men are subject to the naval Articles of War.

The Articles of War, both in the land and marine service, being emanations from the Crown and the Admiralty under the statute law, will be judicially noticed in the Superior Courts without formal proof; but in order to instruct the Court, a copy purporting to be printed by the Queen's printers, or, in the case of the marine service, a copy certified under the hand of the Lord High Admiral, or two or more of the Commissioners for executing his office, should be produced‡.

In Ireland, before the incorporating union with Great Britain, the military constitution was on a different footing from that of England. Until the year 1779 the Irish military establishment was regulated by the Mutiny Act annually passed by the British Parliament. But in that year the Irish Parliament, then struggling for independence, transmitted to England for the approbation of the Privy Council, according to the usage of the time, the draft of a bill corresponding to the Mutiny Act of England. The Ministry introduced an amendment rendering it perpetual: and in this form the Irish Parliament passed the bill. The result was the creation in Ireland of a permanent standing army under the uncontrolled direction of the Executive Government§.

* Lord Campbell's *Chancellors*, Vol. IV. 379.

† Preamble to Stats. 42 Geo. III. c. 115; and 3 & 4 Wm. IV. c. 6.

‡ Pitt Taylor *On Evidence*, 1019. (1848).

§ Miller's *History Philosophically Illustrated*, Book IV. chap. 16.

It thus appears that the laws for the government of the army emanate wholly from the civil power, and may properly be viewed, like the ecclesiastical law, as a distinct division of the civil law of the realm. But as great confusion is to be observed in the works of many public writers, for want of attention to the distinction between *martial* law and *military* law, a few remarks on that subject may not be inappropriate in this place.

Military law is totally distinct from martial law. Military law affects only the troops or forces to which its terms expressly apply, while martial law extends to all the inhabitants of the country or district where it happens to be in force. Military law is a code of previously defined regulations: whereas martial law is wholly arbitrary. By its very nature it originates in emergencies, and is regulated by the expediency of the moment. When martial law is in force, everything or anything may be done at the discretion of the military commander, and according to his own rule or method of action*. Military law is in operation during peace as well as in war; but martial law emanates entirely from a state of intestine commotion, or hostile war actually raging in the scene of its administration. Martial law always accompanies troops in the field on foreign service; but it ceases on their return within the jurisdiction of civil or municipal tribunals actually exercising their functions. Military law, on the other hand, consists with the general undisturbed administration of the civil or municipal law, as is constantly exemplified by the sittings of courts martial in garrisons and harbours within the realm during profound peace.

“ Martial law (says Lord Chief Justice Hale) is not in truth and reality a law, but something indulged rather than allowed as a law: the necessity of government, order, and discipline in an army, is that only which gives these laws a countenance. *Quod enim necessitas cogit, defendit.*” This definition by Sir Matthew Hale will be well followed by an extract from the judgment of the

* In Austria there are two degrees of martial law; one in which all judicial proceedings must be brought to a close within twenty-four hours after their commencement; the other in which an indefinite latitude of time is allowed for the conclusion, according to the judgment of the officers charged with the duty.

† Hale's *History of the Law*, 39.

Chief Justice Lord Loughborough in the case of *Grant v. Sir Charles Gould**.

“ Martial law, such as it is described by Hale, and such
 “ also as it is marked by Mr. Justice Blackstone, does not
 “ exist in England at all. Where martial law is established
 “ and prevails in any country, it is of a totally different
 “ nature from that which is inaccurately called martial law,
 “ merely because the decision is by a court martial, but
 “ which bears no affinity to that which was formerly
 “ attempted to be exercised in this kingdom, which was
 “ contrary to the Constitution, and which has been for a
 “ century totally exploded. Where martial law prevails,
 “ the authority under which it is exercised claims a juris-
 “ diction over all military persons in all circumstances.
 “ Even their debts are subject to enquiry by a military
 “ authority. Every species of offence committed by any
 “ person who appertains to the army is tried, not by a
 “ civil judicature, but by the judicature of the regiment or
 “ corps to which he belongs. It extends also to a great
 “ variety of cases not relating to the discipline of the army
 “ in those states which subsist by military power. Plots
 “ against the sovereign, intelligence to the enemy, and the
 “ like, are all considered as cases within the cognizance of
 “ military authority. In the reign of King William III.,
 “ there was a conspiracy against his person in Holland,
 “ and the persons guilty of that conspiracy were tried by
 “ a council of officers. There was also a conspiracy against
 “ him in England, but the conspirators were tried by the
 “ common law. And within a very recent period, the
 “ incendiaries who set fire to the docks at Portsmouth
 “ were tried by the common law. In this country, all the
 “ delinquencies of soldiers are not triable, as in most
 “ countries of Europe, by martial law; but where they are
 “ ordinary offences against the civil peace, they are tried
 “ by the common law courts. Therefore, it is totally
 “ inaccurate to state martial law as having any place
 “ whatever within the realm of Great Britain†.”

Thomas, Earl of Kent, being condemned at Pontefract, 15 Edward II., by martial law, his attainder was reversed, 1 Edward III., because it was done in time of peace.

* 2 H. Blackstone's *Reports*, 98.

† Per Lord Loughborough, C. J., in *Grant v. Gould*; 2 H. Blackstone's *Reports*, 198.

And it is laid down, that if a lieutenant, or other that hath commission of martial authority, doth in time of peace hang, or otherwise execute, any man by colour of martial law, this is murder, for it is against Magna Charta*.

The case of the celebrated Irish patriot, Theobald Wolfe Tone, furnishes a modern instance of the interference of courts of law to prevent the irregular application of martial law to the offence of high treason, at a time when those tribunals were in the full exercise of their ordinary jurisdiction. Tone was one of the prisoners taken on board the *Hoche*, in the disastrous expedition of the French to Ireland, during the period of the Great Revolution. At first he passed unnoticed among the officers; and when they landed at Letterkenny, he was invited with them to a breakfast with the Earl of Cavan. At the breakfast he was recognized, handed over to the police, and sent off to Dublin to be tried for high treason. As soon as Tone arrived in Dublin, preparations were made for trying him by a court martial. Mr. W. Tone, in the account he gives of his father's trial, says that an erroneous notion prevailed; that his father considered his French commission as a protection; but that "he knew perfectly well that the course he had deliberately taken subjected him to the utmost severity of the British laws." But in Tone's own journal for March 1796, he himself says, "I was willing to encounter danger as a soldier, but had a violent objection to being hanged as a traitor; consequently I desired a commission in the French army: as to the rank, that was indifferent to me, my only object being a certainty of being treated as a soldier, in case the fortune of war should throw me into the hands of the enemy, who I knew would otherwise shew me no mercy†." Certainly if we may judge from his own confession, he appeared at that time to think that a French commission would be a kind of safeguard, at least that it would entitle him to a soldier's death; though in his journal of December 25th, 1796, he seems not quite so sure of this result; for he says "perhaps I may be reserved for a trial, for the sake of striking terror into others, in which case I shall be hanged as a traitor‡."

* Coke's *Institutes*, 52.

† *Life*, Vol. II. 71.

‡ *Ibid*, 264.

On Saturday, the 10th November, 1797, the court martial assembled. It was composed of General Loftus, Colonels Vandeleur, Daly, and Wolfe, Major Armstrong, and Captain Curran; Mr. Paterson was Judge-Advocate. Tone appeared in the uniform of a *chef de brigade*; he pleaded guilty to all the charges brought against him, and endeavoured to justify his political conduct in a very eloquent and affecting speech. He ended by requesting to die the death of a soldier, in consideration of the uniform which he wore. He then handed in his commission from the French Directory, signed by the Minister of War, granting him the rank of *chef de brigade*, and a letter of service giving the additional rank of adjutant-general. The Lord Lieutenant, the Marquis Cornwallis, did not think fit to accede to his request, and he was sentenced to be hanged on the 12th November.. Meantime his friends were not idle. Mr. Curran contended that the sentence was illegal, inasmuch as Tone, not being a military man, could not legally be tried by a court martial, while the Court of King's Bench was sitting, as martial law must cease so soon as civil law is re-established. He, therefore, on Monday morning, the day fixed for the execution, moved the Court of King's Bench for a *habeas corpus*, directed to the provost martial of Dublin barracks and Major Sandys, to bring up the body of Tone. The Chief Justice, Lord Kilwarden*, immediately sent the sheriff to the barracks to stay the execution while the writ was preparing. The sheriff speedily returned with the answer of the provost martial, that he must obey Major Sandys, and with the answer of Major Sandys that he must obey Lord Cornwallis. At the same time, Mr. Tone's father, who had gone off with the writ of *habeas corpus*, returned, saying that General Craig had refused to obey it. On this the Chief Justice ordered the sheriff to take the body of Mr. Tone into custody, to take the provost martial and Major Sandys into custody also, and to shew the order of the court to General Craig. When the sheriff again returned it was only to inform the Court of King's Bench that Mr. Tone had cut his throat during the previous night, and could not be removed. The matter was of course then dropped; but

* Reynold's *Life*, Vol. I. 355.

the opinion of the Court of King's Bench was clearly manifested on the subject. Tone not being a British soldier or officer was not subject to the military articles of war which governed the British army; and the courts of common law being then in full exercise of their powers, martial law was wholly inapplicable to his case.

In accordance with this view of the subject, that accomplished jurist, Sir James Mackintosh, thus expressed himself; "while the laws are silenced by the noise of arms, the rulers of the armed force must punish, as equitably as they can, those crimes which threaten their own safety and that of society, but no longer; every moment beyond is a usurpation. As soon as the laws can act, every other mode of punishing supposed crimes is itself an enormous crime*."

At the time of the Irish Rebellion, in 1799, martial law had been successfully exercised in restoring peace, so far as to permit the course of common law partially to revive; but as rebellion raged in some particular parts of the kingdom, a special Act (39 Geo. III., c. 2) was passed by the Parliament of Ireland to enable the Lord Lieutenant to punish rebels by court martial. Sir James Mackintosh remarks upon this statute, as being the most positive declaration, that where the common law can be exercised in some parts of the country, martial law cannot be established in others, though rebellion actually prevails there, without an extraordinary interposition of the supreme legislative authority itself†.

The principle of the last-cited Act of Parliament is further illustrated by the Irish Coercion Act passed in 1833, during the administration of Earl Grey‡. Martial law was there expressly authorized to be established in certain districts, to be for that purpose proclaimed by the Lord Lieutenant; and so long as the proclamation remained in force the ordinary course of justice in criminal matters was suspended§.

* Mackintosh's Works, Vol. III. 408.

† Ibid 409.

‡ Stat. 3 & 4 Wm. IV. c. 4.

§ The whole subject of the application of martial law in time of peace was discussed at large in the celebrated debate of the House of Commons on the trial by court martial, at Demerara, of the Rev. John Smith, a missionary in that colony, on a charge of aiding a rebellion of the slaves.

It may be proper here to advert briefly to another subject, upon which much misunderstanding has prevailed, especially in the remote dependencies of the empire, viz. : the subordination of the military power to the executive government, which in popular language is not unfrequently termed, by way of distinction, the civil power, as if it possessed no control over military matters. The power of Government, however, is both civil and military. It is the power of the Crown : and we have seen that by the Constitution of the realm the Sovereign is captain-general of all forces by sea and land, as well as chief of the ordinary Executive Government. The military functions of the Crown are administered by a chosen body of men bred to this employment as a profession requiring special training and education for the effectual discharge of its duties : but the supreme controlling power of Government extends not less to this than to every other department of the state or body politic, with authority to prevent the execution of any military measure which appears prejudicial to the public interests. Sir George Barlow, the Governor of Madras, acted upon this principle during the military disturbances and discontents at that Presidency in the early part of the present century, when General Macdowall the Commander-in-Chief put Colonel Munro in arrest, preparatory to his trial by court martial, upon charges preferred against him by several officers of the army, with reference to his conduct in the discharge of duties imposed on him by the Government of the Presidency. Colonel Munro having appealed directly to the Government for protection, Sir George Barlow, by virtue of his official power, and in direct opposition to the Commander-in-Chief, issued a positive order for the release of Colonel Munro, and prevented the holding of the intended court martial*. And now by the India Mutiny Act, 12 & 13 Vict., c. 43, the Government of each Presidency is expressly empowered to suspend the proceedings of any court martial.

In former times the annual introduction of the Mutiny Act, which now passes as quietly as any turnpike-road bill, was a regular opportunity for patriots to declaim against a standing army and military government†. But

* See an account of these proceedings in the *Edinburgh Review* for 1810.

† Lord Campbell's *Chancellors*, Vol. V. 119.

as the maintenance of an army without military laws and courts martial for holding officers and men to their duty, was obviously a practical absurdity, this theme of patriotism has died away; so, on the other hand, officers and soldiers are still regarded as fellow citizens of the people, actuated by the same feelings, and ready not only to defend the country against foreign aggression, but to protect the constitution, instead of combining to overturn it*.

So late as 1732 Mr. Pulteney, a man neither disaffected nor democratical, and whose views extended no further than a change of hands, declared that he "always had been, and always would be, against a standing army of any kind: it was to him a terrible thing. Whether under the denomination of Parliamentary, or any other, a standing army is still a standing army, whatever name it is called by: they are a body of men distinct from the body of the people; they are governed by different laws; blind obedience and an entire submission to the orders of their commanding officer is their only principle. The nations around us are already enslaved, and have been enslaved by those very means; by means of their standing armies they have every one lost their liberties. It is indeed impossible that the liberties of the people can be preserved in any country where a numerous standing army is kept up†."

"Nothing could (says Hallam) be more idle, at any time since the Revolution, than to suppose that the regular army would pull the Speaker out of his chair, or in any manner be employed to confirm a despotic power in the Crown. Such power, I think, could never have been the waking dream of either king or minister. But as the slightest inroads upon private rights and liberties are to be guarded against in any nation that deserves to be called free, we should always keep in mind, not only that the military power is subordinate to the civil, but, as this subordination must cease where the former is frequently employed, that it should never be called upon in aid of the peace without sufficient cause‡."

The army has always been understood to be kept on foot, as it is still expressed in the preamble of every Mu-

* *Parl. Hist.*, XIV. p. 451, per Lord Chancellor Hardwicke.

† *Parl. Hist.*, VIII. 904; Hallam's *England*, III. 347.

‡ Hallam's *England*, III. 349.

tiny Act, "for better preserving the balance of power in Europe." Parliament has never admitted that a military force is necessary in order to maintain the government at home: and notwithstanding the almost universal recognition of the army as a permanent institution, no such recognition is to be found in any of our statutes*.

In order also to preserve the subordination of the military to the executive government, and to prevent any irregularities in the administration of public justice †, the Mutiny Act, both for the army and the marines, always contains a provision, that nothing therein contained shall be construed to exempt any officer or soldier from being proceeded against by the ordinary course of law; and all officers obstructing the process of civil justice, with respect to any other officer or soldier, are, upon conviction, *ipso facto* cashiered, and disabled from holding any civil or military office or employment in the kingdom, or in the service of the Crown. The Act 12 & 13 Vict., c. 43, now in force, for the government of British officers and soldiers in the service of the East India Company, contains similar provisions.

In the year 1800, an attachment was ordered by the Court of King's Bench in Ireland, to issue against Major Uniacke for contempt of court, in removing a soldier from the custody of a gaoler, to whom a *habeas corpus* had been directed for the production of his prisoner at the bar of the Court, with a view to his discharge ‡.

The ancient constitutional jealousy of a standing army was evinced by the statutes for preventing military interference with Parliamentary elections. The Act 8 George II., c. 30, required that all soldiers quartered or billeted in any city, borough, town, or place, should be removed to the distance of two or more miles, when, and as often as any election of any peer or peers to represent the peers of Scotland in Parliament, or of any member or members to serve in Parliament, should be appointed to be held thereat. And this Act, (which did not extend to Ireland) continued in force until a very recent period, when it was repealed by

* Hallam's *England*, III. 344.

† See a notice of Major Uniacke's case, involving this principle, in the *Castlereagh Correspondence*, III. 398.

‡ *Castlereagh Correspondence*, III. 398. The case of Major U. was taken up by the Government: but it does not appear how it terminated.

the statute 10 & 11 Vict., c. 21, which, after reciting that in consequence of the changes in the law for taking the poll at the election of members to serve in Parliament, the expense and inconvenience of the removal of soldiers was greatly increased, enacts that on every day appointed for the nomination, or for the election, or for taking the poll for an election of a member or members to serve in the Commons House of Parliament, no soldier within two miles of any city, borough, town, or place, where such nomination or election shall be declared or poll taken, shall be allowed to go out of the barrack or quarters in which he is stationed, unless for the purpose of mounting or relieving guard, or for giving his vote at such election; and that every soldier allowed to go out for any such purpose within the limits aforesaid, shall return to his barrack or quarters with all convenient speed, as soon as his guard shall have been relieved, or vote tendered. This Act of the Queen does not, however, apply to Ireland.

The House of Commons exhibited the same spirit on the occasion of the Westminster election of 1741, when the military were called in to quell an alleged riot; and the House passed a resolution on the 22nd December, "That the presence of a regular body of armed soldiers at an election of Members to serve in Parliament, is a high infringement of the liberties of the subject, a manifest violation of the freedom of election, and an open defiance of the laws and constitution of this kingdom." The persons concerned in this military interference, having been ordered to attend the House, received on their knees at the bar a very severe reprimand from the Speaker*.

The establishment of the County Militia traces its origin to the same jealous feeling against a standing army, and was introduced by independent men, anxious to remove all pretext for maintaining an obnoxious force, by creating another of a purely national character, commanded by gentlemen of estate, and not liable, except in war, to be marched beyond the limits of its own proper county. The Act for this purpose first passed in 1757: and its promoters were anxious not only to guard the nation against rebellious outbreaks which had lately agitated the country, but to preserve it from ignominious panics, like that which

* *Parl. Hist.*, IX. 326.

had occurred upon the rumour of an extensive armament in France in the year 1756*.

The employment of the troops to quell civil riots and disturbances has frequently been brought forward and commented upon, as an attempt to introduce *martial* law and military government. But this view of the subject is wholly inapplicable to an army constituted like that of Great Britain, and has often been exposed, as a fallacy, by the most dignified constitutional authorities.

In reference to certain formidable riots, which had been suppressed by the military in various parts of England during the reign of George II., the Lord Chancellor Hardwicke, in his place in the House of Lords, justified the employment of the troops, and combated the notion that there was anything illegal in employing soldiers to preserve the public peace. "I am surprised, my lords," said he, "to hear it said, that if the King's troops should now and then, upon extraordinary occasions, be called to the assistance of the civil magistrate, we should on that account be supposed to live under a military government. I hope it will be allowed that our soldiers are our fellow-citizens. They do not cease to be so by putting on a red coat, and carrying a musket. Now, it is well known that magistrates have a power to call any subject of the King to their assistance, to preserve the peace, and to execute the process of the law. The subject who neglects such a call is liable to be indicted, and being convicted to be fined and imprisoned for his offence. Why then may not the civil magistrate call soldiers to his assistance, as well as other men? While the king's troops act under the directions of the magistrate, we are as much under civil government as if there were not a soldier in the island of Great Britain. The calling in of these armed citizens often saves the effusion of innocent blood, and preserves the dominion of the law †."

Constitutional writers treat the permanence of a regular

* *Parl. Hist.* VIII. 883.

† *Parl. Hist.* IX. 1294. Lord Campbell's *Chancellors*, Vol. V. 37, But Mr. Hallam says: "The doctrine of some judges, that the soldier, being still a citizen, acts only in preservation of the public peace, as another citizen is bound to do, must be felt as a sophism, even by those who cannot find an answer to it."—Hallam's *England* III. 349.

military force in England, as the most striking acquisition of power derived by the Crown from the new model of government established at the Revolution of 1688. We have already noticed the smallness of the force previously kept on foot by the Crown, until James II. entered upon the infatuated course of proceedings which cost him his crown. In the breathing time between the peace of Ryswick and the war of the Spanish succession, the Commons could not be brought to keep up more than 7000 troops. Nothing could be more repugnant to the national prejudices than a standing army. But these prejudices were gradually and stealthily overcome by the dexterity of the ministers of the first two Sovereigns of the House of Hanover, whose policy it was to obtain the augmentation of power and security, which a permanent military force alone could give. Two long wars had rendered the army a profession for men in the higher and middle classes, and familiarized the nation to their dress and rank. It had achieved great honour for itself and the English name: and Parliament was induced, after some variations, in the early years of George I., to vote, annually, except when the continent of Europe was disturbed, a force of 17000 men or thereabouts, during the whole administration of Sir Robert Walpole, independently of the troops on the Irish establishment, and the garrisons of Minorca and Gibraltar: and this continued, with little alteration, to be the standing army of Great Britain, in time of peace, during the eighteenth century*.

Anciently, either for convenience, or for purposes of intimidation and annoyance, soldiers were frequently billeted or quartered, in the most oppressive manner, upon private citizens, without any restriction as to time, number, or rate of subsistence. This was claimed by the Crown as a right or prerogative at Common Law. But the Common Law recognised no such right. On the contrary, the practice of billeting soldiers in private houses was clearly illegal; and it was one of the grievances set forth in the famous Petition of Right (3 Chas. I.), that “ of late
“ great companies of soldiers and mariners had been dis-
“ persed into diverse counties of the realm, and the in-
“ habitants, against their wills, had been compelled to

* Hallam's *England*, III. 345.

“ receive them into their houses, and there to suffer them
 “ to sojourn, *against the laws* and customs of this realm,
 “ and to the great grievance and vexation of the people*.”
 This Petition, which received the sanction of the three
 branches of the Legislature, but which the King affirmed
 with the utmost reluctance, has the force of an Act of
 Parliament; and in the subsequent reign it was explicitly
 declared and enacted by the Statute 31 Chas. II., “ that
 “ no officer, civil or military, nor other person whosoever,
 “ should thenceforth presume to place, quarter, or billet
 “ any soldier upon any subject or inhabitant of this realm,
 “ of any degree, quality, or profession whatsoever, without
 “ his consent, and that it shall be lawful for any subject or
 “ inhabitant to refuse to quarter any soldier, notwith-
 “ standing any warrant or billeting whatsoever.” It may
 be taken, therefore, as a clear principle of the constitution,
 that arbitrary billeting of soldiers in England, elsewhere
 than in camps, forts, and barracks, without consent or au-
 thority of Parliament, is an illegal invasion of the liberty
 of the subject†.

In the sixth year of the reign of Queen Anne, a legisla-
 tive provision of the same nature was made by the Par-
 liament of Ireland. By the Statute 6 Anne, c. 14, which
 enacted, “ that no officer, soldier, or trooper in the army,
 “ nor the servant of any officer, nor any attendant on the
 “ train of artillery, nor any yeoman of the guard or battle
 “ axes, nor any officer commanding the said yeomen, nor
 “ any servant of any such officer, should at any time be
 “ allowed any quarters in any part of Ireland, save only
 “ during such time as he or they should be on their march
 “ as in the same act mentioned, or during such time as he
 “ or they should be and remain in some seaport town,
 “ or other place in the neighbourhood of a seaport town, in
 “ order to be transported, or during such time as there
 “ should be any commotion in any part of Ireland, by rea-
 “ son of which emergency, the army, or any considerable
 “ part thereof, should be commanded to march from one
 “ part of Ireland to another.”

The foregoing statutes of Charles II. and Queen Anne
 against billeting soldiers in private houses, are, therefore,

* A.D. 1627 Stat. 3. Car. I.

† See Parkhurst *v.* Forster, 1 Lord Raymond's *Reports*, 479 : and
 see *post* cap. 8.

expressly recited and suspended by the annual Mutiny Acts, preparatory to the introduction of the clauses which authorize billetings in the houses of licensed victuallers, according to the modern custom; and thus the only legal sanction for billeting troops on any private individuals is limited to a brief duration, and requires the intervention of Parliament to preserve it from expiring with the current year.

But though the armed forces levied by the Crown under the authority of Parliament are legal bodies, enjoying the rights and retaining the liabilities of citizenship, and the training of such forces in martial exercise is a necessary incident to the power of raising them, it is not lawful for other bodies of men voluntarily to assemble for the practice of military evolutions without the authority of the Crown, or the lord lieutenant of the county, or two justices of the peace. And by a statute passed in the last year of the reign of Geo. III., at a time of great civil commotion, every person present at, or attending any unauthorized meeting or assembly, for the purpose of training or drilling others in the use of arms and in military evolutions, is liable to be transported for seven years, or to be punished by imprisonment not exceeding two years; and every person who attends, or is present at, any such meeting or assembly, for the purpose of being trained or drilled to the use of arms, &c., is liable to fine and imprisonment, not exceeding two years.

In accordance with the same principle, no private person can lawfully erect or fortify a castle or fortress for the purposes of *war* without the license of the Crown; though this was otherwise in early times when private wars were allowed by law.

The militia, volunteers, and irregular forces of all kinds, when embodied for exercise or active duty, are subject to the Articles of War, applicable to the regular service to which their own corresponds; so that the officers and men are triable by court martial for breaches of military conduct or duty. These points are regulated from time to time by the Acts for embodying such troops.

In India a standing army is indispensable, and forms one of the permanent public establishments, unaffected by any of those constitutional considerations which apply to England. But as British officers and soldiers, commissioned and in the pay of the Company in India, carry

with them to that country the personal rights, privileges and liberties of England, and as the power of the King to make articles of war is, by the Mutiny Act, expressly confined to officers and men commissioned or in the pay of the Crown, another Act became necessary to enable the Crown to make Articles of War for the government of British officers and soldiers so serving in India, and to try them by court martial there. Accordingly, the Stat. 27 Geo. II., c. 9, conferred upon the Crown the necessary powers for these purposes; and the Act 3 & 4 Vict., c. 37, as amended and extended by the Act 12 & 13 Vict., c. 43, contains the present law on this subject. The duration of these Acts is not restricted; and, therefore, the powers of the Crown continue in uninterrupted force until Parliament expressly interferes. In all other respects, the legal principles which affect British officers and soldiers in the service of the Company correspond, in their leading features, with those by which the service in England is governed.

The Governments of Bengal, Madras, and Bombay, are empowered by Stat. 3 & 4 Wm. IV., c. 85, to make all such laws and regulations, and articles of war, as they may think fit, for the order and discipline of all officers and soldiers, *natives of the East Indies*, or the places within the limits of the Company's Charter, in their respective services, and for the administration of justice by courts martial, to be holden on such native officers and soldiers, and for other constitution and manner of proceeding of such courts martial, and for all other purposes relating to, or in any manner concerning such native officers and soldiers, in as full and ample a manner as the same Governments might make any other laws or regulations for the government of natives of the said territories. And this power of the Company is not affected by the later Acts of Parliament, by which the Crown is authorized to make articles of war for British officers and soldiers in India*.

The Articles of War, now in force for the native army of India are contained in the Act No. 19, of 1847, of the Legislative Council of India.

The East India Company is said to have been invested

* See Stat. 12 & 13 Vict. c. 43, s. 1.

with powers of martial law by one of its earlier charters anterior to the Revolution of 1688. At that period such powers were assumed and exercised by the Sovereign as the head of a feudal monarchy: though the right of delegating such powers to an association of British subjects may be questionable.

But when the collisions between the French and English Companies, under Dupleix and Laurence, caused an influx of European forces to that country, and when Royal regiments were sent thither in aid of the slender forces of the Company, it was found necessary to base the military power over these troops on a more exact footing of authority: and accordingly the Stat. 27 Geo. II., c. 9, the first Indian Mutiny Act, was passed which introduced the same principles, couched in nearly the same language, with respect to the government of the Company's forces, as the English Mutiny Acts contained with respect to the troops of the Crown. This Statute with a slight addition in the first year of King George III. continued to be the law of the army in India for nearly 70 years, until the Stat. 4 Geo. IV., c. 81, was passed in 1823.

That Statute was an expansion of the Act of Geo. I. with the incorporation of various necessary provisions taken from the English Mutiny Acts: and similar Acts, with like additions, have been since passed for the same purpose, viz.: the Stat. 3 & 4 Vict., c. 37, amended and extended by the 12 & 13 Vict., c. 43; the latter being the Mutiny Act now in force in the three Presidencies of India*.

The Stat. 12 & 13 Vict., c. 43, s. 4, contains also the following provisions:

“ That all officers and soldiers of any troops being mustered and in pay, which shall be raised and serving in any of the possessions or territories, which are or may be under the Government of the said Company, or in places in possession of or occupied by persons subject to the Government of the said Company, or by any forces of the said Company, and being under the command of any officer having a commission immediately from the Government of any of the Presidencies of the said Company, shall be liable to martial law in like manner as the Company's other forces are.”

* See Porrett's case, in Sir E. Perry's *Oriental Cases*, 414, 421.

The only persons in India, who are authorized by the India Mutiny Acts to institute general courts martial (except in certain specified cases), are the three Commanders-in-Chief of the respective Presidencies. Each Commander-in-Chief has the jurisdiction exclusively over his own army, whenever the troops be employed in the territories of the Company or elsewhere: so that a Bengal Commander-in-Chief never would assume to hold courts martial over Bombay or Madras soldiers while under the immediate orders of their respective Commanders-in-Chief, or *vice versâ*. It seems also, that though the exigencies of the public service may bring the troops of different Presidencies into combination under the orders of one Commander, either in foreign service, or in territories unannexed (as Scinde was for some years after Sir Charles Napier's conquest) to any of the Presidencies, yet the authority to try by general court martial any soldier of a force thus constituted can emanate only from the Commander-in-Chief of the Presidency to which such soldier belongs: no other officer being competent, under the India Mutiny Act, to exercise the prerogative of commuting the punishment awarded by a court martial*. This arrangement may obviously be productive of inconvenience in maintaining the discipline of a combined army, furnished by two or more Presidencies. But there is nothing in the India Mutiny Act to prevent the Commander-in-Chief of any Presidency from delegating his jurisdiction over its army or any portion of it, wheresoever it may happen to be employed, to any officer, whether under his command or not†.

The powers of Commanders-in-Chief of the different Presidencies of India to hold courts martial for the trial of the Company's troops rest solely on Parliamentary enactment. They hold no warrant for this purpose, either from the Crown or the Company. But for the trial by court martial of the Royal troops serving in India, the Commander-in-Chief of each Presidency is furnished with an express warrant‡.

After the conquest of Scinde it was not immediately annexed to any one of the three Presidencies of India: but

* Sir E. Perry's *Oriental Cases*, 414, 427.

† Porrett's Case, Perry's *Oriental Cases*, 414, see p. 431.

‡ Perry's *Oriental Cases*, 431

Major-General Sir Charles James Napier, then commanding a division of the Bombay army, was appointed Governor of the territory: and a large military force from all the Presidencies was placed under his orders. At this period Mark Porrett, a sub-conductor in the Bombay forces serving in Scinde was tried by court martial at Karachi on the 23rd August, 1843, and found guilty on two charges of fraud relating to government unserviceable stores. "Such conduct being most disgraceful and unbecoming the character of a warrant officer." The court sentenced him to be transported as a felon for seven years; and this sentence was confirmed by Sir C. Napier in the following terms: "Approved and confirmed by C. J. Napier, Governor." By virtue of this sentence, Porrett was sent to Bombay under a military escort, and lodged in the common jail, whence he was brought up by *habeas corpus* before the Supreme Court, on a motion to discharge him from custody for want of a proper confirmation of his sentence by Sir Thomas Mc Mahon the Commander-in-Chief of Bombay. It appeared that when Sir C. Napier was serving in Scinde, before his appointment to the government, he had received the customary warrant from Sir Thomas Mc Mahon for holding courts martial: and the court by which Porrett was tried, had in fact been convened by virtue of that authority. But under a misapprehension respecting Sir C. Napier's new authority as Governor, the proceedings were never laid before Sir T. Mc Mahon for confirmation by him as Commander-in-Chief of the Bombay army. Sir Erskine Perry, C. J., pronounced the judgment of the Supreme Court, that Porrett was illegally in custody: and he was discharged accordingly.

Some of the military authorities had attributed to Sir Charles Napier in his office of Governor full and independent authority to hold courts martial. But, upon a consideration of the Mutiny Acts and Indian Articles of War, the Supreme Court ruled that Sir C. Napier's power to hold courts martial was referable solely to the warrant which he held from Sir T. Mc Mahon; that the Governor of Scinde had not *ex officio* any authority to hold courts martial, and still less to confirm their proceedings: that even a separate warrant to Sir C. Napier from the Crown itself would have been invalid and insufficient: and that without a new Act of Parliament for the purpose, the Crown itself was incompetent to grant such a warrant.

The military force of the realm being thus constituted, all officers on full pay are subject to the provisions of the Mutiny Act and the Articles of War; so as to be triable by court martial for unmilitary conduct.

Half-pay officers, however, *as such*, are not subject to military law; but their liability, in this respect, has varied from time to time. This subject gave rise to warm debates in both Houses of Parliament in 1749 and 1751; in which years the Mutiny Acts contained clauses enforcing such liability. The twelve judges were consulted in 1749 upon the question, whether half-pay officers included in the number of effective men mentioned in the preamble to the Mutiny Act of that year could be deemed subject to its provisions, or to the pains and penalties thereby enacted, without a special clause for the purpose; and their lordships were divided in opinion. The clause subjecting half-pay officers to courts martial was omitted in many subsequent Mutiny Acts; and in April 1785, at a court martial holden for the trial of General Ross for challenging General Boyd, the question arose whether the former, being an officer on half pay at the time of the transaction, was subject to the jurisdiction of that tribunal. The twelve judges were again consulted on this occasion, and unanimously held that he, as a half-pay officer, was not subject to military law. They expressly gave their opinion that neither his warrant as a general officer, nor his allowance of half-pay, brought him under the power of a court martial*.

It thus appears that half-pay officers cannot be tried by court martial for any matter occurring after they have been placed on the half-pay list.

But an officer on full pay cannot escape from a court martial by voluntary retiring on half-pay; as he continues liable to be tried by court martial for his conduct during the time he was on full pay, provided the prosecution take place within the period of time limited by the Mutiny Act, *viz.* three years. Neither will absolute retirement, nor even dismissal from the service, exempt or screen an officer from his liability; for Lieutenant-General Lord George Sackville, after being summarily dismissed the army on charges affecting his conduct at the battle of

* Delafons on *Naval Courts*, 62.

Minden, in 1758, was (though at his own request) tried by court martial on the same charges in 1759; and being convicted, was declared incapable of ever serving again. Before the trial the judges were consulted as to its legality, and they held that it would be valid, notwithstanding his lordship's previous dismissal from the service.

In effect the commission of an officer is suspended when he is placed on half-pay, so that he is no longer within the words of the Mutiny Act "commissioned or in pay." But where an officer on half-pay holds brevet rank, the case is otherwise. His brevet commission is an operative commission, and retains him in the service*.

* 1 Macarthur, 201.

CHAPTER II.

ON ADMISSION TO THE SERVICE.

I. *By whom Officers are appointed.*

THE absolute right of selection and appointment of all military officers is vested in the Crown, as a branch of the royal prerogative.

This right formed one great topic of dispute between the Crown and the Long Parliament in the days of King Charles I.; but, with this exception, the prerogative under consideration has been uninterruptedly exercised and enjoyed by the Crown from the earliest times, and no question now exists at law upon this point.

“The command of the army” (says Lord Tenterden, C. J.) “belongs entirely to His Majesty; it is a matter for his discretion and authority only, except so far as this discretion and authority are regulated and controlled by the statute laws*.”

The Crown not only has the power of appointing all the officers of the two services, but likewise of preferring any subject to the highest rank and command in either service, without his having previously held an inferior commission. The royal princes of England are examples of this species of promotion: and distinguished foreign princes have occasionally been promoted in like manner, as in the cases of Prince Leopold, now King of the Belgians, and Prince Albert. In 1755, Clive, the founder of the British empire in India, who had entered the East India Company's service with a writership, and whose only regular military commission had been that of an ensign in the Company's army, although he had served in the post of commissary to troops in the field with the rank of cap-

* 4 Barnewall and Cresswell's *Reports*, 304. At the time when this judgment was pronounced the Roman Catholic Relief Bill had not been passed, and the Crown could not have appointed an officer of that creed to a high command in the army.

tain, received from the hands of King George II. the commission of a lieutenant-colonel in the British army*.

The power of granting commissions may be delegated by the Crown; and by the Articles of War it appears to be taken for granted, that not only the Crown itself, but also, under certain circumstances, a governor of a colony may grant commissions, and make or fill up military appointments. In many cases, it must be essentially necessary to the public service that some person should be appointed, *ad interim*, until the sanction or confirmation of the Crown be received†.

With respect to commissions and subordinate commands conferred by governors and commanders-in-chief of colonies, the Mutiny Act and the Articles of War contain no positive directions touching the selection of persons, but leave that matter to be governed by usage. And as to the usage, it seems to have been proved in *Bradley v. Arthur*‡, that a mere civil individual not possessing any military character or condition cannot be chosen; because, in such a person, the knowledge, talents, skill, and judgment that a military command requires cannot be properly expected. But, in other respects, the selection of persons for subordinate military commands in colonies or dependencies appears to be at the discretion of the local authorities exercising the right of appointment.

By the Stat. 13 & 14 Charles II., c. 3, s. 2, authority is given to lord-lieutenants of counties to grant commissions in the militia.

The East India Company, who exercise the powers of government and territorial authority in India, have a special authority by statute to grant commissions to cadets to hold military appointments. But such a power, it is conceived, is necessarily incident to the sovereign authority§, by whomsoever it may happen to be administered; and the East India Company is, in law a part of the British Government.

* *Malcolm's Life of Lord Clive*, See also the *Annual Register* of 1780 for the Parliamentary Debates on the appointment of Colonel Fullarton and others to the rank of Colonel, *per saltum*.

† See the judgment of Mr. Justice Holroyd in *Bradley v. Arthur*, 4 *Barnewall and Cresswell's Reports*, 292, 311.

‡ 4 *Barnewall and Cresswell's Reports*, 292.

§ See *Reg. v. Shaik Boodin*, in *Sir E. Perry's Oriental Cases*, 460.

II. *Who may be appointed Officers.*

All British subjects are by law eligible to hold command in the army, with the consent of the Crown.

Formerly, however, Protestant Dissenters and Roman Catholics were excluded from holding commissions in the service, by the Stat. 25 Charles II., c. 2, commonly called the Test Act, which required all officers, "civil or military," to receive the sacrament of the Lord's Supper according to the rites of the Church of England, and to sign the declaration against Transubstantiation, as prescribed by the same Act.

But by the Act 9 George IV., c. 17, Protestant Dissenters are relieved from this disability on signing a declaration in Chancery, or the Court of King's Bench, or at the Quarter Sessions, "never to exercise any power, authority, or influence, which they may possess by virtue of their office, to injure or weaken the Protestant Church as by law established in England; or to disturb the said Church, or the bishops and clergy of the said Church, in the possession of any rights or privileges, to which such Church, or the bishops and clergy are or may be by law entitled." By the same Act (s. 7), it is provided "that no military officer below the rank of major-general in the army, or colonel of militia, shall be required to make or subscribe the said declaration in respect of his military commission;" and also, that "nothing therein contained shall extend to require any military officer, upon whom any commission, appointment, or promotion shall be conferred during his absence from England, or within three months previous to his departure from thence, to make and subscribe the said declaration until after his return to England, or within six months thereafter."

With respect to Roman Catholics, an Act was passed in 1793 by the Parliament of Ireland, admitting them to the rank of colonels in the army, including all corresponding and subordinate gradations. But this Act did not extend to the navy. Neither did it take any effect beyond the limits of Ireland. It was consequently inoperative in Great Britain: and the greatest inconvenience

such troops becoming subject to penalties here for not taking the oaths required by the English law. The Act of Union between Great Britain and Ireland contained no provision upon this subject. To remedy this difficulty Lord Grenville, the Prime Minister of 1807, proposed to extend the Irish Act to England by a clause in the annual Mutiny Act. But upon a doubt whether the measure was intended to exclude, or would operate to exclude, Roman Catholic officers from the rank of commander-in-chief, master-general of the ordnance, and general of the staff, from which offices they were specially excluded by the Irish Act of 1793, dissensions arose in the Cabinet which (according to the biographer of Lord Sidmouth) led to the dissolution of the Grenville administration in 1807*. The result was, that in consequence of the well known opposition of King George III. to the removal of any of the Roman Catholic disabilities, no alteration was made in the law till the passing of the Roman Catholic Emancipation Act in 1829. By that Act† it was declared, that it should be lawful for any of His Majesty's subjects professing the Roman Catholic religion, to hold, exercise, and enjoy (with certain exceptions not affecting the military profession) all civil and military offices and places of trust or profit under His Majesty, his heirs and successors; upon taking the oath of allegiance and supremacy prescribed by the same Act.

It is believed that there has been at no time any express legal disqualification of Jews for employment in the army, except so far as they may have been indirectly excluded by the forms of the oaths required to be taken.

Foreigners, not being subjects of the British Crown, are, by the general law, incapable of holding commissions in either service. But during the war which followed the French Revolution the law in this respect was temporarily modified; and by an Act, 34 George III., c. 43, the Crown was authorized to enlist as soldiers any subjects of Louis XVI., and to form them into regiments or battalions, and to appoint French officers to command them. Such troops so officered might be employed on the Continent of Europe, or in the British Channel

* Lord Sidmouth's *Memoirs*, Vol. II. 450, &c.

† Stat. 10 Geo. IV. c. 7.

Islands, Jersey, &c., and in any of the dominions of the French King, *but not elsewhere*. It was also provided that such troops should not, if brought to England, be marched into the country to any distance greater than five miles from the sea coast; and that no greater than five thousand should ever be in Great Britain at the same time.

On the 28th July, 1800, an Act (39 and 40 Geo. III. c. 100) was passed to enable the King to take into his service and pay 6,000 Dutch troops, with liberty also to bring them to any port or place in Great Britain for rendezvous, or with a view to operations abroad, and also to land them anywhere in Great Britain for health or exercise; but such troops were forbidden to be stationed more than 20 miles from the sea coast, except while on march from one part of the Island to another. It was provided also, that such troops should in no case be billeted or quartered, either on march or otherwise, but should be encamped or stationed in barracks. The Crown was also empowered to commission Dutch officers to command these troops. But such commissions were to give no title to half pay on reduction; the officer was to be at liberty to make provision not exceeding the amount of British half pay for Dutch officers disabled by wounds or infirmities.

By the 44 Geo. III., c. 75, the Crown was further empowered *during the continuance of the war*, to form into regiments such foreigners, whether Roman Catholics or not, as were then in Great Britain, and to grant commissions to foreign officers to command them. This Act limited the number of foreign troops which might be assembled in Great Britain at any one time to 10,000. But it authorized the Crown to enlist foreign soldiers *generally* for service in *any* regiment, battalion, or corps, and to grant commissions to foreign officers for service to the like extent.

By the 46 Geo. III., c. 23, the Crown was empowered to augment the foreign troops in its service, with a proviso that the number in Great Britain at any one time should not exceed 16,000.

By the 55 Geo. III., c. 85, which was passed only four days before the battle of Waterloo, the foregoing Acts were ratified, and prolonged till twelve months after the ratification of a treaty of peace. And it was expressly

enacted, that no foreigner should hold a commission in any other regiment in His Majesty's service than the foreign corps enlisted under the powers of the foregoing Acts. But the Act was declared not to extend to His Majesty's 60th regiment of foot, nor to prevent any foreign officer then holding a commission in any other of His Majesty's regiments from continuing to hold such commission, or from receiving any higher regimental commission.

Upon this Act doubts arose, whether the Crown could grant to any such foreign officer a higher rank than a regimental commission; and to remedy these doubts, an Act (7 Wm. IV., and 1 Vict., c. 29) was passed in the first year of the present Queen's reign, declaring that the Queen might grant to any foreign officer holding a commission at the time when the former Act (55 Geo. III.) was passed, the rank and commission of Colonel, Major-General, Lieut.-General, or General, as to Her Majesty should seem fit, with the pay, emoluments, allowances, and advantages belonging to the rank so granted.

By the same Act of the Queen, the Crown is empowered to allow foreigners to enlist and serve as non-commissioned officers and soldiers in the British service, in the proportion of one foreigner for every fifty natural born subjects. But persons so enlisting are expressly prohibited from holding any higher rank than that of a non-commissioned officer.

By the Mutiny Act (of 1847, s. 60), all negroes or persons of colour, who, although not born within Her Majesty's dominions, shall have voluntarily enlisted into her service, are, while serving, to be deemed soldiers legally enlisted, and entitled to all the privileges of natural born subjects; and a simliar provision is made with respect to negroes purchased by, or on account of, the Crown before the abolition of slavery, and all negroes seized and condemned as prize under the Slave Trade Acts, and appointed to serve in the army.

Subject to the foregoing exceptions, the Crown, it is conceived, has no power to employ as a commissioned officer or otherwise in the army, any foreigner whomsoever, unless he were in the service in or prior to the year 1815.

In the early times of English history the feudal system rendered every man occasionally a soldier, whatever might be his ordinary pursuits; and the Chief Justiciary of the

realm, whose office embraced the functions of all the present Courts of Westminster Hall, was likewise the highest military officer of the Crown. Armour and the ermine were thus for a long time combined, after the manner of the Roman Consuls, in many a character of high military and judicial renown, until the list was closed by Hugh le Despencer, who refused quarter, and lost his life at an advanced age, in the decisive battle of Evesham, on the 4th of August, A.D. 1265, after an active career far more distinguished by military achievements than by forensic learning. "Hugh le Despencer (says Lord Campbell) is to be considered the last of those remarkable men, who, for above two centuries, exercised conjointly the functions now belonging to the first judge in the land and to the commander-in-chief of the forces. Such a combination (as was seen in the Roman Republic) certainly has a powerful tendency to develop the highest faculties of the mind, and produces characters of greater eminence than are to be found when the sword and the gown are permanently disunited*."

In later times the profession of arms embraced both services; and the same officers were deemed eligible to serve indiscriminately by sea or land, as occasion required.

The Earl of Surrey (afterwards Duke of Norfolk), who gained the celebrated victory over the Scots at Flodden Field in the reign of Henry VIII., (A.D. 1513,) was subsequently appointed Admiral of the combined English and Imperial fleets in the war against France; during which he conducted several successful operations. He afterwards convoyed the Emperor Charles V. from England to Spain, at the head of 180 men-of-war, the largest fleet that had ever departed from the shores of England. Lord Surrey, on his return with this fleet from Spain, attacked the French town of Mortaix, and destroyed all the shipping in the harbour. He afterwards commanded the English armies in the military operations against Scotland in 1523.

Sir Walter Raleigh is another celebrated instance of this combination of professions, which are now so totally distinct. He served as a volunteer in the Netherlands, under the famous Sir John Norris, and afterwards commanded a company in Ireland under the Lord-deputy

* Lord Campbell's *Lives of the Chief Justices*, I. 59.

Lord Grey, during the rebellion in 1579. In this latter service he commanded for the first three days at the siege of Fort del Ore. He is afterwards found in the *Warspite*, commanding a squadron of men-of-war in the expedition to Cadiz in 1596. In the following year he was officiating at Court as Captain of the Queen's Guard; and in the same year, he was appointed a Rear-Admiral in the fleet destined for an expedition against Spain*.

Admiral Blake, so renowned for his triumphs over the Dutch fleet in the days of the English Commonwealth, was a general officer of great distinction in the land-service; and General Monk, Duke of Albemarle, who restored the monarchy of England in 1660, was afterwards Admiral of the British fleets engaged against the Dutch in the reign of Charles II.

Women cannot hold commissions in British regiments; but they can hold offices of a military nature. The custody of a castle was granted to a woman. It was insisted that a woman cannot have such office, because it appertains to the war, and is to be executed by men only. But this was overruled, as it was granted to her, to be exercised by herself or a sufficient deputy—Lady Russell's Case, Viner's *Abridgt., Officer*, c. 1. But though a public military office, like that of Constable of England, cannot be originally granted to a woman, yet it may descend to her as heiress of the original grantee. Jenk. 236, 237. Humphrey de Bohun's Case.

Infancy is no disqualification for a commission in either service; for the incidents which the law has attached to infants in their natural capacity, do not by the common law extend to them in the exercise of corporal or political functions†. But a minor has been held incapable of acting as a member of a Court-Martial, as appears by the case of Lieut. P. Tothell of the Royal Marines, serving on board H.M.S. *Venus*, who was tried by Court-Martial in May 1802, for disobedience to orders, and sentenced to be placed at the bottom of the list of first-lieutenants. He appealed from this sentence by a memorial to the King in Council, on the ground that Captain Robert Fanshawe, one of the members of the Court, was under 21 years of age at the

* Tytler's *Life of Raleigh*.

† Petersdorff's *Abridgment*, tit. *Infant*. And see *Coates v. Wilson*, 5 *Espinasse's Reports*, 153.

time of the trial. The law officers of the Crown were of opinion, that this objection was valid, and that the trial and sentence were consequently void*. The emergencies of active service may, however, throw upon a minor the most responsible duties, in the discharge of which he may be required to impose upon others the execution of orders involving the gravest results: and it seems anomalous that a minor liable to be intrusted with such high powers, and accountable for miscarriage in their application, should be deemed incapable of sitting in judgment upon the conduct of others on similar occasions.

The East India Company's Act of 1833 declared, that no native, nor any natural born subject of the British Crown, resident in India, shall, by reason of his religion, place of birth, descent, or colour, be disabled from holding any office or employment under the government of the Company†.

III. *How Officers are appointed.*

Military Officers receive their appointments by written instruments, termed commissions, which indicate specifically the rank intended to be conveyed. These commissions are issued under the sign manual of the Sovereign, and countersigned by the Secretary-at-War. But the commissions of officers in the artillery and engineer corps are countersigned by the Master-General of the Ordnance: and commissions in the marines are issued from the Admiralty.

The appointment of persons to offices or places of trust and emolument under the Crown is usually effected by letters patent under the Great Seal. But the sufficiency of the sign manual for the appointment of officers in the two services was long ago decided by the Court of King's Bench‡.

The commissions of officers of the militia are granted by the lord-lieutenant of the county to which the corps happens to belong—subject, however, to the previous approbation of the Crown. The lord-lieutenant of each county

* Hickman, 16. And see *Doe v. Michael*, 16 *Law Times*, 485, where an improper juryman served, and a *venire de novo* was ordered.

† Stat. 3 & 4 Wm. IV. c. 85.

‡ *Beak v. Tyrrell*, *Carthew's Reports*, 31.

has been at the head of its militia force, by virtue of his office, from the reign of Philip and Mary.

The regimental commissions of officers in the service of the East India Company are signed by the Governor and some members of the Council of the Presidency to which each officer belongs.

Officers in the armies of the East India Company hold also an additional commission from the Crown, conferring local rank of the same degree in India. But the Queen's commissions thus granted contain a proviso, that the rank thereby conferred shall continue only so long as the officer holds the corresponding rank in the service of the East India Company. Such commissions are issued and signed on behalf of the Crown by the commander-in-chief of India, while those granted for the purpose of conferring brevet rank on officers in the Company's service, are issued from the War-Office in England under the Queen's sign manual, in the same way as commissions in Her Majesty's regular troops.

This notice of the modes of conferring commissions upon officers is by no means unimportant in a legal point of view; for where the execution or exercise of professional duty would involve loss or damage to third parties, the acts of an officer not duly commissioned could not be justified, if the commission, under colour of which he happens to act, should appear to have been issued without proper sanction. Neither would such parties incur the penalties of the law by forcibly opposing the acts or proceedings of an officer so circumstanced. This principle was recently exemplified in the case of the Spanish crew of a captured slave-ship, who were tried at the Exeter Assizes in 1845, for the murder of a British officer and a party of seamen, who were put on board the prize, and ordered to cruize in her to make further captures. The judges having held that the officer was not properly commissioned to command a cruiser within the intent and meaning of the Slave Trade Acts, the prisoners who had been convicted and sentenced to death at the Assizes, received a free pardon from the Crown, in accordance with the opinion of the judges*.

* *Regina v. Serva and others*, 2 Carrington and Kirwan's *Reports*. And see *post*, Cap. IV.

The *London Gazette* is not evidence of the military appointments therein notified. But in criminal proceedings against an officer it is sufficient to prove that he acted as such without proving his commission signed by the King*.

* *Rex v. Major Gardner*, 2 *Campbell's Reports*, 513. (1810.)

CHAPTER III.

HOME AND FOREIGN ENLISTMENT.

THE command of the troops being the object for which officers are invested with their commissions, we proceed to shew what troops are legally in subjection to such command. The Mutiny Act authorizes the Crown to raise and maintain a specified number of forces, and prescribes the mode of levying them, *viz.* by enlistment.

Non-commissioned officers and soldiers, therefore, enter the service by enlistment, which is the only legal method of raising and recruiting the armed forces of the land-service. Enlistment is a voluntary tender of service, and is distinguished from enrolment or conscription, which implies a compulsory mode of selection. This latter mode is resorted to in cases of emergency, or where a specified district is bound to return a given number of men, or the required number is drawn out of prepared lists, according to the practice in embodying the militia.

The delays and uncertainties of raising troops by voluntary enlistment, to which the temper of the English nation, pacific, though intrepid, and impatient of the strict control of martial law, gave small encouragement, had led in former times to the usage of pressing soldiers for service, whether in Ireland or on foreign expeditions. This prerogative, however, seeming dangerous and oppressive, as well as of dubious legality, it is recited in an Act empowering King Charles I. to levy troops by this compulsory method for the special exigency of the Irish rebellion, that "by the laws of this realm none of His Majesty's subjects ought to be impressed, or compelled to go out of his country to serve as a soldier in the wars, except in case of necessity, of the sudden coming in of strange enemies into the kingdom, or except they be otherwise bound by the tenure of their lands or possessions*".

These were the very terms used by the Legislature in a

* Hallam's *England*, Vol. II. 137.

statute of the first year of the reign of King Edward III., and shew the antiquity of the rule enunciated by the statute of Charles. But tenure of land by military service has long since ceased. The British troops, therefore, both of the Crown and of the East India Company, (which is "a limb of the Government of this country*,") are now raised, under ordinary circumstances, by voluntary engagement alone. Private persons formerly made a trade of enlisting recruits for the army, and great abuses were thus committed. But in 1802 the recruiting department was taken into the hands of the Government, and placed under the control of the Adjutant General; and by a clause in the annual Mutiny Act, any person advertizing, or opening an office for recruits, without authority in writing from the Adjutant General, or the Directors of the East India Company, is liable to a penalty of 20*l.*†.

But though enlistment is the regular course of entering the army as a soldier, it seems to be clearly decided, that where a man is in receipt of military pay, whether regularly enlisted or not, he is invested for the time with the character of a soldier, and becomes liable for all breaches of military duty and obedience, until he is duly discharged from the service. If not duly enlisted, he may claim his discharge in the same manner as a soldier, whose term of service has expired; but so long as he is *de facto* a soldier, he is subject to the legal responsibilities of his situation. This was settled in the case of Serjeant Grant, who was tried in 1793 by a general court-martial at Chatham, for enlisting two men into the service of the East India Company, knowing them to be already soldiers and drummers in the Coldstream Guards. Being convicted of this offence, he was sentenced to receive 1,000 lashes: and a motion was soon after made in the Court of Common Pleas, for a prohibition to prevent the execution of this sentence, on the ground that Grant was not regularly enlisted as a soldier, and therefore not liable to the military law. The motion failed, because it was proved that Grant was in receipt of pay as a serjeant of the 74th regiment, which circumstance fixed him with the character of a soldier, from which he could never be released, but (in the words

* Per Lord Kenyon, C. J. in *Blackford v. Preston*, 8 *Term Reports*, 89.

† Stat. 10 & 11 Vict. c. 12, s. 85.

of Lord Loughborough, C.J.) "by a regular military "discharge*."

The point decided in Grant's case is now provided for by the annual Mutiny Acts, which are expressly made applicable to every person commissioned, *or* in pay as an officer, and to every person listed *or* in pay as a non-commissioned officer or soldier. The Mutiny Act for the marines contains a similar provision.

But though a man *not duly* enlisted is liable, while in the receipt of pay, to all the liabilities created by the law for breach of military duty, he may, in time of peace, and if he be within the dominions of the British Crown, claim his discharge whensoever he thinks fit. This right was exemplified and recognized by the military authorities in the year 1845, when, by an inattention to one of the provisions of the Mutiny Act, a difficulty of great legal importance occurred. A medical officer at Woolwich, by whom a large number of recruits enlisted for the Artillery had been examined and reported fit for service, happened also to be a magistrate for the county of Kent, and in the latter capacity he took from the recruits the declarations, and administered to them the oaths, and made the attestations required by the Act, which, however, expressly states, that the magistrate so acting is not to be a military man; and further provides, that no officer on full pay shall act as a magistrate. The same officer had continued this practice for thirty years: but in 1845, the matter was brought to the attention of the Board of Ordnance, upon the petitions of several privates to be discharged from the service, on the ground of their not having been duly enlisted according to law. A garrison order was, therefore, issued by the commandant, notifying that those men who had been thus irregularly enlisted, might take their discharge; and that if any of them wished to remain they must be re-attested in a legal manner, without prejudice to the length of their former service in the corps†.

It was with reference to this circumstance that, in the Mutiny Act of 1846, a clause (81) was inserted, which, after reciting that certain soldiers, who had been duly

* Grant *v.* Sir Charles Gould, 2 H. Blackstone's *Reports*, 69. See also Walton *v.* Gavin, 15 *Jurist*, 329.

† *Standard Newspaper*, 21st November, 1845.

enlisted, and had voluntarily taken the oath of allegiance and fidelity, and were receiving Her Majesty's pay, had been sworn and attested; but doubts had arisen whether the justices, before whom such soldiers had been so sworn and attested, were duly qualified to administer the oaths; it was enacted, that in every case where any such soldier should not have claimed to be discharged on or before the 17th March, 1846, he should not be entitled to his discharge by reason of such informality, but should have the full benefit of his past services, and all pay and pension in respect thereof, in the same manner as if he had been duly attested and sworn.

A similar clause, to provide for the like difficulty with respect to non-commissioned officers and privates in the marines is inserted in the Mutiny Act of 1847 for that force.

Officers employed in the recruiting service of the army cannot lawfully interfere with each other in the performance of their duties; and in particular, no one is permitted to use any means to obtain for his own party a man who has already taken steps to engage himself to another.

