Colorado.
Adjutant General.

Biennial Report.

1895-1896

BIENNIAL REPORT

OF THE

ADJUTANT GENERAL

OF THE

STATE OF COLORADO

FOR THE YEARS

1895 AND 1896

CASSIUS M. MOSES, Adjutant General

DENVER, COLORADO
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1897

BIENNIAL REPORT

OF THE

ADJUTANT GENERAL

OF COLORADO.

State of Colorado,
Adjutant General's Office,
Denver, Nov. 30, 1896.

TO HIS EXCELLENCY,

ALBERT W. McINTIRE, Governor and Commander in Chief, Denver, Colo.

Sir—I have the honor to submit the following report of the operations of this department for the biennial period ending November 30, 1896.

Owing to the resignation of my predecessor, I took charge of this office under appointment by you on January 17, 1895, to serve his unexpired term, and was reappointed by you for the term commencing April, 1895, and ending April, 1897.

ORGANIZATION OF NATIONAL GUARD.

Under the laws prescribing the organization of the guard of this state it should be composed of one brigade, consisting of two regiments of infantry of not less than ten nor more than twelve companies

each, two troops of cavalry, one battery of artillery and one signal corps, making an aggregate authorized strength of two thousand eight hundred and forty-seven (2,847) officers and men. Owing to the limited amount of money in the military fund and to the fact that at the commencement of your administration, the uniforms of the guard were practically worthless by reason of the rough usage they had received during the strike at Cripple Creek in the summer of 1894, and had to be replaced, it has been impossible to organize the guard as required by law. It has been the intention of this department to have an infantry regiment in each of the congressional districts of the state, which policy will explain the distribution of the companies of infantry as given in the table following:

LOCATION OF BRIGADE AND REGIMENTAL HEADQUARTERS, ETC.

Brigate headquarters, Denver.
Artillery (Chaffee Light Artillery), Denver.
Cavalry (Denver city troop), Denver.
Infantry—
Headquarters first infantry, Denver.
Company "B," Denver.
Company "C," Longmont.
Company "D," Greeley.
Company "E," Denver.
Company "F," Denver.
Company "H," Boulder.
Company "K," Denver.
Headquarters second infantry, Pueblo.
Company "A," Lake City.
Company "B," Pueblo.
Company "C," Pueblo.
Company "D," Monte Vista.
Company "E," Leadville.
Company "F," Leadville.
Company "G," Cripple Creek.
Company "H," Colorado Springs.

The above organizations were those that were in the service on September 21, 1896, when the riot at Leadville caused the guard to be ordered to that place. In a day or two I received orders from you to muster in more companies to be composed of citizens of that place. Pursuant to these orders I mustered in five new companies, which have been assigned to duty as follows:

One to the first infantry as company "G."

Four to the second infantry, as companies "I," "K," "L" and "M."

These new organizations have not yet been uniformed but have been supplied with arms and are being drilled regularly.

ORGANIZATIONS MUSTERED OUT.

Since January, 1895, the following organizations have been found inefficient and mustered out of the service:

Cavalry—
Troop "A," Colorado Springs.
Troop "D," Monte Vista.
Infantry—
Company "C," first infantry, Aspen.
Company "E," second infantry, Victor.
Company "F," second infantry, Grand Junction.
Company "G," second infantry, Leadville.
Company "K," second infantry, Durango.
Signal corps, first brigade, Denver.

In the case of troop "A," it was the desire of this department that the organization under a new captain, should remain a part of the guard, as it was hoped that with a new captain who would attend to his duty, and who by his example as well as by a proper exercise of his authority, would inculcate a proper respect for superior authority and attempt to raise the standard of discipline, and who would properly care for state property in possession of the troop,

the organization might become a very useful part of the force. With this object in view, the captain was requested to resign. After demurring somewhat, he finally submitted his resignation, which was promptly accepted, and an election was held, which resulted in his re-election. It thus appearing that a spirit of insubordination existed throughout this organization, it was promptly mustered out.

In the case of troop "D," Monte Vista, an inspection showed that as a troop of cavalry, this organization could not be kept up to a proper standard in so small a town as Monte Vista, but that the indications were that the town could and would support a good infantry company. For this reason the troop was mustered out and an infantry company was mustered in. The wisdom of this change has been demonstrated by the fact that the company has continued in a prosperous condition.

Company "C," first infantry, Aspen, was mustered out because it had fallen below the minimum allowed by law.

Company "E," second infantry, Victor, was mustered out on account of irregularities in mustering in.

Company "F," second infantry, Grand Junction, was mustered out on account of inefficiency, resulting from loss of interest.

Company "G," second infantry, Leadville, was mustered out on account of inefficiency.

Company "K," second infantry, Durango, was mustered out on account of inefficiency.

Signal corps, first brigade, Denver, was mustered out because of inefficiency.

NEW ORGANIZATIONS.

Many applications have been received for the organization of new companies in various towns in the state which could not be approved because of lack of funds with which to uniform and equip the companies. In spite of this fact, however, several new companies have been mustered in, it being rendered

possible to take these steps by the patriotic action of citizens in the towns in which the new organizations were formed, these citizens by subscription having obtained enough money to uniform the new companies, and in some cases to furnish them with all equipments, excepting rifles. The following are the companies mustered in under the above conditions:

Infantry—

Company "C," first infantry, Longmont.
Companies "E" and "F," second infantry, Leadville.
Company "G," second infantry, Cripple Creek.

In addition to the above, this department has been able, by the use of old uniforms which have been cleaned and repaired, to uniform the following new companies:

Infantry—

Company "D," first infantry, Greeley.
Company "F," first infantry, Denver.
Company "H," second infantry, Colorado Springs.
Denver city troop, first brigade, Denver.

Company "D," second infantry, Monte Vista, was equipped in a great measure with the uniforms that had been in use in troop "D," which was mustered out.

CONDITION OF THE GUARD AS TO PERSONNEL, DISCIPLINE, CLOTHING ARMS AND EQUIPMENTS.

A strong effort has been made by the officers of the guard, in which they have received every possible assistance from this department, to rid the guard of any objectional characters who may have been in it. As a result of these efforts, I am glad to be able to report that the guard as now constituted is composed of as fine a lot of young men as any one could wish. The discipline has been greatly improved, and the

instruction given, while not all that could be wished, is greatly in advance of anything that has ever been attempted in the past. Within the last two years the guard has practically been re-uniformed, and is now fully equipped as to clothing, with the exception that a few companies have not as yet been furnished with new overcoats. All of the arms have been put in thoroughly good condition, and are now very serviceable. The guard is fully equipped with everything necessary for its comfort with the one exception of shelter tents, which it is hoped will be drawn from the general government during the next year.

ACTIVE SERVICE.

I am glad to be able to report that during the year 1895 there was no occasion demanding the services of the guard. On the 30th of April, 1896, the town of Cripple Creek was set on fire for the second time and almost destroyed. Many families were left homeless. Practically all supplies of food and clothing were destroyed by the fire, and some provision had to be made temporarily for the care of the destitute people. In this emergency, the mayor of the town, the honorable Hugh R. Steele, applied for the services of the local company ("G," of the second infantry), which by your direction were promptly rendered. After thirty-six hours of constant duty guarding the remnants of the town from further attempted incendiarism, the men of this company were so much exhausted that Mayor Steele asked for an additional force to relieve them. By your direction I ordered Col. H. B. McCoy, second infantry, by telephone, to gather three officers and fifty men of companies "B" and "C," second infantry, and proceed to Cripple Creek. Just thirty-five minutes from the time this order was given to Col. McCoy, he reported by telephone that he, with the number of officers and men ordered, were at the union depot in Pueblo, ready to take the train for Cripple Creek. When it is remembered that there was no reason for any one to suppose that the Pueblo companies would be called upon for services at Cripple Creek, and that the men of these companies were at that time of the day engaged in their business pursuits, their prompt response to the call was remarkable, and shows that these two companies have attained a remarkable degree of efficiency. This detachment, with company "G," remained on duty at Cripple Creek for six days. The duties performed by them were guarding the town, caring for a camp established for the housing of the inhabitants of the town, and seeing to the prompt and proper distribution of supplies of food and clothing, bedding, etc., which were promptly forwarded to Cripple Creek by the citizens of various towns and cities throughout the state. I am glad to be able to report that all of these duties were performed to the entire satisfaction of the authorities of the town of Cripple Creek, as is evidenced by a letter received by this department from the mayor of that town.

LEADVILLE STRIKE.

