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MARTIAL LAW IN WEST VIRGINIA

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MARTIAL LAW IN WEST VIRGINIA.

If at the last annual meeting of this association the statement had been made or the prophecy ventured that within a year one department of the State government would assert the right and power to enact laws, or regulations having in all respects the force and effect of laws, prescribe the punishment for their infraction, summon and try before itself without presentment, indictment, or grand or petit jury those charged with the violation of such regulations, and thereafter award the punishment and enforce the mandate of its own award, it is difficult to imagine with what reception this association would have greeted such a prophecy.

If in such statement it had been also added that the power to prescribe such regulations would carry with it the power to make them relate back and antedate the period of their promulgation, so as to transform an act which was a misdemeanor at the time of its commission into a felony at the time of trial and judgment, and punishable as such, the reception to such a statement would be still more difficult to forecast.

But such power to so merge the executive, legislative, and judicial powers of the State, which, under Montesquieu's maxim, was defined as the "essence of tyranny," has been not only asserted and exercised but also in large measure judicially upheld, and this without any change in the organic or statute laws of the State, either by constitutional amendment or legislative enactment, and for a total period of about 7½ months out of the past 10 this condition has existed in a large territory of the largest county of this State, and in large sections of two adjoining counties.

To briefly state the material facts, and discuss the law which has been held controlling as applicable thereto, to the end and with the hope that it may be more widely understood and its most vital importance appreciated, is the purpose of this paper. It is my most earnest and sincere purpose to do so without reflecting in any way upon the ability, integrity, or patriotic purpose of the recent or present executive of our State, and with deference, as marked as it is real, for the like ability, patriotism, and learning of the courts which have judicially upheld such action. Purposely and intentionally only the most salient facts are stated, and the law discussed will be confined to our State constitutional provisions and a few general cases, excluding, as far as possible, any general discussion of national and international law, and cases otherwise similar but arising under different organic laws. This is done in the hope that such discussion may perhaps assist in an understanding of the provisions of our State constitution and the historical circumstances of their adoption, with neither attempt nor desire at display of learning, elaborate research, or adornment.

Purposely, also, incidental reference only will be made to any of the provisions of the Federal Constitution or its amendments which might be thought to effect or prevent the exercise of such tremendous power or to the decisions construing such provisions—or the decisions of other States or countries.

This is done for two reasons: The first being that practically all of the decisions, textbooks, and literature bearing upon martial law are reviewed and discussed, or else cited in the majority and dissenting opinions of our State supreme court in the cases hereinafter referred to, and it would profit but little to merely recite and rediscuss the cases which such opinions have rendered familiar to the bar of this State; and secondly, because as I read the provisions of our State constitution, in the light of the history and times of their enactment, they seem to me determinative on the question of power or lack of power of military commissions to sit in West Virginia for the trial of offenses cognizable by any civil court. The language of Justice Davis in the Milligan case, discussing the Federal Constitution, seems equally apt and appropriate to our State constitution, when he said:

> The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our Government were familiar with the history of that struggle and secured in a written Constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct to leave room for misconstruction or doubt of their true meaning.

It is proper to give a brief statement of the causes which led up to the three declarations of martial law in this State during the past year, so far as the same possibly affect the validity of such proclamations or bear upon what might properly be done thereunder to suppress riot and restore order. Such causes of the industrial troubles resulting in the declarations of martial law have occasioned great interest throughout the State and the country at large, and have afforded a cause or an excuse for a torrent of criticism from many sources, some responsible and acquainted with some of the facts, more wholly irresponsible and either acquainted with few or none of the facts, and some which have purposely distorted all facts. Such criticism has been largely unfair and wholly unfavorable to the State and its interests. Such causes, together with various other questions, including whether citizens of the United States have been deprived in this State of liberties or rights guaranteed by the Constitution of the United States, are now the subject of investigation by the Federal Government, which investigation, strangely enough, is being carried on, not by the Department of Justice, district attorneys, grand jurors, nor Federal courts, either in the discharge of their original or appellate jurisdiction, but by a committee appointed by the Senate of the United States. As to the rights or powers of the Senate, or of such committee, to investigate such subjects and compel testimony, had the same not been voluntarily and freely furnished, under certain well-known decisions (such as Kilbour *v.* Thompson, 103 U. S., 168), we may, perhaps, be enlightened by the distinguished guest of this association, Senator Borah, who is a member of such committee.

During the spring of 1912 industrial trouble of the gravest character arose between the coal miners and operators of Paint Creek and Cabin Creek in Kanawha County. Demands were made upon the operators for the "recognition" by them of certain labor unions, and that certain changes be made in wages paid labor and conditions of employment. Negotiations followed which resulted in no agreement. A strike of the union miners was declared. Nonunion labor was brought into the field to replace the strikers. Violence to such nonunion labor and to property was threatened. The coal operators employed private "guards" to watch and protect such lives and such property. Clashes and hostile feeling between such guards and the strikers and their sympathizers followed. The demagogue, the politician of the baser sort, and the agitator were, as all too frequently they are, abroad in the land, and fuel was fed to the flame. Arms and ammunition in large quantities were secretly purchased and supplied to strikers. The guards were armed, and machine guns were installed by the operators. Fights between the guards and the strikers became frequent, many arrests were made, and hostile feeling grew and was intensified. Guards and nonunion miners were fired upon. Strikers and their sympathizers were fired upon. Lives were lost on both sides. The merits or demerits of either side, or which was at any given time the lawbreaker, and which, if either, sought only to sustain and restore law and order, need not be here considered. Finally the sheriff of Kanawha County called upon the governor for military assistance and troops were sent into the field to police it, and order was apparently restored. The troops were later withdrawn, and outbreaks at once recurred. Men were killed and railroad tracks were torn up. The issue had become a simple and fundamental one, regardless of what causes had brought it about, and it was now simply a question of law as against lawlessness, the restoration of order as against the continuance of virtual anarchy. On September 2, 1912, Gov. Glasscock proclaimed martial law to exist within a prescribed zone, sent practically all of the National Guard of the State therein, and appointed a military commission, consisting of six officers of the National Guard, to try all offenders, except members of the National Guard, and a court-martial to try offending members of the guard. By two subsequent proclamations the limits of the zone of martial law were again extended until nearly 145 square miles were included within such zone, covering parts of Kanawha, Boone, and Fayette Counties. This course was admittedly taken by the governor with the greatest reluctance, and was deemed by him justifiable only as a last resort. It may be mentioned that it was so taken after conferences with representatives of the strikers and the coal operators, and that the former urged and the latter opposed such action on the part of the executive. Later quiet was restored, the troops withdrawn, and a proclamation issued on October 14, 1912, removing martial law from the war zone. The same trouble then again broke forth, with the same result, viz., a proclamation by the governor proclaiming martial law within a prescribed district, the appointment of another military commission to try offenders, and again the governor sent the entire guard into the field. The first military commission, according to the message of the governor, tried and sentenced to jail and the penitentiary something like

