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A REPORT

ON

LABOR DISTURBANCES IN THE STATE OF COLORADO, FROM 1880 TO 1904, INCLUSIVE,

WITH

CORRESPONDENCE RELATING THERETO.

Prepared under the direction of
CARROLL D. WRIGHT,
COMMISSIONER OF LABOR.

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CHAPTER XXV.

THE MOYER HABEAS CORPUS CASE.

Charles H. Moyer, president of the Western Federation of Miners, was arrested at Ouray on March 26, 1904, by Sheriff Maurice Corbett, of Ouray County, upon instructions from Sheriff J. C. Rutan, of San Miguel County. The charge against him was desecration of the American flag, by having copies of the flag printed with inscriptions on them. Copies of the flag printed in proper colors, with the inscriptions in black ink on the stripes, had been widely distributed through the State of Colorado and elsewhere. They were printed in various sizes and were posted in many public places. The distribution was done by the Western Federation of Miners. At the head of the circulars or posters bearing the flag were the words, "Is Colorado in America?" Following are the inscriptions on the flag, one on each of the thirteen stripes:

Martial Law Declared in Colorado!
Habeas Corpus Suspended in Colorado!
Free Press Throttled in Colorado!
Bull Pens for Union Men in Colorado!
Free Speech Denied in Colorado!
Soldiers Defy the Courts in Colorado!
Wholesale Arrests Without Warrant in Colorado!
Union Men Exiled from Homes and Families in Colorado!
Constitutional Right to Bear Arms Questioned in Colorado!
Corporations Corrupt and Control Administration in Colorado!
Right of Fair, Impartial, and Speedy Trial Abolished in Colorado!
Citizens' Alliance Resorts to Mob Law and Violence in Colorado!
Militia Hired to Corporations to Break the Strike in Colorado!

On the larger posters, below the picture of the flag, was a half-tone picture of Henry Maki, as he had appeared March 2, 1904, when shackled to a telephone pole at Telluride because he refused to do work on the streets which a military guard had ordered him to perform. Below the picture of the flag also were several paragraphs, one of them as follows

The picture represents Henry Maki, a union miner at Telluride, who was arrested for vagrancy—had money in his pocket and was being supported by his union. He was shackled to a telephone pole because he refused to work in a filthy cesspool under the bayonets of the State militia.

The larger posters also bore facsimiles of the autographs of Charles H. Moyer, president, and William D. Haywood, secretary-treasurer of the Western Federation of Miners.

While President Moyer was arrested on the charge of flag desecration, it was commonly believed that his arrest was ordered by Governor Peabody largely for other reasons. On the day of his arrest at Ouray, President Moyer was taken to Telluride. His bail was fixed at $500 by Justice of the Peace P. A. Lilley, but security for bail was not then offered. He was confined in the city jail, but was permitted to go outside for meals.

On March 30, 1904, Sheriff J. C. Rutan, of San Miguel County, reached Denver bearing a warrant for the arrest of William D. Haywood, secretary-treasurer of the Western Federation of Miners. The charge against him was the same as that for which President Moyer had been arrested. Hearing of the coming of the sheriff, Mr. Haywood caused his own arrest. The arrest was on the complaint of J. Wolff, a friend of Mr. Haywood, charging him with desecration of the flag. The object of Mr. Haywood in seeking arrest at Denver was to avoid being taken to Telluride. Justice of the Peace W. F. Hynes fixed his bond at $300. Though a bond was not furnished, he was not placed in jail, but, accompanied by a constable, he was allowed to attend to his business at Federation headquarters. The justice set the date of his trial for April 8, and until that day Sheriff Rutan was unable to serve the warrant brought from Telluride.

On March 31 District Judge Theron Stevens granted a writ for the release of President Moyer, making it returnable on April 11. On the latter date Adjutant-General Bell and Captain Wells failed to produce Moyer in court at Ouray, as the judge had ordered. The respondents were not present and refused by their legal representatives to produce Moyer, giving as reasons that he was in the custody of Governor Peabody as commanding officer of the State militia, and that it would not be safe to bring Moyer before the court. The respondents were represented by E. C. Howe, deputy district attorney of San Miguel County, who was assisted by Attorney-General N. C. Miller and Assistant Attorney-General H. J. Hersey. The judge refused to permit the filing of the answer of General Bell and Captain Wells, and he issued the following order:

STATE OF COLORADO,
County of Ouray, in the district court, ss:

IN RE CHARLES MOYER—ORDER:

Now, on this 11th day of April, A. D. 1904, the above cause coming on further to be heard upon the return day of the writ of habeas corpus, heretofore issued herein, and it appearing from the return of J. C. Rutan, sheriff of San Miguel County, that the said writ was duly served upon the persons therein named, to wit: Sherman Bell and

Bulkeley Wells, at and within the city of Telluride, in said county of San Miguel, on the 4th day of April, A. D. 1904, by personally leaving with each of them a copy of the said writ duly indorsed with the words, "By the habeas corpus act," and tendering to them the amount of money indorsed on the said writ and ordered to be tendered, to wit, the sum of $12, and that in all respects the said writ and the said service thereof were duly made in accordance with law, and the said Sherman Bell and the said Bulkeley Wells appearing not, and the said Charles H. Moyer neither being present nor produced by them or either of them nor anyone for them:

Now, therefore, upon motion of E. F. Richardson, esq., appearing in behalf of the said prisoner, the said Charles H. Moyer, it is considered and ordered that, inasmuch as there is no answer to the petition or answer or return to the writ herein which can be considered by the court or the judge thereof, the said petition shall be, and it is hereby, taken to be confessed, and the facts therein stated to be and they are hereby found to be true as therein stated, that the said Charles H. Moyer be, and he is hereby ordered to be, discharged from the custody of the said Sherman Bell and Bulkeley Wells; and they and each of them, to wit, the said Sherman Bell and Bulkeley Wells, be deemed to be, and they are hereby adjudged to be, guilty of contempt against the court and the judge of the district court of the seventh judicial district of the State of Colorado, who issued the writ herein, for their disobedience thereto in not producing the prisoner, Charles H. Moyer, as therein commanded, and that an attachment issue, and it is hereby ordered to issue immediately, against the said Sherman Bell and Bulkeley Wells, directing the sheriff of the county of Ouray to forthwith arrest and commit the said Sherman Bell and Bulkeley Wells to the common jail of Ouray County, there to remain without bail until they or either of them shall obey the said writ as therein commanded, and that the said Sherman Bell forfeit and pay to the said Charles H. Moyer the sum of $500, and that the said Bulkeley Wells forfeit and pay to the said Charles H. Moyer the sum of $500, and that they and each of them shall each pay one-half of the costs of this proceeding to be taxed and let execution issue for such forfeiture and costs $500. Dated at Ouray, the day and year first above written.

THERON STEVENS,
Judge of the Seventh Judicial District.

The court declared that in its judgment there was no condition of insurrection or rebellion in San Miguel County unless such condition existed by virtue of the unlawful usurpation of power by the governor and militia.

Sheriff Maurice Corbett, of Ouray County, went to Telluride on April 13. He was met there by General Bell and Captain Wells, but both refused to be arrested. They handed the sheriff a paper declaring that, as officers called into active military service by the governor, they were while in such service "exempt and free from arrest and interference and process of the civil courts, under the law and statutes of this State."

On April 15 the State supreme court issued a writ of habeas corpus

directed against General Bell and Captain Wells ordering them to produce the body of Charles H. Moyer in the supreme court at Denver on April 21. Assistant Attorney-General Hersey stated to the court that the State and military authorities had no objection to the issuance of the writ.

General Bell and Captain Wells, with an escort, brought President Moyer from Telluride, arriving at Denver on the morning of April 21. William D. Haywood, secretary-treasurer of the Western Federation of Miners, went to the railroad station to greet Mr. Moyer, but in attempting to do so he had a violent encounter with the militia. He was brought to the Oxford Hotel, where a second fight occurred. He offered resistance to being held, whereupon several soldiers beat him about the head with revolver butts until the blood ran freely. By order of the governor he was turned over to the civil authorities.

In the State supreme court, April 21, argument was heard on the Moyer habeas corpus case. Present, Chief Justice W. H. Gabbert and Justice R. W. Steele; absent, Justice John Campbell. The petitioner was represented by E. F. Richardson and J. H. Murphy, attorneys, the respondents by Attorney-General N. C. Miller, Assistant Attorney-General H. J. Hersey, and John M. Waldron, attorney. Following is a portion of the answer which was presented to the court:

The military authorities became fully satisfied that the petitioner, Charles H. Moyer, if discharged from arrest would continue to be an active participant in keeping alive the condition of insurrection set forth in the executive order, and a prominent leader of the bands of lawless men engaged in the crimes mentioned in said proclamation and orders in the county of San Miguel; and that in order to accomplish the suppression of the state of rebellion it is, in the judgment of the said governor and the undersigned, absolutely necessary for some time to come to restrain the body of Charles H. Moyer by the National Guard of the State.

That, animated solely by desire to properly discharge the duties and authority in him vested, the undersigned caused the arrest of said Moyer in San Miguel county on the 29th of March, 1904, and does detain him upon grounds of duty and authority conferred and enjoined upon the undersigned.

That it is the intention of the undersigned to release the person of Moyer from military arrest as soon as the same can safely be done, and then to surrender him to the civil authorities to be dealt with in the ordinary course of justice. The exigencies of the military situation in San Miguel County imperatively require the further detention of the person of the prisoner, to prevent him from lending aid and instruction to lawless persons in further prosecution of the acts constituting a state of rebellion, and that the ends of public justice and the restoration of public tranquillity require that the reasonable further detention of Moyer shall in no wise be interfered with by the writ of habeas corpus or other judicial writ whatsoever.

That the uninterrupted exercise of the military in San Miguel County, unimpeded for the time being by any judicial interference

for the accomplishment of the suppression of the rebellion, is indispensable.

That the governor of Colorado has issued orders to the undersigned not to surrender the military custody during the existence and continuing condition of affairs in San Miguel County, either upon writ of habeas corpus or otherwise, until so commanded by him.

That the respondent, Bulkeley Wells, is a subordinate officer, whose acts in the premises with reference to Moyer have been by virtue of the express commands of the undersigned.

Wherefore the undersigned respondent respectfully prays that this honorable court shall take no further cognizance in the matter of said writ of habeas corpus, save and except to quash and hold the same for naught.

SHERMAN BELL,
Brigadier-General and Adjutant-General of the State of Colorado, in the County of San Miguel.

