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## Martial Law and the English Constitution

Harold M. Bowman

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# MICHIGAN LAW REVIEW

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## MARTIAL LAW AND THE ENGLISH CONSTITUTION.

### I.

THE EMERGENCY ACTS OF 1914.—"MARTIAL LAW AND SOMETHING MORE."—TRADITIONS OF THE CONSTITUTION.

ON AUGUST 7th, 1914, three days after Great Britain had declared war, a momentous statute, called the DEFENCE OF THE REALM ACT,<sup>1</sup> was passed through the House of Commons with lightning speed, without a word of protest, in that spirit of decision and confidence which has marked the war measures of this Parliament.

The bill provided that "His Majesty has power during the continuance of the present war to issue Regulations as to the powers and duties of the Admiralty and Army Council and other persons acting in his behalf, for securing the public safety and defence of the realm." "The public safety and defence of the realm,"—this is the warrant and sanction for all that is to follow. By this bill the King in Council—which in effect means the Cabinet, or an inner circle of the Cabinet<sup>2</sup>—might order the trial by courts-martial and punishment of persons contravening the regulations "in like manner as if such persons were subject to military law and had in active service committed an offence" under one of the sections of the Army Act. The regulations for a breach of which such trial might be had and such punishment inflicted were provided for in broad terms. They might be regulations not only to secure the safety of means of communication, or of railways, docks or harbors, but as well regulations "to prevent persons communicating with the enemy or obtaining information for that purpose or any purpose calculated to jeopardize the success of the military forces," "or to assist the enemy."

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<sup>1</sup> 4 and 5 Geo. V. c. 29. Aug. 8th, 1914.

<sup>2</sup> See Sidney Low in *North American Review*, July, 1916. 822, 823, 827.

The Secretary for the Home Department, Mr. McKENNA, introduced the bill with as little ado and as little to say as though it had been of the smallest consequence. He remarked that under the terms of the bill punishment would not include the death sentence. Therefore—since the accused must needs survive the execution of the judgment of the court-martial—there would always be an opportunity of “considering” any action taken by the court-martial. That apparently in his view disposed of all objections as to the possible arbitrariness of the measure. His only other statement was that the House would readily understand that it was extremely desirable in case of tapping wires or attempts to blow up bridges that there should be an immediate court to consider the offence.<sup>3</sup>

The entire record of the proceedings which followed take up hardly twenty lines in the Parliamentary Debates. Two questions were briefly asked and as briefly answered. Leave to introduce the bill was promptly granted. The bill was read the first time and ordered to be printed. Immediately Mr. McKENNA moved that the House resolve itself into a committee on the bill. The bill was read a second time, reported without amendment, read the third time and passed.<sup>4</sup> Superficially—but superficially only—such dispatch might be characterized by the words of Mr. WINDHAM when in December, 1804, the bill to re-establish martial law in Ireland was introduced. “To vote the re-establishment of martial law,” he said, “seemed to be so much a matter of course that it required no argument to support it. They stopped the constitution as a miller would stop a wind or a water-mill, and with as little consideration.”<sup>5</sup> But on that occasion the debate was long and vigorous!

<sup>3</sup> Parliamentary Debates, Commons. LXV, col. 2191.

<sup>4</sup> The proceedings following Mr. McKenna's words asking leave to introduce the bill are, in their entirety, as follows:

“Dr. Chapple: Will this bill be retrospective from the commencement of the war?

“Mr. McKenna: No, sir, it will date from the passing of the Act, and the Regulations will last during the continuance of the war.

“Dr. Chapple: Will it apply to any offense which has already been committed?

“Mr. McKenna: No, it will only apply to offenses committed after the passing of the Act.

“Question put and agreed to.

“Bill ordered to be brought in by Mr. McKenna and the Attorney-General. Presented accordingly, read the first time and ordered to be printed. [Bill 358.]

“Bill read a second time.

“Mr. McKenna: I beg to move that this House will immediately resolve itself into the Committee on the Bill.

“Bill read a second time.

“Bill accordingly considered in committee; reported without amendment, read the third time and passed.” Parliamentary Debates, Commons, LXV, 2191-2193.

<sup>5</sup> Hansard's Debates, I, 1630.

The next day the bill passed the House of Lords—with no discussion.<sup>6</sup> Later on Parliament was to recognize that its action had been hurried but now there was no one to object. Dispatch seemed in the mood of every one. The great emergency must be faced with decision, without wavering, with a might that would overwhelm every disloyal spirit and an authority that would strike the note of discipline and obedience throughout the nation.

Two weeks later the Act was made yet stronger. The power of courts-martial to try and punish civilians was extended to offences committed in violation of any Regulations which might be made "to prevent the spread of reports likely to cause disaffection or alarm," or those which should be made to secure the safety of "any area" proclaimed by the Admiralty or Army Council to be an area necessary to safeguard in the interests of the training or concentration of any of the forces.<sup>7</sup>

The bill to effect these amendments was introduced by Mr. McKENNA on August 24th. He said, "It is now proposed to extend the power of the military authorities to all areas in which trade is being carried on. The House will see that it is very necessary and desirable such an extension should be made." This was all that he said, and there was no further consideration at this time.<sup>8</sup> On the motion for second reading of the bill, on August 26th, there was indeed an interruption in the precipitate course of these measures. Mr. TREVELYAN felt that the proposed words, authorizing trial by court-martial and punishment of persons contravening regulations designed "to prevent the spread of reports likely to cause disaffection or alarm" were of "somewhat vague import." "There is some uncertainty felt," he said, "as to whether these words, taken in connection with the Bill in general and the Regulations to be issued, may not be capable of being interpreted by military authorities to prevent the expression in speech or in writing of any political opinions on the actions of the government." But Mr. McKENNA assured him that the new words would not be used for such purposes.<sup>9</sup>

<sup>6</sup> The whole of the report in *Parliamentary Debates, Lords*, Vol. XVII, Aug. 8, 1914, reads: "Defense of the Realm Bill. Brought from the Commons; read 1a and to be printed; then (Standing Order No. XXXIX having been suspended) Bill read 2a (the Lord Chancellor); committee negatived: Bill read 3a, and passed. (No. 253.)"

<sup>7</sup> 4 and 5 Geo. V, c. 63, in *Parliamentary Debates, Commons*, LXVI, 26.

<sup>8</sup> See *Parliamentary Debates, Commons*, LXVI, 26.

<sup>9</sup> And then he gave an illustration of the purpose of the amending bill, in this regard: "I do not think my hon. Friend can have failed to observe the case of the man who was prosecuted for stating that the Black Watch had been cut up and the wounded brought back to this country. That man was convicted not of the offense of publishing that most untrue statement, but because he was wearing a military uniform which he was not entitled to wear. It is most desirable that the spreading of false

Without any further debate the bill was the same day passed through its various stages in the Commons. In the House of Lords on the following day, August 27th, the bill was passed through all its stages without any debate, and with only a brief statement of its object by Viscount ALLENDALE, who explained that "these emergency measures were hurriedly drawn, with the result that certain omissions took place."

In November the emergency legislation was revised.<sup>10</sup> It was made not only more effective<sup>11</sup> but more drastic. The death penalty, though it was contrary to the original purpose as stated by Mr. McKENNA in his outline of August 7th, was authorized whenever it should be proved that the offence was "committed with the intention of assisting the enemy." The government in August had sought to enlist support by expressly excluding the death penalty. In November its mind had changed, and perhaps nothing reveals the determined support with which the government was meeting in these measures more than the fact that in the House of Commons this provision was passed without a word of dissent. Yet it was a sensational measure, the first time in England for at least two hundred and fifty years when the power to sentence a civilian to death without trial by jury had been given a legal sanction.<sup>12</sup> Only in the

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reports of that kind, which may cause disaffection and do cause alarm, should be punished, and it is obvious that it is only false reports of that kind which it is here proposed to make punishable." *Parliamentary Debates, Commons, LXVI, 87, 88, 89.*

<sup>10</sup> 5 Geo. V, c. 8.

<sup>11</sup> There were changes, some of which perhaps were of first importance from the legal standpoint. Thus the enacting words of the first Defence of the Realm Act were somewhat equivocal; it was doubted whether power was conferred upon the King in Council to make regulations for the defence of the realm and the public safety independently of its regulations as to the powers of the military and naval authorities. But this uncertainty was removed by the enacting words of the Defence of the Realm Consolidation Act of Nov. 27th, 1914. See the two acts and see Baty & Morgan; *War, Its Conduct and Legal Results*, 102-104.

<sup>12</sup> "Thus for the first time in England for at least two hundred and fifty years, a civilian may be sentenced to death without trial by jury. Is this justified? Is it necessary? It may be said (and we have said it) that the offence of assisting the enemy is already treason at common law and punishable as such with the death penalty. So it is and so it ought to be. But it is one thing to try a man for an offence defined by the common law and by innumerable cases in the law reports and to try him with all the safeguards of a jury and with the right to appeal from their verdict, if it is one of 'guilty' to the Court of Criminal Appeal; it is quite another thing to try him for an offence which is not so defined, and to try him by a court of officers ignorant of the common law, who direct themselves, instead of directing a jury, both as to the law and the facts, and whose verdict and sentence in one are subject to no appeal but merely to the revision of a ministerial officer—the Judge-Advocate. Considering that the king's courts are still sitting, that the king's writ runs throughout the realm, and that juries can be, and are being, empaneled every day, we think that this subjection of the lives of private citizens to military law is entirely unjustified. The death penalty once inflicted, is irrevocable." Baty & Morgan: *War, Its Conduct and Legal Results*, 110.

House of Lords was there protest, and there it met with weighty opposition. Lord HALSBURY, Lord LOREBURN and Lord BRYCE united against it.

It was in fact more than two hundred and fifty years since HOLBORNE had declared, with oracular force, that "The Common Law is the common reliever of persons wronged. \* \* \* The ordinary way of Trial for Life is by Indictment and a Jury; when therefore this may be done, and that the sheriff with the Posse Comitatus, is able to keep the peace, it cannot be done by martial law, or by judgment of the king and peers in parliament without indictment as was adjudged in the case of the Earl of MARCH. \* \* \* My lords, the reason of this maxim of law is, as I conceive, these actions extraordinary are done *extra ordinem*, and done only in times of necessity when we are not tied to any rules of law, and therefore not to be brought into example, nor have any warrant but only that of necessity."<sup>13</sup>

There was no further amendment until March of the following year, when, as we shall see, a most important change was made. Throughout the seven months, from early August on, the approval with which the emergency legislation seemed to be received in Parliament was apparently reflected in the country at large. Of public clamor against it there appears to have been none that was of any moment; of expert criticism there had been but little. Parliament in this action seemed more than the council of wise men of the nation. It seemed to be speaking in assertion of the primal instincts of the people, inexorably. If this was not wholly the case, if the government in any degree yielded to the always present temptation of such occasions, its matter-of-fact, almost droning doing of the business was a perfect disguise. It showed nothing of that love for the display of power, the passion "to stand revealed, as it were, in the storm and thunder-bolt" of which HALLAM writes.<sup>14</sup>

And if there was some blind confidence at the time in what the government was doing, this confidence seems to have been approved. There has been time and outlet for recrimination, but the recrimination up to the time of this writing had been almost wanting. The people of Great Britain, it would seem, had put their seal of approval upon what was done by Parliament. This could not have happened if Parliament had not acted with a true instinct for the public welfare.

But the absence of public clamor is not so surprising perhaps

<sup>13</sup> 3 St. Tr., 826, 881. For the judgment of reversal in the case of the Earl of March see 1 Hale P. C. 347, 348. See also the case of the Earl of Lancaster, Ibid, 343-347.

