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SOME OBSERVATIONS ON THE CASE OF PRIVATE WADSWORTH.

The recent strike of the anthracite coal miners raised many doubts in the minds of thoughtful men. The right of the coal-carrying roads to own the mines, their right to combine, the possible extent of public regulation of the business of coal mining, and even the condemnation of the mines by the state, are some of the topics which have demanded attention.

When the civil powers failed in the maintenance of order in the coal regions, and it became necessary for the governor of the state to call out the militia, another sort of question suggested itself, viz: what was the status of the military under the circumstances. And when, in consequence of the orders of the general commanding in the region, a citizen having no connection with the disorder was shot by a militiaman and killed, the inquiry naturally arose, whether such orders were within the authority or power of the general to give; and whether they constituted any protection to the private who did the shooting. Some thought upon these points at the time of the occurrence, led the writer to turn to the books for light, and he has ventured to give the result

of his study of the status of the military in relation to the civil arm in time of riot, mob violence and insurrection.

It will perhaps conduce to clearness if the facts are first shortly stated and the conclusions of law subsequently deduced and applied to them. The only available authoritative sources from which to obtain the facts, are the orders issued by the governor and the commanding general, and the evidence given before the coroner after the shooting occurred.

It is matter of common knowledge that the situation at Shenandoah, Schuylkill County, was very grave throughout the strike. The sheriff lost control of the situation and called upon the governor for troops. They were sent. Subsequently the conditions became more dangerous and the governor ordered out the whole of the National Guard of Pennsylvania. On October 6, Governor Stone issued General Order No. 39, which ran as follows:

"1. In certain portions of the counties of Luzerne, Schuylkill, Carbon, Lackawanna, Susquehanna, Northumberland and Columbia, tumults and riots frequently occur and mob law reigns. Men who desire to work have been beaten and driven away and their families threatened. Railroad trains have been delayed and stoned, and tracks torn up. The civil authorities are unable to maintain order and have called upon the governor and commander-in-chief of the National Guard for troops. The situation grows more serious each day. The territory involved is so extensive that the troops now on duty are insufficient to prevent all disorder. The presence of the entire division, National Guard of Pennsylvania, is necessary in these counties to maintain the public peace. The major-general commanding will place the entire division on duty, distributing them in such localities as will render them most effective for preserving the public peace. As tumults, riots, mobs and disorder usually occur when men attempt to work in and about the coal mines, he will see that all men who desire to work, and their families, have ample protection. He will protect all trains and other property from unlawful interference, will arrest all persons engaging in acts of violence and intimidation, and hold them under guard until their release

"will not endanger the public peace, and will see that threats, intimidations, assaults and all acts of violence cease at once. The public peace and good order will be preserved upon all occasions and throughout the several counties, and no interference whatsoever will be permitted with officers and men in the discharge of their duties under this order. The dignity and authority of the state must be maintained, and her power to suppress all lawlessness within her borders be asserted."

Under this order the Eighteenth Regiment, N. G. P., was stationed at or near Shenandoah. The house of Barney Bucklavage, at No. 1118 West Coal street, had been dynamited twice, and as a result, the general in command issued special orders on October 8, part of which is as follows:

"At 5.30 p. m. a detail of one corporal and six men should be put at the house of Barney Bucklavage, No. 1118 West Coal street; this house was dynamited on the night of October 6 and is occupied by a woman and four small children, and for the present I deem it best to guard it; my instructions to the guard have been that they shall keep a sentry on at the front door sitting inside the house with the door ajar, and one sentry sitting just outside the rear door under the porch, and if any attempt is made to dynamite them, or they are shot at or stoned, or any suspicious characters prowl around, particularly in the rear of the house, who fail to halt when directed by the guard, the guard shall shoot and shoot to kill."

About 11.20 o'clock in the evening of October 8, private Wadsworth was posted as the sentry in the front yard of the house, just in front of the door, under orders to halt all persons prowling around or approaching the house, and if the persons so challenged failed to respond to the challenge after due warning, "to shoot, and shoot to kill."

According to the testimony given before the coroner, Wadsworth about 11.30 o'clock discovered a man approaching along the side of the road nearest the house and called "halt." The man continued to advance, and Wadsworth called "halt" again, but the man paid no attention to the order. Wadsworth then tapped lightly on the door and said, "corporal of the guard." He then called "halt" and again

"halt." Wadsworth testifies that the man had turned and was coming toward the gate, and when he last called "halt," had opened the gate. He fired, the man screamed and fell dead. The corporal of the guard saw the flash of the shot, but nothing else. A number of witnesses testified that when found the dead man lay from three to six feet outside the gate.

There had been no disturbance in the neighborhood of the house and Wadsworth testified that the man he shot was the first and only man he saw coming along the road that night; that he was about five yards distant when the shot was fired. Jacob Durham, a brother of the dead man, swore that his brother was slightly deaf before he went to war, but was more so after his return. Mrs. Mary Shore testified that she saw the soldiers pick up the body and that it was not near the gate then. Thomas Shore testified that he found blood marks in the road, after the shooting.

The coroner's jury found as follows:

"We find that the said William Durham came to his death "October 8, 1902, at Shenandoah, at a place called 1118 "West Coal street, by a gunshot wound inflicted by Arthur "Wadsworth, of Company A, Eighteenth Regiment, N. G. "P., and from the evidence before us and examination of "the premises on West Coal street, we believe said shooting "was hasty and unjustifiable, and we recommend that the "matter be placed in the hands of the District Attorney for "investigation."

As a result of this verdict, a warrant was issued for the arrest of Wadsworth. The military authorities refused to give him up. After his return home he was arrested, and has applied for a *habeas corpus* to release him from the custody of the civil authorities.

Probably if this deplorable occurrence had been avoided, no doubts would have been raised as to the status of the military during the strike. But when it is asserted that a peaceable citizen, not proved to have been guilty of any evil act or intent, may be shot in the public highway, without previous proclamation or notice that he is forbidden to go therein, and that he who did the shooting is amenable only to his military superiors and not to the machinery of the

civil law provided for investigating such occurrences, there must be some good reason why such an extraordinary thing is true. And that reason must be found in some rule of law, which makes the military a higher form of law than the civil. It is proposed to examine into the doctrines regarding military and martial law, to discover if there be any principle upon which such immunity from civil responsibility can be grounded.

