MARTIAL LAW AND ITS EFFECT UPON THE SOLDIER'S LIABILITY TO THE CIVILIAN.

The numerous occasions in recent years on which the civil laws have been superseded by military rule in time of grave public disorder and calamity have given rise to considerable discussion of martial law under the constitutional governments of the United States and England.[1] From the middle of the seventeenth century until the beginning of the twentieth, martial law had very rarely been put in force in England or in the United States, except in time of public war. As a result, there was little precedent to guide the courts in attempting to adjust disputes

[1] Martial law is here used in the restricted sense in which it is generally used in the opinions. It does not include the law which governs the conduct of opposing armies towards each other, which forms, really, a part of international law. Nor does it include military law, which is the disciplinary and governmental code of the army itself, with jurisdiction only over soldiers, and spies who directly interfere with the working of the army. Nor does martial law include what is usually called military government—the authority exercised by military commanders over occupied territory of an enemy country. It includes merely the exercise of authority by military forces over civilians in domestic territory outside the zone of actual conflict, or when there is no conflict of such character as to constitute a civil or foreign war, at times when the civil authorities have proved too weak to maintain their control in the district. This is the sense in which it is used by Chief Justice Chase in referring to the powers of the National Government in his famous exposition in the dissenting opinion in the case of *Ex parte* Milligan, (U. S., 1866) 4 Wall. 2, 141: "There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war outside the boundaries of the United States, or in time of rebellion and civil war, within states or districts occupied by rebels treated as belligerents: and a third, to be exercised in time of invasion or insurrection within the United States, or during rebellion within the limits of the states maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under *Military Law* and is found in the Acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be called *Military Government*, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated *Martial Law Proper*, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion or of civil or foreign war, in districts or localities where ordinary law no longer adequately secures public safety and private rights."

Martial law in this sense does not exist when the soldiers act in subordination to the civil authorities, doing nothing which the civil authorities themselves could not do under the police power. It exists only when the military supplants the civil power and transcends the constitutional limitations, with respect to the invasion of life, liberty and property, placed upon the civil power.

arising out of the ever-increasing suspensions of civil authority. Whether martial law could exist at all in the United States was a debatable question at the beginning of the present century. And if it be admitted to exist the courts are still in a quandry as to what effect its existence has upon the rights and privileges of citizens. Pressed upon one side by the constitutional guarantees and upon the other by the overwhelming necessities of the moment, the courts have generally decided as expediency dictated. Sometimes they have frankly avowed that the decision rested upon expediency.[2] More often they have attempted to justify their decision upon logical grounds. It is but natural to expect that the principles evolved in such cases, under such circumstances, would not form a very logical system. In a recent lecture on the subject Lord Sumner, who sat as Lord of Appeal in Ordinary during the period of the war and thereafter, said that there were three difficulties in dealing with this subject: it was lacking in precision, it abounded in paradoxes and it ran very close to politics.[3] This substantially amounts to a statement that there is no systematic body of law on this subject at all. And this is the learned Lord's conclusion. It is something the common law courts simply do not know.[4]

But the fact remains that instances of martial law have become of frequent recurrence in the United States. Within little over a year, martial law has been in force, for widely varying reasons, in Oklahoma City, in Herrin, in Lorain, and in the tornado-stricken cities of southern Illinois. It was mentioned as a possibility in Weehawken, N. J., a few months ago during the disorders attending liquor smuggling. As a result, it has become a matter of importance to determine the legal basis for the existence of martial law and its legal effect upon the rights of private citizens, and upon the relationship between the soldier and the civilian. It is the purpose of this article to discover how far these things may be ascertained from the decisions.

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[2] See cases discussed p. *infra*.
[3] Martial Law, 154 Law Times 381 (1922).
[4] *Id.*, 382.

At the beginning of the present century, it was, as has been said, a debatable question whether martial law could rightfully exist in English-speaking countries other than in the actual zone of conflict in war time.[5] Involving as it does a dictatorship, carrying with it the strength of the army together with an immunity for the dictator and his agents from responsibility for extraordinary invasions of citizens' rights, martial law is apparently discordant with the theory of democracy. In its present form it first appeared in England in the days of Tudor absolutism. It is descended from the ancient jurisdiction of the Court of the Constable and Marshall, which is defined by the statute of 14 Richard II [6] as extending in wartime over all matters touching war within the realm. This statute gave that court jurisdiction only over soldiers and those liable to be called as soldiers in time of war. By reason of the attainder of the holder of the office of constable in the reign of Henry VIII the office was forfeited to the Crown.[7] The Crown never again appointed anyone to this office but reserved its functions for itself. Characteristically, the Tudors did not feel themselves bound by the limitations of the jurisdiction, either that respecting the time of war or that restricting it to soldiers. The use of this martial law power increased through the sixteenth century with the increase of absolutism in the sovereigns. Under Elizabeth on more than one occasion a subject guilty of a single infraction of the law was declared to be in rebellion against the Crown and was subsequently arrested and tried by the rules of martial law. These abuses became more and more pronounced under the first Stuarts until the people's patience was exhausted. In 1629 Parliament forced the King to sign

[5] Roberts, Some Observations upon the Case of Private Wadsworth, 51 Am. L. Reg. 63, 161 (1903); Dicey, Law of the Constitution, (8th ed., 1915) 283, and note, p. 538 at p. 544. And see Holdsworth, Martial Law Historically Considered, 18 LAW QUARTERLY REVIEW 117 (1902); Ballentine, Martial Law, 12 COL. L. REV. 529 (1912); Ballentine, Unconstitutional Claims of Military Authority, 5 Journal of Criminal Law and Criminology, 718 (1914).

