A TEXT BOOK OF MILITARY LAW AS APPLICABLE TO PERSONS SUBJECTS TO THE ARMY DISCIPLINE ACT; TO WHICH IS ADDED MILITARY LAW AS APPLICABLE TO PERSONS SUBJECTS TO THE INDIAN ARTICLES OF WAR

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MAJOR GORHAM

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"Judicii disserat, et sunent meminisse periti."

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PREFACE TO THE FOURTH EDITION.

THE very favourable reception which has been given to the former editions of this book emboldens me to hope that a fourth edition may not prove unsuccessful.

The whole book has been most carefully rewritten and corrected to suit the provisions of the new "Army Discipline Act," and a full index prepared. A chapter has been also added on Indian Military Law, which will be found useful by all officers in India, and especially by officers of the Indian Staff Corps and Indian Local Army.

I shall be thankful to any one who will point out to me any errors or omissions he may notice.

KABUL, *1st July*, 1880.

CHAPTER I.

THE subject of law is a very wide one. We, however, have only to consider that branch of the subject which concerns the duties we may be called upon to perform as military officers.

Common law.

From the earliest times it has been found necessary to establish laws and regulations for the common welfare and for the protection of individuals. From the usages and customs thus engendered, arose a well-known and universal usage which is called "common law." This is an unwritten code, the maxims of which, coming down to us from ancient times, are usually quoted in Latin.

Statute law.

The progress of civilization has caused numberless questions to arise, to assist in deciding which laws have, from time to time, been passed by the ruling authorities of the country. These constitute the written code, or "statute law."

To illustrate this: By common law all property belonging to a woman becomes absolutely her husband's on her marriage. By statute, however, enactments have been made to enable such property to be settled on the wife—*i. e.*, to be made over to trustees, who, in their turn, are bound, by the law of trusts, to pay the income arising from such property in the manner directed by the deed of settlement.

For a law to become binding, it must be passed by both Houses of Parliament, and be approved by the Sovereign.

The civil law of the realm is supreme, and is equally binding on all persons whether civil or military.

For the due maintenance of military discipline, it has been found necessary to confer power on the military authorities, to enable them to deal with offences which it would be dangerous to leave to the civil authorities. Many acts, which are most serious crimes if committed by a soldier, are no crimes at all, or, at most, very trifling ones if committed by a civilian. Disobedience of orders, desertion, sleeping on post as sentry, drunkenness under arms, insubordination, &c., are purely military crimes, and a special code is necessary to enable us to deal with them. The action of civil law is too slow for military purposes. The necessity, even now, of special codes for the army is shown by the Homicide Act passed in 1862 for the speedy trial of soldiers committed for military murder. Hence arose military law; and, as you may often hear of martial law, it will be well to understand the meaning of these terms, and the difference between them.

Military law defined. Military law is law administered under a special code, framed for the purpose of giving military authorities power to deal with offences, which are either not provided for by the civil law, or which it would be dangerous to leave to the civil power.

Observe that military law is regular in its administration, and is administered under a regular code by persons authorized to do so.

Martial law is irregular in its administration—has *no* code. It is only used in emergencies, and is then exercised by persons who have assumed the power.

Civilians tried by military courts would, probably, not be awarded military punishments, and might be tried for offences purely civil; and though it is a power which, by the custom of

war, is entrusted to the officer commanding an army on active service, yet such officer exercises it under responsibility to the laws of his country, and may be subsequently called to account for his actions. I should define it as follows:—

Martial law defined.

Martial law is 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.

There are three cases in which martial law would be in force, *viz.*:—

1st case.—In the case of a conquered country.

The old laws having ceased to exist, the only law is that established by the military commander.

It must be remembered, however, that in dealing with his own soldiers, his power is limited by military law.

The *2nd case* is that of a country or district formally put under martial law by an Act of Parliament.

In this case the same power which made the civil law, suspends it and replaces it, temporarily, by the military code.

The *3rd case* is when, under circumstances of imminent danger, the executive proclaims martial law.

We had an example of this in Jamaica in 1866.

In this case the military authority and the civil authority clash.

It was formerly thought that the executive had this power; but the Lord Chief Justice, in Governor Eyre's case, denied this, and pointed