Every officer of the army acting contrary to the provisions of the Mutiny Act, in regard to enlistment, is liable to be cashiered. With a view, therefore, to instruction upon this subject, that Act should be carefully consulted.

A ward in Chancery cannot be safely enlisted either for the Crown or the East India Company. In *Harrison v. Goodall* (15th January, 1852), which was a case of this nature, Vice-Chancellor Parker said it would be a high contempt of Court if the ward were taken out of the jurisdiction, and a great mistake in any one assisting to enlist him without the sanction of the Court: and His Honour directed the serjeant, who attended at the bar to answer for his conduct in the business, to convey the opinion of the Court to the Horse Guards and to the officer in command. In *Rochfort v. Hackman* (21st and 26th of January, 1854), George Rochfort, the recruit, was a minor, entitled to a legacy of £700, or thereabouts, in respect of which he was made a party to the suit, and thereby became a ward of Chancery. On the 9th January he enlisted at the age of 17 in the East India Company's Artillery. He was thereupon marched to the Company's depôt at Warley, and was on the point of being shipped for India with a detachment, when he obtained a *habeas corpus*, under

which he was brought to the bar of the Court by the pay-serjeant of the depôt, who had not been at all concerned in the enlistment. The recruit claimed his discharge without paying smart-money. The commanding-officer of the depôt and the East India Company were ordered to be served with notice of the proceedings. The Vice-Chancellor Wood said that the undoubted jurisdiction of the Court over its wards must be maintained: and His Honour pronounced an order for the delivery of the recruit to his guardian.

In *Walton v. Gavin**, Mr. Justice Coleridge told the jury, that in his opinion the enlistment of the plaintiff, a private soldier, was not void by reason of its having been made on Sunday.

Enlistment in time of war is for an unlimited period; but in time of peace, recruits enter for a limited term of years. The present regulations, as to duration of service in the ranks of the army, are contained in the Act 10 & 11 Vict., c. 37, which enacts that, after the passing thereof, no person shall be enlisted to serve Her Majesty, or in the forces of the East India Company as a soldier, for a longer term than ten years in the infantry, or twelve years in the cavalry, or artillery, or other ordnance corps, to be reckoned from the day on which the recruit shall have been attested, if he shall have stated himself to be then of the age of eighteen years; or if not, then from the day on which he will complete the age of eighteen years, to be reckoned according to the age stated in his attestation. Another Act (10 & 11 Vict., c. 63) was shortly afterwards passed for the marines, whereby it is enacted, that no person shall be enlisted to serve in the royal marine forces as a marine, for a longer term than twelve years, to be reckoned in the same way as in the case of recruits for the army.

At the expiration of the term for which a soldier has enlisted he has a positive legal right to his discharge: and nothing but the occurrence of any of the cases or emergencies specifically contemplated by the Act of Parliament can justify an officer in detaining a man from his ordinary liberty as a citizen, or in compelling him to the performance of military duty after his term of service has expired†.

* 15 *Jurist*, 3291.

† *Rex v. Suddis*, 1 *East's Reports*, 306.

In the case of Captain Archibald Douglas, of the Madras Army, who absented himself without leave from his post in India, and came to England, where he was apprehended as a deserter, the Court of Queen's Bench held that he was not a "soldier" within the meaning of the Stat. 5 & 6 Vict., c. 12, s. 22, (extended by s. 32 to troops in the East India Company's employ,) which authorizes constables to arrest "any person reasonably suspected "to be a deserter*," and that these terms did not apply to officers, but to common soldiers only.

The Limited Enlistment Act of 1847 (10 & 11 Vict., c. 37, s. 6) provides, that soldiers becoming entitled to their discharge in foreign stations, should during the time between the expiration of their term of service, and their actual final discharge in England, continue subject to military law, as fully as before the expiration of their term of service.

The Act for the Enlistment of Soldiers in the Artillery and Ordnance Corps contains a power to re-engage such soldiers for a further term of nine years.

Soldiers in the service of the East India Company, entitled to be sent home, continue subject to the Mutiny Act and Articles of War applicable to the Company's forces, until they are landed in the United Kingdom; and the Crown is empowered to provide by these Articles for the punishment of offences committed by such soldiers during their voyage, by means of a trial by court-martial under the Mutiny Act and Articles of War for the government of the Queen's troops; and for this purpose it is accordingly directed by the Company's Articles of War, that soldiers so offending shall be considered as belonging to any regiment in the Queen's service, which the Adjutant-General shall appoint for that purpose†.

The duration or limitation of service of officers and men in volunteer corps is regulated by the special rules established by each corps for its own government. And therefore, where the rules of a volunteer corps are silent respecting the term of service, the officers and men are at

* Re Douglas, 3 *Queen's Bench Reports*, 825.

In the Mutiny Acts of 1847 and subsequent years, the word "deserter" is substituted for "soldier."

† Stat. 12 & 13 Vict. c. 43, s. 53. *Articles of War* for E. I. C. Troops, 130.

liberty to resign or retire from service in the corps at their own pleasure. This was decided by Lord Ellenborough, in the Court of King's Bench, in the case of the *King v. Dowley**, where it was attempted to enforce fines against the defendant for not attending the field exercises of a volunteer cavalry corps, after he had formally signified his retirement to the commanding officer.

On the renewal of hostilities with France, after the peace of Amiens, Mr. (afterwards Lord) Erskine was consulted on behalf of the volunteers then arming themselves in every quarter of the kingdom; and he published, in consequence, a very long, elaborate, and ornate opinion (contrary to that of the law officers of the Crown) to the effect that volunteers were free to quit the service at any time. His reasonings on the nature and extent of the engagement of volunteers are highly characteristic: "If the term *volunteer* is supposed to be satisfied by the original spontaneousness of the enrolment, leaving him afterwards indefinitely bound, then every enlisted soldier must be equally considered to be a volunteer, and with the difference of receiving money and the local extent of service excepted, would be upon an equal footing, both as to merit and independence. Such a doctrine appears to me to be equally unjust and impolitic; unjust, because for the volunteers' engagement there is no consideration but the sense of honour and duty, the reward of which is sullied if the service does not continue to be voluntary; impolitic, because it is overlooking a source of action infinitely greater than the force of any human authority—to take no account of that invincible sensibility in the mind of man for the opinion of his fellow creatures†."

It has been seen that enlistment in the British service is perfectly voluntary by law; and, in former times, the like freedom of enlistment in the service of foreign powers at peace with Great Britain was tacitly accorded to all British subjects desirous of so engaging themselves. It was considered, that while Great Britain was at peace, her subjects might thus be advantageously acquiring or preserving the military experience, which might afterwards be serviceable to their own country in time of war. The military spirit of the feudal ages seemed to require this concession; and Vattel lays it down, that a nation

* 4 *East's Reports*, 512.

† *Townsend's Judges*, Vol. II. 65.

does not commit a breach of neutrality by allowing its subjects to enter into the service of one belligerent, and refusing the same permission with respect to another. Yet though modern statutory restrictions upon this freedom have been much condemned by some eminent statesmen, as an innovation and an infringement upon national liberty and the law of nations, it seems clear that, by the common law, any engagement with a foreign state, which subjects a person to an influence or control inconsistent with the allegiance due to the Sovereign of these realms, is a contempt against the royal prerogative, and a high misdemeanour; and it is expressly laid down by learned writers, that if a British subject enter into the service of a foreign potentate, or even receive a pension from any foreign state, without the leave of the King, it is an indictable offence at common law; which also renders it a high misprision and contempt, if a subject neglect to return from beyond seas when commanded by the King to do so, and his lands may be seized until he does return*: and the Stat. 3 James I., c. 4, which is still in force, makes it felony for any person whatever to go out of the realm to serve any foreign prince or state, without having first taken the oath of allegiance.

The historical records of England, nevertheless, afford innumerable instances of British troops serving under foreign belligerents, without subjecting themselves to any penalty in consequence. A Catholic regiment served in the Spanish service in Flanders, under Lord Arundel of Wardour, a nobleman distinguished among the first of his cotemporaries; and a regiment of Scotch Catholics, commanded by the Earl of Home, entered the service of the King of France†.

It was in the command of English volunteer auxiliaries, in the Dutch war of independence, that Sir Francis Vere, the first military character of Queen Elizabeth's day, acquired his experience and early fame. In the time of James I., Sir Horace Vere became the General of a small force of 2,200 infantry, which volunteered in aid of the Elector Palatine, the son-in-law of the King. This force consisted of picked men, and was officered by the flower of the English nobility and gentry. Two of the regiments

* 1 Hawkin's *Pleas of the Crown*, c. 22. 4 Blackstone's *Com.* 122.

† Sir James Mackintosh's *Memoirs*, Vol. II. 402.

were commanded, and in great part paid and equipped, by the young Earls of Essex and Oxford; and in this campaign the Earl of Essex laid the foundation of that military experience, which was afterwards his principal title to the chief command of the Parliamentary forces, in the great civil war of England*.

About the same period, Gustavus Adolphus had in his pay a force of 6,000 men, raised in Scotland, and led by the Marquis of Hamilton, a man of the first distinction and consequence in his own country, and the personal friend of his sovereign, from whom, however, he had no license. At that time the Spanish and Imperial ambassadors, against whose sovereigns this force was acting, were resident in London, but neither of them remonstrated†.

In the reign of King George II., a Scotch brigade was in the service of the States General of Holland, and was recognized by an Act of Parliament‡, which required British subjects accepting commissions in that force to take the oaths of allegiance to the King of England.

While the claims of the exiled House of Stuart were still espoused by foreign powers, two Acts were passed in order to prevent the formation of Jacobite armies in France and Spain, by the enlistment of subjects of the British Crown. The Acts prohibited generally all enlistment in the service of foreign states; and offences against the Acts were made felonies, punishable with death; the object being to prevent the employment of such troops or forces in operations against England herself, which would have been a species of treason§.

Self-defence was evidently the one object of these Acts of Parliament; and they remained in force until the close of the reign of King George III., when the insurgent Spanish colonies of South America took up arms against their mother country. These colonies not being recognized states or governments, were deemed to be without the scope of the existing laws; and great numbers of British subjects took service accordingly in the forces of the Spanish colonists. Legislation had never before prevented English subjects from serving under powers at amity with Great Britain. But on this occasion, and at

* Grattan's *History of the Netherlands*, 245.

† Sir James Mackintosh's *Memoirs*, Vol. II. 402.

‡ 29 Geo. II. c. 17, (A.D. 1756).

§ 9 Geo. II. c. 30; 29 Geo. II. c. 17.

the instance, as it is alleged, of Ferdinand VII. of Spain, who was desirous of checking the supplies of men and money, which were under preparation here for the aid of the insurgents in his American colonies, the Stat. 59 George III., c. 69 was passed, whereby the above mentioned Acts of George II., and two Irish Acts of the same reign *in pari materiâ*, were repealed: and all natural born subjects of the King are prohibited, under the penalties of fine and imprisonment, from entering, or engaging any other person to enter, or be employed, either as an officer, non-commissioned officer, or private soldier or seaman in the military or naval service of any foreign power, or to go, or agree to go, to any foreign country for that purpose, and whether with or without pay, unless with the consent of the Crown, signified under the sign manual, or by an order in council, or by royal proclamation. Persons fitting out armed vessels, without the license of the Crown, to aid in military operations with foreign powers, or issuing commissions for such ships, or increasing the armament of foreign ships, are subjected by the Act to the same penalties; and vessels with persons on board engaged for foreign service may be detained at any port in any of the dominions of the Crown. The words of the Act are large enough to comprehend all insurgent, irregular, or acting governments.

This statute, however, does not touch the Act of 3 James I., c. 4, to which reference has already been made; and it expressly excepts and protects persons entering into the military service of any Asiatic power by license of the Presidency of Bengal.

This Act of Geo. III. is of universal application, and no British subject can now be lawfully engaged in the service of a foreign power, whether recognized or not as a state, without the license of the Crown. A motion in 1823 for the repeal of the Act, gave rise to very important and instructive debates in Parliament*.

During the contest between Don Carlos and Isabella the present Queen of Spain, for the succession to the throne of that country, the Foreign Enlistment Act was for some years annually suspended, in order to allow British subjects to serve as officers and privates in the Auxiliary Legion, raised in England for the service of Isabella, and commanded by a British officer.

* Sir James Mackintosh's *Memoirs*, Vol. II. 400.

CHAPTER IV.

RANK AND COMMAND.

QUESTIONS as to the positive or relative rank of officers may often be of the greatest importance at law, in consequence of the rule, that every person who justifies his own acts on the ground of obedience to superior authority must establish, by clear evidence, the sufficiency of the authority on which he so relies. There may also be many occasions on which the propriety of an officer's assumption of command, or his exercise of particular functions, or his right to share with a particular class of officers in prize-money, bounties, parliamentary grants, and other allowances, may depend on the correctness of the view taken by himself or others of his right to a specific rank or command; and an error in this respect may expose him to personal loss and damage in suits before the civil tribunals.

The regulation of military rank is vested absolutely in the Crown, which confers or varies it at pleasure; and every military officer, from the ensign to the general, enjoys the rights and authority assigned to him by the Sovereign. The will of the Sovereign in this respect is signified either by the form of the commissions which he confers, or by the regulations of the military code, or is by fair deduction to be inferred from the nature of the functions assigned to each officer; for every man who is entrusted with an employment, is presumed to be invested with all the powers necessary for the effective discharge of the duties annexed to his office.

It is in the power of the Crown to create any new grade, and to discontinue any existing grade, of military rank. Thus in 1736 King George II. instituted the rank of "marshal of the armies of Great Britain," and conferred it upon the Duke of Argyle and the Earl of Orkney, the two senior generals in the service, who thus became the first field marshals of the army; while the rank of brigadier-general, which was formerly a standing grade in the service, is now so far discontinued, as to be only con-

ferred for temporary or occasional purposes. But the grant of rank is usually in accordance with the standing regulations, by which all officers are apprised of their relative superiority or inferiority, and enabled to govern themselves accordingly.

The ordinary rank of every officer is that which his commission specifies. But regimental officers frequently hold by brevet a higher military rank than that which their regimental commission confers; and they are entitled to exercise such brevet rank on all occasions, when they are serving apart from their regiment, or when their regiment is combined with any other corps in the performance of military duty, unless such right be intercepted by the presence of any senior officer similarly entitled.

Officers holding brevet rank take place according to the same at general courts martial; but it is otherwise at regimental courts martial.

In cases where officers of the marines happen to be associated with officers of the land-forces, for the purpose of holding courts martial on officers of the marines, or otherwise, it was enacted by the Mutiny Act of 1812, that the officers of the land and marine forces should in such cases take rank according to the seniority of their commissions in either service; and this is the rule at the present day.

By the Articles of War, colonels, majors, captains, and other inferior officers, serving by commission from the governors, lieutenants, or deputy governors, or presidents of the Council, for the time being, of the provinces, and colonels in North America, shall, on all detachments, courts martial, or other duty wherein they may be employed in conjunction with the regular forces, have rank next after all officers of the like rank, serving by commissions from the Crown.

Officers of militia, when that force is on active duty, rank with those of an equal grade in the regular army, though as the juniors of each grade; but no officer of militia can serve on a court martial at the trial of an officer or soldier of the regular troops. Neither can officers of the regular army sit on courts martial for the trial of officers or soldiers of a militia corps.

By Stat. 43 George III., c. 96, s. 69, every lord-lieutenant is empowered, with the approbation of the Crown, to appoint any deputy-lieutenant to act for him

within the county as lieutenant thereof, during the illness, or necessary absence of the lord-lieutenant, and to appoint any deputy-lieutenant to act as lieutenant of any division of such county: and all vice-lieutenants so appointed take rank within their respective counties as lieutenant-colonels of militia; and all lieutenants of divisions so appointed take rank within their respective counties as majors of militia; and all other deputy-lieutenants acting as such in their respective sub-divisions take rank within their respective counties as captains of militia.

The relative rank of officers of English militia and Scottish fencible corps, when serving together, is regulated by the Stat. 33 Geo. III., c. 36, s. 2, which provides, that such officers shall rank together according to the date of their respective commissions.

The military officers of the East India Company, by virtue of the Queen's commissions, which they hold conjointly with those granted by the Company, rank in India with officers of the British army of the same grade, according to the dates of their respective commissions, and are thus legally entitled, while in India, to sit at courts martial, and to exercise all other military functions according to this rule of rank and seniority, in as full and ample a manner as the officers of the regular troops serving in India can do.

The professional rank of an officer is also preserved to him, notwithstanding his reduction on half-pay; whether that event be occasioned by the disbanding of his regiment, or by his own voluntary request, preferred on the ground of sickness or other private considerations. The consequence is, that a regimental officer, who holds a detached military command at a distance from his own regiment, will not, by the disbanding of the regiment and his own reduction to half-pay, become *ipso facto* disqualified for the retention of such command, or liable to be superseded therein by the officer next in seniority, as on the occasion of a death or other acknowledged vacancy. His army rank is, in the estimation of the law, and according to military usage, a continuing rank; and he is still a military man, entitled, as before, to compel obedience to his own orders at the post intrusted to him.

This was exemplified in the case of *Bradley v. Arthur**,

* 4 Barnewall and Cresswell's *Reports*, 292.

before the Court of King's Bench in 1824. Major Arthur, of the 7th West India regiment*, was appointed, in 1814, by the Duke of Manchester, then Governor of Jamaica, to be H. M.'s Superintendent of the British Settlement of Honduras. At the same time Major A. received from General Fuller, Commander-in-Chief of Jamaica and its dependencies (of which Honduras was one), a commission in the following terms: "I do hereby constitute and appoint you, the said George Arthur, to command such of H. M.'s subjects as are now armed, or may hereafter arm, for the defence of the settlers of the Bay of Honduras. You are, therefore, as commandant, to take upon you the care and charge accordingly." In 1817 Major Arthur was appointed Lieutenant-Colonel of the York Chasseurs, which regiment was disbanded in 1819; and of this fact he had notice on or before the 24th August in that year. He continued thenceforward to act as commandant of Honduras. In May 1820 Lieutenant-Colonel Bradley, on full pay of the 2nd West India regiment, was at Honduras, and thinking that Lieutenant-Colonel Arthur, by the disbanding of the York Chasseurs, was become incapable of further exercising military command, and that the command had in consequence devolved upon himself as the officer next in rank, refused to obey an order issued by Lieutenant-Colonel A. for assembling all the officers in Honduras at Government House, and issued a counter-order for the officers to assemble at Lieutenant-Colonel Bradley's own quarters at the same hour. Lieutenant-Colonel Bradley having absented himself from the meeting at Government House, Lieutenant-Colonel Arthur thereupon caused him to be arrested for disobedience, and for presuming, without authority, to take the command of the troops and issue garrison orders. These proceedings having been reported to General Walker, then Commander-in-Chief at Jamaica, were by him communicated to the home authorities, and Lieutenant-Colonel Bradley was dismissed the service. Lieutenant-Colonel Arthur returned to England in 1822, and shortly afterwards an action for illegal arrest and imprisonment was brought against him by Lieutenant-Colonel Bradley, for the purpose of trying the question, whether or not

* Major-Gen. the Right Hon. Sir George Arthur, Baronet, G.C.B. who died in 1854.

he was entitled to assume the chief military command at Honduras on the disbanding of Lieutenant-Colonel Arthur's regiment, or, in other words, whether or not Lieutenant-Colonel Arthur was the superior officer at the time of his arresting Lieutenant-Colonel Bradley. But upon this point the Court of King's Bench gave judgment in favour of Colonel Arthur. Lord Chief Justice Abbott:—

“ It does not appear to be questioned that at the time
 “ when the defendant received his appointments, what-
 “ ever their nature might be, from the Duke of Man-
 “ chester and General Fuller, he was a person capable of
 “ receiving an appointment to a military command.
 “ Indeed that could not be disputed, because he was
 “ then an officer holding a command in His Majesty's
 “ army on full pay. If, then, he was capable of receiving
 “ military command at that time, the next point is, was
 “ any military command given him? He was appointed
 “ by the Duke of Manchester to be superintendent, which
 “ is considered a civil appointment; at the same time
 “ General Fuller, who then had the command of the troops
 “ on that station, gave him that appointment upon which
 “ so much observation has been made. By that he was
 “ to take upon him the command of all persons armed, or
 “ to be armed, for the defence of the settlers. We must
 “ consider that it was intended to give him the supreme
 “ military command, as connected with the civil supe-
 “ riority conferred upon him by the Duke of Man-
 “ chester. There being, then, nothing in any Act of Par-
 “ liament, or in the Articles of War, to shew that a person
 “ well appointed in the first instance shall lose his au-
 “ thority, as soon as it may happen that the regiment
 “ in which he held a commission is disbanded, I think
 “ that the authority must be considered to have continu-
 “ ance until the Crown thinks proper to put an end to it.
 “ The defendant's authority at Honduras had no connec-
 “ tion with his situation in the regiment. No part of the
 “ regiment was stationed at Honduras; and if we were to
 “ hold that the disbanding of the regiment put an end to
 “ his authority, it must put an end to it immediately,
 “ and then, the greatest mischief would arise; it would,
 “ for some time at least, remain uncertain who was to
 “ take the command; and if he continued in command, as
 “ he would do, until the notification of the fact of disband-
 “ ing, every act he might do in the interval would be

“ void. The mischief and inconvenience of that would be so great that, unless we are informed by some fixed proposition of law, that, having authority to hold such an appointment, his authority ceased upon the disbanding of the regiment, the argument must fail. It appears to me, therefore, that having been well appointed in the first instance, his authority continued, notwithstanding the disbanding of the regiment, until it was the pleasure of His Majesty to put an end to that authority, by appointing some other person, or withdrawing this officer. Nothing of that kind was done.”

It appears, also, from the foregoing case, that the usage of the army in matters of rank and command is recognized as a test by the superior courts of Westminster; and that, in order to ascertain such usage, the evidence of distinguished and experienced officers, and particularly of those who have filled high posts in the military departments of Government, is receivable, and entitled to very high consideration.

The recognition by the home authorities of an officer's possession and exercise of a particular command, in the colonies or dependencies of the empire, appears from the same case to be very decisive in all questions relating to its legality; so that, unless there be any positive rule or law to prevent an individual officer from filling a particular situation coupled with military command, the pleasure of the sovereign, as having the supreme direction of all the armed forces of the realm, will, when clearly signified, satisfy all doubts regarding such officer's legal position.

The duty of military obedience to the commands of superior officers is most fully recognized by courts of law; and it has been held, that disobedience never admits of *justification*,—that nothing but the physical impossibility of obeying an order can excuse the non-performance of it,—and that when such impossibility is proved, the charge of disobedience falls to the ground. The learning on this subject is to be found in the great case of *Sutton v. Johnstone**, which was an action by Captain Sutton of H.M.S. *Isis* against Commodore Johnstone for arresting and imprisoning him on charges of misconduct and disobedience to orders in the action with the French squadron

* 1 *Term Reports*, 548.

under M. Suffrein in Porto Praya Bay in the year 1782; and there the two Chief Justices Lord Mansfield and Lord Loughborough laid down the law in the following terms: "A subordinate officer must not judge of the danger, propriety, expediency, or consequence, of the order he receives: he must obey: nothing can excuse him but a physical impossibility, A forlorn hope is devoted—many gallant officers have been devoted. Fleets have been saved, and victories obtained, by ordering particular ships upon desperate services, with almost a certainty of death or capture*."

But the clear and intelligible rule thus propounded is nevertheless subject to the same distinction by which every other rule of conduct in life is governed. No subordinate officer is bound to obey any order, which is plainly, and to any common apprehension, illegal: but then the illegality must be quite manifest; the order must imply such a contradiction to common sense, and such a violation of duties superior to the duty of military obedience, that there can be scarcely two opinions on the subject wherever any fair doubt can be raised, the obedience of the inferior officer is to be considered as proper and meritorious. Upon any other principle, his situation is the most cruel imaginable: he is liable to the severest punishment, even to instant death, if he refuses to obey; and if he does obey, he is exposed to the animadversion of the civil power, which teaches him that he ought to have canvassed the order,—to have remonstrated against it,—and in case this opposition proved ineffectual to have disobeyed it†.

"It cannot (said Mr. Baron Eyre) be disobedience, where obedience is impracticable, or legally improper: for the term (disobedience) implies a crime: whereas there can be no criminality in omitting to do what is physically impossible or forbidden by law‡."

By the Act 24 Geo. III., c. 25, for regulating the affairs of India, the Commander-in-Chief of the Company's forces

* Judgment of Lord Mansfield and Lord Loughborough in Exchequer Chamber, *Johnstone v. Sutton*, 1 *Term Reports*, 548; and see the opinion of the Law Officers of the Crown in the case of Captain Bennett of H.M.S. *Tribune*, (1805), *Hickman On Naval Courts Martial*, 145.

† See the *Edinburgh Review* for 1810.

‡ *Sutton v. Johnstone*, 1 *Term Reports*, 501.

in India for the time being has voice and precedence in council next after the Governor-General*. By the same Act the Commanders-in-Chief of Madras and Bombay have like precedence in the Councils of those Presidencies, unless the Commander-in-Chief of India be present in either of them, in which case he takes the place in Council of the local Commander-in-Chief, who during such time has only a seat, but no voice, in the Council.

* By the Act 3 & 4 Wm. IV. c. 85, s. 40, no military man [other than the Commander-in-Chief,] having a seat in the Supreme Council of India can, during his continuance in such office, hold, or be employed in any military command or duty.

CHAPTER V.

SALE AND PURCHASE OF COMMISSIONS.

THE grant of a commission in the army is, in law, an appointment to a public office, which stands upon the same legal footing as any other public office holden by the Crown, except as to some particulars in which the Legislature has created an express distinction.

Skill, diligence, and fidelity in the duties of office, are exacted by the law from all public functionaries, without exception, and need not be here insisted upon; as the absolute power of dismissal which the crown holds over the commissioned officers of the armed forces of the realm, prevents all those questions which might, in the case of some offices, arise as to the proof or sufficiency of the grounds of dismissal, where unskilfulness, negligence, or unfaithfulness are imputed.

The peculiarity, however, which is now legally annexed to commissions in the army, of being the subjects of pecuniary purchase, sale, and exchange, renders it necessary to advert briefly to the general law on this head, and on the subject of public offices.

At common law it is illegal to give money for the appointment to a public office, and for the wisest reasons; because, if that sort of traffic were permitted, offices of the greatest trust might come to the hands of persons who are wholly unfit for them*.

“There is no rule” says Lord Kenyon, C. J. “better established respecting the disposition of every office in which the public are concerned than this, *detur digniori*: on principles of public policy no money ought to influence the appointment to such offices †.”

Some early Acts of Parliament were passed in the times of King Richard II. and King Henry IV., prohibiting the appointment or selection of certain specified

* 1 Henry Blackstone's *Reports*, 323.

† *Blackford v. Preston*, 8 *Term Reports*, 89, 92.

officers, "for any gift or brokage, favour or affection;" but the principal statute relating to this matter is 5 & 6 Edward VI., c. 16, which enacted, that no public office shall be sold under pain of disability to hold or dispose of it. And this disqualification extends so far, that any one who makes a contract for an office contrary to the purview of this statute, cannot at any time during life be restored to a capacity of holding it by any grant or dispensation whatsoever*.

There is a proviso, however, in the statute of King Edward, that all acts of persons offending against the statute, done before they are removed from their offices, shall be good and valid.

This statute was held by the Lord Keeper, Sir Nathan Wright, in 1702, not to extend to military offices. The point arose in the case of *Ive v. Ash*†, where Captain Ash, of the Marines, had agreed to sell his commission to Lieutenant Ive, of the same corps, for 600*l.*, and had, accordingly, procured a Captain's commission for Ive to be signed by King William III. Lieutenant Ive was informed that the commission was ready for him, but he refused to take it out, and was desirous of giving up his bargain, and so the place was given to another. Lieutenant Ive thereupon instituted proceedings in Chancery, to be relieved from payment of the money to Captain Ash on the ground that the agreement was a corrupt contract within the statute of King Edward. But the Lord Keeper overruled this objection to the agreement, and declared Lieutenant Ive liable to pay the 600*l.* according to his contract. This decision was afterwards confirmed by the House of Lords.

But though military commissions were thus saleable, such transactions were not valid without the specific consent of the Crown in each case; and many other public offices stood upon a similar foundation. The price also to be paid upon sales and exchanges of such commissions was originally unrestricted, and was regulated solely by the discretion and pleasure of the parties immediately concerned.

A restriction was first put upon the sale of military commissions by the Stat. 7 Wm. and Mary which enacted, that every commissioned officer should take an oath

* Sir Arthur Ingram's Case. *Coke upon Littleton*, 234.

† *Precedents in Chancery*, 199.

that he had not directly or indirectly given any thing for procuring the commission but the usual fees. But this statute did not extend to the Marines; nor was that corps included in the prohibition for a long time afterwards*.

There was formerly no legal restriction as to the persons by whom the agency in the purchase and sale of commissions was undertaken. But by the Stat. 48 Geo. III., c. 15, s. 100, this power was restricted to authorized agents of regiments, troops, or companies; and every such agent who takes any money, or other reward for negotiating the purchase or sale of any such commission, or for his agency therein, forfeits 100*l.*, and treble the sum which should be given or received for, or in relation to, any such commission over and above the regulation price.

Not long after the passing of this Act, there occurred a case of *Davis v. Edgar*†, in which the Court of Common Pleas held, that parties who dealt *with each other* in respect of commissions, and for excessive prices, through the medium of unauthorized agents, could not enforce such contracts in a court of justice; and that such agents could recover no remuneration for their services from either of the parties. One Davis who was not an authorized army agent, had negotiated between G. C. and the defendant Edgar, the sale to the latter of a cornetcy which G. C. then held in the Life Guards. Edgar agreed to give a sum exceeding the regulation price, and paid to G. C. the whole amount except 38*l.* which he retained by an arrangement with G. C., to pay to Davis as a remuneration for his agency. Notwithstanding this deduction from the price, the sum actually paid by Edgar to G. C. for the cornetcy still exceeded the regulation price. Edgar having neglected to pay the reserved 38*l.* to Davis, the latter brought an action against him for the amount. On the part of Davis it was contended, that there was nothing in the Act which made the purchase of a commission at a price above the regulation price illegal *as between the parties*, although the Act imposed a penalty upon the *agents* negotiating such purchase. But this suggestion was overruled by the Court. Sir James Mansfield, C. J.: "It is quite clear that G. C. never could have recovered " this sum of 38*l.* from the defendant, because it was a sum

* *Precedents in Chancery*, 199.

† *Davis v. Edgar*, 4 *Taunton's Reports*, 63.

“exceeding the regulation price; and it appears that he has already received more than that price. If, then, G. C. could not enforce the payment, how can the plaintiff (the agent), who derives his claim through him, stand in a better situation?”

The Annual Mutiny Act, however, now contains the following provisions on this subject: “That every person, not being an authorized army agent, who shall negotiate or act as agent for, or in relation to, the purchase or sale, or exchange of any commission in Her Majesty’s forces, shall forfeit for every such offence the sum of 100*l.*; and every person, whether authorized or not as army agent, who shall receive any money or reward in respect of any such purchase, sale, or exchange, or shall negotiate or receive for any purpose whatever, any money or consideration where no price is allowed by Her Majesty’s regulations, or any money or consideration exceeding the amount so allowed, shall forfeit 100*l.*, and treble the value of the consideration where the commission is not allowed to be sold, or treble the excess of such consideration beyond the regular price”—(10 & 11 Vict. c. 12, s. 83). It will be observed that this act is more extensive than the above-quoted Act, 48 Geo. III., but the principle is the same, and the decision in *Davis v. Edgar* * applies equally to both the Acts.

It has been already pointed out, that military commissions were not formerly considered to be “offices” within the purview of the statute of King Edward VI. But this is no longer the case. For by the Stat. 49 Geo. III., c. 126, s. 1, the Act of King Edward VI. is expressly extended to Scotland and Ireland, and to all “commissions, naval or military,” under the Crown, whether in the United Kingdom or in the colonies; and to all offices, commissions, places, and employments belonging to, or under the appointment or control, of the East India Company; and in addition to the forfeiture of office, as enacted by the old statute, offences against that Act and the new Act are made misdemeanours, punishable by fine and imprisonment.

By Sec. 7, the purchase, sale, or exchange of commissions in His Majesty’s forces, for the regulation prices, by agents of regiments, authorized by the Commander-

* *Supra*, 58.

in-Chief, or by the colonels or commandants of regiments or corps, and taking no fee or reward for acting in such transactions, are expressly legalized, and excepted from the penal operation of the Act.

By Sec. 8, however, officers are declared liable to forfeit their commissions, and be cashiered, who take, accept, receive, or pay, or agree to pay, any larger sum of money, directly or indirectly, than the regulation price authorized by Her Majesty, in relation to the purchase, sale, or exchange of commissions in His Majesty's forces, or who shall pay, or cause to be paid, any sum of money to any agent or broker, or other person, for negotiating the purchase, or sale, or exchange of any commission.

It is under the authority of this Act, that the present system of purchase, sale, and exchange of commissions in the British army takes place. The Act makes no material alteration in the law with respect to those commissions, which (as we have seen) were, from very early times, saleable by the holder with the consent of the proper authorities. It simply prohibits the sale of such commissions, except for the regulation prices, and imposes specific penalties on offences committed by officers in contravention of the Act.

The law, however, still continues to prohibit all pecuniary transactions relative to purchasable commissions, where the heads of the department from which such commissions issue are kept in ignorance of the bargain that has been made between the parties concerned.

The restriction imposed by the Legislature on the prices to be paid for commissions in the army is rigorously observed by courts of justice, whenever the subject is brought under their notice: and on a recent occasion in Chancery, where the trustees and guardians of a ward of court, who had been nominated to a commission in the army by purchase, applied to the Vice-Chancellor of England for the advance of a sum of money out of the minor's fortune to provide the purchase-money, the learned judge, taking notice that the amount of the proposed advance exceeded the regulation price, refused to allow any sum beyond that price for the purpose in view.

In those branches of the service where no purchase whatsoever of commissions is allowed by the Queen's Regulations, as the marines and the ordnance corps, the statute of King Edward VI., as extended by the 49

Geo. III., operates in full force, and places such commissions on the footing of public offices. Every pecuniary bargain, therefore, with reference to such commissions, is a corrupt contract, void at law, whatsoever be the agency through which the business be transacted; and all parties concerned incur the penalties imposed by the latter Act.

The same observation applies equally to naval commissions, which are by law utterly unsaleable; and the sale of cadetships in the military service of the East India Company stands precisely on the same footing*.

All offences committed against the Acts of Edward VI. and Geo. III. by any governor, lieutenant-governor, or person having the chief command, civil or military, in any of the Queen's dominions, colonies, or plantations, or by their secretaries, may be prosecuted as misdemeanours in the Court of Queen's Bench at Westminster†, in the same manner as offences committed by persons holding public employments abroad may be prosecuted under the Stat. 42 Geo. III., c. 85. The penalties are fine and imprisonment.

In *Blachford v. Preston*‡, Lord Kenyon, C. J., expressed an opinion, that, independently of the above-mentioned statute of Edward VI., the common law clearly prohibited the sale of public offices; and the penalties of the statute have, therefore, been held to apply to various offices not known, and not even in existence in the days of King Edward VI., as, for instance, the Excise§. On this principle, the appointment of captain of an East Indiaman, was held in *Blachford v. Preston*||, to be not legally saleable, without the consent of the East India Company; such a transaction being not only contrary to the bye-laws of the Company, and therefore a fraud upon the Company, but also contrary to public policy. And in *Card v. Hope*¶, it was held by the Court of King's Bench, that the secret

* Lord Denman pronounced the judgment of the Court of Queen's Bench in the case of Colonel Charretie, Sir William Young, Bart., (an East India Director,) and others, who were prosecuted for the sale of an India cadetship, that such an appointment is an office or place within the meaning of the Act of Geo. III. (24th February, 1849.)

† 49 Geo. III. c. 126, s. 14.

‡ 8 Term Reports, 89, 92.

§ *Law v. Law*, Cases *tempore* Talbot, 140. || 8 Term Reports, 89.

¶ 2 Barnewall and Cresswell's Reports, 661.

sale of the succession to such a command was not cured of its illegality by the rule of the East India Company to examine into the efficiency of every officer receiving an appointment of that description. To render such an appointment valid, it was essential that the Company should have been distinctly apprised of the bargain made between the retiring officer and his successor.

At law, the money paid under an illegal contract cannot be recovered back. Courts of law will not assist a party to such a contract either in enforcing it, or in extricating himself from the consequences.

But, as the provisions of the statute of Edward VI. do not extend to all the cases within the mischief which it was intended to prevent, courts of *equity* have frequently interposed to prevent the performance of contracts infringing upon the principle of the Act; for though it is a rule of justice that penal laws are not to be extended as to penalties and punishments, yet, if there be a public mischief, and a court of equity sees private contracts made to elude laws enacted for the public good, the court will exercise jurisdiction to prevent the contemplated mischief.

It is thus become an established rule of equity, that money improperly paid by an officer, either for the direct purchase of a commission, or by way of remuneration for the exercise of patronage or influence in obtaining a commission, can be recovered back by a suit in the Court of Chancery. The objection that the party who gave the money has been *pâriceps criminis*, is not allowed in that court to prevail in cases of this nature, where relief is given on grounds of public policy. It is considered to be for the public interest that relief should be administered, and that it should be given to the public through the party whose money has been wrongfully received, so that the wrong-doer may not retain the spoils of his crime*.

Lord Chancellor Henley had a case of this kind before him in 1762†, where one Mac Culloch, a linendraper, entered into a treaty with Morris, who was a livery servant to Captain Bendish, to procure Morris a commission in the marines for 200*l.* Morris, not having the

* Roche v. O'Brien, 1 Ball and Beatty's Reports, 358; Eastbrook v. Scott, 3 Vessey, 456.

money, applied to his master to lend him 200*l.* to pay for the commission. Captain Bendish refused, on the ground that it would be very improper for him to be instrumental in getting his servant into the marines as an officer; and that all the officers in the corps would be offended at it. Captain Bendish who was examined as a witness in the cause, proved also that Mac Culloch was in the passage of Captain Bendish's house when he gave his reason to Morris for refusing to lend him the money, and that he left the parlour-door a-jar on purpose that Mac Culloch might hear the reason, and stated his positive belief that Mac Culloch did hear it. The treaty, however, went on, and Morris having obtained the money from some quarter, agreed for the commission; and accordingly Mac Culloch being acquainted with a Mrs. Stot, who was, or pretended to be the wife of a Captain Stot, and was intimately acquainted with Admiral Boscawen, obtained by her means and interest with the Admiral, (who was then one of the Lords of the Admiralty,) a commission of second-lieutenant for Morris, who paid 200*l.* to Mac Culloch for it. Out of that sum, Mac Culloch paid Mrs. Stot 50*l.* for her service. Mrs. Stot swore that the commission was first obtained for Mac Culloch, but that his wife being unwilling he should take it, prevailed on Mrs. Stot to recommend Morris for it. Morris having thus obtained his commission, went to Portsmouth, and after having served about six months, was discovered to have been a livery servant, upon which the officers refused to roll with him, and sent a letter upon the subject to the Secretary of the Admiralty, which was laid before the Lords of the Admiralty; and the Secretary, by their direction, wrote a letter in answer, commending them, and ordered Morris to be discharged. It appeared also in evidence, that Morris was discharged in consequence of that letter, and for having been a livery servant, and for no other reason. Morris then instituted proceedings in Chancery to recover back the money which he had paid for his commission; and Mac Culloch was decreed to repay it accordingly. Lord Chancellor Henley:—“ I have not the least doubt on this case; and if there be no precedent of such a determination as I shall make, I have no scruples to make one, and I shall glory in doing so. The general question is, whether this case is within the jurisdiction of the court. I lay down this rule, that if a man sells his interest to

“procure an office of trust or service under the Govern-
 “ment, it is a contract of turpitude; it is acting against
 “the constitution by which the Government ought to be
 “served by fit and able persons recommended by the
 “proper officers of the Crown for their abilities, and with
 “purity. It is one of the most useful jurisdictions of the
 “court, and ought to be exercised upon all occasions. By
 “this means, the most innocent and pure officer of the
 “Crown, whose business it is to recommend, may have his
 “honour traduced and scandalized. It is no uncommon
 “thing to sell commissions in the army; but then it is
 “done with the leave of the Crown as a method to reward
 “merit with economy, where an officer, who has deserved
 “well, desires to retire, and the person to succeed him is
 “examined by the Secretary-at-War, and approved as a
 “proper person. That was not the case here; but the
 “defendant sells his interest with Mrs. Stot to procure a
 “commission. The case of *Ive v. Nash** is very different;
 “the commission was sold by leave of the Crown; the
 “defendant surrendered, and it was the plaintiff’s fault
 “that he did not take it. I am also of opinion, that if
 “the defendant might sell his interest, yet the plaintiff
 “has been imposed upon. I do not believe the defendant
 “ever intended to take the commission himself; his name
 “was not entered on the list, nor is it in other respects at
 “all probable; and he knew that the plaintiff was incapable
 “of it by having worn a livery. Decree the 200*l.* to be
 “repaid, with interest, from the time it was advanced by
 “the plaintiff.”

In 1797 occurred the case of *Whittingham v. Burgoyne*† in the Court of Exchequer. The plaintiff was a cornet in a fencible regiment of cavalry of which the defendant was colonel; and the defendant alleging that he had the right or power of selling commissions, agreed with the plaintiff to promote him to the steps of lieutenant and captain for 260*l.* The plaintiff accordingly gave a bill of exchange for that sum, but was, soon after his promotion, deprived of his commission by the defendant. The plaintiff, therefore, sued in Chancery for the recovery of the money which he had paid to the defendant, and the Court of Exchequer held that the suit was maintainable. The Lord Chief Baron Sir Archibald Macdonald observed that the recrimi-

* *Supra*, 57.

† *Anstruther's Reports*, 900.

nation upon the plaintiff, as being *particeps criminis*, did not apply in those cases where public policy requires the interference of courts, to check vicious practices; and that wherever a man sells his interest to procure for another an office of trust or service under the Crown, it is a contract of turpitude, and cognizable by a court of equity.

In ordinary suits in Chancery, and in other courts of equity, the defendant is required to disclose, upon oath, all that he knows regarding the matter in question; but where such disclosure would expose him to penalties, he can plead that fact as a protection and refuse to answer. This was done in the case of *Benson v. Westrop* in 1822, in a case arising under the Act 49 George III., now under consideration; and the Vice-Chancellor held the defendant to be justified in taking that course. The consequence, therefore, is that when a matter of this kind becomes the subject of litigation in Chancery, the party who seeks to invalidate the transaction and recover his money, ought to be in a condition to prove his case by sufficient evidence, independently of any admissions on the part of the defendant.

It appears also, from the judgment of the Court of Common Pleas in the case already cited of *Davis v. Edgar**, that a party who has improperly agreed to take or receive money for his commission beyond the regulation price, cannot, in point of law, evade the Act of Parliament by postponing the receipt of the money until after the grant of the commission to the purchaser; as in case of non-payment by the purchaser, no suit at law or in equity will lie against him for the recovery of the money which he has illegally agreed to pay.

The result is that the seller of a purchasable commission for an illegal price, or in an illegal manner, cannot enforce the contract before any judicial tribunal; and if, in the first instance, the transaction should be completed between the parties without dispute, he can, nevertheless, be afterwards compelled at the suit of the purchaser, in the Court of Chancery, to refund the money improperly received.

From the nature, however, of these transactions, they are seldom brought before the courts of law or equity, unless there has been some departure on one side or the other from the terms of the bargain between the parties. Con-

* *Supra* 58.

tracts in breach or evasion of the public law of the land must rest for their support exclusively upon the private understanding of the parties to such dealings. In defence of such transactions they are frequently designated *mala prohibita*, as distinguished from *mala in se*. But this distinction, though not destitute of the sanction of jurists and moralists, was exploded by the vigorous understanding of Lord Tenterden*, when Lord Chief Justice of the King's Bench.

Thus the law appears to stand with reference to commissions which are lawfully the subjects of sale, purchase, or exchange. But some points remain to be noticed concerning commissions in those corps where promotion by purchase is not allowed or recognized. It is conceived that, on general principles, the consent of the Crown, as signified by the proper officers, is all that is necessary to legalize the sale of such commissions. But so long as such consent is withheld, admission into these corps for pecuniary consideration can only be effected by direct bribery of those who exercise the patronage, or by a corrupt purchase of the influence of others over such persons; either of which modes of proceeding is obviously illegal, as has been already pointed out, and can, therefore, never be presumed. No authority can be necessary to show that bribery, which is a legal offence, can never be made the basis of a legal contract; but with respect to the corrupt exercise of influence, the principle under consideration is illustrated by a case† in which one Law, by the interest he had with the Commissioners of Excise, procured for his brother a place of trust in that department; and in compensation for this service, he, without the knowledge of the Commissioners, took from his brother a bond for the payment of 10*l.* per annum during his continuance in the office. On the brother's death considerable arrears were due upon the bond; whereupon Law brought an action against the widow and executrix of his brother for the recovery of the arrears; but on application to the Court of Chancery the action was stayed by an injunction. Lord Chancellor Talbot: "Bonds " and engagements of this nature are highly to be dis-

* *Cannan v. Bryce*, 3 Barnewall and Alderson's *Reports*, 179; see also 2 Swanston's *Reports*, 161, note.

† *Cases tempore Talbot*, 140.

“couraged. Merit, industry, and fidelity ought to re-
 “commend persons to these places, and not interest with
 “the Commissioners, who, it is to be presumed, had they
 “known from what motive the plaintiff applied to them
 “on behalf of his brother, would have rejected him.
 “The officer’s giving money to a friend of the Commis-
 “sioners for his interest, is altogether as bad as giving
 “money, or a bond for money, to the Commissioners
 “themselves, which undoubtedly would have been relieved
 “against. It is a fraud on the public.”

In 1790 a case came before Lord Chancellor Thurlow, in which Mr. Thrale, on his appointment to the consulate of Tunis, on the resignation of Mr. Charles Gordon, gave bond to one Ross for an annuity of 200*l.* a year, in trust for Mr. Gordon during his life; and His Lordship held that if this bond were given for the resignation of the office by Mr. Gordon, the consideration was corrupt, and the transaction void*. In the cases just cited, the offices were civil; but military offices are under the same rule of law.

The purchase of *admission* into those corps in which commissions are not regularly saleable, being thus totally excluded by law, it only remains to notice the effect of pecuniary bargains for obtaining *promotion* in such corps for officers already holding commissions therein. Such bargains usually consist in holding out valuable inducements to a senior officer to retire, in order to accelerate the promotion or success of a junior to the higher grade thus vacated; and legal precedents appear clearly to warrant the conclusion, that such transactions are wholly illegal, unless they be expressly ratified or approved by the heads of the department from which the officer thus gaining promotion receives his new and higher commission. It will be seen, also, that judges of great eminence have even expressed doubts as to the legal validity of such arrangements, however high be the official authority by which they may happen to be sanctioned.

In Sir Arthur Ingram’s case it was decided, that an agreement to take money for the surrender of an office, to the intent that another party may be appointed, is an offence against the Statute of Edward VI.†, and creates

* Thrale v. Ross, 3 Brown’s *Chancery Cases*, 57.

† *Coke upon Littleton*, 234. *Coke, Third Institute*, 154.

a forfeiture of the office by the party thus corruptly succeeding to it. And in the same case it was held, that where a person has forfeited a place by having purchased it, he is for ever disabled to enjoy the same, and that the Crown has no power of curing the disability thus created*.

Occasionally, however, the resignation of a superior officer is brought about by an arrangement, under which his successor is to allow him still to enjoy a proportion of the salary or emoluments of the rank or station from which he retires. But unless the consent be first obtained of the heads of the department to which the patronage of the office belongs, such a transaction is, if possible, more illegal than a simple payment of money, or an annuity to procure a resignation. For the reason of giving a salary is, that it is supposed to be necessary for enabling the holder of an office duly to execute the duties; and where the policy of the law in this respect is violated by private agreement, unaccompanied by superior sanction, the arrangement is deemed a fraud upon the public, and cannot be sustained in any court of justice.

In the Excise Case already cited†, Lord-Chancellor Talbot pronounced against this practice a solemn opinion in the following terms: "The taking away from the officer what the Commissioners of the Treasury think to be but a reasonable reward for his care and trouble, and an encouragement to his fidelity, must needs be of the most pernicious consequence, and induce him to make it up by some unlawful means, such as corruption and extortion."

In 1790 the subject was much considered by the Court of Common Pleas in the case of *Parsons v. Thompson*‡, where an officer in the royal dockyard at Chatham agreed to give another officer there a certain share of the profit of the office, if the latter would allow himself to be superannuated, and retire on the usual pension, to make way for the former; and it was decided that such an agreement having been made without the knowledge of the Navy Board, to whom the appointment belonged, could not be the foundation of an action, because it was contrary to

* *Croke's Reports, tempore K. James I.* 385.

† *Law v. Law, Cases tempore Talbot*, 140.

‡ 1 *H. Blackstone's Reports*, 322.

public policy. The case was assimilated by the court to commissions in the army; and the practice respecting the sale of them was adverted to, as resting on the consent of those who have the power of granting them. Lord Loughborough, C. J.: "Every action on promises must rest on a fair and valuable consideration, which it is for the plaintiff to make out. What is the consideration stated here?—that the plaintiff represents himself as unfit for future service, and entitled to a pension for the past. This he did at the request of the defendant, on the promise from him of a certain allowance. Now the representation was either true or false. If true, there was no ground for any bargain with the defendant; the plaintiff did nothing for the defendant; all he did was for his own ease and advantage. If false, the public is deceived, the pension misapplied, and the service injured. It is not stated that the plaintiff procured the appointment for the defendant (which would clearly have been brokage of office and bad), but that he *made way* for the appointment. But from thence no valuable consideration can arise. Had the transaction passed with the knowledge of the Admiralty, judging of the case, and applying at their discretion the allowance they are bound to make, possibly it might have stood fair with the public. I say *possibly* only; to be sure the ground of deceit on the public would be done away. But this case rests on a private unauthenticated agreement between the officers themselves, which cannot admit of any consideration sufficient to maintain an action. This agreement resting on private contract and honour may, perhaps, be fit to be executed by the parties, and can only be enforced by considerations which apply to their feelings, and is not the subject of an action. The law encourages no man to be unfaithful to his promise; but legal obligations are, from their nature, more circumscribed than moral duties."

These principles were adopted by the Court of Chancery in another case, of which the leading facts were as follows*: Edward Hartwell was appointed in 1776, by the then Postmasters-General, Lord Le Despenser and the Right Honourable H. F. Thynne, to the command of the *Dartmouth*, a king's packet, running between

* *Hartwell v Hartwell*, 4 Vesey, Jun. *Reports*, 811.

Holyhead and Dublin, in succession to his father, Joseph Hartwell, the former commander, and on the recommendation of friends, with whom Edward Hartwell had stipulated, that if they obtained for him the appointment he would make a suitable allowance towards the support of his mother and sisters. He accordingly gave a bond, securing an annuity for that purpose. His appointment, however, was made by the Postmaster-General unconditionally, and without any reference to the arrangement above stated; they being, in fact, totally uninformed respecting it. It happened that the annuity was in arrear at the death of Edward Hartwell; and a suit in Chancery was instituted against his executors to recover the amount. The Master of the Rolls, Sir Richard Pepper Arden, (afterwards Lord Alvanley,) heard the cause, and after adverting to *Parsons v. Thompson**, where the agreement was without the knowledge of the Navy Board, His Honour proceeded thus: "I have, therefore, no scruple in saying, that if such a contract is made for a sum of money in consideration of the appointment to such a command as this, between individuals, and it is not completely with the knowledge of the Postmaster-General, it is void." His Honour also intimated his opinion, that the transaction could not stand, even if proved to be concluded with the approbation of the Postmaster-General†.

Lord-Chancellor Thurlow, in the year 1781, proceeded on the same principle, in a case where Lord Rochford, Groome of the Stole to King George III., had, by virtue of his own office in the King's household, recommended another person to a place in the household, in consideration of an annuity to be granted by the new placeman to a third person. Lord Thurlow held the contract to be illegal; and restrained, by an injunction, an action which he had brought to recover some arrears of the annuity‡.

But the common law of the land, upon which the foregoing decisions rested, has been partially modified by the Stat. 49 Geo. III., c. 126, s. 10, which authorizes the grant of an annuity to be reserved out of the fees or emoluments of an office to the former holder, *provided the amount, and the circumstances and reasons under which*

* *Supra*, 68.

† *Osborne v. Williams*, 18 Vessey, Jun. Reports, 375.

‡ *Harrington v. Duchatel*, 1 Brown's Chancery Cases, 124.

the arrangement is permitted, be stated in the instrument appointing the successor, by whom the annuity is to be paid. It will be observed, however, that the language of the Act is confined to the former holder of the office, and does not authorize a grant to his wife or children, or to a stranger. The silence, therefore, of the statute with respect to all persons, except the former holder of the office, supports to some extent the conclusion, that every other transaction of the nature under consideration is legally void and unsustainable. And it will be further noticed, that the bargains legalized by the statute are such only as are effected with the direct cognizance of the board, or other party having the right of patronage or promotion, who is also to state the whole matter in the instrument or commission, under which the new officer receives his appointment.

In a modern case, where the bargain involved the purchase of the command of a ship in the maritime service of the East India Company, and the resignation of the present commander, under a secret stipulation for his continuing to enjoy a portion of the emoluments of the appointment, the Lord Chief Justice Abbott made the following observations bearing upon the subject under consideration: "Had the East India Company known that the effect of appointing [Captain ——] would not be to give him the emoluments of the office, but to divide them between him and others, it is probable that the Company might have exercised their right of patronage in a different manner. Such a secret agreement would, therefore, be a fraud upon the Company*."

Applying the foregoing rules and principles, therefore, to military commissions in the East India Company's service, where the purchase of such commissions is unknown to, and unauthorized by, the law, the Lord Chief Justice Abbott's judgment in the last cited case is a direct authority for the proposition, that all pecuniary dealings between officers in that service, for promotion or succession by means of the resignation of their superiors, are offences against the Statutes of King Edward VI. and King George III., unless such bargains be in each individual instance accompanied by an official signification of the consent and approbation of the Company. For the Company are en-

* *Waldo v. Martin*, 4 Barnewall and Cresswell's *Reports*, 319.

titled to a free, impartial, and disinterested course of succession and promotion among their officers; and practices of this nature, if suffered to exist in one corps, operate prejudicially to other corps in which such practices are not known. Under any circumstances, and however general the practice may be, the Company are by such secret proceedings deprived of the power of regulating the promotion of their officers, in the manner or according to the terms upon which they enter the service; and this encroachment upon the Company's rights constitutes an offence against the Government of which the Company is a part*.

* 2 Barnewall and Cresswell's *Reports*, 661, 673. It is to be observed that the prevailing practice of *buying out* the senior officers of regiments in the East India Company's service is sometimes justified by the following extract from a letter of the Court of Directors of the East India Company to the Supreme Government in India, (29th November, 1837.) "We see no necessity for interfering with the arrangements which the junior officers of a regiment may make in individual cases, for adding to the comforts of a senior officer, on his retirement from the service on the pension to which he may be entitled."

"The regulation of 1798, requiring officers, upon retirement, to make oath that they have received no pecuniary consideration for quitting the service, has not been enforced by us in any single case of retirement in England, during the period of nearly forty years which has since elapsed. It was established chiefly on financial grounds, to prevent (as observed Lord Cornwallis when recommending other rules for the same object) *an unreasonable load of pensions*. This presumed necessity for the rule has, however, not yet been felt; on the contrary, additional facilities have been required, and have been given, for enabling officers to retire upon full pay. We shall, therefore, continue to suspend the operation of the rule; and officers retiring from time to time will not be called upon to make the declaration, unless the financial necessity to which we have referred (and of which due notice shall be given), shall at a future period be fully realized."—Jameson's *Code*, 776; Bombay, 1844.

The foregoing extracts may appear at first sight to furnish a legal sanction to the pecuniary arrangements considered in the text, and there described as illegal. But it will be seen on an attentive perusal of the Dispatch, that the Company merely do not think it needful for the government to interfere in such matter under present circumstances. The Company have no power to *legalize* transactions prohibited by Act of Parliament; and parties concerned in them are not protected from suits or prosecutions at the instance of private individuals, according to the precedents and decisions cited in the text, although the Company may not think proper to interfere.

As to those corps, therefore, in the Royal army, in which promotion takes place only by succession, the result is, that where an officer for a pecuniary consideration makes way, by his retirement, for the admission or promotion of another, the transaction is illegal and void; and it makes no difference whether the money paid is in the form of a gross sum or an annuity, or whether the payment is effected out of private funds, or secured by a charge upon the future emoluments receivable by the officer who gets the benefit of the vacancy.

The like law must obviously apply, in equal degree and in every particular, to the East India Company's military service, where succession by seniority is the rule of promotion by express enactment of the legislature*.

It has been already pointed out, that in equity (though not at law) the money paid upon such transactions, whether in the Royal army or in the East India Company's forces, can be recovered back by the officers who contributed it, or by their representatives †; and that officers concerned in such transactions are liable to be cashiered †.

Where an officer lodges money for the purchase of a step, but dies or retires from the service before the purchase is effected, the sum so lodged is repayable to him or his executors, with interest. In the case of *Leche v. Lord Kilmorey* §, the plaintiff was James Leche, formerly a lieutenant in the 86th regiment, of which Lord Kilmorey, then General Needham, was colonel; and William Leche, a relation, had paid 1,050*l.* to Greenwood and Cox, to General Needham's account, to be at his disposal for the use of Lieutenant James Leche; the money so lodged being intended to purchase rank for him whenever the opportunity might occur; and it remained in the hands of Cox and Greenwood until William Leche's death. After that event Lieutenant Leche, being obliged by bad health to retire from the army, commenced a suit in Chancery against Lord Kilmorey and the representatives of William Leche to recover the money from Cox and Greenwood. Lord Kilmorey contended that, under the circumstances of the case, the money was forfeited, and that neither the plaintiff nor William Leche's representatives had any title to it. But the Master of the Rolls, Lord Gifford, decided

* Stat. 24, Geo. III. c. 25, s. 42. † *Supra*, 62, 64. ‡ *Supra*, 60.
§ 1 Turner and Russell's *Reports*, 207.

that no forfeiture had occurred; and, as between the plaintiffs and the parties representing William Leche, his lordship considered, that the circumstance of William Leche leaving the money in the army agent's hands till his death, created a strong presumption of his intention to make an absolute provision for the plaintiff. Judgment was therefore given for Lieutenant Leche, to the full amount of the money lodged, with interest.