<sup>14</sup> Hallam Const. Hist. of Eng. I, 240.

as the small amount of expert criticism that followed. Following the Boer war and especially after the *Marais* case there was a great deal of such criticism. But now in this incomparably greater case, coming home to everyone in Great Britain, those especially qualified to speak were mostly silent.<sup>15</sup> This is not because there was no basis for attack. Here was a precedent that might conceivably lead to the undermining of all the "monuments" of English liberty. Much is made of this in the one outstanding early criticism of the law. The words of J. H. MORGAN, Professor of Constitutional Law at University College, London—a man who later was engaged in official duties in France with the British forces—set the matter forth in a bold light. In his treatise on "War, Its Conduct and Legal Results," which was published early in 1915, he declares that this legislation establishes "martial law and something more"; while it is more specious it is far less restricted than martial law. Never in English history, he asserts, has the Executive assumed such arbitrary power over life, liberty, and property of British subjects. He sees in the Acts and the resulting Regulations a "net of restrictions so finely woven, so ingeniously designed, that it enmeshes every act of the citizen," establishes arrest without warrant;<sup>16</sup> a right without warrant to enter any house by day or by night; a power to deport the whole population of any town or village from one part of the country to another, to punish by court-martial with penal servitude for life, to force incriminating evidence. The private citizen is placed under the absolute orders of any major holding the King's commission. "We must leave the reader to judge for himself," he concludes, "whether this 'Parliamentary despotism,' which recalls nothing so much as the kind of legislation hitherto exclusively reserved for uncivilized Protectorates, is either necessary or wise."<sup>17</sup>

But there seemed few to echo him and the credit for the limitations subsequently placed upon this emergency programme seems to belong almost entirely to the spontaneous purpose of the ministry itself.<sup>18</sup> The later debates seem to bear evidence that even in the house of its friends there had been anxious questioning and mutterings of dissent.

<sup>15</sup> The striking lack of comment will be observed by any one who examines the periodical indexes from August, 1914, onward.

<sup>16</sup> The effect of this is illustrated by a case cited in the House of Commons on March 2, 1915. A Scottish skipper had had the misfortune, in November, to run into a British submarine in port. The skipper and all of his crew were imprisoned for about two weeks and when released no charge had been framed against them. See the Annual Register, 1915, p. 79, London Times, March 3, 1915.

<sup>17</sup> Baty & Morgan: War, Its Conduct and Legal Results, 112, 113.

<sup>18</sup> It is possible that Professor Morgan's book, standing almost alone though it did, had its effect on the government. It is interesting to note that the book is dedi-

## II.

## AMENDING THE ACTS.—COURTS-MARTIAL IN RESERVE FOR BRITISH SUBJECTS; IN USE FOR THOSE NOT BRITISH SUBJECTS.

In February of 1915 most important changes were made with a certain ease of debate and some self-revelation by the members of Parliament participating. A bill so amending the Defence of the Realm Act as to give civil offenders a right to trial by the civil courts was introduced and in March it became law.<sup>19</sup> The amendment however was made subject to a most important qualification. In the event of "invasion or other special military emergency" arising out of the war, the King could by proclamation forthwith suspend the Act, martial law would at once be reinstated and the civilian be subjected to military authority and the military tribunals.

Perhaps nothing in present-day constitutional history will deserve to be more frequently turned to than the brief remarks that were made just before and during the consideration of this bill.

The second reading of the bill in the House of Commons was moved on February 24th, by Sir John SIMON, the Attorney-General. He explained the circumstances under which the Defence of the Realm Act of August 8th was adopted. Some will see in his speech a measure of apology for the haste of that proceeding. Others will find nothing of the kind. He did admit that the Act had been "rapidly" passed through Parliament. This he explained. Parliament had at short notice to decide what was the tribunal which should promptly enforce the necessary regulations, and the House agreed that the graver class of offences under the Act should be dealt with by courts-martial. He admitted that it was "an extremely novel proposal." But he asserted that the justification for it was "very plain." The first duty of the House when the war broke out was to take "adequate and effective steps against a great national danger." And he of course treated the Defence of the Realm Act as closely interwoven with the emergency programme, of which the three bank holidays, the closing of the stock exchange, the moratorium were other parts. The apologia concluded with the declaration that in view of the circumstances "the argument that the Defence of the Realm Act was novel and violated constitutional tradition was of very little weight." But it should be carefully noted that the spokesman of the government did here confess that the Act was novel and that it did violate constitutional traditions.

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cated to Sir John Simon, who as Attorney General piloted the Defence of the Realm Amendment Act of March, 1915, through the House of Commons.

<sup>19</sup> 5 Geo. V, c. 28, March 16, 1915.



In his next words he passed on to the new amendment. He said that the time had now come for looking back to see whether the provisions of the original act "had in any degree gone beyond what was necessary"—a most notable admission. Such consideration, after seven months' experience, he said, was "a matter of the greatest importance for every one who cared for what was characteristic in British institutions." Here was a confession, though the Attorney-General did not put it in so many words, that the Act had gone beyond what was necessary. And the government was ready to change it by giving British subjects, in ordinary circumstances, the right to trial by the civil courts. But the right should be limited to them alone "for after all it was a British tradition that the bill was intended to maintain."<sup>20</sup>

Both in the discussion in committee of March 2nd and in the discussion on the third reading it was proposed that the provisions for trial by jury should admit of abrogation only when the civil courts were rendered unavailable. On the latter occasion Sir R. ADKINS moved an amendment to this end. He said that some members believed that the only time when martial law and courts-martial without alternatives were defensible was when the civil courts could not be used. He declared categorically that this had been an unbroken practice in every kind of crisis, and on every occasion on which Great Britain had been at war.<sup>21</sup> This amendment was seconded.

But the government was strongly opposed to such a change and secured its defeat. The Attorney-General said that he deprecated complacent comparisons with past crises. Let Parliament "be sure they took adequate steps; they would be forgiven by posterity if their steps were more than adequate"—words which, wittingly or unwittingly, echoed those of LINCOLN when, defending his action in the Vallandigham arrest, he said: "I was slow to adopt the strong measures which by degrees I have been forced to regard as being within the exceptions of the constitution and as indispensable to public safety. \* \* \* I think the time not unlikely to come when I shall be blamed for having made too few arrests rather than too many."<sup>22</sup> But however that may be, the Attorney-General said he did not understand how anybody who realized the real nature of the problem the country had to face could think that it would be satisfactory to alter the clause in the way proposed. The right to use courts-martial for the trial of civil offenders in case of special emergency

<sup>20</sup> London Times, Feb. 25, 1915.

<sup>21</sup> London Times, March 10th, 1916.

<sup>22</sup> See Rhodes Hist. of the U. S., IV., 250.

must be preserved for the government. But he "hoped and believed" that they would never have to exercise it. The government "must have the power to take any step, however novel, however far it departed from our traditional or constitutional rights, if that step was, in the pinch of necessity, justified in order to protect the national interests."<sup>23</sup>

It was generally recognized in the debates on these measures that Parliament was breaking with the old "customs" and "traditions." The favored word seems to have been tradition. No one ventured to assert that such acts were beyond the power of Parliament, or that they were unconstitutional in the sense that the supremacy of Parliament did not embrace the authority to enact them. The Opposition seemed, if anything, more strongly convinced than the Liberals that the government should have plenary authority. Mr. Bonar LAW on February 15th had declared bluntly that "at a time like this powers of dictatorship must be given to the government."<sup>24</sup> Sir Edward CARSON, also of the Unionist Party, and who was to succeed Sir John SIMON as Attorney-General, fully supported the emergency measures. Agreeing that so long as the regular courts were sitting they ought to be availed of as far as possible, he thought it idle not to recognize that circumstances might arise, "as no doubt they did arise when the original bill was introduced," which would render it impossible entirely to adhere to all the traditions of the constitution. "The government must have whatever powers they asked for. A great war could not be carried on without throwing full responsibility for everything upon the government. They knew what they had to deal with, and their critics did not." He believed that there was "reason for great congratulation in the fact that notwithstanding the demands of the war the government was able to come to the House and say: 'After seven months of war we think less drastic legislation is necessary for the detection and punishment of crime.'<sup>25</sup>

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<sup>23</sup> London Times, March 10, 1915. Cf. Hansard's Debates, I, 1599, on the bill to establish martial law in Ireland. In his protest against that measure one of the members said that he "could not consent to violate the constitution, unless the necessity of such violation was clearly established" and that the bill would vest the government with extraordinary and unconstitutional powers. See also pp. 1609-1651 *passim*.

<sup>24</sup> This remark was made in the course of his consideration of the powers of the Admiralty to dismiss for incompetence, "or even if they think they have a better man to dismiss without giving any reason," powers which he believed it should have. To the sentence quoted above in the text, he added: "But, with the best intentions, dictators are apt to get to love their power, and one of the evils of dictatorship is secrecy. Where it is necessary let us have it, but let us as far as possible stick to the old custom." London Times, Feb. 16, 1915. See also the remarks of the Marquis of Crewe and Earl Curzon on this subject. London Times, Jan. 8, 1915.

<sup>25</sup> London Times, Feb. 25, 1915.

The debate in the House of Lords at this time might be characterized as somewhat less to the point than that in the House of Commons, but here too the general agreement that these extraordinary powers were needful seems unmistakable. Lords on both sides were of this opinion, though perhaps in the Lords as well as the Commons the conservatives were ready to express themselves more strongly in the matter than the Liberals. Thus the Marquis of LANSDOWNE, who in June, 1915, was to become a member of the cabinet without portfolio, thought it unfortunate that the government should be obliged to recede from its earlier position. "It was no use disguising the fact that this bill was bound to be very much less of a deterrent than the original bill."<sup>26</sup> On the other hand we find Lord BRYCE consistently with the position which he, Lord HALSBURY and Lord LOREBURN had taken in November, expressing the conviction that it would be much more to the satisfaction of the whole public that courts-martial should be limited as proposed in the bill.<sup>27</sup> The debate in the House of Lords was interesting but the impression one gets is that it was far from spirited. Nevertheless to some of the members of the upper house the credit may be largely due for the amendment reinstating trial by civil courts. In the House of Commons, Mr. GOLDSTONE, a Labor member, had remarked that apparently it was to the Lords that the country owed a vindication of trial by jury.<sup>28</sup> The House of Lords has played an honorable part on more than one occasion in safeguarding these rights.

The gist of this emergency legislation, first as it stood at the end of 1914, then as it was amended in March of 1915, is this: By the Acts of 1914 the Executive was authorized in general terms during the continuance of the war to issue regulations for securing the public safety and the defence of the realm,<sup>29</sup> and it was specifically given power by such regulations to authorize the trial and punishment by court-martial or in case of minor offences by courts of summary jurisdiction, of persons committing offences against the regulations.<sup>30</sup> For the purpose of the trial by court-martial "the

<sup>26</sup> London Times, March 12, 1915.

<sup>27</sup> Ibid.

<sup>28</sup> The Annual Register, 1915, 74.

<sup>29</sup> One of the judges of the Court of Appeal, Pickford, has given his judicial opinion that sub-section 1 of the act "gives the widest possible power of making regulations for the safety and defence of the realm and as to the powers and duties of the Admiralty and Army Council and of the members of His Majesty's forces and other persons active in his behalf." In re A Petition of Right [1915] 3 K. B. 663.