100 citizens not engaged in the military service of the State (Gov. Glasscock's message, 1913, p. 46), and the second commission tried and sentenced many scores of citizens not so engaged. The second proclamation of martial law and appointment of a military commission ran about the same course as the first, but extended over a much longer period, namely, from November 15, 1912, to some time in January, 1913. Rules, laws, or regulations for the guidance of such commission were promulgated by the governor through the adjutant general, and the following is the exact language of such rules, so announced under the second proclamation, which is substantially, if not literally, the same as under the first, viz:

GENERAL ORDERS, No. 23.

STATE CAPITOL,
Charleston, November 16, 1912.

The following is published for the guidance of the military commission, organized under General Orders, No. 22 of this office, dated November 16, 1912:

1. The military commission is a substitute for the criminal courts of the district covered by the martial-law proclamation, and all offenses against the civil laws as they existed prior to the proclamation of November 15, 1912, shall be regarded as offenses under the military law, and as a punishment therefor the military commission can impose such sentences, either lighter or heavier than those imposed under the civil law, as in their judgment the offender may merit.

2. Cognizances of offenses against the civil law as they existed prior to November 15, 1912, committed prior to the declaration of martial law and unpunished will be taken by the military commission.

3. Persons sentenced to imprisonments will be confined in the penitentiary at Moundsville, W. Va.

By command of the governor.

C. D. ELLIOTT,
Adjutant General.

Quiet being temporarily restored, martial law was lifted by withdrawal of the troops only and without a proclamation. Thereafter, similar outbreaks again occurring, martial law was again proclaimed on February 10, 1913, and again was a military commission created, with like powers. This third period of martial law continued until lifted by Gov. Hatfield by proclamation of June 13, 1913.

It is to be observed that the intermediate (which is the criminal) court of Kanawha County, the circuit court, with concurrent and appellate jurisdiction, and the supreme court of appeals were all open for the transaction of business in Kanawha County during each period of the existence of martial law, and each and all actually transacted business without the slightest interference or molestation, or any attempt at either. Nor did the governor's proclamation proclaim the contrary, although it did proclaim that a condition of riot and insurrection existed therein "which can not be effectually prevented or suppressed by the sheriff of Kanawha County." This is important and should be borne in mind in considering what follows. Neither actually nor in legal fiction arising from presumption because of any proclamation were such courts closed or in any way interfered with.

It is also particularly to be observed that the instructions "for the guidance of" the military commission in terms established it as a substitute for the civil courts, conferred upon it jurisdiction as to "all offenses against the civil laws as they existed" prior to the proclamation, and in specific terms provided that as punishment therefor—that is, for offenses against such civil, statutory laws—the commission could impose such sentences, either lighter or heavier, with no restric-

tions as to maximum whatsoever, as in its judgment such offenses might merit, than was imposed by statute. Also, it is to be observed that such order likewise in express terms undertook to confer upon such military commission jurisdiction to try for offenses committed prior to the declaration of martial law and unpunished, and provided that persons sentenced should, in all cases, be confined in the penitentiary at Moundsville.

Acting under such proclamations and rules for its guidance, such military commission, during the various periods of martial law, arrested, tried, convicted, and sentenced probably more than 200 citizens of this State, the exact number not being at hand, without either presentment, indictment, or jury, its findings and sentences becoming effective and final when approved by the governor. Many were so approved.

As illustrative cases may be cited L. A. Mays, charged with violating section 19 of chapter 15h of the code of 1909, by preventing by threats or intimidation persons from working in any mine, the statutory penalty for which is a fine of not less than $50 or more than $500, or (not and) confinement in the county jail not less than 10 nor more than 90 days, and also the case of S. F. Nance, charged with violating section 4317 of the code by obstructing an officer in the discharge of his duty, the statutory penalty for which is a fine of not less than $50 nor more than $500, and at the discretion of the court, imprisonment not exceeding one year, the place of imprisonment not being specifically designated in the section.

The offenses charged against both Mays and Nance were committed before the second proclamation and after the removal of the first; in other words, during a time of admitted peace. Mays was sentenced by the commission to two years' confinement in the penitentiary, and Nance to five; and such sentences were approved by the governor.