In *Cope v. Wilmot**, the case was this: Sir John Cope by his will directed his trustees to advance and pay out of certain specified property any sums of money they should think proper and convenient, *not exceeding in the whole the sum of 3000*l.**, for the advancement of the plaintiff in any civil or military employment. After Sir John's death, and while the plaintiff was a minor, the trustees laid out 1093*l.* in purchasing for him a commission in the army, with a horse and arms and accoutrements. But they declined to lay out any more money in the same way; and when he came of age they refused to pay him the balance of the 3000*l.*, on the ground that he had no title to any further payment on that account. The plaintiff then instituted a suit in Chancery† against the trustees, to recover this balance; and in 1771 judgment was given in his favor.

It was long ago decided that the purchase of a military commission by a father for his *younger* son operates, according to the price paid, as a total or partial satisfaction of a legacy given to the son by the father's will. Sir John Hoskins by his will bequeathed to his younger son Henry Hoskins a legacy of 750*l.*; and *afterwards* bought him a commission as cornet of horse for 650*l.* He died without altering his will; and the Lord Keeper Cowper decided that the money paid for the commission should go in diminution of the legacy, and be taken as part payment and satisfaction thereof. The same rule of equity will *à fortiori* be followed, where it is proved that sums advanced by a testator during his life, for the purchase of military promotion for the benefit of a legatee named in his will, were not mere gifts from the testator, but loans of which he expected the repayment. In *Courtenay v. Williams*‡, advances thus made were directed by the Vice-

* 1 Collyer's *Reports*, 396, note.

† *Precedents in Chancery*, 263. (1706.)

‡ 3 *Hare's Reports*, 539.

Chancellor Wigram to be deducted from a legacy left by the lender to the recipient; and in Lord Kircudbright's case* it was decided that money advanced by a father in the purchase of a commission for his *eldest* son is an advancement, the amount of which the son must bring into hotchpot, before he can claim any further share in the distribution of the father's property under his intestacy.

* 8 Vesey, Jun. *Reports*, 51.

CHAPTER VI.

PAY—HALF PAY—PENSIONS.

AN officer duly invested with his commission becomes entitled to receive, during the pleasure of the Crown, the salary allowed by the regulations of the service to officers of the same rank or degree. This salary is commonly designated pay, or full-pay, in contradistinction to half-pay, and is usually enjoyed during an officer's continuance on active duty.

Half-pay is a reduced allowance granted by the Crown, under the authority of Parliament, to commissioned officers, who, by leave of the superior authorities, retire temporarily from active duty. But this allowance, like full-pay, subsists only during the pleasure of the Crown, and may be stopped or suspended accordingly. By the receipt of half-pay, however, an officer continues subject to military authority so far as to be liable to resume full-pay and active duty whensoever he may be thereto required; the grant of half-pay being in the eye of the law, not merely a recognition of the past military character of the recipient, but an express stipulation for future services; and this stipulation continues in force until an officer obtains leave to retire from the army.

A half-pay officer, therefore, cannot refuse to go on full-pay and active service when required by the Commander-in-chief. Half-pay is a retaining fee granted for the express purpose of securing the future services of persons skilled in military duties*; so that when the Commander-in-chief thinks proper to appoint an officer on the half-pay

* Per Lord Langdale, M. R. 2 Beavan's Reports, 549; Price v. Lovett, 15 Jurist, 786.—In the Queen's Warrant of 1st May, 1846, for regulating the grants of unattached pay, retired full pay, and half-pay, there is the following clause: "The half-pay of the army is a remuneration for past military services, and also an obligation on the part of the officer to return to his military duties whenever called upon: and any officer not obeying the call is liable to forfeit his half-pay."—(*United Service Journal*, LI. 624.)

list to a regiment, or other military employment; accompanied by full-pay, he becomes subject at once to the provisions of the Mutiny Act; and in the event of his refusal to enter upon his duties, he may be forthwith tried by court martial for disobedience of orders, and punished according to the Articles of War.

The Crown is empowered by Act of Parliament* to allow to foreign military officers in its service, upon the reduction of their corps, or the expiration of their term of service, half-pay of the same amount as British officers of the like rank receive.

Half-pay was formerly permitted to be received by officers who had taken holy orders, notwithstanding the impossibility of their performing those future services which half-pay is intended to secure to the State. But this practice is now changed; and officers becoming clergymen are no longer entitled to draw their former half-pay. Barristers, however, who have held commissions in the army, are not precluded from the enjoyment of half-pay, as there is nothing to prevent the renewal of their services when required; and some of the most eminent members of the bar at the present time are, or have been, on the half-pay list, during their forensic career. Commercial pursuits, also, are no disqualification for the retention of half-pay.

By the General Militia Act, 42 Geo. III., c. 90, no officer of the line entitled to half-pay was to forfeit or quit the same by serving as lieutenant, adjutant, ensign, regimental or battalion clerk, quarter-master, or surgeon in the militia; and he was entitled to draw such half-pay in addition to his militia allowances.

In the event of any question arising as to the mere amount of an officer's pay or half-pay, the regulations of the War Office on that subject are presumed to be conclusive, in all cases where the officer's right to such allowances, when duly ascertained, is uncontested on the part of the Government.

Neither pay nor half-pay is rateable to the poor†.

In point of law, the title or claim of an officer to the allowance of pay or half-pay hardly amounts to a *right*. It certainly is of a very qualified nature or degree, as

* 55 Geo. III. c. 126.

† Rolleston v. Hibbert, 3 Term Reports, 406.

compared with the ordinary rights of property possessed by a private individual, in reference to an annuity or other periodically accruing income, For the issue of such pay, or half-pay, depends entirely on the pleasure of the Crown; and it does not in anywise rest in, or become the property of, the officer for whom it is destined, until it has been received by his agents, or some other paymaster for his express use. But when pay, or half-pay, is once issued to an officer's agents, or to a paymaster, for his use, his title to the money is complete, and cannot be afterwards questioned. "It is clear (says Lord Chief Justice Tindal) that "no action can be supported against any one to recover the "arrears of half-pay granted by the Crown, unless the "money has been specifically appropriated by the Govern- "ment, and placed in the hands of a paymaster or agent, "to the account, or for the use of the particular officer*." This opinion agrees also with the law, as previously laid down by Lord Kenyon in the case of *Macdonald v. Steele*†, where a half-pay officer brought an unsuccessful action against the paymasters-general, for not giving their draft on the bank for a sum of money due to the plaintiff for his half-pay. It appeared that this officer's agents had lodged a *caveat* against the issue of his half-pay, on the ground of his being indebted to them to a large amount; and that Sir George Younge, the Secretary-at-War, had, in consequence, written a letter to the defendant, signifying *the King's pleasure* that the half-pay in question should not be continued longer than Christmas 1789. Lord Kenyon, C.J., said he "was clearly of opinion that the *pay-office* "could not stop the pay for the debt due to the agent. If "the public had a demand on the officer, that might be set "off against the present action. But (said his lordship) "His Majesty's pleasure supersedes all enquiry, as he has "the absolute direction and command of the army. It is "true Parliament has provided a sum of money; but that "is to be distributed as the King chooses. The money is "under his control till such time as it is paid out. The "King cannot take it for his own use; but he may prevent "it from being paid to a person who is not entitled to "receive it. The *caveat* of the agent was mere waste "paper till adopted by the King; when he adopted it, it "became his own act; and it is for the honour of the

* 7 *Scott's Reports*, 74, 94.

† *Peake's Cases*, 233.

“ Government to see that money due to an officer is applied
“ to the payment of his debts.”

The decision in the foregoing case applied specifically to half-pay; but on the authorities already cited, the same principles would have been equally applicable to full-pay withheld by the Crown*.

In this respect the East India Company stands on the same footing as the Crown. In Trinity Term 1852, Lieut.-General Sir Charles James Napier applied to the Court of Queen's Bench for a rule, calling upon the East India Company to shew cause why a writ of mandamus should not be issued, commanding them to pay to that officer the sum of 20,198 rupees, equivalent to 2,019*l.* 17*s.* 6*d.* British currency; the amount in question being, as he alleged, an improper deduction from the pay due to him as Commander-in-chief of the Queen's forces in India, and as Commander of the forces of the East India Company, in the months of October and November 1850; and he sought to recover it as the arrears of such pay. The Court took time to consider the application, and on the 5th June, 1852, judgment was delivered as follows, Lord Campbell, C.J.:—

“ The first question to be considered is, whether, if Sir
“ Charles Napier's pay had been withheld from him *without*
“ *any reason* being assigned, there is any jurisdiction in
“ this Court to order, by mandamus, the arrears which he
“ claims, to be paid to him by the East India Company. If
“ there be not, we cannot entertain the question whether
“ the East India Company were justified in making the
“ deduction. The applicant must make out that there is a
“ legal obligation on the East India Company to pay him
“ the sum he demands, and that he has no remedy to
“ recover it by action. The latter point becomes material
“ only when the former has been established; for the
“ existence of a legal right or obligation is the foundation
“ of every writ of mandamus; but it seems to us that the
“ attempt to shew that there was any obligation on the
“ East India Company, which the law will enforce, to pay
“ any sum of money to Sir Charles Napier, as Commander
“ of the Queen's forces, or as Commander of the native

* By the ancient and written custom of Rome, a soldier, if his pay were withheld, was allowed to distrain upon the goods of the officer whose business it was to give it him; and the articles thus seized were retained as a pledge for the payment. Arnold's *Rome*, I. 579.

“troops, has entirely failed. A legal obligation, which is the proper substratum of a mandamus, can only arise from the common law, from statute, or from contract. Of course, the obligation here contended for cannot arise from the common law; and it is not rested on contract. We have, therefore, to see whether there be any enactments of the legislature, by which it can be supported. It was not contended that an officer in the Queen’s army at home should apply to us for a mandamus, on the ground that his pay is improperly withheld from him; and the application is entirely founded on certain statutes respecting the East India Company and the Government of the dominions belonging to the Crown in India. We will examine these statutes in chronological order.” (His Lordship then commented on the statutes which had been relied upon, viz.:—33 Geo. III., c. 52, sec. 127; 53 Geo. III., c. 155, sec. 55; 4 Geo. IV., c. 81, secs. 42 & 43 (Indian Mutiny Act); 3 & 4 Wm. IV., c. 85, sec. 79; 7 Wm. IV. & 1 Vict., c. 47; and upon the following decisions which had been cited, viz.:—*Gibson v. East India Company**; *Rex v. Directors of East India Company*†; *Rex v. Lords of the Treasury*‡; *Reg. v. Lords of the Treasury*§.)

“Thus, (continued His Lordship) upon a full examination of the statutes and decisions relied upon, it is quite manifest that the distinguished officer, who now seeks redress by a writ of mandamus, has mistaken his course; and, therefore, the rule to shew cause, for which he has applied, cannot be granted||.”

The full-pay of officers is not subject to any deductions for agency: that charge being provided for at the public expense in the annual army estimates voted by Parliament.

The half-pay and military allowances of officers were formerly subject to several oppressive deductions or stop-

* 5 Bingham’s *New Cases*, 262.

† 4 Barnewall and Adolphus’ *Reports*, 530.

‡ 4 Adolphus and Ellis’ *Reports*, 286.

§ 16 Queen’s Bench *Reports*, 357.

|| Ex parte Napier, 21 *Law Journal* (N. S.) Q. B. 332.

This case originated in an inadvertent payment to Sir C. N. of a sum greater than his just proportion of the Scinde prize-money. On the mistake being discovered, the E. I. Co. proceeded to reimburse themselves by a stoppage of Sir C. N.’s pay, as mentioned in the text. They could not, it is conceived, have compelled him to refund the over-paid prize-money. See *Post*, 82, &c.

pages; but these were all abolished by the statute 55 Geo. III., c. 131. Such half-pay and allowances, however, when received through army agents, are subject to the deduction of a small per centage of $2\frac{1}{2}$ per cent., or sixpence in the pound, for agency, as a remuneration to the agents for drawing the amount from the Paymaster-General, and adjusting the accounts relating to it. But by the statute 2 & 3 Wm. IV., c. 100, military officers and their representatives and widows are empowered to draw bills of exchange upon the Paymaster-General for their half-pay or pensions, without the intervention of army agents, and thus to escape all charges for agency.

Military pay, half-pay, and pensions and allowances are subject to the income-tax, under the statutes relating to that impost; and the amount is stopped by the Government out of the funds in the hands of the Paymaster-General.

As commissioned officers are entitled to various fluctuating rates of pay, according to their rank and the special circumstances of the service in which they are employed, errors occasionally occur on the part of agents, with respect to the proper amount of such allowances. It is, therefore, necessary to point out, that if an officer, by the oversight of the agent, draws his pay or allowances according to an improper or unauthorized scale, the error ought to be corrected by the agents without any delay; for if, through any remissness on their part, an officer is allowed to continue, unchecked, in the receipt of an income larger than that which he ought to draw out of their hands, they cannot recover it back. Many inconveniences would arise from such indulgence to the agents. It would obviously tend to promote inaccuracy in accounts; and it would violate the established rule of law, that a person who pays money on request, with a full knowledge (whether real or imputed) of the facts upon which the demand is founded, is concluded by his own act. He has the option of disputing or submitting to the demand. But, by submitting, he in effect *gives* the money to the person to whom he pays it, makes it his, and closes the transaction. He who receives it has a right to consider it as his own; he spends it in the confidence that it is his; and it would be mischievous and unjust if the party who pays the money under such circumstances were to be at liberty to rip up the transaction.

The following case is an illustration of these remarks : Brevet-major George Skyring* was a captain of the Royal Regiment of Artillery, in the pay of which corps an increase was made in 1806 by a general regulation, which declared that the difference between the former and increased rates was not to be received by an officer holding more than one military commission or appointment. From the 1st of January, 1817, and from thence to the 5th of November, 1820, when he obtained the regimental rank of major, he was at Gibraltar, and held the appointment of brigade-major of the garrison. There was a running account between him and Messrs. Greenwood and Cox, the agents, from the 1st January, 1817, to the 31st December, 1820, in which they erroneously gave credit to him for the increased rate of pay during the whole of that period; and a statement of that account was delivered to him early in 1821, when there appeared due to him thereon a balance of 116*l.*, &c. In this account, the increased rate of pay had been erroneously credited and allowed to Major Skyring for the time that he was brigade-major of Gibraltar. It appeared that in December 1816, the agents had been expressly apprised, by a letter from the Board of Ordnance, that the increased rate of pay in question did not apply to Major Skyring and officers similarly situated; but the agents did not communicate this information to Major Skyring until May 1821. They continued to receive his pay until his death, when his executors required payment of the balance then due to him. The agents claimed to deduct the amount of the over-payments made between 1st January, 1817, and 31st December, 1820; but the executors resisted this demand, and brought an action for the entire balance, which they recovered by the verdict of a jury, under the direction of the learned judge who tried the cause. The matter was afterwards argued before the Court of Queen's Bench, on an application for a new trial, which was refused. Lord Chief Justice Abbott: "I think it was the duty of " [Greenwod and Cox] to communicate to the deceased the

* Skyring v. Greenwood, 4 Barnewell and Cresswell's *Reports*. 281.

“ information which they had received from the Board of
“ Ordnance; but they forebore to do so, and they suffered
“ him to suppose during all the intervening time that he
“ was entitled to the increased allowances. It is of great
“ importance to any man, and certainly not less to military
“ men than others, that they should not be led to suppose
“ that their annual income is greater than it really is.
“ Every prudent man accommodates his mode of living to
“ what he supposes to be his income; it therefore works a
“ great prejudice to any man if, after having had credit
“ given him in account for certain sums, and having been
“ allowed to draw on his agent, on the faith that those
“ sums belonged to him, he may be called upon to pay
“ them back. Here the defendants have not merely made
“ an error in account, but they have been guilty of a
“ breach of duty, by not communicating to Major Skyring
“ the instruction they received from the Board of Ord-
“ nance in 1816: and I think, therefore, that justice
“ requires that they shall not be permitted either to recover
“ back or retain, by way of set off, the money which they
“ had once allowed him in account.”

The following observations on this subject were made by
Mr. Justice Gibbs, in a case involving similar principles:
“ Where a man demands money as a matter of right, and
“ the other, with a full knowledge of the facts upon
“ which the demand is founded, has paid a sum, he never
“ can recover back the sum he has so voluntarily paid.
“ It may be, that upon a further view he may form a dif-
“ ferent opinion of the law; and it may be that his subse-
“ quent opinion may be the correct one. If I were to hold
“ otherwise, I think many inconveniences may arise. There
“ are many doubtful questions of law. When they arise,
“ the defendant has an option, either to litigate the ques-
“ tion, or to submit to the demand and pay the money.
“ I think that by submitting to the demand, he that pays
“ the money *gives* it to the person to whom he pays it, and
“ makes it his, and closes the transaction between them.
“ He who receives it has a right to consider it as his own
“ without dispute: he spends it in confidence that it is his:
“ and it would be most mischievous and unjust, if he who
“ has acquiesced in the right by such voluntary payment,
“ should be at liberty, at any time within the statute of
“ limitations, to rip up the matter and recover back the
“ money. He who received it is not in the same condition;

“ he has spent it in the confidence that it was his, and perhaps has no means of repayment*.”

Each regiment in the army has its own agent selected by the colonel for the time being, to receive the pay, prize-money and other allowances of himself and all the officers and men of the corps; and the colonel is personally responsible to the Government for the solvency of the agent, and for all the consequences of the appointment.

By the General Militia Act, 42 Geo. III., c. 90, when any regiment, battalion, or corps of militia is drawn out into actual service, the colonel or other commandant is to appoint an agent to such regiment, battalion, or corps, and to take security from him, in the same manner as the colonel of a regiment in the regular forces; and such colonel, or commandant, of militia, is made liable for all deficiencies of the agent, on account of the pay, clothing, or public stock of the regiment, battalion, or corps.

A regimental agent, on receiving his appointment, which is in the form of a power of attorney from the colonel†, becomes a public officer, amenable to the public, and bound to pass his accounts periodically at the office of the Paymaster-General, according to the Act of Parliament (45 Geo. III., c. 58, s. 21). He is also accountable to each individual person in the regiment for his distributive share of the money received by the agent for their use, so that any of those individuals may separately, in case of need, maintain proceedings at law or in equity against the agent for the amount of their pay or allowances in his hands.

The responsibility of colonels of regiments for the agents whom they appoint, is obviously a great burden; and it appears that endeavours were once made to substitute a different arrangement. On the 10th of July, 1760, a general order was issued by King Geo. III., which is still in force, and whereby, after reciting that a board of general officers had reported to His Majesty that they had not been able to discover any better method of obviating the inconveniences which might arise upon the death of agents to regiments, than by the colonel's taking a sufficient security, by the deposit of money, or

* *Brisbane v. Dacres*, 5 Taunton's *Reports*, 143, 152.

† See the form in 4 *Barnewell and Cresswell's Reports*, 179.

by the agent vesting a sum of money in the public funds, in the names of trustees, to be applicable on the demand of the colonel, to make good any deficiency arising from the failure or death of the agent, it is declared that His Majesty, agreeably to the opinion of the board, must look upon the colonel as the only person accountable, not only for the pay of his regiment, the regimental funds, and other money with which the agent is usually entrusted, but also for every obstruction and inconvenience which might arise to His Majesty's service from the death or failure of the said agent.

As between the colonel himself and the agent, the mere ordinary relation of banker and customer subsists*. To protect the colonel, however, from the great responsibility which attaches to him for the solvency of the agent, and for the consequences of the appointment, it is customary for the colonel to require from the agent the bonds of himself and one or more sureties, as a security for the right execution of the duties of the office. It will be seen, nevertheless, by the following case, that securities of this description carry with them an imperfection; and that no arrangement can be so effectual as a deposit of stock or money, according to the suggestion of the General Order of King Geo. III. in 1760, to which reference has been made above.

The case† in question was that of Sir William Fawcett, Colonel of the 15th Regiment of Foot, and subsequently also of the 3rd Dragoon Guards, and Governor of the Forts of Tilbury and Gravesend. He appointed Ross and Ogilvie his agents, and took from them a bond in the usual form for 10,000*l.*, to secure the payment of all sums for which they might be accountable in that character. Mr. Duncan Davidson likewise signed the same bond as surety for Ross and Ogilvie. Sir William Fawcett died in 1804; and early in 1805 Ross and Ogilvie became bankrupts. The accounts of Ross and Ogilvie with the Government long remained unsettled; and the executors of Sir W. Fawcett being about to distribute his property among the parties who had established their right to it in the Court of Chancery, gave notice of their intention to the Government. A letter

* Knowles v. Maitland, 4 Barnewall and Cresswell's Reports, 173.

† Antrobus v. Davidson, 3 Merivale's Reports, 569.

from the War Office was thereupon sent to the executors, enclosing a statement of accounts, shewing a balance of 6000*l.* and upwards as due from the representatives of Sir William Fawcett, under his responsibility for the agents, on account of the 15th Regiment of Foot and the 3rd Regiment of Dragoon Guards. Davidson, the surety for Ross and Ogilvie, was then dead ; but the executors of Sir William Fawcett commenced proceedings in Chancery against Davidson's executor, to compel him to set apart a sufficient sum out of Davidson's property to meet the claims which might be made in respect of suretyship, and thus to relieve Sir William Fawcett's estate from its liability to the Government. But the court refused to grant such relief, and dismissed the suit. The learned Judge, Sir William Grant, Master of the Rolls, held that whatsoever loss there might be would ultimately fall upon Davidson, as the surety ; but that until Ross and Ogilvie's affairs were wound up, there was no proof of any such loss, the letter from the War Office being quite insufficient for that purpose ; and that in the mean time Sir W. Fawcett's representatives had no claim against Davidson's property. Any distribution, therefore, of Sir William Fawcett's property would be made by his executors at their peril, unless the claims of the War Office were first discharged.

Regimental pay, remaining unclaimed by the officers to whose credit it has been passed in the agent's books, does not become the property of the agent, but may after any lapse of time be claimed as public money by the Government*.

Commissioned officers become entitled, under certain circumstances, to pensions, some of which are payable only to those who have retired from the service, while others are tenable by those engaged in active duty. The grant of such pensions is regulated entirely by the Government, and Parliament votes the supplies for the purpose. These pensions, however, are mere voluntary bounties from the Crown. They are not given by deed, or by letters patent, but merely by a royal warrant, which may be countermanded at the pleasure of the

* *Brummell v. Macpherson*, 5 *Russell's Reports*, 263 ; *Captain Pollard's Case*, *ibid.*

Sovereign. They, therefore, stand upon the same precarious legal footing as half-pay*.

The East India Company in like manner grants pensions during pleasure to its own officers, for length of service and other meritorious considerations.

Commissioned officers in the East India Company's military service may also become entitled to pensions issuing out of Lord Clive's Fund, which appears to have originated in his lordship's charitable appropriation of a legacy bequeathed to him by Meer Mahommed Jaffier Khan, the Nabob of the Carnatic. By a deed dated in 1770, the legacy in question was made over by his lordship to the Court of Directors, in trust to apply the interest for the support of European officers and soldiers who should become invalids or superannuated in the Company's service, and of their widows, and also the widows of such officers and soldiers as should die in the Company's service.

By the Stat. 9 Geo. IV., c. 50, the unclaimed shares of prize-money belonging to the East India Company's officers and soldiers are directed to be applied in augmentation of Lord Clive's Fund, subject, however, to the right of such persons to reclaim the amount within six years from the time when their title to the money accrued.

A claim was made upon this fund in 1796 by the widow of Colonel Mc Kenny, who had entered the East India Company's service in 1760. In 1789 he had retired, and was, from his wounds and disease, considered a proper object of Lord Clive's bounty. He accordingly obtained an annual pension of 228*l.* out of the fund, and enjoyed this allowance till his death. He married in 1790 *after* his retirement, and died in the following year, whereupon his widow claimed a pension out of the fund; and, on her claim being rejected, she sued the East India Company in the Court of Chancery. The Lord Chancellor Loughborough, however, dismissed the suit, on the ground that it would be a gross breach of trust, and highly prejudicial to the objects of the charity, if the

* In the debates in Parliament, on the 31st of May, 1849, relative to the claim of Colonel Uniacke's widow to a pension, it was stated by the Secretary-at-War to be the standing rule of the War Office, that officers marrying after sixty years of age could not secure military pensions for their widows.

Company were to allow such a pension to a widow who had been married after her husband's retirement from the service*.

With reference to the payment of arrears of pay, pension, or other allowances of a deceased officer, it may be useful to notice here the case of *Allen v. Dundas* †, where the Treasurer of the Navy paid the arrears of the wages of a deceased seaman to a person professing to be his executor under a will which afterwards turned out to be forged. In an action afterwards brought by the true personal representative of the deceased against the Treasurer of the Navy, that officer was held not liable for the money erroneously paid by him to the simulated executor; for as the forged will had been judicially received as genuine by the Ecclesiastical Court, no person could be liable to pay a sum of money a second time which he has once paid in obedience to a court having authority over the subject matter. The same principle would apply equally to military pay.

Ordinarily a person who is entitled to an annuity, or other periodical payment of money, is enabled by law to assign or anticipate the growing payments by sale, mortgage, charge, or any other form of anticipation, according to the fullest rights of property. But with respect to public offices, a different rule of law prevails; and the stipends, salaries, or profits annexed to such places cannot be legally assigned or disposed of to strangers; for as the office itself cannot be made the subject of pecuniary dealings, it is almost a necessary consequence that the holder should not be allowed to deprive himself of that subsistence, which the public provide for him to secure his upright and decorous conduct in office ‡. And although military commissions are allowed to be sold under strict specific regulations, this license in nowise extends to the salary or pay of the officers on whom such commissions have been conferred. In point of law a military commission and its emoluments are inseparable.

The Lord Chief Baron Alexander alludes to this rule as a state policy, established to "protect the servants of the public from their own improvidence; and to secure

* *Mc Kenny v. East India Company*, 3 Vesey, Jun. *Reports*, 203.

† 3 *Term Reports*, 12.

‡ *Lumley On Annuities*, 239.

“ to them, in defiance of their own acts, the possession of those resources which are derived from the public, and intended to enable them to perform their public functions. The pay of naval and military officers and the incapacity to assign it, either at law or equity, after some hesitation at last established, affords the most distinct and intelligible instance of the application of this rule*.”

A commissioned officer, therefore, cannot borrow or take up money on the security of his pay or half-pay; nor transfer to strangers any beneficial interest in those emoluments.

With respect to full-pay, this was settled so long ago as the year 1791, in the case of *Barwick v. Reade*†, where Lieutenant Reade of the Marines having assigned his full-pay to Mr. Barwick, as a security for an annuity of 20*l.*, the Court of Common Pleas made an order that the deed of assignment should be delivered up; and the learned judges delivered a very clear opinion that such a transaction relative to the full-pay of a military officer was illegal, it being contrary to the policy of the law that a stipend given to one man for future services should be transferred to another who could not perform them. Lord Loughborough, the Chief Justice, also said he recollected a similar decision in the Court of Chancery, in a case in which Mr. Ross, then a well-known army agent, was concerned.

With respect, however, to half-pay, the law upon this subject was for a long time unsettled: and in the case of *Stuart v. Tucker*‡, where in 1768 Lieutenant Stuart of the Marines assigned his half-pay to one Pimlott, as an additional security for an annuity for which Lieutenant Stuart had already given him a bond, the Court of Common Pleas decided that the transaction was valid. But in the case of *Flarty v. Odum*§, in the year 1790, the Court of King's Bench came to a different determination upon this question; and this decision has been ever since considered a final settlement of the law upon this subject.

* *Aston v. Gwinnal*, 3 Younge and Jervis' *Exchequer Reports*, 136.

† *Barwick v. Reade*, 1 Henry Blackstone's *Reports*, 627.

‡ 2 Sir W. Blackstone's *Reports*, 1137.

§ 3 *Term Reports*, 681.

Lieutenant Odlum, an officer on half-pay of a reduced regiment of foot, had taken the benefit of the Insolvent Debtor's Act; and a question having arisen, whether he could be discharged out of custody without assigning his half-pay for the benefit of his creditors, the point was argued at length on behalf of the creditors. Lord Kenyon, Chief Justice: "I am clearly of opinion that this half-pay could not be legally assigned by the defendant, and, consequently, that the creditors are not entitled to an assignment of it for their benefit. Emoluments of this sort are granted for the dignity of the State, and for the decent support of those persons who are engaged in the service of it. It would therefore be highly impolitic to permit them to be assigned; for persons who are liable to be called out in the service of their country ought not to be taken from a state of poverty. Besides, an officer has no certain interest in his half-pay; for the King may at any time strike him off the list. Indeed, assignments of half-pay have been frequently made in fact, but they cannot be supported in law. It might as well be contended that the salaries of the judges, which are granted to support the dignity of the State and the administration of justice, may be assigned." Lieutenant Odlum was thereupon ordered to be discharged accordingly; and the reporter adds, that in the case of Captain Kennedy, a bankrupt, the same point was determined by the Lord Chancellor Thurlow about a year and a half before.

The same question was again brought before the Court of King's Bench, and with the same result, in an action by Lieutenant Lidderdale, against the Duke of Montrose and the Earl of Mulgrave, the then joint Paymasters-General of the Army*. Their lordships had received formal notice of an assignment, executed by Lieutenant Lidderdale, of his half-pay as a reduced lieutenant in "Major-Commandant Elford's then late corps of infantry;" and, in compliance with the terms of this notice, which they treated as valid, they refused to allow Lieutenant Lidderdale to draw his half-pay. Lieutenant Lidderdale being thus left to his legal remedy, brought the action in question for its recovery, and obtained a verdict in his favour.

* Lidderdale v. Duke of Montrose, 4 *Term Reports*, 248.

These decisions, however, having been delivered by courts of *law*, the subject was brought before a court of *equity* by Stone, the creditor for whose benefit Lieutenant Lidderdale had assigned his half-pay. It was argued strongly on behalf of Stone, that he had given a valuable consideration for the assignment, upon the supposition that it was a good security; and that to permit an officer to revoke such an instrument, in contradiction of an express agreement, was such a fraud as a court of equity should never allow to succeed. Against these remarks it was argued by Sir Samuel Romily, that half-pay is granted for the purpose of keeping experienced officers in such a situation as not to be compelled to turn themselves to other pursuits, nor be by any circumstances reduced to extreme poverty; and that the allowance of assignments of half-pay defeated that purpose. Lord Chief Baron Macdonald: "Half-pay is intended by the State to provide decent maintenance for experienced officers, both as a reward for their past services and to enable them to preserve such a situation that they may always be ready to return into actual service. It materially differs, therefore, from the general case of expectancies which certainly may, in equity, be assigned. By such assignment no public interest is thwarted. Thus a pension is equally uncertain as half-pay; but as no *future* benefit is meant to arise to the State from granting it, a material distinction arises between them. In deciding upon the nature of a public grant, the great object of public policy in making that grant is to be attended to. The half-pay cannot be transferred*." The principle of the law is, that a British officer on half-pay continues under all the responsibility of a soldier; he is liable at any time to be called into active service, and, therefore, public policy requires that he be in a state of continued readiness and present capacity for service. This principle, however, would be wholly defeated, if an officer were allowed to divest himself of his half-pay at pleasure.

A legal writer of eminence has made the following observation on the effect and operation of the rule under consideration: "It may be a hardship or an evil to a poor officer, that he cannot borrow money for himself or his

* Stone v. Lidderdale, 2 Anstruther's Reports, 533

“ family and give a security upon his future pay; yet it
 “ would be a much greater evil to the public service, if of-
 “ ficers, when they were called out, were destitute of the
 “ means of serving their country from the want of proper
 “ habiliments or accoutrements*.” With respect to the
 pension allowed by the East India Company to a retired
 officer, it is no part of their original contract or arrange-
 ment with an officer on his entering their service. When
 he retires, he makes his request for permission so to do;
 the Company take it into consideration in the common
 course of things; the resolution to allow his retirement
 passes; and the pension follows.

These pensions also have never been granted by deed,
 or in any manner to shew that the Company meant to
 become absolutely or irrevocably liable to the payment.
 The consequence is, that an officer in the enjoyment of a
 military pension, whether under the grant of the Crown
 or the East India Company, is in no condition to make
 an effectual assignment of its fruits to a creditor or pur-
 chaser, as such parties have no means of compelling the
 Crown or the East India Company to give effect to
 the transfer. And in a late case, where a creditor of a
 Company's officer had obtained a judge's order for
 charging such a pension with the payment of a debt, the
 Court of Queen's Bench set aside the order, on the
 ground that the officer had no right of property whatever
 in the pension which was the voluntary bounty of the
 East India Company†.

The foregoing rules and principles with respect to pay,
 half-pay, and pensions, have been fully recognized, and
 even extended by the legislature. By Stat. 11 Geo. IV.,
 c. 20, s. 47, persons entitled to any marine half-pay,
 or to any allowance from the compassionate fund, to
 officers' widows' pensions, or the wages or half-pay of
 seamen or marines, are expressly restrained from as-
 signing the same. In like manner, by the Stat. 7
 Geo. IV., c. 16, s. 26, Chelsea pensioners, and by the
 10 Geo. IV., c. 26, s. 3, Greenwich out-pensioners are
 restrained from assigning their pensions. This, however,
 applies to contracts and transactions between such parties

* Professor Christian's Note to Blackstone's *Commentaries*, Vol. I. 417.

† *Morris v. Manesty*, 7 *Queen's Bench Reports*, 674.

and other individuals, and not to cases of bankruptcy or insolvency, in which, by force or operation of law, the general body of a man's creditors have a claim or demand upon his property and beneficial rights. As to such cases, an idea appears formerly to have existed, that the creditors of a bankrupt or insolvent commissioned officer had a right to seize his pay; and Lord Chancellor Hardwicke is reported to have said, that "if an officer in the army should become a bankrupt, he should have no doubt but he had a power to lay his hands upon his pay for the benefit of his creditors*." But this point has long been settled to the contrary, and an express clause is now inserted in the General Insolvent Debtor's Act, 7 Geo. IV., c. 57, by which the pay, half-pay, and pensions of officers in the service of the Crown; or of the East India Company, are exempted from the general assignment of a debtor's property for the benefit of creditors; and provision is made for arrangement with the Secretary-at-War or the Lords of the Admiralty, for the appropriation of a certain amount of the pay, half-pay, or pension of an officer to the liquidation of his debts.

And although, by the express Standing Regulations of the East India Company, an officer who has served twenty-five years in their military force is entitled to retire on the full pay of his rank by way of pension, yet in the case of a lieutenant-colonel of the Madras army, who had retired upon this allowance, and afterwards entered into commercial pursuits which led to his bankruptcy, the Court of Common Pleas held that his retired allowance was not available for the benefit of his general creditors, and that the East India Company could not, by the powers of a court of justice, be compelled to pay it to their use†. "The grant in question, said the Lord Chief Justice Tindal, appears to range itself under that class of obligations, which is described by jurists as imperfect obligations—obligations which want the *vinculum juris*, although binding in moral equity and conscience; to be a grant which the East India Company, as governors, are bound *in foro conscientie* to make good, but of which the performance is to be sought for by a petition, memorial, or remonstrance, not by action

* 1 Atkyns' Reports, 214,

† Gibson v. East India Company, 7 Scott's Reports, 74.

“ in a court of law. Many grounds of inexpediency in allowing a claim of the present description to be recoverable in a court of law, readily suggest themselves. If the retired pension, which is given for former services, can be recovered by action, why should not the pay and allowances for actual service be equally so during their continuance? And yet how frequently is it not only expedient, but absolutely necessary, that military pay should be suspended, and kept in arrear beyond the day when it becomes due, and until the service, in respect of which it is earned, has been entirely completed; not to mention the expense and inconvenience which must arise, if a suit might be instituted by each individual officer, and the prejudice which such litigation would necessarily occasion to the military service*.”

But though the payment of a military pension cannot be enforced against the Government or the East India Company, there is nothing illegal in the mere act of assigning such a pension in the Royal Army; nor as it seems, in the Bengal and Madras armies. By an Act, however, of the Legislative Council of India, (No. 31 of 1845,) entitled “ An Act for exempting the pensions of soldiers and officers from attachment by process of the Courts of the East India Company,” that object is effected; and the same Act makes null and void all assignments, bargains, sales, contracts, agreements, or securities whatsoever, thereafter to be made by any pensioner for any money to become due on account of the pension. It is remarkable that this Act is confined to Bombay, as the policy of it would appear equally applicable to the other presidencies †.

All right or claim to a pension is forfeited by those persons who are discharged with disgrace, or by sentence of a court martial.

If an officer is arrested and committed to prison on a criminal charge, his pay is immediately suspended; and if he be convicted, he forfeits all right to pay from the time of his arrest; but if he be acquitted, he is entitled on his return to his corps to receive all the arrears of his pay. This is also the case in the East India Company's service ‡.

* See the judgment of Chief Justice Tindal in *Gibson v. East India Company*, 7 *Scott's Reports*, 74, 94.

† *Calcutta Review*, June 1848, 396. ‡ Stat. 4 Geo. IV. c. 81, s. 18.

The same principle, which forbids all dealing with the pay or the half-pay of an officer, extends also to the commission by virtue of which he becomes entitled to such allowances. A military commission may be sold under the regulations of the army, for the purpose of conferring the rank upon another officer; but under no circumstances can an officer part with his commission, either in the way of mortgage or pledge. This subject was judicially expounded in the Court of Chancery in the case of *Collyer v. Fallon**, in 1823. It appeared that in March 1807, Lieutenant — of the 11th Dragoons, having received various advances of money from one Bazett, signed a memorandum, acknowledging the advances, and concluding with the following words: "And it is hereby understood that my commission, as a Lieutenant in the 11th Dragoons, is deposited with Mr. Bazett, as a security for these sums." Afterwards, Lieut. — being desirous of purchasing a captaincy in his own regiment, requested Bazett to advance the requisite sum, which he agreed to do, provided Lieutenant — would secure the re-payment of it, with all previous advances by his bond and *by the deposit of the commission* which he then held or might thereafter hold in the regiment. This arrangement took effect, and, on the purchase of the captaincy, the commission was deposited with Bazett. In 1812 Captain — entered into a composition with his creditors, and agreed that the commission should be sold by Bazett, who was authorized first to satisfy his own demand out of the proceeds, and then to divide the surplus among the creditors. No sale however took place; but in January 1815 Captain — obtained leave from the Commander-in-Chief to retire from the service and sell his commission. Messrs. Collyer, the army agents, effected the sale to Lieutenant Binney for 1785*l.*, and received the proceeds. Immediately after the sale, Captain — signed and delivered to Messrs. Collyer a written memorandum, directing them to apply the purchase-money of his troop in paying certain specified debts, which they were on the point of doing, when Bazett interposed a claim to the money under the foregoing arrangements between himself and Captain —. Under these circumstances, Messrs.

* 1 Turner and Russell's *Reports*, 459.

Collyer instituted proceedings in Chancery for the determination of the conflicting claims; and the Court was clearly of opinion, that the deposit of the commission, and the stipulations respecting it in the previous transactions with Bazett and the other creditors of Captain —, gave them no right whatever to demand the money from Messrs. Collyer. The Master of the Rolls, Sir Thomas Plumer: "The question is not whether it is legal for an officer to sell his commission, but what is the effect of his making a deposit of the parchment or instrument which appoints him to hold, and is the evidence of his being invested with, a certain military rank? Can such a deposit be lawfully made by an officer who continues in the service? If it can be so made, what are the rights which it gives to the depositary? A military commission is in its very nature personal, being the authority under which the individual named in it is to act; it cannot be separated from him, and is of no use to any one else. If he should be taken prisoner; if any doubt should arise with respect to seniority or comparative rank; should there on any occasion be a question as to his title to enjoy all the rights and privileges attached to the service, the commission is the document on which the officer must rely, and which he must, therefore, take care to keep always within his own power. If he were at any time called upon to produce the authority under which he claimed to act, would it be an answer to say, that he had placed it in pledge or mortgage? The commission is not property: he could not sell it: more than the parchment, at least, he could not sell; and for the purpose of effecting a sale of the office, the possession of the parchment is not necessary. Apart from the officer named in it, the commission is nothing; in the hands of a stranger it is mere waste paper, conferring neither authorities nor rights. The depositary could not go to the War Office and claim either whole or half-pay, for military pay is not assignable; neither could he give any body else a right to receive pay. The most alarming consequences might follow, if it were to be held that an officer might pledge or mortgage his commission; and it is of importance that it should be generally understood, that this Court will not entertain the doctrine that an officer, while he

“remains in the service, can lawfully part with his commission by way of pledge or mortgage, or that he can, by so doing, give the depositary any rights with respect to it.”

In consequence of the importance of the foregoing case the Court allowed it to be reheard; and Lord Gifford, who had then succeeded Sir Thomas Plumer, gave judgment in these terms upon the point now under consideration: “It has been settled in various cases, on the ground of public policy, that the pay of an officer in the army cannot be assigned by him to any other person. It is equally clear that he has no right to alienate his commission; though if he wishes to retire from the army, he may under special circumstances and through the medium of the Commander-in-chief, obtain the leave of the Crown to sell out for the regulation price. Undoubtedly, therefore, the commission itself was not alienable by the officer in question.”

If, in the foregoing case, Captain — had made no deposit or pledge of his commission, but had simply stipulated that whenever his commission should be sold, the proceeds should in the first instance be liable to the satisfaction of Bazett's debt, it is probable that this would have amounted to an equitable assignment, and that Bazett's claim would have been enforced by a court of equity as against Messrs. Collyer; so that, after notice of such claims, Messrs. Collyer would not have been justified in obeying the contrary instructions which Captain — sent to them after the sale of the commission.

This point has in fact been lately so decided by the Court of Chancery, in the case of *L'Estrange v. L'Estrange**, wherein it appeared that Captain Henry L'Estrange having occasion, on selling out of the army, to pay some money to his brother George L'Estrange, placed in his hands a letter addressed to Messrs. Cox and Co., the army agents, in the following terms:—“Gentlemen,—Please pay to G. L'Estrange, Esq., my brother, or bearer, the balance of the price of my commission in the 31st regiment, which remains in your hands.” This letter, dated the 26th April, 1850, was delivered to Cox & Greenwood on the 1st May, 1850,

* 13 Beavan's Reports, 281.

by George L'Estrange, with a note from himself in the following terms :—" When you receive any further sum on " Captain L'Estrange's account, as the balance arising " from the proceeds of his commission, I request you will " forward the amount to me in a bank post bill." Some days afterwards Mr. George L'Estrange observing that an ensigncy in the 31st regiment was gazetted as filled up, wrote Cox & Co, and requested to know when he might draw on them, in accordance with his brother's letter of 26th April. In reply, Messrs. Cox & Co. wrote as follows : " Craig's Court, 30th May, 1850. The ensign " appointed to the 31st regiment on the 17th instant was " not in your brother's succession; but the candidate for " the ensigncy will, I have no doubt, go up for examina- " tion on the 14th June, and if he passes, I expect he will " be gazetted on the 14th of that month, after which time " you will be at liberty to draw on Messrs. Cox & Co. for " 40*l.* 10*s.* 11*d.*, which will be the balance on Captain " L'Estrange's account, after the 450*l.* is received for the " ensigncy." In June Messrs. Cox & Co. were served, by a creditor of Captain L'Estrange, with a copy of an attachment from the Lord Mayor's Court, dated the 3rd of that month, to prevent them from parting with the proceeds of his commission; and on the 12th they advised Captain L'Estrange of the circumstance. On the 14th, George L'Estrange replied that he had seen their letter, but that as they held Captain L'Estrange's cheque in his favour for all moneys coming to Captain L'Estrange under the sale of his commission, he required that the balance of 40*l.* 10*s.* 11*d.* should be forwarded to him, as the money was his, and not Captain L'Estrange's. On the 18th August the ensigncy in succession to Captain L'Estrange was filled up and gazetted: whereupon George L'Estrange commenced proceedings in Chancery for an injunction to restrain Messrs. Cox & Co. from paying the money in their hands to any other person than himself. The Master of the Rolls (Lord Langdale) decided that Captain L'Estrange's letter to Cox & Co., with their letter of 30th May to George L'Estrange, recognizing his demand, amounted together to an assignment or appropriation in his favour of the money to arise from the sale of the commission; and His Lordship granted the injunction, and thus secured the money to George L'Estrange.

Vice-Chancellor. Lord Cranworth acted on these views

in the case of *Price v. Lovett**, where it was decided that the difference payable to an officer retiring on half-pay is lawfully assignable, and is not affected by the doctrine which governs an officer's dealings with his full-pay. Captain George William Molyneux Lovett, of H.M. 3rd West India Regiment, being indebted to one Joseph Price, executed a deed dated the 15th January, 1850, by which Captain Lovett (who was then on full-pay) assigned to Price, in trust for the benefit of himself and the other creditors of Captain Lovett, who should execute the deed, a portion of such pay, to be received in monthly instalments, and to be applied in liquidation of their several claims. The deed contained also a stipulation, that if Captain Lovett should sell out of the army, or retire upon half-pay, and receive any sum by way of difference, the trustee was to receive the amount and apply it in payment of the debts. On the same day Captain Lovett gave a notice and request to his agents, to pay the proceeds of his commission, or the regulation difference, as the case might be, according to the last-mentioned stipulation. It happened that Price was the only creditor who executed the deed; and a trust was thus created for his exclusive benefit. In December 1850, Captain Lovett went upon half-pay, receiving the difference; and Price claimed the amount accordingly. On the other side it was contended by opposing creditors, that the deed was wholly inoperative, as being against public policy; and that even if an assignment of the difference could be sustained when standing alone, its connection in the present case with an illegal disposition of an officer's full-pay vitiated the whole instrument, and rendered it entirely incapable of recognition or support in a court of equity. Lord Cranworth, V.-C.: "The principle upon which it is not permitted to assign half-pay is, that an officer may be able to maintain himself, and be in a position to come back to the army, whenever it pleases Her Majesty to require his services. I do not suppose this power is ever exercised now; but it is clear that Her Majesty has the power to claim the services of any person on half-pay; but I do not see any ground for applying the same principle to a sum of money, which is paid in a gross amount upon retirement, and may be at once spent or given in charity, or disposed of in any way."

* 15 *Jurist*, 786.

“ The Crown trusts to the half-pay being sufficient for the officer’s maintainance in such a position as to be brought back to the army at any subsequent period. It appears to me that the doctrine of not allowing the assignments of pay or half-pay does not apply to a gross sum received by way of difference.” And upon the question whether the whole transaction was not void, by reason of its including an assignment of a portion of Captain Lovett’s full-pay, His Lordship thus proceeded : “ It was contended that inasmuch as this deed contained an assignment of pay which was invalid, consequently the whole of the deed was void ; but that is quite wrong. There is no reason why, because there is a stipulation in a deed which is contrary to public policy, that therefore the rest of the deed should not be carried out. This disposes of the question whether he (Captain Lovett) had power to assign.”

But where a transaction of this nature points specifically to the proceeds of a sale, it will not be extended by the Courts to the proceeds of an exchange. This was the case of *Bere v. Havelock**, before the V.-C. Knight Bruce. The plaintiff was a creditor, to whom Captain Havelock wrote a letter in December 1848, stating that he had sent in his resignation of his commission as captain in the army, and had directed the proceeds of the *sale* to be paid to the plaintiff. Instead, however, of a sale taking place, Captain Havelock was advised to exchange from full-pay to half-pay : and the exchange having been effected, the plaintiff contended that he still had a right to the proceeds of the exchange, which were received by Cox & Greenwood. It was insisted on the part of other creditors, that the plaintiff could not recover, as Captain Havelock had not in fact sold out of the army, but continued liable to be attached to any regiment by order from the Horse Guards. The Vice-Chancellor, agreeing with this argument, considered it a hard case upon the plaintiff ; but as the contemplated sale of Captain H.’s commission could not be said to have taken place, and the money in question was only the fruit of an exchange, which was a very different thing, His Honour said he could only order the agents to retain the fund in their hands for a sufficient time to enable the plaintiff to appeal to a higher Court. It does not appear that any further proceedings took place.

* *Chancery*, 4 July, 1850.

In all cases of this nature the expressions which constitute the equitable assignment or appropriation, must be very precise in order to acquire legal effect. In *Watson v. the Duke of Wellington** the order to pay out a particular fund of prize-money was not sufficiently explicit to constitute an equitable assignment; and the claim was therefore disallowed. The plaintiffs were the executors of Mr. Sims to whom the Marquis of Hastings had become indebted to the amount of 9000*l.*, on a bond given by the Marquis and a surety. Towards the end of the year 1825, the Marquis having resigned the government of India and returned to England, the plaintiffs repeatedly applied to him for payment of the debt. The Marquis represented to them that he was about to receive a large share of the Deccan prize-money, and promised that their demand should be satisfied out of that fund, and begged that in the mean time no legal proceedings should be taken against himself or his surety in the bond. In February 1826 Mr. Allen, the solicitor of the plaintiffs, had an interview with the Marquis, who stated that Colonel Doyle, whom he had empowered to receive the prize-money, had been directed to pay thereout the debt due to Mr. Sims: and his lordship at the same time wrote a note to Colonel Doyle, and delivered it to Mr. Allen. The note was in the following terms: "Feb. 6, 1826. My dear friend, as I shall leave to you the distribution of the prize-money as soon as it shall be issued for me, I have to mention that the executors of Mr. Sims are claimants on that fund for a bond debt with interest. Faithfully Yours, Hastings. To Colonel Francis Hastings Doyle." Mr. Allen shortly afterwards presented this note to Colonel Doyle, who required a statement of the particulars of the debt to be sent to him through the solicitors of the Marquis. The suit was instituted against the Duke of Wellington and his co-trustee of the Deccan prize-money and various other interested parties, to recover payment of Sims' debt out of that fund. But the Master of the Rolls, Sir John Leach, decided that there was no engagement by the Marquis to pay the debt out of the prize-money, nor any positive direction to Colonel Doyle to pay the debt, and that the note was a mere intimation of the claim of the plaintiffs and that the distribution of the fund

* 1 Russell and Mylne's *Reports*, 602.

was left entirely to the discretion of Colonel Doyle. The suit was therefore dismissed.

It seems also, that an officer selling out of the army does not acquire a full right of property in the purchase money for his commission, without the consent or approbation of the Commander-in-Chief; so that if the War-office has any pecuniary claims against an officer who has obtained leave to sell his commission, the Commander-in-Chief has power to direct satisfaction of such claims out of the proceeds of the sale, and for that purpose to stop the necessary amount in the hands of the army agents through whom the purchase-money passes. A case of this nature recently came before the Recorder of London in an action in the Lord Mayor's Court*. Lieutenant Gordon Henry Evans late 69th regiment, being indebted to Messrs. Landon and Morland, sold out of the army: and on the 19th April, 1850, pursuant to an order of the Commander-in-Chief, signified to Messrs. Cox & Co., the army agents, through a letter from Lord Fitzroy Somerset, the Military Secretary, the sum of 700*l.* was placed to the credit of Lieutenant Evans at Messrs. Cox & Co.'s, as the price of the commission; but with a special direction that only 650*l.* were to be at Lieutenant Evans's immediate disposal, and that the balance of 50*l.* should be retained by Messrs. Cox & Greenwood until further orders in consequence of the War-office having some claims upon Lieutenant Evans. The sum of 650*l.* being due from Lieutenant Evans to Messrs. Cox & Co., was at once retained by them in satisfaction of their debt; but Lieutenant Evans was not in a position to draw the surplus 50*l.* until the 16th August, when another letter from the Horse Guards gave authority to Messrs. Cox & Co. to hold that sum at his disposal. In the mean time, however, Messrs. Landon & Morland had brought their action against Cox & Greenwood and Lieutenant Evans for the recovery of this sum of 50*l.*, and had issued an attachment from the Lord Mayor's Court on the 30th April, to compel payment to themselves of this sum of 50*l.*, as money belonging to Lieutenant Evans; but Cox & Co. having then received no authority from the Horse Guards to part with the money, refused payment. The action was tried between Messrs. Landon & Morland and Messrs. Cox & Greenwood; and it was proved to the satisfaction

* *Landon v. Cox*, 29 October, 1850; *MS.*

of the Recorder by witnesses from the War-office, that when Lieutenant Evans sold out, he was not absolutely independent of the Horse Guards in the disposal of the purchase money, and that without the orders of the Commander-in-Chief he could not have received anything at all. The learned judge was therefore of opinion, that the Commander-in-Chief had authority to order the stoppage of the 50*l.* in question, and that Lieutenant Evans by accepting the 650*l.* had recognized such authority; so that at the time when Landon & Morland sought to lay hands on the 50*l.* by means of the attachment, Lieutenant Evans himself had no legal claim to the money, and could not have sued Cox & Co. for it. The facts not being disputed, the Recorder directed the jury to take the law from the Court: and in answer to a remark of a jurymen that the jury thought Lord Fitzroy Somerset had no authority to make the order contained in his letter of the 19th April, the Recorder required them to act upon his view of the law, and added that in his opinion Lord F. Somerset had as much right to make the order, as a man paying money into a bank to the credit of another has to direct a portion of it to be withheld until a certain cheque was honoured. The jury, however, to the astonishment of the whole Court, delivered a verdict for the plaintiffs, in defiance of the ruling of the learned Recorder.

In the East India Company's service, an officer remaining in gaol under arrest for debt for more than three successive years, becomes *ipso facto* disentitled to further military pay, and is liable to be struck off the strength of the army, pursuant to the standing order of the Court of Directors for that purpose*.

Courts of Justice render no assistance for the recovery of any pay or advantages, which may have been promised to the participators in unauthorized expeditions for warlike purposes. James Minns, a seaman of the *Leander*†, one of the ships employed in the expedition against Spanish America under General Mina, volunteered at St. Domingo to join the military part of the expedition, and listed as an artilleryman under an agreement that seamen volunteers should cease to be considered as belonging to the crew, and should receive a quarter of a dollar per day, and a

* Jameson's *Military Code*, 678; Bombay, 1814.

† 1 Edwards's *Admiralty Reports*, 30.

gratification of prize-money, with an allotment of land in case the expedition succeeded, but not otherwise. On first embarking as a seaman, Minns received a month's pay in advance; and as the military expedition failed, he commenced proceedings in the Court of Admiralty against the ship for the recovery of his wages for the whole voyage. But the Court held, not only that his engagement as a seaman had terminated by his own agreement to serve as a soldier; but that, as the ship had been fitted out on an illegal adventure, that circumstance alone was a legal bar to his claim.

CHAPTER VII.

ON PRIZE AND BOOTY.

PRIZE, in the general acceptation of that term, embraces every description of hostile property captured, either by land or by sea, in the course of operations against the enemy. But prize, in its legal definition, is more limited, and means a capture effected by a purely *naval* force: property taken on shore by an army or other land force being not strictly prize, but *booty of war**. At the same time, the proceeds of booty as well as of prize are indiscriminately called prize-money.

It will be convenient to consider, I. The subjects of prize or booty; II. The title to prize-money; III. The distribution of prize-money.

I. *As to the subjects of Prize or Booty.*

In the feudal times, and before the institution of the regular military establishments of modern days, it was the custom for armies not to act only against armies, but to levy contributions from the unarmed inhabitants of the invaded countries, according to the method practised with so much success by the French in the Republican and Imperial wars. In the foreign invasions of the middle ages, all property, whether public or private, within the reach of the invader, was subjected to his use; and the inhabitants would have been as much astonished at an invading army paying for its provisions and supplies, as the soldiers would have been indignant at the slightest restraint upon the privilege of plundering at discretion†. In those times, each belligerent exercised the extreme rights of war against the enemy; but the milder military

* 2 Dodson's *Admiralty Reports*, 444.

† Galt's *Life of Wolsey*, 60.

usages of later times have placed the law of booty on a totally different footing; and except in those special cases where a town is expressly given up to be sacked, the regular subjects of prize or booty, as recognized by the law of England for land forces or for conjunct expeditions of land and sea forces, appear to be very circumscribed. A recent Act of Parliament, (2 Wm. IV., c. 53,) relative to the appropriation and distribution of military prize-money, proceeds on this principle, by specifying as the subjects from which prize-money is to arise, the following particulars, *viz.*—arms, ammunition, stores of war, goods, merchandize, and treasure belonging to the *State* or to any *public trading company* of the enemy, and found in any of the fortresses or possessions; and all ships and vessels in any road, river, haven, or creek belonging to any such fortress or possession. These therefore may be considered the legitimate subjects of booty.

II. *The title to Prize-money.*

The army has not, by the act of capture, any original or inherent right of property in the booty taken from the enemy; and the right to prize-money is entirely dependent on the will of the Crown. "All prize," says Lord Chancellor Brougham, "is clearly and distinctly the property of the Crown. This is a principle not to be disputed. . . . It is equally incontrovertible that the Crown possesses this property absolutely, and wholly without control; that it may deal with it entirely at its pleasure; may keep it for its own use; may abandon or restore it to the enemy; or, finally, may distribute it in whole or in part among the persons instrumental in its capture; making that distribution according to whatever scheme, and under whatever regulations and conditions it sees fit. It is equally clear that the title of a party claiming prize must needs in all cases be the act of the Crown, by which the royal pleasure to grant the prize shall have been signified to the subject*." The foregoing observations were made in an important case relative to the

* 2 Russell and Mylne's *Reports*, 54.

Deccan prize-money*, and had immediate reference to army prize. But the same doctrine has been laid down in the Court of Admiralty, with reference to captures made by the navy. "Prize (says Lord Stowell) is altogether a creature of the Crown. No man has, nor can have, any interest but what he takes as the mere gift of the Crown; beyond the extent of that gift he has nothing. This is the principle of law on the subject, and founded on the wisest reasons. The right of making war and peace is exclusively in the Crown. The acquisitions of war belong to the Crown, and the disposal of these acquisitions may be of the utmost importance for the purposes of war and peace‡."

