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# Need the Propriety and the Basis of Martial Law with a Review of the Authorities

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# THE NEED, THE PROPRIETY AND THE BASIS OF MARTIAL LAW, WITH A REVIEW OF THE AUTHORITIES[a]

(CONCLUDED)

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In West Virginia, in the Spring of 1912, a strike of coal miners was called in certain parts of Kanawha County. For a time there was no disorder, but, when the mine owners began to bring in men to take the place of the striking miners, clashes between the men employed as mine guards and the miners and their sympathizers were frequent. As the strike progressed, the disorders grew worse, extending to murder and arson.

In July, the Governor sent the military forces of the state into the district to aid the civil authorities to maintain order and to protect life and property. The military, from time to time, made arrests, and the persons so arrested were turned over to the civil authorities, and promptly gave bond and returned to the troubled districts, pending their hearings or trials. Disorder increased. The Governor uged the local authorities to convene a special grand jury to deal with the situation, but was told by the court officials that they had no evidence and could get none, to warrant the call of a special grand jury, and that the county officers themselves had no evidence against the lawbreakers, and had no funds to employ persons to collect the evidence to present to the grand jury. The Governor responded by placing his contingent fund at the disposal of the county officers to defray this expense. No action or efforts, worthy of mention were taken by the county authorities to suppress the disorders. Disorder continued. Each of the contending factions was armed with modern weapons, and men traveled the districts, in many instances, carrying high-power rifles with bayonets fixed. In September a battle of considerable proportions was reported as pending between the contending forces. The law gave the Governor no control over the county officials. Under the constitution, he was vested with the chief executive power of the state, made a commander-in-chief of its military force, and authorized to call out the same to execute the laws, suppress insurrection and repel invasion, and charged with the care that the laws be faithfully executed. The legislature, by special act, had given the Governor

[a]Read before the American Society of Military Law, Chicago, Sept., 1916. See last number, pp. 167 ff.

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power, in event of invasion, insurrection, rebellion or riot, at his discretion, to declare a state of war in the towns, cities, districts or counties where the disturbance existed. The constitution contained the usual bill of rights, but provided that the habeas corpus should never be suspended, and that persons accused or tried, should be tried by a jury of the county, in which the crime was committed; that the military should be subordinate to the civil power, and that no citizens, unless engaged in the military service of the state, should be tried or punished by any military court for any offense that is cognizable by the civil courts of the state. It contained also a general provision that 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, etc. The state was face to face with the condition that demonstrated the truth that

"The idea of government at all times, by simple force of law, which we have been told is the only admissable principle of republican government, has no place but in the reveries of those political doctors whose sagacity sustains the admonition of experimental instruction."[27]

The practical question, could the Governor, under the power and authority conferred upon him, by the constitution and the law, use the means necessary to end the trouble and restore the constitution and the laws, or did the two provisions of the constitution, to-wit: "The military shall always be subordinate to the civil," etc., and the declaration that the provisions of the constitution are operative alike in a period of war as in time of peace, control all the other provisions of the constitution? or, to state it differently, Were the provisions above set out, to receive a literal interpretation, when the other provisions of the constitution were pracically overthrown in the disturbed districts? It was the same question that was considered in 1861, and presented to the Supreme Court in the Prize Cases, 2 Black: "Could a sovereign exercise belligerent rights against its own citizens, in an insurrection of such proportions as to warrant the governor to declare a state of war exist in the district?"

