Notre Dame Law School
NDLScholarship

Journal Articles | Publications

1943

Military Action in Labor Disputes

William Burns Lawless
Notre Dame Law School

Follow this and additional works at: https://scholarship.law.nd.edu/law_faculty_scholarship

 Part of the Labor and Employment Law Commons, Legal History Commons, and the Military, War, and Peace Commons

Recommended Citation
William B. Lawless, *Military Action in Labor Disputes*, 18 Notre Dame L. 288 (1942-1943).
Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/1020

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

tary.[33] The courts closely examine the facts to see that there has been a divestiture of control from the grantor during his lifetime. If the instrument remains within his control, courts declare his intention testamentary; that is, from his acts it is apparent that he intended to keep the property until his death.[34] Delivery of the instrument may be also validly made to a third party for the actual grantee to be delivered at the death of the grantor, and this will not make the conveyance testamentary.[35]

Recapitulation of salient facts and principles will bring within view the answer sought here. We have seen that a conveyance made within one day of death was upheld as an *inter vivos* disposition. So long as the grantor clearly intends to make an *inter vivos* disposition and validly delivers the instrument, his motives seem of little consequence, providing they are legitimate. Even when the grantor makes a will and a deed on the same day this does not destroy the *inter vivos* nature of the absolute conveyance. Presence of valuable consideration given in exchange for the property is a helpful test in support of an *inter vivos* disposition, although it is not an essential element thereto. Consequently so long as the grantor executes an absolute deed and shows by his acts and words unequivocally that it is his intention to pass the title presently and immediately however near to death he is, seems of little consequence. Nor does it matter who the grantee is. In more graphic terms, in the last few minutes of life a grantor may execute an absolute deed and deliver it, so long as he is mentally competent, and it will be given effect as an *inter vivos* disposition.

Warren A. Deahl.

MILITARY ACTION IN LABOR DISPUTES.—Historians of labor in the United States place the beginning of American labor movements in the year 1827 when at Philadelphia American wage earners for the first time joined together as a class, regardless of class lines, in a contest with employers. As early as 1786 the printers "turned out" demanding a minimum wage of six dollars a week; still, it was not until the Philadelphia meeting that the first union of trade associations organized. A swift century of machine development and mass production has knit these original strands of organized effort into a vast pattern of labor federations and unions. Notions of collective bargaining, employer obligations and strikes quickly followed the wake of progressive organization. Where meditation failed strikes were employed.

---

33 Rypka v. Field, ... Cal. App. ....., 115 Pac. (2) 521 (1941).

34 Oswald v. Caldwell, 225 Ill. 224, 80 N. E. 131 (1906); but see: Szymczak v. Szymczak, 306 Ill. 541, 138 N. E. 218 (1923).

35 Southern v. Southern, ... Mo. ....., 52 S. W. (2) 868 (1932).

The great railway strike of 1877 paralyzed almost all the lines between the Atlantic and the Mississippi. Pitched battles took place between strikers and scabs. So great was the danger to the disinterested citizenry that the five governors of Maryland, Ohio, Pennsylvania, Illinois and New York called out their respective militias and ordered *martial* law. In Pittsburgh alone scores of lives were lost and $2,000,000 worth of property burned to the ground. Finally, the strike was broken with the aid of Federal troops.

Interference by state authority in this violence warned labor that strike violence would not be tolerated. Then, as now, almost complete uniformity existed in the constitutional and statutory provisions of the various states on the relationship of the executive and the militia. In every state constitution except New York it is provided that the militia shall be subordinate to the civil authority. Provisions prohibiting the suspension of the writ of habeas corpus are found in all of the states. Likewise, forty-seven of the states provide in their constitutions that the governor be commander-in-chief of the military forces while Maryland designates it by statute. When the several governors declared a state of martial law to exist at the time of the great railway strike, they relied upon the words of Chief Justice Taney in *Luther v. Borden.*[1] He upheld the right of the Rhode Island legislature to declare a state of martial law because of Dorrs rebellion. He stated: "If the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the state, as to require the use of military force and the declaration of martial law, we see no ground on which this court can question its authority." This decision, however, dealt more with the power of the legislature than that of the governor. It was not until 1909 that the question of the governor's power to call out the militia as a protection against strike violence came squarely before the high tribunal.

In September, 1903, the Western Federation of Mines struck for an eight-hour day. Violence predominated until troops arrived in November. When a purported peace agreement was arranged in the following March, the militia withdrew. A few days later a mob of "Citizen Alliance Members" (vigilantes of the time) searched the towns in San Miguel county, broke into residences and collected about sixty miners who were too friendly with the strikers. The group was escorted from the county with orders never to return. When they attempted to come back in mass, the civil authorities requested the governor to proclaim martial law. The governor complied. On the same day one Moyer, President of the Federation, was arrested and imprisoned by the militia. When the governor concluded his term of office, Moyer sued on grounds that he had been denied due process of law by the imprisonment. The