The capturing force having therefore no *legal* right to the spoils of the war, it has long been the practice on the part of the Crown to encourage and reward distinguished military services, when attended with the capture of large booty, by issuing a special warrant bestowing upon the successful troops, the fruits of their own valour. Such grants are the title deeds of officers to their respective shares in the prize money; and no officer can claim an interest in this bounty, unless his rights be distinctly manifested by the warrants under which he demands them‡.

Whenever the booty taken by a land force is conferred by the Crown upon the captors, the operation of the grant is confined to the particular occasion, and forms no rule or precedent from which the same or any other troops can deduce the slightest *legal* title to a similar boon on any subsequent occasion. The captors owe their rights, in every instance, to the pure bounty of the Crown, specially called forth and exercised in their favour, after the capture has been made.

In this respect the army differs from the navy, there being always a standing proclamation, by which maritime prizes are prospectively ordered to be distributed amongst the captors, without waiting, as in the case of the army for a special grant on each occasion. For the navy, indeed,

* *Alexander v. Duke of Wellington*, 2 Russell and Mylne's Reports, 35.

† *The Elsebe*, 5 Robinson's Admiralty Reports, 173; *Thurgar v. Morley*, 3 Merivale's Reports, 20.

‡ See the *Prize Warrants* issued on various occasions in the Appendix.

such a standing proclamation is almost essential as a matter of public convenience, the capture of prizes at sea being an event of daily occurrence in time of war; and even in time of peace, a naval prize proclamation is always in force, though its chief effect is to regulate the captures of piratical vessels, slavers, and smugglers.

But when a conjunct expedition of land and sea forces is fitted out, a special grant from the Crown is necessary, to vest the prize or booty in the captors for their own use and benefit. For as the force employed is not exclusively naval, the naval prize proclamation does not apply to such a case. The fleet, therefore, as well as the army, is, on such occasions, directly dependent on the bounty of the Crown. It is customary, however, to notify, in the instructions to the respective commanders-in-chief of the naval and military divisions of such combined forces, the intention of the Crown to bestow upon the captors the fruits of their success; and all their rights are thus derived entirely from the royal grant.

It is to be noted also, that as the army is not commissioned to engage in naval operations, a maritime capture, if effected by a land force, would confer upon the troops no right to prize-money under the naval proclamation. It is only in favour of the navy that the proclamation operates. "Thus," says Lord Stowell, "if a ship of the enemy were compelled to strike by a firing from the Castle of Dover, or other garrisoned fortress upon the land, that ship would be a droit of the Admiralty, and the garrison must be content to take a reward from the bounty of the Admiralty, and not a prize interest under the King's proclamation. All title to sea prize must be derived from commissions under the Admiralty, which is the great fountain of maritime authority; and a military force upon the land is not invested with any commission so derived, impressing upon them a maritime character, and authorizing them to take upon that element for their own benefit*."

Of this rule there is an instance in the case of a vessel captured in the harbour of Gibraltar by order of Colonel Roger Elliot, lieutenant-governor, the prize being condemned as a droit of the Admiralty†. The same

* 1 Robinson's *Admiralty Reports*, 235.

† *Ibid.* 228.

principle applies also to captures made by officers and men in the naval service acting on shore, and using appliances found upon land; for prize so taken is clearly not the property of the captors under the naval proclamation. "Suppose," says Lord Stowell, "that the crew, or part of the crew, of a man-of-war were landed, and descried a ship of the enemy at sea, and that they took possession of any battery or fort upon the shore, such as may be met with in many parts of the coast; and by means of such battery or fort compelled such a ship to strike, I have no doubt that such a capture, though made by persons having naval commissions, yet being made by means of a force upon the land which they employed accidentally, and *without any right under their commission*, would be a droit of the Admiralty, and nothing more*."

A conjunct expedition stands upon a peculiar footing with respect to captures made at sea. It is a combined naval and military force set forth under special orders from the home government, with instructions to effect a particular service in time of war. These instructions are of the essence of such an expedition; for a combined naval and military force casually meeting and coalescing for a particular object, which may be detrimental to the enemy, does not constitute a conjunct expedition; and troops happening to be on board ships of war making captures at sea under such circumstances are mere passengers, and do not alter the purely naval character of the capturing force. A conjunct expedition, however, may be set forth by governors and commanders-in-chief on foreign stations; and if the home government afterwards approves of the enterprize, the effect is the same as if they had originally planned and ordered it. The point, however, to be borne in mind, with reference to captures made by these conjunct expeditions, appears to be, that the whole of the forces employed are to be viewed as one mixed and indivisible force, neither purely naval nor purely military. With respect to prizes taken at sea by ships employed in such expeditions, it long remained a subject of uneasiness between the two services, what was the claim of the military force acting with the navy on such occasions. Certainly no such claim could be maintained under the Navy

* 1 Robinson's *Admiralty Reports*, 235, 236.

Prize Acts and Proclamations; for they pointed only to *naval* captors. At length came the case of the Hoogskarpel, which was one of several Dutch ships taken in Saldanha Bay near the Cape of Good Hope in 1781, by a conjoint force under Commodore Johnstone and General Meadows, acting according to instructions under the King's sign-manual, which directed that all the *booty* taken by the expedition should be divided between the land and sea forces employed in it. The navy preferred an exclusive claim to these captures as made at sea, and as being therefore within the terms of the standing Navy Prize Acts and Proclamations; but an elaborate judgment against this claim was pronounced on the 30th June, 1786, by Earl Camden, then President of the Council, assisted by Lords Kenyon and Grantley. They laid it down that conjunct expeditions were entirely out of the Navy Prize Acts with reference to *both* the services; and that the whole property captured was at the sole disposal of the Crown, whose equity and liberality in justly estimating the merits of both could not be doubted.

The principle of this decision was again asserted and acted upon by Lord Stowell, in the case of the French ships lying in harbour at the Isle of France, when that island was surrendered in 1810, under a capitulation, to Vice-Admiral Bertie and Lieut.-General the Hon. Ralph Abercrombie*. His Lordship also took the same view of the subject in the important case of the booty captured in 1814, upon the surrender of Genoa to the combined sea and land forces under Admiral Sir E. Pellew and General Lord William Bentinck, to whom the Prince Regent had granted the property for distribution among the naval and military forces engaged on that occasion†. On both those occasions the exclusive claim of the navy was overruled by the Court of Admiralty.

The rights of the army with reference to prize-money are now to a considerable extent regulated by an Act of Parliament passed in the early part of the reign of King Wm. IV. By this statute (2 Wm. IV., c. 53) it is enacted, with respect to all captures made by the army, Royal Artillery, provincial, black, and all other troops in the pay or service of the Crown, or belonging to the

* *La Bellone*, 2 Dodson's *Admiralty Reports*, 343.

† *Genoa*, 2 Dodson's *Admiralty Reports*, 444.

Crown, and in the pay of the East India Company, of any fortress or possession of the enemy, or of any ship or vessel in any road, river, haven, or creek belonging to such fortress or possession, and in all expeditions or actions from which prize-money, bounty-money, or grant shall arise, that the officers and soldiers engaged therein shall have such right and interest in the arms, ammunition, stores of war, goods, merchandize, booty, prize, and treasure so taken, *as the Crown shall think fit* to be ordered; and distribution shall be made according to such rule as the royal proclamation for the purpose shall direct*. The Act makes similar provisions respecting the share of the army, in all captures made by conjunct expeditions of land and naval forces of the Crown, after the property has been condemned by the Court of Admiralty (s. 29). The Act effects no material alteration in the common law relating to prize and booty, but makes a number of provisions relative to the official administration of the proceeds. The booty is to be collected, valued, and sold by prize agents, appointed by the commanders and officers entitled thereto; one by the commanders-in-chief and field officers, and the other by the other commissioned officers entitled to share; and the profits of the agency are not to be shared by any persons other than the agents under a penalty of 100*l.* The agents are not to be officers of Chelsea Hospital; and they are to render an account to the treasurer of the Hospital. All grants from the Crown, or from Parliament, or otherwise, to the officers and troops employed in any capture or expedition, unless otherwise directed, are to be received by the treasurer of Chelsea Hospital, for the use of the persons entitled thereto; and the treasurer is at the end of three months to give public notice of distribution. All assignments of prize-money paid into Chelsea Hospital are declared invalid unless the true consideration of the bargain be expressed therein; and the regimental debts of officers and others entitled to prize-money may be stopped by order of the Secretary at War out of their shares, and paid by the treasurer of the Hospital to the party making the claim. In all conjunct expeditions of land and naval forces, after the condemnation of the booty by the Court of Admiralty, the shares of

* See the *Proclamation* for the Russian War of 1854, in the Appendix.

the army are to be paid over to Chelsea Hospital, for distribution, as in case of captures made by land forces alone. By the same Act deserters from the army are not to be entitled to prize-money; and shares not claimed within six years after being paid, as directed by the Act, to the treasurer of Chelsea Hospital, are declared forfeited, unless upon good cause shewn and allowed.

By letters patent dated 14th January, 1758, in the reign of Geo. II., the Crown made a grant to the East India Company of all booty captured from the enemy by the Company's troops *alone*. Booty, however, which is captured by a force of which the Royal troops form a part, is still by law the property of the Crown, and does not pass by the foregoing grant. But the Company's forces have no beneficial right to any booty taken by themselves alone, except under a special grant from the Company, which, in the disposal of such captures, may exercise the same discretion that belongs to the Crown in the distribution or application of prize; and where the capture is made by the Company's army in conjunction with Royal troops, a grant from the Crown is absolutely necessary, according to the rules already laid down with respect to prize and booty in general.

In connexion with the foregoing Royal grant, the East India Company have issued a Government General Order in the following terms:—"We think it proper to direct, that
 " in future no booty taken from an enemy shall be called or
 " considered as *lawful prize*, or the proceeds thereof in any
 " way appropriated or distributed, without our previous
 " sanction, (or that of the Crown in cases where the Royal
 " sanction is legally requisite;) but that all such booty, or
 " the value arising from the sale of it, be set apart and de-
 " posited in our treasuries, and a correct account taken of
 " it, and transmitted to us by the earliest practicable oppor-
 " tunity, to await our decision, or the decision of the
 " Crown, as the case may require*."

* Jameson's *Code*, 679; Bombay, 1844. The following General Order of the Commander-in-chief of India, was issued 26th December, 1791:—"Grain, cattle, and sheep, found in the territory and villages of the enemy's country, that have been deserted, are likewise to be considered as the property of the Company."
 "All guns and military stores taken from the enemy, are immediately to be delivered to the commanding officer of Artillery, but as the Company have considered them in the same light as other

It has been already mentioned, that for want of a commission from the Admiralty, a land force cannot take prizes properly so called; and that when a land force and a naval force jointly co-operate in an expedition or enterprise from which captures result, the army derives all its future interest in the proceeds of such captures from the bounty of the Crown, as in ordinary cases of booty taken by a land force alone*. But the circumstance of land forces doing duty as marines on board of men-of-war will not make the force a mixed force. Captures, therefore, which are made by such ships, are good naval prizes; and troops thus engaged will be entitled to share as marines under the naval prize proclamation as matter of right and not of favour. Such troops are in truth part of the armament of the ship in which they happen to serve.

Troops embarked on board a fleet as passengers for the mere purposes of transport, and doing duty in naval combats, are not entitled under the naval prize proclamation to share except as passengers; and in this respect, officers and men so circumstanced would all be rated alike, and share accordingly without distinction. The services, however, of troops so situated may be on some occasions exceedingly meritorious, and deserving of the highest scale of reward; and a feeling of this kind appears to have given rise, on the part of the naval officers engaged in the Copenhagen expedition of 1802, to a highly honourable arrangement, respecting which the following memorandum, in Lord Nelson's hand-writing, has been published in the valuable collection of his despatches by Sir Harry Nicholas:—

MEMORANDUM†.

Apparently written about July 1802.

(Autograph in the possession of Colonel Davidson)

From the very particular situation in which the Hon. Lieutenant-Colonel Stewart, with the troops under his command, were placed on board the fleet under the command of Sir Hyde Parker, for they certainly did not belong to any of the ships, therefore they were

property taken from the enemy, a just valuation is to be made of their amount as soon as possible. This valuation is to be submitted to the commanding officer, and if approved by him, is to be delivered to the prize agents, who will debit the Company accordingly, provided Government is pleased to allow it."—*Ibid.*

* *Supra* 109; *Genoa*, 2 *Dodson's Admiralty Reports*, 444, 446.

† *Nelson's Despatches*, Vol. V.

borne as supernumeraries; and they cannot be considered merely as passengers, therefore they must, in fairness, be considered as connected with the services of the fleet; and as the situation is entirely new, and being truly sensible that the army shared with us the toils and dangers of the expedition, we do, therefore, (as the proclamation for the distribution of prize-money, nor any joint expedition, is in the smallest degree similar to the present,) as a mark of our high sense of the services of the Hon. Colonel Stewart and the army, agree to give up a proportion of the Admiral's one-eighth of prize-money, so as to make Colonel Stewart's share of prize-money equal to that of a junior flag officer: and we hereby authorize our agent, Alexander Davidson, Esq., to take from the one-eighth due to the class of Admirals such a sum as will make Colonel Stewart's share equal to a junior flag officer's; and we are of opinion that the field officers of the 49th regiment ought to share with the Captains in the navy, and the other classes, according to their rank, with the navy.

III.—*The Distribution of Prize-money.*

When the Crown has made a grant of booty to the captors, the claims of particular troops to take the benefit of the grant, as participators in the services from which the booty has arisen, are often a matter of serious controversy; as troops in the field, though at a distance from the scene of action, may be shewn to have contributed materially to the success of the capture. When, therefore, any dispute of this nature arises, it is customary to petition the Crown to investigate the claim; and the Crown in former times usually referred the case to the decision of the Privy Council, before whom the matter was argued in due form of law. But under the Act 3 and 4 Vict., c. 65, the Court of Admiralty can now entertain such questions, on a like reference by the Crown. A doubt can seldom exist as to the forces actually present at the capture; but it is often a difficult question to decide, whether certain specified forces are, by meritorious co-operation or otherwise, *constructively* concerned in the capture, so as to be equitably entitled to share in the booty; and this is a mixed question of law and fact, and military usage. In the distribution of army prize-money, co-operation is the test by which the claims of the troops are regulated; and questions of great nicety have arisen upon this point. But generally it may be stated, that a much more remote degree of co-operation, than that which is required in support of claims of joint capture in naval warfare, will admit troops acting at a distance from the scene of capture

to participate in the booty taken by an expeditionary land force.

Co-operation, however, of some sort, must be proved. The last instance of this nature was the celebrated case of the Deccan prize-money, which involved the conflicting claims of the Marquis of Hastings, and Lieutenant-General Sir Thomas Hislop, and the armies engaged under their respective commands in the Mahratta war. In 1817, the Marquis being Governor-General, and also Commander-in-Chief of all the forces of the King and the Company in India, commenced hostilities against the Pindarrees and several of the Mahratta princes, who were threatening an invasion of the British territories. With a view to a vigorous prosecution of the war, and an effectual co-operation with the other troops engaged in the same service, his lordship took the field in person, at the head of a large force belonging to the Presidency of Bengal, and denominated the Grand Army; but the chief burden of active war fell upon the forces posted in the vicinity of the hostile states. The troops there assembled consisted partly of what formed properly the Deccan division, commanded by Sir Thomas Hislop, and supplied from the Madras army, and partly of brigades and detachments supplied from other divisions, and belonging to different Presidencies. The whole, however, bore the general appellation of the army of the Deccan, and was under the orders of Sir T. Hislop, as Commander-in-Chief. In the following year, hostilities terminated in the total defeat and subjugation of the native powers; and a very large quantity of valuable booty fell into the hands of the conquerors, as the fruits of their success. Portions of this booty were acquired by the enterprise of small detachments, who, acting independently of the main army, attacked and plundered individual forts, and in some instances after the camp had been broken up, and open warfare had ceased. Another, and much the largest portion, was captured by the Deccan army, by whom the principal operations of the war were performed. But the whole booty, from whatever sources derived, and by whomsoever captured, was thrown into one mass, under the name of the Deccan prize-money, and was admitted to have vested in the Crown, by virtue of the prerogative, so as to be disposable at the King's pleasure. The whole of the Deccan prize-money was claimed by Sir Thomas Hislop and the

army under his immediate command, as the *actual* captors of the booty. But the Privy Council decided that the Bengal army, under the Marquis of Hastings, as Governor-General and Commander-in-Chief, though at a great distance from the scene of the capture, were, nevertheless, co-operating by their presence in the field, and by keeping native powers in check, who might have impeded the operations of the army commanded by Sir T. Hislop. Evidence was also given of the orders issued by Lord Hastings, indicative of his having assumed the supreme command over Sir T. Hislop and the Madras army; and on these grounds the Privy Council held, after protracted legal discussions, that the Bengal army were constructive captors, and entitled as such to stand on the same footing as the Deccan army, with reference to the booty in question. The result was extremely prejudicial to the interests of Sir T. Hislop and the Deccan army, who, considering themselves the actual captors of the great bulk of the property, had expected to share it exclusively among themselves; and it was proportionably favourable to Lord Hastings and the Grand Army, who were thus admitted to participate in a fund which the Deccan army had supposed to be peculiarly its own. The share of Sir T. Hislop became in consequence reduced from that of a commander-in-chief to the share of a subordinate officer only*.

The following extract from the *Wellington Despatches*, relative to the desire of Major Irton and the body of troops under his command at Hyderabad in 1804, to be included in the expected distribution of the property captured by the army under the orders of the Duke of Wellington (then Sir A. Wellesley), exhibits his Grace's views on this subject.

“I am perfectly satisfied with the manner in which Major Irton and the officers and troops under his command have done their duty; and it is with regret that I feel myself obliged to give an opinion which is not favourable to the wishes of those troops. They certainly have been in an important post; but I must observe that it was not more important to the success of the war, and had no greater effect than many other posts occupied by the British troops. When I submitted to your Excellency my sentiments on the subject

* The scale of distribution of prize-money in India will be found in the Appendix.

of the distribution of the property captured in the war, I considered that it was necessary to draw a line. The most distinct line that could be drawn under existing circumstances, was between the troops who had, and those who had not, been engaged with the enemy. According to this plan, many of the troops who have been employed in the detachments mentioned by Major Irton will be included in the distribution. There can be no doubt but that Major Irton's detachment, with the exceptions which have been provided for, underwent none of the labour, suffered none of the fatigue, incurred none of the expense or risk, and gained none of the honour of the late campaign in this quarter; and therefore as the amount of the property captured is not great, I have not recommended, and do not recommend, that any part of it should be distributed to them*."

Still greater difficulty, however, attends a claim of the army, to be admitted to share with the navy in the distribution of sea-prize, where the land and sea forces are not combined in a conjunct or preconcerted expedition or operation, of which the capture is the result. In all such cases the *onus probandi* lies on the army to shew actual and essential co-operation on their part: it being established by decided authority, that much more than being in sight (which is the test as between different parties of naval force) is necessary to entitle an army to share with the navy in the capture of an enemy's fleet. "I am strongly inclined to hold (says Lord Stowell†) that when there is no preconcert, it must not be a slight service, nor an assistance merely rendering the capture more easy or convenient, but some very material service, that will be deemed necessary to entitle an army to the benefit of joint capture. Where there is preconcert, it is not of so much consequence that the service should be material, because then each party performs the service that is previously assigned to him: and whether that is important or not, it is not so material; the part is performed, and that is all that was expected. The principle of terror to support this claim must be of terror operating not mediately and with remote effect, but directly and immediately influencing the capture. I will not say that a case might not under possible circumstances arise, in which troops on shore might be allowed to share in a capture made in the first instance by the

* *Wellington Despatches*, Vol. III. 61.

† *The Dordrecht*, 2 *Robinson's Admiralty Reports*, 57.

“ fleet. I will put this case : suppose a fleet should come
 “ into a hostile bay with a design of capturing a hostile
 “ fleet lying there, and a fleet of transports should also
 “ accidentally arrive with soldiers on board. Suppose
 “ these soldiers made good their landing, and gained possession of the hostile shore, and by that means should
 “ prevent the enemy from running on shore and landing,
 “ and thereby influenced them to surrender ; I will not say
 “ that troops in such a situation might not entitle themselves to share, although the surrender had been made
 “ actually to the fleet. But suppose the troops to land on
 “ a coast not hostile, but on their own coast, I do not
 “ apprehend that the possession of such a shore would
 “ draw the same consequences after it : for what difference
 “ would it make whether there were troops on shore or
 “ not ? The enemy must know that in a day or two the
 “ landing on a shore to them hostile must be followed by
 “ sure and certain captivity, whether there were a party of
 “ military or not. What additional terror does an army
 “ hold out ? The consequences of captivity would be the
 “ same in either case ; and unless there had been a notice
 “ and denunciation of particular severity, I do not understand, that by the laws of war they would be exposed to
 “ more than a rigorous imprisonment.”

Questions and claims relative to the rights of particular forces to share in *military* prize-money could formerly be entertained only by the Privy Council ; but a recent Act of Parliament (3 & 4 Vict., c. 65, s. 22) gives jurisdiction to the Court of Admiralty also in such matters relating to booty of war and the distribution thereof, as shall be referred by the Crown to that Court, which is to proceed therein as in cases of naval prize.

The relative amounts and proportions of the shares of the officers and men actually or constructively engaged in the service, from which the prize-money arises, can seldom be matter of dispute ; as the scheme of apportionment is either prescribed by a royal warrant or proclamation*, or framed by the commissioners nominated by the Crown to manage the distribution of the money. These commissioners are also constituted the sole judges of all claims relative to the distribution ; so that in the distribution of

* See the *Proclamation* for the Russian War of 1854, in the Appendix.

army prize, the ordinary legal tribunals exercise no jurisdiction whatever. The share of a military commander-in-chief is usually one-eighth of the whole booty.

Parliamentary grants of money for the reward of the forces engaged in any particular service stand upon the same footing as prize or booty, in determining the rights of parties claiming to share in the distribution.

But the army cannot raise the question whether such a grant, made to the navy alone in lieu of prize, ought to have been made to the army and navy, as forming a conjunct expedition. The grant must be taken as it stands, and applied accordingly*.

If an officer dies or is killed in battle after giving orders, he is considered as a captor with respect to a share in prize-money, and his executors are entitled to claim it accordingly. Upon this point the law was laid down by Sir Wm. Grant, Master of the Rolls, that when the property has been granted by the Crown to the captors, it is, by relation, considered as theirs from the time of the capture. "The intention of the Crown (said His Honour) "in all cases of this kind, is to put what is in strictness "matter of bounty upon the footing of right. The service "performed is thought worthy of reward; and though the "party performing it died before payment, the claim of "bounty from the Crown is considered as transmissible to "his representatives, in the same plight and condition as "the claims for wages, or any other stipulated or legal "remuneration of service†."

An officer can therefore assign or dispose by will of his future prize-money, even before the proclamation conferring the booty on the successful troops has been issued by the Crown. For when the Crown has made the grant, the rights of the officers are placed by the law on the same footing as if they had been previously entitled to the money‡.

Prize-money being the reward of personal valour and exertions, no officer is entitled to share in the distribution, unless he has taken a personal part in the performance of the services from which the prize-money arises.

* Booty in the Peninsula, 1 Haggard's *Admiralty Reports*, 53.

† Stevens v. Bagwell, 15 Vesey's *Reports*, 152.

‡ Alexander v. Duke of Wellington, 2 Russell and Mylne's *Reports*, 54.

It is not enough that his regiment should be a part of the capturing force, unless he is also actually present in the field.

It was formerly the practice for the army to elect prize agents to superintend the collection and sale of the captured booty, in anticipation of the royal grant. But, on one occasion in India, the Duke of Wellington disapproved of this course of proceeding, and by his own authority appointed five officers to perform the duty in question*. And now by the above-mentioned Act of King Wm. IV.† two prize agents are to be elected in the manner thereby directed, viz.: one by the Commander-in-Chief and Field Officers, and the other by the rest of the commissioned officers entitled to share in the distribution.

On the reduction of Tarragona in 1813, by a conjunct expedition consisting of troops under Lieut-General Lord Wm. Bentinck, and a part of the fleet under the command of Sir Edward Pellew (Lord Exmouth), a large booty was taken; and in 1820, a grant of £31,531 18s. was made by the Crown to the land and sea forces engaged in the operations. The military and naval commanders were authorized by royal warrant to appoint prize agents to superintend the distribution; and Lord Wm. Bentinck appointed Col. Kenah. Lord Exmouth appointed Mr. Muspratt and Mr. Ghrimes his lordship's secretary. A doubt thereupon arose as to the division of the commission money payable to the prize agents. Lord Exmouth and his agents insisted that the distribution should be jointly made, so that Col. Kenah would take one moiety and Lord Exmouth's agents the other moiety. Col. Kenah on the other hand contended that he should distribute to the land forces exclusively, and receive his commission on the portion which he should so distribute. It is obvious that the agent who represented the largest force would on this principle receive the largest payment and benefit. But, to prevent disputes, the point was referred to the Court of Admiralty, where Lord Stowell decided in accordance with the opinion of Lord Exmouth and his agents. A similar opinion was given by Lord Chief Justice Ellenborough when Attorney-General, on a case submitted to him relative to the prize agency on the booty captured at the Cape of Good Hope, by the combined naval and

* *Wellington Despatches*, Vol. II. 606.

† *Supra*, 110.

military force under Admiral Lord Keith and General Sir Alured Clarke*. And it may be presumed that the same course would be followed with regard to the remuneration of prize agents of conjunct expeditions under the provisions of the Act 2 Wm. IV. above cited†.

* *Tarragona*, 2 Dodson's *Admiralty Reports*, 487.

† *Supra*, 110.

CHAPTER VIII.

LIABILITY FOR PRIVATE INJURIES.

IN the exercise of professional duty by military officers, injuries may frequently be occasioned to other officers, or to private individuals, whose legal remedies in such cases are now to be considered. As between officers themselves, the language of the Articles of War is sufficiently comprehensive to bring most of such cases within the cognizance of a court martial; but a court martial has no power to award pecuniary damages for injurious conduct*. Its jurisdiction is criminal, and its judgments are penal. It may happen, too, that the common feeling of the service, to which the offending or the complaining party belongs, would in many cases render an application to such a tribunal utterly fruitless; as the general sentiment of the members of a particular profession or class of society, respecting a matter of professional or corporate right or conduct, is often found to be at variance with the public law of the land.

Civil actions are therefore maintainable against commissioned officers, for exceeding their powers, or for exercising them in an oppressive, injurious, and improper manner, whether towards military persons or others. Extreme difficulties, however, lie in the way of plaintiffs in actions of this nature, for no such action is maintainable for an injury, unless it be accompanied by malice or injustice: and the knowledge of this (says Mr. Baron Eyre), while it can never check the conduct of good men, may form a check on the bad†. Where an officer (says the same learned judge) makes a slip in form, great latitude ought to be allowed; but for a corrupt abuse of authority none can be made‡.

It will be convenient to consider the law upon this subject: 1st, as it applies to wrongs committed by officers towards persons under military authority; and, 2dly, as

* 4 Taunton's Reports, 78.

† Per Mr. Baron Eyre, 2 Term Reports, 539.

‡ Ibid.

it applies to persons not subject to such authority. Some of the decisions that will be quoted were pronounced in cases where naval officers were concerned; but the principle of the decisions applies equally to both services.

I. *Wrongs towards Persons under Military Authority.*

A notion appears to have at one time extensively prevailed that an officer could have no remedy against ill treatment received from his superiors in the course of professional duty, except by bringing the offending party to a court martial, and subjecting him to the penalties of the Articles of War. This opinion, however, was quite unfounded in point of law; and such a state of things might often be productive of the worst consequences. The question was distinctly raised in *Grant v. Shand**, where an action was brought by an officer in the army against his superior officer for oppressive, insulting, and violent conduct. The plaintiff was directed to give a military order: and it appeared that he sent two persons, who failed. The defendant thereupon said to the plaintiff, "What a stupid person you are," and twice struck him: and although the circumstances occurred at Gibraltar, and in the actual execution of military service, it was held by the learned judge at the trial that the action was maintainable; and a verdict was found for the plaintiff. An application was afterwards made to the Court of King's Bench to set aside the verdict; and Lord Mansfield, the Chief Justice, was very desirous to grant a new trial; but the Court, after argument, refused to disturb the verdict.

So also an action will lie for unjust treatment under the form of discipline, as in *Swinton v. Molloy*†, where the defendant, who was Captain of the *Trident* man-of-war, put the purser into confinement, kept him imprisoned for three days without inquiring into the case, and then released him on hearing his defence. The purser brought his action against Captain Molloy, for this unlawful detention in custody; and, upon the evidence, Lord Mansfield said, that such conduct on the part of the

* Cited 4 Taunton's Reports, 85.

† 1 Term Reports, 537.

captain did not appear to have been a proper discharge of his duty, and therefore that his justification under the discipline of the navy had failed him. The jury gave £1,000 damages. In the foregoing case no want of uprightness was attributed to Captain Molloy; and the decision rested wholly on the circumstance of his having committed an injustice, although without a corrupt intention.

Cruelty or unnecessary severity, when wilfully committed in the exercise of superior authority, are also good causes of action. Thus in *Wall v. Macnamara**, the action was brought by the plaintiff, as captain in the African corps, against the defendant, Lieutenant-Governor and Military Commandant of Senegambia, for imprisoning the plaintiff for the space of nine months at Gambia, in Africa. The defence was a justification of the imprisonment under the Mutiny Act, for the disobedience of orders. At the trial it appeared that the imprisonment of Captain Wall†, which was at first legal, namely, for leaving his post without leave from his superior officer, though in a bad state of health, was aggravated with many circumstances of cruelty, which were adverted to by Lord Mansfield, in the following extract for his charge to the jury: "It is admitted that the plaintiff was
 "to blame in leaving his post. But there was no enemy,
 "no mutiny, no danger. His health was declining and
 "he trusted to the benevolence of the defendant to consider the circumstances under which he acted. But sup-
 "posing it to have been the defendant's duty to call the
 "plaintiff to a military account for his misconduct, what
 "apology is there for denying him the use of the common
 "air in a sultry climate, and shutting him up in a gloomy
 "prison, when there was no possibility of bringing him to
 "a trial for several months, there not being a sufficient
 "number of officers to form a court martial? These cir-
 "cumstances, independent of the direct evidence of malice,
 "as sworn to by one of the witnesses, are sufficient for
 "you to presume a bad malignant motive in the defen-
 "dant, which would destroy his justification, had it even

* 1 *Term Reports*, 536.

† It is remarkable that Captain Wall, the plaintiff in this action, was afterwards the celebrated Governor Wall, who was hanged at Tyburn in 1802, for the very offence of cruelty, which formed the foundation of his own action against Governor Macnamara.

“been within the powers delegated to the defendant by “his commission.” The jury thereupon found a verdict, for Captain Wall, with 1000*l.* damages.

On the same principle a military officer recovered damages against the officers of an East India Company's ship for cruelty in compelling him, on his passage to India, to submit to a ducking on crossing the Line. Lieutenant Man, of the East India Company's service, sailed as a passenger, on board the *Scaleby Castle*, Indiaman, from England to Bombay. On the approach of the ship to the equator, preparations were made for shaving and ducking the passengers. Lieutenant Man, having had, from early life, a diseased or contracted arm, which, but for the peculiarly high testimonials which he produced, would have prevented him from entering the service at all, and being greatly averse to any exposure of this infirmity, gave notice early on the day of the ceremonial that he did not intend to submit to the operations in view, and offered money in abundance to the crew to purchase his exemption; but the money was refused, and violent threats were uttered against him; in consequence of which he retired for protection to his cabin, and there barricaded himself, by placing chests and trunks across the door, and closing the port to sea-ward. For many hours he continued unmolested in this state of darkness, suffering much from the heat and confinement; but in the latter part of the day his cabin was attacked by a large body of seamen headed or encouraged by two of the ship's officers. Some of the assailants lowered themselves down the side of the ship, and forced open the cabin port, and one sailor repeatedly made thrusts with a drawn cutlass into the cabin in various directions, with the intention of wounding or injuring its inmate; who, however, parried these attacks with his sword. The rest of the party effected an entrance into the cabin from the interior of the ship, attacked Lieutenant Man with drawn cutlasses, disarmed him of his sword, and after using great violence to his person, dragged him on deck, and there forced him into a boat nearly full of filthy water. He was there stripped and tarred, and most roughly shaved or scraped with a jagged rusty iron hoop; and his infirm arm in particular was wantonly exposed and exhibited, and made the subject of contemptuous derision to all present throughout the proceedings, which were terminated by forcing his

head under the water in the boat, and retaining him in that state till he was almost suffocated. The sores and bruises occasioned by this treatment confined the plaintiff to his bed under medical attendance for some days. For these outrages he brought an action on his arrival at Bombay against the officers who had been the ring-leaders in the transaction, and also against some of the crew. He expressly disclaimed all desire to interfere with the ordinary sports and amusements of ship-board, when restricted within due bounds, and not employed as instruments of cruelty or oppression; and rested his case, therefore, principally on the great insult which had been committed upon his feelings, by the heartless exposure of his personal infirmities. It appeared, also, that Lieutenant Man was an officer of distinguished gallantry, and had signalized himself in his profession; so that his objection, in the first instance, to the ceremonial of crossing the Line, was in no wise to be attributed to timidity or needless alarm. The Court severely condemned the conduct of the officers of the ship, and gave judgment against them with 400 rupees damages, which, with the expenses of the suit, amounted to a heavy fine; their pay and allowance (which was their only support) being very small*.

An undue assumption of authority in matters not within the range of military discipline is also a good ground of action against a superior officer. This appears from the case of *Warden v. Bailey*†, where the plaintiff was a permanent serjeant in the Bedford regiment of local militia, of which the defendant was the adjutant. In November 1809, the lieutenant-colonel issued a regimental order for establishing an evening school at Bedford. He appointed the serjeant-major the master, and ordered all serjeants and corporals, including the plaintiff, to attend and pay eight-pence a week towards the expenses of the school. The plaintiff and some other of the scholars having afterwards omitted to attend, several were tried by court martial and punished. The Plaintiff, however, was only reprimanded, and he promised regular attendance in future. Shortly afterwards he was ordered to attend a drill on parade, when the defendant, who appears to have been a shopkeeper, shook his fist at the plaintiff, called him a rascal, and told him,

* *Man v. Learmouth, Medland and Weobly's Remarkable Trials*, Vol. I. 99.

† 4 *Taunton's Reports*, 67.

he deserved to be shot. The defendant then directed a serjeant to draw his sword and hold it over the plaintiff's head, and if he should stir to run him through; and, by the defendant's direction, a corporal took off the plaintiff's sash and sword. The plaintiff was then conducted, by the defendant's order, to Bedford gaol, with directions that he should be locked up in solitary confinement, and kept on bread and water. He was thus imprisoned for three days. He was then brought up before the colonel and the defendant, and other officers of the regiment, and again remanded to the gaol. The plaintiff's health having been impaired by the continuance of this treatment for several weeks, he was afterwards conducted to his own house, and there kept a close prisoner until January 1810, when he was escorted by a file of corporals from Bedford to Stilton, to be tried by court martial for mutinous words spoken on parade at the time of his arrest, and for thereby exciting others to disobedience. He was tried accordingly, but liberated in March 1810. Upon this he brought his action against the adjutant for the wrongful imprisonment, when an objection was taken that the question of the propriety of the arrest was not within the jurisdiction of the civil courts. The Court of Common Pleas, however, overruled this objection. Sir James Mansfield, C. J.: "It might be very convenient that a military officer might be enabled to make the men under his command learn to read and write,—it might be very useful, but is not a part of military discipline. Then, further, there is a tax of 8*d.* a week for learning to read and write "The subject cannot be taxed, even in the most indirect way, unless it originates in the Lower House of Parliament." Mr. Justice Lawrence: "It is no part of military duty to attend a school, and learn to write and read. If writing is necessary to corporals and serjeants, the superior officers must select men who *can* write and read; and if they do not continue to do it well, they may be reduced to the ranks. Nor is it any part of military duty to pay for keeping a school light and warm: this very far exceeds the power of any colonel to order."

In a subsequent stage of the same case, when it was attempted to justify or defend the mutinous expressions used by Warden on parade as above stated, on the ground of the illegality of the order which gave rise to them, the

Court held, that although Warden had been unlawfully arrested for disobedience to that order, such a circumstance afforded no warrant for insubordinate language on Warden's part, and therefore no exemption from military arrest and punishment for the same. "Nor will he (said Lord Ellenborough, C. J.) be less an object of military punishment, because the order of the lieut.-colonel, to which this language referred, might not be a valid one, and such as he was strictly competent to make. . . . There may be disorderly conduct to the prejudice of good order and military discipline, in the manner and terms used and adopted by one soldier in dissuading another soldier not to obey an order not strictly legal. If every erroneous order on the part of a commanding officer would not only justify the individual disobedience of it by the soldier, but would even justify him in making inflammatory and reproachful public comments upon it to his fellow soldiers, equally the objects of such order with himself, is it possible that military order and discipline could be maintained*?"

The common defence of officers, against whom actions of this nature are brought, is a justification of their conduct as agreeable to the discipline of the service, and contributory to the maintenance of that discipline. And there can be no doubt, that where the conduct brought into question is not an oppressive, malicious, or unreasonable exercise of power, and does not amount to an excess or abuse of authority, an action is wholly unsustainable.

This will appear from the following case, in which Midshipman Leonard of H. M. S. *Saturn*, having disobeyed an order of the First Lieutenant (Shields) to go to the mast-head, and there remain for a certain time by way of punishment, Lieutenant Shields ordered him to be forcibly hoisted to the mast-head by a party of seamen. For this proceeding Leonard brought an action in the Court of Common Pleas against Lieutenant Shields for an assault; but the usage of the service as to the mast-heading of midshipmen for minor offences having been proved, the Chief Justice, Lord Loughborough, before whom the action was tried, ruled that the custom of the service was a justification of the lieutenant; and the jury found a verdict for

* Per Lord Ellenborough, C. J. : in *Bailey v. Warden*, 4 Maule and Selwyn's *Reports*, 400.

him accordingly. This result was also warranted by the 36th naval Article of War, which directs that all crimes not capital, and not mentioned in the Act of Parliament, or for which no punishment is thereby prescribed, shall be punished "according to the laws in such cases used at "sea*."

On the other hand, an order clearly within the limits of an officer's authority, may be given by him under such circumstances, as to place him in great jeopardy, if he attempts to enforce obedience to it. "It may not be fit" (said Mr. Baron Eyre on an important occasion) that a "subordinate officer should dispute the commands of his "superior, if he were ordered to go the mast-head; but "if the superior were to order him thither, knowing that "from some bodily infirmity it was impossible he should "execute the order, and that he must infallibly break his "neck in the attempt, and it were so to happen, the discipline of the navy would not protect that superior from "being guilty of the crime of murder. And one may "observe in general, that there is a wide difference between "indulging to situation a latitude touching the *extent* of "power, and touching the *abuse* of it. Cases may be put "of situations so critical, that the power ought to be un- "bounded; but it is impossible to state a case where it is "necessary that it should be abused; and it is the felicity "of those who live under a free constitution of govern- "ment, that it is equally impossible to state a case where "it can be abused with impunity†."

The principles upon which the Courts of Law proceed

* Macarthur *On Courts Martial*.

† 1 *Term Reports*, 503, 504. In reference to the same subject the following extract from the Annual Register of the year 1802 may be not improperly inserted here:—"Jan. 22. A court martial "was held at Portsmouth on board the *Gladiator*, on Captain "Sir E. Hamilton, of H.M.S. *Trent*, (who distinguished himself in "the West Indies by the re-capture of the *Hermione*,) for sending "the gunner and his crew up in the main rigging for three hours, "when the gunner was taken down in a fainting fit through the "severity of the cold. The charge being fully established, he was "sentenced to be dismissed the service." The officer's authority was of course sufficient to support his order as a mere matter of military discipline; but the offence consisted in the excess of the punishment, for which an action at law clearly lay, if the injured parties had been advised so to proceed. And an officer of the army, under corresponding circumstances, would stand in exactly the same predicament.

in actions arising out of the abuse of military power, will receive further illustration from the language of Lord Mansfield, in summing up the evidence to the jury in *Wall v. Macnamara**. His Lordship thus expressed himself: "In trying the legality of acts done by military officers in the exercise of their duty, particularly beyond the seas, where cases may occur without the possibility of application for proper advice, great latitude ought to be allowed; and they ought not to suffer for a slip of form, if their intention appears by the evidence to have been upright. It is the same as when complaints are brought against inferior civil magistrates, such as justices of the peace, for acts done by them in the exercise of their civil duty. There the principal inquiry to be made by a court of justice is, *how the heart stood?* and if there appear to be nothing wrong there, great latitude will be allowed for misapprehension or mistake. But, on the other hand, if the heart is wrong,—if cruelty, malice, and oppression appear to have occasioned or aggravated the imprisonment, or other injury complained of, they shall not cover themselves with the thin veil of legal forms, nor escape under the cover of a justification the most technically regular, from that punishment, which it is your province and your duty to inflict on so scandalous an abuse of public trust."

It is no legal objection to an action for the abuse of military authority, that the defendant has not been tried and convicted by a court-martial, for that argument holds in no case short of felony†.

The infliction of an unjust or illegal sentence, pronounced by a court-martial, is a good cause of action by the prisoner, against all or any of the members of the court, and all persons concerned in the execution of the sentence; such a sentence, if it exceeds the authorized measure of punishment, being not merely invalid for the excess, but absolutely void altogether.

The most remarkable case on record of this kind is that of Lieutenant Frye, of the Marines, who, after an unnecessary previous imprisonment for fourteen months, was brought to trial before a naval court martial at Port Royal in the West Indies, and sentenced to be imprisoned

* 1 *Term Reports*, 536.

† Per Mr. Baron Eyre, 1 *Term Reports*, 539.

for fifteen years, for disobedience of orders, in refusing to assist in the imprisonment of another officer, without an order in writing from the Captain of Her Majesty's ship *Oxford*, on board of which Lieutenant Frye was serving. At the trial the written depositions of several illiterate Blacks were improperly received in evidence against him, in lieu of their oral testimony, which might have been obtained and sifted by cross-examination; and the sentence pronounced was itself illegal for its excessiveness, the Act 22 Geo. II. which contains the naval Articles of War, not allowing any imprisonment beyond the term of two years. On the return to England of Admiral Sir Chaloner Ogle, the President of the court martial, Lieutenant Frye brought an action against him in the Court of Common Pleas for his illegal conduct at the trial, when the jury, under the direction of the Lord Chief Justice Willes, gave a verdict for the plaintiff, with 1,000*l.* damages. The Chief Justice at the same time informed Lieutenant Frye that he might have an action against all or any of the other members of his court martial; and Lieutenant Frye accordingly issued writs against Rear Admiral Mayne and Captain Renton, upon whom the same were served as they were coming ashore at the conclusion of the proceedings of the day at another court martial, of which they were acting members, for the trial of Vice-Admiral Lestock, for his conduct in a naval engagement with the French fleet off Toulon, in the early part of the same year. This was deemed a great insult by the members of the sitting court martial, who accordingly passed some resolutions or remonstrances in strong language, highly derogatory to the Chief Justice, which they forwarded to the Lords of the Admiralty, by whom the affair was reported to the King. His Majesty, through the Duke of Newcastle, signified to the Admiralty "his great displeasure at the insult offered to the court martial, by which the military discipline of the navy is so much affected; and the King highly disapproved of the behaviour of Lieutenant Frye on the occasion." The Lord Chief Justice, as soon as he heard of the resolutions of the court martial, ordered every member of it to be taken into custody, and was proceeding to uphold the dignity of his Court in a very decided manner, when the whole affair was terminated in Nov. 1746, by the members of the court martial signing and sending to his lordship a

very ample written apology for their conduct. On the reception of this paper in the Court of Common Pleas, it was read aloud, and ordered to be registered among the records as a "memorial," said the Lord Chief Justice, "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." The proceedings and the apology were also published in the *London Gazette* of 15th Nov., 1746*.

At a naval court martial for the trial of Mr. Crawford, a midshipman of Her Majesty's ship *Emerald*, for contempt and disobedience to the orders of his superior officer, Captain Knell, the court inadvertently found Mr. Crawford guilty only of having been *disorderly when a prisoner at large*, which formed *no part of the offence of which he was accused*; and he was reprimanded accordingly. Mr. Crawford thereupon brought an action against the captain for damages; and the learned judge who presided at the trial, having made some severe adnimadversions on the illegality of the proceedings, the jury awarded heavy damages†. A similar action was brought against Colonel Bailey, Colonel of the Middlesex Militia, for improperly flogging a private in the militia, and the jury gave 600*l.* damages‡.

In *Moore v. Bastard*§ also, an action was brought against the president of a court martial for imprisoning the plaintiff upon an alleged charge of subornation of perjury. The jury gave 300*l.* damages.

An action was tried in 1793 before Mr. Barron Perrot, at the Spring assizes for the county of Devon, against the officers of the Devon Militia, for inflicting 1000 lashes on the plaintiff, in pursuance of their sentence pronounced against him at a court martial, held to try him upon a charge of mutiny; the only act proved being that the plaintiff had written a letter to the colonel of the regiment, which was not communicated to any one else, telling him that the men of the regiment were discontented. The jury gave 500*l.* damages; and the case is quoted with approbation by Mr. Justice Heath, who also intimated, that if the plaintiff had died under the punishment, all the

* *Gent. Mag.* 1746.

† 2 Macarthur, 221, note.

‡ 4 *Taunton's Reports*, 70.

§ *Ibid.*

members of the court martial would have been liable to be hanged for murder*.

There was also another case of an action against Captain Touyn, a naval officer, in which the plaintiff recovered damages for the infliction of several dozen lashes without a court martial, for a single offence, thereby exceeding the custom which had prevailed in the navy that commanding officers might inflict one dozen lashes (called a starting) without a court martial†.

No action, however, will lie for merely bringing a man to a court martial, nor for the previous arrest or suspension; such acts being clearly within the limits of military authority, and exercisable, like all other such powers, in a discretionary manner, under the safeguards and at the risks provided by the Articles of War. A commanding officer has, of necessity, a discretionary power to arrest, suspend, and bring to trial by court martial, any person under his orders. But though this power is indispensable, and its limits cannot, like those of the power of punishment, be exceeded in point of extent, it may, nevertheless, be oppressively, or improperly used; and therefore, by the Articles of War, such conduct is of itself a distinct military offence, triable by a military jurisdiction. This was the opinion of the Judges of the Exchequer Chamber, in the case of *Sutton v. Johnstone*†, and it seems also to be a just inference from the judgment in the same case, that when an officer is expressly charged and found guilty before a court martial, of having improperly brought another to trial before a similar tribunal, an action is sustainable for the special damage resulting from the offence; but that, until the officer procuring the first trial has been found guilty of improper conduct by a court martial, a court of law cannot interfere; no civil tribunal being capable of appreciating, with sufficient delicacy, the circumstances which attend the exercise of military power, or of accurately discriminating the grounds of its application.

Want of probable cause for the accusation is the only basis on which an action for a malicious prosecution before a court martial can rest; and when that is shewn, malice will be inferred by the law. An acquittal, how-

* 4 Taunton's Reports, 70.

† 1 Term Reports, 549.

ever, by the court martial, of the party who brings the action, is not conclusive as to the want of probable cause. At the same time, such an acquittal is an essential preliminary to the action, for though the accuser may have been actuated by the most clear and undisguised malice, yet if he substantiates his original charge to the satisfaction of a court martial, the accused has no *locus standi* in a civil court, even upon the fullest evidence of his prosecutor's malice, it being impossible to say that there was a want of probable cause, after a court martial has adjudged that there was a positive cause. Innocence and uprightness of intention will therefore, on the one hand, be no defence to an action of this nature, when there appears to have been a want of probable cause for the prosecution before the court martial; while, on the other hand, the most malicious, or even corrupt intention, will not subject the accuser to a civil action, where he succeeds in establishing the criminal charge before the military tribunal.

A wrongful imprisonment being, in the language of the law, a *tort*, savouring of crime, it is held that if two commit a *tort*, and the plaintiff recovers against one, he cannot recover against the other for the same *tort**. This rule was applied in the above-mentioned case of *Warden v. Baily*†, where another action was brought against the colonel of the Bedford militia for the same transaction, and the court held that the imprisonment inflicted by the defendant, the adjutant, terminated on the plaintiff being brought up before the colonel on the third day, and being then remanded by him, so that the adjutant was held not liable for more than the first three days' imprisonment, and the colonel not liable, except from the time of the commencement of the remand ordered by himself.

It should be observed, however, that no civil action will lie, in the first instance, against a commissioned officer for a discretionary exercise of military authority while in the performance of actual duty in the field in time of war. Where a discretionary power is clearly vested by military usage in the officer whose conduct is impeached, questions as to the exercise of such authority are so essentially military, that the civil tribunals decline to consider them without the previous judgment of a court martial. This was

* Per Mr. Justice Lawrence, 4 Taunton's *Reports*, 88.

† *Supra*, 126.

settled in the case of *Barwis v. Keppel**, in which the plaintiff was a serjeant in the second battalion of the first regiment of foot guards. The defendant, Colonel Keppel, was the second major of that battalion; and in the absence of his superior officers he had the command of it. In 1760, the battalion was ordered to Germany, under the command of the defendant, to form part of the King's forces serving under Prince Ferdinand. In September 1761, the Prince, being in hourly expectation of a battle, issued an order that all deserters from the enemy should be immediately sent to head quarters without a moment's delay. The plaintiff had full notice of this order; and three French deserters having surrendered to him, he detained them six hours without bringing them to head quarters or reporting their arrival. For this neglect of orders the plaintiff was tried by court martial, and sentenced to be suspended from his rank of serjeant for a month, and to do the duty and receive the pay of a private soldier during the same time. On the sentence being reported to Colonel Keppel, he did not confirm it, but made an order at the foot of the sentence in the following terms:—"But, as Serjeant Barwis could not be ignorant of the Duke's order concerning deserters, and Colonel Keppel thinking his neglect might have been attended with the utmost bad consequences, orders that he be broke, and that Corporal Billow be appointed serjeant in his room." This order was carried into execution, and the plaintiff served accordingly as a private until his battalion returned to England. Colonel Keppel was appointed, in 1762, to command an expedition against the Havannah; and, on his return to England, Barwis brought an action against him for maliciously and improperly reducing him (Barwis) to the ranks. A verdict was found for the plaintiff, with 70*l.* damages, subject to the opinion of the Court of Common Pleas, upon the question, whether the action was maintainable. The Court held, that as the whole matter took place abroad, and in the field, in open war, the conduct of the defendant, Colonel Keppel, could not be tried in a civil court. *Per Curiam*: "By the Act of Parliament to punish mutiny and desertion, the King's power to make articles of war is confined to his own dominions. When his army is out of his dominions, he acts by virtue of his

* 2 *Wilson's Reports*, 314.

“ prerogative, and without the Statute or Articles of War,
 “ and, therefore, you cannot argue upon either of them,
 “ for they are both to be laid out of this case; and,
 “ *flagrante bello*, the common law has never interfered
 “ with the army; *silent leges inter arma*. We think, (as
 “ at present advised) that we have no jurisdiction at all
 “ in this case; but if the plaintiff’s counsel think proper
 “ to speak more fully to this matter, we are willing to hear
 “ him.” The report contains the following memor-
 andum:—“ But plaintiff seeing the opinion of the Court
 “ against him, acquiesced, and the judgment was for the
 “ defendant, *ut audiui**.”

It was intimated, however, by the two Chief Justices, Lord Mansfield and Lord Loughborough, on a subsequent occasion†, that if the conduct of Colonel Keppel had been previously condemned by a court martial, an action at law would have been maintainable against him, although the transaction in question took place in the field, and in open war.

Again, with respect to the exercise of military power by commanding officers in the execution of actual service, and the right of action against them on such grounds, the following observations fell from the Court in *Sutton v. Johnstone*: “ Commanders, in a day of battle, must act
 “ upon delicate suspicions; upon the evidence of their
 “ own eye; they must give desperate commands; they
 “ must require instantaneous obedience. In case of a
 “ general misbehaviour, they may be forced to suspend
 “ several officers, and put others in their places. A
 “ military tribunal is capable of feeling all these circum-
 “ stances, and understanding that the first, second, and
 “ third part of a soldier is obedience. But what con-
 “ dition will a commander be in, if upon the exercising
 “ of his authority he is liable to be tried by a common
 “ law judicature? Not knowing the law, or the
 “ rules of evidence, no commander or superior officer will
 “ dare to act; their inferiors will insult and threaten
 “ them Upon an unsuccessful battle, there are
 “ mutual recriminations, mutual charges, and mutual
 “ trials Party prejudices mix. If every trial is
 “ to be followed by an action, it is easy to see how endless

* 2 *Wilson's Reports*, 318.

Sutton v. Johnstone, 1 *Term Reports*, 548.

“the confusion, how infinite the mischief must be. The person unjustly accused is not without his remedy. He has the properest among military men. Reparation is done to him by an acquittal; and he who accused him unjustly is blasted for ever, and dismissed the service. These considerations induce us to turn against introducing this action*.”

It may be gathered, also, from the case of *Sutton v. Johnstone*, which was an action between naval officers, that unless a court martial shall first expressly decide that it was physically impossible for an officer to execute the orders delivered to him in the field or on actual duty, he has no right of action against his commanding officer for bringing him to a court martial on a charge of disobedience to those orders, even though the court martial may have acquitted him of misconduct.

Delay in bringing an officer to a court martial, after he has been put under arrest, is also no ground of action against the officer ordering the arrest; this being a point of purely military conduct and authority, of which a court martial alone can properly judge. But if a court martial should condemn the commanding officer's conduct on such an occasion, an action against him would probably lie. Captain Sutton, of H. M. S. *Isis*, brought an action † against Commodore Johnstone, for maliciously bringing him to a court martial on charges of disobedience to orders during an engagement with a French force in 1781. It appeared that Captain Sutton, after his arrest at the close of the engagement, was carried with the squadron to India, where he was detained in arrest for two years, during a lengthened cruise and various naval operations, before he was eventually sent to England by Admiral Sir Richard Hughes, to be tried. His trial was thus delayed for two years and a half; and great stress was laid on these circumstances, as an unnecessary aggravation of his arrest. But the Court said: “The delay is charged to be contrary to the defendant's duty as Commander-in-Chief. There is no rule of the common or statute law applicable to this case. It is a mere military offence. It is the abuse of a military discretionary power; and the defendant has

* 1 *Term Reports*, 548.

† *Sutton v. Johnstone*, 1 *Term Reports*, 548.

“not been tried for it by court martial. A court of common law cannot in such a case assume an original jurisdiction. It is like the case of *Barwis v. Keppel**; this objection we think fatal.”

But, although questions regarding the use or abuse of military discipline can thus in some instances be discussed in the civil courts, the learned judges of those tribunals have deprecated the resort to such proceedings in ordinary circumstances; and in *Warden v. Bailey*†, where the Court entertained the case, and ordered a new trial, the Chief Justice, Sir James Mansfield, said, “I must express the strongest wish that the cause will not be again tried, for all disputes respecting the extent of military discipline are greatly to be deprecated, especially in time of war; they are of the worst consequence, and such as no good subject will wish to see discussed in a civil action; they ought only to be the subject of arrangement among military men‡.” In the case which gave rise to the foregoing observations, the learned judges allowed that a considerable amount of unnecessary violence and indignity had taken place.

By the Annual Mutiny Act it is provided, that actions brought for any thing done in pursuance of that Act, must be commenced within six months, and defendants in such actions are so far protected, in the first instance, from wanton or unreasonable litigation, that if the plaintiff does not obtain a verdict, the Court is to allow treble costs to the defendant, (10 & 11 Vict., c. 12, s. 93.) Actions of this nature are also confined by the Act to the superior courts of Westminster, Dublin, and Edinburgh, where justice may be presumed to be administered with the greatest impartiality and precision.

A recent case of *Walton v. Major Gavin* of the 16th Lancers, for alleged false imprisonment, gave rise to a very important question with reference to the 20th Article of War, which directs that no officer commanding a guard; or Provost Marshal shall refuse to receive or keep any prisoner committed to his charge by any officer or non-

* *Supra*, 135.

† *Supra*, 126.

‡ On the other hand, the highest living military authority of England has expressed a decided opinion against officers bringing others to courts martial for matters of private conduct, not affecting military duty. *Wellington Despatches*, Vol. II. 300, 568; Vol. VII. 440. (*Note to First Edition*).

commissioned officer belonging to the Queen's forces, which officer, or non-commissioned officer shall, at the same time, deliver an account in writing signed by himself, of the crime with which the prisoner is charged. And, after very elaborate argument; it was held by Lord Campbell, C. J., and Mr. Justice Coleridge, and Mr. Justice Wightman (Erle J. dissenting) that a commanding officer receiving into his custody a person subject to military law, and accused of desertion by a non-commissioned officer who signed the charge, was justified in detaining the prisoner, notwithstanding any irregularity in the proceedings antecedent to his own reception of the prisoner, and was not bound to inquire into the legality of such proceedings. Judgment was therefore given for the defendant. The principle appears to be the same which is applied to the governor or keeper of any ordinary prison, who on receiving a prisoner with a warrant, regular in point of form for his detention, is justified in receiving him without inquiring whether the magistrate who signs the warrant is duly qualified to act as a justice, or whether in a poaching case the bird mentioned in the warrant as the *corpus delicti* was properly designated a partridge.

Negligence in the use of military arms or weapons is also a good cause of action. In *Weaver v. Ward**, the case was, that the plaintiff and defendant were both soldiers of the trained bands of London. While Ward's band was skirmishing, by way of military exercise, with their muskets charged with powder, against another train-band to which Weaver belonged, Ward's musket was discharged in such a manner as to wound the plaintiff, who thereupon brought an action of trespass against Ward. The defence made by Ward was, that he was in training by order of the Lords of the Council, and skirmishing in obedience to military command, and that the injury happened casually, by misfortune, and against his will. But this was decided not to be enough. *Per Curiam*: "No man shall be excused of a trespass except it may be judged utterly without his fault. As if a man by force take my hand and strike you, or if here the defendant had said that the plaintiff ran cross his peece when it was discharging, or had set forth the case with the circumstances, so as that it had appeared to the Court that it had been in-

* *Hobart's Reports*, 134, A.D. 1616.