Adhering to the purpose and attempting to confine this paper to the consideration of the State constitutional provisions only, I merely suggest the quære: If the proclamation and rules for the guidance of the commission were in all other respects legal and valid, and in all respects laws of the State, what as to the validity of such ex post facto provisions of the rules and the sentences which transformed a statutory misdemeanor at the time of its commission into a felony at the date of sentence, with reference to the Federal inhibition against ex post facto laws? It being remembered that the Supreme Court of the United States has on at least two occasions felt itself constrained to discharge, absolutely unwhipped of justice, two convicted murderers, sentenced to death by State courts, in the records of whose trials the Supreme Court declared there was absolutely no error, for the sole reason that while at the time of the commission of their respective crimes the State statute provided the penalty should be death, that thereafter and before sentence it was so changed as to provide for solitary confinement until execution, and also conferred upon the warden of the penitentiary the power to fix the exact day and hour of execution within one week, which week was fixed by the court pronouncing sentence, and repealed the former law. (Ex parte Medley, 134 U. S. 160, L. Ed. Vol. 33, p. 842; Ex parte Savage, 134 U. S. 176, L. Ed. Vol. 33, p. 842.)

And while the Supreme Court has uniformly held that the provision of the Federal Constitution against ex post facto laws is directed against legislative acts only, as distinguished from judicial acts, yet it is has held with equal uniformity that it reaches every form in which legislative power of a State is exerted, whether it be a constitution, a constitutional amendment, a law of the legislature, a by-law or ordinance of a municipality, or a regulation or order or some other instrumentality of the State. (Ross *v.* Oregon. Decided Jan. 27, 1913.)

West Virginia, in common with all of the States of the American Union, also has a like inhibition in her constitution against ex post facto laws. (Sec. 4, Art. III.)

The argument for the power of the governor to proclaim martial law, create a military commission, try and sentence offenders not in the military service of the State, and award such punishment as he, the governor, should deem fit and proper in each particular case, upon the sentence or recommendation of such commission, in its last analysis must rest, and was rested, upon two grounds only:

First. That such power is incidentally granted by the constitutional provision (sec. 12 of art. 7), which provides "The governor shall be commander in chief of the military forces of the States (except when they shall be called into the service of the United States), and may call out the same to execute the laws, suppress insurrection, and repel invasion," and (sec. 5, art 7) "The chief executive power shall be vested in the governor, who shall take care that the laws be faithfully executed."

Or, second, that the power to suspend all law, constitutional or statutory, in times of war, invasion, or rebellion within its domain is an inherent and necessary attribute of all sovereign States, not yielded up or restricted by any express provisions of the constitution, and one not to be presumed as impliedly restricted by any necessary presumptions flowing from express provisions. And that the necessity for exercising such power in American States is determinable by the governor, the substitution of his will in lieu of existing laws is exercisable by the governor, and in either event is the question of the propriety or necessity of such exercise, or of the will substituted in lieu of other laws, reviewable in any manner by the courts.

As to the first ground assigned, namely, that the constitution by providing that the governor "shall take care that the laws be faithfully executed" and authorizing him to "call out the military to execute the laws, suppress insurrection, and repel invasion" it would seem manifestly obvious that such provisions contemplate the execution of the constitution and constitutional law of the State only, not the suspension of or substitution for such laws of arbitrary rules promulgated by the commander in chief or any other person or department of the State government, under execuse of executing them; and contemplated the suppression of insurrection against such laws, and the repelling invasion of the domain of the State in violation of such laws and rights conferred or existing thereunder.

What laws could the governor by possibility be charged to execute other than the provisions of the same constitution which created and defined the powers of his office, and the laws passed and enacted in conformity with its provisions? Except to lawfully enforce or law-

fully restore such laws of this State the governor would never have been vested with any of the extraordinary, but express and carefully defined, powers conferred upon him as chief executive of the State and of its laws.

As to the second ground, of implied power and inherent and sovereign necessity, much can be said and much has been said. A number of similar, or somewhat similar, cases have arisen in various States of the American Union, and have caused several of the courts, State and Federal, to examine and consider the rights of parties and property in times of war, rebellion, and insurrection as dependent upon the provisions of the State and Federal constitutions invoked therein as conferring, defining, or restricting such an implied war power. It is hardly necessary to state, however, that the value and authority of any such cases as aids to the solution of the law of this State, if any, must depend upon the similarity or dissimilarity of the constitutional provisions presented in them to those of this State. Their proper scope is limited to aiding in deciding why the provisions of our own Constitution were inserted, and what such provisions, in the light of the reason for their insertion, really mean.

West Virginia's present constitution, adopted in 1872, was framed by as able a convention of men as that of probably any State in the Union. Many of them had held and more thereafter held high place in the affairs of the State and Nation. Personally I am not one who joins in the recently apparently popular movement of clamoring for the new and untried, and deprecating the ability, patriotism, or learning of the framers of our Constitution, or seeking to dismiss contemptuously as no longer adequate or adapted to present conditions most of its fundamental principles and groundwork. Fundamental principles of government are slow in evolution; sometimes slower still in being comprehended and understood; but the principles themselves if once sound are unchanging and will remain sound, though surrounding conditions and men may change, industries may develop and multiply, and the outward affairs of the State expand and change almost beyond recognition. We should remember that if wisdom did not die with the ancient, neither was it born with the modern lawmakers and would-be lawmakers.

Practically all of the members of that convention were native sons of the territory comprising the new State. They were familiar with its genesis, having assisted at its birth while the storm and smoke of battle fields still rolled over its hills and valleys, amid the throes of an entire nation. They were familiar with the causes which gave it birth; familiar with the grievances of its inhabitants against the mother State; familiar with the evils and oppressions which preceded and which accompanied and followed the Civil War; familiar with the evils and oppressions which followed it during the dark and, in many instances, shameful days of reconstruction in this State and throughout the South—military districts, courts-martial, and military commissions, with all of their incidents, and with all of the arguments for their maintenance to suppress war, under the plea of necessity, and other pleas, were all matters of their most intimate knowledge, derived from bitter and from recent schooling. With the written history of our country, and with the recently enacted history of their own sections, these men were thoroughly familiar, as students,

personal observers, and personal actors and participants. And I submit that no man even casually acquainted with the Constitution which they prepared can doubt that among them were many gifted to an unusual degree with the ability to express in clearly written language provisions conferring such powers and imposing such restrictions, limitations, and prohibitions upon their exercise, as they deemed proper, and providing other safeguards around rights clearly understood and which they were intelligently determined to protect and enforce or, in some instances, to create.