The Governor took the position, that the powers conferred upon him by the constitution and under the law, were the powers of a co-ordinate branch of the government, and that in exercising those powers, he had the right to use the means necessary to secure the end; that a proper construction of the constitution, to give force and effect to all these provisions, warranted his position. To prevent the battle reported pending, the Governor, on September 1, declared a state of war to exist in the district, proclaimed martial law,

[27]28 Federalist.

and put the military forces in charge. All persons within the district, including partisans of each faction, were disarmed, all persons residing out of the district who had been acting as mine guards therein, were deported, and several non-residents who were in the state acting as mine guards in violation of the state law, were tried by a military commission and confined in the penitentiary. Order was apparently restored. The martial law proclaimed was withdrawn in October, and disorder again broke out. The second proclamation was issued in November, and the military again took charge. This proclamation was not withdrawn, but order was apparently restored and the military withdrawn in December. The Governor released the persons, who had been sentenced by the military commissions, with hope that no further disorder would occur. A short time thereafter, disorder again occurred, which continued with more or less violence until February, when a pitched battle occurred in which several persons lost their lives. Martial law was again declared, the military took charge of the situation, arrested a large number of persons and restored order. During this period no person was tried by the military commission. The persons arrested were confined in the military camp and in some instances in the jails of the counties, pending a restoration of order. The action of the Governor was widely discussed and finally resulted in an investigation by a special committee of the United States Senate. With the action of the Governor, in declaring martial law, and the measures taken thereunder, to restore peace, this article does not deal, as it is believed that it is a political question. The practical question was, "Was the state without power to sustain itself in a crisis, in which its laws and constitution were being set at naught?" The declaration of a state of war and martial law did not create a condition, but only recognized it, as it existed. The condition as it existed, showed that courts could, for some purposes, be open, and were open, but were inadequate to protect the citizens in their constitutional rights, and were as effectually closed for that purpose, as if closed by force. It was a condition that demonstrated that a literal construction of the constitution would result in anarchy, and that a construction that would harmonize each of its parts would restore the constitution and preserve law. The question was presented to the Supreme Court in two cases: *State ex rel* Mays and Nance, 71 W. Va., 519, and *Ex Parte Jones*, 71 W. Va., 567. The syllabus of each case follows:[28]

*State ex rel.* L. A. Mays et al.

[28]Robinson, J., dissenting.

"The governor of this state has power to declare a state of war in any town, city, district or county of the state, in the event of an invasion thereof by a hostile military force or an insurrection, rebellion or riot therein, and, in such case to place such town, city, district or county under martial law.

The constitutional guaranties of subordination of the military to the civil power, trial of citizens for offenses cognizable by the civil courts in such courts only and maintenance of the writ of habeas corpus 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.

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.

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

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.

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."

*Ex Parte Jones, Supra.*

"The principles and conclusions of law announced in State ex rel Mays v. Brown, Warden, and State ex rel Nance v. Brown, Warden, having been reexamined, after thorough argument and consideration, are approved and reaffirmed.

"A state of war having been declared in any part of the state on an occasion of insurrection, the war power of the state in the form of military rule, defined by the usages of nations, prevails in the territory subject to the proclamation, excluding the civil powers as to offenses, if the executive so order, while the peace powers of government under civil law prevail elsewhere.

"In such case, the governor may cause to be apprehended, in or out of the military zone, all persons who shall wilfully give aid, support or information to the insurgents, and detain or imprison them, pending the suppression of the insurrection.

"Sections 6, 7, 8 and 9 of chapter 14 of the Code, authorizing such arrest and imprisonment, do not violate the provisions of the state and federal constitutons, inhibiting deprivation of liberty without trial by jury, and are constitutional and valid.

"Being so, such arrest, detention and imprisonment, by virtue of said statute, are effected by due process of law within the meaning of section 10

of Article III of the Constitution of the State and the Fourteenth Amendment to the Constitution of the United States."

During the third period of martial law the Governor caused a Socialist paper, which was being widely circulated in the proclaimed districts, to be suppressed by his military forces. After the proclamation was withdrawn, an action for damages was brought by the Socialist Printing Company against the governor, and the military officers, who acted under his instructions in closing the plant and suppressing the paper. A plea was filed by the defendants denying malice and abuse of power, denying that any damage was done to the plaintiff further than to suppress the publication, and the trial court sustained a demurrer to the plea and held it insufficient. Thereupon an application was made to the Supreme Court for a writ of prohibition, which was granted in the opinion following:[29]

"The office of governor is political and the discretion vested in the chief executive by the constitution and laws of the state respecting his official duties is not subject to control or review by the courts. His proclamations, warrants and orders made in the discharge of his official duties are as much due process of law as the judgment of a court.

