any principle of public policy which prevented an assurance against insanity and its consequences. It must, therefore, be declared that the policy for £300 was valid, and that the plaintiff, as personal representative, was entitled, notwithstanding the circumstances under which Mr. Horne had died, to the benefit of it.

As to other points, an inquiry in chambers directed.

LEGAL MISCELLANY.

MARTIAL LAW.

We can readily perceive how, in the present posture of our National affairs, many questions may arise, from time to time, touching the precise relation which the military bear to the civil powers of the State in moments of extreme danger, when the safety and the life of the body politic are imperilled by the violence and treachery of internal foes. The general inquiry, which the complexion of recent events seems to have induced, is, Under what circumstances and by whose authority the municipal law of the land will be rightfully superseded by what is known as the military or martial law?

Martial law has been variously defined. One English authority has described it as "the law of war, that depends upon the just but arbitrary power and pleasure of the king or his lieutenant: for though the king doth not make any laws but by common consent in Parliament, yet in time of war, by reason of the necessity of it, to guard against dangers that so often arise, he useth absolute power, so that his word is law."[1] This description is somewhat confused and obscure, but it seems to correspond substantially with the more concise definition of Sir Matthew Hale, who says that "martial law is no law at all, but something indulged rather than allowed by

[1] Smith de Repub. Angl. lib. 2, c. 4. Bacon, in one of his political works, gives us certain "Cases of the King's Prerogative," and among them we find this: "The king hath power, in time of war, to execute martial law, and to appoint all officers of war at his pleasure" Bacon, probably, uses the term "*martial law*" for *military law*—a distinction that we endeavor to make clear in the text of this essay.—*Vide Bacon's Works, Spedding & Ellis' Ed., vol. xv., p.* 375.

law."[1] Blackstone adopts Hale's description as the basis of his own view of this system of law, and remarks, that "it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land."[2]

By the common law of England, before the adoption of the Continental custom of maintaining standing armies in time of peace, the execution of any English subject, under color of martial authority, was no less an offence than murder. Coke has so stated the law. "If a lieutenant or other," he says, "hath commission of martial authority in time of peace, and hang or otherwise execute any man by color of martial law, this is murder: for it is against *Magna Charta*, cap. 29, and is done by such power and strength as the party cannot defend himself, and here the law implieth malice."[3] Hale has announced the same doctrine. "If a court martial," he states in the *Pleas of the Crown*,[4] "put a man to death in time of peace, the officers are guilty of murder." Such was, undoubtedly, the unwritten customary law of England before *Magna Charta* was won by the "bluff, bold men of Runnymede;" and when that document declared that no freeman shall be taken or imprisoned but by the lawful judgment of his peers or by the law of the land, it merely gave expression to that which had been from time immemorial the "*inalienable right*" of every English freeman. The Constitutional History of England, during the period of the Plantagenet, Tudor, and Stuart dynasties, speaks of frequent attempts, on the part of the Crown, to rob the subject of the protection which the Common Law and the Charter threw around him. The principles and procedure of the municipal law of the realm were, time and again, set at naught by the king. Offences, many of which were perfectly well defined by "*the law of the land*," while others were unknown to it, were declared to be treason. Persons suspected of the commission of those offences were proclaimed *rebels*, and as rebels were directed to be executed by martial law. In the year 1558, a proclamation was made by Mary, that "whosoever had in his possession any heretical, trea-

[1] Hist. C. L. c. 2
[2] 1 Comm. 413.
[3] 3 Inst. 52.
[4] 45.

sonable, or seditious books, and did not presently burn them, without reading them or showing them to any other person, should be esteemed a *rebel*, and without any further delay be executed by the martial law."[1] Thirty years after, when the coming "Armada" threw its shadow over the island, another proclamation issued, under the hand of Elizabeth, bearing date the 1st of July, 1588, declaring that "such as brought into the kingdom, or dispersed papal bulls or traitorous libels against the queen, should, with all severity, be proceeded against by her majesty's lieutenants, or their deputies, by *martial law*, and suffer such pains and penalties as they should inflict; and that none of her said lieutenants or their deputies be any wise impeached, in body, lands, or goods, at any time hereafter, for any thing to be done or executed in the punishment of any such offender, according to the said martial law, and the tenour of this proclamation, any law or statute to the contrary in any wise notwithstanding."[2] Mr. Hallam, speaking of this act of Elizabeth, observes; "The measure, *though by no means constitutional*, finds an apology in the circumstances of the times. It bears date the 1st of July, 1588, when, within the lapse of a few days, the vast armament of Spain might effect a landing upon our coasts; and prospectively to a crisis, when the nation, struggling for life against an invader's grasp, could not afford the protection of law to domestic traitors. But it is an unhappy consequence of all deviation from the even course of law, that the forced acts of overruling necessity come to be distorted into precedents to serve the purposes of arbitrary power."[3]

