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Frazer Arnold

the same time, the French papers in commenting on the situation, were quite strong in stating that France should not be intimidated by what they called a "German bluff". This was a political question and after a long discussion, it was finally settled in the Council by the Italian representative, who said he thought France could have 800 soldiers in the region if they did not use them. This humorous remark concluded a very serious controversy to the apparent satisfaction of all concerned.

The Assembly is the Parliament of the Nations, and it never gets beyond the preparation and discussion of world affairs. Its matters of importance are usually referred to a commission.

The commissions of the League are summoned to meet from time to time to deal with specific problems and Dr. Shotwell said at this point that there was not a week in the year during which some commission was not holding a meeting, discussing some national problem, something unheard of before the war.

In conclusion, Dr. Shotwell said that as first planned, the League was only for the purpose of averting wars, but that due to the way the League had functioned, it was going to succeed because of the world interest in building up human contacts and a world community.

B&M.

Martial Law in Colorado

(Address delivered before The Law Club, Jan. 25, 1928,
By Frazer Arnold, of the Denver Bar.)

ORGANIZATIONS or societies to oppose organized government have existed continuously from the Middle Ages to the present day. The first anarchist is said to have been Zeno the Stoic. He represented a group of philosophers opposed to the ideas of the State as elaborated by Plato.

In 19th and 20th Century despotisms, organizations to oppose government generally, have claimed a large share of the talent and energy of the revolutionary movement, especially among the youth. The cruelties and stupidities of their government excited fiery indignation against the only State with which they were familiar. It has been characteristic of the Russian and German temperament, especially, that it will work out comprehensive systems of philosophy to harmonize all society and all life with some rather narrow conclusion. This is done with a laboriousness and a plausibility that are amazing. With the criminality of their own government immutably fixed in mind, they evolve systems which demonstrate that the governments of France, the United States and all other modern republics are practically as bad as any other form of the State. They very early, in any revolution, break with the Constitutional Democrats, whom they regard as obstructionists to a realization of their dreams, and whom they persecute relentlessly whenever they get in power. This is the normal course of all European revolutions: of the First Revolution in France, the upheavals on the continent in 1848, the Paris Commune interlude of 1871, and the events in Russia, Austria and Hungary in 1917, '18 and '19.

The anarchists have had their share

of geniuses, among them such brilliant and attractive writers as Bakunin, Proudhon, and Prince Kropotkin; and it is not hard to understand their influence upon the young of certain European countries. In America, however, their proselytes are generally those of defective education, individuals with a flair for wild theory, victims of academic seclusion, and others with no knowledge or practical experience in business, administration or law.

It is needless to say that not every radical organization is illegal. A perfect right exists to change our system of government and society by methods provided in our Constitution, and to advocate such change by constitutional methods, regardless of the impolicy or folly of the change advocated. We are here dealing only with radicalism which seeks to enforce its demands by violence.

Such societies are declared unlawful by Sec. 6655 of our Compiled Laws, and the next section makes participation in their activities a felony.

A few years ago the danger of extreme radicalism seemed to lie in the labor unions, but of late years wiser counsels have prevailed there. Today the extreme radicals get more comfort in institutions of higher learning, universities and theological seminaries.

In an attempt to gauge the problem in America, for executive purposes, our Federal Government a few years ago made surveys of the extreme radical man power in this country, with the following conclusion:

In extreme radical organizations	380,000	
Radical members of semi-radical organizations	322,000	
Non-enrolled adherents of the above groups	200,000	
Total of this type		902,000
Elements which experience has shown are likely to join in wherever disturbances occur:		
(1) Unorganized aliens	40,000	
(2) Unorganized criminals	50,000	
(3) Other uncertain and hoodlum elements	50,000	
Total of this kind		140,000
Grand total		1,042,000

Extreme radical groups are, as a rule, loosely organized, the leaders inefficient and unreliable, and the members undisciplined. All possess or could easily procure small arms, such as rifles, pistols, revolvers, shotguns and bombs. Very few will be found in their ranks who have had military training or experience.

Most of our disturbances are industrial and local, although, as at present, they usually draw their leadership and inspiration from the anarchist-communist societies, whose aims are not local or economic but political and revolutionary. I do not suppose that the violent radicals are any more numerous now than in 1920; but that does not mean that we shall not continue to have violent disturbances from time to time, for as long a period as any of us shall remain on the scene.