We may premise our discussion of the problems raised by this occurrence, by some observations on the relations of the civil and military jurisdictions. There is a belief, common to layman and lawyer, that the arm of civil power does not reach the soldier. Nothing could be more fallacious.¹ In England the soldier, as a soldier, is governed and tried by a code enacted by Parliament and known as the

¹ "The citizen on becoming a soldier does not merge his former character in the latter. He releases himself from none of his former duties and obligations. Instead of this he engages to perform other duties in addition to those with which he was formerly charged. He submits himself to a special code of laws, which does not supersede or abrogate that to which he was formerly subject, but which, on the contrary, binds him by a new tie to the very same authority, which, as a citizen he previously obeyed. With regard to the civil powers and authorities, he stands in precisely the same position he formerly occupied. They lose none of their rights and prerogatives. . . . There is no principle more thoroughly incorporated in our military as well as in our civil code, than that the soldier does not cease to be a citizen and cannot throw off his obligations and responsibilities as such. The general law claims supreme and undisputed jurisdiction over all. The military law puts forth no such pretensions. It aims solely to enforce, on the soldier, the *additional* duties he has assumed. It constitutes tribunals for the trial of breaches of *military* duty only. . . . These two systems of law can in no case come into collision. Their spheres of action are different. The military code commences where the other ends. It finds a body of men, who besides being citizens, are also soldiers. Their rights and duties, in the former capacity, it finds already well settled and established; but in their latter capacity, their duties are undefined, their rights are unascertained until it steps in to fill the vacuum, to place the soldier as completely under cover of law, and to guard him as securely against tyrannical and arbitrary power in his military as in his civil character. The one code embraces all citizens, whether soldiers or not; the other has no jurisdiction over any citizen as such."—O'Brien, *Military Law*, pp. 26 and 27.

mutiny act.² But the fact that he has his own code, does not relieve him from trial for crime, by the common law courts.³ This is well illustrated by the famous case of Governor Wall,⁴ who just prior to leaving Goree for England, called his troops out on parade, formed them in a circle, and taking a private named Armstrong out of their midst had him bound to a cannon and given eight hundred lashes with a one-inch rope. As a result Armstrong died. Wall was indicted in England, twenty years later, for murder.

His defence was that Armstrong was a leader of a mutiny; that swift and drastic action was necessary; that he held a conference with his officers before punishing the culprit, and that this conference was the best and only sort of court-martial he could hold under the circumstances; that he had no idea the punishment would be fatal in its result. The evidence of the prosecution tended to show that there was no mutiny and that Wall had been guilty of the most summary and brutal conduct. The court charged the jury that if there was no mutiny, there was no ground for the proceedings, and if there was a mutiny then Wall was bound to give some consideration to Armstrong's side of the case before inflicting punishment, and instructed them to inquire whether this was done, and lastly asked them to inquire whether Wall acted with malice. If they found there was no mutiny, or

² Prior to the mutiny acts, the army was governed by rules made from time to time by the king, by advice of the marshal and constable of his realm: Hale's Hist. Com. Law, 42.

³ Coke Inst. III, c. 7: "If a lieutenant or other that hath commission of martial authority in time of peace, hang or otherwise execute any man by colour of martial law, this is murder, for this is against Magna Charta, c. 29." See also, Hale's Hist. Com. Law (sixth edition, London, 1820), 45: "The common law, and the judges of the courts of common law, have the exposition of such statutes or acts of parliament, as concern either the extent of the jurisdiction of those courts, whether ecclesiastical, maritime or military, for the matters depending before them. And, therefore, if those courts either refuse to allow these acts of parliament; or expound them in any other sense, than is truly or properly the exposition of them;—the king's great court of common law, who, next under the king and his parliament, have the exposition of those laws, may prohibit and control them. To the same effect, *Comm. v. Small*, 26 Pa. 31.

⁴ 28 State Trials, 51.

no hearing of the prisoner's defence, and if there was malice, then Wall's action was murder. A verdict of guilty was returned and Wall was hanged.⁵ It is admitted that an English soldier may sue another for a civil wrong.⁶

The law is equally clear in this country. In the leading case, *United States v. Clark*,⁷ a soldier was indicted in the District Court of the United States for murder in shooting and killing a fellow soldier who was attempting to escape from military prison. On a *habeas corpus*, it was contended for the prisoner that the court had no jurisdiction, (1) because he was a soldier, and hence, not liable in a civil court for the murder of another soldier; and (2) because a court-martial had been convened, had passed upon his case, and had found him not guilty.

The court cited two federal cases wherein cognizance had been taken of such offences,⁸ and overruled the first point in the following language: "In view of the fact that this was a homicide committed by one soldier, in the performance of his alleged duty, upon another soldier, within a military reservation of the United States, I had at first some doubt whether a civil court could take cognizance of the case at all; but as crimes of this nature have repeatedly been made the subject of inquiry by civil tribunals, I have come to the conclusion that I ought not to decline to hear this complaint. Indeed it is difficult to see how I could refuse to do so without abdicating that supremacy of the civil power which is a fundamental principle of the Anglo-Saxon polity."⁹

The second point was answered in the following manner: "In this connection it is urged by the defence that the finding of the court of inquiry acquitting the prisoner of all blame is a complete bar to this prosecution. I do not so regard it. If the civil courts have jurisdiction of murder, notwithstanding the concurrent jurisdiction by court-martial of military offences, it follows logically that the proceedings

⁵ See also *Artells Case*, Kelyng, 13.

⁶ *Keightly v. Bell*, 4 Fost. & Fin. 763.

⁷ 31 Fed. 710.

⁸ *U. S. v. Cornell*, 2 Mason, 61; *U. S. v. Carr*, 1 Woods, 480.

⁹ To the same effect, *U. S. v. Jones*, 3 Wash. C. C. 209; *Riggs v. State*, 3 Cold. (Tenn.) 85; *U. S. v. Greiner*, 4 Phila. 396 (*semble*); *In re Fair*, 100 Fed. 149.

in one cannot be pleaded as a bar to proceedings in the other; and if the finding of such court should conflict with the well-recognized principles of the civil law, I should be compelled to disregard it."¹⁰

The same law holds with regard to the criminal liability of a soldier of the United States in a state court, if he commits a crime within its jurisdiction.¹¹

The cases in federal and state courts holding an officer or soldier civilly liable for going beyond his rights in the treatment of the person or property of a citizen are quite numerous.¹²

But perhaps the most striking case of the assertion of the supremacy of the civil courts over the military,—after the termination of hostilities and in the country whose army has the prisoner in custody,—is *Wolf Tone's case*.¹³ Tone was a famous Irish agitator, and was advised that as he was suspected of treason he had better leave the country. He fled, and finally landed in France. He was given a commission in the French army, was captured on board a French vessel,

¹⁰ Citing *Rankin v. State*, 4 Cold. (Tenn) 145. In *Coleman v. Tennessee*, 97 U. S. 509, Mr. Justice Field (at p. 514) intimated that Congress has power to render the military jurisdiction of offences exclusive. This was, however, merely *dictum*, and is not believed to be correct.

