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LIABILITY OF GOVERNOR FOR UNLAWFUL IMPRISONMENT OF PARTIES THREATENING DISORDER DURING PERIODS OF INSURRECTION.

As an aftermath to the late unpleasantness in Colorado and Idaho in which certain officials of the Western Federation of Miners were implicated in several serious embroglios with the authorities of those states comes the determination by the Supreme Court of the United States of a suit by Charles H. Moyer, president of that labor organization, against ex-Governor James H. Peabody, for false imprisonment.

The ground of this action against Governor Peabody was the arrest and kidnaping of plaintiff by the governor previous to his extradition to the jurisdiction of the State of Idaho. It was alleged in the petition that plaintiff's imprisonment was without probable cause, and that no proper complaint was laid against him as a ground for his arrest. It was disclosed upon the hearing, however, that the governor had declared a certain county to be in a state of insurrection, had called out troops to put down the trouble, and had ordered that the plaintiff should be arrested as a leader of the outbreak, and should be detained until he could be discharged with safety, and that then he should be delivered to the civil authorities, to be dealt with according to law.

In other words, the position of the plaintiff was that the action of the governor, sanctioned to the extent that it was by the decision of the supreme court on habeas corpus proceedings (35 Colo. 154, 91 Pac. 738), was the action of the state, and therefore within the 14th Amendment; but that, if that action was unconstitutional, the governor received no protection from personal liability for his unconstitutional interference with the plaintiff's right. It was admitted, as it must have been, that the governor's declaration that a state of insurrection existed was conclusive of that fact. It was admitted also that the arrest alone would not necessarily have given a right to bring this suit. Luther v. Borden, 7 How. 1, 45, 46, 12 L. Ed. 581, 600, 601. But it was contended that a detention for so many days, alleged to be without probable cause, at a time when the courts were open, without an attempt to bring the plaintiff before them, makes a case on which he had a right to have a jury pass.

Justice Holmes rendered the decision of the court, and held that what might not be due process of law during a time of perfect tranquility, would be perfectly justified during a time of unrest and insurrection, and that executive officers acting honestly, but unreasonably, and even harshly, would not be judged in the light in which the case presents itself to the historian, but to a man compelled to act in the midst of the excitement.

Speaking further on the nature of arrests during such periods of social unrest, the learned judge said: "Such arrests are not necessarily for punishment, but are by way of precaution, to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office, on the ground that he had not reasonable ground for his belief. If we suppose a governor with a very long term of office, it may be that a case could be imagined in which the length of the imprisonment would raise a different question. But there is nothing in the duration of the plaintiff's detention or in the allegations of the complaint that would warrant submitting the judgment of the governor to revision by a jury. It is not alleged that his judgment was not honest, if that be material, or that the plaintiff was detained after fears of the insurrection were at an end. No doubt there

are cases where the expert on the spot may be called upon to justify his conduct later in court, notwithstanding the fact that he had sole command at the time and acted to the best of his knowledge. That is the position of the captain of a ship. But, even in that case, great weight is given to his determination, and the matter is to be judged on the facts as they appeared then, and not merely in the light of the event. Lawrence v. Minturn, 17 How. 100, 110, 15 L. ed. 58, 62; The Star of Hope, 9 Wall. 203, 19 L. ed. 638; The Germanic (Oceanic Steam Nav. Co. v. Aitken) 196 U. S. 589, 594, 595, 49 L. ed. 610, 613, 25 Sup. Ct. Rep. 317. When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process. See Keely v. Sanders, 99 U. S. 441, 446, 25 L. ed. 327, 328. This was admitted with regard to killing men in the actual clash of arms; and we think it obvious, although it was disputed, that the same is true of temporary detention to prevent apprehended harm."

NOTES OF IMPORTANT DECISIONS.

MASTER AND SERVANT—IS A CONTRACT WITH A WRECKING COMPANY TO CLEAR GROUND IN RETURN FOR THE WRECKAGE, A SALE OR AN EMPLOYMENT?—A very interesting question of law arose recently in the English Court of Appeal in the case of Mulrooney v. Todd, 73 J. P. 73, where it was held that a contract whereby the city of Bradford desiring to clear a piece of ground for the purpose of erecting a market contracted with one Todd to wreck the old buildings, for which service Todd agreed to take the wreckage and also to pay the city fifteen pounds. During the wrecking of the building, plaintiff's intestate was killed, for which injury suit was brought against Todd and the city of Bradford. C. A. Russell, K. C., counsel for the municipality, argued that his client was not liable for the reason that the contract with Todd was not the employment of a vice-principal, but a sale of goods. The court of appeal refused to accede to this contention and held the city liable for the injury.

On the question whether the contract above set forth was a sale or an employment, Cozens-Hardy, M. R., said: "It has been contended that this was really a contract for the sale of goods. I am not so sure that it may not be a contract for the sale of goods, but I think, having regard to the whole transaction, that it was not primarily a contract for the sale of goods. It was a contract entered into by the corporation with Todd in order that the site might be utilized for the purposes of their market, and in order to achieve that they said that Todd might have all the materials, he undertaking to clear the site and, as the materials were worth more than the cost of the labour, he was to pay them £15 in addition. I do not regard this as an ordinary contract for the sale of goods where the purchaser has to remove the goods from off the premises. I think there was an express obligation here binding Todd to remove the bricks and clear away the rubbish. That was the primary intention of the contract, and that Todd was to be entitled to keep the bricks was only one element in the payment for the work that he undertook to do on behalf of the corporation. It seems to me that this was work undertaken by the corporation, and it was done by virtue of the contract made with Todd for that purpose."

Another member of this learned court, Fletcher Moulton, L. J., said: "The very able argument of Mr. Russell in this case rested on a method of advocacy which is very apt to mislead the court and against which we have to be on our guard. With great skill he showed that this contract could be regarded as a contract for the sale of goods, and thereupon he took a variety of well-chosen instances of contracts for the sale of goods, as if they were parallel cases with the contract in the present case. The fallacy lies in this: A contract may well be a contract for the sale of goods, but not merely a contract for the sale of goods; it may be a complex contract; it may be a contract for the sale of goods and also a contract for work to be done. When one