Eighty years have rolled by since Karl Marx issued his Communist Manifesto calling upon the workers of the world to unite and overthrow bourgeois society, yet the proletarian revolution seems as far away in Western Europe and America as it did then. Nevertheless our republic is only a century and a half old, which is nothing, compared with the great empires of history, and there is no predicting what may be ahead in the none too remote future.

At present the I. W. W. is the most formidable organization for violent disturbance, and the industrial and economic effects of its activities are great and baneful. Its leaders have mapped the country, showing the various so-called "sympathetic areas". Wherever a state constabulary is nonexistent or hastily organized, or the local executives are wavering or sympathetic, or the courts are believed to be equivocal in their doctrines, there do these goshawks and turkey buzzards of "direct action" wing their way.

The truth is that in no modern country, except in the Confederate States during their brief existence, have there been so many instances of civil disturbance, demanding the executive remedy of Martial Rule, as in the United States. And nowhere (that I know of) have the legal rules and principles defining and explaining that extreme remedy been better or more clearly stated.

Martial Law is the child of necessity and is not peculiar to any nation or type of nation. In Continental Europe it is called the state of siege. It exists and has always existed in England, although some attempt was formerly made to disguise it with fictions, and to treat it as an illegal exercise of power, to be followed and justified by parliamentary acts of indemnity. In this country it has been invoked at all periods of our history, and by executives of every school of opinion. Washington, Jefferson, Madison, Jackson, Tyler, Lincoln, Johnson, Grant, Cleveland, McKinley, Wilson, Coolidge, all found it necessary to use the remedy, either in strict or qualified form, during their respective terms of office, as President or as Governor of a State, or both. Nowhere has it been oftener or more vigorously employed than by the central government of the Confederate States during the Civil War. It has been invoked continually by governors in the various states and once by a legislature —that of Rhode Island.

The jurisdiction has been explained and upheld quite consistently by nearly all state and federal courts, including the federal Supreme Court, and is, perhaps, more or less clearly understood by most lawyers. It is doubtful, however, whether a majority of laymen, including many writers, have a clear conception of what it is all about, and why, during a period of Martial Rule, the familiar constitutional guaranties are, in greater or less degree, suspended. Most citizens approve of Martial Law, on the vague ground of necessity, because they have confidence in their government and its courts; but a certain amount of nonsense is spoken and written on the subject whenever Martial Rule appears, not only by the insurrectionists and their sympathizers, who may be depended upon in that particular, but likewise by persons who are presumed to know. Among lawyers the difficulty is not that they do not believe that the jurisdiction properly exists, but they are not always clear on the legal formula which establishes it. The maxims, Necessity knows no law; Inter arma silent leges; salus republicae suprema lex, etc., are not very convincing, and, like most legal maxims, require explanation to be properly applied.

It will be my attempt in this paper to make clear some of these vague conceptions, and to show how the summary methods involved in martial law are entirely constitutional and just as legal as any other acts devolving upon the executive department, with especial reference to the executive of a state, and of Colorado in particular.

The chief misunderstandings may be briefly indicated. All state constitutions contain bills of rights similar to those in force in Colorado. Most of these provisions contain lan-

guage showing on its face that the guaranty afforded is qualified and subject to exception in time of insurrection, but I shall first state them as though their language purported to be absolute and without exception. Few of those who denounce the supposed violation of the sacred guaranties have ever read the guaranties, and I shall state them as they are popularly alleged to be, assuming, as I say, that the Colorado clauses are fairly typical of other state constitutions.

The courts of justice shall be open to every person (Art. II, Sec. 6).

No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject (Sec. 10).

All persons shall be bailable except for capital offenses (Sec. 19).

The privilege of the writ of habeas corpus shall never be suspended (Sec. 21).

The military shall always be in strict subordination to the civil power (Sec. 22).

The right of trial by jury shall remain inviolate (Sec. 23).

The people have the right peaceably to assemble for the common good. (Sec. 24).

No person shall be deprived of life, liberty or property, without due process of law (Sec. 25).

Now, it is argued, these guaranties are laid down by the sovereign people in their constitution, the same fundamental law which creates the office of governor. The governor is a mere creature of this constitution. Without it, he has no official existence. He has no powers whatsoever except what that instrument gives him. He cannot override any one of its provisions without being guilty of usurpation. Therefore, the guaranties above set forth being of equal dignity with those creating the governor and defining his powers, not he or any other department of the state can ever abrogate them. No necessity or emergency, no matter what, can ever authorize the governor or any subordinate of his to disregard the privileges set out in this bill of rights.