<sup>30</sup> "And in particular against any of the provisions of such regulations designed to prevent communication with the enemy or obtaining information for that purpose," etc., etc. For the detailed provisions see 5 Geo. V, c. 8, § 1. See also the Defence of the

person may be proceeded against and dealt with as if he were a person subject to military law and had in active service committed an offence under section five of the Army Act." Under such section the highest punishment is imprisonment for life. But contrary to the original purpose the death penalty was expressly provided for in the revised legislation of November 27th, 1914.<sup>81</sup> As affected by the amendment of March 16th, 1915,<sup>82</sup> this general scheme stood unimpaired so far as persons not British subjects are concerned excepting that trial of such persons by the civil courts was made optional at the will of the Executive, not however at the will of the accused. British subjects are given a right to trial by the civil courts for offences against the regulations.<sup>83</sup> But even as to them in case of invasion or other special emergency this right may be suspended, and trial by court-martial for offences under the regulations be made general.

### III.

#### MARTIAL LAW IN ENGLAND AS LIMITED BY THE COMMON LAW AND GREAT ACTS OR CHARTERS.

What then is the place in the history of English constitutional law of this great group of acts and rules? Does legislation which first conferred upon the Executive power to make drastic regulations circumscribing the rights and liberties of civilians and to proceed against, try and punish those committing offences against such acts in the same way that soldiers in active service are; which, while it later gave to the British subject a qualified exemption from the latter power, retained it as to all others and prescribed that it might again be called into full operation by the Executive whenever in its opinion the special need for it existed—does such legislation signify that Great Britain has broken with her past in some grave manner, or is it open to a different interpretation?

The Attorney General, Sir John SIMON, when he made his argu-

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Realm (Consolidated) Regulations. The Act and the Regulations will be found in Baty & Morgan: War, Its Conduct and Legal Results, 438, 439, and in Pulling: Manual of Emergency Legislation, and supplements.

<sup>81</sup> 5 Geo. V, c. 8.

<sup>82</sup> 5 Geo. V, c. 28.

<sup>83</sup> The British subject may claim the right to such trial within six clear days from the time when the general nature of the charge is communicated to him. He is entitled to notice in writing of the "general nature" of the charge as soon as practicable after the arrest and at the same time notice in writing of his rights under the act. Where it is in the interest of national safety the court on application of the prosecution may exclude all or any portion of the public from trial, but the sentence must be passed in public. See 5 Geo. V., c. 34. No change was made by this amendment as to offences triable before a court of summary jurisdiction, the purpose of the amendment being to change the law as to trial by court martial only. See the speech of Sir John Simon in the House of Commons, Feb. 24, 1915. London Times, Feb. 25, 1915.

ment on the second reading of the Defence of the Realm amendment bill conceded, as we have seen, that all of this legislation was highly novel and that it involved a breach of the "traditions" of the British constitution. Others made the same admission.

In the Constitution of the United States we have come to distinguish between the written constitution and the unwritten constitution. The former is "law," the latter—as illustrated for example by the doctrine that no man shall be President of the United States for more than two terms—may be termed "custom."

The English Constitution is not written, yet even in it some such distinction between law and custom may be made. The rules and principles that compose it—while they may be manifested by documents, such great documents as the Great Charter or the Petition of Right—are those expressions of political experience of the state which have come to be regarded as fundamental. Some of these rules have been in their origin statutes; some have had the character of compact; some have taken form out of the thin air of use and wont. Often they may be spoken of as "traditions." Yet many of them, the more fundamental ones, those which go to the organic constitution of the government and which fix the rights and privileges of the individual in the state and under the government, are in the highest sense "law," "constitutional law."<sup>34</sup> When Parliament, supreme as it is, changes that law it changes the constitution. A leading writer on English constitutional law states what none would challenge, when he says that "the right to individual freedom is part of the constitution because it is inherent in the ordinary law of the land [as distinguished from the systems in which right is guaranteed by a written constitution]," and he adds that "the right is one which can hardly be destroyed without a thorough revolution in the constitution and manners of the nation."<sup>35</sup>

Perhaps no more ready way of coming at the heart of the matter will be found than that of asking to what extent the regime of "martial law and something more" which was inaugurated by this legislation would have been legal if this almost omnibus authority had not been forthcoming. Under certain circumstances and conditions martial law, arbitrary measures, drastic executive acts are not only necessary but are regarded as legal,<sup>36</sup> and these circum-

<sup>34</sup> See, for example, the treatment of constitutional law in Dicey, *Law of the Const.*, 7th ed., 22 et seq. And see Lowell, *The Government of England*, new ed., I, 9.

<sup>35</sup> Dicey, *Law of the Const.*, 7th ed., 197.

<sup>36</sup> *Case of Shipmoney* (1637) 3 St. Tr. 826, 976, 1162; *R. v. Nelson & Brand* (1867), Cockburn's Report, 85; Stephen, *History of Criminal Law*, I, 215; Dicey, *Law of the Constitution*, 7th ed., 270; *Edinburgh Review*, January, 1902, 84; *Juridical Review*, 36-213.

stances afford an ample defence in any suit against the one who does these acts. Yet in a sense martial law is not law at all.<sup>37</sup> It is not the administration of law, but the assumption of absolute power.

As to the circumstances warranting such arbitrary measures, and as to the measures thus warranted there is a difference of opinion—often vexatious enough. But even so there is an approach to a measurable concensus of opinion, while those who take extreme positions almost always acknowledge some limitations.

It is generally agreed that when the country is invaded, or when a state of war, or—what for this purpose is regarded as amounting to the same thing—a serious condition of riot, insurrection or rebellion exists,<sup>38</sup> the Crown and its officers, that is to say the government, may use the amount of force necessary in the circumstances to restore order, or to secure the public safety and defence of the realm.<sup>39</sup>

"Martial law cannot be said in strictness to *supersede* the ordinary tribunals, inasmuch as it only exists by reason of those tribunals having been practically superseded,"<sup>40</sup> or at least by reason of a necessity so real that some of the ordinary processes of civil government are perforce suspended.<sup>41</sup> Suspension of the civil courts is not the only test. It seems that according to the weight of authority martial law may exist even when the courts are open.<sup>42</sup>

<sup>37</sup> *R. v. Nelson and Brand*, Cockburn's Report, 85 et seq; W. S. Holdsworth in *Law Quarterly Review*, XVIII, 127, 128.

<sup>38</sup> "Making insurrection in order to redress grievances, real or pretended," said Lord Mansfield, "is levying war within the realm, and against the King," and he gives numerous other illustrations of "levying war within the realm." 121 Cobbett's *Parl. Hist.*, 694.

<sup>39</sup> See the argument by Holborne in *Case of Shipmoney* (1637), 3 Howell's *St. Tr.* 826, at 881, 976. "Royal power, I account, is to be used in case of necessity, and imminent danger \* \* \* as in cases of rebellion, sudden invasion and some other cases, where martial law may be used, and may not stay for legal proceedings. But in time of peace, and of no extreme necessity, legal courses must be used and not royal power," per Croke, J., *Ibid.*, at 1162; see also Forsyth, *Cases and Opinions on Cons. Law*, 198, 199, 201; Kent, *Comm. II*, 341n.

<sup>40</sup> Joint opinion of Attorney and Solicitor General Sir John Campbell and Sir R. M. Rolfe as to the power of the Governor of Canada to proclaim martial law, Jan. 16, 1838. Forsyth, *op. cit.* 199. "When martial law is proclaimed under circumstances of assumed necessity, the proclamation must be regarded as the statement of an existing fact, rather than the legal creation of that fact," Cushing, Attorney General of the United States, 8 *Opinions of Attorneys General* 365, 374. "Martial law \* \* \* is founded on paramount necessity." Kent, *Comm. II*, 341n.

<sup>41</sup> "It has been usual for all governments, during an actual rebellion, to proclaim martial law or the suspension of civil jurisdiction." Hallam, *Const. Hist.*, 7th ed., 1, 240.

<sup>42</sup> *Marais v. The General Officer* [1902] A. C. 109; *Elphinstone v. Bederechund* (1830), 2 *Tr. N. S.* 379; *Ex parte Milligan*, 4 Wall. 121, minority opinion. "As to *Ex parte D. F. Marais*, the only point it really decided, in my opinion, was that the absence of visible disorder and the continued sitting of the courts are not conclusive evidence of a state of peace," Sir Frederick Pollock, *Law Quart. Rev.*, XVIII, 157. "The fact that the courts are open and undisturbed will in all cases furnish a powerful

As to the source of this power there has been much dispute. On the one hand it has been maintained that the power is a prerogative of the Crown, on the other that it is found in the common law right and duty of all, subject as well as ruler, to use as much force as may be necessary to deal with the situation.<sup>43</sup> Very recently the courts have pronounced upon important phases of the question. In July, 1915, on an appeal from the King's Bench Division to the Court of Appeal on a petition of right,<sup>44</sup> it was held, affirming the decision in the King's Bench, that elements of this power exist as a prerogative of the Crown. The immediate question was whether the Crown represented by the competent military and naval authorities has power in time of war to take possession of and occupy any lands or premises for the purpose of the defence of the realm without making compensation therefor to the owner. It was held that the Crown has such power.

One of the judges, WARRINGTON, said: "It cannot, I think, be disputed, and the suppliants do not in fact dispute, that the King, as the supreme executive authority, was and is now by virtue of this prerogative entitled in certain circumstances of national emergency to take and use the property of a subject or otherwise interfere with private rights in order to provide for the safety of the public and defence of the realm." And COZENS-HARDY, Master of the Rolls, declared that "the prerogative applies to what is reasonably necessary for preventing and repelling invasion at the present time, regard being had to the invention of gunpowder and the use of aeroplanes

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presumption that there is no necessity for a resort to martial law, but it should not furnish an irrebuttable presumption," Willoughby on the Constitution, 1251. "When the courts are sitting it is no doubt a time of peace—but, subject to the qualification established by these two cases [*Marais v. The General Officer*, supra, and *Elphinstone v. Bedreechund*, supra], that they are sitting in their own right and not merely as licensees of the military power," W. S. Holdsworth, *Law Quart. Rev.* XVIII, 130. As to the latter point, the relation of the military to the civil power where martial law is proclaimed, see Willoughby, *op. cit.*, 1229, 1230.

<sup>43</sup> Not every exertion of force to repel force is martial law. Where for instance officers of the law or private individuals interfere to prevent the commission of a felony though they repel force with force, they exercise not martial law, but a common law right which has a recognized place in the ordinary civil law as has the law of arrest to which it is closely related. But when the force is used to overcome a real danger to the state which takes the form of "actual war or of insurrection, riot or rebellion amounting to war," it may become martial law. By many English authorities such force whether employed by a civilian or the military arm, has been called martial law. Forsyth, *Cases and Opinions on Const. Law*, 198; Sir Frederick Pollock, in *Law Quart. Rev.* XVIII, 153. Generally—and especially by American authorities—it is agreed that when on such an occasion the military arm is called in to aid the civil martial law exists. See Willoughby on the Const. II, 1228; Chase, C. J., in *ex parte Milligan*, 4 Wall. 127; Winthrop, *Military Law and Precedents* II, 1244, 1274; Stephen, *Hist. of Crim. Law* I, 211, 215; *Opinions of the Attorney General* VIII, 374.