[6] 13 Rich. II, St. 1, c. 2 (1389).

[7] See as to this, and as to the history of martial law in England, generally, Holdsworth, Martial Law Historically Considered, 18 LAW QUARTERLY REVIEW 117 (1902).

the Petition of Right,[8] which practically prohibits martial law jurisdiction over civilians at any time, or even over soldiers except in time of war. From that time until very recent years there were practically no cases involving an attempt to impose martial law upon the people of England itself, and apparently the legal commentators considered martial law as applied to civilians impossible in England.

This has not been true, however, with regard to the English colonies. In America the institution of martial law in Massachusetts was one of the sparks which fired the Revolution.[9] This abuse, coming as it did just prior to the Revolution, caused each of the states to make part of its fundamental law

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[8] 3 Car. I. (1627). The pertinent portions of the petition are: "And whereas also by the authority of Parliament in the twenty-fifth year of the reign of King Edward the Third, it is declared and enacted, that no man shall be forejudged of life and limb against the form of the great charter, and the law of the land; and by the said great charter and other laws and statutes of this your realm, no man ought to be adjudged to death, but by the laws established in this your realm, either by the customs of the same realm or by acts of Parliament; and whereas no offender of what kind soever is exempted from the proceedings to be used and the punishments to be inflicted by the laws and statutes of your realm; nevertheless, of late divers commissions under your majesty's great seal have issued forth, by which certain high persons have been assigned and appointed commissioners with power and authority to proceed within the land, according to the justice of martial law against such soldiers and mariners, or other dissolute persons joining with them as should commit any murder, robbery, felony, mutiny, or other outrage or misdemeanor whatsoever, and by such summary course or order, as is agreeable to martial law, and is used in armies in time of war, to proceed to the trial and condemnation of such offenders, and them to cause to be executed and put to death, according to the law martial.

"By pretext whereof, some of your majesty's subjects have been by some of the said commissioners put to death, when and where, if by the laws and statutes of the realm they had deserved death, by the same laws and statutes also they might, and by none other ought to have been, adjudged and executed.

"And also sundry grievous offenders by color thereof, have escaped punishments due to them by the laws and statutes of this your realm . . . upon pretense that the said offenders were punishable only by martial law, and by authority of such commissions as aforesaid, which commissions, and all others of like nature, are wholly and directly contrary to the said laws and statutes of this your realm.

"They therefore do humbly pray your most excellent majesty, . . . that the aforesaid commissions for proceeding by martial law may be revoked and annulled; and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever, to be executed as aforesaid, lest by color of them any of your majesty's subjects be destroyed or put to death, contrary to the laws and franchise of the land."

[9] Bancroft, History of the United States, Vol. VII, 56 *et seq.*

the provision that in all cases the military power should be subordinate to the civil.[10] In the early years of our history as a nation, martial law was never resorted to. Washington, in sending troops to put down the Whiskey Rebellion in Pennsylvania, gave very explicit orders that the soldiers should hold themselves subordinate to the civil authorities, and the soldiers in no instance went beyond what would be justified under the ordinary police power.[11] Jefferson's attempt to make use of it by procuring the suspension of the writ of *habeas corpus* during the trouble with Burr met with a prompt and decisive rebuff from Congress, which refused to suspend the writ at his request.[12] General Jackson, it is true, put the city of New Orleans under martial law and suspended the writ temporarily. But in characteristic fashion, after the necessity had passed, he admitted that he had been in error and submitted to the fine which the court imposed upon him.[13] Martial law was used for the first time in our history with the subsequent acquiescence of the courts in Dorr's Rebellion in Rhode Island in 1840. In order to put down a formidable rebellion the government of the state called out its militia which, without any gross invasion of ordinary private rights, quelled the riots occuring throughout Rhode Island. Civil government was restored immediately upon their suppression.[14] In the Civil War an attempt to establish martial law outside the zone of actual conflict was condemned by the majority of the Supreme Court in *Ex parte Milligan*.[15]

The exigencies of our changing civilization in the period following the Civil War have, however, settled the question. It

[10] This provision in so many words is found in the constitutions of all the states except New York. For a complete digest of the constitutional provisions upon this subject, see Stimson, Federal and State Constitutions, 82, 245-248. The Constitutions of Rhode Island, Massachusetts, New Hampshire and South Carolina, give express sanction to martial law in case of necessity, although in three of these states it is to be declared by authority of the Legislature. *Id.*, 246.

[11] See dissenting opinion of Robinson, *J.*, in State v. Brown, 71 W. Va. 519, 544, 77 S. E. 243 (1912).

[12] See dissenting opinion of Steele, *J.*, in *In re* Moyer, 35 Colo. 159, 180, 85 Pac. 190 (1905).

[13] Birkhimer, Military Government and Martial Law (2d ed.) 426, note.

[14] Luther v. Borden, 7 How. 1 (U. S. 1849).