It is with deep regret that I have to report that on the 21st of September, 1896, the disturbances growing out of the miners' union strike at Leadville, reached such an acute stage that it became necessary to order the entire guard of the state to duty at that point. The immediate cause of this action was the burning of the buildings of the Coronado mine, together with an effort to do the same with the Emmett mine, and the attempt to destroy the lives of the employees of these two properties by the use of firearms, dynamite, and an improvised field piece, and incidentally the dastardly murder of Mr. Jerry O'Keefe, a fireman connected with the fire department at Leadville, who was heroically endeavoring to perform his duty as a fireman in spite of the threats that were used against him. With this one exception, all the men who were killed belonged to the attacking party—a fact upon which the people of this state are to be

congratulated. The guard is still on duty at Leadville, performing its duties most efficiently, in spite of the very great hardship that the service entails on its individual members through loss of position in many cases, and in other cases through loss of income, which is not adequately compensated for by the small pay which the law allows them while on duty. In this connection I would most earnestly request that proper steps be taken to bring to the attention of the legislature, at its next session, the fact that under such circumstances very great hardship is brought upon the men of the guard by compelling them to serve the state for such an entirely inadequate pay. I would recommend that the pay be increased to at least two dollars per day for the first twenty days, and at least one dollar a day for any other length of time, as I do not believe that the people of this state want the young men, who from patriotic motives join the guard, to serve under dangerous circumstances for any smaller sum of money. How long it may be necessary to keep the guard on duty at Leadville, is something that no one can foresee.

NECESSITY FOR CHANGE OF LAWS GOVERNING NATIONAL GUARD.

The military law of this state, after an actual trial, has been found so faulty in so many particulars that about the only thing that can cure all of its defects will be to repeal it and substitute for it an entirely new law. There are so many changes needed it will be impossible to enumerate them in a report of this kind, but I can not resist the temptation to mention some few of those most needed.

The following are some of the points that are most in need of attention:

1. Medical Department.

An entire reorganization of this department is necessary. At present there are no qualifications required by law for the appointment of either surgeon general or regimental surgeons. In my opinion the department should be under the control of the surgeon general, and separate and distinct from the line. A sufficient number of surgeons and assistant surgeons should be appointed by the governor upon the recommendation of a board to consist of the brigadier general, adjutant general and surgeon general, to provide sufficient medical attendance for the guard under any and all circumstances. These surgeons, etc., should be appointed only from physicians who have been graduated from some medical college in good standing, who are actively engaged in the practice of their profession at the time of appointment. Hospital stewards should be appointed upon the recommendation of the same board, and no one should be eligible to this position unless he holds a certificate from the state board of pharmacy as a registered pharmacist. Some provision should also be made for the enlistment of a hospital corps, whose duties should consist of nursing the sick, driving the ambulance, cooking for the sick, etc.

2. Courts-Martial.

All portions of the military law bearing on this most important subject are defective. In my opinion an entirely new system, assimilated as closely as possible to the administration of military justice in the United States army, should be adopted in this state.

3. Military Poll Tax.

If the legislature sees fit to support the guard by means of a military poll tax, proper provision should be made for its more efficient collection. Under the present laws a very large percentage of those liable to this tax now escape its payment entirely, thus throwing the entire burden of the support of the guard upon the few who do pay the tax.

ORGANIZATION.

While the present organization is very satisfactory in many respects, there are some minor defects which it would be well for the legislature to consider. In my opinion the staffs of the brigadier general and colonels are larger than is absolutely necessary. Several of these offices might be abolished without detriment to the guard. The efficiency of the cavalry branch of the guard might be greatly increased by doing away with the provision of law which requires the cavalry force to be attached to the infantry regiments. I would suggest that a squadron organization be authorized, the squadron to consist of not more than four nor less than two troops of cavalry, and to be commanded by a major, who should be allowed a squadron adjutant, quartermaster, sergeant-major and quartermaster-sergeant.

ADJUTANT GENERAL'S SALARY.

As my term of office will expire before any benefit can possibly be derived from any increase of the salary of the adjutant general, I feel no hesitancy in recommending that the salary of the position be increased to a figure commensurate with the importance of the office. In times gone by the office did not demand the constant attention of the adjutant general, and he was able to attend to it as well as his other business. When such was the case the salary was sufficient, but of recent years the requirements of the office have increased so greatly that the adjutant general is now compelled to devote his whole time to the affairs of the office, and the salary is not sufficient for the proper maintenance of himself and family and the meeting of the various calls that are made on his purse in the way of official entertainment. I would recommend that his salary be made three thousand dollars ($3,000) per annum, payable as now, out of the military fund of the state, and I

believe that since this increase of salary will require no increase in taxation, that the best interests of the state will be subserved by making the salary sufficient to command the services of a competent, energetic man. Another reason for increasing this salary is found in the fact that the head of this department occupies the important position of purchasing agent for the state at all times in his capacity of quartermaster general, and in times of active service he has also to perform the duties of commissary general. These duties entail a very large financial responsibility, in addition to the immense amount of work.

MEDICAL EXAMINATION OF RECRUITS.

I would recommend that a provision be made requiring every man who desires to enlist in the national guard to undergo at the hands of the medical department of the guard a suitable physical examination, to the end that only men who are sound physically may be enlisted in the guard.

"CALLING OUT" THE GUARD.

This is a subject which under the law as it at present exists requires careful revision.

ISSUING OF STORES.

In my opinion, the provision in the law requiring that stores be issued to the assistant quartermaster general of the first brigade in order that he may issue them to the various companies should be repealed, as the practical result is simply to complicate matters.

PROTECTION OF MEN FROM LOSS OF POSITION WHEN CALLED OUT FOR DUTY.

The experience of the guard under the "call" under which it is now serving, as well as two years ago when it was in the service at Cripple Creek, shows

that many of the men lose their positions as a result of being "called out." I most earnestly recommend that some legislation be had looking to the punishment of any employer who discharges an employee for doing his duty to the state.

ELECTION OF OFFICERS.

I do not believe that the present system of electing company officers results in all cases in the selection of the best possible material for these important offices, and would respectfully recommend that it be changed. A system of competitive examination for these places might be devised under which candidates for these positions would be compelled to undergo a thorough competitive examination to become eligible for election. The company might then be allowed to select the man for the office from among the three passing the best examination. The selection of the questions and the grading of the candidates should be left to a thoroughly impartial board, consisting of the adjutant general, the brigadier general and the judge advocate general. This examination should be written and should be conducted by the inspector general of the state. Candidates should be required to be able to show that they had served not less than one year in the United States army or the national guard of this or some other state or had, for a similar period, been students at some school or college where a military department is supported. The above examination should take the place of the examination now prescribed by law and a commission should issue to the successful candidate as soon as his bond and oath of office are received and approved.

EXAMINATION OF STAFF OFFICERS.

While it is eminently proper that officers entitled to staff officers should be allowed to make their own selections for these positions, it is entirely reasonable that these officers should be compelled to show their fitness for their positions by undergoing a proper examination.

UNIFORMS AND SUBSISTENCE FOR OFFICERS.

In view of the fact that ordinarily officers of the guard draw no pay from the state, it seems to me that there is no good reason for their being placed on a different footing as regards uniforms and arms from the rest of the guard. It frequently happens that some bright young man, greatly to the detriment of the guard, is entirely prohibited from aspiring to a commission by reason of the fact that he cannot afford to buy the necessary uniforms. I therefore recommend that the law be changed so as to put officers on the same footing as to uniforms, etc., as the rest of the guard. Owing to the fact that all members of the guard, when called into active service, leave their business and families and are under added expense for their own subsistence and are not always able to provide for their own subsistence, both justice, convenience and the good of the service demand that the state provide subsistence for them as well as the men.

In concluding this report, I desire to extend my hearty thanks to Geo. L. Byram, first lieutenant, First United States cavalry, for the valuable services rendered to this department, and to the officers and men of the guard for the cordial support that they have given this department in its efforts to increase the efficiency of the guard, and I desire especially to thank your excellency for the kindly interest that you have taken in the guard and the prompt attention and hearty support that all measures intended for its improvement have met with from you.

A supplement to this report, showing the operations at Leadville, and a statement of the expense incurred is now in course of preparation and will be submitted in due time.

Respectfully submitted,

CASSIUS M. MOSES,
Adjutant General.

APPENDICES.

Appendix A. Statement of expenditures from military fund—November 30, 1894, to November 30, 1896.

Appendix B. Supplementary report in reference to Leadville riots.

Appendix C. Opinion on the powers of the governor to use the national guard in enforcing laws, etc.

Appendix D. Report of Gen. Brooks on Leadville.

APPENDIX "A."

EXPENDITURES FROM MILITARY FUND, NOVEMBER 30, 1894, to NOVEMBER 30, 1896.

Salaries—adjutant general and office force; brigade—assistant adjutant and quartermaster general; regimental adjutants and bands; state armorer and janitors at armories, extra labor, etc.	$19,119 67	
Rents	17,298 37	
Uniform clothing	9,121 78	
Equipments	3,389 49	
Expenses of Cripple Creek fire	3,080 96	
Pensions	2,490 00	
Lights, fuel, etc.	2,202 53	
Incidental expenses—Inspection and mustering in and mustering out companies	1,566 04	
Transportation of persons and stores	1,563 93	
Carpentering, etc.	1,250 33	
Office supplies, printing, etc.	729 65	
Telegraphic and telephonic service	396 54	
Armory necessities, repairs, etc.	390 79	
Insurance	325 00	
Incidental expenses—Brigade and regimental headquarters	79 30	
Total		$62,824 38

APPENDIX "B."

Adjutant General's Office,
Denver, December 31, 1896.

His Excellency,
ALBERT W. McINTIRE, Governor and Commander-in-Chief,
Denver, Colorado.