<sup>44</sup> [1915], 3 K. B. 649.

in warfare."<sup>45</sup> These decisions would seem to make the more extreme contentions against the prerogative no longer tenable if they were ever so.<sup>46</sup> Subject no doubt to most important limitations, clearly implied in the foregoing quotations, there is a prerogative right. On the other hand, while it is doubtless to be understood that the things which the government may do in exercise of the prerogative may for obvious reasons vary in nature or degree from those which a private individual may do in case of national emergency (here there is real concrete difference of which much more may be made in the future), they do not remove the uncertainty as to the legal identification in source of the emergency powers of ruler and subject.<sup>47</sup> As COZENS-HARDY declares in this case "the prerogative is a part of the common law." Does the subject then participate in the prerogative? Is his right, let us say, to go on private property and dig trenches, a portion of the King's prerogative subsisting in the hands of a subject?—what BLACKSTONE defines a franchise to be. Or is the prerogative merely a portion of the general common law rights subsisting in the hands of the government?<sup>48</sup> Or are the general and the prerogative rights in this matter different common law rights?<sup>49</sup>

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<sup>45</sup> And in the King's Bench Division it was said: "In support of his argument that this prerogative can lawfully only be exercised in the event of actual invasion, Mr. Leslie Scott relies upon the words in the Saltpetre case [12 Co. 12], 'when enemies come against the realm to the sea-coast,' and upon the words 'or unless the enemy shall have actually invaded the United Kingdom at the time when such lands shall have been so taken,' in § 23 of the Act, 5 & 6 Vict., c. 94. If this be a limitation on the exercise of the prerogative, I think the changed condition of modern warfare must be taken into account, and the realm now requires protection from enemy aircraft and long-range guns of enemy ships as in the old days it required protection from the landing of enemy troops. Moreover when possession was taken of the lands and premises in question there had been an actual bombardment of the coast by ships of the enemy," [1915] 3 K. B. 652. See also Cozens-Hardy's and Warrington's opinions to the same effect, 658, 659, 666. Cf. the opinion of Pickford, L. J., 664.

<sup>46</sup> It may affect even the measured opposition of such a writer as Dicey. See his *Law of the Constitution*, 7th Ed., 549. Dicey's position seems to be that the prerogative right, such as it is, cannot be regarded as a thing separate and apart from the general right.

<sup>47</sup> An uncertainty which finds expression even in the most recent works. Thus in the article on Constitutional Law in Halsbury's *The Laws of England*, published in 1909, we find: "Whether this power [to use force, that is declare martial law], is really a prerogative of the Crown, or whether it is an example of the common law right and duty of all—ruler and subject alike—to use the amount of force necessary to suppress disorder—is not quite free from doubt." Vol. 6, p. 403, and citations. See also Holborne's argument in 3 St. Tr. 395, and Dicey, *Law of the Constitution*, 539; here, as in most if not all of the judicial decisions in the matter, the prerogative right and the common right are closely identified.

<sup>48</sup> In the opinion by the King's Bench Division—whose reasoning Cozens-Hardy, on appeal to the Court of Appeal, declared that he had substantially reproduced—it was said (by Avory, J.), that the "authorities appear to establish that by the Constitution the defence of the realm is entrusted to the Crown, that the law has entrusted



But the practical consequences of the identification in source of these powers, or the lack of such identification, seems slight.<sup>50</sup> In either case the powers that may be invoked are limited by the necessity of the case. All excepting some of those who uphold the theory of immunity of an officer in time of war<sup>51</sup> agree that the power is limited to what is necessary. But they disagree as to the kind or degree of necessity which will act as a justification.

The tendency to champion the principle that only that may be done which is "in strictness necessary"—"the doctrine," as it has been called, "of immediate necessity"—is a notable one. It has the support of numbers of the ablest judges and students of this subject. Then there are those who occupy a sort of middle ground.<sup>52</sup> And finally the view that "necessity" means little more than what appears

the person of His Majesty with the care of this defence, that in this business of defence the *suprema potestas* is inherent in His Majesty as part of his Crown and kingly dignity, that in times of war or invasion the *maxim salus populi suprema lex* must prevail, and that in these times of war not only His Majesty but likewise every man that hath power in his hands, may take the goods of any within the realm, pull down their houses or burn their corn to cut off victuals from the enemy, and do all other things that conduce to the safety of the kingdom without respect had to any man's property." [1915] 3 K. B. 651. These words echo some of the expressions employed by Mr. St. John in the case of *Shipmoney*, 3 St. Tr. 826, 836, et seq, and see the extracts in *Clode, Military forces of the Crown*, I, 3, 4.

<sup>50</sup> If the prerogative exists as part of the "Crown and kingly dignity" while it exists by the common law it could be at least nominally differentiated from the common law right of the subject. Perhaps the most persuasive arguments for the differentiation of the prerogative right are the clauses of various Acts of Parliament expressly authorizing the exercise of martial law in Ireland, which have declared that such legislation shall not affect the right of the Crown to exercise martial law. Thus in 39 Geo. III, 11 (Irish) it is provided that "nothing in this act contained shall be construed to take away, abridge or diminish, the acknowledged prerogative of His Majesty, for the public safety, to resort to the exercise of martial law against open enemies or traitors." See also 43 Geo. III, c. 117; 3 & 4 Wm. IV, c. 4, § 40. But the argument from these statutes while it has persuaded at least one prominent authority on the subject, Mr. Hargrave (see Forsyth, *Cases and Opinions on Con. Law*, 190) has had little weight in the courts. The statutes are explained away in *R. v. Nelson & Brand* (1867), Cockburn's Report, 70-74; see also *R. v. Eyre* (1868), Finlason's Report, 73, 74; *Grant v. Gould* (1792), 2 H. Bl. 69, 98. In the *Petition of Right* case of [1915], 3 K. B. 649, there is no reference to any of these statutes. Stephen speaks of "the common law right of the Crown and its representatives to repel force by force in the case of invasion or insurrection, and to act against rebels as it might against invaders." And speaking of 39 Geo. III, c. 11, and 3 & 4 Wm. IV, c. 4, he says: "It is impossible to suppose that such declarations as these should operate as a repeal of the *Petition of Right* as regarded Ireland." *Hist. of Criminal Law* I, 208, 211. See also W. S. Holdsworth in *Law Quart. Rev.* XVIII, 126-128.

<sup>51</sup> See *Ency. of the Laws of Eng.* VI, 403, note g.

<sup>52</sup> For a statement of this theory see H. Earle Richards, *Martial Law*, *Law Quart. Rev.* XVIII, 133, 139, 140. For a criticism see Dicey, *Law of the Constitution*, 7th Ed., 550.

<sup>53</sup> It will be found difficult always to distinguish those who incline toward the stricter from those who are satisfied with the less exacting view. Nor is this for the present purpose particularly important.

to be politically expedient in the circumstances of a threatening situation, also has had more than one able champion. Sir Frederick POLLOCK has taken it in an interesting paper.<sup>53</sup>

The rule given in the latest authoritative utterance, the decision above considered, can not be described as the rule of immediate or strict necessity, and should not be described as a rule of political expediency. It is the rule of reasonable necessity. COZENS-HARDY announces the rule of reasonable necessity in so many words.<sup>54</sup> And WARRINGTON says: "The only condition which it would appear must be fulfilled is that the act in question, having regard to existing circumstances, must be necessary for the public safety and defence of the realm, and on this matter the opinion of the competent authorities who alone have sufficient knowledge of the facts, provided they act reasonably and in good faith, should be accepted as conclusive."<sup>54</sup>

A rule of reasonable necessity is a flexible one, in any branch of the law. It has the disadvantage of some uncertainty, but it has the perhaps more than compensating advantage of equitable adaptation to actual conditions. To be understood it must be examined against its own proper background, though it will become a finely adjusted instrument of judicial measurement only after it has been repeatedly applied. Such a rule, when accepted as a measure of the official or individual power in time of public emergency to invade

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<sup>53</sup> Law Quart. Rev. XVIII, 152. See also Finch, C. J., in the case of *Shipmoney*, 3 St. Tr., at p. 1234. "Consider the application of the principles to modern conditions," says Sir Frederick Pollock, "An enemy's army has landed in force in the north and is marching on York. The peace is kept in London and Bristol, and the courts are not closed. It is known that evil-disposed persons have agreed to land at several ports for the purpose of joining the enemy and giving them aid and information. Bristol is one of the suspected ports. What shall the Lord Mayor of Bristol do? I submit that it is his plain moral duty [which he later declares to be a legal obligation] \* \* \* to assume control of the railway traffic and forbid undesirable passengers to proceed northward, and to exercise a strict censorship and inquisitorial power over letters and telegrams." Law Quart. Rev. XVIII, 162. Critics of this position will ask whether any of the Mayors of England have felt themselves endowed with such authority on merely suspected or apprehended danger in the present war. Mr. Dicey remarks that one of the circumstances which give "an apparent but merely apparent impressiveness to the doctrine of political expediency, is the current idea that, at a great crisis, you cannot have too much energy. But this notion is a popular delusion. The fussy activity of a hundred mayors playing the part of public spirited despots would increase tenfold the miseries and the dangers imposed upon the country by an invasion." Dicey, *Law of the Const.*, 7th Ed., 554.

<sup>54a</sup> See the use of the term by Stephen, *History of the Criminal Law*, I, 204, 205.

<sup>54</sup> This would seem to reserve to the court a power to determine whether the "competent authorities" that are amenable to the courts have acted reasonably and in good faith. Notwithstanding the contentions of some recent writers, for example, H. Erle Richards in Law Quart. Rev. XVIII, 140, probably the idea that the power of judicial review of such acts has been denied either by this case or the *Marais* case [1902] A. C. 109, would be strongly resisted.

or curtail private rights, is held within bounds in various ways by history and precedent.

The court said that the Crown might take private land without compensation for the defence of the realm before there was actual invasion by troops, if that was reasonably necessary.<sup>55</sup> But this is far from approving the principle—enunciated by a majority of the judges in the *Shipmoney* case but discredited by the Petition of Right—that mere “expectancy of danger” would warrant the exercise of the prerogative.<sup>56</sup> It was the decision of CROKE, and the argument of HOLBORNE, one of HAMPDEN’s counsel in that case, that the Petition of Right confirmed.<sup>57</sup> HOLBORNE declared that mere expectancy of danger did not enlarge the powers of the Crown one whit, that only the actual presence of pressing danger did this. Ruler and subject alike might do what was necessary to ward off such danger. “Put the case,” he said, “an enemy was landed, to show what the powers are by our laws in that case for defence; when there is a particular appearance of instant and apparent danger, in that case particular property must yield much to necessity. These cases our books warrant, as building of bulwarks on another man’s ground, and burning corn. In 1588 there was an actual danger and then it was just to take corn or grass or anything to raise supplies. But where do any of our books say that upon fear of danger, though in the King’s case, a man can without leave make a bulwark in another man’s land, I do not read. \* \* \* *Levis timor* will not serve. \* \* \* but such a fear as ariseth from an actual and apparent danger.”<sup>58</sup> HOLBORNE’S reference to 1588, an illustration not of actual but of threatened invasion, by the Great Armada, shows that his view was not a narrow one.<sup>59</sup> It might have been cited by the Court of Appeal and Court of King’s Bench in 1915 to support their view.

<sup>55</sup> In this view of the common law it might seem that 43 Geo. III, c. 55, s. 10, enacted when an invasion by Napoleon was feared, in so far as it provided that no private land should be taken without the consent of the owner unless “the enemy shall have actually invaded the United Kingdom at the time,” actually limited the prerogative. The act has since been repealed.

<sup>56</sup> See 3 St. Tr. at p. 1234. Perhaps it is not without some significance that while Avory, J., cited the *Shipmoney* case in support of his decision, the judges of the Court of Appeal eschewed all reference to it. Those who held that the prerogative as well as the Defence of the Realm Act warranted the taking of land without compensation—one judge, Pickford, expressed no opinion as to the prerogative—based their decision, so far as judicial precedent was concerned, almost wholly on the case of *The King’s Prerogative in Saltpetre*, 12 Co. 12.