¹¹ *Steiner's Case*, 6 Ops. Atty. Gen. 413. In this case, Steiner, an army surgeon, killed his commanding officer at an army post in Texas. He was indicted in the Texas court and admitted to bail. A court-martial was also summoned. The opinion of the attorney-general of the United States was asked, with reference to Steiner's liability to answer in the state court. The attorney-general said: "It must be conceded that an officer or soldier of the American army, on his committing, within the United States, an act 'punishable by the known laws of the land,' is subject to be tried and punished for that act, according to those laws, *i. e.* by the competent, ordinary tribunals of the state or territory in which the act was committed." At p. 416. See also, *Riggs v. State*, 3 Cold. (Tenn.) 85; *Coleman v. Tennessee*, 97 U. S. 509; *Peo. v. Godfrey*, 17 Johns. 225.

¹² *Little v. Barreme*, 2 Cranch, 170; *Mitchell v. Harmony*, 13 How. 115; *Despan v. Olney*, 1 Curtis, 306; *Bates v. Clark*, 95 U. S. 204; *McCall v. McDowell*, 1 Abbott, 212; *Holmes v. Sheridan*, 1 Dill. 351; *McConnell v. Hampton*, 12 Johns. 234; *Smith v. Shaw*, 12 Johns. 257; *Teagarden v. Graham*, 31 Ind. 422.

¹³ 27 State Trials, 614.

and taken to Dublin, where a court-martial was assembled; he was accused of treason, pleaded guilty, and was sentenced to death. Tone feared certain threatened indignities, at the hands of the commanding general, in connection with his execution. He therefore procured a petition to be presented to the King's Bench, setting out the facts, and requesting a writ of *habeas corpus*, on the ground that the court-martial was without jurisdiction, as it was neither time nor place of war, and the court of King's Bench was sitting to hear criminal pleas. The prayer of the petition was granted. The famous Curran moved for the writ in language both eloquent and convincing.¹⁴ The court granted the writ. To the same effect are the American cases.¹⁵

¹⁴He said: "I do not pretend to say that Mr. Tone is not guilty of the charges of which he was accused;—I presume the officers were honorable men;—but it is stated in the affidavit as a solemn fact that Mr. Tone had no commission under his majesty, and therefore no court-martial could have cognizance of any crime imputed to him, while the court of King's Bench sat in the capacity of the great criminal court of the land. In times when war was raging, when man was opposed to man in the field, courts-martial might be endured; but every law authority is with me, while I stand upon this sacred and immutable principle of the constitution—that *martial law and civil law are incompatible*; and that the former must cease with the existence of the latter. This is not the time for arguing this momentous question. My client must appear in this court. *He is cast for death this day.* He may be ordered for execution while I address you. I call on the court to support the law. I move for a *habeas corpus* to be directed to the provost-marshal of the barracks of Dublin, and Major Sandys to bring up the body of Mr. Tone."

The following colloquy ensued:

Lord Chief Justice [Kilwarden].—"Have a writ instantly prepared."

Mr. Curran.—"My client may die while this writ is preparing."

Lord Chief Justice.—"Mr. Sheriff, proceed to the barracks and acquaint the provost-marshal that a writ is preparing to suspend Mr. Tone's execution; and *see that he be not executed.*"

The reporter adds that the court awaited, in a state of the utmost agitation, the return of the sheriff.

Mr. Curran.—"Mr. Tone's father, my lords, returns after serving the *habeas corpus*; he says General Craig will not obey it."

Lord Chief Justice.—"Mr. Sheriff, take the body of Tone into your custody. Take the provost-marshal and Major Sandys into your custody; and show the order of this court to General Craig."

Mr. Sheriff (who was understood to have been refused admittance

¹⁵ See, *In re Egan*, 5 Blatch. 319; *Skeen v. Monkheimer*, 21 Ind. 4.

In view of this uniform trend of decision, it must be admitted that in ordinary times the civil is above the military law; that the two are separate and distinct and that the former applies to soldier and civilian alike, and disregards the decrees of the latter.¹⁶ Any other rule will substitute a dictatorship for law, whenever a commanding general happens to think such a thing wise; and the general will then be acquitted of all fault by a military tribunal, appointed by the same power which usurped the reins of government, and whose finding cannot be revised by a civil court constituted to enforce the constitution and laws of the state.

Is it true, then, that the common law ever loses its right to pass upon the acts of the military? Is it possible that the sole discretion and disposition as to the rights of men and things, unquestionable anywhere, by any tribunal, is ever vested in the commander of an army, or a court-martial of his creation? I suppose the obvious reply is, that this is the case when martial law exists; that then the common law is unable to cope with the situation and gives way to its complementary code,—the law-martial. If this be true, it will be important for us to determine what this martial law, so called, is defined to be.

There is a growing tendency to limit the term martial law to *the government of the citizens of a state by its own army*. Taken in this sense it is to be distinguished from military law and from military government. Thus Chase, C. J., in his dissenting opinion in *Ex parte Milligan*,¹⁷ said: "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 without the boundaries of the United States, or in time of rebellion and

at the barracks) returns.—"I have been at the barracks. Mr. Tone having cut his throat last night, is not in a condition to be removed. As to the second part of your order, I could not meet the parties."

Lord Chief Justice.—"Let a rule be made for suspending the execution of Theobald Wolf Tone, and let it be served on the proper persons."

Tone lingered for some days, when he died, as the result of his self-inflicted wound.

¹⁶ So held in *Comm. v. Small*, 26 Pa. 31.

¹⁷ 4 Wall, 2.

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 limits of 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 acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as *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, within districts or localities where ordinary law no longer adequately secures public safety and private rights."¹⁸

All of the American text-writers make a similar division of the subject of Military Law.¹⁹ It will perhaps be sufficient to quote a few words from the leading English writer on the subject. Finlason says, "When, however, the military act in support of the executive, at common law, that is, to suppress actual riot, or insurrection, they merely act *in aid of* civil power, and are subordinate to it; whereas, under

¹⁸ At p. 141.

¹⁹ "Military law may be defined to be a body of rules and ordinances prescribed by competent authority for the government of the military state considered as a distinct community. It is an accumulative law. The citizen on becoming a soldier does not merge his former character in the latter. He releases himself from none of his former duties or obligations. Martial law is something very different from this. . . . It is an expedient resorted to in times of public danger similar, in its effect, to the appointment of a dictator. The general or other authority charged with the defence of the country, proclaims martial law. By so doing he places himself above all law."—O'Brien, *Military Law*, 26. See also, DeHart, *Military Law*, 17; Winthrop, *Military Law*, II, 1; Birkhimer, *Military Law*, 1; see also, Davis, *Military Law*, 5; 300 n. 1.