"The governor cannot be held to answer in the courts in an action for damages resulting from the carrying out of his lawful orders or warrants issued in good faith in discharge of his official duties.

"By virtue of the authority vested in the governor by the constitution and laws of the state, he has authority as commander-in-chief of the military forces, pending the existence of martial law covering any portion of the state's territory, to cause to be arrested and imprisoned until peace is restored, any person whom he has good reason to believe is aiding or encouraging disorder and rioting; and he may also temporarily suppress any newspaper published in the state, having a circulation in the martial zone, and containing articles which he has reason to believe will encourage a continuation of the disorder therein."

In Georgia in 1912, a portion of the militia of Georgia was ordered out by the City of Augusta, charged with the duty of restoring order and protecting property from mob violence. Three citizens were killed by the soldiers in the discharge of their duty. This action did not come before the courts of Georgia for decision, but the soldiers were tried by a court martial and acquitted. The Governor, in approving the finding, stated:

"When soldiers are called upon by civil authorities, it is to be assumed that the soldiers were considered needed. These citizens met their death by refusing to obey the lawful orders of the guards to halt, and after repeated warnings not to attempt to pass the lines had been given them by soldiers. Law and order in this commonwealth must be maintained.

"JAS. M. BROWN, Governor."

[29] *Hatfield et al.* v. *Graham,* 73 W. Va. 759; 53 L. R. A. 175.

In Ohio in 1913, certain portions of the southern section of the state were visited by a disastrous flood, particularly the City of Dayton. The troops were called out, martial law was established, and the military took supreme charge, establishing military courts, and tried numerous persons for violation of civil laws and military regulations.[30] The civil authorities co-operated as far, as possible, with the military and admitted their inability to protect life or property. The City of Warren, Trumbull County, was also visited by the flood, but martial law was not declared therein. The military assisted, however, in helping to preserve order, and its action in making an arrest came before the Common Pleas Court of Cuyahoga County, in an application of Edward S. Smith for habeas corpus,[31] which held as follows:

"1. The commanding officer of troops of the Ohio National Guard, when such troops are ordered into active service by the governor, in cases of riot, disorder, invasion, or overwhelming disaster, may make reasonable regulations for the protection of life and property, whether martial law has been proclaimed or not.

"2. Where a portion of a city has been visited by a disastrous flood, and much property has been temporarily abandoned by reason thereof, an order by the commander of troops excluding all persons from such flooded district without a pass was a reasonable and proper regulation.

"3. Troops so on duty under such circumstances might properly arrest a person who sought to force his way across their line, whether martial law had been declared, or whether the troops were called in aid of the civil authorities only; or they might forcibly eject him, using no greater force than necessary.

"4. After such arrest, the offender might be brought to trial before a military commission if martial law were declared, but if not, he should be turned over to the civil authorities.

"5. Upon such a prisoner being turned over to the civil authorities, the jurisdiction of the military commander ceased; and the validity of an ordinance under which he is subsequently arraigned and tried by the civil authorities may be tested by habeas corpus."

This case afterwards went to the Court of Appeals of the Sixth Circuit of Ohio, which is now the court of last resort except in special matters, and by that court was affirmed without comment.