[15] 4 Wall. 2 (U. S. 1867).

is now beyond serious dispute that martial law in some form may exist under certain circumstances even in times of peace. or, in times of war, outside the zone of actual conflict. Since 1902 martial law has been enforced with the subsequent acquiescence of the courts, including the United States Supreme Court, in six of the states during times when the nation was at peace.[16] On two other occasions the courts, while holding that martial law was not in existence under the facts in the particular case, have conceded that it might exist under some circumstances in their respective states.[17]

In the British courts the twentieth century has seen a similar development of the law on this subject. In 1902 the question arose as to whether a military commission might judge and punish a person in British territory in South Africa during the Boer War for an act done two hundred miles from the battle-front.[18] Disturbances were at the time rampant throughout the entire colony, and the Privy Council held that martial law existed, and refused to disturb the execution of the commission's sentence. The Parliament of Great Britain, during the recent war, passed statutes authorizing the executive even in the home territory of Great Britain to exercise powers or to give powers to military authorities in cases of necessity, far beyond the common law police power over civilians.[19] In England, of course, this statute cannot be questioned, but it seems clear that it was considered by the House of Lords to make no change in the Constitution.[20]

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[16] Colorado: *In re* Moyer. 35 Colo. 159, 85 Pac. 190 (1904); Moyer v. Peabody, 212 U. S. 78 (1909); Idaho: *In re* Boyle. (1899) 6 Idaho 609, 57 Pac. 706 (1899); Montana: *Ex parte* McDonald, 49 Mont. 454, 143 Pac. 947 (1914); Nebraska: U. S. v. Fischer, 280 Fed. 208 (D. C. Neb. 1922); Pennsylvania: Commonwealth v. Shortall, 206 Pa. 165, 55 Atl. 952 (1903); Texas: U. S. v. Wolters, 268 Fed. 69 (D. C. Texas 1920).

[17] *Ex parte* Lavinder, 88 W. Va. 713; 108 S. E. 428 (1921); Bishop v. Vandercook, 228 Mich. 349, 200 N. W. 278 (1924).

[18] *Ex parte* Marais [1902] A. C. 109.

[19] Defence of the Realm Act, 5 Geo. V., Chap. 8 (1914).

[20] Rex v. Halliday, [1917] A. C. 260, in which the House of Lords upheld, under Regulation 14 B made by his Majesty's Council under the Defence of the Realm Act, *supra*, the internment of a naturalized citizen of hostile origin on the ground that "it was expedient."

Against all this there stands only one state supreme court which has actually denied that martial law can exist when the nation is at peace, and has held that in such time the military may act only in strict subordination to the civil authorities, and may not exercise any powers in excess of the ordinary police powers.[21]

While it is not our purpose to seek the reasons for this development, it seems that at bottom it is due to the rising tide of group consciousness that has developed with startling rapidity since the middle of the nineteenth century, overwhelming the ideal of individual liberty, which was so powerful in the English-speaking countries in the eighteenth and early nineteenth centuries. The broadest expression of this group feeling is the Nationalist sentiment, leading as it did in the World War to the organization of the entire nation, instead of merely its professional armies, for war. In this state of affairs, the placing of even parts of the territory of the United States, four thousand miles from the embattled area, under a species of martial law, seemed in no degree unnatural.[22] Scarcely less significant an exhibition of this group feeling is seen in the organization of laboring men into unions to further the interests of their group. The unions have at times become so powerful as to control particular districts. Under the influence of irresponsible leaders, they have more than once been diverted from their ordinary and legitimate sphere of activity, and have undertaken to overthrow the constituted authorities and to enforce their demands by physical terrorism. In several instances, since 1902, they have paralyzed the civil agencies of law enforcement, and the people, to avert a greater evil, have acquiesced in the declaration of martial law in the affected districts. In fact, they have generally applauded the action of the executive who took such strong measures. The courts, feeling the same constraint, have followed the sentiment of the overwhelming majority of the peo-

[21] Franks v. Smith, 142 Ky. 232, 134 S. W. 484 (1911).

[22] This was done, not under any new war-time legislation, but under a statute which has been standing upon the books in its entirety since the Civil War, and in greatest part since 1806. U. S. Rev. St., Sec. 1343.

ple, and have declared such instances of martial law, and acts done thereunder, to be political matters beyond their cognizance.[23]

II.

There remain a number of questions which cannot, as yet, be said to be settled. First, under what conditions will the courts hold that a state of martial law exists or has existed so as to withdraw acts done under it from their cognizance? Second, conceding that martial law exists, so as to withdraw the great majority of acts done thereunder from the cognizance of the civil courts, does the fact of martial law withdraw all acts done thereunder from the cognizance of the civil courts, or are there some acts so extreme that even the protecting mantle of martial law will not shield the soldier from subsequent accountability to the injured parties in the courts? There is a third question of grave importance which comes up in this connection. How far is a soldier protected in case of an injury inflicted by him under an order given by his superior acting under the supposed authority of martial law, if the courts later decide that the superior from whom the order emanated was not legally authorized to give it?

