PERLMAN v. PICHÉ AND ATT'Y-GEN'L OF CANADA, intervenant Re HABEAS CORPUS

41 D.L.R. 147

Quebec Superior Court
Bruneau, J.

July 5, 1918

CONSTITUTIONAL LAW (Section I D — 82) — HABEAS CORPUS — SUSPENSION OF — CONSTITUTIONALITY — WAR MEASURES ACT — MILITARY SERVICE ACT — ORDERS-IN-COUNCIL — REVIEW OF BY COURTS — ALIENS — MILITARY SERVICE.

1. S. 5 of the Order-in-Council of April 30, 1918 purporting to suspend the right of habeas corpus ad subjiciendum "Canada Official Gazette, May 18, 1918, t. 51, N. 46, p. 4027, is ultra vires of the powers of the executive because it is authorized neither by the War Measures Act of 1914 (5 Geo. V. c. 2), nor by the Military Service Act of 1917 (7-8 Geo. V. c. 19), nor by any express and formal law of the federal parliament;

2. In ordering that those who claim not to fall under the provisions of the Military Service Act of 1917 (whether on account of age, status, or nationality) should carry with them, at all times, their birth or marriage certificate, as the case may be, or a certificate, if aliens, signed by the consul or vice-consul of the country of which they are subjects -- the said order-in-council of April 30, 1918, is intra vires of the powers which s. 6 of the said War Measures Act gives and confers upon the executive;

3. The only penalty which the federal parliament has permitted the executive to prescribe for infraction of the provisions of the order-in-council of April 30, 1918, is a fine or imprisonment, or both, by s. 10 of the War Measures Act of 1914, but not the suspension of the remedy of habeas corpus ad subjiciendum, accorded by s. 1120 of the Criminal Code to all persons incarcerated in criminal matters;

4. The issue of the writ of habeas corpus ad subjiciendum cannot be refused; the writ is of right, and is accorded ex debito justitiae;

5. In all matters concerning the liberty of the subject, the acts of the Crown, its Ministers, the members of the Privy Council, or the executive are subject to revision and control by the court and its judges, by way of habeas corpus ad subjiciendum. (16 Chas. I. c. 10). The military tribunals and officers are also subject to this revision.

6. By sub-par. (c) of the first section of the said order-in-council of April 30, 1918, with s. 2 thereof, the presumption, primâ facie, of the liability of an alien for military service, when he has not in his possession the necessary consular certificate, establishing his nationality, can be rebutted and destroyed by contrary proof.

[See annotation on Habeas Corpus, 13 D.L.R. 722.]

PETITION by way of habeas corpus for discharge of an alien from military custody and service. Application granted.

S. W. Jacobs, K.C., and Louis Fitch, for petitioner.

F. W. Hibbard, K.C., for respondent.

P. B. Mignault, K.C., for intervenant.

BRUNEAU, J. :— The petitioner, who is the brother of Max Perlman, alleges that the latter, born in 1892, at Sckurin, in Russia, came to Canada in October, 1910; that he has never been naturalized, and that he is still a Russian subject; that the said Max Perlman, not being a British subject, does not come under the Military Service Act of 1917 (7-8 Geo. V. c. 19); that ***[page148]*** he was, nevertheless, apprehended, and taken into custody by the respondent, who detains him illegally, against his

will and consent, without cause or reason, thus depriving him of his liberty, to which he is entitled. Petitioner asks for the issue of a writ of habeas corpus ad subjiciendum, addressed to the respondent, ordering him to shew cause for the detention of the said Max Perlman, in order that this court may decide whether it is justifiable.

When the petition was presented, Mtre. Hibbard appeared for the respondent, and contested petitioner's application, on the ground that the executive power of Canada had, by order-in-council, dated April 30, 1918, suspended the Habeas Corpus Act, in such cases as that alleged by the petitioner. The latter's attorney replied that he intended to attack the constitutionality of the said order-in-council, as being ultra vires of the powers of the executive. Demers, J., then presiding, being aware of the importance of the question raised by the respective parties, ordered the service of the petition upon the Minister of Justice, who is charged with the administration of the Military Service Act. The petitioner accordingly gave notice to the Minister of Justice, and to the Minister of Militia and Defence, for Canada, in accordance with the provisions of art. 114 of the Code of Procedure, that he would plead the unconstitutionality of ss. 5 and 6 of the orders-in-council bearing numbers 968 and 1013, published in the "Canada Official Gazette," on the 18th and 25th of May, respectively.