In Colorado, in 1913 and 1914, there was a recurrence of industrial troubles, and the Governor proclaimed martial law, and the military forces of the State of Colorado were put in the field. There was more or less disorder, during the period of martial law, with the final result that in the Spring of 1914, the Governor of Colorado called upon the President of the United States for federal troops to help restore order. In response to tiis request, in April, 1914, the President sent

[30]Report Adjutant-General, State of Ohio, 1913. pp. 342-7.
[31]The Ohio Law Reporter, Vol. XI. No. 25, p. 497.

federal troops into the State of Colorado, and issued a proclamation warning all persons engaged in, or connected with, the domestic violence and obstruction of the laws, to disperse and retire peacefully to their respective abodes, on or before the 30th of April following. Under date of May 1, 1914, a proclamation was issued under his authority, directing all persons not in the military service of the United States, who had arms and ammunition in their possession, or under their control, to deliver them to certain designated officers, and to take receipts therefor. This latter proclamation was followed by one under date of May 6th, charging the officers and soldiers of the United States Army with the enforcement of the proclamation of disarmament, and to take into their possession all arms, ammunition, etc., found upon the person of any individual. The latter proclamation was published, but no action seems to have been taken under it. There was no disorder while the federal troops were present, and order was finally restored. The measures taken by the President to restore order were mild, but the question as to the authority exercised by the United States forces in Colorado was raised by the mine operators, having reference to certain restrictions exceeding those of the laws of Colorado placed upon the importation of so-called strike-breakers. The question was taken up with the Secretary of War, who, in reply to a letter from a member of the House of Representatives of Colorado, advised him as to the basis of the federal authority, concluding his letter with the statement "that he (the President) has full power and authority to do whatever he finds necessary to restore public order and maintain it.

*Ex Parte McDonald et al.,* Montana, 143 Pacific, 947.

This case arose out of a proclamation made by the Governor of Montana declaring Silvergold County in a state of insurrection and proclaiming martial law. The petitioner, McDonald, had been arrested and was being detained by the military authorities. A second petitioner, Gillis, had been committed, under a commitment by a military officer, acting as a summary court. The court held, that under the constitutional provision providing that the governor shall be commander-in-chief of the militia and have power to call out any part or the whole to aid in the execution of laws or suppress insurrection, the governor alone has the authority to determine when a state of insurrection exists, and his determination could not be reviewed by the judicial authorities; where the military is called out by the governor to put down an insurrection, the military forces operate as a sort of major police, for the restoration of the public order and may arrest

rioters and hold them until the insurrection is put down, before they are turned over to the civil authorities. The power to suspend the writ of habeas corpus is legislative, and the governor of the state, upon declaring martial law where insurrection exists, cannot suspend the writ. The military authorities, in case of insurrection, which is not an act of sovereignty, as is the declaration of war, are not empowered to punish the defendants without jury trial; nor can a jury trial be denied upon the ground that a jury of the vicinage would not do their duty, for the state may, if necessary, exercise its right to change of venue; and made an order denying the release of petitioner, with leave to re-petition after thirty days if at that time they had not been delivered to the civil authorities and the courts were then open and able to execute their processes.

The court, in the course of its opinion, in discussing the governor's authority to proclaim a state of insurrection, said:

"In a case of insurrection it is not merely the local law that is set at naught; it is the law of the state. Our constitution places the responsibility for the maintenance of that law exactly where it belongs: . . . and it is the duty of this court to refrain from interference or question, so long as the governor remains within the limits established by the constitution. So much being true, the recitals in the proclamation that a state of insurrection existed in the county of Silvergold cannot be controverted, but must be taken as final and conclusive. For reasons equally cogent, we must presume the conditions thus proclaimed to continue until by executive order or proclamation it shall be otherwise declared."

From these premises the court continues:

"We are convinced that the theory which accords the least power to the governor and to the militia in cases of insurrection is that he acts as a civil officer of the state, and that the military forces under him operate as a sort of major police for the restoration of public order."

The court then quotes at length from the Moyer case, and the *Moyer* v. *Peabody* case, concluding:

"The reasoning of this case, properly understood and strictly confined to its proper sphere, we take to be unanswerable and to be entirely applicable to the right and duty of the governor and militia, under the constitution and laws. The release of McDonald and his co-petitioners was therefore denied, but since justification is a necessity, and since it cannot obtain beyond the period of such necessity, we granted leave to re-apply, having in mind that the course of events might or might not demonstrate the detention of these petitioners beyond the time indicated to be unnecessary."

