

MIDDLETON, J., IN CHAMBERS.

DECEMBER 14TH, 1918.

RE MACSWINEY.

RE ROCHE.

Military Law—Disobedience of Lawful Military Commands—Refusal to Don Uniform—Sentence of Court Martial—Imprisonment with Hard Labour—Application for Habeas Corpus—Order in Council Suspending Habeas Corpus Act in Respect of Persons in Military Custody—Validity—Penalty for Disobedience—Canadian Militia Act, R.S.C. 1906 ch. 41, sec. 122.

Motion for a habeas corpus to bring up the bodies of two men now suffering imprisonment under the sentence of a court martial for disobedience of lawful military orders.

These men refused to obey the requirements of the Military Service Act and to don His Majesty's uniform, were sentenced to two years' imprisonment with hard labour, and were confined at Kingston.

Gordon Waldron, for the applicants.

W. N. Tilley, K.C., for the Crown.

MIDDLETON, J., in a written judgment, said that by order in council of the 30th April, 1918, all persons who in fact were or might thereafter be in or taken into military custody should be held and remain in custody without bail or inquiry until released by direction of the Minister of Militia or delivered by his order to the civil authorities, notwithstanding anything contained in the Habeas Corpus Act or any other law.

In the opinion of the Supreme Court of Canada, this order in council was valid law, and that prevented the granting of any writ.

But for this order in council, the learned Judge said, he would have granted the writ to permit the argument of the questions suggested and the taking of any appeal open in due course of law; but the questions discussed did not appear to him to be capable of solution in favour of the prisoners. Under the British Army Act the punishments awarded were warranted. What was contended was that a provision (sec. 122) of the Canadian Militia Act, R.S.C. 1906 ch. 41, imposing a fine of \$10 for disobedience of any lawful command, gave the only penalty which could be imposed. The learned Judge could find no inconsistency between the provisions of the Canadian Act and the very drastic provisions of the British Act, which were essential to enforce obedience on