Sir—I have the honor to submit the following report of the expenses incurred on account of the disturbances at Leadville from September 21 to December 31, 1896, inclusive.

In this connection I desire to remind you of the severe conditions under which the guard has been serving, as this will explain the necessity for the seemingly large expenditures for heavy winter clothing. The guard as a whole comes from a much lower altitude than that of Leadville, where, of course, the weather is much less severe than at that place, and where it is not necessary for the men to wear as heavy clothing as has been found necessary at Leadville.

A few hours after the arrival of the guard in Leadville, snow and rain commenced to fall, making the condition of the guard from a physical standpoint a very precarious one. This department, acting under your orders, at once took steps to furnish each enlisted man with heavy underwear, sweaters, heavy shoes, etc., etc. If this course had not been pursued much suffering among the troops would have been inevitable.

On November 11 two feet of snow fell in and around Leadville, rendering the purchase of overshoes, heavy winter caps, woolen and fur gloves, absolutely imperative. The prices paid for these articles, as well as for the groceries, feed, etc., are very reasonable, as I have been able to inform the merchants that while their claims would necessarily be paid by certificates of indebtedness, these certificates would be taken up at par, thus making the transaction practically a cash transaction.

The duties required of the guard are of a very severe nature. During the first week the troops were in Leadville, some companies were on duty constantly for seventy-two hours.

On October 13, while the troops were escorting a body of men from the Denver & Rio Grande depot to the Emmett and Little Johnnie mines, they were compelled to march over roads which in places were knee-deep in mud. The guard duty at night at the different mining properties has been constant, and at times exceptionally severe upon the men. The members of the guard have in each and every instance performed their duties in a highly creditable manner. In a great many instances the officers and men of the guard have been placed in positions where the best of judgment and discretion were necessary. It gives me great pleasure to be able to inform you that the conduct of the officers and men has been most exemplary, and that they have borne themselves in such a manner as to deserve the praise of all law-abiding and law-respecting citizens.

As conditions have changed, the original force has been gradually reduced, until on December 31 the force is three hundred and seventy-one (371) officers and men available for duty, which, to my mind, is as small a force as can perform the duties required until such time as the new sheriff shall have gotten his force organized and at work.

In spite of the many hardships which the men have been compelled to undergo, the health of the

command has been remarkably good, and severe illnesses have been rare, and but two deaths have occurred that in any way could be attributed to the service.

I regret to report the serious injuries received by Captain McGwire, first infantry, and Sergeant Hamilton, company "G," second infantry. The former lost his left leg by an unfortunate accident which befell him while returning to Denver on special duty, and the latter sustained a very severe wound in the leg through an unfortunate mistake of a sentinel. With these two exceptions no severe injuries have been received by any of the men.

The following is a statement of the various expenses incurred:

Groceries, forage, etc.	$21,614	09
Boots, shoes and clothing	17,171	38
Fuel (coal and wood	3,959	00
Garrison equipage	863	05
Blacksmithing, wagon and harness repairing	128	85
Drugs and medical supplies	1,512	25
Stationery and printing	246	55
Telegraph and telephone service	168	26
Pullman charges	10	00
Lumber and building material	506	20
Hardware, tools, etc.	1,124	22
Transporting troops	9,522	29
Freight charges	2,503	08
Express charges	1,353	23
Miscellaneous services rendered	95	50
Payment of troops, September 21 to December 10, both inclusive	72,211	69
Payment of troops, December 11 to December 31, both inclusive, estimated	13,500	00
Meals and lodging furnished troops, estimated	7,004	81
Claims rendered, subject to adjustment	2,070	75
Miscellaneous camp expenses, estimated	1,248	55
Miscellaneous teaming, prices subject to adjustment	524	47
Horses, estimated	5,403	00
Total		$162,741 22

The above items which are marked "estimated" or "subject to adjustment," are in excess of what they will be after the military board has acted upon them. In order to bring the expenses of this campaign up to date, it was necessary to include the above bills.

I have on file in this office a tabulated statement showing exactly how many pounds or articles in the grocery or provision line have been purchased; also, the number of each article purchased in the clothing or furnishing goods line. This tabulated report is entirely too lengthy to be included in a report of this character.

Respectfully submitted,

CASSIUS M. MOSES,
Adjutant and Quartermaster General.

APPENDIX "C."

The following opinion in connection with the calling out and use of the national guard is deemed of value to the service, and is therefore printed with this report:

State of Colorado,
Executive Department,
Denver, Colo., October 15, 1896.

Hon A. W. McINTIRE,
Governor.

Sir—You have requested our opinion as to the power and duties of the governor of this state in respect to calling into service the organized militia of the state in the execution of his duty to "take care that the laws be faithfully executed."

Having heretofore arrived, with you, at these same conclusions, we now present the matter in form for preservation.

Little opportunity is afforded to become advised of the exact legal principles governing this matter, when the occasion has actually arisen rendering the the duty imperative, and for this reason, and because much confusion exists in the public mind, both among lawyers and laymen, we believe we perform a service to all in utilizing the present occasion to state at some length what we believe to be the law of this matter.

The terms "military law," "martial law," and "calling out the militia" to execute the laws, are

much confounded. A clear apprehension of the meaning of these terms and their differences will enable the matter to be more easily understood, and there is a vast difference between them.

MILITARY LAW.

Military law consists of the regulations for the government of persons employed in the army or in the militia. (Anderson's Law Dictionary.) It is the specific law governing the army as a separate community.

15 American and English Encyclopedia of Law, page 392.

It is the rules and regulations made by the legislative power of a state for the government of its land and naval forces.

1 Kent's Comm., 341, note A.

In short, military law consists of those rules and regulations provided for the government of land and naval forces, regulating the duties due and owing among those in the military and naval forces, and has no binding effect upon and does not govern or concern any person not in the military or naval service. Military law, therefore, always exists wherever there is a military force, but it governs the military only, and with it other citizens have no concern, since it does not affect them.

Ex parte Milligan, 4 Wallace, at 123.
Cooley, Con. Lim., 391, note 1.
Luther vs. Borden, 7 How., page 60.
Cooley's Blackstone, B. 1, 413, note 4.

MARTIAL LAW.

This term has been indiscriminately applied, in the common understanding, to every use of troops or militia for any purpose. The well known and well founded antipathy which our people feel towards

government by any other means than through the orderly civil administration of affairs, has caused in many instances the application of the epithet, "martial law," to every use of the ordinary military forces of civil government to carry on its affairs and perform its just functions.

What is "martial law," and does or can it exist in Colorado under our constitution?

Martial law is the law of military necessity in the actual presence of war, administered by the general of the army; it is arbitrary; it is the will of the general who commands the army; it supercedes all existing civil laws; the commander is the legislator, judge and executioner; there may or may not be a hearing upon charges, at the will of the commander; it is built upon no settled principles, but is entirely arbitrary in its decisions. In reality it is no law, but something indulged rather than allowed as law.

Anderson's Law Dic., 663, where many authorities are collected sustaining these definitions.

Where actual war exists between foreign nations, or when within the same nation a rebellion exists of such dimensions as amounts to a war between two nations, then the invading army which overthrows the opposing army, thereby supplants by force the existing authority in that country or section of country, and out of the necessity for having some government, as well as for the safety of the conquering army, some law must be established, and out of this necessity grows the right and practice of establishing the will and discretion of the general of the successful army in the place of the overthrown government. Martial law has its rise in, and is limited by, this necessity. But it can be established only where there is an actual state of war; where in case of insurrection in a nation, the very integrity of the state or nation is assaulted. It can not apply merely because there are infractions of the law, or where the law breakers, though too numerous to be controlled by the ordinary local civil authorities, aim

not to overthrow the government itself, but merely to break the laws in that locality. The very definitions above given show it is unsuited to our institutions, and no stronger arguments can be made than such as naturally suggest themselves from the mere definitions alone.

The authorities conclusively show that at the common law, whence we derive the principles underlying our law, and which is by express legislative enactment made part of our laws, martial law was unknown and unauthorized as applied to the people governed by it. See the authorities collected by Woodbury, J., in Luther vs. Borden, 7 How., 46. Though the opinion of this justice was a dissenting one, there is no dispute among the authorities as to the correctness of his statements upon the point for which it is here cited, and his opinion is the most valuable summary of law upon this point to be found in the books. In fact, the principal grievance against the house of Stuart, which lead to beheading Charles I., and the settling of the crown of William III., was the attempted establishment by the kings of martial law. Though Wedderburn, as attorney general of England, had in 1774, insulted Franklin, who had laid before the British government the grievances of the colonies, and particularly as to the use of the army, yet afterwards, as Lord Loughborough, chief justice of the common pleas, he decided, in 1792, that martial law "does not exist in England at all." That it was "contrary to the constitution," and that "it has been for a century totally exploded." Grant vs. Gould, 2 H.; Blackstone, 98. It never existed at common law at all, and every pretense for its exercise had been unknown since a century before; since the accession of William III. True, martial law, since the date of his accession, had been two or three times declared in Ireland, yet the occasions when it was done amounted almost to open war similar to our late rebellion, and besides on every occasion acts of parlia-

ment were procured, ratifying and approving the declaration and saving the authorities harmless.