It is hard to reconcile these conclusions with the first holding. If the constitution imposes this duty upon the governor, and it is true, as stated in the opinion, that local and state laws are set at naught, and that duty is imposed upon the governor to restore these laws,

(and, incidentally, the constitution) then the means necessary to the end are to be used by him under the responsibility of his office and not to the court. The expression used by the court, that the military, in such condition, under such circumstances, operates as a "sort of major police" is a new expression, and the conclusion that the justification of the governor's act "is a necessity and it cannot obtain beyond the period of such necessity, we have granted leave to reapply," etc., suggests this query: Suppose at the end of thirty days the insurrection still exists, and in the opinion of the military officers the detention of these persons were necessary, upon re-petition would the court hold that the conditions set out in the proclamation continue until by executive order it shall be otherwise declared, or would the officers upon return to the habeas corpus, be put to proof of the conditions?

The record in this case does not show that there was an attempt to suspend the habeas corpus; upon the contrary, the record shows that a writ was issued and a return made by the military authorities and all that is was necessary for the court to hold was, whether or not the return was sufficient or insufficient, and it was not necessary to decide that the governor had or had not the right to suspend the writ of habeas corpus, as the record shows no attempt to suspend it.

Further in its opinion the court held:

> "When in domestic territories the laws of the land have become suspended, not by executive proclamation, but by the existence of war, the executive may supply the deficiency by such form of martial law as the situation requires, but we deny that insurrection and war are convertible terms, and that an insurrection is an act of sovereignty, as is a declaration of war,"

and quotes an excerpt from the majority opinion delivered by Mr. Justice Greer, in the Prize Cases. The excerpt is not from the part of the opinion that deals with the question of insurrection, but the part of the decision discussing the property rights of individuals within rebel territory.

A reading of the opinion will not sustain the conclusion of the Montana court. It will be borne in mind that the points in the Prize Cases were, "Had the president the right to institute a blockade of the ports in possession of persons in armed rebellion against the government, on principles of international law?" and "Was the property of persons domiciled or residing in those states, a proper subject of capture?" A majority of the court held in the affirmative and four of the judges dissented.

Mr. Justice Greer, in his opinion, stated:

"War has been well defined to be 'that state in which a nation prosecutes its right by force.' Insurrection against the government may or may not culminate in an organized rebellion, but a civil war always begins by an insurrection against lawful authority of the government. A civil war is never solemnly declared, but becomes such by its acicdents—the number, power and organization of the persons who organize and carry it on.

"As a civil war is never publicly proclaimed (*eo nomine* against insurgents), its actual existence is a fact in our domestic history which the court is bound to notice and to know. The true test of its existence, as is found in the reading of the common law, may be thus summarily stated: When the regular course of justice is interrupted by revolt, rebellion or insurrection, so that the courts of justice cannot be kept open, civil war exists and hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land."

The dissenting opinion of Mr. Justice Nelson concludes that no civil war existed between this government and the states in insurrection until recognized by the act of Congress on July 13, 1861, and that prior to that time, any action of the President as commander-in-chief of the military forces of the United States, either under the Constitution or acts of Congress passed authorizing him to call out the militia of the several states, is an exercise of power under the municipal laws of the country and not under the laws of nations; or, to state it differently, if the battle of Manassas had been fought a few days earlier, it would, under his holding, not have been a real battle fought under the laws of war, but the men who took part therein would have been required to have justified their action on the ground that the force used was necessary, and this necessity passed on by a court.

