The Daily Journal.

VOL. XIX—NO. 257. WILMINGTON, N. C., WEDNESDAY MORNING, JULY 27, 1870. WHOLE NUMBER 5,599.

THE DAILY JOURNAL

WILMINGTON, N. C.

WEDNESDAY, JULY 27, 1870.

From the Raleigh Sentinel.

DECISION OF JUDGE PEARSON IN THE HABEAS CORPUS CASE.

Ex parte Adolphus G. Moore.

Upon proof of service and the failure of Col. Kirk to return the writ, the counsel for the prisoner submitted two motions:

1. For an attachment against G. W. Kirk for failing to make return.

2. For a writ, to be directed to the Sheriff of some county, commanding him, with the power of the county if necessary, to take the prisoner out of the hands of said Kirk, and have him before the Chief Justice.

The fact of service and the failure to make return was a sufficient foundation for these motions. But the affidavit sets out further that G. W. Kirk said "he was acting under the orders of Gov. Holden, and should make no return."

This extraneous matter, if true, had in my judgment an important bearing on the pending motions, and not being at liberty to assume it to be true, on the verbal statement of Col. Kirk, I addressed a communication to his Excellency, asking to be informed if Col. Kirk had such orders.

The purpose was to have the ord r to Col. Kirk avowed or disavowed, and make it a final fact one way or the other, and to afford an opportunity to his Excellency, if avowed, of setting out the ground of his action and of being heard by counsel. The cause of truth is always served by argument on both sides.

1. The main question, and one on which both motions depend, is this: Does the fact that the Governor had declared the county of Alamance to be in a state of insurrection, and had taken military possession, have the legal effect to suspend the privilege of the writ of *habeas corpus* in that county? If so the prisoner takes nothing by either motion; if otherwise it will become necessary to give them further consideration.

It was insisted by the counsel of the prisoner that the Governor's reply is no part of this proceeding and cannot be noticed. In my opinion, it forms a part of the proceedings to the extent of the avowal of the orders given to Col. Kirk, (that is in direct response to my inquiry;) and of the fact that in the exercise of the power conferred on him, he had declared the county of Alamance to be in a state of insurrection, taken military possession and ordered the arrest and detention of the petitioner as a *military* prisoner. The notion of his Excellency is relevant, for, if the privilege of the writ of *habeas corpus* be suspended, the writ now moved for, ought not to be awarded. (*Exparte* Tobias, Watkins, 3; Peters 193) the Chief Justice says: "the writ ought 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: "The Governor shall be commander-in-chief, and have power to call out the militia to execute the law, suppress riots and insurrections and to repel invasion," Art. XII., sec. 3. And on the statute, act 1869-'70, chap. XXVII., sec. 1, "The Governor is hereby authorized and empowered, whenever in his judgment, the civil authorities in any county are unable to protect its citizens in the enjoyment of life and property, to declare such county to be in a state of insurrection, and to call into active service, the militia of the State, to such an extent as may become necessary to suppress the insurrection;" and he insisted,

1. 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, as the matter is confided solely to the judgment of the Governor.

2. The Constitution and this statute confers on the Governor all 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. This was necessary, for, unlike other insurrections, it is not open resistance, but a novel kind of insurrection, seeking to effect its purpose by a secret association spread over the country, scourging and other crimes committed in the dark and evading the civil authorities by masks, fraud, perjury and intimidation. It follows that the privilege of the writ of *habeas corpus* is suspended in that county until the insurrection be suppressed. I accede to the first proposition; full faith and credit are due to the action of the Governor in this matter, because he is the competent authority, acting in pursuance of the constitution and the law. The power from its nature must be exercised by the Executive, as in case of invasion or open insurrection. The extent of the power is alone the subject of Judicial determination. As to the second, it may be that the arrest and also the detention of the petitioner is necessary as a means to suppress the insurrection. But I cannot yield my assent to the conclusion; the means must be *proper*, as well as necessary, and the detention of the petitioner as a military prisoner, is not a proper means, for it violates the Declaration of Rights. "The privilege of the writ of *habeas corpus* shall not be suspended."—Constitution, Art. 1, Sec. 21. This is an *express* provision, and there is no rule of construction or principle of Constitutional law by which an express provision can be abrogated and made of no force by the *implication* from any other provision of the instrument.

The clauses should be construed so as to give effect to each, and prevent conflict.—This is done by giving to Art. XII, sec. 3, the effect of allowing military possession of a county to be taken and the arrest of all suspected persons, to be made by military authority, but requiring by force of Art. 1, sec. 21, the persons so arrested to be surrendered for trial to the civil authorities on *habeas corpus*, should they not be delivered over without the writ.