One of the most extraordinary measures of Elizabeth's reign, in point of violence and illegality, was the execution of a commission, in July, 1595, to Sir Thomas Wilford, as the provost marshal, granting him authority, and commanding him "upon signification from the justices of peace of London, or the neighboring counties, of idle vagabonds and riotous persons, *worthy to be speedily executed by martial law*, to take them, and according to the justice of martial law, to execute them on the gallows or gibbet, near

[1] Hume's Hist. of England, vol. 4, p. 419.

[2] Ibid. vol. 5, p. 454. [3] Constitutional History of England, vol. 1, p. 328.

the place where they committed their offences."[1] The great historian of the English Constitution has condemned the measure as an unconstitutional stretch of prerogative, but palliates the conduct of Elizabeth in this attempt to supersede the common law, and impose the tyranny of martial law upon her subjects, upon the ground that circumstances, probably, of which we are ignorant, gave rise to the extraordinary commission to Sir Thomas Wilford.[2] There is no difference of opinion, among the authorities upon this branch of jurisprudence, that exercises of the royal prerogative, such as we have mentioned, were utterly in violation of the constitutional rights of the British people—that they were, in fact, mere usurpations of a power which Parliament alone had constitutional authority to exert. The practical course of government, in the times of the Tudor kings, was arbitrary and violent; but liberty survived the blows which the mailed hand of prerogative inflicted, and by means of her defeats in that age, grew strong enough to wrest from the Crown, in the next, still larger grants and more substantial guaranties. The time came at last, in the reign of the second Stuart, when "the liberty of the subject in person and estate" was to be placed upon an indestructible basis. The history of the memorable struggle between Charles the First and his third Parliament—a body which represented, as has been said, "the prime intellectual manhood of England"—we will not review. We have only one reference to make to it in relation to the subject of this essay, and it is this, that one of the most glorious results of that struggle was the exaction of a distinct and unqualified acknowledgment from the Crown of England, in the PETITION OF RIGHTS, that all previous commissions from the king, "*by which certain persons were assigned and appointed commissioners, with power and authority to proceed within the land, according to the justice of martial law,*" were issued in violation of the fundamental principles of the English Constitution, and contrary to "The Great Charter of the Liberties of England;" and a solemn promise, under the royal seal, that thereafter no commis-

[1] Hume's History of England, vol. 5, p. 456. Rymer, xvi. 279.

[2] Hallam vol. 1, p. 329.

sion of like nature should issue forth "*to any person or persons whatsoever, to be executed as aforesaid, lest by colour of them any be destroyed or put to death contrary to the laws and franchises of the land.*"[1] When Charles I. gave his royal assent to this petition, the work which Wentworth, Selden, Pym, Hollis, Coke, Eliot, and Hampden entered the Parliament of 1628 to accomplish, was nobly done. The "*ancient vital liberties*" of England were vindicated. The "*ancient laws*" of our British ancestors were reinforced, and "*no licentious spirit*" dare hereafter "*enter upon them.*"[2]

This brief historical retrospect will enable the reader to understand the remark of an eminent English judge, in deciding a leading modern case, touching the jurisdictions of the civil and military tribunals of Great Britain, that "martial law, such as it is described by Hale, and such also as it is marked by Mr. Justice Blackstone, does not exist in *England* at all. Where martial law is established and prevails in any country, it is of a totally different nature from that which is inaccurately called martial law, merely because the decision is by a court martial, but bears no affinity to *that which was formerly attempted to be exercised in this kingdom, which was contrary to the Constitution, and which has been for a century totally exploded.*"[3]

Martial law, even by some juridical writers, is not unfrequently confounded with military law. The popular opinion is, that they are in fact but different names for the same code. The martial law which the Crown of England, as we have seen, attempted, in times gone by, to employ, was not the military law known to our modern jurisprudence. It was a system of procedure—it can hardly be said to have been a code of principles—which governments, now-a-days, authorize and employ only upon occasions of imminent and extraordinary peril. The whole body of the municipal law is, for the time being, set aside. The highest rights of the citizen in time of peace are suspended, and the dearest privi-

[1] Creasy on the English Constitution, p. 260.

[2] Speech of Wentworth; Parliamentary History, vol. 2.

[3] Grant *vs.* Sir Charles Gould, 2 H. Bl. 98.

leges of the freeman are revoked. The military authority, for the time, takes the place of all civil institutions,[1] and the government of the sword supersedes the government of established law.