A few specific instances of one of the primary, if not the principal, evil with which this convention was acquainted and which it proposed and attempted to prevent in the future, may be briefly given. Their historical accuracy is easily demonstrable, and in fact probably needs no proof before this body.

In Hampshire, Greenbrier, and other of the border counties of what is now West Virginia, during the late Civil War the territory was alternately overswept by the armed forces of the Federal and Confederate armies. The civil courts were closed, literally and not figuratively. As the contending forces, upon the actual theater of war, alternately possessed this territory, they arrested, seized, and tried large numbers, certainly hundreds, of the citizens of these counties for offenses against the sovereignty represented by them respectively, such as disloyalty, aiding and abetting the enemy, furnishing supplies and assistance to the enemy or their sympathizers, and in fact for almost every conceivable offense, statutory or arbitrarily defined, against either the civil law or the authority of the sovereignty represented by the military. As a result Camp Chase, Johnsons Island, Fortress Monroe, Libby Prison, and other places of confinement were alternately populated by hundreds of our citizens, condemned by courts-martial or military commissions, without indictment, trial by jury, or counsel. Without discussing the necessity or the propriety of such action in such circumstances, I desire only to point out that they had been of recent and most frequent occurrence, which fact was perfectly well known to the convention, and such sentences had been pronounced in times of actual war and within the theater of warfare, and the fact remained that this method of trial of civilians, not combatants, had excited the deepest and most intense feeling among the citizens of the counties where such prisoners had resided and lived. They felt, rightly or wrongly, that the Constitution of the United States had been violated, and they had been deprived of their right to a trial, as that term had been used and understood since Magna Charta.

For a still more specific State incident may be cited the execution of David S. Creigh, of Greenbrier County, late in 1864. Mr. Creigh was one of the best known, most highly esteemed, and personally popular citizens of that county. He was advanced in years and had taken no personal part in the war. Greenbrier County was the theater of active warfare, and Lewisburg its county seat, and the county at large had been alternately in the possession of the Confederacy and of the Union. Its courts were closed. In November, 1864, the Federal forces under Gens. Crook and Hunter were occupying that county, while the forces of Gen. Averill were but a short distance away between Greenbrier and Staunton, and the Confederate

forces under Gen. Echols had been temporarily driven up the valley. A camp follower of Gen. Crook, not an enrolled man, as it developed, assaulted Mr. Creigh in his own home, where such follower was discovered pilfering and robbing, and after he had insulted the members of the family and fired at Mr. Creigh, in the ensuing struggle he was slain by Mr. Creigh. For this alleged offense Mr. Creigh was subsequently arrested by troops under Gen. Crook, was tried by a military commission, and shortly thereafter was executed. It is difficult for one not acquainted with the history of that section to conceive the indignation which resulted from this so-called trial and execution. So deep was the resentment over the act and over the trial by a military commission, under which alone could an execution conceivably have been possible, that the bitterness resulting therefrom against the act itself and the manner of its perpetration exists in that county to this day among the second and the third generations, practically unabated. It may be noted in this connection and at this point that Greenbrier County was represented in the convention in 1872 by a connection of David S. Creigh, a profound and learned lawyer, who was the president of that convention, the late Gov. Samuel Price, who had been lieutenant governor of Virginia and was subsequently a Member of the Senate of the United States, and by another gentleman who was an able lawyer, and subsequently the attorney general and governor of this State.

So much for local and merely selected illustrations within the State. The same or similar conditions existed and had existed in many of the States of the Union, and the entire Nation had been but recently shocked by the execution of Mrs. Surratt, almost literally within the shadow of the Capitol at Washington, for alleged participation in the deplorable assassination of President Lincoln. In violation of the fifth amendment of the Constitution, which guaranteed that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger." Mrs. Surratt, a woman, not a soldier in the Army of the United States or subject to militia duty, had been arrested and tried by court-martial and condemned to death. She sued out a petition for a writ of habeas corpus, bringing the sentence under the jurisdiction of the civil courts in Washington and to determine the power of the court-martial to condemn her to death. The writ was issued by Mr. Justice Wiley, one of the judges of the District of Columbia. The military defied and refused obedience to the order of Justice Wiley, and Mrs. Surratt was executed, and thus, to use the language of an eminent text-writer upon constitutional law, with whom the great majority if not literally all of the constitutional text-writers and judges now agree, "this woman, in the shadow of the Capitol, under a jurisdiction utterly unconstitutional, and by a military power in defiance of the jurisdiction of the civil courts, was hung. * * * The military power was left without restraint to work the death of its victim in defiance of the Constitution of the country. This construction, therefore, is not only fatal to the liberty but to the life of the citizen, and puts his liberty and life in the hand of the Executive. * * * The history of these unhappy precedents is given only to exhibit the dreadful evils of a departure under any exigency

from the sacred provisions of the Constitution of the country, and to note them, we hope, as the only cases in all our future as in all our past history which will endanger the life and liberty of the citizen so fully protected by the noble provisions of the Constitution of the United States." (Tucker on the Constitution, sec. 320.) That similar conditions had existed and similar claims recently made as to the power of the military in times of war to arrest and try in other parts of the country, especially in the South, may be further and finally illustrated by a mere reference to the famous North Carolina Ku Klux cases of ex parte Moore and ex parte Kerr, reported in 64 North Carolina Reports, at pages 802 and 816, respectively.