This prevents conflict with the *habeas corpus* clause and harmonizes 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 other 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 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 chief, who is the Governor of the State, not to obey the writ. His Excellency avows that Col. Kirk was acting under his orders. So, we have this case, Col. Kirk is commanded by the Chief Justice to produce the body. He is ordered by his commander in chief not to obey the writ. What was the man to do? He elected to obey his orders. In my opinion there was sufficient excuse for refusing to return the writ. The motion is not allowed. The act in question does not rest on the idea of punishing for a *contempt of the Judge or Court*, but of compelling a return to the writ and the production of the body. It is a substitute for the provision in "the old *habeas corpus* act," which punished the officer or person refusing or neglecting to make due return "upon conviction by indictment," with a fine of $500 for the first offence, and of $1,000 and incapacity to hold office for the second. The late act is an improvement upon the former, by substituting the speedy remedy of attachment in place of indictment and the severe punishment of imprisonment. Both acts are evidently intended to punish for not making return, and the last is also intended for the immediate relief of the party in whose behalf the writ is issued. The notion of punishing for a contempt of the Judge or Court, is not involved in either act, certainly not in that of 1868-'69; that is provided for by the "contempt act," (same session.) The proceeding is, *by a rule to show cause* why an attachment should not issue. And yet I was urged, with much vehemence by learned and aged counsel to rule 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 Gov. Holden, and shall not obey the writ;" I will surrender them on Gov. 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 we usually find 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 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 thirty 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 believed there was an intent to assail it. I know my duty and trust I have firmness enough to discharge it. These remarks seemed 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 and occupied by military forces, and the public mind feverishly excited; it is highly probable, nay, in my opinion, certain, that a writ in the hands of a Sheriff, (with authority to call out the power of the county) by which he is commanded with force, if necessary, to take the petitioner out of the hands of the military authorities, will plunge the whole State into civil war.

If the Sheriff demands the petitioner of Col. Kirk, with his present orders, he will refuse, and then comes war. The country has had war enough. But it was said by the counsel of the petitioner, "if in the assertion of civil liberty, war comes, let it come! The blood will not be on your hands or on ours; it will be on all who disregard the sacred writ of *habeas corpus*.—Let Justice be done if the heavens fall."

It would be to act with the impetuousity of youth and not with the calmness of age, to listen to such counsels. "Let justice be done if the heavens fall," is a beautiful figure of speech, quoted by every one of the five learned counsel. Justice must be done, or the power of the Judiciary be exhausted, but I would forfeit all claim to prudence tempered with firmness should I without absolute necessity, add fuel to the flame, and plunge the country into civil war, provided my duty can be fully discharged without that awful consequence. Wisdom dictates, if justice can be done, "let heaven stand." Unless the Governor revokes his orders Col. Kirk will resist; that appears from the affidavit of service.

The second branch of the motion, that the power of the county be called out if necessary to aid in taking the petitioner by force out of the hands of Kirk, is as difficult of solution as the first.

The power of the county or "posse comitatus" means the men of the county in which the writ is to be executed; in this instance Caswell, and that county is declared to be in a state of insurrection.—Shall *insurgents* be called out by the person who is to execute the writ to join in conflict with the military forces of the State?

It is said a sufficient force will volunteer from other counties. They may belong to the association or be persons who sympathize with it. But the "posse comitatus" must come from the county where the writ is to be executed. It would be illegal to take men from other counties. This is settled law. Shall illegal means be resorted to in order to execute a writ.

Again, every able-bodied man in the State belongs to the militia. The Governor is by the Constitution "Commander-in-Chief of the Militia of the State." Art. III, sec. 8. So the power of the county is composed of men who are under the command of the Governor. Shall these men be required to violate with force the order of their Commander-in-Chief, and battle with his other forces that are already in the field? In short, the whole physical power of the State is by the Constitution under the control of the Governor. The Judiciary has only a moral power. By the theory of the Constitution there can be no conflict between these two branches of the Government.

The writ will be directed to the Marshal of the Supreme Court, with instructions to exhibit it, and a copy of this opinion to his Excellency, the Governor. If he orders the petitioner to be delivered to the Marshal, well; if not, following the example of Chief Justice Taney in Merriman's case, Annual Cyclopedia, for the year 1861, page 555, I have discharged my duty, the power of the Judiciary is exhausted, and the responsibility must rest on the Executive.

PEARSON.

The following is the order of the Chief Justice to the Marshal:

To David A. Wicker, Marshal of the Supreme Court:

You are hereby commanded in the name of the State of North Carolina, forthwith to bring Adolphus G. Moore, wherever to be found, before me, Richmond M. Pearson, Chief Justice of the Supreme Court, in the city of Raleigh. Herein fail not. Have therein this writ and make due return.

RICHMOND M. PEARSON,
Chief Justice Supreme Court.

Raleigh, July 20th, 1870.

Instructions.—You will wait upon His Excellency, the Governor, exhibit to him this writ and a copy of the opinion in "Moore's case" and make return to me.

R. M. PEARSON, C. J. S. C.

July 23d, 1870.

P. S.—Chief Justice Pearson has, this afternoon, issued similar orders for all the other prisonerrs now held by Kirk.