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Opinion of Chief Justice Pearson in the Habeas Corpus Case of A. G. Moore

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... Does the fact that his Excellency had declared the county of Alamance to be in a state of insurrection, and has taken military possession, have the effect to suspend the writ of *habeas corpus* in that county? If so, the prisoner is not entitled to either motion; if otherwise, it will become necessary to give them further consideration.

[illegible]

... privilege of the writ of *habeas corpus* be suspended, the writ now sued for ought not to be awarded — *Ex parte Tobias Watkins*, 3 Peters 193. The Chief Justice says: "The writ ought not to be awarded, if the Court is satisfied that the prisoner would be remanded." This case is cited and approved, *Ex parte Milligan*, 4 Wallace 111.

His Excellency was also pleased to set out some of the special facts that satisfied him that the civil authorities of the county were unable to protect its citizens in the enjoyment of life and property; it is not mine to pass upon these facts or judge of their sufficiency.

Mr. Badger, of counsel for his Excellency, relied on the Constitution [illegible] shall be commander-in-chief [illegible] power to call out the militia to execute the law, suppress riots or insurrections and to repel invasion [illegible]

This clause of the Constitution and the statute empowers the Governor to declare a county to be in a state of insurrection whenever in his judgment the civil authorities are unable to protect its citizens in the enjoyment of life and property. The Governor has so declared in regard to the county of Alamance, and the judiciary cannot call his action in question or review it; the matter is confided solely to the judgment of the Governor.

4. The constitution and this statute confers on the Governor all the powers necessary to suppress the insurrection, and the Governor has taken military possession of the county and ordered the arrest and detention of the petitioner as a military prisoner [illegible]

[illegible]

This prevents conflict with the *habeas corpus* clause and harmonises with the other articles of the "declaration of rights," trial by jury, &c., all of which have been handed down to us by our fathers, and by our English ancestors, as great fundamental principles, essential for the protection of civil liberty.

I declare my opinion to be, that the privilege of the writ of *habeas corpus* has not been suspended by the action of his Excellency; that the Governor has power under the constitution and laws to declare a county to be in a state of insurrection, to take military possession, to order the arrest of all suspected persons, and to do all things necessary to suppress the insurrection, but he has no power to disobey the writ of *habeas corpus*, or to order the trial of any citizen otherwise than by jury. According to the law of the land, such action would be in excess of his power.

The judiciary has power to declare the action of the executive as well as the acts of the General Assembly, when in violation of the constitution, void and of no effect. Having conceded full faith and credit to the action of his Excellency, within the scope of the power conferred on him, I feel assured he will in like manner give due observance to the law as announced by the judiciary. Indeed he cannot refuse to do so, without taking upon himself the responsibility of acting on the extreme principle, "The safety of the State is the supreme law." I will venture to hope, as evil as the times may be, our country has not yet reached the point, when a resort to extreme measures has become a public necessity.

2. The motion for an attachment against Col. Kirk is based on the *habeas corpus* act, acts 1868-'69, chap. 1, sec. 15. "If any person on whom a writ of *habeas corpus* is served, shall refuse or neglect to obey the same by producing the body, &c., within the time required, and *no sufficient excuse be shown*, it shall be the duty of the Judge or Court, forthwith to issue an attachment against such person to the Sheriff of any County in the State, commanding him immediately to arrest such person, and bring him before the Judge or Court, and such person shall be committed to jail, until he shall make return to the writ and comply with any order that may be made in *relation to the party* for whose relief the writ shall have been issued."

Col. Kirk has refused to make return. The question is, do the facts before me "show a sufficient excuse?" The affidavit sets out that Col. Kirk put his refusal on the ground that he had orders from his commander-in-[illegible]

[illegible] cause why an attachment should not issue. And yet I was urged with much vehemence by learned and aged counsel, to rule Col. Kirk up for a contempt of the Chief Justice in this. The affidavit of service sets out that Col. Kirk, when the writ was served, said, "tell them such things are played out; I have my orders from Governor Holden, and shall not obey the writ." "I will surrender them on Governor Holden's order, but not otherwise, unless they send a sufficient force to whip me." This, as was well said by Mr. Badger, is the language of a rude soldier, and not as courteous as [illegible] and in judicial proceedings. The motion for a rule to show cause for this contempt is not pertinent to the matter now on hand. The evidence on which it rests comes in a questionable shape — extraneous matter put into an affidavit of service to excite prejudice, and the motion made at the instance of one who is under arrest for the horrid crime of murder by midnight assassination! At a time when, as Mr. Bragg feelingly remarked, "we are in the last ditch, we look to the judiciary as our only hope. If that fails us, the country is gone! gone! gone!" I do not feel it to be my duty to leave grave matters, and then turn aside, to put a rule on a rude soldier, to show cause for making a flippant speech. I will be borne out by every member of the profession in saying, during the thirty-five years I have had the honor of a seat on the bench, I have never been slow to punish for contempt and preserve the dignity of the Court, when I believe there was an intent to assail it. I know my duty and trust I have firmness enough to discharge it. These remarks seem called for because of the earnestness with which the motion was pressed in language more courtly, but fully as strong as that used by the rude soldier, and the excited manner in which I was reminded of my duty, and exhorted to perform it; nay, the oath of office was read to me, and I had the benefit of hearing read much of the lofty language of Lord Mansfield.

3. The motion for a precept directed to the sheriff of some county to bring the petitioner forthwith before me, and if necessary to take with him the power of the county, is based on the 17th and 18th sections of the *habeas corpus* act. "The Court or Judge may direct a precept to any sheriff, coroner or other person to be designated therein, commanding him to bring forthwith before such Court or Judge the party (wherever to be found) for whose benefit the writ of *habeas corpus* shall have been granted." "In the execution of this writ the sheriff or person designated may call out the power of the county."

The petitioner is entitled to this writ; the only question is, to whom should it be directed. The motion is that it should be directed to the Sheriff of some county.

I have considered the matter fully, and have come to the conclusion not to direct it to a sheriff. The act gives a discretion. In the present condition of things, the counties of Alamance and Caswell declared to be in a state of insurrection [illegible]

[illegible]