The very fact that an act of the omnipotent parliament was considered necessary is, as it has been said, itself a tribute to the common law, and little less than a parliamentary declaration that but for the acts, its officers enforcing martial law even in Ireland, were criminally and civilly liable. It is scarcely necessary to say that Great Britain has no written constitution as has our general government and as have our states. And their parliament may probably pass curative, retrospective and ex post facto laws. Under our Colorado constitution, the legislature cannot pass a law relieving from responsibility under the law as it was when an act was done. Authority must be found for a declaration of martial law at the time it is declared. No statute of oblivion can afterwards come to the aid of those who declare it.

The great leading case in this country upon the right of a state to declare martial law is the before cited case of Luther vs. Borden, 7 How., 1. The case was this: Rhode Island had not yet formed a constitution since the independence of the United States, but was governed by their old and liberal charter of 1663, granted by Charles II., while this country was yet a colony of Great Britain. Many citizens of that state considered this charter too illiberal and restrictive for a modern state of the American Union, particularly as to the right to vote. Efforts were made to procure a new constitution, and the matter not proceeding to the satisfaction of a large part of the population, and the question not then having been settled as to how a new constitution could legally be obtained, it was supposed that the people had the right to assemble in their original and sovereign capacity and make a constitution to suit them, without waiting for or being dependent upon any action by the then established authority. A new constitution was thus formed by those who considered themselves

"the people," and Thomas W. Dorr was elected governor thereunder, and a full quota of other officers was likewise elected. The authorities acting under the old order of things opposed the legality of these proceedings, and both sides armed for the conflict. The Dorr side to overthrow the old government, and the old government to maintain themselves and to suppress the new. Martial law pure and simple was declared by the old legislature. Borden was an officer in the militia, and, acting under orders from a superior officer, broke into Luther's home, searched it and arrested Luther. Actions were thereupon brought by Luther and wife against Borden and others for this trespass. The defendant justified the trespass as having been done by virtue of the order of the superior officer, and whether this was a sufficient defense depended upon whether the order was valid, and this in turn depended upon whether the declaration of martial law was valid. It will be observed that there was an armed effort and intention to overthrow the existing government and to substitute another in its place. There was not an acknowledgment of the existing government by an armed body of men, and a mere violation of the laws by a mob so numerous as to render the enforcement of the laws difficult. The movement was directed against the existence and integrity of the government itself. There was no constitutional provision in Rhode Island, similar to ours, "that the military shall always be in strict subordination to the civil power." Martial law was declared by the legislature and not merely by the governor or any other officer. We may here observe, though a familiar principle to the legal profession, that the constitution of the United States delegates powers to the general government, and that therefore congress can do those things only which it is affirmatively authorized to do, expressly or by implication; while state constitutions are limitations upon the powers of a legislature, and that therefore a legislature may pass any

law unless it is prohibited by the constitution of the state, or of the United States, with the caution that some things are naturally and inherently right or wrong, and that under our system of government there is no such thing as unlimited power in any branch of our government.

Loan Association vs. Topeka, 20 Wall., 655.

Omnipotent as parliament is said to be, writers deny it absolute power.

Whether the absence of any provision in the constitution of Rhode Island similar to the one quoted from our own, had any influence upon the decision of the supreme court, does not clearly appear, but at any rate the court declared that the legislature of a state may declare martial law if it be necessary in order to overthrow efforts aimed at the very existence of the state itself. The right is based upon the ground of self-preservation. Woodbury, J., as we have said, dissented, and if, as all authorities show, martial law comes only out of a state of war, and as by the constitution of the United States the power to declare war and to conduct it is in the general government, and if the exercise of the war power is prohibited to the states, and as martial law does not exist at common law, and as the strong arm of the federal government is by express constitutional mandate behind the state governments to insure them a republican form of government and protect them from domestic violence too strong to be overcome by local authority, it is difficult to logically sustain the right of a state government to establish martial law, arising as such law does from a state of war.

Ex parte Kemp, 16 Wis., 360.

But be that as it may, the case establishes the authority of a legislature to declare martial law only in an exigency going to the very existence of the state itself. Even during our late rebellion, when the

integrity of the nation was threatened, when those in sympathy with the rebellion extended their secret operations or open treason throughout the Union, it was held by the supreme court of the United States, even in 1866, when the passions of men swayed even the most enlightened, that martial law could not exist in a state not invaded and not engaged in rebellion, in which federal courts were open, and in the proper and unobstructed exercise of their judicial functions, and that even congress could not invest military commissions with power to try offenders in such states under such circumstances. Ex parte Milligan, 4 Wall., 2. These two cases, Luther vs. Borden and Ex parte Milligan, contain all that is necessary to make this question plain. Both cases were argued by the most eminent counsel of the day, and all the learning upon this question is in them presented. These cases are entirely accessible to every person, and it will serve no good purpose to do more than refer to them.

It is clearly established that only in the event that all civil authority is overthrown—that a state of war exists—can martial law prevail. It is not enough that resistance to civil power is so strong that the ordinary means of enforcing the laws are temporarily unable to cope with the situation. Civil power must be overthrown. For every act done by any military officer under the color of martial law, when martial law cannot exist, that officer is civilly and criminally liable, and not even the high authority of the president, the congress, the governor or the legislature can exempt him from liability.

Johnson vs. Jones, 44 Ill., 142.

On the continent of Europe military power has always been exalted over the civil, and martial law, in some sense, is continually present. In extreme cases, when it is proposed to entirely subject a particular locality to strictly martial law, by a convenient fiction of declaring that place in a state of siege, the

ordinary civil authority was wholly subverted and everything placed in the almost absolute control of the military powers. They had and have there no such jealous insistence upon the supremacy of the civil power. This is well exemplified by one instance. William III. of England had been Prince of Orange, in Holland. After he became king of England there was a conspiracy against his person—high treason—in England and Holland. The guilty persons in Holland were tried by a council of officers—court martial. Those in England were tried by a jury, according to the common law.

Grant vs. Gould, 2 H. Blackstone, 99.

Not content to rest upon the general common law principles, which exalts the civil above the military power, our constitution, articles XI., XXII., emphatically and affirmatively provides "that the military shall always be in strict subordination to the civil power." Not sometimes, but always. Not under some, but under all circumstances. Here is a plain declaration that the military power shall never be used or operated under any law but the ordinary civil law. This same provision in almost the same form, is found in all our state constitutions, and in none of them, it is believed, except in that of Rhode Island, formed as it was during the excitement of the Dorr rebellion, is martial law by name recognized. In other words, under our state constitutions, martial law does not exist. It comes into action, if at all, outside of and beyond the constitutions, and only to preserve the constitution itself. Nor will it do to give the name "rebellion," "insurrection" or "war" to every concerted infraction of the laws by any mob or combination, however numerous. There is a profane old distich running:

"And if we cannot alter things,
By ——, we'll change their names."

By this simple process, the essential nature of things is observed. Mobs have been dubbed rebels;

and riots, rebellions. Even the great railroad riots of 1877, extending their ramifications throughout almost the whole Union, participated in by thousands, paralyzing all traffic and thwarting all peace laws, and even going to the full extent of firing upon and killing some of the state militia, were, nevertheless, judicially determined not to be rebellions or insurrections.

County of Allegheny vs. Gibson, 90 Pa. St., 397, and see note to 94 Amer. Dic., 579.

We conclude that martial law has no place under our constitution; that the governor can not declare martial law; that in Colorado not even the legislature can do so, unless possibly in the extreme case of actual war and for self-preservation.

WRIT OF HABEAS CORPUS.

As supplementary to a declaration of martial law and in aid thereof, the privilege of the writ of habeas corpus has sometimes been suspended. It is pertinent to consider in this connection the law of this matter.

The constitution of the United States, article I., section 9, paragraph 2, says, as to the powers of the United States: "The privilege of the writ of habeas corpus shall not be suspended unless, when in case of rebellion or invasion, the public safety may require it."

This is identical for all practical purposes with article XI., section 21, of our state constitution, and authorities applicable to the one are so to the other. This writ is the remedy which the law gives for the enforcement of the civil right of personal liberty, and any person held in custody by any other person whomsoever upon any pretense whatsoever, has a right to have this writ issued by a court commanding the person holding him in custody to bring him before the court for inquiry as to the cause and

legality of his imprisonment, and if illegally restrained of liberty, the prisoner is entitled to his discharge. It is a common mistake to suppose that the right to this writ comes from or was enlarged by the famous habeas corpus act of 31 Charles II., C. 2 (1680). The right is at least as old as Magna Charta (1215), and the statute of Charles merely cut off the abuses which, through long ages of arbitrary rule, had impaired this fundamental privilege. Church on Habeas Corpus, section 25 A. It has been denominated "one of those great irrepealable laws which, without the aid of legislation, become a part of the common law of England, and is of greater age than the Magna Charta itself." It was the one writ by virtue of which only the liberty of the subject could be secured against arbitrary acts of government, and by the constitution of the United States, and of every state of the Union, the absolute right to the writ is supposed to exist without the aid of any law whatsoever, and these provisions quoted are aimed merely to prohibit any interference with the right. Some state constitutions prohibit the abolition of the privilege of the writ in any case whatsoever, but our constitution prohibits its suspension at any time "unless when in case of rebellion or invasion the public safety may require it." The writ itself can never be suspended, but under some circumstances, the privilege of the writ may be suspended. That is, although the courts must always issue the writ in all cases when proper facts are presented, yet whether the prisoner can have the benefit of the writ to secure his release or inquire into the legality of his imprisonment may depend upon whether this privilege has been suspended.