The return and a motion to quash, as contained in a separate document, were in part as follows:

Now come the respondents to the writ of habeas corpus and file their returns, showing that the petitioner, Charles H. Moyer, is lawfully restrained of his liberty by them under the express command of the governor and commander in chief of the military forces of the State of Colorado as a military necessity, in the course of the suppression of an existing state of insurrection in the county of San Miguel, and that this honorable court ought not to exercise any further jurisdiction in the premises, and is not lawfully vested with jurisdiction to further order whatsoever in the proceedings, except to dismiss the writ from the statement of fact recited in the petition, and that the production of the body of Moyer before this court is not by way of recognition of the court to order the release of the petitioner, but solely as an act of courtesy on the part of the chief executive of the State to conform to the mandate of the writ to the extent only of duly advising the court of the cause of the detention of the prisoner.

Wherefore the respondents now respectfully challenge the power of jurisdiction of the court to make any further order whatsoever touching the further detention of Charles H. Moyer, and now move this honorable court to quash the writ and enter a final order declining to assume any further jurisdiction in the premises.

N. C. MILLER,
Attorney-General of the State of Colorado, for the Respondents.
JOHN M. WALDRON,
Special Counsel.

The answer of Mr. Moyer through his attorneys was as follows:

First. That the return upon its face fails to state facts constituting any answer to the writ of habeas corpus.

Second. That the return is wholly insufficient in law to constitute any justification whatsoever, either for the arrest, imprisonment, detention, or further detention of the petitioner.

Third. That upon the face of the return the petitioner is entitled to his discharge.

Fourth. That neither the governor of the State nor the respondents are, under any circumstances appearing upon the face of the papers in this proceeding, either authorized to arrest or continue to detain the body of the petitioner.

Fifth. That there exists no power in the governor or in Bell or Wells to suspend the privilege of the writ of habeas corpus.

Sixth. That for the reason that no authority is shown which authorizes the detention of the prisoner he is entitled to the privilege of the writ and his discharge.

Seventh. The petitioner denies that on the 23d of March, 1904, or any other time, there has been a state of insurrection, either against the government or constitution or laws of Colorado, in San Miguel County. On the contrary, the petitioner avers that the county was in a state of peace. That shortly before, an organization called the Citizens' Alliance of Telluride was brought into existence by certain mine owners, mine operators, merchants, bankers, liquor dealers, and gamblers, for the purpose of controlling the miners of that county, in violation of law, and in the supposed interests of said organizers, and to that end they organized themselves into a mob, shortly before said date, and had deported about 70 men, theretofore miners in that county.

That these miners announced their intention of returning peaceably to their homes in the county, and that to that end they would resist any further interference with their persons, and would resist any attempts at their deportation, but that their mission in returning was one of peace, and no force whatever would be used by them except in defense of their persons from attack by the said mob. Thereupon certain members of the mob, whose names are signed to the alleged petition to the governor, made the representations set forth in the return, which were a part of the plan of action agreed upon by the Citizens' Alliance, for the purpose of controlling the labor situation; that all the proceedings were part of a conspiracy of the members of the alliance.

Eighth. That as to what the said respondent Bell may believe, either in good faith or otherwise, this petitioner is not informed, but he avers that he is not responsible therefor, and has not, nor would he continue to be an active participant in fomenting any condition of rebellion. On the contrary, he has at all times been a law-abiding citizen and conducted himself at all times and in all places in strict conformity to the laws of the land, and has advised, in his capacity as president of the Western Federation of Miners, that no act of lawlessness occur upon the part of any member of the Federation, to the end that no reflection might be cast upon the organization as other than a law-abiding, peaceable, conservative, and order-loving organization, for the purpose of bettering the social and financial conditions of its various members. The petitioner avers that his incarceration is in violation of the law of the land, of the Constitution of the United States, and of the State of Colorado.

Ninth. He denies that his detention is essential to public justice or to the restoration of public tranquillity, or to the suppression of any state of insurrection, but denies that such state exists, but whether it does or not, he avers is wholly immaterial, since neither the governor nor the respondents have any power whatsoever over the writ or the supension of its privileges.

Tenth. This petitioner denies that the uninterrupted exercise of the military force of the State in San Miguel County is at all necessary, denies that they should be unimpeded by any judicial interference. On the contrary, the petitioner avers that the military force under the command of the governor and of the respondents is acting in violation of the constitution and statutes of the State, in declaring that it is superior to the civil authorities, and is authorized to act in contravention of that power, and that said power is in subordination to it. That it is violating the rights of your petitioner under the Constitution of the United States and the constitution of the State of Colorado.

Wherefore, having fully answered and replied to the said answer and return, your petitioner prays here, and now moves the court upon the face of said answer and return, that he be discharged from the custody of the respondents.

Chief Justice Gabbert announced that it was the court's desire that the full bench should hear and decide the main question, and that could not be until Judge Campbell should return. The attorney of the petitioner then requested that he be admitted to bail pending the hearing. The court took the question of bail under consideration, remanding the petitioner to the military authorities pending a decision. On the same evening, April 21, General Bell and his military forces started back to Telluride with Mr. Moyer as a prisoner.

On April 23, 1904, Adjt. Gen. Sherman M. Bell and Capt. Bulkeley Wells applied to the supreme court for a writ of supersedeas to hold in abeyance the ruling of Judge Theron Stevens requiring them to produce the body of Mr. Moyer in the district court and answer to a writ of habeas corpus, fining them $500 each and ordering their arrest and confinement in jail for contempt of court in not producing Mr. Moyer.

