REVIEWS AND NOTICES.

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INTERNATIONAL ADJUDICATIONS.*

These are the first three volumes of a monumental work edited by John Bassett Moore, the distinguished American jurist and former member of the Permanent Court of International Justice. The purpose of the work is "to furnish an intelligible and fully documented report of all judicial decisions of international questions not recorded in the ordinary law reports." In the main the subject matter of the compilation may be called international arbitrations, but considerable portions are to consist of mediatorial reports, advisory opinions and decisions of domestic commissions, on international claims.

The author has divided the work into two series—Ancient and Modern; the modern series commencing with the revival of international arbitration under the Jay Treaty of 1794 between the United States and Great Britain. Some conception of the exhaustive treatment accorded each case may be gathered from the fact that the first two volumes, published in 1929 and 1930 respectively, are devoted exclusively to the arbitration over the St. Croix River dispute, settling part of the boundary between the State of Maine and the Province of New Brunswick. These volumes contain verbatim copies of all available relevant documents, and maps are extensively utilized. The historical background and progress of the negotiations are also given in detail. The third Volume, published in 1931, deals with the cases arising under Article 6 of the Jay Treaty of 1794, which provided for the arbitration of claims arising out of losses sustained as the result of lawful impediments to the collection of Pre-Revolutionary War Debts owing to British subjects by American citizens. Many of the new American States had passed legislation amounting to sequestration or even confiscation of such debts. By the Jay Treaty the United States agreed to pay compensation for losses due to such causes. This third volume is a careful record of the cases which came before the mixed commission set up under the Treaty to determine their validity and extent.

*Modern Series, Volumes 1 to 3. (Publications of the Carnegie Endowment for International Peace). New York: Oxford University Press. Vols. 1, 2 and 3, 564 pp. $2.50.

From these first three volumes the immensity of the task which the editor has set himself is apparent. When completed, this work will make readily available a vast amount of material dealing with the settlement of all manner of disputes between the nations of the world. It will fill an important existing gap in international juristic literature.

Winnipeg. C. R. S.

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MARTIAL LAW.*

"Books," said Thoreau, "must be read as deliberately and reservedly as they were written," and well has a present American illustrated the truth of a former countryman's dictum. For the result before us, of six years' diligent labour, is worthy of deliberate study by statesmen, soldiers, lawyers and all others who should learn this essential, even if, in British lands, infrequently used branch of constitutional law.

In a treatise which is approached objectively, however, there lies one danger. If the reader is aware of the relative merits of the sources, his conclusions should be reasonably sound. But if he gives credence to judgments with a mind which is uncritically biassed by great names and fame, then indeed is he liable to arrive at erroneous conceptions. And perhaps in no subject is this more truly evident than in the contentious one of martial law.

The main fault of the book lies in the method of dealing with the application of the Petition of Right. That the framers "were not formulating a comprehensive statute on the royal prerogative," but were "applying a specific remedy to a specific abuse" is, in so far as the last phrase is concerned, a truism which Hallam, over a hundred years ago, thought applicable to " . . . the laws of all other time." The abuse in question was the Commission issued by Charles I in 1625. Yet the general and later application of this statute must not be determined by the politically tempered opinions of the framers in 1628. Rolle is quoted, "If the Martial Law in time of Peace should be executed on Soldiers, that were a great dishonour and prejudice to them," whilst the words of Selden were much to the same effect. The author realizes that they included military law in the term "martial law" and that Rolle defined "peace" as that period when the courts were open. But to conclude therefrom that "Parliament looked with such apprehension upon standing armies and upon special courts that it denied to the Crown the authority to punish

**The Law of Martial Rule.* By Charles Fairman. Chicago: Callaghan and Co.

even its troops by martial law where the common law courts were available," is scarcely a conclusion in accordance with the facts.

No standing army existed in England in 1628. Armies raised therein when needed were, thanks to Parliament, seldom either a cause for apprehension or a menace to any save those upon whom they were so unpopularly billetted. It was the strength of the New Model which aroused Parliamentary apprehensions, and both Houses kept the post-Restoration army's size in check by ignoring and hence not paying it, until terrified into recognition in 1689.

