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MILITARY LAW.

Its Origin, Development and Application.

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ONT.

In submitting the following remarks on the subject of Military Law, its Origin, Development and Application, I lay no claim to originality in the treatment of my subject. The matter contained in my paper is compiled from notes extracted by me from the works of standard writers on Military Law. I am indebted to "Clode's Military Forces of the Crown," the official "Manual of Military Law," and to the works of Lt.-Colonel S. C. Pratt and Major D. Jones, R.A., for the material which I have put together in the following pages:—

In order to maintain proper discipline in the army, it has been found necessary to confer special powers on the military authorities to enable them to deal with offences which it would be either impossible or inexpedient to leave to the Civil power.

As the essential strength of an army depends on the power and force of many men being absolutely subordinate to and at the disposal of the will of one, the first necessity in the existence of such a body is to ensure implicit obedience to the orders of superior authority, and so to ingraft this quality into the constitution of the force, that every member of it may, according to his position, be certain as by a second nature, to fulfil the orders he may receive or to enforce those he may find it necessary to give.

Further, unless such a body is under strict rule and discipline, it would not fail to become a terror and an oppressive burden upon the community among whom it is placed.

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for the force acquired by combination would place its members beyond the control of the ordinary civil power. The officers in command of the military force must, therefore, be charged with the duty of keeping it constantly in hand and must have effectual means of so controlling it that those composing it may always be made to respect the laws and customs of their civilian fellow-subjects, and to comport themselves as peaceable, not turbulent members of society.

The necessity for the existence of a distinct code of Military Law is thus stated by Lord Loughborough:—

“The army being established by the authority of the Legislature, it is an indispensable requisite that there should be order and discipline kept up in it, and that the persons who compose the Army, for all offences in their military capacity, should be subject to trial by their officers. That has induced the absolute necessity of a Mutiny Act. One object of that Act is to provide for the Army, but there is a much greater cause for the existence of that Act, viz.: the preservation of the peace and safety in the Kingdom. The object therefore is to create a Court, invested with authority to try those who are part of the Army, in all their different descriptions of officers and soldiers, limited to breaches of military duty.”

Military Law is the law which governs the soldiers in peace and war; at home and abroad, at all times and in all places, the conduct of officers and soldiers, as such, is regulated by Military Law. Military Law, as distinguished from Civil Law, is the law relating to and administered by Military Courts and concerns itself with the trial and punishment of offences committed by officers, soldiers, and other persons (e.g., camp followers, &c.) It has no regular permanent statute, and reference to precedent, such as at Common Law, is by no means frequent. It is regular in its procedure, and is administered according to an authorized code. There exists however the written law, the Army Act, Rules of Procedure, King's Regulations, Army Orders, Royal Warrants and Orders in Council, and the unwritten law, founded upon the established custom of the Army and recognized in the former Articles of War, under the term, “Custom of War,” which was analogous to Common Law. The Rules of Procedure now in force state: “In any case not provided for by these Rules, such course will be adopted as appears best

calculated to do justice." In such cases decisions given by competent authority will be followed when possible, but the nature of Military Courts being temporary, and all records of proceedings being destroyed after a certain time, former precedents cannot always be followed, although members of Courts would often have gladly availed themselves of precedents for their guidance if such had been available.

The term Military Law is frequently used in a wider sense, to include not only the disciplinary, but also the administrative law of the Army, as for instance the law relating to enlistment and billeting and impressment of carriages.

Military Law is embodied in the Army Act, which is part of the Statute Law of England and is judicially recognized by all Civil Courts. The administration of the Code is simplified by means of Rules of Procedure, Regulations and Orders, which lay down the manner in which the Law is to be carried out by the Military Courts. In the administration of Military Law all the principles of Civil Law are observed, but the technicalities of the latter are not adhered to.

The study of Military Law involves considerations as to its origin and progress, as well as the exact details of the Law as it at present exists, and though this latter point is undoubtedly of the greatest importance still it is clearly necessary, even in the hurried glance at the question which we are able to take to-day, that something should be said concerning the introduction of a Law, which till the close of the 17th century was unknown in England.