On April 25 the supreme court, Campbell, J., not participating, denied Mr. Moyer's application for bail, pending the settlement of the questions involved in his original application for a writ of habeas corpus, and set May 5 and 6 as the dates for hearing the original application. The opinion, written by Steele, J., said: "To admit the petitioner to bail before we have determined the main question would, it seems to us, be invading the legitimate province of the executive department, and that we are restrained from doing by the fundamental law."

On the same day the supreme court granted the application of Adjutant-General Bell and Captain Wells for a writ of supersedeas to stay the ruling of Judge Stevens against them in the first Moyer habeas corpus case. The two national-guard officers were placed under bonds of $2,000 each, and the court ruled that the case brought before Judge Stevens should remain in statu quo until the entire issue should be decided. On May 5 and 6 the supreme court heard arguments on the habeas corpus case, reserving its decision.

On May 9 the case against William D. Haywood for alleged flag desecration was heard by Justice of the Peace W. F. Hynes, at Denver. His attorney, H. N. Hawkins, admitted that Mr. Haywood had caused to be printed, posted, and distributed circulars on which was a representation of the United States flag and bearing the inscriptions on which the alleged offenses were based. Mr. Hawkins read from the State statute of 1901, which makes the use of the flag for advertising purposes a misdemeanor, and called attention to the fact that the statute does not prohibit the use of a representation of the flag, as do the statutes of New York and Illinois. The attorney moved that the proceedings be dismissed on the ground that no violation of the statutes of Colorado or the United States had been committed by the defendant. On May 13 the magistrate gave a decision in favor of the defendant.

DECISION OF THE STATE SUPREME COURT.

On June 6, 1904 (a few hours after the fatal explosion at the Independence depot), the supreme court handed down its decision in the Moyer habeas corpus case. Following is the opinion, delivered by Chief Justice William H. Gabbert, Associate Justice John Campbell concurring, Associate Justice Robert W. Steele dissenting:

In re Charles H. Moyer.—Original application for writ of habeas corpus.

On behalf of Charles H. Moyer a petition was presented, representing that he was illegally restrained of his liberty in the county of San Miguel, by Sherman Bell and Bulkeley Wells. A writ of habeas corpus was issued directed to these parties, who, on the day it was returnable, produced the petitioner in court, and at the same time made a return to the writ, whereby the jurisdiction of this court to further proceed in the matter was challenged. The averments upon which the claim of want of jurisdiction is based are to the effect that prior to the detention of petitioner His Excellency Governor Peabody, by proclamation, had determined and declared the county of San Miguel to be in a state of insurrection, and that by reason of lawlessness, disturbances, and threatened acts of violence, the civil authorities of the county were unable to cope with the situation. In pursuance of this proclamation, the governor directed respondent, Sherman M. Bell, adjutant-general of the State of Colorado, to forthwith order out such troops as in his judgment might be necessary, and report to the sheriff of San Miguel County, and that he use such means as in his judgment might be right and proper to restore peace and good order in the county and enforce obedience to the laws and constitution of the State.

In pursuance of this order, General Bell proceeded to the county of San Miguel in charge and command of members of the Colorado National Guard, and ever since has been, and now is, actively engaged in quelling the disturbances which called forth the proclamation and the executive order above referred to; that in the discharge of these duties

he became convinced that petitioner had been, and if discharged would continue to be, an active participant in fomenting and keeping alive the conditions of insurrection existing in the county; that he was and is a prominent leader of those engaged in the acts of insurrection and crime, to suppress which the National Guard was called into requisition; that for these reasons he caused the arrest, apprehension, and detention of the petitioner in the county of San Miguel, and does now restrain, detain, and imprison him for the reasons and upon the grounds above set forth; that it is his purpose and intention to release and discharge petitioner from military arrest as soon as the same can be safely done with reference to the suppression of the existing state of insurrection in the county, and then surrender him to the civil authorities, to be dealt with in the ordinary course of justice, after such insurrection is suppressed.

It is further stated that the governor has issued orders and instructions to General Bell not to surrender or release the military custody of petitioner during the existence and continuing condition of affairs in the county of San Miguel, as mentioned and set forth in the proclamation and executive order of his excellency.

It is also stated that the respondent, Bulkeley Wells, is a subordinate military officer under the direct command of General Bell, and that his acts in the premises, with reference to the arrest and detention of petitioner, have been by virtue of express commands in that behalf issued to him by his superior officer. To this return is appended the certificate of Governor Peabody to the effect that the matters and things set forth in the return are true, and that the arrest and present detention of petitioner were had and done in pursuance of the authority conferred upon him by the constitution of the State; that the acts of General Bell in arresting and detaining petitioner were done by his express sanction as governor of the State and commander in chief of its military forces, and that the insurrection recited in his proclamation has not as yet been fully suppressed. To this return a reply was filed by petitioner in the nature of a general demurrer to the effect that it is wholly insufficient in law to constitute any justification whatsoever, either for the arrest, imprisonment, or further detention of petitioner. The reply also alleges that neither on the date of the proclamation and order of the governor nor at any other time has there been a state of insurrection in the county of San Miguel.

