

the right of issuing commissions in war and rebellion." But he rightly adds that the military commander may permit the usual courts to continue their jurisdiction upon such subjects as he thinks proper. Legislative enactments have also sanctioned this special jurisdiction at various times, notably in 1798, 1799, 1801, and in 1803. These enactments lay down that exceptional powers may be exercised "whether the ordinary courts shall or shall not be open." As an invariable rule an act of indemnity has been passed on the withdrawal of martial law, but only to protect any person in charge of the execution of martial law who has exceeded his powers in good faith.

There has been much discussion as to whether, in districts where martial law has not been proclaimed, a person can be sent for trial from such district into a district where martial law was in operation. It is argued that if the ordinary courts were open and at work in the non-proclaimed district recourse should be had to them. The Privy Council in 1902 (*re Marais*) refused leave to appeal where the Supreme Court of Cape Colony had declined to issue a writ of Habeas Corpus in these circumstances. Mr Justice Blackburn in his charge in *R. v. Eyre* says, "I have come to the conclusion that, looking at what martial law was, the bringing of a person into the proclaimed district to be tried might, in a proper case, be justified." The learned judge admits that there should be a power of summary trial, observing all the substantial of justice, in order to stamp out an insurrection by speedy trial.

Whilst martial law is the will of the commanders, and is only limited by the customs of war and the discretion of those who administer it, still, as far as practicable, the procedure of military law is followed, and a military court is held on the same lines as a court-martial. Charges are simply framed without technicalities. The prisoner is present, the evidence of prosecution and prisoner is taken on oath, the proceedings are recorded, and the sentence of the court must be confirmed according to the rules of the Army Act. Sentences of death and penal servitude must be referred to headquarters for confirmation. In the South African War (1899-1902) these limits of procedure were observed, and when possible will always be.

Entering more into detail, the term martial law has been employed in several senses:—(1) As applied to the military forces of the crown, apart from the military law *Different Applications under the old Mutiny Acts, and the present annual of Martial Law.* Army Acts. (2) As applied to the enemy. (3) As applied to rebels. (4) As applied to civilian subjects who are not in rebellion, but in a district where the ordinary course of civil life cannot be maintained owing to war or rebellion.

1. In regard to the military forces of the crown, the superseding of justice as administered under the Army Act could only occur in a time of great need; e.g. mutiny of five or six regiments in the field, with no time to take the opinion of any executive authority. The officer in command would then be bound to take measures for the purpose of suppressing such mutiny, even to putting soldiers to death if necessary. It would be a case where necessity forced immediate action.

2. Martial law as applied to the enemy or the population of the enemy's country, is in the words of the duke of Wellington, "the will of the general of the army, though it must be administered in accordance with the customs of war."

3, 4. But it is as affecting the subjects of the crown in rebellion that the subject of martial law really obtains its chief importance; and it is in this sense that the term is generally used; i.e. the suspension of ordinary law and the temporary government of the country, or parts of it, or all of it, by military tribunals. It has often been laid down that martial law in this sense is unknown to the law of England. A. V. Dicey, for instance, restricts martial law to only another expression for "the common right of the crown and its servants to repel force by force, in the case of invasion, insurrection, or riot, or generally of any violent resistance." But more than this is understood by the term martial law.

When the proposition was laid down that martial law in this sense is unknown to the law of England, it is to be remembered that fortunately in England there never had been a state at all similar to that prevailing in Cape Colony in 1900-1902, and it may perhaps be questioned whether the statement would have been made with such certainty if similar events had been present to the writers' minds.

In the charge delivered by Mr Justice Blackburn in the Jamaica case the law as affecting the general question of martial law is well set out.

"By the laws of this country," said Mr Justice Blackburn, "beginning at Magna Carta and getting more and more established, down to the time of the Revolution, when it was finally and completely established, the general rule was that a subject was not to be tried or punished except by due course of law; all crimes are to be determined by juries subject to the guidance of the judge; that is the general rule, and is established law. But from the earliest times there was this also which was the law, and is the law still, that when there was a foreign invasion or an insurrection, it was the duty of every good subject, in obedience to the officers and magistrates, to resist the rebels, . . . in such a case as that of insurrection prevailing so far that the courts of law cannot sit, there must really be anarchy unless there is some power to keep the people in order, . . . before that principle the crown claimed the prerogative to exercise summary proceedings by martial law . . . in time of war when this disturbance was going on, over others than the army. And further than that, the crown made this further claim against the insurgents, that whilst it existed, pending the insurrection and for a short time afterwards, the crown had . . . the power to proclaim martial law in the sense of using summary proceedings, to punish the insurgents and to check and stop the spread of the rebellion by summary proceedings against the insurgents, so as . . . to stamp out the rebellion. Now no doubt the extent to which the crown had power to do that has never been yet decided. Our law has been declared from time to time and has always been a practical science, that is, the judges have decided so much as was necessary for the particular case, and that has become part of the law. But it never has come to be decided what this precise power is."

So far as the United Kingdom is concerned the need has never arisen. It has always been found possible to employ the ordinary courts directly the rebels have been defeated in the field and have been made prisoners or surrendered. "Fortunately in England only three occasions have arisen since the Revolution when the authority of the civil power was for a time, and then only partially, suspended," 1715, 1745 and 1780. Clode, *Military Forces*, ii. 163, says: "Upon the threat of invasion followed by rebellion in 1715, the first action of the government was to issue a proclamation authorizing all officers, civil and military, by force of arms (if necessary) to suppress the rebellion." This, therefore, would only seem to fall within the limited sense in which Dicey understands martial law to be legal, "the right of the crown and its servants to repel force by force." There was no attempt to bring persons before courts-martial who ought to be tried by the common law, and all the extraordinary acts of the crown were sanctioned by parliament. After the rebellion had been suppressed two statutes were passed, one for indemnity and the other for pardon. Before the revolution of 1745 similar action was adopted, a proclamation charging civil magistrates to do their utmost to prevent and suppress all riots, and acts of parliament suspending Habeas Corpus, providing for speedy trials; and of indemnity. In the Gordon Riots of 1780 a very similar course was pursued, and nothing was done which would not fall within Dicey's limitation. No prisoners were tried by martial law.

In Ireland the ordinary law was suspended in 1798-1801 and in 1803. In 1798 an order in Council was issued to all general officers commanding H.M. forces to punish all persons acting in, aiding, or in any way assisting the rebellion, according to *martial law*, either by death or otherwise, as to them should seem expedient for the suppression and punishment of all rebels; but the order was communicated to the Irish houses of parliament, who expressed their approval by addresses to the viceroy. It was during the operation of this order that Wolfe Tone's case arose. Tone, a subject of the king, was captured on board a French man-of-war, and condemned to death by a court-martial. Curran, his counsel, applied to the king's