The Minister of Justice appeared, and filed an intervention. After having alleged that the order-in-council bearing No. 968, passed by His Excellency the Governor-General in Council, on May 25th, 1918, had been annulled by another orders-in-council, on May 29, 1918, and that it had no longer force and effect, although it was, nevertheless, intra vires, the intervenant invoked the following reasons:--

> That the other order-in-council, No. 1013, being the order-in-council under which the said Max Perlman was apprehended and is being detained, and which was first published in the "Canada Gazette" on May 11, 1918, and was thereafter published in subsequent issues of the said "Canada Gazette," was validly adopted by His Excellency the Governor-General-in Council on April 30, 1918, for the more efficient enforcement of the Military Service Act, 1917, and as requisite measures in connection with the emergencies of the war, and in virtue of the powers conferred on the Governor-in-Council by the War Measures Act, 1914, and otherwise, and the same and the ***[page149]*** several provisions and enactments thereof were duly made under the authority of the said Acts of Parliament and are and always have been intra vires and valid, and have and always have had force of law, and are and always have been binding on all courts and on all persons whatsoever;
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> That the subject-matter and the several provisions and enactments of the said order-in-council, No. 1013, as well as the said Acts of Parliament, the War Measures Act, 1914, and the Military Service Act, 1917, and the powers and authority thereby conferred, fall within the powers, authority and jurisdiction appertaining to the Parliament of the Dominion of Canada under and by virtue of the British North America Act, 1867, and its amendments, and the said order-in-council and the said Acts of Parliament override and prevail against any law of the Province of Quebec, or any other law whatsoever;
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> This Honourable Court, in view of the order-in-council, is without jurisdiction to issue the said writ of habeas corpus or to declare the same absolute;
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> Wherefore the intervenant es qualité prays that the said intervention be maintained, and that it be declared and adjudged that the said order-in-council, No. 1013, and the several provisions and enactments thereof are intra vires, valid and binding and have force of law, and that this Honourable Court do declare that it is without jurisdiction to issue the said writ of habeas corpus or to declare the same absolute, with costs against the petitioner.

Before examining and deciding upon the question raised in the foregoing intervention, it is well to show briefly the importance of the principles involved. It is a maxim of the English common law "that no person can be imprisoned or deprived of his liberty without legal cause." This principle was firmly established by the Magna Charta, wrenched from King John, and renewed, on many occasions, by his successors. Magna Charta still forms the chief basis of the English law of our time. It deals with all branches of the law, civil, political, and public, but what is particularly remarkable is the care with which Magna Charta guarantees and safeguards individual liberty; it lays down specific rules for the arrest and trial of citizens. Arbitrary imprisonment and confiscations are expressly and absolutely prohibited, and excessive fines are suppressed. Art. 42 declares:--

> Nullus liber homo capiatur vel imprisonetur au dissaisiatur aut ullaghetur aut exuletur aut aliquo modo destruatur; nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel legem terrae.

Art. 20 also safeguards the individual against arbitrary authority:--

> Nulla predictarum misericordia ponatur, nisi sacramentum proborum hominum de vicineto.

What is characteristic in the Magna Charta is the practical sense with which it limits the action of the State, and determines the rights of the individual. It has been rightly considered the pivot of the civil and political liberties of English subjects. ***[page150]***

> Les dispositions expresses de la Grande Charte sont aujourd'hui surannées (says Boutmy), mais son esprit est toujours vivant. C'est lui qui pénètre encore et anime l'Angleterre contemporaine.

The Magna Charta was not a unilateral act, emanating solely from the spontaneous will of the King, as the charters of the predecessors of John; neither is it a treaty; for we cannot say that it was concluded between two legitimate and independent sovereignties, nor between two nations; nor is it a law. The barons do not appear in it as subjects, for they were freed from their promise of fidelity, and the King, brought captive, placed before them, submitted to the conditions which the conquerors imposed upon him. Magna Charta is therefore a contract, but resembles a treaty concluded between two nations, in that one of the parties, in virtue of the law of war, can impose its will on the other. (Glasson, History of Law and Political, Civil and Judicial Institutions of England, vol. 3, pp. 51-52.)

From time to time, when they believed them to be in peril, the English Parliament reaffirmed the fundamental principles of Magna Charta: in the Petition of Right addressed to Charles First; in the Habeas Corpus Act, passed under Char. II. (31 Car. II. c. 2), and finally, in the Bill of Rights, a declaration passed by the two Houses, to the Prince and Princess of Orange, on February 13, 1688.

In the case of Thaw v. Robertson, the Chief Justice of the Court of King's Bench gave the history of the writ of habeas corpus, 13 D.L.R. 715 (annotated), 23 Que. K.B. 11. We can add nothing to this description. The Habeas Corpus Act is the contract between the King and the nation which guarantees the liberty of the people; it is rightly considered the cornerstone of the individual liberty of British subjects.

The petitioner also alleges that the order-in-council of April 30, 1918, which suspends remedy by way of habeas corpus is ultra vires, for the following reasons:--

1. Because the writ of habeas corpus, as provided for by the Imperial Statute of 1079 (31 Car. II. c. 2), forming part of the body of English public law, was introduced into this country after the Cession, and the Parliament of Canada can neither suspend nor abolish it.

2. Legislation relative to habeas corpus is exclusively within the jurisdiction of the province; there is no federal Habeas Corpus ***[page151]*** Act. In suspending it, the executive of the federal government encroaches upon civil rights, which are under the domain of the provincial parliament, by virtue of the B.N.A. Act.