Counsel for petitioner contend that on the facts above stated he is entitled to his discharge, because the governor has no power to suspend the privilege of the writ of habeas corpus, or declare martial law, or that, if he has such power, he has not assumed to exercise it. Special counsel representing the respondents controverts these propositions, and further contends that this court is without jurisdiction to proceed further than to deny the relief demanded, or remand the petitioner to their custody. The attorney-general claims that the governor, independent of the questions of his power to declare martial law, suspend the privilege of the writ of habeas corpus, or the question of the jurisdiction of this court, is fully authorized under the constitution and laws of the State to suppress insurrection and lawless conditions through the power of the military under his command, and that his subordinate officers actively engaged in suppressing such insurrection by seizing and holding those engaged in acts of violence

or in advising and aiding such acts, to suppress which the military was called out, can not be interfered with so long as conditions exist which require the action and the presence of the military to correct. Counsel amici curiæ, in their views on these several questions, are divided.

The purpose of proceedings in habeas corpus is to determine whether or not the person instituting them is illegally restrained of his liberty, and we shall proceed to determine whether or not, under the facts stated and the laws of this State, the petitioner is entitled to his discharge, without attempting to pass specifically upon the question raised by his counsel. Before proceeding, however, to a discussion and determination of this question, two propositions are presented which should be disposed of. It is urged by counsel for petitioner that certain averments in the petition for the writ are not controverted by the return. The latter is not treated as an answer to the application, but rather as a response to the writ itself. The averments of the petition are made for the purpose of obtaining the writ, and the respondent, in his answer thereto, simply seeks to relieve himself from the imputation of having imprisoned petitioner without lawful authority, and this he does, or rather, is required to do, under the law, by statements in the return from which the legality of the imprisonment is to be determined, without regard to the statements of the petition for the writ. In short, he is not required to make any issue on the petition for the writ, but to answer the writ. (In re Chipchase, 56 Kan., 357; 43 Pac., 264; Ex parte Durbin, 14 S. W. (Mo.), 821; Simmons *v.* Georgia Iron and Coal Co., 61 L. R. A., 739; In re Boyle, 57 Pac. (Idaho), 706.)

By the reply it is alleged that notwithstanding the proclamation and determination of the governor that a state of insurrection existed in the county of San Miguel, that, as a matter of fact, those conditions did not exist at the time of such proclamation or the arrest of the petitioner, or any other time.

By section 5, Article IV, of our constitution, the governor is the commander in chief of the military forces of the State, except when they are called into actual service of the United States, and he is thereby empowered to call out the militia to suppress insurrection. It must, therefore, become his duty to determine as a fact when conditions exist in a given locality which demand that in the discharge of his duties as chief executive of the State he shall employ the militia to suppress.

This being true, the recitals in the proclamation to the effect that a state of insurrection existed in the county of San Miguel can not be controverted. Otherwise the legality of the orders of the executive would not depend upon his judgment, but the judgment of another coordinate branch of the State government. (Luther *v.* Borden, 7 How., 1; Ex parte Moore, 64 N. C., 802; Martin *v.* Mott, 12 Wheat., 19.)

By the constitution the supreme executive power of the State is vested in the governor, and he is required to take care that the laws be faithfully executed. (Section 2, Article IV.) To this end he is made commander in chief of the military forces of the State and vested with authority to call out the militia, to execute the laws and suppress insurrection. (Section 5, supra.)

This authority is supplemented by the laws of 1897, page 204, section 2, whereby it is provided that when an insurrection in the State exists or is threatened, the governor shall order out the National Guard to suppress it.

These are wise provisions, for the people in their sovereign capacity in framing the Constitution, as well as the general assembly, recognized that an insurrection might be of such proportions that the usual civil authorities of a county and the judicial department would be unable to cope with it. Through the latter, parties engaged in such insurrection might be punished, but its prompt suppression could only be secured through the intervention of the militia.

Being vested with authority to employ the militia for a specific purpose, and it appearing from the return to the writ that the governor has called it into requisition for that purpose, his action through his subordinates can not be interfered with so long as he does not exceed the power which, under the fundamental law of the State and the acts of the legislature in conformity therewith, he is authorized to exercise. (1 Story on the Constitution, 434.)

The crucial question, then, is simply this: Are the arrest and detention of petitioner under the facts narrated illegal? When an express power is conferred, all necessary means may be employed to exercise it which are not expressly or impliedly prohibited.

Laws must be given a reasonable construction, which, so far as possible, will enable the end thereby sought to be attained. So with the Constitution. It must be given that construction of which it is susceptible, which will tend to maintain and preserve the Government of which it is the foundation, and protect the citizens of the State in the enjoyment of their inalienable rights. In suppressing an insurrection it has been many times determined that the military may resort to extreme force as against armed and riotous resistance, even to the extent of taking the life of the rioters.

Without such authority the presence of the military in a district under the control of the insurrectionists would be a mere idle parade, unable to accomplish anything in the way of restoring order or suppressing riotous conduct.

If, then, the military may resort to the extreme of taking human life in order to suppress insurrection, it is impossible to imagine upon what hypothesis it can be successfully claimed that the milder means of seizing the persons of those participating in the insurrection or aiding and abetting it may not be resorted to. This is but a lawful means to the end to be accomplished. The power and authority of the militia in such circumstances are not unlike that of the police of a city or the sheriff of a county, aided by his deputies or posse comitatus, in suppressing a riot. Certainly such officials would be justified in arresting the rioters and placing them in jail without warrant, and detaining them there until the riot was suppressed.—Hallett, J., In re Application of Sherman Parker. If, as contended by counsel for petitioner, the military, as soon as a rioter or insurrectionist is arrested, must turn him over to the civil authorities of the county, the arrest might, and in many instances would, amount to a mere farce. He could be released on bail, and left free to again join the rioters or engage in aiding and abetting their action, and if again arrested, the same process would have to be repeated, and thus the action of the military would be rendered a nullity. Again, if it be conceded that

on the arrest of a rioter by the military he must at once be turned over to the custody of the civil officers of the county, then the military, in seizing armed insurrectionists and depriving them of their arms, would be required to forthwith return them to the hands of those who were employing them in acts of violence, or be subject to an action of replevin for their recovery, whereby immediate possession of such arms would be obtained by the rioters, who would thus again be equipped to continue their lawless conduct.