Did the Petition make the peace-time trial of military offenders, by courts-martial, illegal? Hale and Blackstone said so, and it appears that the author considers that such was the Parliamentary contention. But let us leave conflicting opinions with the book under review, in order that we may ascertain the ruling of custom.

On the 3rd July, 1668, the Duke of Albemarle issued a warrant to Doctor Samuel Barrowe, Judge Advocate of His Majesty's Forces, for the assembly of a court-martial to try John Garard and John Pinkney, troopers in the Earl of Oxford's Troop of His Majesty's Regiment of Horse. The offences took place at Reading when there was no war or rebellion. The warrant concludes, "and according to the nature of the offence to give sentence thereupon according to military discipline and to cause such sentence to bee putt in execution Provided that the same shall not extend to the taking away of life or Limbs."

The 64th Article of War of 1688, corresponding to the present Section 40 of the Army Act, was as follows, . . . "All other faults, misdemeanours, and Disorders not mentioned in these Articles, shall be punished according to the Laws and Customs of War, and discretion of the Court-Martial: Provided that no punishment amounting to the loss of Life and Limb, be inflicted upon any Offender in time of Peace, although the same be allotted for the said Offence by these Articles, and the Laws and Customs of War."

No contrary opinion can, with effect, be ranged against this as the correct interpretation of the military application of the Petition of Right. Parliament knew that an army existed in peace, and acknowledged that it did in 1689.[1] "The Forces which are now on foote should be continued." Parliament was likewise in a position to know that an army is no army without discipline, whilst history had repeatedly shown the futility of the civil courts for this purpose. But the Executive would have immediately interposed had courts-martial exceeded the peace-time constitutional limit that "no man

[1] 1 W. & M. Ch. 5.

should be forjudged of Life and Limb against the Form of the *Great Charter* and the Law of the Land."

The First Mutiny Act reaffirmed this limitation and added others. But these others could not be retroactive, and a careful comparison of the Act with the Petition will show that they were new. Frightened though the Houses were in 1689, they sought to make it clear that they alone could legalize an army by passing an Act limited in time. Yet they had raised no protest previously, and later paid for an "illegal" army when, in 1698, the Mutiny Act lapsed for almost three years.

But the old contention that peace-time courts-martial were illegal, persisted without foundation, as a political club with which annually to endeavour to kill the Mutiny Act, particularly between 1714 and 1739.

The title of the book is taken from Field in his argument in *ex parte Milligan* (1866). From an American point of view this case is very important as the essence of the doctrine therein expressed is generally accepted by them as sound. But however apt the term "martial rule" may be in the United States, we cannot agree that it is a preferable one in the British Empire. The "Manual of Military Law" states that martial law, *in its proper sense,* can be established lawfully only "by, or by regulations made under, an Act of Parliament expressly authorizing the step." Hence it must be law. Moreover "rule" signifies a supremacy which the military commander never in reality possesses, having always over him that superior authority from whence his power came, and in whose name he acts.

After summarizing the obsolete and unlawful uses of the term "martial law," the author presents the sense—not the proper one in our view—with which his book is concerned. First Sir James Fitzjames Stephen is quoted:— "The common law right of the Crown and its representatives to repel force by force in the case of invasion or insurrection, and to act against rebels as it might against invaders." Only the necessary force must be used, he adds: "martial law is provisional in character," flexible, and when the courts are silenced they are only temporarily so, the military authorities being theoretically answerable to the courts. In much the same terms the Supreme Court in *ex parte Milligan* defined it, adding, however, that it can never exist "where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war." With this the author contrasts the British "latitudinarian view."

In the definition given by Sir James Stephen, the word "insur-

rection" is used. Stating the American practice, Mr. Fairman says "The employment of troops during an insurrection does not unseat the courts." But the Court of King's Bench in Ireland refused the application for writs of prohibition, *habeas corpus* and *certiorari* in *John Allen's* case in 1921. In the decision it was definitely ruled that the state of armed insurrection was one of war.