That is the argument.

Before coming to the main answer, let me call attention to some of the qualifying phrases I have mentioned, in the bill of rights itself, which will serve to make the main answer more clear and conclusive.

"The courts of justice shall be open to every person, and", the language is added, "a speedy remedy afforded for every injury."

Very good. But suppose the courts of justice have been closed by a mob, or, what is the same thing, the forces of disorder have rendered their process ineffective and their protection nil. Who will open the courts of justice? Not the mere declaration of section 6. It is a thing of paper and printer's ink. If the courts are to be opened at all, it must be by some restorative *power* outside of the court itself, and not found anywhere in the phraseology of Article II.

The next guaranty reads: "That no *law* shall be passed impairing the freedom of speech."

By its very terms, this guaranty imposes a limitation on the legislative, not the executive, department. When the governor and his military subordinates place a ban on inflammatory speech-making in the insurrectionary zone, their action is wholly executive and does not pretend to be legislative.

The habeas corpus clause, in Sec. 21, is very significant, because, just after the words "shall never be suspended", we find the phrase "unless when in cases of rebellion or invasion, the public safety may require it".

Section 17, which says that the military shall always be in strict subordination to the civil power is fulfilled by making the governor its commander-in-chief, placing it under the chief civil magistrate of the state, for "the civil power" means the executive department no less than the legislative or judicial. This section clearly relates to the normal times and places of civil peace, because in insurrectionary districts there is no civil power, at least none that is effective, and the military cannot be in strict subordination to the local "civil power" until the military itself has restored and revivified that civil power, whereupon everyone admits that the role of the military is over. In civil war, the military cannot be in strict subordination to something that does not exist, something which has been overthrown and which the military is doing its level best to set upright and enthrone again, under the command of the chief civil magistrate the governor.

The right of assembly, like the privilege of the writ of habeas corpus, was also sadly qualified by the practical empire-builders who framed the fundamental law of Colorado. They said: "That the people have the right *peaceably* to assemble for the *common good.* and to apply *to those invested with the powers of government* for redress of grievances, by petition or remonstrance".

And, as to the due process of law section, it will presently be seen that the summary methods of martial law are as much due process of law as any other executive process.

What then is Martial Law? We may answer that crudely by saying that it is the action of the governor in trying, by means of the instrumentalities given him in the state constitution, to fulfill the primary function of his office, by carrying out Sections 2 and 5 of Article IV.

These provide that the *supreme executive power of the state* shall be vested in the governor, who shall take care that the laws be faithfully executed; and that he shall be commander-in-chief of the military forces of the state, with power to call out the militia to execute the laws, *suppress insurrection* or repel invasion.

In his specially concurring opinion in the Milligan case, Chief Justice Chase gave the first clear statement, or rather suggestion, of the three kinds of military jurisdiction under our federal Constitution. His classification has been adopted by practically all American courts, text writers and publicists, and forms the basis for the manuals and studies of the War Department today.

Not in the language of any authority, but in my own phraseology, these may be briefly indicated as follows:

First we have Military Law, governing persons in the military service and camp followers. It is found in the Acts of Congress, Articles of War, General Orders, and Customs of the Service. It does not apply to civilians, either in peace or war; and its characteristic tribunal is the Court-Martial, General, Special and Summary. It is part of our domestic or municipal law.

Second is Military Government, sometimes called the law of hostile occupation. This supersedes, so far as the commander of the invading forces deems expedient, the local law in force before the invasion took place; and the sanction for that part of the local law which is allowed to govern is not the displaced sovereignty of the invaded country, but the will of the military commander of the invader. Examples of this were the military government set up in Mexico by General Scott in 1847; that of the belligerent Confederate States when invaded in the '60s; that enforced, with unnecessary rigor, by the German forces in

Belgium during the world war; and that of the occupied zone in Germany from 1918 to 1920. Its sanction is the will of the military commander under the direction (with us) of the President. Its legal foundation is International Law. Its practices and precedents are the customs and usages of war. Its characteristic tribunals are the Military Commission and the Provost-Court, superior and inferior.