"Martial law is that rule which is established when civil authority in

martial law, the military have independent power of action; for the whole district, in fact, is placed under military command and military discipline, the only authority being that of the commanding officer."²⁰

These quotations show sufficiently what modern writers mean by martial law. The first question we must determine is whether such a thing existed in the coal regions of Pennsylvania during the recent strike. No inquiry concerning such a question can afford to disregard history. The writer proposes, therefore, in the first place to investigate the instances, if any, of such law under the English Constitution, and whether in fact such a sort of law can exist in England, from which country we so largely derive our ideals and theories of law, freedom and personal liberty. In the second place, it will be well to determine whether martial law may exist under the Constitution of the United States, and whether any proper instances of its exercise, as above defined, can be found in the history of our own country. And, thirdly, we may discuss the possibility of its existence under the constitution of Pennsylvania or those of the other states of the Union. In the light of the conclusions reached it will remain to consider the lawfulness of the orders issued, as above cited, and to determine whether the private, acting under such orders, is immune from criminal liability for his acts.

I. MARTIAL LAW IN ENGLAND.

It seems never to have been doubted that the Crown has the prerogative of meeting force with force. So when rebellion breaks out, it is the right and duty of the Crown

the community is made subordinate to military either in repelling invasion or when the ordinary administration of the laws fails to secure the proper objects of government. . . . It is exercised only over districts of that country whose military authorities enforce it."—Birkhimer, *Military Law*, 291.

"Martial law, as the term is used in this treatise, is military rule exercised by the United States (or a state), over its own citizens (not being enemies), in an emergency justifying it."—Winthrop, *Military Law*, Vol. II, p. 37.

²⁰ "A Treatise on Martial Law" (London, 1866), Preface, p. v.

to use the military arm for its suppression. If, in such suppression life has to be taken, no one is to blame but he who made the use of such extreme measure necessary. No one thought that the execution of Wat Tyler was illegal. Parliament and the courts never dreamed of interfering. Such an insurrection had to be put down,—force used against force,—and if the force used was no more than necessary, no liability on the part of any one ensued. A rebel must be treated as at war with the Crown and must be tried and dealt with according to the summary laws of war. This was martial law in a sense of that phrase, but not in the sense in which it has been used above.

Later, in the reigns of Mary, Elizabeth and James, this prerogative was abused in a most dangerous fashion. The sovereign would declare that this or that person was a rebel and should at once be put to death by martial law. Thus in time of peace commissions sat to determine the guilt of alleged rebels, and summarily put them to death. Charles commenced his reign with such a flood of these commissions that the people were at once aroused.²¹ They presented (3 Car. I) the famous Petition of Right, setting forth the illegality of such trials by martial law, and praying that the king would grant that hereafter no such commissions should be created lest any of the king's subjects be put to death contrary to law. This petition the king granted. Strangely enough the Long Parliament soon after authorized trial by commission and a number of prominent men were so tried and executed.

But, none the less, it had come to be recognized that under the law of England, no martial law trial of a citizen could take place on English soil in time of peace. And from the time of the restoration to the present day, no such thing has been attempted.

It is believed that no such thing as martial law, as above defined, has existed in England proper since that time. And yet there have been some violent riots, in which the troops were called upon, and in at least one of which they fired without orders from the magistrates.²²

²¹ The forms of several such commissions are given in Stephen's "History of the Criminal Law of England," Vol. I, p. 209.

²² The London Riots of 1780: Hough, *Prec. Mil. Law*, 571.

Martial law has been declared in several British colonies from time to time by proclamation of the governors. It was done in the case of actual rebellions however. These cases really have no bearing on our present inquiry, any more than would the proclamation of martial law in Porto Rico by the governor of that island in case of an uprising.

The only other instance of martial law in Great Britain is that of the Irish Rebellion in 1803. Certain portions of Ireland were in open rebellion; the civil authorities could not enforce the law; nor could they enforce it with the aid of the military, as was thought; hence an act of Parliament was passed to meet the emergency. This act²³ provided that the Lord Lieutenant, from time to time, whether the courts were open or not, might issue orders for taking the most drastic measures to end the rebellion, to punish all who aided and abetted the rebellion by martial law, by death or otherwise, and to try all offences committed by court-martial. The act contained also a declaration that nothing in it contained should be construed to take away the king's undoubted prerogative to proceed by martial law against open enemies and traitors. But as Stephen points out²⁴ such a declaration as this cannot be construed to repeal the Petition of Right and therefore must be taken to mean only that the king may proceed by actual warfare to put down rebellion, which no one has ever taken the trouble to deny, but of which prerogative he was deprived by the protectorate, and which prerogative was expressly restored to him by Parliament upon the restoration.²⁵

Even after such a sweeping act as the above, it was thought necessary to pass an act of indemnity to protect those who had carried out the provisions of the act.

The result of this review of English history is undoubtedly inconclusive. No case of martial law has arisen within England since the Petition of Right. There have been violent riots and uprisings and the troops have been called upon, but it is clear that no such thing as martial law has

²³ 43 Geo. III, c. 117.

²⁴ "History of the Criminal Law of England," Vol. I, p. 211.

²⁵ 13 and 14 Car. II, c. 3; see Tytler, *Mil. Law*, 95.

prevailed, the troops being the mere assistants of the magistrates.²⁶ But in the London Riots of 1780, the king issued orders that the military should "act without waiting for directions from the civil magistrates and use force for dispersing the illegal and tumultuous assemblies of the people."²⁷ Sir Edward Law, attorney-general (afterwards Lord Ellenborough), in an opinion furnished the Horse Guards in 1801, said that "in cases of great and sudden emergency, the military, *as well as all other individuals*, may act without . . . the presence of any peace officer whatsoever";²⁸ but this only means that every man is a peace officer and must meet force with force, when riot or insurrection arises.

Then again the colonial cases are not in point, they being cases really of military government rather than martial law.

Lastly, if the case of the Parliamentary authorization of martial law in Ireland is conclusive, then martial law may only be declared by act of Parliament. But such act does not relieve the military of civil liability, since an act of indemnity was considered necessary for that purpose.