Insurrection is defined as:

"A rising against civil or political authority, or the established government, open and active opposition to the execution of law in a city or state. Rebellion is an extended insurrection and revolt."[32]

"The term 'insurrection' is one in a large measure incapable of exact legal definition, more or less elastic in its meaning, and the constitutoinal officer vested with the power of ascertaining its existence and exercising the necessary military power and constraint to suppress it is vested with a broad discretion, to be exercised under the exigencies of each particular occasion, as the same may present itself to his judgment and determination."[33]

"When evil spreads, affecting great numbers in the city or provinces, or subsists in such manner that the sovereign is no longer obeyed, such a disorder and custom is more particularly distinguished by the name of insurrection."[34]

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[32]Webster.

[33]1 Kent's Commentaries, page 283. Storey's Constitution, Sec. 1491.

[34]Vattel's Law of Nations, p. 485.

"Insurrection closely resembles rebellion, of which, in fact, it is an incipient form, in that it is a movement directed against the existence of a government. It is distinguished from rebellion in that the movement is less extensive and its political or military organization is less highly developed."

"In localities where the insurrectional movement has become so formidable as to make it necessary to resort to armed force with a view to its suppression, all residents of the territory in insurrection become liable to be treated as enemies."[35]

"An insurrection is a rising against civil or political authority; the open and active opposition of a number of persons to the execution of the law in a city or state; a rebellion and revolt."[36]

"In common parlance there is little or no difference between mutiny and insurrection."[37]

"The term 'insurrection' is used in the statute, making it a capital offense for any free person to aid or assist in any insurrection or rebellion, or intended insurrection or rebellion of slaves, is synonymous with the term rebellion as there used."[38]

The question then presents itself, when an insurrection ceases to be an insurrection and becomes a rebellion, and when a rebellion assumes the proportions of a war, and from whence comes the authority for the holding, that the authority to put down insurrection is not an incident of sovereignty. It is believed, that insurrection and rebellion are so closely allied that, where one leaves off and the other begins can never be definitely concluded, and that the question upon principle is one for the political department of the government to decide and not a question of fact to be decided by a court.

Another authority cited and relied upon by the court, is the case of *Smith* v. *Shaw,* found in 12 Johnson.[39] It is believed that this case is not in point, as it does not involve rights exercised under executive order in a period of martial law, but was an action of trespass for the detention by the commanding officer at Sackett's Harbor, of the plaintiff, who had been committed by two officers on charges in writing, one of which was that he was a spy. The defendant justified on the ground that he was the commanding officer of the post, and under the Articles of War, the men being committed under charges signed by an officer, he was required to hold them. The proof in the case showed that the plaintiff had been brought before the commanding officer, who promised to investigate his case, and from this fact it was contended that the defendant sanctioned the arrest, with the result

[35]22 Cyc., p. 1452, and cases there cited.

[36]*Allegheny County* v. *Gibson,* 90 Pa. 35; Am. Repts. *Spruill* v. *North Carolina Mutual Life Insurance Co.,* 46 N. C., 126.

[37]*Chicago* v. *New Orleans Ins. Co.,* 33 Am. Dec. 180.

[38]*State* v. *McDonald* (Ala.), 4 Port. 449, 455.

[39]Compare with *In re* Vallandigham, Federal Cases.

that the jury brought in a verdict for the plaintiff, the court further holding that the plaintiff, being a citizen, could not be a spy.

It is believed that the foregoing are all of the decided cases that bear directly upon the rights of military forces under martial law.

The cases of *Mitchell* v. *Harmony,* in 13 Howard, 113, and *Mitchell* v. *Clark,* 110 U. S. Reports, referred to and relied upon by text writers and courts, defining the rights and liabilities of military officers during martial law periods, are not in point.

The case of *Mitchell* v. *Harmony* (*supra*) was an action for damages brought by the plaintiff for property taken by the defendant, who was in command of a military expedition in Mexico. The plaintiff was a citizen of the United States, and had accompanied the expedition by permission. The defendant attempted to justify the taking. The court held:

"Private property may be taken by a military commander to prevent it from falling into the hands of the enemy, or for the purpose of converting it to the use of the public, but the danger must be immediate and impending, or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the action calls for.