The third is Martial Law proper. A more logical descriptive term is Martial Rule. It relates to domestic territory in a condition of insurrection or invasion, when the Constitution and its civil authorities have been rendered inoperative and powerless by the insurrectionary or invading forces. It is part of our domestic or municipal law. In Colorado its foundation is Article IV, Sections 2 and 5. Its characteristic tribunals are the Military Commission and the Provost Court. Its practices and precedents are borrowed from International Law, in the usages and customs of war. Superficially, therefore, it resembles Military Government or hostile occupation.

In the Moyer case, decided in 1905 and reported in 35 Colorado, it was argued for the petitioner that the governor could not declare Martial Law or find or proclaim that a condition of insurrection existed, and that that power resided solely in the legislature; but the court, in line with the authorities, held that these were executive functions fundamentally. Exercising the caution required of the judicial office, they declined to say that the state of affairs incident to the overthrow of civil authority in San Miguel County and the employment of the troops by the governor to restore and maintain order could be called Martial Law, and confined themselves rigidly to a decision of the case before them under our Constitution and statutes. In point of fact, however, whenever an insurrection is found by the governor to exist, for the suppression of which he sends a military force into the field, the resultant legal status is one of Martial Law in the district, regardless of whether strict or mild measures of repression are put into effect, or whether it is called Martial Law or something else.

Neither the governor, nor the commander of the troops, nor the proclamation or declaration of either, is what suspends or abrogates Constitutional guaranties. Those have already been suspended and abrogated by the mob or other violent forces in the locality. It is mere mockery to assert that the Constitution is in force in a district where a mob and its leaders hold the life and property of the citizen in the hollow of their hands. The Constitution does have a theoretical or potential existence there, but it is, for the time being, a mere shadow; otherwise the civil authorities would be in actual control. It is true that the mob may confine its hostility to some particular class or business like the coal industry, or to some locally unpopular race or the devotees of a form of worship of which the mob does not approve. Other citizens may be unmolested, but it is because the mob has its attention and fury focused in another direction. In those cases, the military commander allows the civil officers to function in the many duties which are unobstructed by the riotous forces; yet, as to that class, race or industry which the civil authorities' have shown their impotency to protect, its constitutional rights have clearly been torn away from it by the riotous forces and not by the state executive.

The error into which enthusiasts for the civil guaranties fall is that they ignore other articles of the fundamental law, of equal dignity. There are more things in a constitution than the Bill of Rights. All constitutional provisions must be construed together, and harmonized. A workable govern-

ment *could* be established without a bill of rights, but no government could be set up upon a bill of rights alone. As said in the Moyer case, power must reside somewhere. The primary duty of a state is self-defense and self-preservation. To the executive is entrusted that duty. In times of tranquillity people imagine that our civil government is part of the law of nature, but the men who founded the state knew that the maintenance and vindication of its authority might be a serious thing, and that the state executive is vested with office for more basic purposes than to sign bills and pardon criminals. Article IV entrusts to our governor those great but necessary powers which were entrusted to the powerful governors of old time, when the real role of a governor of a colony or province was better understood, by people generally, than it is today.

In addition to the constitutional sections above mentioned, the General Assembly has provided as follows:

Comp. L. 1921, Sec. 218:

> "When riots, invasion or insurrection in the state is made or threatened, the governor shall order the national guard to repel or repress the same; *Provided* that when the emergency is great and time will not permit of communication with the governor, the commanding officer of any portion of the national guard stationed at the scene of trouble may assemble his command and after taking steps to notify the governor in the most speedy manner possible, aid the civil authorities in suppressing riots or insurrection, or repelling invasion".

Sec. 219:

> "When there is in any town, city or county a tumult, riot, mob or body of men, acting together by force with attempt to commit a felony or to offer violence to persons or property, or by force and violence to break and resist the laws of the state, or when such tumult, riot or mob is threatened and the fact is made to appear to the governor, he may issue his order, or such sheriff or mayor may issue a call directed to any commanding officer of any portion of the national guard within the limits of their jurisdiction, directing him to order his command to appear at a time and place designated, to aid the civil authority to suppress such violence and to support the law".

The next ensuing sections provide penalties for disobeying the act, or failing to respond to such call, provide for the method of notifying members of the command, etc.

These sections were enacted in the session of 1921, and were evidently prompted by the tramway riots which occurred in Denver in the summer of 1920.