The doctrine of martial law was discussed at great length by a committee of the House of Commons, which sat to inquire into certain alleged unlawful acts in Ceylon. Sir David Dundas, then judge-advocate general, in reply to questions regarding the right of a governor to declare martial law, said: "I say he is responsible just as I am responsible for shooting a man on the king's highway, who comes to rob me. If I mistake my man, and have not, in the opinion of the judge and jury who try me, an answer to give, I am responsible. My notion is that martial law is a rule of necessity, and that when it is exercised by men empowered to do so, and they act honestly, rigorously and vigorously, and with as much humanity as the case will permit in discharge of their duty, they have done that which every good citizen is

²⁶ Hough, *Prec. Mil. Law*, 571, 578, 584, 591.

²⁷ Yet Lord Mansfield expressed the opinion that this was not martial law; that the soldiers were but part of the *posse comitatus* and accountable for what they did in the courts. See 9 *Parl. Hist.* 1274, 1294.

²⁸ Hough, *Prec. Mil. Law*, 558.

bound to do."²⁹ Stephen, in commenting on the above, says: "The views thus expressed by Sir David Dundas appear to me to be substantially correct. According to them the words 'martial law,' as used in the expression 'proclaiming martial law,' might be defined as the assumption for a certain time, by the officers of the Crown, of absolute power, exercised by military force, for the purpose of suppressing an insurrection or resisting an invasion. The 'proclamation' of martial law, in this sense, would only be a notice to all whom it might concern that such a course was about to be taken. *I do not think it is possible to distinguish martial law, thus described and explained, from the common law duty which is incumbent on every man, and especially on every magistrate, to use any degree of physical force that may be required for the suppression of a violent insurrection, and which is incumbent as well on soldiers as on civilians, the soldiers retaining during such service their special military obligations.*"³⁰

This seems to the writer a very different thing from the definitions of martial law quoted above. As stated here it is but another name for common law.³¹ Every act done dur-

²⁹ Hough, *Prec. Mil. Law*, 539.

³⁰ Stephen, *Hist. Crim. Law of Eng.*, Vol. I, p. 214. (*Italics mine.*) He continues: "Thus, for instance, I apprehend that if martial law had been proclaimed in London in 1780, such a proclamation would have made no difference whatever in the duties of the troops or the liabilities of the rioters. Without any such proclamation the troops were entitled, and bound, to destroy life and property to any extent which might be necessary to restore order." He adds (p. 215): "The officers of the crown are justified in any exertion of physical force, extending to the destruction of life and property to any extent, and in any manner that may be required for the purpose. They are not justified in the use of cruel and excessive means, but are liable civilly or criminally for such excess. They are not justified in inflicting punishment after resistance is suppressed, and after the ordinary courts of justice can be reopened." See, also, a very able historical review which reaches similar conclusions to those of Stephen, in *17 Law Quarterly Review*, 117.

³¹ In the *Manual of Military Law*, issued with the sanction of the British War Office, it is stated that martial law, as distinguished from military law and the customs of war, is unknown to English jurisprudence; that the intermediate state between war and peace called by continental writers a "state of siege," does not exist in English law; . . . that while what is called martial law had been in former

ing its continuance is not "at the whim of the commanding officer," but is examinable by judge and jury in the civil and criminal courts of the land. If this is all that is intended by those who so strenuously contend that martial law may exist in England, it is scarcely worth while to quarrel with them over the use of a name.³² Such writers as Finlason and Birkhimer seem not to contend that martial law has existed in England since the restoration, but that it may exist upon proper occasion. If it be not enough to cite, from Stephen, certainly Sir Matthew Hale and Lord Chief Justice Cockburn ought to turn the balance in favor of the proposition that there is no such thing under English law.³³

times proclaimed against disturbers of the public peace in England, yet such a proclamation in no degree suspended the ordinary law, or substituted any other in its stead, and amounted to no more than an authoritative announcement of the existence of a state of things in which force would be used against wrongdoers for the purpose of protecting the public peace. See Birkhimer, 318.

³² Finlason, Commentaries upon Mart. Law, Introd. 24.

³³ Hale's Hist. Com. Law (sixth edition, London, 1820), 42: "This indulged law was only to extend to members of the army, or, to those of the opposite army, and never was so much indulged as intended to be executed or exercised upon others. For others who had not listed under the army, had no colour or reason to be bound by military constitutions, applicable only to the army, whereof they were not parts. But they were to be ordered and governed according to the laws to which they were subject, *though it were a time of war.*" (Italics mine.)

Lord Chief Justice Cockburn on the indictment of Colonel Nelson and Lieutenant Brand for murder, for participation in the court-martial which condemned Gordon and Clark during the negro rebellion in Jamaica in 1865, said: "A rebel in arms stood in the position of a public enemy. You might kill him, refuse him quarter, and deal with him in all respects as a public enemy. The jury must not confound with martial law applied to civilians what had been commonly done at many epochs of English history in the treatment of rebels taken in the field or in pursuit. . . . It was an egregious mistake to suppose that the punishment which might be inflicted if mutiny broke out in a ship or in a regiment formed any part of the martial law. There was one law paramount to all other laws, and this was, where illegal violence is used you may defend yourself, and redress that violence by any amount of force necessary for that purpose. . . . So, in the case of a mutiny,—you might put it down by force. But that was not martial law; it was part and parcel of the law of England. . . .

II. MARTIAL LAW IN THE UNITED STATES.

We come now to a much more difficult question. This question is whether martial law can exist within the borders of our own country under our form of government. Admittedly it can exist in an enemy's country, where our armies are prosecuting a war. But then it is the law of *war*. It is equally certain that military government may be exercised over conquered territory. But the question is whether under the Constitution, either Congress, or the President, or any commanding officer of the army, is justified in proclaiming martial law within the boundaries of the United States, and over loyal supporters of the government.

No argument can be drawn from the arbitrary rule of the Southern States during the Rebellion by Union commanders, nor from the arbitrary governments established under acts of Congress during the reconstruction period. For, though the North technically denied the right of the South to secede, yet in fact the South was granted belligerent rights. It was enemy's territory. Hence martial law, or the rule of the commanding general, was the only possible regulative, during invasion of Southern territory; and military government was its only possible successor, upon the termination of hostilities.

Cases of attempted extension of the military power over loyal citizens in states unaffected with rebellion have been few. They have been confined, altogether, so far as federal troops are concerned, to cases arising during time of actual war.

The first instance of such an attempt was that by General Jackson in New Orleans in 1814-15. But even here the courts of Louisiana held his action illegal³⁴ and a federal

Now the question before the jury was whether for the suppression of rebellion, you might not subject persons who are not actively engaged in it, and whom you could not kill upon the spot, to a law which was in this sense entirely exceptional, and to be carried into execution in an exceptional way. There was no authority for any such proposition. Annual Register (N. S.) for 1867 (London, pp. 230, 234); cited, Hare, American Constitutional Law, Vol. II, pp. 923-4. See also Lord Loughborough, in *Grant v. Gould*, 2 H. Bl. 69. Sir Frederick Pollock takes a similar view in an article in 17 Law Quarterly Review, 152.