Ex parte Milligan, 4 Wall., 2.

And this presents the question: What branch of the government can suspend the privilege of the writ, and under what circumstances?

In England, it appears that the habeas corpus act itself is suspended. Church, Habeas Corpus, section 50. 1 Black Com., 136, says of the suspension of the writ: "And yet, sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger to the state is so great as to render this measure expedient; for it is the parliament only, or legislative power, that whenever it sees proper, can authorize the crown, by suspending the habeas corpus act for a short and limited time, to imprison suspected persons without giving any reason for so doing." And it is customary there to pass an act of indemnity to relieve the parties concerned, from the consequences of arrests made without express authority in times of great public danger.

Cooley's Blackstone, 135, note 16.

Historians say that not even the most arbitrary king ever assumed a right in himself to suspend the act, though in ancient times there were repeated violations of the act. There will be found in 3 May's Constitutional History, chapter XI., a statement of the occasions when this act has been suspended in England in modern times, and it will be seen that always it was done by act of parliament, and always, or almost always, acts of indemnity were passed as an additional precaution for those who have made arrests during the suspension. The privilege of the writ was never suspended by the United States before 1861. On July 5 of that year, Attorney General Bates advised President Lincoln that the president had power, in case of war, to suspend the privilege of the writ without any act of congress whatsoever, and numerous arrests followed.

10 Opinion Attorneys General United States, 74.

On May 5, 1861, Taney, chief justice of the supreme court of the United States, held the power to

suspend the privilege of the writ resided in congress, and that the president had no such power.

Ex parte Merriman, Taney, 246.

These were dangerous times, and the chief justice contented himself with filing his opinion without any attempt to enforce obedience. The suspension of the privilege of the writ by the president alone, came up in various state courts, and the question was uniformly decided in harmony with Chief Justice Taney's opinion. In Wisconsin, in 1863, upon a full review of the authorities, including comments and criticisms of the Merriman case, it was held that the president had no such power. The judges delivered separate opinions, all coming to the same conclusion, and all characterized by great ability. One of the judges stated the law and the reasons therefor in the shortest possible compass: "To deprive a citizen of the privilege of the writ of habeas corpus is to take from him one of the highest and most sacred rights secured to him by the constitution and the laws of the land. It is a change of the law which from the nature of things belongs to the power which can make the law."

In re Kemp, 16 Wis., 378.

Such indignation existed throughout the North against arbitrary arrests made under orders from the departments at Washington, that in November, 1862, all prisoners thus arrested were discharged, except those taken in arms or arrested for resisting the draft. On March 3, 1863, congress passed an act authorizing the president, whenever in his judgment the public safety might require it, to suspend the writ anywhere throughout the United States, and thereafter suspensions of the writ took place under that act. Other cases quite generally hold the same view.

McCall vs. McDowell, 1 Abb., U. S., 212; Ex parte Field, 5 Blatch., 63; State vs. Sparks, 27 Texas, 705; Griffin vs. Wilcox, 21 Ind., 370; Johnson vs. Jones, 44

Ill., 142; and more might be cited to the same effect. The great case, Ex parte Milligan, 4 Wall., 2, in effect endorses the view of Taney. Some of the cases suggest that there may be a right in the president to suspend the privilege of the writ, under his war powers, whenever and wherever martial law can rightfully exist, as a branch of and in aid of martial law, but that in the sense of the constitution, he has no such power. But it is also held in the case last cited that it is competent for the courts to investigate whether a state of war does in fact exist, and that an act of congress is not conclusive on this point; as also holds the Wisconsin case before cited. It is obvious, therefore, that the privilege of the writ can not be suspended under the war power, except when martial law can be declared. Nor does a constitutional provision that the governor may call out the militia to suppress riots, etc., and to declare a county in a state of insurrection, empower him to suspend the privilege of this writ.

Ex parte Moore, 64 N. C., 802.

See generally on this subject, Church on Habeas Corpus, section 50, et seq. It thus appears that only the legislative power can suspend the privilege of this writ, and then only in the instances mentioned in the constitution, of "rebellion" or "invasion."

What is meant by these terms is discussed in other parts of this writing and in the cases cited.

USE OF THE MILITIA.

If martial law may not be declared, is the state powerless in case of dangerous mobs and riots? By no means. Ample power exists for every emergency under the law.

The provisions of our constitution which it is considered govern this question are these:

"That the military shall always be in strict subordination to the civil power." Article II., section

22. "The supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed." Article IV., section 2. "The governor shall be commander-in-chief of the military forces of the state, except when they shall be called into active service of the United States. He shall have power to call out the militia to execute the laws, suppress insurrection or repel invasion." Article IV., section 5. "There shall be elected in each county * * * one sheriff * * *." Article XIV., section 8.

As respects the matter in hand, the powers and duties of neither the governor nor the sheriff are more particularly prescribed by the constitution than by the above citations. Powers and duties of each must therefore be found from the correct interpretation of those provisions and from our statutes and the principles of the common law. Without making a technical statement of the various offenses which it is the duty of the respective officers of the state and county to provide against, it is sufficiently accurate to consider these duties under the generic term, "to keep the peace," for in their ultimate analysis all offenses may possibly be resolved into breaches of the peace.

Profiting by the bitter experience of centuries of struggle for the freedom which to-day is enjoyed as a matter of course, the English had by express statute, upon the accession of William III., forever curbed the assumed power of the king to control absolutely the army; and among other things a riot act was passed, perhaps further extending an old act on the subject, whereby, in general, it was provided that unless riotous assemblages should disperse within one hour after they had been notified so to do by a civil magistrate, the posse comitatus or the militia could be called out to suppress them by a civil magistrate, and this force could use any reasonable means to accomplish such result. But the king's control over the army, as an army, in cases of domestic violence, was gone. These various acts of parliament put the use of the British army or militia in all essential particulars, as armed forces are under American constitutions. In the reign of George III. laws had been passed removing many of the disabilities under which Catholics had long suffered. These liberal laws provoked the resentment of many unthinking and perhaps fanatical Protestants, who believed or affected to believe that the country was in danger from this extension of religious liberty, and vast meetings were held all over England and Scotland to protest against these laws and to demand their repeal. Lord George Gordon was the head and leading spirit of these movements, and from that fact the memorable riots growing out of this infatuation have come down in history as the "Lord George Gordon Ritos." The rioters, said to have been 60,000 strong, assembled in London, and it is said that 20,000 of them marched down to the houses of parliament, then in session, and demanded the repeal of the laws in favor of Catholics. Many members of parliament supposed to be favorable to the Catholics were assaulted, beaten and insulted, and parliament itself, for very fear, adjourned. The local civil authorities seemed paralyzed and took no step to quell these riots. Emboldened by this inaction of the authorities, the rioters took fresh courage. Objectionable persons were assaulted; prisons were broken open and the inmates released; London was set on fire in many places. Among other acts of violence the house of the venerable Mansfield, the greatest common law lawyer of the day, was burned, with its precious treasury of books and manuscripts. For several days a reign of terror prevailed, and though a military force was stationed in London, the local civil authorities did nothing to suppress the disorders. At this juncture the king called a meeting of his ministers and said: "There shall, at least, be one magistrate in the kingdom who will do his duty." And he called upon the military to suppress these

riots, and directed them not to await the call of any local magistrate whatsoever.

2 May's Constitutional History, 275.

The militia acted promptly upon these orders. About three hundred rioters were killed and many wounded, and the rioters speedily dispersed. Dickens' portrayal of these riots in Barnaby Rudge is said to be historically accurate. The order of the king was, then, apparently in the very teeth of the act of parliament placing the power to call out the militia under such circumstances in the local magistrates. Those were the days when the great contest of all the ages was being waged for civil liberty and constitutional government; when Pitt, Fox, Burke, and, greatest of all, Lord Camden, were battling for the priceless heritages we to-day enjoy with scarcely a thought of the bitter struggle waged to secure them.

The king's act in calling out the militia, therefore, did not pass unchallenged. When parliament reassembled, in his address, the king reported "that I found myself obliged by every tie of duty and affection to my people to suppress in every part these rebellious insurrections, and to provide for the public safety by the most effectual and immediate application of the force intrusted to me by parliament."