The first of these questions is discussed in the recent case of *Bishop v. Vandercook*.[24] During the period of the World War, while state prohibition was in force in Michigan, there was persistent illicit transportation of liquor from Ohio to Michigan. These activities, and the efforts of the authorities to curb them, led to a constant racing of automobiles on the main highway between Toledo and Detroit, seriously interfering with traffic and endangering life. The sheriff of Monroe County, Michigan, experienced difficulty in stopping these practices and asked aid from the Governor. The Governor issued an order directing the defendant, Colonel Vandercook, to take a detachment of the militia, proceed to Monroe County for duty, and

[23] C. v. Shortall, *supra*, note 16; *In re* Moyer, *supra*, note 16, Moyer v. Peabody, *supra*, note 16; *Ex parte* McDonald, *supra*, note 16; State v. Brown, *supra*, note 11.

[24] 228 Mich. 349, 200 N. W. 278 (1924).

take such steps as might be necessary to "protect the highways from lawless and viciously inclined drivers of automobiles," to enforce the laws, and to give the sheriff such assistance "as he requires in putting a stop to conditions which not only menace the people of Michigan, but the truck transportation of the United States army." Difficulty in enforcing these orders was subsequently brought to the attention of the Governor by the defendant, Vandercook. The Governor thereupon authorized the placing of a log across the roadway, but directed that "every precaution . . . . be taken to give the good citizens a chance to get through and to see that people were not inconvenienced and to take such steps as would give everybody a warning as to the use of the log." Acting under these orders, the soldiers under Colonel Vandercook, apparently under the more immediate command of the other defendant, Captain Childs, placed the log across the road. The plaintiff, a taxicab driver in Toledo, was hired to take a party to Detroit. The passengers were carrying intoxicating liquor but it was not shown that the plaintiff knew this fact. According to the plaintiff's testimony, when the cab was at a considerable distance from the log, two men jumped out from the side of the road and began to shoot. He, thinking they were "stick-up men" did not stop, but rather increased his speed. He saw no later signals or warnings until he crashed into the log. His machine was overturned and he was seriously injured. A verdict and judgment for the plaintiff was affirmed by the Supreme Court on appeal. The Court held that martial law was not in force in the district at the time; that, as a result the military officers had no authority beyond the ordinary police powers, and were liable for all violence used beyond what was justified by such police powers and, therefore were liable for the injury to the plaintiff.

Even though the courts have no cognizance of acts done under cover of martial law, yet when an appropriate case is brought before them, they must say whether or not martial law was in force at the time of the invasions complained of. The ordinary statement of the rule is in the form of a two-fold proposition. When a state of insurrection exists, the Governor

or the legislature, if it is in session, may declare martial law: the question as to when a state of insurrection exists is a political one as to which the Governor or the legislature, is the final judge. Whether the Michigan case accepts this rule is somewhat doubtful from the opinion. When the opinion is considered in the light of the facts, it may mean either (1) that martial law does not exist until the Governor actually proclaims it (or proclaims that the district is in a state of insurrection), and that merely authorizing acts justifiable only under a state of martial law is not equivalent to such proclamation; or (2) that there are certain limits, other than mere good faith, to the Governor's right to declare martial law.

The first of these alternatives does not seem to be correct. Formal executive proclamation was not considered necessary to the existence of a state of martial law in many recent instances. In *Commonwealth v. Shortall,*[25] there was no declaration of martial law *ipsis verbis,* but there was what the Court called a declaration of qualified martial law. It was in substance an order to the Commander-in-Chief to place his entire division on duty, to protect all persons in life, limb and property from intimidation or violence, and to preserve the public peace and good order. So in the recent Irish cases involving *habeas corpus* proceedings, the Court, in declining to take jurisdiction upon the ground that martial law was in force, referred to no declaration of martial law, and apparently considered such declaration unnecessary.[26] A substantially similar decision was rendered in England during the war.[27] It seems, therefore, that a formal declaration of martial law by the executive is not requisite to afford protection to those using such extraordinary measures to preserve the peace in an emer-

[25] *Supra,* note 16.

[26] There was, however, an act of the Dáil Eireann empowering the Minister of Defense to take the necessary steps for the national defense, and the Dáil later ratified the acts of the Army and Military Commissions. See Rex v. Allen, [1921] 2 I. R. 241; Rex v. Strickland, [1921] 2 I. R. 317, 333; Rex v. O'Sullivan, [1923] 2 I. R. 13; Rex v. Adjutant-General, [1923] 1 I. R. 5.

[27] *Cf.* Rex v. Halliday, *supra,* note 20.

gency. Conversely, in *Ex parte Lavinder*,[28] it was held that a mere declaration of martial law, or of a state of war,[29] by the Governor, without more, does not of itself, establish a state of martial law.

It appears, then, that the other alternative is the correct one, and that there are limits to the Governor's discretion in declaring and enforcing martial law. It would be startling if one of our Governors could, like the Tudors or Stuarts, declare martial law in a district where there is profound peace, while the nation is not at war, and send down troops, close the courts, and suspend the writ of *habeas corpus* in the district. Yet it would be a long step in this direction if the courts, following to the limit, indeed going beyond the self-declared limit of the decision in *Luther v. Borden*,[30] should hold this a political mat-

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[28] *Supra*, note 17.