³⁴ *Johnson v. Duncan*, 3 Mart. O. S. 531.

judge issued a writ of *habeas corpus* to release a publisher who had printed an article reflecting on the conduct of General Jackson, whereupon that doughty soldier promptly arrested and confined the publisher. On the issuance of the writ the judge was arrested, held a few days, and then sent beyond the military lines. After the restoration of peace the judge fined the general one thousand dollars for contempt. This was promptly paid. Congress, years afterwards, reimbursed the general.³⁵ It is clear that here the will of the commanding general was not the only rule of action, for neither state nor federal courts considered themselves bound by it.

This is the only instance, prior to the Rebellion, of a declaration of martial law by a military commander, which has come under the writer's notice. It is significant that when Washington sent troops to quell the Whisky Insurrection in Pennsylvania, he was careful to instruct them to operate strictly in aid of the civil authorities.³⁶

When we come to the civil war, we shall find numerous declarations and proclamations of martial law by officers of the Union army stationed in the rebel territory, as, for example, that of General Canby in New Mexico in 1861,³⁷ or that of General Fremont in Missouri, which latter was afterwards confirmed by the President by general order.³⁸ But, as remarked above, these cases furnish no argument regarding martial law, for the confederacy was conceded belligerent rights and the territory placed under military rule was the enemy's country. Indeed, in every case, with one exception, where martial law was attempted to be enforced in a loyal state, the courts, both federal and state, animadverted against it, and refused to recognize its validity.³⁹ Such instances fairly raised the question we are here discussing.

³⁵ Birkhimer, 337 (n).

³⁶ See 7 Howard, at p. 80.

³⁷ R. R. S., 1, Vol. 4, p. 62; see Birkhimer, 371.

³⁸ R. R. S., 1, Vol. 3, pp. 466-7; R. R. S., 1, Vol. 8, p. 401.

³⁹ See, for example, *Exp. Merryman*, Taney, 246; *Exp. Milligan*, 4 Wall. 2; *Holmes v. Sheridan*, 1 Dill, 351; *Skeen v. Monkhimer*, 21 Ind. 4; *Teagarden v. Graham*, 31 Ind. 422; *In re Kemp*, 16 Wis. 359. The same law was held by the Southern State Courts,—*State v.*

Martial law may proceed from one of two sources, the executive or the legislative branch of government, including in the term executive such proclamations or acts as have originated with the secretary of war or a general commanding a district, as well as those ordered directly by the President. Let us examine first the power of the legislature to declare such law.

It may be remarked at the outset, that no congressional action looking to the declaration of martial law is, so far as is known to the writer, on the statute books. The acts giving the President arbitrary power to establish military sway over the conquered Confederate States, were passed in the exercise of the power to govern vanquished enemies pending the re-establishment of civil government. The statute coming nearest to the authorization of martial law is that of April 20, 1871,⁴⁰ which declared that certain acts constituted rebellion against the United States and authorized the President in event of such acts, and in event of the administration of civil justice becoming impossible, to suspend the writ of *habeas corpus*. This act was never passed upon by the courts and was in force for only seventeen months. Moreover, it did not go the length of authorizing the President to override the civil tribunals, but, in fact only empowered him to suspend the writ of *habeas corpus*.

We shall have, therefore, to examine the powers of Congress as found in the Constitution for any authority to declare martial law. And first, it must be mentioned that nothing in the clauses relating to the legislative branch ought to be construed as depriving a citizen of the privileges guaranteed him in the various amendments, unless such clauses are clear to that effect.

Now while the Congress is given in Art. I, § 8, the power to make rules and regulations for the government of the land and naval forces of the United States, this does not infringe the fifth amendment, for that amendment runs: "No person shall be held to answer for a capital, or other-

Sparks, 27 Texas, 627; but see, *Trammell v. Bassett*, 24 Ark. 499. The apparent exception is *Mitchell v. Clarke*, 110 U. S. 633.

⁴⁰ 17 Stat. at Large, 13.

wise infamous crime, unless on presentment or indictment of a grand jury, *except in cases arising in the land or naval forces, etc.*" Here, then, is express power to adopt a code of military laws, distinct from those applicable to the citizen, and a clear exception in the bill of rights to meet it.

Nowhere is there a similar clear declaration of the right to prescribe a code of martial law for others than soldiers. The third amendment, providing against troops being quartered in any house in time of peace without the owner's consent; the fourth, securing the people against unreasonable searches and seizures, and providing that no warrants shall issue except on probable cause, and upon oath; the fifth, making indictment a prerequisite to criminal trials, and guaranteeing that no one shall be deprived of his life, liberty or property, without due process of law, and the sixth, securing to the citizen a speedy trial by a jury of the vicinage, etc., are absolute in their terms, save only the exception, above noted; in the fifth. Art. III, § 2, provides for trial by jury. It is not said that these shall be suspended in time of war, or of insurrection or of public disturbance. The farthest that the Constitution goes is to provide in Art. I, § 9, that 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. In *Ex parte Milligan*,⁴¹ however, Chief Justice Chase, delivering the opinion of the dissenting minority,⁴² gave utterance to the following *dictum*, which was not called for, even on the basis of decision taken by the minority for whom he spoke: "*Martial Law*, is called into action by Congress . . . in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights. We think that the power of Congress, in such times and in such localities, to authorize trials for crimes against the security and safety of the national forces, may be derived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to provide for governing the national forces."⁴³ The Su-

⁴¹ 4 Wall. 2.

⁴² Chase, C. J., Wayne, Swayne and Miller, JJ.

⁴³ At p. 142.

preme Court has gone very far, and properly so, in implying powers from the express grants of power to Congress in the Constitution, but it does not seem that the clause in question is susceptible of this broad interpretation. Moreover, the writer does not know of any other case than this, wherein the opinion has been expressed that a power could be implied, which would take away an express right granted to the citizen in another clause of the instrument. Certainly it is fortunate that the members of the court holding such a dangerous view were in the minority.

It seems that the other powers granted in Art. I, § 8, such as, to provide for the common defence and general welfare, to constitute tribunals inferior to the Supreme Court,⁴⁴ to declare war, to make rules for the government and regulation of the land and naval forces, to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions, do not any of them, or collectively, override the amendments quoted. Nor do they authorize the erection of a military rule over a loyal citizen at home, at any time, higher than the civil tribunals of the common law, which are secured to him forever by the guaranty of the fifth amendment that he shall not "be deprived of life, liberty or property, without due process of law." Such a view is taken by recognized text writers upon the Constitution.⁴⁵

Let us now see whether there is any place under our Constitution for the creation of martial law by the chief executive or his subordinates in command of the troops of the United States. On this point we are not embarrassed by the paucity of authority. The question has been raised and decided by both federal and state tribunals.