<sup>57</sup> See Law Quart. Rev. XVIII, 125.

<sup>58</sup> 3 St. Tr., at 975.

<sup>59</sup> The same illustration was given by Finch, C. J., to support his contention that mere expectancy of danger warrants the exercise of the prerogative. 3 St. Tr., at 1234. Here is a common meeting ground, the basis for what is perhaps the true test. It is the reality of the danger as against (1) mere expectancy of danger, or (2) on the purely physical test of actual invasion or similar overt manifestation.

And if the rule of reasonable necessity does not justify martial law on a mere expectancy of danger neither would it make political expediency a sanction for martial law. "Reasonable necessity" and "expediency" are not equivalent terms. It will require no argument to demonstrate this to anyone who is at all familiar with judicial wrestling over the concepts "reasonable" and "reasonably necessary," in any one of several branches of the law.<sup>59a</sup> By the overwhelming weight of authority the condition that will justify martial law must be such as seemingly to compel, not merely to counsel, emergency measures. Such measures must be necessary, whether strictly or reasonably necessary; they may not be simply expedient. To the words of the Court of Appeal and the words of HOLBORNE in the *Hampden* case might be added many others, and the no less eloquent silence of a few. Without here going into shades of difference or peculiarities of treatment it will suffice to note that neither HALE,<sup>60</sup> nor COKE,<sup>61</sup> NOY,<sup>62</sup> ROLLE,<sup>63</sup> BLACKSTONE,<sup>64</sup> Lord LOUGHBOROUGH,<sup>65</sup> Lord BROUGHAM,<sup>66</sup> Sir George CROKE,<sup>67</sup> STEPHEN,<sup>68</sup> Judge-Advocate

<sup>59a</sup> For example, in the application of the rule that an easement can be created by implied grant only where it is reasonably necessary to the enjoyment of the property by the grantee, or in the application of the rule—in quite another branch of the law—that contracts in reasonable restraint of trade are not illegal.

<sup>60</sup> When earlier writers such as Hale, Coke and Blackstone use the term martial law they are speaking of the law applicable to the soldier. See *R. v. Nelson & Brand*, 99, 100, 104. And see the animadversion on Lord Hale by Attorney General Cushing in 8 Atty. General's Opinions, 365. But they make clear that even in emergent cases expediency is not a justification for denial of those common law remedies in which the liberty of the Englishman consists. See Hale, *History of the Common Law*, 35, and see comment in *R. v. Nelson & Brand*, 57n, et seq.

<sup>61</sup> 3 Coke 52; Rushworth's *Hist. Collections* III, App. 81. See the comment of Hargrave on these opinions of Coke, Noy, Rolle and Banks declared to a committee of the House of Commons sitting on martial law. Hargrave, *Jurisconsult Exercitationes* I, 399, in *R. v. Nelson & Brand*, Cockburn's Report, 63.

<sup>62</sup> Rushworth's *Hist. Collections* III, App. 80.

<sup>63</sup> "The question is now when this Martial Law is to be used, and upon whom the Common Law is the highest for the Subject \* \* \* every Liege man inherits the Law, it is the inheritance of the King, this great inheritance is not to be taken from him, and Martial Law is merely for necessity, when the Common Law cannot take place; now for the time when that necessity falls out, in times of Peace it cannot, for now we must consider what is time of Peace and War." Rushworth, *Hist. Collections* III, App. 79.

<sup>64</sup> Comm. I, 413.

<sup>65</sup> *Grand v. Gould*, 2 H. Bl. 69, 98. Here, as late as 1792, we find an English judge using martial law "in the same or much the same sense as Hale and Coke used it." See Cushing's comment in 8 Opinions of Atty's. Gen., 365, 366.

<sup>66</sup> Created by necessity, necessity must limit its continuance. It would be the worst of all conceivable grievances—it would be a calamity unspeakable—if the whole law and constitution of England were suspended one hour longer than the most imperious necessity demanded." 11 Hansard's Debates (2), 968; Clode, *Military Forces of the Crown*, 484.

<sup>67</sup> Case of Shipmoney, 3 St. Tr. 826, 1162.

<sup>68</sup> *Hist. of the Criminal Law*, I, 215, 216.

General Sir David DUNDAS,<sup>69</sup> Justice BLACKBURN<sup>70</sup> and Chief Justice COCKBURN<sup>71</sup> in the famous *Jamaica* cases of 1867-1868, nor any of the leading cases bearing on this question—such as the case of *Saltpetre*,<sup>72</sup> *Wolf Tone's* case,<sup>73</sup> *Elphinstone v. Bedreechund*,<sup>74</sup> the *Marais* case,<sup>75</sup> (in short hardly any of the leading English authorities) can be cited to the proposition that expediency or anything less than a real necessity will justify executive authority in resorting to the emergency measures of martial law. Nor need the statement take a negative form; many of these authorities and others besides,<sup>76</sup> notably distinguished law officers of the Crown,<sup>77</sup> American judges,<sup>78</sup> and constitutional writers such as KENT<sup>79</sup> and Attorney General CUSHING<sup>80</sup> have taken a most positive stand.

The present aspect of our question then comes down to this: Would the Crown acting through its ministers have had the prerogative right in the emergency of 1914 and following to make the rules and bring about the judicial, administrative and military situation among civilians brought about by the Defence of the Realm Acts

<sup>69</sup> See the extracts from his answers to Sir Robert Peel, Mr. Gladstone and others in 1849, in Stephen, *Hist. of the Criminal Law*, I, 213, 214.

<sup>70</sup> *R. v. Eyre*, Finlason's Report, 74.

<sup>71</sup> *R. v. Nelson & Brand*, Cockburn's Report, 69.

<sup>72</sup> 12 Co. Rep. 12, 13.

<sup>73</sup> 27 St. Tr. 616.

<sup>74</sup> 2 St. Tr. N. S. 379. See Lord Tenterden's opinion at 449. Arbitrary imprisonment was justified in this case because it was made "if not flagrante yet nondum cessante bello." Holdsworth identifies this decision with the *Marias* case, but Sir Frederick Pollock thinks it not an unessential distinction that in *Elphinstone v. Bedreechund* there had never been any regular jurisdiction in the territory in question. 18 Law Quart. Rev. 129, 130n.

<sup>75</sup> "It may often be a question whether a mere riot, or disturbance neither so serious nor so extensive as really to amount to a war at all, has not been treated with an excessive severity, and whether the intervention of the military force was necessary." [1902] A. C. 109, 115.

<sup>76</sup> In a letter dated July 13, 1640, Lord Conway wrote: "The lawyers and judges are all of opinion that Martial Law cannot be executed here in England but when an enemy is really near to an army of the King's." See Clode, *Military Forces of the Crown*, I, 23, 441.

<sup>77</sup> Forsyth, *Cases and Opinions on Cons. Law*, 198, 201, 214. In the joint opinion of Mr. Edward James and Mr. Fitzjames Stephen on Martial Law, with reference to the *Jamaica* Insurrection of 1866, they said: "As to the legal power of the officers sitting as a court-martial at Morant Bay, we are of opinion that they had no powers as a court-martial, and that they could justify the execution of Mr. Gordon only if, and in so far as they could show that, the step was immediately and unavoidably necessary for the preservation of peace and the restoration of order." Forsyth, *op. cit.* 562. See the generalization to like effect in *Edinburgh Review*, Jan., 1902, 101.

<sup>78</sup> See *Ex Parte Milligan*, 4 Wall. 121, 127.

<sup>79</sup> *Comm. II*, 341n.

<sup>80</sup> 8 *Opinions of Attorneys General* 365. Cushing's opinion finds a prominent place in English citations. This is the more interesting because of his rasping comment on Hale's and Lord Loughborough's view of martial law. See Forsyth, *Cases and Opinions on Cons. Law*, 209; *Ency. of the Laws of England VI*, 403n; W. S. Holdsworth in *Law Quart. Rev. XVIII*, 129.

and Regulations? And if the Executive had of its own initiative entered upon such a titanic programme would it have escaped unscathed? Would its acts have been regarded as reasonably necessary? If an act of Parliament seems expedient does it follow that the same act by the Executive must be "reasonably necessary"?

It is probable that almost every recognized authority upon constitutional law, and as well the political instinct of the government itself, would answer these questions with an emphatic "No." Not even the most convinced advocate of the doctrine that political necessity or expediency is a sufficient defence for the establishment of martial law has been heard to say that the Executive in circumstances like these could legally accomplish what Parliament has accomplished. And it should be remembered that only a part of what Parliament has done has been recorded here.

It would be admitted by some if not all that the Executive could within bounds, in places and on occasions where the need was urgent, make arbitrary arrests, suppress the press, appropriate or destroy private property, perhaps establish government by military tribunal, the highest badge of martial law,<sup>81</sup> in short do whatever upon the theatre of the emergency<sup>82</sup> necessity might dictate. But to say that in such circumstances as existed the Executive could have done

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<sup>81</sup> But some would energetically deny this, and would be able to give a considerable array of authority to the effect that martial law in this sense is unknown to English law, and is to be sharply distinguished from the admitted common law right to repel force with force. Chief Justice Cockburn, Lord Loughborough, Hale, Blackstone, Coke, Dicey and others would be cited to this effect. See *Edinburgh Review*, Jan., 1902, 85, 90, 105, which says that "upon the whole though the subject is somewhat barren of judicial authority, the better opinion would seem to be that martial law in its proper sense, is unknown to the law of England." In the article on martial law in the *Encyclopaedia Britannica*, by Sir John Scott, Deputy Judge Advocate General to the Forces, it is admitted that martial law in the above sense is unknown to the law of England. But this writer like others observes that this state of opinion may be explained by the fact that in England there had never been a state similar for example to that prevailing in Cape Colony in 1900-1902, when martial law was declared. "It may perhaps be questioned," he says, "whether the statement would have been made with such certainty if similar events had been present to the writers' minds." And compare the rather broad if somewhat indefinite statements by Warrington and Cozens-Hardy in [1915] 3 K. B. 649.

<sup>82</sup> And this would not need to be narrowly construed. One part of the country might be in a state of invasion or rebellion, other parts apparently unaffected, and yet the general safety make arbitrary arrest, let us say, of imperious necessity. This seems to be conceded even by so firm an advocate of the principles that strict necessity only excuses martial law as Mr. Dicey. See his *Law of the Constitution*, 7th Ed., 542. "In many places there may outwardly be peace, and yet modern means of communication may admit of important aid being conveyed to the enemy in the shape of information, supplies and personal adherents. In this manner the effective radius of a war has been multiplied tenfold or more." Sir Frederick Pollock, *Law Quart. Rev.* XVIII, 156. But on the other hand the mere fact that the nation is engaged in foreign war does not of itself make an uninvaded country the theatre of war or change the legal "time of peace" to legal "time of war," which alone would

what Parliament has done would be to say that although the *general* security of the inhabitants of the British Isles did not appear to be seriously threatened, it could make rules intended to operate *generally* and for the period of the war, drastically curtailing or totally extinguishing the ordinary rights of all the people, and that it could throughout the realm enforce these rules by a system of tribunals whose operation imports the abrogation of other equally fundamental rights.