An opinion was intimated in the house of lords that the employment of the militia to quell riots by firing on the people could only be justified, if at all, by martial law proclaimed under a special exercise of the royal prerogative and this, as we have seen above, was unconstitutional. Lord Mansfield replied. He said: "My lords, the noble duke who last addressed the house is utterly mistaken in supposing that the employment of the militia to suppress the late riots, proceeded from any extraordinary exertion of the royal prerogative, and in his inference that we are living under martial law. I hold that his majesty in the orders he issued by the advice of his ministers, acted perfectly and strictly according to the common

law and the principles of the constitution." After showing that some of the acts of the rioters amounted to treason, he proceeded: "Besides high treason, my lords, they were guilty of many acts of felony, by burning private houses and stealing as well as destroying private property. Here, then, my lords, we shall find the true ground upon which his majesty * * * proceeded. I presume it is known * * * that every individual in his private capacity may lawfully interfere to suppress a riot, much more to prevent acts of felony, treason and rebellion. Not only is he authorized to interfere for such a purpose, but it is his duty to do so, and if called upon by a magistrate, he is punishable in case of refusal. What any single individual may lawfully do for the prevention of crime and preservation of the public peace, may be done by any number assembled to perform their duty as good citizens. It is the peculiar business of all constables to apprehend rioters, to endeavor to disperse all unlawful assemblies, and, in cases of resistance, to attack, wound, nay, kill, those who continue to resist, taking care not to commit unnecessary violence or to abuse the power legally vested in them. Everyone is justified in doing what is necessary for the faithful discharge of the duties annexed to his office, although he is doubly culpable if he wantonly commits an illegal act under the color or pretext of law. The persons who assisted in the suppression of these tumults are to be considered mere private individuals acting as duly required. My lords, we have not been living under martial law, but under the law which it has long been my sacred function to administer—the ordinary civil everyday law. For any violation of that law, the offenders are amenable to our ordinary courts of justice, and may be tried before a jury of their countrymen. Supposing a soldier, or any other military person, who acted in the course of the late riots, had exceeded the powers with which he was invested, I have not a single doubt that he may be punished, not by a court mar-

tial, but by open indictment to the found by the grand inquest (grand jury) of the city of London or the county of Middlesex, and disposed of before the ermined judges sitting in justice hall at the Old Bailey. Consequently the idea is false that we are living under a military government, or that, since the commencement of the riots, any part of the laws or of the constitution has been suspended or dispensed with. I believe that much mischief has arisen from a misconception of the riot act, which enacts that, after proclamation made that persons present at a riotous assembly, shall depart to their homes, those who remain there above an hour afterwards shall be guilty of felony and liable to suffer death. From this it has been imagined that the military cannot act, whatever crimes may be committed in their sight, till an hour after such proclamation has been made, or, as it is termed, 'the riot act is read.' But the riot act only introduces a new offense—remaining an hour after the proclamation—without qualifying any pre-existing law, or abridging the means which before existed for preventing or punishing crimes." After adverting to his own views on religious toleration, which perhaps had made his house one of the subjects of attack, he resumed: "I am clearly of opinion that no steps have been taken (for the purpose of suppressing the riots) which were not strictly legal, as well as fully justifiable in point of policy. Certainly the civil power, whether through native imbecility, through neglect, or the very formidable force they would have had to contend with, were unequal to the task of putting an end to this insurrection. When the rabble had augmented their numbers by breaking open the prisons and setting the felons at liberty, they had become too formidable to be opposed by the staff of a constable. If the military had not acted at last, none of your lordships can hesitate to agree with me that the conflagrations would have spread over the whole capital, and, in a few hours, it would have been a heap of rubbish. The king's

extraordinary prerogative to proclaim martial law, whatever that may be, is clearly out of the question. His majesty and those who have advised him have acted in strict conformity to the common law. The military have been called in—and very wisely called in—not as soldiers, but citizens. No matter whether their coats were red or brown, they were employed, not to subvert, but to preserve the laws and constitution which we all prize so highly." Though we have said some of the most noted champions of constitutional liberty were members of that body, the legality of the king's act, upon the principles laid down by Lord Mansfield, was approved unanimously, "nemine dissentiente." 3 Campbell's Lives of the Chief Justices, 436. Afterwards he used to say "that perhaps some of the blame might have attached upon himself as well as on others in authority for their forbearance in not having directed force to have been at the first moment repelled by force—it being the highest humanity to check the infancy of tumults." 3 Campbell's Lives of C. J., 428. For judges and magistrates, as well as sheriffs, are by common law conservators of the peace and have power to call on the posse comitatus for that purpose. Lord Chancellor Thurlow laid down the same law. 3 Campbell's Lives of Lord Chancellors, 64. Our statutes on that subject are but in substance the common law. Afterwards, in discussing the subject, the great chief justice approved and reinforced these same views, saying: "If it is necessary for the purpose of preventing mischief or for the execution of the law, it is not only the right of soldiers, but it is their duty, to exert themselves in assisting the execution of a legal process, or to prevent any crime or mischief being committed. It is therefore highly important that the mistake should be corrected which supposes that an Englishman, by taking upon him the additional character of a soldier, puts off any of the rights and duties of an Englishman."

Burdett vs. Abbot, 4 Taunton, 450.

The same idea is expressed under our laws: "The soldier is still a citizen, and as such is always amenable to the civil authority."

15 American and English Encyclopedia of Law, 428, note 4, and authorities cited.
18 Albany Law Journal, 87.

Lord Ellenborough, while attorney general, in 1801, laid down the law to be that, "in case of sudden riot or disturbance, any of his majesty's subjects, without the presence of a peace officer of any description, may arm themselves, and, of course, may use ordinary means of force to suppress riots and disturbances." After citing authorities, he proceeds: "And what his majesty's subjects may do, they also ought to do for the suppression of public tumult * * *. Whatever any other class of her majesty's subjects may allowably do in this particular, the military may unquestionably do also." It is advisable, however, says the same authority, that the attendance of the peace officers be procured; "but still, in cases of great emergency, the military as well as all other individuals may act without their presence." The same questions were again brought up for discussion by the occurrence of the British riots in 1831. Lord C. J. Tindel, in addressing a grand jury, almost repeated the words of Lord Ellenborough, dwelling most insistently upon the point that it is every man's duty to take immediate, and if necessary, forcible action for the suppression of a riotous and tumultuous assembly, even in the absence of a magistrate. "It is the duty," says he, "of every subject to act for himself, * * * and he may be assured that whatever is honestly done by him in the execution of the object will be supported and justified by the common law; and whilst I am stating the obligation imposed by law on every subject of the realm, I wish to observe that the law acknowledges no distinction between the soldier and the private individual. The soldier is still a citizen living under

the same obligations and invested with the same authority to preserve the peace of the king as any other subject." These propositions were re-asserted by Justice Littledale, on the trial of the mayor of Bristol. (18 Albany Law Journal, 87-88.) It is needless to remark that the principles of the common law exist in Colorado, not only by decisions of the courts, but by express statute; and, therefore, that the rights and duties of our citizens and soldiers are governed by the same rules, where no statutes or constitution otherwise provide. These instances have been cited as embracing in most compendious form the law, and it will be seen from an examination of the American cases hereinafter cited, and from text books, that the law is the same in this country.

The peace that may be broken, is the peace of the state. There is no peace of a county. Every indictment avers an act of lawlessness to be "against the peace and dignity of the state of Colorado." The obligation to keep the peace is upon the state; the countie are under no such obligation, except only so far as they have been made agencies of the state for that purpose; nor are they responsible for acts done in breach of the peace in their borders, except when made so liable by express statute. Services rendered in any county in preserving the peace are services rendered for the state, though it is competent for the law to provide, as it usually does provide, that the expense of so keeping the state's peace must be borne by the county. (Chapin vs. Ferry, 3 Wash. St., 386.) In some states, as in Kentucky, the laws have provided that certain expenses for trials in felony cases must be borne by the state at large.

Though a sheriff at common law had powers judicial in their nature, as well as executive and ministerial, yet under the American system, by virtue of the statutes, his powers are executive and ministerial only.

See 22 American and English Encyclopedia of Law, 525, note 9.

At common law, and by virtue of our statutes, he can call on the posse comitatus—the citizens in his county—to aid him in preserving the peace; but his powers in this regard extend not beyond the county. If he has the power to call assistance from beyond his county, it must be expressly given by statute. The very definition of a sheriff, approved by American authority, shows the nature of his office in this regard. He is "a county officer representing the executive or administrative power of the state within his county." He is, in some of his functions, called "bailiff to the chief executive." (Bouvier Law Dictionary.)

While the sheriff is, under all usual circumtances, the chief reliance for the preservation of the peace within his county, and while to him is usually committed, and properly committed, the enforcement of the laws within his county, yet, nevertheless, his powers are limited to his county, and to the means which the common law or statutes have placed at his disposal. If he would use any means beyond the posse comitatus of his county in the performance of his duties, some statute must be shown to confer this authority. The constitution, as we have seen, simply provides for his election. His duties and powers, in the respect we are now considering, must be found in the statutes. Many states have elaborate provisions in their laws empowering sheriffs, mayors, judges and other peace officers to call out organized militia on their own motion; but the sheriff's whole power under out statute, so far as we have found, rests upon the implication in section 3102, Mills' Annotated Statutes; which section provides that the sheriff may call out the militia "during the absence of the commander-in-chief." The old act said, "during the absence of the commander-in-chief from the county." But these latter words are not in the present act; and since in the absence of the governor, the lieutenant governor has full power of governor, and the president of the senate is governor in the absence of both, it is difficult to imagine a condition under which the

sheriff can, on his own motion and by his own power, call out the militia. Almost the same implication arises under section 3078, that a mayor or judge may call out the militia. While the legislature can not abridge the constitutional power of any officer, and therefore can not abridge the power of the governor to call out the militia, it is perfectly competent by legislative act to also put the militia power of the state under other peace officers. In many states the militia are thus made subject to the call of sheriffs, mayors, and other officers, who may act in the premises without any demand on the governor. But our legislature seems to have made no adequate provision for any officer other than the governor to call out the militia. There are in the statute no provisions regulating the powers or duties of any local officer in the management of the militia. It is needless to suggest that these laws need a thorough revision. There is no legislative intimation that the governor must wait the "call" of the sheriff, and it is exceedingly doubtful if such a provision would be valid.