1 Luther v. Borden, 7 How. 1 (U. S.) (1848).

case [2] came before the Supreme Court. A unanimous decision supported the action of the governor and Mr. Justice Holmes stated the principle: "So long as such arrests are made in good faith and in the honest belief that they are needed to head the insurrection off, the governor is the final judge. . . . When it comes to a decision by the head of the state on a matter involving its life, the ordinary rights of the individual must yield to what he deems the necessities of the moment. *Public danger warrants the substitution of the executive process for judicial process.*" The last sentence of this extract from the opinion neatly summarizes one of the greatest points in favor of executive interference in labor disputes — expediency. By granting the governor power to enforce his own proclamations, he is capable of subduing mob violence and widespread damage. The principle is not undisputed, however. Professor Charles Fariman labels this emergency, delegation of judicial process:[3] "A defective method likely to degenerate into a grim class struggle. One cannot deny that the state militia has on some occasions served as the champion of employers against striking workmen." This view has been strengthened by the findings of the Colorado Strike Investigation [4] where state militiamen seemed to be on the side of the mine operators. Despite the minority view as expressed by Professor Fariman, both reason and authority dictate that when in pursuance of law, an executive proclaims a condition of insurrection or of martial law, that decision is final.[5]

From the case rulings we have seen that the executive power of the state, the governor, may at his discretion call out the militia and proclaim a state of martial law. This conclusion, however, develops another problem. In time of a violent strike what are the limits upon the governor's delegated power of judicial interpretation? Admittedly there is discord between the Federal District Courts in defining the governor's scope of constitutional power. As in similar problems the courts express negative limits rather than positive powers. While it is impossible to draw definite axioms, we may at least examine the limitations. The early and much quoted, *Ex Parte Mulligan,*[6] stated: "Martial law can never exist where the courts are open and in proper and unobstructed exercise of their jurisdiction." Yet, the states have not followed this pattern of procedure. Often the state executive proclaims martial law but neither closes the courts nor supplants them with military court martials governing with the Articles of War. *In Re Boyle,*[7] *In Re Moyer,*[8] and *Ex*

2 Moyer v. Peabody, 212 U. S. 78, 29 Sup. Ct. 235 (1909).

3 See 19 Cornell L. Q. 20.

4 House Docket, No. 1630, 63rd Congress, 3rd Sess. at p. 16.

5 Vanderheyden v. Young, 11 Johns (N. Y.) 150 (1814); Martin v. Mott, 12 (Wheat.) U. S. 19 (1827); Luther v. Borden, 7 How. 1 (U. S.) (1848); Ex Parte Moore, 64 N. C. 802 (1870); In Re Boyle, 6 Idaho 609 (1899); Frank v. Smith, 142 Ky. 232, 134 S. W. 484 (1911).

6 Ex Parte Milligan, 4 Wall 2 (U. S.) (1866).

7 In Re Boyle, 6 Idaho 609, 57 Pac. 706 (1899).

Parte McDonald [9] applications for writs of habeas corpus were brought and denied on grounds that the governor's declaration was conclusive of insurrection and that preventive detention during the emergency was a lawful means of accomplishing his duty to suppress the insurrection.

A problem of serious nature arose in West Virginia when an acute labor dispute broke out in the coal fields. The governor proclaimed that "a state of war" existed. The Court of Appeals held this declaration to be conclusive and thereupon conceded to the governor powers appropriate to a commander on the field of battle. The Court refused to intervene when a military commission sentenced civilians to the penitentiary for terms of years. This exercise of punitive martial law in West Virginia gave rise to the setting up of military tribunals for the trial of civilians during the longshoremans strike at Galveston in 1920 and again in the packers strike at Nebraska City in 1922. In each case the military custody was challenged in a Federal District court and in each case habeas corpus was denied while the exercise of the "war-power" was expressly upheld.[10] *Smith v. Whitney* [11] ruled that the acts of a court martial within the scope of its jurisdiction could not be controlled or reviewed in the civil courts by writ of prohibition or otherwise. This would lead us to reason that an aroused striker causing a physical injury or death to his fellow might enjoy his privileges under the fourteenth amendment before a military court if the governor had proclaimed martial law in the strict sense. Military tribunals have a reputation for their expeditious process, a reputation which might be well impressed upon the perpetrators of mob violence.

It is vital to note that in all the cases where the executive proclamation of martial law is questioned on constitutional grounds, the courts are careful to investigate the grounds on which the state executive made his declaration. The circumstances of the insurrection, the good-faith of the governor and the suppression of any right in its relation to restoring law and order are all considered. For example: *In Stirling v. Constantin* [12] the Governor of Texas desirous of limiting the production of oil declared a state of martial law to exist, fixed by proclamation the amount of oil to be shipped and claimed that since martial law existed he and his adjutant-general were not amendable to court action. The Supreme court took jurisdiction in this case to prevent the denial of due process of law and condemned the governor for calling out the troops to act as civil officers. Although this decision did not involve a state of martial law proclaimed in time of labor violence, it shows that

---

8 In Re Moyer, 35 Col. 154, 85 Pac. 190 (1905).

9 Ex Parte McDonald, 49 Mont. 454, 143 Pac. 947, 952 (1914).

10 U. S. ex rel. Seymour v. Fischer, 280 Fed. 208 (1922); U. S. ex rel. McMasters v. Walters, 268 Fed. 69 (1920).

11 Smith v. Whitney, 116 U. S. 167, 29 Law ed. 601, 6 Sup. Ct. (1886).

12 Stirling v. Constantin, 287 U. S. 378, 53 Sup. Ct. 190 (1932).

the governors discretion is subject and amendable to review. There seems to be no valid reason why this doctrine of judicial review would be inapplicable where the governor acted in bad faith.