The Army Act has of itself no force, but requires to be brought into operation each year (generally in April) by another Act of Parliament called the "Army (annual) Act," thus securing the constitutional principle of the control of Parliament over the discipline requisite for the government of the Army. The advantage of this method of enactment over that usually followed in Civil Law is that the Act having to be re-enacted every year, can be periodically corrected, and all regulations or enactments becoming obsolete, or requiring change, can be struck out or amended. Considerable use has been made of these opportunities for amendment. In Civil Law it often happens that only alterations in parts of certain ancient Acts are made from time to time,

and so one Act gets, as it were, piled up on top of another, until there is great confusion:

The *object* of Military Law is to maintain discipline among the troops forming part of the Army. To effect this object, acts and omissions, which are mere breaches of contract in Civil Life, such as desertion, insubordination and disobedience of orders, must, if committed by soldiers, even in time of peace, be made what are known as crimes, or offences with penalties attached to them.

While on active service, any act or omission which impairs the efficiency of a man in his character as a soldier, must be punished with severity. Civil Law would be inadequate for this purpose, because it does not recognize at all some of the most serious military crimes and offences—such for example as mutiny—fraudulent enlistment, neglect or disobedience of orders, sleeping on one's post as a sentry—and treats as comparatively trivial, other offences, such as disobedience, insolence to superiors, insubordination, absence without leave, and drunkenness on duty, which are military offences of a grave and serious character. Moreover Civil Law is slow and complicated, and requires trained administrators, whereas Military Law must be prompt and decisive in its action, and to be efficient, the procedure connected with its administration should not be complicated with details.

The *study* of Military Law involves the consideration of the measures of repression and punishment which may be resorted to for the maintenance of discipline, but while the existence of such powers is obviously a necessity, it would be a grave error to imagine that punishment is, in itself, the chief agent to be relied upon for promoting and maintaining discipline among soldiers, whether regulars or militia. Discipline cannot be enforced solely by the fear of punishment, and no reliance can in reality be placed upon any system which is not founded upon the good relations and understanding existing between military superiors, and their inferiors in rank, and the mutual respect of officers and men. The *spirit* of obedience and subordination, built up by these means, rests upon a sure basis, and cannot be easily undermined. On the other hand, in military, as in civil life, punishment must be necessarily meted out to offenders, and this, with increasing severity, according as it appears that reproof, or the infliction of mild forms of

punishment, have failed to take effect. The *absence* of crime, not its *screened existence*, is the criterion of good discipline and the certainty that serious crime will never be overlooked or treated with indifference, is the surest deterrent to its commission. The strict enforcement of discipline, if governed by considerations of fairness and equity, will never be regarded in any adverse spirit by military subordinates, and if it goes hand in hand with the friendly interest of the officer for his men in everything appertaining to their comfort, welfare and happiness, it will seldom fail to establish and maintain a system of sound discipline, in the truest acceptation of the term, and will go far to render the application of Military Law unnecessary, save in rare instances.

Military Law consists of two parts, (a) written, (b) unwritten, or the customs of war. The *written* part applicable to the militia of Canada consists of:

1. The Militia Act.
2. The King's Regulations and Orders for the Canadian Militia, 1910.
3. The Imperial Army Act.
4. All other laws applicable to His Majesty's troops and not inconsistent with the Militia Act.
5. The King's Regulations for the (Imperial) Army.

The *unwritten part* is founded upon the established customs of the Army, as ascertained by decisions given by competent authority, and depends on precedent and the practice of civilized nations in war.

The Imperial Army Act, the King's Regulations, and Imperial Laws relating to the Army are made applicable to the Canadian Militia, by Section 74 of our own Militia Act, which says:—

Section No. 74 of the Militia Act.