“ evitable, and that the defendant had committed no negligence to give occasion to the hurt.”

As a general rule, all language traducing or defaming a man in the way of his profession or calling is actionable, as it tends to his pecuniary damage or loss.

One of the earliest cases of this kind affecting the military profession is *Dymmock v. Fawcett**, in the reign of Charles I., where an action was brought by a military man “ who had served as Captain in the warrs,” for the following words spoken in London, “ Thou art a pimp:” which word was there known to mean a bawd. The defendant further said that the plaintiff was a common pimp and notorious. The plaintiff recovered a verdict for this slander. But a motion was made on the part of the defendant to arrest the judgment on the ground that the words constituted a mere spiritual slander, as “ whore or heretique,” and were punishable only in the Ecclesiastical Court as a spiritual offence, though to say that a man keeps a bawdy house would be punishable at common law, as such an act is a legal offence. The Captain’s counsel argued that the word in question was actionable, “ because “ it is spoken of one of an honourable profession, viz.: a “ souldier, and trenches to his disreputation, to be taxed “ with such a base offence,” which had often been visited with corporal punishment in London, where the words were spoken. Much profound learning was brought to bear upon the meaning of the words by the learned judges of the Court, according to the fashion of the times: and two of them agreed that the words were “ very slanderous, “ and more than if the defendant had called the plaintiff “ adulterer or whoremonger: for this is an infamous offence “ to be a solicitor for others for such base offices. And it “ tends to the breach of the peace to use such a course of “ life, and he may be indicted and punished for it corporally.” But the other two judges took a different view of the case; and the Court being thus equally divided, no judgment at all was given†.

In *Nias v. Scott*, the plaintiff and defendant were Captains in the navy. The former commanded *H. M. S. Herald*, and the latter *H. M. S. Samarang*, in a squadron employed in the Chinese war of 1840; and in reference to the conduct of Captain Nias on the occasion of an attack

* *Croke’s Rep. Temp. Charles I.* 393.

† *Ibid.*

made by the squadron against an island called North Wantong, Captain Scott in conversation with a General Officer at the United Service Club in 1852, stated that the plaintiff was a man against whom there was an awkward imputation, and that he had not obeyed a signal to go into action. The language used by Captain Scott amounted to a charge of cowardice—a professional crime of the deepest dye—and the imputation having reached the ears of Captain Nias, who had been forty-four years in the navy, and had acquired a very high reputation, that officer being then in command of H. M. S. *St. George*, 120, at Devonport, felt it his duty to bring an action against Captain Scott for slander. The case was tried before Lord Chief Justice Jervis, on the 21st June, 1852, but terminated in an apology on the part of the defendant, after the examination of the plaintiff and his witnesses, Sir Thomas Herbert, a Lord of the Admiralty, who was Commodore of the squadron to which Captain Nias and Captain Scott formerly belonged, and Sir T. Maitland, who was Captain of H. M. S. *Wellesley*, in the same squadron. These witnesses fully vindicated the character of Captain Nias, whose counsel thereupon forebore to press for damages, and consented to take a verdict for forty shillings, which sufficiently showed that there was a good cause of action, and threw upon the defendant all the costs of the proceedings.

The communication to the Judge Advocate General, by the president of a court martial, of their opinion, in the form of a censure, respecting the prosecutor's charges, and his conduct in preferring them, is not a libel, and cannot be made the subject of an action at law. This point was decided in 1806, in the case of *Jekyll v. Moore**. Captain Jekyll, of the 43rd regiment, had preferred certain charges against Colonel Stewart of the same regiment, who was accordingly tried by a general court martial, of which Sir John Moore was president. The judgment of the court was, that "the court do most fully and most honourably acquit him:" but to this sentence the following remarks were subjoined: "The court cannot pass without observation the malicious and groundless accusations that have been produced by Captain Jekyll against an officer whose character has, during a long period of service, been so irreproachable as Colonel

* 2 *New Reports*, 351.

made by the squadron against an island called North Wantong, Captain Scott in conversation with a General Officer at the United Service Club in 1852, stated that the plaintiff was a man against whom there was an awkward imputation, and that he had not obeyed a signal to go into action. The language used by Captain Scott amounted to a charge of cowardice—a professional crime of the deepest dye—and the imputation having reached the ears of Captain Nias, who had been forty-four years in the navy, and had acquired a very high reputation, that officer being then in command of H. M. S. *St. George*, 120, at Devonport, felt it his duty to bring an action against Captain Scott for slander. The case was tried before Lord Chief Justice Jervis, on the 21st June, 1852, but terminated in an apology on the part of the defendant, after the examination of the plaintiff and his witnesses, Sir Thomas Herbert, a Lord of the Admiralty, who was Commodore of the squadron to which Captain Nias and Captain Scott formerly belonged, and Sir T. Maitland, who was Captain of H. M. S. *Wellesley*, in the same squadron. These witnesses fully vindicated the character of Captain Nias, whose counsel thereupon forebore to press for damages, and consented to take a verdict for forty shillings, which sufficiently showed that there was a good cause of action, and threw upon the defendant all the costs of the proceedings.

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* 2 *New Reports*, 351.

“ Stewart’s; and the court do unanimously declare that
“ the conduct of Captain Jekyll in endeavouring falsely to
“ calumniate the character of his commanding officer,
“ is most highly injurious to the good of the service.”
Captain Jekyll contended that the foregoing passage
formed no part of the matter submitted to the judgment
of the court, and was, therefore, a libel on him. He
accordingly brought his action for it in the Court of
Common Pleas, against Sir John Moore, but the whole
Court was of opinion that no such action could be main-
tained. Sir James Mansfield, Chief Justice: “ In order
“ to enable the court martial to decide upon the charges
“ submitted by the King, they must hear all the evidence,
“ as well on the part of the prosecution as of the defence;
“ and after hearing both sides, are to declare their opinion
“ whether there be any ground for the charges. If it
“ appear that the charges are absolutely without founda-
“ tion, is the president of the court martial to remain
“ perfectly silent on the conduct of the prosecutor, or
“ can it be any offence for him to state that the charge is
“ groundless and malicious? It seems to me that the
“ words complained of in this case form part of the
“ judgment of acquittal, and consequently no action can be
“ maintained upon it.”

It may perhaps be fairly inferred from the foregoing
decision, that if a court martial pass a censure upon the
prosecutor, with reference to a matter which is not ex-
pressly connected with the charge under trial before such
court martial, or with the proceedings of the court, the
case would stand upon a different footing, and would prob-
ably be held actionable on the principle of Mr. Crawford’s
case already noticed.

Confidential communications from the members of a
military court of inquiry to the superior military author-
ities are likewise privileged, and furnish no ground of
action to the officer whose conduct is implicated in the
documents.

In 1820 the Duke of York as Commander-in-Chief of
the army, appointed a commission of military officers as a
court of inquiry, to investigate the conduct of a lieutenant-
colonel in the army, relative to a mining adventure.
The President of the commission was a major-general, by
whom a written report was made to His Royal Highness,
of the unfavourable opinion of the court on several points

arising in the inquiry. The report concluded also with a statement, that in the particulars therein referred to "the conduct of Lieutenant-Colonel ——— does not appear to have been actuated by those high and delicate feelings of honour which in all transactions of life ought to influence an officer of high rank and reputation." In consequence of this report Lieutenant-Colonel ——— was deprived of his rank in the army, and his regimental commission. He then brought an action against the President for a libel, in publishing the contents of the report, by communicating it to the Commander-in-Chief. But the Court of Common Pleas were unanimously of opinion, that the report was a privileged communication, for which the officer making it could not be rendered responsible in a court of law; and that Sir Henry Torrens, the Duke's military secretary, who had been summoned by the dismissed officer to produce at the trial of the action the report in question and the proceedings of the court of enquiry, was not bound, nor even at liberty, to disclose the documents in question; they being State documents, and protected as such from exposure in courts of justice*.

Neither is the promulgation of a sentence in the Gazette by a competent official person to be deemed a libel on the officer named in the paper. In 1807 Lord Wm. Bentinck, Governor of Madras, issued the following public order: "The Honorable the Court of Directors having resolved to dismiss Colonel Oliver of this establishment from the service of the Honorable Company, for gross violation of the trust reposed in him as Commanding Officer of the Molucca Islands, the Right Honorable the Governor in Council directs that the name of Colonel Oliver be erased from the Army List of this Presidency, from the 20th June last." In 1811, Colonel Oliver brought an action at Westminster against Lord Wm. Bentinck, for the publication of this order, on the ground of its containing libelous matter injurious to the plaintiff. But the Court of Common Pleas decided it to be no libel. Sir James Mansfield, C. J.: "How should an officer in India know why he was dismissed, if the reason assigned is not to be made known? If the Court of Directors were peremptorily to dismiss him, without assigning a

* 2 Broderip and Bingham's *Reports*, 130.

“ reason, that would be a greater hardship on the
 “ defendant. . . . One should be very sorry to have
 “ any thing like a judgment in favour of a plaintiff in such
 “ an action as this, than which a more foolish or a more
 “ mischievous one cannot easily be imagined; it is much
 “ better for the Company, for the country, and for the
 “ plaintiff himself, that the cause of his dismissal should be
 “ stated, than that it should be supposed that the East
 “ India Company did it *suo arbitrio**.”

“ On the same principle, (says Mr. Justice Heath, in
 “ the same case,) when a delinquent, guilty of some enor-
 “ mity, has been brought to a court martial, the Com-
 “ mander-in-chief is not chargeable with libel, for directing
 “ the sentence to be read at the head of every regiment†.”

It is decided also, that any communications made by private individuals to superior officers, for the *bona fide* purpose of obtaining redress of grievances, or otherwise invoking the exercise of authority over other officers, will be deemed privileged communications and no libels.

In the reign of George II. Colonel Bayley wrote a letter to General Willes and the principal officers of the Guards, to be by them presented to the King, stating that a sum of 350*l.* having become due to the colonel, for supplying the guard at Whitehall with fire and candle, the Government had issued a warrant for the payment of that sum to Colonel Bayley; that Captain Carr had got from him the warrant, for the purpose of obtaining payment of it, and under a promise to hand over the amount to Colonel Bayley; and that Captain Carr, after receiving payment, had refused to pay the money to Colonel Bayley. The Court of King's Bench held that this letter was no libel, but a representation of an injury, drawn up in a proper way, and without any intention of aspersing Captain Carr‡.

In *Fairman v. Ives*§, a creditor of a half-pay officer sent a memorial to Lord Palmerston, then Secretary at War, inclosing two bills of exchange drawn by the officer, detailing the circumstances of their non-payment, and requesting his lordship to direct the officer to satisfy the debt. The memorial also stated matter very deroga-

* 3 Taunton's *Reports*, 456.

† *Ibid.* 459.

‡ Bacon's *Abridgment*, tit. Libel.

§ 5 Barnewall and Alderson's *Reports*, 642.

tory to the officer's character, in reference to the subject of complaint. For this, as a libellous communication, the officer brought an action against the creditor: but at the trial the Chief Justice, Lord Tenterden, told the jury, that if they thought the memorial contained only a fair and honest statement of facts, according to the understanding of the party who sent it, they ought to find a verdict for the defendant. The jury did so; and on an application to the Court of King's Bench for a new trial, their lordships held that under the circumstances the memorial in question was no libel. The case is more remarkable, because the Secretary-at-War had no jurisdiction over the matter, and had no right to stop the pay of the officer.

The principle of the law on this subject, was declared by the Court, in *Cutler v. Dixon**, to be this, that "if actions should be permitted in such cases, those who have just cause of complaint, would not dare to complain for fear of infinite vexation."

But where the author of a written communication traducing another person in his professional character has himself no interest in the matter, the *bonâ fides* of the proceeding will be no defence against an action. In *Harwood v. Green*†, the plaintiff was master of the *Jupiter* transport; and the defendant, a lieutenant in the Navy, acting as government agent on board, wrote a letter to the Secretary at Lloyd's, imputing to Harwood misconduct and incapacity in the management of the vessel. In consequence of this letter, Harwood brought an action against Lieutenant Green for a libel. Lieutenant Green defended himself on the ground that his letter was a privileged communication. But the Lord Chief Justice Best declared his opinion to the jury, that an officer in the Navy had not, as such, the right to make any communication to Lloyd's, but only to the Government, by whom, if the matter were important, it might be again communicated to Lloyd's; and the jury gave Harwood a verdict with 50*l.* damages.

In the case of the *Queen v. Lang*, which was tried before the Supreme Court of Calcutta in August 1851, the defendant was a barrister, who, in defending his client

* *4th Report*, 14*B*; 27 & 28 Eliz. A D. 1585.

† 3 *Carrington and Payne's Reports*, 141.

Jotee Persaud in a State prosecution, of which Colonel Mactier of the Bengal army was a principal promoter, made a vehement attack upon the Colonel's character and motives. The notes of Mr. Lang's speech, as prepared for the occasion, contained a passage reviving against Colonel Mactier, an antiquated charge or imputation of Military misconduct, which had been investigated and declared unfounded, twenty-eight years before, by the Marquis of Hastings, when Governor-General and Commander-in-Chief in India: but Mr. Lang, in addressing the Court, unintentionally omitted to make use of the passage thus prepared. The privilege of Counsel would probably have been a protection to Mr. Lang, if he had confined such an imputation to a speech for his client in open Court: but he shortly afterwards published his speech in a newspaper of which he was the editor; and he inserted in the report the obnoxious passage, which he had forgotten to deliver at the trial. He was thereupon prosecuted by Colonel Mactier for the publication of a libel; and being found guilty, he was sentenced to two months' imprisonment, and a fine of 1000 rupees.

In 1852, the *Anglo-Celt*, an Irish Newspaper, contained a libellous article on the conduct of the 31st Regiment in the riot at Six Mile Bridge, during the Clare Election of that year. For this offence the Editor was tried and convicted at Dublin, on the 22d December, 1852: and in the following Easter Term, he was sentenced to pay a fine of 50*l.*, and to be imprisoned for six months.

It may be useful to mention here, as a legal point giving rights of redress between military men, that a superior officer cannot safely deal for his own advantage, in money matters, with a junior officer under his command. The influence which a senior officer can exercise over his junior is such as to destroy, or at least to control, in the purview of a Court of Equity, that entire freedom which is essential to the perfection of a bargain or contract; and if a regimental officer places himself in a position, where such influence may operate to the prejudice of the junior, the transactions between them are liable to be set aside for want of fairness or conscientiousness. This is the rule applied to dealings between a guardian and his ward, a physician and his patient, a landlord and his steward, a clergyman and a penitent, and all other cases where the existence of a just and unavoidable influence may lead to abuse.

In 1841 some extensive pecuniary transactions had taken place, between a captain of a regiment of dragoons, and a money lender, from whom he was desirous of obtaining further advances. The Captain had the confidence of Cornet ——, of the same regiment, and induced him to sign his name to three accommodation bills, of 1000*l.* each; thus rendering the cornet his surety to the amount of 3000*l.* These bills were taken by the Captain and delivered to the money-lender, who was well aware that the Cornet had received no value for them, but had signed them merely for the accommodation of his superior officer. In about two months the bills would become due: the Cornet had only recently attained his majority: he became alarmed as to the responsibility which he had incurred, and apprehensive lest his father should become acquainted with his conduct*. Under these circumstances he applied to the Court of Chancery, to restrain Clark, the money lender, from enforcing payment of the bills: and Lord Langdale, the Master of the Rolls, was clearly of opinion, that if the facts alleged by the Cornet were established in evidence they would constitute a gross fraud on the part both of the Captain and the money-lender. The learned Judge alluded in unmistakable terms to the conduct of the captain, in having abused, for his own advantage, the influence which, as a superior officer, he possessed over a cornet in the same regiment; and His Lordship held that circumstance alone sufficient to throw a suspicion of fraud upon the whole transaction. His Lordship therefore issued an injunction to restrain the money-lender from making use of the bills to the prejudice of the Cornet, until the whole transaction should be investigated. The final result of the case is not in print, but the probability is, ~~that~~ the captain alone was left to provide for payment of the bills as he best might.

II. *Wrongs towards Persons not under Military Authority.*

Injuries may be occasioned to persons not subject to military authority, by officers mistaking or exceeding their powers, or exercising them with malice, negligence, or unskilfulness: but for acts of this kind a remedy lies

* *Lloyd v. Clark*, 6 Beavan's Reports, 309.

only in the civil courts; the military tribunals, as already observed, having no power to grant pecuniary compensation by way of damages, and non-military persons having no *locus standi* as prosecutors before such Courts, which are instituted solely for the maintenance of order and discipline among the armed forces.

In cases of the kind now under consideration, it is quite immaterial whether the cause of action has arisen within the realm, or beyond the seas; though this proposition was not finally established until the year 1774, when the great case of *Fabrigas v. Mostyn** was determined in the Court of King's Bench, and put an end to all further question or doubt upon the subject. The plaintiff was a native of Minorca, of which Island the defendant, General Mostyn, was governor. The General had by his own absolute authority imprisoned the plaintiff and banished him from the island without a trial. The defence was, that in the peculiar district of Minorca, where the offence occurred, no ordinary court or magistrate had jurisdiction. But the proof of this defence failed, and the jury gave the plaintiff 3000*l.* damages. The objection, however, was taken that the action did not lie, by reason of the foreign locality of the cause of it, and the point was twice argued at great length; but judgment was eventually pronounced against General Mostyn, in accordance with the verdict of the jury. It should be noticed also that, as General Mostyn happened to be a governor, his appointment gave him the character of a viceroy, so that *locally and during his government* no civil or criminal action lay against him. On principles of public justice, therefore, it was necessary that a remedy should be had in England.

The *undue assumption* or *mistaken* exercise of authority by officers towards non-military persons, is a clear ground of action against them in the civil courts, even though there be no malice accompanying the transaction.

Thus in the reign of King William III. an action of trespass was brought against the defendant for billeting a dragoon upon the plaintiff, and forcing him to supply meat, drink, hay, and straw for the soldier and his horse. The plaintiff kept merely a lodging house at Epsom, and the Court of King's Bench held that he was not liable to

* *Cowper's Reports*, 161.

have soldiers billeted upon him within the statute of 4 & 5 William & Mary, c. 13, so that the act of the defendant was a great invasion of the liberties of the subject, and the plaintiff had a verdict with damages*.

Captain Gambier, of the navy, under the orders of Admiral Boscawen, pulled down the houses of some sutlers on the coast of Nova Scotia, who supplied the seamen of the fleet with spirituous liquors. The act was done with a good intention on the part of the admiral; for the health of the sailors had been affected by frequenting these houses. Captain Gambier, on his return to England, incautiously brought home in his ship one of the sutlers, whose houses had been thus demolished. The man would never otherwise have got to England; but on his arrival he was advised to bring an action against Captain Gambier. He did so, and recovered 1000*l.* damages. But as the Captain had acted by the orders of Admiral Boscawen, the representatives of the admiral defended the action and paid the damages and costs. This was a favorable case, unaccompanied by any malicious feeling; but the parties concerned did not attempt to disturb the verdict†.

Admiral Sir Hugh Palliser was defendant in a similar action for destroying fishing huts on the Labrador coast. After the treaty of Paris, the Canadians, early in the season, erected huts for fishing, and by such means obtained an advantage over the fishermen who came from England. It was a nice question upon the rights of the Canadians. But the admiral, on grounds of public policy, ordered the huts to be destroyed. An action was brought against him in England by one of the injured parties, and the case ended in arbitration. But on the part of the admiral it was never contended that the action did not lie by reason of the subject matter of it having occurred beyond the seas‡.

“I remember,” said Lord Mansfield, “early in my time being counsel in an action brought by a carpenter in the train of artillery against Governor Sabine, who was Governor of Gibraltar, and who had barely confirmed the sentence of a court martial, by which the plaintiff had been tried and sentenced to be whipped.

* *Parkhurst v. Forster*, 1 Lord Raymond's *Reports*, 479.

† *Cowper's Reports*, 180.

‡ *Ibid.* 181.

“ The Governor was very ably defended, but nobody ever thought that the action would not lie; and it being proved that the tradesmen who followed the train were not liable to martial* law, the court were of that opinion, and the jury found the defendant guilty of the trespass, as having had a share in the sentence, and gave 700*l.* damages.†”

The following case, involving the same principle, occurred in India, and was there tried before the Supreme Court of Madras. Mr. H. Smith was agent, at Secunderabad, of a mercantile house at Madras, from whom he received a very handsome salary. He became indebted to a soldier of H. M.'s 33rd regiment for some work intrusted to him; and a dispute having arisen between them as to the amount, this led to a violent altercation between Mr. Smith and the superintendent of the bazaar acting under local military regulations. Lieutenant-Colonel Gore thereupon sent a file of men to arrest the plaintiff, who was accordingly seized about six o'clock in the evening, and marched from his house through the streets of the cantonment to the main guard at Secunderabad, where he was kept till twelve o'clock the next day. In consequence of these proceedings he brought an action against Colonel Gore for false imprisonment. Secunderabad was an open cantonment for a part of the subsidiary force serving in the territories of the Nizam; the force consisting partly of British, and partly of native troops. It had barracks, and the men were hutted. It was also upon a field establishment, constantly ready for immediate service. The article of war then in force, being the 22nd in the 11th section of the Statute 27 Geo. II., was thus intituled, “ Of duties in quarters, in garrison, and in the field;” and it enacted, “ that all sutlers and retainers to the camp, and all persons whatsoever serving with forces *in the field*, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war‡.” Sir Thomas Strange, C. J.: “ The question was, whether the troops, *being cantoned*, were in the state to which the cited articles

* Military law was here evidently intended by the learned judge. When *martial* law is in force, every person, military or non-military, is subject to it.

† Cowper's *Reports*, 175.

‡ Sir Thomas Strange's *Madras Reports*, 435.

“ of war applied. The court thought they were not.
“ It might have been a field force, being upon a field
“ establishment, so as to be ready to move at the shortest
“ notice. There might be great similarity in the arrange-
“ ments adopted for an army, whether in the field or
“ cantoned. A respectable witness, Brigade-Major Lyne,
“ intimated as much. Still, so far as the court could
“ form a judgment upon a question of this nature, there
“ seemed to be a difference between a camp and a can-
“ tonment, which appeared material. When in the
“ field, not only the army, but its appendages, must be
“ under the immediate control of the officer commanding
“ it, according to the rules and discipline of war. So
“ situated, the sutler, who chose to follow the camp,
“ identified himself in a manner with the soldier, for every
“ purpose almost but that of fighting. The plaintiff
“ called upon the court to say, whether the force in
“ question, under the command of the defendant, was at
“ the time in the field. It seemed impossible to say
“ that it was, without confounding ideas apparently very
“ distinct. The defendant appeared to have acted
“ under a mistake of his authority, for which he was
“ liable to answer, as it had been productive of serious
“ injury to the plaintiff.” Judgment was therefore given
against Colonel Gore, with fifty pagodas damages.

In the foregoing case reference was made to an action brought by Mr. Robert Bailie, an up-country trader in the province of Bengal, against Major-General Robert Stewart, for an assault and false imprisonment. Mr. Bailie had resided within the cantonments of Cawnpore for many years, and dealt in European articles, which he principally disposed of to the military stationed there. In October 1797, upon a complaint made to him by one of the people of his Zenanah, he tied up and very severely flogged one of his *chowkydars**. For this act Major-General Stewart ordered Mr. Bailie to be tried by court martial; and as he acknowledged to have used no less than six switch whips in the flogging, alleging as his reason, that as they were new whips he was afraid of breaking them and spoiling their sale, the court martial sentenced him to five days' imprisonment, and to make an apology to the commanding officer. This sentence General Stewart,

* Watchmen or Guards.

though he did not approve of it, confirmed; and issued orders for Mr. Bailie to depart the camp as soon after his enlargement as possible. The supreme court of Calcutta held Mr. Bailie to be a sutler within the meaning of the Articles of War, so as to render him amenable to military law. But in the above-mentioned action of *Smith v. Lieut.-Col. Gore*, the Chief Justice, Sir T. Strange, declined to be governed by the decision in General Stewart's case, as the note furnished to the Court did not clearly show whether or not the army was in the field when the transaction occurred.

In 1831 Mr. Glyn, a British merchant, was residing at Gibraltar, of which fortress General Sir Wm. Houston, Bart., was Lieutenant-Governor acting as Governor. On the 3rd of November in that year, between the hours of eleven and twelve in the day, Col. Mair, the military secretary of Sir Wm. Houston, surrounded the plaintiff's premises with a detachment of troops, and searched a house immediately adjoining for the person of Torrijos, a Spanish General, who was suspected to be secreted there. During the search, which was unsuccessful, Mr. Glyn, on attempting to leave his house, was prevented from doing so by a sentinel placed at the door, who presenting his fixed bayonet compelled the plaintiff to retire within. Under these circumstances Mr. Glyn brought an action in the Court of Common Pleas against Sir Wm. Houston, for assault and false imprisonment committed by him, or under his orders; and the foregoing facts having been given in evidence, the jury, under the direction of Mr. Justice Erskine, found a verdict for Mr. Glyn, with 50*l.* damages*.

In *Goodes v. Wheatley*†, the plaintiff was doing duty as a constable at St. James' Palace, on the birth-day of King George III. in June 1807, and had occasion to desire the defendant, who was a Lieutenant-Colonel of the guards, but not wearing his uniform, to walk on; whereupon Col. Wheatley marched the plaintiff off to the guard-room by a file of grenadiers, and confined him there several hours. For this trespass and false imprisonment the action was brought: but, in consequence of a failure in the proof of the plaintiff's appointment as a constable for St. James'

* *Glyn v. Houston*, 2 Manning and Grainger's Reports, 337.

† 1 Campbell's Reports, 231.

parish, he was non-suited under the direction of the Chief Justice, Lord Ellenborough. His Lordship at the same time regretted that the case had not been so prepared as to enable him to deal with it as a common assault, in which case there would have been a verdict for the plaintiff.

An *unreasonable* or *malicious* exercise of power will in like manner render an officer liable to an action for damages. An instance of this occurred in the year 1783, when an action was brought against General Murray, Governor of Minorca, for improperly suspending the Judge of the Vice-Admiralty Court of that island. The General had professed himself ready to restore the judge on his making a particular apology; and, on reference to the home authorities, the King approved of the suspension, unless the Governor's terms were complied with. There was no doubt as to General Murray's power to suspend the judge for proper cause; yet on the proof of his having unreasonably and improperly exercised that authority, and notwithstanding the King's approbation of his proceedings, damages to the amount of 5000*l.* were awarded against him by a jury; and, as Mr. Baron Eyre observed, it never occurred to any lawyer that there was any pretence for questioning the verdict*.

In 1829 an action of a similar nature was brought by one Basham, a resident in Bermuda, against General the Hon. Sir William Lumley, for injuries committed by him when Governor and Commander-in-Chief of that settlement†. It had been usual for the churchwardens of the colonial parish of St. George to collect the rates made by the select vestry; and it was customary to allow the churchwardens thirty days after the expiration of their year of office to render their accounts and pay over the balance to their successors. Basham and Till were elected churchwardens for 1820, and, in consequence of the magnitude of the rates, found it necessary at the end of that year, to have more than the usual time for getting in the arrears and passing their accounts. The select vestry met on 1st June, 1821, and passed a resolution directing the collection of rates in arrears, and granting to Basham and Till, as outgoing churchwardens, an extension of time to sixty days for that purpose. The resolution also ordered them to pay several specified sums, including 30*l.* to the Com-

* 1 *Term Reports*, 538.

† *Annual Register*, 1829, 1.

mittee for managing a memorial to the throne against some of the acts of the Governor in his administration, and particularly for his having caused the soldiers to attend Divine Service at the church, instead of having it performed at the barracks, as was the custom previously to his government. The preparation of this memorial had made some noise in the island, and the governor having determined to oppose the proceedings of the vestry, attended a meeting of that body on the 11th June; and, though he was not a vestryman, placed himself in the chair. By the minutes made of this meeting, it appeared that he protested against the resolution of 1st June, ordering the specific payments therein mentioned; and he at the same meeting produced a paper, which was, read by the clerk, declaring the governor's opinion that the vote of the 1st June was illegal; that, if persisted in, he would cite the parties before him as Ordinary, or in the Court of Chancery; that, if the churchwardens obeyed the vote, he would direct all parties to be prosecuted in the Ecclesiastical Court; that the parishioners were authorized by him to refuse payment of the rate; and that the outgoing churchwardens would be guilty of fraud, if they paid any money except to their successors, or for church purposes. This paper was signed by Sir Wm. Lumley as Lieutenant-General, Governor, and Commander-in-Chief and Ordinary*. It was dated from Government House, 6th June, 1821, and addressed to the rector, who sided with the governor in the dispute. After the reading of this document, Sir Wm. Lumley addressed the vestry in language of the same purport; whereupon Mr. Till announced that the payments directed by the vestry had been made. Sir William then declared the payments illegal; and ordered the late churchwardens, Till and Basham, to produce their parochial accounts to himself as Ordinary, and gave them fourteen days for the purpose, on pain of a prosecution in the Ecclesiastical Court. The meeting of the 11th June was then dissolved. Sir William being both Chancellor and Ordinary, and exercising other functions connected with the Ecclesiastical Court, then cited Till and Basham to render their accounts, although the sixty days allowed them by the vestry had not expired. On

* The person possessing Episcopal authority in Ecclesiastical matters.

the 17th July, Basham, who was an auctioneer by trade, was engaged at a public sale of the property of a gentleman deceased, when a constable came to the auction room, and told him that the Governor required his immediate attendance at the vestry-room. Basham said he could not then leave the auction, but would come when his business would be over, in about two hours. The constable then went away, and in a short time returned with three soldiers, who assisted in conveying Basham to the vestry-room, where the Governor was sitting as chairman. He immediately asked Basham for his accounts, which Basham said that he had not prepared. The Governor then said they must be produced. Till, the other churchwarden, then came into the vestry-room, and was, in like manner, asked for his accounts, and ordered to produce them. Till answered that the sixty days allowed by the vestry had not expired; and added that the churchwardens could not submit to his Excellency's directions, as they were bound to account to the vestry alone. Sir William then denied the rights of the vestry, but offered Till and Basham a few days to prepare and produce their accounts. Till, however, insisted on the whole time allowed by the vestry; whereupon Sir William said he would send them both to gaol, whence no power on earth could release them, and where they should remain till they rotted, unless they rendered the accounts. He then produced from his pocket a warrant which he had prepared, and having signed it, he gave Till and Basham into the custody of the constable, who conveyed them both to gaol. The gaoler, knowing their respectability, committed a little irregularity in their favour, by allowing Basham to go home after dark, as one of his children was ill and his wife pregnant. Sir William having heard of this indulgence, issued an order prohibiting all persons from leaving the gaol after sunset or before sunrise, and a sentinel was posted at the gaol to enforce this order. The parties remained in gaol till the 1st August, being the expiration of the sixty days allowed them by the vestry resolution of 1st June; and they then rendered their accounts to the vestry and were released. Basham then brought an action in the Court of the Colony against the constable who had taken him to gaol, and recovered 200*l.* damages. He brought also a similar action against the gaoler, for an illegal detention in custody, and recovered 500*l.* damages

against him. Sir William Lumley sitting in the Court of Error as Chancellor, reversed the former judgment against the constable. In the other action, the gaoler applied to the Court of Chancery in the colony for an injunction against Basham to restrain him from levying the damages, on the ground that he (the gaoler) could not procure sureties for the expenses of an appeal to a Court of Error; and that if the enormous damages awarded against him were levied he should be totally ruined. Sir William Lumley sitting as Chancellor, granted this application, and Basham was thus deprived of the benefit of the two verdicts which he had recovered. Sir William Lumley, by way of defence to Basham's action against him for the injuries thus committed, attempted to show that he possessed the power of an Ordinary, and had done nothing but what he might legally do in that character. But Lord Tenterden was of opinion, that even if the Governor had possessed such power, he had exercised it in an illegal manner; and, under His Lordship's directions, the jury found a verdict for Basham, and gave him 1000*l.* damages.

Negligence or Unskilfulness in the exercise of an officer's duty may also be a cause of action for damages in respect of private injuries thus occasioned; and in such cases the approval of an officer's conduct by the Government, or by the superior military authorities, will neither relieve him from liability to an action, nor have any influence upon the decision of the Courts of Westminster Hall. Those tribunals investigate such matters on independent evidence, according to their own rules, and pay no regard to the previous conclusions of official functionaries, however high their rank may be. Thus where a naval officer was sued* by the owners of a merchantman for having, through carelessness or unskilfulness, brought his ship into collision with their vessel on the coast of Spain, and the Commander-in-Chief of the Station and the Lords of the Admiralty, after inquiry into the circumstances had approved of the officer's conduct, and had since promoted him in the service, the learned judge of the Admiralty, Dr. Lushington, decided that these circumstances had no weight whatever in a Civil Court, and that the matter must be tried in the same way as if no such circumstances had occurred. The officer was found liable for the damage. It will

* *The Volcano*, 2 W. Robinson's *Admiralty Reports*, 337.

have been noticed likewise, that in General Murray's case* the King's approbation of his proceedings was no protection to him against the verdict of a jury.

It is a rule of English law, in unison with the law of nations by which all civilized states are governed, that no officer engaged in military operations in his country's cause, by the order or with the sanction of the constituted authorities, shall incur any individual or private responsibility for acts done by virtue of his commission or official instructions. Such transactions being of a public nature, redress or satisfaction for injuries to which they give birth, is to be sought by public means alone from the sovereign power of the belligerent or offending state, according to the principles of international law and the general usages of civilization, which never suffer such matters to be litigated before ordinary tribunals. An action involving these principles was brought before the Court of King's Bench in 1822 by Mr. Forbes, a British merchant, against Vice-Admiral Sir Alexander Cochrane as Commander-in-Chief, and Rear-Admiral Sir George Cockburn as second in command, on the North American Station, during the last war between Great Britain and the United States of America. A proclamation by these officers, holding out encouragement to the blacks in the enemy's territories to join the British force, had found its way into the *then* Spanish provinces of East and West Florida, where Mr. Forbes resided. His slaves immediately took advantage of it, and deserted in great numbers to the Rear-Admiral's ship then lying in the Chesapeake. They had thus, by the law of England, regained their freedom, and could not be compelled to return to their former owner. The Admirals accordingly refused to surrender them to Mr. Forbes, who in due time brought his action against those officers for the injury which he had sustained by their harbouring the slaves in their ships. But the Court unanimously held that the action did not lie; and Mr. Justice Best delivered a most eloquent judgment in support of the privilege of freedom which the slaves had acquired by treading on the deck of a British ship of war†. The principle of the decision would of course be equally applicable to officers of the land service.

* *Supra*, 153.

† Forbes *v.* Cochrane, 2 Barnewall and Cresswell's *Reports*, 448.

If in time of peace the citizens of a friendly foreign state sustain a private injury at the hands of a naval or military officer, serving under the orders of the British Government, but unauthorized by his commission or instructions to do the act complained of, the ordinary tribunals of England afford the same redress against him as in the case of a British subject similarly aggrieved; and this rule applies even in those cases, where the violated rights of the foreigner are such as the law of England denies or prohibits to its own subjects.

Thus in *Madrazo v. Willes**, the plaintiff was a Spanish merchant and owner of a slaver, which had been captured by the defendant, a captain in the royal navy; there being no treaty between Spain and this country for the suppression of the slave trade, and that trade being permitted by the laws of Spain. An action having been brought against Captain Willes for compensation in respect of this capture, the jury found a verdict for the plaintiff, with 12,180*l.* damages. An opinion was at first entertained, that no action could be maintained in respect of an unrighteous traffic so strongly condemned by the British law. But the Court of King's Bench decided that Madrazo, as a Spaniard, could not be considered as bound by acts of the British Legislature prohibiting the slave trade,—that he, as a Spanish subject, had a legal property in the cargo of slaves, and was therefore entitled to the damages awarded by the jury.

But if the British Government have expressly instructed the officer to commit the act which constitutes or gives occasion to the grievance, the matter becomes an affair of State which is not cognizable by the courts of law, and must be adjusted by diplomatic arrangement between the two Governments concerned. In such cases also it is quite sufficient, if the officer's proceedings, though not originally directed or authorized by the terms of his instructions, are afterwards sanctioned and adopted by the Government; for this renders them public acts, over which courts of law have no jurisdiction. This principle is to be found in the case of Sir Home Popham, who of his own accord, instituted a blockade of Monte Video, for which he was individually censured as an officer; but his act was afterwards recognized and adopted by the British

* 3 *Barneswall and Alderson's Reports*, 353.

Government as an act of State. A vessel being seized under that blockade, the legality of her capture was discussed in the Court of Admiralty, before Lord Stowell, who held the capture legal, by reason of the subsequent recognition of the blockade by the British Government*.

A similar instance lately occurred†, where a foreign slave-dealer brought an action against the Honourable Captain Denman, R.N., for battering down some barracks, which the plaintiff had erected on the coast of Africa, in the territory of an African chief, for the reception of slaves preparatory to their embarkation in slave-ships. Captain Denman's defence was grounded principally on the permission given him by a treaty or arrangement with the native chiefs of the territory, and on the recognition of that treaty by the British Government, who thereby rendered it an act of State. A verdict was therefore found substantially in favour of Captain Denman.

It having thus been shewn how officers become answerable at law for their own acts or defaults occurring in the course of professional duty, it remains to consider to what extent they are legally liable for wrongs or injuries occasioned by the conduct of their subordinate officers in the execution of the services confided to them; and in this respect it will be seen that officers stand upon a different footing from that of private individuals.

By the general law, masters and employers of every kind are answerable for the acts or neglects of their servants or subordinate agents; but the principle of this rule is, that private individuals have the power of appointing and selecting such agents or servants as they may think proper, and are consequently bound to employ only those who are of competent skill, diligence, and ability. But this principle has no application as between superior and subordinate officers in the army, for the obvious reason that the former do not choose the latter, but each receives his appointment from one common superior. The rule as to military officers therefore is, that the wrong-doer alone is personally liable for the damages or injury resulting from his conduct; and the wrong-doer is he who issued the order, or otherwise gave direct occasion to the act or omission, which led to the mischief.

* 6 Robinson's *Admiralty Reports*, 365.

† *Buron v. Denman*, *Law Times*, March 25th, 1848.

When an officer, therefore, is employed upon a particular service, the execution of which is left to his own skill and uncontrolled judgment, the superior officer from whom he receives his orders incurs no legal responsibility for injuries occasioned to the persons or property of third parties by the conduct of the junior in executing the duty confided to him. For the senior officer has no power of appointing his subordinate officers; he does not even appoint himself to the station which he fills; he is not to be deemed a volunteer in that particular station merely by having voluntarily entered the army; but is compellable to take it when appointed to it; and has no choice whether or not he will serve with the junior officers placed under his orders, but is bound to take such as he finds there and make the best of them. He is a servant of the Crown doing duty with others appointed and stationed in like manner, and by the same authority*.

But the case is altered when the senior officer not only orders another to perform a particular service, but likewise prescribes the specific mode of execution. For the subordinate officer is then deprived of all exercise of his own judgment and discretion; his acts are the direct acts of his senior officer; and the latter becomes as thoroughly responsible, in a legal point of view, as if he had been personally present and assisting in the performance of the duty in question.

It frequently happens in suits at law respecting private wrongs, that the officer against whom the action is brought is the only person acquainted with some of the material facts, which it may be necessary to prove against him: and though in cases of mere debt or contract a defendant is compellable by the Court of Chancery to make a disclosure on oath of such facts as lie within his own knowledge, that rule does not apply to actions respecting private wrongs or injuries. An attempt, however, was made in Sir William Houston's case, by means of proceedings in the Court of Chancery, to compel that officer to produce certain military and other orders, reports, books, letters, and documents, from which the truth of the charge against him would appear. But the Master of the Rolls refused to make any order for the production†. Lord Langdale,

* *Nicholson v. Mounsey*, 15 East's Reports, 383.

† *Glyn v. Houston*, 1 Keen's Reports, 383.

M. R. : " It cannot be doubted that a governor of a colony, " or any person whatsoever, however high his rank, acting " in the service of the Crown, whether in this country or " elsewhere, is answerable for any wrong he may commit " to a party injured, by an action for damages, or crimi- " nally if the justice of the case demand a criminal prose- " cution. I cannot concur in the observation made at the " bar, that the injury of which the plaintiff complains is " one of a trifling nature. To imprison a man in his own " house,—to surround his house with soldiers, who threaten " his life if he attempts to quit it upon his lawful avoca- " tions,—is a very considerable injury ; and if this wrong " has been done, the plaintiff has his remedy by the action " which he has brought. On the other hand no one is " bound to make a discovery to criminate himself.) " The whole object is to obtain a discovery of the alleged " fact, that by the order of the defendant the plaintiff was " illegally assaulted and imprisoned. If that fact be " established, the defendant would be subject to penal " consequences for his misconduct in that respect. In what " way he would be so subject, whether by indictment, " information, impeachment, or, if necessary, by a bill of " pains and penalties, is immaterial ; it is sufficient that he " would be subject to penal consequences."—Motion refused.

In *Cook v. Maxwell**, which was an action brought by an American citizen against the Military Governor of Sierra Leone, for an illegal arrest and imprisonment, and also for destroying the plaintiff's factory, the plaintiff called Major Appleton, who had effected the arrest, to prove the orders under which he acted. He stated that they were in writing ; whereupon it was objected that such writings being State papers were privileged documents, of which for reasons of public policy, the production could not be required ; and so the court decided. But the plaintiff proved his case as to the illegality of the defendant's conduct by other evidence, and obtained a verdict, subject to a reference as to the amount of damages.

* 2 Starkie's Reports, 183.

CHAPTER IX.

CRIMINAL LIABILITIES.

THE ordinary liabilities of military officers, for acts which fall within the range of the criminal law, are the same as those which affect civilians. But there is one peculiar liability, to which military officers are in the course of their profession especially exposed; and this arises on all those occasions when the troops are employed in restoring or maintaining public order among their fellow-citizens. The use of arms, and particularly fire-arms, on such emergencies, is obviously attended with loss of life or limb to private individuals; and for these consequences, a military man may be called to stand at the bar of a criminal court.

A private soldier also may occasionally be detached on special duty, with the necessity of exercising discretion as to the use of his arms; and in such cases he is responsible, like an officer, for the right use or exercise of such discretion.

One of the earliest reported cases on this subject occurred in 1735, when Thomas Macadam, a private sentinel, and James Long, a corporal, were tried before the Admiralty Court of Scotland, upon a charge of murder under the following circumstances: They were ordered to attend some custom-house officers, for their protection in making a legal seizure; and being in a boat with the officers in quest of the contraband goods, one Frazer and his companions came up with them, leaped into the boat, and endeavoured to disarm the soldiers. In the scuffle, the prisoners stabbed Frazer with their bayonets, and threw him into the sea. For this homicide the prisoners were tried and convicted of murder by a jury; and the Judge-Admiral sentenced them to death. But the High Court of Justiciary reversed this judgment, on the ground that the homicide in question was necessary for securing the execution of the trust committed to the prisoners. The report of this case contains the following remarks upon it by Mr. Forbes, afterwards Lord President of the Court of Session of Scotland; and they appear to be of great

importance to military men*: "Where a man has *by law* weapons put into his hands, to be employed not only in defence of his life when attacked, but in support of the execution of the laws, and in defence of the property of the Crown, and the liberty of any subject, he doubtless may use those weapons, not only when his own life is put so far in danger that he cannot probably escape without making use of them, but also when there is imminent danger that he may by violence be disabled to execute his trust, without resorting to the use of those weapons; but when the life of the officer is exposed to no danger, when his duty does not necessarily call upon him for the execution of his trust, or for the preservation of the property of the Crown, or the preservation of the property or liberty of the subject, to make use of mortal weapons, which may destroy His Majesty's subjects, especially numbers of them who may be innocent, it is impossible from the resolution of the Court of Justiciary to expect any countenance to, or shelter for, the inhuman act†." This quotation, in the latter part of it, has a direct bearing on the case of the unfortunate Captain Porteus, whose trial took place in the following year, and whose melancholy fate is the groundwork of Sir Walter Scott's "Heart of Mid Lothian."

In the year 1736, the collector of customs on the coast of Fife made a seizure of contraband goods of considerable value, which were condemned and sold. Two of the proprietors of these goods took an opportunity of robbing the collector of just so much money as these goods had sold for. They regarded this as merely a fair reprisal, and no robbery; but they were nevertheless taken up, tried, and condemned to death for the fact. With the exception of some smuggling transactions, in which they had been concerned, the prisoners were men of fair character; and the mob expressed much dissatisfaction with their sentence, and the prospect of their execution. On the Sunday preceding the day appointed for the execution, the prisoners were taken to a church near the gaol, attended by only three or four of the city guards, to hear divine service. None of the congregation had assembled, and the guards being feeble old men, one of the prisoners made a spring over the pew where they sat, while the other, whose name

* Maclaurin's *Arguments and Decisions*, 80.

† *Ibid.*, 83, 84.

was Wilson, in order to facilitate his companion's escape, caught hold of two of the guards with his hands, and seized another with his teeth, and thus enabled his companion to join the mob outside, who bore him off to a place of safety. Wilson then composedly resumed his own seat, without making any attempt to recover his own liberty. This generous conduct of Wilson created a strong public feeling in his favour; and the magistrates of Edinburgh soon learned that an attempt would be made by the mob to rescue him at the place of execution. They therefore procured some of the regular forces on duty in the suburbs to be posted at a convenient distance from the spot, so as to support the city guard, in case they should be vigorously attacked. The officer, whose turn it was to do duty as captain of the city guard, being deemed unfit for the critical duties of the day, Captain Porteus, unfortunately for himself, was appointed to the command on the occasion. His men were served with ball-cartridge; and, by order of the magistrates, they loaded their pieces when they went upon duty. The execution took place without any disturbance until the time arrived for cutting down the body, when the mob severely pelted the executioner with stones, which hit the guards as they surrounded the scaffold, and provoked them to fire upon the crowd. Some persons at a distance from the place of execution were thus killed. As soon as the body was removed, Captain Porteus withdrew his men, and marched up the West Bow, which is a narrow winding passage. The mob having recovered from the fright occasioned by the previous firing, followed the guard up this passage, and pelted the rear with stones, which the guards returned with some dropping shot, whereby some were killed, and others wounded. On reaching the guard-house they deposited their arms in the usual form, and Captain Porteus went with his piece in his hand to the Spread Eagle Tavern, where the magistrates were assembled. On his arrival there, he was charged with the murder of the persons who had been slain by the city guards, on the allegation that he had commanded the guards to fire. The mob was very riotous, and called for justice upon him; and the magistrates, after adjourning to the council chamber, committed him to the Tolbooth for trial. The strongest feeling existed against him on the part of the mob, until the hour of his trial before the High Court of Justiciary arrived, when, to their great

satisfaction, he was found guilty, and condemned to be hanged. The higher class of society, however, unaffected by the popular prejudice against the unfortunate prisoner, exerted themselves strenuously in his behalf, and succeeded in obtaining a reprieve. This created the greatest discontent among the lower orders, who, on the night before the day originally appointed for the execution, broke open the gaol, dragged the unhappy Captain Porteus down stairs by the heels, carried him to the common place of execution, and there throwing a rope over a dyer's pole, hanged him with many marks of barbarity. The perpetrators of this outrage were never discovered, and the subject gave rise to very warm debates in Parliament, particularly in the House of Lords, with respect to the conduct of the city magistrates and officers.

It was quite clear, however, with reference to the criminality of Captain Porteus, that he had ordered his men to fire without sufficient cause or justification; and under such circumstances, he was in point of law justly found guilty of murder*.

Ensign Hugh Maxwell, of the Lanarkshire Militia, was tried in 1807, before the High Court of Justiciary of

* The following extract from Campbell's *Life of John Duke of Argyle*, 307, is not without interest: "It will be necessary here to let the reader into the character of Captain Porteus, the spirit of the then guards, and the mob of Edinburgh. The captain was originally bred a tailor, but that not suiting his genius, he went into the army, and served some time in Flanders, in the last war. On returning to his own country, upon the Peace of Utrecht, or shortly after, he was made drill-master to the city guard of Edinburgh, in which place he behaved so well, that in a short time he was made one of the captains, by the interest of Provost John Campbell, whose housekeeper he had married. Mr. Porteus behaved in this situation to the satisfaction of every body, except the lower class of mechanics and journeymen, whom he checked in their natural inclination to mobbing, and used sometimes, when he had an opportunity, to chastise them very severely with his cane. By this means, they both dreaded and hated him with all the rancour and malice they were capable of; and finding this unhappy affair furnished them a plausible handle, they were resolved to pursue their revenge without any regard to mercy or humanity.

"The city guards of Edinburgh were composed, at that time, mostly of old men, who had served in the wars abroad, who were very full of their military knowledge, and thought at this time, their courage and conduct were called in question, by calling in the aid of the King's forces. They found themselves trusted with loaded pieces, which they imagined they had a discretionary power to use in their own defence, which 'tis possible they used without the command of their officer."

Scotland, for the murder of Charles Cottier*, a French prisoner of war at Greenlaw, by improperly ordering John Gow, a private sentinel, to fire into the room where Cottier and other prisoners were confined, and so causing him to be mortally wounded. It appeared that Ensign Maxwell had been appointed to the military guard over 300 prisoners of war, chiefly taken from French privates. The building in which they were confined was of no great strength, and afforded some possibilities of escape. The prisoners were of a very turbulent character, and to prevent their escape during the long winter nights, an order was given that all lights in the prison should be put out by nine o'clock, and that if this was not done at the second call, the guard were to fire upon the prisoners, who were often warned that this would be the consequence of disobedience with regard to the lights. On the night in question there was a tumult in the prison, but of no great importance; and Ensign Maxwell's attention having been on that account drawn to the prisoners, he observed a light burning beyond the appointed hour, and twice ordered it to be put out. This order not being obeyed, he ordered the sentry to fire, but the musket merely snapped. He repeated the order; the sentinel fired again, and Cottier received his mortal wound. At this time there was no symptom of disorder in the prison, and the prisoners were all in bed. The general instructions issued from the Adjutant-General's office in Edinburgh, for the conduct of the troops guarding the prison, contained no such order as that which Ensign Maxwell had acted upon; and it appeared that the order in question was a mere verbal one, which had from time to time, in the hearing of the officers, been repeated by the corporal to the sentries on mounting guard, and had never been countermanded by those officers, who were also senior to Ensign Maxwell. The Lord Justice Clerk described the case to the jury as altogether the most distressing that any court had ever been called upon to consider, and laid it down most distinctly, that Ensign Maxwell could only defend himself by proving specific orders, which he was bound to obey without discretion; or by shewing that in the general discharge of his duty he was placed in circumstances, which gave him discretion, and called upon him to do what he did. His lordship was of opinion that both these grounds

* Buchanan's *Remarkable Cases*, Part II. 3.

of defence failed in the present case; and the jury having found Ensign Maxwell guilty of the minor offence of *culpable homicide*, with a recommendation to mercy, the court sentenced him to nine months' imprisonment. Ensign Maxwell's conduct certainly exhibited none of those gross features which characterize murder; but at the same time he was guilty of a rash and inconsiderate act, which, if he had not been engaged at the time in military duty, though he was mistaken in the exercise of it, would probably have been held to amount to murder. In Maxwell's case, the soldier who fired the shot was not prosecuted for the act, nor was he liable to such prosecution.

It is laid down in a book of authority, that if a ship's sentinel shoot a man, because he persists in approaching the ship when he has been ordered not to do so, it will be murder, unless such an act was necessary for the ship's safety. And it will be murder, though the sentinel had orders to prevent the approach of any boats, had ammunition given to him when he was put on guard, and acted on the mistaken impression that it was his duty. In *Rex v. Thomas**, the prisoner was sentinel on board H.M.S. *Achille*, when she was paying off. The orders to him from the preceding sentinel were to keep off all boats, unless they had officers in uniform in them, or unless the officer on deck allowed them to approach: and he received a musket, three blank-cartridges, and three balls. The boats pressed, upon which he repeatedly called to them to keep off; but one of them persisted, and came close under the ship, and he then fired at a man in the boat and killed him. It was put to the jury to find whether the sentinel did not fire under the mistaken impression that it was his duty; and they found that he did. But the case being reserved for the opinion of the judges, their Lordships were unanimous that it was murder. They thought it, however, a proper case for a pardon: and further, they were of opinion that if the act had been necessary for the preservation of the ship, as if the deceased had been stirring up a mutiny, the sentinel would have been justified.

The cases already cited turned upon the improper exercise of discretion by the officers concerned. But in the following case, though not attended with actual consequences involving a criminal charge, the discretion in the

* *Rex v. Thomas*, Easter Term, 1816, Bacon's *Abridgment*, Tit. Murder.

use of arms was wisely exercised, and indicated great presence of mind, and correctness of judgment.

Some years ago, the public journals of London recorded the meritorious behaviour of a private sentry, upon the occasion of a riotous mob assembled at the entrance of Downing Street, with the intent of attacking the Government offices in that quarter of the town. This man standing alone presented his musket, and threatened to fire upon the crowd, if the slightest attempt were made to approach the particular office for the defence of which he was placed on duty, and succeeded by the terror thus created, though at a great risk of consequences to himself, in keeping the rioters at bay until a larger force arrived to assist him. The soldier's conduct was publicly much approved. It was also clearly legal according to Macadam's case* ; and if after the announcement of his intentions the mob had pressed forward to execute their purpose, he would have been held justified at law in firing at the rioters upon his own responsibility. The Duke of Wellington, as Constable of the Tower, testified his marked approbation of this man's conduct, by promoting him at once to a Wardership at that fortress.

During the Irish insurrection of 1848, Smith O'Brien was arrested at the railway station of Thurles, on a charge of high treason. A public passenger train was on the point of starting for Dublin, and the engineer was mounted on the engine, with the steam up, and everything in readiness for the immediate prosecution of the journey. The scene of the arrest lay in the disturbed district, which was in the occupation of the troops employed to suppress the insurrection and prevent its extension. General Macdonald's aid-de-camp, having been apprised of the arrest, proceeded instantly to the station, and there commanded the engineer to dismount from the engine, and to stop the train; it being of the utmost importance to the public safety and service that the news of the arrest should not be carried along the line of railway, as the country people might assemble in great numbers and destroy the rails, and rescue the prisoner, or otherwise impede the conveyance of the prisoner to Dublin. Such interference would obviously have occasioned great loss of life, besides the danger to the public service at such a season. The engineer at first refused to obey the aid-de-camp's orders

* *Supra*, 162.

whereupon the officer presented his pistol at the engineer, and threatened him with instant death if he persisted in his refusal. The man then dismounted; but it is conceived that the officer pursued a correct line of conduct, and exercised upon the occasion a sound discretion, which would have been a good legal defence to him, if he had ultimately proceeded to execute his threat upon the engineer. "Power in law (says Sir Edward Coke) means "power with force*."

The right of officers or soldiers to interfere in quelling a *felonious riot*, whether with or without superior military orders, or the direction of a civil magistrate, is quite clear and beyond the possibility of mistake. This subject however was formerly little understood; and military men failed in their public duty through excess of caution. It was imagined also, that the Riot Act, in allowing an hour for rioters to disperse before the capital penalty for rioting was incurred, suspended the right of interference with a mob, until after the expiration of the hour so allowed. But this was a gross error.

"In 1780, (says Sir James Mansfield, C. J.) this mistake extended to an alarming degree. Soldiers with arms in their hands stood by and saw felonies committed, houses burnt and pulled down before their eyes by persons whom they might lawfully have put to death, if they could not otherwise prevent them without interfering; some because they had no commanding officer to give them the command, and some because there was no justice of the peace with them. It is the more extraordinary, because formerly the *posse comitatus*, which was the strength to prevent felonies, must, in a great proportion, have consisted of military tenants, who held land by the tenure of military service. If it is necessary for the purpose of preventing mischief, or for the execution of the law, it is not only the right of soldiers, but it is their duty, to exert themselves in assisting the execution of a legal process, or to prevent any crime or mischief being committed. It is therefore highly important that the mistake should be corrected which supposes that an Englishman, by taking upon

* Speech of Sir Edward Coke, Ex-Chief Justice of England, *Parl. Hist.* II. 357.

“him the additional character of a soldier, puts off any
“of the rights and duties of an Englishman*.”

In the celebrated trial† of Brackley Kennett, Esq., Lord Mayor of London, who was indicted and convicted for breach of duty in not promptly quelling the great riots of London in 1780, by ordering the troops to clear the streets, Lord Mansfield, C. J., said, “The common law
“and several statutes have invested justices of the peace
“with great powers to quell riots, because, if not sup-
“pressed, they tend to endanger the constitution of the
“country; and, as they may assemble all the King’s sub-
“jects, it is clear they may call in the soldiers, who are
“subjects, and may act as such; but this should be done
“with great caution. It is well understood that magis-
“trates may call in the military. It would be a strange
“doctrine, if, in an insurrection rising to rebellion, every
“subject had not a power to act, when they possess the
“power in a case of a mere breach of the peace. By
“the Act of Geo. I. (the Riot Act) a particular direc-
“tion is given to every justice for his conduct; he is
“required to read the Act, and the consequences are ex-
“plained. It is a step *in terrorem* and of gentleness; and
“is not made a necessary step, as he may instantly repel
“force by force. If the insurgents are not doing any act,
“the reading of the proclamation operates as notice.
“There never was a riot without bystanders, who go off
“on reading the Act.”

George III. and his Attorney General (Wedderburn) both deservedly acquired high credit for their energy in the crisis of the riots of 1780. When the King heard that the troops which had been marched in from all quarters were of no avail in restoring order, on account of a scruple that they could not be ordered to fire till an hour after the Riot Act had been read, he called a cabinet council, at which he himself presided, and propounded for their consideration the legality of this opinion. There was much hesitation among the Councillors, as they remembered the outcry that had been made by reason of some deaths from the interference of the military in Wilkes’s riots, and the

* Per Sir J. Mansfield, C. J. in *Burdett v. Abbott*, 4 Taunton’s Reports, 449.