Section 5495, enacted in 1914, provides:

> "Whenever in the opinion of the governor a condition of riot, insurrection or invasion exists in this state, or in any county or counties, city or cities, town or towns, district or districts in this state, he shall have the right to declare the state or any such county or counties, etc., to be in a state of riot, or insurrection, or invasion, by proclamation, and to prohibit the purchase, etc., . . . of any firearms or ammunition, in the places covered by such proclamation or in any other portions of the state designated by him during the time that said proclamation remains in force".

These statutes are interesting, and suggest some questions to which we shall return in a moment.

We have seen that when constitutional protection is wiped out by insurrection, it becomes the governor's duty immediately to restore it. This is ordinarily done:

(a) By sending the armed forces of the state into the field in such numbers as may seem best to subdue the turbulent elements and protect the citizens and industries of the district; and

(b) By simultaneously issuing a proclamation of Martial Law, defining the district wherein the governor finds

that the civil authority has been overthrown, and publishing, for the information of everyone, the measures he finds needful to enforce while the civil authority is in process of reestablishment.

The first of these is necessary, as there can be no Martial Law unless a military force has been called out. The second is not necessary, although usual and advisable. If the governor himself issues no proclamation, the commander of his troops may; or there may be fragmentary and supplemental proclamations from either. In any event, the will of the governor, and of the commander of the troops (with the governor's approval, express or implied) is the law of the district during the emergency. We have seen that the practices and precedents to guide the military forces are borrowed from International Law in the usages and customs of war. This is necessarily true, because the means to be used, under the express terms of the constitution, are the military forces of the state, and they are trained, equipped, organized and tactically employed as military forces, and not otherwise. The usages of war, as recognized in International Law, are the only precedents and standards that exist for the employment of troops. As said by Chief Justice Taney in Luther v. Borden:

> "Unquestionably, a state may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the states of this Union as to any other government. . . . It was a state of war; and the established government resorted to the *rights and usages of war* to maintain itself, and to overcome the unlawful opposition".

And in Moyer v. Peabody, 212 U. S., the Federal Supreme Court, after referring to the Colorado constitution and supplemental statutes, authorizing the governor to use the national guard to suppress insurrection, "made or threatened", says:

> "That means that he shall make the ordinary use of the soldiers to that end".

Considering, for a moment, the acts of the General Assembly, quoted above, it will be apparent that they fall into two elements; the first being merely declaratory, so to speak, of the Constitution, and the second actually legislative in effect. I am inclined to think that every authority purported to be conferred on the governor by section 218, already existed under the constitution, that is, to order out the national guard to repress any riot or insurrection made or threatened, or to authorize, by general or special order, his subordinate commanders in the National Guard to act promptly in a local emergency, notifying him as quickly as possible. Section 219 is clearly declaratory, except in that part which authorizes a sheriff or mayor to issue a call to a local commander, and making a response thereto obligatory. The latter is, I think, valid, unless the governor should countermand the call or give other orders to the local commander. The governor is the constitutionally appointed commander-in-chief; and the legislature cannot dictate how he shall employ his troops. This is not only clear in principle but established by authority. Another point is that when the sheriff or mayor has issued his call, he is *through*. A civil officer cannot command or control a military force. That is for its commander, and he takes orders from and is responsible to no one but his superior officers. In suppressing the riot, he uses his troops in the way he thinks best to accomplish his mission. Section 5495 is clearly declaratory. When insurrection is flagrant anywhere, the governor can regulate or prevent, by any method he

finds necessary, the sale of arms and ammunition in Denver, Pueblo, or elsewhere.

Nevertheless, it seems that all these statutes are dictated by good policy, placing the moral support of the legislature behind any governor who acts with promptness and energy to restore civil authority.

It of course results, from the foregoing principles, that the commanding officer may seize and imprison anyone whom he has reason to think is contributing to a continuance of the disorder, may direct the activities of the sheriff or other civil authorities, or remove them from office, may interdict meetings or the publication or circulation of inflammatory newspapers and manifestoes, and establish curfew regulations, etc., for the government of the disturbed area. In the course of his tactical operations he may destroy life and property where necessary; in short, he may resort to such measures, and the same sort of measures, as would be proper if the forces of a foreign government were invading the district. It is here we find the proper application of the maxims, "The safety of the republic is the supreme law. Between armed forces the laws are silent".