A large number of the members of the convention had suffered either personally, through their families or through friends, by the actions of courts-martial and commissions, and all of the members of the convention were perfectly familiar with these and many other similar incidents. Tracing backward now, 41 years after their work was done, one can not fail to be impressed with the fullness of their knowledge, historical and literary as well as personal, with this particular subject of their labors. It is not too much to say that no single idea was more dominant in that convention than the determination to prevent the recurrence of such incidents in the future. Under these circumstances and these conditions the convention met in Charleston, and they embodied in the bill of rights and in other provisions in the constitution more numerous and more specific provisions inhibiting the trial of civilians other than by the civil courts than can be found in any other State constitution which I have had an opportunity of examining. Among them are the following:

Among the powers so reserved to the State is the exclusive regulation of their own internal government and police. (Art. I, sec. 2.)

The provisions of the Constitution of the United States and of this State, are operative alike in a period of war as in time of peace, and any departure therefrom or violation thereof, under the plea of necessity or any other plea, is subversive of good government and tends to anarchy and depotism. (Art. I, sec. 3.)

The privilege of the writ of habeas corpus shall not be suspended. No person shall be held to answer for treason, felony, or other crime not cognizable by a justice unless on presentment or indictment of a grand jury. No bill of attainder, ex post facto law, or law impairing the obligation of a contract shall be passed. (Art. III, sec. 4.)

No person shall be deprived of life, liberty, or property without due process of law and the judgment of his peers. (Art. III, sec. 10.)

Standing armies in time of peace should be avoided as dangerous to liberty. The military shall be subordinate to the civil power; and no citizen, unless engaged in the military service of the State, shall be tried or punished by any military court for any offense that is cognizable by the civil courts of the State. (Art. III, sec. 12.)

The trials of crimes and misdemeanors, unless herein otherwise provided, shall be by a jury of 12 men, public, without unreasonable delay, and in the county where the alleged offense was committed unless upon petition of the accused and for good cause shown it is removed to some other county. In all such trials the accused shall be fully and plainly informed of the character and cause of the accusation, and be confronted with the witnesses against him, and have the assistance of counsel, and a reasonable time to prepare for his defense; and there shall be awarded to him compulsory process for obtaining witnesses in his favor. (Art. III, sec. 14.)

The legislative, executive, and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly bedonging to either of the others, nor shall any person exercise the power of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature. (Art. V, sec. 1.)

The only specific definition of the powers of the executive over the militia, whether to command the same, suppress insurrection, or otherwise, is found in Article VII, section 12, which simply provides that—

> The governor shall be commander in chief of the military forces of the State (except when they shall be called into the service of the United States) and may call out the same to execute the laws, suppress insurrection, and repel invasion.

Most of the above-quoted provisions are found in the constitutions of other States or of the United States, or in both, and their language is not only clear, but their meaning has been generally construed and recognized. The provision forbidding the suspension of the privilege of the writ of habeas corpus differs from the provision found in the bill of rights of the constitution of 1863 only in that the words "except when in time of invasion, insurrection, or other public danger the public safety may require it" are omitted in the present constitution, and while the former constitution (sec 6, Art. II) provided that no person "in time of peace" should be deprived of life, liberty, or property without due process of law, the words "in time of peace" were also deliberately and significantly removed from the present section. The purpose of the deliberate elimination of these words in the constitution of 1872 would seem to be obvious and to have been intended to make these provisions harmonize with section 3 of Article I, which has been already and will be again referred to. The provision subordinating the military to the civil authority and providing that no citizen unless in the military service should be either tried or punished by any military court for any civil offense was, as to the latter clause, a new provision not found in the former constitution. The provision for the trial of crimes or misdemeanors by a jury, publicly, and without delay, and in the county where the offense was committed is substantially the same as section 8 of Article I of the constitution of 1863. The provision expressly providing that the legislative, executive, and judicial departments should be separate and distinct, so that neither should exercise any of the powers belonging to either of the others, and that no person should exercise the power of more than one of them at the same time, had no prototype in the old constitution but was newly written into the present one.

The powers conferred upon the governor as commander in chief by section 12 of Article VII are the same as in the former constitution except that the old constitution did not contain the exception as to such times as the militia was in the service of the United States. It will, therefore, be seen that all of the old safeguards insuring trial by jury were retained in the present constitution or elaborated; that exceptions limiting such guaranties to "times of peace" and excepting times of "invasion, insurrection, or other public danger" were deliberately stricken out; and that the power of the governor as commander in chief was not specifically defined beyond the provision authorizing him "to execute the laws, suppress insurrection, and repel invasion," and that three new provisions were inserted, one specifically separating the legislative, executive, and judicial departments, and providing that no person should exercise the powers of more than one department; secondly, specifically providing that the military should be subordinate to the civil power, and that no citizen

unless engaged in the military service of the State should be tried or punished by any military court for any offense cognizable by the civil courts; and, thirdly, specifically providing that the provisions of this present constitution, as well as the Constitution of the United States, are and should be operative alike in a period of war as well as in time of peace, and solemnly assigning a reason for the last provision, and giving it as the judgment of the Constitution makers in justifying the same that any departure therefrom and any violation thereof, under the plea of necessity or any other plea, is subversive of good government and tends to anarchy and despotism.

So far as I am aware, the provision last quoted, which is one of the first provisions inserted in the Bill of Rights, is unique in its language and unusual in containing not only an express and solemn provision that the Constitution shall prevail in peace or in war, but also in assigning in the section itself a reason and an argument for its adoption, and particularly unique in that it recalls and recites the pleas under which its purpose has been defeated in the past, namely, the plea of necessity, and it pronounces that its violation is subversive of good government and tending to anarchy and despotism, whether under the plea of necessity or any other plea whatsoever.