This problem of military action in labor disputes has been widely heralded throughout the last decade. In the year ending June 30, 1934, 7000 guardsmen were called out in 28 states to restore law and order to districts overcome by strike and riot. In the next year the national guard was called 84 times in 31 states. Each subsequent year shows increasing number of calls until 1940.[13] Of these, two cases are especially worth noting. On July 26, 1934 Governor Olson of Minnesota declared martial law for the city of Minneapolis. The Adjutant-General of the state militia conducted troops to the city where he promulgated certain rules and regulations in order to prevent injury and quell strike violence. Only certain trucks were permitted to use the highways under the restrictions. One Powers Mercantile Company refused to obey on grounds that the regulation was discriminatory and that the power of the governor was unconstitutional. The court ruled:[14] "The means and methods he has adopted for restoring law and order are not subject to review by the courts, since such matters must necessarily rest entirely in his discretion as chief executive of the state of Minnesota." . . . Despite that decision, the same Federal District Court ruled two years afterwards that:[15] "A rule (as expounded in the Powers case) which would permit an official, whose duty it was to enforce the law, to disregard the very law which it was his duty to enforce, in order to pacify a mob or suppress an insurrection, would deprive all citizens of any security in the enjoyment of their lives, liberty or property. The churches, the stores, the newspapers, the channels of communication and the homes of the people could be closed under such a rule. Carried to its logical conclusion, under such a rule the banks could be closed and emptied of their cash to prevent bank robberies; the post-offices locked to prevent mail being robbed and the citizens kept off the street to prevent hold-ups. A state government should not suppress rights which it is the duty of the state to defend . . . in order to suppress disorder." These two Minnesota cases represent diametrically opposed judicial opinions as to the executive power. When we consider that the court here changed its opinion from one extreme to the opposite in a period less than two years, we better realize the discord, although the greater weight of authority supports a broad scope of executive power when an emergency arises from labor violence.

When Governor McNutt declared martial law to protect private property from damage in 1935, Otis Cox brought an action for an injunction against McNutt and by bill of complaint alleged the declara-

13 See 13 Wisconsin L. R. 314.

14 Powers Mercantile Co. v. Olson, 7 F. Supp. 865 (1934).

15 Strutwear Knitting Co. v. Olson, 13 F. Supp. 384 (1936).

tion null and void. The court held:[16] "The power of the governor and his subsequent acts are justified in that they are to be exercised upon certain emergencies, upon great occasions of state and under circumstances which may be vital to the existence of the union. The nature of the power necessarily implies a great range of honest judgment falling within the executive exercise to maintain peace. Constitutional rights must give way in time of insurrection. The Governor may order arrests to prevent hostility."

These incidents of past experience point the way for definite conclusions. First, the executive proclamation that insurrection exists is decisive. This power is expressly granted in either the state constitution or in the statutes. Second, the executive authority may institute a qualified degree of martial rule and the court will uphold all measures which are shown to have seemed necessary and proper at the moment of actual or threatened strike violence. Generally, we may say that the executive power to initiate military action is comensurate with the emergency. If the situation is grave, the civil courts may be closed and a military commission appointed by the governor to substitute for the judiciary. In all events the power is potentially a vast one. Discriminately applied it bargains a temporary suspension of rights for a restoration of law and order. We realize the conflict between the decision of the state and the personal liberty of the individual but justify such military action on the maxim: *"Salus populi est suprema lex."*

William B. Lawless, Jr.

PRESUMPTION OF SURVIVORSHIP WHERE TWO PERSONS DIE IN COMMON DISASTER — GENERALLY — AND IN PENNA. IN PARTICULAR.— This is a problem which deserves a great amount of consideration. It has been heatedly discussed from its inception and is even yet undetermined in some jurisdictions in the absence of statute. In spite of the disagreement among legal minds over a period of years, we can safely say that now a general rule has been formulated on the proposition.

The common law rule is commonly stated to be that where two or more persons perish in the same disaster and there is no fact or circumstance to prove which survived, the law will no more presume that all died at the same instant than it will presume that one survived the other.[1] In the absence of evidence from which the contrary may be inferred, all may be considered to have perished at the same moment, not because that fact is presumed, but because, since those asserting the contrary have failed to prove it, property rights must necessarily be

16 Cox v. McNutt, 13 F. Supp. 355 (1935).

1 Carpenter v. Severin, 201 Iowa 969, 204 N. W. 448 (1925).