Likewise, the governor or commander may, if deemed necessary, establish Military Commissions and Provost Courts, to try offenses against the rules of Martial Law and crimes and disorders generally. These tribunals are really in the nature of executive committees to advise the commander as to the truth in cases where the facts and circumstances require a full and fair investigation, and are usually needed only where operations are on a large scale. Their findings and sentences require approval of the convening authority, i. e. the governor or commander, before they can be executed. The penalties imposed are, for the most part, in Martial Law situations, only temporary measures of safety, such as imprisonment during the emergency, until the prisoner can be tried upon the restoration of civil authority under conditions fair to the People, expulsion from the district and the like; but not necessarily so. They may impose penalties for offenses against the military regime, like disobedience to orders, breaking regulations, etc., but if the offenses are to be punished as being against *civil laws*, their trial should ordinarily await the restoration of civil authority. In discussing this question, in the case of the United States v. Fischer, 280 Fed. 208, arising out of disorders in Nebraska in 1922, Judge Munger said:

> "Does the military power in the occupied territory which is declared under martial law extend to the trial and punishment of offenders against regulations made by the military commander? Some cases are cited in support of the proposition that the military forces can do no more than to arrest and detain offenders against the laws of the state until they can be delivered to the civil authorities for trial, upon the restoration of peace and order. No doubt the commander may avail himself of the courts as a means of trial, but he may also institute tribunals during the emergency to deal with offenders in the district. This is especially true of offenses against the military regulations, such as these petitioners committed, acts which are not offenses against the laws of the state. . . . Can the sentence of imprisonment by such a military tribunal be continued after peace is declared? This question has not been the subject of many reported decisions. The power to punish serious offenses by imposition of the death penalty is well understood, and the lesser punishment of imprisonment for life has been sustained. It is stated that during the Civil War such military commissions acting under the authority of the United States held trials and entered judgment in more than two thousand cases, and that sentences of imprisonment for terms of years and

for life were imposed. In cases of serious offenses it is not doubted that the sentence of imprisonment may continue during the war or insurrection. If the punishment is inflicted but a few days before the establishment of peace, it would seem absurd that sentences, otherwise just, should at once expire. While the necessity for crushing further resistence may have passed, the reason for continuance of sentences theretofore given has not ceased. The conclusion is that . . . there is nothing in the exertion of this power which contravenes the right of due process of law guaranteed by the Constitution of the United States".

Although the governor had theretofore proclaimed the insurrection to be over, the applications of the prisoners for their release were denied.

Military Commissions resemble Courts-Martial in organization and appearance and are composed of as many officers as the tactical situation permits, not usually exceeding thirteen. A commission of less than three would be contrary to precedent. A judge advocate and defense counsel are provided for, and trials proceed, so far as possible, on the principles of General Courts-Martial. Provost courts are one-man tribunals, to handle more or less petty offenses.

No case involving martial-law courts has yet arisen in Colorado. They are merely a detail, however, in the exercise of the admitted powers of the commander, and are not affected by the constitutional provisions as to bail, jury trial, etc. A sentence under them does not make the prisoner a convict, although he be imprisoned in the state penitentiary as a matter of convenience.

It follows, from what has been said, that the civil *courts* have no more right to impede or hamper the governor in discharging his duty of suppressing insurrection, than the governor has to hamper the courts in their administration of justice in times and places of civil peace. Both, when so acting, act under the constitution. The executive and the judiciary are co-ordinate and independent departments, and neither is above the other. It is true that the governor has the power to say whether the time or the place is one of peace or insurrection, and no court can question his finding. It is also true that unless the governor is in the exercise of a constitutional duty, he is the same as any other citizen and amenable to the process of the least court in the state. And this brings us to the question of procedure in cases of habeas corpus, which are often brought in behalf of rioters imprisoned under executive authority. Usually the military operations have been promptly successful to an extent that has permitted a civil court to sit in quiet somewhere in or near the insurrectionary zone. Prompt application is there made on behalf of the prisoner, alleging that he is illegally restrained of his liberty. At various times during the last century, a few courts failed to grasp the principles involved, held that the executive department had no right to operate otherwise than under civil procedure, and undertook to discharge the prisoner. Wherever the executive department stood its ground, the court's theory was soon reduced to an absurdity. The only officers who could enforce the court's order were the sheriff and his deputies, bailiff, coroner, etc., who had already proved powerless to deal with the local disturbances and who could not possibly, unaided, take away the prisoner from the military commander and his soldiers. The only higher authority was the governor, and *his* was the very authority by which the prisoner was held. If the sheriff tried to organize a posse comitatus to give battle to the troops, he must draw his force from the unorganized militia of the state, all able-bodied male residents between the ages of 18 and 45,