This provision (Art. I, sec. 3) was manifestly taken almost word for word from the opinion of Mr. Justice Davis in ex parte Milligan (4 Wall., 2), a case presented to the Supreme Court by an array of constitutional lawyers seldom equaled and never excelled, then but recently decided, and a case recognized by that court, the bar, and the country generally as being one of the most fundamental and far-reaching importance. In the opinion, in that case, Mr. Justice Davis said—

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy and despotism, but the theory of necessity on which it is based is false; for the Government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority.

The language of the excerpt is merely paraphrased by the constitutional provision referred to. But the language of that provision was carefully changed so as to provide against suspension whether on the plea of necessity " or any other plea."

It is worthy of note that in the argument of that case made by Mr. David Dudley Field, as condensed in the official reports, referring to the third and fifth amendments to the Federal Constitution, he says:

> These amendments were passed for a state of war as well as a state of peace. They were aimed at the military authority as well as the civil. The language of the Constitution should set this matter at rest forever. There is no room left for interpretation. If one should set himself to the task of expressing most clearly the intention to limit and restrain military jurisdiction, he would find it hard to choose a better form of words. If he were to exclude military commissions by name, that would, perhaps, leave the door open to the same thing in another form.

Evidently acting upon this suggestion or intimation the language of our constitution, after containing all and much more than was inserted in the Federal Constitution, did actually add thereto an ex-

press provision inhibiting trial or punishment "by any military court," thus actually excluding military commissions by name.

It would seem that the framers of the constitution by this language desired not only to make their meaning plain, but to justify it; and desired not only to insure against their purpose being thwarted upon any plea or pretext with which they were historically or personally familiar, but by careful foresight and anticipation to prevent the substitution of any other plea, not theretofore advanced, from again accomplishing the same purpose.

In the case of Nance and Mays (reported as State ex rel., etc., Nance and Mays *v.* Brown, warden of the State penitentiary, 77 S. E., 243) and in the case of Jones and others (reported as Ex parte Jones, 77 S. E., 1029) the validity of the military commission and its sentences were presented to the Supreme Court of Appeals upon applications for writs of habeas corpus. In the Nance and Mays cases the petitioners had been tried and sentenced and were held as prisoners in the State penitentiary under warrants signed by the governor, which warrants set forth the charges, findings, and sentences by the military commission, and the approval of such sentences by the governor, the petitioners, as hereinbefore stated, having been sentenced for five and two years, respectively. In the latter cases the petitioners had been arrested outside of the military zone, taken before a justice of the peace and by such justice remanded to the custody of the military commission, but had not yet been tried by such commission. In the Nance and Mays cases the court held that the governor of this State has power to declare a state of war to exist in any specific section therein, and to place such section under martial law. The second, third, fourth, fifth, and sixth points of the syllabus are as follows:

2. The constitutional guaranties of subordination of the military to the civil power, trial of citizens for offenses cognizable by the civil courts only, are to be read and interpreted so as to harmonize with other provisions of the Constitution authorizing the maintenance of a military organization, and its use by the Executive to repel invasion and suppress rebellion and insurrection, and the presumption against intent on the part of the people, in the formulation and adoption of the Constitution, to abolish a generally recognized incident of sovereignty, the power of self-preservation in the State by the use of its military power in cases of invasion, insurrection, and riot.

3. It is within the exclusive province of the executive and legislative departments of the Government to say whether a state of war exists, and neither their declaration thereof nor executive acts under the same are reviewable by the courts while the military occupation continues.

4. The authorized application of martial law to territory in a state of war includes the power to appoint a military commission for the trial and punishment of offenses within such territory.

5. Martial law may be instituted in case of invasion, insurrection, or riot in a magisterial district of a county, and offenders therein punished by the military commission, notwithstanding the civil courts are open and sitting in other portions of the county.

6. Acts committed in a short interim between two military occupations of a territory for the suppression of insurrectionary and riotous uprisings, and such in their general nature as those characterizing the uprising, are punishable by the military commission within the territory and period of the military occupation.

In the Jones case the principles and conclusions of law in the Nance and Mays case were reexamined and in all respects approved and affirmed. In each case Judge Robinson dissented forcibly and

at length, the other members, including Judge Brannon in the Nance case, and his successor, Judge Lynch, in the Jones case, concurring in the opinions rendered by Judge Poffenbarger.

It is impossible in this paper to review at length the majority and dissenting opinions. Each shows a wealth of study and research through the whole realm of text-writers and decisions, modern and ancient, and leaves but little which could be added from the standpoint of decided cases in support of the respective views and conclusions reached.

It is worthy of careful note, however, that in the first-mentioned case the warden answered justifying under a warrant showing that the petitioners were committed under definite sentences and for specific terms, and the opinion, in point 4 of the syllabus, expressly holds that the authorized application of military law in a territory held to be in a state of war includes the power to appoint a military commission for the trial and punishment of offenses within such territory, although an addendum to the first opinion of the court in this case (understood to have been added after the opinion was rendered and made public, although before it was officially reported) specifically limits the inquiry of the court to the question of the legality of the custody of the petitioners at the then present time and under the then existing conditions, martial law still being in effect at the date of such opinion, and states that the court was not called upon to say whether at the end of the reign of military law the sentences would automatically terminate. The syllabus, however, remains unchanged.

The only statute relied upon as sustaining the appointment of military commissions and the trial of citizens thereby seem to be section 92 of chapter 18 of the code, which provides, in part—

> In event of invasion, insurrection, rebellion, or riot the commander in chief may, in his discretion, declare a state of war in the towns, cities, districts, or counties where such disturbances exist—

which provision is part of the military code of this State, and which code does elsewhere provide in detail for the trial of soldiers or officers, but not of citizens; and also section 6 of chapter 14, which provides that the governor—

> may also cause to be apprehended and imprisoned all who in time of war, insurrection, or public danger shall willfully give aid, support, or information to the enemy or insurgents or who he shall have just cause to believe are conspiring or combining together to aid or support any hostile action against the United States or this State.

