weight of authority and the better reasoning. The buyer has the possession of the property and the seller cannot refuse to transfer title on payment of the price.[5] It has also been decided that the benefit of increase goes to the conditional buyer.[6] "Though payment be a condition precedent to the vesting of legal title, it is not a condition precedent to the vesting of a right of property in the buyer, called in the cases a 'special property'. The transaction is, therefore, properly called a conditional sale, not a conditional contract to sell."[7]

The contract in the principal case imposed a duty upon the vendee to return the safe to the vendor in good order in any event. By suing for the price the court under the established rule held that the seller had waived his right to make a claim based upon his right to possession.[8]

By this decision the buyer's right under a conditional sale must be looked upon as a mere contract right and the seller must be considered as the owner of the property. The seller can sue for the price in the event of destruction of the goods only when the contract expressly provides that the loss shall fall upon the buyer.

M. C. L.

STATE OF INSURRECTION: POWER OF MILITARY UNDER EXECUTIVE PROCLAMATION.—The Governor of Montana issued his proclamation to the effect that the county of Silver Bow was in a state of insurrection, under martial law, and under the jurisdiction of the military authorities. One McDonald was seized by the military and detained as a ring leader of the insurrection. One Gillis was arrested for resisting a military officer, tried by a military court, and sentenced to a fine and imprisonment. Both applied to the Supreme Court of the state for a writ of habeas corpus. For the petitioners it was urged that the executive proclamation accomplished, and could accomplish, no more than adding the military to the police force of the state with the same powers that peace officers have in putting down a riot, and no more. Against the granting of the writ it was argued that the proclamation of the Governor created martial law, meaning thereby "No law except the sword, unsheathed and uncontrolled". No court has ever sanctioned the theory that the arbitrary will of the military commander can be substituted for the law of the land, except in the theater of actual military operations in case of war against a belligerent,

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[5] Carpenter v. Scott (1881), 13 R. I. 477, 479; Chase v. Ingalls (1877), 122 Mass. 381, 383; Crompton v. Pratt (1870), 105 Mass. 255, 258.

[6] Anderson v. Leverette (1902), 116 Ga. 732, 42 S. E. 1026; Allen v. Delano (1869), 55 Me. 113, 92 Am. Dec. 573; Bunker v. McKenney (1875), 63 Me. 529; Clark v. Hayward (1877), 51 Vt. 14.

[7] Williston on Sales, § 330.

[8] Parke etc. Co. v. White River Lumber Co. (1894), 101 Cal. 37, 35 Pac. 442; Holt Mfg. Co. v. Ewing (1895), 109 Cal. 353, 42 Pac. 435; Muncy v. Brain (1910), 158 Cal. 300, 110 Pac. 945.

recognized as such and asserting rights of sovereignty in political form. Between these two extremes, one of which limits the authority of the military in a time of insurrection to that of policemen and the other which exalts it to the despotic power of the commander of an army in the field, the cases show much difference of opinion.

It has been held that a qualified martial law exists which justifies the establishment of military lines and the posting of sentries with power to shoot as in time of war.[1] It has been held that the ring leaders and fomenters of a state of insurrection may be arrested and detained without trial until the danger is over. No court has gone further than that of West Virginia where the majority apparently sustained the substitution of military tribunals for the civil courts in the trial of past and present offences, at least during the continuance of the executive proclamation.[2]

In the principal case, *Ex parte McDonald et al. In re Gillis*,[3] the court, in an able opinion by Mr. Justice Sanner, justified the detention of those instigating riots but condemned the attempted trial by the military court. The writ of habeas corpus was refused in both cases as the military were held justified, while the proclamation was in force, in refusing to liberate the petitioners or turn them over to the civil authorities for trial, but the court made it plain that military tribunals for civilians were illegal. Trial by jury and the other constitutional guaranties cannot be superseded by executive proclamation. Misleading notions on this subject arise from the use of the term "martial law". As the principal case points out, martial law cannot exist in time of peace. A strike may be dangerous but it is not war. Where the law on this subject has been codified the situation is usually correctly defined as a state of insurrection.[4] Martial law has no place in strikes or other calamities. Such conditions as those existing during the San Francisco fire,[5] the Dayton flood, and the West Virginia mining strikes are unfortunately of too frequent occurrence. Peace must be kept but the situation is a difficult one. The state owes it to its citizens who are struggling for what they regard as their rights and owes it to those who bear arms in its defense to define more accurately than