To deny the right of the militia to detain those whom they arrest while engaged in suppressing acts of violence and until order is restored, would lead to the most absurd results.

The arrest and detention of an insurrectionist, either actually engaged in acts of violence or in aiding and abetting others to commit such acts, violates none of his constitutional rights. He is not tried by any military court or denied the right of trial by jury, neither is he punished for violation of the law, nor held without due process of law. His arrest and detention in such circumstances are merely to prevent him from taking part or aiding in a continuation of the conditions which the governor, in the discharge of his official duties and in the exercise of the authority conferred by law, is endeavoring to suppress. When this end is reached, he could no longer be restrained of his liberty by the military, but must be, just as respondents have indicated in their return to the writ, turned over to the usual civil authorities of the county, to be dealt with in the ordinary course of justice, and tried for such offense against the law as he may have committed. It is true that the petitioner is not held by virtue of any warrant, but if his arrest and detention are authorized by law, he can not complain because those steps have not been taken which are ordinarily required before a citizen can be arrested and detained.

Nor do those views conflict with section 22 of the Bill of Rights, which provides that the military shall always be in strict subordination to the civil power.

The governor, in employing the militia to suppress an insurrection, is merely acting in his capacity as the chief civil magistrate of the State, and although exercising his authority conferred by the law through the aid of the military under his command, he is but acting in a civil capacity. In other words, he is exercising the civil power vested in him by law through a particular means which the State has provided for the protection of its citizens. No case has been cited where the precise question under consideration was directly involved and determined, but in cases where the courts have had occasion to speak of the authority of the military to suppress insurrection and the means which may be employed to that end, it has been stated that parties engaged in riotous conduct render themselves liable to arrest by those engaged in quelling it. In re Kemp, 16 Wis., 382 (413); Luther *v.* Borden, supra; Johnson *v.* Jones, 44 Ill., 142.

The same rule necessarily applies to those found in the zone of the disaffected district who are aiding and abetting the insurrectionists, for such conduct, unless repressed, would result in the continuation of the insurrection, or, at least, render it more difficult to suppress.

We therefore reach the conclusion that, independent of the questions of the authority of the governor to declare martial law, or suspend the privilege of the writ of habeas corpus, that the petitioner, on the showing made by the return, is not illegally

restrained of his liberty. In reaching this conclusion we are not unmindful of the argument that a great power is recognized as being lodged with the chief executive, which might be unlawfully exercised. That such power may be abused is no good reason why it should be denied. The question simply is, does it exist? If so, then the governor can not be deprived of its exercise. The prime idea of government is that power must be lodged somewhere for the protection of the commonwealth. For this purpose, laws are enacted and the authority to execute them must exist, for they are of no effect unless they are enforced. Neither is power of any avail unless it is exercised. Appeals of a possible abuse of power are often made in public debate. They are addressed to popular fears and prejudices, and often given weight in the public mind to which they are not entitled. Every government necessarily includes a grant of power lodged somewhere. It would be imbecile without it. (1 Story on the Constitution, par. 425; 1 Bailey on Jurisdiction, par. 296, p. 309.)

Many authorities have been cited by counsel for petitioner which it is not necessary to attempt to review. They are not in conflict with the conclusions reached in this case. They treat of the power of the President to declare martial law, to suspend the privilege of the writ of habeas corpus; of the authority of the military to arrest, try, and punish persons not actually in the military service, and when the military may or may not temporarily supersede the usual civil authorities. None of these questions are involved in the present case. In fact, counsel for petitioner practically concede that the questions of the authority of the governor to declare martial law and suspend the writ of habeas corpus are not involved, because, they say, if he has such authority he has not assumed to exercise it; but it is immaterial what power in this respect may be vested in the governor, or whether he has, in fact, attempted to declare martial law or suspend the writ of habeas corpus. The petitioner was lawfully arrested by the military authorities while the work of suppressing the insurrection in San Miguel County was in progress. Such arrest being lawful, his restraint by respondents until it is suppressed is not illegal.

The writ is discharged and the petitioner remanded to the custody of the respondents.

Writ discharged and petitioner remanded. Steele, J., dissents.

It will be noticed that the court did not pass specifically upon the questions relating to the right of the governor to declare martial law or to suspend the writ of habeas corpus. The point mainly considered by the court was: Were the arrest and detention of the petitioner, under the facts recited, illegal? The decision being in the negative, its practical effect was that Mr. Moyer should remain as a military prisoner at Telluride until Governor Peabody should abolish military rule there. On June 8 Attorney-General N. C. Miller gave out an interview in which he said:

The supreme court has given the governor all the authority necessary to suppress insurrection, but not the power to suspend the privilege of the writ of habeas corpus. If the governor had the right to

suspend the privilege of the writ of habeas corpus, this would forbid all inquiry into the causes of arrest and detention.