whose commander-in-chief is the governor, and whose paramount allegiance is to him. The governor in a courteous communication would point out to the court its fundamental error, and that he could not, consistent with his oath of office release the prisoner and thus permit him to help keep alive the insurrection which the governor was so anxiously engaged in suppressing. This very transaction took place in Ex parte Moore, 64 N. C. 802, in disturbances created by the original Ku Klux Klan. The Supreme Court of that state soon afterward modified its views in keeping with the logic of correct principles.

If a court is sitting and application for the writ is made, not showing clearly on its face that the prisoner is held by proper authority, the court should ordinarily grant the writ, to be returnable in the usual way. The national guard commander should make return, setting out very fully and in courteous and respectful language the basis and reasons for holding the petitioner. Forms for this are found in the appendix to Davis on Military Law and are easily adaptable to state practice. The commander should also, out of respect for the court, produce the prisoner, unless tactical considerations seemed to forbid, in which case an explanation should be included in the return. The return showing that the petitioner is held by the governor's authority in connection with the civil disturbances, the court should, of course, remand the prisoner. I am told that during the Cripple Creek insurrection, a district judge, supposed to be in sympathy with the rioters, undertook to discharge a military prisoner, in the face of a proper return such as above indicated; and that the Adjutant General, Sherman Bell, was compelled to rise in open court and notify the judge that he could not and would not obey the order. If so, he did exactly right, as there is no reason why the executive should back down in the face of judicial usurpation, any more than that the judiciary should tamely submit to executive usurpation where no authority exists. These delicate situations show that bad conflicts may lurk close to the surface; and the only way to avoid them, among honest men, is for everyone to understand the correct principles which apply.

Time will not permit dealing with, or even suggesting, many problems that may arise out of Martial Rule; but there is one of particular importance, namely, the correct theory of liability against the governor and those in military service during the insurrection. Many a mob leader comes into court, after peace is restored, loudly complaining that his sacred rights under the constitution have been infringed by restraining him. At all other times he abhors that document. Cases may conceivably arise, of course, where the executives should be held liable; and the ground for their liability is simply a wanton abuse of power. In Moyer v. Peabody, the plaintiff, president of the Western Federation of Miners, had been held by the military for two and a half months during which the insurrection was flagrant. After it was over, and Gov. Peabody's term of office had expired, Moyer sued him, his Adjutant General Bell and Bulkley Wells, a captain of militia, for damages for that imprisonment, taking the position that it was wholly illegal in any event. Judge Lewis disposed of that contention (148 Fed. 870) upon the grounds expressed by the state supreme court in re Moyer in 35 Colo., and said:

> "It would seem to be in keeping with principle to hold the defendants responsible by civil action for a wanton abuse of power. In Luther v. Borden it is said: 'No more force . . . can be used than is necessary to accomplish the object, and if the

power is exercised for purposes of oppression, or any injury wilfully done to person or property, the party by whom, or by whose order, it is committed would undoubtedly be answerable' . . . (Judge Lewis continues:) Reasonable inquiry and care on their part, under the circumstances as they then exist, ought to relieve them from civil responsibility."

The complaint not showing any wanton abuse of power, he sustained a demurrer to it. Moyer carried the case to the Supreme Court where Mr. Justice Holmes delivered the unanimous opinion. After sustaining the authority of the state officials in every particular he said:

"No doubt there are cases where the expert on the spot may be called upon to justify his conduct later in court, notwithstanding the fact that he had sole command at the time and acted to the best of his knowledge. That is the position of a captain of a ship. But, even in that case, great weight is given to his determination, and the matter is to be judged on the facts *as they appeared then*, and not merely in the light of the event. When it comes to the 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 judicial process".