[29] It is taken for granted by the West Virginia Court in the cases of *Ex parte* Lavinder, *supra*, note 17, and State v. Brown and *Ex parte* Jones, *infra*, note 35, that a state may carry on a war independently of the nation. In an article on The Jurisdiction of Military Tribunals, 12 CALIF. L. REV. 75, 159 (1924), Major L. K. Underhill denies the right of a state to engage in war to suppress insurrection or for any other purpose except to defend itself from imminent invasion, pp. 168-170. The words of the Federal Constitution support him. Article I, Section 10, provides that "no state shall, without the consent of Congress, . . . engage in war, unless actually invaded or in such imminent danger as will not admit of delay." From the context and sources of this passage, it seems clear that the "imminent danger" referred to is "imminent danger of invasion." 12 CALIF. L. REV., 168. But it seems that the West Virginia Court is merely recognizing a fact which is thrust upon the state by necessity or by the will of its people, notwithstanding constitutional limitations. *Cf.* Grier, *J.*, in The Prize Cases, 67 U. S. (2 Black) 635, 667 (1862): "When the regular course of justice is interrupted by revolt, rebellion or insurrection, so that the Courts of Justice cannot be kept open, civil war exists and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land." Though it have not the right, a state has on occasion, the Court concedes, the actual power to declare war.

[30] 7 Howard 1 (U. S. 1849). In this case, the trespass complained of was committed by soldiers, who broke the plaintiff's close in seeking to arrest him, at a time when they suspected that he was concealed on the premises. As the plaintiff was suspected, with good reason, of being in arms against the government, the actions of the military were justified under the ordinary police power. The defendants needed to justify under martial law only to the extent that it invested them with the authority of ordinary police officers. The Court indeed said that in a state of war, the troops might be called upon by the state to suppress an insurrection, and that the state was the final judge as to when this drastic measure should be required. But this was followed by these words: "In relation to the act of the Legislature declaring martial law, it is not necessary, in the case before us, to inquire to

ter, of which they have no cognizance. Certainly, there should be some requirements, other than mere good faith, which must be complied with before an executive can declare martial law. Indeed, in all the American cases in which it has been said that the action of the executive authority is not reviewable in such matters, there has been a condition of violent public disorder, amounting to continuous rioting or complete overthrow of civil authority in the district, or a state of actual insurrection or war. In a state of actual public peace, there is no necessity for this extraordinary power. Its exercise is a clear violation of the Petition of Right.[31] This provision of the Petition has, in substance, been adopted in the Federal, and in all the state constitutions.[32]

A few recent cases furnish positive evidence of the likelihood that the courts will recognize limits to the discretion of the political departments in this matter. In a recent Irish case,[33] the Court took judicial notice of the fact that the rebellion in Ireland had been suppressed so far as to say that a state of war no longer existed, and held that, as a result, further executive orders in suppression of the revolt were reviewable by the courts, and that such of these orders as were beyond the ordinary police powers in times of peace were illegal. The Court, therefore, freed the petitioner who had been arrested and confined under such orders.

The case of *Ex parte Lavinder*[34] involved a situation where the Governor, because of serious rioting in Mingo County, proclaimed martial law and sent a military officer to the county to take charge of the situation. No other soldiers were sent to the

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what extent, or under what circumstances that power may be exercised by a state. Unquestionably, a military government, established as the permanent government of the state, would not be a republican form of government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government." Note, too, that in this case the Court was not dealing with the right of the executive to declare martial law without consulting the Legislature.

[31] *Supra*, note 8. In the case of *Ex parte* Marias, *supra*, note 17, the House of Lords declared that the petition applied only in times of peace.

[32] *Supra*, note 10.

[33] Rex v. The Military Governor of the Military Internment Camp, [1924] 1 I. R. 32.

[34] *Supra*, note 17.

district and the military officer was simply placed in charge of the civil authorities. The petitioners were arrested and confined in jail without trial, and no effort was being made to bring them to trial. The Court issued a writ of *habeas corpus*, declaring that martial law did not exist, and that the imprisonment of the petitioners was, therefore, unjustifiable. This Court had in earlier cases [35] refused to review the decision of the Governor as to the necessity for declaring martial law at a time when there was an insurrection in progress. But in this case it was held that the Governor had no such discretion when no state of war or armed insurrection existed, and no soldiers were in the field. The decision seems to rest upon the method in which the Governor attempted to exercise this extraordinary power. The Court said that he could not, simply because of his military power as Commander-in-Chief of the militia, confer upon civil peace officers the right to use these war powers, but that he could exercise such powers only through the militia. But the Court goes on to say that, if this were not so the Governor might, at any time, through the medium of civil officers, exercise these arbitrary powers, even though there were no necessity. This, the Court says, is beyond the Governor's power, as he cannot put martial law into force except in time of invasion or insurrection.

That the Michigan case [36] is explainable on a similar ground seems very probable. The trespass occurred after the war had in fact come to an end, although no formal declaration to that effect had yet been made. There was not a condition of domestic insurrection or riot, such as would paralyze the civil authorities. Under such circumstances, the Court held, acts beyond what were embraced by the ordinary police powers were not justified, even though done at the command of the Governor under what the defendants termed, and the Governor intended to be, from the tenor of his orders, martial law.

It seems likely, therefore, that in the future the Courts may impose some limit beyond mere good faith upon the executive's

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[35] State v. Brown, 71 W. Va. 519, 77 S. E. 243 (1912); *Ex parte* Jones, 71 W. Va. 567, 77 S. E. 1029 (1913).