POWER OF THE GOVERNOR.

Turning now to the powers of the governor, let us see how the matter stands.

We have seen that the sheriff is a "county officer representing the executive or administrative power of the state within his county."

The constitution, article IV., section 2, says the governor is "the supreme executive power of the state." As the state is divided into counties, it necessarily follows that in every county in the state the governor is the supreme executive within each of the counties. The very words "supreme executive," implies that there are inferior executives; whatever executive duties are to be performed within or for the state are under the supervision, primarily, of the special and local executive officers of that particular locality; but over all is this supreme executive power.

"The command and application of the public force to execute law, maintain peace and resist foreign invasion are powers so obviously of an executive nature, and require the exercise of qualities so characteristical of this department, that they have always been exclusively appropriated to it, in every well organized government upon earth."

1 Kent's Comm., 283; 2 Story on the Constitution, 327.

It would be strange that the force of the state could be used by the local executive authority, while the supreme executive power rested upon no more solid basis than a mere abstract declaration of the constitution. The governor is a "civil magistrate, not a military chief."

10 Opinions of the Attorneys General U. S., 79.

Even the king, during the Lord George Gordon riots, designated himself as "one magistrate * * * who will do his duty."

"The governor is the chief executive of the commonwealth, and as such embodies the power of the people for the conservation of the peace and the protection of the rights and property of the citizens of the state."

Appeal of Hartranft, 85 Pa. St., 449.

As such chief executive, by the section of our constitution last referred to, he "shall take care that the laws be faithfully executed." The "peace" that must be kept is, as we have seen, the "peace" of the state; the execution of the laws providing for this peace, by arresting offenders, suppressing riots and tumult, and the due execution of each and every step thereabout, fall, therefore, within the province of the chief executive power. The laws which he shall take care are faithfully executed are the laws made to preserve "the peace and dignity of the state." Whatever

limitations there may be beyond these, these laws he shall take care are faithfully executed.

Nor in the discharge of this duty is he limited to any mere persuasion or advice; he is not limited to "reading the riot act."

Article IV., section 5, of the constitution says: "The governor shall be commander-in-chief of the military forces of the state. * * * He shall have power to call out the militia to execute the laws."

In common speech the "militia" are usually considered that body of our citizens who have been organized into troops and have subjected themselves to military organization. This is erroneous; the constitution is broader. "The militia of the state shall consist of all able-bodied male residents of the state, between the ages of eighteen and forty-five years," except such as are specially exempted. Article XVII., section 1.

The militia which he may call out, therefore, consists of every person in the state answering the above description, whether organized into military bodies or not; he may call to his aid the grand posse comitatus of the state. Thus by express constitutional provision the governor has as full power over the state at large as the sheriff has in his county.

There can be no military organization in the state without legislative authority. Mills' Annotated Statutes, section 3119. And such is the law everywhere. Our laws (Mills' Annotated Statutes, chapter 84) provide for the organization of parts of the general militia of the state into troops, companies, etc., and provide for arming and equipping this organized militia and for the government thereof.

Though the governor may call out the militia, the legislature has provided that he shall call out the organized militia before the unorganized. Mills' Annotated Statutes, section 3039; Acts 1893, page 342, section 3. It is of this organized militia, called "The Colorado National Guard," we now speak.

Why call first on the organized militia? For several obvious reasons. They are ready armed; those who are to respond are easily ascertainable. Each of them is under military law, and special punishments are provided for failure to respond and to perform their public duties; they have the training and tactical skill, a most necessary element in extreme cases, and, more than all, they act as a unit of strength under the command of their officers. The governor has power to call them out and, having called them out, he has power to do something with them when called out. They are not to be mere "carpet knights," to be led in idle display. They are called out for the serious business of seeing that the laws are executed. The governor calls out the militia "to execute the laws," and in the execution of the laws they have the full powers that any other executive officers have; they may do what is necessary to be done in the discharge of their duty; they hold the commission of the governor by virtue of the call, issued under the high mandate of the constitution; their title to their office is as high as that of any other officer; and by virtue of the laws providing for their organization they may act as an organization in the manner provided by law; and the individual soldier has the right, as it is his duty, to act in obedience to the orders of his superior officers, lawfully given.

By the constitution it is the governor who shall take care that the laws are faithfully executed; it is the governor who shall call out the militia to execute the laws. Nowhere in the constitution, and nowhere in the laws, if such a law could be passed, is it provided that they shall be called out only on the demand of any other officer, or that when called out they shall be put under the command of any other officer.

The only provision of our constitution which might be cited to the contrary is article II., section 22: "That the military shall always be in strict subordination to the civil power." The words are "civil

power," not civil officers. This section does not say that the militia, which is no more nor less than the organized posse comitatus of the state, shall be put under the command of local civil officers. The section is found in our bill of rights, put there to further insure and emphasize the fact that this is a government of law, enacted by our recognized and customary legislative authority; put there so that under no circumstances and under no pretense shall our laws be subverted or displaced, or the arbitrary rule of military law be substituted for the orderly laws provided for our common government; a declaration, in effect, that martial law shall not be declared, but that all, citizens and soldiers alike, shall be subject to the general laws of the land and answerable to those laws accordingly. This section, we say, is found in the bill of rights, among the other guarantees of civil and personal liberty, and is not designed to affect the question of the distribution of power among the various executive officers. Besides, by every construction, the governor is a civil officer and exercises civil power and no other; and the militia under his control are as strictly subordinate to the civil power as if under the control of the sheriff.

10 Opinions of the Attorneys General U. S., 79.

From the foregoing other important consequences follow. The governor shall take care that the laws are faithfully executed; the governor shall have power to call out the militia. It follows, therefore, that he must determine, in his discretion and judgment, when the occasion has arisen for the exercise of this power, and as to the best means of performing his duty. His discretion is not subject to review or control by any other officer or by any court.

But for an illegal exercise of the power; for using or attempting to use it to overthrow, not to uphold the law, he may be impeached and expelled from office. And for an unwise or improvident use

of the power he is answerable at the bar of public opinion.

Appeal of Hartranft, 85 Pa. St., 433.
Chapin vs. Ferry, 3 Wash. St., 386.
Martin vs. Mott, 12 Wheat., 30.
Vanderheyden vs. Young, 11 Johns, 150.
Ela vs. Smith, 5 Gray, 121.
Belcher vs. Farrar, 8 Allen, 327.

Cases to this effect might be multiplied indefinitely. It is not necessary that the governor should himself be present with the troops. His duty is to see that the laws are executed, and he may act by agents; and the officers of the organized militia may be his agents; and, being his agents, they have full power to do any act commensurate with the duty to be performed, and can no more be interfered with by any other officer than could the governor himself in the discharge of his duties. "He must be the judge of the necessity requiring the exercise of the powers with which he is clothed, and his subordinates, who are employed to render these powers efficient and to produce the legitimate results of their exercise, can be accountable to none but him.

Appeal of Hartranft, 85 Pa. St., 444.
Letter to the Governor, 8 Mass., 547.
Ela vs. Smith, 5 Gray, 356.

But the power of the governor is to execute the laws, not to subvert them, and his acts and the acts of those under him must conform to the law. The soldier's first duty is to obey his superior officer, always with the caution that the orders given were within the general scope of the power of the officer. The soldier, as well as every other citizen, is subject to the law of the land. The militia have no other or different powers than peace officers by law have under the same circumstances, except they may act as an organized body. That an act was done by military order or by order of the governor is no defense, unless

the order itself be one conformable to law. While the common soldier may find the order of his superior a palliation, or even a justification, for a particular act done by order of his superior, yet he has a most hazardous duty to perform; being bound to obey his superior, as the first duty of a soldier; being also bound to answer before the law for any acts not warranted by the law.

Ela vs. Smith, 5 Gray, 356.
Mitchell vs. Harmony, 13 How., 115.
Vanderheyden vs. Young, 11 Johns, 150.
15 A. & E. Enc. of Law, 426, and cases cited.
Steiner's Case, 6 Opinions Attorneys General U. S., 413.

Our law and the English law is the same in this regard. Lord Chancellor Thurlow said in the great debate on the Lord George Gordon riots: "The king, any more than a private person, could not supersede the law, and therefore he was bound to take care that the means he used for suppressing even rebellions and insurrections be legal and constitutional; and the military employed for that purpose are amenable to law, because no command of their particular officer, no direction from the war office or order in council could sanction their acting illegally." Taney, C. J., said: "The order given was an order to do an illegal act, to commit a trespass upon the property of another, and can afford no justification to the person by whom it was executed. * * * And upon principle, independent of the right of judicial decision, it can never be maintained that a military officer can justify himself for doing an unlawful act by producing the order of his superior. The order may palliate, it can not justify."