For their better definition and security these rights have been set down principally in the four great charters or statutes of Magna Charta,<sup>83</sup> the Petition of Right,<sup>84</sup> the Bill of Rights,<sup>85</sup> the Act of Settlement,<sup>86</sup> and in the Habeas Corpus Acts.<sup>87</sup> They secure to the individual the peaceful enjoyment of his rights of property, and protect him in his person from illegal detentions or punishments. He may not be taken on arrest, be imprisoned, be deprived of his liberties or "otherwise molested" except in accordance with the law of the land and under all the protections which it throws around him. He may not be judged or condemned "except by the lawful judgment of his peers," and justice or right may not be "sold or denied or deferred" to him.<sup>88</sup> The right to act as he desires, provided he heeds the law, his immunity from wrongful detention and imprisonment are reinforced and ensured by the Habeas Corpus Acts,<sup>89</sup> and though the Crown be "the source and fountain of justice," it may issue only such commissions to administer the law as are warranted

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justify martial law. The distinction is technical but it is of great importance to a correct understanding of this subject. Referring to the famous debate by Coke, Noy, Banks and Rolle as to martial law in III Rushworth's Historical Collections, App. 80—so frequently cited to the rule that when the courts are open it is time of peace—Mr. H. Erle Richards, after pointing out that the real test must be the necessity of the occasion, goes on to say: "But what were the circumstances there. This country was at war with France, but there had been no invasion of England and no state of war existed there. The speakers appealed to the fact that the ordinary business of the courts was continuing as evidence that there was no necessity for superseding the ordinary law in the one function of martial law to which the Petition of Right referred, viz., the trial of offenders by military courts. There was no reason in the circumstances why offenders should not be dealt with by the ordinary process, for in fact there was no war. Even if opinions expressed in debate in the Commons in those contentious times could be safely accepted as the sober judgment of the speakers, it seems certain that they had in their minds only the particular facts before them and did not intend to enumerate any principle of universal application." *Law Quart. Rev.* XVIII, 142.

<sup>83</sup> 1215, see Adams & Stevens, *Select Documents*, 42.

<sup>84</sup> 1627, 3 Car. I, c. 1.

<sup>85</sup> 1688, 1 Will. & Mary, sec. 2, c. 2.

<sup>86</sup> 1701, 12 & 13 Will. III, c. 2.

<sup>87</sup> For a clear and instructive statement of the purpose of the writ of habeas corpus and the reason for legislative protection of it see Goodnow: *Principles of Constitutional Government*, 252.

<sup>88</sup> Magna Charta, sec. 40.

<sup>89</sup> See 31 Car. II, c. 2.

by the common or statute law.<sup>90</sup> The very prerogative of the Crown, the Executive, is both controlled and limited by the common law.<sup>91</sup> In consequence the sovereign can claim no prerogative which the law does not allow.<sup>92</sup> His prerogatives are not only subordinate to and limited by the great charters of English liberty, but as well by any other statute.<sup>93</sup> They may not trespass upon the "acknowledged rights" of the subject.<sup>94</sup> It is a fundamental general rule that the King cannot sanction any act forbidden by law; it is in that point of view that he is under, and not above, the laws; that he is bound by them equally with his subjects.<sup>95</sup> Therefore the courts have full jurisdiction and authority to enquire into the existence and extent of any alleged prerogative, a power which they have exercised in numerous instances.<sup>96</sup> In a word, as was declared in the Act of Settlement, "the laws of England are the birthright of the people thereof, and all the kings and queens who shall ascend the throne \* \* \* ought to administer the government of the same according to the said laws, and all their officers and ministers ought to serve them respectively according to the same."<sup>97</sup>

<sup>90</sup> Com. Dig. Prerog. D. 29; Bl. Comm. I, 233. "All commissions of new invention are against law until they have allowance by act of Parliament." 4 Co. Inst. 163. "The commission for creating the late court of commissioners for ecclesiastical causes and all other commissions and courts of like nature are illegal and pernicious." Bill of Rights, 1 Will. & Mary, sec. 2.

<sup>91</sup> Bl. Comm. I, 233.

<sup>92</sup> "For the king has not any prerogative, but such as the law allows." Com. Dig. tit. Prerog. A.

<sup>93</sup> "And by the St. of Marl. \* \* \* no prerogative of the king can be claimed contrary to Magna Charta." Com. Dig. tit. Prerog. A.; 2 Co. Inst. 36, 54.

<sup>94</sup> "Though I am desirous of maintaining the prerogative of the Crown in its just and proper limits, yet at the same time I must have a care of making a precedent on the records of the court, of extending the authority of the Crown, so as to restrain the liberty of the subject \* \* \* further than the law will allow." Lord Chancellor Hardwicke in *ex parte Barnesly* (1744), 3 Atk. 167, 171.

<sup>95</sup> Chitty, Prerogative of the Crown, 5.

<sup>96</sup> In the case of Monopolies, 11 Co. 84b, alleged prerogatives of the Crown "in matters of recreation and pleasure" and the creation of monopolies therein were searchingly examined, and denied. On the prerogative of dispensations it was said in *Edward v. Sorrel*, Vaughan 330, 332, 334, "I observed not that any steady Rule hath been drawn from the Cases cited to guide a man's Judgment, where the King may or may not dispense imperial Laws, excepting that old Rule taken from the Case of 11 H. 7. That with *Malum prohibitum* by Stat. the King may dispense, but not with *Malum per se*. \* \* \* But I deny that the king can dispense with every *Malum prohibitum* by Statute, though prohibited by statute only. \* \* \* Where the suit is only the King's for breach of a Law, which is not to the particular damage of any third person the King may dispense; but where the suit is only the King's, but for the benefit and safety of a third person, and the King is entitled to the Suit by the prosecution and release of such third person, the King cannot release, discharge or dispense with the Suit, but by the consent and agreement of the party concern'd." And see the *East India Company v. Sandeys*, 10 St. Tr. 371, 454, 516, 517; trial of Sir Edward Hales, 11 St. Tr. 1166.

<sup>97</sup> 12 & 13 Will. III, c. 2.



## IV.

## PARLIAMENT'S BREAK WITH PARLIAMENTARY TRADITIONS.—THE CONSTITUTION AMENDED.

Parliament is not, like the Congress of the United States, a legislative body of delegated powers. Its authority is supreme, the scope of its legislative activity unlimited. It is both the law-making power, in the ordinary sense of that term, and the organ which has the power to amend the constitution. No limits restrain it in the exercise of either of these functions; no limits, that is, except such as must necessarily exist in any organization of the sovereign power. There are, as Professor DICEY has pointed out, external and internal limits to any such authority. The external limit to legislation that is contrary to the settled desires of the people is the possibility or the certainty that the people or a large number of them, will resist or disobey. Even a despot's power is so limited. "This is shown by the most notorious facts of history. None of the early Caesars could at their pleasure have subverted the worship or fundamental institutions of the Roman world. \* \* \* Louis the Fourteenth at the height of his power could revoke the Edict of Nantes, but he would have found it impossible to establish the supremacy of Protestantism, and for the same reason which prevented James the Second from establishing the supremacy of Roman Catholicism. \* \* \* Parliament might legally establish an Episcopal Church in Scotland; Parliament might legally tax the colonies; Parliament might without any breach of law change the succession to the throne or abolish the monarchy; but everyone knows that in the present state of the world the British Parliament will do none of these things. In each case widespread resistance would result from legislation, which though legally valid, is in fact beyond the stretch of Parliamentary power."<sup>87</sup> The other, the internal limit, is found in the nature of the sovereign power itself. The power of Parliament is limited by what Parliament is. Or as Leslie STEPHEN puts it, "the legislature is the product of a certain social condition, and determined by whatever determines the society."<sup>88</sup>

There can be no question then that the system brought about by the Defence of the Realm Acts and Regulations is legal. All this is within the capacity of Parliament.<sup>89</sup> And in the light of its loyal

<sup>87</sup> Dicey, *Law of the Const.* (7th Ed.), 75-77.

<sup>88</sup> Quoted in Dicey, *op. cit.* 78.

<sup>89</sup> "Now, nobody can deny for a moment the power of Parliament to enact that martial law shall be put in force; and in case of need, a wise government would probably, if it had the opportunity, have recourse to Parliamentary authority for the purpose." Chief Justice Cockburn in *R. v. Nelson and Brand*, Cockburn's Report, 53.

acceptance by the people it would seem that no question can be made as to whether Parliament has kept within its natural limits. It is supported by public opinion. But this is not to say that Parliament has not changed the constitution. That question is already partly answered. We have considered the limitations upon the Executive acting alone. We may now turn to see what precedent, if any, there is for such executive action under a direct Parliamentary grant of power.

Until August, 1914, Parliament had never conferred upon executive or military authorities of England such power over the rights of the people as it did at that time. Only once, and then when the great Civil War was at its height and for a period of four months only,<sup>100</sup> had it ever conferred upon courts-martial the power to try civilians in England.<sup>101</sup> The measure was distinctly a war measure given in time of war, to be exercised plainly enough, upon the theatre of war, which England then was.<sup>102</sup>

Parliament had constantly stood guard against the encroachment of the Executive, very jealous of its aggrandizement where the rights of the people might suffer. And when there was riot or rebellion, making it necessary for the Executive to use force, Parliament had played its part after and not before the event. It had indemnified the officers and civilians for what they had done,<sup>103</sup> it had in some cases congratulated them; *ex post facto* it had rendered legal illegality.<sup>104</sup> But it had not in anticipation of an emergency said to the

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<sup>100</sup> "The terrible certainty of conviction by courts-martial summoned under military authority, made Parliament hesitate long, even in time of great social disorder, before it gave any sanction (and for four months only), to such tribunals acting under martial law." Clode, *Military Forces of the Crown*, II., 158.

<sup>101</sup> Ordinance of August 16, 1644, with additional article September 16, 1644, 5 Rushworth's *Hist. Collections*, part III., 777, 778.

<sup>102</sup> The almost total absence of comment upon this ordinance (it is not mentioned even by Chief Justice Cockburn in his elaborate review of instances of martial law in the charge in *R. v. Nelson and Brand*), indicates its character perhaps better than anything. And see the above case. Cockburn's Report, 53.

<sup>103</sup> See the interesting statutory pardon of 5 Richard II., c. 6. Acts such as 39 Geo. III., c. 11, are more to the point however. For a review of the more noteworthy acts see *R. v. Nelson and Brand*, Cockburn's Report, 49-57.

<sup>104</sup> Much has been made of these acts of indemnity. Those who maintain that martial law must be distinguished in England from the right to repel force with force, and in such sense is illegal, cite the custom of passing these acts as manifest proof of the illegality of martial law. See *R. v. Nelson and Brand*, Cockburn's Report, 74. "The view that the Crown is not legally competent to declare martial law either in the United Kingdom or in the colonies, even in time of war or rebellion, would seem to derive considerable confirmation from the fact that after every proclamation of martial law there has followed an act of indemnity; and it does not appear to us that this argument could be disposed of by the suggestion that they are only measures of precaution." *Edinburgh Review*, Jan., 1902, 90. On the nature and effect of an act of indemnity see Dicey, *Law of the Cons.* (7th Ed.), 47, 228, 231, 547-549. In sharp contrast with his view that the purpose of an act of indemnity is to legalize illegality Sir Frederick

Executive that it might do what it found expedient, and that it should not suffer for it.