[36] Bishop v. Vandercook, *supra*, note 17.

discretion in declaring and enforcing martial law. The broad rule, enunciated in the cases, that the governor, if he acts in good faith, is the final judge as to the existence of the necessity for these extraordinary measures,[37] will probably be modified to some extent. The courts seem inclined to hold that mere persistent breach of one law, or an isolated crime, even amounting to treason, is not justification to the Governor for declaring martial law in times of substantial peace in the vicinity. Either a state of war must exist or civil authority in the district must be so far paralyzed that the enforcement of all, not merely one, of the laws is suspended or in danger of complete collapse. Whether such facts exist may ordinarily be for the executive to determine, but when he does not even claim the existence of such facts, or when they obviously do not exist, it seems probable that the courts generally, in the future, will hold, as the Irish Court of Appeals, and the Supreme Courts of West Virginia and Michigan have held, that in spite of the executive's action, martial law does not exist.

It may well be that the courts will strike a middle ground such as the West Virginia Supreme Court suggested in the cases of *State v. Brown*[38] and *Ex parte Jones*.[39] There the Court suggested that if the Governor had acted unreasonably in declaring martial law, he might be held answerable subsequently, after the disorder had been put down, for invasions of citizens' rights in pursuance of such declaration. But the Court did not consider that it had the right to interfere with the executive while he was at work in putting down the supposed rebellion. In the North Carolina case of *Ex parte Moore*,[40] the Court came, in effect, to the same conclusion. While saying that it had the right

[37] *In re* McDonald, 49 Mont. 454, 460, 143 Pac. 947, 949 (1914); *In re* Moyer, 35 Colo. 159, 164, 85 Pac. 190, 192 (1904); State v. Brown, 71 W. Va. 519, 524, 77 S. E. 243, 246 (1912). The original American authority upon which these decisions purport to rest is Martin v. Mott, 12 Wheat. 19, (U. S. 1827) in which the United States Supreme Court, through Story, *J.*, upheld the right of the President to declare when such an emergency existed as to justify the calling out of the militia.

[38] *Supra*, note 11.

[39] *Supra*, note 35.

[40] 64 N. C. 802 (1870).

to interfere with the Governor's actions, it denied that it had the power to do so. The Court's process against the Governor could be served only by the sheriff's gathering an opposing army to combat that commanded by the Governor. Realizing that the only method of enforcing his decree was by inaugurating what amounted to a rebellion against the government under which he held office, Pierson, C. J., refused to order the sheriff to forcibly execute the decree, saying that he had no power to enforce it under the circumstances. There is much to be said for this position. The courts may make themselves ridiculous by issuing decrees which they cannot enforce. On the other hand, they may occasionally paralyze the only efficient arm of the Government in combating serious emergencies. But these objections would not apply to a subsequent holding, in an action brought after the subsidence of the disturbance, that the officials who ordered such invasions of private rights, or the soldiers acting under them, are liable in trespass to those whose rights they have invaded.

III.

During the time when martial law exists, the military commander is, according to the majority view, in absolute control. His actions are not subject to judicial review in any civil court.[41] There have been no American cases which repudiate this doctrine. But there have been no American cases involving any outrageous abuse of power by the military commander.

In England, there is one case on the books in which the military commander under martial law powers, went beyond the

[41] See cases cited in note 16, *supra*. But note that in *In re* McDonald, *supra*, note 16, it was held that the governor could not authorize a trial by military commission even though he might authorize the suspension of the writ of *habeas corpus* temporarily and other drastic measures to restore order. But it seems that to effectively put down a rebellion or serious insurrection, the military should have power to impose reasonable punishment upon those who do not obey regulations. Such punishments would naturally often include imprisonment even after the end of military rule. This distinction between so-called "preventive" martial law which the Montana Court permits under certain circumstances, and "punitive" martial law which it condemns under all circumstances, seems not well founded. See Glenn, The Army and the Law, (1918) 185-189. But see for a defense of the Court's position in *In re* McDonald, Underhill, Jurisdiction of Military Tribunals in the United States over Civilians, 12 CALIF. L. REV. 159, 165 *et seq.* (1924).

necessities of the situation. In the case of *Wright v. Fitzgerald*,[42] an action of trespass was brought against Fitzgerald, the high-sheriff of Tipperary, who was in control of the forces engaged in putting down a rebellion in that county. The plaintiff, without trial, was condemned by the defendant to receive five hundred lashes and then to be shot. According to the evidence the defendant thereafter kicked the plaintiff and struck him with his sword, causing blood to flow, and caused one hundred and fifty lashes to be inflicted upon the plaintiff's back. The final part of the sentence was, for some reason not stated, never executed. The defendant took the stand and claimed that a necessity for such treatment existed, and went on to portray graphically the success he enjoyed in obtaining confessions of guilt from those suspected of treason by flogging, and to state that he considered himself justified in cutting off the heads of these suspects, if necessary to obtain confessions. This bit of reasoning was so abstruse as to "somewhat discompose the gravity of the Court," in the words of the reporter. The plaintiff obtained the verdict, on the ground that the defendant's violence had exceeded the necessities of the case.