† Douglas’s Reports, 436, note 4; and see 5 Carrington and Payne’s Reports, 282.

eagerness with which grand juries had found indictments for murder against those who had acted under the command of their superiors. At last the question was put to the Attorney-General, who attended as assessor, and he gave a clear, unhesitating, and unqualified answer to the effect, that if the mob were committing a felony, as by burning down dwelling houses, and could not be prevented from doing so by other means, the military, according to the law of England, might and ought to be ordered to fire upon them; the reading of the Riot Act being wholly unnecessary and nugatory under such circumstances. The exact words used by him on this occasion are not known; but they must have been nearly the same which he employed when he shortly afterwards expounded from the judgment seat the true doctrine upon the subject. The requisite orders were issued to the troops, the conflagrations were stopped, and tranquillity was speedily restored*.

This eminent lawyer having become Chief Justice of the Court of Common Pleas, with the title of Lord Loughborough, delivered a charge to the grand jury on the special commission for the trial of the rioters of 1780, in the following terms†: “I take this public opportunity of mentioning a fatal mistake into which many persons have fallen. It has been imagined, that because the law allows an hour for the dispersion of a mob to whom the Riot Act has been read by the magistrate, the better to support the civil authority, that during that time the civil power and the magistracy are disarmed, and the King’s subjects, whose duty it is at all times to suppress riots, are to remain quiet and passive. No such meaning was within view of the legislature, nor does the operation of the Act warrant such effect. The civil magistrates are left in possession of all those powers which the law had given them before. If the mob collectively, or a part of it, or any individual within or before the expiration of that hour, attempts, or begins to perpetrate an outrage amounting to felony, to pull down a house, or by any other act to violate the law, it is the duty of *all present*, of whatever description they may be, to endeavour to stop the mischief, and to apprehend the offender.”

* Lord Campbell’s *Lives of the Chancellors*, Vol. VI. 137.

† 21 *State Trials*, 485.

“ A riot (says Mr. Justice Gaselee) is not the less a riot, nor an illegal meeting the less an illegal meeting, because the proclamation of the Riot Act has not been read; the effect of that proclamation being to make the parties guilty of a capital offence if they do not disperse within an hour; but if that proclamation be not read, the common law offence remains, and it is a misdemeanour; and all magistrates, constables, and even private individuals are justified in dispersing the offenders; and if they cannot otherwise succeed in doing so, they may use force*.”

After the suppression of the great riots of London in 1780, by the aid of the troops, as already mentioned, the Government was acrimoniously attacked both in and out of Parliament, on the ground that the employment of a military force, to quell riots by firing on the people, could only be justified, if at all, by martial law proclaimed under a special exercise of the Royal prerogative; and it was thence argued that the nation was living under martial law†. But Lord Mansfield, the Chief Justice of the King's Bench, addressed the House of Lords on this subject, and placed it in its true light. “ I hold (said His Lordship) that His Majesty, in the orders he issued by the advice of his ministers, acted perfectly and strictly according to the common law of the land, and the principles of the Constitution. . . . Every individual in his private capacity may lawfully interfere to suppress a riot, much more to prevent acts of felony, treason, and rebellion. Not only is he authorized to interfere for such a purpose, but it is his duty to do so: and if called upon by a magistrate, he is punishable in case of refusal. What any single individual may lawfully do for the prevention of crime and preservation of the public peace, may be done by any number assembled to perform their duty as good citizens. It is the peculiar business of all constables to apprehend rioters, to endeavour to disperse all unlawful assemblies, and in case of resistance, to attack, wound, nay kill those who continue to resist;—taking care not to commit unnecessary violence, or to abuse the power legally vested in them. Every one is justifi-

* *Rex v. Furse*, 6 Carrington and Payne's Reports. 81.

† Lord Campbell's *Lives of the Chief Justices*, II. 527, 528.

"fied in doing what is necessary for the faithful dis-
 "charge of the duties annexed to his office, although he
 "is doubly culpable if he wantonly commits an illegal
 "act under the colour or pretext of law. The persons
 "who assisted in the suppression of those tumults are to
 "be considered mere private individuals acting as duty
 "required. My Lords, we have not been living under
 "martial law, but under that law which it has long been
 "my sacred function to administer. For any violation
 "of that law the offenders are amenable to our ordi-
 "nary courts of justice, and may be tried before a jury
 "of their countrymen. Supposing a soldier or any other
 "military person who acted in the course of the late
 "riots, had exceeded the power with which he was in-
 "vested, I have not a single doubt that he may be
 "punished, not by a court martial, but upon an indictment
 "to be found by the Grand Inquest of the City of Lon-
 "don or the County of Middlesex, and disposed of before
 "the ermined judges sitting in Justice Hall at the Old
 "Bailey. Consequently the idea is false that we are
 "living under a military government, or that, since the
 "commencement of the riots, any part of the laws or of
 "the Constitution has been suspended or dispensed with.
 "I believe that much mischief has arisen from a miscon-
 "ception of the Riot Act, which enacts that after pro-
 "clamation made that persons present at a riotous assem-
 "bly shall depart to their homes, those who remain
 "there above an hour afterwards shall be guilty of felony
 "and liable to suffer death. From this it has been
 "imagined that the military cannot act, whatever crimes
 "may be committed in their sight, till an hour after such
 "proclamation has been made, or, as it is termed, 'the
 "'Riot Act is read.' But the Riot Act only introduces
 "a new offence—remaining an hour after the proclama-
 "tion—without qualifying any pre-existing law, or abridg-
 "ing the means which before existed for preventing or
 "punishing crimes*."

In the case of *Handcock v. Baker*†, which was an
 action brought against the defendants who were not con-
 stables, for forcibly detaining and confining the plaintiff,
 in order to prevent him from murdering his wife. Mr.

* *Parl. Hist.* XXI. 688-698.

† 2 *Bosanquet and Puller's Reports*, 234.

Justice Heath made the following observations: "It is a matter of the last consequence that it should be known upon what occasions bystanders may interfere so as to prevent felony. In the riots which took place in 1780, this matter was much misunderstood, and a general persuasion prevailed that no indifferent person could interpose without the authority of a magistrate; in consequence of which much mischief was done which might otherwise have been prevented." And in the same case, Mr. Justice Chambre said: "There is a great difference between the right of a private person in cases of intended felony and breach of the peace. It is lawful for a private person to do anything for the prevention of a felony." And in so doing it becomes quite immaterial whether the persons wounded or slain are taking any active part in the riot. In the case of *Clifford v. Brandon**, which was an action by a barrister of great eminence against the box-keeper of Covent Garden Theatre, who had arrested him in the theatre for wearing in his hat a ticket with O.P. on it,—this being a badge of the party by whom the celebrated O.P. riots relative to the prices of admission were carried on,—and nothing else having been proved against him,—the Lord Chief Justice, Sir James Mansfield, said: "If any person encourages, or promotes, or takes part in riots, whether by words, signs, or gestures, or by wearing the badge or ensign of the rioters, he is himself to be considered a rioter, he is liable to be arrested for a breach of the peace. In this case all are principals."

But notwithstanding the existence of a clear right and duty on the part of military men voluntary to aid in the suppression of a riot, it would be the height of imprudence to intrude with military force, except upon the requisition of a magistrate, unless in those cases where the civil power is obviously overcome, or on the point of being overcome, by the rioters.

With regard to the requisition of military aid by the civil magistrate, the rule seems to be, that when once the magistrate has charged the military officer with the duty of suppressing a riot, the execution of that duty is wholly confided to the judgment and skill of the military officer,

* 2 Campbell's *Reports*, 370.

who thenceforward acts independently of the magistrate until the service required is fully performed. The magistrate cannot dictate to the officer the mode of executing the duty; and an officer would desert his duty if he submitted to receive any such orders from the magistrate. Neither is it necessary for the magistrate to accompany the officer in the execution of his duty.

The learning on these points may be gathered from the charge of Mr. Justice Littledale to the jury, in the trial of the Mayor of Bristol, for breach of duty in not suppressing the riots at that city in 1831. "Another charge (said His Lordship) against the defendant is, that upon being required to ride with Major Beckwith, he did not do so. In my opinion he was not bound to do so in point of law. I do not apprehend it to be the duty of a justice of the peace to ride along and charge with the military. A military officer may act without the authority of the magistrate, if he chooses to take the responsibility; but although that is the strict law, there are few military men who will take upon themselves so to do, except on the most pressing occasions. Where it is likely to be attended with a great destruction of life, a man, generally speaking, is unwilling to act without a magistrate's authority; but that authority need not be given by his presence. In this case the mayor did give his authority to act; the order has been read in evidence; and he was not bound in law to ride with the soldiers, more particularly on such an occasion as this, when his presence elsewhere might be required to give general directions. If he was bound to make one charge, he was bound to have made as many other charges as the soldiers made. It is not in evidence that the mayor was able to ride, or at least in the habit of doing so; and to charge with soldiers it is not only necessary to ride, but to ride in the same manner as they do; otherwise it is probable the person would soon be unhorsed, and would do more harm than good: besides that, if the mob were disposed to resist, a man who appeared in plain clothes leading the military would be soon selected and destroyed. I do not apprehend that it is any part of the duty of a person who has to give general directions, to expose himself to all kinds of personal danger. The general commanding an army does not ordinarily do so, and I can see no reason why a magistrate should. A case may be

“conceived where it might be prudent, but here no necessity for it has been shewn*.

This subject was also luminously expounded by the late Lord C. J. Tindal, in his charge to the grand jury on the special commission held at Bristol, on the 2nd January, 1832, for the trial of the parties implicated in the formidable riots and devastations committed in that city during the autumn of the previous year: “It has been well said that the use of the law consists, first, in preserving men’s persons from death and violence, next, in securing to them the free enjoyment of their property; and although every single act of violence, and each individual breach of the law, tends to counteract and destroy this its primary use and object, yet do general risings and tumultuous meetings of the people in a more especial and particular manner produce this effect, not only removing all security, both from the persons and property of men, but for the time putting down the law itself, and daring to usurp its place. In the first place, by the common law, every private person may lawfully endeavour, of his own authority, and without any warrant or sanction of the magistrate, to suppress a riot by every means in his power. He may disperse, or assist in dispersing, those who are assembled; he may stay those who are engaged in it from executing their purpose; he may stop and prevent others whom he shall see coming up, from joining the rest; and not only has he the authority, but it is his bounden duty, as a good subject of the King, to perform this to the utmost of his ability. If the riot be general and dangerous, he may arm himself against the evil-doers to keep the peace. Such was the opinion of all the judges of England in the time of Queen Elizabeth, in a case called ‘The Case of Arms,’ (Popham’s *Reports*, p. 121,) although the judges add, that ‘it would be more discreet for every one in such a case to attend and be assistant to the justices, sheriffs, or other ministers of the King in doing this.’ It would, undoubtedly, be more advisable so to do; for the presence and authority of the magistrate would restrain the proceeding to such extremities, until the danger was sufficiently immediate, or until some felony was either committed or could not be prevented without recourse to arms; and at all events

* 3 Barnewall and Adolphus’ *Reports*, 963.

“ the assistance given by men who act in subordination to,
“ and in concert with, the civil magistrate, will be more
“ effectual to attain the object proposed, than any efforts,
“ however well intended, of separate and disunited indi-
“ viduals. But if the occasion demands immediate action,
“ and no opportunity is given for procuring the advice or
“ sanction of the magistrate, *it is the duty of every subject*
“ *to act for himself, and upon his own responsibility* in
“ suppressing a riotous and tumultuous assembly; and he
“ may be assured that whatever is honestly done by him in
“ the execution of that object, will be supported and justi-
“ fied by the common law. And whilst I am stating the
“ obligation imposed by the law on every subject of the
“ realm, I wish to observe that the law acknowledges no
“ distinction in this respect between the soldier and the
“ private individual. The soldier is still a citizen, lying
“ under the same obligation, and invested with the same
“ authority to preserve the peace of the King as any other
“ subject. If the one is bound to attend the call of the
“ civil magistrate, so also is the other; if the one may
“ interfere for that purpose when the occasion demands it,
“ without the requisition of the magistrate, so may the
“ other too; if the one may employ arms for that purpose,
“ when arms are necessary, the soldier may do the same.
“ Undoubtedly the same exercise of discretion which
“ requires the private subject to act in subordination to,
“ and in aid of, the magistrate, rather than upon his own
“ authority, before recourse is had to arms, ought to operate
“ in a still stronger degree with a military force. But where
“ the danger is pressing and immediate, where a felony has
“ actually been committed, or cannot otherwise be pre-
“ vented, and from the circumstances of the case no
“ opportunity is offered of obtaining a requisition from the
“ proper authorities, the military subjects of the King,
“ like his civil subjects, not only may, but are bound to do
“ their utmost, of their own authority, to prevent the
“ perpetration of outrage, to put down riot and tumult,
“ and to preserve the lives and property of the people*.”

It is one result of the law, as laid down by the foregoing authorities, that a military officer refusing or failing, on a

* 5 Carrington and Payne's *Reports*, 261, note. See also on the same subject a passage in the *Life of Lord Chief Justice Holt*; Lord Campbell's *Chief Justices*, II. 174.

proper occasion, to bring into action against a riotous or an insurrectionary mob, the force under his command, would be guilty of an indictable offence at common law, and might be prosecuted accordingly for breach of duty, independently of his liability to military censure.

The most recent case on this subject arose out of the conduct of the military at Six-mile Bridge, in the County of Clare, during the Parliamentary election for that county in the year 1852. At the ensuing Spring Assizes held at Ennis in February 1853, an indictment for murder was preferred against the magistrate and the officers and men whose conduct was impeached; but the grand jury threw out the bill: and the case is here noticed only for the sake of the charge delivered to them by Mr. Justice Perrin, who thus commented upon the law in its application to the offence of which the military were accused.

“ It appears that there was an escort of soldiers, consisting of forty men, with two serjeants, as a safeguard for some persons going to the hustings at Six-mile Bridge, under the command of a captain and a lieutenant, and the conduct of a magistrate—a very difficult and a very nice service. With respect to the requisition, its terms, grounds, or sufficiency, the soldiers could have no knowledge. The orders of the general which they are bound to obey, and not permitted to canvass, were obligatory on them; and for its sufficiency they are not responsible, and you are happily relieved from any inquiry into that matter. Under that order, and the command of Captain Eager, and the conduct of Mr. Delmege, they assembled. They proceeded to Six-mile Bridge, and were there with their arms in their hands in obedience to orders. Those orders will not justify any unlawful conduct or violence in them, but it accounts for their presence there in arms: for ordinary persons going on such an occasion as that to the hustings would act very indiscreetly and very dangerously, if, perhaps, not very illegally, to arm themselves with deadly weapons, in order to meet obstruction or opposition, if it were expected. But the soldiers were bound, and were there under orders; and that which in other persons might denote a previous evil or deadly intention, you will see, plainly suggests none in them, for they must obey their orders as soldiers. *There was nothing illegal in their proceeding through the crowd with the freeholders, possibly like any other body of free-*

“ holders and their companions, but doing or offering no
“ unnecessary violence, nor were they to be subject to any
“ violence beyond others. They had no right to force a
“ way through the crowd by violence, nor to remove any
“ obstruction by arms, still less by discharging deadly fire-
“ arms. They had no right to repel a trespass on them-
“ selves, or on the escort, by firing or inflicting mortal
“ wounds. You will observe the distinction I take between
“ removing an obstruction and repelling a trespass in
“ another part of the case. They had a right to lay hold
“ of, as every subject of Her Majesty has, and to arrest
“ persons guilty of any assault or trespass, or other act
“ tending to a riot, either to restrain or make them
“ amenable. There is no distinction between soldiers
“ and others in that respect, Lord Mansfield says, and his
“ attention was very much called to this subject, touching
“ the military engaged, not as soldiers, but, he says, as
“ citizens, and I say, as subjects of Her Majesty. No
“ matter whether their coats be red or brown, they are
“ employed not to subvert but to preserve the laws which
“ they ought to prize so highly, taking care not to commit
“ any unnecessary violence, or to abuse the power vested
“ in them. Every one is justified in doing what is neces-
“ sary for the faithful discharge of his duty, although he
“ is deeply culpable if he wantonly commits any illegal
“ act under the colour or pretext of law. Those persons
“ who assist in the suppression of tumults are to be con-
“ sidered as mere private individuals, acting as duty
“ requires. It is a mistake to suppose that having resort
“ to soldiers, is introducing martial law or military govern-
“ ment. Suppose a soldier, or any other military person,
“ who acted in the course of the late occurrence, had
“ exceeded the powers with which he was invested, there is
“ no doubt that he may be punished, not by a court-martial,
“ but by an indictment, to be found by the grand inquest
“ of the county of Clare, and to be disposed of before the
“ criminal judge, acting with the assistance of the jury, in
“ the court of the county. If assaulted, or struck with
“ stones, they had a right to repel force by force, but not
“ with deadly or mortal weapons; though if provoked by
“ blows, so as to lose the command of their tempers—
“ though more forbearance, perhaps, would be expected
“ from soldiers than from others—if they did, when so
“ provoked, use the mortal weapons in their hands, not

“ with any previous premeditation on their parts so to use
 “ them,—and I have marked the distinction between soldiers
 “ and others under such circumstances,—in such repulsion
 “ or affray, the law, in consideration of the provocation and
 “ the frailty of human nature, reduces the crime which
 “ would otherwise be murder to manslaughter. And if it
 “ should still further appear that, having been so assailed
 “ and attacked, they having been guilty of no aggression,
 “ and repelling force by force, the violence proceeded so
 “ far that, without any misconduct on their part, their lives
 “ were threatened, and in actual danger; and if it appears
 “ that, in order to save themselves and their lives, they
 “ were obliged to fire, and did fire in the defence of their
 “ lives, and slay, the homicide is excusable and justifiable.
 “ *But in order to warrant that finding by the jury, or that*
 “ *proceeding by the soldiers, you must be convinced by*
 “ *actual proof that their conduct had been all through*
 “ *correct, and by actual proof—not the saying nor the*
 “ *opinions of any individual—that their lives were in*
 “ *danger, and were saved by the firing, and only by the*
 “ *firing.* In order to warrant such a finding as that, you
 “ must entertain that conviction founded upon the evidence
 “ given before you. The facts evincing danger imminent
 “ to their lives, and which could be prevented only by
 “ the firing, must be established by clear evidence, de-
 “ monstrating that such danger existed, and could be pre-
 “ served only by resorting to that deplorable remedy. *In con-*
 “ *sidering that matter you will recollect that there were of*
 “ *the party forty soldiers fully armed, with fixed bayonets,*
 “ *under the command of two officers and two serjeants;*
 “ and further, that it is at least doubtful whether there was
 “ any legal command upon them to fire. No command
 “ was given by their officers,—I think that is admitted on
 “ all hands. *And, further, you must recollect that the*
 “ *firing cannot be justified upon the ground merely that*
 “ *otherwise the freeholders might either have escaped or*
 “ *been withdrawn. That would afford no justification for*
 “ *slaying the assailants.* You will also consider where the
 “ matter occurred—in this respect favourable to the accused
 “ —a narrow lane. In another point of view (but that is a
 “ matter for inquiry), it is said to have been near the
 “ court-house, and near an open road where there was a
 “ large body of police and a strong detachment of soldiers
 “ stationed, and where several magistrates were in atten-

“ dance. You will also consider the matter I have before
“ taken into consideration, whether the soldiers fired with-
“ out orders, and whether they showed the steadiness and
“ forbearance that they ought. I need not again repeat to
“ gentlemen of your intelligence, that when I state any-
“ thing, I merely state what I have been informed; and I
“ will not state a word as to that, but you will look to the
“ evidence before you. If it shall appear to you that shots
“ were fired, and some persons were killed, at a con-
“ siderable distance from the lane, and out of that lane,
“ and by some of the soldiers who had occupied and
“ immediately came from it, and gained the open ground
“ without any continued resistance—where there was no
“ pretence of danger to their lives, and the persons were,
“ some at a great distance, and some of them with their
“ backs turned,—if that state of facts appeared, without
“ previous excitement and previous provocation, it would
“ amount to a case of murder; but it will be for you to say
“ whether such a state of facts as to some individual sol-
“ diers should appear—whether there was any previous
“ excitement and provocation (which, as I before told you,
“ would reduce the killing, though it would not justify it,
“ to manslaughter), continuing for a sufficient time, and
“ preventing the blood from cooling. You will consider
“ how far that consideration in your minds operates, and
“ leads you to the conclusion that they acted, not from a
“ deliberate intention to take away life, but from the ex-
“ citement and warmth produced by previous provocation.
“ That would reduce the crime to manslaughter. There-
“ fore, gentlemen, as to those persons who were slain on
“ what is called the Lodge Road, or near Miss Wilson’s,
“ your inquiry will be—first, as to whether any persons
“ were slain; next, by whom they were slain: because,
“ unless it appears that the whole body of soldiers were
“ forward, and if it should appear there were only a few
“ there, it will be your duty to inquire with respect to
“ them if it make any distinction in the finding—to
“ identify and particularize those individuals. If you
“ should find that the homicide was of the worst descrip-
“ tion, and that they had unnecessarily, and without pro-
“ vocation and excitement to excuse, and also a warmth of
“ blood, for which there is allowance made, you could not
“ visit their act upon the whole body; and, therefore, it
“ will be material for you to ascertain who those indi-

“vidual persons were. That is as much and as important a part of the bill as any other. Then, gentlemen, if they be distinguishable, it is your duty to do so. If you find them guilty of a higher degree of offence than any of the others, you must be able to distinguish them; for you cannot find a general verdict against all upon that. With respect to those slain in the lane, if you are convinced that the soldiers were not the aggressors, but that when they fired they were unlawfully assailed, so as to be in real danger of their own lives, and could not otherwise save them,—as I before mentioned, it would amount to justifiable homicide, and ought to be so found. But if you think that, though they were not the aggressors, and that they were assailed and struck, and, being thereby provoked, repelled force by force, with the affray thickening, and they receiving blows, either from weapons in the hands, or stones cast upon them,—that they were provoked so, and repelled force by force, so as to get their blood so heated that they fired and slew them,—I think then, you ought to find a bill of manslaughter against all, that is, against every man who is proved to you to have discharged his musket on that occasion; but you must have such proof of course. And whatever you find with respect to those slain in the lane—manslaughter or homicide in self-defence—you ought to find a bill of manslaughter, at the very least, against every soldier who is proved to have fired in the broad street, or what is called the Lodge Road. These are the observations that I think it right to suggest for your assistance. I cannot, of course, in my imperfect view of the facts, give you such advice and assistance as I would give a jury upon a case which I had heard; but I will be ready and happy, if you find any difficulty in applying anything I have said upon the evidence, to give you such further assistance as I can, and answer any questions which you shall put to me on the subject.”

It may perhaps be useful to subjoin a general order issued to the Commander-in-Chief at Madras in April 1825, during the government of Sir Thomas Munro, shortly after a melancholy affair at Kittoor, in which one or two civil servants of the East India Company lost their lives under circumstances, which, in the opinion of the public authorities, indicated, both in the civil and

military functionaries, a want of general knowledge respecting the subject of the order.

“ The Honourable the Governor in Council deems it necessary to lay down the following rules relative to the exercise of the authority with which civil magistrates, and other officers acting in a similar capacity, are vested, for calling out military force to preserve the peace of the country.

“ 1 The first and most important rule is, that no civil officer shall call out troops until he is convinced, by a mature consideration of all the circumstances, that such a measure is necessary.

“ 2 When the civil officer is satisfied of the necessity of the measure, he should, before carrying it into execution, receive the sanction of Government, unless the delay requisite for that purpose is likely to prove detrimental to the public interests. In that case also, he should fully report the circumstances to Government.

“ 3 When the civil officer may not deem it safe to wait for the orders of Government, he should address his requisition for troops, not to any subordinate military officer, but to the officer commanding the division, to whom he should communicate his object in making it, and all the information he may possess regarding the strength and designs of those by whom the public peace is menaced or disturbed. His duty is confined to these points. *He has no authority in directing military operations.*

“ 4 The officer commanding the troops has alone authority to determine the number and nature of those to be employed; the time and manner of making the attack; and every other operation for the reduction of the enemy.

“ 5 Whenever the officer commanding the division may think the troops at his disposal inadequate to the enterprise, he should call upon the officer commanding the neighbouring division for aid, and report to Government and to the Commander-in-Chief.

“ 6 No assistant or subordinate magistrate is authorized to call out troops. When any such officer thinks military aid necessary, he must refer to his superior, the principal magistrate of the district.

“ The foregoing rules are to be observed, when it can be done without danger to the public safety. Should any extraordinary case occur, which admits of no delay, civil and military officers must then act according to the emergency, and the best of their judgment. Such cases, however, can rarely occur, unless when an enemy becomes the assailant; and therefore occasion can hardly ever arise, for departing from the regular course of calling out troops, only by the requisition of the principal civil magistrate of the province, to the officer commanding the division.

“ Ordered, that the foregoing resolutions be published in general orders to the army, and be communicated for the information and guidance of such civil officers as they concern.”

Negligent or incautious use of military arms or weapons, may not only expose a man to an action for damages*, but also to criminal liabilities. Sir John Chichester, in play or sport, passed at his servant with his sword in the scabbard. The servant parried with a bed staff. In the heat of the exercise, the chape of the scabbard flew off, and the servant was killed with the point of the sword. Mr. Justice Foster thus remarks upon these facts: "Sir John ought not to have used a deadly weapon with so little caution. The chape was likely enough to be beaten off in the violence of the play: and if that should happen, death or some great bodily harm must ensue. *He did not use that degree of circumspection* which common prudence would have suggested. And therefore the fact so *circumstanced*, might well amount to manslaughter, though the exercise itself with proper weapons might have been otherwise lawful†".

Officers misdemeaning themselves in high commands on foreign stations, are not left to be sued in a civil action for damages simply by the party aggrieved. Delinquencies might thus escape exposure. By the Stat. 42 Geo. III., c. 85, every person employed by the Crown in any civil or *military* station, office, or capacity, and committing any crime, offence, or misdemeanour, under colour, or in the exercise of his office, may be prosecuted criminally by an information exhibited by the Attorney-General, or upon an indictment found by a grand jury in the ordinary way, and is liable, upon conviction, to the ordinary penalties for the like offence when committed to England, besides being liable, at the discretion of the Crown, or of the Court of King's Bench, to be adjudged incapable of serving again in any military or public employment whatever. Under this Act the late General Sir Thomas Picton was tried before the Court of King's Bench at Westminster, in February 1806, on a charge of criminal misdemeanour, for having given an order, while he was Governor of Trinidad, for the infliction of torture on a female, from whom it was desired to obtain evidence or a confession in support of a prosecution for a robbery committed in her master's house. General Picton's defence was, that the occurrence took place in the ordinary course of judicial proceedings, over

* *Supra*, c. VIII.

† Foster's *Crown Law*, 260; Discourse on Homicide.

which he presided as Governor, and that torture was allowed in such cases by the law of the island. The latter point, however, was not established to the satisfaction of the court, and, under the direction of the Chief Justice, Lord Ellenborough, the jury found General Picton guilty. Upon additional evidence being obtained regarding the Spanish law prevailing in Trinidad the Court of King's Bench granted a new trial, which took place accordingly in June 1808, when the jury gave a special verdict, finding all the facts proved, together with the law of the island, and submitting to the court whether or not the criminal charge was sufficiently established. Long arguments subsequently took place, during which General Picton was at large on bail, which liberty was afterwards extended indefinitely in 1812. "It was thought by the bar, (says the editor of the *State Trials*), that had the opinion of the court been delivered, judgment would have been given against General Picton; but that upon a consideration of the merits, it would have been followed by a punishment so slight, and so little commensurate with the magnitude of the questions embraced by the case, as to have reflected but little credit on the prosecution*. The judgment of the Court, was therefore never prayed; and in 1809, while these proceedings were pending, General Picton was appointed to the command of a brigade, at the attack of Walcheren, where he commenced that series of brilliant services, which terminated with his death at Waterloo." From the proceedings, however, which took place in the Court of King's Bench, it will not be an unsafe inference, that when a foreign colony or dependency becomes a British conquest, its inhabitants, though permitted in a general way to retain their own laws and institutions, become entitled to certain constitutional privileges of British subjects, one of which is unquestionably the right of exemption from torture.

It is the opinion of the best writers on public law, that in civil war, where armies on both sides take the field, and contend for the pre-eminence of the party which they support, the prisoners taken on either side are entitled to all the rights of prisoners of war, and ought not to be treated as malefactors. But this doctrine has not always

* *Howell's State Trials*, XXX. 955.

been observed in the heats and animosities, to which such contests naturally give rise*.

A commission from a foreign power is no defence to a rebel taken in arms, and actually fighting against his sovereign. In point of law, the acceptance of such a commission, from a foreign Government, at war with England, is in itself an act of treason†.

Among the prisoners tried in England for participation in the Scotch rebellion of 1745, was Colonel Francis Townley, the representative of an ancient family in Lancashire. He had in early life entered the French service, in which he had much distinguished himself at the Siege of Philipburgh, and on many other occasions: and he still held a commission from the King of France, when he joined the army of the Pretender. He set up two defences at his trial. The first was, that he ought to be treated as a prisoner of war, and not as a traitor, for that he had acted under the authority of a foreign sovereign carrying on open war against the Crown of Great Britain. He demanded, therefore, instead of being executed for high treason, to be exchanged under a cartel, lately established between the two countries, according to the usages of honorable hostilities. His second ground of defence was, that if he were still liable to be treated as an English subject, he was at all events entitled to the benefit of the Articles of Capitulation at Carlisle, whereby the Duke of Cumberland, as Commander-in-Chief of King George's troops, engaged that on the surrender of the city, the prisoners taken in arms "shall not be put to the sword, but be reserved for the King's pleasure." This amounted, as the prisoner contended, to a solemn pledge that their lives should be spared, and was a bar to any capital proceedings against them. Lord Chief Justice Lee: "Neither defence can avail: 1. The prisoner is a native-born subject of this realm, and cannot free himself from the allegiance which he owes to his own sovereign, by entering into the service of a foreign state. Our law says, *Nemo potest exuere patriam*. The very fact relied upon, that the prisoner is in the service of France, a country

* See upon this subject Lord Campbell's *Chief Justices*, I. 417, 418, 484: II. 222.

† See Wolfe Tone's Case, *supra*, c. I.

‡ Lord Campbell's *Lives of the Chief Justices*, II. 222.

“ with which we are now at war, is *an adherence* to the King’s enemies, and an overt act of high treason. 2. The second defence we could give no effect to here; and it could only be made the foundation of an appeal to the Crown, to withdraw a prosecution, which ought not to have been instituted; but as it has been brought forward I think I am bound to say that, in my opinion, there is no foundation for it in reason, justice, or honour. The only fair meaning of the words relied upon is, that the prisoners should not immediately be put to death by Martial law, as rebels taken in arms, but should have the benefit of a fair trial, according to our humane forms of procedure before the Judges of the Land*.”

In connexion with this subject, the melancholy case of the French Marshal Ney may be mentioned, as one of striking similarity to that of Colonel Townley†.

* 18 *State Trials*, 329-352.

† *Wellington Despatches*.

CHAPTER X.

LIABILITY ON CONTRACTS.

BY analogy to the rule which protects an officer from the treatment of a trespasser or malefactor, in respect of acts done by him in the execution of the behests of his own Government, a similar immunity is extended to him in respect of contracts which he enters into for public purposes within the sphere of his authority. No private means or resources could be adequate to the support of such responsibilities; the weight of which, under any other rule, would effectually deter the best citizens of a state from rendering their services to the Government. On high grounds, therefore, of public policy it has long been established, that no action will lie against any government officer upon contracts made by him in his official character for public purposes, and within the legitimate scope of his duties.

“ Great inconveniences (says Mr. Justice Ashhurst) would result from considering a governor or commander as personally responsible in such cases. For no man would accept of any office of trust under Government upon such conditions. And indeed it has been frequently determined that no individual is answerable for any engagements which he enters into on their behalf*.”

“ In any case (says Mr. Justice Buller) where a man acts as agent for the public, and treats in that capacity, there is no pretence to say that he is personally liable†.” This doctrine applies in full force to military officers in the exercise of their professional duties.

One of the earliest cases of this nature was *Macheath v. Haldimand*‡, in which it appeared that General Haldimand, being Commander-in-Chief and Governor of Quebec, had, in those capacities, appointed Captain Sinclair to the command of a fort upon Lake Huron, with instructions to employ one Macheath in furnishing supplies for the service

* 1 *Term Reports*, 181.

† *Ibid.* 182.

‡ *Ibid.* 172.

of the Crown. In pursuance of these orders, Macheath had furnished various articles for the use of the fort; and Captain Sinclair, according to his instructions from General Haldimand, drew bills upon him for the amount. Macheath also remitted his accounts to General Haldimand at Quebec, with the following words prefixed: "Government debtor to George Macheath for sundries paid by order of Lieutenant-Governor Sinclair." General Haldimand objected to several of the charges, and refused payment of the amount; but ultimately made a partial payment on account, without prejudice to Macheath's right to the remainder, to recover which he brought the present action. At the trial it appeared so clearly that Macheath had dealt with General Haldimand solely in the character of commander-in-chief, and as an agent of Government, that Mr. Justice Buller told the jury they were bound to find for the defendant in point of law. The jury gave their verdict accordingly; and upon the express ground of General Haldimand's freedom from personal liability in such a case, the Court of King's Bench were unanimous in refusing a new trial.

In a case which was tried before Lord Mansfield, one Savage brought an action against Lord North, as First Lord of the Treasury, for the expenses which he (Savage) had incurred in raising a regiment for the service of Government; and Lord Mansfield held that the action did not lie*. So in another case of *Lutterlop v. Halsey*†, an action was brought against a commissary for the price of forage, supplied to the army by the plaintiff, at the request of the defendant, in his official character; and the commissary was held not to be liable‡.

On another occasion a suit was instituted in Chancery against General Burgoyne, for a specific performance of a contract for the supply of artillery carriages in America. But Lord Chancellor Thurlow said there was no colour for the demand as against General Burgoyne, who acted only as an agent for Government; and His Lordship dismissed the suit with costs§.

In 1818 an action was brought against Hall, the late purser of H. M. S. *La Belle Poule*, by the purser's steward of the same ship, to recover the amount of pay due to the

* 1 *Term Reports*, 180.

† *Ibid.*

‡ *Ibid.* 178.

§ *Carter v. Hall*, 2 *Starkie's Reports*, 361.

latter for his services on board. It appeared that the purser's steward could not be appointed without the consent of the commander, and that he was entitled to the pay of an able seaman, but usually received pay under a private contract with the purser. The Chief Justice, Lord Ellenborough, at first felt some difficulty in the case; but considering how very extensive the operation of the principle might be, if such an action could be supported, and if a person, receiving a specific salary from the Crown in respect of his situation, could recover remuneration for his services from the officer under whose immediate authority he acted, and that the purser had no fund allowed him out of which such services were to be paid, His Lordship was of opinion that the plaintiff had no right of action against the purser.

It is quite immaterial also, whether the officer gives the orders in person, or through a subordinate agent appointed by himself. The creditor cannot, in the latter case, charge the officer with a personal liability. In *Myrtle v. Beaver**, the plaintiff, a butcher at Brighton, brought an action against Major Beaver, the captain of a troop in the Hampshire Fencible Cavalry, for the price of meat supplied to the troop when quartered at Brighton, in January and February 1800. One Bedford, a serjeant in the troop, had been employed by Major Beaver, according to his duty as captain, to provide for the subsistence of the men; and so long as Major Beaver remained with the troop, he regularly settled the butcher's bill monthly, up to the 24th January, 1800. At that date Major Beaver was detached with a small party to command at Arundel, the greater part of the regiment remaining at Brighton under the command of the colonel; and the command of Major Beaver's troop, with the duties of providing for its subsistence, devolved on Lieutenant Hunt, who continued to employ Serjeant Bedford in providing supplies for the men, and gave him money for that purpose. The plaintiff furnished meat as before, under Serjeant Bedford's orders, but it did not appear that he had been apprised of the change of the authority, under which the serjeant gave those orders. On the 20th February, and before the usual monthly period of settling the butcher's bill, Lieutenant Hunt, who was also paymaster of the regiment, absconded

* 1 East's Reports, 139.

with the regimental monies, and left the plaintiff's demand and the regimental accounts unsettled. As Serjeant Bedford had, in the first instance, been accredited by Major Beaver, as his agent for ordering the supplies, the plaintiff Myrtle contended that until he had been informed of the discontinuance of that authority, he had a right to presume its continuance, and to look to Major Beaver for payment as before. But the Court of King's Bench held, that although the serjeant acted by Major Beaver's orders, he was not to be considered as the agent of a private individual, as it was plain that he acted as agent for whatever officer happened to have the command of the troop. There was, therefore, no ground for fixing Major Beaver with any personal liability in the matter.

In *Rice v. Chute**, the plaintiff's demand was for forage supplied to the Hampshire Fencible Cavalry, at Brighton, from October 1799 to May 1800. The defendant was captain of a troop in that regiment, and appointed Quarter-master Reed, of the same troop, to be its clerk, at an annual salary of 10*l*. Reed proved the delivery of the forage, as ordered by himself, under the *express direction* of Captain Chute. In that point the case differed from Major Beaver's case, as he was absent from Brighton when the supplies were ordered, and had not personally interfered in the business. It was shewn also, from the accounts of Paymaster Hunt, who had absconded, that the regiment was indebted to him in the sum of 700*l*.; and from thence it was argued that the captains of the troops were to that extent personally answerable for the supplies of the regiment. At the trial, the jury found a verdict for the plaintiff. But, on a motion for a new trial, the Chief Justice, Lord Kenyon, said: "I cannot conceive how the captain
" of a troop can be personally responsible for the forage
" furnished to the troop, whether he has received any
" money for that purpose or not. It is admitted that the
" goods were not furnished upon his express undertaking.
" They were not ordered by the clerk, who receives his
" orders from whatever officer happens to be in the com-
" mand at the time. But it is notorious to all parties,
" that he does not contract as an individual, but on the
" behalf of Government. And Government, it appears,
" provides money for this very purpose, which is issued

* 1 East's *Reports*, 579.

“ from time to time to the paymaster of the regiment. “ The parties who furnish the goods know that the money “ is not to come out of the pocket of the captain of the “ troop.” The verdict was therefore set aside.

An agent of Government may, however, render himself personally liable upon contracts made by himself in the execution of his office. On this principle an action was brought against General Burgoyne, to recover a sum of money due to the plaintiff as provost-marshal of the British Army in America; the General having promised that the plaintiff should be paid at the same rate as the provost-marshal under General Howe had been. At the trial, an objection was taken to the legality of the action; but Lord Mansfield refused to stop the case, and the plaintiff thereupon went into his evidence. It appeared, however, in the course of the inquiry, that the plaintiff's demand had been satisfied; and, therefore, the verdict was in favour of General Burgoyne. But it is evident from Lord Mansfield's suffering the trial to go on, that His Lordship thought a commanding officer might so act as to make himself personally liable in such a case; and the question, whether he had so acted or not, was for the determination of a jury*.

In the next case† it was accordingly sought to fix a naval officer with a personal liability for supplies furnished to his crew, on the ground of the language used by him on the occasion of ordering the supplies.

Lieutenant Temple was first lieutenant of H. M. S. *Boyne*, and on her arrival at Portsmouth from the West Indies, he inquired for a slop-seller to supply the crew with new clothes, saying “ He will run no risk; I will see “ him paid.” One Keate being accordingly recommended for this purpose, Lieutenant Temple called upon him and used these words, “ I will see you paid at the pay-table; “ are you satisfied?” Keate answered, “ Perfectly so.” The clothes were delivered on the quarter-deck of the *Boyne*, though the case states that slops are usually sold on the main-deck. Lieutenant Temple produced samples to ascertain whether his directions were followed. Some of the men said that they were not in want of any clothes, but were told by the Lieutenant that if they did not take

* 1 *Term Reports*, 179.

† Keate v. Temple, 1 *Bosanquet and Fuller's Reports*, 158.

them he would punish them; and others, who stated that they were only in want of part of a suit, were obliged to take a whole one, with anchor buttons to the jacket, such as were then worn by petty officers only. The former clothing of the crew was very light, and adapted to the climate of the West Indies, where the *Boyne* had been last stationed. Soon after the delivery of the slops, the *Boyne* was destroyed by fire, and the crew dispersed into different ships. On that occasion Keate, the slop-seller, expressed some apprehension for himself, but was thus answered by Lieutenant Temple—"Captain Grey (Captain of the *Boyne*) and I will see you paid; you need not make yourself uneasy." After this the Commissioner came on board the *Commerce de Marseilles* to pay the crew of the *Boyne*, at which time Lieutenant Temple stood at the pay-table, and took some money out of the hat of the first man who was paid, and gave it to the slop-seller. The next man, however, refused to part with his pay, and was immediately put in irons. Lieutenant Temple then asked the Commissioner to stop the pay of the crew, but he answered that it could not be done. It was in evidence that though the crew were pretty well clothed, yet from the lightness of their clothing they were not properly equipped for the service in which they were engaged; and the compulsory purchases were not improperly ordered by the officer. Under these circumstances, Keate, the slop-seller, being unable to obtain the payment to which he was entitled, brought his action against Lieutenant Temple for the price of the clothing; and Mr. Justice Lawrence told the jury that if they were satisfied that the goods were advanced on the credit of the Lieutenant as immediately responsible, Keate was entitled to recover the amount; but if they believed that Keate, on supplying the goods, relied merely on the Lieutenant's assistance to get the money from the crew, the verdict ought to be in favour of the Lieutenant. The jury found a verdict against Lieutenant Temple, but the Court of Common Pleas set it aside. Eyre, C. J.: "The sum recovered is 576*l.* 7*s.* 8*d.*, and this against a lieutenant in the navy, a sum so large that it goes a great way towards satisfying my mind that it never could have been in contemplation of the defendant to make himself liable, or of the slop-seller to furnish the goods on his credit. I can hardly think that had the *Boyne* not been burnt,

“ and the plaintiff been asked whether he would have the lieutenant or the crew for his paymaster, but that he would have given preference to the latter. . . . From the nature of the case it is apparent, that the men were to pay in the first instance; the defendant’s words were ‘I will see you paid *at the pay-table*; Are you satisfied?’ and the answer was, ‘Perfectly so;’ the meaning of which was, that however unwilling the men might be to pay of themselves, the officer would take care that they should pay. . . . I think this a proper case to be sent to a new trial.” The verdict found against Lieutenant Temple was accordingly set aside.

But where an officer acting in his private capacity and for his own private purposes, enters into any contract with another officer or a private individual, the ordinary rules and principles of law apply to such cases in the same manner as between civilians. Some instances founded on transactions of a professional nature, may perhaps be not improperly here stated.

A lieutenant in the East India Company’s army sailed in an Indiaman from Madras to London, and tendered the regulation price in payment for his passage-money. This was refused by the captain of the ship, who brought an action for a larger amount*. It appeared, that by an order of the Court of Directors, officers of the rank of lieutenant were to pay 1000 rupees, and no more, for their passage and accommodation at the captain’s table: but the captain contended that a lieutenant, for the regulation price, was only entitled to swing his cot in the steerage, whereas in the present case he had been allowed a cabin to himself, for which the additional payment was required. Evidence having been given at the trial that during the voyage no officer slept in the steerage, and that Lieutenant Cookson’s cabin would have remained empty had he not occupied it, the Chief Justice, Lord Ellenborough, was of opinion, that there was no ground for charging him with any passage-money beyond the regulation price.

In another case, a military officer brought an action to recover part of the passage-money paid to the captain of a ship, who had agreed to carry him as a passenger to *Antigua*. The plaintiff had paid the money before the commencement of the voyage, and had intended to have

* *Adderley v. Cookson*, 2 Campbell’s *Reports*, 15.

gone on board at Portsmouth; but the luggage was shipped in the Thames, and in proceeding round from the river to Portsmouth the ship was lost. It appeared in evidence, that it is usual for the passage-money to be paid in London, and that the stores for the use of the passengers were always put on board in the river. The Lord Chief Justice Gibbs, in his direction to the jury, said*: "If the money had been paid at the end of the voyage, the defendant could not have recovered any part of it, there being an entire contract to carry the plaintiff from London to Antigua. But if the voyage was commenced, and the ship was prevented from completing it by perils of navigation, the Captain may be entitled to retain the passage-money previously paid to him. The contract for this purpose may either be express, or may be evidenced by established usage. Here it is proved that in West India voyages the passage-money is paid before the voyage commences; and it does not appear to be returned, although the voyage is defeated. On the other hand, if the ship were lost before the commencement of the voyage for which these parties had contracted, the money paid by anticipation must be returned‡."

Captain Compton, of the *Bolton* East Indiaman, was sued by a captain in the army for a breach of contract, in not properly conveying the plaintiff as a cuddy passenger, on a voyage from Madras to London‡. The grounds of the action were, that the plaintiff had not been treated as a cuddy passenger, but had been excluded by Captain Compton from the cuddy, and from walking on the weather side of the ship. The defence was, that the conduct of the plaintiff was vulgar, offensive, indecorous, and unbecoming; and that he had threatened to cane the defendant. Upon these grounds of defence, the Lord Chief Justice Tindal observed: "There is some evidence that the plaintiff was in the habit of reaching across the passengers, and of taking potatoes and broiled bones with his fingers. It would be difficult to say if it rested here, in what degree want of polish would, in point of law, warrant a captain in excluding a passenger from the cuddy; conduct unbecoming a gentleman, in the strict sense of the

* *Gillan v. Simpkin*, 4 *Campbell's Reports*, 241.

† And see *Leman v. Gordon*, 8 *Carrington and Payne's Reports*, 392.

‡ *Prendergast v. Compton*, 2 *Carrington and Payne's Reports*, 454.

“ word, might justify him ; but in this case there is no imputation of the want of gentlemanly principle. With respect to the threat used by the plaintiff, that he would cane the defendant, it is important to consider, whether it was heard by the defendant before he gave the order for the exclusion of the plaintiff from the cuddy. If it did operate on the mind of the defendant at the time of the exclusion, I cannot conceive that such conduct would not justify that exclusion. A man who has threatened the commanding officer of the ship with personal violence, would not be a fit person to remain at the table at which he presided.” The jury found a verdict for the plaintiff with considerable damages.

In another case*, the defendant was a military officer, who had engaged two cabins on a voyage from England to Madras. He refused to go because the vessel did not leave the docks by the appointed day, the 10th October; whereupon the captain of the ship sued him for half the passage-money. It was proved to be the rule of the East India trade, that when a passenger refused to go, in consequence of a delay in the sailing of a vessel, he was to forfeit half the amount of the passage-money agreed for; and it appeared that the ship did not leave the docks until the 21st day of October. Chief Justice Tindal directed the jury to find for the plaintiff, with half the passage-money as damages, if they thought that the time of sailing was matter of representation, but not an essential part of the contract, and that, under these circumstances, the ship had sailed within a reasonable time: and the jury found a verdict accordingly.

In an action† against a captain of a ship for not furnishing good and fresh provision to a passenger on a voyage, Lord Denman said in his address to the jury: “ I think the result of the evidence is, that the captain did not supply so large a quantity of good and fresh provisions as is usual under such circumstances. But there is no real ground of complaint, no right of action, unless the plaintiff has really been a sufferer; for it is not because a man does not get so good a dinner as he might have had, that he is therefore to have a right of action against the captain, who does not provide all that he

* *Yates v. Duff*, 5 Carrington and Payne's Reports, 569.

† *Young v. Fewson*, 8 Carrington and Payne's Reports, 56.

“ought; you must be satisfied that there was a real grievance sustained by the plaintiff.”

It has been held that the master of a ship has a right of detention of the luggage of a passenger for his passage-money, but not of the clothes which he is wearing when about to leave the vessel*. It may be a question, however, whether this right of detention would extend to an officer's military accoutrements when he is proceeding to his station on actual service. There are strong grounds for conceiving that the right in question would not apply to such a case.

Where an officer dies in debt or in poor circumstances, great care should be taken by his executors to avoid extravagance in the conduct of his funeral; for though a man's funeral is necessarily the first charge upon the property that he leaves behind him, an undue outlay upon such an occasion will be no bar to the demand of a creditor.

Thus, in *Hancock v. Podmore*†, the defendant was the executrix of a captain in the army, who, at the time of his death in 1825, was on half-pay. Not more than 129*l.* came to her hands in respect of the captain's property; and out of this sum she expended 79*l.* on his funeral. Upon an action brought against her by a creditor of the captain, to recover the amount of a bond for 400*l.* and interest, the executrix pleaded that she had administered all the assets of the deceased, and gave evidence of the expenditure of 79*l.* on the funeral. The Court of King's Bench, however, were of opinion that that sum was too large, and could not be allowed as against a creditor. Mr. Justice Bayley: “The rule as against a creditor is, that no more shall be allowed for a funeral than is necessary. In considering what is necessary, regard must undoubtedly be had to the degree and condition in life of the party.” In *Shelly's case*‡, Lord Holt says, that “for strictness, no funeral expenses are allowable against a creditor, except for the coffin, ringing the bell, parson, clerk, and bearer's fees; but not for pall or ornaments.” In *Stag v. Punter*§, Lord Hardwicke says: “When a person dies insolvent, the rule is that no more shall be allowed for a funeral than is necessary, at first only 40*s.*,

* *Woolf v. Summers*, 2 *Campbell's Reports*, 631.

† 1 *Barnewall and Adolphus' Reports*, 260.

‡ *Salkeld's Reports*, 296. § 3 *Atkyns' Reports*, 119. (1744.)

“ then 5*l.*, and at last 10*l.* The last-mentioned sum may, “ perhaps, at the present day, be less than what should “ reasonably be allowed for a person of condition; but we “ all think that 7*l.* is a larger sum than what ought to be “ allowed as against a creditor, for the funeral of a person “ in the degree and condition of life of this testator (a half- “ pay captain in the army).”

In the case of *Stag v. Punter* above cited, Lord Hardwicke goes on to say: “ I have often thought it a hard “ rule as an executor is obliged to bury his testator “ before he can possibly know whether his assets are suffi- “ cient to pay his debts.”

An officer, though under the age of twenty-one years, may enter into contracts with tradesmen for supplies needful or suitable to him in his professional position; and if an action be brought against him for the price, he cannot plead his infancy, whatever be the magnitude of the price; though evidence of the reasonableness of the charges, according to the nature and quality of the goods, must be given by the tradesman to entitle him to a verdict. This is no more than the common rule of law as between a tradesman and a non-military person.

In the year 1800*, a tradesman brought an action against Captain Slaney of the ——— regiment for the price of some liveries supplied to his servant, and some cockades which he had ordered for the use of his company. Captain Slaney was a minor, and pleaded his infancy in bar to the action, on the ground that none of the articles in question were necessaries. But the Court of King's Bench held that a servant was necessary for an officer of Captain Slaney's rank, and consequently that his servant's liveries were necessaries, for which Captain Slaney was liable notwithstanding his minority. But, as to the cockades, the Court held the contrary; and the verdict, which a jury had given for the whole amount of the tradesman's demand, was ordered to be reduced, so as to strike off the price of the cockades.

Again in *Coates v. Wilson*†, the plaintiff was a tailor, and the action was brought to recover the value of a suit of regimentals for a volunteer corps. It was not denied by the defendant that he had received the clothes, or that

* *Hands v. Slaney*, 8 *Term Reports*, 578.

† 5 *Espinasse's Reports*, 153.

he was a member of the corps; but he pleaded infancy as a defence to the suit. Lord Ellenborough, C. J., said, that "in those perilous times when young men had enrolled themselves in different corps for the defence of the country, he should hold that clothes so furnished "were necessaries;" and a verdict passed accordingly for the value.

In like manner it was held by the Court of Exchequer, in an action brought by a tailor against the executors of the late Captain Nisbett of the Life Guards, for the value of some uniforms supplied to him, that expensive uniforms were necessaries for officers in that station of life, and that the price charged was reasonable, though the goods were supplied during that officer's minority*.

The officers of a regimental mess are only separately liable, each for his own share of the provisions and other articles supplied†,

* *Burghart v. Hall*, 4 Meeson and Welsby's *Reports*, 730.

† *Brown v. Doyle*, 3 Campbell's *Reports*, 51, note.

CHAPTER XI.

COURTS MARTIAL.

THE ordinary course of procedure in trials before courts martial does not fall within the scope of the present work: which only attempts to exhibit the application of the general law of the land, when in conflict with such courts, or their judgments.

Courts martial are to all intents and purposes, Courts of Law: and are not to be impelled by the imaginary dictates of *Honour*, but are bound to proceed according to the established principles of British jurisprudence and of the ordinary law of the land, except where the Mutiny Act shall have otherwise expressly ordered. The Duke of Wellington has said on more than one official occasion*, that the proceedings of courts martial are conducted on the principles of the Civil Law Courts, and are founded on, in a great measure, and analogous to, the proceedings of the *other* Courts of Law†.

JURISDICTION. — Courts Martial being tribunals specially instituted by the legislature for the trial of military offences, it is an established rule of law, that their sentences cannot be interfered with by the superior courts of Westminster on the ground of the punishment being excessive, or disproportionate to the offence. The power of awarding punishment for military offences is left entirely to the discretion of courts martial, and of the authorities by whom they are ordered to assemble: and when a discretionary power is thus vested, the superior courts have no power to control it. Neither can any objection for informality in the proceedings of courts martial be entertained by the superior Courts, which have, repeatedly, declared themselves not to be Courts of Review for Courts Martial. In Serjeant Grant's case‡ before the Court of Common Pleas, there was an undoubted informality in the finding of the

* Selections from *Despatches of the Duke of Wellington*, No. 392.

† Letter to the Queen on a late Court Martial by Samuel Warren, Esq. Q. C. 1850.

‡ 2 Henry Blackstone's *Reports*, 107.

court martial; but it was disposed of by the Chief Justice (Lord Loughborough) in the following terms: "It would be exceedingly absurd to comment upon it, as if it were a conviction before magistrates, which was to be discussed in a Court where that conviction could be reviewed." So also in *Rex v. Suddis**, where an imperfect finding of a court martial came before the Court of King's Bench, Lord Kenyon, Chief Justice, said in answer to the objections of the prisoner's counsel: "We are not now sitting as a Court of Error to review the regularity of these proceedings: nor are we to hunt after possible objections." And Mr. Justice Grose added: "It is enough that we find such a sentence pronounced by a Court of competent jurisdiction to inquire into the offence, and with power to inflict such a sentence: as to the rest we must presume *omnia rite acta*." On a more recent occasion also, Lord Denman laid down the law in a similar way in the Court of Queen's Bench in the case of Lieutenant Poef.

"The principle of the non-interference of the superior courts of law with the procedure of courts martial is clear and obvious. The groundwork of the jurisdiction and the extent of the powers of courts martial are to be found in the Mutiny Act and the Articles of War: and upon all questions arising upon these, Her Majesty's Judges are competent to decide: but the Mutiny Act and Articles of War do not alone constitute the Military Code: for they are, for the most part, silent upon all that relates to the procedure of the Military Tribunals to be erected under them. Now this procedure is founded upon the usages and customs of war, upon the regulations issued by the sovereign, and upon old practice in the army, as to all which points common law judges have no opportunity, either from their law books, or from the course of their experience, to inform themselves. It would, therefore, be most illogical, to say nothing of the impediments to military discipline which would thereby be interposed, to apply to the procedure of courts martial, those rules which are applicable to another and different course of practice‡."

* 1 East's Reports, 313.

† Re Poe, 5 Barnewall and Adolphus' Reports, 588.

‡ Porrett's Case, Sir E. Perry's Oriental Cases, 414. See the judgment of Sir E. Perry, C. J., 418.

There are cases, however, in which this principle of non-interference, and the inclination to presume every thing in favour of the tribunals established by the legislature for the trial of military offences, give way to the necessity of affording legal protection against arbitrary proceedings and excesses of jurisdiction. Lord Loughborough, in a case where the sentence of a court martial was in question, laid down the law on this point in the following terms: "Naval Courts Martial, Military Courts Martial, Courts of Admiralty, Courts of Prize, are all liable to the controlling authority which the Courts of Westminster Hall have, from time to time, exercised for the purpose of preventing them from exceeding the jurisdiction given to them." A court martial sits under the authority of the Mutiny Act and the Articles of War: its constitution and powers, as to all the graver offences, are strictly defined by their express provisions: and if any parties but those contemplated by the legislature assume to wield the powers therein defined, their proceedings are altogether void, and, in law language, *coram non judice*; or if, the Court being duly constituted in the first instance, a procedure is adopted or sentence awarded contrary to the enactments of the legislature, such sentence is wholly illegal. Again, if any question arises as to what the proper construction of the statute is upon the matters contained in it, and any difference of opinion takes place among those whose duty it is to carry into effect its provisions, the only competent tribunals to decide the difficulty, are those with which the construction of all the acts of the legislature ultimately rests, — namely, the superior Courts of Law*.

The Court of Queen's Bench exercises the prerogative jurisdiction of keeping all inferior Courts of Justice within the limits of their own jurisdiction; and would, therefore, prohibit a Court Martial from trying a civilian or carrying its sentence into execution in any case not warranted by law†.

It appears, however, that the Supreme Royal Courts of India, which are invested with the general powers of the Court of Queen's Bench in England, have no jurisdiction over native Courts Martial; and, therefore, on an applica-

* Porrett's Case, Perry's Oriental Cases, 414, 420.

† Wolfe Tone's Case, *supra*, c. I.

tion for a *habeas corpus* to bring up the body of Shaik Boodin, who was in custody at Poona, under the sentence of a native Court Martial for extortion, the Supreme Court of Bombay held itself incompetent to interfere with a native Court Martial, even upon evidence of such a Court having exceeded its jurisdiction, and the motion was refused*.

Prohibitions against the proceedings of Courts Martial are never granted by the Courts of Westminster without very urgent grounds and the most cautious consideration; for it would be extremely dangerous, if there were a facility in obtaining such interference, and the execution of a military sentence were to be stopped merely by asking for an inquiry into its propriety. In such cases it is the duty of a Court of Law to consider the matter fully and deliberately upon the motion for a prohibition: as the motion cannot safely be granted on the grounds which apply to ordinary cases, where there is no such danger in the delay, as the suspension of a military sentence would probably occasion†.