"The facts as they appeared to the officer must furnish the rule for the application of these principles. But the officer cannot take possession of private property for the purpose of insuring the success of a distant expedition upon which he is about to march."

In the latter case, *Mitchell* v. *Clark, supra,* the military authorities in St. Louis during the Civil War required the defendant to pay certain moneys due from the defendant to the plaintiff for rent. After the war, the plaintiff sued the defendant, who plead payment to the military authorities, an act of Congress indemnifying persons acting under the color of authority from the United States during the rebellion, an act of Congress prescribing a statute of limitation upon actions against persons acting under such authority in putting down rebellion, and that the case at bar was barred. The opinion of the court did not discuss the question of martial law, but was given up to the discussion of the rights of Congress to pass the act relied upon, the court holding:

"An act of indemnity by Congress, passed after an event which in effect ratifies what has been done, and declares no suit shall be sustained against the party acting under color of authority from the United States during rebellion, is valid so far as Congress should have conferred such authority before,"

and held that the case at bar presented a federal question; that the statute of limitations relied upon was valid, and that the plea of the

defendant that the rents had been confiscated by the military authorities, was good.

Whether these two opinions can be reconciled is not within the scope of this paper, but it is certainly believed that neither of them are in point either for or against the right of the United States or of a state to declare martial law, or the actions of officers taken under it.

## CONCLUSION.

It is submitted that the basis of martial law is found in the inherent power of a sovereign state to preserve itself and its territory. Vattel lays it down that a sovereign state not only has this power, but that it is its duty to preserve itself and all of its territory. Its justification is in the necessity of the case. In using the word "justification," it must be borne in mind that it does not necessarily mean a justification before a court. Political actions of every nation or country are justified at the tribunal of public opinion, and by history. Under our system of government there are co-ordinate departments, equal in their respective spheres. The Constitution of the United States provides that (and those of the several states have practically the same provision), "the executive power shall be vested in the President of the United States." There is no attempt to limit or define the executive power. What, then, is the executive power of the United States? The answer is that the executive power of the United States (or of a state within its proper sphere), is the same as the executive power of any sovereign country, exercised, however, by a responsible agent—not a monarch—responsible not to the judicial department of the government, but in the manner provided by the constitution and to the people. The Constitution imposes upon the President the duty of putting down insurrection, rebellion, invasion, etc. It does not say how it must be done. Upon what theory could we look to the acts of the legislative department to see how he should perform this duty? Upon principle we should not.

> "The measures to be taken in carrying on war and suppressing insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the constitution."[40]

Upon what theory should the executive answer to the judiciary as to the necessity of his acts? It is contended that this is a great power, and that it can be abused. This is true of all powers, and instances are not wanting to show that the powers of the other

[40] *Stewart et al.* v. *Bloom, Kahn, et al.*, 11 Wallace, 20, Law Ed. 176.

branches of the government have been abused; but this fact does not take away or limit the power.

It is contended that this power is inconsistent with the Bill of Rights. Granted! In time of riot and insurrection the citizen who is not engaged therein is deprived of many of his constitutional rights. They are denied to him by the local authorities, for the reason that they cannot protect him. Has he no rights?

The declaration of a state of war and martial law by a state does not overthrow the constitution; it simply recognizes a condition that exists in the particular locality, and announces to the community that the civil authorities are no longer able to cope with conditions as they exist, and that war measures will be resorted to, to restore the constitution. The extent of the use of these measures rests with the department that puts them in force, and it is not for the branch of the government that has demonstrated its inability to control the situation to handicap another branch that is charged with the duty of restoring law and order. This construction of the constitution harmonizes all of its provisions, and is consonant with the canons of construction. A narrower view will lead to the result that the state or nation will find itself face to face with war and insurrection on the one hand, and a constitutional provision on the other, that ties its hands, and a condition that could only be remedied by the call of a constitutional convention to cut the Gordian knot.