The responsibility of the military authorities to the courts must always be a point of interest. Notwithstanding the author's surprising statement that British "improvidence" in the granting of acts of indemnity has "undermined" the value of judicial control, it is considered that such a step must be the only wise and fair one in such circumstances. Yet such an act as that of 1799 in Ireland is far more satisfactory from the military point of view. "And be it enacted, that no act which shall be done in pursuance of any order which shall be so issued as aforesaid, shall be questioned in His Majesty's Court of King's Bench or in any other court of the common law," it being conclusive evidence to indemnify the person if the proper authority signed a declaration that the deed was done in conformity to orders issued under the Act.

This extremely interesting legislation moreover gave as a good and sufficient return to an application for a writ of *habeas corpus* that the person was detained under a warrant from the proper military authority. This raises the question of the writ of *habeas corpus* during a period of martial law.

A differentiation is made between British and American employment of martial law. "In American practice it is a clumsy *modus operandi* which has been hit upon in keeping industrial conflict within some bounds. It has sometimes degenerated into a grim class struggle." In the British Empire it is "a device whereby servile and native uprisings have been stamped out, often with more celerity than decorum." "In America it is industrial rather than racial antagonism that has evoked 'martial law'," and notwithstanding the imaginary lack of British colonial "decorum," American industrial antagonism is far more frequent than British racial antagonism, if the comparative frequency of martial law may be taken as an indication.

The author gives an excellent summary of cases in the British Empire, quoting from those which have come before the courts of Natal, Cape Colony and Ireland. Briefly he discusses the instituting of it by the legislature, and by the unconstitutional method of advanced statutory authority for the Executive, as in Jamaica in 1865. The main questions arise, however, when it is instituted with-

out legislative authority. Is it constitutional for the Crown to exercise discretionary power in this respect? Finlason is perhaps the greatest exponent of the Royal Prerogative. Oth rs have maintained that the Crown shares with the subject the common law right, even duty, to restore peace by force. The former side maintains the legal force of the proclamation; the opposite side denies it. Now 39 Geo. III. c. 11 says, "His Majesty's undoubted prerogative in executing Martial Law for defeating and dispersing such armed and rebellious force." This has been quoted in support of both sides. But the official view to-day is that the Crown can exercise no such prerogative in the United Kingdom or within the Dominions. The author however, is not quite correct in his too general statement that "There is little doubt to-day that the prerogative theory is discredited." In an Empire such as the British, general statements can seldom be made to apply throughout. Where a British possession is under the direct *legislative* authority of the Crown, a Royal Proclamation has the full effect and legality of a statute in England or Canada. Apart from this, however, the proclamation is merely a statement of intention. But as the author well puts it, by an act of oblivion the Government arrives at the same point as it would with a prerogative right.

Halifax, N.S. H. MEREDITH LOGAN.

NOTICES BY THE EDITOR.

Smith of Birkenhead. By H. A. Taylor. London: Stanley Paul & Co. Ltd. 1931.

Any one who knows somewhat of the life story of the late Lord Birkenhead—and there are few of middle age in the English-speaking world who do not—will be interested to read this very complete and impartial survey of his meteoric career. We know of no man of his time who clutched the shears of destiny and cut a path to success with them with more boldness than Frederick Edwin Smith. Distinction first came to him when he was elected at the age of seventeen to an open scholarship at Wadham College, Oxford, and went on from strength to strength until he attained the Woolsack thirty years later. Rare intellectual gifts coupled with supreme self-confidence account for the greatness he achieved in his short life-span of fifty-eight years. Nothing more characteristic of the man could be found than his remark on accepting the Lord Chancellorship of England: "I approach the discharge of the high duties which await me in a spirit of anxious solicitude; but not, believe me, in one of morbid self-distrust."