The Army Act for the time being in force in the United Kingdom, the King's Regulations, and all other laws applicable to His Majesty's troops in Canada and not inconsistent with this Act or the regulations made thereunder, shall have force and effect as if they had been enacted by the Parliament of Canada for the government of the Militia, and every officer and man of the militia shall be subject thereto from the time of being called out for active service,

and also during the period of annual drill or training under the provisions of this Act, and also at any other time while upon military duty, or in the uniform of his corps, upon or within, any rifle range or any armoury or other place where arms, guns, ammunition or other military stores are kept, or any drill shed or other building or place used for militia purposes, or during any drill or parade of his corps at which he is present in the ranks, when going to or from the place of drill or parade, and also whether in uniform or not at any drill or parade of his corps at which he is present as a spectator.

(2) Officers and men of the permanent force and members of the permanent staff of the militia shall at all times be subject to military law.

I can only refer in the briefest manner to the origin and history of Military Law from the time of the conquest to the passing of the Army Act, and to the steps by which the necessity for a statutory power to maintain discipline in the Army led gradually to the substitution in time of war, of Articles of War issued under the authority of the Mutiny Act, for Articles of War, issued under the prerogative power of the Crown.

Before proceeding further I think we should distinguish clearly between Military Law proper, and what is known as Martial Law.

What is known as Martial Law consists also of exceptional powers for dealing with offences. As distinguished from Military Law and the Customs of War, it is unknown in English jurisprudence. It has no code, is irregular in its application and, unless proclaimed by Parliament, is administered by persons who have either assumed the power to do so, or who have received it without legal sanction. It affects all persons, both civil and military.

Up to the close of the 17th century Martial Law had been from time to time exercised in Great Britain and Ireland by commissions from the reigning sovereign, but even then it was considered by Parliament as an extreme use of the Royal prerogative. In the early Mutiny Acts there was no mention of the Crown's prerogative to proclaim Martial Law, but in the later Acts in the present Army Act it distinctly states that no man can be "subjected in time of peace to any kind of punishment within this Realm by Martial

Law." Hence there is a distinctly defined permission to proclaim Martial Law, but the difficulty remains to define when this authority may be exercised.

There have been many definitions of Martial Law, but all are considered defective.

Sir D. Dundas, as Judge Advocate General in 1850, said:

"It is necessary to distinguish between Martial and Military Law. Military Law is to be found in the Mutiny Act and Articles of War. Martial Law is not a written law—it arises on the necessity to be judged by the Executive, and ceases the instant it can be allowed to cease. Military Law has only to do with His Majesty's land forces. Martial Law comprises all persons, whether Civil or Military.

Sir Chas. Napier said of it:—"The union of Legislative, Judicial, and Executive power in one person, is the essence of Martial Law." The Duke of Wellington said it was neither more nor less than the will of the General of the Army. It has also been defined as "Sway exercised by a military commander over all persons, whether Civil or Military, within the precincts of his command, in places where there is either no civil judicature, or where such judicature has ceased to exist."

Martial Law was proclaimed in Canada during the Rebellion of 1837. The letter of instructions from the War Office to the Lieut.-General commanding stated: "In all cases where the unlimited authority you are now vested with can be exercised in co-operation with, or in subordination to the Civil Courts, you are required to so execute it." Hence the General was always when possible to send persons for trial before the Civil authorities.

The law of necessity for the proclamation of Martial Law is then fully recognized, but all acts done under it save to be covered by an act of indemnity, which covers from Civil prosecution. This is always allowed for acts done reasonably in good faith by the ruling authority for the suppression of rebellion, and also for such acts as have been done by subordinates under and with the authority of superiors, and even for acts done in good faith by inferiors without orders.

In the early periods of English history, Military Law only existed in time of actual war. Before the days of standing armies, troops in time of peace were few. They

were paid and kept by the sovereign as his personal guards, and were liable to punishment like any of his other servants. When war broke out, troops were raised as occasion required, and ordinances for their government, or Articles of War, as they were called, were issued by the Crown with the advice of the Lord High Constable or by the Peers of the Realm, or were enacted by the Commander-in-Chief, in pursuance of an authority for that purpose, given in his commission from the Crown. These articles only remained in force during the service of the troops for whose government they were issued, and ceased to operate on the conclusion of peace.