3. Even if the federal parliament had the right to legislate in this matter, it could only do so by a legislative Act, and not by a simple order-in-council. Parliament, moreover, has not the right, in this case, to delegate its powers to the executive.

4. The suspension of the Habeas Corpus Act is repugnant to the spirit of English law. "The Colonial Laws Validity Act," of 1865, passed by the Imperial Parliament, makes this clear.

5. The War Measures Act of the Dominion Parliament, passed in 1914 (5 Geo. V. c. 2) does not give to the executive the right to suspend the Habeas Corpus Act.

Many of these questions are not new. That of deciding whether English law was substituted for the old French law by the mere fact of the cession of the country to England, was necessarily presented for the consideration of the courts from the very beginning of the new régime. It was particularly raised, discussed and decided in 1857, by the Court of Appeal, in the case of

Wilcox v. Wilcox, 8 L.C.R., p. 34. It was decided in the negative. The dissertation of Sir L. H. Lafontaine on this question, as all other writings of that great magistrate, is lengthy, explicit and well reasoned. He expresses the opinion, with former Chief Justice Hay and many other authorities, that the Proclamation of October 7, 1763, had not for effect the substitution of the laws of England for the former laws of the country, for "it is a well-known and indisputable maxim of the law of nations, adopted and confirmed by the law of England, that the laws of a conquered people continue in force, till they are expressly changed by the will of the conquering nation." But Sir L. H. Lafontaine admits, nevertheless, that the Proclamation of 1763 could be interpreted as having a different effect as to the English criminal law (id., p. 52). The Habeas Corpus Act (31 Car, II. c. 2) forms part of the body of English criminal law. It was therefore introduced into Canada by the Proclamation of 1763. (Brunet on Habeas Corpus, n. 30, p. 14). It is true that at the enactment of the Quebec Act of 1774, the Imperial Parliament refused to insert in its provisions the privileges of the Habeas Corpus Act, but this decision of parliament could not change the effect of the Proclamation of ***[page152]*** October 7, 1763. Further, the Quebec Act enacted, or rather, confirmed the introduction of the English criminal law into Canada. If habeas corpus, in criminal matters, is a recourse under the criminal jurisdiction, it follows necessarily that the Act, 31 Car. II. c. 2, was likewise established and adopted as the law of Canada by the Quebec Act of 1774 (14 Geo. III. c. 83). This statute, by confirming the right to the criminal laws of England, by the inhabitants of Canada, likewise gave the force of law in this province, not only to the common law of England in criminal matters, but also to all English statutes which dealt with this matter. (Crémazie, p. 305, note "d.") This question presented itself in 1838, and was decided, in conformity with this latter opinion, by Panet, Bédard, and Vallières, JJ.

The Habeas Corpus Act having been suspended on November 8, 1838, on account of the disturbances in the province, Mtre. Aylwin applied for and obtained for his clients, John Teed and Pierre Chasseur, arrested at Quebec, on suspicion of treason, the issue of a writ of habeas corpus, in virtue of the Imperial statute, 31 Car. II. c. 2. Mr. Justice Vallières, de St. Réal, rendered a similar decision at Three Rivers, on December 3, 1838, on the petition of Célestin Houde, for a writ of habeas corpus. We may add, however, that Rolland, J., refused a writ of habeas corpus asked for by Joseph Guillaume Barthe, and that Stuart and Bowen, JJ., also decided against the petition of John Teed. (Crémazie, English Criminal Laws, p. 275 à 319.)

At all events, the Habeas Corpus Act passed into our legislation by the Provincial Ordonnance of 1784 (24 Geo. III. c. 1), in the same terms as the statute of the Imperial Parliament (31 Car. II. c. 2). In 1812 it was made to apply to the imprisonment of a person in all other cases, as well as in criminal matters. These two Acts were reproduced in c. 95 of the Con. Stat. of Lower Canada, the provisions of which in civil matters are to be found in art. 1114 et seq. of our Code of Procedure.

This is not the first time that the Habeas Corpus Act has been suspended. It was done, as stated, on November 8, 1838, by an Ordonnance of the Special Council (2 Vict. c. 4), during the troubles of that period, and in 1866 and 1870, during the Fenian Raids. (29 Vict. c. 1; 33 Vict. c. 1.)