Upon these slender statutory enactments, coupled with the so-called "light of reason" and usages of international war, if applicable, rests the apparently Herculean task of explaining away or reconciling the constitutional provisions to which I have referred, adopted under the circumstances mentioned.

It would seem to be manifest that the clause last quoted has no bearing whatever upon arrest or imprisonment of citizens for the commission of ordinary misdemeanors or felonies, and is no warrant for the creation of an extra judicial court for the trial of such citizens. The section first quoted, authorizing the governor to declare war, and the application to such war when so declared of principles of international or general law, including martial law and trials

by military commissions, must, in the last analysis, be the only basis upon which can be vested any power in the State of West Virginia to try citizens before a military court or commission.

It will be noted that section 92, above quoted, does not in terms mention or refer to martial law, but confines itself to authorizing the governor, in the event of invasion, insurrection, rebellion, or riot, in his descretion, to declare that a state of war exists in the town, districts, or counties where such disturbances exist. In different forms and in several places in the majority opinions in both of the cases referred to, the argument is made, in slightly variant forms, that the power is given the governor by the constitution to use the military forces "to execute the laws, suppress insurrection, and repel invasion," and that the conferrence of such power, coupled with his power "to declare war," carries with it the right to use the military in any manner which he may deem necessary to restore order, and specifically carries with it the right, as being so necessary, to try and punish citizens by military commissions. And it is further argued that in the absence of an express denial in the constitution of such power to try by military commissions, the presumption is against the intention to destroy or abolish it by implication.

It is not perceived why or in what manner the right given the executive to declare war necessarily carries with it as an incident to suppress insurrection the right to use any one given particular method to suppress insurrection even if elsewhere in the constitution such right is either expressly denied, as I submit such is expressly denied by our constitution as to military commissions, or where the right to resort to such means is forbidden by reasonably plain implication. The recognized and usual incidents to war are not unchangeable, neither are they inherent and perpetual. They have changed almost beyond recognition throughout the centuries by the slow growth of civilization, until even many international rules, formerly usual and ordinary, have been completely abolished, although some of such incidents, such, for instance, as the custom of poisoning wells and putting women and children to the sword, certainly had the merit of effectiveness. May not a State in adopting its organic law and providing for putting down insurrection among its own citizens prescribe such conditions as it deems proper upon the method to be used, and which it thereby intrusts to its executive in general terms, such executive being himself a citizen? May it not in such organic law elect that insurrection shall neither in the suppression thereof nor in thereafter dealing with its inciters, if they be citizens and not in the military service, be intrusted to a military commission, whether upon the plea of necessity or any other plea? And, giving the language used its fair intendment and neither straining to create nor to deny such power, has not this State in terms so inhibited both its executive and its legislative? Can any supposed presumption against the intention to abolish such a method of dealing with insurrectionists, conceding for argument that it theretofore existed and that its value was then estimated highly, prevail over such express and unequivocal language as was used therein and thereafter inhibited? May not the makers of our constitution well have thought, in view of the past history of their State and of their country, that the price of suppressing

an insurrection was too dear if it meant the substitution of martial law, the will of the incumbent of the executives's chair, at any given time, without restriction, for all guaranties and all sureties? Especially if, as is contended, the necessity and propriety for declaring such martial law, and the length of its duration were also intrusted to the same executive, without power of review by any department of the Government or by all departments? It must be constantly borne in mind that this, like all questions under a written constitutional government, is one of power and not a question of its benevolent or tyrannical exercise.

If the decisions of our court in the cases cited are capable of being restricted so as to sustain the right of the executive through the military to arrest and detain persons inciting or contributing to a state of insurrection, riot, or war, pending the suppression of such riot, insurrection, or war, they will, to such extent, probably meet with the unanimous approbation of the profession. So restricted, the principles announced as being within the power of the military amount to no more than the right to meet lawless force with lawful force to whatever extent is necessary to suppress lawlessness. So restricted, such power has always been asserted and upheld equally and to exactly the same extent in soverign States, municipal corporations, sheriffs, police officers, or private individuals. Any or all of these classes have the right and power, in the suppression or prevention of crime, to forcibly arrest or detain a criminal and to prevent the commission of an offense. Each and all of such classes have the right to detain and restrain the personal liberty of such criminal or person attempting to commit an offense for so long as may be necessary until such person may be turned over for trial and punishment to the proper department of National, State or municipal government. Such power plainly conflicts with none of the provisions cited. It is the power, strictly and exactly, of the most ancient and paramount law, self-defense.

Such power of detention pending suppression of the insurrection was recognized in the case of Moyer *v.* Peabody (212 N. S. 78) and in re Moyer (35 Colo. 154; 91 Pacific 738; 12 L. R. A. (N. S.) 979; 117 Am. St. Rep. 189), but such cases go no further, and the executive of Colorado expressly disclaimed in his return any further claim on his part.

But the right and power to so overcome lawless force by lawful force until the offender may be turned over to the proper civil department for trial and punishment is a very different question from that of the arresting power, whether it be the military forces of the State, sheriff of the county, the police of a municipal corporation, or a private individual, to thereafter try, sentence, and punish for the alleged crime or attempted crime. There is a marked and sharp distinction between the power of a policeman to arrest and the right and power of the same policeman after arrest to constitute himself a court and try, convict, and sentence the offender arrested.