The courts of law exist by the sufferance merely of the temporary power which the sovereign has placed above them. Their doors may be at any moment closed, and the swift justice which the laws of war meet out, is all that the citizen can ask or get. Such a system is entirely abnormal in its character. It is despotic in its nature, cruel and harsh in its operation. The remark need scarcely be made, that, in a country like our own, the establishment of such a system ought not to be permitted unless the safety and perpetuity of the government absolutely depend upon its existence. Military law, on the contrary, is naught but a body of rules and ordinances prescribed by competent authority for the government of the military state considered as a distinct community.[2] In other words, it is the jurisprudence of those cases which are decided by military judges or courts martial. In England, the several "Mutiny Acts," passed from time to time by Parliament, have arranged and modelled those rules and ordinances into the form of a symmetrical and permanent code. The king has power to make articles of war, but only for the

[1] It was the opinion of one of the ablest publicists whom this country ever produced, JOHN QUINCY ADAMS, that, under the laws of nations, after the declaration of martial law in an invaded territory, the President of the United States possessed power to order the universal emancipation of the slaves belonging to the people of that country. This doctrine was announced by that eminent man in his speech in the United States House of Representatives, April 14 and 15, 1842, on war with Great Britain and Mexico. The question, in what branch of the Government the power to proclaim martial law resided, Mr. Adams did not discuss in that speech, but we infer that he was of opinion that the power belonged to Congress. We quote his words: "By the laws of war an invaded country has all its laws and municipal institutions swept by the board, and martial law takes the place of them. This power in Congress has, perhaps, never been called into exercise under the present Constitution of the United States. But, when the laws of war are in force, what, I ask, is one of those laws? It is this: that when a country is invaded, and two hostile armies are set in martial array, the commanders of both armies have power to emancipate all the slaves in the invaded territory."

[2] O'Brien's Am. Military Laws, 26.

better government of his forces. They can extend no further than they are thought necessary to the regularity and due discipline of the army.[1] The court martial is regarded as a court established by positive law, and the proceedings of it, and the relation in which it stands to the Courts of Westminster Hall, depend upon the same rules with other courts which are instituted and have particular powers given them, and whose acts, therefore, may become the subject of application for a prohibition, to the Courts of Westminster Hall.[2]

In the United States, under the Constitution, the power of Congress over the army is absolute. The President commands the army when it is once created; but Congress alone has power to diminish or increase its numbers and its strength at pleasure. The President possesses the ordinary powers and prerogatives of the commander-in-chief of an army; but he is limited and controlled in his action by any general or special law which Congress may choose to enact in regard to him in his relation to the forces. If the President employ the troops under his command for a purpose which Congress has not sanctioned, he violates the obligations of his office. The President has no power to constitute military tribunals, unless he is expressly authorized by Congress to do so. The organization of these courts, the subjects of their jurisdiction, by whom they are to be ordered, of whom they shall consist, the rank of their members, and their forms of procedure, are all matters for the regulation of Congress in the plenitude of its power under the Constitution.

It is the opinion of the highest authorities in English constitutional law, that martial law, in the strict sense we have explained,—such as in the reign of Philip and Mary, and in the succeeding reign of Elizabeth, the crown attempted to impose upon its subjects—cannot be employed without the authority of Parliament. M'Arthur, in his work upon Courts Martial, assumes that Parliament alone has power to declare it. "*Martial law*," he says, "is *proclaimed by authority of Parliament*, and prevails generally or

[1] Grant *vs.* Sir Charles Gould, 2 H Bl. 100.

[2] Ibid.

partially in a kingdom for a limited time, as latterly in Ireland, for the suppression and extinction of the rebellion which had so long unhappily existed."[1]

The Petition of Rights forever set at rest the question which shook the State of England, as we have seen, to its centre, in the middle of the seventeenth century, whether the crown, without the authority of Parliament, could rightfully arrest and punish the subject contrary to "the law of the land," and according to the form and practice of martial law; and if the power of suspending the privilege of the writ of *habeas corpus* be regarded as one entirely independent of the power of proclaiming martial law, and one which the Revolution of 1642 did not determine, belonged exclusively to Parliament, then we say, the *habeas corpus Act*, (31 Car. II. c. 2,) placed the privilege of that important writ entirely beyond the control of the Executive of the British Government.[2]

We are enabled to approach, with the result of this brief historical review in our mind, the grave and now practical question of American constitutional law—by and under the authority of what department of our Federal Government martial law may be proclaimed or employed? It is the glory of our national life that the elements of LIBERTY and ORDER have, hitherto, been so happily blended in it, that the minds of the people of this country have been seldom turned to the consideration of the question as one of practical importance. We look, therefore, into the books of our national reports with the expectation of finding little light that will guide us in the inquiry. Sir Matthew Hale, in his History of the Common Law, expresses a surprise that so little has been written upon the subject of martial law. The people of this country should be profoundly grateful that the literature of their law is as barren, in this particular, as the books of the English lawyer were

[1] 1 M'Arthur, 26.