The R.S.C. (1859), contain no provisions relating to habeas corpus for Upper Canada. ***[page153]***

The B.N.A. Act, of 1867, is likewise silent on this question. On this the petitioner bases his contention that there is no federal Act relating to habeas corpus; that the power of enacting, suspending, or abolishing it falls within the exclusive jurisdiction of the provinces, because it deals with the liberty of the subject, i.e., with the exercise of civil rights, which fall under the domain of the provinces, being reserved for them by the constitution. We are not of this opinion. The B.N.A. Act (art. 91) gives the Dominion parliament power to enact criminal laws for the country. By the Proclamation of 1763, the Habeas Corpus Act of 1679 was introduced into Canada, because it formed part of the English criminal law. It is therefore not necessary for the federal power to enact specific provisions relative to habeas corpus in criminal matters. It has, however, provided for it. The 22nd part of the Criminal Code establishes, as an extraordinary remedy, the recourse, by way of habeas corpus, to examine into the legality of the imprisonment of any person (art. 1120). The federal power has, therefore, undoubtedly the right to legislate concerning habeas corpus in criminal matters. But how can it exercise this power? Can it not, for example, suspend the right of habeas corpus only by a legislative act? Can it delegate this power, if it possesses it, to the executive? The validity of the order-in-council of April 30, 1918, depends solely, in our opinion; on the powers conferred upon the executive by the War Measures Act of 1914 (5 Geo. V. c. 2). The petitioner contends that this power does not extend to authority to modify, suspend, or repeal existing laws, particularly the right of habeas corpus, because the federal parliament, or the executive, cannot abolish or do away with an Imperial statute, such as that of 31 Chas. II. c. 2, on habeas corpus. Consider first the general powers of parliament, and of the executive. We will then examine the effect of the War Measures Act of 1914, i.e., the extent of the authority conferred upon the executive. We will also look in the Military Service Act, 1917 (7-8 Geo. V. c. 19),

for the justification, if any, of the order-in-council in question: for the intervenant specially invokes certain clauses of these two Acts to prove that its action is legal, and intra vires of the powers of the executive.

The B.N.A. Act, sanctioned on March 29, 1867, created a general parliament for the Dominion of Canada, and a separate ***[page154]*** legislature for each of the provinces which compose it (30-31 Vict. c. 3). We may state as an established fact that all important questions affecting the interests of the Dominion are left to the federal parliament, while questions and laws of local interest are given to the jurisdiction of the provincial legislatures. The right to legislate on all matters of a general character, which are not specially and exclusively reserved for the control of the provinces, resides in the federal authority. The criminal law, as we have already mentioned, is a federal matter, except insofar as concerns the constitution of the courts of criminal jurisdiction, but including procedure in criminal matters (art. 91, p. 27). It is important that criminal law should be uniform throughout all the provinces.

Habeas corpus in criminal matters is, therefore, within the federal jurisdiction; in civil matters, it is within the provincial jurisdiction.

Here, as in England, the legislative power, which is called "parliament" or "legislature," has authority to make laws, and to change or abrogate existing laws. In their respective spheres, the federal parliament and provincial legislatures are omnipotent. They can accord to certain bodies the power to make laws, or by-laws.

The Governor-General of Canada, and the Lieutenant-Governors of the Provinces represent here the King, by delegation of authority. The Senate of Canada and the legislative councils of the provinces are modeled on the House of Lords. In the same way, the House of Commons of Canada and the legislative assemblies of the provinces are modeled on the House of Commons of Great Britain, but with this difference, however, that the Imperial Parliament is all-powerful, and can adopt any law which it thinks useful or necessary, while the provincial legislatures cannot pass any law contrary to the provisions of the Imperial Act which constituted them.

The executive power does not make laws, but it is charged with watching over their administration; and everything which results from the administration of laws already passed, as well as resolutions made by the legislative authority, therefore, enter into the domain of the executive power.

To the King is attributed the executive power in Canada. He ***[page155]*** is represented by the Governor-General, who, in order to exercise the executive power in each of the provinces, names Lieutenant-Governors, and can name one or more deputies to exercise these functions.

As the executive power, the Governor-General of Canada, and the Lieutenant-Governors of the Provinces are assisted by counsellors or ministers; they could not act without this assistance. As in England, they reign in the name of the King, but do not govern. They are called collectively "the Crown," or "the Governor-in-Council," or the "Lieutenant-Governor in Council."

There are certain prerogatives which cannot be delegated to the Governor, and which the King exercises himself, directly, in all the colonies; such is the right of making war or peace, of concluding treaties, etc.

Contrary to the system in the United States, where the Senate is the great executive council, and watches the President in his relations with foreign powers, as well as in the distribution of offices, the executive, in Canada, as in England, must be guided by the directions of the House of Commons, which is its great council, and to which it must defer, as the popular chamber must defer to the general will of the people of the country.

Such are some of the elementary principles of the constitutional government of our country, and the explanation of these will help us to decide as to the legality of the order-in-council of April 30, 1918.

If parliament, in this political system, is the sole legislative authority, how can the executive pretend to have the right to suspend the English common law relative to habeas corpus, of which the Act 31 Car. II. c. 2, was only declarative (Short & Mellor, Practice of the Crown Office, p. 306), or, in virtue of what authority can the executive so legislate, and repeal the extraordinary remedy created by the Parliament of Canada by s. 1120 of the Criminal Code, relating to habeas corpus?

