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CONSTITUTIONAL LAW-MARTIAL LAW-SUSPENSION OF THE LAW

CONSTITUTIONAL LAW—MARTIAL LAW—SUSPENSION OF THE LAWS—Fifteen thousand workmen in a county struck, forced business houses to close, cut off the milk supply even to hospitals, threatened electric and water company

employees with violence, stopped all transportation services, and congregated in mobs. On request of the local authorities the governor issued a proclamation suspending the right to carry arms, the right of assembly, and the right to enter or leave the county, and directed the military to disperse all crowds, picketers, or other assemblages. A striker imprisoned by the military forces sued to enjoin the governor and military officials from carrying out the proclamation on the ground it violated a provision of the state constitution reading: "The operation of the laws shall never be suspended, except by the authority of the General Assembly."[1] The statutory federal three-judge district court denied an injunction and *held* that it had jurisdiction, but that the governor under his duty to enforce the laws had a discretionary power, which he had not abused, to declare martial law and to imprison without the rights of habeas corpus or trial by jury. *Cox v. McNutt*, (D. C. Ind. 1935) 12 F. Supp. 355.

The unanimous current of American authority to the effect that a gubernatorial determination that necessity for martial law exists is conclusive and not reviewable by the courts[2] was overruled as to the federal courts by *Sterling v. Constantin*,[3] which held that a governor could be enjoined by a federal three-judge court from enforcing martial law if there was no reasonable basis for his belief that the situation demanded it. As to the power of the military forces after a valid declaration of martial law, some states hold that they are in complete control with almost unlimited power,[4] some that they are merely armed police subject

[1] Indiana Constitution (1851), Art. I, § 26.

[2] Moyer v. Peabody, 212 U. S. 78, 29 S. Ct. 235 (1909), affirming (C. C. Colo. 1906) 148 F. 870; United States ex rel. McMaster v. Wolters, (D. C. S. D. Tex. 1920) 268 F. 69; United States ex rel. Seymour v. Fischer, (D. C. Neb. 1922) 280 F. 208; United States ex rel. Palmer v. Adams, (D. C. Colo. 1927) 26 F. (2d) 141, (C. C. A. 8th, 1928) 29 F. (2d) 541; In re Moyer, 35 Colo. 159, 85 P. 190 (1904); In re Boyle, 6 Idaho 609, 57 P. 706 (1899); Ex parte McDonald, 49 Mont. 454, 143 P. 947 (1914); Commonwealth ex rel. Wadsworth v. Shortall, 206 Pa. St. 165, 55 A. 952 (1903); State ex rel. Mays v. Brown, 71 W. Va. 519, 77 S. E. 243 (1912); In re Jones, 71 W. Va. 567, 77 S. E. 1029 (1913); Hatfield v. Graham, 73 W. Va. 759, 81 S. E. 533 (1914); Ex parte Lavinder, 88 W. Va. 713, 108 S. E. 428 (1921). And see Fairman, "Martial Rule, In the Light of Sterling v. Constantin," 19 CORN. L. Q. 20 (1933).

[3] 287 U. S. 378, 53 S. Ct. 190 (1932), affirming Constantin v. Smith, (D. C. E. D. Tex. 1932) 57 F. (2d) 227. Noted in 19 CORN. L. Q. 20 (1933); 31 MICH. L. REV. 988 (1933); 3 DETROIT L. REV. 114 (1933); 81 UNIV. PA. L. REV. 468 (1933); 33 COL. L. REV. 152 (1933); 1 GEO. WASH. L. REV. 272 (1933); 32 COL. L. REV. 1073 (1932); 6 OKLA. S. B. J. 5 (1935). And see generally: Sterling, "Civil and Criminal Liability of National Guardsmen Called Out for Duty," 8 TEMP. L. Q. 69 (1933), and Corwin, "Martial Law, Yesterday and Today," 47 POL. SCI. Q. 95 (1932). Accord: Powers Mercantile Co. v. Olson, La Belle Safety Storage Co. v. Olson, (D. C. Minn. 1934) 7 F. Supp. 865. The latter two cases are noted in 19 MINN. L. REV. 481 (1935) and 3 GEO. WASH. L. REV. 129 (1934).