Military Law in time of peace did not come into existence till the passing of the first Mutiny Act in 1689. The system of governing troops on active service by articles of war such as those just mentioned issued under the prerogative power of the Crown, and continued from the time of the Conquest till long after the passing of the Annual Mutiny Acts, and did not actually cease till the prerogative power of issuing such articles was superseded in 1803 by a corresponding Statutory power. Mutiny Act, 43 Geo. III., Chap. 20.

Numerous copies of these old Articles made on the occasion of the various wars in which England was from time to time involved, are in existence. The earlier articles were of a very severe nature, inflicting death or loss of limb for almost every conceivable crime. The idea of a separate code, with distinct Courts, seems to have been taken from the Statutes, Ordinances and Customs of Richard II., (1377-99), issued by him to his army in the ninth year of his reign (1385), which established a Court of the Constable and Marshal and which dealt with Military matters not cognizable by Common Law. The power of the Marshal and his deputies was absolute and summary, extending to the death penalty, and there was no appeal except to the sovereign in person, though this was always objected to by Parliament.

These Statutes and Ordinances of Richard II. were followed by the Statutes of Henry V., and the orders for the Army published by Henry VII., before the Battle of Stoke. In the great Rebellion the King and the Parliamentary Leaders governed their troops by Articles of War.

Gradually they assumed the shape which they bore in modern times, and the Articles of War issued by Charles II. in 1672, more than any other, formed the groundwork or model for the present Military Code and the system of military judicature and more particularly of the Articles of War issued in 1878, and which were consolidated with the Mutiny Act, in "The Army Discipline and Regulation Act of 1879," now replaced by the Army Act, under which we work at present.

Attempts were made from time to time, especially during the despotic reigns of the Tudors, to enforce Military Law under the prerogative of the Crown in time of peace, but no countenance to such attempts was afforded by the Law of England. The first trace of the issue of laws applicable to soldiers (not in war time) was in 1625, for the government of the troops (guilty of offences, civil or military) who had returned from Spain, and whom Charles I. ordered not to be disbanded. For this purpose he issued a commission, in 1625, to 25 military officers and civilians for the government of these troops. These commissions exercised their authority so freely that their loyalty was challenged on the ground that in time of peace the Civil Magistrate had cognizance of all offences, and that the civil population at least were not subject to Military Law.

The Common Law of England (having sprung up in an age when all men bore arms occasionally, and none constantly) recognized no distinction in time of peace between a soldier and any other subject, consequently Parliament objected to the soldiers being withdrawn from the protection of Civil Laws, and this led to the declaration in the Petition of Right of 1627, by which soldiers were not to be withdrawn from the protection of Civil Law, nor from its punishments.

Up to that time the Army had been governed by Courts acting under the prerogative of the Crown, which declared what offences should be punishable, as well as the powers of punishment, and as there was no appeal to the Civil Courts, an absolute despotism had been set up. These commissions were thenceforth declared illegal and the Army left without any sufficient legal government at all and in the wars waged in 1638 against the Scots, Charles I. had by illegal means to raise a sum and pay his army and issue a commission to the Commander-in-Chief and others to punish offenders

against military discipline by means of laws and ordinances which the army had to obey. This army was disbanded in 1641, and in 1642 Parliament having undertaken to raise an army, its Commander-in-Chief, the Earl of Essex, obtained the sanction of Parliament to Articles of War which he promulgated that same year. In order to cover up any possible omissions in the Code, it wound up with a general clause for punishing according to the "ancient order of Martial discipline," offences for which no special order is set down. This clause, long known as the Devil's article, still exists, but in another form in the Army Act.

At the restoration of Charles II. the army then existing was raised by the Commonwealth.

The Parliament of the Restoration (1660) allowed Charles II. to retain at his own cost, and govern by his own Regulations, a body of soldiers, 8,000 strong, designated His Majesty's Guards and Garrisons, which ultimately formed the standing army of England, but no sanction was given to Military Law. Parliament feared that if it legislated for these troops, the country would have to pay for their maintenance, consequently the King was left to govern them under his own prerogative. The first Articles of War sanctioned by Parliament were in 1612 when Charles II. issued orders for the mustering, regulation and payment of his troops, to which I have before referred. By these authority was given to the General in command to constitute Courts Martial in time of peace, and a Judge Advocate was appointed to take evidence on oath. When capital punishment was inflicted, the prisoner was to be tried by the Laws of the Land; if the offence was not so punishable, he was to be tried by a Royal Commission issued under the great seal.