It is a well-established principle in English law that parliament alone, and not the executive, can suspend the Habeas Corpus

Act. The following authorities are so emphatic on this point that there can be no doubt in the present case. First, let us cite, as absolutely ad rem, the following splendid page from Blackstone's Commentaries on the Laws of England (11th ed., 1791, vol. 1, c. 1, No. 2, t. 1, pp. 135 to 136):-- ***[page156]***

> Of great importance to the public is the preservation of this personal liberty; for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whoever he or his officers thought proper (as in France it is daily practised by the Crown), there would soon be an end of all other rights and immunities. Some have thought that unjust attacks, even upon life, or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom; but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient; for it is the parliament only, or legislative power, that, whenever it sees proper, can authorize the Crown, by suspending the Habeas Corpus Act for a short and limited time, to imprison suspected persons without giving any reason for so doing; as the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the Republic in any imminent danger. The decree of the senate, which usually preceded the nomination of this magistrate, "dent operam consules, ne quid respublica detrimenti capiat," was called the senatus consultum ultimae necessitatis. In like manner, this experiment ought only to be tried in cases of extreme emergency; and in these, the nation parts with its liberty for a while, in order to preserve it forever.

May we not even argue, with the petitioner, that the suspension of the Habeas Corpus Act by the federal parliament would not prevent the subject from having recourse, as was done in 1838, to the Imperial Statute of 1679 (31 Car. II. c. 2), since the federal parliament cannot put aside any Imperial statute applicable to the colonies?

The history of the writ of habeas corpus in England shews that parliament alone can suspend it, or authorize its suspension. It has exercised this power many times. (The King v. Earl of Orrery, 8 Mod. 96, 88 E.R. 75, 11 Cox C.C. 64; 4 Green's History of England, 130, 315, 320), but in exceptional and extraordinary circumstances, for the safety of the state and of the country, as in the case of invasion, insurrection, or disloyalty of the population. (Cockburn, p. 97.) Also, May has well said (Const. Hist., c. 11) that the suspension of the right of habeas corpus constitutes the suspension of the Magna Charta itself, "and nothing but a great national emergency could justify or excuse it." In the United States, where the power of suspending the habeas ***[page157]*** corpus is given to Congress by art. 9 of the constitution, this privilege is considered as an attribute of the legislative power, and the President can only exercise it if he is specially authorized by law. (Ex parte Merryman, 9 Am. Law Reg. 524; S.C. 14 Law Rep. N.S., 78; Taney, 246; McCall v. McDowell, 1 Abb. U.S. 212; Ex parte Field, 5 Blatch 63; Cooley, Principles of Const. Law (1880), p. 289).

The history of the writ of habeas corpus in the United States, relative to the right of suspension, is particularly instructive and interesting. The question as to whether the President could use the power of suspension without authority from Congress arose under the following circumstances:

A military officer, residing in Pennsylvania, ordered, in 1861, the arrest of a person named Merryman, of the State of Maryland, on a vague and indefinite charge, and without any proof in support of it. Merryman was arrested at night, at his house, made prisoner, and sent to Fort Henry, where he was secretly detained. A writ of habeas corpus was served on the commandant, ordering him to produce the body of Merryman before a judge of the Supreme Court of Maryland, in order that he might examine into the cause of detention. The officer answered that he was authorized by the President of the United States to suspend, at his discretion, the writ of habeas corpus, and that, in the exercise of his discretion, he believed it necessary to exercise this power, and had consequently suspended the right to habeas corpus. He refused, for this reason, to obey the order contained in the writ. But Taney, C.J., decided that, under the constitution of the United States, Congress alone had power to suspend the right to habeas corpus. Some time later, and without any Act of Congress authorizing it, President

Lincoln issued a proclamation by which he suspended the right to habeas corpus,

> in respect to all persons arrested, or who are now or hereafter during the rebellion shall be imprisoned in any fort, camp, arsenal, military prison, or other place of confinement, by any military authority, or by the sentence of any court-martial or military commission.

In December, 1862, the Supreme Court of Wisconsin issued a writ of habeas corpus, ordering General Elliott to bring before it one Nicholas Kemp. The prisoner had been arrested for having taken part in a riot at Port Washington, in Wisconsin. The respondent pleaded ***[page158]*** that Kemp was under his custody by order of the President of the United States, and that the President had, on September 24, 1862, suspended the right to the writ of habeas corpus for such cases as that of the prisoner. The question of the power of the President to suspend the writ of habeas corpus therefore arose again, but the court held, as in the Merryman case, that the President of the United States had not the power which he had arrogated to himself, and that the suspension of the writ of habeas corpus, constituting as it did an exercise of a purely legislative power, Congress alone could exercise it. (Kemp's case, 16 Wisc., p. 382.)

It was under these circumstances, and while the War of Secession was raging, that the Congress of the United States passed a law, on March 3, 1863, authorizing the President to suspend the writ of habeas corpus for the duration of the war. On September 15, 1863, the President proclaimed the suspension of the habeas corpus. (Church on Habeas Corpus, pp. 41 to 45, and 50 to 53; Hurd, on Habeas Corpus, p. 116.)