[4] Ship Money Cases, 3 How. St. Tr. 826 (1637); Wolf Tone's Case, 27 How. St. Tr. 613 (1798); Prize Cases, 2 Black. (67 U. S.) 635 (1862); United States ex rel. Seymour v. Fischer, (D. C. Neb. 1922) 280 F. 208; United States ex rel. McMaster v. Wolters, (D. C. S. D. Tex. 1920) 268 F. 69; State ex rel. Mays v. Brown, 71 W. Va. 519, 77 S. E. 243 (1912); Ex parte Jones, 71 W. Va. 567, 77 S. E. 1029 (1913);

to all the common law limitations of constables,[5] and some occupy a middle ground, that the military forces in such a case are free from civil authority and may meet force with force, but their measures must bear a reasonable relation to the prevention of disorder and protection of public safety.[6] Recent decisions of the federal courts appear to follow the latter view,[7] under which the measures taken in the principal case would seem to be justifiable. Apparently there are no reported Indiana cases construing the suspension of the laws provision and, although there are similar provisions in the constitutions of seventeen of the states,[8] the writer has been able to find only thirteen reported cases in which they were considered. Of these, all related to local-option type laws, except one which held that the governor might not by proclamation remit statutory penalties to delinquent taxpayers in order to speed payment.[9] From the fact that the point has not been raised in a martial law case previously, it would seem that the suspension-of-the-laws provisions have not been thought to apply to such a situation. Probably such provisions were originally inserted in the constitutions to foredoom any attempt by executives to assert the power to dispense with the laws or to grant indulgences from their operation as done by King James II of Great Britain.[10]

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Hatfield v. Graham, 73 W. Va. 759, 81 S. E. 533 (1914). The Hatfield case holds the acts of the military are not even subject to judicial review. See generally: 13 NEB. L. BULL. 292 (1935).

[5] Ela v. Smith, 5 Gray (71 Mass.) 121 (1855); Bowditch v. Boston, 101 U. S. 16 (1879); Manley v. State, 62 Tex. Cr. App. 392, 137 S. W. 1137 (1911); Franks v. Smith, 142 Ky. 232, 134 S. W. 484 (1911); Allen v. Gardner, 182 N. C. 425, 109 S. E. 260 (1921); Fluke v. Canton, 31 Okla. 718, 123 P. 1049 (1912); Bishop v. Vandercook, 228 Mich. 299, 200 N. W. 278 (1924).

[6] Ex parte McDonald, 49 Mont. 454, 143 P. 747 (1914); In re Boyle, 6 Idaho 609, 57 P. 706 (1899); In re Moyer, 35 Colo. 159, 85 P. 190 (1904); Commonwealth ex rel. Wadsworth v. Shortall, 206 Pa. St. 165, 55 A. 952 (1903).

[7] Moyer v. Peabody, 212 U. S. 78, 29 S. Ct. 235 (1909); Powers Mercantile Co. v. Olson, La Belle Safety Storage Co. v. Olson, (D. C. Minn. 1934) 7 F. Supp. 865.

[8] *Alabama:* Constitution of 1901, Art. I, § 21; *Arkansas:* Constitution of 1874, Art. II, § 12; *Delaware:* Constitution of 1897, Art. I, § 10; *Indiana:* Constitution of 1851, Art. I, § 26; *Kentucky:* Constitution of 1891, Bill of Rights, § 15; *Maine:* Constitution of 1819, Art. I, § 13; *Massachusetts:* Constitution of 1780, Part I, Art. XX; *New Hampshire:* Constitution of 1784, Part I, Art. 29; *North Carolina:* Constitution of 1868, Art. I, § 9; *Ohio:* Constitution of 1851, Art. I, § 18; *Oregon:* Constitution of 1857, Art. I, § 22; *Pennsylvania:* Constitution of 1874, Art. I, § 12; *South Carolina:* Constitution of 1895, Art. I, § 13; *South Dakota:* Constitution of 1888, Art. VI, § 21; *Texas:* Constitution of 1876, Art. I, § 28; *Vermont:* Constitution of 1793, Ch. I, Art. 15; *Virginia:* Constitution of 1902, Art. I, § 7.

These provisions were probably copied from the Bill of Rights, 1 Wm. & Mary, sess. 2, c. 2 (1688): "That the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall."

[9] Hutton v. McLleskey, 132 Ark. 391, 200 S. W. 1032 (1918).

[10] 12 ENCYCLOPEDIA BRITANNICA, 14th ed., 877 at 888 (1929); Seven Bishops' Case, 3 Mod. Rep. 212, 87 Eng. Rep. 136 (1688); Godden v. Hales, 2 Show. K. B. 475, 89 Eng. Rep. 1050 (1686); Thomas v. Sorrell, 1 Freem. K. B. 85, 89 Eng. Rep. 55 (1673).