On June 11 a petition for a rehearing in the Moyer habeas corpus case was filed in the supreme court. Eight reasons why there should be a rehearing were presented, as follows:

First. That the said opinion and decision is in violation of the rights guaranteed the petitioner by the Constitution of the United States.

Second. That said opinion and decision is in violation of the fourteenth amendment of the Constitution of the United States, in that it abridges the privileges and immunities of the prisoner, who is a citizen of the United States, as guaranteed by that amendment.

Third. That said opinion and decision is in violation of the fourteenth amendment to the Constitution of the United States, in that it deprives the petitioner of his liberty without due or any process of law.

Fourth. That said opinion and decision is in violation of the fourteenth amendment to the Constitution of the United States, in that it denies to the petitioner the equal protection of the law.

Fifth. That said opinion and decision is in violation of the fourth amendment to the Constitution of the United States, in that it deprives the petitioner of the security of his person without due warrant or other process of law.

Sixth. That said opinion is in violation of the fifth amendment to the Constitution of the United States, which provides that no person shall be deprived of his liberty without due process of law.

Seventh. That said opinion and decision is in violation of the sixth amendment to the Constitution of the United States, which provides that one accused of crime shall be entitled to a speedy trial by jury.

Eighth. That said opinion and decision is in violation of the sixth amendment to the Constitution of the United States, which requires that the petitioner be informed of the nature and cause of the accusation against him.

On June 15 E. F. Richardson, attorney for Moyer, secured from Judge Amos M. Thayer, of the United States circuit court of the eighth circuit, sitting at St. Louis, Mo., in and for the district of Colorado, a writ of habeas corpus, which ordered that Governor Peabody, Adjutant-General Bell, and Captain Wells should, on July 5, produce the body of Moyer before that tribunal and show cause why he should not be given his liberty.

On the same day, June 15, Governor Peabody ordered that Capt. Bulkeley Wells, in command of the militia at Telluride, should relieve from active duty at 9 p. m., on that day, all soldiers at that place. By command of Governor Peabody, Adjutant-General Bell ordered Captain Wells to turn over all military prisoners, including Charles H. Moyer, to the sheriff of San Miguel County at Telluride, at the hour of 8.59 p. m. on the same day. This order was obeyed by Captain Wells, but on the same day, June 15, and before the

delivery of Moyer to the sheriff of San Miguel County, the latter was requested by Edward Bell, sheriff of Teller County, to hold Moyer on the charge of insurrection and conspiracy, based on the fatal explosion in the shaft of the Vindicator mine in November, 1903. On June 17 the district attorney at Telluride dismissed the charges of flag desecration against Moyer. On June 18 Moyer was taken to Cripple Creek by two deputy sheriffs who had come from Teller County bearing a warrant for his arrest.

DISSENTING OPINION.

In the State supreme court, on July 1, the dissenting opinion of Justice Robert W. Steele was handed down. Extracts therefrom follow:

The authority is overwhelming that the position of the governor can not be sustained; that the power of suspending the privilege of the writ of habeas corpus is legislative and not executive; that martial law can only prevail in places where the civil law is overthrown by force, and that it exists only so long as it is necessary to reinstate the courts; that martial law can not prevail where the courts are open and exercising their functions; that the judicial department will take notice whether the courts are open or have been overthrown by superior force. * * *

I believe that the Constitution has been "unnecessarily assailed and rudely violated" by the head of the executive department, and I further believe that this court has removed the landmarks which our fathers have set, and my duty requires me to withhold my approval. * * *

It is held by the court that as the governor, under the constitution, is empowered to suppress insurrection or repel invasion, the recitals in his proclamation that an insurrection exists can not be controverted, because it becomes his duty to determine as a fact when a condition exists that demands the exercise of his power, and that the judicial department can not substitute its judgment for that of the executive department in matters calling for the exercise of discretion. As I have before stated, I do not regard the proclamation as of great importance. It does not seem to me to be necessary to proclaim an insurrection before undertaking to suppress it, and I am satisfied that a proclamation is not a condition precedent to the exercise of the power. * * *

The court has not construed the constitution; it has ignored it, and the result is that it has made greater inroads on the constitution than it intended, and that not one of the guarantees of personal liberty can now be enforced. * * *

When the court says that, because the governor is the head of the executive department of the State, that when he takes command of the military forces he is still at the head of the civil power, and that the section of the bill of rights that declares "that the military shall always be in strict subordination to the civil power" has no other meaning than that the military shall always be under the command of the governor, it is simply annulling that section of the bill of rights. The section referred to must have some meaning. It can

have no meaning if it is construed as the court construes it. I think it has a meaning. The language used is not obscure or ambiguous. It undoubtedly means that the civil power shall control at all times, in war and in peace. The Supreme Court of the United States has said that the attempt to make the military independent of and superior to the civil power by the King of Great Britain was deemed by our fathers such an offense that they assigned it to the world as one of the causes which impelled them to declare their independence. (4 Wall., 2.)

Again the court says: "To deny the right of the militia to detain those whom they arrest while engaged in suppressing acts of violence and until order is restored, would lead to the most absurd results."

This sentence inflicts a fatal wound upon civil liberty, suspends indefinitely the privilege of the writ of habeas corpus, annuls that section of the Constitution which declares that no person shall be deprived of liberty without due process of law, and characterizes the declaration of the Supreme Court of the United States as an absurdity.