[2] "It is the Parliament only, or legislative power, that, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for so doing." 1 Black. Comm. p. 36.

in Hale's day. An American scholar[1]—one whose accurate and profound knowledge of legal bibliography renders him as well an ornament as a light to the bar of America—has observed, that the English reporters "reflect almost immmediately, and often quite vividly, the social state of England during the time in which they give us cases." The American reporters show us, as in a glass, the social and political features of our country's history; but the rugged lines of care and pain, drawn by the iron hand of martial law, are not found upon the written picture.

The privilege of the writ of *habeas corpus* has never been suspended by Congress, nor are we aware that the right of the citizen to demand its protection has ever been practically denied by the Executive, till very recently, since the adoption of the Federal Constitution. The State of Massachusetts, during the progress of the formidable Shay's Rebellion, directed the writ to be suspended for a limited period; but the military were ordered to act in strict subordination to the civil powers whenever they were called upon to assist the execution of civil processes.[2] The precedent which Massachusetts thus established was followed by the General Government, with Gen. Washington at its head, throughout the Pennsylvania Rebellion of 1793. Congress authorized the raising of additional troops for one purpose, and none other—the support and assistance of the civil authorities in their effort to execute the laws.[3] The arrests were made by the authority of the civil officers, and prisoners were taken before the civil magistrates for hearing and trial.[4] Special sessions of the Circuit Court were allowed to be called near the place of offence, whenever it became necessary to try those who were charged with resistance to the laws.[5] Washington assured the army that "they should not consider themselves as judges or executioners of the laws, but as employed to support the proper authorities in the execution of them."[6]

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[1] John William Wallace, Esq.; "Curiosities of the Reports." Philadelphia Legal Intelligencer, 1861, p. 102.

[2] Minot's History of Shay's Insurrection, p. 101.

[3] 1 Stat. at Large, p. 403. [4] Findley's History of the Western Insurrection, p. 181.

[5] 1 Stat. at Large, 334. [6] Findley's History, p. 179.

It was proposed, during the conspiracy of Aaron Burr, that the *habeas corpus* should be suspended in cases where persons were charged *on oath* with treason, and imprisoned by warrant, on the authority of the President, or the Governor of any of the States. But Congress refused, even in this partial way, to exert its powers.

Where arrests were made without oath and warrant, the parties were discharged as soon as the action of the courts upon writs of *habeas corpus* required it.

The Supreme Court of the United States determined, while that conspiracy was in progress, that if an arrest were made without orders from the Commander-in-Chief, the prisoner would be discharged at once;[1] and even an arrest by a military officer was decided to be invalid, though ordered by the Executive, unless the person was then actually engaged in hostilities, or in aiding and abetting those who were arrayed in war against the government.[2]

The specific question, to which we have referred, has never been directly determined by the highest judicial tribunal under the Constitution. The books of Reports, both State and Federal, record incidental remarks of the judges—nothing higher in their character, however, than *dicta*—which may be of value, in the absence of express decision, to any one who is disposed to examine further the subject of this paper. We will close our observations, then, with a brief reference to the most important of those cases which touch our general subject.

The question, as a constitutional one, has been discussed in relation to the 9th Section of Art. I. of the Constitution of the United States, which provides as follows:

"The privilege of the writ of *habeas corpus* shall not be suspended unless, when in cases of rebellion or invasion, the public safety may require it."

It would seem to be conceded that the power to suspend this writ, and that of proclaiming martial law, include one another. The privilege of the writ may be withdrawn, to be sure, without the declaration of martial law; but the establishment of martial law

[1] Alexander's Case, 4 Cranch 75, (note.)

[2] Bollman *vs.* Swartwout. Ibid 101, 126.

implies of necessity the suspension of the privilege of the *habeas corpus*. The right to exercise one power, however, implies the right to exercise the other; and if the one is vested by the Constitution in any branch of the Federal Government, that department may exert the other also.

The question came directly, in the year 1815, before the Supreme Court of Louisiana, and was examined with care and ability by that tribunal.[1] A brief analysis of the argument employed by the judges upon that occasion, will present the constitutional view which they adopted, more clearly than any explanation of our own.