It is parliament, and not the executive, which has always, in England, suspended the remedy of habeas corpus; the same thing took place in Canada, during the Fenian Raids; but it was the federal parliament, and not the provincial legislature, which passed the law. There are no precedents, we believe, in English constitutional law, at least none have been cited, where the executive has suspended the Habeas Corpus Act by an order-in-council such as that of April 30, 1918. Certainly, we do not contend that the executive could not have done it, but in such case that parliament would have had to formally and expressly authorize it. We will shortly examine into whether the claim of the intervenant is well founded, on this point, but first we will cite other authorities.

M. Brunet, in his excellent work on Habeas Corpus, expresses the opinion that in England and in Canada, it is parliament which has the right to suspend the writ of habeas corpus (p. 13, note 1).

If the suspension of this important statute has given rise, in our province, only to the judgments mentioned, rendered in 1838, we find in our jurisprudence expressions of opinion from distinguished magistrates.

In the case of Gaynor & Greene, 9 Can. Cr. Cas. 496 at 498, Ouimet, J., in the Court of Appeal, said:--

> I cannot admit that an Act of the importance of the Habeas Corpus Act can be amended, and the rights of the subject intended to be preserved ***[page159]*** under it can be so curtailed, by a casual expression found in a subsequent statute. To amend an existing Act, there must be a clear and positive enactment; such amendment cannot be interpreted as resulting from mere implication or inference.

In the case of Thaw v. Robertson, 13 D.L.R. 715, at 719, the Chief Justice of the Court of Appeal said:--

> I will not discuss the question as to whether our parliament can suspend or arrest in certain cases the operation of the Habeas Corpus Act. At first sight, my opinion is that it has this power. I do not say that our parliament can take away from Canadian subjects the privilege of the provisions of the Magna Charta which I have cited above. This privilege forms such a part of the English constitution that I do not believe any colonial parliament can suppress it, but I believe that the Parliament of Canada has the power to suspend the provisions of our Habeas Corpus Act, as it had the power to pass this law. But the provisions of this Act are so precious in the opinion of every British subject, as I have said, that a formal law would be necessary to suppress or abolish it.

The judge cited on this point the opinion, hereinbefore mentioned, of Ouimet, J.

The suspension of the habeas corpus being an act of legislation solely, does not enter, as we have seen, into the list of ordinary

attributes of the executive power. There can be no doubt as to this. The executive could, therefore, order such a suspension only if parliament had expressly delegated its powers to it. This is the claim of the intervenant, who gives, as his authority, in his reasons for intervention: 1. The War Measures Act, 1914 (5 Geo. V. c. 2); 2. Military Service Act, 1917 (7-8 Geo. V. c. 19).

Let us examine first the War Measures Act. Not a single clause in that Act authorizes expressly and formally the executive to suspend the writ of habeas corpus. It is therefore by inference only that the intervenant proceeds to establish his contention. This method cannot avail when it is a question of the suspension of such a writ: an express law is necessary. At all events, let us examine his argument.

The order-in-council of April 30, 1918, enacts that those who allege that they are not subject to the Military Service Law of 1917, whether on account of their age, status, or nationality, must carry on their persons, or have with them, at all times, their birth certificate, or marriage certificate, as the case may be. And as to those, like the petitioner's brother, who claim exemption from military service on account of their nationality, they must have with them a certificate to that effect, signed by the consul or vice- ***[page160]*** consul of the country of which they are subjects. Such persons found, after June 1st, 1918, without having in their possession the documents mentioned, are presumed, primâ facie, to be liable to military service, and considered as deserters; they are liable, on summary conviction, to a fine not exceeding $50 and to imprisonment of not more than one month, or to both. Further, these persons may be arrested, put under military custody, and forced to do military duty, as long as their services are required, or at least until it has been established to the satisfaction of competent authority, that they are not liable for military service. And it is as sanction for these provisions, according to the intervenant, that the order-in-council (s. 5) decrees:--

> Notwithstanding anything contained in the Habeas Corpus Act or in any other law or statute, and notwithstanding any right or remedy of habeas corpus, or proceeding by way of habeas corpus, all persons who in fact are or hereafter may be in or taken into or held or detained in military custody shall be held, detained and remain in such custody, without bail, inquiry or mainprize, until released by discretion of the Minister of Militia and Defence, or delivered by his order to the civil authorities.

Let us repeat: there is nothing in the War Measures Act, of 1914 which authorizes the executive to give such sanction to its order. Far from it: parliament has authorized the executive to give a sanction to its orders-in-council, but it has never authorized it to suspend, in this manner, the remedy given by way of the writ of habeas corpus.

The only penalties which the executive can impose for infraction of its orders and regulations made under authority of the War Measures Act of 1914 are those provided for by s. 10, i.e., a fine of $5,000, or imprisonment for a term not exceeding 5 years, or to both. The executive, under the same Act, can prescribe whether (as it has done by the order-in-council of April 30, 1918) this penalty is to be imposed by summary conviction or upon indictment.