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[1] Commonwealth ex rel. Wadsworth v. Shortall (1903), 206 Pa. 165, 55 Atl. 952, 65 L. R. A. 193, 98 Am. St. Rep. 759.

[2] State ex rel. Mays v. Brown (1912), 71 W. Va. 519, 77 S. E. 243, 45 L. R. A. (N.S.) 996; Ex parte Jones (1913), 71 W. Va. 567, 77 S. E. 1029, 45 L. R. A. (N.S.) 1030.

[3] (Mont., Oct. 8, 1914), 143 Pac. 947.

[4] Cal. Pol. Code, §§ 1917 et seq.

[5] It is, perhaps, unnecessary to state that the proclamation of Mayor Schmitz was no justification to any one acting under it, and that General Funston's participation with the federal troops in subordination to the Mayor was in direct contravention of an Act of Congress. See Prof. Ballantine in 1 Cal. Law Rev. 413. In this article and in the principal case many authorities are collected.

has been done, just how far the military have a right to go. It is conceded that the courts cannot go behind the Governor's proclamation that a state of insurrection exists. If the power under this proclamation is greatly extended, our constitutional guaranties become a scrap of paper.

A. M. K.

SURETYSHIP: CONSTRUCTION OF CONTRACTS OF A SURETY COMPANY.—The difficulty involved in applying the ordinary rules of suretyship to the case of corporations engaged in the business of acting as sureties for profit, is well shown by a decision rendered by the Supreme Court of Kansas in the case of *School District v. Massachusetts Bonding & Insurance Company.*[1] Suit was instituted by the school district to recover on the bond of the defendant company, which insured the performance of a building contract, one of the terms of the contract being that the work should be completed before a specified date. The bond provided that no liability should attach to the surety, unless, in the event of default of the principal, the school district should give notice to the surety immediately upon knowledge thereof and not later than thirty days after default. The work was not completed within the time specified, but no notice was given as provided. The court ruled that since the company had suffered no loss by the failure to receive notice, it was not released from liability on the contract. Mr. Justice West dissented on the ground that the parties had contracted that no liability should attach unless notice was given and that such notice was a condition precedent, performance of which was necessary for recovery.

Ordinarily, under the general rules of suretyship, any material alteration of the contract releases the surety from liability, applying the maxim that "a surety is a favorite of the law". Where, however, as in the above case, the surety undertakes the obligation for profit, it is not entitled to such tender consideration and its contracts are not governed by the rule of *strictissimi juris,* but any ambiguity in the contract is construed in favor of the other party.[2] In fact such surety contracts are interpreted much like insurance contracts, since they are drawn by the company and hedged about by conditions and requirements, which should estop the company from asserting a right to have ambiguous terms construed in its favor, as against any reasonable construction acted upon by the

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[1] (April 11, 1914), 142 Pac. 1077.

[2] Baglin v. Title Guaranty & Surety Co. (1909), 166 Fed. 356; Atlantic Trust & Deposit Co. v. Town of Laurinburg (1908), 163 Fed. 690, 90 C. C. A. 274; United States Fidelity & Guaranty Co. v. United States (1910), 178 Fed. 692, 102 C. C. A. 192; United States Fidelity & Guaranty Co. v. United States (Guaranty Co. v. Pressed Brick Co.) (1903), 191 U. S. 416, 48 L. Ed. 242, 24 Sup. Ct. Rep. 142.