MILITARY ARREST. — If any officer or soldier under military arrest for a breach of military law or discipline be not brought to a court martial within the time limited for that purpose by the Articles of War, he is entitled to apply to any Court of Westminster Hall for his discharge from the arrest; and such court will proceed to discharge him, unless good ground be shewn for the detention and delay. In order to effect this object a writ of *habeas corpus* issues to bring the prisoner to the bar of the court, and to give the officer detaining him in custody an opportunity of proving the legality of the detention.

On January 28th, 1784, a motion was made in the Court of King's Bench for a *habeas corpus* to General John Bell to bring up Humphrey Wade, a serjeant of marines, on affidavit that he absented himself on the 14th June, 1783, from his regiment: soon after surrendered to a justice of the peace: on the 4th of July was thrown into a dungeon; kept hand-cuffed; denied pen, ink, and paper; carried to the hospital: as soon as recovered, imprisoned in the guard-room, where he had been ever since, except once again being in the hospital. On asking for a copy of

* *Regina v. Shaik Boodin, Perry's Oriental Cases, 434.*

† *1 Henry Blackstone's Reports, 101.*

the charge against him, handcuffs were again put on. Applied for a court martial; refused, though several have been held. By the Articles of War then in force, a prisoner was to be tried by a court martial within eight days, or as soon after as a court martial could be held. Lord Mansfield, C. J., pronounced the order of the Court of King's Bench, that General Bell should shew cause why Wade should not be discharged; but it does not appear what further was done upon this case*.

But if good cause for delay can be shewn, the courts of law will not interfere. In Blake's case†, a *habeas corpus* was moved for on the 12th of February, 1814, to be directed to the commanding officer of the infantry barracks at Windsor, on behalf of Richard Blake, a lieutenant in the 55th regiment. The affidavit in support of the motion stated, that Blake being on leave of absence, and hearing that there were charges of alleged misconduct against him, and that he was charged as a deserter, voluntarily surrendered himself, to take his trial, and on the 21st of September, 1813, was placed under arrest, and committed to close confinement, in which he had ever since continued, and that until the latter end of October he was not permitted to quit his room; but that afterwards, upon a representation that his health was suffering from his confinement, he was allowed to take necessary exercise. On the 1st of November, not having been furnished with any copy of the charges against him, he presented a memorial to the Commander-in-chief for relief, but did not receive any answer thereto. On the 16th he was officially informed that a warrant had been signed for holding a court martial, and was furnished with a copy of the charges, which consisted, among others, of certain offences stated to have been committed at Windsor towards an officer of the same regiment. On the 22nd, the 55th regiment received orders to go on foreign service, and left the barracks on the following day, and embarked and sailed for Holland. The affidavit then stated that all or many of the witnesses, who might be called in support of the prosecution, and would be necessary for his defence, had sailed with the regiment, and that the laws of this realm would not permit him to be sent to a foreign country for trial, and therefore he could not be brought to trial till the return of the regiment. It then set forth that by the 23rd

* 2 Maule and Selwyn's Reports, 428.

† Ibid.

Article of War, then in force, it was declared that "No officer or soldier who shall be put in arrest or imprisonment, shall continue in his confinement more than eight days, or until such time as a court martial can be conveniently assembled;" that, from the vicinity of Windsor to head quarters at the War Office, and to several barracks where troops were stationed till within the last fortnight, a sufficient number of officers might at any time have been speedily and conveniently assembled for the purpose of constituting a court martial, and therefore there had been ample opportunity for conveniently assembling one, between the time of Blake's first commitment and the signing the warrant, and also between the signing the warrant and the regiment's sailing. Wade's case* was cited as an authority; and Grant v. Gould† was also mentioned to shew that the Court had power to examine the merits of military proceedings. The Court of King's Bench granted a conditional order for the *habeas corpus*; and shortly afterwards upon the case being again brought on, the Judge-Advocate-General made an affidavit that directions were given, and proceedings instituted, for bringing Blake to trial as soon after his arrest as, according to the usual course of office and the nature of the case, could conveniently be done; and that he believed Blake would have been sooner brought to trial, but for the absence in the West Indies of persons alleged by Blake to be material witnesses for his defence, and partly on account of the embarkation of the 55th regiment, which was still engaged on foreign service. Lord Ellenborough, C. J.: "Up to the 16th of November, he (Blake) seems to have thought it a fair time, and the delay since has been satisfactorily explained. It is not a wanton or oppressive delay, but one arising out of the circumstances of the country. We cannot lay down any general rule, but must, in a very great degree, give credence to persons in high situations, when they depose that all has been done which could conveniently and according to the course of office be done, unless something be shewn to the contrary."

PROCEDURE.—A military court martial may assemble at any place appointed for that purpose by the proper authorities, whether within or without the limits of a fort or military station.

* *Supra*, 203.

† 2 H. Blackstone's *Reports*, 69.

The sentences pronounced by courts martial are not required to be drawn up with the technical precision which is expected from the ordinary courts of justice. The Court of Common Pleas decided in *Grant v. Sir Charles Gould**, that where a sentence shews clear ground on the face of it, that a court martial meant to convict a prisoner of a specific charge, such sentence would not be invalidated by any mere defect of nicety in penning the language of it.

So also, with respect to charges, the Judge-Advocate-General, Sir Charles Morgan, on the trial of Colonel Quentin, thus expressed the general principle: "In the case of charges brought before a court martial, they are not bound to the technical formalities which prevail in Courts of Law: but there is this essential principle in every charge, before any Court that can exist in the civilized world, that the charge should be sufficiently specific to enable the person to know what he is to answer, and to enable the Court to know what they are called to enquire into†."

EVIDENCE:—As the Mutiny Act lays down no particular rules of evidence to be observed by Courts Martial, they are bound to adopt and conform to those prescribed by the ordinary law of the land, and observed in the courts of common law; and, therefore, the sentence of a court martial, if founded upon the improper reception or exclusion of evidence, is liable to be set aside by the Crown on the report of the Judge-Advocate-General. An instance of this occurred in the case of the mutineers of *H. M. S. Bounty*, which was sent by King Geo. III. on an expedition, under the command of Captain Bligh, for the purpose of transplanting the bread-fruit and other valuable plants from the islands in the South Seas to the British Colonies in the West Indies. A great part of the crew mutinied during the voyage, and took possession of the vessel; but some of the mutineers were afterwards captured and brought to England, where they were tried by a court martial at Portsmouth. There being no evidence against one of the prisoners, it was insisted by another prisoner that he had a right to examine the first on his behalf; but the court martial, under the advice of the Judge-Advocate

* 2 Henry Blackstone's *Reports*, 107.

† Printed Trial, 81, cited in Simmons *On Courts Martial*, 135; Edition 1851.

refused to permit the examination on the ground of its being contrary to the practice of courts martial, and the prisoner was condemned to death. Upon the report, however, of the sentence to the King, the execution was respited till the opinion of the Judges was taken; and they being all of opinion that the sentence was illegal on the ground of the improper rejection of evidence, the prisoner was ordered to be discharged*.

A later instance of the same nature occurred before a court martial in Ireland, in the case of Mr. Stratford, where the sentence was set aside, on account of some irregularity in the trial against the rules of the common law. In the above-mentioned case, also, of Lieutenant Frye of the marines, one of the defects in his trial, consisted in the reception of improper evidence by the Court†.

In the more recent case of Lieutenant Perry of the 46th Regiment, upon whom two courts martial were held in July and August 1854, the Judge-Advocate-General advised the Crown not to confirm the sentence of the first court martial, on the ground that evidence had been improperly admitted which the court ought to have rejected, and that evidence had been improperly rejected which the court ought to have received.

SENTENCE.—A court martial cannot sentence a prisoner to any punishment not specified in the Articles of War relating to his offence. Thus, in 1848 a private marine of H.M.S. *Bellerophon*, having been convicted of an assault upon his officer, the court martial sentenced him to a punishment less than death, which is the penalty annexed to the offence by the Articles of War. On the proceedings being transmitted to the Admiralty, the prisoner was ordered to be released from custody, without any punishment at all, as the court martial had exceeded their powers by passing a sentence unauthorized by law. They ought to have sentenced the prisoner to death, and recommended him to the Admiralty for a milder punishment.

MEMBERS OF COURTS MARTIAL.—An officer summoned to attend as a witness at a trial before a court martial, cannot properly sit as a Member of the court: it being his duty as a judge to form his conclusions upon an impartial consideration of the *whole* of the evidence. This he cannot

* 1 East's Reports, 312, 313.

† *Supra*, 130.

do where he is himself a witness. The characters of witness and judge are therefore wholly inconsistent: and in the only reported instance where judges were called upon to give evidence at a criminal trial, *viz.*, that of Colonel Hacker the Regicide, shortly after the restoration of Charles II., they sat no more as judges during that trial*. There is nothing, however, to preclude the members of a court martial, or any other judge, from giving evidence as to the good character of a prisoner at his request. And where a party fills the double character of witness and prosecutor, and conducts the prosecution in person, there is the high authority of Lord Chief Justice Campbell for the proposition, that he cannot make two statements to the court, one on oath, and one not on oath†.

PRISONER.—the prisoner has a right to be present during the examination of the witnesses, for the prosecution and for the defence. But if he misconducts himself in such a manner as to obstruct the proceedings of the court, he may lawfully be removed, and the trial may be continued in his absence. A prisoner might otherwise by noisy and obstreperous behaviour prevent the court from ever concluding or even commencing the trial‡.

On principle, a member of a court of enquiry which has made a report, ought not to sit as a member of a court martial held in pursuance of such report. A court of enquiry corresponds very much to a grand jury: and grand jurors are expressly disqualified by statute§ from sitting as jurors on the trial of an indictment, which they themselves have personally, as grand jurors, assisted in finding. The Statute does not in terms extend to courts martial or courts of inquiry which were then unknown; but the principle of it having a foundation in justice seems on that ground applicable to every jurisdiction, and worthy of universal adoption.

Generally speaking, all those fundamental principles of justice, from which the regular and ordinary courts are not allowed to depart, in cases of life, limb, or liberty, must be observed by courts martial in the conduct of their proceedings.

The annual Mutiny Act for the army, provides that if

* Keyling's *Reports*, 12.

† *Law Times*, 11 May, 1850.

‡ So ruled by Mr. Baron Rolfe, (now Lord Chancellor Cranworth) at the trial of J. B. Rush for murder, at the Norwich Spring Assizes, in 1849.

§ 25 Edw. III. c. 3.

an officer or soldier has been acquitted or convicted of any offence by a civil magistrate, or by the verdict of a jury, he cannot be again *tried* for the same crime by a court martial, or punished for the same otherwise than by cashiering.

The Mutiny Act for the Royal Marines (16 & 17 Vict., c. 10) declares, that no person who shall have been tried before any of the ordinary courts of law for any crime cognisable in such courts, shall be liable to be punished for the same, by any court martial, otherwise than by cashiering.

The Mutiny Act for the Indian army (12 & 13 Vict., c. 43, s. 18) declares, that no officer or soldier being acquitted or convicted of any offence shall be liable to be *tried* a second time by the same or any other court martial for the same offence : and that no finding of, or sentence given by, any court martial and signed by the president thereof shall be liable to be revised more than once ; nor shall any additional evidence be received by the court on any revision.

It appears, therefore, that after acquittal or conviction before a court of law an officer of the regular army cannot even be brought to a court martial on the same charge, though he may be summarily cashiered ; but that an officer of the marines may under like circumstances be tried by court martial, although the sentence is in such a case restricted to cashiering : while no provision of the same kind is found in the India Mutiny Act in reference to officers of the East India Company's forces.

None of these enactments, however, interfere with the ordinary right of the Crown summarily to dismiss any officer at discretion, notwithstanding his acquittal, in the same manner as after a court martial or court of inquiry.*

The power of cashiering an officer, notwithstanding his acquittal by a civil court, is deemed necessary to support the high character of the service. For an acquittal by a civil court may frequently spring from mere technicalities, although the facts constituting guilt may have been fully substantiated ; and it would be a hardship upon the service to allow such an acquittal to screen an offender : though to protect individuals from the vindictive feelings of disappointed authority, the extent of military punishment is in such cases wisely limited to cashiering.

* *Post*, 236.

If the court martial be equally divided in opinion upon any charge against a prisoner, the president has not by law a casting vote: and the prisoner must be acquitted on such charge.

We have seen that the courts of common law can prohibit the execution of an erroneous sentence pronounced by a court martial. But there is no appeal to the ordinary courts of law or equity, against the sentence of a court martial, such courts having no power to reverse or alter the sentence. A memorial, however, for a revision of the sentence may be presented to the Queen, and the case will then be referred to the Judge-Advocate-General for investigation*.

COURTS OF INQUIRY.—Though a court martial is the regularly appointed tribunal for the trial of military offences, and the accused party can in no other way be subjected to the penalties imposed by the Articles of War, the Crown can nevertheless investigate charges of unofficer-like conduct by a Court of Inquiry, in order to ascertain in an effective manner the expediency of summarily dismissing the accused party.

Courts of Inquiry have been held as long ago as any memory goes back, though the earliest instance on record is that which sat in 1757 upon the conduct of General Sir John Mordaunt in the abortive expedition fitted out against Rochfort in the previous year, during the administration of the elder Pitt†. The court was composed of three general officers, *viz.*, Lieutenant-General Charles, Duke of Marlborough, and Major-Generals Lord George Sackville and John Waldegrave. Their report, which was adverse to Sir John Mordaunt, was not however sustained by the court martial, before which he was afterwards tried for neglect of duty, and he was unanimously acquitted, to the great dissatisfaction of the public, who had built great expectations of success upon an enterprise fitted out on so large a scale of power and expense‡.

The following description of Courts of Inquiry is given by a writer on military tribunals§: “A Court of Inquiry

* In *Re Poe*, 5 *Barnewall and Adolphus' Reports*, 681.

† See the Warrant in *Tytler's Military Law*, Appendix, No. III.

‡ *Smollett's England*, Vol. IV. 88, &c.

§ *Symes' Military Dictionary*, tit. Court.

“ is of a very delicate nature ; a number of officers are assembled to inquire into an officer's supposed misbehaviour, and I have known them ordered to give their opinions in writing to the person who ordered them to assemble, that he may judge from their determination if there is sufficient matter to bring him to a general court martial. There is no Article of War for this kind of proceeding, and though it has frequently been complained of because the members are not sworn, and that its opinions may influence a general court martial, yet reason has hitherto been unsuccessful in its endeavours to abolish this unequitable custom of the army.”

In *Home v. Lord W. Bentinck**, the legality of Courts of Inquiry was clearly established, and their report is decided to be a privileged communication, for the making of which no action of libel lies. By military writers a Court of Inquiry is usually likened to a grand jury, with the duty of finding whether there are grounds for a court martial or not. But though the Court of Inquiry in *Home v. Bentinck* reported their opinions on the merits of the case referred to them, the Court of Exchequer Chamber held that the report was nevertheless still a privileged communication.

It is not necessary, however, that a Court of Inquiry should be followed by a court martial. For in the last cited case the accused officer solicited and received the promise of a trial by court martial: but the Judge-Advocate-General having twice given an opinion that the subject matter of the accusation was not cognizable by a military tribunal, a Court of Inquiry was ordered to conduct the investigation: and upon the report of that Court, the accused officer was dismissed the service.

* 2 Broderip and Bingham's *Reports*, 130. (1819.)

CHAPTER XII.

MISCELLANEOUS.

AS TO CIVIL OFFICES OR FUNCTIONS.—Military officers on full pay cannot act as justices of the peace, either in the enlistment or the billeting of troops.

No commissioned military officer in full pay can be nominated or elected to the office of sheriff, mayor, portreeve, or alderman, or to any office in any municipal corporation in any city, borough, or place in Great Britain or Ireland*.

Officers on full pay are likewise exempted from serving on juries, or in the parochial offices of churchwardens, overseers, vestrymen, and the like; but officers on half-pay are not so exempt.

But military officers on full pay may hold the civil governorship of a colony along with the supreme military command; and to these offices are often added the functions of a local chancellor, of an Admiralty judge, and of an ecclesiastical judge.

A Lieutenant-Colonel on full pay of his regiment, then serving out of England, was a Lord of the Treasury in 1847.

It is conceived that every civil office or employment not forbidden by the Mutiny Act is tenable or exercisable concurrently with a commission in the army.

Officers on half-pay could formerly take Holy Orders and continue to retain their half-pay. But this indulgence has been abolished, and not without sound reason, because half-pay is by law a retainer for future service, while the party thus changing his profession enters upon a calling with which military duty would by no means harmonize.

Any officer, however, may be called to the bar, or become, if unmarried, a fellow of a college at either university.

DEBTOR AND CREDITOR.—All regimental debts owing by an officer or soldier dying in the service, are to be paid

* Mutiny Act.

out of their effects in such proportion as shall be ordered by the Secretary of War in preference to any other debts of such officer or soldier*.

The Mutiny Act provides that no enlisted soldier, or non-commissioned officer, or drummer, on the permanent staff of the disembodied militia, shall be liable to be arrested or taken out of the Queen's service in respect of any debt less than 30*l.*, and where this privilege is invaded, the prisoner may obtain his discharge by *habeas corpus*†. In *Bayley v. Jenner*‡, the defendant was a cavalry trooper, who, though enlisted, had not yet performed any duty, as he was still learning to ride. The Court held him to be protected, although he was incompetent for duty. The privilege in question, however, does not extend to volunteer corps, who are only subject to such provisions of the Mutiny Act as relate to trial and punishment by courts martial composed of their own officers. In *Rickman v. Studwick*§, therefore the Court of King's Bench refused to discharge from arrest for debt the drill-serjeant of a volunteer corps, though sworn and in the receipt of constant pay. And an out-pensioner at Chelsea is not within the privilege||. Officers also are not within the privilege; for in *Boehm v. Wood*¶, where an officer of the East India Company's service was arrested for debt, on the eve of his departure from England to rejoin his regiment in India, the Master of the Rolls, Sir Thomas Plumer, decided that the debtor's military profession, and his arrest while he was in preparation to resume its duties in obedience to the Court of Directors, formed no ground of protection; and His Honour refused to order his discharge from custody. This is still the law, notwithstanding the general abolition of arrest for debt; persons going abroad being excepted.

AS TO RIGHTS BARRED BY TIME.—With reference to the prohibitions created by the statute law of England against the bringing of actions and suits for the establishment of private rights, after the lapse of certain fixed periods of time, no difference exists between military men and private

* Stat. 58 Geo. III. c. 73, s. 1 & 2.

† *Woodfall's Case*, 1 *Blackstone's Reports*, 29; *Johnson v. Howth*, 1 *Strange's Reports*, 7.

‡ 1 *Strange's Reports*, 2.

§ 8 *East's Reports*, 105.

|| *Barnes*, 432.

¶ 1 *Turner and Russell's Reports*, 322.

individuals, notwithstanding the frequent compulsory absence of the former from England. In India, however, a different rule of law prevails, as a special privilege for the benefit of the native soldiery, with reference to the tenure of land. For by an Act of the Legislative Council of India (No. 4 of 1840) for preventing affrays respecting land, all ordinary persons who have been dispossessed by *force*, are entitled to be restored by the magistrate, without reference to any disputed right, provided they make their complaint within one month after the dispossession. But as a special privilege to native officers and soldiers, who are for the most part small landholders, the time for making the complaint is, by the Act No. 15 of 1845, enlarged to such period as the magistrate shall consider reasonable with reference to the distance of the complaining officer or soldier, and the difficulty of communication. This substantial benefit to the native troops is ascribed to the considerate care of Lord Hardinge* at the time when His Lordship was Governor-General of India.

SUITS BY OFFICERS ABROAD.—The general rule is, that all persons resident abroad, who commence suits or actions in English Courts of Justice, may be required to give security for the costs of the proceedings; because, if the judgment of the court should be against their claims, the defendant would not otherwise be able to recover his expenses. But British officers on actual duty or service abroad, whether during peace or war, are exempted from this liability. And an officer serving by leave of the Government in a foreign army, appears to enjoy the same privilege; for in *O'Lawler v. Macdonald*†, the plaintiff was an officer of the British army, who had left this country to take a command in the insurgent army in South America. An application was made that he should give security for the costs of the action; but the Court of Common Pleas refused to interfere.

PARLIAMENTARY PRIVILEGE.—Attempts were made in Parliament in 1644 and 1749, to exempt Peers of the realm and the members of the House of Commons from military jurisdiction; but it has long been settled, on the grounds of public justice and expediency, that so long as

* *Calcutta Review*, June 1848, 394.

† 8 Taunton's *Reports*, 736.

such persons continue to hold offices of rank and trust in the army and navy, they shall be subject to the discipline of the service to which they belong*.

Military officers, however, who have seats in Parliament, have a right to absent themselves from regimental duty for the purpose of giving their attendance in Parliament, without that previous permission which is necessary for all officers under other circumstances; the legislative service due to the State being considered of paramount importance. But with this exception, parliamentary privilege does not exempt any officer from his liability to military law for breaches of the same. But whenever a commissioned officer, who happens to be a member of either House of Parliament, is under arrest by a court of justice, it is customary for the judges to give notice to the Speaker of the House of which the accused officer is a member†; and the same practice is observed by courts martial. Thus in June 1809, notice was given to the House of Commons of the intended trial of Captain Barlow, a military officer; and on another occasion, similar notice was given of the trial of General Barton, for challenging an officer of inferior rank.

Where a military officer, possessing a seat in the House of Commons, has been convicted by a court martial of scandalous and disgraceful conduct, that House usually consults its own dignity by voting his expulsion. This was done in the case of Colonel Cawthorne in 1795, by a majority of 108 to 12: he having been tried by a court martial composed of militia officers of high rank, and found guilty of misappropriating the pay and allowances issued for the use of his own regiment of militia, and falsifying the vouchers‡.

COLLECTIVE RIGHTS.—A regiment is legally a mere aggregation of individuals filling various ranks in the corps; so that in the eye of the law the rights of individual members of a regiment, or the injuries sustained by individual members of the corps, are confined to such persons alone, and do not affect the regiment in its collective character. Still less do the officers of any particular regiment possess,

* *Law Magazine*, Vol. XIV. 12.

† Long Wellesley's Case, 2 Russell and Mylne's *Reports*, 639; Lechmere Charlton's Case, 2 Mylne and Craig's *Reports*, 316.

‡ *Law Magazine*, Vol. IV. 12.

as such, any corporate or collective civil rights or privileges, distinct from those which they possess as individual officers. The association of such officers in the various commands of any given regiment is, to a great extent, fortuitous and precarious; and they may at any time be dispersed into other regiments at the mere pleasure of the Crown. The result is, that the title or designation of any particular regiment does not legally indicate the individuals composing it. They could not be collectively prosecuted, nor could they collectively sue or be sued under such a title in a court of law or equity. Lord Chancellor Erskine, when at the bar, took this view of the subject, and gave, in a letter to a friend, the following account of the occasion on which the point arose: "Lord Stopford, an officer of
" the 1st regiment of Guards, being on guard at the palace
" on the King's birth-day, having thought it his duty to
" remove obstructions, and having laid hold of a gentle-
" man in the throng, had an action brought against him;
" and the regiment approving of his conduct, having re-
" solved to defend him at their own expense, which they
" had a clear right to do, directed me to be retained to
" defend him; but the late Mr. Lowten, their solicitor,
" instead of entering the retainer for Lord Stopford, en-
" tered it for the 1st regiment of Foot Guards, and the
" Duke of York, as their colonel, afterwards consulted
" with me on the subject; but before the trial the plaintiff
" came in person to my chambers, with his attorney, to
" retain me; and being informed I was retained against
" him, desired to inspect my retainer-book, when, seeing
" no other retainer than for the 1st regiment of Guards,
" his attorney objected to its obligation, and requested me
" as usual to leave it to the decision of the bar, who con-
" sidering it as no retainer, I was obliged to receive that
" of the plaintiff, and afterwards, as his counsel, obtained
" a verdict against Lord Stopford in Westminster Hall*."

DOMICILE.—By law every man's domicile is in the country where he has his permanent residence, or to which he ordinarily returns for the purpose of residence after occasional absence; and in case of his death, the right of succession to his goods and chattels and personal property of all sorts is regulated by the law of the country of his domicile, although he may happen to die beyond its limits.

* *Law Magazine*, Vol. XXIII. 70.

As regards military men, however, it is necessary to mention, that in the theory of the law the space occupied by the lines of a British army in a hostile country is considered British territory; so that an officer serving with such forces retains his domicile, however long his absence on such employment may be extended. If, therefore, he dies either in camp or in the field where so employed, he is considered to have died on British ground, and the succession to his property is regulated accordingly. His absence also is only temporary in its intention, and therefore would not, on common principles, cause a change of domicile. But if a British subject quits his native country, and enters the service of a foreign power, he loses his original domicile, and acquires one in the metropolis of the country from which he accepts military employment. In the application of these rules, it has also been decided that the service of the East India Company is a foreign service. This topic is therefore of considerable practical importance to military men, because the law of succession in Scotland differs from the English law on that subject; and it has been decided that a Scotchman, entering the military service of the East India Company, abandons and loses his original Scotch domicile, so that if he dies in India while in the pay of the Company, and without making a will, the succession to his personal property is regulated by the law of England, and not by that of Scotland.

Major William Bruce, a son of the celebrated Abyssinian traveller, and a Scotchman by birth, entered, at an early period of life, the military service of the East India Company, and continued to serve in India until his death, on the 30th of April, 1783. In the course of his career he had acquired a considerable property in stocks and public securities, which were partly in England, and partly in India, at the time of his death. At that period he had no intention of immediately returning to Scotland, though he often had professed his purpose of spending the evening of his days in his native country. He died without having made a will; and under these circumstances, a question arose regarding the proper distribution of his property. The case turned upon the point, whether he was to be considered a domiciled Scotchman or not; for if he were, one set of claimants were entitled by the law of Scotland; and if he were not, the English law of succession (which is in force in India) would prevail, and the opposite

party would be entitled. The Court of Session in Scotland, and afterwards the House of Lords, decided that Major Bruce, by entering the Company's service, and taking up his residence in India, had lost his original Scotch domicile, and acquired an Anglo-Indian domicile, and, therefore, that the distribution of his property must take place according to the law of England*. Lord Chancellor Thurlow thus expounded the law upon the occasion: "The true ground upon which the cause turns is the Indian domicile. The deceased was born in Scotland; but a person's origin is only one circumstance to be regarded in considering by what law the succession to his personal property is to be regulated. A person being at a place is *prima facie* evidence that he is domiciled at that place. It may be rebutted, no doubt. A person may be travelling; on a visit; he may be there for a time on account of health or business: a soldier may be ordered to Flanders, and an ambassador may be sent to Madrid, where they may remain many months; England is still their domicile or home. But if a British man settles as a merchant abroad, and carries on business there, enjoying the privileges of the place, and dies there, his original domicile is gone; although, had he survived, he might possibly have returned to end his days in his native country. Let it be granted that Major Bruce meant to return to Scotland; he then meant to change his domicile; but he died before actually changing it." "Personal property, in point of law, has no locality; and, in case of the decease of the owner, must go, wherever in point of fact situate, according to the law of the country where he had his domicile†."

The principle of Major Bruce's case, however, does not extend to Scotchmen holding commissions in British regiments. This seems to have been decided in the case of the 14th Lord Somerville, who entered the army in 1745, and continued in the service till the peace of 1763, during which period he accompanied his regiment to England, Scotland, and Germany, both in quarters and on active duty. At his death in 1796, a question arose, whether, under the circumstances, his domicile was English or Scotch; and the Master of the Rolls, (Sir R. P. Arden) in giving

* Bruce v. Bruce, 2 Cooper's Reports, temp. Cottenham, 510.

† Robertson's Law of Personal Succession, 121.

judgment, said, "I am clearly of opinion Lord Somerville was a Scotchman upon his birth, and continued so to the end of his days. He never ceased to be so, never having abandoned his Scotch domicile, or established another. The decree, therefore, must be, that the succession to his personal estate ought to be regulated according to the law of Scotland." His Honour must consequently have been of opinion, that a Scotchman entering the British Army does not thereby lose his original Scotch domicile; and since the union of England and Scotland, the army is certainly as much that of Scotland as of England*.

Sir Charles Douglas, a Scotchman by birth and original domicile, left his native country at the age of twelve, to enter the navy†. From that time to his death, he was in Scotland only four times; 1st, as captain of a frigate; 2ndly, to introduce his wife to his friends, on which occasion he staid about a year; 3rdly, upon a visit; and 4thly, when upon his appointment to a command upon the Halifax Station, he went in the mail coach to Scotland, and died there in 1789. He was not for a day resident there in any house of his own; nor was he ever there except for temporary occasions. He also commanded the Russian Navy for about a year, and was afterwards in the Dutch Service. He had no fixed residence in England till 1776, in which year he took a house at Gosport, where he lived as his home when on shore. This was his only residence in the British dominions; and when he went on service he left his wife and family at Gosport. At his death it became necessary to decide whether his domicile was Scotch or English, because he had made a will, bequeathing a legacy to his daughter, with certain conditions, which were void by the law of Scotland, but valid by the law of England. The House of Lords decided that his original domicile was Scotch, and that though he did not lose it in this first instance, by becoming an officer in the British Navy, he abandoned it by entering a foreign service, and acquired a Russian domicile; that on returning to England, and resuming his position as a British officer, he acquired an English domicile, but did not recover his Scotch domicile, that his subsequent visits to Scotland, not being made *animo manendi*, did not revive his Scotch domicile;

* Somerville v. Somerville, 5 Vesey's Reports, 750.

† 5 Vesey's Reports, 757.

and that the succession to his property as that of an Englishman, was therefore to be governed by the law of England, in which country he last acquired a domicile.

In connexion with this subject, it may be proper to notice an opinion expressed by the Master of the Rolls, during the argument of Lord Somerville's case—that an officer entering the military or naval service of a foreign power, with consent of the British government, and taking a qualified oath of allegiance to the *foreign* state, does not thereby abandon or lose his native domicile*.

In *Forrest v. Funston*†, the defendant was a Lieutenant in the King's army, and held the situation of Master Gunner at Blackness Castle in Scotland, where he had the charge of considerable military stores, with an apartment for his residence. He was a native of Strabane in Ireland; and it was held by the Court of Session, that though it was his duty to reside at Blackness, he did not by the possession of his office acquire a Scottish domicile. With respect to the East India Company's service, the question of domicile does not turn upon the simple fact of the party being under an obligation, by his commission, to serve in India; but when an officer accepts a commission or employment, the duties of which necessarily require residence in India, and there is no stipulated period of service, and he proceeds to India accordingly, the law from such circumstances presumes an intention consistent with his duty, and holds his residence to be *animo et facto* in India‡.

In the recent case of General Forbes§ in the Court of Chancery, the subject of domicile in its relation to military men was extensively discussed before the Vice-Chancellor Wood. Nathaniel Forbes, afterwards General Forbes, was born in Scotland of Scotch parents; his father being possessed of an ancestral estate called Auchernach, on which there was then no house. In 1786, Nathaniel Forbes, being then a minor, and a lieutenant on half-pay in the 102nd foot, a disbanded regiment, contracted a marriage with a Scotch lady. He shortly afterwards obtained an appointment in the service of the East India Company; and in December 1787 he sailed for India, where he con-

* 5 Vesey's *Reports*, 782, note.

† 2 Hailes' *Decisions*, 1066.

‡ Per Vice-Chancellor Wood, 4 Kay's *Reports*, 356. See also *The Dree Gebroeders*, 4 Robinson's *Admiralty Reports*, 232.

§ *Forbes v. Forbes*, 1 Kay's *Reports*, 341.

tinued until 1808. He then obtained a furlough, and returned with his wife to Scotland. On the death of his father in 1794 he had succeeded to the family estate in Scotland; and during his furlough he built a house there, and furnished it, and made some improvements in the grounds. In 1812 he returned with his wife to India, and remained there for several years. The wife left India in 1818: and in 1822 her husband, who had then attained the rank of a General Officer, and was Colonel of a regiment, also quitted India, according to the rules of the service, with the intention of never returning to that country; and he never did return thither. During the whole of his service under the East India Company General Forbes retained his commission and rank of a lieutenant in the King's army. His domicile was without doubt originally Scottish. After his final return from India he had an establishment at a hired house in Sloane Street, London. He also kept his house at Auchernach furnished; and had some servants there also. He likewise became a justice of the peace and a commissioner of taxes in Scotland: and kept his pedigree and papers (including his will) at Auchernach, where he was in the habit of residing half the year, and where he had constructed a mausoleum in which he wished to be buried. But his health did not permit him to reside constantly at Auchernach, where his establishment was also not suitable for his wife; and his house in Sloane Street was manifestly his chief establishment, and his wife resided there. He died in 1851. His wife thereupon laid claim to a share of his property according to the Scotch law of succession, and contended that, in the events which had happened, he must be considered to have died possessed of his original Scottish domicile. The substantial question in the cause was, whether his domicile was in England or in Scotland. If he had been a single man his final domicile would probably have been considered Scottish. But the Court held that Sloane Street, having been his chief establishment and the abode of his wife, must be taken to have been the seat of his domicile. In pronouncing judgment upon the case, the learned Vice-Chancellor ruled the following points: 1. That the Scottish domicile of General Forbes, notwithstanding his having gone to India during his minority, in the service of the East India Company, continued until he attained the age of twenty-one; on the principle that a minor cannot change

his domicile by his own act. 2. That on attaining twenty-one he acquired an Anglo-Indian domicile; and thereupon his Scottish domicile ceased: on the principle that a service in India, under a commission in the Indian army, of a person having no other residence, creates an Indian domicile. 3. That the circumstance of his being a lieutenant on half-pay in a disbanded King's regiment did not affect the question. 4. That the Anglo-Indian domicile of General Forbes continued unchanged until his departure from India in 1822: the furlough, or limited leave of absence, implying by its nature that it was his duty to return to India on its expiration. 5. That in 1822 the Anglo-Indian domicile of General Forbes was abandoned and lost: the possibility of his being called upon, as colonel of a regiment, to return at some indefinite time to active service in India, being too remote to have any material bearing upon the question. 6. That he had acquired by choice a new domicile in England on his return from India.

MARRIAGE.—Places in the military occupation of British troops have been considered to be, for the purposes of English marriages, subject to the English law. It was partly on this principle that the marriage in St. Domingo of a British soldier of the army there with an English woman, the widow of another, was held valid: Lord Ellenborough, C. J. intimating an opinion that the King's troops would carry with them the law of England, civil and ecclesiastical*. And the same reason influenced the decision in *Ruding v. Smith*†, that a marriage between two British subjects at the Cape of Good Hope, when that place was occupied by English troops under a capitulation, was valid, notwithstanding its nullity by the Dutch law, which governed the place. Lord Stowell also, in expressing an opinion as to the validity of a marriage, celebrated by the chaplain to the forces, between an officer of the army of occupation in France and an English woman, said that the marriage, though void by the French law, would be supported in England on the ground that under the circumstances the parties were not French subjects under the dominion of French law‡.

* *Rex v. Brampton*, 10 East's Reports, 282. See also *Lacy v. Dickinson*, 1 Esp. N. E. C. 353.

† 2 Haggard's *Consistory Reports*, I. 387.

‡ *Burn v. Farrar*, *ibid.* 369.

Since the foregoing cases occurred, the Statute 4 Geo. IV., c. 91, has been passed, which renders marriages solemnized within the lines of a British army on foreign service valid. It would seem also that such marriages may be valid by that statute, even though celebrated without either ritual or clergyman; since in the Waldegrave Peerage case*, which depended on the validity of a marriage so circumstanced, it was contended, that, in order to bring the marriage within the provisions of the statute, it was not only necessary that the marriage should be celebrated by a British chaplain, but that there should be the authority of the commanding officer for its celebration, but without effect: the Lord Chancellor Cottenham and Lord Brougham both concurring in the validity of the marriage, notwithstanding the absence of those circumstances. The claimant of the earldom, therefore, took his seat in the House of Lords by virtue of this decision.

Children born of British parents within the lines of a British army on foreign service, or on board of ships of the navy, whether at sea or in foreign harbours, are deemed native born subjects according to the law of England†.

BANKRUPTCY.—It was once attempted to make the colonel of a fencible cavalry regiment a bankrupt, on the ground of his having from time to time sold the cast horses of his regiment, and made a profit by the transaction. But it was decided that dealings of that nature did not constitute a trader within the purview of the bankrupt laws‡.

RATES AND TAXES.—The possessions of the Crown, or of the public, are ordinarily exempted from rates and assessments for parochial or other purposes. But where such property is in the *beneficial* occupation of private persons, such persons are deemed liable to be rated to the relief of the poor and otherwise, because the parish *may*, by reason of such occupation, become burdened with the settlement of the occupiers and their children.

All forts, castles, barracks, fortifications, arsenals, storehouses, and buildings used for military purposes are the property of the Crown, and when used or occupied purely for the services of the Crown, or for public purposes, are

* 4 Clark and Fumelly's *Reports*, 656.

† Phillimore's *Commentaries on International Law*, 345.

‡ 1 Deacon's *Bankrupt Law*, 35, 1st Edition.

exempt from parochial and other rates. But many parts of such possessions consist of buildings adapted for the private residence and accommodation of officers to an extent exceeding the mere exigencies of the public service; and it is conclusively settled by numerous decisions, that, in respect of such beneficial residence and accommodation, and to the extent of their value, officers and others who occupy such buildings are liable to pay rates and taxes.

Thus in *Eyre v. Smallpage**, the question arose whether some officers, who had private apartments in Chelsea Hospital, were ratable for the poor in respect of such occupation; and the Judges decided that a rate including those officers was valid. Again, in the case of the officers of Greenwich Hospital, a similar decision was pronounced. So also in *Rex v. Hurdist*†, the master gunner at Seaforth, who occupied the battery house there, which he held with his office at the pleasure of the Crown, was deemed ratable in respect of his private accommodation, although one of the rooms in the house was appropriated to, and occupied by, the under-gunner, while the rest was occupied as a dwelling-house by the master-gunner himself.

A similar question arose in the case of *Lord Amherst v. Lord Somers and others*‡. It appeared that on the 26th July, 1780, His Majesty George III., by his sign-manual, gave a warrant to Lord Robert Bertie, "the then captain and colonel of the 2nd troop of Horse Guards," authorizing him to treat with one Adams for the building of stables and a riding-house for the use of the troop, and to take a lease of such stables and riding-house when completed, and to execute a counterpart of such lease, which was to be binding on Lord Robert Bertie, and the captain and colonel for the time being of the troop. Adams accordingly agreed to complete the buildings by the 1st June, 1783, fit for the reception of all the servants, grooms, hostlers, horses, and cattle, belonging to the troop. In March 1782, Lord Robert Bertie died, and was succeeded in his command by Lord Amherst, to whose porter the keys of the stables and buildings when finished were duly delivered by Adams; and thenceforward, under Lord Amherst's orders, the horses of the troop, *except the horse of the captain and colonel of the troop*, occupied the

* 2 Burrow's Reports, 1059.

† 3 Term Reports, 497.

‡ Lord Amherst v. Lord Somers, 2 Term Reports, 372.

ables. No person resided constantly at the stables, nor was there any room or apartments fitted up therein for the purpose of a residence or dwelling. Two grooms were hired and paid by the purveyor to take care of the horses, and each of these grooms in his turn sat up by night with two troopers as sentinels. No other use was made of the stables. The rent was paid by the agent of the troop, and was charged by him on all the troop (except the colonel, the chaplain, and the surgeon) and was stopped out of their pay. A rate having been made on Lord Amherst by the Justices of Middlesex in respect of the occupation of these stables, His Lordship refused to pay; whereupon a distress-warrant issued, under which His Lordship's goods were seized. Lord Amherst then brought an action against the Justices who signed the distress-warrant; and, on the ground that the stables were in the occupation of the public, the Court of King's Bench decided that the distress was wrongful, and the rate illegal.

In the foregoing case Lord Amherst's exemption from ratability was clearly established, because he had no beneficial occupation whatever of the stables, beyond the mere requirements of his troop. But in the following case, where a beneficial occupation accompanied an officer's use of a portion of the barracks for the public service, the officer was held ratable.

Lieutenant-Colonel Terrott*, as commanding officer of the Royal Artillery at Portsmouth Barracks, occupied a building consisting of two stories, with four rooms on each floor, besides attics. The rooms on the ground floor were thus appropriated:—one room as a store-room, another as a quarter for the adjutant, a third as an office for the commanding officer to transact the business of the regiment, and the fourth as a kitchen. The whole of the first floor and the attics were the residence of the commanding officer of the artillery for the time being, together with a kitchen, wash-house, and other offices, coach-house, stable-yard, and small garden. Lieutenant-Colonel Terrott, with his wife and family and servants, occupied this residence, and was rated in respect thereof to the relief of the poor. He appealed from the order of the justices to the Court of King's Bench: but that Court confirmed the rate. Lord Ellenborough, C. J.: "The principle to be collected from

* *Rex v. Terrott*, 3 *East's Reports*, 506.

“ all the cases on the subject is, that if the party rated
 “ have the use of the building or other subject of the rate
 “ as a mere servant of the Crown, or of any public body,
 “ or in any other respect for the mere exercise of public
 “ duty therein, and have no *beneficial* occupation of, or
 “ emolument resulting from, it in any personal and private
 “ respect, then he is not ratable. It is said that if
 “ the commanding officer be rated for the degree of private
 “ accommodation he enjoys in a building of this descrip-
 “ tion, why not the soldiers in their barracks for the
 “ accommodation they enjoy there. I am not aware that
 “ private soldiers have any accommodations in barracks
 “ beyond what are required for the mere ordinary uses
 “ and purposes of animal nature—I mean for sleeping,
 “ eating, and the like; but if their barracks should supply
 “ them with any accommodation of a beneficial and valu-
 “ able, and not strictly of a necessary, nature, the analogy
 “ between the two cases would rather afford perhaps a
 “ ground for including them, under such circumstances, in
 “ the rate, than for excluding an occupier of the present
 “ description from it. The reason of the thing, and the
 “ sound and established construction of the statute subjects
 “ every person who has the *beneficial* use of any local
 “ visible property in a parish to this species of public con-
 “ tribution. Whether the commanding officer
 “ could withdraw himself from the rate, by contracting his
 “ occupation in some proportionable degree within the same
 “ narrow limits of merely necessary enjoyment with the
 “ soldier in his barracks, will be a question to be decided
 “ when it shall occur. It is enough for us to say at pre-
 “ sent that upon the principles laid down and acted upon
 “ in the cases already referred to, the commanding officer
 “ in question has such a beneficial occupation of these
 “ apartments and other conveniences as to render him
 “ ratable for the same.”

WILLS.—By the general law of England, as contained
 in the Will Act 1 & 2 Vict., cap. 26, no will is valid
 unless the same be signed by the testator, or by some
 person authorized to do so on his behalf, and be also
 attested by two witnesses. But the Act (s. 11) contains
 an exception in favour of soldiers on “actual military
 “ service,” who retain all such privileges as they previ-
 “ ously enjoyed with regard to the making of wills. What

those privileges were will appear from the Statute of 29 Charles II., c. 3, which provides (s. 19) that "a nuncupative will (*i. e.* verbally uttered or dictated without writing) should be good where it is proved by the oaths of three witnesses present at the making thereof, and swearing that the testator, at the time of pronouncing such will, bid the persons present, or some of them, bear witness that such was his will, or to that effect; provided also that the will were made in the time of the last sickness of the deceased, and in the house where he was dwelling for ten days before, unless he were surprised or taken sick when absent from his own home, and died before he returned to the place of his dwelling." By s. 23, it is also enacted, that "any soldier or seaman being in 'actual military service,' may dispose, by will, of his movables, wages, and personal estate."

Thus it appears, that soldiers and seamen, "on actual military service," can still make nuncupative wills, though no other persons can legally do so. Their written wills are also valid, though not attested with the formalities required by law from other persons.

Whenever, therefore, a military officer on full pay makes an informal will, its validity can only be supported by shewing the testator to have been on actual military service at the time when the will was made. And the result of the decisions appears to be, that an officer serving with his regiment, or in the command of troops in garrisons or quarters, either in the United Kingdom or the Colonies, is not to be deemed on *actual* military service. To satisfy the meaning of the Act of Parliament in that respect, he must be on an expedition, or on some duty associated with positive danger. Otherwise mounting guard at Whitehall, or Windsor Castle, would be sufficient.

Major-General Percy Drummond died at Woolwich on New-Year's day 1843*. At the time of his death, and at the date of his will, he was an officer holding a commission in Her Majesty's army. He filled also the office of Director-General of the Royal Artillery, and was on full pay. A will, dated in June 1842, but not attested by any witness, was found in his private repository of papers, and the question was, whether this will was valid; or, in other words, whether General Drummond was a "soldier on

* Drummond *v.* Parish, 2 Curteis' *Ecclesiastical Reports*, 522.

“ actual military service,” within the meaning of the exception in the Will Act. It was argued that his duties extended to the Royal Artillery abroad, as well as in England, that he was liable to be tried by court martial, and was subject in all respects to military law; that he was accordingly liable to be sent abroad on foreign service whenever it might be required, and was as completely on duty as if he had been in the command of, or attached to, a British regiment on foreign service. Sir Herbert Jenner-Fust decided at Doctors’ Commons that the will was invalid. “ In doing so,” said the learned Judge, “ I feel great pain; but I think it better to express my decided opinion in the first instance, in order that persons in the situation of the late General Drummond may be made aware how the law stands on this point, and that the families of officers in Her Majesty’s service may not be placed in doubt and difficulty as to the validity of a will so made. I am not prepared to say, that the privilege is one which it would be advantageous to the army, as a body, to possess; I think it would not be unlikely to lead to fraud and misapprehension.”

The Honourable John H. Percy, captain in Her Majesty’s 30th regiment of foot, died at St. John’s, New Brunswick, on the 6th of August, 1842, he being then a commissioned officer in Her Majesty’s army, and quartered in barracks with his regiment at St. John’s. His will had only one witness to it, and the question was raised, whether Captain Percy was a soldier on “ actual military service” at the time of his death. Sir Herbert Jenner-Fust: “ Is there any distinction between this case and that of General Drummond? The only difference I can see is, the one was in a colony, the other at Woolwich. I do not think this difference creates a distinction.” The will was therefore set aside*. A similar opinion had been previously expressed by the learned Judge, with reference to an unattested will of Lieutenant Constantine E. Phipps, of the 76th regiment, stationed at Demerara; but the circumstances of the case did not then call for an absolute decision of the point†.

Major-General Clement Hill, at the time of making his will in 1843, held the military command of the Mysore

* *White v. Repton*, 3 *Curteis’ Ecclesiastical Reports*, 818.

† *Ibid*, 368.

Division in India, the head quarters of which were stationed at Bangalore, where he resided in ordinary until the time of his death, which took place in January 1845, whilst on a tour of inspection of the troops under his command. The will was not attested by any witness. Lord Fitzroy Somerset gave evidence that General Hill was in the active performance of military duty, from the time of his going to India in 1841, till the date of his death; that he was at any moment liable to be called upon to march with his division, or other body of troops, to whatever point the exigencies of the wars then going forward in India might have required, and was, according to the rules of the army and in military understanding and acceptance, in *actual military service**. Sir Herbert Jenner-Fust: "This is a stronger case than any which has hitherto been brought before the court; still I cannot, after my decision in *Drummond v. Parish*†, grant probate of this paper." The will was, therefore, declared invalid.

In the following case, the irregularly executed will of a military officer was held valid. Major-General Chatham Horace Churchill died on the 8th December, 1843, in the East Indies, of a mortal wound received on the field of battle. In the previous month of March he had made a regular will, on the back of which was found an unsigned memorandum in these words, "General Churchill being unable to write his wishes, he bequeaths his watch to his daughter Lucy Churchill." This memorandum was decided to be part of the will. Sir Herbert Jenner Fust: "When the memorandum on the paper was written does not exactly appear; but probably it was after the testator received his mortal wound on the field of battle; and if so, it would be a good disposition of the property, he being, at that time, in actual military service, and unable to write his wishes. I cannot, under these circumstances, see how it is possible for the Court to pronounce that the memorandum does not form part of the will‡.

The term "soldier," in the Will Act, has been held also to extend to persons in the military service of the East India Company. Dr. Donaldson, a surgeon in that service, having been in England on furlough, embarked in July

* 1 Robertson's *Ecclesiastical Reports*, 276. † *Supra*, 227.

‡ Churchill's Case, 4 *Notes of Cases in the Ecclesiastical and Maritime Courts*, 47.

1838, to join his regiment in India, and was placed in medical charge of recruits for Queen's regiments in India, though he had no commission in Her Majesty's service. Whilst on board ship at Portsmouth, he wrote an informal paper, which he forwarded as his will to his mother, in whose possession it remained till she heard of her son's death. Sir Herbert Jenner-Fust: "The deceased must be considered to have been a surgeon in the East India Company's service; his being in charge of recruits for royal regiments, which was no part of his regimental duty, would not constitute him a Queen's officer. I am of opinion that a soldier in the East India Company's service comes within the exception; and I am inclined to hold, that under the circumstances, the deceased was in actual military service at the time the will was written*."

Sir Herbert Jenner-Fust has also expressed an opinion, that though a minor in any other station of life is, by the general provisions of the Will Act, declared incapable of making a will, a soldier, on actual military service may make a will, notwithstanding his minority†.

Cornet Trevor Graham Farquhar of the 11th Bengal Light Cavalry, died a bachelor and a minor, on the 28th January, 1846, being mortally wounded at the battle of Aliwal, in the East Indies. After he received his wound, he wrote a will in pencil (which the surgeon alone attested) on the field of battle. By the general law two witnesses are requisite to every will, and no person under 21 years of age can make a will. Sir Herbert Jenner-Fust: "This is the first case of the will of a minor dying on the field of battle. The question is, whether it is a good and valid will. Under the general provisions of the Act it is not: but under the 11th clause it would be valid, whether the deceased were major or not; 'any soldier being in actual military service, may dispose of his personal estate as he might have done before the making of this Act.' Then, as he might make such a will according to the statute of frauds, and even a nuncupative will, and whether a major or minor, according to this clause this is a good and valid will‡."

* Donaldson's Case, 2 Curteis' *Ecclesiastical Reports*, 386. † Ibid.

‡ Farquhar's Case, 4 *Notes of Cases in Ecclesiastical and Maritime Courts*, 651.

It appears from the preface to the life of Sir Leoline Jenkins, Judge of the Admiralty in the reign of Charles II., and framer of the above-mentioned Act of the same King, that he claimed to himself some merit for having obtained for British soldiers the testamentary privileges of the Roman army*.

Military men dying abroad sometimes appoint a firm of bankers or agents to be their executors. In regard to this practice it is necessary to mention the case of the late Lieutenant-Colonel Fernie, who died in India some time after he had made a will, whereby he nominated Messrs. A. B. & Co. as his executors. The members of the firm in question had dissolved partnership before Colonel Fernie's death; and under those circumstances it was decided that the appointment wholly failed†. Even if the firm had continued to subsist, a change in its membership subsequently to the date of the will would probably have the same effect, unless the testator made the "members for the time being" his executors.

It has sometimes occurred that the wills of military men have been proved, and their property put into a course of distribution upon erroneous information respecting their death in the field. A case is mentioned by Swinburne‡ in which a Yorkshireman sailed in a military expedition to Portugal, whence, after some exploits, his fellow soldiers returned without him; and a fame arose that he was dead, whereupon administration was granted. But whilst his kinsfolk were in suit about the same, he himself re-appeared, after three years' absence, and put an end to the controversy.

In 1809, probate of the will of Charles James Napier, Esq., (afterwards Lieutenant-General Sir Charles J. Napier, G.C.B., and Commander-in-chief in India), was granted at Doctors' Commons, to his brother and sole executor, Richard Napier, Esq., upon his affidavit of the receipt of intelligence, which he believed to be correct, that the said Charles James Napier had been killed at the battle of Corunna in Spain, on 16th January, 1809. That officer had, in fact, been left for dead on the field, and had been reported in Sir John Hope's despatches to be amongst the

* 3 Curteis' *Ecclesiastical Reports*, 531.

† 13 *Jurist*, 216 (1849); and see *Holland v. Teed*, 7 *Hare's Reports*, 50.

‡ *Treatise on Wills*, part 6, s. 13.

number of the slain*. This report, however, turning out to be erroneous, and the supposed deceased having appeared in the Ecclesiastical Court, the probate of his will was revoked and declared to be null: and the original will, after cancellation of the probate copy, was delivered back to him out of the registry†.

TRESPASS.—Any officer of the Army, Navy, or Marines, being duly employed for the prevention of smuggling, and on full pay, or any person acting in his aid when on duty, may patrol upon, and pass freely along and over, any part of the coasts of the United Kingdom, or any railway, or the shores or banks of any river, creek or inlet of the same (not being a garden or pleasure ground): and any such officer so patrolling, shall not be liable to any indictment, action, or suit, for so doing‡.

ARMY CONTRACTORS.—A clothier who contracts with the Colonel of a regiment to supply the regiment with military uniforms and equipments, is not within the disqualifying clause of the Stat. 22 Geo. III., c. 45, which incapacitates contractors for the public service from being elected or from sitting and voting in the House of Commons. This was held by the Court of Common Pleas, in *Thompson v. Pearce*§, on the grounds that, as Colonels clothing their men were not under the disqualification, it would be absurd to say that the clothiers employed by the Colonels should be affected by the Act.

MILITARY BENEFIT SOCIETIES.—By an Act 12 & 13 Vic., c. 71, all regimental Benefit Societies were dissolved: and by the same Act, all regimental charitable funds were ordered to be paid into the Bank of England, and placed under the administration of the Secretary at War.

PRISONERS OF WAR.—A *habeas corpus* will not be granted to bring up a Prisoner of War from military custody to the bar of a Court of Law, for the purpose of enquiring into the cause of his detention; this being a matter

* *London Gazette*, 24 January, 1809.

† 1 Phillimore's *Reports*, 83.

‡ 16 & 17 Vict. c. 107, s. 253.

§ 1 Broderip and Bingham's *Reports*, 25.

of State policy under the sole control of the Government, and not cognizable by any Courts of Law*. In 1815, when the French Emperor, Napoleon, was on board H. M. S. *Bellerophon*, in Plymouth Sound, great desire was felt both by himself and the public, that he should be brought ashore; but his situation as a prisoner of war was considered a complete barrier to any discussions or questions regarding his detention in custody.

On Napoleon being brought captive in an English ship of war to Plymouth, the question arose how his person was to be disposed of? Lord Ellenborough, Sir Wm. Grant, Lord Stowell, and other great jurists being consulted, they gave conflicting and very unsatisfactory opinions with respect to the Law of Nations upon the *status* of the Emperor; some saying that he was to be regarded as a prisoner of war; others, as a subject of Louis XVIII., to whom he should be delivered up to be tried for treason; and others, as a pirate, or *hostias humani generis*, carrying about with him *caput lupinum*; while there were not wanting persons so romantically liberal, as to contend, that having thrown himself on our hospitality, he was entitled to immediate freedom, and that he should be allowed to range at pleasure over the earth. "I think" (says Lord Campbell), that Lord Eldon took a much "more sensible view of the subject than any of them, "which was, that the case was not provided for by anything "to be found in Grotius or Vattel, but that the law of "self-preservation would justify the keeping of him under "restraint in some distant region, where he should be "treated with all indulgence compatible with a due re- "gard for the peace of mankind. Accordingly, St. Helena "was selected as the place of his exile; and to put a stop "to all experiments in our Courts, by writs of *habeas corpus*, or actions for false imprisonment, an Act of Parliament (56 Geo. III., c. 22) was passed to legalize his "detention†."

WITNESSES.—Officers and soldiers duly summoned to give evidence in courts of justice are bound to attend at the appointed time and place; and no military duties will form an excuse for non-attendance. Where soldiers or

* 2 Lord Kenyon's *Reports*, 473; 2 W. Blackstone's *Reports*, 1324.

† Lord Campbell's *Lives of the Chancellors*, VII. 320.

officers are required as witnesses, it is usual to give notice to the commanding officer, in order that he may enable them to perform the duty in question, and may see that there is no collusion for any improper purpose. He has no power, however, to disregard a lawful summons; and if he refuses obedience, a *habeas corpus* will issue from the court of law to bring up the witnesses whose attendance is thus impeded. But prisoners of war cannot be thus dealt with. In *Furley v. Newnham**, a motion was made to the Court of King's Bench, for a *habeas corpus ad testificandum* to bring up an American prisoner of war from the Mill Prison at Plymouth, to give evidence for the plaintiff in a Maritime Insurance cause: the prisoner being the only witness in England who could prove the capture of the ship to which the insurance related. The Court decided that there could be no *habeas corpus* to bring up a prisoner of war: and Lord Mansfield said, that the presence of witnesses, under like circumstances, was to be obtained only by an order from a Secretary of State.

* 2 Douglas' Reports, 419.

CHAPTER XIII.

DISCHARGE FROM THE SERVICE.

THE legal discharge of an officer from military service may be effected in four ways: I.—By royal mandate; II.—By sentence of a court martial; III.—By sentence of a civil court; IV.—By voluntary resignation.

I. *By Royal Mandate.*

Commissions in the army being held, as we have seen, at the sole will and pleasure of the Crown, a royal mandate or order is at any time sufficient for the summary discharge of an officer from the service, without the formality of a court martial or a court of inquiry, or the assignment of any reason whatsoever. And this power of the Crown is not affected by the circumstance of an officer having purchased his commission, the value of which he wholly forfeits upon dismissal; though, by way of indulgence, an officer so situated is frequently allowed to sell one of the steps of his rank.

In the course of the debate on Major-General Sir R. Wilson's summary dismissal from the army in 1821, the Secretary of State, Lord Londonderry, read the following opinion given by Lord Erskine when at the bar upon the case of some officers who had been similarly dealt with: "Serjeants' Inn, Sept. 8, 1801. I am bound to add, (after stating the arguments on the case) that the parties are wholly without remedy. The King is the acting party here. He is at the head of the army, and the grounds of his decision cannot be questioned in any court of law; and whenever His Majesty dismisses an officer, whether of the highest or lowest rank, he loses all benefit belonging to his situation, according to the Articles of War; and this every soldier must know when he enters the army*."