The Petition of Right which so strikingly exemplifies the Parliamentary role, was not a charter of new liberties, but a confirmation of ancient liberties, a check to royal pretensions which had often stifled these liberties. For one thing, Tudor and Stuart kings,<sup>105</sup> contrary to the Great Charter, had in time of peace, or in time of merely apprehended danger, issued commissions by which, in the words of the Petition of Right, "certain persons" had been "assigned and appointed Commissioners, with power and authority to proceed, within the land, *according to the justice of Martial Law*, against such soldiers and marines, or other dissolute persons joining with them as should commit any \* \* \* felony, mutiny, or other outrage or misdemeanor whatsoever; and by such summary course and order as is agreeable to Martial Law, and is used in armies in time of war, to proceed to the trial and condemnation of such offenders, and them to cause to be executed and put to death according to the Law Martial."<sup>106</sup> Parliament declared that this was illegal, and the king

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Pollock has maintained that while such acts are not superfluous their office is not to justify unlawful acts *ex post facto* but "to quiet doubts." "An act of indemnity," he says, "is a measure of prudence and grace." Law Quart. Rev. XVIII, 157, and see the criticism in Dicey, *op cit.* 553. Acts of indemnity are as a rule so framed as to protect such acts as have been *bona fide* and necessary. They do not protect one who has been guilty of wanton wrong doing. May it not be said that acts of indemnity, while in some cases they have merely served to quiet doubts, have in others established a dispensation of leniency rendering legal morally defensible, because not flagrant, acts of power for which in the absence of such legislation there would have been no legal defense? See remarks by Lord Chancellor Thurlow in 21 Cobbett's Parl. Hist. 736. In the case of *Wright v. Fitzgerald*, 27 St. Tr. 759, at 765, although it is said that one "may not exceed the necessity which gave him the power," it seems to be held that if the act is not wanton it is indemnified. In this case a sheriff who had flogged a man without any pretense that he was implicated in the Irish rebellion, was held liable in damages. See also Forsyth, *Cases and Opinions in Cons. Law.*, 213, 214. Acts of indemnity have not been unknown in the United States. See Winthrop, *Military Law and Precedents*, (2nd Ed.), 1295 and citations.

<sup>105</sup> 17 Rymer's Foedera, 43, 246, 647. Chief Justice Cockburn in *R. v. Nelson and Brand*, Cockburn's Report, 25 et seq., enters into a detailed historical review of the origin and exercise of martial law in its application to civilians. Rejecting the trial of the Earl of Lancaster in the reign of Edward II., as probably not a case of martial law, he finds that the first instance occurred in the Wat Tyler insurrection of Richard II.'s reign. See especially pp. 35, 39, 40, 43, for the more noteworthy cases; also Hallam, *Cons. Hist. of England*, I., 237, 240-243; *R. v. Eyre*, Finlason's Report, 70-74.

<sup>106</sup> (1) "In very early times various systems of law co-existed in this country—as the common law, the ecclesiastical law, the law of the Court of Admiralty, etc. One of these was the law martial, exercised by the constable and marshal over troops in actual service, and especially on foreign service. (2) The existence of this system in cases of foreign service or actual warfare appears to have led to attempts on the part of various sovereigns to introduce the same system in time of peace on emergencies, and especially for the punishment of breaches of the peace. This was declared to be illegal by the Petition of Right. \* \* \* Although martial law in sense (1) is obsolete, and in sense (2) is declared by the Petition of Right to be illegal, the expression has survived,

was forced to subscribe to the instrument which so solemnly confirmed its illegality.<sup>107</sup> Still later in the Bill of Rights, in the Habeas Corpus Acts, and in the Act of Settlement, Parliament was moving mightily to the same end; carving deeper the assurances of civil liberty.

From the time of the Revolution down to the War of 1914 England had had little experience of the exercise of emergency powers by the Executive,<sup>108</sup> and in none of these cases did Parliament enact anticipatory laws authorizing officials to exceed their customary authority or, after the Executive had acted, indulge any presumption as to the legality of such questionable acts.

In three instances, in 1715, 1745, and 1780, the authority of the civil government was in part overcome. In 1715 invasion was threatened, the Pretender landed in Scotland, and there was rebellion. The government issued a proclamation on July 25th<sup>109</sup> authorizing all officers whether civil or military, to suppress the rebellion, by force of arms if necessary. Parliament had not acted, and not until six months later—when it opened—did it act. The

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and has been applied to a very different thing; namely, to the common law right of the Crown and its representatives to repel force by force in the case of invasion or insurrection, and to act against rebels as it might against invaders." Stephen, *History of the Criminal Law*, I, 207, reproducing with some slight changes the opinion, drawn by himself, and signed by Mr. Edward James and himself in reference to the Jamaica insurrection. The opinion is in Forsyth, *Cases and Opinions on Cons. Law*, 551. In the opinion it is said that the term martial law in the last sense above is used, "we think, inaccurately and improperly." These words are not reproduced in the history. And see the definition of martial law at p. 215 of the history, which is identical with that in the opinion, Forsyth, *op. cit.* 559.

<sup>107</sup> See Hallam, *Cons. Hist. of England I.*, 389-392. "It must be noticed that these commissions were issued and executed in time of peace; the powers conferred were to be used \* \* \* for the more speedy punishment of any crimes that might be committed by offenders, either in the commission or pay of the Crown, or by civilians associated with them. The argument against the legality of these commissions rested upon this principle,—that in the time of peace the civil magistrate had cognizance of all offenses committed against the public peace, and that the civil population ought not—whatever rule should be applied to soldiers—to be subjected to martial law. The status of an offender was at that time a doubtful necessity upon which to rest his life or liberty, and therefore the Petition of Right made no distinction between the Civil and Military population, but declared these commissions of Martial Law against any person whatsoever to be wholly and directly contrary to the laws and status of the realm." Clode, *Military Forces of the Crown I.*, 19, and see 17-19.

<sup>108</sup> Chief Justice Cockburn maintains that "the last instance of these attempts to declare martial law in England \* \* \* occurred in the reign of Charles I.," and that since the Petition of Right "martial law has never been attempted to be exercised in the realm of England by virtue of the prerogative." *R. v. Nelson and Brand*, Cockburn's Report, 43, 45 and see 47, cf. Clode, *Military Forces of the Crown II.*, 168. If something less than government by military tribunals may constitute martial law Cockburn's view would not be tenable. "The popular (and sometimes official) notion that martial law necessarily means trial by court martial has caused much confusion." Sir Frederick Pollock in *Law Quart. Rev.* XVIII, 155.

<sup>109</sup> Printed in Clode, *Military Forces of the Crown II.*, app. 655.

speech from the throne of January 9th, 1716, congratulated the army as "having disappointed our enemies and contributed so much to the safety of the nation." Congratulations from both houses,<sup>110</sup> and action sanctioning what had been done were forthcoming.<sup>111</sup> Authority to suspend the Habeas Corpus Act, to seize the horses of suspected persons and to try rebels in any county was given.<sup>112</sup> Beyond this Parliament was pleased to approve and legalize. The power to indemnify for an actually or possibly illegal act is not unlike the power to pardon, and after the Rebellion had been suppressed these special acts of Parliamentary grace went hand in hand. There was an act to pardon the rebels, and an act to indemnify, to discharge from civil or criminal liability, those who had suppressed the rebels.<sup>113</sup>

In the rebellion of 1745 which attended the landing and efforts of Charles Edward, the son of the Pretender, this action of Parliament was practically repeated. Parliament was in recess at the outbreak of the rebellion. The King on the advice of the Privy Council, issued a proclamation<sup>114</sup> and charged all civil magistrates to do their utmost to prevent and suppress riots, and to put in execution all laws made for preventing the same. This was early in September. Parliament reassembled in October and both Houses voted addresses pledging themselves to support the authority of the Crown.<sup>115</sup> Suspension of the privilege of habeas corpus was authorized,<sup>116</sup> an act was passed providing for the speedy trial of offenders by the ordinary courts,<sup>117</sup> and finally there was an act of indemnity in much the same terms as the act that had followed the earlier rebellion.<sup>118</sup>

Speaking of the rebellions of 1715 and 1745 Chief Justice Cockburn has said: "In neither of these was martial law attempted to be exercised. It is true that after the battle of Culloden [1746] horrible barbarities were perpetrated—but not by virtue of martial law. The wounded who were slaughtered in cold blood on the field, the day after the battle, or who were dragged from the neighboring houses where they had taken refuge and executed, or who were

<sup>110</sup> Cobbett's Parl. Hist., 225, 244.

<sup>111</sup> *Ibid.*, 275, 276.

<sup>112</sup> 1 Geo. I, 2, c. 33. There had been "no attempt to bring persons before courts-martial who ought to be tried by the Common Law (save in the instance of the half-pay officers at Preston.)" Clode, *Military Forces of the Crown*, II, 164.

<sup>113</sup> Clode, *op. cit.*, II, 164.

<sup>114</sup> Printed in part in Clode, *op. cit.*, II, app. 657.

<sup>115</sup> 13 Cobbett's Parl. Hist., 1326, 1362.

<sup>116</sup> 19 Geo. II., c. 1.

<sup>117</sup> 19 Geo. II., c. 9.

<sup>118</sup> 19 Geo. II., c. 20. Clode, *op. cit.*, II, 165.

burned in the house in which they lay helpless, were not put to death under any pretence of martial law. \* \* \* I rejoice to think that the name of law, even of martial law, was not profaned and polluted by being associated with such atrocities as these."<sup>119</sup>

In the Lord George Gordon riots of 1780 the troops were called out to aid the civil authorities. But, in the words of the Secretary at War, "in one instance the Civil Magistrate, having called for the troops, was not ready to attend them; \* \* \* in another instance, the troops having been called out, were left by the Magistrates exposed to the fury of the populace; and \* \* \* in two other instances after the troops had marched to the places appointed for them, several of the Magistrates refused to act."<sup>120</sup> "Certainly the civil power," Lord MANSFIELD says,<sup>121</sup> "whether through native imbecility, through neglect, or the very formidable force they would have been obliged to contend with, were unequal to the task of suppressing the riots and putting an end to the insurrection." In these circumstances a Council was hastily summoned, a proclamation issued and orders given to the military "by the immediate exertion of their utmost force"<sup>122</sup> to repress the riots. Thus the civil magistracy having failed to exercise its acknowledged power,<sup>123</sup> to the military in this case was confided the authority independently to restore peace and order. The toll of lives was more than four hundred, but all of them were taken in the actual suppression of disturbances, none by the judgment of courts-martial. Indeed there were no trials by court-martial; though "undoubtedly," said Lord Chancellor THURLOW, "in opposing, repressing and quelling such daring outrages as had lately been perpetrated, the military as well as individuals must necessarily have been forced into excesses" which "would be seen to have been unavoidable, and to be the proper subject of an act of indemnity."<sup>124</sup> The Act of Indemnity

<sup>119</sup> R. v. Nelson and Brand, Cockburn's Report, 47. And see the similar remarks on the atrocities of the Monmouth rebellion in the reign of James II., at p. 46.

<sup>120</sup> Letter of the Secretary at War to the Secretary of State June 6, 1780, in Clode, op. cit., App. II, 636.

<sup>121</sup> 21 Cobbett's Parl. Hist., 698.

<sup>122</sup> See the Proclamation of June 7th, in Clode, op cit., App. II., 659.

<sup>123</sup> The order of June 5th issued by the Secretary at War to the guards to assist the civil powers read in part: "I do hereby signify to you His Majesty's pleasure that you hold yourself and the troops under your command in readiness to assist the Civil Magistrate in case he shall require it, and that upon his requisition, and under his authority, you do order, from time to time, such of the said troops as shall be thought necessary for the purpose before mentioned, to march to the place or places which the Civil Magistrate shall point out." Printed in Clode, op cit., II., 635. See the remarks of Lord Mansfield on the powers and duties of Civil Magistrates in case of riot, Cobbett's Parl. Hist., 21, 695.

