

agreeing to the underlying guarantee of the Article. The suggested amendments were rejected, but the assumed doctrine was not controverted. It is reasonable to conclude that in this brief interlude in the 1864 debates, the proper purpose of Article 32 is found to guarantee to the civilian a civilian trial.

In the critical years of the 1770's, colonial America hungered for more than the rights of Englishmen, but the first state constitutions, sparked from the conflagration of July 4, 1776, not only guaranteed new freedoms of speech and religion but declared as well many rights known to the colonials as former subjects of the Crown.

The civilian's access to common law trial was such a right. In the same anxious days when Maryland wrote her first constitution, sister states provided "in convention assembled" that

"No person in any case be subject to law-martial, or to any penalties or pains, by virtue of that law, except those employed in the army or navy and except the militia in actual service."⁹

The civilian's right to common-law trial has its roots in the reign of Richard II. The court of the "constable and marshal" had been ordained to deal summarily with "contracts touching deeds of arms and of war out of the realm," but the people were anxious lest the "marshal's law" encroach upon their right to the "good laws" of old, i.e., the common-law process. Statutory enactments sought to curtail the as-

⁹ MASS. CONST., DEC. OF RIGHTS, art. 28; N.H. CONST. art. I, § 34; S.C. CONST. art. I, § 27. VT. CONST. art. I, § 17, added "but by authority of the legislature."

sumption of new powers by the marshal.¹⁰

"The Kings of the realm, preparatory to an actual war, were used to impose rules and orders for the due order of their soldiers, together with certain penalties on the offenders, and this was called martial law."¹¹ It was the extension of martial law to civilian insurgents which brought unrest. The culminating legislation was the 1628 Petition of Rights¹² which provided "that the aforesaid Commissions, for proceedings by Martial Law, may be revoked and annulled."

The so-called "Mutiny Act" of 1689 affirmed the principle that:

"no man can be forejudged of life or limb, or subjected in time of peace to any kind of punishment in this realm by *martial law* . . . ; yet, nevertheless, it being requisite, for the retaining of all the before-mentioned forces and other persons subject to *military law* . . . in their duty, that an exact discipline be observed," etc.¹³ (emphasis added).

As one writer has indicated,¹⁴ the above statutory equivalence of "martial law" and "military law" is noteworthy. To Englishmen near the turn of the Eighteenth Century, "martial law" had

¹⁰ 8 Rich. 2, c.5 (1384); 13 Rich. 2, c.2 (1389); 1 Hen. 4, c.14 (1399).

¹¹ M. HALE, HISTORY OF THE COMMON LAW, quoted in W. BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW 372 (1914).

¹² 3 Chas. 1, c.1 (1628).

¹³ Mutiny Act of 1689 quoted in Fairman, *infra*, note 14, at 1258.

¹⁴ Fairman, *The Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253, 1258 (1942). At 1258, n.26, the author comments "In several of our early state constitutions, martial law is used in the same connotation." The Maryland Article is then cited.