Sir Charles Morgan, the Judge-Advocate-General, in

* *Parl. Hist.* Feb. 1822, 326.

alluding to the case of a militia officer who had been dismissed without trial, declared his opinion that the King was quite competent to remove any officer, without assigning any reason, and without any trial whatever. It was sufficient that the King did not think fit to retain him any longer in his service*.

In the debates in Parliament on Sir Robert Wilson's case, the Secretary of State (Lord Londonderry) informed the House of Commons, that "he held in his hand a paper containing the names of not less than 212 officers, who in the preceding ten years had been removed from the army without a trial; and in that paper there were instances after instances, in which, after acquittal by a court martial, the parties had been dismissed; and this, not from any notion that the court martial had acted improperly, but because there were many cases in which legal guilt could not be proved, but in which, notwithstanding, there were circumstances to affect the character of a gentleman, or the harmony of a regiment, or in some way or other the good of the service. Nothing was so common as to aggravate the sentence of a court martial—nothing so common as to dismiss those whom a court martial had not ordered to be dismissed, leaving or not leaving to an individual the price of his commission, for that was another circumstance on which the Crown might exercise its discretion†."

In some cases, however, of summary dismissal, the Crown has, at the solicitation of the accused party, and as a matter of pure favour, granted him a trial by court martial upon the charges brought against him. This was done in the celebrated case of Lieutenant-General Lord George Sackville, who in the reign of Geo. II., was summarily deprived of his commission, for imputed misconduct at the battle of Minden in 1759. On his return to England he demanded a court martial; and the request having been granted, he was found guilty of having disobeyed the orders of Prince Ferdinand of Brunswick, whom he was, by his commission and instructions, directed to obey as Commander-in-Chief of the Allied Forces, according to the rules of war; and the court martial thereupon adjudged him unfit to serve His Majesty in any

* *Parl. Hist.* Feb. 1822, 326.

† *Annual Register for A. D.* 1822, 181.

military capacity whatever. The King confirmed the sentence, and ordered it to be recorded in the books of every regiment, with the following remarks: "It is His Majesty's pleasure that the above sentence be given out in the public orders, not only in Britain, but in America, and every quarter of the globe, where British troops happened to be, that officers, being convinced that neither high birth nor great employments can shelter offences of such a nature, and that seeing they are subject to censures much worse than death to a man who has any sense of honour, they may avoid the fatal consequences arising from disobedience of orders." The Judges of England had given their opinion, that he might be tried by court martial, notwithstanding he had ceased to hold any commission in the service; and it had been intimated to him before the trial, that if the court martial should adjudge him to suffer death, the sentence would be most certainly carried into execution, according to the recent example of Admiral Byng.

To complete his lordship's disgrace, His Majesty in council called for the council book, and ordered his name to be erased from the list of Privy Councillors. Four years after this event, however, Lord George was restored to his seat in the Privy Council; and in 1782, twenty-two years after the sentence, his lordship was created a peer of the realm by the title of Viscount Sackville, upon which occasion a very acrimonious debate, involving the most severe personal observations on his lordship, took place in the House of Peers*.

But when Major-General Sir Robert Wilson was summarily dismissed from the army in 1821, by King Geo. IV., a different course was pursued. Upon receiving the notice of his dismissal, that gallant officer instantly wrote to the Commander-in-Chief, requesting that the King would institute "some military court, before which he (Sir Robert) might have an opportunity to vindicate himself, and prove the falsehood of those accusations, whatever they might be, which had disposed His Majesty to remove him from an army in which he had served twenty-nine years, and in which he had purchased every commission, with the exception of the junior one." This request, however, was refused; and Sir Robert Wilson remained

* *Parl. Hist.* XXII. 999, 1002, &c.

excluded from the Army List, until he was honourably restored as one of the first acts of the reign of King Wm. IV*.

The royal prerogative of summary dismissal is also in no wise controlled or affected by the circumstance of an officer having been previously acquitted by a court martial, or having received only a lenient sentence for the conduct in question. Lord Londonderry's speech †, to which reference has been made, mentions numerous instances illustrative of this proposition.

In 1756, when General Fowke, Governor of Gibraltar, along with Admiral Byng and Admiral West, were brought to England under arrest, for their conduct in the expedition for the relief of Minorca, the General was tried for disobedience of orders in not sending a battalion on that service from the garrison of Gibraltar, and was sentenced to be suspended for a year. The King confirmed the sentence, but nevertheless struck him out of the Army List ‡. This occurred not long before the execution of Admiral Byng for his conduct on another occasion §.

When the sentence of a court martial declares an officer

* Some very absurd charges regarding Sir R. Wilson's conduct at Queen Caroline's funeral procession, having been made the pretext for his dismissal, it is right to add that, in a letter to the Duke of York, Sir Robert Wilson affirmed that, "upon his honour every one of those allegations was utterly false, and that in every instance where the mention of names had enabled him to trace those statements to their supposed sources, their falsehood had either been at once exposed and acknowledged, or they had been disavowed by the parties said to have made them."—*Annual Register*, A.D. 1821.

† *Supra*, 236. ‡ Campbell's *Admirals*, Vol. IV., 84.

§ Mr. Croker, in his Edition of Boswell's Johnson (1848), quotes, with reference to this proceeding, the following lines from a poem by Lloyd:

"So ministers of basest tricks—
I love a tinge at politics—
Amuse the nation, court, and king,
By breaking F[lowk]e, and hanging Byng."

Arthur Herbert, Earl of Torrington, Admiral and Commander-in-chief in the reign of King Wm. III., was tried by a court martial held on board H.M.S. *Kent* at Sheerness, in December 1690, in pursuance of a commission from the Lords of the Admiralty, upon the following very heavy charge, founded on the report of a previous commission of inquiry into his conduct, *viz.*: his having, "in the engagement with the French off Beachy Head, (30th of June, 1690,) through treachery or cowardice, misbehaved in his office, drawn dishonour on the English nation, and sacrificed our good

incapable of future service, this adjudication is not binding on the Crown, which may, notwithstanding the severity of such a judgment, recall the subject of it into active professional employment*. Neither does such a sentence debar an officer from the most honourable civil offices, if it be the pleasure of the Government afterwards to employ him therein, as we have seen in the case of Lord George Sackville, who became a peer of the realm by creation, and also a Secretary of State.

In the case of a captain in the Guards†, a lieutenant-colonel in the army, whose name was removed from the Army List by the Prince Regent in 1819, that step was taken in consequence of the report of a commission of inquiry not followed by any court martial.

The East India Company possesses similar powers over officers in the armies of India; and by an express Act of Parliament military officers in the service of the East India Company may also be summarily dismissed by the Crown, without the intervention of a court martial or a court of inquiry‡.

A military officer cannot by law hold his commission, or any military employment, free from this liability to summary dismissal by the Crown. In 1710, when the Duke of Marlborough was commanding the British and allied armies in Flanders, the pending political changes in

“Allies the Dutch:” and, notwithstanding the court unanimously acquitted the Earl of any imputation whatever from his conduct on the occasion in question, his commission was suspended, and he never was afterwards employed. (2 Broderip and Bingham’s *Reports*, 151, note.)

In July 1702, Sir John Munden, Rear-Admiral of the Red, was tried by court martial in pursuance of a commission from the Lord High Admiral Prince George of Denmark, on charges of miscarriage and neglect in an expedition to Corunna, for the purpose of intercepting a squadron of French ships destined to sail from the Groyne for the Spanish West Indies. The court gave their opinion that Sir John had fully cleared himself from the charges, and so far as appeared to the court, had complied with his instructions, and behaved with great zeal and diligence on the occasion. Notwithstanding this acquittal, he was immediately afterwards dismissed from the service by Queen Anne; and the proclamation issued for that purpose in the *London Gazette* of the 9th August, 1702, declared, that Sir John Munden had not done his duty pursuant to his instructions. (1 Macarthur on *Courts Martial*, 111.—Ed. 1813).

* Campbell’s *Admirals*, Vol. IV., 62.

† 2 Broderip and Bingham’s *Reports*, 130.

‡ Stat 53, Geo. III. c. 155, s. 74.

England created an apprehension, that the Duke would, on the retirement of his friends from office, resign his command, or that a new ministry might displace him. But the Duke, with his well-known steady regard for his own interest, thought of a much better expedient than resignation, and determined to protect himself against a recall. He proposed that, to increase the confidence of the Allies, he should receive a patent as "Commander-in-Chief for life:" so that his office, which ought to be unconnected with party politics, might not depend upon the casualties of Parliamentary warfare. He accordingly submitted this scheme to Queen Anne, who asked the Lord Chancellor Cowper whether such a patent would be legal and constitutional? His Lordship unhesitatingly declared, that whether the proposed patent would be legal or not, it certainly would be unconstitutional, as, under a monarchy, military command could only be properly held during the pleasure of the monarch*.

In former times a practice prevailed, which would not now be tolerated, of cashiering officers who voted in Parliament in opposition to the Government of the day. There is a well-known anecdote that, in the first Parliament of James II., one of that King's ministers rushed up to a member, who, on a very important occasion had voted against the Court, and inquired, "Sir, have you not a troop of horse in His Majesty's service?" "Yes, my Lord," was the reply; "but my elder brother is just dead, and has left me 700*l.* a-year." Sir Robert Walpole, when prime minister, thus arbitrarily exercised his power on several occasions; and the most signal instances were those in which he deprived the Duke of Bolton and Lord Cobham of their regiments for voting against the ministerial project of an Excise†.

The dismissal of two officers of such high position created a great sensation in political circles; and on the 13th February, 1734, Lord Morpeth, after the reading of the Mutiny Bill, rose and concluded a speech full of trite reflections on a standing army under the influence of the Crown, and on

* Lord Campbell's *Lives of the Chancellors*. Vol. IV. 322.

† The Duke of Argyle, who supported the Ministry, reflected with severity on the Duke of Bolton's want of service: "It is true (said he) there have been two Lords removed, but only one Soldier."—*Lord Mahon's History of England*.

the danger of arbitrary power, by moving for leave to bring in a bill "for securing the constitution, by preventing officers not above the rank of colonels of regiments from being deprived of their commissions, otherwise than by judgment of a court martial to be held for that purpose, or by address of either house of Parliament." This motion was argued at great length and with uncommon warmth, but with no success. Sir Robert Walpole concluded the debate with a speech replete with sound doctrines and constitutional principles. He defended not only the prerogative of the Crown, but the interest of Parliament, and the well-being of the community against the horrible despotism of a stratocracy or army Government. He vindicated the purity of courts martial, and deprecated the evils which would result to the service from subjecting them to the influence of intrigue, and making their decisions the means of retaining or forfeiting a post for life*. "The behaviour of an officer (Sir Robert observed) may be influenced by malice, revenge, and faction, under the pretence of honour and conscience; and if ever any officer of the army, because the King refused to comply with some very unreasonable demand, should resolve to oppose in everything the measures of Government, I should think any man a most pitiful minister, if he should be afraid of advising His Majesty to cashier such an officer. On the contrary, I shall leave it as a legacy to all future ministers, that upon every occasion it is their duty to advise their master, that such a man is unfit to have any command in his armies. Our King has by his prerogative a power of displacing, preferring, and removing any officer he pleases, either in our army or militia. It is by that prerogative chiefly he is enabled to execute our laws, and preserve the peace of the Kingdom. If a wrong use be made of that prerogative, his ministers are accountable for it to Parliament; but it cannot be taken from him or diminished without overturning our constitution; for our present happy constitution may be overturned by republican as well as by arbitrary schemes. Therefore it must be left to His Majesty to judge by what motives an officer acts; and if

* *Coxe's Life of Sir Robert Walpole*, III. 126.

“ he thinks an officer acts from bad motives, in duty to himself he ought to remove him*.”

It is not easy to refuse assent to the doctrines thus abstractedly propounded; but the difficulty of admitting them is, that the minister, who calls the obnoxious power into exercise, is not only the sole judge of the fitness of the occasion, but is in truth a judge in his own cause. Sir Robert Walpole, on a subsequent occasion, exercised this authority, by dismissing “ that terrible cornet” Pitt, (afterwards the great Lord Chatham,) from the Blues†.

On the fall of the Marquis of Rockingham, Burke pronounced it to have been one of that statesman’s foremost merits, that he “ discountenanced, and, it is hoped, for ever “ abolished the dangerous and unconstitutional practice of “ removing military officers for their votes in Parliament.”

It was probably from a notion that the power in question created great subservience on the part of junior officers towards the ministers of the Crown, that in the year 1759, Frederick, Prince of Wales, the father of King George the Third, in a paper delivered on his behalf to the leaders of the Parliamentary opposition of that day, promises, when he should have it in his power, to promote “ a Bill “ to exclude all military officers in the land service under “ the degree of colonels of regiments, and in the sea “ service under the degree of rear-admirals, from sitting “ in the House of Commons‡.”

The latest political proceeding which furnishes an illustration of Sir R. Walpole’s opinions, occurred in the year 1800, while the Act for the Union of Great Britain and Ireland was depending in Parliament. The then Marquis of Downshire, being violently opposed to that measure, availed himself of his position as colonel of the Downshire regiment of Militia, to incite the officers and men of that corps, to the number of several hundreds, to sign a petition to Parliament against the passage of the bill: the major of the regiment assembling it for the purpose at head

* On the same day the young Duke of Marlborough brought into the House of Lords a similar bill, which was thrown out after the first reading. But a protest signed by 30 peers was entered on the journals; and the Duke of Bolton and Lord Cobham separately signed a short and manly protest.—Coxe’s *Life of Sir Robert Walpole*, III. 129. Lord Mahon’s *History of England*, II. c. 16.

† Lord Mahon’s *History of England*, III. c. 21.

‡ Smollett’s *History of England*, V. 278, note.

quarters, and there bringing forward the petition under Lord Downshire's directions. Mr. Pitt deeming this a factious and unseemly course of conduct, dismissed Lord Downshire from the regimental command, and from all his civil offices and employments under the Crown*.

Though military commissions are thus revocable or determinable at the pleasure of the Crown, they nevertheless do not expire on the death of the Sovereign, so as to release an officer *ipso facto* from his military character, or from further service. Previously to the reign of King William IV., all commissions expired on the death of the King by whom they were conferred; and in strictness an officer's powers and rights then came to an end, unless it were the pleasure of the new Sovereign to revive them by a new commission. But upon such occasions, the commissions of all officers previously in the service were renewed as soon as possible; and as they continued in the receipt of pay and allowances, their military character was, in point of law, kept alive until the arrival of new commissions; so that no question ever arose regarding their subjection to the Articles of War, or their authority to command the troops in the interval. In order, however, to prevent the difficulties and inconveniences which might spring from the exercise of a dubious authority by civil as well as military officers, an Act was passed at the beginning of the reign of King William IV., by virtue of which all civil and military commissions and commissions in the Royal Marines signed by King George IV., and expiring on his death, were to have a legal continuance for six months after that event, unless they should be previously revoked. And by an Act passed immediately after her present Majesty's accession†, a like provision with regard to military and marine commissions is extended to future demises of the Crown.

II. *By Sentence of a Court Martial.*

The Mutiny Act and Articles of War confer upon courts martial the power of sentencing officers to dismissal from the service. But a sentence of this nature requires confirmation by the Crown, which cannot be deprived,

* Castlereagh's *Correspondence*, III.

† Stat. 7 Wm. IV. & 1 Vict. c. 31.

without its own consent, of the services of any of its officers, except by force of an Act of Parliament*. On this principle, even a sentence of death pronounced by a court martial does not operate as an absolute dismissal from the service; for if the offender should be pardoned, he is restored to his former position. This point arose in the case of William Clarke, a seaman of H. M. S. *Rattler*, one of a squadron employed in 1786 off the Leeward Islands, under the command of Lord Nelson as senior captain. Clarke had been sentenced to death by court martial; but was pardoned at the instance of H. R. H. the Duke of Clarence, and then discharged from the ship by Lord Nelson. The Admiralty demanded an explanation of His Lordship's conduct on this occasion, and signified that the discharge of the seaman under such circumstances was a mistaken course of proceeding†. The law, it is conceived, would be just the same in the case of a soldier, or of a military officer.

But though a pardon operates as a restoration to the service, the greater question still remains to be judicially decided, whether a restoration to the service operates as a pardon. In the words of Gibbon, "it remains to determine, whether a Prince entitled to perform an act of favour and mercy, actually does so by conferring an office of dignity, which cannot be enjoyed unless the act of mercy has previously been obtained, that is to say, whether the substance ought to prevail over the form, or the form over the substance‡."

This question is inseparably connected with the fate of the gallant but unfortunate Sir Walter Raleigh. He had been condemned to death for alleged participation in a treasonable plot to raise Arabella Stuart to the throne: and, after undergoing thirteen years' imprisonment, he received from James I. by a commission under the Great Seal, the command of a fleet and army fitted out against the Spanish possessions in South America, with power of life and death over the King's subjects serving in the expedition. The enterprise failed; and on Sir Walter's return to England, James caused his head to be struck off, according to the sentence originally pronounced. On

* See *Post*, 246.

† See the Correspondence, 1 *Nelson's Despatches*, 253.

‡ Gibbon's *Miscellaneous Works*, 400, Edit. 1837.

shewing cause against his execution, Sir Walter pleaded that his commission was tantamount to a pardon. "By that commission (said he) I gained new life and vigour; for he that hath power over the lives of others must surely be master of his own. In the 22nd Edward III., a man was indicted for felony, and he showed a charter, whereby it appeared that the King had hired him for the wars in Gascony; and it was allowed to be a pardon. Under the commission I took a journey to honour my Sovereign, and to enrich his kingdom; but it had an event fatal to me, the loss of my son, and the wasting of my whole estate." Lord Chief Justice Montague: "Your commission cannot in any way help you; for by that you are not pardoned. In *felony* there may be an implied pardon, as in the case you cite; but in *treason* you must shew a pardon by express words, and not by implication. There was no word tending to pardon in all your commission, and therefore you must say something else to the purpose, otherwise we must proceed to give execution." Notwithstanding the melancholy character of this case, we have the high legal authority of Lord Campbell for saying, that the Chief Justice declared and expounded the law soundly; and that in strictness Sir Walter's attainder under the former judgment could only be done away with by letters patent under the Great Seal, expressly reciting the treason, and granting a free pardon*.

In 1811 Private John Weblin of the 3rd Buffs, then serving in Portugal, was tried by court martial, for addressing abusive language to the Captain of his Company, and striking him in the execution of his duty. The prisoner was found guilty, and sentenced to be shot. The case was reported in the usual way to the Commander-in-Chief, the Duke of Wellington, who, in his "Remarks" upon the proceedings, took notice, that, through some extraordinary inattention with reference to the custody of the prisoner, he had actually been permitted to serve in an engagement with the enemy, after he had been put into arrest for his crime. On this ground the Duke pronounced, that he was under the *necessity of pardoning* the prisoner†.

This subject was debated in Parliament in March 1849,

* Lord Campbell's *Chief Justices*, I. 357, 358.

† *The Principles of War*; Cadell: 1815.

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with reference to the case of some soldiers in the Madras army, who were alleged to have been employed on military duty for many months after the discovery of a mutinous and treasonable plot in which they had been concerned. They were then brought to trial by court martial, and executed in 1844. The facts, however, were not clearly shewn; and therefore the House of Commons did not pronounce an opinion on the matter.

III. *By the Sentence of a Civil Court.*

The Mutiny Act directs, that officers impeding or refusing to assist the civil magistrate in apprehending any officer or soldier, who has committed violence against the person or property of any of Her Majesty's subjects, shall, upon conviction before any court of record at Westminster, Dublin, or Edinburgh, be deemed to be *ipso facto* cashiered; and be utterly disabled to hold any civil or military employment in Her Majesty's service. It is conceived, also, that this incapacity cannot be removed by royal pardon, or by any other means than an Act of Parliament, as it is intended to be a constitutional protection against the abuse of military power*. A conviction, however, upon any other criminal charge, though of the most heinous or disgraceful character, would not alone operate as a dismissal from the service. The pleasure of the Crown for that purpose must be signified, notwithstanding the conviction.

By the present and several recent Mutiny Acts, every officer sentenced to transportation for felony ceases to belong to Her Majesty's service upon the confirmation of the sentence, and thereupon becomes for ever incapable of serving the Crown in any military capacity whatever.

IV. *By Voluntary Resignation.*

But though the Crown has the power of dispensing at pleasure with the services of any officer in either service, this power is not reciprocal; and it may be taken as a general rule, that an officer cannot resign his commission, or discharge himself from the service, without the leave of the Crown, to be signified through the proper official

* Sir Arthur Ingram's Case, *supra*, 57.

channel. In practice, and during the time of peace, this subject creates little or no difficulty in England, as there are numerous well-qualified candidates for every regimental or other vacancy. But cases might occur, where the uncontrolled resignation of an officer employed in the colonies, or elsewhere beyond the seas, would be productive of the greatest mischief to the public interests, as troops might suddenly be left without a proper commander, and the safety, or even the allegiance of a colony, might be considerably endangered.

In March 1786, it was asked in the course of a debate in the House of Lords on the Mutiny Bill, whether an officer might not, in actual service, give up his commission whenever he pleased? It was answered by Lord Loughborough, Chief Justice of the Common Pleas, that such a resignation was subject to His Majesty's acceptance; and the Lord Chancellor Thurlow supported this opinion.

In one sense an officer's engagement under his commission is unlimited in point of time, as neither the annual Mutiny Act, nor the Articles of War, nor his commission, contain any provision or stipulation on the subject. He therefore cannot retire from the service without the leave from the Crown. Neither has a Commander-in-Chief on foreign service authority to grant such leave to an officer on his station. The recent publication of Lord Nelson's Despatches furnishes an instance in which his Lordship acted on this principle towards a young officer of marines, who had succeeded to a large property in England, and was desirous of quitting the service in order to attend to his private affairs. His Lordship, on that officer's application to have leave of absence to England, and to be discharged from H.M.S. *Swiftsure*, on the ground that his presence in England was absolutely necessary in consequence of the fortune which had been left to him, made answer, that the request was wholly out of his Lordship's power to grant*.

The law is the same with respect to officers in the East India Company's service. In 1769, Captain Parker, an officer in that service, brought an action† against Lord Clive, late Commander-in-Chief of the Company's forces in India, for assault and false imprisonment in that country.

* 3 *Nelson's Despatches*, 302.

† *Parker v. Lord Clive*, 4 *Burrow's Reports*, 2419.

An order having been issued by Lord Clive for the discontinuance or diminution of *batta*, the officers affected by the reduction resented it so highly, that 175 of them threw up their commissions and quitted the service. Of this number Captain Parker was one; whereupon Lord Clive, as Commander-in-Chief, arrested him, and kept him for four months in custody. He was then tried by court martial for mutiny, and acquitted; that court being of opinion that he had a right to resign his commission, and quit the service when he pleased. Lord Mansfield, before whom Captain Parker's action was tried, held that military officers in the service of the Company were *not* at liberty to resign their commissions and quit the service at *any* time, and under *any* circumstances, merely *ad libitum*, whenever they themselves should think fit, or be so inclined; and consequently that Captain Parker had no right of action. The point was afterwards argued before the full Court of King's Bench, where it was contended, on behalf of Captain Parker, that the Company's contract with their military officers was *reciprocal*, so as to enable either party to put an end to it at pleasure. On the other hand the absurdity was pointed out of supposing officers at liberty to quit at the very time when their services are most required, upon the very point of an engagement, the instant of an attack, or *flagrante bello*. It could never be conceived that officers should have it in their power to quit the service at the critical moment when their assistance is most wanted. The Company might be ruined if such a doctrine were allowed. The Court unanimously concurred in the opinion held by Lord Mansfield at the trial, and gave judgment against Captain Parker accordingly. But in order to give him an opportunity of shewing the particular circumstances under which he stood when he resigned, the court ordered a new trial of the action. A new trial was afterwards had, in which the verdict went against Captain Parker.

Another similar action, arising out of the same transaction, was brought against Lord Clive by Captain Vertue*, whose case did not depend, like Captain Parker's, on the *general* abstract question, whether an officer in the Company's service had a right to resign his commission under *any* circumstances, and whenever he pleased, but upon the

* Vertue v. Lord Clive, 4 Burrow's Reports, 2472.

particular circumstances under which Captain Vertue stood when he resigned his commission. Captain Vertue's case rested on the proposition that he had a right to resign at any time under *proper* circumstances; and he contended that the circumstances under which his resignation took place were such as to justify it. The evidence shewed that on the reduction of *batta* being announced, the officers of each brigade then in the field, to the number of 200 and upwards, entered into a combination to resign at the same time. Many subalterns, including Captain (then Lieutenant) Vertue, wrote letters to Colonel Smith, commanding the field force, desiring liberty to resign at the end of the month. He issued a very severe censure on their behaviour. Others, who desired liberty to resign immediately, were sent by him at once to Calcutta; and he declared that the rest should have an answer before the end of the month. Captain Vertue was not affected by the order to send some of the dissatisfied officers to Calcutta; but he nevertheless, on the 8th of May, went to Colonel Smith, to complain of that order, and offered to resign. Colonel Smith refused to accept his resignation, and commanded him to remain in the camp. Vertue laid down his commission on Colonel Smith's table, and went away from the camp next morning, in sight of the officers and troops under arms. Whereupon Colonel Smith ordered him to be arrested, and brought him to a court martial, before which he was tried for mutiny, and ignominiously broken. The Company then paid their troops monthly, and in advance. An officer could not, therefore, quit before the end of the month for which he had received pay: but at the beginning of the month of May, when the transactions in question occurred, Vertue had not received, but on the contrary declined to receive, his month's pay in advance. It appeared, however, that the pay had been issued to the paymaster on the previous 28th April, for distribution to the officers; that Vertue was mustered on the first of May; that on the 6th he signed himself "Lieut." in a letter to Colonel Smith; and that on the 7th he wrote another letter with the same signature: consequently he was a lieutenant on the morning of the 8th, when he was arrested.

The only way in which Lord Clive was connected with the plaintiff's case was by his Lordship having confirmed the sentence of the court martial. And the real question

was, whether Captain Vertue at the time of his arrest was an object of military law, so as to bring him within the jurisdiction of a court martial. The Court of King's Bench unanimously held that Captain Vertue's resignation was invalid, as having been made in pursuance of an improper combination of a large number of officers to terrify and intimidate the Government into an allowance of the *batta* which had been reduced; and consequently that Captain Vertue was an officer of the Company's service at the time of his arrest, and properly triable by court martial for his offence.

In the foregoing case of *Vertue v. Lord Clive*, Mr. Justice Yates intimated that Vertue ought to have given sufficient notice to prevent the advanced pay and his being mustered

If appears, therefore, that there may be a state of circumstances, under which an officer may have a legal right to resign, and so to obtain a release or exemption from military law; and that the Crown would be bound to accept such resignation. It would, nevertheless, be impossible to define every combination of circumstances in which such a right would be maintainable, if disputed by the Crown, or by the superior military authorities. Yet there can be little doubt that bodily or mental infirmity, or advanced age, would generally form a good legal title to a discharge from the service; and it is fairly to be inferred from the foregoing cases of Captain Parker and Captain Vertue, that, in time of peace, an officer who has given due notice of his desire to be discharged, and has allowed sufficient time to the Government to make arrangements for his relief, might effectually retire and discharge himself from the service, without incurring the penalties of military law. Such cases, however, are very unlikely to arise. But the foregoing decisions shew that an officer threatened with a court martial cannot escape from trial, by merely throwing up his commission, as his resignation is not perfect until it has been accepted by the Crown.

By the Act 33 Geo. III., c. 55, an officer in the East India Company's service, not returning to India on the expiration of his leave of absence, is deemed to have quitted the service, unless he has previously attained the rank or standing by virtue of which he would be entitled to remain in England.

APPENDIX.

I.—Prize Warrants*.

1. SCINDE BOOTY.

VICTORIA R.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, To all to whom these presents shall come Greeting. Whereas the Commissioners of our Treasury have represented unto us, that certain hostilities were carried on in the year 1843 against the Ameers of Scinde by our land forces and the land forces raised and paid by the East India Company, in which a portion of the Indus Flotilla co-operated: and that during the said hostilities certain battles were fought, and a quantity of booty and plunder captured or taken possession of, consisting of gold and silver bars and coins, of ornaments, jewels, and ornamented arms, and of guns, cattle, and other property, of which the following schedule or account has been rendered to our said commissioners, (that is to say,)

| | RUPEES. |
|--|-----------|
| Paid in to the Public Treasury in Scinde } on account of the articles sold, about } | 229,038 |
| Realized at Kurrachie | 17,743 |
| Value of Silver | 2,564,337 |
| Gold sold | 1,713,537 |
| Gold remaining unsold, estimated at | 123,273 |
| Lead, valued at | 15,000 |

to which are to be added the sum due from the Government for articles transferred to public departments, the sum due from individuals for articles sold in Scinde, and the sum which may be produced by the sale of the jewels, &c., which are at present in deposit at Bombay, but have been ordered to be sold;

And whereas it has been further represented unto us that the said booty and plunder do of right belong to us in virtue of our Royal prerogative, and that the said booty and plunder should

* As documents of this nature are not ordinarily accessible, it has been considered desirable to print a selection, for which I am indebted to the obliging courtesy of Philip Melvill, Esq., Military Secretary to the East India Company. H. P.

be given and granted in such manner as to us may seem meet and just ;

And whereas our said commissioners, under all the circumstances of this case, have recommended unto us to give and grant the said captured booty and plunder, or the produce or value thereof, as before stated, according to the following scheme (that is to say) ;

Such articles of personal use and ornament to be reserved for the Ameers as may be selected for that purpose by the Governor General of India in council, with the approbation of the Commissioners of our Treasury ;

The remaining property to be divided into sixths ;

One sixth to be given to all such of the troops stationed at, or between Shikarpoor, Seikkur, and Kurrachie, and all such of the Indus Flotilla stationed between Seikkur and Kurrachie on any day between the 17th of February and 24th of March, 1843, both included, as shall not be otherwise entitled to share in the booty ;

The Major-General commanding in Scinde, and the officers of the general staff of the forces serving under his orders in the above mentioned operations, to share in this portion as well as in the other portions hereinafter specified.

The remaining five sixths (subject to the deductions hereinafter specified) to be divided in two equal parts, one moiety to be given to the troops who fought at Meanee, and the other to those who fought at Hyderabad ; the troops who were in both battles receiving a share of each moiety ; and from the share or shares accruing to each individual under the distribution to be made of this portion of the booty there should be deducted and repaid into the Company's Treasury the amount of the Donation of Batta, which the individual entitled to the said share or shares has received under the general order of the Government of India, dated 28th of February, 1844, as having been present at the battles of Meanee or Hyerabad ;

And our said Commissioners likewise recommend that the troops under Lieutenant-Colonel Outram, who were detached previously to the battle of Meanee, and directed to fire the Shikargah on upon the right flank of the army, as well as the detachment which so gallantly defended the British Residency on the 15th of February, and also such portion of the Indus Flotilla as was engaged in that defence, or co-operated with the detachment under Colonel Outram, or was in any other way in immediate connection with the army that achieved the victory of Meanee, should share as if they had all been actually present at the battle of Meanee ; and in like manner the garrison of Hyderabad, should be entitled to share in the sum allotted to those engaged in the second battle ;

Now know ye that We, taking the premises into our Royal consideration, are graciously pleased to approve the said scheme, and do, with the advice and recommendation of our said Com-

missioners, by this our Royal Warrant, under our Royal sign-manual, give and grant the said captured booty and plunder, or the produce or value thereof as before stated, unto the Directors of the East India Company, or to such person or persons as they shall appoint to receive the same, upon the trust following, (that is to say) upon trust, after making the reservations and deductions above stated, to distribute the remainder among our land forces, and the land forces of the said Company, and the officers and crews of the Indus Flotilla, engaged in the aforesaid hostilities in accordance with the scheme hereinbefore mentioned and set forth, and with the usage* of the army of India ;

And we are graciously pleased to order and direct that in case any doubt shall arise respecting the claims to share in the distribution aforesaid, or respecting any demand upon the said captured booty or plunder, the same shall be determined by the Directors of the East India Company, or by such person or persons to whom they shall refer the same, which determination thereupon made shall, with all convenient speed, be notified in writing to the Commissioners of our Treasury, and the same shall be final and conclusive to all intents and purposes, unless, within three months after the receipt thereof at the office of the Commssioners of our Treasury, We shall be graciously pleased otherwise† to order, hereby reserving to ourselves to make such order therein as to us shall seem meet.

Given at our Court at Windsor Castle, this 11th day of November, in the 9th year of our reign, and in the year of our Lord 1845.

By Her Majesty's Command,

(Signed) HENRY GOULBURN,
J. MILNES GASKELL,
WILLIAM CRIPPS.

* See *Post*, 264.

† This power was acted upon by awarding to Sir Charles Napier the share of a Commander-in-chief, viz. one entire eighth in lieu of one-sixteenth which had originally been allotted to him.

2. TARRAGONA BOOTY.

(*Conjunct Expedition of British Land and Sea Forces.*)

GEORGE R.

Whereas ordnance, arms, stores, magazines, and other booty have been captured from the enemy during the year 1813, at Tarragona, by that part of the British Army under Field Marshal the Duke of Wellington, in Spain, which was under the immediate orders of Lieutenant-General Lord William Bentinck, and by H. M. S. *Malta, Fame, Invincible, Merope, Buzzard* and *Volcano*, forming part of the fleet under Admiral Lord Exmouth, then under the immediate orders of Admiral Sir Benjamin Hallowell, and appropriated to the public service; And whereas an Act passed in the 54th year of the reign of our late Royal Father, entitled an Act for regulating the payment of Army prize money, and to provide for the payment of unclaimed and forfeited shares to Chelsea Hospital; And whereas, application hath been made to us by the said F. M. the Duke of Wellington and Admiral Lord Exmouth to grant the sum of £31,531 18s. (being the estimated value of such ordnance and stores) in trust, to be distributed as booty to the officers, non-commissioned officers, and privates serving in that part of the British army under his command in Spain, which was under the immediate orders of Lieutenant-General Lord William Bentinck, and to the officers, non-commissioned officers, seamen and marines, on board H. M. S. *Malta, Fame, Invincible, Merope, Buzzard* and *Volcano*, placed by Admiral Lord Exmouth under the immediate orders of Admiral Sir Benjamin Hallowell, at Tarragona; And whereas the said Field Marshal the Duke of Wellington, having expressed his wish not to participate in the distribution of the booty as Commander-in-chief of the British army serving in Spain; We, taking the same into our Royal consideration are graciously pleased to give and grant, and do hereby give and grant to the said Lieutenant-General Lord William Bentinck and Admiral Lord Viscount Exmouth the said sum of £31,531 18s.; and that the said sum be issued and paid without any fee or other deduction whatsoever, in trust, for the benefit of the said Lord William Bentinck and the officers, non-commissioned officers, and privates serving under his and of Admiral Lord Viscount Exmouth, and the officers, non-commissioned officers, seamen, and marines actually on board of our before-mentioned ships employed in that service, as booty and prize, or bounty

money in the nature of prize money, under the provisions of the said Act passed in the 54th year of the reign of our late Royal Father, to be distributed under the provisions of the said Act of Parliament, and agreeably to our Proclamation for the distribution of prize, in force at the time of the said expedition, and this our Royal grant, in manner and in the several proportions following (that is to say), such sum being divided into eight equal parts :

| | |
|---|---------------------------|
| To the said Lieut.-Gen. Lord Wm. Bentinck, Adm ^l . Lord Vis ^t . Exmouth, and such General Officers and Admirals under their command, who were actually present at the capture of the said booty, so that the said Lieut.-Gen. Lord Wm. Bentinck and Admiral Lord Viscount Exmouth shall take one moiety, and the other General Officers and Admirals who were actually present at the capture of the said booty, the other moiety in equal pro- portions | } <i>One Eighth.</i> |
| To the Colonels, Lieut.-Colonels, and Majors in the army, and Captains and Commanders in the navy, who were actually present at the capture of the said booty, to be equally distributed among them, and the persons entitled by the usage of our army to share with them | } <i>Two Eighths.</i> |
| To the Captains in the army and Lieutenants in the navy, and other description of persons entitled by the usage of our army and navy respectively to share with them | } <i>One Eighth.</i> |
| To the Lieutenants, Cornets, Ensigns, and Quarter- masters in the army, and Warrant and other Offi- cers in the navy, and other description of persons entitled by the usage of our army and navy to share with them | } <i>One Eighth.</i> |
| To the Serjeants in the army and Petty Officers in the navy, and other description of persons entitled by the usage of our army and navy respectivly to share with them. | } <i>One Eighth.</i> |
| To the Trumpeters and Soldiers, Seamen, and Ma- rines, and other description of persons entitled by the usage of our army and navy respectively to share with them | } <i>Two Eighths.</i> |

And we are further pleased to direct that all such respective sums of money shall be distributed as prize or bounty money, or money in the nature of prize money, according to the provisions of the said Act of Parliament of the 54th year of the reign of our

Royal Father, and the several Acts relating to the distribution of prize-money in our navy, and our said Proclamation, and this our grant, and the rules and customs heretofore used and observed in our army and navy respectively in that behalf, and the agents entrusted with the distribution thereof by the said Lieutenant-General Lord William Bentinck and Admiral Lord Viscount Exmouth shall give all such notices, and make such notifications of such distribution, as are required by the said Act of Parliament and the several Acts of Parliament in force relating to the distribution of prize-money in our army, and our said Proclamation, and pay over all unclaimed shares to Chelsea and Greenwich Hospitals respectively, to be hereafter paid to the persons entitled thereto, or remain for the benefit of the said respective Hospitals according to the provisions and regulations of the said Act of Parliament and the several Bills in force relating to the distribution of prize-money in our navy; And We are further graciously pleased to order and direct that in case any doubt shall arise respecting the said distribution, or with respect to any other matter or thing relating thereto, the same shall be determined by the said commanders of the said land and sea forces, Lieutenant-General Lord William Bentinck and Admiral Lord Viscount Exmouth, or by such person or persons to whom the said commanders of the said land and sea forces shall refer the same; and such determination shall be final and conclusive* upon all persons concerned, and as to all matters and things relating to the said distribution.

Given at our Court, at Carlton House, this 7th day of June, 1820, in the first year of our reign.

By his Majesty's command,

(Signed) BATHURST.

* It will be observed that this warrant reserves no power to the Crown to vary the decision of the Commanders-in-chief as in the final clause of the Scinde Warrant, and of those which are printed in the following pages. It is conceived, however, that on the principles above stated (Chap. VII.) the powers of the Crown continue in force over the prize-money until the distribution commences.

3. GENOA BOOTY.

(Conjunct Expedition of British and Allied Forces.)

In the name and on behalf of His Majesty,

GEORGE P. R.

Whereas it has been represented to us that at the capture of the Territory and City of Genoa and its dependencies, on the 18th of April, 1814, a quantity of ordnance, military and naval stores, ships and vessels, and other booty, being public property belonging to the enemies of the Crown of Great Britain, was seized and taken possession of by our sea and land forces, under the command of Vice Admiral Sir Edward Pellew, Bart. (now Lord Exmouth) and Lieutenant-General Lord William Cavendish Bentinck, Knight of the Bath, commanding our naval and military forces in and upon the coasts of the Mediterranean, assisted by certain Sicilian and Italian troops, and troops in British pay, and has been condemned to us as good and lawful prize taken in the said conjunct expedition; And whereas no instructions were given by us for the division or distribution of the booty to be captured on the said conjunct expedition; *And whereas* application hath been made to us that we would be graciously pleased to order and direct that the same ordnance, military and naval stores, ships, vessels and other booty may be distributed between the officers and crews of our ships, and those of our Ally the King of the Two Sicilies, and the officers and men of our land forces, and those of our Ally the King of the Two Sicilies, according to any plan of distribution We shall be graciously pleased to approve: We, taking the premises into our Royal consideration, are graciously pleased to give and grant, and do hereby give and grant to the said Vice-Admiral Sir Edward Pellew (now Lord Exmouth), Commander-in-chief of our fleet and vessels employed on the said expedition, and Lieutenant-General Lord William Cavendish Bentinck, Knight of the Bath, Commander-in-chief of our land forces employed on the said expedition, the said ordnance, military and naval stores, ships, vessels, and other booty, so as aforesaid taken and condemned to us, in trust, to distribute the same amongst the commanders-in-chief, general and flag officers, and all other officers serving on the said expedition in the following manner (that is to say), that the division of the booty between the army and navy and the said Sicilian and Italian ships and troops serving in the said expedition, shall be made according to the

following scheme or schemes: the whole being first divided into eight equal parts:

- 1 To the Commanders-in-chief and to the Flag and General Officers serving in the said expedition, one-eighth, to be distributed amongst them, so that each Commander-in-chief shall take double that share which each General and Flag Officer (not being Commander-in-chief) shall take; but if the number of Flag and General Officers, exclusive of the two Commanders-in-chief, shall exceed four, in that case a moiety of the said one-eighth shall be divided between the two Commanders-in-chief, and the other moiety amongst the other Flag and General Officers } *One Eighth.*
- 2 To the Colonels, Lieutenant-Colonels, and Majors in the army, and Post Captains, and Masters and Commanders in the navy, *and to the persons of like rank belonging to the said Sicilian and Italian ships and troops*, to be equally distributed amongst them } *One Eighth.*
- 3 To the Captains of Marines and land forces, and the sea Lieutenants, and other description of persons entitled by our Proclamation for the distribution of prize of the 11th November, 1807, or by the usage of our army, to share with them, *and to the persons in like rank belonging to the said Sicilian and Italian ships and troops* } *One Eighth.*
- 4 To the Lieutenants and Quarter-Masters of marines, and Lieutenants, Ensigns, and Quarter-Masters of land forces, and the Boatswains, Gunners, Pursers in the navy, and other description of persons entitled by our said Proclamation or by the usage of our army, to share with them, *and to the persons in like rank belonging to the Sicilian and Italian ships and troops* } *One Eighth.*
- 5 To the Midshipmen, Captains' Clerks, Serjeants of marines and land forces, and the other description of persons entitled by our said Proclamation or by the usage of our army, to share with them, *and to the persons in like rank belonging to the said Sicilian and Italian ships and troops*) *One Eighth.*
- 6 To the Trumpeters, Quarter-Gunners, Seamen, Marines, and Soldiers, and the other description of persons entitled by our said Proclamation, or by the usage of our army, to share with them, *and to the persons in like rank belonging to the said Sicilian and Italian ships and troops* } *One Eighth.*

And that the portion of the said booty, so belonging to our said land forces employed on the said expedition, *and the persons belonging to the said Sicilian and Italian troops*, shall be distributed between the Commanders-in-chief, officers, and privates composing the same, according to the rule heretofore used and observed by the army, under the above scheme or schedule ;

And that the portion of the said booty so as aforesaid belonging to our naval forces employed in the said expedition, *and the persons belonging to the said Sicilian and Italian ships*, be distributed amongst the Commander-in-chief, flag and other officers, and men belonging to our navy employed on the said expedition, *and the persons belonging to the said Sicilian and Italian ships*, agreeably to our Proclamation for the distribution of prize in force at the time of the said expedition.

And we are graciously pleased to order and direct, that, in case any doubt shall arise respecting the said distribution, or respecting any charge or demand upon the said captured property, the same shall be determined by the Commanders-in-chief, and flag and general officers, or such of them as can conveniently be assembled, or by such person or persons to whom they, or a majority of them, shall agree to refer the same, which determination so thereupon made, shall, with all convenient speed, be notified in writing to the Clerks of our Council, and the same shall be final and conclusive to all intents and purposes, unless within three months after the receipt thereof at our Council Office, we shall be pleased otherwise to order ; hereby reserving to ourself to make such orders therein as to us shall seem fit. Given at our Court at Carlton House, this second day of August, 1815, in the 55th year of our reign.

By Command of H.R.H. the Prince Regent, in the name, and on the behalf of, His Majesty.

(Signed) BATHURST.

4. RUSSOOL KHYMA BOOTY.

*(Conjunct Expedition of British and Indian Forces
against Pirates.)*

GEORGE R.

Whereas the Commissioners of our Treasury have represented unto us, that in the year 1819, the Governor in Council of Bombay, with the concurrence of the Governor in Council of Fort William in Bengal, made war on the part of the United Company of Merchants trading to the East Indies, against the Joasmees and other piratical tribes in the Gulf of Persia, as a defensive measure against the depredations of the said piratical tribes upon the ships and property of the said United Company, and other our subjects in those parts; and that, in the course of such warfare, considerable booty and plunder, consisting of treasure, boats, and other articles belonging to the said piratical tribes, or some or one of them, was taken in the month of January, 1820, at the capture of Russool Khyma, in the Gulf of Persia, in an expedition by our ships and vessels in the service of the said United Company, and by our land forces and land forces raised and paid by the said United Company, under the command of Major-General Sir William Grant Keir and Francis Augustus Collier, Esq., Commander of our ship *Liverpool*, acting under the orders of Vice-Admiral Sir Richard King, K.C.B., Commander-in-chief of our ships and vessels employed in the East Indies. And whereas it has been further represented to us that the said booty does of right belong to us in virtue of our royal prerogative, and that the said booty should be given and granted in such manner as to us should seem meet and just; And whereas application has been made to us on the part and behalf of the said United Company of Merchants trading to the East Indies and of the captors, that we would be graciously pleased to grant the said captured booty, or the produce thereof, to be distributed amongst them in such proportions as to us in our royal wisdom might seem meet; We, taking the premises into our royal consideration, are graciously pleased to give and grant the said captured booty, or the produce thereof, in manner following, to wit, one moiety or half part thereof unto the said United Company of Merchants trading to the East Indies, or to such person or persons as they shall appoint to receive the same, to be retained to the use of the said United Company; and as to the other moiety or half part of the said captured booty, or the produce thereof, unto Major-General Sir William Grant Keir and Vice-Admiral Sir Richard King, K.C.B., intrusted to

distribute the same amongst our land and naval forces, and the land and naval forces as aforesaid of the said United Company of Merchants of England trading to the East Indies employed in the said expedition, according, to the following scheme or schedule;

The whole of such moiety being divided into eight equal parts:

- | | |
|---|----------------------------|
| <p>To the Commanders-in-chief and Flag and General Officers, to be distributed amongst them, so that each Commander-in-chief shall take double that share which each General and Flag Officer (not being a Commander-in-chief) shall take; but if the number of Flag and General Officers, exclusive of the Commanders-in-chief, shall exceed four, in that case a moiety of the said one-eighth shall be divided between the two Commanders-in-chief, and the other moiety between the other Flag and General Officers</p> | <p><i>One Eighth.</i></p> |
| <p>To the Colonels, Lieutenant-Colonels, and Majors, serving in the said land forces, and the Post-Captains, Masters, and Commanders in the said naval forces, to be distributed amongst them, according to the usage prevailing in India* with respect to such land and naval forces</p> | <p><i>Two Eighths.</i></p> |
| <p>To the Captains of marines and land forces, and the Lieutenants serving in the said naval forces, and other description of persons entitled by our Proclamation for the distribution of prizes in force at the termination of last war, according to the usage prevailing in India* with respect to such land and naval forces, to share with them</p> | <p><i>One Eighth.</i></p> |
| <p>To the Lieutenants and Quarter-Masters of marines, and Lieutenants, Ensigns, and Quarter-Masters of land forces, and the Boatswains, Gunners, and Pursers, serving in the said naval forces, and other description of persons entitled by our said Proclamation, or according to the usage prevailing in India* with respect to such land and naval forces, to share with them</p> | <p><i>One Eighth.</i></p> |
| <p>To the Midshipmen, Captains' Clerks, Serjeants of marine and land forces, and other description of persons serving in the said land and naval forces, entitled by our said Proclamation, or according to the usage prevailing in India* with respect to such land and naval forces, to share with them</p> | <p><i>One Eighth.</i></p> |

* See Post 264.

To the Trumpeters, Quarter-Gunners, Seamen, Marines, and Soldiers, and other description of persons serving in the said land and naval forces, entitled by our said Proclamation, or according to the usage prevailing in India with respect to such land and naval forces, to share with them .

*Two
Eighths.*

And we do hereby direct, authorize, and require all officers, and persons whomsoever that it shall or may concern, to pay unto the said United Company of Merchants trading to the East Indies, or to such person or persons as they shall appoint to receive the same, one moiety or half part* of the said captured booty or the produce thereof, and unto the said Major-General Sir William Grant Keir and Vice-Admiral Sir Richard King, K.C.B., or their agent or agents legally appointed, one other moiety or half part of the said captured booty or the produce thereof, as is hereby given and granted unto them, in trust, as aforesaid; And we are graciously pleased to direct, that the portion of the said booty so belonging to the said land forces employed on the expedition shall be distributed between the Commanders-in-chief, officers, and privates composing the same, according to the rule heretofore used and observed by the army in India, under the aforesaid scheme or schedule; And that the portion of the said booty, so as aforesaid belonging to the naval forces employed in the said expedition, be distributed amongst the Commander-in-chief, flag and other officers, and men belonging to the said naval forces employed in the same expedition, agreeably to our Proclamation aforesaid, and to the practice of our navy respecting the ships or vessels in the service of the United Company of Merchants, trading to the East Indies sharing with them; And we are graciously pleased further to order and direct that in case any doubt shall arise respecting the claims to share in the distribution of the moiety hereby granted to the said land and naval forces, or respecting any demand upon the said captured booty, the same shall be determined by the said Major-General Sir William Grant Keir and Vice-Admiral Sir Richard King, K.C.B., and the flag and general officers, or such of them as can be conveniently assembled, or by such person or persons to whom they, or a majority of them, shall agree to refer the same; which determination thereupon made shall with all convenient speed be noticed to the Commissioners of our Treasury,

* The moiety thus granted by the Crown to the East India Company was ordered by the Court of Directors, in the customary manner, to be paid as a donation from them to the forces engaged in the expedition in question, and to be distributed according to the King's Warrant relative to the other moiety.

and the same shall be final and conclusive to all intents and purposes, unless within three months after the receipt thereof at the office of the Commissioners of our Treasury, We shall be pleased otherwise to order; hereby reserving to ourselves to make such order therein, as to us shall seem fit*.

Given at our Court at Carlton House, this 10th day of October, 1823, and in the fourth year of our reign.

By His Majesty's command,

(Signed) B. PAGET,
LOWTHER,
G. C. H. SOMERSET.

* An instance of the exercise of the power thus customarily reserved in prize-warrants occurred in the case of the Burmese prize-money, when King William the Fourth, on the memorial of Major-Gen. Sir Archibald Campbell, the Commander-in-chief in the Burmese war, supported by the unanimous opinion of the law officers of the Crown, directed the original scheme of distribution to be altered, by excluding the Arracan division of the forces employed in the war from all participation in the Ava booty, on the ground that that division was an entirely separate and distinct force, which had not, in a military point of view, afforded any actual or constructive co-operation towards the capture of the booty in question. This proceeding was in accordance with the principle applied to the claims of the Marquis of Hastings and the Bengal Army in reference to the Deccan prize-money. *Supra*, 115.

In the case of the Burmese booty the Crown further exercised its prerogative, by directing the restitution of the bells of some religious edifices to the enemy, in order to prevent the natives of India from entertaining the idea that the British Government deemed such articles legitimate objects of plunder in Indian warfare. But to compensate the troops for the loss, the Crown recommended the East India Company to substitute a donation of money, to the value of the property thus restored, which was estimated at £10,400.

II.—*India Prize Money.*

The following is the present standing scale of distribution* of prize money in India, to European commissioned and non-commissioned officers, privates, &c.

| | SHARES. |
|--|-----------------------------|
| Commander-in-chief | $\frac{1}{4}$ of the whole. |
| General Officers | 1500 |
| Colonels | 600 |
| Lieut.-Colonels, Adjutant-Gen.† and Quarter-Master-General† of Her Majesty's and the Hon. Company's† Troops, Commissary-General†, Members of the Medical Board, Inspector of Hospitals of Her Majesty's Troops | 360 |
| Majors, Deputy Adjutant-General, and Deputy Quarter-Master-General† of Her Majesty's and the Hon. Company's Troops, Deputy Commissary-General†, and Superintending Surgeons | 240 |
| Captains, Surgeons, Assistant Adjt.-General†, and Assistant Quarter-Master-General of Her Majesty's and the Hon. Company's Troops, Assistant Commissary-General, Deputy Assistant Adjutant-General†, Quarter-Master General and Commissary-Gen., Paymaster†, Surgeon to His Excellency the Commander-in-chief, Brigade-Majors†, Aides-de-camp† to His Excellency the Commander-in-chief and General Officers, and Commissaries of Ordnance | 120 |
| Lieutenants, Assistant-Surgeons, Cornets, Ensigns, Adjutants and Quarter-Masters of Her Majesty's Dragoons and Infantry, Veterinary Surgeons, Deputy Commissaries, and Deputy Assistant Commissaries of Ordnance | 60 |
| Conductors, Riding Masters, Apothecaries, Stewards, Sub-assistant and Veterinary Surgeons and Provost Martial | 15 |

* Extracted from Jameson's *Code*: Bombay, 1844.

† These officers share according to their brevet or regimental rank, if superior to those above stated.

| | SHARES. |
|--|---------|
| Sub-conductors, Assistant-Apothecaries, Assistant-Stewards, Regimental Serjeant-Majors, Staff-Brigade and Farrier-Serjeants of Horse Artillery, Park Serjeant, Armourer, and Serjeants of Artillery | 3 |
| Trumpet-Majors, Paymaster-Serjeants, Saddler-Serjeants, Schoolmaster-Serjeants, Hospital-Serjeants, Drill-Serjeants, Colour-Serjeants, Armourer-Serjeants, Drum-Majors, Brigade and Staff-Serjeants of Foot Artillery, Magazine - Serjeants, Laboratory - Serjeants, and Serjeants | 2 |
| Fife-Majors, Corporals, Bombardiers, Trumpeters, Farriers, Rough Riders, Gunners, Drummers, and Privates | 1 |
| Volunteers | 1 |

The following scale of distribution of prize-money, for the several classes and ranks of native troops, has been promulgated by the Court of Directors of the East India Company, and ordered to be adopted at all the Presidencies of India*.

| | SHARES. |
|-------------------------------------|-----------------|
| Subedar, Syrang | } 6 |
| Woordee, Major, Russaldar | |
| Jemedar, Tindal | } 2 |
| Naib Russaldar | |
| Havildar, Native Doctor | 1 |
| Naik, Drummer | } $\frac{2}{3}$ |
| Trumpeter, Gun Lascar | |
| Private, Puckallie | |
| Native Farrier, Duffadar | |
| Nishan Burder, Nuggurchee | |
| Vakell and Hirkarra | |
| Gun-Driver, Bheestie | |
| Nakeeb | |

For the Royal Army there is no standing scale of distribution, though, by the foregoing Prize Warrants, it will be seen that a uniform practice is generally observed.

* Jameson's *Code*, 688.

IV.—*Prize Proclamation for the Russian War of 1854.*

VICTORIA R.

Whereas by our Royal Proclamation, bearing date the Twenty ninth day of March, One thousand eight hundred and fifty-four, We have ordered and directed that the net proceeds of all prizes taken during the present War with Russia, by any of our ships or vessels of war, after the same shall have been to us finally adjudged lawful prize, shall be for the entire benefit of the officers and crews of such ships and vessels of war (save as therein excepted), in which Proclamation We have directed in what proportion the land forces, doing duty as Marines, shall be entitled to share: And whereas in the said Proclamation We have reserved to ourselves the division and distribution of all prize and booty taken on any conjunct expedition of our ships and vessels of war with our army; and it is desirable that We should provide for the division and distribution of all prize and booty taken on such conjunct expedition, as also by our army alone: We therefore hereby order and direct, that in such cases the net proceeds of the share which shall be assigned by us to our army, under our Royal Sign Manual, shall be divided and distributed in the following manner and proportions, viz. :—

| | |
|--|--|
| Commander of the Forces | } <i>One Fourth of One Tenth part of the net proceeds.</i> |
| General Officers : | |
| 1st Class.—General Officers commanding Divisions, and other Officers, &c. holding equivalent Staff Appointments | } <i>The remaining Three Fourths of One Tenth part of the net proceeds; the same to be so divided that a General Officer, &c. of the 1st Class shall receive One Half more in amount than a General Officer, &c. of the 2nd Class.</i> |
| 2nd Class.—Other General Officers, and all other Officers, &c. holding equivalent Staff Appointments | |
| Field Officers : | |
| 1st Class.—Colonels, Lieutenant-Colonels, and Brevet Lieutenant-Colonels, and other Officers holding Staff Appointments equivalent thereto | } <i>One Eighth of the remainder of the net proceeds; the same to be so divided that a Field Officer, &c. of the 1st Class shall receive One Half more in amount than a Field Officer, &c. of the 2nd Class.</i> |
| 2nd Class.—Brevet Lieutenant-Colonels not holding an Appointment qualifying them to share in the preceding Class of Field Officers, and all Majors, Regimental or Brevet, and all other Officers holding Appointments equivalent thereto | |

The remainder of the net proceeds shall be distributed in the following Classes, so that every Officer, Non-Commissioned Officers, &c. shall receive shares or a share according to his Class, as set forth in the following scale :—

| | |
|--|-----------------------------------|
| 1st Class.—Captains, and all other Officers entitled according to the usage of our army to share in that rank | } <i>Thirty-five Shares each.</i> |
| 2nd Class. — Subalterns, and all other Officers entitled according to the usage of our army to share in that rank | } <i>Twenty Shares each.</i> |
| 3rd Class.—Serjeant Majors, Quartermaster Serjeants, and all other Staff Serjeants, and others holding equivalent rank | } <i>Ten Shares each.</i> |
| 4th Class.—Serjeants, and others holding equivalent rank | } <i>Eight Shares each.</i> |
| 5th Class.—Corporals | <i>Four Shares each.</i> |
| 6th Class.—Private Soldiers, Trumpeters, Drummers, &c. | } <i>Three Shares each.</i> |

And in the event of any difficulty arising with respect to the Class in which any Officer, &c. shall be entitled to share, our will and pleasure is, that the same shall be determined and adjusted by the Commander-in-Chief of our land forces for the time being.

Given at our Court at Buckingham Palace, this Eleventh day of August, in the year of our Lord One thousand eight hundred and fifty-four, and in the eighteenth year of our reign.

GOD SAVE THE QUEEN.

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"The Principles of War"
Cadell - 1815 -
See p. 245 -