It is in virtue of this provision of s. 10 that the order-in-council of April 30, 1918, imposed the penalties which it fixes, and that the executive has chosen the method of summary conviction, and not of indictment, for enforcing it.

Such is the sanction given by the War Measures Act, and the only one which parliament has permitted the executive to prescribe for the infraction of its orders and regulations, such as that ***[page161]*** of April 30, 1918. It is thus that the War Measures Act, invoked by the intervenant, formally condemns his pretensions, since s. 10 limits the fine and imprisonment, the penalties which the executive can impose for such infractions of its orders and regulations.

The intervenant vainly invokes, by way of comparison, the Imperial statute of 1914, "To consolidate and amend the Defence of the Realm Acts" (5-6 Geo. V. c. 8). There is nothing in that statute which authorizes the executive to suspend the writ of habeas corpus. The case of The King v. Halliday, [1917] A.C. 260, which has interpreted it, and applied it to a particular case, has no application to the present case, in our opinion, relative to the suspension of the writ of habeas corpus.

We must not forget that the petitioner only contests the legality of par. 5 of the order-in-council, and that he recognizes that all the other provisions are legal, i.e., intra vires of the power of the executive. We will return to this important aspect of the case before concluding.

There is no doubt, in view of the jurisprudence of the Privy Council, that the federal parliament has jurisdiction in all matters which are not within the exclusive right of the provinces, and that it may even, in the exercise of its powers, encroach upon civil rights, but this presupposes the right, the jurisdiction, to do such act or thing. (Bank of Toronto v. Lambe, 12 App. Cas. 575; 56 L.J. P.C. 87; Clement's Canadian Const., p. 427; Cushing v. Dupuy, 5 App. Cas. 409; Tennant v. Union Bank of Canada, [1894] A.C. 31. It is precisely this right, this power, this jurisdiction, which the petitioner contests, rightly, in the executive, to suspend, proprio motu, without the authorization of parliament, the Habeas Corpus Act.

> The operation of the Habeas Corpus Act, 1679 (31 Car. II. c. 2) has at various periods been temporarily suspended by the legislature on the ground of urgent political necessity. Such suspension has usually been effected by a statute enabling persons to be arrested on suspicion of treasonable practices or certain other crimes of a political nature, and detained in custody, without bail or trial, notwithstanding any law to the contrary. 10 Hals. 44.

The War Measures Act of 1914 did not substitute the executive for the federal parliament. The object of the law -- such is its title -- is "to confer certain powers on the Governor-in-Council, and to modify the Immigration Act." The suspension of the Habeas Corpus Act is not of the number. ***[page162]***

The powers which the executive may possess in virtue of the War Measures Act have just been the object of litigation which has re-echoed throughout Canada. We know that the executive, relying on the said law, passed an order-in-council, on April 20, 1918, abolishing all causes of exemption for young men between the ages of 19 and 22, and setting aside the judgments of all the courts of the country, which exempted these young men, for one cause or another, from the obligation to military service. A young man named Norman Earl Lewis, who had been so exempted, being affected by this order-in-council, applied to the Supreme Court of the Province of Alberta for the issue of a writ of habeas corpus, alleging that the action of the executive was unconstitutional, and ultra vires of its powers, seeing that it annulled, in the case of men between the ages of 19 and 22 years, the judgments of the tribunals created by the Military Service Act, which had been rendered in conformity with its provisions. On June 29, last, the Supreme Court of Alberta (Harvey, C.J., dissenting) maintained the writ of habeas corpus, and declared the order-in-council in question to be ultra vires.

Let us examine now the Military Service Act. It is to be remarked, first of all, that it applies only to British subjects, and not to aliens. It would appear strange to us to invoke its provisions against aliens. At all events, there is no formal and express provision in this Act authorizing the executive to suspend the Habeas Corpus Act. To arrive at such a conclusion, the intervenant is obliged to resort to inference. The object of the order-in-council of April 30, 1918, is explained by reference, he says, to the Military Service Act, for the administration of which it was passed.

The preamble of the Military Service Act declares that it is necessary to provide for reinforcements for the Canadian Forces engaged on active service overseas, in order to maintain and support them in their struggle for the defence and security of Canada, the safety of the Empire, and human liberty. But, as this Act does not apply to aliens, it cannot be pretended that it is intended to be enforced, n respect to them, by the suspension of the Habeas Corpus Act. We look in vain in the various sections of the Military Service Act, cited and invoked by the intervenant, for justification for par. 5 of the order-in-council. Par. 6 of s. 5 of ***[page163]*** the Act declares that no proceeding can be retarded, set aside or revised on account of irregularities, by way of injunction, prohibition, mandamus, or even habeas corpus, but it is a question in that paragraph of not hindering the action of the various exemption tribunals created by the Act. The right to the writ of habeas corpus is denied in that case only, which is entirely different from the present case.