If the decisions of the supreme court are properly susceptible of upholding the right of the executive through a military commission, not only to arrest and detain pending a state of insurrection or so-called war, but also to try, sentence, and punish offenders against the civil law in lieu and instead of the courts of this State, and for spe-

cific and determinate periods, then I most respectfully, but with all the earnestness of which I am capable, desire to record an emphatic protest, a protest which I believe will be concurred in by the great majority of those acquainted with the constitutional history of our country, and particularly and especially with the constitutional history of our State. And frankness compels me to state that, as I understand the decisions in the Nance and Mays cases and in the Jones case, unless the decision reached and opinion announced does and was intended to go beyond the extent of merely sustaining the right to arrest and detain pending the quelling of insurrection, the court in its opinion traveled far afield in its review of constitutional provisions, State and Federal, its examination into and announcement of the rules and principles of national and international law and of belligerent rights; and this not alone in the language contained in such opinions, but also in the principles stated in the syllabus, which under our constitution (sec. 5, Art. VIII) is required to set forth the points actually adjudicated in each case. If such decisions are susceptible of the restricted interpretation necessary to uphold the power of the military to meet force with force in putting down an insurrection or riot, even to the extent of taking life, no one can properly question its propriety. But if, properly construed, they uphold the power of the executive, through a military commission or otherwise, to try, condemn, and sentence for offenses against statute law, or for any offenses, they would seem to be in the very teeth of the carefully considered, intelligibly expressed, and deliberately enacted provisions of our State constitution. I confess that with the majority opinions before me I am unable to see how the skilled draftsmen and exact stylists who were the makers of our constitution could, had they foreseen these decisions, have inserted provisions more plainly inhibiting and denying the right of a military commission to try citizens of this State for offenses cognizable under the civil law. While but little is said in the majority opinions of the court as to the exact provisions of our constitution, yet they are mentioned, and it is not attempted to be denied that, in direct and specific contravention of their language, citizens not engaged in the military service of the State have been tried and were being punished by the military for offenses cognizable by the civil courts of the State. I submit that the language of the constitution could no more plainly inhibit such trial and punishment had it named the petitioners in the habeas corpus cases and provided they should not be so tried and so punished. The reasoning of these opinions, so far as they discuss the specific provisions at all, would seem to be simply that while such provisions are by section 3 of Article I operative alike in a period of war as in time of peace, yet that they are not operative in a place of war, upon the actual theater of the war itself. As the constitution is supposed to and must operate on every foot of the territory of West Virginia, it would seem that such provision, in the absence of some exception mentioned in the constitution, must certainly operate in each section as well as in every period of war or peace within the State. In addition, the postulate upon which this construction is predicted, namely, that the abuses sought to be prevented arose from trial in peaceful territory by military commissions, and not from trial in sections where war was actually being carried on, is historically and

demonstrably a false postulate, reasons for which have been hereinbefore specifically given, and for which many more historical causes might be assigned.

In what I have said, or may say, as to the course pursued by Gov. Glasscock in proclaiming martial law I hope that I may make it plain beyond question that his sincerely high motives, the purity of his purpose, and his patriotic objects are in no way questioned, but are recognized in fullest degree and measure. I can not too strongly express my personal disagreement with and condemnation of those agitators and lawless characters who, to further their own political, personal, or business interests, profess to see therein his personal desires of self-aggrandizement, desire for power, or tyrannical and unjust exercise thereof. The situation he was called upon to meet to restore peace and uphold the law was difficult and grave in the extreme; it menaced life, property, liberty, and law itself. It was a condition and not a theory, and its solution admitted of no delay or academic hair splitting. All this I recognize. My difference with these measures is solely and sharply upon the question of the existence of the power proclaimed, and not because of the manner of its exercise, as wielded either too harshly or too leniently.

As a humble student of American and State history, as one hoping to read truly, understand, and perhaps to help maintain the true spirit of constitutional freedom, and as a sincere admirer of the wisdom and purpose of the constitutional provisions of West Virginia, I feel emboldened to voice this protest. More, I feel that it is in the exercise of a high privilege and that it is in the discharge of a high duty as a lawyer that I do so.

By the subsequent pardon of those convicted by the military commission and denied relief by our supreme court their cases can not now be reviewed by the Federal Supreme Court. By like pardon granted to all those others found guilty by the commission and whose sentences were approved they are, in like manner, effectively prevented from resorting to the inferior Federal courts by habeas corpus. Peace being now happily restored, and I devoutly trust permanently, the decisions of the Supreme Court herein referred to must, as I submit, unfortunately, stand as the established and settled law of our Commonwealth, as I know of no method, unless by an action for damages in the Federal inferior courts, diverse citizenship existing, by which it may now be called in question other than before the bar of enlightened public opinion, which has, however, upon historic occasions proven sufficient to reverse and hold for naught the equally solemn judgments of a tribunal yet higher and more august than the supreme court of any Commonwealth.

Such sentiment I can not believe will ever crystallize into an approval of or even a passive acquiescence in the doctrine that in the twentieth century in the liberty-loving American Republic, and especially in a State where liberty is as well understood, as highly cherished, as carefully safeguarded, and has been so dearly bought as in our West Virginia, such confidence was ever felt or could ever be felt in any executive, that the wise men who framed our constitution purposely, although by mere implication, conferred upon him the power, at any time or upon any plea, to substitute his will for the expressed and written will of the people as to modes of trial and

extent of punishment of our citizens. Nor, I submit, will the same sentiment acquiesce in the belief that the language used by our State fathers unwittingly gave such power, or that they failed carefully to prohibit its exercise. And finally, with all confidence, I submit that the argument that the right to exercise such a power is so inherent in a State and so sovereign in its character as to raise a well-nigh conclusive presumption that the people themselves, in framing their own organic law for their own self-government, did not self-impose restrictions upon its exercise by the executive is a plain confusion of the power of the people as a whole with the power they saw fit to confer upon the executive; that such a principle is an anomaly under all forms of written constitutional government, a contradiction in terms, and that it necessarily results in a denial in fact of that very sovereignty of the people and the State, to so govern and protect both, which it in terms asserts.