<sup>124</sup> Cobbett's Parl. Hist., 739. Lord Mansfield said that it "had been taken for granted \* \* \* that His Majesty, in the orders he gave respecting the riots, acted

which was passed extended its protection to "magistrates and other persons" concerned in repressing the riots, thus making no special mention of the military.<sup>125</sup>

The above instances, though in two of them there was what might be called technically invasion, partook of the nature of civil strife. They afford the principal modern instances in England of anything approaching martial law. Foreign war in and of itself had not moved Parliament to suspend the civil liberties of the subject. The duel with France from 1756 to 1763 saw no such legislation as that which the present war evoked. It is true, that war did not menace the integrity of Britain itself; it was a struggle for colonial expansion. England was not on the defensive. Led by Pitt, she was seeking a position where she need fear no rival. But even the Napoleonic wars, in which until the battle of Trafalgar there was real dread of invasion,<sup>126</sup> passed without the establishment of martial law or sweeping parliamentary grants of power to the Executive. Now and again laws were enacted repressing or suspending civil rights. The agitations and demonstrations in England between 1791 and 1799—in part a reflection of the French Revolution—resulted in a series of acts<sup>127</sup> which almost suspended the popular constitution of England. Another, and even more signal illustration of the use of such Parliamentary authority to overcome a

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merely upon his prerogative, as being entrusted with the protection and preservation of the state, in cases arising from necessity, and not provided for in the ordinary contemplation and execution of law. \* \* \* I take the case to be exactly the reverse, and that His Majesty, with the advice of his ministers, acted perfectly and strictly agreeable to law, and the principles of the constitution." And see the elaborate argument following. 21 Cobbett's Parl. Hist., 694-698. It is interesting to observe in this connection that while Chief Justice Cockburn in *R. v. Nelson and Brand*, considers the rebellions of 1715 and 1745 he entirely passes over the riots of 1780. It would seem to follow that he would fully agree with Lord Mansfield.

<sup>125</sup> 20 Geo. III., c. 63.

<sup>126</sup> See the preamble to 55 Geo. III., c. 55 (June, 1803). In the House of Commons on June 20, 1803, the Secretary at War said, "he made little doubt but the army which would attempt to invade us would be sent to the bottom of the sea, or be dashed to pieces by the cannons of those who would be opposed to them. When he looked to the promises made to the first consul by the different provinces of France, and by his military coadjutors, \* \* \* he made little doubt, from Bonaparte's character, that the attempt would be made." 36 Cobbett's Parl. Hist., 1603. And see the earlier speech of Pitt. *Ibid.*, at pp. 1396, 1397.

<sup>127</sup> In 1794 the Habeas Corpus Act was suspended. By the Treasonable Practice Act of 1795 the law of treason was modified by dispensing with the necessity for the proof of an overt act in order to secure conviction. The Seditious Meetings Act, also of 1795, made all meetings of over fifty persons, and all political debates and lectures subject to the premier's consent and active supervision of magistrates. As a result of the latter act various political societies and clubs whose activities had been open became secret organizations, a French invasion was plotted and sedition fomented. Following the injuries attendant on the Irish rebellion of 1798 the Corresponding Societies Act (1799) was passed, which completed this series of repressive measures.

dangerous domestic situation is afforded by the laws enacted during the second decade of the nineteenth century,<sup>128</sup> when the Industrial Revolution sowed the seeds of those great reform measures for which that century is notable. But these measures were not due to foreign war, and, sinister though they appeared to many people, they were not martial law.

Nor when we turn to the legislation affecting Ireland or the "settled colonies,"<sup>129</sup> do we find any analogy to the Defence of the Realm legislation of 1914-1915. There were important and highly significant illustrations of the establishment of martial law by legislative authority<sup>130</sup> but the laws thus enacted were intended for a "time of war" within the region affected, whereas it has not yet been established or perhaps seriously maintained, that Great Britain itself is, or has been since the outbreak of the war, *internally* in other than a time or state of peace, though her technical condition in this respect—in view of modern military developments—may seem to be somewhat anomalous.<sup>131</sup> It does not appear, at any rate, that she has been in a condition in which necessity has commanded the trial of civilians by court-martial.

Some of the acts for Ireland were most vigorous,<sup>132</sup> but they were not so far reaching as the Defence of the Realm acts. However the rebellions or insurrections in Ireland or the colonies, and the measures resulting, do not afford a parallel to the existing legal conditions in Great Britain. And it might be noted somewhat parenthetically that Irish and colonial commotions have often been regarded by Englishmen as in a case by themselves, and not bearing

<sup>128</sup> The Habeas Corpus Act was again suspended, the legislations of 1795 and 1799 were renewed and extended, and later by the "Six Acts" of 1819, a detailed legislative program of repression was established.

<sup>129</sup> The Crown Colonies "may be dealt with, legislatively and authoritatively, as the sovereign may please." *R. v. Nelson and Brand*, Cockburn's Report, 11.

<sup>130</sup> See *R. v. Nelson and Brand*, Cockburn's Report, 47-57; Clode, *Military Forces of the Crown*, II, 168-179. In a settled colony "the inhabitants have all the rights of Englishmen. They take with them, in the first place, that which no Englishman can by expatriation put off—namely, allegiance to the Crown, the duty of obedience to the lawful commands of the Sovereign, and obedience to the laws which Parliament may think proper to make with reference to such a colony. But on the other hand they take with them all the rights and liberties as against the prerogative of the Crown which they would enjoy in this country." Chief Justice Cockburn in *R. v. Nelson and Brand*, Cockburn's Report, 11, and see pp. 65, 66; *R. v. Eyre*, Finlason's Report, 62. See the "Circular Dispatch to Colonial Governors" of 1867, which is of special significance in that it followed close upon the famous Jamaica cases; the dispatch is printed at length in Clode, *op. cit.*, II, 666, and in part in Forsyth, *Cases and Opinions in Cons. Law*, 214.

<sup>131</sup> If actual bombardment from sea and sky could be deemed invasion—an idea that at least one of the judges in the *Petition of Right* case seems to glimpse, [1915] 3 K. B. 649—some interesting legal questions would be raised.

<sup>132</sup> See 43 Geo. III, c. 127; 3 & 4 Wm. IV, c. 4.



decisively upon constitutional practice in England.<sup>133</sup> In this we have the paradox of two peoples subject to the same law but, as it were, not affected by the same precedents—a generalization which of course must escape all legal logic.

## V.

### DETERMINING PRINCIPLES.

In attempting to arrive at the determining principles in this matter, and so at a more perfect understanding of the judgment which English statesmen have already passed on the Defence of the Realm legislation,—the judgment that it has broken with the traditions of the constitution and so has changed it—the following have been the outstanding considerations:—

1. Such action as is authorized by this legislation would not be in accord with the common law unless, being in exercise of the prerogative or common right, it was necessary.

2. The necessity which would justify like action by the Executive or individuals did not exist in this case. The spokesmen of government admitted that even its purely legislative action for 1914 went beyond what was necessary. It implied furthermore that the law as amended in 1915 went further than was necessary.

3. These principles are established by an overwhelming weight of authority, legal, political and historical. Mere expectancy of danger does not, according to these authorities, warrant the concomitants of martial law. The danger must be real and pressing.

4. Parliament hitherto has never in England, or perhaps out of it, where the constitution extends, granted comparable authority to the Executive or assumed it itself.

5. In granting this authority it made legal the promulgation of rules and the establishment of tribunals which, if the Executive fully employed this power, could reduce the rights of the individual to the vanishing point.

6. Though the sovereignty of the British nation is organized in Parliament and it may thus pass any law, the nature of that law as a change in the constitution or as a mere statute is determined entirely by its content. If it effects a fundamental change in the organic structure of the government or in the rights of the subject it changes or at least suspends the constitution.

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<sup>133</sup> See *R. v. Nelson and Brand*, Cockburn's Report, 48, 49; Dicey, *Law of the Cons.*, 546, with its hints that the *Marais* case may have one meaning in England, another in the colonies. But see the remarks by Sir John Scott in *Ency. Britannica*. Vol. 17, 791.

7. The recognized rights of the subject have been regarded as fundamental limitations upon the "war power," as exercised by the Crown and Parliament. To change these fundamental limitations is to change the constitution.

It is of course true that the restraint with which the Executive has exercised its powers under the emergency legislation must be weighed, if its significance is to be accurately appraised. Though martial law and arbitrary power have been authorized through a wide range of action they have probably affected the normal administration of justice in no very marked degree. The courts have been in general operation.

The ordinary law is still in force. Most offenders are and have been tried by the civil courts. A regime of emergency government or martial law in England does not now, and perhaps never will, mean the complete substitution of military for civil rule, unless a large part of the British Isles should become the theatre of actual war. If that should happen martial law, which is but an instrument of the civil authority, would easily merge into military law under which the civil authority so far as it acts at all acts as the licensee of the military.

Moreover due weight must be attached to the popular acceptance of this legislation. It seems to have been ratified by a public opinion of exceptional solidarity. And finally the very fullest acknowledgement must be made of the crucial nature of the test to which the British empire has been put, a life and death struggle in the opinion of many or most of its people. The acceptance of this legislation is but one manifestation of that spirit which at last came to its full fruition in the widespread British approval of universal military service.

With due regard to these and other considerations which stamp the times, the outlines of this legislation are not much softened. They stand out sharp against the past. A precedent has been established. And such precedents are not unlikely to be followed. The precedents of 1795 and 1799 by which the popular constitution was suspended were followed no later than 1819. The precedent by which the Habeas Corpus Act was first suspended<sup>134</sup> by Parliament has been often repeated.<sup>135</sup> Is the era of international wars at an end? With the development of science and invention will the Eng-

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<sup>134</sup> On the true effect of the so-called "suspension" see Dicey, *Law of the Cons.*, 7th ed., 226.

<sup>135</sup> The frequency of these suspension acts is largely explained by the fact that they are annual acts. Every such act, if it is to continue in force, must be renewed each year. Dicey, *op. cit.*, 226.

land of the future be more, or less, proof against invasion than the England of today?

Whatever be the quality and degree of this change in the constitution of Great Britain, few may doubt that history will confirm its wisdom so far as this great emergency was concerned. The future must account for itself. Strong action, a complete mastery of the situation, was the first need of that critical moment when the war broke out. The government instinctively felt that England would be called upon to make exertions such as England had never made before. Never had there been greater danger of ultimate invasion. The possible terrors of sea and sky were as yet a sealed book. Foresightedness, the display of conscious strength, proof that weakness was not in the government's make-up, these things were essential if confidence, at best a plant of none too rapid growth, was to be developed. And confidence was the absolute prerequisite of a nation-wide sympathetic understanding and support. The government played its part with such skill that it proved able to move rapidly from one extreme request to another.<sup>136</sup> If much had not been asked by it, and at the very beginning, would much have been given to it?

HAROLD M. BOWMAN.

*Boston, Mass.*

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<sup>136</sup> "In Parliamentary matters the government have at each step taken the country with them. The most obvious illustration arises from the Military Service Acts. \* \* \* Those who would have liked compulsion a year ago would have had it with convulsions and national turmoil which would have spoiled its value. At every stage in this controversy, so far as it is possible to ascertain the main current, not only of national opinion but of national desire, the government has neither gone ahead of, nor lagged behind, the real national will. \* \* \* Restrictions upon trade, the increase of taxation, the tightening of Regulations for National Defence, can only be efficacious in a country like ours when they come about at the earliest moment at which the nation is ready to receive them and the situation demands them. Those who will contend that these things have been done too late or too early have the burden of proof upon them, and one does not know where to look to find that burden discharged." Sir W. R. Adkins, M. P., in the *Contemporary Review*, June, 1916, 681 at 685.