On the 15th of December, 1815, Gen. Jackson placed the city of New Orleans and its environs under strict martial law. The general question before the Supreme Court of Louisiana, in the case referred to, was how far such a proclamation, by an officer of the Federal government in command within a State, superseded the exercise of the functions of civil magistrates. The primary question arose under the clause of the Constitution which we have mentioned. If the President, or an officer acting under his authority, had no power to suspend the writ of *habeas corpus*, it was conceded that he did not possess the power to proclaim martial law. The section in which the above clause is found contains all the limitations which the Constitution imposes upon the legislstive powers of Congress, granted by the preceding section. The limitations therein mentioned cannot extend to any of the other branches of the government. The section is found in the first Article which treats exclusively of the organization and powers of the National Legislature.[2] The limitation of this particular clause must be the limitation which the Constitution imposes upon the exercise of the power to suspend the writ by implication, vested in *Congress*. Congress, therefore, has no authority to exercise the power except "in cases of rebellion or invasion when the public safety may require it." If, then, this suspending power exist in the Executive, it exists without limitation, and the result is, that the President possesses a power without limitation, which Congress cannot exercise,

[1] Johnson *vs.* Duncan et al., 3 Martin, 531.

[2] 3 Story on the Constitution, § 1336.

except under certain defined conditions; or, to carry the logical process a step further, the President possesses a power *alone* greater than the two branches of the National Legislature and himself *jointly* are entitled to exert.

Neither in peace nor in war, again, it may be observed, can a law be enacted or repealed by any department of the government but the legislative. The suspension of a law is its partial repeal—and therefore a legislative act which the President cannot perform under the Constitution.

In deciding the celebrated case of *Bollman* vs. *Swartwout*, to which reference has before been made, Chief Justice MARSHALL takes occasion to remark: "If at any time the public safety should require the suspension of the powers vested by this act (*habeas corpus*) in the courts of the United States, it is for the legislature to say so. The question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the laws."

The subject, in some of its aspects, was ably and elaborately discussed by Mr. Justice WOODBURY in the case of *Luther* vs. *Borden*,[1] decided by the Supreme Court in the year 1849. The opinion of Judge WOODBURY, read in that case, is a profound dissertation upon the branch of law to which our attention has been directed, and we commend it to the reader who would pursue the study of our subject in the light of history and sound jurisprudence.

The general result of his researches, applied to the question before the Supreme Court for adjudication, was, that the legislature of Rhode Island could not rightly establish martial law under the circumstances which surrounded her in 1842—the year of Dorr's rebellion. "The writ of *habeas corpus*," the Justice observes, "unless specially suspended by the legislature having power to do so, is as much in force in intestine war as in peace, and the empire of the laws is equally to be upheld, if practicable."

We cannot close this paper more appropriately than by quoting

[1] 7 Howard, 1.

a few sentences from Judge WOODBURY'S opinion; and we present them without note or comment.

He says: "If Parliament now exercises such a power (that of proclaiming martial law,) it is only under various limitations and restrictions, and only because the power of Parliament is by the English Constitution considered as unlimited or omnipotent. . . It may well be doubted whether in the nature of the legislative powers in this country, it can be considered anywhere rightfully authorized, any more than the Executive, to suspend or abolish the whole securities of person and property at its pleasure; and whether, since the Petition of Rights was granted, it has not been considered as unwarrantable for any British or American legislative body, not omnipotent in theory like Parliament, to establish in a whole country an unlimited reign of martial law over its whole population."

This case, as well as those previously cited, should be studied, of course, with reference to the special circumstances which gave them origin. Whether any of the doctrines which they are founded on, apply to, and ought to determine, cases which may arise under the more extraordinary condition of affairs now existing, it is not our purpose to discuss. That is a question which each reader must ask and answer.[1]

Occasions may happen, we would say, however, in the life of the State, when the imperious law of self-preservation, which pervades the whole moral universe, not only sanctions the temporary abandonment of constitutional forms, but requires those who are invested with the authority of the State, to exert transcendent powers, fitted to meet and conquer surrounding dangers. If the preservation of the constitution of the government, or the everlasting welfare of the governed, sometimes renders resistance and revolution by the *people* necessary, and even *heroic*—acts which are themselves, of their very nature, violations of the land's law[2]—why may it not, in

[1] Since the preparation of this paper, the highest judicial officer of the government, Chief Justice Taney, has determined that the President of the United States does not possess, under any circumstances, the power to suspend the privilege of the writ of *habeas corpus*. His opinion is, by this time, before the nation.

[2] The Elements of Morality and Polity. By Dr. Whewell, Volume ii. p. 196. (Am. ed.)