There is one incident in Birkenhead's career (when he was plain Mr. F. E. Smith) that we were ignorant of until we read of it in Mr. Taylor's book. Before he began practice at the Bar it seems that he had made the acquaintance of Lady Wimborne, who shared with John Kensit championship honours in combatting the advance of so-called "Romanism" in the Church of England during the last decade of the nineteenth century. The ecclesiastical battle was waged with great vigour in Liverpool, where Mr. Taylor says "it was practically an impossibility to be a politician and to abstain from religious controversy." Lady Wimborne induced Smith to attend a meeting of the National Church League, then in course of formation. This meeting apparently was so captivated by his presentation of the national peril in Anglo-Catholicism that Mr. Joynson-Hicks (now Lord Brentford) moved that Smith be appointed organizing secretary of the League, which was done—a salary going with the office. *Tempora mutantur,* and history is fond of ironical surprises. In 1928-9 the Church of England was rent with the controversy over Archbishop Davidson's proposal for Prayer Book Revision, and we find Sir Joynson-Hicks in the House of Commons leading a bitter attack on the proposal which had received Birkenhead's unhesitating approval in the House of Lords.

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Shakespeare and His Legal Problems. By George W. Keeton. London: A. & C. Black. Toronto: The Macmillan Company of Canada, 1931. Price $2.25.

It is told of a certain English Judge, who had read a solitary play of Shakespeare's on the advice of a friend, that he was of opinion that Shakespeare was a very much over-rated man. It is a pity that Mr. Keeton's excellent exposition of the fact that Shakespeare's great fund of knowledge included some learning in the law was not available to the learned Judge before he pronounced his absurd dictum. At all events Lord Darling, who writes a Foreword to the book before us, does not share the opinion referred to. He commends the book to "all who may incline to learn something of the law as Shakespeare knew it, and are curious regarding the use he made of legal procedure in his plays." On such a subject Lord Darling knows what he is talking about. Mr. Keeton's book has proved a source of edification to the present writer. Referring to the play of *King John* we especially like what is said about the possibility of Shakespeare applying to King Philip's explanation of his support of Arthur's claim to the English throne as against that of King John the theory, then being put forward by scholars, that natural law lies at the root

of international obligations. Mr. Keeton thinks that Shakespeare might have become acquainted with the views of Alberico Gentili at the time that Italian jurist was lecturing at Oxford.

Mr. Keeton's book should not be overlooked by those who are interested in knowing what Shakespeare knew about the law of his day.

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What Price Jury Trials? By Irvin Stalmaster. Boston: The Stratford Company. 1931. Pp. 143. Price $2.00.

This is a little book on the American jury system written, ostensibly for people who have no knowledge of the subject, by a lawyer who has been privileged to hold, respectively, the offices of Judge, Assistant Attorney-General and Attorney-General in the State of Nebraska, and at the present time is an instructor in constitutional law at the University of Omaha. He presents an exhaustive examination of the defects of the American jury in civil cases, and points to the conclusion that as there is no adequate method of reforming the system it ought to be abolished.

CORRESPONDENCE.

Davies v. Mann in British Columbia.

The Editor, Canadian Bar Review.

Dear Sir:—I wish to call your attention to an article that appeared in Volume IX, Part 7, Canadian Bar Review, under the heading *Davies* v. *Mann and Contributory Negligence Statutes.* At page 470 of the article referred to, Mr. Weir states:

"The judgment of Mr. Justice McPhillips indicates very clearly that the learned Judge retains very little respect for the famous Donkey Case."

The judgment referred to is *Morgan* v. *B. C. Electric Railway.*[1] In his reasons for judgment Mr. Justice McPhillips does not depart from the doctrine of *Davies* v. *Mann,* but graphically illustrates the changes in methods of travel as they were at the time of *Davies* v. *Mann* as compared with the present.

The doctrine of *Davies* v. *Mann* has been applied in all of the Courts of British Columbia time and again.

I have the honour to be,

Yours truly,

Vancouver, B.C. A. H. MacNeill.

Legal Position of Child of Unmarried Parents.

The Editor, Canadian Bar Review.

Sir:—The Brief by Mr. Frederick Read, of Manitoba Law School, under the above caption, which has been appearing in your columns, is a very useful, practical collocation.

[1] 42 B.C.R. 382.