In his argument for the defendant in Luther v. Borden, Webster very clearly set forth the discretionary nature of the commander's martial law authority in the following words:

"I shall only draw attention to the subject of Martial Law, and in respect to that, instead of going back to Martial Law as it existed in England at the time the charter of Rhode Island was granted, I shall merely observe that Martial Law confers power of arrest, of summary trial, and prompt execution, and that when it has been proclaimed the land becomes a camp, and the law of the camp is the law of the land. Mr. Justice Story defines martial law to be the law of war, a resort to military authority in cases where the civil law is not sufficient; and it confers summary power, not to be used arbitrarily or for the gratification of personal feelings of hatred or revenge, but for the preservation of order and public peace. The officer clothed with it is to judge of the degree of force that the necessity of the case may demand, and there is no limit to this, except such as is to be found in the nature and character of the exigency".

Had Mr. Webster added that, on the one hand, when used calmly, reasonably, and with the evident desire to serve the public welfare, though great errors of judgment may be made, much latitude is allowed the commander in the exercise of his authority; and on the other hand, if an intent to use power for personal ends, or in an oppressive manner be manifested, he is liable to be held to account, both militarily and civilly, the outline would be complete. The rule is that when martial law exists, either by proclamation or otherwise, the commanding officer must use his discretion, and is expected to come as reasonably near to the line of justice and fair dealing as the circumstances, as they appear at the time, and the information he has or may easily obtain will permit.

The question naturally arises in any mind as to possibilities of abuse of power; but as stated in the Moyer case, arguments based on such possibilities are of the weakest variety; because abuse of power is always possible in any department of government. The political remedy for abuse of power is by impeachment under Article XIII. Under Article IV, Section 4, of the Federal Constitution the national government guarantees to every state a republican form of government. A permanent status of martial rule would not be republican in form, and, if attempted, the federal government would promptly overthrow it. Cases of governors' exceeding their authority are very rare, one of the few

instances arising in West Virginia in 1921. There the Supreme Court of Appeals, in a series of exceedingly well-considered cases, had upheld the executive department in putting an end to reigns of terror in the coal districts. A later governor, evidently conceiving that he could enjoy the efficacy of Martial Rule, without the expense of maintaining troops, declared Martial Law and sent only his Adjutant General to the district to take command of the activities of the sheriff, his deputies and the posse comitatus. The same judge who had written most of the previous opinions denied, in a clear and unanswerable exposition of the law, the authority in any executive to inaugurate a military jurisdiction when he can get along without the military itself. (88 W. Va. 713; 108 S. E. 428; 24 A.L.R. 1178).

It is worth noticing that state police are not state troops, but are civil police, and no martial law measures can be predicated upon their use alone, although under martial rule they can be used by, and may cooperate with the military. Martial Law is an extreme measure, and efficient local peace officers, aided by a permanent state police, are desirable to make the necessities for Martial Rule as infrequent as possible. These would be more infrequent if the civil officers would do their duty. As pointed out by the Chief Justice in the Milligan case, the local civil officers may even be the allies of insurrection. More often, they allow themselves to be intimidated, and excuse their inaction by claiming it is impolitic to enforce the law or prosecute the rioters; or they pretend to regard the disturbance as a private quarrel in which they should not "take sides"; meaning that the mob is free to murder and loot to the extent of its capacity. The victims of its hostility must then defend themselves as best they can, and when they do so, are often criticized by a large section of the pulpit and press for carrying on a "private war".

The failure on the part of peace officers and prosecutors to do their duty results in a denial to the citizen of protection and redress under the civil phases of the constitution; it amounts to a usurpation by such local officers of a discretion which is not even lodged in the legislature but is forbidden to any department, namely, a discretion to abandon the inhabitants, property and industries of a given locality to the will and desires of a mob. As they must be protected somehow, it thus becomes necessary to send in the troops, where they might not have been needed if the local prosecutors and peace officers had made a serious attempt to carry out their duties in the first instance; and the continual failure of county and district officers causes many persons to assume that no authority is ever very effective except the military.

In conclusion, I think the most important points are:

1st. That the civil guaranties are not suspended by the executive, but, in theory and in fact, by the mob or insurrection that temporarily wipes out constitutional protection.

2nd. That, in restoring the constitutional regime, the governor and his officers use the armed forces of the state in accordance with the customs and usages of war, and any measures they in good faith adopt are due process of law.

3rd. That, when civil authority has been restored, they can be held liable civilly and politically, only for a wanton or wilful abuse of power in carrying out their functions.

It Was Catching

Nutz was arrested on a charge of driving under the influence of liquor. cand ⅛alth⅝t mtr ft rtircmfeftdfalw. —*Denver Paper.*