So far as is known, this case stands alone. In no other case where martial law admittedly existed has the court ventured to criticize or review the action of the military commander. While martial law exists the jurisdiction of the civil courts is suspended. As the Michigan court says in *Bishop v. Vandercook*,[43] martial law is no law at all. The arbitrary will of the commander is the supreme authority. To use the Continental phrase, "the Constitutional guarantees are suspended." Our courts never use this phrase, yet it expresses what occurs during martial law in England and America. Certain of our constitutional guarantees are suspended because either the necessities of war demand it, or because the constitutionally appointed authorities are paralyzed and cannot enforce those guarantees. The permanent safety of our constitutional form of government and our constitutional rights and liberties requires a temporary

[42] 27 State Trials 759 (1799).
[43] *Supra*, note 17.

suspension of certain of those guarantees in order to restore permanent effectiveness to the machinery set up for the preservation of those constitutional rights and liberties.

The opposite viewpoint is set forth with great eloquence in the opinion of Judge Davis, speaking for the majority of the United States Supreme Court in *Ex parte Milligan*,[44] coming to a climax in the famous declaration that "a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation." [45] But whatever may be said for the opinion expressed in Judge Davis' dictum, it is now fairly well settled by the decisions that under certain circumstances these constitutional rights and liberties of citizens must be temporarily foregone. So Justice Holmes, in delivering the majority opinion of the United States Supreme Court in *Moyer v. Peabody*,[46] forty-two years after *Ex parte Milligan*, says: "When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicicial process."[47] And the fact remains that, with the exception of a single *nisi prius* case in Ireland,[48] no decision has undertaken to limit the power of the military commander in times of martial law, other than by the requirement of good faith.

The requirement of good faith, mentioned in some dicta, notably in *Moyer v. Peabody*,[49] is after all but a shadowy limitation, non-compliance with which is almost incapable of proof. The official can in many cases claim with a good show of justice, even with the approval of his own conscience, that in the heat of the disturbance he considered the extraordinary force used necessary. This would justify him, in view of Justice Holmes.

But while practically no restrictions have been imposed upon military commanders by the courts, except in the *Fitzgerald* case,

[44] 4 Wall. 2 (U. S. 1866).
[45] *Id.*, 126.
[46] 212 U. S. 78 (1909).
[47] *Id.*, 85.
[48] Wright v. Fitzgerald, *supra*, note 42.
[49] *Supra*, note 46, at p. 85.

yet no cases but this have come before them, where extraordinary violence has been used. Most of the cases have involved a temporary suspension of the writ of *habeas corpus*, with an imprisonment of sixty days or less. In one case a man was shot down and killed on suspicion that he might be about to attempt a felony.[50] Neither of these things would be justifiable under the police power. But to hold that such actions are justifiable during martial law is far from holding that nothing done by the military during a period of martial law is reviewable by the courts. Justice Holmes intimates that *Moyer v. Peabody* might have gone differently if the imprisonment had stretched over a number of years.[51] The English trial court in the *Fitzgerald* case departed from the broad rule when it was faced with a case of extreme cruelty. And it is not easy to imagine that any court would adhere to the rule if, in a time when a band of turbulent strikers had gained control of the community, an overzealous military commander should turn his soldiers loose to overawe the strikers and the community generally by rapine and pillage. Rape and wanton murder were practiced by some of the armies in Europe during the recent war at the instance of their officers, as report has it, and the courts, being powerless, attempted to exercise no control over the soldiers. But can it be conceived that such things would go unchallenged by the courts when the nation generally was at peace? The question has never been tested in our courts but the answer appears obvious. If we are ever so unfortunate as to have a temporary reversion to barbarous depotism of this sort, there seems to be little doubt that our courts will punish the offenders, and that the plea of martial law will not avail as a protection. One rather vague dictum and one *nisi prius* case are enough to confirm us in this conclusion, in view of the abhorrence of this sort of military tyranny felt by the men who compose our courts and by our people in general. The counter-dicta that the acts of the military commander in times of martial law are not reviewable are far too broad.

[50] Commonwealth v. Shortall, *supra*, note 16.

[51] *Supra*, note 46, at p. 85.

IV.

One of the most curious phenomena in our law is the status of the soldier who, in obeying an order of his superior, threatens or inflicts death or serious injury upon a civilian, or deprives him of his liberty, only to find himself arrested and brought to trial because the orders under which he acted were not authorized. This usually is brought into question only in times of martial law or supposed martial law. If the officer goes beyond his authority, whether deliberately or by mistake, in issuing the order, is the soldier justified in executing it, by reason of his duty to obey? If the officer has issued an order in pursuance of his authority under martial law, only to find, as in the recent West Virginia and Michigan cases,[52] that martial law did not exist, is he justified by reason of the order of his superior officer, the Governor? The cases on the subject are not numerous, but they have generally held that the soldier is not justified by his orders.[53] If the officer is mistaken in the existence of martial law,[54] if the executive goes beyond his authority in his order to the military,[55] if the military authorities are acting under the civil in putting down disorder, and the soldier is given an order beyond what the police power would justify,[56]—in all these cases the soldier is liable, by the weight of authority, for the injury inflicted by him upon private citizens. Truly, as Dicey says,[57] his lot is a hard one—he is "liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it."

Some courts have announced exceptions to this strict rule. There are dicta in cases involving crimes to the effect that the soldier is excused for his otherwise criminal act unless his orders were illegal on their face,[58] or "palpably illegal" on their

[52] *Ex parte* Lavender, *supra*, note 17; Bishop v. Vandercook, *supra*, note 17.