The origin of the later Military Courts is to be found in the ancient Court of Chivalry, the Judges of which were the Constable, or Lord High Constable who was originally the King's General, and the Marshal, or King's Marshal, whose duty it was to marshal the army and ascertain whether the persons liable to serve the King in His Wars, fulfilled their services. The Court of Chivalry formed part of the *Aula Regia*, or Supreme Court, established in England by William the Conqueror.

The Master of Horse, or Commander-in-Chief of the Army, was, from his position as one of the great officers of

State, a member of this Court, and had allotted to him the army, and all persons and matters connected therewith—and he and the Marshal together constituted the Court, which exercised civil and criminal jurisdiction. In time of war its jurisdiction was extended and the Court, which was usually called the Court of Constable, acquired somewhat the character of a permanent Court Martial, as it followed the march of the army, and punished summarily in accordance with the Articles of War in force for the time being, all the offences committed by the army.

The office of High Constable, as a permanent office, became extinct in the 13th year of the reign of Henry VIII., in 1521, on the attainder and execution of Edward, Duke of Buckingham, and since then a High Constable has never been permanently appointed, but only on occasion of a coronation, and like ceremonies.

This change, while it seriously affected the Court of Chivalry, or Court of Constable, did not materially affect the administration of Military Law, which was subsequently provided for by commissioners from the Crown, or clauses inserted in the Commission of the Commanders-in-Chief—authorizing them to enact ordinances for the government of the army under their command, and to sit in judgment themselves, or appoint Deputies to do so. These Deputies consisted of officers and out of their sittings arose a new form of Military Tribunal, called a Court or Council of War—which sat at stated times, under an officer of certain rank, who was styled President.

The transition from Council of War to Courts Martial in their present form was a matter more of form than of substance. The exact time at which Courts Martial, under that name, began to be held, is not ascertained, but they are mentioned with the distinction of General and Regimental Courts Martial, in the articles of war, known as "Prince Rupert's Code" issued in 1632, on the outbreak of the Dutch war, by Prince Rupert as commander in chief, under the authority of a commission from Charles II. These articles of 1632 (Prince Rupert's Code), more than any other, have formed the model on which the present military code and system of military jurisdiction have been framed, and they were also adopted by the United States in 1775.

There was this difference between the earlier Courts Martial, and those of the present day, that in the earlier Courts,

the General or Governor of the garrison, who convened the Court, ordinarily sat as President, instead of as at present the convening officer appoints the President—and that the power of the Court was plenary, and that these sentences were carried into execution, without the confirmation required under the present law.

The first articles of war were, as I have stated, passed in 1689, and the necessity for such passing arose from the fact that during the reigns of the Stuarts, the army was entirely under the Sovereign.

When the revolution of 1688 placed William Prince of Orange on the throne of England, the change was not universally acquiesced in by the soldiers serving in the army, and on the abdication of James II. the Scotch regiments refused to recognise William III. as their lawful sovereign, and when ordered to embark for Holland, they refused to do so, and marched off to their homes in the North—saying that James was their King. The absence of any constitutional law by which these mutinous troops could be punished shewed the necessity of passing the Act which was accordingly done by the Act 1 William and Mary, chap. 5. Its duration was limited to seven months, but it was afterwards re-enacted.

By these successive changes which I have mentioned, the Crown gradually acquired a complete statutory power, for the government of the army in time of peace, whether in England or in the colonies, by means of the Mutiny Act and articles of war. This power was co-extensive with the prerogative power of governing troops serving in foreign countries in time of war, by means of Articles of War, made under the prerogative. In 1806 Geo. III. relinquished the Royal prerogative of the control of the army and which was superseded by the statutory power conferred in 1803 by 43 Geo. III., chap. 20, extending the Mutiny Act and articles of war to the army, whether serving within or without the dominion of the Crown.

The law as then settled has continued ever since, and is now regulated by the Army Act, under which we now serve.