I say this because the opinion declares that the governor is the sole judge of the conditions which impel him to call forth the militia, and to withdraw it, and of the necessity to imprison and detain; and this without regard to the guilt or innocence of the person imprisoned. * * * I know of no authority that vests in the governor the power to arrest one who he may think will commit an offense. No such power is granted by the Constitution nor bestowed by statute. * * *

Moyer may be guilty of the most heinous offenses. It may be that he deserves to linger in prison the remainder of his natural life, but he is entitled to his liberty unless some one, in proper form and before a proper tribunal, charges him with violation of the law. But the court says he is held by due process of law. Whatever war power the governor may have, this power is not due to process of law. * * *

Again, the court says: "If, then, the military may resort to the extreme of taking human life in order to suppress insurrection, it is impossible to imagine upon what hypothesis it can be successfully claimed that the milder means of seizing the persons of those participating in the insurrections or aiding and abetting it may not be resorted to."

The power to take the life of an insurgent does not include the power to take the life of a person not an insurgent. And, if that be true, then by the process of reasoning that the court adopts, if the military authorities may not take the life of one not an insurgent, they may not imprison a person who is not an insurgent. * * *

The decision has applied the articles of war to conditions that do not justify their application. Whatever may be said of the deplorable condition of San Miguel County that resulted in foul assassinations, in murder, and in plunder, so revolting to the law-abiding citizen, these conditions were past at the time the petitioner was taken there. The civil authorities of the county, with the aid of the military, had full possession and control, and if the petitioner was in any way implicated in the commission of these foul crimes it should have been so charged. * * *

If one may be restrained of his liberty without charges being preferred against him, every other guarantee of the Constitution may be denied him. * * * The constitutional privileges are not, in the nature of things, separable. It was intended by our fathers that all should be inviolable except one, and that to be suspended by the legislature only in case of great emergency. Martial law exists or it does not exist. When it exists there is no civil law. Martial law and civil law can not exist together. If the civil law can enforce one guarantee, it can enforce all. If the civil law is overthrown, it is powerless to enforce any right. When martial law does not prevail, unless the privilege of the writ of habeas corpus is suspended, every right guaranteed by the Constitution is enforceable, and the Constitution is violated, rudely violated, when one is deprived of liberty without due process of law.

Habeas corpus is the proper remedy to release from arbitrary arrest, and unless its privileges have been suspended, one is not subject to arrest on suspicion merely, and detention beyond the time fixed by statute for the return of the writ. As the privilege of the writ has not been suspended, as the courts are open, as martial law does not prevail, and as no charge has been preferred against the petitioner, he should be discharged. * * *

When we deny to one, however wicked, a right plainly guaranteed by the Constitution, we take that same right from every one. When we say to Moyer: "You must stay in prison, because if we discharge you you may commit a crime," we say that to every other citizen. When we say to one governor, "You have unlimited and arbitrary power," we clothe future governors with that same power. We can not change the Constitution to meet conditions. We can not deny liberty to-day and grant it to-morrow; we can not grant it to those theretofore above suspicion and deny it to those suspected of crime, for the Constitution is for all men—"for the favorite at court, for the countryman at plow"—at all times and under all circumstances.

We can not sow the dragon's teeth and harvest peace and repose; we can not sow the wind and gather the restful calm.

Our fathers came here as exiles from a tyrant king. Their birthright of liberty was denied them by a horde of petty tyrants that infested the land—sent by the king to loot, to plunder, and to oppress. Arbitrary arrests were made, and judges aspiring to the smile of the prince refused, by "pitiful evasions," the writ of habeas corpus. Our people were banished; they were denied trial by jury; they were deported for trial for pretended offenses, and they finally resolved to suffer wrong no more, and pledged their lives, their property, and their sacred honor to secure the blessings of liberty for themselves and for us, their children. But if the law is as this court has declared, then our vaunted priceless heritage is a sham, and our fathers stood "between their loved homes and the war's desolation in vain."

On July 4, Sheriff Edward Bell, of Teller County, brought Charles H. Moyer to Denver that he might furnish bail, fixed at $10,000. Mr. Moyer had been arrested on March 26, and was constantly confined from then until July 5, when he was released on a bond furnished by a fidelity and guarantee company. Warrants charging the same crime (complicity in the fatal explosion at the Vindicator

mine) were served also on J. C. Williams, vice-president, W. D. Haywood, secretary-treasurer, and other officers of the Western Federation of Miners, and each was released on furnishing a $10,000 bond assured by the same company.

A silent indorsement of the official acts of President Moyer was given in the annual convention of the Western Federation of Miners on June 7, when officers were elected. Section 1 of Article III of the constitution of the Federation provides:

The officers of the Federation shall consist of a president, a vice-president, a secretary-treasurer, and an executive board of nine members, including the three general officers before named, of whom the president shall be chairman, all of whom shall be elected from the delegates present by a majority of the votes cast at each annual convention, and shall hold office until their successors are duly elected and qualified and enter upon the duties of their office.

President Moyer being in a military prison, the delegates simply refrained from making any nomination for the office, the effect of which was to continue him as the duly qualified head of the organization. During the period of his confinement in prison, his official duties were attended to by Vice-President J. C. Williams, of Grass Valley, Cal., who was reelected on June 7.

In the United States circuit court at St. Louis, July 5, Attorney-General Miller filed a return to the writ of habeas corpus which had been issued by Judge Thayer on behalf of Moyer. The answer of the respondents alleged that at no time since the writ had been served upon them had Moyer been in their custody, and therefore it was not within their power to produce him in this court.