[53] Mostyn v. Fabrigas, 1 Cowp. 161, 98 E. R. 1021 (1774); Little v. Barreme, 2 Cranch. 170 (U. S. 1804); Mitchell v. Harmony, 13 How. 115 (U. S. 1851); Franks v. Smith, *supra*, note 21; Bishop v. Vandercook, *supra*, note 17.

[54] Franks v. Smith, *supra*, note 21.

[55] Little v. Barreme, *supra*, note 53; Franks v. Smith, *supra*, note 21.

[56] Bishop v. Vandercook, *supra*, note 17.

[57] Dicey, Law of the Constitution, (8th ed., 1915) 299.

[58] Riggs v. State, 3 Cold. 85 (Tenn. 1866).

face.[59] This rule seems just as regards criminal liability. It would, indeed, be harsh treatment to punish the soldier for doing what reasonably appears to him to be his duty, especially when, as in time of war or rebellion, he has behind him the threat of most severe penalties at the hands of the military authorities if he disobeys.

But even in criminal cases, the courts have been slow to excuse the soldier under such circumstances.[60] It is, then, only natural to find them loath to relieve the soldier from civil liability to the citizen injured by the unwarranted invasion of his rights. In a few early cases, however, the soldier was held excused from civil liability when he acted under orders.

In *Despan v. Olney,*[61] a case arising out of Dorr's Rebellion in Rhode Island, the court charged that a soldier who arrests a citizen is justified even though his act would not be justifiable under the ordinary police power, if (1) there is no malice and he follows his orders exactly with intent to do his military duty; and (2) the orders are such as, from their nature, are within the scope of the officer's authority and nothing appears to show that the authority is not lawfully exercised in the particular case.

A similar limitation was placed upon the strict rule of liability in *McCall v. McDowell.*[62] One defendant, Douglas, a soldier under the orders of the other defendant, McDowell, his commanding general, arrested the plaintiff for speaking words derogatory of Lincoln, shortly after the latter's assassination. This was not a crime and the arrest was, therefore, unjustified. But while the commander was held in the action, the soldier was relieved from liability, since he made the arrest under an order of his superior officer which was not palpably illegal.[63] Yet even here, the Court might not have reached this decision but for the

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[59] *In re* Fair, 100 Fed. 149 (1900).

[60] See U. S. v. Carr, 1 Woods 480 (U. S. C. C. 1872); Commonwealth v. Blodgett, 53 Mass. 56 (1846).

[61] 1 Curtis 306 (U. S. C. C. 1852).

[62] 1 Abb. 212 (U. S. C. C. 1867).

[63] *Id.,* 218.

Indemnity Act of Congress,[64] which ratified all acts done by soldiers, until orders, whether legal or illegal when given, during the Civil War period. This act, without more, furnished the subordinate with a complete defense.[65]

Only one case has held, without qualification, that the soldier's acts are justified when done under orders.[66] But the broad rule laid down in this case did not seem necessary to its decision. The Court enunciated it in holding the lower court in error in sustaining a demurrer to a plea that the trespass alleged was committed by the defendants, under orders of their superior officer, in commandeering the plaintiff's property for the use of the army in the field. The facts recited in the plea would justify the superior in giving the orders, if he acted in good faith. So the soldiers would be justified in any case.

On the other hand, in the only recent cases in which the question has come up,[67] the strict doctrine has been re-affirmed and the soldier has been held liable for the trespass when the orders under which he acted were in fact illegal, irrespective of whether they might appear so to him. There is, therefore, but little basis for the view prevalent among some of the theorizers on the subject that the soldier, acting under orders, is justified even if the order is beyond the authority of commander to issue.

V.

The decisions since 1902 must considerably modify the view generally held up to that time as to the possibility, extent and effect of martial law, as distinguished from military law, in the English-speaking countries. The law at present, it is submitted, may be concisely stated as follows:

1. Martial law may exist in the United States in cases of necessity.

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[64] Act of March 3 1863, Section 4. This was considered and held constitutional by the Circuit Court in M'Call v. M'Dowell. *supra*, note 62. A motion for a new trial was refused by the Circuit Court of Appeals on which Field, *J.*, of the Supreme Court, was sitting.

[65] *Supra*, note 62, at p. 239.

[66] Tramwell v. Bassett, 24 Ark. 499 (1866). See dictum to the same effect in Taylor v. Jenkins, 24 Ark. 337 (1866).

[67] Franks v. Smith, *supra*, note 21; Bishop v. Vandercook, *supra*, note 17.

2. This necessity is, in general, a political matter, to be decided by the executive or the legislature.

3. But the mere breach, or persistent breach, of a single law does not create the necessity. The defiance of law in the district must be general, and of such nature as to close the courts or paralyze the administration of the law. Until at least a semblance of these conditions exists, the Governor has no discretion to declare martial law.

4. The authority of the military commander under martial law is very broad and will shield him in all suits brought by private citizens unless:

(a) he has acted without good faith or with malice; or

(b) he has so flagrantly invaded rights of individuals as to shock all sense of decency,—has, for example, inflicted or permitted flogging, torture, rape, or pillage.

5. The individual officer or soldier is not protected; in the absence of statute, from civil liability merely because he acted under orders, if, in fact, his superior, for any reason, had no right to give such orders, although Congress may constitutionally indemnify him against, or relieve him from, liability for such acts done in wartime.

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