Mitchell vs. Harmony, 13 How., 115.
Notes to 87 Amer. Dec., 508; 88 A. D. 773; 89 A. D., 605, 612; 91 A. D., 272.

It would render this already long document too voluminous to discuss the exact limits upon the power and force that can be used by the militia. But in general it may be said that the powers are limited by what, under the laws, peace officers may do; there is not one law for the organized militia and another for the unorganized. And it behooves those who would wield this dangerous but necessary power to inform themselves of these limits, and to always remember that their functions are to preserve the laws; their duties are preventive, not to punish, and always they are to bear in mind those great fundamental principles written in our bill of rights for the security of personal liberty; that they act as a branch of the peace or police department of the state; that malefactors are to be tried and punished only according to the law of the land.

It is scarcely necessary to add that if, in the exercise of his discretion, the governor believes his duty can best be performed by placing the organized militia in any instance under the order of the sheriff, there is no objection to that course, but he is not bound to so place them.

The duty of the militia and their rights and obligations are ably set forth in 18 Albany Law J., 85 and 107, and that article may be read with great profit. We conclude with this appropriate quotation from that article: "Every citizen's highest duty is of active obedience to the law, but if in ignorance of that duty because in ignorance of the law, riot or tumult should gain headway and temporarily overthrow our institutions, it would be too late to acquire the knowledge which should to-day be common learning. Our citizen soldiery should know that duty which is higher than any military command existing in the absence of that command, and that although as soldiers they are not a reasoning body, as citizens they are such pre-eminently. The soldier owes no duty of "boundless submission" to his chief, and Tennyson's fine lines are only partially true.

Prof. Maurice seems to have apprehended more clearly the higher duty of the soldier, and his words are memorable: 'The inscription at Thermopylae, "These three hundred died in obedience to the laws," expresses briefly and grandly, as it seems to me, the true conception of the warrior's life in the earliest ages and in the latest. They go because the law commands them to go; they stand and fall at the bidding of the law; they are witnesses for law against brute force of numbers.' Our laws neither endanger the state through jealousy for popular liberties, nor liberty through jealousy for the state. The citizen may act, must act, when occasion requires, and of his own volition; and may kill and slay, so urgent is the law for its maintenance; but if even in the maintenance of the law he violates a right, he is amenable to that same law which will no more permit an injustice, even in its own behalf, than it will submit to its own overthrow."

Respectfully submitted,

(Signed.) J. C. HELM,
HARVEY RIDDELL,
PLATT ROGERS.

APPENDIX "D."

Headquarters Military District of Leadville.
Leadville, Colo., January 5, 1897.

BRIG. GEN. C. M. MOSES, Adjutant General State of Colorado, Denver, Colorado:

Sir—I have the honor to submit the following brief report of the operations of the national guard of Colorado, since September 21, 1896, the date upon which it was called into active service:

On the evening of September 21, 1896, Col. H. B. McCoy, second infantry, with companies "B," "C" and "G," second infantry, reached Leadville, and the following morning (22d) the remaining companies of the second infantry, and the seven companies of the first infantry, with the Chaffee light artillery (four guns), and the Denver city troop (cavalry) arrived, and went into camp immediately, at the fair grounds, outside the city limits.

On the same day I issued an order assuming command of the military district of Leadville, including the city of Leadville and all country contiguous thereto, wherein there was danger of riot or unlawful assemblies.

I found that Col. McCoy had already placed guards at the following mining properties, believing them to be in danger of destruction:

The Ibex Mining Company (Little Johnny), the Resurrection, the Herman lease, the Emmet, the Coronado, the R. A. M., the Maid of Erin, the Penrose, the Last Chip, the Bison, the Bon Air, the Bohn, the

Delante mines Nos. 1 and 2, and the powder magazines.

The details at the above named points were afterwards increased sufficiently to render the properties absolutely safe.

On the 22d, Camp McIntire was completed and occupied, with 150 tents pitched.

The following permanent camps were established: At the Little Johnny mine (four and one-half miles from the city and 1,400 feet higher), with sixty-one men and four officers, from which the guard for the Resurrection was also furnished; and at the Maid of Erin, with ninety-one men and five officers, the latter camp furnishing guards at night for the Emmet and R. A. M. mines (neighboring properties).

These outlying stations were made permanent on account of the distance from Camp McIntire, as it was impossible to relieve them daily without inflicting unnecessary hardships on the men.

On the 24th of September, Capt. Wm. A. Smith, of my staff, was assigned to duty as provost marshal general of the district, and on the 26th, company "F," first infantry, Capt. C. E. Locke commanding, was detached from the regiment and ordered to special duty as provost guard in the city.

On the 29th of September the first shipment of miners from Missouri arrived and were safely escorted to their respective destinations.

I quote from Col. McCoy's report:

"On September 29 the mine operators brought into the district, over the Denver & Rio Grande railroad, a body of miners, and in order to insure perfect protection, five companies of infantry, a troop of cavalry and two Gatling guns were detailed to act as an escort to these men from the depot to the Emmet mine, where they were to be employed. On October 13 another body of men was brought in over the same road, and the same measures for their safety were adopted. The men were for the Emmet, Resurrec-

tion and Little Johnny mines, the last named property being a distance of four and one-half miles from the Denver & Rio Grande depot, and a hard, heavy climb.

"On October 27 and November 15 two more lots of men were brought in, being for the Bison, Last Chip, Resurrection and Little Johnny mines, and again the escort was furnished for their protection.

"The duty done by the men while acting as escort to these various bodies of men was a delicate one, and was performed in a highly satisfactory manner, and both officers and men are deserving of the highest praise and commendation for their work and conduct.

"The importation of what is commonly called 'scab labor' was exceeding distasteful to the striking miners, and the national guard came in for more than their share of the abuse which was heaped upon them on the first trip. It was decided that should not again be allowed, and for the next three trips, different measures were taken.

"The streets were cleared along the line of march, and people who congregated in the yards were notified that they must preserve the peace, and that no offensive epithets would be allowed. In my judgment, this was the only thing to be done under the circumstances, and the result proved the correctness of this view. The march in each case was more orderly and quiet, and we did not have the same abuse to contend with. In a few cases it became necessary to quiet a few men who became unruly, but this was done without trouble.

"During the past few weeks a large number of men were relieved from duty and allowed to return home, and on December 8 a further reduction was made, 117 men being relieved from duty and returned to their respective company stations."

On September 30, 1896, the regular details for outlying posts and permanent camps were as follows:

	Men.	Officers.
The Ibex mine	80	4
The Emmet, R. A. M. and Maid of Erin.	107	4
The Coronado	5	1 (non-com.)
The Penrose, Bohn and Bon Air	25	2
Water works	20	1
Powder magazines	20	1
Bison mine	10	1
Resurrection mine	15	1
Oil tanks, D. & R. G. depot	5	1 (non-com.)
Camp guard	48	7 (5 non-com.)

A total of 358 officers and men.

On this date, December 5, the following statement shows the disposition of the guards at the various mines and permanent camps:

	Men.	Officers.
Emmet, Maid and R. A. M.	45	4
Resurrection	3	1 (non-com.)
Penrose and Bon Air	20	2
Bison	3	1 (non-com.)
Last Chip	3	1 (non-com.)
Delante No. 1	3	1 (non-com.)
Powder magazines	4	1 (non-com.)
Powder magazines, January 6	3	1 (non-com.)
Camp guard	24	6 (5 non-com.)

A total of but 126 officers and men.

For several weeks the most alarming reports of contemplated violence were received daily, and in every instance proper precautions were taken to prevent any overt act, and I am gratified to state that with the exception of occasional exchanges of shots between sentinels and skulkers, no collision has occurred.

The closing of the saloons at midnight, by direction of Hon. Frank Owers, district judge, and the rigid enforcement of the order by the city police, aided by the provost guard, had a most beneficial effect, and the city has been as quiet and peaceful since that order went into effect as any city of its size in the state.

The duties of the troops of this command have been arduous in the extreme, half of the command being on duty a portion of the time every night and always every other night.

The details at the outlying stations have been reduced from time to time as circumstances seemed to warrant, and these reductions have made it possible to relieve the Denver City troop, a detachment of the Chaffee light artillery with one Napoleon gun, and six companies of infantry from further duty in this district.

The command has been generously cared for and everything possible to alleviate the hardships of service under such peculiar circumstances has been done under the direction of Brig. Gen. C. M. Moses, adjutant and quartermaster general, amid surroundings and conditions most difficult to contend with. The prompt and regular payment of the troops is owing to his magnificent and untiring efforts in this direction, and is the first instance of the kind on record of payment in money for services of the guard.

To the officers and men of this command, the thanks of the state are justly due for faithful, loyal service and the splendid discipline and prompt and satisfactory execution of every order is a lasting monument to the efficiency of the citizen soldiery whenever called into active service.

Yours respectfully,

E. J. BROOKS,

Brigadier General, N. G. C., Commanding.