The leading case on the subject is *Ex parte Milligan*,⁴⁶ decided by the Supreme Court of the United States in 1866.

⁴⁴ In *Ex parte Vallandigham*, 1 Wall. 243, the Supreme Court in fact held that a military commission was not a tribunal within the meaning of this clause, and refused a *certiorari* to review its action for that reason.

⁴⁵ Hare, American Constitutional Law, Vol. II, Lecture xlv, *passim*; Pomeroy (Bennett's edition) 594.

⁴⁶ 4 Wall. 2.

In this case, Milligan, a citizen of the United States and of the State of Indiana, was arrested at his home in the said state, by order of the military commandant of the district of Indiana, and incarcerated in a military prison. Later he was placed on trial before a "military commission" convened by order of said commandant, charged with conspiracy against the government, affording aid and comfort to rebels, inciting insurrection, disloyal practices and violation of the laws of war. He was convicted and sentenced to be hanged. Later he filed his petition in the Circuit Court of the United States, setting out the above facts; he also showed that while he was in custody and more than twenty days after his arrest, a grand jury was convened in said district and had adjourned without finding any indictment, and had made no presentment whatever against him. He also showed that he was in no way connected with the military or naval service. His prayer was that he might be brought before the court, and either turned over to the proper civil tribunal, or discharged, as provided by the act of March 3, 1863. This was the *habeas corpus act*, which provided that lists of all prisoners confined by military authority were to be furnished to the United States Court judges by the officials of the War Department, and it was required that in all such cases where the grand jury in attendance upon any of these courts should terminate its session without proceeding, by indictment or otherwise, against any prisoner named in the list, the court should forthwith make an order that such prisoner, desiring a discharge, should be brought before the court to be discharged, on giving recognizance to keep the peace and obey the further orders of the court. If no lists were furnished, then the prisoner was entitled to a discharge after twenty days' confinement, provided a grand jury had adjourned without indicting him. The judges of the Circuit Court were divided in opinion upon three questions, which they certified to the Supreme Court: (1) On the facts as stated, ought a writ of *habeas corpus* to be issued? (2) Ought Milligan to be discharged? (3) Whether the military commission had jurisdiction legally to try and sentence Milligan? The majority of the court answered the last question in the negative.

They held that the constitutional guarantees are as binding in war as in peace, and cannot be suspended during any of the exigencies of government. That every trial involves an exercise of judicial power, but that the Constitution nowhere sanctions such a court as this military commission. The President could not establish such a court, for he was under the Constitution, not over it. The proceeding could not be justified under the "laws and usages of war," for "they can never be applied to citizens in states which have upheld the authority of government and where the courts are open and their process unobstructed." The court then says that this is a deprivation of the right to trial by jury. It then adverts to the argument "that martial law covers with its broad mantle the proceedings of this military commission"; the proposition being, "that in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge) has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will*; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States." The court answers the argument thus: "The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law established on such a basis, destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power' . . . Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and in the conflict, one or the other must perish." The court went on to say that this decision was not intended to deny the propriety of a declaration of martial law when war exists in a community and the civil courts are closed; that martial rule is the only sort there can be when "the courts are actually closed and it is impossible to administer criminal justice according to law";⁴⁷ and only

⁴⁷ See also, *In re Egan*, 5 Blatch. 319.

so long as this condition lasts and in the actual locality of *war* can it exist.

The two remaining questions the court answered in the affirmative.⁴⁸ Four justices⁴⁹ concurred in the result reached by the majority, but for very different reasons. The minority held that the whole case might well be settled under the Act of 1863; that Milligan was within its terms and hence entitled to his discharge; they therefore answered the first two questions in the affirmative. But they held the opposite to the majority concerning the third question. They justified the right of Congress to authorize the President to appoint such a military commission by the powers granted it to pass laws for the regulation of the land and naval forces, to raise and support armies and to declare war. They said: "Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great or imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army or against the public safety." They then say that by passing the Act of 1863, Congress impliedly said that military commissions were unnecessary and hence under the act the tribunal was prohibited and illegal.⁵⁰

This case ought to settle the doctrine that there is no such thing as martial law possible under the Constitution. But there are others equally positive.

In 1861, the national government suspected a large num-

* Davis, J., wrote the majority opinion, concurred in by Nelson, Grier, Clifford and Field, JJ.

* Wayne, Swayne and Miller, JJ., and Chase, C. J., who wrote the opinion.

* The court went on to say "What we have already said sufficiently indicates our opinion that there is no law for the government of the citizens, the armies or the navy of the United States, within American jurisdiction, which is not contained in or derived from the constitution." . . . Then follows the language cited *supra* pages 72 and 83.

ber of citizens of Maryland of disloyalty and this disloyalty showed itself in the attack by a mob on a Massachusetts regiment passing through the city. By order of General Scott, the commanding general of the district arrested the marshal of police and the police board. He issued a proclamation stating he would uphold the civil authorities, but treason and sedition would be suppressed. The courts were open, and no civil officer had failed or been prevented from serving process. Under orders, one Merryman, a citizen of Maryland, was arrested by the military in Pennsylvania and sent to Fort McHenry. He presented a petition for a *habeas corpus* to Chief Justice Taney, who issued a writ directed to General Cadwalader ordering him to produce Merryman. This, the general refused, in a letter stating that he had the power to suspend the writ of *habeas corpus*, and had suspended it in this case. The chief justice then issued an attachment against the general, but the marshal was barred out of the jail and could not serve it. Taney then wrote an opinion adjudging the general guilty of contempt and certified it to the President. No action was taken upon this opinion. He held that only Congress had the power to suspend the writ of *habeas corpus*, but that the question here was much greater, viz: the power of the military to usurp the civil power and functions of the judiciary.⁵¹

The supreme courts of two states have held that no such thing as martial law existed in their borders during the Rebellion, and that military arrest and confinement were illegal.⁵² In the first of these cases a man arrested for participating in a riot, the object of which was to prevent a draft for the United States army, was granted a *habeas*

⁵¹ Ex parte *Merryman*, Taney, 246. The Chief Justice said: "I can only say that if the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found." (At p. 269.)

⁵² In re *Kemp*, 16 Wis. 359; *Skeen v. Monkheimer*, 21 Ind. 4.

corpus. And in the second, similar action was taken in the case of a man arrested on suspicion of having stolen goods, the property of the United States.