All regulations made by the executive (s. 12, n. 2) must be submitted to parliament, if it is then in session, and if not, within the first 10 days following the opening of the next session of parliament, but the War Measures Act does not contain such a provision. It does not authorize the suspension of the writ of habeas corpus.

It has been argued, in justification of the order-in-council of April 30, 1918, as to the suspension of habeas corpus, that Canada is now at war. The United States were likewise at war when Lincoln suspended the Habeas Corpus Act in 1862. The tribunals of his country, nevertheless, declared that he had acted illegally, and contrary to the provisions of the constitution. The argument drawn from the fact that we are at war may be answered by those noble words pronounced, in 1838, by Valières de St. Réal:--

> In my opinion, the greatest possible good, the most pressing necessity, is the respect due to the law, even when it is opposed to our desires or our opinions; for the laws are the natural safeguard of governments and of peoples, and without them, neither society nor government could exist. (Crémazie, English Criminal Law, p. 302.)

These truths would become more palpable if the executive power, placing itself above the laws or above the parliament which made them, suppressed, by a stroke of the pen, the recourse to the courts by way of habeas corpus. We would then see born again the dark days of oppression which the English people wished to avoid for all time within the limits of its Empire, by inscribing in its statutes that beautiful and grand maxim of justice and of liberty: "No person shall be apprehended, detained, or imprisoned without just and legal cause."

In deciding, as we have done, that art. 5 of the order-in-council of April 30, 1918, suspending recourse by way of habeas corpus, is ultra vires of the powers of the executive, because it is authorized neither by the War Measures Act of 1914, nor by the ***[page164]*** Military Service Act of 1917, and that the federal parliament alone can suspend, or authorize the executive formally and expressly, to suspend, the Habeas Corpus Act, in criminal matters, we do not declare all the other provisions of the said order-in-council to be null, and unconstitutional. We are of opinion, on the contrary, that they are within the limits of the special powers conferred on the executive by s. 6 of the War Measures Act of 1914, and that art. 5 alone is illegal and ultra vires. It is a question of the arrest and detention provided for by par. b of the said s. 6, and in decreeing that those who pretend to be aliens must have in their possession a certificate to that effect signed by the consul or vice-consul of their country, under such penalties, the executive wished to provide against surprise, pretexts, and lies, which might be made and invoked to evade the obligation to military service. It has certainly this power, in virtue of said s. 6 of the War Measures Act of 1914. The petitioner had not in his possession, at the time of his arrest, proof of his nationality. Being a Russian subject, he should have had a certificate from the Russian consulate. He had, nevertheless, the right to the issue of a writ of habeas corpus ad subjiciendum, in order to show that he is a Russian subject, and consequently exempt from military service. The writ of habeas corpus is, in effect, a writ of right, and is grantable ex debito justitiae. (Re Cowle, 2 Burr. 834, 97 E.R. 587, per Lord Mansfield, C.J., at p. 855; Crowley's case, 2 Swan. 1, 36 E.R. 514, per Lord Eldon, L.J., at p. 48; Corner, Crown Practice, p. 10.)

We, therefore, considered that we were obliged to issue the writ, in order to have the body of the petitioner's brother brought before us, to decide definitely, on the return of the writ, after hearing the parties, and their respective pretensions, and examining into the cause of the detention, whether it is legal. For, in all matters affecting the liberty of the subject, the action of the Crown, its Ministers, the officers of the Privy Council or the executive power is subject to revision and to the control of this court, and of its judges, by way of the writ of habeas corpus (16 Car. I. c. 10). The tribunals and military officers are likewise subject to the courts. (Douglas's case, 1842; Manual of Military Law, War Office, 1914, p. 127. Vide also p. 120-121; Clement's Can. Const., p. 209; Anson, Law and Custom of the Constitution, vol. 2, pt. 2, pp. 186-7.) ***[page165]***

There is no question as to the proof made by the petitioner. If sub-paragraph c of art. 1 of the order-in-council of April 30, 1918, exacts that the alien should have in his possession a certificate from the consulate of his country, establishing his nationality, art. 2 of the said order-in-council declares that in default of such certificate, there is a primâ facie presumption of the liability of the alien to military service, and he can be detained and required to enlist in the Canadian Army, "unless or until the fact be established to the satisfaction of competent authority that he is not liable for military duty."

This presumption can be rebutted and destroyed by contrary proof. The petitioner is now before the competent authority. He produces in proof, to-day, the certificate of the Russian consulate, showing that he is a subject of that country. He is not, therefore, subject to military service here. But, as he was arrested when he had not with him or on his person any proof to show his nationality, he is liable to the penalties provided by the order-in-council of April 30, 1918; the petition is granted, the intervention rejected, the writ of habeas corpus ad subjiciendum maintained, and order is given to the respondent to restore the petitioner's brother, Max Perlman, to liberty; but without the ordinary recommendation to the Crown to pay costs.

Judgment accordingly.