State and federal courts have also held officers and soldiers liable in trespass at the instance of persons who have been injured by the seizure of their bodies or their property, in loyal territory, where the courts were open; and in doing so, have reiterated the same doctrine as that laid down by the court in *Ex parte Milligan*.⁵³

In view of these authorities it seems a safe assertion that there is not under the United States Constitution any such thing as martial law, in the sense of the arbitrary and discretionary government of loyal communities or citizens by the military. The civil law is above the military. The soldier is responsible thereto for his acts, save those acts performed *flagrante bello*, or in the enemy's territory.

III. MARTIAL LAW IN PENNSYLVANIA.

The discussion of this topic need not be long. All that has been said relative to the Constitution of the United States applies with equal force to that of Pennsylvania.

Art. I, § 6, provides that trial by jury shall be as heretofore and the right thereof remain inviolate.

Art. I, § 8, prohibits unreasonable searches and seizures.

Art. I, § 9, gives one accused of crime the right to a speedy public trial, and provides that no man shall be deprived of life, liberty, or property, unless by the judgment of his peers, or the law of the land.

Art. I, § 12, reads: "No power of suspending laws shall be exercised, unless by the legislature, or by its authority."

Art. I, § 22, "No standing army shall, in time of peace, be kept up, without the consent of the legislature; and the military shall in all cases, and at all times be in strict subordination to the civil power."

In view of the above clauses it would seem clear that, not

⁵³ *McConnell v. Hampton*, 12 Johns. 234; *Smith v. Shaw*, 12 Johns. 257; *Griffin v. Wilcox*, 21 Ind. 370; *Johnson v. Jones*, 44 Ill. 142; *Milligan v. Hovey*, 3 Biss. 13; *Holmes v. Sheridan*, 1 Dill. 351, at p. 356.

only is no arbitrary military power authorized, but by § 22 it is strictly prohibited. No act of the military is free from revision by the civil courts. These provisions are much stronger than those of the federal constitution. The only clause relating to the militia is Art. XI, § 1, "The freemen of this Commonwealth shall be armed, organized and disciplined for its defence, when and in such manner as may be directed by law."⁵⁴ Certainly it would be a liberal construction which could find in this any authority for a declaration of martial law.

Nothing is added to the argument for martial law by Art. IV, § 2, which provides: "The supreme executive power shall be vested in the governor and he shall take care that the laws are faithfully executed." This does not place the governor above the law, but under it, he cannot therefore suspend any portion of the law, unless some part of the fundamental law gives him that right. Nor does Art. IV, § 7, making the governor commander-in-chief of the army and navy of the commonwealth authorize martial law.

On principle, then, it is difficult to find any ground on which to base the right of the legislature, much less of the executive, to declare or exercise so-called martial law. It apparently does not exist. Nor has the legislature attempted to provide any general laws giving the governor such power.⁵⁵

No intimation has been made from any quarter, that the writer can find, to the effect that martial law ever has existed in this state.

"The remainder of the section has no bearing on the question at issue.

"The only acts which have come to the writer's knowledge are that of April 28, 1899 (P. L. 133) § 51, which provides, "When an invasion of or insurrection in the state is made or threatened, or a tumult, riot or mob, shall exist, the commander-in-chief shall call upon the National Guard, and he may at his discretion, order any number of men of the enrolled militia to be drafted, and may detail or commission officers to organize the forces;" and the Act of June 10, 1893 (P. L. 443), § 2, which provides: "But the commander-in-chief shall have power in case of war, invasion, insurrection, ripe or imminent danger thereof, to increase the said force and organize the same as the exigencies or the necessity may require."

If we are to draw analogies from other states, but one instance is known where anything approaching martial law has existed in a state. This was the famous Dorr rebellion in Rhode Island, which gave rise to the case of *Luther v. Borden*,⁵⁶ in the Supreme Court of the United States. In that case it appeared that a large number of the citizens of Rhode Island were dissatisfied with the old frame of government (a charter from Charles II.) under which the state was organized. There was great agitation for a new constitution which culminated in a rump convention which adopted a new instrument and then proceeded to overthrow the old government by force of arms. The old legislature passed an act declaring martial law, and the governor proclaimed the same. The insurgents were put down. Afterwards this suit was brought by a citizen of Massachusetts against one of the soldiery of Rhode Island, in trespass, for entering the plaintiff's house, and arresting him without reasonable cause. The Supreme Court held that it could not say which was the lawful government of Rhode Island. But the question had been decided in favor of the old government by the Supreme Court of the state and this was adopted as final by the Supreme Court of the United States. The question then arose whether the defendant was justified in entering plaintiff's house to arrest him. The court expressly refused to pass on the question whether martial law had been established in the state,⁵⁷ but found that the defendant was justified in his action as the jury had found for him, and he had apparently only done what seemed at the time reasonable and necessary to put down insurrection against his state. Mr. Justice Woodbury dissented,⁵⁸ taking the view that this was an attempt to establish martial law for which there was no justification in the law of the land.

From all this, the conclusion is inevitable that no such thing as martial law (in any sense of the term which makes it other than the common law) exists, or can exist under the laws of England, of the United States, or of Penn-

⁵⁶ 7 How. 1.

⁵⁷ Page 45.

⁵⁸ Page 48.

sylvania. If this be so, private Wadsworth cannot shield himself from the process of the civil law on the ground that he was acting under a different and independent code.

A citizen of Pennsylvania was shot, on the highway, in Schuylkill County. The county was in a state of peace. Certainly no one would declare that *war* existed there. Certainly the military could not deal with citizens as enemies and belligerents. Certainly Schuylkill County was not enemy's territory. If this be true no such thing as the law of war existed there. We have shown that martial law, if by it is meant something other than the law of war, could not exist there. The civil courts were open, criminal process was being served every day. Only one presumption could arise from the facts of the case. That presumption was that a homicide had been committed "against the peace and dignity of the Commonwealth of Pennsylvania." Such a homicide only one tribunal is authorized to investigate, and that tribunal is the criminal court of Schuylkill County. There is no escape from this conclusion. Wadsworth's act may or may not have been a breach of military law as embodied in the articles of war. With that we have nothing to do. Whether it was an offence against the law of the land, is a question that must be settled in the tribunal duly constituted to administer that law.

I have carefully refrained from saying that Wadsworth's act was criminal. That will be a question for a civil court to decide. And two questions will be involved in that decision: (1) Was the order under which he acted a lawful order, and (2) If it was illegal was its illegality patent to a man of his station and in his situation? On the answers to these two questions will depend the responsibility or immunity of the accused.

I shall postpone, for discussion in another paper, these two important questions.

Owen J. Roberts.